

## THE NEW SWISS APPROACH TO THE RIGHT TO BE HEARD – BALANCING CHALLENGING FAIRNESS AND EFFICIENCY CONCERNS

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### Abstract

*Based on recent jurisprudence by the Swiss Supreme Court on the parties' right to be heard, this article analyses how the focus on evaluating infringements of the right to be heard under Swiss lex arbitri has shifted over time. Whereas some decades ago any infringement of the right to be heard led to the annulment of the arbitral award, the Swiss Supreme Court now requires that there be a potential impact on the substantive outcome of the case. As an analysis of pertinent jurisprudence in Austria, England and in relation to the International Centre for Settlement of Investment Disputes ["ICSID"] demonstrates, this appears to be in line with developments at the forefront of international arbitration. From a practical point of view, the new Swiss approach is likely to help tribunals increase procedural efficiency, one of the utmost concerns of modern arbitration. At the same time, parties may, in certain scenarios, run into evidentiary problems in annulment proceedings. As a potential remedy, parties may need to react timely with more specifically reasoned objections against any potential infringements of the right to be heard by arbitral tribunals. The authors trust that the new approach adopted by the Swiss Supreme Court will increase procedural efficiency in Swiss arbitration proceedings.*

### I. Introduction

Procedural fairness is quintessential for every adjudication of a dispute. This holds true for international arbitration proceedings, whether they are conducted in India, Switzerland or elsewhere. Despite the universal recognition of the parties' right to be heard, arbitral awards are rarely successfully challenged on such basis.<sup>1</sup> In the view of State courts reviewing such challenges, not every violation of the parties' right to be heard should lead to an annulment. But what are the appropriate consequences of its violation? In particular, should an arbitral award only be annulled for a violation of the parties' right to be heard if it can be demonstrated that such an infringement was likely to have had an impact on the outcome of the award?

The Swiss Supreme Court, like other State courts dealing with setting aside proceedings,<sup>2</sup> has developed this practically relevant question for decades. Interestingly, it was more than once that the challenge by a professional tennis player made the Swiss Supreme Court reconsider and further refine its extensive case law on the right to be heard and the question of the appropriate

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<sup>1</sup> Cf. Felix Dasser & Piotr Wójtowicz, *Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017*, 36(2) ASA BULL. 279 (2018).

<sup>2</sup> Cf. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3255 (2d ed. 2014).

requirements for a successful challenge of an arbitral award in this regard.<sup>3</sup>

As a first step, this article will discuss earlier and more recent approaches of the Swiss Supreme Court on due process challenges of arbitral awards. In order to compare the Swiss approach internationally, the article will then go on to provide a brief overview of the challenge requirements in select international arbitration jurisdictions. This comparative overview is not intended to be comprehensive, but to serve as a comparative reference for the Swiss development. In the final section, we will analyse key factors which necessarily have to be considered in the context of this topic, such as the crucial balancing of fairness and efficiency. After all, the question of how the parties' right to be heard in international arbitrations shall be effectively protected is a key question not only for Switzerland, but also of general importance for the future success of international arbitration.

## II. The Swiss Supreme Court's Approach to the Right to Be Heard

### A. Legal Framework

As a general principle of fair procedural treatment under Swiss *lex arbitri*, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.<sup>4</sup> These principles are of a mandatory nature.<sup>5</sup> Although Switzerland is not a Model Law country (i.e. a signatory to the United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration), the pertaining provision of Article 182(3) of the Swiss Private International Law Act [**"PILA"**] reflects the international minimum standards when it comes to due process.<sup>6</sup> A violation of the right to be heard is one of the few grounds under Swiss *lex arbitri*<sup>7</sup> on the basis of which an arbitral award may be challenged,<sup>8</sup> or refused recognition and enforcement.<sup>9</sup>

The PILA as such, however, is silent on the content of the parties' right to be heard and the requirements for a successful challenge as a consequence of a violation thereof. In practice, the case law developed by the Swiss Supreme Court is of outstanding importance. As the only forum

<sup>3</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Mar. 22, 2007, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235 (Switz.) [*hereinafter* "Cañas Decision"], *infra* § II(D); Bundesgericht [BGer] [Swiss Supreme Court] Jan. 29, 2019, 4A\_424/2018 (Switz.) [*hereinafter* "Errani Decision"], *infra* § II(E).

<sup>4</sup> Cf. LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [SWISS PRIVATE INTERNATIONAL LAW ACT] Dec. 18, 1987, art. 182(3) (Switz.) [*hereinafter* "SWISS PRIVATE INTERNATIONAL LAW ACT" or "PILA"]: "Whatever procedure is chosen [by the parties and/or the arbitral tribunal], the tribunal shall assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure." (Informal translation).

<sup>5</sup> Cf. CHRISTOPH MÜLLER & SABRINA PEARSON, SWISS CASE LAW IN INTERNATIONAL ARBITRATION, art. 182, ¶ 3.1 and cited case law (3d ed. 2019) [*hereinafter* "MÜLLER & PEARSON"]; STEFANIE PFISTERER, BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT, art. 190, § 60 (Honsell et al. eds., 3d ed. 2013) [*hereinafter* "PFISTERER"].

<sup>6</sup> Cf. United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration arts. 18, 34 and 36, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"]; MICHAEL E. SCHNEIDER & MATTHIAS SCHERER, *in* BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT, art. 182, ¶ 49 (Honsell et al. eds, 3d ed. 2013).

<sup>7</sup> The term "Swiss *lex arbitri*" used in this article refers to Chapter 12 of the Swiss Private International Law Act, which addresses *international* arbitrations in Switzerland.

<sup>8</sup> Cf. SWISS PRIVATE INTERNATIONAL LAW ACT, art. 190(2)(d) (Switz.): "Proceedings for setting aside the award may only be initiated [...] where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed." (Informal translation).

<sup>9</sup> Cf. SWISS PRIVATE INTERNATIONAL LAW ACT, art. 194 (Switz.); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. 1(b), 1(d) and 2(v), June 10, 1958, 330 U.N.T.S. 38.

before which an arbitral award rendered in Switzerland may be challenged, it is the Swiss Supreme Court which has effectively shaped the contours of the right to be heard. This holds, in particular, true for the requirements to set aside an award due to infringements of the right to be heard.

As a matter of principle, the Swiss Supreme Court resorts to the guidelines and case law developed with a view to the provisions of the Swiss Federal Constitution and domestic law.<sup>10</sup> In doing so, the court follows a pragmatic approach, thereby allowing itself to adjust the scope of the right to be heard depending on the assessment of a particular case. Essentially, the right to be heard under Swiss *lex arbitri* entails the right of a party (i) to give its views on any and all circumstances pertinent for the decision; (ii) to support its legal points; (iii) to make motions; (iv) to present relevant evidence; (v) and to participate in any hearings.<sup>11</sup> These practical implications of the right to be heard are always to be understood as such being embedded in adversarial proceedings i.e. each party must be granted the opportunity to scrutinize the other party's arguments, to express its views thereon and to try to prove them wrong with its own allegations and means of evidence.<sup>12</sup>

Finally, it is important to note that the right to be heard encompasses a sender (party) and a recipient (arbitral tribunal) angle:<sup>13</sup> it may be violated when a party is prevented from effectively expressing its views in the proceedings ("active" violation; e.g., because the tribunal does not grant an opportunity to comment on a specific subject), as well as when the tribunal – for whatever reason – does not take any expressed views into consideration ("passive" violation; e.g., where an arbitral award is reasoned in detail, but does not address an argument raised by the party which is relevant to the outcome of the dispute).<sup>14</sup> In the words of the Swiss Supreme Court:

*“The right to be heard [...] does not require that an international arbitral award be reasoned. However, jurisprudence has inferred a minimum duty on arbitral tribunals to analyse and deal with the relevant issues. This duty is violated if an arbitral tribunal inadvertently or due to a misunderstanding fails to consider allegations, arguments, evidence or offers of evidence which have been raised by a party and are important for the award.”*<sup>15</sup>  
(Informal translation)

## B. Formal Nature as Constitutional Guarantee

<sup>10</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Apr. 26, 2016, BUNDESGERICHTSENTSCHEID [BGE] 142 III 360, ¶¶ 4.1.1–4.1.2 (Switz.) (“The right to be heard, as guaranteed by art. 182(3) and 190(2)(d) PILA, does not in principle have a content different from that enshrined in constitutional law [...]” and “However, the right to be heard in adversarial proceedings in Switzerland, far from being unlimited, is subject to significant restrictions in the field of international arbitration.”) (Informal translations) [*hereinafter* “SFT 142 III 360”].

<sup>11</sup> Cf. MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.3.1 and cited case law; JOACHIM KNOLL, ARBITRATION IN SWITZERLAND: THE PRACTITIONER’S GUIDE, art. 182, ¶ 32 (Arroyo ed., 2d ed. 2018); DANIEL GIRSBERGER & NATALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES ¶¶ 905, 1620 (3d ed. 2016).

<sup>12</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Feb. 19, 2007, BUNDESGERICHTSENTSCHEID [BGE] 133 III 139, ¶ 6.1 (Switz.); MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.4 and cited case law.

<sup>13</sup> Cf. *infra* § IV(C) and the corresponding chart.

<sup>14</sup> Cf. Cañas Decision, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235, ¶ 5.3; *infra* § II(D).

<sup>15</sup> Cf. Errani Decision, 4A\_424/2018, ¶ 5.2.1; MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.3.12 and cited case law.

By virtue of its express mention in the fundamental rights section of the Swiss Federal Constitution,<sup>16</sup> the right to be heard has an exceptionally strong footing in Swiss law as a procedural guarantee covering all legal proceedings.

The purpose of the right to be heard against its constitutional background is twofold: on the one hand, the right to be heard serves as a means of clarifying the facts of the case (presentation of the facts, taking of evidence), and thus, of establishing the truth in the process. On the other hand, the right to be heard should, in the sense of equality of arms, enable the parties to have a personal right to participate (*persönlichkeitsbezogenes Mitwirkungsrecht/droit personnel de participer*) in the process which leads to the issuing of the decision.<sup>17</sup>

According to its general importance as a fundamental right – vesting the parties with a right to *properly participate* – the right to be heard is regularly construed and referred to by the Swiss Supreme Court as a right of formal nature: its violation, thus, leads to the annulment of the contested decision irrespective of the chances of success of an appeal on the merits.<sup>18</sup> This also holds true in the field of international arbitration.<sup>19</sup>

This initial approach taken by the Swiss Supreme Court may be illustrated by its landmark decision in SFT 121 III 331, a dispute arising out of a service agreement for construction projects in Turkey.<sup>20</sup> The sole arbitrator based its decision on factual findings contrary to the submissions of both parties. More specifically, the sole arbitrator found that the agent had stopped rendering any services for the principal in June 1991, while the parties had submitted that services had been rendered by the agent even after June 1991. The finding of the sole arbitrator was, in his opinion, relevant to the outcome of the case under the legal concept of a synallagmatic relationship<sup>21</sup> between the parties. Accordingly, he concluded that for lack of services, no further consideration was owed by the principal to the agent after June 1991. In the challenge proceedings before the Swiss Supreme Court, the sole arbitrator, while admitting his error on the mentioned factual finding, submitted that his legal analysis had led to the same result i.e. that the agent had to conclude that the service agreement had (impliedly) been terminated by the principal.<sup>22</sup>

The Swiss Supreme Court ruled that the sole arbitrator had refused the agent’s right to be heard by not taking note of its corresponding submission.<sup>23</sup> Moreover, the court stated that – due to

<sup>16</sup> Cf. CONSTITUTION FÉDÉRALE [CST] [SWISS FEDERAL CONSTITUTION] Apr. 18, 1999, art. 29(2) (Switz.): “Each party to a case has the right to be heard.” (Informal translation by the Swiss Federal Office of Justice).

<sup>17</sup> Cf. MYRIAM A. GEHRI, BASLER KOMMENTAR SCHWEIZERISCHE ZIVILPROZESSORDNUNG, art. 53, ¶ 3 (Karl Spühler et al. eds., 3d ed. 2017).

<sup>18</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Mar. 23, 2011, 5A\_791/2010, BUNDESGERICHTSENTSCHEID [BGE] 137 I 195, ¶ 2.2; PETER KARLEN & JULIA HÄNNI, in BASLER KOMMENTAR SCHWEIZERISCHE ZIVILPROZESSORDNUNG, art. 29 (BV), ¶ 32(a) (Karl Spühler et al. eds., 3d ed. 2017).

<sup>19</sup> Cf. MÜLLER & PEARSON, *supra* note 5, art. 182, ¶ 3.3.1 and cited case law; *but see* BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶ 1755 (3d ed. 2015).

<sup>20</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Apr. 25, 1995, BUNDESGERICHTSENTSCHEID [BGE] 121 III 331 [*hereinafter* “SFT 121 III 331”].

<sup>21</sup> Under Swiss contract law, a synallagmatic relationship describes the situation where two performance obligations are in an exchange relationship (“*synallagma*”): one party promises its performance only because the other party promises something in return (*quid pro quo*), cf. BERNHARD BERGER, ALLGEMEINES SCHULDRECHT ¶ 285 (3d ed. 2018).

<sup>22</sup> Cf. SFT 121 III 331, ¶¶ 3, 3(b).

<sup>23</sup> Cf. *Id.* ¶ 3(b).

the formal nature of the right to be heard – the award had to be set aside irrespective of the prospects of success on the substantive level of the case “*since the actual meaning [of the formal procedural guarantee of the right to be heard] is not to ensure that the decision on the merits is free of errors in accordance with the cognition of the appellate court, but to guarantee the parties an independent assessment of the claims and factual assertions submitted to the court in conformity with the procedure.*”<sup>24</sup> (Informal translation)

### C. Phase I: Emphasis on Formal Nature and its Implications

On the basis of the formal nature of the right to be heard, the Swiss Supreme Court developed its traditional approach with the two basic requirements for a successful challenge of an arbitral award:

*First*, the right to be heard does not protect the parties from erroneous decisions as such and, hence, not from a *substantive* denial of justice. The purpose of the right to be heard is not to ensure a flawless decision on the merits, but to protect the parties from a *formal* denial of justice in providing the parties with the possibility to participate in an independent assessment of their claims and submissions by the tribunal.<sup>25</sup> The Swiss Supreme Court specified this requirement as follows:

*“A formal denial of justice only exists if the parties are prevented from participating in the process, influencing it and putting forward their point of view, and thus their right to be heard is effectively undermined by the obvious oversight. This alone justifies annulling the decision without regard to the substantive chances of success of the complaint, since the right to be heard does not guarantee substantive correctness but the right of the parties to participate in the decision-making process.”*<sup>26</sup> (Informal translation)

