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# Arbitrating Labor Disputes in Switzerland

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*Long regarded as against nature, the relationship between arbitration and labor law has generated a growing interest in recent years, with the realization that arbitration can be an effective tool for the resolution of individual employment disputes, especially for top-level managers or international athletes. The Swiss system broadly recognizes the arbitrability of individual employment disputes on an international level. On a domestic level, arbitrability of individual employment disputes is more limited following a decision of the Swiss Federal Tribunal of June 28, 2010. However, under the new Swiss Civil Code of Procedure, which will enter into force on January 1, 2011, parties to domestic arbitration agreements will be able to opt into the international regime and therefore possibly circumvent such limitation. Furthermore, the article discusses particularities related to arbitration agreements in collective employment contracts, as well as arbitration of collective labor disputes.*

## I. INTRODUCTION

Traditionally, arbitration and labor law are seen as incompatible due to the tension between the principles of party autonomy and protection of the “weaker” party. The interaction between those two areas seems to have gained increased interest in the past years both in the courts and in the literature. Although arbitration is still more often used in case of collective labor conflicts, the idea that it can also provide for an effective dispute resolution tool for individual employment disputes is slowly gaining ground, thanks in particular to the important development of sports arbitration in recent years.<sup>1</sup> Strong arguments are now being raised, particularly in France,<sup>2</sup> in favor of a harmonious combination of the two fields, notably in the international context, where arbitration has become the usual mode of resolution of disputes in international commerce.<sup>3</sup> Legal commentators have also criticized the fact that arbitrators have traditionally been perceived as biased against employees and siding with employers.<sup>4</sup> On the assumption that arbitration is the functional equivalent of the state court system and that arbitrators offer the same

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<sup>1</sup> See Diana Akikol, *Die bundesgerichtliche Rechtsprechung zur Schiedsgerichtsbarkeit im Jahr 2009*, JUSLETTER (No. 8, 2010).

<sup>2</sup> See, e.g., Estelle Courtois-Champenois, *L'Arbitrage des litiges en droit du travail: à la redécouverte d'une institution française en disgrâce*, 2003 REV. ARB. 349; Beatrice Castellane, *Arbitration in Employment Relationships in France*, 26 J. INT'L ARB. 293 (2009); see also, a decision of the Cour d'Appel Grenoble, September 12, 1993, 1994 REV. ARB. 337 (upholding the validity of an arbitration agreement in an international contract, considering that: “the employee, as well as a person engaged in commercial activities, may have an interest in the application of arbitration rules which enable him to participate in the designation of the arbitrators rather than being judged by a national court which does not include a judge having the same legal background as his” (unofficial translation)).

<sup>3</sup> Antoine F. Kirry, *Arbitrability: Current Trends in Europe*, 12 ARB. INT'L 373 (1996).

<sup>4</sup> Thomas Clay, *L'arbitrage, justice du travail*, in PROCÈS DU TRAVAIL, TRAVAIL DU PROCÈS 99 (Bibliothèque de l'Institut André Tunc, L.G.D.J. ed., 2008).

guarantees of independence and impartiality as judges, the fact that one party can impose it on the other does not suffice to conclude that the latter is at a disadvantage.<sup>5</sup>

That said, it is true that the rules prevailing in arbitration may not be suitable for all types of disputes<sup>6</sup> and that in the field of employment law, issues of access to justice and protection of the weak party will certainly continue to arise.<sup>7</sup> Often, in employment matters, amounts in dispute will be relatively low and recourse to arbitration will be prohibitively expensive for the employee. On the other hand, arbitration will be an attractive option for executives of multinational companies<sup>8</sup> or top-level athletes, or other situations where parties tend to deal more on an arm's length basis. In those cases, the need for special protection of the employee is no longer justified.<sup>9</sup>

## II. ARBITRATING INDIVIDUAL EMPLOYMENT DISPUTES IN SWITZERLAND

### A. PRELIMINARY STEP: QUALIFICATION OF THE DISPUTE AS DOMESTIC OR INTERNATIONAL

Under the Swiss system, the statutory regime varies depending on whether the arbitration is domestic or international. Domestic arbitrations are governed by the Intercantonal Concordat on Arbitration of 1969 (the "Concordat"), which will be replaced as of January 1, 2011 by Articles 353 et seq. of the new Swiss Code of Civil Procedure (CCP). International arbitrations are governed by Chapter 12 of the Swiss International Private Law Act (PILA) of 1987. Important issues, such as arbitrability, formal validity of the arbitration agreement, grounds for appeal and recognition and enforcement of arbitral awards, are treated differently depending on whether the arbitration is domestic or international. Accordingly, when considering arbitrating labor disputes, it is important to determine, as a preliminary step, into which category the contemplated arbitration falls.

To make such qualification, Switzerland has adopted a criterion based on the domicile of the parties. Pursuant to Article 176(1) of the PILA, the provisions of Chapter 12 of the PILA apply when the arbitration has its seat in Switzerland and, in addition, when at least one of the parties did not have its domicile<sup>10</sup> or habitual residence in Switzerland at the time the arbitration agreement was made. Similarly, for the application of the Article 353(1) of the CCP requires that the arbitration has its seat in Switzerland and all

<sup>5</sup> ANTONIO RIGOZZI, *L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT* 424 (2005).

<sup>6</sup> GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, *ARBITRAGE INTERNATIONAL* 4 (2010).

<sup>7</sup> See, e.g., Franck Valencia, *Parties faibles et accès à la justice en matière d'arbitrage*, 2007 REV. ARB. 45.

<sup>8</sup> See, e.g., *Messier v. Vivendi Universal*, where an arbitration panel constituted under the AAA Rules issued an award on June 27, 2003, ordering Vivendi Universal to pay its former Chairman and CEO, Mr. Messier, over EUR 20 million in relation to his severance indemnities; see *Dispute between Vivendi Universal and Mr. Messier*, BUSINESS WIRE, June 30, 2003, available at <[http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2003\\_June\\_30/ai\\_104524686/](http://findarticles.com/p/articles/mi_m0EIN/is_2003_June_30/ai_104524686/)>.

<sup>9</sup> See RIGOZZI, *supra* note 5, at 394, who rightly wonders whether a football player who is a party to an employment contract providing several thousand or even millions of francs a year can still be qualified as the "weaker" party.

<sup>10</sup> When a legal entity such as a corporation is involved, it should be noted that the requirement of "domicile" of art. 176(1) of the PILA refers to its seat within the meaning of art. 150 of the PILA and not merely to its local branch or representation.

parties have their seat or domicile in Switzerland at the time the arbitration agreement was made.<sup>11</sup> Thus, Article 176(1) of the PILA refers to a formal criterion and not a material one,<sup>12</sup> with the advantage that the international character of the dispute does not depend on the issue in controversy.<sup>13</sup> Special attention should be paid to the time element: an arbitration will be deemed domestic, for example, if the arbitration agreement is concluded between a Swiss company and an employee domiciled in Switzerland, irrespective of the fact that the employment agreement may later be transferred to a foreign corporation or that the employee may subsequently be relocated abroad.<sup>14</sup> Conversely, the arbitration will remain international if the foreign company later moves its seat to Switzerland. The choice of the formal criterion to define internationality may therefore lead to artificial results; however, it serves to ensure a certain degree of predictability for the parties entering the arbitration agreement.

In addition, for the international arbitration provisions to apply, the parties should not have agreed on the exclusive application of the procedural provisions of cantonal law relating to arbitration (i.e. the Concordat), pursuant to Article 176(2) of the PILA.<sup>15</sup> At present, the parallel right for parties to a domestic arbitration to “opt in” to Chapter 12 of the PILA and agree that their (domestic) dispute be resolved pursuant to the provisions relating to international arbitration does not exist. However, that will change with the entry into force of the new CCP on January 1, 2011. Article 353(2) of the CCP provides that the parties can, by an express declaration<sup>16</sup> in the arbitration agreement or in an agreement concluded subsequently, exclude the application of the CCP and agree that the provisions of Chapter 12 of the PILA will be applicable. According to the opinion of the Swiss Federal Council relating to the CCP, the rationale for this new provision is, *inter alia*, to allow sports associations to submit domestic arbitrations to Article 176 *et seq* of the PILA.<sup>17</sup> Indeed, given that the arbitrability of disputes between Swiss-based sports associations and athletes depends on the place of domicile of the latter, this can lead to artificial results or even inequalities of treatment if the dispute involves a Swiss athlete

<sup>11</sup> Urs Weber-Stecher, *Article CCP 353 N 3-4*, in *BASLER KOMMENTAR SCHWEIZERISCHE ZIVILPROZESSORDNUNG* (Karl Spühler et al. eds., 2010).

<sup>12</sup> Such as, e.g., “the interests of international commerce” which is the prevailing criterion in France (New French Code of Civil Procedure, art. 1492).

<sup>13</sup> See decision of the Federal Tribunal, October 16, 2003, 4P.115/2003, 22 ASA BULL. 364 (2004).

<sup>14</sup> Philippe Schweizer, *Droit du travail: droit international privé et fors, arbitrage*, in *PANORAMA EN DROIT DU TRAVAIL* 839, 841 (Rémy Wyler ed., 2009).

<sup>15</sup> The conditions of an exclusion agreement (or “opting-out”) are rather stringent: the agreement should be made in writing, should explicitly rule out the application of Chapter 12 of the PILA by making an explicit reference thereto, and should provide that such exclusion is to the benefit of the application of cantonal law to all matters relating to arbitration. In practice, the right to opt out of Chapter 12 of the PILA is rarely used. See 25 ASA BULL. 519 (2007). However, for a fairly recent example regarding a distribution agreement, see the decision of the Federal Tribunal, March 26, 2008, 4A.435/2007, 27 ASA BULL. 333 (2009). See also decision of the cantonal tribunal of Ticino, February 27, 2007, 4P.304/2006, 25 ASA BULL. 582 (2007).

<sup>16</sup> The second sentence of art. 353(2) of the CCP provides that the declaration is subject to the formal requirements set out at art. 358 of the CCP, i.e., in the written form or any other means which enables it to be evidenced by a text. See *infra*.

