2.2 The main findings of the Federal Tribunal

Confronted with the US law firm's plea of violation of public policy, the Federal Tribunal in the first place confirmed its previous case law according to which the disregard of the res judicata effect of a previous arbitral award by an arbitral tribunal seated in Switzerland constitutes a violation of procedural public policy pursuant to Article 190(2)(e) PILA. Hence, an arbitral tribunal seated in Switzerland may expose its award to annulment if the res judicata effect of a previous award has not been respected. However, the Federal Tribunal made clear that such risk exists only if the foreign award can be recognised in Switzerland, pursuant to Article 194 PILA, in connection with Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the case at hand, there was no reason to reject the recognition of the Frankfurt award in Switzerland.

As a next step, the Federal Tribunal had to determine the applicable law to assess the extent of the res judicata effect of the Frankfurt award. In this context, the Federal Tribunal referred to its previously established concept of the controlled transfer of a foreign award's effects (“kontrollierte Wirkungsübernahme”). This principle takes into account that the res judicata effect originates from the foreign arbitral award. It can, therefore, not be attributed more extensive effects in Switzerland than it deploys in the jurisdiction of its origin. Hence, the effects of the foreign award are, as a first step, “transferred” to Switzerland. Yet, such transfer is “controlled” by the idea that the impact of a foreign award cannot go beyond the effects of an identical decision hypothetically rendered in Switzerland. According to the Federal Tribunal, the res judicata effect of a foreign award is, therefore, to be determined, in a second step, on the basis of the Swiss lex fori.

The statutory Swiss lex fori and lex arbitri are both silent on the (objective) scope of res judicata. However, in its constant case law, the Federal Tribunal has held that arbitral awards have the same effect as binding and enforceable judicial decisions. Accordingly, in the view of the Federal Tribunal, the res judicata effect of both court judgments and arbitral awards is confined to their operative (or dispositive) part. The reasons of a respective decision are exempted from res judicata. They may be consulted solely in order to determine the extent of the dispositive part of an award.

On the basis of these findings, the Federal Tribunal pointed out that neither the US law firm nor the German attorney had incorporated into their prayers for relief the issue of how to correctly interpret the disputed BCA clause. As a consequence, this aspect was not considered by the Federal Tribunal to be a part of the formal subject matter of the
dispute ("Streitgegenstand"), which delimits the scope of res judicata and is reflected in the dispositive part of an award. In the view of the Federal Tribunal, the Zurich tribunal did not, therefore, violate procedural public policy (Article 190(2)(e) PILA) when it decided the matter based on its own interpretation of the BCA clause. Rather, according to the Federal Tribunal, it would have amounted to a violation of public policy if the Zurich tribunal had wrongfully considered itself bound by the Frankfurt tribunal's interpretation of the disputed contract clause and, as a consequence, had refused to assess this aspect of the dispute on its own.  

1This article is partly based on a speech held by Niklaus Zaugg at the ASA/ArbAut/LIS Dreiländer-Konferenz in Schaan on 30 September 2016.  
14DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 609, cons. 3.2.3.  
15DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 609, cons. 3.2.3.  
With respect to (potential) exceptions to this principle cf. D. Summermatter/A. Sidiropoulos, Rechtskraft und Rechtsschutzinteresse bei Teilklage und negativer Feststellungswiderklage: oder: darfs ein bisschen mehr sein?, HAVE 2013, 229 et seq.  
20DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 610 et seq., cons. 3.2.4 and 3.2.6; DFT 128 III 191, 195 cons. 4a.  