to difficulties at the enforcement stage, since their existence cannot be established in writing within the meaning of NCPC, Art.1499[178a] and Art.IV of the New York Convention.[179]

Contrary to Art.33(2) of the Concordat, which mandatorily requires a signature and, thus, the written form,[180] PILS, Art.189(2) provides for a written award only if the parties have not agreed otherwise (see PILS, Art.189(1)), but the question is controversial.[181] Two commentators consider that waiving the written form is tantamount to waiving the right to challenge the award, so that it is subject to the conditions set out in PILS, Art.192.[182] We do not share this opinion since a challenge against an oral award is not intrinsically excluded to the extent that its contents can be established: first, as stated above, the parties can agree that the arbitrator shall render his award orally and subsequently give reasons in writing; secondly, OJ, Art.93(2) provided that an authority whose decision was challenged could give reasons supporting it in its answer to the challenge, and the same result follows from an application by analogy of Art.112(2) of the new Swiss Federal Tribunal Act, which is in force as from January 1, 2007. This provision provides that if a decision challengeable before the Swiss Supreme Court is not motivated, either party can request, within 30 days following from the notification of such decision, the reasons supporting it.

Finally, PILS, Art.190(2) does not provide for any ground for setting aside the award in respect of the form of the award. Thus, the Federal Tribunal held that the absence of signature of the chairman, required by PILS, Art.189(2), was not as such a ground for setting aside the award but could at most be a sign that the chairman did not participate in the deliberations, what would lead to the annulment of the award in application of PILS, Art.190(2)(a).[183]

In practice, it is at least conceivable that the parties agree that the arbitral tribunal shall give its award orally and confirm the result in writing, giving reasons in a subsequent document or, in the event of a challenge, in the form provided for in the proceedings before the court. Under such conditions, dispensation from the written form or from the duty to provide reasons could expedite the resolution of the dispute. However, the parties should only waive a written, reasoned award in particularly urgent situations, and we do not advise such a practice.

[178a] Devolvé, Rouche and Pointon, p.170 para.306, go a step further and infer from this provision the requirement of the written form.
[179] Fouchard, Gaillard and Goldman, para.1389.
[180] Lalive, Poudret and Reymond, p.189 para.3 *ad* Art.33 of the Concordat.
[181] On the relationship between parags 1 and 2, see Dutoit, p.661 para.1 *ad* Art.189; Lalive, Poudret and Reymond, p.410 para.3 and p.414 para.12 *ad* PILS, Art.189; *contra*, Rüede and Hadenfeldt, p.298 § 41 I, who consider that the reservation of an agreement of the parties in para.1 does not apply to the second sentence of para.2, and that the written form, the reasons, the date and the signature are therefore mandatory.
[182] IPRG-Heini, p.2060 paras 19 and 20, and KSP-Wirth, p.1660 para.25 *ad* Art.189, the latter only referring to the former's opinion without commenting on it.
[183] ASA Bul. 2006, p.105, c.3.1 and 3.2.

8.3.2 The essential elements of the award

Several laws briefly enumerate the essential elements which the award must contain.[184] These generally include the names of the parties and the arbitrators, the seat of the arbitration and/or the place where the award was made, the subject matter of the dispute, the arbitrators' decision and their reasons, the date and signature(s). We shall return to these points in 8.3.3 and 8.3.5. This list does not imply that the omission of one of these elements necessarily leads to the setting aside of the award.[185] Thus the Italian *Corte di Cassazione* held that it is not indispensable that the holdings (or operative part, *dispositif*) be separated from the reasons, provided that the former can be identified with certainty from the award.[186] The same court held that the indication of the seat of the arbitration, which was a condition of validity of the award under, ICCP 1994, Art.823(2) No.5—today ICCP 2006, Art.823(2) No.2—could result from an interpretation of the award.[186a] The contents of the award may also be prescribed by the parties' agreement or rather by the arbitration rules to which they submit.[187] While some rules are very detailed,[188] others are lacking in this regard.[189]