*Second*, not every (technical) violation of the right to be heard leads to a successful challenge. The hurdles for an effective denial of justice are higher. The Swiss Supreme Court intervenes only if a party succeeds in establishing that the error or inadvertence of the arbitral tribunal prevented it from presenting its arguments and the necessary evidence on an issue relevant to the proceedings:

*“If the arbitral decision were set aside in the event of any obvious oversight, irrespective of the substantive prospects of success of the challenge, the Federal Supreme Court would have a cognition in the context of the arbitral complaint which it does not even have as a proper appeal instance in other proceedings [...] Rather, the party concerned must demonstrate that the oversight of the court made it impossible for it to introduce and prove its point of view on an issue relevant to the proceedings.”*<sup>27</sup> (Informal translation)

Consequently, the initial test developed by the Swiss Supreme Court was for the party concerned to establish (only) that it was prevented, by error or inadvertence of the arbitral tribunal, from *presenting (and proving) its views* in respect of an *issue relevant to the proceedings*. In other words, the

<sup>24</sup> Cf. *Id.* ¶ 3(c).

<sup>25</sup> Cf. *supra* § II(B); *Id.* ¶ 3(c).

<sup>26</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Sept. 10, 2001, BUNDESGERICHTSENTSCHEID [BGE] 127 III 576, ¶ 2(d) [*hereinafter* “SFT 127 III 576”].

<sup>27</sup> Cf. *Id.* ¶ 2(f).

decisive factor was that a party has been *disadvantaged in the proceedings* and its right to participate had been devalued in such a way that it was, as a result, in no better position than if it had not been granted the right to be heard on a decisive question at all.<sup>28</sup> In turn, if it was established that the procedural conditions allowed the party to put forward its arguments and the tribunal took note of the party's submissions, the right to be heard was not affected.<sup>29</sup>

D. Phase II: Increased Requirements and Potential Causality

Although the constitutional footing of the right to be heard has remained the same, the initial test developed by the Swiss Supreme Court has evolved over time and become more stringent. The first major step in the direction of a more restrictive approach taken by the Swiss Supreme Court may be illustrated by the famous *Cañas* case of 2007,<sup>30</sup> which concerned a dispute between the professional tennis player, Guillermo Cañas (who would later challenge the award) and the Association of Tennis Professionals ["ATP"] arising out of a positive drug test during a tournament in Acapulco, Mexico.

In this case, the tennis player had put forward a number of subsidiary arguments before the Court of Arbitration for Sport ["CAS"], in the event that it rejected his main submissions. However, the arbitral tribunal did effectively ignore a number of these subsidiary arguments in its legal analysis. While the main submission refuted the allegation that he had committed any fault in connection with the reception of the tested drug, the subsidiary submissions addressed the non-compliance of any sanction with a number of allegedly applicable laws.<sup>31</sup>

*First*, the Swiss Supreme Court held that the concerned party has to establish that it was not heard on an *important point* (not only an issue relevant to the proceedings).<sup>32</sup> *Second*, the court established a new "double test" with a new requirement of potential causality:

*"It is for the party concerned to establish, on the one hand, that the arbitral tribunal did not examine some of the facts, evidence or law that it had properly put forward in support of its submissions and, on the other hand, that those facts were of such nature as to affect the outcome of the dispute."*<sup>33</sup> (Informal translation)

The introduction of this new requirement had no negative impact on the success of the challenge in the case. The Swiss Supreme Court held that the subsidiary arguments made by the tennis player were likely to alter the outcome of the dispute, since they excluded the possibility of imposing any sanction on him. Their relevance could, hence, not be denied from the outset. In the view of the Swiss Supreme Court, the CAS had in its decision not sufficiently indicated (save for a timid reference to Delaware law in its summary of the appellant's legal pleadings) why it considered that the laws relied on by the appellant were not applicable in the present case.

<sup>28</sup> Cf. *Id.* ¶ 2(e); confirmed in *Cañas Decision*, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235, ¶ 5.2; MICHELE ALBERTINI, DER VERFASSUNGSMÄSSIGE ANSPRUCH AUF RECHTLICHES GEHÖR IM VERWALTUNGSVERFAHREN DES MODERNEN STAATES 90 (2000).

<sup>29</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Dec. 10, 2002, 4P.207/2002, ¶ 4 and chart *infra* § IV(C).

<sup>30</sup> Cf. *Cañas Decision*, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235.

<sup>31</sup> Cf. *Id.* ¶ 5.3.

<sup>32</sup> Cf. *Id.* ¶ 5.2; interestingly, the Swiss Supreme Court refers to SFT 127 III 576, ¶ 2(f), although the passage herein refers to "an issue relevant to the proceedings".

<sup>33</sup> Cf. *Id.* ¶ 5.2.

Consequently, it could not be excluded, so the court reasoned, that the omission was the result of an inadvertence on the part of the arbitral tribunal. The Swiss Supreme Court concluded that due to the formal nature of the right to be heard, the challenged award had to be set aside, regardless of the outcome of the effective analysis of the subsidiary legal pleadings put forward by the appellant.<sup>34</sup>

Although the Swiss Supreme Court formally introduced a new requirement to the initial test, its actual application in the *Cañas* decision shows that it did not effectively change the traditional approach of the Swiss Supreme Court: the violation of the right to be heard must be *relevant* for the decision, so that it can be proven to what extent the elements not taken into account *were eligible to have an impact* on the decision.<sup>35</sup> However, as the *Cañas* decision shows, a demonstration of the *causal connection* between the violation of the right to be heard and the outcome of the decision is not required. This “eligibility” test used to be applied by the tribunal until recently, including in another landmark decision on the right to be heard, SFT 142 III 360.<sup>36</sup>

Pursuant to very recent case law, however, this eligibility test has been replaced by an approach of a “hard” causality requirement.

#### E. Phase III: Emphasis on Interconnection with Outcome of the Award

Lately, the Swiss Supreme Court has issued two decisions setting a new framework for successful challenges due to infringements of the right to be heard.<sup>37</sup>

One of them, the *Errani Case*,<sup>38</sup> illustrates a second major shift by the Swiss Supreme Court to a more restrictive approach. In this case, a dispute between the professional tennis player Sara Errani (who would later challenge the award) and a sports organization (i.e., the Italian doping agency, NADO) arose out of a positive drug test. The CAS did not provide the tennis player with an opportunity to comment on the effects of the backdating of her suspension period from the date of the arbitral award. The Swiss Supreme Court held that, as the tennis player could not have expected that the CAS would rule seven months later than she had anticipated, and the arbitral tribunal had not offered her the opportunity to express her views on future effects of the backdating from the date of the CAS decision, the CAS had thereby violated her right to be heard.<sup>39</sup>

Surprisingly, the tennis player’s challenge of the CAS decision was, nevertheless, unsuccessful. While the double test pursuant to the *Cañas* case as such remained essentially the same,<sup>40</sup> the Swiss Supreme Court put particular emphasis on the notion that the right to be heard is “*not an end in itself*” and thereby embedded the test in a new legal setting:

<sup>34</sup> Cf. *Cañas* Decision, BUNDESGERICHTSENTSCHEID [BGE] 133 III 235, ¶ 5.3.