<sup>17</sup> See opinion of the Swiss Federal Council in support of the CCP of June 28, 2006, FF 2006 6831, 7000; Weber-Stecher, *supra* note 11, *Article 353 CCP N 16*; Werner Wenger, *Die Schiedsgerichtsbarkeit im Entwurf zur Schweizerischen Zivilprozessordnung*, 4 ZZZ 401, 403 (2007).

and a competitor or teammate who has a foreign domicile.<sup>18</sup> In the field of employment arbitration, it will be interesting to see how this new possibility for the parties to “opt in” to the application of Chapter 12 of the PILA will be used in practice, in light of a recent decision from the Swiss Federal Tribunal limiting the arbitrability of future domestic employment disputes.<sup>19</sup>

In Switzerland, domestic arbitration has generally less practical relevance than international arbitration,<sup>20</sup> and it will likely remain so despite the declared intention of the Swiss legislature to render domestic arbitration as successful as international arbitration by providing for greater flexibility and party autonomy in domestic arbitral proceedings within the new CCP.<sup>21</sup> As we will see, the new regime does not expressly regulate labor arbitration, but repeats the same arbitrability criteria as the Concordat. In theory, the option of domestic arbitration is thus left open for parties to employment disputes, who may consider it more often once a dispute has already arisen in their employment agreement, while using the possibility to opt into the international arbitration regime.<sup>22</sup>

To the extent that some important distinctions will remain between international and domestic arbitration after the entry into force of the new federal legislation, we will examine some key issues for the resolution of employment disputes in domestic arbitration and in international arbitration, below.

## B. DOMESTIC ARBITRATION

### 1. *Arbitrability*<sup>23</sup>

Public interest may command exceptions to domestic arbitrability to ensure that certain types of disputes are settled within the state court system and not in private proceedings with limited supervision by the national authorities. When looking abroad, for example to Germany, it can be seen that a typical exception to domestic arbitrability are individual employment disputes.<sup>24</sup> In Switzerland, there is no such explicit exception for the arbitration of individual employment disputes. However, the arbitrability of individual employment disputes has always been much debated and has remained contentious until today. Therefore, in this section we look at the arbitrability of individual employment disputes as it is now, and as it will be when the new Federal Code of Civil Procedure enters into force on January 1, 2011.

<sup>18</sup> Antonio Rigozzi, *L'arbitrabilité des litiges sportifs*, 21 ASA BULL. 501, 503 (2003); Weber-Stecher, *supra* note 11, Article 353 CCP N 21 et seq.

<sup>19</sup> See *infra*.

<sup>20</sup> DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION IN SWITZERLAND 22 (2008).

<sup>21</sup> See opinion of the Swiss Federal Council in support of the CCP of June 28, 2006, FF 2006 6831, 6998; Wenger, *supra* note 17, at 404.

<sup>22</sup> D. Girsberger et al., *Before Articles 353–399 CCP N 6–7*, in BASLER KOMMENTAR SCHWEIZERISCHE ZIVILPROZESSORDNUNG (Karl Spühler et al. eds., 2010).

<sup>23</sup> “Objective arbitrability,” as opposed to “subjective arbitrability” which deals with the capacity of the parties to enter into an arbitration agreement. This article will be limited to the examination of objective arbitrability.

<sup>24</sup> Labour Court Code (Arbeitsgerichtsgesetz), ss. 101–10.



a. *Arbitrability before January 1, 2011*

In the current regime, arbitrability of domestic disputes is determined by Article 5 of the Concordat. According to that provision, claims can be submitted to arbitration provided that they are (i) capable of party settlement (literally “which are at the free disposal of the parties”), and (ii) not within the exclusive jurisdiction of the state courts. The fulfilment of those two conditions depends on federal and cantonal law.<sup>25</sup> They raise the controversial issue of the compatibility of arbitration of individual employment disputes with the waiver prohibition of Article 341(1) of the Swiss Code of Obligations (CO), with cantonal law, as well as with the procedural requirements of Article 343 of the CO.

(i) *Article 341 of the CO.* The question whether claims are freely disposable by the parties is determined by the substantive law applicable to such claims (“*lex causae*”), that is, for employment disputes subject to Swiss law, by Article 341 of the CO. Pursuant to that provision, the employee may not waive any claims resulting from mandatory provisions of the law or from mandatory provisions of a collective employment contract during the course of the employment relationship, and for one month after its termination. Some authors contend that labor-related claims are freely disposable within the meaning of Article 5 of the Concordat insofar as the waiver prohibition of Article 341 of the CO is only aimed at settlement occurring outside of legal proceedings.<sup>26</sup> However, a majority of authors point out that the determinative factor with regard to Article 5 of the Concordat is the legal nature of the claim at stake and not its procedural treatment. Accordingly, those authors argue that if an arbitration agreement (“*compromis*”) concluded after the one-month period of Article 341 of the CO is perfectly admissible, an arbitration clause (“*clause compromissoire*”) relating to claims not yet freely disposable would instead be invalid for that reason.<sup>27</sup>

That was the approach recently adopted by the Swiss Federal Tribunal in a landmark decision rendered on June 28, 2010.<sup>28</sup> The reasoning of the court was as follows: because the employee can waive the claims based on mandatory or semi-mandatory provisions pursuant to Articles 361 and 362 of the CO only within the strict limitations of Article 341, those claims are not “freely disposable” within the meaning of Article 5 of the Concordat. If the employee cannot waive certain claims in light of Article 341 of the CO, he also cannot agree in advance to submit those claims to arbitration. The Federal Tribunal pointed out that it would be inconsistent for the law to prohibit forum selection clauses in domestic employment disputes<sup>29</sup> but to allow agreements to arbitrate. Accordingly,

<sup>25</sup> PIERRE JOLIDON, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE, *Article 5 N 51* (1984).

<sup>26</sup> Thomas Sutter-Somm, *Zivilrechtspflege im Einzelarbeitsvertragsrecht (Article 343 OR). Eine prozessrechtliche Vorschau im Bundesprivatrecht*, 1986 B.J.M. 121, 129; JOLIDON, *supra* note 25, at 158–59, 165; Wenger, *supra* note 17, at 406.

<sup>27</sup> ULLRICH STREIFF & ADRIAN VON KAENEL, ARBEITSVERTRAG: PRAXISKOMMENTAR ZU ARTIKEL 319–62 OR, *Article 343 CO N 8* (2006); Kurt Meier, *Schiedsgerichtsbarkeit in arbeitsrechtlichen Streitigkeiten*, in Festschrift 125 Jahre Kassationsgericht des Kantons Zürich 267, 274 (Andreas Donatsch et al. eds., 2000); François Bohnet, *L'arbitrage des conflits individuels de travail selon le projet de code de procédure civile suisse*, JUSLETTER (No. 10, 2006).

<sup>28</sup> See decision of the Federal Tribunal, June 28, 2010, 4P.69/1989, available at <[http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=28.06.2010\\_4A\\_71/2010](http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=28.06.2010_4A_71/2010)>.

<sup>29</sup> See arts. 21(1)(d) and 24(1) of the FSTJ, *infra* note 41.

the Federal Tribunal held that an arbitration agreement (“*clause compromissoire*”) was not valid if inserted in an employment agreement for future disputes regarding claims covered by Article 341 of the CO.

Undoubtedly, the solution adopted by the Swiss Federal Tribunal in that decision undermines the proposition, expressly recalled in the decision, that federal law does not preclude the submission of individual employment disputes to arbitration.<sup>30</sup> In light of this new holding, the admissibility of arbitration in domestic employment disputes is reduced to non-mandatory claims or to arbitration agreements concluded at the earliest one month after the termination of the employment relationship. One may regret the general reach of that decision, particularly in light of the considerations set out in that decision. The Federal Tribunal noted that Article 341 of the CO is premised on the fact that an employee is in a situation of “acute dependence” towards his employer, which may cause him to accept a reduction of his claims. Accordingly, Article 341 prohibits unilateral waivers without corresponding compensation. In our view and as mentioned above, the employee is not systematically in a situation of dependence vis-à-vis his or her employer.<sup>31</sup> In addition, we believe that it is also wrong to assume as a matter of principle that agreeing to a dispute resolution procedure such as arbitration necessarily entails a unilateral renunciation from the employee without a corresponding concession from the employer.

In light of the June 28, 2010 decision, parties who have agreed to an arbitration clause in their employment contract would be well advised to reassess the situation. Unless the parties proceed without reservation to arbitration when the dispute arises,<sup>32</sup> such arbitration agreement will be considered null and void under Swiss law.<sup>33</sup> A possible way out will be offered to the parties with the new CCP insofar as they will be allowed to agree on the application of Chapter 12 of the PILA, including its Article 177, which defines arbitrability on the basis of the financial interests involved and no longer on the free disposition of the claims.<sup>34</sup>

(ii) *Cantonal law.* The permissibility of domestic arbitration may be further limited or even excluded by cantonal law on civil procedure or court organization, on the basis of the reservation set forth in Article 5 of the Concordat.<sup>35</sup> Currently, arbitrability of domestic disputes is thus not determined in a uniform manner in Switzerland but depends on cantonal law. Regarding employment disputes, cantonal regulations vary, ranging from the

<sup>30</sup> *Supra* note 28.

<sup>31</sup> *See supra.*

<sup>32</sup> Which amounts in fact to the tacit conclusion of an arbitration agreement (“*compromis*”).

<sup>33</sup> As such, the expiry of the one-month period of art. 341 of the CO, is not sufficient in our view to cure the defect affecting the arbitration clause, since that period is not a mere reflection period as noted by the Swiss Federal Tribunal in its June 28, 2010 decision, *supra* note 28.

<sup>34</sup> *See infra.*

<sup>35</sup> ADRIAN STAEHELIN, KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILRECHT Bd. V/2c, DER ARBEITSVERTRAG: ARTIKEL 331–355 UND ARTIKEL 361–362 (1996), *Article 343 CO N 4*; STREIFF & VON KAENEL, *supra* note 27, *Article 343 CO N 8*; decision of the Swiss Federal Tribunal, SJ 2000 I 71; Cour d’Appel GE, JAR 1998, 309; Kantonsgericht VS, JAR 1997, 297; Arbeitsgericht Olten-Gösgen, JAR 1994, 270. *Critical Schweizer*, *supra* note 14, at 866.

prohibition of arbitration clauses,<sup>36</sup> their admission only in collective labor agreements,<sup>37</sup> regulations which prohibit a waiver of state jurisdiction or of a special jurisdiction before the dispute arises,<sup>38</sup> to the unconditional admission of arbitration clauses.<sup>39</sup> However, this possibility left for the cantons to restrict arbitration will be abolished by the entry into force of the CCP on January 1, 2011,<sup>40</sup> with the new Article 354 of the CCP abandoning the reservation in favor of a state authority. This is a welcome change as the patchwork of arbitrability resulting from the various cantonal laws on jurisdiction will no longer apply.

