

NKF Dispute Resolution Team

Swiss Arbitration – Practical Aspects and New Developments

Publication 19

NIEDERER KRAFT & FREY

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Zurich, October 2015

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In the **NKF series** of publications an informal sequence of articles and essays is published that deal with issues related to the field of business activity of Niederer Kraft & Frey.

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Foreword

We are often asked by foreign legal practitioners why Switzerland is such a popular place for international arbitration. Indeed, for decades parties have used Switzerland as their preferred place for arbitration. Such popularity did not suffer from the increasing competition by arbitration hubs in emerging countries.

This treatise attempts to shed some light as to why Switzerland remains also in today's dynamic environment one of the foremost places for arbitration. Switzerland's privileged position does not only stem from its long standing tradition as a neutral country. It is also the result of a liberal legal framework, enabling parties to model their contractual arrangements and contentious procedures to their liking. Its position as premier player among the global places for arbitration is further supported by the extensive and arbitration-benevolent case law and doctrinal writing in Switzerland.

Arbitration provides the opportunity to resolve disputes in a private and efficient manner, without being bound by ordinary procedural limitations and the direct involvement of state authorities. It is for this reason that arbitration perfectly fits the needs of a modern and free-market oriented society and has, therefore, a bright future. Such future is further ascertained by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which provides for an unparalleled legal framework for the nearly global enforceability of arbitral awards. Such enforceability is presumably the crucial feature of dispute resolution in a globalized world.

The dispute resolution practice of Niederer Kraft & Frey has actively participated in the development of arbitration in Switzerland. Members of the practice are acting both as arbitrators and party representatives alike, be it in commercial or sports-related matters, ranging from banking, insurance, energy, post-M&A, pharmaceutical, commodities, construction to procurement disputes. With the publication of this treatise the members of the dispute resolution team of Niederer Kraft & Frey wish to share insights gained in the course of their longstanding and diverse practice.

Particular thanks are extended to all members of our team that have contributed to this treatise, including the authors as well as Kathrin Biehler, Michèle Joho and Andrea Zindel.

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Abbreviations

AAA	American Arbitration Association
AJP	Aktuelle Juristische Praxis, Zurich
Art.	Article
ASA	Swiss Arbitration Association
BBl	Official gazette of the Federal Government in Switzerland (Bundesblatt der Schweizerischen Eidgenossenschaft)
BGE	Official Collection of the Decisions of the Swiss Federal Supreme Court (= Swiss Federal Tribunal) (Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts)
BK	Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Bern
BSK	Basler Kommentar zum schweizerischen Recht
Bull.	Bulletin
CAS	Court of Arbitration for Sport (Lausanne)
CC	Swiss Civil Code of 10 December 1907 (SR 210)
CCP	Swiss Civil Procedure Code of 19 December 2008 (SR 272)
cf.	confer/compare
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (SR 220)
cons.	consideration
DEBA	Swiss Debt Enforcement and Bankruptcy Act of 11 April 1889 (SR 281.1)
Diss.	Dissertation (thesis)
e.g.	<i>exempli gratia</i> (= for example)
ed.	edition/editor
eds.	editors
esp.	especially
et al.	<i>et alii</i> (= and others)
et seq.	<i>et sequens/et sequentes</i> (= and the following)
FAA	U.S. Federal Arbitration Act
FSCA	Federal Supreme Court Act of 17 June 2005 (SR 173.110)
i.e.	<i>id est</i> (= that is)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, as adopted by the IBA Council on 29 May 2010

IBA	International Bar Association
ICAS	International Council of Arbitration for Sport
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration of 1 January 2012
Id.	<i>idem</i> (= the same)
IOC	International Olympic Committee
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
lit.	<i>litera/literae</i>
no.	number
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 10 June 1958)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PC	Swiss Penal Code of 21 December 1937 (SR 311.0)
PILA	Swiss Private International Law Act of 18 December 1987 (SR 291)
pKSG	Polish Bankruptcy and Reorganisation Act
PwC	PricewaterhouseCoopers AG
S.Ct.	U.S. Supreme Court
SFT [1A...]	Decisions of the Swiss Federal Supreme Court that are not included in the Official Collection of Decisions (BGE)
SJZ	Schweizerische Juristen-Zeitung, Zurich
SR	Official collection of the Federal Statutes in Switzerland, in systematic order (Systematische Sammlung des Bundesrechts)
Swiss Rules	Swiss Rules of International Arbitration of 1 June 2012
U.S.	United States
WADA	World Anti-Doping Agency
ZK	Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, Zurich
ZR	Blätter für Zürcherische Rechtsprechung, Zurich

Table of contents

Foreword.....	3
Authors	4
Abbreviations.....	5
I. Switzerland – as Arbitration Friendly as It Gets	9
II. Drafting the Arbitration Agreement	32
III. Security for Costs in Swiss International Arbitration.....	48
IV. Arbitration: an Efficient Solution for Multiparty Disputes?	63
V. The Impact of Cross-border Insolvency on International Arbitration: A Swiss View.....	87
VI. Sport Arbitration in Switzerland	92
VII. Appeal in Arbitration Matters to the Swiss Federal Supreme Court	104
VIII. Recognition and Enforcement of Foreign Arbitral Awards in Switzerland – Avoiding Common Pitfalls.....	119
IX. Potential of Evaluative Mediation to Supersede Arbitration in International Commercial Disputes	135
X. Can Labour Law Disputes Be Submitted To Arbitration?	148
XI. Excursion: Arbitration in the U.S. – Mandatory and Inequitable?	157
XII. 10 Reasons for Choosing Arbitration in a U.S. – Swiss Context	177
Dispute Resolution Team.....	194
Annex A: ICC Rules and Standard Clause	195
Annex B: Swiss Rules and Standard Clause	244
Annex C: CAS Rules and Standard Clauses.....	284

I. Switzerland – as Arbitration Friendly as It Gets

By Tamir Livschitz

A. Introduction

In today's globalized world, parties involved in business relationships with a cross-border nexus often wish to resort to arbitration as a means of resolving potential future disputes. While the reasons for choosing arbitration as an alternative dispute resolution process are manifold, the choice of the place of arbitration has played a more and more central role in parties' considerations. This can in particular be explained by the recent emergence of a number of new arbitration hubs like Singapore, Hong Kong and Dubai. They have entered the global arbitration scene to compete against traditional arbitration hubs such as Paris, London, Stockholm, New York, Zurich and Geneva.

The place of arbitration (also referred to as the seat of the arbitral tribunal) is generally understood as "a definable place that commits the parties (i) to the arbitral procedure, the arbitral tribunal and a particular arbitration law (*lex arbitri*), (ii) to a forum for judicial assistance in support of the arbitration, and (iii) to State courts of a particular country for recourse against the award".^{1,2}

Hence, the parties' choice of a place of arbitration is essentially a choice of the legal framework that shall govern their arbitral procedure. When choosing such framework, parties can be expected to opt for an arbitration-friendly

¹ BERGER BERNHARD/KELLERHALS FRANZ, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, para. 740.

² To be sure, the place of arbitration does not necessarily need to correspond with the venue where the actual hearings of the arbitration proceeding will take place. Based on practical aspects such as convenience of location and availability of infrastructure such venue may be determined by the arbitral tribunal, in consultation with the parties, to be at a geographically different place than the place of arbitration. However, in practice and in particular if one of the reputable arbitration hubs is chosen, the place of arbitration will often correspond with the actual venue where the arbitration hearings take place.

framework, which will ordinarily provide for the following three fundamental aspects: (i) full support of arbitration proceedings, (ii) avoidance of any non-warranted interference with arbitration proceedings, and (iii) full deference by State courts to the results of arbitration proceedings.

Traditionally, Switzerland has been amongst the premier hubs for arbitration and enjoys a reputation of being one of the world's friendliest places for it. Not surprisingly, an analysis of the framework it provides in arbitration matters reveals that, in terms of the above outlined parameters, such reputation is well deserved indeed.

B. Full Support of Arbitration Proceedings in Switzerland

1. Few Obstacles for Arbitration

Arbitral tribunals seated in Switzerland that deal with a dispute where at least one party has its residence or place of business outside Switzerland, are governed by the 12th chapter of the Swiss Private International Law Act (PILA).³ Such 12th chapter of the PILA contains 19 articles in total, which on its face already provides a clear indication of Switzerland's unintrusive approach towards arbitration. This law greatly defers to party autonomy when modeling the arbitral procedure to apply to any potential future dispute.

The law stipulates only two prerequisites⁴ that must be met for a dispute to be validly submitted to arbitration in Switzerland: (i) the subject matter of the dispute must be deemed arbitrable and (ii) the agreement to arbitrate must meet certain minimum criteria of form and substance. Generally, both of these prerequisites should not constitute serious obstacles for the submission of a dispute to arbitration.

³ This article does not deal with domestic arbitration in Switzerland, which is governed by the Swiss Code of Civil Procedure. Art. 176 para. 2 PILA grants the parties to an international arbitration dispute the possibility to have the provisions on domestic arbitration of the Swiss Code of Civil Procedure apply in lieu of the provisions of the 12th chapter of the PILA. In practice this option is however only rarely chosen.

⁴ Excluding any questions of legal capacity on the end of the parties concluding the arbitration agreement.

1.1 Broad Definition of Arbitrability

An arbitral tribunal with seat in Switzerland will apply Swiss law to determine whether a dispute is arbitrable or not, regardless of the law that applies to the subject matter of the dispute (i.e. the contract). Swiss law provides for a broad definition of disputes deemed arbitrable. According to art. 177 para. 1 PILA any dispute of financial interest may be the subject of an arbitration procedure, whereby the term “financial interest” comprises any claim that “ultimately pursues an economic purpose”.⁵

Importantly, the broad interpretation of the term “financial interests” as a prerequisite for a dispute being deemed arbitrable under art. 177 para. 1 PILA does not *per se* exclude certain pre-determined areas of law from the ambit of arbitration. Thus, in addition to all kinds of commercial disputes, also real estate matters and shareholder disputes are in principle deemed arbitrable, unlike in certain other countries. Similarly, monetary claims in family and inheritance law, monetary claims relating to intellectual property and competition as well as antitrust law will, as a rule, be deemed arbitrable in Switzerland.⁶

This broad definition of arbitrability opens the door for a wide array of disputes to be resolved by arbitration and, hence, serves as a further element of Switzerland’s friendly approach towards arbitration.⁷

1.2 Limited Minimum Requirements for an Agreement to Arbitrate

The second prerequisite stipulated by Swiss law for the valid submission of a dispute to arbitration are the minimum requirements of form and substance that arbitration agreements must meet. Parties submitting their dispute to arbitration waive their right to have such dispute heard and decided by a State court, which in Switzerland is a right enshrined in its constitution.⁸ The waiver of a constitutional right cannot be assumed lightly and an arbitration proceeding as alternative dispute resolution mechanism should not be imposed on any party that did not freely accept arbitration as an alternative process to

⁵ BGE 108 II 778 cons. 1a.

⁶ BERGER/KELLERHALS, *supra* footnote 1, para. 207 et seq. For the sake of completeness it should be noted that the definition of arbitrability in Swiss domestic arbitration being governed by the Swiss Code of Civil Procedure is narrower than its understanding in international arbitration matters governed by the PILA.

⁷ BGE 118 II 353 cons. 3a.

⁸ Art. 30 Federal Constitution.

ordinary State court litigation.⁹ It is for this reason that the law stipulates minimum requirements of form and substance to ensure the parties' common intent to waive their constitutional right of State court litigation for arbitration. On the other hand, while a duly protection of constitutional rights must be ensured, an arbitration-friendly regime must be sure not to impose unnecessary requirements that create serious obstacles for a matter to be referred to arbitration.

The regime enacted by the Swiss legislator fully caters to both interests described above. While parties that choose to arbitrate in Switzerland must – in terms of their arbitration agreement – observe certain minimum criteria both of form and substance, these criteria will generally not affect the ease with which parties can submit their disputes to arbitration.

1.2.1 Criteria on Form

Pursuant to art. 178 para. 1 PILA an arbitration agreement must be made in writing, by telegram, telex, facsimile or any other means of communication which permits it to be evidenced by text. Thus, Swiss law does, strictly speaking, not require any signature of the arbitration agreement by the parties for as long as the parties' agreement to arbitrate can otherwise be evidenced based on written documents. The flexible form requirements stipulated by Swiss law confirm for instance that an arbitration clause contained in general terms and conditions which is incorporated by written reference will, generally,¹⁰ suffice to meet the formal prerequisites stipulated by law.¹¹

Regardless, one will always be well advised to avoid any kind of uncertainty when it comes to the question of whether the formal requirements of the arbitration agreement and the minimal requirements on substance are met. Thus, parties wishing to agree to arbitration in Switzerland should always ensure that their agreement is clearly evidenced by written documents stemming from both parties. Both parties properly signing the agreement would certainly be the easiest and most advisable way to do so.

⁹ BGE 140 III 134 cons. 3.2.

¹⁰ Practically speaking and barring any extraordinary circumstances, this will almost always be the case amongst experienced business parties.

¹¹ SFT 4P.113/2001 of 11 September 2001; 4P.126/2001 of 18 December 2001; 4P.230/2000 of 7 February 2001; BERGER/KELLERHALS, *supra* footnote 1, para. 465 et seq. Note, however, when incorporating an arbitration clause by global reference, the contract containing the reference should be signed by the parties (BGE 121 III 38).

1.2.2 **Criteria on Substance**

Art. 178 para. 2 PILA contains the minimum requirements on substance an arbitration agreement must meet. The requirements on substance are put in place to ascertain whether or not the parties have indeed had a common intent in the submission of their dispute to arbitration. An arbitration agreement will be deemed valid if it displays the legal requirements for a mutual party intent. These must be met based on the requirements established either (i) by the law chosen by the parties to specifically govern the arbitration agreement, or (ii) by the law governing the subject matter of the dispute (i.e. in general the underlying contract), or (iii) by Swiss law.

While in practice parties will rarely choose a specific law to govern their arbitration agreement (as opposed to the law governing the underlying contract), the two other alternatives being offered by art. 178 para. 2 PILA often prove to be invaluable in affirming the valid conclusion of an arbitration agreement. The approach chosen by the Swiss legislator ensures that, for instance, even if an arbitration agreement were not deemed valid under the law governing the subject matter of the dispute, the arbitration agreement could nevertheless be valid if the parties' intent to arbitrate can be confirmed based on Swiss law principles (being the more arbitration benevolent law in this example). The possibility to assess the validity of arbitration agreements on substance based on three alternative laws, or rather based on the most favorable amongst the three laws, shows the preferential treatment arbitration enjoys in Switzerland.

In practice, to confirm the validity of an arbitration agreement on substance it is advisable to have the following aspects covered by the parties' mutual intent:¹²

- the parties' common intent to submit a dispute or parts thereof to arbitration (including a description of such dispute), thereby unequivocally derogating the competence of State courts to decide such dispute;

¹² Strictly speaking, only the first two of the following elements are *essentialia* that must be covered by the parties' mutual intent. However, to avoid possibly lengthy discussions and disputes all of the following elements should be covered by the parties' arbitration agreement.

- the arbitral tribunal to which the dispute is to be submitted;¹³
- the place of arbitration (i.e. the place where the arbitral tribunal shall have its seat), defined as a specific city such as Zurich or Geneva and not by mere reference to a country only;
- the number of arbitrators (regularly either one sole arbitrator or a panel of three arbitrators);¹⁴ and
- the language in which the arbitration proceeding shall be conducted.

Practically speaking, the foregoing shows that Swiss law does not put any significant obstacles in the way of parties that wish to submit their dispute to arbitration.

2. Comprehensive Dispute Resolution by way of Arbitration

For arbitration to be an efficient means of dispute resolution, it must resolve all facets of such disputes as comprehensively as possible. While an agreement to arbitrate will ordinarily be concluded between two parties, contractual disputes do often not remain limited to the contractual parties, but extend to third parties (e.g. parties to which one of the contractual parties may wish to take recourse) or to related contracts. The comprehensive resolution of a dispute may in such cases often require to extend the scope and applicability of the arbitral proceeding (and thus of the underlying arbitration agreement) onto third parties or third contracts, respectively.

Catering towards the need of a comprehensive dispute resolution, Swiss court practice has developed principles which allow – under certain circumstances – for an extension of an arbitration agreement to third parties or third contracts.

The approach adopted by Swiss court practice in this respect is two-tiered. Firstly, the existence of a manifest expression of the parties' common will to arbitrate in the requisite form and substance – as discussed above – must be verified in a strict manner. This ensures that an agreement to arbitrate, which

¹³ According to the practice of the Swiss Federal Supreme Court the arbitral tribunal designated to resolve the dispute should either be clearly defined or at least determinable (BGE 130 III 66).

¹⁴ Should the parties wish to deviate from the procedure foreseen by the PILA to appoint arbitrators (art. 179 para. 2 PILA), the procedure how to appoint the arbitrators, e.g. by reference to certain institutional rules or another procedure, should also be covered by the party agreement.

entails the parties' waiver of their constitutionally guaranteed right to have their dispute resolved before a State court, is not taken lightly.¹⁵

Once the parties' common will to arbitrate is confirmed, the scope of the arbitration agreement will be interpreted liberally and broadly.¹⁶ This may allow for the scope of the arbitration agreement to include third parties and contracts closely related to the dispute for the purpose of comprehensively resolving the dispute without the need of multiple court proceedings.¹⁷ However and to be sure, a possible extension of an arbitration agreement to third parties or other contracts will always need to be assessed on a case-by-case basis, taking into account the specific circumstances of the case.

3. Active Assistance of State Courts in Arbitration Proceedings

3.1 Appointment of Arbitrators by the State Court (*juge d'appui*)

When called upon, active assistance to arbitration proceedings is readily made available by Swiss courts. Such assistance constitutes a separate pillar of Switzerland's support of arbitration. In particular the Swiss courts' assistance in the appointment of arbitrators and the grant of interim relief are the two central aspects of practical significance.

Art. 179 para. 2 PILA states that the State court at the place of arbitration may be seized by the parties (or one of them) to appoint the arbitrators of an arbitration proceeding if the parties failed to designate such arbitrators – whether in their arbitration agreement (e.g. directly or by reference to institutional rules of arbitration, or by providing for an alternative mechanism or authority to appoint the arbitrators) or thereafter.

The applicability of art. 179 para. 2 PILA and hence the possibility to seize the State court at the place of arbitration does not only apply if no party agreement exists as to how or by whom the arbitrators are to be designated. The State court can also be seized by the parties if the terms of appointment contemplated by the parties prove to be flawed, inoperative or incapable of being performed.¹⁸ This is of particular significance in case of ad hoc arbi-

¹⁵ *E.g.*, BGE 140 III 134; 128 III 50.

¹⁶ BGE 140 III 134.

¹⁷ BGE 116 Ia 56.

¹⁸ BSK IPRG-PETER/LEGLER, art. 179 para. 19; ZK IPRG-VISCHER, art. 179 para. 17.

trations,¹⁹ where no arbitration institution was designated to administer the arbitral proceeding and the State court at the place of arbitration must step in to overcome such problems. This will be the case if one of the parties fails to appoint its arbitrator or, in case of a panel of three arbitrators, if the two party appointed arbitrators fail to agree on a third arbitrator to chair the arbitral panel.

Hence, on the one hand the assistance of the State court is made available to efficiently and smoothly establish an arbitral tribunal if the parties have failed to designate a (valid) process for such purpose. On the other hand such assistance serves to prevent the possibility of one party obstructing the arbitration proceedings by failing to cooperate in the establishment of the arbitral tribunal.

To benefit from art. 179 para. 2 PILA, it is important that the parties clearly state the place of arbitration in their arbitration agreement. Otherwise the determination of the place of arbitration and thus of which State court, if any, is competent to be seized for assistance in relation to the appointment of arbitrators may prove very difficult and potentially time consuming.²⁰ In this respect, one should in particular take note that mere reference to “arbitration in Switzerland” will likely create major problems in the designation of a place of arbitration. As already stated above, parties are well advised to designate a concrete place of arbitration such as Zurich or Geneva.

3.2 Grant of Interim Relief by State Courts

The second core aspect of State court assistance in arbitration concerns the grant of interim relief. The need for interim relief arises in arbitration proceedings as much as it does in ordinary State court litigation. Often, interim relief will be necessary in order to avoid compromising the subject matter of a dispute. In this respect, it should first be mentioned that Swiss law allows for an arbitral tribunal to grant interim relief.²¹ In order for an arbitral tribunal to be able to grant interim relief, it must be established and in a position to deal

¹⁹ Assuming that the parties have in their arbitration agreement not referred to the UNCITRAL Rules on arbitration, which contain provisions on the appointment of arbitrators that apply if such rules are referred to.

²⁰ See BERGER/KELLERHALS, *supra* footnote 1, para. 754 et seq. and 819 et seq. with further details on the variety of potential problems that may arise in this respect.

²¹ Art. 183 para. 1 PILA.

with the motion for interim relief. Under various institutional arbitration rules, not even such prerequisite must be met as they provide for the possibility to call on a so called emergency arbitrator to grant interim relief even before the arbitral tribunal has been formally established in accordance with the applicable institutional rules.²² However, institutional rules and the use of an “emergency arbitrator” are only applied if such rules were explicitly declared applicable by the disputing parties, be it in their arbitration agreement or otherwise.

Notwithstanding the general power of an arbitral tribunal to grant interim relief, there are various reasons why the assistance of State courts in connection with interim relief is of critical importance. The most prominent of reasons is that interim relief that is ordered by arbitral tribunals is not directly enforceable (at least not without involvement of the State courts),²³ and hence only effective if voluntarily complied with by the parties. Moreover, if third parties are affected by provisional measures – e.g. banks in case of freezing orders – the arbitral tribunal has no competence and thus no basis to issue binding and enforceable orders to such third parties, since the latter will normally not be part of the arbitration agreement and therefore not be bound thereby. Bearing in mind that interim relief is generally connected with matters of urgency, an immediate enforceability is fundamental and an indispensable prerequisite for interim relief to fulfill its purpose. Furthermore, for interim relief to fulfill its purpose it will often need to be given *ex parte*, without hearing the counter party. However, unless the specific applicable institutional rules of arbitration expressly provide otherwise,²⁴ arbitral tribunals will in general not grant interim relief *ex parte*, but only once the counterparty is heard. Naturally, this makes the assistance of State courts even more important because they can grant *ex parte* relief.²⁵

In practice, a party will therefore in many instances apply for interim relief before the State court, in particular in case of urgency. In this respect it is

²² *E.g.* art. 43 of the Swiss Rules of International Arbitration.

²³ Art. 183 para. 2 PILA. POUURET JEAN-FRANÇOIS/BESSON SÉBASTIEN, *Comparative Law of International Arbitration*, 2nd ed., London 2007, para. 606 et seq., in lieu of many.

²⁴ *E.g.* art. 26(3) of the Swiss Rules of International Arbitration.

²⁵ BORN GARY B., *International Commercial Arbitration*, 2nd ed., Alphen aan den Rijn 2014, p. 2509; FRY JASON/GREENBERG SIMON/MAZZA FRANCESCA, *The Secretariat’s Guide to ICC Arbitration*, Paris 2012, paras. 3–1040.

noteworthy that in Switzerland a party applying for interim relief before a State court is not deemed to be in breach of the arbitration agreement notwithstanding that such agreement, in principle, derogates the jurisdiction of the State court to hear the dispute.²⁶ The application for interim relief before a State court is therefore fully in line with an applicable arbitration agreement and a party reverting to a State court for interim relief needs not fear any repercussions for breach of the arbitration agreement.

Thus, disputing parties in Swiss arbitration proceedings can, just as in ordinary State court litigation, benefit from the entire array of interim relief available under Swiss domestic law,²⁷ and Swiss law generally provides the necessary tools to prevent most situations that could compromise the subject matter of the arbitration proceeding.

4. Interim Conclusion

Easy access and a comprehensive resolution of disputes by way of arbitration in Switzerland is ensured by (i) the broad range of disputes deemed arbitrable in Switzerland, (ii) the limited minimum requirements on form and substance that apply to arbitration agreements, and (iii) the broad and liberal interpretation of an arbitration agreement's scope, which allows for an extension onto third parties and related disputes.

In addition, active assistance readily made available by State courts both in connection with the constitution of an arbitral tribunal and with the grant of interim relief to preserve the parties' interests in the arbitral proceeding ensure proper, functioning and efficient arbitration proceedings in Switzerland.

²⁶ POUURET/BESSON, *supra* footnote 23, para. 611, in lieu of many.

²⁷ In case of interim relief requested from the arbitral tribunal, even interim relief not known under Swiss law may theoretically be granted (in contrast to interim relief from State courts). However, this may prove problematic when it comes to enforcement of such measures should the counterparty not voluntarily comply.

C. Protection from Unwarranted State Court Interference

1. General

As shown so far, Switzerland has adopted a policy favoring and, where necessary, actively supporting arbitration. A truly preferential treatment of arbitration requires, however, not only an active support by the State authorities, but at times also a protection from such State authorities' unwarranted interference. This is of particular practical relevance when one of the parties bound by an arbitration agreement attempts, for strategic or other reasons, to avoid arbitration by first reverting to State court litigation.

As a deterrent against such improper conduct, arbitral tribunals in Switzerland are given priority over ordinary State courts when the latter are called on in lieu of the commencement of arbitral proceedings relating to matters falling within the ambit of an arbitration agreement. Furthermore, the Swiss legislator has enacted legislation providing for a complete disconnect between foreign proceedings a party may attempt to initiate in violation of an arbitration agreement and any Swiss arbitration proceeding pending or to be initiated in the same matter. Such disconnect ensures that the Swiss arbitration proceedings remain entirely unaffected from any blocking action intended by the initiation of foreign proceedings.

2. Priority of Arbitral Tribunals – a Policy Decision in Favour of Arbitration

2.1 *The Principle of Kompetenz-Kompetenz and the Problem Connected Therewith*

Arbitration agreements are interpreted broadly in Switzerland. Ordinarily, they also cover any question on the validity of the arbitration clause itself or the validity of the contract featuring the arbitration clause.²⁸ Hence, an arbitral tribunal may determine its own competence to hear a case, a principle generally referred to as *Kompetenz-Kompetenz*. The applicability of this principle to arbitral tribunals is recognised by many countries and applies in Switzerland by virtue of law.²⁹

²⁸ BSK IPRG-GRÄNICHER, art. 178 para. 35.

²⁹ Art. 186 para 1 PILA.

The principle of *Kompetenz-Kompetenz* ensures that when questions on the scope of the arbitration clause arise or where the existence or validity of an agreement to arbitrate is contested, the arbitral tribunal will itself rule on such matters rather than suspend proceedings and refer the matter to the State courts. The principle of *Kompetenz-Kompetenz* ensures an uninterrupted and thus efficient arbitral proceeding.

But what happens if, despite the existence of an arbitration agreement, a party first seizes a State court to hear the case? The principle of *Kompetenz-Kompetenz* not only applies to arbitral tribunals but also to State courts in Switzerland. Hence, based on this principle, a State court in Switzerland would be perfectly entitled to determine its own competence to hear the case. If faced with an arbitration agreement, the State court would first, as a preliminary question to its competence, need to determine the validity and applicability of the arbitration agreement to the dispute in question. If answered in the affirmative, the State court would decline its jurisdiction to hear the case. If answered in the negative, the State court would, assuming all other requirements being met, confirm its competence and proceed to hear the case on the merits.

Should the State court reject its jurisdiction due to the existence of a valid and applicable arbitration agreement, the arbitration agreement would not be affected and the parties would have to call on the arbitral tribunal to hear the case (or any issues relating to the validity or applicability of the arbitration agreement).³⁰

However, should the State court in the above constellation affirm its jurisdiction, which presupposes that it has found the arbitration agreement invalid or inapplicable to the case at hand, such a decision would conclusively decline the competence of the arbitral tribunal to hear the case. An arbitral tribunal cannot, by law, hear a case in parallel to a State court.³¹ If the State court affirming its jurisdiction is located in Switzerland, a Swiss arbitral tribunal will

³⁰ BGE 120 II 155.

³¹ By submitting a dispute to arbitration, it is exactly such State court's competence that is derogated and replaced by the exclusive competence of the arbitral tribunal (leaving questions of residual competences of State courts aside, see, e.g., SFT 4A_240/2012 of 20 August 2012).

always need to respect the final decision of a Swiss state court.³² Moreover, if the decision affirming jurisdiction and thus declining the validity or applicability of the arbitration agreement is made by a foreign State court, a Swiss arbitral tribunal will have to defer to such a decision if this decision is recognizable in Switzerland based on the requirements stipulated by law.³³

Hence, if a Swiss State court decided to confirm its jurisdiction to hear the case, the fate of the arbitration agreement would be doomed, without regard to the *Kompetenz-Kompetenz* of the arbitral tribunal.