<sup>35</sup> Cf. PFISTERER, *supra* note 5, art. 190, ¶ 70.

<sup>36</sup> Cf. SFT 142 III 360, dealing in particular with the right to reply (*Replikrecht, droit de réplique*).

<sup>37</sup> Cf. *Errani* Decision, 4A\_424/2018; Tribunale fédérale [TF] [Swiss Supreme Court] Apr. 18, 2018, 4A\_247/2017 (Switz.).

<sup>38</sup> Cf. *Errani* Decision, 4A\_424/2018.

<sup>39</sup> Cf. *Id.* ¶ 5.7.

<sup>40</sup> Cf. *Id.* ¶ 5.2.2: “Thus, in addition to the alleged violation, the party allegedly affected by the arbitrators’ inadvertence must demonstrate, on the basis of the grounds set out in the challenged award, that the facts, evidence or law which it had duly presented, but which the arbitral tribunal failed to take into consideration, were of such nature as to influence the outcome of the dispute.” (Informal translation).

*“Undoubtedly, the right to be heard is a constitutional guarantee of a formal nature. However, since it is not an end in itself, when it is not clear what influence its violation may have had on the procedure, there is no reason to set aside the challenged decision [...]. This case law also applies, *mutatis mutandis*, to international arbitration.”*<sup>41</sup> (Informal translation)

Applying this test to the facts of the *Errani* Case, the Swiss Supreme Court found that the appellant had failed to demonstrate that the violation of her right to be heard could have any impact on the decision of the CAS. The court reasoned as follows:

*“However, the Court does not see what influence this violation may have had on the fate of the dispute. If she had been questioned by the Panel before it handed down its sentence, the appellant could certainly have claimed that her sporting performance had, in her view, been generally negative in the previous months and that a backdating would be less harmful to her. However, this would not have changed the fact that it was impossible to predict the athlete's future performance [...]. Therefore, it is not demonstrated that the violation of the athlete's right to be heard could have had any impact on the solution adopted by CAS.”*<sup>42</sup> (Informal translation)

With this decision, it becomes evident that the Swiss Supreme Court has changed its approach, compared to its initial stance that a violation of the right to be heard “*justifies annulling the decision without regard to the substantive chances of success.*”<sup>43</sup> The very notion of the formal nature of the right to be heard is to guarantee the formal participation of the parties. Under this notion, the substantive outcome of a dispute is secondary. This holds, in particular, true as the right to be heard is a personal right to participate in the decision-making process of the tribunal. Against this background, the right to be heard as such, indeed, appears in its initial interpretation by the Swiss Supreme Court as an end in itself.

The major impact of the *Errani* decision on the requirements for a successful challenge might be illustrated if the facts of the *Cañas* decision were to be examined under the new regime. In the *Cañas* decision, the Swiss Supreme Court held that regardless of the outcome of the effective analysis of the subsidiary legal pleadings, the award had to be set aside. If we look at the reasoning of the Swiss Supreme Court in the *Errani* decision, it is likely that the court would have run a *prima facie* analysis on the potential impact of the subsidiary legal pleadings on the outcome of the dispute.

#### F. First Conclusion

Originally, the right to be heard was considered as formal in nature in that a violation of the right to be heard had to result in the setting aside of the challenged decision, no matter whether the violation had adversely impacted the outcome of the case or not.

In the meantime, the right to be heard has – in two major shifts – moved away from such formal nature. Nowadays, the challenging party has to establish that the outcome of the dispute would

<sup>41</sup> Cf. *Id.* ¶ 5.2.2.

<sup>42</sup> Cf. *Id.* ¶ 5.7.

<sup>43</sup> Cf. SFT 127 III 576, ¶ 2(d).



have been (practically) affected if the right to be heard had not been infringed. Consequently, the challenging party must not only establish that its right to be heard was violated in connection with an important issue of the case, but also effectively show that such violation was likely to have had an adverse impact on the outcome of the award. We understand that this is the case if the operative part of the award (in German: “*Dispositiv*”) would have any different content, had the right to be heard not been violated.

This new approach taken by the Swiss Supreme Court has set the scene for a *de facto* change of the nature of the right to be heard. The referral by the Swiss Supreme Court to the constitutional right of formal nature is, therefore, at least questionable.<sup>44</sup> This major change has important implications. Thus, while the procedural efficiency has been strengthened, one of the core pillars of the right to be heard – the personal right to participate in the process of issuing the award – has been more and more undermined.

### III. Selected International Developments

In the following section, three different challenge regimes of important international arbitration jurisdictions (or, in the case of ICSID, international dispute settlement systems) shall be briefly considered, specifically with regards to the nature of the right to be heard. In this way, the Swiss approach may be compared to international developments in this field.

#### A. Austria: No Requirement to Demonstrate Influence on Award

In Austria, as it is a Model Law country,<sup>45</sup> the parties to arbitration proceedings shall be treated fairly and each party shall be given the right to be heard.<sup>46</sup> Accordingly, the violation of the right to be heard is a ground for setting aside the award.<sup>47</sup> Like in Switzerland, statutory laws are silent on the content and scope of the right to be heard in international arbitration and the requirements for a successful challenge based on a violation thereof.<sup>48</sup> While the parties’ right to be heard is mandatory in nature,<sup>49</sup> the Austrian Supreme Court generally takes a restrictive approach on the content of the parties’ right to be heard in arbitration proceedings; pursuant to longstanding jurisprudence of the Austrian Supreme Court, the right to be heard is only infringed if a party was not able to present its case at all.<sup>50</sup>

We understand the majority of legal doctrine in Austria to submit that the challenging party is not required to demonstrate that the violation of its right to be heard had any effect on the

<sup>44</sup> Cf. Axel Buhr, *The Right to be Heard: A Constitutional Guarantee of No Formal Nature*, DRSK – DER DIGITALE RECHTSPRECHUNGS-KOMMENTAR [THE DIGITAL CASE LAW COMMENTARY] ¶ 20 (May 9, 2019).

<sup>45</sup> Cf. *supra* § II(A).

<sup>46</sup> Cf. ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 594(2) (Austria): “The parties shall be treated fairly. Each party shall be given a right to be heard.” (Informal translation).

<sup>47</sup> Cf. ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 611(2) (Austria): “An arbitral award shall be set aside if a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present its case.” (for an unofficial translation, see STEFAN RIEGLER, ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE, § 611 (Riegler et al. eds., 2007) [*bereinafter* “RIEGLER”]).

<sup>48</sup> Cf. *supra* § II(A).

<sup>49</sup> Cf. Reinmar Wolff, *Verzicht auf rechtliches Gehör im Schiedsverfahren*, in PRIVATAUTONOMIE UND IHRE GRENZEN IM WANDEL 172 (Michael Nueber et al. eds., 2015).