(iii) *Article 343 of the CO.* When it enacted Article 343 of the CO in 1971, the Swiss legislator wanted to ensure to employees a minimal procedural protection, by providing for mandatory venues for disputes arising out of employment contracts (Article 343(1) of the CO), as well as minimal procedural requirements (Article 343(2)–(4) of the CO), such as, for example, the provision of a simple and expeditious procedure for disputes up to 30,000 Swiss francs. The regulation of mandatory venues in Article 343(1) of the CO has evolved over time and was eventually replaced in 2001 by the Federal Statute on Territorial Jurisdiction (FSTJ),<sup>41</sup> whose Article 24 has introduced partly mandatory venues at the domicile or seat of the defendant or at the place where the employee usually performs his work.<sup>42</sup> As mentioned, the question whether the mandatory venues of Article 343 of the CO and Article 24 of the FSTJ preclude the submission to arbitration of individual employment disputes has long been a debated issue among commentators.

The enactment of the FSTJ clarified this question to some extent. The draft bill of November 18, 1998, by the Federal Council provided that arbitration clauses should be permitted as long as they did not depart from mandatory venues.<sup>43</sup> However, the Parliament did not follow that proposal, which led the majority of legal commentators to conclude that Article 24 of the FSTJ does not apply to arbitration.<sup>44</sup> That solution was unequivocally endorsed by the Swiss Federal Tribunal in the above-mentioned decision of June 28,

<sup>36</sup> As it is the case in cantons Basel, Geneva (Tribunal des Prud'Hommes GE, JAR 2004, 505), Ticino, and Solothurn (Arbeitsgericht Olten-Gösgen, JAR 1995, 280).

<sup>37</sup> For example, in cantons Vaud and Valais (Kantonsgericht VS, JAR 1997, 297).

<sup>38</sup> Such regime exists for the time being in cantons Aargau, St-Gallen, and Zurich (Arbeitsgericht and Obergericht ZH, ZR 2001, No. 64).

<sup>39</sup> This most permissive approach has been adopted in cantons Bern and Jura.

<sup>40</sup> See FRANÇOIS BOHNET, *Les conflits individuels de travail et les litiges en matière de bail et de droit de la consommation seront-ils arbitrables sous l'empire de la loi fédérale de procédure civile?*, in MÉLANGES EN L'HONNEUR DE FRANÇOIS KNOEPFLER 161, 175 (François Bohnet & Pierre Wessner eds., 2005); STREIFF & VON KAENEL, *supra* note 27, *Article 343 CO N 8*.

<sup>41</sup> Federal Statute on Territorial Jurisdiction of March 24, 2000, entered into force January 1, 2001, will be abolished on January 1, 2011, RS 272.

<sup>42</sup> FF 1999, 2603, para. 163.

<sup>43</sup> FF 1999, 2591, 2640.

<sup>44</sup> See, e.g., Bohnet, *supra* note 27, No. 18; Felix Dasser, *Article 1 FSTJ N 73 et seq.*, in KOMMENTAR ZUM BUNDESGESETZ ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN (Thomas Müller & Markus Wirth eds., 2001); Yves Donzallaz, COMMENTAIRE DE LA LOI FÉDÉRALE SUR LES FORS EN MATIÈRE CIVILE, *Article 1 FSTJ N 16–17* (2001); Dominik Gasser, *Article 1 FSTJ N 43–44*, in KOMMENTAR ZUM BUNDESGESETZ ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN (Franz Kellerhals ed., 2005); Balz Gross, *Article 24 FSTJ N 8*, in KOMMENTAR ZUM BUNDESGESETZ ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN (Thomas Müller & Markus Wirth eds., 2001); Franz Kellerhals, *Bemerkungen zum Anwendungsbereich des Bundesgesetzes über den Gerichtsstand in Zivilsachen*, in MÉLANGES EN L'HONNEUR DE HENRY-ROBERT SCHÜPBACH 224 (Pierre-Henri Bolle ed., 2000); Wolfgang Portmann, *Article 343 CO N 21*, in BASLER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, OBLIGATIONENRECHT I, ARTICLE 1–529 OR (Heinrich Honsell et al. eds., 2007); Jean-François Poudret, *L'arbitre n'a pas de for*, in MÉLANGES EN L'HONNEUR DE HENRY-ROBERT SCHÜPBACH 232 (Pierre-Henri Bolle ed., 2000); MANFRED REHBINDER, *BERNER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, VI/2./2./2.*, DER EINZELARBEITSVERTRAG, ARTIKEL 331–355 OR, *Article 343 CO N 9* (1992); Obergericht ZH,

2010.<sup>45</sup> The FSTJ regulates the territorial jurisdiction of state courts and therefore should not apply to arbitration. By signing an arbitration clause, the parties forego the jurisdiction of the state courts and thereby waive the venues guaranteed by the FSTJ. As a consequence, the seat of the arbitration does not have to correspond to the mandatory or partly mandatory venues of the FSTJ.

Similarly, it has been a matter of debate in Switzerland whether the procedural principles of Article 343(2)–(4) of the CO have to be observed in arbitration proceedings. Those principles provide for simple, expeditious (paragraph 2) and free (paragraph 3) proceedings for claims less than 30,000 Swiss francs, as well as *ex officio* establishment of facts and free appreciation of proof by the judge (paragraph 4). The same arguments as above can be made against the application of those principles in arbitration.<sup>46</sup> As noted by Bohnet, if one considers that the legislator's intention was apparently to clearly separate procedural rules applicable to court proceedings from those applicable in arbitration, then the procedural requirements of Article 343(2)–(4) should also not apply in arbitration.<sup>47</sup> This also makes sense from a practical perspective, as generally requirements such as the voluntariness of the proceedings will hardly be compatible with arbitration.<sup>48</sup> In addition, the requirements of Article 343 of the CO are addressed expressly to the cantons and the judges,<sup>49</sup> not to parties or arbitrators. That question was not addressed in the recent decision of the Swiss Federal Tribunal of June 28, 2010, since the amount in dispute was in that case above the 30,000 Swiss francs threshold.<sup>50</sup>

In our opinion, the procedural requirements of Article 343(2)–(4) do not apply to arbitration due to a lack of an explicit provision to that effect. It is true that this approach leaves the employee without the special protection offered in state court proceedings for disputes up to 30,000 Swiss francs. Indeed, an employer could try to circumvent the protective purpose of Article 343 of the CO by imposing an arbitration clause in the employment contract. Some authors advocate recourse to the doctrine of evasion of the law

ZR 1990, No. 79, 169=JAR 1990, 400; decision of the Federal Tribunal, SJ 2000 I 71; Cour d'Appel GE, JAR 1998, 309; Kantonsgericht VS, JAR 1997, 297. *Contra*: Gabriel Aubert, *L'arbitrage en droit du travail*, 18 ASA BULL. 2, 6 (2000); CHRISTIANE BRUNNER ET AL., COMMENTAIRE DU CONTRAT DE TRAVAIL (SELON LE CODE DES OBLIGATIONS), Article 343 CO N 16 (2004) (contradicting her speech before the Council of States, see OFFICIAL BULL. COUNCIL OF STATES 893 (1999)); Dominik Infanger, Article 2 FSTJ N 27, in BASLER KOMMENTAR ZUM SCHWEIZERISCHEN ZIVIL-PROZESSRECHT, GERICHTSSTANDSGESETZ (Karl Spühler et al. eds., 2001); RÉMY WYLER, DROIT DU TRAVAIL 626 (2008); Tribunal des Prud'Hommes GE, JAR 2004, 505, para. 2b.

<sup>45</sup> See *supra*.

<sup>46</sup> Conversely, the authors who support the application of the procedural principles in arts. 343(2)–(4) of the CO to arbitral procedures are mostly those who also approve the application of the partly mandatory venues of art. 24 of the FSTJ to arbitration. See, e.g., Aubert, *supra* note 44, at 6; BRUNNER ET AL., *supra* note 44, Article 343 CO N 16; Ernst Hasler, *Die Zuständigkeit bei arbeitsvertraglichen Streitigkeiten im Kanton Zürich*, 1988 ARB. 59; Meier, *supra* note 27, at 270; STAEHELIN, *supra* note 35, Article 343 CO N 4; WYLER, *supra* note 44, at 626; Tribunal des Prud'Hommes GE, JAR 2004, 505; Obergericht ZH, ZR 1990, No. 79, 169=JAR 1990, 400.

<sup>47</sup> JÜRG BRÜHWILER, KOMMENTAR ZUM EINZELARBEITSVERTRAG, Article 343 N 5 (1996); RICHARD FRANK ET AL., KOMMENTAR ZUR ZÜRCHERISCHEN ZIVILPROZESSORDNUNG, ss. 238–258 CCP N 18a (1997/2000); REHBINDER, *supra* note 44, Article 343 CO N 9–10; FRANK VISCHER, SCHWEIZERISCHES PRIVATRECHT VII/4, DER ARBEITSVERTRAG 291 (2005). See also decision of the Federal Tribunal, March 25, 2004, 4P.253/2003, para. 5.4, available at <[http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=25.03.2004\\_4P.253/2003](http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=25.03.2004_4P.253/2003)>.

<sup>48</sup> Meier, *supra* note 27, at 271–72; Bohnet, *supra* note 27, No. 24.

<sup>49</sup> STREIFF & VON KAENEL, *supra* note 27, Article 343 CO N 8; WYLER, *supra* note 44, at 623. This has historically always been so, see, e.g., former art. 29 of the Fabrikgesetz and former art. 19 of the Heimarbeitsgesetz.

<sup>50</sup> See *supra*.

to apprehend that type of abuse,<sup>51</sup> and consequently the (indirect) application of Article 343 in arbitration in those instances.

Given the uncertainties and diverging views among the authors regarding the application of Article 343(2)–(4) to arbitration, Bohnet suggested in 2006 to include provisions on the arbitrability of employment-related matters into the draft CCP.<sup>52</sup> Unfortunately, this idea has not been pursued (see below).

b. *Arbitrability after entry into force of CCP on January 1, 2011*

As of January 1, 2011, the Concordat will be replaced by Article 353 et seq. of the CCP,<sup>53</sup> which will thus govern Swiss domestic arbitration proceedings. The new CCP will have considerable consequences in the field of labor-related procedures. The FSTJ and Article 343 of the CO will be completely replaced by the CCP, which will in essence take over the procedural requirements of Article 343 of the CO and of Article 24 of the FSTJ.<sup>54</sup>

During the legislative process related to the new CCP, it has been pointed out on several occasions that the issue of arbitrability of individual employment disputes in domestic arbitration may need explicit regulation. In addition to proposals made in this direction by Bohnet in his article from 2006,<sup>55</sup> the University of Zurich also raised concerns during the consultation procedure about the fact that the draft CCP did not include any limits to domestic arbitration for individual employment disputes. The University of Zurich specifically noted that arbitration should not be prohibited entirely in the labor field, since it may be justified for higher amounts in dispute or may be wanted by the social partners. The University of Zurich advocated the adoption of a reasonable compromise, i.e. the prohibition of arbitrability for individual employment disputes involving an amount in dispute of less than 30,000 Swiss francs unless the arbitration clause stemmed from a collective employment contract.<sup>56</sup> This view was not followed.