2.2 Negative Kompetenz-Kompetenz as a Means Against Undue Delay and Outside Interference

The above depicts the potential failure to take into consideration the *Kompetenz-Kompetenz* of an arbitral tribunal, when a State court seized first affirms its jurisdiction on the basis of its own *Kompetenz-Kompetenz*. But why does it matter which of the two, i.e. the State court or the arbitral tribunal, first review the validity and/or applicability of the arbitration agreement? Clearly, both of them must apply the same principles when reviewing questions of validity and applicability of an arbitration agreement and, in principle, a State court should be perfectly able to apply the law correctly. Even though in principle this may hold true, practice has shown that not every State court has the same extent of expertise when it comes to arbitration matters. Such lack of expertise may result in faulty decisions, which, even if overturned on appeal, could in practice considerably delay the arbitration proceedings. And it is exactly such potential of delay that is considered one of the major obstacles for arbitration, as it significantly undermines the reputation of arbitration as a valid and time-efficient alternative to ordinary State court litigation.

³² BGE 120 II 155; POUURET/BESSON, *supra* footnote 23, para. 515; BSK IPRG-SCHOTT/COURVOISIER, art. 186 para. 12 et seq.

³³ See art. 25 et seq. PILA on the requirements for recognition in Switzerland of a foreign State court decision. Pursuant to the practice of the Swiss Federal Supreme Court (BGE 124 III 83) the proper jurisdiction and thus, the proper interpretation of the arbitration agreement based on art. II no. 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 by the State court are, in principle, reviewed in the Swiss recognition and enforcement proceeding, unless a bi- or multilateral convention to which Switzerland has acceded applies and states otherwise (e.g., questionable in connection with the Lugano Convention).

It is for this reason that Swiss court practice has established principles favoring arbitration over State court litigation, at least where the parties have agreed on arbitration seated in Switzerland. When a State court's jurisdiction is contested based on the existence of an arbitration agreement, Swiss court practice directs any State court seized to refer the matter for review to the arbitral tribunal stipulated in the arbitration agreement in question, if the arbitration agreement on its face appears to be valid and capable of being performed by the parties.³⁴ Put differently, even in case of doubt, a State court must refrain from reviewing the arbitration agreement and refer the matter to arbitration. Such priority to first review the arbitration agreement is commonly referred to as the negative effect of *Kompetenz-Kompetenz*, which Switzerland, as one of very few countries, has implemented for the benefit of arbitral tribunals seated within Switzerland.

Essentially, this means that even if a party contests the validity or applicability of an arbitration agreement, it will need to initiate arbitration proceedings. This is because the arbitral tribunal foreseen in such arbitration agreement will remain the competent judicial body to review that specific question and rule on the merits of such contestation. Such priority given to the arbitral tribunal should, hence, compromise any motivation and deter parties from any attempts to avoid or interfere with the arbitral proceedings by (illegitimately) calling on a Swiss court in matters subject to arbitration in Switzerland.

3. Exemption from Applicability of Rules on *lis pendens*

3.1 Introduction of art. 186 para. 1bis PILA

It has been shown that the implementation of the negative effect of *Kompetenz-Kompetenz* for arbitral tribunals with seat in Switzerland serves to avoid the circumvention of arbitration agreements and, consequently, is set to avoid undue delay and interference with the arbitral proceedings.

³⁴ BGE 122 III 139; confirmed by SFT 4A_119/2012 of 6 August 2012, confirming the negative effect of *Kompetenz-Kompetenz* in the application of art. 7 PILA, which applies, however, only to arbitration agreements providing for a place of arbitration within Switzerland. The negative effect of *Kompetenz-Kompetenz* does not apply to arbitration agreements providing for a place of arbitration outside Switzerland (BGE 121 III 38). For the contemplated alignment of the situation for arbitration agreements providing for a place of arbitration within and outside Switzerland *de lege ferenda*, see the "Lüscher Initiative" of 20 March 2008 (no. 08.417).

What happens, however, if a party to an arbitration agreement attempts to avoid such agreement by initiating State court proceedings outside Switzerland where, often, the negative effect of *Kompetenz-Kompetenz* will not be recognized and where arbitral tribunals will not be favored over State courts?

In order to address such a situation and further support the protection of arbitration proceedings in Switzerland, the Swiss legislator has enacted art. 186 para. 1bis PILA. Such provision provides for a complete disconnect between any pending foreign State court proceedings³⁵ and arbitral proceedings initiated in Switzerland between the same parties on the same subject matter.

Art. 186 para. 1bis PILA expressly stipulates that a party subject to an agreement to arbitrate can seize an arbitral tribunal in Switzerland even though a foreign State court was seized first in the same dispute between the same parties. Barring any exceptional circumstances, the Swiss arbitral tribunal has no obligation to defer to the proceedings before the foreign State court. It is neither deprived from continuing the arbitral proceedings, nor from rendering any preliminary or final ruling. Hence, art. 186 para. 1bis PILA compromises any attempts to circumvent an arbitration agreement by initiating ordinary State court proceedings before a foreign State court, because such initiation will not halt or otherwise detrimentally affect the arbitration proceeding in Switzerland (whether ongoing or yet to be commenced).

The introduction of art. 186 para. 1bis PILA is a clear statement in support of the priority given in Switzerland to arbitral tribunals as it ascertains the uninterrupted conduct of arbitration proceedings in Switzerland. The priority granted to arbitral tribunals by art. 186 para. 1bis PILA becomes even more clear considering the situation described above where a foreign State court was seized first with the same dispute between the same parties. In this case, a Swiss State court would need to halt its proceedings if the rendering of a decision on jurisdiction by the foreign State court first seized could be expected to occur in a timely manner and if such decision on jurisdiction could be recognized in Switzerland.³⁶ This principle is ordinarily referred to as the

³⁵ The same applies with regard to possible arbitration proceedings initiated abroad (art. 186 para. 1bis PILA).

³⁶ Art. 9 para. 1 PILA. Should the foreign State court affirm its jurisdiction, the Swiss State court would have to terminate its proceedings, while if the foreign State court would reject its jurisdiction, the proceedings before the Swiss State court could be resumed.

rules on *lis pendens*, which, succinctly put, intend to avoid contradictory decisions from different authorities in the same dispute between the same parties.

3.2 Explicit Reversal of Prior Arbitration Hostile Court Practice

The enactment of art. 186 para. 1bis PILA (effective 1 March 2007) provides protection of Swiss arbitral proceedings from outside interference through the commencement of preceding legal action before a foreign State court. Prior to art. 186 para. 1bis PILA, the above rules on *lis pendens* and the deference given thereby to foreign State court proceedings commenced before the arbitral proceedings were held by Swiss courts to apply and bind arbitral tribunals in Switzerland.³⁷ The fact that with the enactment of art. 186 para. 1bis PILA the Swiss legislator overruled the Swiss Federal Supreme Court's hostile arbitration court practice is clear evidence that Switzerland is committed to protecting Swiss arbitration proceedings from undue outside influence and to supporting the priority of arbitral tribunals in Switzerland.

While the derogation of the rules on *lis pendens* for arbitration matters may seem theoretical in nature, it has important practical implications. Imagine the following example: For tactical or other reasons, a foreign party may attempt to avoid an arbitration agreement by initiating State court proceedings at its place of business outside Switzerland. When faced with the arbitration agreement, the foreign State court will determine the existence, validity and applicability of such agreement based on its own local laws. Compared to Switzerland, most foreign laws will have more strenuous requirements on the existence, validity and/or applicability of arbitration agreements. Often, this will be the very reason for the commencement of foreign State court proceedings, as the party attempting to avoid arbitration will count on the strenuous local laws to have the arbitration agreement declared invalid or at least non applicable. While the ultimate decision of a foreign State court can, of course, never be predicted, it is clear that the decision finding process on the part of the foreign State court will often be time consuming³⁸ at least.

³⁷ BGE 127 III 279 (Fomento).

³⁸ This may be the case both due to a possible complex fact pattern that may apply to the case at hand or due to massive delays of judicial proceedings in certain foreign States (the latter commonly being referred to as "Italian torpedo").

If, in the above example, the rules on *lis pendens* applied to a Swiss arbitral tribunal before which proceedings had in the interim been commenced, it would have to halt its proceedings in deference to the State court first seized until the latter would decide on its competence.³⁹ This would, at best, massively delay the arbitral proceeding and possibly even frustrate such proceeding all together, rendering it redundant. Hence, the exemption of arbitration from the applicability of the rules on *lis pendens* serves as a formidable tool for the Swiss arbitral tribunal to render any (illegitimate) attempts of circumvention or delay of the arbitration proceeding ineffective.

In sum, art. 186 para. 1bis PILA together with the negative effect of *Kompetenz-Kompetenz* applied by Swiss court practice are effective tools to protect arbitration proceedings in Switzerland from unwarranted outside interference. They also cater towards an uninterrupted, proper and efficient arbitration proceeding that the parties envisioned when they agreed to have their disputes adjudicated by an arbitral tribunal seated in Switzerland.

D. Deference to Results of Arbitration Proceedings

1. General

It is crucial that the results of arbitration proceedings are respected by State courts and not subject to review on the merits other than within the very limited boundaries of certain fundamental procedural and material guarantees ensuring due process and compliance with a country's principles of public policy. Anything else would clearly interfere with the parties' intent to have their disputes finally resolved by way of arbitration and would therefore harm the notion of arbitration as a valid alternative to State court litigation.

The rules adopted by the Swiss legislator and court practice can also in this regard be seen as a premier example of an arbitration friendly framework. In Switzerland an arbitral award is, in principle, deemed final. This is not only expressed in art. 190 para. 1 PILA, but also by the fact that a challenge of the arbitral award will, barring any decision by the appeals court to the contrary,

³⁹ In practice it will, regardless of any reputation to the contrary, be difficult to argue before a Swiss State court – being subject to the rules on *lis pendens* – that the proceedings need not be halted as the decision of the foreign State court first seized would not be recognisable or would not occur in a timely manner.

not suspend the effect and enforceability of the arbitral award.⁴⁰ Moreover, the appeals court not only has restricted powers of review based on applicable law, but in practice it has shown reluctance to interfere with arbitration proceedings and their results. An appeal of an arbitral award has, thus, from the very outset very little chance of success.

2. Limited State Court Review in Appeal Proceedings

Swiss law provides for only a very restricted number of grounds on which arbitral awards may be appealed. If all parties to the dispute have their domicile or place of business outside Switzerland,⁴¹ the disputing parties may even waive any possibility at all to appeal an arbitral award.⁴² Such waiver can either be outlined in the arbitration agreement or be made subsequently by written declaration of the parties. Mere reference in an arbitration agreement to institutional rules that provide for such waiver of an appeal do, however, not suffice to validly waive the appeal. The waiver must, given its implications, be made expressly by the parties.⁴³

If the appeal of an arbitral award has not been excluded by the parties, the very restrictive grounds for appeal provided by Art. 190 para. 2 PILA are: (i) the irregular composition of the arbitral tribunal, (ii) an incorrect decision on jurisdiction, (iii) the fact that the arbitral tribunal rendered a decision beyond the claims made by the parties or did not answer all claims raised, (iv) the violation of equal treatment of the parties or their right to be heard, and (v) a violation of the (procedural or substantive) principles of public policy.⁴⁴

The restrictive list provided by art. 190 para. 2 PILA and the nature of the grounds based on which arbitral awards may be challenged reflects the clear

⁴⁰ Art. 77 para. 2 FSCA in connection with art. 103 FSCA.

⁴¹ For this possibility to apply, no party may have its domicile, place of business, ordinary stay or branch in Switzerland.

⁴² Art. 192 para. 1 PILA.

⁴³ BGE 116 II 639.

⁴⁴ Apart of the setting aside proceedings pursuant to art. 190 para. 2 PILA Swiss court practice also recognises the possibility of revision of an award (i) in case the decision of the arbitral tribunal was affected by a criminal offence or (ii) if new facts or new evidence are discovered at a later date, which however the aggrieved party was unable to present without fault in earlier proceedings (art. 123 BGG; BGE 118 II 199; 134 III 286). In practice, the recourse of revision is of very limited applicability.

message of the Swiss legislator that an interference with arbitral proceedings and an annulment of arbitral awards are only permissible in circumstances where principles of equity and fairness are not complied with or where the arbitration proceeding conflicts with fundamental principles considered public policy in Switzerland. While Swiss law does not provide for a legal definition of public policy,⁴⁵ public policy is according to court practice deemed violated if “fundamental legal principles are disregarded and a decision is therefore incompatible with the generally recognized values that according to the prevailing view in Switzerland should form the foundation of any legal order”.⁴⁶ It becomes clear from this description that a violation of public policy cannot be easily assumed. This is confirmed by the fact that since inception of the PILA the Swiss Federal Supreme Court has only in two instances overruled arbitral awards on grounds of a violation of public policy.⁴⁷ Even if an award were to be blatantly arbitrary, such arbitrariness would in and of itself not suffice to qualify as a violation of Swiss public policy and would thus not constitute valid grounds to challenge and set aside an arbitral award.⁴⁸

Apart from these restrictive grounds of appeal, the chances of an appeal’s success are further diminished by the fact that the appeals court’s powers of review are very much restricted. Appeals lodged on the basis of an incorrect decision on jurisdiction are reviewed with unlimited powers of review.⁴⁹ In contrast, the review of appeals brought based on all other grounds listed in art. 190 para. 2 PILA occurs within a limited scope. Such limited scope does not allow for the review and re-assessment of the facts underlying the case. That means that the grounds called on for the appeal will need to be established, and then reviewed by the court on appeal, based on the factual find-

⁴⁵ According to court practice, the principles of *pacta sunt servanda*, expropriation without compensation, prohibition of discrimination, prohibition of the abuse of rights, forced labour and the protection of persons without legal capacity are regarded as public policy principles in Switzerland, such enumeration, however, not being exhaustive (BGE 132 III 389; 128 III 191).

⁴⁶ BGE 132 III 389.

⁴⁷ SFT 4A_558/2011 of 27 March 2012, where the right of personality pursuant to art. 27 of the Civil Code was also recognized as a principle of public policy to the extent there is a severe violation. In BGE 136 III 345, the Swiss Federal Supreme Court has rendered a decision overruling an award based on a violation of procedural public policy (*res judicata*).

⁴⁸ BGE 121 III 331.

⁴⁹ BSK BGG-KLETT, art. 77 para. 10.

ings of the arbitral tribunal, even though those factual findings will often be at the very heart of why a party would consider to lodge an appeal⁵⁰ in the first place. It is therefore not surprising that statistically speaking appeals lodged due to an arbitral tribunal having rendered an incorrect decision on its competence to hear the case are the ones that have the highest (albeit still extremely low)⁵¹ chances of success.

In addition to the very restrictive grounds of appeal in Switzerland, which *de facto* ensure in most cases the finality of the arbitral award, any appeals lodged against arbitral awards in Switzerland are also handled in a time efficient and consistent manner by the appeals court. Such efficient handling contributes greatly to avoid any undue delays and furthers the reputation and the attractiveness of arbitration as a valid alternative to ordinary State court litigation.

The swift handling of appeal proceedings is as important as the consistency of such proceedings in arbitration matters. Switzerland ensures a uniformity in the review of arbitral awards and the development of a consistent court practice by having only one instance for appeals of arbitral awards, which is the Swiss Federal Supreme Court, the highest court in Switzerland.⁵² Thus, arbitral awards are always reviewed by the same State court, ensuring consistency. The Swiss Federal Supreme Court also ascertains that the judges reviewing arbitral awards not only have the requisite expertise in arbitration matters but also a proper understanding of the restricted grounds for appeal. Moreover, having one appeals court ensures efficient and timely appeal proceedings. A Swiss Federal Supreme Court decision on an appeal of an arbitral award can generally be expected to be rendered within six to eight months from the lodging of the appeal. This is an expedited proceeding compared to other countries in the arbitration world.

Given the above, it does not come as a big surprise that based on available statistical data, the likelihood of an appeal against an arbitral award to be successful (other than by reason of an incorrect decision on jurisdiction)

⁵⁰ BSK BGG-KLETT, art. 77 para. 7. Under exceptional circumstances, new evidence may be considered by the Swiss Federal Supreme Court (BGE 133 III 139).

⁵¹ According to the statistics disclosed in DASSER FELIX/ROTH DAVID, *Challenges of Swiss Arbitral Awards – Selected Statistical Data as of 2013*, ASA Bulletin 2014, pp. 460–466, p. 464 the chances for success are at about 10%.

⁵² Art. 191 PILA and art. 77 FSCA.

amounts to about 7% only.⁵³ It is therefore safe to say that Swiss arbitration proceedings will, as a matter of policy in Switzerland, not be interfered with by the State judiciary, giving full deference to the decision of the arbitral tribunal and, ultimately, to what the parties intended when entering into an arbitration agreement.

3. Limited State Court Review in Enforcement Proceedings

Just as in appeal proceedings, the findings of arbitral awards rendered in Switzerland are generally also respected and deferred to upon enforcement of the awards in Switzerland. The enforcement in Switzerland of arbitral awards rendered by a Swiss arbitral tribunal is rather straightforward. Their enforcement occurs pursuant to the same rules that apply to final and enforceable judgments of Swiss State courts.⁵⁴

Swiss law has two different procedures of enforcement, depending on whether the award concerns monetary or non-monetary claims (i.e. claims for specific performance). Monetary claims are enforced pursuant to the rules set forth in the Federal Debt Enforcement and Bankruptcy Act, while the Swiss Code of Civil Procedure applies to the enforcement of non-monetary claims.

Irrespective of the type of claims, whether monetary or non-monetary, a party wishing to enforce an arbitral award rendered in Switzerland does not need to apply for any kind of certificate of enforceability.⁵⁵ It will generally suffice to present the award itself, along with proof that it was properly notified to the disputing parties, as the document on the basis of which enforcement of the claim is sought.⁵⁶

Of great practical import and irrespective of the nature of the claim to be enforced, it should be noted that the reviewing State court may, as a rule, not review the merits of the arbitral award. Rather, the debtor of the claim may object enforcement based on the following limited grounds only: (i) contestations on the existence or finality of the arbitral award, (ii) claims based on

⁵³ DASSER FELIX/ROTH DAVID, Challenges of Swiss Arbitral Awards – Selected Statistical Data as of 2013, ASA Bulletin 2014, pp. 460–466, p. 463.

⁵⁴ BERGER/KELLERHALS, *supra* footnote 1, para. 2007.

⁵⁵ BGE 107 Ia 320; art. 193 para. 2 PILA provides, however, for the possibility to obtain a certificate of enforcement. Such certificate has only declaratory character.

⁵⁶ BSK SchKG I-STAEHELIN, art. 80 para. 58.

documentary evidence that the debt certified by the award was fully settled in the interim, deferred or has become time barred, or (iii) if the parties opted to waive the possibility to appeal the award as per art. 192 para. 1 PILA (as mentioned above), objections on the basis of any of the limited grounds provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.⁵⁷

In practice, a debtor will rarely be in a position to legitimately object to the enforcement of a claim stipulated in an arbitral award that is rendered in Switzerland. Hence, also in enforcement proceedings in Switzerland,⁵⁸ the State courts grant full deference to the merits of the arbitral award and fully respect the parties' intent to have their dispute resolved with finality through arbitration.

E. Summary

The desire to have a dispute adjudicated by an arbitral tribunal in an efficient, uninterrupted and final manner and not have the arbitral award subsequently subjected to scrutiny of State courts, are two of the central interests of parties reverting to arbitration. A country that wishes to compete as a place for arbitration must ordinarily cater towards these interests and ensure that such interests will not in any way be compromised by the arbitration legislation that applies in such country.

The Swiss legal framework on arbitration fully protects such interests. Not only does its legal framework allow for easy access to arbitration for a wide array of disputes, but it also ensures that arbitral tribunals are given the proper tools to protect arbitration proceedings from unwarranted external interference and delays. These could otherwise detrimentally affect the efficiency and the attractiveness of arbitration as a valid alternative to ordinary State court litigation.

⁵⁷ Art. 81 para. 1 Federal Debt Enforcement Act and art. 341 para. 3 Swiss Code of Civil Procedure; BERGER/KELLERHALS, *supra* footnote 1, para. 2011 et seq.

⁵⁸ Note that arbitral awards rendered outside Switzerland will be enforced in Switzerland pursuant and subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

It is for such reason and premised on objective grounds that Switzerland's legal framework on arbitration can truly be called as arbitration friendly as it gets.

II. Drafting the Arbitration Agreement

By Valerie Meyer Bahar, Martina Madonna-Quadri and Eva-Viola Bohnenblust

A. Introduction

The arbitration agreement, often in the form of an arbitration clause in a contract, is “the cornerstone of the arbitral proceedings”:⁵⁹ The contractual agreement between the parties is the basis for the jurisdiction of the arbitral tribunal.⁶⁰

In this article, we would like to outline legal and practical aspects that should be considered when drafting arbitration agreements, and to highlight pitfalls that should be avoided.

B. Requirements for a Valid Arbitration Agreement

1. Applicable Law

The form and substance of the arbitration agreement are governed by the law governing the arbitration (*lex arbitri*), and must therefore comply with the requirements of this law in order to be valid.⁶¹ In Switzerland, the *lex arbitri* is determined differently depending on whether the arbitration is international or domestic.

International arbitration is defined as proceedings before arbitral tribunals based in Switzerland whereby at least one party has its domicile outside Switzerland at the time of the conclusion of the arbitration agreement. It is

⁵⁹ BERGER/KELLERHALS, *supra* footnote 1, Title of §5, para. 277 et seq.

⁶⁰ BERGER/KELLERHALS, *supra* footnote 1, para. 1 et seq. and para. 277.

⁶¹ BERGER/KELLERHALS, *supra* footnote 1, para. 316 et seq.

governed by the Federal Act on Private International Law (PILA).⁶² While parties may exclude the applicability of the PILA in favor of art. 357 and seq. CCP,⁶³ such a choice to opt-out is rare in practice.⁶⁴

Art. 178 para. 2 PILA holds that the arbitration agreement is valid if it conforms to the law chosen by the parties, the law governing the dispute, or Swiss law.⁶⁵ By offering such an alternative attachment, the conflict of law rule is designed to uphold the validity of the arbitration agreement and, to the extent possible, avoid any disputes in this regard.⁶⁶ The law does not provide for any hierarchy between the laws that might apply to the arbitration clause.⁶⁷ However, in order to be valid, the arbitration clause has to fully correspond to one of the possibly applicable laws as they may not be combined.⁶⁸

Domestic arbitration is governed by art. 353 et seq. of the Swiss Code of Civil Procedure (CCP), whose provisions apply by default if PILA is not applicable.⁶⁹ The CCP does not contain an explicit provision regarding the law that applies to the arbitration agreement. It is disputed in the doctrine whether the arbi-

⁶² Art. 176 para. 1 PILA. Due to the fact that the governing law depends on the domicile of the parties, the law governing the arbitration may not be determined until the beginning of the proceedings. This holds particularly true in multi-party arbitration agreements, where at least one party is domiciled outside Switzerland, since in such situation, the governing law will depend on whether the party domiciled outside Switzerland participates in the arbitral proceedings. See KAUFMANN-KOHLER GABRIELLE/RIGOZZI ANTONIO, *When is a Swiss arbitration international?*, Comments on a Swiss Federal Tribunal decision of June 24, 2002 (SFT 4P.54/2002), Jusletter of 7 October 2002, para. 10.

⁶³ Art. 176 para. 2 PILA; BSK IPRG-PFIFNER/HOCHSTRASSER, art. 176 para. 40 et seq.

⁶⁴ BERGER/KELLERHALS, *supra* footnote 1, para. 107.

⁶⁵ BERGER/KELLERHALS, *supra* footnote 1, para. 391; LIVSCHITZ TAMIR, *Switzerland – as Arbitration Friendly as It Gets*, *supra*, p. 13 et seq.

⁶⁶ BGE 119 II 380 cons. 4a: “Cette règle de conflit “in favorem validitatis” fonde un rattachement alternatif dans le but d’éviter, si possible, la survenance de différends relatifs à la validité de la convention d’arbitrage.”; LALIVE PIERRE/POUDRET JEAN-FRANÇOIS/REYMOND CLAUDE, *Le droit de l’arbitrage interne et international en Suisse*, Lausanne 1989, art. 178 para. 14; BERGER/KELLERHALS, *supra* footnote 1, para. 393; BSK IPRG-GRÄNICHER, art. 178 para. 24.

⁶⁷ BGE 134 III 565 cons. 3.2.

⁶⁸ BSK IPRG-GRÄNICHER, art. 178 para. 26.

⁶⁹ Art. 353 para. 1 CCP. The parties may exclude the application of CCP in favor of PILA (art. 353 para. 2 CCP).

tration agreement is subject to Swiss law⁷⁰ or to the law chosen by the parties, with Swiss law only being applicable in the absence of such choice of law.⁷¹

2. Form

In international arbitration, the form requirements established by Swiss law are straightforward. The arbitration agreement must be concluded in writing or by telegram, telefax, telecopier or any other means of communication which allows proof of the agreement by text (art. 178 para. 1 PILA). The requirements in domestic arbitration are the same.⁷²

The form requirements established by Swiss law are mandatory. Thus, parties cannot submit the form of their arbitration agreement to another law of their

⁷⁰ BGE 116 Ia 56 cons. 3a; DASSER FELIX, in: Oberhammer/Domej/Haas (eds.), *Kurzkommentar ZPO*, 2nd ed., Basel 2014, art. 357 para. 11; Report (*Botschaft*) of the Federal Council regarding the Swiss Code of Civil Procedure, BBl 2006 7221, p. 7394; WEHRLI DANIEL, *Die Schiedgerichtsbarkeit*, in: Sutter-Somm/Hasenböhler (eds.), *Die künftige schweizerische Zivilprozessordnung*, Zurich/Basel/Geneva 2003, p. 115.

⁷¹ BERGER/KELLERHALS, *supra* footnote 1, para. 319; STACHER MARCO, DIKE-Komm-ZPO, art. 357 para. 3; MÜLLER-CHEN MARKUS/EGGER RAHEL, in: Sutter-Somm/Hasenböhler/Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 2nd ed., Zurich/Basel/Geneva 2013, art. 357 paras. 32–33; PFISTERER STEFANIE, in: Hausheer/Walter (eds.), *Berner Kommentar zur Schweizerischen Zivilprozessordnung*, Berne 2014, art. 357 para. 33.

⁷² Art. 358 CCP: “The arbitration agreement must be done in writing or in any other form allowing it to be evidenced by text”; Report (*Botschaft*) of the Federal Council regarding the Swiss Code of Civil Procedure, BBl 2006 7221, p. 7395. The NYC is somewhat more restrictive than the PILA, as it requires a signature or an exchange of documents between the parties (art. II(2) NYC in comparison with art. 178 para. 1 PILA; BERGER/KELLERHALS, *supra* footnote 1, para. 429 et seq.). However, this difference has no practical significance due to the NYC’s “most favourable law” approach, which leads to the application of Swiss law if a Swiss court is seized with a request for recognition and enforcement of a foreign arbitral award; art. 178 PILA would be the most favorable law pursuant to art. VII NYC (see BSK IPRG-GRÄNICHER, art. 178 paras. 5 and 19; BERGER/KELLERHALS, *supra* footnote 1, paras. 42 and 2104. *Contra* POUURET/BESSON, *supra* footnote 23, para. 193). The Swiss Federal Tribunal even – though not entirely accurately – stated that there are no differences between the formal requirements of art. II(2) NYC and art. 178 PILA (BGE 121 III 38 cons. 2c).

choice.⁷³ However, if an arbitration agreement does not meet the form requirements, the parties may remedy this issue by subsequently issuing another agreement complying with the respective requirements, or they may uphold the agreement by not challenging the validity of the arbitration agreement on these grounds.⁷⁴ With regard to the extent to which the form requirements must be complied with, it is disputed whether they only apply to the objectively essential clauses of the arbitration agreement, or whether they also apply to the subjectively essential clauses of the agreement.⁷⁵

The law does not require the arbitration agreement to be signed by the parties.⁷⁶ It is admissible to refer to pre-existing documents containing the arbitration agreement, such as standard contract terms and general business conditions, if these documents are in writing.⁷⁷ However, it is important to keep in mind that, should there be a challenge to the arbitration agreement, consensus of the parties regarding the submission of the dispute to arbitration must be established. This may prove to be more difficult if the arbitration agreement is solely entered into by reference. It is therefore advisable to have the document containing the arbitration agreement signed by all involved parties.⁷⁸

⁷³ See, with regard to PILA, BERGER/KELLERHALS, *supra* footnote 1, paras. 394 and 420; BSK IPRG-GRÄNICHER, art. 178 para. 6; POUURET/BESSON, *supra* footnote 23, para. 193; the issue is left open by GIRSBERGER DANIEL/VOSER NATHALIE, *International Arbitration in Switzerland*, 2nd ed., Zurich 2012, para. 284.