<sup>50</sup> Cf. Oberster Gerichtshof [OGH] [Austrian Supreme Court] Feb. 23, 2016, 18 OCg 3/15p, ¶ 3.2(a) (Austria); Michael Nueber, *Neues zum rechtlichen Gehör im Schiedsverfahren*, 27 WIRTSCHAFTSRECHTLICHE BLÄTTER 130 (2013); ELISABETH LOVREK & GOTTFRIED MUSGER, in HANDBUCH SCHIEDSRECHT, ¶ 16.62 (Czernich et al. eds., 2018) [*bereinafter* “LOVREK & MUSGER”].

outcome of the proceedings.<sup>51</sup> This is against the background of the already very strict requirements set by the Austrian Supreme Court for the qualification of an instance of procedural misconduct by the tribunal as a “proper” violation of the parties’ right to be heard.<sup>52</sup> As leading scholarship points out, it would be unreasonably burdensome for the party challenging the award to additionally prove that the violation of its right to be heard indeed caused it to lose the arbitration.<sup>53</sup>

Interestingly, one scholarly opinion postulates that it must be assessed by way of a plausibility check (in German: “*Plausibilisierung*”): whether the violation of the right to be heard had at least been “eligible” to influence the outcome of the proceedings. According to this view, the door to challenges of arbitral awards would otherwise be opened too wide, as the losing party would always find a circumstance that allegedly established a violation of its right to be heard.<sup>54</sup> This latter view, which has been expressly rejected by the Austrian Supreme Court,<sup>55</sup> might in theory be comparable to the eligibility test under the *Cañas* decision (as discussed above in Phase II).<sup>56</sup>

In sum, we understand that in Austria the overall discussion on the right to be heard in arbitration proceedings has so far focused on its content as such (i.e., is there any violation?) rather than on the requirements for a successful challenge in case of an actual violation (i.e., is there any causality between the violation and the outcome of the award?). Against this background, it is not surprising that neither the Austrian Supreme Court nor leading scholarship postulate that the party challenging the award, as a rule, has to demonstrate that the alleged violation of the right to be heard had a likely or any impact on the outcome of the award.

#### B. England: Requirement of Realistic Impact on Outcome

Like Switzerland, England is not a Model Law country.<sup>57</sup> Pursuant to Section 33 of the English Arbitration Act 1996 [“**Act**”], arbitral tribunals have to act fairly and impartially, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent.<sup>58</sup> Although the Act is silent on the exact scope of the right to be heard, it has a more restrictive approach in comparison to the Model Law. Under English *lex arbitri*, the scope of the right to be heard must be determined by the considerations of *reasonableness*. As leading commentators explain:

*“Such a term [i.e. the Model Law term “a full opportunity of presenting his case”] might have given the impression that a party was entitled to take as long as he required to explore*

<sup>51</sup> Cf. MARTIN PLATTE, in ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE, § 594 (Riegler et al. eds, 2007) (reference to Oberster Gerichtshof [OGH] [Austrian Supreme Court] Sept. 24, 1981, 7 Ob 623/81 (Austria)); RIEGLER, *supra* note 47, ¶ 38; LOVREK & MUSGER, *supra* note 50, ¶ 16.76, with a carve-out for cases where the irrelevance of the violation for the outcome of the proceedings was apparent on the basis of the reasoning of the award; MARTIN WIEBECKE ET AL., in HANDBUCH SCHIEDSGERICHTSBARKEIT, § 1512 (Torggler et al. eds., 2d ed. 2017).

<sup>52</sup> Cf. Oberster Gerichtshof [OGH] [Austrian Supreme Court] Oct. 10, 2014, 18 OCg2/14i, ¶ 3.2 (Austria).

<sup>53</sup> Cf. RIEGLER, *supra* note 47, ¶ 38; LOVREK & MUSGER, *supra* note 50, ¶ 16.76.

<sup>54</sup> Cf. Dietmar Czernich, *Kriterien für die Aufhebung des Schiedsspruchs wegen mangelnden rechtlichen Gehörs*, 136 JURISTISCHE BLÄTTER 295, 300 (2014).

<sup>55</sup> Cf. Oberster Gerichtshof [OGH] [Austrian Supreme Court] Feb. 23, 2016, 18 OCg 3/15p, ¶ 3.2(e) (Austria).

<sup>56</sup> Cf. *supra* § II(D).

<sup>57</sup> Cf. *supra* § II(A).

<sup>58</sup> Cf. Arbitration Act 1996, § 33(1)(a) (Eng.) [*hereinafter* “English Arbitration Act 1996” or “Act”].

*every aspect of his case, at absurd length if necessary. The term “a reasonable opportunity” conveys an objectively viewed balance of what is fair to the party, but is also compatible with expedition and economy.”*<sup>59</sup>

In the same vein, the respective ground for setting aside an arbitral award is interpreted very narrowly.<sup>60</sup> Pursuant to Section 68 of the Act, the failure of the tribunal to comply with its duties under Section 33 – and, hence, to honour the parties’ right to be heard – may constitute a ground for setting aside the award,<sup>61</sup> in case such failure constitutes a “*serious irregularity affecting the tribunal, the proceedings, or the award.*”<sup>62</sup> A “*serious irregularity*” is understood as an irregularity which has caused or will cause substantial injustice to the applicant.<sup>63</sup> Generally, the test of substantial injustice will be fulfilled only in those cases where it can be said that what has happened is “*so far removed from what could reasonably be expected*” that the reviewing State court shall take action.<sup>64</sup>

The Act is silent on other requirements for a successful challenge, including whether the violation needs to have an impact on the outcome of the award. However, relevant case law suggests that mere “*technical*” violations of the right to be heard are not sufficient for a successful challenge. In *Warborough Inv. Ltd. v. S. Robinson & Sons (Holdings) Ltd.* [“**Warborough**”], the Court of Appeal of England and Wales held that the court deciding over the challenge shall assess how the infringed party would have argued its case if the violation of its right to be heard would not have taken place.<sup>65</sup> On such basis, the Court of Appeal of England and Wales concluded:

*“In the instant case, I am not satisfied that the case which Mr. Gillott would have put had he been afforded the opportunity to submit a further report along the lines indicated in his witness statement would have been so different as to justify the conclusion that the lack of that opportunity in itself caused a substantial injustice, regardless of what the outcome of the arbitration would have been. Nor, for that matter, am I satisfied that the outcome in that event would have been materially different. Accordingly, I agree with the judge that the*

<sup>59</sup> Cf. BRUCE HARRIS ET AL., THE ARBITRATION ACT 1996: A COMMENTARY § 33 (3d ed. 2003).

<sup>60</sup> Cf. NEIL ANDREWS & JOHANNES LANDBRECHT, SCHIEDSVERFAHREN UND MEDIATION IN ENGLAND [ARBITRATION AND MEDIATION IN ENGLAND] 551 (2015).

<sup>61</sup> Cf. English Arbitration Act 1996, § 68(2)(a).

<sup>62</sup> Cf. English Arbitration Act 1996, § 68(1).

<sup>63</sup> Cf. English Arbitration Act 1996, § 68(2).

<sup>64</sup> Cf. DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, 1996 REPORT ON THE ARBITRATION BILL, 1996 280 (1996), *cited with approval in Warborough Inv. Ltd. v. S. Robinson & Sons (Holdings) Ltd.* [2003] EWCA (Civ.) 751 [59] (Eng.) [*hereinafter* “**Warborough**”] (“The test of ‘substantial injustice’ is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus, it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. [...] In short, [§ 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected.”); HARRIS ET AL., *supra* note 59, §§ 68(d)(4), 68(e).

<sup>65</sup> Cf. *Warborough*, [2003] EWCA (Civ.) 751 [57] (Eng.), with reference to *Checkpoint Ltd. v. Strathclyde Pension Fund* [2003] EWCA (Civ.) 84 [58] (Eng.) (“In my view, the approach has to be much more amorphous. The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather, the court should try to assess how the [applicant] would have conducted his case but for the irregularity. It is the denial of the fair hearing, to summarize procedural irregularity that must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will.”) (emphasis added).