Despite the criticism raised during the consultation procedure, the new Article 354 of the CCP maintains the criterion of the free disposal of the claims to determine arbitrability, like the current Article 5 of the Concordat. The arbitrability of employment disputes in the domestic regime will therefore remain subject to the important limitations set forth in the recent decision of the Federal Tribunal,<sup>57</sup> which also expressly referred to new Article 354 of the CCP. The question will remain as to whether the special protection of employees for disputes below 30,000 Swiss francs should apply to domestic arbitration, as the issue is not expressly addressed in the CCP.

<sup>51</sup> STAEHELIN, *supra* note 35, Article 343 CO N 4; Aubert, *supra* note 44, at 6.

<sup>52</sup> Bohnet, *supra* note 27, Nos. 39, 43.

<sup>53</sup> FF 2009, 21.

<sup>54</sup> Describing the changes: Wolfgang Portmann, *Arbeitsvertragsrecht und Zivilprozess*, in GAUCHS WELT: RECHT, VERTRAGSRECHT UND BAURECHT, FESTSCHRIFT FÜR PETER GAUCH ZUM 65. GEBURTSTAG 539 (2004).

<sup>55</sup> *Supra* note 4.

<sup>56</sup> See Compilation of Consultations, 799, available at <www.zpo.ch>.

<sup>57</sup> See *supra*.

The materials on the CCP suggest that the principles of Article 343(2)–(4) of the CO, which will be integrated into the CCP, should not apply to arbitration proceedings. In its opinion related to the CCP, the Swiss Federal Council stated that:

Arbitration deliberately constitutes an independent part of the code of civil procedure. As a basic principle no conclusions should be drawn from state court regulations for arbitration proceedings. Hence the code relinquishes in principle cross-references to other regulations of the draft code: The third part of the code of civil procedure should be handled by practitioners like a self-contained law and should be interpreted and appreciated as an independent unit.<sup>58</sup>

In addition, the opinion specifies that the mandatory nature of a venue has no influence on the arbitrability of a claim.<sup>59</sup> To the extent that arbitrability of individual employment is given in international arbitration, the uniformity of the legal system would also argue in favor of the arbitrability of those disputes in domestic arbitration.<sup>60</sup> Again, one should reserve the cases of evasion of law: an employer should not be allowed to use arbitration clauses in employment contracts by default without a special objective reason and only in order to evade the application of protective norms.<sup>61</sup>

If the new CCP does not entirely clarify the question of the mandatory application of protective provisions of labor law in domestic arbitration, it is, however, likely that recourse to arbitration for labor disputes will be primarily for disputes exceeding 30,000 Swiss francs, thus reducing the practical importance of the issue. That said, parties could try to reduce the risks that their arbitration agreement be held invalid where the amount in dispute does not reach the statutory threshold by addressing those concerns in their agreement, for example, by providing for “fast-track” arbitration proceedings, by having the seat of the arbitral tribunal coincide with one of the mandatory venues for labor disputes,<sup>62</sup> and by providing that the costs of the arbitration be borne entirely by the employer.<sup>63</sup>

## 2. *Special Issues of Arbitration Agreements in Collective Employment Contracts*

Arbitration agreements concerning individual and collective employment disputes are often found in collective employment contracts.<sup>64</sup> This type of agreements raise issues additional to the ones discussed above, such as (a) the legal character of the arbitration agreement, (b) its formal validity, as well as (c) the independence and stability of the arbitral tribunal.

<sup>58</sup> FF 2006, 7392 (free translation).

<sup>59</sup> FF 2006, 6841, 7001, 7269; Weber-Stecher, *supra* note 11, *Article 354 CCP N 24*; Wenger, *supra* note 17, at 405–06.

<sup>60</sup> Wenger, *supra* note 17, at 406.

<sup>61</sup> Similarly Weber-Stecher, *supra* note 11, *Article 354 CCP N 25* (“An arbitration clause should therefore only be regarded as *abusive* and *invalid* in those cases in which the agreement to arbitration improperly prevents the employee from raising claims (e.g., different language used than the official language at the place of work or at the domicile of the employee).”) (free translation).

<sup>62</sup> As some authors suggest, *see, e.g.*, POUDET, *supra* note 44, at 233.

<sup>63</sup> As is sometimes the case in the United States. There is a risk, however, that such arrangement may lead to concerns regarding the impartiality of the arbitrators.

<sup>64</sup> JEAN-FRITZ STÖCKLI, *DER INHALT DES GESAMTARBEITSVERTRAGES* 133 (1990).

a. *Legal character of arbitration agreement*

A collective employment contract is a contract whereby employers or associations thereof and employees' associations jointly establish provisions concerning the conclusion, the content, and termination of individual employment relationships of the participating employers and employees (Article 356(1) of the CO). To the extent that they relate to the procedure and not to the conclusion, content, and termination of individual employment relationships, arbitration agreements do not form part of those normative regulations. There is therefore no mandatory and direct "normative" application of arbitration agreements to individual employment relationships subject to the collective employment contract.<sup>65</sup>

b. *Formal validity of the arbitration agreement*

Since the application of an arbitration agreement via direct and normative force of the collective employment contract has to be denied, the formal validity of the arbitration agreement has to be examined. *De lege lata*, the requirements of formal validity of the arbitration clause are set forth in Article 6(1) of the Concordat which requires the written form.<sup>66</sup> According to Article 6(2), the arbitration agreement can also result from a written declaration of adhesion to the bylaws of a legal entity, as long as the declaration explicitly refers to the arbitration agreement contained in the bylaws or in a regulation arising therefrom. Accordingly, it is not sufficient to have an arbitration clause in the collective employment contract, since it is lacking the signature of the individual employee. Furthermore, arbitration agreements in collective employment contracts may not be declared generally binding on third parties,<sup>67</sup> unless the individual employment contract with the third party contains an explicit agreement to the contrary.<sup>68</sup>

As of January 1, 2011, the formal validity requirements of an arbitration clause in domestic arbitration will be modeled on the more flexible standard prevailing in international arbitration (see below). Article 358 of the CCP will require that the arbitration clause be made in writing or by any other means allowing it to be evidenced by a text. The formal validity requirements for arbitration clauses in collective employment contracts will thus be softened and Article 6(2) of the Concordat will be abolished altogether. A signature of the individual employee will in fact no longer be necessary. However, the formal validity of the arbitration clause will still necessitate proof by text of the agreement

<sup>65</sup> See Obergericht ZH, ZR 1990, no. 79 = JAR 1990, 400, para. 4. However, a minority of Swiss commentators are arguing for a normative effect of the clause in the collective labour agreement: Aubert, *supra* note 44, at 9–10, 21–22; Schweizer, *supra* note 14, at 858.

<sup>66</sup> According to the Swiss doctrine and case law, such requirement entails compliance with arts. 13 to 18 of the CO, which means that the arbitration clause must be signed by the parties in order to be valid. See GIRSBERGER & VOSER, *supra* note 20, at 68; *contra see* BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONALE UND INTERNE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ 141 (2006).

<sup>67</sup> See art. 1(3) of the Federal Law Allowing the Extension of the Scope of Collective Labour Agreements (RS 221.214.311).

<sup>68</sup> THOMAS RÜEDE & REIMER HADENFELDT, SCHWEIZERISCHES SCHIEDSGERICHTSRECHT 41 (1993); Meier, *supra* note 27, at 276; Aubert, *supra* note 44, at 10.

between the individual employee and the individual employer. An arbitration clause in a collective employment contract to which there is no reference in an employment contract will therefore still be insufficient.

c. *Independence and stability of arbitral tribunal*

In the context of collective employment contracts, it is the social partners who decide on the composition of the arbitral tribunal, and not the parties ultimately involved in the dispute. This may lead to problems concerning the independence and parity of the arbitral tribunal, if one party does not belong to any of the associations or is at odds with them. In such cases, the party should have the possibility to nominate its own judge; otherwise, the arbitration clause is null and void.<sup>69</sup>

The stability of an arbitral tribunal based on a collective employment contract may also pose a problem. In the event that a collective employment contract is terminated, the arbitration agreement would also cease to exist.<sup>70</sup> Therefore, there is a danger that during a pending procedure the arbitral tribunal is being deprived of its legal and financial basis, as it is financed by the social partners. An arbitration agreement regarding individual employment disputes in a collective employment contract should thus call for an arbitral tribunal that is independent of the term of validity of the collective employment contract. Otherwise, the stability of the arbitral tribunal is not guaranteed and the arbitration clause must be regarded as null for the employers and employees concerned.<sup>71</sup>

C. INTERNATIONAL ARBITRATION

As mentioned above, the situation where parties to an employment contract are seeking to submit their dispute to an arbitral tribunal is likely to arise more frequently in the international context than in the domestic one. The traditional advantages of arbitration<sup>72</sup> (designation of the arbitrators, resolution of the dispute within a neutral forum, and preservation of confidentiality among the main ones) are indeed attractive for parties to an international employment agreement, particularly, as noted earlier, in the sports field and for top-level executives.

As we will see, contrary to many other countries, Switzerland permits parties to an international employment agreement to submit their dispute to arbitration. After discussing the principle of arbitrability of that type of dispute, we will consider the formal and substantive conditions to the validity of such arbitration agreements, as well as the judicial setting aside of the award, and enforcement and recognition issues (see below).

<sup>69</sup> ATF 107 Ia 155; Meier, *supra* note 27, at 277.

<sup>70</sup> Obergericht ZH, ZR 1990, No. 79 = JAR 1990, 400; Meier, *supra* note 27, at 277.

<sup>71</sup> Obergericht ZH, ZR 1990, No. 79, para. 7c; Meier, *supra* note 27, at 277.

<sup>72</sup> See Girsberger et al., *supra* note 22, Articles 353–399 CCP N 19.