⁷⁴ BERGER/KELLERHALS, *supra* footnote 1, para. 598 et seq.; GIRSBERGER/VOSER, *supra* footnote 73, para. 335.

⁷⁵ BSK IPRG-GRÄNICHER, art. 178 para. 9.

⁷⁶ Art. 178 para. 1 PILA; BERGER/KELLERHALS, *supra* footnote 1, para. 422; BSK IPRG-GRÄNICHER, art. 178 para. 15; POUURET/BESSON, *supra* footnote 23, para. 193.

⁷⁷ SFT 4P.126/2001 of 18 December 2001 cons. 2c; 4P.113/2001 of 11 September 2001 cons. 3b.dd; 4P.230/2000 of 7 February 2000 cons. 2a; Decision of the Swiss Federal Tribunal of 31 October 1996, ASA Bulletin 2001, pp. 523–530, p. 529; GIRSBERGER/VOSER, *supra* footnote 73, para. 274; BSK IPRG-GRÄNICHER, art. 178 paras. 18, 58; LALIVE/POURET/REYMOND, *supra* footnote 66, art. 178 para. 13.

⁷⁸ LIVSCHITZ TAMIR, *Switzerland – as Arbitration Friendly as It Gets*, *supra*, p. 12.

3. Essential Clauses

3.1 Overview

The arbitration agreement is a contract between the parties. Within the limits of the law, the parties are free to determine the content of the arbitration agreement at their discretion.⁷⁹ However, in order for the arbitration agreement to be concluded, they must agree on the essential clauses of such contract (*essentialia negotii*), which the Swiss Federal Tribunal has defined as follows (BGE 129 III 675 cons. 2.3):⁸⁰

“The law does not define the necessary content of an arbitration agreement. The purpose of an arbitration agreement implies that it has to express the parties’ common intention that certain defined existing or future disputes be resolved by an arbitral tribunal, i.e. not by a state court (...). For this to be possible, the arbitral tribunal must be determinable (...).”

In order for an arbitration clause to be effective under Swiss law, the following elements are thus required: (i) the parties’ agreement to submit the dispute to an arbitral tribunal at the exclusion of national courts, and (ii) the specification of the dispute or legal relationship to be resolved by the arbitration.⁸¹

We will now discuss the material requirements of Swiss law for an arbitration agreement to be valid. It is important to keep in mind that Swiss law provides for a broad choice of attachments in international arbitration (art. 178 para. 2 PILA, see above, section 2). An arbitration agreement that does not comply with the requirements of Swiss law therefore might nevertheless be valid and enforceable if it complies with the requirements of another law, namely the law chosen by the parties or the law governing the dispute.

3.2 Agreement to Submit the Dispute to an Arbitral Tribunal at the Exclusion of National Courts

When entering into an arbitration agreement, the parties exclude the jurisdiction of state courts and provide for arbitration as the exclusive dispute resolu-

⁷⁹ Art. 19 CO; see BERGER/KELLERHALS, *supra* footnote 1, para. 604.

⁸⁰ BGE 129 III 675 cons. 2.3 (translation as per BERGER/KELLERHALS, *supra* footnote 1, para. 285); see also BGE 138 III 29 cons. 2.2.3; 130 III 66 cons. 3.1.

⁸¹ See also BERGER/KELLERHALS, *supra* footnote 1, para. 286.

tion mechanism. The agreement of the parties to submit their dispute to arbitration, and thus to derogate the competence of the state courts, has to be stated in a sufficiently clear manner in the arbitration agreement.⁸²

There is no legal presumption that the jurisdiction of an arbitral tribunal shall be exclusive.⁸³ Nor is there an explicit rule against the validity of a so-called optional arbitration clause, which offers the parties a choice between arbitration and litigation in case of a dispute.⁸⁴ The Swiss Federal Tribunal has, until now, left open whether such a clause would be valid.⁸⁵ The parties may also submit only claims based on specific legal grounds or arising from a specific legal relationship to arbitration.⁸⁶ However, it is generally advisable to submit the entire legal relationship and, thus, potential dispute to the same dispute resolution mechanism, in order to avoid both forum running – i.e. an attempt by both parties to file a claim as soon as possible in order to secure the desired forum and/or dispute resolution mechanism – and disputes regarding the applicability of the different dispute resolution mechanisms at a later stage.⁸⁷

The Swiss Federal Tribunal has held consistently that, due to the significance of the parties' decision to renounce the competence of state courts both because of the limited rights of appeal and the often higher costs in arbitration, the question of whether an arbitration agreement has been validly concluded should be examined restrictively. If, however, consent of the parties to enter

⁸² BGE 130 III 66 cons. 3.1; 129 III 675 cons. 2.3; BERGER/KELLERHALS, *supra* footnote 1, para. 289. "Sufficiently clear" does, however, not necessarily mean explicitly, as long as the intention of the parties to submit their dispute to arbitration is clear, see BSK IPRG-GRÄNICHER, art. 178 para. 32; BERGER/KELLERHALS, *supra* footnote 1, para. 290.

⁸³ BERGER/KELLERHALS, *supra* footnote 1, para. 495.

⁸⁴ BERGER/KELLERHALS, *supra* footnote 1, para. 496; DASSER, *supra* footnote 70, art. 357 para. 10; BSK IPRG-GRÄNICHER, art. 178 para. 32; *see also* GIRSBERGER/VOSER, *supra* footnote 73, para. 227, stating that the clause "the parties may refer their disputes to arbitration" is unclear and defective.

⁸⁵ SFT 4A_244/2012 of 17 January 2013 cons. 4.4. In the case at hand, the arbitration agreement contained the provision that "any dispute shall be submitted to an ICC arbitral tribunal with its seat in Basle or to the courts in the City of Basle".

⁸⁶ *See below*, section B.1.3; DASSER, *supra* footnote 70, art. 357 ZPO, para. 10.

⁸⁷ DASSER, *supra* footnote 70, art. 357 ZPO, para. 10. *See also*, with regard to the problems that may arise if a contract contains both an arbitration clause and an independent forum-selection clause, BERGER/KELLERHALS, *supra* footnote 1, para. 498, with reference to SFT 4A_240/2012 cons. 3 and 4; STEBLER SIMONE, ASA Bulletin 2013, pp. 27–44, p. 27.

into such an agreement is established, the scope of the arbitration agreement shall be interpreted extensively based on the assumption that the parties that agreed to submit their dispute to an arbitral tribunal would like such tribunal to be fully competent to hear the case.⁸⁸

3.3 Subject Matter of the Arbitration

In the arbitration agreement, the parties must designate either an existing dispute that shall be subject to arbitration, or the legal relationship out of which such a dispute might arise.⁸⁹ This requirement is met if the legal relationship is at least identifiable,⁹⁰ a requirement that generally does not pose any difficulty if the clause refers to disputes potentially arising from an already existing legal relationship. Care should be taken, however, when referring to potential future legal relationships between the parties, since such reference may be too vague to constitute a valid arbitration agreement, should a future dispute arise.⁹¹

As mentioned above (section 3.2), it is usually advisable to broadly define the scope of disputes that shall be subject to arbitration. A standard clause to this effect is that the arbitration clause shall cover “all disputes arising out of or in connection with this contract”. This clause confers to the arbitral tribunal a jurisdiction that is all-encompassing by comprising also tort claims or unjust enrichment claims, disputes regarding the contract’s performance and interpretation as well as the conclusion and validity of the contract.⁹² If the parties

⁸⁸ BGE 116 Ia 56 cons. 3b; 129 III 675 cons. 2.3; e.g., SFT 4A_103/2011 of 20 September 2011 cons. 3.2.1; BERGER/KELLERHALS, *supra* footnote 1, para. 485 et seq.; JOLIDON PIERRE, *Commentaire du Concordat Suisse sur l’arbitrage*, Berne 1984, p. 132 et seq.; LALIVE/POUDRET/REYMOND, *supra* footnote 66, p. 46.

⁸⁹ BGE 130 III 66 cons. 3.1; 129 III 675 cons. 2.3.

⁹⁰ BERGER/KELLERHALS, *supra* footnote 1, para. 300.

⁹¹ BERGER/KELLERHALS, *supra* footnote 1, para. 300 et seq., referring to the clause “any and all disputes arising from any existing or future business relationship” as an example for a clause that would “generally be held to be too broad, not precise enough and therefore invalid, inoperative and incapable of being enforced”; BSK IPRG-GRÄNICHER, art. 178 para. 34; GIRSBERGER/VOSER, *supra* footnote 73, para. 315.

⁹² IBA Guidelines for Drafting International Arbitration Clauses, adopted by a resolution of the IBA Council on 7 October 2010, International Bar Association, Guideline 3, p. 10 et seq.; BORN GARY B., *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 4th ed., Alphen aan der Rijn 2013, p. 40 et seq.; BSK IPRG-GRÄNICHER, art. 178 para. 35.

wish to narrow the scope of the arbitration agreement, they may exclude some of the claims or grounds for claims that could arise from their legal relationship from the arbitration agreement.

4. Arbitrability

Last, but not least, an arbitration clause may only be validly concluded if the parties have the legal capacity to enter into an arbitration agreement and to appear as a party in arbitral proceedings (*subjective arbitrability*), and if the subject-matter of the dispute can be validly submitted to arbitration (*objective arbitrability*). In order to determine the parties' capacity to be a party and to conduct legal proceedings in their own name (*Partei- und Prozessfähigkeit; subjective arbitrability*), the Swiss Federal Tribunal has applied the general conflict of laws rules of the PILA regarding the capacity of natural persons (art. 35 and 36 PILA) and legal entities (art. 154 and 155) as well as art. 126 PILA with regard to their representation.⁹³

Objective arbitrability is determined by each country according to its own law.⁹⁴ Under Swiss law, every pecuniary claim may be the subject of (international) arbitration.⁹⁵ The term "pecuniary claim" is interpreted extensively and encompasses "all claims which have a financial value for the parties".⁹⁶ In domestic arbitration, all claims capable of party settlement may be submitted to arbitration.⁹⁷

Arbitrability is relevant not only in order to determine whether a dispute may be submitted to arbitration, but also in order to ensure enforceability of any future award: As per V(2)(a) NYC, the recognition and enforcement of a for-

⁹³ BGE 138 III 714 cons. 3.3.2; Decision of the Swiss Federal Tribunal of 22 December 1992, ASA Bulletin 1996, p. 648; BERGER/KELLERHALS, *supra* footnote 1, para. 348; GIRSBERGER/VOSER, *supra* footnote 73, para. 331.

⁹⁴ Art. V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC); for more details, see LEHMANN ANDREAS, Recognition and Enforcement of Foreign Arbitral Awards in Switzerland – Avoiding Common Pitfalls, *infra*, p. 119 et seq.

⁹⁵ Art. 177 para. 1 PILA.

⁹⁶ BGE 118 II 353 cons. 3b; POUURET/BESSON, *supra* footnote 23, para. 338 et seq.; see also LIVSCHITZ TAMIR, Switzerland – as Arbitration Friendly as It Gets, *supra*, p. 9 et seq.

⁹⁷ Art. 354 CCP.

eign arbitral award may be refused if the “subject matter of the difference is not capable of settlement by arbitration under the law of that country”.⁹⁸

5. Invalid Arbitration Agreements and Pathological Clauses

An arbitration agreement is invalid if there is a lack of (subjective or objective) arbitrability, if the form requirements are not met, or if its clauses are incomplete, unclear or contradictory (so-called pathological clauses).⁹⁹ Some of these deficiencies may be remedied by the parties, namely by concluding another arbitration agreement that complies with the requirements of the applicable law, or by tacitly approving the arbitration agreement.¹⁰⁰ If the parties cannot or do not want to remedy the deficiencies of the arbitration agreement, the consequences of such pathological clauses are governed by art. 20 CO:¹⁰¹ The arbitration agreement is either null and void,¹⁰² i.e. no arbitral tribunal has jurisdiction to hear the dispute,¹⁰³ or partially null if the deficiency only concerns part of the contract and if it seems likely that the parties would have concluded the contract notwithstanding the deficient part had they been aware of it.¹⁰⁴

In order to determine whether an arbitration agreement containing a pathological clause may be partially upheld, and in order to determine the content of such an arbitration agreement, the contract must be interpreted. Such contract interpretation follows the general principles of Swiss law, including interpretation in good faith, interpretation in favorem validitatis (attempting to uphold the validity of the contract), and contra proferentem (interpretation of an ambiguous clause against the drafter).¹⁰⁵ To the extent that such interpretation comes to the conclusion that the parties wanted to submit their

⁹⁸ For more details on this topic, see LEHMANN ANDREAS, Recognition and Enforcement of Foreign Arbitral Awards in Switzerland – Avoiding Common Pitfalls, *infra*, p. 119 et seq.

⁹⁹ See, e.g., BGE 130 III 66 cons. 3.1.

¹⁰⁰ BERGER/KELLERHALS, *supra* footnote 1, paras. 600 and 603; GIRSBERGER/VOSER, *supra* footnote 73, paras. 335 and 338.

¹⁰¹ BERGER/KELLERHALS, *supra* footnote 1, para. 611 et seq. (regarding nullity), para. 613 et seq. (regarding partial nullity).

¹⁰² Art. 20 para. 1 CO.

¹⁰³ BERGER/KELLERHALS, *supra* footnote 1, para. 612.

¹⁰⁴ Art. 20 para. 2 CO; BGE 130 III 66 cons. 3.3.3.

¹⁰⁵ BGE 130 III 66 cons. 3.2; BERGER/KELLERHALS, *supra* footnote 1, para 478; GIRSBERGER/VOSER, *supra* footnote 73, paras. 222 and 228.

dispute(s) to arbitration (partial nullity of the agreement as per art. 20 para. 2 CO, see above), the pathological clause shall be (i) interpreted in a way that does not impact the validity of the (partially null) agreement, (ii) eliminated, or (iii) substituted by a provision of state law.¹⁰⁶

C. Institutional or Ad hoc Arbitration and Standard Clauses

1. Ad hoc or Institutional Arbitration

When agreeing on an arbitration clause, the parties must, at least implicitly, choose between institutional and ad hoc arbitration. If they choose institutional arbitration, they must agree on the institution that shall run the proceedings.¹⁰⁷

In institutional arbitration, an arbitral institution provides assistance in conducting the proceedings, according to its own set of rules, and against payment of a fee. In Switzerland, the pre-eminent arbitration institution is the Swiss Chambers' Arbitration Institution, which conducts its proceedings according to the Swiss Rules. Internationally, the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the London Court of International Arbitration (LCIA) come to mind as examples of well-known and –respected arbitral institutions. The advantage of institutional arbitration is the institution's significant experience and knowledge and its ability to ensure that the process moves along smoothly.¹⁰⁸ The downside is that the parties may have somewhat less flexibility to shape the process, that the procedure may be more costly due to the fact that the parties have to pay for the administrative support provided by the institution, and that proceedings might be slower than in ad hoc arbitration.¹⁰⁹

¹⁰⁶ BGE 138 III 29 cons. 2.2.3; 130 III 66 cons. 3.3.3; BSK IPRG-GRÄNICHER, art. 178 para. 54.

¹⁰⁷ IBA Guidelines, *supra* footnote 92, Guideline 1, p. 6 et seq.

¹⁰⁸ IBA Guidelines, *supra* footnote 92, Guideline 1, p. 7; BORN, Arbitration Agreements, *supra* footnote 92, p. 44 et seq., pp. 65–66.

¹⁰⁹ BERGER/KELLERHALS, *supra* footnote 1, para. 23 et seq.; BORN, Arbitration Agreements, *supra* footnote 92, p. 45 et seq., pp. 65–66; GIRSBERGER/VOSER, *supra* footnote 73, para. 93 et seq.

If the parties have not opted for institutional arbitration, the arbitration proceedings will be ad hoc.¹¹⁰ Ad hoc arbitration is conducted without an administering authority, and it is therefore crucial that the parties agree on the applicable procedural rules beforehand, in order to avoid an impasse at a later stage.¹¹¹ If the parties do not choose institutional rules, they will have to draw up their own rules, a process that is difficult, time-consuming, and overall rarely advisable.¹¹²

2. Standard Clauses

If the parties have opted for institutional arbitration, the arbitration agreement should ideally be drafted by making use of the standard clause provided by the arbitral institution whose rules shall be adopted.¹¹³ These clauses contain the language necessary to conclude a valid arbitration agreement (see above, section B) and can, if necessary, be tailored to the individual needs of the parties by adding additional clauses as set out below (section D).

The Swiss Rules of International Arbitration, e.g., propose the following clause, referring to the Swiss Rules:¹¹⁴

“Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

¹¹⁰ Art. 182 para. 1 PILA.

¹¹¹ BERGER/KELLERHALS, *supra* footnote 1, para. 23; BORN, *Arbitration Agreements*, *supra* footnote 92, pp. 65-66; GIRSBERGER/VOSER, *supra* footnote 73, paras. 77, 79 et seq.

¹¹² IBA Guidelines, *supra* footnote 92, Guideline 2, p. 7.

¹¹³ IBA Guidelines, *supra* footnote 92, Guideline 2, p. 7 et seq.

¹¹⁴ <https://www.swissarbitration.org/sa/en/clause.php> (last visited on 14 August 2015).

The number of arbitrators shall be ... (“one”, “three”, “one or three”);

The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country);

The arbitral proceedings shall be conducted in ... (insert desired language).”

Also for ad hoc arbitration, such standard clauses can provide a good starting point for drafting an arbitration clause, both because they contain all essential elements of a valid arbitration agreement, and because, as mentioned above (section C.1), it is also in ad hoc arbitration usually advisable to incorporate the rules of an arbitration institution.

3. Further Provisions of the Arbitration Agreement

Agreeing on the *essentialia negotii* and the rules that shall govern the arbitration proceedings is sufficient to subject a dispute to arbitration and to ensure that the arbitration proceedings can be held. However, in order for the arbitration to run smoothly, the parties may want to complete their agreement with provisions addressing the following:

3.1 Place of Arbitration

Even though the determination of the place of arbitration is not a necessary requirement for the arbitration clause to be valid, it is, for practical reasons, advisable to include it in every arbitration agreement. While this is less important in institutional arbitration, where there are usually rules in place to determine the place of arbitration,¹¹⁵ in ad hoc arbitration, failure to determine the seat of the arbitral tribunal may make it difficult, if not impossible, to constitute the arbitral tribunal at all. In particular, the constitution of the arbitral

¹¹⁵ The Swiss Rules, for example, provide for the Arbitration Court of the Swiss Chambers' Arbitration Institution to determine the seat of the arbitral tribunal, or to request the arbitral tribunal to determine it (art. 16 Swiss Rules); see also art. 1 para. 2 Swiss Rules (the seat designated by the parties may be in Switzerland or in any other country); art. 3 para. 3 lit. (g) and para. 7 lit. (e) Swiss Rules (both the Notice of Arbitration and the Answer to the Notice of Arbitration shall contain proposals as to the seat of arbitration, if the parties have not previously agreed thereon).

tribunal by the judge as provided for in art. 179 para. 2 PILA presupposes that the parties have agreed on the seat of the arbitral tribunal.¹¹⁶

The determination of the seat of the arbitral tribunal has, first, legal consequences because it determines the governing law (the *lex arbitri*) as well as the access to and jurisdiction of the respective state courts. Secondly, there are practical implications, such as whether the venue can be easily reached by the parties, their counsel and the arbitrators, convenience of facilities, availability of skilled local support, and the proximity to potential witnesses and other evidence. Finally, other criteria that may be considered are geographical neutrality and political stability of a potential venue, as well as the quality of the state court system and the pace of state court proceedings.¹¹⁷

Switzerland is ideally suited as a venue for arbitration as it is situated in the centre of Europe, and well-connected to the world. Switzerland offers a neutral and stable environment coupled with a long-standing tradition of arbitration. The Swiss legal community has produced many highly skilled and experienced arbitrators to date, and its younger generation, in particular, has a distinctly international outlook and strong language skills.

3.2 Composition of the Arbitral Tribunal

The parties are free to determine the composition of the arbitral tribunal, in particular regarding the number of arbitrators and, potentially, their qualifications. In institutional arbitration, the applicable institutional rules will provide for the appointment and, if necessary, replacement of the arbitrators.¹¹⁸ In ad hoc arbitration, the parties may have to request the state courts to appoint an arbitrator, should such an appointment not be possible otherwise.¹¹⁹

Arbitral tribunals typically consist of one or three arbitrators. While a single arbitrator is less expensive, and often faster, opting for a panel of three arbitrators may increase the quality of the decision-making process and, conse-

¹¹⁶ BGE 129 III 675 cons. 2.3; BERGER/KELLERHALS, *supra* footnote 1, para. 304 et seq.; BSK IPRG-GRÄNICHER, art. 178 para. 36 with further references.

¹¹⁷ IBA Guidelines, *supra* footnote 92, Guideline 4, p. 12 et seq.; BORN, Arbitration Agreements, *supra* footnote 92, p. 68 et seq.; PAUL D. FRIEDLAND, Arbitration Clauses for International Contracts, New York 2000, p. 50.

¹¹⁸ See, e.g., Art. 5–13 of the Swiss Rules.

¹¹⁹ See art. 179 PILA (for international arbitration); art. 362 CCP (regarding domestic arbitration).

quently, the decision.¹²⁰ If there is a panel of three arbitrators, the usual procedure is for each party to first designate one arbitrator. The two arbitrators designated by the parties will then, once appointed, jointly designate the chairman.¹²¹

The parties may also agree on certain requirements the arbitrators shall meet, e.g. with regards to legal or industry experience, or language skills. However, when doing so, the parties should be mindful that being overly prescriptive about the qualifications or experience required to serve as an arbitrator may exclude too many from the pool of eligible candidates.¹²²

3.3 Applicable Law

If a contract is submitted to arbitration, the parties may choose the law governing the contract (*lex causae*) as well as the law governing the arbitration agreement (the *lex arbitri*).¹²³ In Switzerland, the law governing the arbitration proceedings is determined by the seat of the arbitral tribunal and prescribed by law.¹²⁴

While the law governing the contract and the law governing the arbitration agreement may differ,¹²⁵ it is usually advisable to synchronize the laws applicable to the dispute to the extent possible, i.e. to subject the arbitration clause to the same law as the legal relationship that shall be subjected to arbitration, and the law governing the arbitration proceedings.¹²⁶

¹²⁰ IBA Guidelines, *supra* footnote 92, Guideline 5, p. 14.

¹²¹ See, e.g., Art. 8 of the Swiss Rules.

¹²² BORN, Arbitration Agreements, *supra* footnote 92, p. 83; MEREDITH IAN, Drafting an effective international arbitration agreement, Dispute Resolution 2008/2009 Volume 2: Arbitration, pp. 25–30, p. 29.

¹²³ Art. 178 para. 2 PILA.

¹²⁴ Art. 176 PILA; art. 353 CCP.

¹²⁵ This is a consequence of the principle of the autonomy of the arbitration agreement under Swiss law, see FURRER ANDREAS/GIRSBERGER DANIEL/SCHRAMM DOROTHEE, Vorb. zu IPRG 176 ff. in: Furrer/Girsberger/Müller-Chen (eds.), CHK-Handkommentar zum Schweizer Privatrecht, Internationales Privatrecht Art. 1–200 IPRG, para. 33, 2nd ed., Zurich/Basel/Geneva 2012; BSK IPRG-GRÄNICHER, art. 178 para. 90 with further references.

¹²⁶ IBA Guidelines, *supra* footnote 92, Guideline 8, p. 19 et seq.

3.4 Language

It is advisable to agree on the language of the arbitration proceedings in the arbitration clause. When choosing a language, the main considerations are the language spoken by the parties, the language the relevant documents are drafted in, and the availability of arbitrators with command of the chosen language.¹²⁷ If the parties fail to agree on the language in which the proceedings shall be conducted beforehand, the Swiss Rules provide for the arbitral tribunal to determine the language of the arbitration.¹²⁸ Most arbitration practitioners in Switzerland have a very good command of several languages, including German, French, Italian, and English.

3.5 Further Provisions to Address Specific Requirements

As a general rule, the arbitration agreement should be kept as brief as possible.¹²⁹ This notwithstanding, the parties may wish to include additional provisions in their arbitration agreement. In particular, they may agree on the following:

- Multi-tier dispute resolution clauses, requiring negotiation or mediation processes to take place before arbitration can be initiated;¹³⁰
- confidentiality obligations;¹³¹
- rules regarding the allocation of costs and fees;¹³² and
- special rules in case of multi-party arbitrations.¹³³

Last, but not least, Swiss law allows the parties to an international arbitration to waive their right to challenge the arbitral award if none of the parties is domiciled in Switzerland.¹³⁴ Such a waiver shortens the time period until a

¹²⁷ IBA Guidelines, *supra* footnote 92, Guideline 7, p. 18, with further comments regarding multi-lingual arbitration.

¹²⁸ Art. 17 para. 1 Swiss Rules; see *also* art. 3 para. 3 lit. (g) and para. 7 lit. (e) Swiss Rules (both the Notice of Arbitration and the Answer to the Notice of Arbitration shall contain proposals as to the language in which the arbitration shall be conducted, if the parties have not previously agreed thereon).

¹²⁹ FRIEDLAND, *supra* footnote 117, p. 54.

¹³⁰ IBA Guidelines, *supra* footnote 92, p. 30 et seq.

¹³¹ IBA Guidelines, *supra* footnote 92, p. 24 et seq.

¹³² IBA Guidelines, *supra* footnote 92, p. 25 et seq.

¹³³ IBA Guidelines, *supra* footnote 92, p. 35; see *also* LIVSCHITZ TAMIR, Arbitration: an Efficient Solution for Multiparty Disputes?, *infra*, p. 63 et seq.

¹³⁴ Art. 192 PILA.

final decision is rendered, at the cost of ceding any right to judicial control over the arbitration.¹³⁵

D. Summary: A Checklist for Drafting the Arbitration Agreement¹³⁶

- Determine or, if possible, choose the applicable law (*lex arbitri*), and make sure that:
 - Any formal requirements of the *lex arbitri* are met;
 - the arbitration agreement contains the essential terms as defined by the *lex arbitri*; and
 - the matter is arbitrable under the *lex arbitri*.
- Define the scope of disputes subject to arbitration;
- decide between institutional and ad hoc arbitration;
- if you have opted for institutional arbitration, choose the institution / arbitration rules and use the applicable model clause as a starting point;
- if you have chosen ad hoc arbitration, start with a model clause (and, possibly, arbitration rules) provided by an arbitral institution and take it from there;
- select the place of arbitration;
- specify an odd number of arbitrators and the method of selection and replacement of arbitrators;
- specify the language of arbitration; address any other concerns you may have; and
- keep it simple and clear to avoid pathological clauses.

¹³⁵ BGE 133 III 235 cons. 4.3.1; BERGER/KELLERHALS, *supra* footnote 1, para. 1840, 1843 et seq.; GIRSBERGER/VOSER, *supra* footnote 73, para. 360.

¹³⁶ IBA Guidelines, *supra* footnote 92, p. 3; GIRSBERGER DANIEL/MRÁZ MICHAEL, Missglückte ("pathologische") Schiedsvereinbarungen: Risiken und Nebenwirkungen, in: Spühler (ed.), Internationales Zivilprozess- und Verfahrensrecht III, Zurich 2003, pp. 129–165, p. 160; IAN, *supra* footnote 122, p. 29.

III. Security for Costs in Swiss International Arbitration

By Daniel Eisele and Tamir Livschitz

A. Introduction

Orders for security for costs have significant practical relevance in international arbitration. Whether and under what circumstances security for costs may be granted will often depend on the place of arbitration, i.e. on the *lex arbitri*, as well as the procedural rules governing the arbitration.

Even though requests for security for costs may be a procedural tool more often – and presumably more successfully – used in common law jurisdictions, also arbitral tribunals seated in Switzerland have had to deal with their fair share of security for costs requests. As a Swiss arbitration practitioner it is by no means rare to come across applications seeking security for costs even if such applications have in the past only rarely been successful.

This article will attempt to shed some light on the competence of arbitral tribunals seated in Switzerland to order security for costs and the prerequisites for the grant of security for costs in proceedings conducted under the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (Swiss Rules).

B. Legal Nature of Security for Costs

Unless the requirements pursuant to which security for costs may be granted are explicitly regulated in the applicable *lex arbitri* or the governing procedural rules of arbitration – which is neither the case in the Swiss *lex arbitri* for international arbitration nor in the Swiss Rules – the competence of an arbitral tribunal to order security for costs and the requirements to do so depend on the legal nature of such procedural tool. To determine the legal nature of security for costs, one must first assess their procedural purpose.