*appeal fails on this question also.*<sup>66</sup> (Emphasis added)

Pursuant to such holding, we understand the test before the Court of Appeal of England and Wales to be twofold: *first*, the challenging party must demonstrate that the violation of its right to be heard has prevented it from putting forward a material point in addition to its existing presentation of the case. *Second*, such point (not brought to the arbitral tribunal's attention) might have likely influenced the outcome of the award. Accordingly, leading commentators postulate that one of the consequences of the *Warborough* case is the *necessity* to show that the procedural irregularity (which includes a violation of the right to be heard) is likely to have made a real difference on the result of the proceedings.<sup>67</sup>

However, further case law suggests that there is no need to demonstrate that the procedural irregularity would in any event have had an impact on the outcome of the award.<sup>68</sup> Rather, as pointed out by the High Court of Justice in *Cameroon Airlines v. Transnet Ltd.* [**“Cameroon Airlines”**], it needs to be demonstrated (only) that the procedural irregularity could *realistically* have an impact on the outcome of the award:

“[...] I do not think it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome.”<sup>69</sup> (Emphasis added)

It appears that the English courts generally take a restrictive approach to both the content of the right to be heard, as well as the requirements for a successful challenge. Against this background, it is not surprising that, under the Act, the party challenging the award has to demonstrate that the alleged violation of the right to be heard could realistically impact the outcome of the award. Practically, this might, in our view, be comparable to the new test of the Swiss Supreme Court pursuant to the *Errani* Decision (as discussed above in Phase III), requiring the challenging party to demonstrate that the violation *likely* had an impact on the outcome of the award.<sup>70</sup>

### C. ICSID: Requirement of Potential Impact on Outcome

The limited grounds for the annulment of an ICSID award are set out in Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of other

<sup>66</sup> Cf. *Warborough*, [2003] EWCA (Civ.) 751 [58].

<sup>67</sup> Cf. HARRIS ET AL., *supra* note 59, § 68(e), with further reference to *Icon Navigation Corp. v. Sinochem Int'l Petroleum (Bahamas) Co. Ltd.* [2002] EWHC 2812 (Comm) (Eng.) and *Groundshire v. VHE Construction* [2001] 1 Lloyd's Rep. 395 (Eng.).

<sup>68</sup> Cf. *Hussmann (Eur.) Ltd. v. Al Ameen Development & Trade Co. & Others* [2000] 2 Lloyd's Rep. 83 [51] (Eng.) (“HCN submitted that the reasoning of Dr Al-Qasem in that part of his report which is complained of must have caused substantial prejudice because there was no rational basis upon which the tribunal could have found for HCN on the issue of commission. I do not agree. Although there are very powerful and persuasive arguments that, if the contract is construed in accordance with the principles of Saudi law, it is clear that no commission was due under the distributorship agreement in the circumstances; however, I cannot say that no tribunal could have reached a different view.”) (emphasis added).

<sup>69</sup> Cf. *Cameroon Airlines v. Transnet Ltd.* [2004] EWHC 1829 (Comm) [102] (Eng.) [*hereinafter* “Cameroon Airlines”]; *Lorand Shipping Ltd. v. Davof Trading (Afr.) BV* [2014] EWHC 3521 (Comm) [30] (Eng.) *quoted in* ANDREWS & LANDBRECHT, *supra* note 60, at 583 et seq.

<sup>70</sup> Cf. § II(E).

States [**“ICSID Convention”**].<sup>71</sup> The forum deciding over applications for annulments is an ad hoc committee appointed by the Chairman of the Administrative Council.<sup>72</sup> One of the annulment grounds is a “*serious departure from a fundamental rule of procedure*”.<sup>73</sup> The violation of a rule of procedure will be a ground for annulment only if two requirements are met: the departure from the rule must be serious and the rule concerned must be fundamental.<sup>74</sup> The right to be heard belongs to such category of fundamental rules.<sup>75</sup>

According to eminent scholars in this field, in order to be serious, the departure must be more than minimal; it must be substantial and must have had a material effect on the affected party. In other words, it must have deprived that party of the benefit of the rule in question *or* cause a tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.<sup>76</sup> Accordingly, as set out in the annulment decision in *Victor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile* [**“Pey Casado”**], there are basically two views relating to the “seriousness” of the departure:<sup>77</sup>

At least one (earlier) ad hoc committee has looked at the importance of the right involved.<sup>78</sup> In essence, it concluded that if the right is fundamental or substantial as such, the deprivation thereof is likely to jeopardize the legitimacy or integrity of the arbitral process. Against this background, we understand this ad hoc committee postulates that the violation of the right to be heard as such may already qualify as a serious departure, without the need of any (demonstrated) impact on the outcome of the award.

However, more recent ad hoc committees have opined that the departure must relate to an outcome-determinative issue in order to be serious.<sup>79</sup> This line of precedents focuses on the impact of the infringed right on the outcome of the proceedings. In the landmark case of *Wena*, the ad hoc committee held that the violation of a fundamental rule must have caused the arbitral tribunal to reach a “*result substantially different*” from what it would have awarded had such rule

<sup>71</sup> Cf. Convention on the Settlement of Investment Disputes between States and Nationals of other States, Oct. 14, 1996, 575 U.N.T.S. 159 [*hereinafter* “ICSID Convention”].

<sup>72</sup> Cf. *Id.* art. 52(3).

<sup>73</sup> Cf. *Id.* art. 52(1)(d): “Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: [...] that there has been a serious departure from a fundamental rule of procedure.”

<sup>74</sup> Cf. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, art. 52, § 227 (2001).

<sup>75</sup> Cf. *Id.* art. 52, § 245.

<sup>76</sup> Cf. *Id.* art. 52, § 230; LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 165 (2d ed. 2011); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 05, 2002) [*hereinafter* “Wena”].

<sup>77</sup> Cf. *Victor Pey Casado and Found. “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 76 (Dec. 18, 2012) [*hereinafter* “Pey Casado”].

<sup>78</sup> Cf. *Maritime Int’l Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, ¶ 5.05 (Dec. 22, 1989) [*hereinafter* “MINE”]; *Pey Casado*, ICSID Case No. ARB/98/2, ¶ 76 (Dec. 18, 2012).

<sup>79</sup> Cf. *Wena*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 5, 2002), with reference to *MINE*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, ¶ 5.05 (Dec. 22, 1989), *confirmed in* *CDC Group plc v. Republic of the Sey.*, ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for Annulment of the Republic of Sey., ¶ 49 (June 29, 2005) and *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, ¶ 8 (Jan. 8, 2007).

been observed.<sup>80</sup>

On such basis, we understand that there is a basic understanding among more recent ad hoc committees that “*in order for a departure from a fundamental rule of procedure to be serious, an applicant is not required to show that, if the rule had been respected, the outcome of the case would have been different or that it would have won the case. What an applicant must show is that the departure may have had an impact on the award.*”<sup>81</sup> (Emphasis added)

Certain ad hoc committees have concluded – sometimes impliedly<sup>82</sup> – that the departure may have had an impact on the award, if it concerned an issue that was determinative for the outcome of the case.<sup>83</sup>

In general, ad hoc committees have proven not to overly restrict the content and exact scope of the parties’ right to be heard in a specific case. This might be against the background that the “*annulment system is designed to safeguard the integrity, not the outcome.*”<sup>84</sup> In this context, it has been voiced in legal doctrine that in the case of investment arbitration, where the arbitration arises from a dispute between a private party and a State or State entity, legitimacy concerns must prevail over finality (and efficiency concerns).<sup>85</sup>

Additionally, regarding the actual requirements of a successful application for annulment due to a violation of the parties’ right to be heard, we understand ad hoc committees to generally take – similar to the Swiss Supreme Court – a pragmatic, and not an overly formalistic, approach. In any event, more recent decisions of ad hoc committees show that the party challenging the award has to demonstrate that the alleged violation of the right to be heard may have had a potential impact on the outcome of the award.