## 1. *Arbitrability*

As seen above, the first question that arises in employment disputes is to know whether they are arbitrable, that is, capable of being submitted to arbitration. For international disputes, the answer is to be found in Article 177(1) of the PILA, which provides that any dispute involving an economic interest may be the subject matter of arbitration. The criterion of economic interest was deliberately chosen by the Swiss legislator to open widely the access to international arbitration in Switzerland.<sup>73</sup> Accordingly, the Swiss Federal Tribunal has given a broad interpretation of the concept of arbitrability under Article 177(1) of the PILA, considering in particular that the notion of economic interest comprised all claims with a financial value for the parties, or in other words:

All rights that, for at least one of the parties, involve some interest which can be assessed in financial terms, irrespective of whether the parties may freely dispose of the rights/legal relationship that is submitted to arbitration.<sup>74</sup>

Given such a broad and liberal definition, and considering that salary is a defining element of an employment contract, employment disputes are generally arbitrable under Swiss law.<sup>75</sup> Even where the relief sought is not a sum of money, such as, for example, claims for the issuance of a work certificate,<sup>76</sup> there is usually a financial interest at stake.<sup>77</sup> From a comparative law standpoint, Switzerland's approach towards the arbitrability of employment disputes is one of the most liberal in Europe, many other European countries having set important restrictions to the arbitrability of such disputes.<sup>78</sup>

<sup>73</sup> See ATF 118 II 353, para. 3a.

<sup>74</sup> *Id.*

<sup>75</sup> RIGOZZI, *supra* note 5, at 390–91; Aubert, *supra* note 44, at 7. The arbitrability of employment disputes in international arbitration was expressly acknowledged by the Swiss Federal Tribunal in its decision of June 28, 2010. See *supra*.

<sup>76</sup> Schweizer, *supra* note 14, at 862.

<sup>77</sup> A caveat should be raised when employment disputes are intertwined with a field where arbitrability is restricted, such as bankruptcy law. For example, in Switzerland, the arbitrability of certain insolvency proceedings affecting all the creditors ("rein betriebsrechtliche Klagen vollstreckungsrechtlicher Natur") is disputed. See, e.g., JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 307, 363 (2007). In addition, the bankruptcy of a company may have an impact on the validity of the arbitration agreement and may also bring a stop to ongoing arbitration proceedings. See, e.g., decision of the Federal Tribunal, March 3, 2009, *Vivendi*, 4A.428/2008; and comments from Akikol, *supra* note 1, No. 26; Martin Aebi & Harold Frey, *Impact of Bankruptcy on International Arbitration Proceedings: A Special Case Does not Make a General Rule*, 28 ASA BULL. 113 (2010).

<sup>78</sup> See Bernard Hanotiau, *L'arbitrabilité*, in 25 RECUEIL DES COURS 226 (2002). For example, in Italy, art. 806(2) of the Italian Civil Code of Procedure (CPC) provides that parties can submit to arbitration the disputes which have arisen between them, with the exception of those specified under CPC, art. 409, which are precisely the labour-related disputes. Those can be submitted to arbitration only if provided by law or collective labour agreements and if the parties agree to retain the possibility to appeal before the state courts (CPC, art. 808(2)). In France, at a domestic level, parties can agree to submit their dispute to arbitration only after the termination of the employment relationship. If arbitration clauses included in international employment contract are generally allowed for future disputes, they are only binding towards the employer but unenforceable ("inopposable") against the employee who remains free to seize the state courts when the dispute arises even when the arbitration clause is valid under the applicable law. See Thomas Clay, *L'arbitrage en droit du travail: quel avenir après le rapport Barthélemy-Cette?*, 2010 DROIT SOCIAL 930; Courtois-Champenois, *supra* note 2, at 360–61; Belgium prohibits parties to an employment contract from agreeing in advance to submit their dispute to arbitration (Judicial Code, art. 1678(3)), unless the annual salary of the employee exceeds EUR 32,000 and the employee has a managing position (art. 69 of the Belgian Law on Employment Contracts). In Germany, the Labour Court Code provides that individual employment disputes are not arbitrable, with the exception of disputes arising out of contracts between a company and its managing directors (since managing directors are not considered to be employees under German employment law, those disputes are not employment disputes and are therefore not covered by the Labour Court Code).

In this regard, it is important to note that the Swiss Federal Tribunal, in a landmark decision of 1992 (the *Fincantieri* decision),<sup>79</sup> has held that Article 177(1) of the PILA was a substantive rule of private international law, as opposed to a conflict-of-law provision. This means that an arbitral tribunal sitting in Switzerland will examine the question of arbitrability by the yardstick of Article 177(1) (as the *lex arbitri*) and irrespective of any more restrictive rules, be it in the law governing the merits (*lex causae*), the national laws of the parties, or the law of the likely place of enforcement of the award.<sup>80</sup> For example, an employment dispute between an Italian company and a Swiss employee will be deemed arbitrable by an arbitral tribunal with seat in Switzerland even if the substantive law governing the contract, Italian law, prohibits arbitration of that type of dispute. The issue of whether that decision would be enforceable is another question.<sup>81</sup> At the arbitrability stage, however, concerns about enforcement should not bar arbitration of employment law claims in Switzerland. The case law of the Swiss Federal Tribunal is clear on that point: the arbitral tribunal has no obligation to take into account the public policy or other mandatory requirements of the likely place of enforcement, as the risk of a possible refusal of recognition and enforcement of the award is to be borne by the parties to the arbitration.<sup>82</sup>

Nevertheless, some uncertainty remains as to what extent the arbitral tribunal sitting in Switzerland has to take into account public policy or any mandatory rules from the *lex causae* or any other sources to assess arbitrability of a claim. Clearly, public policy and arbitrability are not interchanging notions. It is not because an award is contrary to public policy that the underlying claim is inarbitrable.<sup>83</sup> That said, in the *Fincantieri* decision, the Swiss Federal Tribunal stated in an *obiter dictum* that:

The arbitrability of a dispute could be denied in relation to claims for which resolution would be reserved exclusively to the jurisdiction of a state court on the basis of provisions which must be taken into consideration from a public policy point of view.<sup>84</sup>

One can wonder whether this was meant to imply that the arbitrator sitting in Switzerland has to deny arbitrability of certain types of disputes, such as a labor-related ones, when applying a foreign law providing for the exclusive jurisdiction of state courts over those claims as a matter of public policy. We agree with Berger and Kellerhals that such general conclusion cannot be drawn from the Federal Tribunal's *dictum*.<sup>85</sup> First, it is not clear from the decision whether the public policy to be taken into account is Swiss public

<sup>79</sup> See ATF 118 II 353.

<sup>80</sup> GIRSBERGER & VOSER, *supra* note 20, at 83.

<sup>81</sup> See *infra*.

<sup>82</sup> ATF 118 II 353, para. 3c.

<sup>83</sup> See BERGER & KELLERHALS, *supra* note 66, at 89 (emphasizing the complex relationship between arbitrability and public policy, those authors also point out that the Swiss Federal Tribunal has up until now never denied arbitrability on the basis of the public policy reservation). See also Akikol, *supra* note 1, No. 62.

<sup>84</sup> ATF 118 II 353, 357 (the arbitrability of the case could be denied "only in respect to claims whose resolution would have been exclusively reserved to a state court on the basis of provisions that should be taken into account as a matter of public policy.") (free translation).

<sup>85</sup> BERGER & KELLERHALS, *supra* note 66, at 90 No. 255.

policy, the foreign public policy, or the Swiss international public policy.<sup>86</sup> Second, one should bear in mind that the main holding of the Federal Tribunal's decision was the principle according to which arbitrability is defined by a substantive rule of private international law. If one were to oblige the arbitral tribunal to consider, in its determination of arbitrability, a rule of foreign law, albeit belonging to public policy, we would fall back (at least partially) on a conflict-of-law based approach, a solution that the Swiss legislator deliberately rejected.<sup>87</sup>

A few years after the *Fincantieri* decision, an arbitral tribunal sitting in Geneva under the ICC rules had to hear a dispute between a Syrian agent (claimant) and an Italian supplier (defendant) regarding an agency agreement.<sup>88</sup> The defendant objected to the jurisdiction of the arbitrators, claiming that the dispute fell under the exclusive jurisdiction of the Italian courts pursuant to Articles 409 and 413 of the Italian Code of Civil Procedure. The arbitral tribunal rejected the defendant's arguments, considering that the arbitrability of the dispute was governed by the *lex arbitri* and not by the *lex causae*, and that the only restrictions to Article 177(1) of the PILA were the ones set by public policy within the meaning of Article 190(2)(e) of the PILA. On that basis, the arbitral tribunal denied that the mandatory jurisdiction of the Italian courts was part of public policy and affirmed its jurisdiction over the dispute. The solution adopted by the arbitral tribunal in this case should be approved.<sup>89</sup> To consider that the public policy referred to in the *Fincantieri* decision is the same notion as in Article 190(2)(e) of the PILA is not only coherent with the system of the law but also in line with the intention of the legislator.<sup>90</sup> It would be contrary to the substantive character of Article 177 of the PILA to force the arbitrators to take into account mandatory protective provisions of a foreign state within the meaning of Article 19 of the PILA, as a minority of authors advocate.<sup>91</sup>

Given the above, we do not see how transnational public policy could limit arbitrability of employment disputes in Switzerland. It would be very difficult indeed, if not

<sup>86</sup> RIGOZZI, *supra* note 5, at 512. Subsequently, in a decision, March 8, 2006, the Swiss Federal Tribunal endeavored to clarify to some extent the elusive concept of public policy by stating that: "an award is inconsistent with public policy if it disregards those essential and broadly recognised values, which, according to the prevailing values in Switzerland, should be the founding stones of any legal order." See ATF 132 III 389, para. 2.2.3.

<sup>87</sup> BERGER & KELLERHALS, *supra* note 66, at 90 No. 255.

<sup>88</sup> See partial award in case ICC No. 8420 of 1996, YCA 2000, 328.

<sup>89</sup> See, however, the contrary approach adopted by the Court of Arbitration for Sport (CAS) in an award of 2002 (CAS 2002/A/379 and CAS 2002/A/382 UCI v. Vandenbroucke & RLVP) reported by RIGOZZI, *supra* note 5, at 512, in which the CAS annulled a decision of the Belgian cycling federation on a question of doping on the basis that such decision was within the exclusive jurisdiction of a state, the Flemish disciplinary commission. As noted by Rigozzi, had the CAS upheld the decision of the federation, the award might have been challenged on the basis of the *Fincantieri dictum*.

<sup>90</sup> Of the same opinion, *see, e.g.* BERGER & KELLERHALS, *supra* note 66, at 91; Zina Abdulla, *The Arbitration Agreement*, in INTERNATIONAL ARBITRATION IN SWITZERLAND 15, 22 (2004). That solution is also in line with the recent trend observed by legal commentators among courts and arbitral tribunals in Europe to reduce the impact of public policy in relation to arbitrability and to consider that the former notion cannot serve as a criterion to delimitate between what is arbitrable and what is not. *See* GIRSBERGER & VOSER, *supra* note 20, at 65.