In arbitral proceedings, a request for security for costs will ordinarily be submitted by respondents.¹³⁷ Before commencing legal action, claimants will typically assess their chances of success beforehand. The assessment will also be based on any cost risks inherent with their taking of legal action. Conversely, respondents will generally have little choice but to assume any cost risk related to the litigations they are drawn into. Respondents will ordinarily have little if any security at all to recover any costs they may incur in the course of such litigations. In the case of claimants without assured financial solidity or claimants domiciled in countries where the enforceability of arbitral awards is not guaranteed¹³⁸ this may have severe detrimental implications on respondents.

It is specifically this inequality between claimants and respondents when assuming cost risks related to legal action that the procedural tool of security for costs aims to address. By having claimants furnish security for costs, respondents' risk of recovering their legal costs will be alleviated if not fully taken care off. Hence, an order for security for costs does nothing else than securing a potential future claim of a respondent, the existence of which – i.e. the respondent's entitlement thereto – will only be decided later on, generally depending on the outcome of the litigation.¹³⁹ In other words, security for costs aims at providing means to preserve assets out of which a subsequent cost award may be satisfied. The authors, same as other legal commentators,¹⁴⁰ therefore submit that security for costs is to be regarded as a provisional (or

¹³⁷ The submission of a security for costs request by claimants is also conceivable in cases where respondents have raised counterclaims. The authors submit that in international arbitration proceedings seated in Switzerland the requirements set out in this article to order security for costs pursuant to requests of respondents apply equally to security for costs requests lodged by claimants in case of counterclaims.

¹³⁸ Reference is made to non-signatory states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) or to signatory states of the New York Convention where practical experience has shown the enforcement of foreign arbitral awards to be cumbersome if not impossible at all.

¹³⁹ This is true if the allocation of the costs of arbitration is made on the basis of the „costs follow the event“-rule, commonly applied in international arbitration proceedings seated in Switzerland (see also art. 40(1) of the Swiss Rules in this respect).

¹⁴⁰ BORN, *supra* footnote 25, para. 2495; BERGER/KELLERHALS, *supra* footnote 1, para. 1592; PLOUDRET/BESSON, *supra* footnote 23, para. 604; BSK IPRG-MABILLARD, art. 183 para. 13.

conservative) measure, albeit of a special kind since the respondent's right to cost reimbursement is only created (if at all) upon issuance of the arbitral tribunal's cost award.

C. Competence of the Arbitral Tribunal to Order Security for Costs

The competence of an arbitral tribunal seated in Switzerland to order security for costs was doubtful in the past,¹⁴¹ particularly before the coming into force of the Swiss Private International Law Act (PILA) – art. 176 et seq. PILA being the *lex arbitri* of international arbitration proceedings seated in Switzerland.

On the basis of an application of art. 183 para. 1 PILA, the competence of an arbitral tribunal to order security for costs can nowadays, in the authors' opinion, no longer be reasonably questioned.

Art. 183 para. 1 PILA explicitly grants arbitral tribunals in international arbitration proceedings the authority to order provisional measures, unless the parties to the arbitration agreement have agreed otherwise. Even though art. 183 PILA does not explicitly refer to security for costs – unlike art. 379 of the Swiss Code of Civil Procedure (CCP), which is the *lex arbitri* for Swiss domestic arbitrations – security for costs can in the authors' opinion be subsumed under art. 183 PILA given that, as shown above, security for costs ought to be viewed as provisional (or conservatory) measures.

Alternatively, an arbitral tribunal's authority to order security for costs may also be construed on an application of art. 182 para. 2 PILA, pursuant to which an arbitral tribunal sitting in Switzerland may, to the extent the parties have not regulated the arbitral procedure, draw on legal provisions otherwise not applicable. This would permit an arbitral tribunal seated in Switzerland hearing an international arbitration case to derive its competence to order security for costs from an analogous application of art. 379 CCP. Such provi-

¹⁴¹ POUURET/BESSON, *supra* footnote 23, para. 610.

sion permits an arbitral tribunal to order security for costs when conducting a Swiss domestic arbitration proceeding.¹⁴²

For arbitral proceedings conducted under the Swiss Rules, art. 26 of the Swiss Rules explicitly grants an arbitral tribunal the competence to issue interim measures of protection. Based on the nature of security for costs as a special kind of provisional relief and pertinent legal commentary on the Swiss Rules, the wording of art. 26 of the Swiss Rules is sufficiently broad to permit orders for security for costs.¹⁴³

Accordingly, Swiss arbitral tribunals have in a number of published arbitral awards confirmed their competence to order security for costs (see hereinafter).

D. Requirements for the Grant of Security for Costs

1. General

Neither the PILA, i.e. the *lex arbitri* governing international arbitration proceedings in Switzerland, nor the Swiss Rules set out the requirements governing the grant of security for costs.

Since it is a special kind of provisional measure, legal commentators suggest that the classic requirements for the grant of provisional measures, as developed in international arbitration, must be met to order security for costs by an arbitral tribunal seated in Switzerland. This will require (i) a showing – with reasonable degree of certainty – that the respondent has a valid, potential future claim for reimbursement of its costs incurred in the course of the arbi-

¹⁴² BSK IPRG-MABILLARD, art. 183 para. 13; BERGER BERNHARD, Security for Costs, Trends and Developments in Swiss Arbitral Case Law, ASA Bulletin 2010, pp. 7–82, p. 7 and 9; GÖKSU TARKAN, Schiedsgerichtsbarkeit, Zurich 2014, para. 1845.

¹⁴³ STACHER MARCO in: Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration, Commentary, 2nd ed., Zurich 2013, art. 41 para. 24; MAGLIANA MELISSA, in: Manuel Arroyo (ed.), The Practitioner’s Guide, Arbitration in Switzerland, Alphen aan den Rijn 2013, art. 26 Swiss Rules para. 13.

tration, and (ii) evidence that the respondent will suffer irreparable harm if the order for security for costs is not granted.^{144,145}

Contrary to the requirements for ordinary provisional measures, an arbitral tribunal reviewing a security for costs request need not assess the chances of success of the underlying case on which the future reimbursement claim for cost is based.¹⁴⁶ Respondents should therefore have little difficulty in showing the existence of a valid, potential future claim for cost reimbursement, if the governing procedural rules provide for such potential reimbursement claim, as the Swiss Rules do.

According to art. 40(1) of the Swiss Rules, the costs of the arbitration shall in principle be borne by the unsuccessful party, even though the arbitral tribunal is given discretion to deviate from the “costs follow the event”-rule. This rule typically also extends to the costs of arbitration incurred by a respondent and, thus, respondents in Swiss Rules governed arbitration proceedings can generally be expected to establish the first prerequisite for the grant of security for costs.

It is the second requirement – a showing of an irreparable harm if a security for costs order is not made – that in practice proves an obstacle difficult to overcome.

2. Irreparable Harm in Case of Exceptional Circumstances Only

A look at legal commentary and published arbitral decisions shows that in connection with orders for security for costs the existence of an irreparable

¹⁴⁴ BERGER/KELLERHALS, *supra* footnote 1, para. 1594 et seq.; MAGLIANA, *supra* footnote 143, art. 26 Swiss Rules para. 14.

¹⁴⁵ Further requirements that are sometimes stipulated for the grant of provisional measures – e.g. that the grant of provisional measures will not amount to a prejudgment of the case or that the risk of harm to the requesting party outweighs any risk of harm to the party against which the provisional measures are asked – are either generally of less relevance in relation to requests for security for costs or are already dealt with as part of the two prerequisites set out above.

¹⁴⁶ STACHER, *supra* footnote 143, art. 41 para. 24; BERGER/KELLERHALS, *supra* footnote 1, para. 1595 KARRER PIERRE A./DESAX MARCUS, Security for Costs in International Arbitration, Why, when, and what if..., in: Briner/Fortier/Berger/Bredow (eds.), Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz, Böckstiegel, p. 339, 345; GÖKSU, *supra* footnote 142, para. 1857.

harm – and thus a showing of the second prerequisite for the grant of security for costs – is only confirmed where an “acute danger” of non-recovery of a respondent’s legal costs of arbitration can be demonstrated.

Legal commentary confirms that orders for security for costs should be limited to exceptional circumstances only, especially since such orders may lead to a denial of access to justice.¹⁴⁷ It is presumably for this reason that when it comes to requests for security for costs, and unlike what one might see in practice with regard to requests for other kinds of provisional measures, arbitral tribunals seated in Switzerland have shown great reluctance in accepting respondents’ assertions of an irreparable harm if no security for costs is ordered.

In its order no. 3 of 4 July 2008, an arbitral tribunal seated in Switzerland held that “(...), a review of the scholarly writing and published arbitral decisions on point reveals that arbitral tribunals sitting in Switzerland are indeed generally reluctant in willing to assume factual situations in which an applicant’s future claim for recovery of its costs would be in acute danger.”¹⁴⁸

Another arbitral tribunal confirmed the general reluctance with which arbitral tribunals regard security for costs requests as follows: “Both under the Swiss Rules and PILS [PILA], an award of security for costs is appropriate only under exceptional circumstances (...). Accordingly, arbitral tribunals and commentators alike find that the authority to award security for costs should be exercised only with considerable restraint (...). Thus, a mere showing that the arbitral claimant is insolvent or close to insolvency is insufficient to warrant an award of security for costs (...). Likewise, the fact that an arbitral claimant has less assets now than at the time of concluding the arbitration agreement is insufficient grounds to grant security for costs (...). This is true in particular where there is no evidence that the claimant consciously secreted or reduced its assets in anticipation of the arbitration (...).”¹⁴⁹ Further published decisions of

¹⁴⁷ BSK IPRG-MABILLARD, art. 183 para. 13; POUURET/BESSON, *supra* footnote 23, para. 610; STACHER, *supra* footnote 143, art. 41 para. 23 et seq.

¹⁴⁸ Procedural Order No. 3 of 4 July 2008, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 28, p. 32 at para. 20.

¹⁴⁹ Procedural Order No. 1 of 19 December 2008, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 47, 53 at paras. 6.1 and 6.2.

arbitral tribunals seated in Switzerland confirm the above standard¹⁵⁰ and the authors have recently been involved in a number of decisions rendered by arbitral tribunals on security for costs requests where the above standard was applied similarly.

Legal commentary and arbitral practice in Switzerland have identified two sets of exceptional circumstances that may amount to an “acute danger” of non-recovery of costs and may therefore convince an arbitral tribunal to overcome its general reluctance in ordering security for costs: (i) an unforeseeable deterioration of the chances to enforce a potential future costs award and (ii) bad faith conduct of a claimant. Below, each of these two sets of exceptional circumstances will be reviewed.

3. Unforeseeable Deterioration of Enforceability of a Cost Award

Pursuant to legal commentary, a fundamental change in circumstances may warrant the grant of security for costs, where such fundamental change was (i) unforeseeable, (ii) occurred after signing the arbitration agreement and (iii) substantially increased the respondent’s risk of not being reimbursed for its legal costs; the reimbursement of the costs must be “in acute danger”.¹⁵¹

In other words, this appears to be an application of the *clausula rebus sic stantibus*-principle, whereby the question of predictability must in particular be assessed based on the commercial risk the parties in each respective case have assumed when entering into their contract (i.e. the financial conditions of the parties at the time the contract was signed, the terms of the contract, the economic conditions and outlook at the time the contract was signed etc.).

The above alludes to published Swiss arbitral practice on point, which clarifies the requirements stipulated by legal commentary as follows.

¹⁵⁰ Decision of 17 May 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 15 et seq., at para. 7; Procedural Order No. 4 of 17 June 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 23 et seq., at para. 25 et seq.; Procedural Order No. 2 of 29 May 2009, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 71 et seq., at para. 2.3.

¹⁵¹ STACHER, *supra* footnote 143, art. 41 para. 26; POUURET/BESSON, *supra* footnote 23, para. 610; BERGER/KELLERHALS, *supra* footnote 1, para. 1598; MAGLIANA, *supra* footnote 143, art. 26 of the Swiss Rules para. 14.

An arbitral tribunal seated in Geneva denied the respondent's request for security for costs on the basis that the claimant had filed for liquidation following the initiation of the arbitral proceedings. It held that the claimant's insolvency was a normal commercial risk the respondent would have to bear, taking into account that international arbitration arises in connection with international trade, which implies greater risks than domestic trade.¹⁵²

Even the commencement of bankruptcy proceedings against a claimant, presumably one of the worst situations a respondent concerned about the enforceability of a potential future cost award can face, does not seem to automatically warrant the order of security for costs. Rather, arbitral practice requires evidence of a claimant's manifest insolvency (i.e. the lack of any realizable assets), which would confirm the non-enforceability of a potential future cost award.

An arbitral tribunal seated in Switzerland confirmed the foregoing in a procedural order no. 3 of 4 July 2008 as follows: *"(...) If there is no reasonable chance for the defendant to enforce a future cost award in its favor, an order for security for costs must be granted, unless the plaintiff would prove that its financial troubles are directly connected to a behavior of the defendant contrary to the principle of good faith. The foregoing applies, however, only if the objective analysis reveals that the plaintiff is manifestly insolvent at the time of the initiation of the arbitration proceedings. Manifest insolvency may not be readily assumed. The opening of bankruptcy would not be sufficient grounds as long as the estate of the bankrupt party has sufficient realizable assets (...)"*.¹⁵³

The above opinion is confirmed in a number of other published arbitral decisions.¹⁵⁴ Hence, there appears to be a consensus in Swiss arbitral practice that even the opening of bankruptcy proceedings in and of itself would not constitute proof of manifest insolvency of a claimant, i.e. proof that the recoverability a future reimbursement claim of the respondent is in "acute danger".

¹⁵² A.S.p.A. v. B AG, decision of 25 September 1997, ASA Bulletin 2001, p. 749.

¹⁵³ Procedural order no. 3 of 4 July 2008, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 37, 41 at para. 18 et seq.

¹⁵⁴ Procedural order no. 4 of 17 June 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 23, 26, at para. 25; ZCC Arbitration Proceedings No. 415, Fourth Order of 20 November 2001, ASA Bulletin 2002, p. 471; Order no. 1 of 19 December 2008, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 47, 55, at para. 6.2.1.

Rather, additional evidence will need to be adduced, showing that the insolvency is manifest and that the “acute danger”-requirement is met. In Switzerland, a suspension of bankruptcy proceedings due to lack of assets would serve as evidence of manifest insolvency, since a suspension will only be pronounced if the estate’s assets are insufficient to cover the costs of the bankruptcy proceeding.¹⁵⁵

This standard appears to have developed based on the notion that in international trade the deterioration of a party’s financial ability is, in principle, a risk assumed by the parties at the time of contracting, where only dramatic cases of unforeseeable financial deterioration will be deemed outside of the financial risk originally accepted by the parties.

In other words, the uncertainty surrounding the financial situation of a party, which generally applies to all parties engaged in international trade unless financial guarantees are provided at the stage of contracting, and the potential risk connected therewith, are factors deemed to have been accepted by the contractual counterparty (i.e. the respondent) when the latter agreed to sign the contract with the claimant. This notion may lead to, at times, surprising decisions of arbitral tribunals reviewing security for costs requests, which may differ substantially from what ordinary state courts would have decided in similar circumstances (depending on the applicable procedural rules).¹⁵⁶

In an arbitral proceeding the authors were recently involved in,¹⁵⁷ the respondent applied for security for costs on the basis that the claimant was a mere shell entity without an operative business. Its balance sheet showed minimal assets only, which would evidently not suffice to cover any award ordering the reimbursement of the respondent’s costs of arbitration. On the basis of the claimant’s balance sheet it was also clear that the arbitral proceedings were third party funded on behalf of the claimant.

However, regardless of the third party funding situation and the fact that the claimant would indeed not have had sufficient assets to comply with any future costs award for the reimbursement of the respondent’s arbitration costs, the arbitral tribunal rejected the request for security for costs, stating the following: “As to the *fundamental change of circumstances* criterion, the Arbitral

¹⁵⁵ Art. 230 para. 1 of the Swiss Debt Enforcement and Bankruptcy Act.

¹⁵⁶ See further below.

¹⁵⁷ The procedural order referred to is unpublished.

Tribunal notes that beside demonstrating that the Claimant does not have the financial ability to guarantee payment of the Respondent's arbitration costs, it has not established that the Claimant's financial situation suffered a fundamental change since the conclusion of the arbitration agreement. By contracting with a partner with no guaranteed financial solidity, the Respondent accepted to take the risk of not recovering the legal costs in case of a future dispute."

Thus, even in a case where a respondent would undisputedly not be in a position to enforce a future cost award against the claimant due to the latter's lack of financial means, it appears that arbitral practice deems the clear and undisputed lack of assets of a claimant in and of itself not sufficient to justify security for costs. If already at the time of contracting the financial solidity of the claimant was not guaranteed, it seems that an arbitral tribunal will not step in and cure the financial risk so assumed by the respondent when agreeing to contract with the later claimant.

Notably, the above standards developed by arbitral practice with regard to the requirement of an unforeseeable and extreme deterioration of a claimant's financial means is in contrast with the requirements for security for costs stipulated by the Swiss Code of Civil Procedure (CCP), both with regard to state court proceedings (art. 99 CCP) and with regard to domestic arbitration in Switzerland (art. 379 CCP).

Pursuant to art. 99 CCP, security for costs in state court proceedings is ordered, *inter alia*, if the claimant appears insolvent, or if for other reasons there seems to be a considerable risk that a cost decision providing for the reimbursement of the respondent's litigation costs will not be paid. Art. 379 CCP, which applies to security for costs in domestic Swiss arbitration, stipulates the insolvency of the claimant as sole grounds for the ordering of security for costs.¹⁵⁸

¹⁵⁸ It should be noted, however, that legal commentary argues that in addition to insolvency, the other grounds set out in art. 99 CC to apply to state court proceedings should also apply to Swiss domestic arbitration proceedings by analogy – see MÜLLER CHRISTOPH in: Sutter-Somm/Hasenböhler/Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 2nd ed., Zurich/Basel/Geneva 2013, art. 379 para. 16; BSK ZPO-HABEGGER, art. 379 para. 12.

Hence, the factual situation applicable to the above arbitral decision could presumably have been decided very differently in Swiss state court proceedings and possibly also in Swiss domestic arbitration proceedings, where the respondent would in the author's opinion have had better chances to succeed with its security for costs request. In fact, this may be one of the main reasons why parties attempt to obtain security for costs in international arbitration proceedings, even though the factual situations do often quite apparently not meet the prerequisites developed by Swiss arbitral practice for the grant of security for costs in international arbitration.

4. Bad Faith Conduct

The second set of exceptional circumstances that according to legal commentary may permit the grant of security for costs relates to blatant bad faith conduct of a claimant.

Namely, if a claimant frivolously attempts to deprive the respondent of its potential cost recovery claim, a request for security for costs may be justified. This may be the case if a claim is – for the purpose of depriving the respondent of its potential future claim only – assigned to an impecunious party or if the arbitration proceeding is funded by a third party on behalf of an impecunious party, in which case the third (non-participant) party will not be obliged to reimburse the respondent for its costs of arbitration if the case is lost. The same may be true in case that a claim is, for the purposes of the arbitral proceedings only, assigned to a party domiciled in a country where the enforceability of arbitral awards is much more cumbersome than in the country where the assignor of the claim is domiciled.¹⁵⁹

The above in essence summarizes the practice reflected by published decisions of arbitral tribunals seated in Switzerland. To properly understand and apply such practice, a closer look is warranted.

In a decision of an arbitral tribunal seated in Berne dated 17 May 2003, the panel stated that the grant of security for costs should be limited to a situation “*where a party has deliberately and in view of the arbitration taken steps so as to ensure that the other party, in case of a final award in its favor, would*

¹⁵⁹ STACHER, *supra* footnote 143, para. 25; BERGER/KELLERHALS, *supra* footnote 1, para. 1600; POUURET/BESSON, *supra* footnote 23, para. 610; GÖKSU, *supra* footnote 142, para. 1855.

be deprived of recovering the costs of the arbitration". "Manoeuvres contrary to good faith" and "decisions made in circumstances amounting at bad faith" would be required.¹⁶⁰

This standard was confirmed in a procedural order issued by another arbitral tribunal seated in Geneva just one month later.¹⁶¹

Both decisions furthermore expressly confirmed that their restrictive approach would be warranted in particular also because an order for security for costs qualified as a conservatory measure, which under normal circumstances would only be available for claims already due. This clearly is not the case in relation to the potential future claim for the recovery of costs. Pursuant to Swiss Law principles, for monetary claims not yet due, conservatory measures would normally require a bad faith conduct on the end of the debtor so as to escape from the performance of its obligations or a wilful divestiture from its assets.¹⁶²

This restrictive practice was even confirmed in one of the rare published cases where a request for security for costs was granted. The arbitral tribunal hearing the matter noted that the requisite bad faith conduct must be evidenced by facts which display that the claimant deliberately, with a view to the arbitration proceedings, undertook measures to ensure that the respondent would be deprived of claiming reimbursement for costs related to the proceedings.¹⁶³

It should be noted that in a third party funding constellation, even where the party being funded is impecunious, a bad faith conduct cannot be taken lightly. As shown above, arbitral tribunals will be reluctant to confirm a bad faith conduct by a claimant based on the mere fact alone that it is impecunious and that a third party funds the proceedings. Such reluctance seems war-

¹⁶⁰ Decision of 17 May 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 15, 21, at para. 25.

¹⁶¹ Procedural order no. 4 of 17 June 2013, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 23, 26, at para. 27.

¹⁶² Decision of 17 May 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 15, 21, at para. 26; Procedural order no. 4 of 17 June 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 23, 26, at para. 28.

¹⁶³ Order no. 6 of 25 July 2003, cited in BERGER, ASA Bulletin 2010, *supra* footnote 142, p. 28, 32, at para. 20.

ranted in cases where at the time of contracting the parties knew – given a party’s financial situation – that if such party were to commence legal action later on, such action would likely need to be third party funded.

In such a situation, a third party funded legal action could reasonably be deemed to fall within the ambit of the commercial risk assumed by the parties when contracting and would presumably not serve as sufficient proof of a bad faith conduct on the part of the claimant, unless other factual aspects could be shown that would indicate otherwise. Thus, even though third party arbitration funding is always done deliberately and specifically with a view to arbitration proceedings, the mere fact that proceedings are third party funded should not suffice to meet the requirements for the ordering of security for costs in Swiss arbitration.

In sum, to justify an order of security for costs on the basis of a claimant’s bad faith conduct, a deliberate action by the claimant with a view to hinder the enforcement of a potential future cost award must be demonstrated, or put differently, a conduct arising to *mala fide* par excellence. This is a high barrier to overcome and not surprisingly, experience shows that a respondent will only in very exceptional circumstances be able to obtain security for costs on such grounds.

5. “Clean Hands” of the Respondent

Security for costs is an issue about the conflict between the claimant’s right to have access to arbitral justice and the respondent’s interest to have a potential future costs award duly enforced. Regardless of any of the above requirements to order security for costs, some arbitral tribunals have required, as an additional prerequisite, that a requesting party, which generally will be the respondent in an arbitration proceeding, come with “clean hands” if it wishes to request security for costs.¹⁶⁴

In practice, many situations have shown that respondents object to the jurisdiction of an arbitral tribunal and therefore choose not to pay their share of an advance deposit on costs of arbitration, as instructed by the arbitral tribunal. Arguably, in the event that the jurisdictional objection of the respondent is dismissed and the arbitral tribunal affirms its jurisdiction, the respondent

¹⁶⁴ Extract from ICC Case of 28 February 1994, ASA Bulletin 1995, p. 306.

will be in breach of the arbitration agreement by not having paid its share of the advance costs of arbitration. In such a case, arbitral tribunals that deem “clean hands” to be a prerequisite for a party applying for security for costs, may dismiss such application based on the lack of clean hands.

The rationale behind the “clean hands” requirement draws on the principle of good faith. According to such principle a party cannot ask to be secured any potential and uncertain future compensation right for costs, while refusing to pay its share of costs as instructed by the arbitral tribunal and as contractually obliged under the arbitration agreement referring to the applicable institutional rules.

The authors observe, however, that on the basis of published arbitral awards and their own experience, the prerequisite of “clean hands” does not (yet) appear to be a requirement generally recognized by Swiss arbitral tribunals for the ordering of security for costs. Nevertheless, the authors favorably view the prerequisite of “clean hands” since respondents at times revert to – doubtful – tactics aimed at illegitimately hindering claimants to pursue their claims on practical – most often financial – grounds.

To illustrate the problem: if a respondent fails to pay its share of the advance costs of arbitration, such share will pursuant to most institutional rules – including pursuant to art. 41(4) of the Swiss Rules – generally need to be paid by the claimant should it wish the arbitral proceedings to continue. Advance costs of arbitration often range in the hundreds of thousands, if not millions, of Swiss francs, euros or US dollars. If a respondent refuses to pay its share of the advance of arbitration costs, the claimant must, in addition to its own share, also pay the respondent’s share. This is a serious additional financial burden on the claimant. To impose an additional obligation on the claimant to furnish security for costs in similar amounts as the advance costs of arbitration may, and will in many instances, unduly burden the claimant. And in instances of claimants without limitless financial means, this will *de facto* deprive them from access to justice.

It is specifically for this reason that the requirement of “clean hands” on the requesting party should be accepted and required as an additional prerequisite for the grant of security for costs. This would compromise tactics of respondents, deliberately undertaken to impose as high as possible a financial burden on claimants to deter them from legitimately commencing or continuing legal action.

E. Conclusion

Security for costs is a subject of universal interest. Unlike in some other countries, such as England and Singapore, where specific provisions on security for costs were enacted in the relevant *lex arbitri*,¹⁶⁵ in Switzerland neither the *lex arbitri* for international arbitration nor the Swiss Rules contain any specific guidance on such subject matter.

Nevertheless, it is presently undisputed that international arbitral tribunals seated in Switzerland are authorized to grant security for costs. The arbitral practice developed in Switzerland on the requirements for the ordering of security for costs is restrictive and puts up a high barrier to overcome. Such practice attempts to balance the need to protect the enforceability of a potential future cost compensation claim of respondents against the hindrance of claimants' access to justice.

The principles developed by Swiss arbitral practice permit security for cost in two instances only: (i) Upon evidence that a party's financial means have dramatically deteriorated in a manner, which could not have been reasonably foreseen at the time of contracting, and that as a result thereof, the future recoverability of arbitration costs by the respondent is made impossible. (ii) If a party has engaged in bad faith conduct, in particular if it has engaged in action such as divestiture of assets or assignment of claims to shell companies set up for litigation purposes only, directed at preventing the factual recoverability of the counterparty's cost compensation entitlement.

Even in countries where the *lex arbitri* contains provisions on security for costs, such provisions ordinarily do not specify under which conditions security for costs will be granted. Since the subject matter and the problems addressed thereby are universal, the authors submit that the standards developed by Swiss arbitral practice may also be taken as guidance when arbitral tribunals outside Switzerland review requests for security for costs.

¹⁶⁵ Art. 38(3) and 70(6) of the English Arbitration Act 1996 and art. 12(1)(a) of the Singapore International Arbitration Act.

IV. Arbitration: an Efficient Solution for Multiparty Disputes?

By Tamir Livschitz

A. Introduction

Arbitration has originally been conceived as an alternative means for the resolution of a dispute between two contracting parties. In present times however one more and more observes complex contractual relationships involving more than just two parties or more than just one contract. For instance, in construction projects (with related sub-contracts), commodities transactions (with the involvement of intermediaries) or generally in projects involving back-to-back contracts, disputes typically include multiple parties and contracts. The same can be seen in the field of M&A, shareholder, joint venture and insurance relationships, just to name a few. When disputes under such agreements arise, multiple parties are regularly affected.

While the commercial contracts of the kind just mentioned often include an arbitration clause, the involvement of multiple parties or multiple contracts begs the question whether arbitration is indeed well equipped to handle such multi-party or multi-contract disputes. Even though such question may in the author's opinion be answered in the affirmative, it is crucial to bear in mind the inherent problems of multi-party arbitration, which in many instances can be avoided by parties acting with foresight.

B. Arbitration of Multi-Party Disputes

1. Why Choose Multi-Party Arbitration in the First Place?

Let us begin with a short sample scenario that will accompany us throughout this article. Under a supply contract, a customer brings claims against a manufacturer for the delivery of defect goods and requests damages. The manufacturer believes that the defects, if any, were caused by parts, which it had received from its sub-contractor under a separate contract for inclusion into the manufactured goods. If held liable vis-à-vis its customer, the manufac-

turer will naturally want to take recourse against its subcontractor for any damages it will have to pay to the customer. The involvement of the subcontractor converts the initial standard two-party dispute between the customer and the manufacturer into a multi-party dispute.