Although it is not possible to exactly match the standards set by the Swiss Supreme Court, we

<sup>80</sup> Cf. *Wena*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, ¶ 58 (Feb. 5, 2002).

<sup>81</sup> Cf. *TECO Guat. Holdings LLC v. Republic of Guat.*, ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 193 (Apr. 5, 2016); *Pey Casado*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 78 (“The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected. The Committee notes in fact that, in *Wena*, the committee stated that the applicant must demonstrate “the impact that the issue may have had on the award.” The Committee agrees that this is precisely how the seriousness of the departure must be analyzed.”) (emphasis added) and ¶ 307 (Dec. 18, 2012).

<sup>82</sup> Cf. *Amco Asia Corp., Pan Am. Dev. Ltd. and P.T. Amco Indon. (Amco) v. Republic of Indon.*, ICSID Case No. ARB/81/1, Decision on the Applications by Indon. and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Indon. for Annulment of the Supplemental Award of October 17, 1990, ¶ 9.09 (Dec. 17, 1992), 1 ICSID Rep. 569 (1993) [*hereinafter* “Amco”].

<sup>83</sup> Cf. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, ¶¶ 218, 230 (Dec. 23, 2010); *Amco*, ICSID Case No. ARB/81/1, Decision on the Applications by Indon. and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Indon. for Annulment of the Supplemental Award of October 17, 1990, ¶ 5.22(a) (Dec. 17, 1992), 1 ICSID Rep. 569 (1993).

<sup>84</sup> Cf. *Hussein Nuaman Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 20 (June 5, 2007).

<sup>85</sup> Cf. *Alina Cobuz & Silviu Constantin, Surviving an ICSID Award: Post-Award Remedies in ICSID-Arbitration – A Perspective of Contracting State’s Interests*, 8 CZECH (& CENTRAL EUR.) Y.B. OF ARB. 41, ¶ 3.27 (2018) [*hereinafter* “Cobuz & Constantin”].

understand that such a test of a *potentially different* impact may be comparable to the eligibility test of the Swiss Supreme Court under the *Cañas* decision (as discussed above in Phase II), requiring the challenging party to demonstrate that the violation might theoretically have had an impact on the outcome of the award.<sup>86</sup> In turn, we understand this approach to be less stringent than the test of a *realistically different* impact as followed by the English High Court of Justice.<sup>87</sup>

#### IV. Legal Considerations on the Swiss Supreme Court's Present Approach

##### A. Strong Right to Be Heard in Line with International Standards for Challenge

The analysis of select international development yields two main conclusions regarding the Swiss approach to the parties' right to be heard:

*First*, the comparison with the interpretation of the right to be heard of other important international arbitration systems shows that parties enjoy, generally, a broad scope of the right to be heard under Swiss *lex arbitri*. This becomes particularly clear when we look at the jurisprudence in Austria, where it is constantly held that the right to be heard is only infringed if a party was not *at all* able to present its case, which, in practice, will very rarely be the case.<sup>88</sup> Also, under English *lex arbitri*, the concept of "*substantial injustice*" is in line with the legislators' intent to only cover extreme cases of injustice – for a very narrow interpretation of when an instance of procedural misconduct of the tribunal qualifies as a violation of the parties' right to be heard.<sup>89</sup> On the other hand, the extensive case law developed by the Swiss Supreme Court on the right to be heard shows that this fundamental procedural right is taken very seriously under Swiss *lex arbitri* due to its anchoring within the Swiss Federal Constitution.

*Second*, we submit that with the earlier approach taken by the Swiss Supreme Court under the *Cañas* decision, the requirements were – at least measured by its practical implications – comparable to the annulment standards set by certain ad hoc committees under ICSID. This is particularly interesting against the background that the integrity and legitimacy of the proceedings may have a higher standing in investment arbitrations than in commercial arbitrations.<sup>90</sup> This shows, in consequence, that the requirements set by the Swiss Supreme Court in the *Cañas* decision were, as a matter of principle, more relaxed than one might expect in the context of international commercial arbitration.

With the new approach taken under the *Errani* Case, the Swiss Supreme Court now applies a standard for a successful challenge, which is more similar to the standards set by the English courts. With London being one of the most important arbitration hubs in the world, the Swiss Supreme Court's recent jurisprudence is in line with international developments at the forefront of arbitration.<sup>91</sup>

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<sup>86</sup> Cf. § II(D).

<sup>87</sup> Cf. § III(B).

<sup>88</sup> Cf. § III(A).

<sup>89</sup> Cf. § III(B).

<sup>90</sup> Cf. Cobuz & Constantin, *supra* note 85, ¶ 3.27.

<sup>91</sup> Cf. BORN, *supra* note 2, at 3255, and in particular at 3257: "Despite this, the better view is that an award should ordinarily be annulled only if a tribunal's procedural error had a material effect on the arbitral process or the outcome in the arbitral award; the wrongful denial of an opportunity to be heard on an ancillary or incidental point

B. Development of Increased Procedural Efficiency

The new approach taken by the Swiss Supreme Court shifts the balance between the key principle of due process and the key postulate of time and cost efficiency. This is because the stringency of the requirements for a successful challenge – at least in theory – are an expressive denominator of how these two key drivers in international arbitration proceedings are to be balanced against each other.

Generally, a regime with less strict requirements for a successful challenge tends to encourage the party discontent with the outcome of the proceedings to challenge the award. In turn, arbitral tribunals under a challenge-friendly regime tend to be procedurally more cautious in order to avoid any potential risks of a challenged award. This might, depending on the case, substantially affect the efficiency and speed of the arbitration; arbitrators may, just for the sake of “good order”, albeit without any relevance for their assessment of the merits, grant additional rounds of submissions or additional time for overdue submissions, summon witnesses where their testimony is not needed according to their assessment, etc. Simply put, the easier it is for parties to successfully challenge an arbitral award on the basis of due process concerns, the more cautious (and potentially inefficient) arbitral tribunals will be in order to avoid any potential violation of the parties’ right to be heard.

In turn, the stricter the requirements for a successful challenge are, the lesser the parties may be inclined to challenge an award with an outcome unfavourable to them. Consequently, if the potential risk of a challenged award is generally lower, arbitral tribunals might feel encouraged to focus on the merits of the case rather than on “comforting” the parties for the sake of mere formality. As a matter of principle, efficient conduct of the proceedings might generally increase under a stricter challenge regime.

Whether the principle of due process or the postulate of time and cost efficiency is to be given more weight is ultimately a policy consideration. Policy considerations, in turn, depend on the specific balance of the key interests involved. When it comes to the nature of the right to be heard, the Swiss Supreme Court has, with its new approach, decided to give more weight to efficiency concerns than it did in the past.