<sup>91</sup> FRANK VISCHER ET AL., INTERNATIONALES VERTRAGSRECHT 1405 (2000); ANDREAS BUCHER, DIE NEUE INTERNATIONALE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ 41 (1989); RIGOZZI, *supra* note 5, at 391 n.2246, 392. In our view, while the approach advocated by the latter author has the merit of weighing the interests at stake by taking the concrete need of protection in the case at hand, it has the disadvantage (in addition of being contrary to the letter of art. 177 of the PILA) of presenting a degree of unpredictability for the employer and a potential inequality of treatment for the worker, who would not have the chance of living or working in a state with protective norms.

impossible, to imagine that what is allowed under Swiss law (submitting international employment disputes to arbitration) would be deemed contrary to fundamental principles of law. In addition, if one considers the narrow range of fundamental principles which have been held by the Swiss Federal Tribunal to fall under the notion of international public policy<sup>92</sup> (and those which have not, despite their importance, been elevated to the level of “ordre public”),<sup>93</sup> we very much doubt that the mandatory provisions of foreign law providing for exclusive jurisdiction of state courts would fall into that category.<sup>94</sup> For the same reasons, we cannot agree with Aubert who considers that the requirements set forth by Article 343 of the CO for the protection of the employee are “incompressible” and that therefore an arbitration clause which would not offer guarantees of rapidity, simplicity, and voluntariness for disputes where the amount in controversy is below the legal threshold, would be contrary to international public policy.<sup>95</sup>

Beyond the issue of public policy, it should be noted that there is still a controversy among Swiss legal commentators as to when arbitrability (or lack thereof) should be raised. According to a majority of authors, a limitation to arbitrability is the result of a legal restriction on a party's autonomy and must therefore be considered *ex officio* by the arbitral tribunal. The defence of arbitrability could thus be raised at any stage of the arbitral proceedings and the annulment proceedings.<sup>96</sup> To the contrary, others argue that the party contesting the arbitrability of a dispute in fact raises an objection to the arbitral tribunal's jurisdiction and as such, has to invoke it before any submission on the merits.<sup>97</sup> So far, the Swiss Federal Tribunal has followed the minority approach and has reaffirmed in two recent decisions that, given that arbitrability is a condition of the validity of the arbitration agreement and therefore of the jurisdiction of the arbitral tribunal, the defence of inarbitrability must be raised before any defence on the merits is being submitted.<sup>98</sup> Based on the current case law of the Swiss Federal Tribunal, parties wanting to raise any defence of arbitrability are thus advised to do so immediately.

<sup>92</sup> Among which are, e.g., the principle of *pacta sunt servanda*, the prohibition of expropriation without compensation, the prohibition of discrimination based on gender or religion, etc. See, e.g., decision of the Swiss Federal Tribunal, June 10, 2010, 4A.458/2009; decision of the Swiss Federal Tribunal, February 15, 2010, 4A.488/2009; decision of the Swiss Federal Tribunal, October 18, 2004, 4P.104/2004; ATF 128 III 191.

<sup>93</sup> Such as, e.g., the provisions of competition law. See ATF 132 III 389, para. 3.2.

<sup>94</sup> Besides, as seen *supra*, rules governing the territorial jurisdiction are rules of “attribution” and not rules of “arbitrability”; hence they do not normally restrict arbitrability. See Poudret, *supra* note 44, at 232. Also the argument was made that since it is possible, under international conventions on jurisdiction, such as the Brussels Convention of September 27, 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (now Council Regulation 44/2001 (EC)) and its sister treaty, the Lugano Convention of September 16, 1988, to agree, under certain conditions, upon the insertion of a forum selection clause in favour of the courts of other contracting states, it would be difficult to then argue that the mandatory provisions of a country regarding the exclusive jurisdiction of a court are so strong that they “cannot be circumvented by any means and should be classified in the very narrow category of international public policy.” See Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?*, 12 ARB. INT'L 391, 402 (1996).

<sup>95</sup> Aubert, *supra* note 44, at 8.

<sup>96</sup> KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 101–02; ANDREAS BUCHER, *LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE* 53 (1988); Frank Vischer, *Article 177 PILA N 26*, in *ZÜRCHER KOMMENTAR ZUM IPRG* (Daniel Girsberger et al. eds., 2004).

<sup>97</sup> PIERRE LALIVE ET AL., *LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE, Article 177 PILA N 6* (1989).

<sup>98</sup> See decision of the Swiss Federal Tribunal, June 2, 2010, 4A.320/2009; decision of the Swiss Federal Tribunal, February 21, 2008, 4A.370/2007, 26 ASA BULL. 334 (2008).

## 2. *Formal Validity of the Arbitration Agreement*

Pursuant to Article 178(1) of the PILA,<sup>99</sup> an arbitration agreement must be in writing, by telegram, telex, or any other means of communication, which enables it to be evidenced by a text, failing which it is invalid.<sup>100</sup> Like Article 177(1) of the PILA regarding arbitrability, Article 178(1) is a substantive rule of international private law,<sup>101</sup> which must be interpreted in an autonomous manner.<sup>102</sup>

Since the arbitration agreement can be concluded by any means of communication that is evidenced by a text, it is widely accepted that the parties' signature is not necessary for it to be valid.<sup>103</sup> Thus, in practice, documents such as notes, minutes, general conditions, articles of association, and emails may constitute a written arbitration agreement,<sup>104</sup> provided that all essential elements of the arbitration clause<sup>105</sup> are evidenced in writing.

The question whether the formal requirements must be observed by all parties is debated among Swiss legal commentators, and has to our knowledge not yet been expressly considered by the Swiss Federal Tribunal. The majority view seems to be that all parties to the arbitration agreement must comply with the formal requirements.<sup>106</sup> Accordingly, the arbitration clause will be valid if it is contained in a document drafted by one party and signed by the other one. However, an increasing number of authors consider that an oral agreement confirmed in a text signed by one party only is also compliant with the requirements of Article 178(1) of the PILA.<sup>107</sup> In addition, the Swiss Federal Tribunal has also held that, in special circumstances, a party's behavior may substitute pursuant to the principle of good faith for the observation of the formal requirement of Article 178(1).<sup>108</sup>

If we apply those rules in the context of employment matters, it is important to note that the arbitration clause does not necessarily need to be contained in the individual

<sup>99</sup> Article 178(1) of the PILA applies when the seat of the arbitration is in Switzerland. On the other hand, art. II of the New York Convention on the Recognition and Enforcement of Foreign Awards [hereinafter "New York Convention"] dealing with formal requirements of an arbitration clause applies when Swiss courts are called to rule upon the recognition and enforcement of the arbitral award or when a Swiss court is seized despite the existence of an arbitration agreement providing for arbitration seated abroad. Despite the differences in the text of those provisions, the Swiss Federal Tribunal has considered that the formal requirements laid down in art. II of the New York Convention overlap with those of art. 178(1) of the PILA. See ATF 121 III 38.

<sup>100</sup> As pointed out by KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 111, the invalidity is not absolute insofar as a party who proceeds without raising an objection regarding a formal deficiency is deemed to have accepted the jurisdiction of the arbitral tribunal.

<sup>101</sup> Which means that the parties may not submit the formal requirements of the arbitration clause to a law other than a Swiss law. See Abdulla, *supra* note 90, at 16.

<sup>102</sup> In particular the formal requirements of art. 13 of the CO are not applicable here. See BERGER & KELLERHALS, *supra* note 66, at 136.

<sup>103</sup> ATF 121 III 38, 45. GIRSBERGER & VOSER, *supra* note 20, at 68.

<sup>104</sup> Abdulla, *supra* note 90, at 17.

<sup>105</sup> I.e., the parties' intention to submit their dispute to arbitration and the object of the dispute or the legal relationship which will be the subject matter of arbitration.

<sup>106</sup> See, e.g., Werner Wenger & Christoph Müller, *Article 178 PILA N 16*, in BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT (Heinrich Honsell et al. eds., 2007); Paul Volken, *Article 178 PILA N 31*, in ZÜRCHER KOMMENTAR ZUM IPRG (Daniel Girsberger et al. eds., 2004).

<sup>107</sup> See, e.g., KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 115 No. 219; BERGER & KELLERHALS, *supra* note 66, at 138 n.400; Marc Blessing, *The Arbitration Agreement: Its Multifold Critical Aspects*, 8 ASA SPECIAL SERIES 7 (1994).

<sup>108</sup> See decision of the Federal Tribunal, January 20, 2010, 4A.548/2009, available at <[http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=20.01.2010\\_4A\\_548/2009](http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=20.01.2010_4A_548/2009)>; see also ATF 121 III 38.

employment contract. As pointed out by Schweizer, there is no derogation from the rule based on the presumed relative strength or weakness of the parties.<sup>109</sup> Therefore, arbitration agreements may also be valid if inserted in the job application or in the employee's manual to the extent that the employee's signature can evidence the intention to agree to arbitration.<sup>110</sup> In the sports field particularly, the issue of the "arbitration clause by reference" has a practical importance, insofar as recourse for arbitration is often not provided in the bylaws of the local or national federation to which the athlete has adhered, but in the bylaws of the international federation to which the local or national bylaws refer.<sup>111</sup> According to the Swiss Federal Tribunal, it is sufficient that the contractual document refers globally (and not necessarily by pointing specifically to the arbitration clause) to the document containing the arbitration clause.<sup>112</sup> The case law of the Swiss Federal Tribunal regarding the formal validity of the arbitration agreement reflects the general trend towards a relaxation of the formal requirements.<sup>113</sup> That said, issues of form will often relate to issues of substance, in particular the question whether a party has effectively consented to arbitration.<sup>114</sup> That question will be interpreted restrictively by courts and arbitral tribunals.<sup>115</sup>

### 3. *Substantive Validity of the Arbitration Agreement*

Article 178(2) of the PILA specifies that an arbitration clause is valid as to substance if it complies either with (i) the law chosen by the parties specifically to govern the arbitration agreement (which is rare in practice); or (ii) the law governing the subject matter of the dispute; or (iii) Swiss law. Pursuant to the principle of *in favorem validitatis*, it is thus sufficient if the arbitration agreement is valid under the substantive rules of any of the three laws listed. The purpose of this alternative test conforms with the pro-arbitration

<sup>109</sup> Schweizer, *supra* note 14, at 858.

<sup>110</sup> It should also be noted that, contrary to the current provisions of domestic arbitration (*see supra*), the adhesion to the bylaws of a legal entity carries automatically the acceptance of the statutory arbitration clause (thus an arbitration clause "by reference") regardless of the form of the adhesion. Accordingly, the acquisition of a corporation's securities constitutes acceptance of the arbitration agreement contained in the bylaws of the company. *See* KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 117. This will be relevant for an employee who is incentivized by stock option plans, for example.