Based on the circumstances of the case, there may be good arguments for the manufacturer not to join its subcontractor to the pending proceeding with the customer and thus not to convert it into a multi-party proceeding. Rather, the manufacturer could opt to take recourse against its subcontractor in a subsequent proceeding commenced only once the manufacturer's liability vis-à-vis the customer has been finally confirmed. However, when weighing its options, the manufacturer will need to consider at least two significant advantages of settling the dispute between itself, its customer and its subcontractor in one joint proceeding: the likely necessity of a coherent decision on questions of law and fact applicable to all parties factually involved in the dispute, and potential cost savings.

1.1 Coherent Decisions on Questions of Law and Fact

First and foremost, the settling of a multi-party dispute in one comprehensive proceeding ensures a consistent adjudication of common issues of fact and law that may be relevant for all parties involved in the multi-party dispute. In contrast, a separation of the dispute into multiple proceedings bears the risk that inconsistent conclusions on common issues of fact and law are drawn by the separate judicial bodies, potentially leading to conflicting awards and the potential loss of a party's claim of recourse.

To illustrate the problem, let us return to the above sample scenario. In the first proceeding between customer and manufacturer the latter is found to have delivered defect goods. It was furthermore found that the defects related to the part of the goods which were produced by the manufacturer's subcontractor. In the second proceeding subsequently commenced by the manufacturer against its subcontractor, the court, in contrast, holds that the defect could not with sufficient certainty be allocated to the particular part of the goods manufactured by the subcontractor. Hence, a second conflicting court decision compared to the first court decision means that the manufacturer may lose its right to be compensated by the subcontractor for the damages the manufacturer paid to the customer.

The above illustration demonstrates that multi-party disputes generally require a single coherent ruling on common questions of fact and law to allow for a proper passing on of liability up or down the line or share liability with involved third parties. When such common questions of fact and law are decided by separate judicial bodies, there is a risk of incoherent or contradicting conclusions that could jeopardize any passing on or sharing of liability with a third party.

1.2 Cost Savings

The second advantage of settling a multi-party dispute in one multi-party proceeding rather than in separate proceedings relates to efficiency and, hence, to cost savings. Clearly, in terms of time as well as in terms of expenditure of internal and external resources by the parties (e.g. deployment of internal personnel for case handling, cost of outside counsel, experts, costs of the proceeding etc.), settling a dispute between multiple parties in one proceeding as opposed to separate proceedings will almost always come out on top when weighing efficiency and cost aspects.

1.3 Statistical Data on Multi-Party Arbitration

According to statistical data made available by the International Chambers of Commerce on cases conducted under the ICC Rules in the year 2014, 2,222 parties were involved in arbitration proceedings, a third of which being multiparty cases. In the multiparty arbitration proceedings conducted in 2014 the majority (82%) of the multiparty cases were between one and five parties, while 18% of the cases were between more than five parties and one case involved as many as 36 parties. The number of cases involving both multiple claimants and multiple respondents increased from 17% of all multiparty cases in 2013 up to 23% in 2014.¹⁶⁶

Hence, empirical evidence suggests that disputing parties put significant emphasis on the advantages of multi-party arbitration, whose popularity continues to grow from year to year. Accordingly, there is practical merit in addressing some of the main problems that come with it.

¹⁶⁶ ICC International Court of Arbitration Bulletin 2015/1, p. 8.

2. Problems of Multi-Party Arbitration and Remedies

In order not to exceed the scope of this article, the potential roadblocks of resolving multi-party disputes through arbitration will be illustrated based on the concept of joining a third party to a pending dispute, which will convert the proceeding into a multi-party (tripartite) dispute. The following remarks will therefore be limited to problems relating to a third party joinder situation. However similar problems will in substance arise regarding multi-party disputes in general, hence also if multi-party disputes are caused by a consolidation of separate proceedings (with the same or different parties) into one joint proceeding, or by the intervention of third parties, i.e. the motion of a third party to join a pending proceeding based on its own volition.

Two aspects most often raised as problems of multi-party arbitration concern questions of confidentiality and the loss of efficiency. However, the author believes that the confidentiality question may be considered less critical since in practice most parties involved in multi-party proceedings will generally be familiar with the factual set up or business relationship underlying the dispute. The question of the potential loss of efficiency caused by the involvement of multiple parties should similarly not be a major roadblock as thorough procedural planning and case handling by the arbitral tribunal should alleviate such concerns. In addition, such loss of efficiency will in most cases be outweighed by the loss of efficiency if two or more parallel or subsequent proceedings in the same or related matters would need to be conducted.

It is for this reason that the passages below focus on what the author believes are the two truly central problems of multi-party arbitration: (i) the requisite consent of all involved parties as the legal fundament for an arbitral tribunal's jurisdiction and (ii) the appropriate process to constitute the arbitral tribunal, i.e. the proper appointment of the tribunal's arbitrators.

3. Necessity of Consent to Arbitrate

3.1 Consent to Arbitrate Based on Parallel Arbitration Agreement

Let us return to the above sample scenario of the supply contract under which defect goods were delivered to the customer. If the supply contract features an arbitration clause, the dispute between customer and manufacturer must be resolved through arbitration. Should the manufacturer want its subcontractor to be joined to the arbitral proceeding, a number of criteria will need to be met. The central criterion will be the consent of the subcontractor and

all parties involved to have the dispute resolved by arbitration and by the specific arbitral tribunal named in the arbitration clause featured in the supply contract.

In State court litigation the law regularly equips a State court with the requisite authority to impose an extension of proceedings and thus an extension of its jurisdiction onto third parties if the pertinent requirements stipulated by the law are met. The setup in an arbitration proceeding is different. Arbitration is premised on the consent of disputing parties to submit their dispute to an arbitral tribunal for resolution. Put differently, the jurisdiction of the arbitral tribunal originates from a consent between the disputing parties in relation to a particular dispute. As a consequence, not only does such consent requirement as to the arbitral tribunal's jurisdiction also apply to the third party to be joined. Also the consent of the arbitrating party that does not request the third party joinder is necessary to have the third party included into the arbitral proceedings. This is necessary because a consent of a party to arbitrate with a specific counterparty cannot automatically be understood as a general consent of such party to arbitrate with any other or additional counterparties.

There may be instances where a third party and the arbitrating party that does not request the third party joinder explicitly consent to the third party joinder. However, regularly there will be no such express consent. Rather, such consent will need to be construed based on the documents, the parties' conduct or other circumstances of the case.

The following are situations one may possibly face when dealing with questions of admissibility of a third party joinder:

a) *Dispute between Multiple Parties to an Agreement Containing an Ordinary (not Multiparty) Arbitration Clause*

The presumably most straightforward situation for a third party joinder is an agreement involving multiple (i.e. more than two) parties that features a standard arbitration clause which will ordinarily be modelled for a standard two-party dispute. If between two of the multiple contracting parties a dispute arises and one of the arbitrating parties wishes to involve a third contracting party into the dispute, such third party (same as all other contracting parties) must in the author's view be deemed to have given its consent to a joinder by virtue of having signed the contract, including the arbitration clause. Such view is premised on the understanding that when signing the multi-party contract every contracting party was or ought to have been aware

that out of such contractual set up a number of disputes between several or all of the contracting parties could potentially arise and that all such disputes would be referred to arbitration as per the contractually agreed arbitration clause. This must necessarily also comprise any concepts of extending or converting an initial ordinary two-party dispute into a multi-party dispute involving other contracting partners, be it by way of joinder of third parties, consolidation or intervention.

In other words, even though a standard arbitration clause is premised on a two-party dispute, such clause if included in a multi-party contract should, in the author's view and based on Swiss law principles, constitute a sufficient legal basis for an arbitral tribunal's jurisdiction to decide a dispute between multiple contracting parties in one multi-party proceeding.

b) Joinder of a Non-Signatory Third Party to an Arbitral Proceeding

The situation becomes more complicated if in an arbitration proceeding between contracting parties one party wishes to join a third party, which is not a party to the contract featuring the arbitration clause on which the arbitral tribunal's jurisdiction premises. Such situation begs the question whether a third party that has not signed such specific arbitration clause may be joined to the arbitral proceedings against its volition and whether the other involved arbitrating party that does not request the joinder can also be deemed to have consented to the joinder of the third party.

From a practical point of view, an arbitrating party will in many instances only want to join a non-contracting third party into a proceeding if it has a contractual relationship with such third party somehow connected to the dispute in question. For instance, this may be the case in back-to-back or subcontract-situations. In such situations, the admissibility of a third party joinder will depend on whether or not the related contract with the third party contains an arbitration clause, and if it does, on what the specific contents of the arbitration clauses contained in both the main and the sub-contract at stake are.

If the related contract with the third party contains an arbitration clause of at least substantially similar content as the arbitration clause of the main contract on which the arbitral tribunal's jurisdiction premises (e.g. an agreement to the same institutional rules, the same arbitral seat, the same number of arbitrators) there are good arguments to imply a consent on the part of the contracting parties of both contracts to have any dispute arising under such contracts resolved in one arbitral proceeding initiated under any of the two

contracts. This conclusion is in particular warranted by the fact that where parties are involved in interrelated commercial agreements that ordinarily also require interrelated contractual performance, their agreement to identical dispute resolution provisions can in good faith be interpreted as implied consent to a joinder.

However, should the two arbitration clauses provide for differing arbitral mechanisms, such as providing for different institutional or other procedural rules to apply, different seat, different number of arbitrators etc., it will generally be difficult to construe any kind of implied consent at least on the part of the third party to be joined to an arbitration proceeding initiated under a different contract (i.e. under a different agreement clause).

The same is true where the related contract with the third party to be joined includes no arbitration clause at all. Joining a third party to the arbitral proceeding will be difficult as there is no apparent legal basis on which one may attempt to construe the third party's consent to have the dispute adjudicated by an arbitral tribunal in general, and by the specific arbitral tribunal in question in particular. The admission of a third party's joinder, which has not signed an arbitration clause, could in such circumstances only be justified if the arbitration agreement on the basis of which the arbitral proceedings were commenced could be extended onto the third party based on principles developed by court practice (see section 3.2 below).

c) *Construction under Institutional Rules*

Often arbitration clauses refer to procedural rules of an arbitration institution (such as to the rules of arbitration of the International Chamber of Commerce (ICC) or to the Swiss rules of international arbitration of the Swiss Chambers' Arbitration Institution). Some of such rules contain specific provisions on multi-party disputes, amongst which provisions on admissibility of third party joinder. If institutional rules are referred to in an arbitration clause, the possible joinder of a third party will not only depend on the consent of such third party to resolve the dispute through arbitration in general, but it will require a consent of such third party to submit the dispute to arbitration pursuant to the specific institutional rules in question.

If such consent can be construed and, thus, affirmed, the admissibility of a third party joinder will then be subject to any pertinent further provisions contained in the governing institutional rules. This follows naturally from the understanding that a consent to arbitration governed by certain institutional

rules extends also to the application of any and all provisions and requirements stipulated by such rules, barring any party agreement to the contrary. Hence, if institutional rules contained in an arbitration clause feature provisions on third party joinders, all parties involved in the dispute that have explicitly or implicitly consented to arbitration governed by such rules are deemed to also have consented to any further requirements and possibilities stipulated by such rules for the joinder of third parties.

The most common set of institutional rules referred to in agreements providing for arbitration seated in Switzerland are the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (Swiss Rules) and the Rules of Arbitration of the International Chamber of Commerce (ICC Rules).

Both the Swiss Rules and the ICC Rules contain specific provisions on the admissibility of third party joinders.

aa) Third Party Joinders under the Swiss Rules

Art. 4(2) of the Swiss Rules concerns the admissibility of third party joinders, which is to be decided by the arbitral tribunal hearing the case. The arbitral tribunal is given wide power and discretion to decide on the admissibility of a third party joinder without requiring any additional express consent from the parties to the dispute. As stated before, the parties are deemed to have consented to such wide powers and discretion granted to the arbitral tribunal by virtue of their agreement to the Swiss Rules as governing rules of their arbitral proceeding. When deciding the question of admissibility, all circumstances of a case are to be taken into consideration, amongst which are questions of practicality, impact on efficiency and potential delays of the proceeding. Although no consent is necessary, the parties to the dispute will ordinarily be consulted.

bb) Third Party Joinders under the ICC Rules

Same as under the Swiss Rules, the concept of a third party joinder is also recognized and provided for under the ICC Rules, albeit under rather strict conditions.¹⁶⁷

The ICC court – being the authority administering the arbitral proceeding and not the arbitral tribunal that decides the dispute – is empowered to undertake a prima facie assessment of any request to join a third party, provided that in case the ICC court approves the joinder, it will at a later stage ultimately be up to the arbitral tribunal to confirm its jurisdiction over all parties involved, including any joined third party. When dealing with a request for a third party joinder, the ICC court will in particular consider whether the third party is bound by an arbitration agreement which stipulates the arbitration proceeding to be governed by the ICC Rules.¹⁶⁸ If such arbitration agreement is a different arbitration agreement to the one based on which the arbitration proceeding in question was initiated, the ICC court will also consider and only approve the joinder of a third party if it is prima facie satisfied that the two arbitration agreements are compatible and, furthermore, that all parties involved may have agreed to have the claims heard together in one single arbitration.¹⁶⁹

cc) Summary under Institutional Rules

If an explicit or implied consent of all involved parties to refer a dispute to arbitration governed by institutional rules recognizing third party joinders can be construed, a third party joinder may be admitted if all further requirements stipulated under the applicable rules are met. Admissibility of a joinder under institutional rules will in addition to the question of consent in particular also depend on questions of practicality, impact on efficiency and potential procedural delays.

¹⁶⁷ For the sake of completeness and to avoid confusion, while both the Swiss Rules and ICC Rules contain – in addition to provisions on third party joinder – also provisions on the admissibility of a consolidation of proceedings, only the Swiss Rules allow for an intervention of third parties, i.e. the request of a third party to participate in arbitration proceedings based on its own volition. In contrast, the ICC Rules do not permit an intervention of a third party, barring any party agreement to the contrary.

¹⁶⁸ Art. 6(4)(i) and 7 ICC Rules „codify“ the general prerequisite of an (express or implied) consent of all parties as to the applicability of the rules in the first place.

¹⁶⁹ Art. 6(4)(ii), 7 and 9 ICC Rules.

3.2 Consent to Arbitrate of Non-Signatories to an Arbitration Agreement

If the consent requirement relating to a third party joinder cannot be established based on the principles set out above, a third party joinder will not be possible. This holds true unless the scope of the arbitration clause, pursuant to which the arbitration proceedings in question were initiated, may legitimately be extended onto the non-signatory third party whose joinder is sought.

In relation thereto, Swiss court practice has established general principles pursuant to which a rather arbitration benevolent approach has been adopted.

a) Liberal Court Practice of the Swiss Federal Tribunal

The practice developed by the Swiss Federal Tribunal suggests a two tiered approach to decide whether or not the scope of an arbitration agreement can be extended onto a non-signatory party allowing for a joinder of the non-signatory party to the arbitral proceedings.¹⁷⁰

As a first step, one must determine whether there exists a validly concluded arbitration agreement between some (but not necessarily all) parties involved in the arbitral proceeding, which must meet the applicable formal and substantive requirements stipulated by Swiss law. Such determination will be made based on a restrictive interpretation of the arbitration agreement in question, given that the submission of a dispute to arbitration entails the parties' waiver of their constitutionally guaranteed right to have their dispute reviewed by a State court, a waiver that cannot be assumed lightly.¹⁷¹

Once the validity of form and substance of an arbitration agreement is confirmed, the scope of the arbitration agreement, i.e. what contracts and what further parties may fall within its ambit, is interpreted liberally and broadly.¹⁷² Depending on the circumstances of the case, such liberal interpretation may allow for an extension of an arbitration agreement onto a non-signatory third party. This approach is driven by the understanding that parties referring their disputes to arbitration intend to resolve their disputes by way of arbitration in an as comprehensive manner as possible. A comprehensive resolution of a dispute or disputes may, at times and subject to the applicable requirements

¹⁷⁰ BGE 129 III 675; 128 III 50; 116 Ia 56; SFT 4A_103/2011 of 20 September 2011.

¹⁷¹ BGE 140 III 134.

¹⁷² BGE 140 III 134.

being met, warrant the imposition of an arbitral tribunal's jurisdiction onto a non-signatory third party. This would be warranted,¹⁷³ in particular, if a consent of the latter to arbitrate may be construed based on its conduct or the facts of the case.

b) Practical Scenarios

Of course, whether an arbitration agreement can be extended onto a non-signatory third party must always be assessed on a case-by-case basis and should never be assumed lightly. However, such an extension may in the following factual scenarios be possible:

- Apparent authority: A party acting on behalf of a principal vis-à-vis a third party without proper authority may nevertheless be deemed to bind such principal to an arbitration agreement with the third party, if the principal created the appearance of proper authorisation on which the third party could reasonably and in good faith rely.¹⁷⁴
- Implied consent: An entity may become subject to an arbitration agreement impliedly, typically by virtue of its conduct. Pursuant to Swiss court practice, under certain circumstances an interference by a third party in the negotiations or performance of a contract containing an arbitration clause may lead to the applicability of such arbitration clause to the interfering third party.¹⁷⁵
- Third party beneficiaries: Third party beneficiaries of contracts with arbitration clauses may generally invoke such arbitration clauses when raising claims under the pertinent contracts, even though these third party beneficiaries have not signed the contracts in question.¹⁷⁶ On the flip side, if parties to a contract with a third party beneficiary do not want the latter to become entitled to bring claims under the arbitration clause contained in such contract, express language to this effect must be included in the contract or in the arbitration clause itself.

¹⁷³ BGE 138 III 681.

¹⁷⁴ Decision of the Swiss Federal Supreme Court of 1 September 1993, ASA Bulletin 1996, p. 623.

¹⁷⁵ BGE 134 III 565; 129 III 727; SFT 4A_450/2013 of 7 April 2014.

¹⁷⁶ SFT 4A_627/2011 of 8 March 2012; 4A_44/2011 of 19 April 2011.

- Guarantors: It is standard practice for a bank or another third party to provide guarantees on behalf of third parties to secure their proper performance of a contract. One may ask whether an arbitration clause contained in the contract whose performance is guaranteed may also apply to the guarantee undertaking which itself does not feature an arbitration clause. Much depends on the specific language of the arbitration clause and possibly also on the language of the guarantee undertaking in question. Under Swiss law, barring extraordinary circumstances to the contrary, it will be difficult to extend an arbitration clause to a guarantor.¹⁷⁷ This is mainly due to the abstract nature of a guarantee under Swiss law (i.e. the fact that a guarantee in general is to be regarded as independent and unaffected by the fate of the contract whose proper performance the guarantor guarantees).
- Alter ego/piercing of the corporate veil: Under the alter ego doctrine, commonly also referred to as the piercing of the corporate veil doctrine, a non-signatory party can be bound by an arbitration agreement, if such non-signatory party can be regarded as an alter ego of a party formally bound by the arbitration agreement.¹⁷⁸ Assumption of an alter ego requires that a party exerts complete and exhaustive control over another party and has misused such control to such extent that it may be appropriate to disregard the separate legal forms of the two parties and treat them as one entity. As a consequence, the fact that the controlled party is formally bound by the arbitration agreement must automatically and fully also bind the controlling entity, as they are regarded as one and the same entity. In Switzerland, the separate corporate forms of companies will only under exceptional circumstances be disregarded, such as in case of fraud or blatant abuse of rights.¹⁷⁹
- Group of companies doctrine: The group of companies doctrine refers to a situation where two or more entities belonging to one joint corporate group act in connection with a contract, where their actions occur solely based upon instruction by their parent entity, which is not a signatory to the contract featuring the arbitration clause in question. In such a situa-

¹⁷⁷ BGE 134 III 565; SFT 4A_44/2011 of 19 April 2011.

¹⁷⁸ Decision of the Swiss Federal Supreme Court of 29 January 1996, ASA Bulletin 1996, p. 505.

¹⁷⁹ BGE 137 III 550.

tion, the non-signatory parent may nevertheless be bound by the arbitration clause if it has indeed played an active role in the negotiations, performance or termination of the contract in question. Contrary to the alter ego doctrine referred to above, the group of companies doctrine is based on the parties' objective intent. Thus, in the situation described above, one will have to ascertain that it was at least at some point of the contractual negotiations or performance the parties' intent (evidenced by their conduct) that the non-signatory parent company should be bound by the arbitration agreement as beneficiary under the underlying contract. It is highly controversial whether the group of companies doctrine applies in Switzerland. Regardless, in many of the circumstances that may give rise to an application of the group of companies doctrine, an extension onto a non-signatory third party may be possible by construing an implied consent of the "interfering party" as described above.

3.3 Consent Requirement for the Joinder of a Third Party in Summary

Clearly, it will certainly be easier to join a third party if some sort of implied or explicit consent can be demonstrated based on an arbitration agreement expressly agreed to in writing by the third party to be joined. Nevertheless, under certain circumstances a third party joinder may also be justified without any such written agreement, but merely based on an implied consent derived from the third party's conduct in the negotiations or performance of a contract featuring an arbitration clause.

Without any such express or implied consent of the third party (same as of all other parties involved in the arbitral proceeding), a third party joinder to an arbitral proceeding will not be possible.

4. Problems Concerning the Appointment of the Arbitral Tribunal

Once the consent of a third party to be joined into arbitral proceedings is affirmed, the second critical aspect in a multi-party arbitration setup must be addressed: the proper constitution of the arbitral tribunal, i.e. the question of how and by whom the arbitrators of the tribunal must be appointed.

As per our initial sample scenario, after being sued by its customer for the delivery of defect goods, the manufacturer requests the joinder of its subcontractor allegedly responsible for the defect part. Standard arbitration clauses

(premised on a dispute between two parties only) that provide for a three member arbitral tribunal give each disputing party the right to appoint one member, the presiding arbitrator ordinarily to be jointly designated by the two party appointed members or the administering institutional authority (such as the ICC). While this mechanism is widely accepted in standard two-party arbitrations, in arbitrations involving multiple parties it may cause more than a simple headache, depending on the circumstances of the case and in particular the interests of the various parties' involved.

4.1 The main problem: Equal treatment of all parties

When it comes to the appointment of arbitrators in a multi-party arbitration setup, the major difficulty concerns the compliance with the right of equal treatment of all involved parties. The right of equal treatment is a procedural right applying to all contentious proceedings, and is enshrined in most arbitration laws, the European Convention of Human Rights as well as in the Federal Constitution.

To be sure, given the general deferral of arbitration to party autonomy, the parties are free to agree on a mechanism for the appointment of arbitrators, which will generally be respected in Switzerland. However, even specific appointment mechanisms agreed to by the parties (at least in advance) must comply with the parties' right of equal treatment. As a result of one of the parties having a preponderant influence on the constitution of the arbitral tribunal,¹⁸⁰ and thus on grounds of unequal treatment of parties, a Swiss court has denied to uphold an appointment mechanism chosen by the parties.

In practice, one rarely comes across arbitration clauses featuring an arbitrator appointment mechanism specifically modeled towards multi-party disputes. Barring any such agreed mechanism, in a proceeding before a three member arbitral tribunal dealing with a three-party dispute such as in the sample scenario of one claimant and two respondents, the following appointment mechanism options appear possible and their adequacy must therefore be assessed against the right of equal treatment:

¹⁸⁰ ZR 3/2002 Nr. 21.

a) Individual Appointment by the Claimant and Joint Appointment by the Two Respondents

Permitting the claimant to select its arbitrator and requiring the two respondents to jointly select their arbitrator may deny each respondent the correlating right to appoint, same as the claimant, its own arbitrator (as opposed to a joint appointment).

Whether in the above situation the right of equal treatment will be violated depends very much on the interests of the parties involved and in particular on the interests of the two respondents. In a first step, one will have to split the parties into a group of claimants and a group of respondents based on the interests of the parties involved; one claimant and two respondents as per the present example. If both respondents have completely aligned interests, their right of equal treatment would in the above scenario likely not be violated. If those interests are, however, not aligned, the requirement to jointly appoint an arbitrator may arise to a violation of the right to equal treatment. In this respect one should note that in many cases of multi-party disputes, one will only with difficulty be able to split up all involved parties into a "claimant group" and a "respondent group", where all parties within the respective group would have completely aligned interests.

To illustrate such difficulty, let us return to the above scenario of the manufacturer and its subcontractor. While one can say that both respondent parties have aligned interests vis-à-vis the customer in demonstrating that the goods delivered were not defect, clearly their interests are very much contradicting when it comes to the question of who is responsible for such defect. A further difficulty of grouping parties based on their interests is the fact that differing interests of parties often become only visible during the course of a proceeding, which makes a proper grouping at the outset of a proceeding even more problematic.

It is the author's view that for the purposes of grouping parties into a group of claimants and respondents, fully aligned interests will ordinarily only exist between parties belonging to the same corporate group. Even in such a case, it may be questionable and very much depend on the specific circumstances of the case if the interests of all involved group companies are truly fully aligned. This is especially so, given that Swiss law states that even within a group of companies, each group company has to act according to its own

interest and such interest may not always be fully aligned with the interests of its affiliate companies.

One must therefore act with great care when splitting parties into a claimant and a respondent group, bearing in mind the different facets to be taken into account when assessing the interests involved and their alignment. In many instances it may be questionable whether separating parties into a respondent or claimant group and requiring a joint appointment of an arbitrator by such group will satisfy the right of equal treatment.

Such risk can, in the author's view, not be alleviated by a solution where a neutral authority (such as an administering institution like the ICC) appoints the joint arbitrator on behalf of a group, in our sample scenario on behalf of the respondents, while the claimant still itself appoints its arbitrator (as opposed to having all arbitrators appointed by a neutral authority).¹⁸¹ A one sided appointment by a neutral authority risks to equally violate the principle of equal treatment, except in the rare situation where the group on behalf of which the appointment is made has fully aligned interests. Having said this, no concerns relating to the equal treatment of parties should generally arise (at least in Switzerland¹⁸²), where multiple parties (whether on the respondent or claimant side) agree to jointly appoint one arbitrator.

b) Individual Appointment by Each Party

Each party appointing its own arbitrator would in the above three-party setup result in the arbitral tribunal being composed of one arbitrator appointed by claimant and two arbitrators appointed by the respondents. This would allow the two respondents with (at least partially) aligned interests to select arbitrators with a majority of the votes on the tribunal. This setup would create a strong impression of the respondents having a preponderant influence on the constitution of the arbitral tribunal, which is highly problematic when reviewed under aspects of equal treatment.

Neither would the above conclusion significantly change if all three parties agreed, which is in principle permissible, that each of the three parties could appoint its own arbitrator and the three arbitrators would designate a fourth person as chairman with the tying vote. Assuming at least partially aligned

¹⁸¹ See sub-section c) below.

¹⁸² See section 4.4 below.

interests of the two respondents, the preponderant influence on the constitution of the arbitral tribunal would still have to be acknowledged, albeit in this scenario to a somewhat lesser extent than under the previous three-member tribunal scenario.

Furthermore, in a multi-party dispute with more than three parties, each party appointing its own arbitrator would lead to practical problems. The appointment of four or more arbitrators would in many cases be impractical and have a major detrimental effect in terms of costs and efficiency of the arbitral proceeding.

c) *Appointment of All Arbitrators by a Neutral Authority*

In the author's view, this third option best addresses concerns relating to the parties' equal treatment in arbitral proceedings. If a neutral authority, be it a court, an arbitral institution or any other neutral authority, appoints all arbitrators of the tribunal (or, alternatively, the two wing arbitrators ordinarily appointed by the parties, who then jointly appoint the chairman), it is clear that all parties (regardless of their number) are treated equally in the setup of the arbitral tribunal.

The draw back under this option is the denial of the parties' right to appoint their arbitrator, which is considered one of the core principles and possibly also advantages of arbitration vis-à-vis ordinary State court litigation. Nevertheless, in a multi-party context, where a group of parties does not agree on the joint appointment of an arbitrator, it seems – not least with a view to ensure the future enforceability of the arbitral award¹⁸³ – that such draw back is, as a general notion and always assessed on a case-by-case basis, the lesser evil than violating the parties' right to an equal treatment in the arbitral proceeding.

¹⁸³ See section 4.4 below.

4.2 Exacerbating timing issues

a) General

The problems relating to the appointment process of arbitrators in multi-party arbitrations may be further exacerbated by timing issues. Let us assume, in our sample scenario, that the arbitral tribunal has been constituted as part of a standard two-party arbitration, where the customer and the manufacturer have each appointed their arbitrator, who then designated a third arbitrator as chairman. Subsequently to the constitution of the arbitral tribunal, the manufacturer's subcontractor is joined to the arbitral proceeding. In this set-up, the subcontractor had obviously no involvement at all in the appointment of the arbitral tribunal.