In times where users of international arbitration are regularly faced with the manifold ramifications of “due process paranoia”,<sup>92</sup> any tool or means to reduce the risk of overly cautious tribunals is to be welcomed. Thus, at least on a theoretical level, the new approach by the Swiss Supreme Court will help to increase the efficiency of arbitral proceedings in Switzerland. At the very least, such an approach takes on and supports the international endeavours to strengthen the much-needed efficiency of arbitration proceedings.

C. Potential Uncertainties and Risks

For a party willing to challenge an arbitral award based on a violation of its right to be heard, it will be necessary to convince the Swiss Supreme Court that such violation had an adverse impact

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should not provide grounds for annulling an otherwise valid award. This requirement is express in some national arbitration legislation and has been adopted by the weight of judicial authority in other jurisdictions”.

<sup>92</sup> Cf. Shubham Jain, ‘Public Policy’ as the Root Cause of Due Process Paranoia: An Examination of the Statute and Court Decisions in India, 6(2) INDIAN J. ARB. L. 145 (2018).



on the outcome of the award. What does that mean in practice? As a matter of principle, such demonstration must be based on (i) an anticipated alternative scenario in terms of facts and/or evidence, and (ii) the legal analysis of a potentially different legal outcome of the dispute taking into account such anticipated alternative scenario. In particular, the first element of this two-pronged test may come with considerable uncertainties as to its practical consequences.

In our view, an important distinction has to be drawn between an “active” and a “passive” violation of the right to be heard.<sup>93</sup> In the scenario of an active violation of the right to be heard, a party is prohibited from presenting certain aspects of its case as a result of procedural measures taken by the tribunal. This may, for instance, be the case if a party cannot submit an additional brief setting out its position on an important point. In this situation, it will not be possible for the party to demonstrate what information the additional brief would have contained, had it been filed. As a further example, if a witness whose testimony was requested by the challenging party is not being summoned by the tribunal, it is not possible (for anyone) to establish what the requested witness would have testified. In other words, no one can be asked to prove something which does not exist – this fundamental evidentiary principle is also known as “*negativa non sunt probanda*”. The party burdened with such a task may speculate what might have happened but cannot demonstrate it. Taken further to the legal analysis of a potentially different legal outcome, it will additionally be impossible to demonstrate how the tribunal might have decided differently on the basis of such *negativa*. Hence, this scenario might in fact become problematic for the party challenging an award due to a violation of its right to be heard before the Swiss Supreme Court.

On the other hand, in the scenario of a passive violation of the right to be heard, although a party is not prohibited from presenting its case, the arbitral tribunal fails to consider allegations, arguments, evidence or proffered evidence raised by a party.<sup>94</sup> This was the case in the *Cañas* decision, where certain legal arguments made by the challenging party were ignored by the tribunal.<sup>95</sup> In our view, this scenario might be less problematic as the submission(s) by the party and the award’s reasoning will generally provide sufficient material to demonstrate a violation of the right to be heard.

On the basis of these considerations, the implications of the new approach taken by the Swiss Supreme Court may be summarized as follows, in a somewhat simplified manner:

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<sup>93</sup> Cf. § II(A).

<sup>94</sup> Cf. § II(A).

<sup>95</sup> Cf. § II(D); SFT 121 III 331 where the sole arbitrator based its decision on factual findings contrary to the submissions by both parties); *supra* § II(B).

	<i>Positive decision by the Arbitral Tribunal</i>	<i>Negative decision by the Arbitral Tribunal</i>
<i>Active Violation?</i> <i>(Party not able to present its case)</i>	<b>No violation of the right to be heard</b> (e.g., party may submit an additional brief setting out its position on an important point).	Violation of the right to be heard <b>which is generally more difficult to demonstrate</b> under the new test (e.g., party may not submit an additional brief setting out its position on an important point).
<i>Passive Violation?</i> <i>(Arbitral Tribunal fails to consider)</i>	<b>No violation of the right to be heard</b> (i.e., outcome of the dispute and/or reasoning in the award takes into account party's position on an important point).	Violation of the right to be heard <b>which is generally <u>not</u> more difficult to demonstrate</b> under the new test (i.e., outcome of the dispute and/or reasoning in the award does not take into account party's position on an important point).

D. Postulate for Reasoned Objections by Counsel

Under Swiss *lex arbitri*, the party which considers itself to be affected by a violation of its right to be heard must immediately object and submit its complaints to the arbitral tribunal. Otherwise, such party runs the risk of forfeiting its right to be heard (for the respective issue).<sup>96</sup> Against the background of potential difficulties with *negativa*, it may be crucial for counsel not only to object, but to explicitly mention the reasons for their objections in the respective submission to the tribunal.

This consideration may be illustrated with a simplified example regarding the lapse of a prescription period. In case the party challenging the award has already pleaded that the claim of the opponent party had become time-barred due to prescription, but such claim is upheld by the tribunal in the final award and the issue of prescription is not addressed at all, it will be straightforward for the challenging party to establish that the tribunal engaged in a passive violation of its right to be heard.<sup>97</sup> On the other hand, if the challenging party was not granted any possibility to raise the issue of prescription in an additional brief (e.g., because this issue surfaced only in the hearing on the basis of a potentially different triggering point in the past), it will be impossible to demonstrate what it would have submitted if it had been granted leave to do so (*negativum*). In this scenario, counsel are, in our view, well-advised to immediately object to the arbitral tribunal's rejection of a request to grant an additional submission, by explicitly mentioning that the reason for the submission is the raising of the prescription issue. On such basis, counsel will be in a much better position in the challenge proceedings before the Swiss Supreme Court as it will, in principle, be comprehensible why the rejection by the tribunal had

<sup>96</sup> Cf. Tribunale fédérale [TF] [Swiss Supreme Court] Sept. 7, 1993, BUNDESGERICHTSENTSCHEID [BGE] 119 II 386, ¶ 1(a); PFISTERER, *supra* note 5, art. 190, § 69.

<sup>97</sup> Cf. §§ II(A) and IV(C).

an impact on the outcome of the award which was adverse for the challenging party.

## V. Conclusion

The new approach of the Swiss Supreme Court towards a stricter challenge regime for violations of the right to be heard has consequences on different levels:

*First*, it will help arbitral tribunals which intend to conduct the proceedings in an efficient manner. This is in line with developments in important international arbitration centres, and the key postulate of procedural efficiency in international arbitration proceedings.

*Second*, although the new requirements have the potential of “formalistic” rejections of challenges on the basis of an improbable prejudice on the outcome of the award, however, we believe that the Swiss Supreme Court will – according to its longstanding pragmatic approach – further develop its rich case law, differentiating scenarios which may typically affect the outcome of the case.<sup>98</sup>

*And finally*, although the burden for parties willing to challenge the award has been raised, counsel will, in our view, have the opportunity – and maybe even the onus – to prepare themselves for a potential (subsequent) challenge by explicitly addressing the substantive argument behind the procedural request which was eventually rejected by the tribunal. This particularly holds true when it comes to procedural decisions by the tribunal preventing parties from presenting their case (active violations). From a wider perspective, this will discipline counsel to consider, right at the outset, the (technical) violations by the tribunal which might have an impact on the outcome of the proceedings. We expect this to add to more efficiently conducted international arbitration proceedings.

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*Cf.* §§ I and II(A); MÜLLER & PEARSON, *supra* note 5, ¶ 3.3.