<sup>111</sup> RIGOZZI, *supra* note 5, at 415. As reiterated in recent decisions, the Swiss Federal Tribunal adopts a lenient approach regarding the parties' consent to recourse to arbitration in the sports field. *See* decision of the Swiss Federal Tribunal, January 20, 2010, 4A.548/2009 (*supra* note 108); decision of the Swiss Federal Tribunal, January 9, 2009, 4A.460/2008, available at <[http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=09.01.2009\\_4A\\_460/2008](http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=09.01.2009_4A_460/2008)>.

<sup>112</sup> Decision of the Swiss Federal Tribunal, February 7, 2001, 4P.230/2000, 19 ASA BULL. 523 (2001).

<sup>113</sup> KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 115; Akikol, *supra* note 1, No. 30.

<sup>114</sup> On that issue, *see* decision of the Swiss Federal Tribunal, November 6, 2009, 4A.358/2009, available at <[http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.11.2009\\_4A\\_358/2009](http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.11.2009_4A_358/2009)>, where the Swiss Federal Tribunal, without contradicting its liberal case law in favour of arbitration, annulled a CAS award which had regarded as valid an arbitration clause which the Federal Tribunal held was invalid for want of consent.

<sup>115</sup> POUDRET & BESSON, *supra* note 77, at 264 No. 304; GIRSBERGER & VOSER, *supra* note 20, at 78–79. It should be specified that the approach is not the same regarding the principle of the arbitration and the scope of the arbitration. The interpretation will be narrow with regard to the principle of the arbitration, the renunciation of the state courts not being admitted too easily. However, once the intention to resort to arbitration is confirmed, the scope of the arbitration will be interpreted broadly pursuant to the principle of "effective interpretation." *See* ATF 116 Ia 56; ATF 129 III 675, 22 ASA BULL. 353 (2004).

bias of the Swiss legislator and the clear policy to affirm the validity of the arbitration agreement where possible.<sup>116</sup>

Article 178(2) does not list the issues to which the rules of substantive validity apply. Aside from the parties' consent to submit their dispute to arbitration, it is generally recognized that issues regarding the conclusion, interpretation, scope, performance, and extinction of the arbitration agreement are covered by this provision.<sup>117</sup> A detailed examination of all the problems that might arise in terms of the substantive validity of the arbitration clause goes beyond the scope of this contribution. It must, however, be emphasized that for the topic at hand, the issue of consent has a great practical importance. In particular, situations where the employee will have been forced to accept arbitration will be problematic. Under Swiss law, since the arbitration agreement is nothing other than a contract, Articles 3–9 of the CO regarding offer and acceptance, as well as Article 18 of the CO regarding the interpretation of contracts, will be applicable to determine whether there was a mutual assent by the parties.<sup>118</sup>

#### 4. *Judicial Setting Aside of the Award*

Another advantage of arbitration (or disadvantage depending on the outcome of the arbitration for the parties) is the limited possibility to challenge arbitral awards. Swiss law provides for only one level of challenge in international matters: setting aside proceedings must be brought before the Swiss Federal Tribunal pursuant to the procedure set forth in Article 77 of the Swiss Federal Tribunal Act (FTA) and on the basis of the exhaustive list of grounds mentioned in Article 190(2) of the PILA.<sup>119</sup> In employment matters, as in other fields, a challenge brought by disgruntled parties for lack of arbitrability or failure of the arbitral tribunal to apply the requirements of Article 343 of the CO will have very little chance of success.<sup>120</sup> The Swiss Federal Tribunal will not review the correct application of the law by the arbitrators and is also bound by the arbitral tribunal's finding of facts.<sup>121</sup> However, the Swiss Federal Tribunal has full power to review legal arguments regarding the jurisdiction of the arbitral tribunal (which comprises issues of arbitrability).<sup>122</sup> It

<sup>116</sup> GIRSBERGER & VOSER, *supra* note 20, at 73.

<sup>117</sup> *Id.* at 74–75; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 125.

<sup>118</sup> KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 126 et seq. With regard to arbitration clauses by reference, there is usually no problem in case of a specific reference, i.e. when the document specifically refers to the arbitration clause contained in another document. However, things are less transparent in case of a general reference. In such cases, the Swiss Federal Tribunal applies, on the basis of art. 18 of the CO, the principle of good faith and fair dealing and examines in light of the concrete circumstances of the case if, given the usages of the field, the parties' previous dealings and the experience of the parties, that general reference can be interpreted as a consent to an arbitration agreement.

<sup>119</sup> This list comprises the irregular constitution of the arbitral tribunal (art. 190(2)(a) of the PILA); the lack of jurisdiction (art. 190(2)(b) of the PILA); the *ultra, infra* or *extra petita* award (art. 190(2)(c) of the PILA); the violation of the right to be heard and equal treatment (art. 190(2)(e) of the PILA); and the violation of public policy (art. 190(2)(e) of the PILA).

<sup>120</sup> Schweizer, *supra* note 14, at 877. See also, Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: An Updated Statistical Analysis*, 28 ASA BULL. 82 (2010).

<sup>121</sup> Unless, as noted by POUDET & BESSON, *supra* note 77, at 726, those facts were established in violation of the mandatory rules of the art. 182(3) of the PILA, or in breach of procedural public policy. See also BERNARD CORBOZ, *Article 77 LTF N 1*, in COMMENTAIRE DE LA LOI SUR LE TRIBUNAL FÉDÉRAL (Bernard Corboz et al. eds., 2009).

<sup>122</sup> GIRSBERGER & VOSER, *supra* note 20, at 322.

should also be noted that if the arbitral tribunal decides on its jurisdiction in a preliminary award, that award must be challenged immediately under penalty of foreclosure.<sup>123</sup>

An interesting issue which arises in connection with challenges of awards is the possibility given to the parties by Article 192(1) of the PILA to waive, in advance, any right of challenge of an award rendered by an arbitral tribunal sitting in Switzerland or to exclude certain grounds of challenge listed in Article 190(2) of the PILA, provided that neither party has its domicile, habitual residence, seat or place of business<sup>124</sup> in Switzerland when the waiver was made. Because it deprives the parties of judicial review of the award, the waiver of appeal should be explicit and unambiguous. The Swiss Federal Tribunal has interpreted those requirements very strictly. In this regard, it is not sufficient that the parties state that the award shall be “final and binding” to exclude a challenge.<sup>125</sup> In employment-related disputes, parties should be particularly careful before entering into a waiver agreement. In a recent decision, the Swiss Federal Tribunal has held that the exclusion agreement also applies in cases where the arbitral tribunal’s jurisdiction is challenged based on the allegedly limited substantive scope of application of the arbitration agreement (competence *rationae materiae*).<sup>126</sup> Practically, as pointed out by Schweizer, this has the quasi “perverse” effect that a party agreeing to a complete waiver will be deprived of the possibility even to challenge the lack of arbitrability of the subject matter (or any other excess of power of the arbitrator) before the Swiss Federal Tribunal.<sup>127</sup> An important nuance should, however, be underlined in relation to the topic at hand: the Swiss Federal Tribunal has recently held that a waiver agreement is not valid if the party cannot refuse to sign it.<sup>128</sup> That decision, which is aimed at protecting the “weak” party (*in casu* the athlete who had no choice but to agree to the exclusion imposed by the federation) could easily be transposable to the employment field.<sup>129</sup>

Let us note finally that, to our knowledge, the question whether the challenge of an award is subject to a minimum amount in dispute or not has not yet been decided by the Swiss Federal Tribunal and is debated in the literature. Pursuant to Article 74 of the FTA, an appeal is admissible only if the amount in controversy is a minimum of 15,000 Swiss francs in employment and lease matters, and 30,000 Swiss francs in other matters. As it

<sup>123</sup> Article 190(3) of the PILA.

<sup>124</sup> For corporations, the mere branch or business establishment are comprised within the ambit of art. 192 of the PILA, whereas they are not sufficient for the requirement of “domicile” of art. 176(1) of the PILA, as pointed out *supra* note 10.

<sup>125</sup> Similarly, it is not sufficient that the arbitration clause contains a general reference to arbitration rules providing for a waiver of appeal and the finality of the award (*see* decision of the Swiss Federal Tribunal, June 6, 2007, 4A.18/2007, available at <[http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.06.2007\\_4A\\_18/2007](http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.06.2007_4A_18/2007)>). On the other hand, the Swiss Federal Tribunal has upheld the validity of an exclusion agreement drafted in the following terms: “the parties ... exclude all and any rights of appeal from all and any awards insofar as such exclusion can be validly made” (ATF 131 III 173, para. 4.2.3.1).

<sup>126</sup> Decision of the Swiss Federal Tribunal, March 6, 2008, 4A.500/2007, 27 ASA BULL. 94 (2009).

<sup>127</sup> Schweizer, *supra* note 14, at 875.

<sup>128</sup> Decision of the Federal Tribunal, March 22, 2007, 4P.172/2006, 25 ASA BULL. 592 (2007).

<sup>129</sup> As pointed out by KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 477, although the Swiss Federal Tribunal will examine the existence and validity of a waiver agreement, the party who considers the waiver agreement as invalid should raise it as soon as possible. *See* decision of the Swiss Federal Tribunal, February 4, 2005, 4P.236/2004, 23 ASA BULL. 496 (2005).



seems, the prevailing view among international arbitration authors is to say that the requirement of a minimum amount in dispute does not apply in the field of international arbitration.<sup>130</sup> On the other hand, since there are no explicit reservations in the FTA in favor of international arbitration (Articles 74 and 77(2) of the FTA), a growing number of commentators opine that Article 74 of the FTA should apply to all types of appeals.<sup>131</sup> In our view, special consideration should be given in the field of employment arbitration. It is true that the issue is largely theoretical in international arbitration due to the generally important amounts in dispute. However, as pointed out by some authors, if any judicial review of the award had to be excluded by virtue of Article 74 of the FTA, one could question the compatibility of such result with the guarantee of access to justice of Article 6(1) of the European Convention on Human Rights.<sup>132</sup>

## 5. Recognition and Enforcement

After overcoming possible obstacles regarding arbitrability, applicable law, and mandatory procedural requirements, parties to an employment arbitration may well face additional impediments at the stage of the enforcement of the award. On the other hand, parties to an international arbitration are often at an advantage compared to state court litigants depending on where they seek to enforce the award since they will in principle benefit from simple and efficient procedures for the recognition and enforcement of arbitral awards.