In this scenario, the right of equal treatment of the subcontractor appears, at least prima facie, violated. Thus, the solutions delineated above must also apply in these situations. Generally, there will only be two options to proceed. If the joining subcontractor accepts the arbitral tribunal already constituted, which is more likely to be the case if its interests are aligned with the ones of the manufacturer, the admissibility of the joinder should be confirmed. If, however, the subcontractor does not accept the arbitral tribunal previously constituted, it would in the author's view be necessary to vacate the existing arbitral panel and have a new panel appointed by a neutral authority. This in turn may create issues under efficiency considerations and may in particular cause significant time delay. Furthermore, it would require repetition of procedural steps previously taken, which may lead to a request for the joinder of a third party to be denied for these very reasons.

b) Solutions under ICC and Swiss Rules

When it comes to the appointment of three member arbitral tribunals in multi-party proceedings governed by either the Swiss Rules or the ICC Rules, both sets of rules leave great discretion to the respective administering authorities (the ICC court or the Swiss Rules Arbitration court). This includes, but is not limited to, the solution favored by the author, which is the appointment of all arbitrators or at least the two wing arbitrators by a neutral authority.

Both under the Swiss Rules and the ICC Rules, the constitution of the arbitral tribunal shall first be effected in line with the parties' agreement.¹⁸⁴ If no such agreement exists, the court first requests the claimant or group of claimants

¹⁸⁴ Art. 8 (3) Swiss Rules, art. 12(5) ICC Rules.

to jointly appoint their arbitrator. Then the respondent or group of respondents are requested to do so.¹⁸⁵

If either the claimant or respondent group fails to jointly appoint their arbitrator, which will presumably more often be the case if the various parties do not consider themselves to have aligned interests, the court is given wide discretion to appoint the arbitral tribunal. For instance, if the group of respondents fails to jointly appoint their arbitrator, the court may do so on their behalf. Alternatively, the court may (under the Swiss Rules) also only appoint the two wing arbitrators and leave the designation of the chairman up to the appointed wing arbitrators, or simply appoint all three members of the arbitral tribunal.¹⁸⁶

The timing issue raised above, i.e. if a joinder occurs after the members of the arbitral tribunal have been designated, is differently addressed under the ICC Rules and the Swiss Rules. The Swiss Rules do not impose any restrictions on the arbitral tribunal's discretion when deciding on the admissibility of a joinder. When doing so, the tribunal will most certainly take the issue of time delays and the need for repetition of procedural steps into consideration.

In contrast, under the ICC Rules a third party may in general only be joined to a proceeding before the arbitrators in such proceeding were appointed. Thereafter, a joinder is only permitted with the explicit agreement of all parties involved.¹⁸⁷

4.3 Enforceability of the Arbitral Award in Jeopardy?

A party may reject any thought of joining a third party into an arbitration proceeding for practical reasons, in particular because of a third party's lack of liquidity to meet any potential payment obligations imposed by an award or also because of such third party being domiciled in a country where enforcement of arbitral (and also State court) awards is generally regarded as cumbersome and costly.

In addition to such practical considerations, parties acting with foresight will also need to consider whether the enforceability of a subsequent arbitral

¹⁸⁵ Art. 8 (4) Swiss Rules, art. 12(6 and 7) ICC Rules.

¹⁸⁶ Art. 8 (5) Swiss Rules and art. 12(8) ICC Rules.

¹⁸⁷ Art. 7(1) ICC Rules.

award may become jeopardized by joining a third party into an arbitral proceeding.

In the context of enforcement, two potential problems caused by a third party joinder should be briefly highlighted: the refusal to enforce an award due to the lack of a written arbitration agreement binding all parties (and in particular the joined third party) and a refusal to enforce an award because of a violation of the parties' right of equal treatment. Both of these grounds constitute proper reasons to deny enforcement based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC), which governs the enforcement of foreign arbitral awards in a vast majority of countries worldwide (including Switzerland).

a) *Unenforceability Due to Lack of Arbitration Agreement?*

Under Article II of the NYC, an arbitration agreement in writing must be recognized by any signatory country to the NYC. Article V(1)(a) of the NYC states that the enforcement of a foreign arbitral award may be refused if the arbitration agreement from which the arbitral tribunal issuing the award derived its competence, is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made. Under Article V(2)(b) NYC a foreign award may be further denied enforcement if it is contrary to the public policy of the country where enforcement is sought.

A third party that was joined to arbitral proceedings based on an extension of an arbitration clause, without being a signatory to an arbitration agreement, could attempt to avoid enforcement by arguing the lack of the arbitral tribunal's jurisdiction with respect to such non-signatory party. The lack of jurisdiction could either be based on the fact that there is no written arbitration agreement binding such third party, which is contrary to the applicable law – as per Article V(1)(a) NYC. Alternatively, the extension of an arbitration agreement onto a third party without any written consent of such third party could also be argued to violate the public policy of the country where enforcement is sought, as per Article V(2)(b) NYC.

If the arbitral tribunal's jurisdiction and thus the admissibility of the joinder of the third party by extending the arbitration clause is governed by Swiss law, Article V(1)(a) NYC would presumably not be violated, since such extension

may, depending on the circumstances, be permitted under Swiss law.¹⁸⁸ Thus, unless such an extension onto a non-signatory party would be deemed to violate the public policy of the country where the enforcement is sought (which should in general not be the case, but would need to be determined on a case-by-case basis), it should be difficult to avoid an enforcement of the arbitral award based on such argument. This being said, the mere fact that additional arguments – even such without merit – may exist for a party to contest the enforceability of an award may, practically speaking, render the enforcement of an arbitral award more cumbersome and lead to significant time delay in the enforcement stage.

b) *Unenforceability Due to Violation of Right of Equal Treatment?*

As shown above, the problems in the appointment mechanism of arbitral tribunals in multi-party arbitrations are linked to the principle of the parties' right of equal treatment. This is a procedural right that in Switzerland same as in many foreign countries is recognized as a fundamental procedural right, which must not be violated.

Adherence to such fundamental procedural right may be critical when it comes to the enforcement stage of an award. Under the NYC, the enforcement of an award may be denied under Article V(1)(d) NYC if the composition of the arbitral authority or the procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country of arbitration.

Thus, where the appointment of an arbitral tribunal is held to violate the parties' right of equal treatment, enforcement of such tribunal's award may on the basis of the NYC be denied (based on the above Article 1(i)(d) NYC or on public policy grounds as per Article V(2)(b) NYC. In this respect, different standards apply in different countries. In Switzerland it may be compatible with the parties' right of equal treatment to request a group of parties with aligned interests to jointly (as opposed to each party individually) appoint their arbitrator.¹⁸⁹ In contrast, in France the opposite may be true¹⁹⁰, where court

¹⁸⁸ See section 3.2 above.

¹⁸⁹ Arab Republic of Egypt vs. Westland Helicopters Ltd., SFT P.1703/1982 of 16 May 1983 (unpublished).

¹⁹⁰ Judgment of 7 January 1992, *Sociétés BKMI et Siemens v. Société Dutco* (e.g., in *ArbInt* 2/1993, p. 197–202).

precedent has held that a party may as a matter of public policy not waive in advance its right to equal treatment. This case law would cause a party agreement on the application of institutional rules of arbitration that foresee in multi-party situations that the administering authority may appoint one arbitrator in lieu of a group of claimants or respondents, as the ICC and Swiss Rules do, to potentially violate French public policy.

In case of doubt and if a subsequent award may need to be enforced in France or in other countries with a similar understanding of the right of equal treatment, the prudent approach would be to have the entire arbitral tribunal (as opposed to only one of the wing arbitrators) be appointed by a neutral authority. It is exactly for this reason that, following the emergence of the above mentioned French case law, many institutional rules have been amended to explicitly empower the administering authority to designate the entire arbitral panel in multi-party disputes, rather than only step in on behalf of a group of parties that (due to contradicting interests) failed to jointly appoint their arbitrator.

4.4 Problems Related to the Appointment of Arbitrators in Multi-Party Set Ups in Summary

When constituting an arbitral tribunal in multi-party disputes the participating parties' right of equal treatment must be duly considered. Not only must a preponderant influence of one group of parties in the constitution of the tribunal be avoided, potential concerns on grounds of public policy in countries where a subsequent arbitral award will need to be enforced must also be taken into account. Failure to do so may render the arbitral proceedings prone to challenges in setting aside same as in enforcement proceedings and will likely cause substantial time delay and additional, possibly substantial, costs.

5. Practical Sample Clauses

To avoid many of the above highlighted problems, parties in multi-party or multi-contract situations are generally well advised to address the multi-party setup already when dealing with the arbitration clause(s) to be included in the contract(s). An arbitration clause addressing a multi-party setup may both provide for (i) a special multi-party mechanism to appoint arbitrators or for (ii) special provisions relating to the admissibility of third party joinders (and for that matter also relating to the admissibility of intervention or consolidation).

The below extracts from model clauses suggested by the IBA Guidelines for Drafting Arbitration Clauses may be used as a good starting point when drafting multi-party setups in arbitration clauses:¹⁹¹

Joinder

“Any party to this agreement named as respondent in a request for arbitration, or a notice of claim, counterclaim or cross-claim, may join any other party to this agreement in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against that party, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within 30 days from the receipt by such respondent of the relevant request for arbitration or notice of claim, counterclaim or cross-claim.”

Appointment of arbitrators in multi-party arbitration

“In the event that more than two parties are named in the request for arbitration or at least one contracting party exercises its right to joinder or intervention, the claimant(s) shall jointly appoint one co-arbitrator and the respondent(s) shall jointly appoint the other co-arbitrator, If the parties disagree about their classification as claimant(s) or respondent(s), or if the multiple claimants or the multiple respondents fail to appoint a co-arbitrator as provided above, [the designated arbitral institution / appointing authority] shall, upon the request of any party, appoint all three arbitrators and designate one of them to act as presiding arbitrator. If the claimant(s) and the respondent(s) appoint the co-arbitrators as provided above, the two co-arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator.”

C. Summary

There are manifold reasons why parties wish to include an arbitration clause in their commercial agreements irrespective of whether the contractual setup relates to one or multiple counterparties. However, multi-party disputes have in the last years shifted more and more into the focus of the arbitration com-

¹⁹¹ Guidelines for Drafting International Arbitration Clauses (2010) is reproduced by kind permission of the International Bar Association, London, UK, and is available at: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
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munity, in particular posing questions as to the appropriateness of arbitration as a true alternative to State court litigation when it comes to multi-party or multi-contract disputes.

There are practical arguments in favor or against multi-party arbitration based on considerations of efficiency, cost, coherent decisions, and preservation of rights of claim. Be it as it may, when considering whether or not to opt for multi-party arbitration, one should bear in mind the two central problems that come with it: (i) the question of consent on the part of all parties involved relating to the jurisdiction of the arbitral tribunal and (ii) the proper constitution of the arbitral tribunal.

An awareness of these two central aspects before commencing a multi-party arbitration proceeding or even when drafting an arbitration clause will go a long way to address and solve such problems in a proper and efficient manner, making arbitration a well-equipped and therefore true alternative for the resolution of conflicts involving multiple parties and/or contracts.

V. The Impact of Cross-border Insolvency on International Arbitration: A Swiss View¹⁹²

By Daniel Eisele and Tamir Livschitz

A. Introduction

In cross-border contractual arrangements parties often resort to arbitration as a means to resolve any potential future disputes. The parties then naturally expect any future disputes to be submitted to arbitration regardless of any corporate or other changes which any of the parties may subsequently undergo. Such expectation certainly also applies should one of the parties become insolvent or fall into bankruptcy.

Surprisingly, even though Switzerland is widely perceived as one of the premier places for international arbitration with an arbitration friendly legislation in place, a party's reliance on the choice of arbitration to survive and remain valid in case a party to the agreement falls into bankruptcy was seriously put in jeopardy by case law of the Swiss Federal Supreme Court, until a recent decision by the same body provided further guidance and clarity in the matter.

B. Jurisdiction of Arbitral Tribunals in Cross-Border Insolvency Situations and the Vivendi Case

The question raised by a situation where a party to an arbitration agreement becomes bankrupt relates to such party's legal capacity to arbitrate (often also called subjective arbitrability) and to the validity of the arbitration agreement as such. While Swiss law contains a specific provision preventing state entities from invoking their own law to contest their legal capacity to arbitrate

¹⁹² This article was previously published in: Expert Guide Litigation & Dispute Resolution 2013, Corporate LiveWire, p. 34–37.

(art. 177 para. 2 of the Private International Law Act (PILA)), there is no such express provision for private entities.

Lacking such express provision, the Swiss Federal Supreme Court – sitting on appeal – was confronted back in March 2009 with an interim award on jurisdiction rendered by an arbitral tribunal dealing with the impact of cross-border insolvency on its competence to hear the case. In such interim award the arbitral tribunal decided to discontinue arbitration proceedings against a Polish entity, Elektrim SA, which had fallen into bankruptcy subsequent to the initiation of the arbitration proceedings. Since pursuant to Polish law (art. 142 pKSG), the law of the place of incorporation of Elektrim SA, any arbitration clause concluded by the bankrupt was deemed to lose its legal effect, the arbitral tribunal concluded that the bankruptcy of Elektrim SA revoked its legal capacity to arbitrate and thus the lack of the subjective arbitrability automatically resulted in the lack of jurisdiction of the arbitral tribunal over Elektrim SA.

The Swiss Federal Supreme Court upheld the interim award on appeal (*Vivendi SA et al. vs. Deutsche Telekom AG et al. and Elektrim SA et al.*; DTF 4A_428/2008 dated 31 March 2009) holding that pursuant to the Swiss conflict of laws rules (art. 154 and 155 lit. c PILA) the legal capacity of a corporation were governed by the law of such corporation's place of incorporation and, thus, since according to Polish law any arbitration clause lost its legal effect with respect to the bankrupt party, the arbitral tribunal rightfully rejected its jurisdiction over the bankrupt Elektrim SA. The Swiss Federal Supreme Court thereby pointed to the fact that according to the opinions expressed by the Polish law experts who had appeared in the arbitration proceeding a Polish party would lack any legal capacity to conduct an arbitration proceeding.

While the decision triggered a great deal of criticism¹⁹³ – the reasons for which would exceed the scope of this article – it resulted in great concern as to whether parties agreeing to arbitration in Switzerland could rely on such agreement also in case one of the parties would subsequently fall into bankruptcy.

C. Retraction of the Vivendi Case Law

In November 2011, an arbitral tribunal with seat in Geneva issued a jurisdictional award confirming its jurisdiction over a Portuguese entity against which arbitration proceedings had been commenced even though it had prior thereto fallen into bankruptcy. The Portuguese bankruptcy administrator appealed such decision with reference to the Vivendi case, arguing that based on Portuguese insolvency law the Portuguese entity no longer had the capacity to be a party to arbitration. Hence, on appeal the Swiss Federal Supreme Court was asked to again decide on the impact of cross-border insolvency on international arbitration proceedings in Switzerland.

In its holding (DTF 138 III 714; 4A_50/2012 dated 16 October 2012), the Swiss Federal Supreme Court seized the opportunity to clarify – and in essence (to a certain extent) retract – its previous stance voiced in the Vivendi decision. In a first step, separating the question of the validity of the arbitration clause from the question of legal capacity, the Swiss Federal Supreme Court noted that pursuant to Swiss law an arbitration clause would be valid if it corresponded either to the law chosen by the parties, to the law applicable to the dispute (and to the main contract) or to Swiss law (art. 178 para. 2 PILA). In

¹⁹³ See, in particular, KARRER PIERRE A., *The Swiss Federal Supreme Court got it wrong, wrong, wrong and wrong a fourth time*, ASA Bulletin 2010, pp. 111–112.; AEBI MARTIN/FREY HAROLD, *Impact of Bankruptcy on International Arbitration Proceedings*, ASA Bulletin 2010, pp. 113–123, p. 120 and p. 123; MARKERT LARS, *Arbitrating in the Financial Crisis: Insolvency and Public Policy versus Arbitration and Party Autonomy – Which Law Governs?*, Contemporary Asia Arbitration Journal 2/2009, pp. 217–246, p. 233; SPOORENBERG FRANK/FELLRATH ISABELL, *The Uneasy Relationship between Arbitration and Bankruptcy*, ILO Newsletter 30 July 2009; BERGER BERNHARD, *Die Rechtsprechung des Bundesgerichts zum Zivilprozessrecht im Jahre 2009*, 3. Teil: *Schiedsgerichtsbarkeit*, ZBJV 147/2011, pp. 551–575, p. 555 et seq.; KRÖLL STEFAN, *Arbitration and Insolvency*, Selected Conflict of Laws Problems, in: Ferrari/Kröll (eds.), *Conflict of Laws in International Arbitration*, Munich 2011, pp. 211–256, pp. 232–233.

application of such rule the arbitration clause was held valid, because under Swiss law an arbitration clause generally survives the opening of a bankruptcy proceeding and remains binding on the bankruptcy administrator.

In a second step the court went on to distinguish the case at hand from the Vivendi case, thereby clarifying its holding in the latter case. The court stated that unlike in the Vivendi case, the pertinent provision in the Portuguese law invoked by the bankruptcy administrator related to the validity of the arbitration clause and not to the question of legal capacity, since it referred to the “efficacy of arbitral agreements” in bankruptcy situations rather than to the legal capacity of a bankrupt party.

The court concluded that if pursuant to the pertinent Swiss conflicts of laws provisions foreign law applied to the question of the legal capacity of an entity – as held in the Vivendi decision – one would need to determine whether under such foreign laws an entity that had entered a bankruptcy proceeding could still hold rights and obligations in general. Should this be the case, such entity would be deemed to have legal capacity for the purposes of an arbitration agreement.

The court further clarified that any possible limitations foreign laws may impose on a bankrupt party that are specific to arbitral proceedings and leave the legal capacity of the foreign entity untouched would be fundamentally irrelevant from the point of view of the capacity to be a party to an arbitration seated in Switzerland. Hence, if the legal capacity of a foreign party could pursuant to its laws of incorporation be affirmed, the validity of the arbitration clause would be decided pursuant to art. 178 para. 2 PILA, permitting also the application of Swiss law under which a bankrupt party remains bound by an arbitration agreement for as long as it has legal capacity to hold rights and obligations.

D. Conclusion: No Impact of Cross-Border Insolvency on Arbitration in Switzerland

With its recent decision the Swiss Federal Supreme Court has in essence retracted from its previous position on the impact of cross-border insolvency on arbitration. It has made clear that a foreign party falling into bankruptcy will not lose standing and will continue to be bound by an arbitration clause, even

if the laws of incorporation of such foreign party stipulate limitations on bankrupt entities to arbitrate. In other words, the Swiss Federal Supreme Court has clearly confirmed that as a rule cross-border insolvency will have no impact on an arbitration proceeding in Switzerland. The contrary will only be the case in the very unlikely situation where based on the laws of incorporation of a foreign bankrupt entity the mere fact of the opening of a bankruptcy proceeding deprives such entity from its general ability to hold rights and obligations, which in the vast majority of global jurisdictions will not be the case.

VI. Sport Arbitration in Switzerland

By Dr. András A. Gurovits, CAS-Arbitrator, and Martina Madonna-Quadri

A. Introduction

Switzerland has a long tradition in national and international arbitration. Reasons to choose Switzerland as the seat in international arbitration include the country's neutrality, political stability and modern as well as straightforward *lex arbitri*.

The *lex arbitri* for international arbitration is set out in the 12th Chapter of the Private International Law Statute (PILA), while the relevant rules of domestic arbitration are found in the Swiss Code of Civil Procedure (CCP). Arbitration is "international" if one of the parties does neither have its domicile nor its habitual residence in Switzerland.

The Swiss *lex arbitri* applies in both the cases of *ad hoc* arbitration and institutional arbitration. Institutional arbitration institutions in Switzerland include the Swiss Chambers' Arbitration Institution and the Court of Arbitration for Sport (CAS) in Lausanne. This paper focuses on arbitration before the CAS.

B. The International Court for Arbitration in Sport – The CAS

1. The Creation of the CAS

It was the former president of the International Olympic Committee (IOC), Juan Antonio Samaranch from Spain, who had the initial idea to establish an independent body that would serve as an international "supreme court" in the area of sport. On 30 June 1984 the IOC founded the CAS, and the first set of the CAS Procedural Rules was adopted.¹⁹⁴ The main objectives included that the CAS

¹⁹⁴ History of the CAS, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>, (last visited on 14 August 2015).

- be easily accessible for athletes and other persons that are active in sports,
- provide for simple procedural rules,
- be available at reasonable costs,
- be established as one single private body that is distinct and independent from national court systems, and
- handle the cases by specialised arbitrators,

so that, over time, a unified “lex sportiva” could emerge.

As the CAS was a completely new institution that first needed to be promoted within the sports community it took another two years before it rendered its first decision in a case that had been brought to Lausanne. This first case was a purely internal Swiss matter between the Swiss Ice Hockey Club and the Swiss Ice Hockey League. The Swiss club had filed an appeal against a decision of the Ice Hockey League that had sanctioned the club’s coach for misbehaviour. The CAS dismissed the appeal.¹⁹⁵

2. The Independence of the CAS

In the early years of the CAS’ existence several parties expressed doubts as to whether the CAS was actually a true and independent arbitration institution. The critics primarily stressed that the CAS had been founded by the IOC and that CAS arbitration was in the hand of a closed group of arbitrators. It was argued that for these reasons the CAS was too closely connected with the sports federations and that, therefore, there was a risk that the CAS arbitrators would not consider the athletes’ interests with the required degree of neutrality and independence.¹⁹⁶

However, in the Gundel case,¹⁹⁷ where the appellant, a German rider, had contended that the CAS was not an independent court of arbitration and its decision should be annulled, the Swiss Federal Tribunal upheld the CAS award. It openly confirmed that there were no doubts about the arbitrators’ independence. However, the Swiss Federal Tribunal did also express its concerns with respect to cases in which the IOC would be one of the parties and ex-

¹⁹⁵ CAS decision no. 86/1.

¹⁹⁶ History of the CAS, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>, (last visited on 14 August 2015).

¹⁹⁷ BGE 119 II 271.

plained that in such cases, CAS' independence and impartiality would be doubtful given that the CAS had been established by the IOC.

3. The CAS Reform of 1994

As a consequence of the Gundel decision, the CAS was reformed, both financially as well as organizationally in order to ensure its full independence. To this end, the so-called International Council of Arbitration for Sport, the ICAS, was created and two distinct CAS divisions, the (i) ordinary arbitration division and the (ii) appeals arbitration division, were founded.¹⁹⁸

Following these changes, in 2003 the Swiss Federal Tribunal confirmed in the Lazutina case¹⁹⁹ that the CAS was a completely independent and impartial arbitration court and that, in particular, the CAS was now also completely independent from the IOC. Larissa Lazutina from Russia was one of the most successful cross country skiers ever. At the 1998 Winter Olympic Games in Nagano Japan, she won five medals including three gold medals. However, after the 2002 Winter Olympic Games in Salt Lake City she had been banned from competition for a period of two years because of a positive doping test resulting from the Salt Lake City games. She had appealed against a CAS decision that confirmed the sanction against her. Ms Lazutina contended, among other things, that the CAS was not independent. However, she lost this case and the Swiss Federal Supreme Court rejected her appeal and argued that the CAS was independent.

4. The Adoption of the WADA Code

Another important step in the history and development of the CAS followed in 2003 when the new WADA (World Anti-Doping Agency) Code was adopted. In accordance with the WADA Code, the CAS became, and still is, the last instance tribunal also for all international doping-related disputes. This significantly contributed to the creation of a worldwide last tribunal for sports matters.

¹⁹⁸ History of the CAS, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>, (last visited on 14 August 2015).

¹⁹⁹ BGE 129 III 445.

5. The Structure of the ICAS and the CAS

The establishment of the ICAS ensures that the entire Olympic movement is represented and involved in CAS arbitration. Its main objective is to ensure the proper operation of the Court of Arbitration for Sport. The ICAS is composed of twenty members, all of which are high-level jurists representing the Summer Olympic International Federations, the Winter Olympic International Federations, the IOC, the National Olympic Committees, and the Athletes. In addition, four members are independent so that an appropriate mix of representation is ensured.²⁰⁰

The ICAS shall not only ensure proper operation of the CAS, but shall also adopt and amend the CAS Code that provides the procedural set of rules for all CAS proceedings. The ICAS, further, appoints the CAS arbitrators and the CAS General Secretary and it supervises the activities of the CAS Court Office. Finally, it takes care of the financing of the CAS.²⁰¹

While the ICAS is responsible for the operation of the CAS, the arbitration procedures are managed by the CAS Court Office and the CAS arbitrators. The CAS Code sets out that there shall always be at least 150 CAS arbitrators and 50 CAS mediators.²⁰² CAS proceedings can be conducted, depending on the parties' decisions, either by one Sole Arbitrator or by a panel of three arbitrators.²⁰³ With respect to procedural matters the CAS arbitrators are supported by the CAS Court Office. Upon request of the panel, the CAS Court Office can also appoint an ad-hoc clerk.²⁰⁴

Since it had been established, the CAS organization has significantly grown. The CAS is presently composed of more than 250 arbitrators representing approximately 80 countries as well as nearly 70 mediators. The CAS Court Office is run by the CAS Secretary General who currently works together with eight legal counsels who take care of the administrative side of the CAS proceedings.

²⁰⁰ Article S4 of the Code of sports-related Arbitration (CAS Code).

²⁰¹ CAS Code, S6.

²⁰² CAS Code, S13.

²⁰³ CAS Code, R40.1.

²⁰⁴ CAS Code, R54.

C. The Competence of the CAS

1. “Sports-Related” Matters

The CAS may handle any matter that is somehow sports-related. This term is to be understood broadly. The CAS cases, for instance, include sporting sanctions, pecuniary matters, doping and, generally speaking, any other matter that is somehow related or connected to sport.²⁰⁵

2. Party Agreement Conferring Jurisdiction to the CAS

In accordance with general principles of arbitration, a claimant or appellant can only lodge a claim or appeal with the CAS if a valid arbitration agreement is in place and if such arbitration agreement provides for a choice of the CAS rules.²⁰⁶ In light of standard practice of the Swiss Federal Tribunal such arbitration clause can be contained in a specific arbitration agreement that forms part of a commercial contract (e.g. an employment agreement) or it may be set out in the statutes or regulations of a federation, association or other sports-governing body.²⁰⁷

If the CAS competence shall be derived from such statutes or regulations it must be ensured that the relevant athletes are actually bound by the arbitration clause. In daily CAS practice, the question of whether an athlete is bound by the arbitration clause or not sometimes creates issues. Athletes that defend a case, a disciplinary one or a doping case, may be inclined to contend that they are not obliged to go to CAS as they are not bound by the arbitration clause provided by the relevant statutes and regulations.

One can note, however, that the Swiss Federal Court, that has some limited competence to review CAS decisions, takes a rather liberal approach and usually recognizes validity of arbitration clauses embedded in a sports federation's statutes or regulations. However, in a limited number of cases the Swiss Federal Supreme Court ruled, on appeal, that the legal requirements for a

²⁰⁵ CAS Code, R27.

²⁰⁶ CAS Code, R38 and R47.

²⁰⁷ Art. 178 para. 1 PILA; BSK IPRG-GRÄNICHER, art. 178 para. 6 et seq., esp. paras. 18a and 61a; BGE 134 III 565 cons. 3.2.

valid arbitration agreement had not been observed and, thus, denied existence of an agreement validly conferring jurisdiction to the CAS.²⁰⁸

D. The Grounds for Appeal against CAS Awards

Switzerland follows a very liberal approach with regard to arbitration. Decisions of Swiss arbitral tribunals shall, absent major flaws, be respected and challenges are permitted for only a limited number of reasons.

With respect to international arbitration, these reasons are found in article 190 of the PILA that states that an appeal against a decision of an arbitral tribunal will only be permitted if (i) the panel was constituted in an irregular way (for instance, if it was not impartial), (ii) the arbitration tribunal wrongfully accepted its jurisdiction (for instance, if there was no valid arbitration agreement), (iii) the arbitration tribunal decided on points that were not submitted, disputed or disregarded, (iv) the right to be heard was violated or (v) the award is incompatible with public policy. This list is exhaustive. A CAS award cannot be challenged before the Swiss Federal Tribunal for any other reason.

Swiss law even allows that in international arbitration where none of the parties is domiciled in Switzerland the right of appeal with the Swiss Federal Supreme Tribunal is excluded.²⁰⁹

This means that a CAS award cannot be challenged on the merits of the case. If a party that loses a case is of the opinion that the decision is not accurate, it has practically no means to challenge the decision, unless it is able to prove that any of the foregoing important reasons is given (and, if the parties are not domiciled in Switzerland, they have not expressly ruled out their right of appeal).

So far, only eight appeals against an award of the CAS with the Swiss Federal Tribunal were successful. In three cases the award was annulled due to lack of

²⁰⁸ For example, SFT 4A_358/2009 of 6 November 2009.