In Switzerland, while Art.33 of the Concordat contains a particularly detailed list of the elements which an award must contain, the absence of which constitutes a ground for setting aside under Art.36(h), PILS, Art.189 opted for a more liberal solution by referring to the parties' agreement (the disregard of which is not a ground for setting aside the award under Art.190(2)). The parties' agreement applies not only to the form of the award, but also to its contents, in particular to the reasons, as we shall see in 8.3.3 below. This does obviously not dispense the arbitrators from providing the elements necessary to make their award comprehensive and enforceable,[190] failing which the Federal Tribunal could apply OJ, Art.93(2) by analogy or Art.112(2) of the new Federal Tribunal Act as from January 1, 2007 in order to obtain clarification from the arbitral

[184] CJB, Art.1701(5); NCPC, Art.1472, only applicable to international arbitration in the event of submission to French law pursuant to NCPC, Art.1495 (Fouchard, Gaillard and Goldman, para.1406); ICCP, Art.823(2); WBR, 1057(4); Art.33 of the Concordat (idem).
[185] For France, Fouchard, Gaillard and Goldman, para.1406, while de Boisséson (p.803 para.782) reserves the ground for setting aside of NCPC, Art.1502 No.3 for non-respect of the arbitrator's mission; for Switzerland, see the decision cited in n.183.
[186] Riv. dell'arb. 1998, p.245, with a note by Grossi; Rüede and Hadenfeldt, p.303 § 41, IV, propose the same solution for Swiss law.
[186a] Riv. dell'arb. 2004, p.697.
[187] Redfern and Hunter, pp.379–380 para.8–54.
[188] Notably ICSID, Art.47.
[189] Thus Art.32 of the UNCITRAL Rules, Arts 32.3 and 32.4 of the Swiss Rules, and Art.25 of the ICC Rules, which only require that the award give reasons; on the usual contents of ICC awards see Craig, Park and Paulsson, pp.365–366 § 19.04, and H. Lloyd, M. Darmon, J.-P. Ancel and Lord Devaird, Ch. Liebscher and H. Verbist, Drafting Awards in ICC Arbitration, ICC Bul. 2005 (vol. 16/2), pp.19–40.
[190] See Lalive, Poudret and Reymond, p.410 para.4 *ad* PILS, Art.189, reserving procedural public policy pursuant to Art.190(2)(e) rather than the right to be heard pursuant to Art.190(2)(d); KSP-Wirth, p.1660 para.26, giving a detailed list of elements which are usual and useful, but not all essential.

tribunal. Setting aside an award for this reason would only be justified as a final resort.

Section 52 of the Arbitration Act 1996 also refers principally to the agreement of the parties, which can for instance consist in a reference to s.26 of the LCIA Rules, and provides that to the extent that there is no such agreement, the award shall be made in writing signed by all the arbitrators, shall contain reasons, and shall state the seat of the arbitration and the date when it was made. Nevertheless, as Merkin has observed,[191] an effective award should also satisfy other requirements, notably resolve all the questions submitted to the arbitrators, not make any findings *ultra petita*, and contain an unconditional holding (operative part) which can be enforced. Sections 48 and 49 contain indications on the remedies which may be exercised by arbitrators (always provided the parties have not agreed to the contrary) and which must be respected in the holding made in the award. In particular, s.49 authorises an arbitral tribunal to award simple or compound interest on amounts due before the date of the award, and simple or compound interest on the amount due after such date up to the date of payment (post award interest),[191a] which is not provided for under common law.[192] A decision of the High Court clarifies that if a party intends obtaining such post award interest, it must apply explicitly for them to the arbitral tribunal, and if the latter does not award them, the court cannot do so instead.[193] The power of the arbitral tribunal to grant pre-award interest pursuant to s.49 was, together with the applicable currency, one of the issues before the courts in the case *Lesotho Highlands Development Authority v Impregilo SpA*. More specifically, the question was whether such a power was excluded or modified by the terms of the main contract or by operation of the *Lesotho* law, as the substantive law of the contract. Contrary to the High Court and to the Court of Appeal, the House of Lords upheld the award on interest and found that the arbitral tribunal had power under s.49(3) to award interest. It considered that there was nothing in the main contract to the contrary and that the party challenging the award had not satisfied its burden to show that the law of *Lesotho* prevented such award on interest in the framework of the "exceptional remedy under s.68".[193a] This case illustrates the inconveniences that may result from the three levels of judicial challenges offered by English law against arbitral awards.

8.3.3 Reasons for the award

746 While common law arbitrators traditionally abstained from giving reasons, this was above all in order to avoid exposing their awards to appeals on a point of

[191] Merkin, p.139 *ad* s.52; see also Mustill and Boyd, pp.382–388 Ch.26.