The enforcement regime is different depending on whether the party seeks to enforce the Swiss arbitral award in Switzerland or abroad. In the latter case, the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) will most probably apply insofar as this treaty has been ratified by most states.<sup>133</sup> The New York Convention sets out an exhaustive list of grounds for refusal of recognition and enforcement under its Article V, either at the request of one party<sup>134</sup> or on the court’s own motion. Regarding the latter category, Article V(2)(a) of

<sup>130</sup> Philippe Schweizer, *La Loi sur le Tribunal fédéral et l'arbitrage, quoi de neuf?*, 2007 REVUE DE L'AVOCAT 55; Sébastien Besson, *Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux)*, 25 ASA BULL. 16 (2007); Jean-François Poudret, *Les recours au Tribunal fédéral suisse en matière d'arbitrage international (Commentaire de l'Article 77 LTF)*, 25 ASA BULL. 669, 689 (2007); HANS PETER WALTER, NEUE BUNDESRECHTSPFLEGE. AUSWIRKUNGEN DER TOTALREVISION AUF DEN KANTONALEN UND EIDGENÖSSISCHEN RECHTSSCHUTZ 147 (2007).

<sup>131</sup> See, e.g., DONZALLAZ, *supra* note 44, at 931 No. 2433; CORBOZ, *supra* note 121, Article 77 LTF N 67.

<sup>132</sup> Poudret, *supra* note 44, at 688; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, at 467 with reference to Sébastien Besson, *Arbitration and Human Rights*, 24 ASA BULL. 395, 405–06 (2006). But CORBOZ, *supra* note 121, Article 77 LTF N 65, has pointed out that there is no reason why an athlete should be able to bring a challenge before the Swiss Federal Tribunal regardless of the amount in dispute, while an employee would not have the same possibility. However, the distinction resides in our view in the fact that in state court litigation, the employee usually has the benefit of a second level of judicial review, which would not be given in international arbitration.

<sup>133</sup> There are currently over 150 states which have ratified the New York Convention, available at <[www.admin.ch/ch/f/rs/0\\_277\\_12/index.html](http://www.admin.ch/ch/f/rs/0_277_12/index.html)>.

<sup>134</sup> More specifically, the New York Convention defines five grounds for refusal of recognition and enforcement which have to be raised by one party, which include the incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, and setting aside or suspension of the award in the country in which or under the law of which it was made.

the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country. Consequently, given the liberal Swiss approach on arbitrability, there is a risk that a foreign court denies enforcement of the award rendered in Switzerland concerning an employment dispute if such dispute is not arbitrable under the national law of that foreign court. Similarly, under Article V(2)(b) of the New York Convention, recognition and enforcement may also be refused if they would be deemed contrary to the public policy of that country. However, as mentioned above, arbitrators sitting in Switzerland generally do not have to worry about this possibility, the enforcement of the award being, in the first place, the responsibility of the parties.<sup>135</sup> In those cases, the concrete chances for the creditor to enforce the award will depend on the location of the debtor's assets in countries with a liberal approach to arbitrability of labor disputes.<sup>136</sup> For example, the successful employee domiciled in France will not necessarily have to seek enforcement of the award rendered in Switzerland against its Italian employer in Italy (where, by hypothesis, courts may deny such enforcement request) if he knows that the latter has a bank account at the place of its Swiss branch office, upon which he could request a judicial attachment.

If a party wants to enforce a Swiss (international) arbitral award in Switzerland, no additional exequatur will be needed, as Swiss awards are assimilated into Swiss state court judgments.<sup>137</sup> Monetary awards will be enforced pursuant to the provisions of the Swiss Debt Enforcement and Bankruptcy Act, while the non-monetary awards are currently enforced according to the various provisions of cantonal laws, which will be replaced, as of January 1, 2011, by the new CCP. An important exception to those rules arises when the parties have excluded all setting aside proceedings: in those cases, Article 192(2) of the PILA provides that the provisions of the New York Convention apply by analogy.<sup>138</sup>

### III. ARBITRATING COLLECTIVE LABOR DISPUTES IN SWITZERLAND

Collective labor disputes do not enjoy the special protection of individual employment disputes. They are resolved with ordinary jurisdiction. However, the social partners also have an interest to resolve their differences in a way that does not harm their collaboration in the long run, which is why they usually prefer to avoid going before ordinary

<sup>135</sup> See *supra*; see also Hanotiau, *supra* note 94, at 398.

<sup>136</sup> In this sense, see Tetiana Bersheda, *Les clauses d'arbitrage statutaires en droit suisse*, 27 ASA BULL. 691, 711 (2009).

<sup>137</sup> GIRSBERGER & VOSER, *supra* note 20, at 342.

<sup>138</sup> Resulting in a last paradox noted by Schweizer, *supra* note 14, at 882, that in those cases, if the validity of the exclusion agreement is upheld, an employee might successfully resist enforcement of an arbitral award rendered in violation of the Swiss employment protective norms by virtue of the application of the public policy of the host country (i.e., Switzerland) on the basis of art. V(2)(b) of the New York Convention, rather than the more restrictive notion of public policy under art. 190(2)(e) of the PILA. However, this paradox is premised on the fact that the Swiss protective norms are part of the Swiss domestic policy, which, as argued above, seems unlikely in our opinion.

courts. The law recognizes that ordinary jurisdiction is not the ideal forum to resolve collective labor disputes and therefore favors arbitration.<sup>139</sup>

Most often, the collective employment contracts include an arbitration clause for disputes between the contracting parties, either by a permanent or an ad hoc arbitral tribunal (private arbitration) or by a Cantonal Office of Conciliation (public arbitration).

#### A. PRIVATE ARBITRATION VERSUS PUBLIC ARBITRATION

Private arbitration has to be distinguished from public arbitration. The latter is accomplished through public authorities on the basis of federal or cantonal law. A classic example for public arbitration is the arbitration of collective labor disputes done by the so-called Offices of Conciliation. These Offices of Conciliation are public arbitral tribunals to which the rules of the Concordat are not applicable,<sup>140</sup> unless the parties to the collective employment contract expressly decide otherwise.<sup>141</sup>

#### B. ARBITRATION BETWEEN CONTRACTING PARTIES TO COLLECTIVE EMPLOYMENT CONTRACTS

The social partners will appreciate arbitration because of the possibility to nominate the judges of the arbitral tribunal freely.<sup>142</sup> Sometimes judges are chosen from trade associations so that the procedure appears like a final phase of collective negotiation. This may allow for a solution which otherwise may have been unacceptable to the members of the association if ordered by a court. Under Article 18(1) of the Concordat and Article 34 of the FTA, arbitrators who are members or employees of a legal entity party to the dispute may be rejected. Pursuant to Article 367(1)(c) of the CCP, arbitrators may be challenged if there are legitimate doubts as to their independence and impartiality. Judges chosen from the associations which are parties to the collective employment contract may be challenged, although in collective labor disputes, none of the parties usually invoke that ground.

Another matter of importance is provisional measures taken by an arbitral tribunal. Often labor unions will announce a strike which is of questionable legality. The employers' association may need to obtain a provisional interdiction of the announced strike.<sup>143</sup> Under Article 26 of the Concordat, only the ordinary courts are competent to issue provisional measures; up until now arbitral tribunals only had the possibility to propose such provisional measures, which had to be enforced by the parties on a voluntary basis.<sup>144</sup> This

<sup>139</sup> As pointed out by Clay, *supra* note 4, at 104, the dispute resolution procedures related to collective labour disputes should rather be referred to as "false arbitration" insofar as they often lack one of the following criteria that allow for a qualification of "arbitration," i.e., a free choice to resort to arbitration, a free choice regarding the selection of the arbitral tribunal, a procedure that is compliant with the fundamental guarantees of fair justice, and a res judicata decision which binds the parties.

<sup>140</sup> See Aubert, *supra* note 44, at 12.

<sup>141</sup> ATF 107 Ia 152, para. 2c.

<sup>142</sup> Aubert, *supra* note 44, at 13.

<sup>143</sup> *Id.* at 14.

<sup>144</sup> JOLIDON, *supra* note 25, at 381.

situation was unsatisfactory from a practical perspective.<sup>145</sup> Fortunately, this has been changed in the new CCP. Arbitral tribunals will now be empowered to order provisional measures on the basis of Article 374 of the CCP.

Finally, it should be noted that an arbitral award is only binding for the employers and the employees belonging to the trade associations which are parties to the procedure. The arbitral award is not directly and mandatorily applicable to outsider employees who are not members of the labor union,<sup>146</sup> since it is based on the collective employment contract which has normative effects only for employers and employees who are members of the contracting associations.

### C. JOINT IMPLEMENTATION

Pursuant to Article 357b(1) of the CO, in a collective employment contract concluded between associations, the contracting parties may provide that they will be entitled to jointly require from the participating employers and employees the observance of the contract on specific issues.<sup>147</sup> In other words, if a participating employer or employee does not follow the parties' request to observe the contract, the parties then have the possibility to jointly ask the competent jurisdiction to condemn the non-observing employer or employee. Often, collective employment contracts provide that disputes arising from such joint implementation must be resolved by arbitration. If, in most cases, the competent jurisdiction will be an arbitral tribunal, the collective employment contract can also sometimes provide for a different mechanism, such as, for example, a paritarian commission.

In case of arbitration, the collective employment contract will often provide for the arbitral tribunal to be framed by the contracting parties. If the disputing parties are the contracting parties, on the one hand, and a non-observing employer or employee, on the other hand, this may be contrary to Article 19 of the Concordat. According to that provision, the disputing parties must have an equal influence on the composition of the arbitral tribunal, failing which the arbitral tribunal will be subject to challenge.<sup>148</sup> That rule is superseded by the new Article 368 of the CCP. It is therefore advisable to have a third party nominate the arbitral tribunal or to appoint a cantonal office of conciliation as arbitral tribunal.

### IV. CONCLUSION

The approach of the Swiss system regarding arbitration of labor disputes is fairly liberal and, at least regarding international arbitration, places no restrictions on the arbitrability of such disputes. However, because of legitimate concerns as to protection of the weaker

<sup>145</sup> Aubert, *supra* note 44, at 14.

<sup>146</sup> ATF 123 III 120, para. 3; Aubert, *supra* note 44, at 16.

<sup>147</sup> As listed in art. 357b of the CO.

<sup>148</sup> RVJ 1983, 194; Aubert, *supra* note 44, at 20.

party in some instances, parties desiring to submit their dispute to arbitration will have to pay close attention to the drafting of the arbitration clause and also consider the possible hindrances they could face at the enforcement stage. Overall, even if more tortuous than in other areas, the path to arbitration can present significant advantages for resolving labor disputes, and therefore deserves to be taken more often.



The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at [editorjoia@kluwerlaw.com](mailto:editorjoia@kluwerlaw.com)
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at [www.kluwerlawonline.com/JournalofInternationalArbitration](http://www.kluwerlawonline.com/JournalofInternationalArbitration).
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
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