²⁰⁹ Art. 192 para. 1 PILA.

jurisdiction of the CAS.²¹⁰ In three other cases the Swiss Federal Tribunal determined that the right to be heard of a party was violated.²¹¹ In two cases, the Swiss Federal Tribunal decided that the CAS award was against public order.²¹²

All in all, we can, however, conclude that the Swiss Federal Tribunal is following a benevolent approach and tries not to interfere with CAS decisions whenever reasonably possible.

E. The CAS Procedures

The two most relevant types of CAS procedures are the ordinary arbitration procedure and the appeals arbitration procedure.²¹³ The subject matter of an ordinary arbitration procedure can be any commercial topic that could, as a principle, also be brought to any other (commercial) arbitration court, but is being brought to the CAS as it is somehow related to sports. On the other hand, the subject matter of an appeal procedure is a challenge of a decision rendered by a sports federation if the procedural rules of the federation provide that the CAS shall be the competent body to hear the appeal.²¹⁴ Such arbitration proceedings typically relate to disciplinary matters and doping cases.

In an attempt to minimise litigation within the world of sports, the CAS also provides the option to go for mediation instead, or before arbitration.²¹⁵ It further offers the so-called ad hoc procedure which was implemented to facilitate speedy decision making during important international games or championships (e.g. the ad hoc division for the Summer Olympic Games 2012 in London).²¹⁶ Finally, the CAS Code also provides the option of an expedited procedure for cases where (outside an international event for which an ad hoc

²¹⁰ SFT 4A_244/2012 of 17 January 2013; 4A_627/2011 of 8 March 2012; 4A_358/2009 of 6 November 2009.

²¹¹ SFT 4A_600/2010 of 17 March 2011; 4A_400/2008 of 9 February 2009.

²¹² BGE 138 III 322; 136 III 345.

²¹³ CAS Code, R27.

²¹⁴ CAS Code, R47.

²¹⁵ CAS Code, S2; CAS Mediation Rules.

²¹⁶ CAS Code, S2; CAS Mediation Rules.

institution is established) fast decision taking is required (e.g. in case of a sanction against a player banning the player from taking part in an upcoming important match).²¹⁷

F. Basic Legal Principles in Sports Arbitration in Switzerland

1. The Rule of Law vs. the Rule of the Game

The reference to the CAS ad-hoc division raises another important question in sports arbitration and litigation. To what extent can a decision that was taken during a game or other sport events be open for appeal to the CAS?

For instance, should a referee's decision during a football game of awarding a penalty-kick to one team be open for appeal? Or should giving a five minutes penalty in an ice hockey game to a team's defender be appealable? What about a decision to sanction a player for violence with a five games suspension? The answer cannot be the same in all three examples.

Why not? Because of the basic and very important difference between the rules of the game and the rules of law. The rules of the game are applied by a referee during a game or other sport events. The purpose of these rules is to ensure a fair competition, and they only regulate the athletes' conduct during a competition. In other words, the rules of the game affect the course of the competition itself, but do not affect personality or other rights of an athlete beyond such competition. Once taken, they are, and have to be, final.²¹⁸

On the other hand, rules of law are those rules that have a legal effect after the competition, that affect an athlete's personality or other rights. There is a basic consensus that rules of the game, or field-of-play, decisions are not open to appeal, while decisions that are based on an application of the rules of law are, and must be, appealable.²¹⁹

²¹⁷ CAS Code, R44.4.

²¹⁸ BGE 108 II 15 cons. 3.

²¹⁹ BGE 120 III 369 cons. 2; 118 II 12 cons. 2; 103 Ia 410 cons. 3b.

With respect to the three examples discussed above, awarding a penalty-kick and sanctioning an ice hockey player with a five minutes sanction during the game are “rules of the game decisions”. Alternatively, sanctioning a player for five additional games is a “rule of law decision”, where the athlete must have, at least in cases where Swiss law applies, the right of appeal.²²⁰

It is widely accepted that a decision made during a match or competition can be challenged in limited and exceptional circumstances, i.e. if the decision was taken in an arbitrary manner, and if it would otherwise qualify as a serious breach of the principle good faith. Otherwise, any field-of-play decision, even if it has been mistakenly made, is final and not open for appeal.

There is also a practical, non-legal, justification for the principle that rules of the game decisions are not appealable. Once a game or sports event is over, its result must be valid. If the result was open for challenge for any kind of (alleged) breach of the rules of the game, this would diminish the spirit of sports. The athletes and the audience want to leave a game knowing that the result is valid even after they leave the stadium, and will not be changed some days or months later because of an (alleged) breach of the rules of the game.²²¹

2. The Autonomy of Sports Federations/Appeal Procedures

Under Swiss law it is widely recognized that sports federations enjoy a high degree of autonomy. The right to establish and join (and leave) a sport federation or association (and any other kind of association) is a constitutional right. In particular, this autonomy gives the federations the right to (i) organize themselves in a manner the members deem appropriate and (ii) administer “justice” within the federation.²²² This autonomy is far-reaching and is one important reason for many international sports federations to choose Switzerland as their country of domicile.

²²⁰ BGE 108 II 15 cons. 3.

²²¹ BGE 108 II 15 cons. 3.

²²² Art. 23 Federal Constitution; M NSTITUTION; AL/SCHEFER MARKUS, Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte, 4th ed., Berne 2008, p. 598 et seq.; BSK ZGB-HEINI/SCHERRER, Vor Art. 60–79, para. 10 et seq.; MEIER-HAYOZ ARTHUR/FORSTMOSER PETER, Schweizerisches Gesellschaftsrecht mit Einbezug des k EMRK und der UNO-egungsrechts und der Aktienrechtsreform, 11th ed., Berne 2012, p. 675.

On the other hand, one must note that if a body of a sports federation is called “dispute resolution chamber” or “appeals body”, or the like, it is usually not independent and is, thus, no arbitration tribunal in the real sense of the term.²²³ If such a judicial body renders a decision then the athlete affected by such decision has a constitutional right to appeal and to have his case heard by a court, insofar as the decision affects the personality or other rights of the athlete.²²⁴

In other words, if an athlete is affected by a “rule of law decision”, he or she may appeal against it and may bring the case not only to the relevant judicial body within the federation, but also, once the internal appeals are exhausted, to a judicial body outside the federation. In principle, such judicial body can be a state court or an arbitration tribunal. In the world of sport, such cases are usually brought to arbitration before the CAS.

G. Cases before the CAS – Some Figures

The largest numbers of matters brought to the CAS relate to doping sanctions, contractual disputes and transfer issues. These top three are followed by eligibility disputes, i.e. decisions about an athlete’s right to compete at a specific event such as the Olympic Games or to play for a specific national team, as well as disciplinary sanctions, like the suspension of a football player for a number of games because of a severe breach of the federation’s regulations.

The number of CAS cases in total increased quite steeply in the past two decades. During the first five years after creation of the CAS in 1984 there were, on average, not more than five cases per year that led to a decision by the CAS. In the year 1991, this number was four and by the year 1997 the CAS dealt with only ten cases that led to a decision. Then the situation changed quite significantly: in 2008 the CAS rendered 222 decisions and in 2012 the number of decisions increased to 241.²²⁵

²²³ BGE 119 II 271 cons. 3b.

²²⁴ Art. 29a Federal Constitution.

²²⁵ <http://www.tas-cas.org/en/general-information/statistics.html>, (last visited on 14 August 2015).

H. The Advantages of Going to the CAS

What is the reason for this steep increase of cases brought to the CAS most recently? Firstly, one should note that the international sports federations accepted that the CAS be the one common supreme body that would resolve sports disputes and hence, they drafted their statutes and regulations accordingly.

There are other good reasons for the parties to decide to go to the CAS, including the specialisation of the CAS arbitrators, the speed of the procedures and, last but not least, the comparably low costs.

The CAS enacted a closed list of arbitrators which means that the parties are not allowed to nominate an arbitrator among anyone who does not appear on the list.²²⁶ While some have criticised this approach arguing that the closed list puts at risk independence and impartiality of the arbitrators (an argument that has been rejected by the Swiss Federal Tribunal on various occasions), one should note that the objective of the closed list is to ensure a certain quality level in the CAS jurisprudence. The CAS rules provide that the ICAS may only call upon personalities who have full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sports in general and a good command of at least one of the CAS working languages.²²⁷

In respect to speed of the CAS procedure, the relevant rules of the CAS Code for appeal proceedings explicitly state that the panel shall communicate the operative part of the decision (only) within three months after the file has been transferred to the panel. Even if the president of the appeals arbitration division has the competence to extend this time limit, as it does in many cases, the CAS proceedings are still quite fast compared with proceedings before the state courts.²²⁸

Regarding cost, the CAS Code provides that disciplinary cases of an international nature are free, except for an advance of CHF 1'000 that the appellant must pay at the beginning of the procedure.²²⁹ Beyond that amount, no fees

²²⁶ CAS Code, R38.

²²⁷ CAS Code, S14.

²²⁸ CAS Code, R59.

²²⁹ CAS Code, R65.2.

will be due in these kind of proceedings. In other cases, the table of costs of the CAS provides relatively moderate charges to be borne by the parties. With respect to the attorney's fees or fees of legal representation, respectively, the CAS Code provides a quite unique rule that states that the party that loses the case will contribute to the costs of representation of the other party. Hence, in essence, the panel has a wide discretion to determine the compensation to be paid to the prevailing party. In the author's experience, the compensation awarded to such prevailing party usually only covers a moderate fraction of the legal costs actually incurred.²³⁰

Another rather unique rule is that the parties are free to decide who shall represent them before the CAS.²³¹ They may actually elect persons that have never passed any bar exam. Whether it is wise or not to nominate a representative that has no proof of sufficient education and expertise is, of course, another question that the relevant party must respond to. But in CAS proceedings, the party is free to nominate anyone he or she wants.

The CAS Code also provides flexibility in terms of the language of the proceedings. As a matter of principle, the proceedings are conducted either in English or French. However, if the parties and the CAS agree, the proceedings may also be conducted in any other language.²³²

Another advantage of CAS arbitration is the flexibility of the procedure. The CAS Code has been designed with a toolkit if matters are very urgent. One such tool is the ad hoc division that shall ensure fast decision making at big sport events such as the Olympic Games. Another tool is the expedited procedure which will allow fast-decision taking in urgent cases that may occur outside Olympic Games (or other events for which an ad hoc division is established). For instance, in case of a sanction imposed on an athlete just a few days before an important match or other sports event, the athlete may have a prevailing interest in obtaining a decision fast so that the issue of whether or not he or she is eligible for that event be cleared before the event starts.

Last, but not least, it is to be noted that CAS awards are internationally recognized and enforceable in accordance with the New York Convention of 1958.

²³⁰ CAS Code, R64.5.

²³¹ CAS Code, R30.

²³² CAS Code, R29.

VII. Appeal in Arbitration Matters to the Swiss Federal Supreme Court

By Christa Sommer

A. Introduction

When the parties reach a valid arbitration agreement,²³³ they take the matter in dispute away from the state jurisdiction believing that an arbitral tribunal is more suited for the dispute settlement than the state courts.²³⁴

As, however, a ruling by an arbitral tribunal (arbitral award) is equal in its effects to a state ruling,²³⁵ there is nevertheless a need for a certain degree of state control in order to guarantee fair proceedings for the parties and a minimum standard with regard to content. Only if none of the parties has their domicile, habitual residence or a business establishment in Switzerland can an appeal against the arbitral award be fully excluded.²³⁶

In particular, Swiss legislation sees the possibility of appealing against arbitral awards to the Federal Supreme Court.²³⁷ The present article provides an overview of the appeal in arbitration matters to the Federal Supreme Court by presenting the requirements for its admissibility, the possible grounds for appeal, and some selected procedural aspects.

²³³ Cf. art. 357 et seq. CCP and art. 178 PILA.

²³⁴ CHRISTIAN LUCZAK, *Beschwerde gegen Schiedsgerichtsentscheide („Appeal against arbitral awards“)*, in: Geiser/Münch/Uhlmann/Gelzer (eds.), *Prozessieren vor Bundesgericht („Conducting proceedings before the Swiss Federal Supreme Court“)*, 4th ed., Basel 2014, para. 6.35.

²³⁵ Cf. art. 387 CCP, according to which the arbitral award has the effect of a legally-binding and enforceable judicial decision, once notice of the award has been given to the parties.

²³⁶ Art. 192 PILA; LUCZAK *supra* footnote 234, para. 6.3.

²³⁷ Art. 389 para. 1 CCP; art. 191 PILA; art. 77 FSCA; for the chances of success of such appeals see above, LIVSCHITZ TAMIR, *Switzerland – as Arbitration Friendly as It Gets*, *supra*, section D.2.

B. Arbitration Appeal as a Special Appeal in Civil Matters

The arbitration appeal is an appeal in civil matters.²³⁸ Basically, the same regulations therefore apply for arbitration appeals as for civil appeals – subject to the provisions named in art. 77 para. 2 of the Federal Supreme Court Act of 17 June 2005 (FSCA) that are not reconciled with arbitration.²³⁹

However, in its function, the appeal in arbitration matters differs fundamentally from the usual appeal in civil matters. Whereas the latter guarantees the uniform application of the federal law and international law throughout Switzerland,²⁴⁰ the application of law is basically a matter of the arbitral tribunal within the framework of arbitration. The arbitration appeal does not result in a repeated review of the arbitral award concerning the application of law by the Federal Supreme Court.²⁴¹ The Federal Supreme Court is solely to monitor that certain fundamental basic rules are also complied with in arbitration proceedings.²⁴²

C. Admissibility of the Appeal

The prerequisites for the admissibility mentioned below must exist cumulatively, so that the Federal Supreme Court does not reject an arbitration appeal and deals with it materially.

1. Object of Appeal

Arbitral awards within the meaning of art. 77 FSCA can be contested with an appeal to the Federal Supreme Court, i.e. the area of application of the arbitration appeal is restricted to proceedings that were issued in application of the provisions regarding arbitration in the Swiss Code of Civil Procedure of

²³⁸ Art. 72 et seq. FSCA.

²³⁹ The following articles are not applicable: art. 48 para. 3, art. 90–98, art. 103 para. 2, art. 105 para. 2, art. 106 para. 1, art. 107 para. 2 FSCA.

²⁴⁰ Cf. art. 95 lit. a and b FSCA.

²⁴¹ LUCZAK, *supra* footnote 234, para. 6.6; cf. also SFT 4A_682/2012 of 20 June 2013 cons. 3.2.

²⁴² LUCZAK, *supra* footnote 234, para. 6.35. Regarding the possible grounds for appeal see below, section D.

19 December 2008 (CCP)²⁴³ or the Private International Law Act of 18 December 1987 (PILA).²⁴⁴ This requires the *arbitral tribunal* to have its *seat in Switzerland*.²⁴⁵

In addition, the arbitral award to be contested must be *in the last instance*.²⁴⁶ Any instance procedure envisaged for the arbitral tribunal must be exhausted for the objections that are submitted to the Federal Supreme Court.²⁴⁷ Besides, fundamentally all objections submitted to the Federal Supreme Court must have already been filed in the arbitration proceedings themselves as far as possible.²⁴⁸

Final decisions that end the arbitration proceedings as well as *partial decisions* with which the arbitral tribunal comprehensively rules on individual disputed claims in advance can be contested.²⁴⁹ *Preliminary or interim rulings* with which procedural or material preliminary issues are ruled upon cannot usually be contested until the final decision has been issued.²⁵⁰ However, this principle is broken when it is intended to file against an interim decision that the arbitral tribunal has been appointed or compiled contrary to regulations²⁵¹ or if the arbitral tribunal wrongly accepted or declined jurisdiction.²⁵² Such formal objections must be filed directly.²⁵³

2. No Waiver of Legal Remedies

For the Federal Supreme Court to address an arbitration appeal, there must be *no waiver of legal remedies*. Ruling out the appeal to a state court entirely is, however, only possible in international arbitration proceedings pursuant to

²⁴³ Art. 353 et seq., art. 389–395 CCP (national arbitration).

²⁴⁴ Art. 176 et seq., art. 190–192 PILA (international arbitration).

²⁴⁵ LUCZAK, *supra* footnote 234, para. 6.11.

²⁴⁶ Art. 75 para. 1 FSCA.

²⁴⁷ Cf. art. 391 CCP.

²⁴⁸ LUCZAK, *supra* footnote 234, para. 6.19.

²⁴⁹ Cf. art. 383, 392 CCP; art. 188 PILA.

²⁵⁰ LUCZAK, *supra* footnote 234, para. 6.20 et seq.

²⁵¹ Art. 393 para. 1 lit. a in conjunction with art. 392 lit. b CCP; art. 190 para. 1 lit. a and para. 3 PILA.

²⁵² Art. 393 para. 1 lit. b in conjunction with art. 392 lit. b CCP; art. 190 para. 1 lit. b and para. 3 PILA.

²⁵³ BGE 136 III 605 cons. 3.2.2; 130 III 76 cons. 3.2.1.

PILA but not in Swiss arbitration proceedings pursuant to the CCP.²⁵⁴ A requirement is also that none of the parties has their domicile, habitual residence or a business establishment in Switzerland.²⁵⁵

In addition, the declaration regarding the exclusion of legal remedies against arbitral awards pursuant to art. 192 para. 1 PILA *must be explicit*. Here, it is sufficient that it is clearly stated in the declaration by the parties that they will make use of the possibility pursuant to art. 192 para. 1 PILA and will waive the appeal against the international arbitral award to the Federal Supreme Court.²⁵⁶ However, it is not sufficient that the parties describe the decision by the arbitral tribunal as “final” or undertake to respect and enforce the arbitral award.²⁵⁷ No indirect waiver through mere reference to a regulation that excludes the legal remedy is sufficient either.²⁵⁸

3. No Possibility of Appeal to a Cantonal Court

If the provisions of the CCP apply to the arbitration proceedings,²⁵⁹ the parties can envisage through explicit declaration in the arbitration agreement or in a subsequent agreement an appeal option to the cantonal court responsible in the canton to decide on objections and applications for review instead of the appeal to the Federal Supreme Court.²⁶⁰ Such a cantonal court gives final judgment.²⁶¹ The competence of the Federal Supreme Court to assess an appeal is not given, neither against a corresponding arbitral award nor against the appeal ruling of the cantonal court.

²⁵⁴ SFT 4A_254/2011 of 5 July 2011 cons. 3.1; cf. SFT 4A_238/2011 of 4 January 2012 cons. 3.2 regarding the conformity of the possibility of exclusion envisaged under law with the European Convention of Human Rights.

²⁵⁵ Art. 192 PILA; BSK IPRG-PATOCCHI/JERMINI, art. 192 para. 5 et seq.

²⁵⁶ BGE 131 III 173 cons. 4.2; SFT 4A_238/2011 of 4 January 2012 cons. 2.1.

²⁵⁷ SFT 4A_464/2009 of 15 February 2010 cons. 3.1.1.

²⁵⁸ BGE 133 III 235 cons. 4.3.1; 131 III 173 cons. 4.2.1.

²⁵⁹ If the rules of the PILA apply, the use of a cantonal court instead of the Federal Supreme Court is not permissible (art. 191 PILA).

²⁶⁰ Art. 390 para. 1 CCP.

²⁶¹ Art. 390 para. 2 CCP.

4. Legitimation

Parties to the arbitration proceedings are entitled to file an arbitration appeal. Another requirement is that the appealing party failed in part before the arbitral tribunal, i.e. has a protectable interest in the rescission or amendment of the contested award.²⁶²

5. Deadline for Appeal

The appeal against an arbitral award is to be submitted to the Federal Supreme Court *within 30 days* after the opening²⁶³ of the complete version.²⁶⁴

6. Dispute Value?

In *financial disputes*, the *civil appeal* is only permissible if the dispute value is at least CHF 30,000.00 and in disputes concerning employment and tenancy law at least CHF 15,000.00.²⁶⁵ If the dispute value does not reach the indicated amount, the appeal is nevertheless permissible under certain circumstances; in particular if a legal question is of fundamental importance.²⁶⁶

The disputed question as to whether the *arbitration appeal* is also subject to the dispute value requirement has been left open by the Federal Supreme Court up to now – as far as is discernible.²⁶⁷ With financial arbitration disputes, a minimum dispute value of CHF 30,000.00 is normally given anyway, meaning that the dispute value requirement is barely significant in practice.

²⁶² Art. 76 FSCA; LUCZAK, *supra* footnote 234, para. 6.27.

²⁶³ The type of opening is primarily determined based on the agreement between the parties and/or the arbitration rules (SFT 4A_582/2009 of 13 April 2010 cons. 2.1.2; cf. also SFT 4A_146/2012 of 10 January 2013 cons. 2.3).

²⁶⁴ Art. 100 para. 1 FSCA; SFT 4A_146/2012 of 10 January 2013 cons. 2.3; 4A_46/2011 of 16 May 2011 cons. 3.3.1. An extension of the deadline is not possible (SFT 4A_244/2012 of 17 January 2013 cons. 2.5).

²⁶⁵ Art. 74 para. 1 FSCA.

²⁶⁶ Art. 74 para. 2 lit. a FSCA.

²⁶⁷ SFT 4A_214/2013 of 5 August 2013 cons. 3; 4A_515/2012 of 17 April 2013 cons. 1; 4A_392/2008 of 22 December 2008 cons. 2.3; LUCZAK, *supra* footnote 234, para. 6.13; cf. BSK BGG-KLETT, art. 77 para. 3a.

D. Grounds of Appeal

The objection can be submitted to the Federal Supreme Court that

- the sole arbitrator was not properly appointed or the arbitral tribunal was not properly constituted;²⁶⁸
- the arbitral tribunal wrongly accepted or declined jurisdiction;²⁶⁹
- the arbitral tribunal's award went beyond the claims submitted to it or failed to decide one of the items of the claim;²⁷⁰
- the principle of equal treatment of the parties or the right of the parties to be heard was violated;²⁷¹

In the *proceedings pursuant to PILA*, the award is also contestable if

- it is irreconcilable with the *ordre public*.²⁷²

In *proceedings pursuant to the CCP*, it can be submitted that

- the award is arbitrary in its result because it is based on factual findings that are obviously contrary to the record or on an obvious violation of law or equity;²⁷³
- the compensation and expenses of the members of the arbitral tribunal set by the arbitral tribunal are obviously too high.²⁷⁴

The individual grounds for appeal will be addressed in more detail in the following.

1. Constitution of the Arbitral Tribunal

If there is an objection regarding the incorrect appointment or improper constitution of the arbitral tribunal,²⁷⁵ it is about guaranteeing the parties the entitlement to the statutory judge guaranteed in the Federal Constitution.²⁷⁶

²⁶⁸ Art. 393 lit. a CCP; art. 190 para. 2 lit. a PILA; see below, section D.1.

²⁶⁹ Art. 393 lit. b CCP; art. 190 para. 2 lit. b PILA; see below, section D.2.

²⁷⁰ Art. 393 lit. c CCP; art. 190 para. 2 lit. c PILA; see below, section D.3.

²⁷¹ Art. 393 lit. d CCP; art. 190 para. 2 lit. d PILA; see below, sections D.4 and 5.

²⁷² Art. 190 para. 2 lit. e PILA; see below, section D.6.

²⁷³ Art. 393 lit. e CCP; see below, section D.7.

²⁷⁴ Art. 393 lit. f CCP; see below, section D.8.

²⁷⁵ Art. 393 lit. a CCP; art. 190 para. 2 lit. a PILA.

²⁷⁶ Art. 30 para. 1 Federal Constitution.

The guarantee of art. 30 para. 1 of the Federal Constitution, according to which any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court, also applies in arbitration proceedings.²⁷⁷ If there are deficits at an arbitral tribunal with regard to the independence or impartiality, this is a case of constitution contrary to regulations.²⁷⁸ Such objections are already to be filed immediately in the arbitration proceedings; otherwise, the claim to file this ground of appeal before the Federal Supreme Court is forfeited.²⁷⁹

2. Objection regarding Jurisdiction

Objection regarding jurisdiction²⁸⁰ is of central importance in arbitral proceedings. An exclusion of the state jurisdiction and control is only permissible with the approval from the parties. The Federal Supreme Court checks on an appeal to this effect whether the issue under dispute can be withdrawn from state jurisdiction,²⁸¹ whether and to what extent the parties have made use of this possibility,²⁸² and whether the parties involved in the proceedings are covered by the arbitration clause.²⁸³ The objection to the arbitral tribunal on the grounds of lack of jurisdiction must be raised prior to any defence on the merits.²⁸⁴

It is also ensured via this objection that the parties who have agreed the jurisdiction of an arbitral tribunal in valid form are not forced into the state jurisdiction if the arbitral tribunal wrongly declined jurisdiction.²⁸⁵

²⁷⁷ BGE 136 III 605 cons. 3.2.1; 118 II 359 cons. 3c; BSK IPRG-PFISTERER, art. 190 para. 26.

²⁷⁸ SFT 4A_612/2009 of 10 February 2010 cons. 3.1.2.

²⁷⁹ Art. 367 para. 2, art. 368 para. 2 CCP; art. 180 para. 2 PILA; SFT 4A_612/2009 of 10 February 2010 cons. 3.1.2; BGE 129 III 445 cons. 3.1.

²⁸⁰ Art. 393 lit. b CCP; art. 190 para. 2 lit. b PILA.

²⁸¹ Arbitrability of the matter under dispute.

²⁸² Valid conclusion and material impact of the arbitration agreement.

²⁸³ Subjective impact of the arbitration clause; cf. on the entire issue LUCZAK, *supra* footnote 234, paras. 6.3, 6.7 and 6.43.

²⁸⁴ Art. 359 para. 2 CCP; art. 186 para. 2 PILA.

²⁸⁵ LUCZAK, *supra* footnote 234, para. 6.43.

3. Ne ultra vel extra petita partium

It can be appealed before the Federal Supreme Court that the arbitral tribunal has decided on issues of dispute that were not submitted to it, that the arbitral tribunal did not decide on legal requests or assigned a party more than the latter requested or in a form different to that requested.²⁸⁶

If the arbitral tribunal remains within the legal requests filed, however, it can appraise the claim complained about from a legal perspective in its entirety or in part in deviation from the substantiations from the parties. The principle of legal application ex officio applies also in arbitration proceedings, unless the parties have agreed otherwise.²⁸⁷

4. Equal Treatment of the Parties

The arbitral tribunal must guarantee that the parties are treated equally.²⁸⁸ In particular, the arbitral tribunal is expected to treat the parties according to the same principles in all procedural issues²⁸⁹ and not to give one party something that is refused to the other.²⁹⁰ Both parties must be given the same opportunities to exploit the means envisaged in procedural law.²⁹¹

5. Right to Be Heard

The arbitral tribunal must also guarantee the parties their right to be heard.²⁹² Within the framework of arbitration proceedings, this right primarily corresponds to the procedural guarantees derived from art. 29 para. 2 of the Federal Constitution²⁹³ with the exception of the obligation to substantiate the award.²⁹⁴ It includes the rights of the parties to participate in proceedings and to influence the decision-making process. The jurisdiction derives from

²⁸⁶ Art. 393 lit. c CCP; art. 190 para. 2 lit. c PILA.

²⁸⁷ SFT 4A_440/2010 of 7 January 2011 cons. 3.1; 4P.146/2004 of 28 September 2004 cons. 6.2 and 7.2; 4P.260/2000 of 2 March 2001 cons. 5c.

²⁸⁸ Art. 373 para. 4 CCP; art. 182 para. 3 PILA.

²⁸⁹ BGE 133 III 139 cons. 6.1; SFT 4A_2/2007 of 28 March 2007 cons. 4.

²⁹⁰ LUCZAK, *supra* footnote 234, para. 6.64.

²⁹¹ SFT 4A_360/2011 of 31 January 2012 cons. 4.1.

²⁹² Art. 373 para. 4 CCP; art. 182 para. 3 PILA.

²⁹³ BGE 130 III 35 cons. 5; 127 III 576 cons. 2c; SFT 4A_2/2007 of 28 March 2007 cons. 3.1.

²⁹⁴ BGE 134 III 186 cons. 6.1; 133 III 235 cons. 5.2; 130 III 125 cons. 2.2.

this in particular the right of the parties to give a statement on the facts relevant for the ruling, to represent their legal standpoint, to file relevant requests for evidence, to participate in the negotiations, and the right to inspect the records.²⁹⁵ The parties should also not be surprised by an unexpected legal argumentation.²⁹⁶

The right of the parties to be heard is, according to established case law of the Federal Supreme Court, *of a formal nature* as this right does not guarantee the material accuracy but rather the parties' right to participation in the decision-making process. This means that the breach of the right to be heard – irrespective of the material substantiation of the appeal – leads to the approval of the appeal and to the rescission of the award that has been appealed against.²⁹⁷

6. Breach of the Ordre Public

In the *arbitration proceedings pursuant to PILA*, it can be claimed that the award appealed against is irreconcilable with the ordre public.²⁹⁸ In individual cases, the ordre public is an escape clause to refuse equal status of arbitral awards that ignore certain fundamental principles from a procedural or material perspective with state rulings.²⁹⁹ In other words, the ordre public is the "handbrake" against decisions that with regard to the type and manner of the decision-making process (*procedural ordre public*) or the result (*material ordre public*) may not be taken against the will of the concerned party by a court with its seat in Switzerland.³⁰⁰ However, the Federal Supreme Court

²⁹⁵ BGE 127 III 576 cons. 2c; SFT 4A_2/2007 of 28 March 2007 cons. 3.1.