[191a] On the issue of award on interest, see generally the Chartered Institute of Arbitrators' Guideline on Awards of Interest, Arbitration 70 (2004), vol. 3, pp.201–210; D. Altaras, The Arbitrators' Power to Award Interest, Arbitration (70) 2004, vol. 2, pp.108–114.

[192] Merkin, pp.133–136 *ad* s.49; Mustill and Boyd (2001), p.5 para.14 and pp.331–333 *ad* s.49, who point out that this is an advantage of arbitration for creditors.

[193] *Walker v Rowe* [2000] 1 Lloyd's Rep. 116, QB.

[193a] [2005] UKHL 43, [2005] 2 Lloyd's Rep. 310.

law,[194] following the advice given to judges by Lord Mansfield: "But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong"![195] Since then, times have changed. The Arbitration Act 1979 conferred on the courts the power to refer back to the arbitrators an award if it contained no reasons or insufficient reasons, and this rule is now to be found in s.70(4) of the Arbitration Act 1996. The latter even introduced in s.52(4) a general obligation to give reasons for the award, unless the parties have agreed to dispense with reasons. This is a true revolution although since 1979 an ever increasing importance had been attached to the giving of reasons, except in the case of quality arbitrations which are not suited to this.[196] The Court of Appeal confirmed that it was a valid practice under the Arbitration Act 1996 to allow the arbitrators to provide the parties with confidential reasons, which are not part of the award, but the Court added that it could examine such reasons if serious irregularities were raised against the award.[196a]

Conversely, on the Continent, and above all in France, several authors consider the duty to give reasons a rule of international public policy.[197] These different approaches and traditions explain the diversity of the legislations. While certain laws and arbitration rules make it mandatory to give reasons,[198] an even larger number reserve an agreement to the contrary by the parties. This was already the case in Art.VIII of the 1961 European Convention, which provides that the parties shall be presumed to have agreed that reasons shall be given for the award unless they either expressly declare that reasons shall not be given, or have submitted to an arbitral procedure under which it is not customary to give reasons for awards. In the second case, it is furthermore necessary that neither party requests that reasons be given before the end of the hearing or, if there has not been a hearing, before the making of the award.[199] This second exception refers in particular to commodity arbitrations. Similarly, Art.31(2) of the Model Law requires a reasoned award unless the parties have agreed to the contrary or, of course, in the case of a consent award.[200] Similar wording is to be found in ZPO,

[194] See de Boisséson, p.803 para.782; Delvolvé, *op. cit.*, pp.154–157; Mustill and Boyd, pp.372–381; Redfern and Hunter, p.382 para.8–63. In particular, it was possible to communicate the reasons in a separate, and confidential document, which was not part of the award.

[195] Cited by Lord Justice Bingham, *op. cit.*, p.147.

[196] Mustill and Boyd (2001), pp.335–336, who consider that this requirement might prove excessive in certain cases and that in the future the presence of reasons should not be deemed an absolute condition for the enforceability of a foreign award.

[196a] *The Easyrider* [2004] 2 Lloyd's Rep. 626, Q.B.

[197] In particular Delvolvé, *op. cit.*, especially p.165; Devolvé, Rouche and Pointon, pp.174–178 paras 312–317; Loquin, note *ad* Paris, Rev. arb. 1989, p.83, especially pp.95–96; Fouchard, note *ad* Paris, Rev. arb. 1998, p.558; Mourre, *op. cit.*

[198] CJB, Arts 1701(6) and 1704(2)i (see Huys and Keutgen, pp.305–306 paras 463–464; Linsmeau, pp.141–142 paras 288–291, Simont, *op. cit.*, and Rev. arb. 1998, p.207 para.42); Art.823(2) No.5 of the ICCP; WBR, Arts 1057(4)(e), except in quality arbitrations, and Art.1065(1)(d), the violation of which entails the setting aside of the award (Sanders and van den Berg, p.85 para.74 *ad* Art.1057; van den Berg, van Delden and Snijders, p.95 para.7.12); Art.25 of the ICC Rules and Art.47.1 of the ICSID Rules.

[199] D. Hascher, YCA 1995, p.1031 para.66.

[200] See Ch.8.1.3 para.731(f).