²⁹⁶ BGE 130 III 35 cons. 5; SFT 4A_46/2011 of 16 May 2011 cons. 5.1.1; 4P.146/2004 of 28 September 2004 cons. 7.2.

²⁹⁷ BGE 135 I 187 cons. 2.2; 127 III 576 cons. 2d; SFT 4A_46/2011 of 16 May 2011 cons. 4.3.2.

²⁹⁸ Art. 190 para. 2 lit. e PILA.

²⁹⁹ SFT 4A_458/2009 of 10 June 2010 cons. 4.1.

³⁰⁰ LUCZAK, *supra* footnote 234, para. 6.69; HANS PETER WALTER, Rechtsmittel gegen Entscheide des TAS nach dem neuen Bundesgesetz über das Bundesgericht und dem Entwurf einer Schweizerischen Zivilprozessordnung („Legal remedies against arbitral awards rendered by the CAS according to the new FSCA and draft of CCP“), in: Rigozzi/Bernasconi (eds.), *The Proceedings before the Court of Arbitration for Sport*, Zurich 2007, p. 161.

does not check any content but examines merely the *result* and the *type of decision-making*.³⁰¹

6.1 Procedural Ordre Public

The procedural ordre public guarantees the parties the *fundamental procedural rights* that apply for every arbitral tribunal in Switzerland. A breach of procedural ordre public only exists with a breach of fundamental and generally acknowledged procedural principles, non-compliance with which conflicts unacceptably with the perception of law so that the award appears absolutely irreconcilable with the valid system of law and values in the culture states.³⁰² The breach of the agreed rules of arbitration is not enough on its own to make the award appear contrary to the ordre public from a procedural perspective.³⁰³

The guarantees of the procedural ordre public are largely already covered by art. 190 para. 2 lit. a–d PILA that as a *lex specialis* take precedence over the ordre public.³⁰⁴ In addition to these guarantees, for instance, the lack of non-partiality of an expert³⁰⁵ or the non-consideration of the material legal validity³⁰⁶ (including the principle “*ne bis in idem*”³⁰⁷) are contrary to the procedural ordre public.

6.2 Material Ordre Public

The Federal Supreme Court does not check whether the contested arbitral award is materially correct or wrong. In the case of an appeal against a breach of the material ordre public, it can only check whether the result is reconcilable with certain material principles that are seen as essential and have to be respected by every (arbitral) tribunal in Switzerland.³⁰⁸ There is only a rescis-

³⁰¹ BGE 138 III 322 cons. 4.1; SFT 4A_612/2009 of 10 February 2010 cons. 6.1.

³⁰² BGE 136 III 345 cons. 2.1; 132 III 389 cons. 2.2.1; 126 III 249 cons. 3b.

³⁰³ BGE 129 III 445 cons. 4.2.1; 126 III 249 cons. 3b.

³⁰⁴ BGE 138 III 270 cons. 2.3; SFT 4A_276/2012 of 6 December 2012 cons. 4.1; BSK IPRG-PATOCCHI/JERMINI, art. 192 para. 26.

³⁰⁵ BGE 126 III 249 cons. 3.

³⁰⁶ BGE 136 III 345 cons. 2.1; 128 III 191 cons. 4a; SFT 4A_386/2010 of 3 January 2011 cons. 9.3.1.

³⁰⁷ SFT 4A_386/2010 of 3 January 2011 cons. 9.3.1, whereby it was left open whether the principle has to be assigned to the formal or material ordre public.

³⁰⁸ LUCZAK, *supra* footnote 234, para. 6.73.

sion of the arbitral award appealed against if this contradicts the ordre public in its result.³⁰⁹

The material assessment of a disputed claim only breaches the ordre public if it ignores fundamental legal principles and is therefore simply irreconcilable with the fundamental, largely recognised system of values that should be the basis of any legal system pursuant to the prevailing interpretation in Switzerland.³¹⁰ The material ordre public includes in particular³¹¹

- sanctity of contracts (“pacta sunt servanda”),³¹²
- the principle of trust,³¹³
- the prohibition of misuse of the law,³¹⁴
- the prohibition of discrimination,³¹⁵
- the protection of parties unable to act,³¹⁶
- the prohibition of the payment of bribes,³¹⁷
- the prohibition of forced labour,³¹⁸
- the prohibition of the breach of human dignity,³¹⁹
- the prohibition of dispossession without compensation³²⁰ and
- the breach of art. 27 of the Swiss Civil Code if there is an obvious and serious breach of basic rights therein.³²¹

³⁰⁹ BGE 138 III 322 cons. 4.1; 120 II 155 cons. 6a; SFT 4A_612/2009 of 10 February 2010 cons. 6.1.

³¹⁰ BGE 138 III 322 cons. 4.1; 132 III 389 cons. 2.2.1; 128 III 191 cons. 6b.

³¹¹ The list is not exhaustive (BGE 138 III 322 cons. 4.1). Cf. also BSK IPRG-PFISTERER, art. 190 para. 75 et seq.

³¹² BGE 138 III 322 cons. 4.1; 132 III 389 cons. 2.2.1; 128 III 191 cons. 6b; SFT 4A_612/2009 of 10 February 2010 cons. 6.1; 4A_46/2011 of 16 May 2011 cons. 4.2.1.

³¹³ BGE 138 III 322 cons. 4.1; 132 III 389 cons. 2.2.1; 128 III 191 cons. 6b.

³¹⁴ BGE 138 III 322 cons. 4.1; 132 III 389 cons. 2.2.1; 128 III 191 cons. 6b; SFT 4A_612/2009 of 10 February 2010 cons. 6.1.

³¹⁵ BGE 138 III 322 cons. 4.1; 132 III 389 cons. 2.2.1; SFT 4A_612/2009 of 10 February 2010 cons. 6.

³¹⁶ BGE 138 III 322 cons. 4.1; 132 III 389 cons. 2.2.1; 128 III 191 cons. 6b; SFT 4A_612/2009 of 10 February 2010 cons. 6.1; 4A_458/2009 of 10 June 2010 cons. 4.1.

³¹⁷ BGE 138 III 322 cons. 4.1; 119 II 380 cons. 4b; SFT 4A_538/2012 of 17 January 2013 cons. 6.1.

³¹⁸ BGE 138 III 322 cons. 4.1; SFT 4A_458/2009 of 10 June 2010 cons. 4.1.

³¹⁹ SFT 4A_458/2009 of 10 June 2010 cons. 4.1.

³²⁰ BGE 138 III 322 cons. 4.1; SFT 4A_612/2009 of 10 February 2010 cons. 6.1.

³²¹ BGE 138 III 322 cons. 4.1 and 4.3.2; SFT 4A_16/2012 of 2 May 2012 cons. 4.1; 4A_458/2009 of 10 June 2010 cons. 4.4.3.2; 4A_320/2009 of 2 June 2010 cons. 4.4.

7. Arbitrary Decisions

In *arbitration proceedings pursuant to the CCP*, it can be objected that the contested award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity.³²² This possibility of appeal guarantees from a formal and material perspective an award that withstands the prohibition of arbitrariness in art. 9 of the Federal Constitution. Breaches of the *ordre public* can thus also be sanctioned.³²³

Obvious breach of the law pursuant to art. 393 lit. e CCP means only a breach of the material law and not of procedural law.³²⁴

With regard to the facts of a case, the competence to review in the arbitration proceedings is also limited as the result of the consideration of evidence and the evaluations therein are not the subject of the appeal regarding arbitrariness but rather the establishment of facts indisputably refuted by the case files. The Federal Supreme Court does not check the consideration of evidence. Those who submit their dispute to an arbitral tribunal pursuant to national rules must accept the latter's consideration of evidence but not obviously actual findings contrary to the case files. These are, however, only taken by the arbitral tribunal if it conflicts with the case files as a result of an error – whether due to overlooking parts of the files or because it ascribed them a different content to their actual content, whether it mistakenly assumed that a fact was documented in the case files, whereas the case files in reality do not provide any information in this regard.³²⁵

In addition, the appeal only has a promise of success if it can be absolutely excluded that the contested award could at best be correct in its result.³²⁶

³²² Art. 393 lit. e CCP.

³²³ LUCZAK, *supra* footnote 234, para. 6.67.

³²⁴ BGE 131 I 45 cons. 3.4; SFT 4A_627/2011 of 8 March 2012 cons. 3.4.2; 5A_634/2011 of 16 January 2012 cons. 2.1.1.

³²⁵ BGE 131 I 45 cons. 3.6 and 3.7; SFT 4A_627/2011 of 8 March 2012 cons. 3.4.2; 5A_634/2011 of 16 January 2012 cons. 2.1.1.

³²⁶ LUCZAK, *supra* footnote 234, para. 6.84.

8. Excessive Compensation and Expenses of the Arbitrators

In *arbitration proceedings pursuant to the CCP*, it can be claimed before the Federal Supreme Court that the compensation and expenses of the members of the arbitral tribunal defined by the arbitral tribunal are obviously too high.³²⁷

The appealing party must file a *quantified request* as the Federal Supreme Court can decide itself with regard to compensation and expenses of the arbitrators.³²⁸ If there is no quantified request, the Federal Supreme Court will not address the appeal to this effect.³²⁹

E. Procedural Aspects of the Appeal Proceedings

In the following, some selected procedural aspects of the Federal Supreme Court appeal proceedings will be addressed in more detail.

1. Suspensory Effect and Temporary Legal Protection

Under the law, the arbitration appeal has no suspensory effect. Consequently, with all arbitral awards, an application for *the issuing of the suspensory effect* is necessary to grant the suspensory effect during the Federal Supreme Court proceedings.³³⁰ Although the suspensory effect can also be ordered *ex officio*, in practice the Federal Supreme Court does not use this possibility in arbitration proceedings if the respective party does not seek suspensory effect.³³¹ The same applies accordingly for the orders with regard to the temporary legal protection pursuant to art. 104 FSCA.³³²

³²⁷ Art. 393 lit. f CCP.

³²⁸ Cf. art. 395 para. 4 CCP.

³²⁹ SFT 4A_424/2011 of 2 November 2011 cons. 1.2.

³³⁰ This is in particular also the case with awards modifying a legal relationship as art. 77 para. 2 FSCA explicitly excludes the application of art. 103 para. 2 FSCA, according to which the appeal against such awards has suspensory effect in the scope of the legal requests.

³³¹ BSK BGG-KLETT, art. 103 para. 14; LUCZAK, *supra* footnote 234, para. 6.94.

³³² LUCZAK, *supra* footnote 234, para. 6.94.

2. Requirements of the Appeal Petition

The appeal petition must include a *legal request*.³³³ The Federal Supreme Court can fundamentally not decide itself in the matter when the arbitration appeal is approved³³⁴ and there is a referral back to the arbitral tribunal for a new decision.³³⁵ A mere *application for referral* is therefore sufficient.³³⁶ However, a *material request* is necessary if the Federal Supreme Court can decide itself as an exception, for instance, when a decision is required regarding the jurisdiction of the arbitral tribunal,³³⁷ in the appeal against the improper constitution of the arbitral tribunal³³⁸ or in proceedings pursuant to the CCP in the appeal against excessive compensation or expenses.³³⁹

It should be noted that with an arbitration appeal no legal application is done ex officio but that the “*principle of objection*” (“*Rügeprinzip*”) applies. The Federal Supreme Court only checks the objections provided for by law³⁴⁰ that have been precisely submitted and substantiated in the appeal.³⁴¹

3. Earliest Possible Filing of Formal Objections

It should also be noted that breaches against procedural law are already to be objected to in the arbitration proceedings; otherwise they cannot be claimed any more before the Federal Supreme Court.³⁴² The party that considers itself at a disadvantage due to a relevant procedural deficit forfeits its objections if it does not submit them in a timely manner and does not make all reasonable efforts to eliminate the defect.³⁴³

³³³ Art. 42 para. 1 FSCA.

³³⁴ Cf. Art. 77 para. 2 FSCA that excludes the application of art. 107 para. 2 FSCA if the latter permits the Federal Supreme Court to decide itself in the matter.

³³⁵ SFT 4A_388/2012 of 18 March 2013 cons. 2.2.

³³⁶ SFT 4A_454/2011 of 27 October 2011 cons. 3.

³³⁷ BGE 136 III 605 cons. 3.3.4; SFT 4A_515/2012 of 17 April 2013 cons. 2.3; 4A_244/2012 of 17 January 2013 cons. 2.2.

³³⁸ BGE 136 III 605 cons. 3.3.4.

³³⁹ SFT 4A_424/2011 of 2 November 2011 cons. 1.2.

³⁴⁰ Cf. above, section D.

³⁴¹ Art. 77 para. 3 FSCA; SFT 4A_305/2013 of 2 October 2013 cons. 2.2; 4A_538/2012 of 17 January 2013 cons. 3.1.

³⁴² Art. 373 para. 6 CCP.

³⁴³ SFT 4A_682/2011 of 31 May 2012 cons. 3.1; 4A_617/2010 of 14 June 2011 cons. 3.1.

Accordingly, court organisational issues are to be clarified in the arbitration proceedings at the earliest possible point in time before the proceedings progress.³⁴⁴ The outcome of this principle is in particular that interim awards by the arbitral tribunal regarding its constitution or jurisdiction are not only contestable on their own³⁴⁵ but also have to be appealed against on their own; otherwise the objections directed against them are forfeited pursuant to the circumstances known at the time of the interim award.³⁴⁶

4. Right to Submit New Facts and Evidence

New facts and evidence may only be submitted to the Federal Supreme Court if the arbitral award gives cause for this.³⁴⁷ New objections and requests are excluded³⁴⁸ which also already results from the fact that the Federal Supreme Court as a state court would not be responsible at all for handling them.³⁴⁹

Apart from the filing of new objections, new legal arguments are permissible. However, it should be noted that new legal arguments are fundamentally not significant if the Federal Supreme Court does not check the legal application of the arbitral tribunal. New legal arguments are only important if grounds for objection are given under the law and if it is not important for their realisation that the party had not submitted the new legal considerations to the arbitral tribunal.³⁵⁰

³⁴⁴ BGE 130 III 66 cons. 4.3; SFT 4P.298/2005 of 19 January 2006 cons. 2.3.

³⁴⁵ Art. 393 lit. b CCP; art. 190 para. 3 PILA.

³⁴⁶ BGE 130 II 66 cons. 4.3; SFT 4A_282/2013 of 13 November 2013 cons. 5.3.2; 4P.298/2005 of 19 January 2006 cons. 2.3.

³⁴⁷ Art. 99 para. 1 FSCA.

³⁴⁸ Art. 99 para. 2 FSCA.

³⁴⁹ LUCZAK, *supra* footnote 234, para. 6.93.

³⁵⁰ BESSON SEBASTIEN, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux), ASA Bulletin 2007, p. 27 et seq. fig. 60; LUCZAK, *supra* footnote 234, para. 6.90.

VIII. Recognition and Enforcement of Foreign Arbitral Awards in Switzerland – Avoiding Common Pitfalls

By Andreas Lehmann

A. Introduction

In international commercial disputes, a claimant often has to initiate proceedings in a country different from the one where the defendant has located the bulk of his assets. This is especially true for disputes which are subject to arbitration: when considering an arbitration clause, contract parties often choose an arbitration seat in neutral territory in order to avoid one party having a perceived advantage over the other in future proceedings. But even if the place of arbitration is located in a country where one of the parties has its seat or a substantial part of its assets, this will often not be the case for the opposing party. As a result, claimants are frequently compelled to have their arbitral awards recognized and enforced outside the borders of the country where the arbitral proceedings took place.

It is therefore paramount for claimants and their legal counsel to consider the requirements of a cross-border enforcement of the award already at an early stage in the arbitration. This approach will help avoid a series of commonplace traps which may later hamper the enforcement proceedings or, in the worst case, result in an unenforceable award and thereby render a long and expensive arbitration useless.

The present article outlines the basic steps and requirements involved in the recognition and enforcement of a foreign arbitral award in Switzerland and highlights a few practical aspects to be considered in the process of the arbitration itself and the subsequent request for recognition and enforcement.

B. Requirements under the New York Convention

One of the principal advantages of arbitration over state court litigation when resolving international commercial disputes is the unified global framework for enforcing arbitral tribunals' decisions. The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) has to date been ratified by 156 countries worldwide, including Switzerland.³⁵¹ It provides for common legislative standards on the recognition of arbitration agreements, i.e. the referral to arbitration by state courts in case of a valid arbitration agreement, and the recognition and enforcement of arbitral awards.³⁵² There is no comparable legal framework applicable to state courts: the largest multilateral convention concerning the international recognition and enforcement of court decisions is the Lugano Convention of 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which applies to the European Union in addition to four European states outside of the Union, including Switzerland. Article 194 of the Swiss Private International Law Act (PILA) expressly states that the recognition and enforcement of a foreign arbitral award in Switzerland is governed by the New York Convention. As a result of this provision as well as art. I(1) NYC, the Convention is applied *erga omnes*, i.e. even with regard to arbitral awards from countries that have not ratified it.

The New York Convention contains an exhaustive list of formal requirements that must be respected when applying for recognition and enforcement of a foreign award. Aside from this, it defines a range of substantive grounds allowing for a refusal of recognition, which are examined by the court where the application is made either at the request of the defendant or *ex officio*.

1. Formal Requirements (Article IV NYC)

According to art. IV(1), the party applying for recognition and enforcement shall supply to the court along with its application: (i) the duly authenticated original award or a duly certified copy thereof; (ii) the original of the arbitration agreement or a duly certified copy thereof. Authentication means confir-

³⁵¹ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (last visited on 15 September 2015).

³⁵² The text of the Convention can be downloaded on: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf, (last visited on 15 September 2015).

mation that the signatures of the arbitrators on the original award are genuine, certification confirms that the copy of the award corresponds to the original. Such authentication or certification can be issued by any authority competent according to the laws of the state where the award originated. In most cases, this is either the ministry of justice, another governmental or judicial office, or a notary public. Swiss courts have adopted the liberal approach of waiving the authentication requirement as long as the authenticity of the award is not challenged by the defendant.³⁵³ With regard to the arbitration agreement, it follows from art. IV(1) NYC that an authentication is not necessary if the agreement is filed in its original version. In some cases, parties decide to have the authenticated documents accompanied by an Apostille in accordance with the Hague Convention of 1961, however, such “over-authentication” is not an express requirement under the New York Convention.

If the arbitral award or the arbitration agreement are not in an official language of the country in which recognition and enforcement is sought, the requesting party is obliged to produce a translation of the documents pursuant to art. IV(2) NYC. In Switzerland, a translation into German, French or Italian is recommended depending on the Canton in which the application is made. The translation must be certified by an official or sworn translator or by a consular or diplomatic agent of either the state of rendition of the award or the state where enforcement is sought, i.e. Switzerland. In a recent decision, the Swiss Federal Supreme Court has relaxed these formal requirements with regard to English language documents, holding that a partial translation of the award submitted by the party seeking enforcement was sufficient in view of the fact that Swiss courts are generally at ease with the English language.³⁵⁴

2. Grounds for Refusal of Recognition and Enforcement (Article V NYC)

The recognition and enforcement of an arbitral award may be refused based on a specific number of grounds, which are defined in art. V NYC. The list of grounds for refusal is exhaustive and may not be supplemented by national courts. The Convention distinguishes two types: article V(1) NYC contains challenges which are examined only if raised and evidenced by the party

³⁵³ *E.g.*, see SFT 4A_124/2010 of 4 October 2010 cons. 4.2.

³⁵⁴ Cf. BGE 138 III 520.

resisting recognition or enforcement, whereas the grounds for refusal listed in art. V(2) are examined *ex officio*.

2.1 Grounds to be Raised by the Respondent

a) Incapacity of the Parties or Invalidity of the Arbitration Agreement

According to the first part of art. V(1)(a) NYC, recognition may be refused if the parties were, under the law applicable to them, under some incapacity to enter into the arbitration agreement. Despite the text of the provision, it is a sufficient ground for refusal if one of the parties was not capable. The provision does not indicate which conflict-of-law rules should be depended on in order to determine the applicable law. The majority of scholars point to the rules of conflict of the state where the award is relied upon, i.e. art. 34–36 or art. 154 and 155 lit. c PILA in Switzerland.³⁵⁵

The second part of art. V(1)(a) NYC refers to the validity of the arbitration agreement. This comprises the formal validity of the agreement, which is examined based on the requirements of art. II(2) NYC, as well as its substantive validity, which is examined according to the law the parties have chosen or, failing that, the law of the country where the award was made. Article V(1)(a) NYC has a very far-reaching effect, as it (indirectly) allows for a review of the arbitral tribunal's jurisdiction at the stage of the award's recognition and enforcement.

Challenges that can be raised with respect to substantial validity include among others lack of consent, error, fraud or improper representation of the parties at the time of the conclusion of the arbitration agreement as well as inexistence or illegality of the arbitration agreement. Some authors contend that arbitrability may also be verified under the heading of this provision,³⁵⁶ however, the majority concludes that the examination of whether a dispute is capable of arbitration shall only be subject to art. V(2)(a) NYC and therefore the law of the country where recognition is sought.³⁵⁷ The scope and meaning of the term "validity" in art. V(1)(a) NYC is not entirely clear in some re-

³⁵⁵ BERGER/KELLERHALS, *supra* footnote 1, para. 2057; POUURET/BESSON, *supra* footnote 23, para. 906.

³⁵⁶ POUURET/BESSON, *supra* footnote 23, para. 907.

³⁵⁷ BORN, *supra* footnote 25, pp. 769 et seq., in lieu of many.

spects, which can lead to issues at the stage of an award's recognition and enforcement particularly if pathological arbitration clauses are involved.³⁵⁸

b) Violation of Due Process

Recognition and enforcement of an award may be refused if the respondent furnishes proof that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. While many authors see art. V(1)(b) NYC as a universal, substantive standard with respect to the right to be heard and equal treatment of the parties,³⁵⁹ courts in charge of enforcing a foreign award in practice tend to rely on case law and doctrine of their own forum law in defining the specific requirements of due process.³⁶⁰ As a result of this, claimants looking to enforce a foreign arbitral award in Switzerland must bear in mind the requirements of due process under Swiss law, in particular those related to valid notice, already during the arbitration proceedings.³⁶¹

c) Scope of the Arbitration Agreement

According to art. V(1)(c) NYC an arbitral award may be denied recognition if the arbitral tribunal decided on issues which were not covered by the arbitration agreement, i.e. issues for which it lacked jurisdiction. Furthermore, the provision covers cases in which the arbitral tribunal rendered a decision beyond the claims submitted, in that it granted a party more (*ultra petita*) or something else (*extra petita*) than it had asked for.³⁶² Albeit, art. V(1)(c) NYC authorizes the court of enforcement to partially recognize such arbitral award to the extent that it is within the scope of the submission to arbitration if the matters submitted to arbitration can be separated from the rest.

³⁵⁸ See section D.1 below in further detail.

³⁵⁹ POUURET/BESSON, *supra* footnote 23, para. 910, in lieu of many.

³⁶⁰ SCHERER MAXI in: Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Commentary*, Munich 2012, art. V para. 139; BERGER/KELLERHALS, *supra* footnote 1, para. 2065; in the US leading case *Parsons v Société Générale de l'Industrie du Papier (RAKTA)* of 1974, the Federal Court of Appeal for the 2nd Circuit considered that art. V(1)(b) NYC „essentially sanctions the application of the forum state's standards of due process.“

³⁶¹ See section D.2 below in further detail.

³⁶² BERGER/KELLERHALS, *supra* footnote 1, para. 2076 et seq.

d) Failure to Respect the Arbitral Procedure

An irregular composition of the arbitral tribunal or any violation of the arbitral procedure agreed by the parties constitutes a further ground for refusal of recognition. Article V(1)(d) NYC makes it clear that the court of enforcement must strictly base its deliberations on the procedural rules determined by the parties to the arbitration, only failing such determination may the court resort to the law of the country in which the arbitration took place.

e) Non-Binding or Suspended Arbitral Award

Recognition and enforcement may be refused if the respondent can establish that the arbitral award has not yet become binding upon the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

It is controversial among commentators whether the definition of “binding” is determined in an autonomous manner or with reference to the law of the country in which the award was made.³⁶³

According to the Swiss Federal Supreme Court, whether or not the award is binding should primarily be determined in accordance with the agreement of the parties, i.e. the chosen procedural rules. If the parties have agreed in advance that the award shall be “final and binding” or if they have waived their right to any form of recourse, the arbitral award will be deemed binding under art. V(1)(e) NYC without reference to the law of the country in which the award was made. Only failing such agreement by the parties should the courts look to the law of seat of the arbitration.³⁶⁴ The Swiss courts have defined a binding award as an award in relation to which ordinary means of recourse are no longer possible.³⁶⁵ Ordinary means of recourse usually connote a genuine appeal on the merits, whereas extraordinary means of recourse are reserved for certain procedural irregularities. Article V(1)(e) NYC does not require that the arbitral award has been declared enforceable in its country of origin.³⁶⁶

³⁶³ Cf. DARWAZEH NADIA in: Kronke/Nacimiento et. al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Alphen aan den Rijn 2010, pp. 301–344, p. 311 et seq.

³⁶⁴ Cf. BGE 108 Ib 85 cons. 4b–c.

³⁶⁵ BGE 135 III 136 cons. 2.2; SFT 5P.292/2005 of 3 January 2006 cons. 3.2.

³⁶⁶ BGE 135 III 136 cons. 2.2.

If the party against whom recognition and enforcement is sought has filed a motion to set aside or has requested a suspension of the award before the competent judicial authority in the country where the award originated, a Swiss court may at its discretion: (i) adjourn its decision on the request for recognition and enforcement; (ii) stay its decision, provided that the respondent has provided suitable security; or (iii) recognize and enforce the award without regard to the order for suspension or the setting aside proceedings still pending in the country where the arbitration was seated (art. V(1)(e) and V NYC).³⁶⁷

In line with the art. V(1)(e) NYC, courts in most jurisdictions, including Swiss courts, will decline to enforce an arbitral award that has been set aside in its country of origin. A different approach has been taken in France, where foreign arbitral awards that have previously been annulled by a court at the place of arbitration are enforced on a regular basis.³⁶⁸ Recently, courts in the Netherlands have shown willingness to do the same, at least in cases where it is considered that the annulment of the award is not the result of an impartial and independent judicial process.³⁶⁹ Similarly, courts in the United States may enforce foreign arbitral awards that have been set aside at the place of arbitration if their annulment appears fundamentally unfair.³⁷⁰

2.2 Grounds Examined ex officio

The Swiss court charged with recognizing a foreign arbitral will, based on art. V(2) NYC, examine out of its own accord whether (i) the subject in dispute is capable of settlement by arbitration under Swiss law and whether (ii) the recognition and enforcement of the award would be contrary to Swiss public policy.

³⁶⁷ BERGER/KELLERHALS, *supra* footnote 1, para. 2086 et seq.

³⁶⁸ Leading case: *Société Hilmarton Ltd v Société OTV*, Cour de Cassation, 1st Civil Chamber, 23 March 1994; practice confirmed by numerous subsequent decisions.

³⁶⁹ Cf. *Yukos Capital S.A.R.L. v. OAO Rosneft*, Amsterdam Court of Appeal, 28 April 2009, where enforcement was granted with regard to an arbitral award that had been set aside in Russia.

³⁷⁰ Cf. *Chromalloy Aeroservices v. Arab Republic of Egypt*, District Court of the District of Columbia, 31 July 1996; *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploracion y Produccion*, District Court of the Southern District of New York, 27 August 2013.

C. Request for Enforcement and Freezing Orders

1. Request for Recognition and Enforcement

According to articles 335 para. 3 and 339 of the Swiss Code of Civil Procedure (CCP), a request for recognition and enforcement of a foreign arbitral award is treated in a summary procedure before the first instance court either at the seat of the respondent or at the place where enforcement measures will be taken, i.e. the place where the respondent's assets are located. In the Canton of Zurich, for example, the competent court is the relevant District Court (*Bezirksgericht*), where a single judge will adjudicate upon the request (§ 24 lit. e of the Zurich Court Organisation Act).

Arbitral awards dealing with monetary claims, which constitute the vast majority of cases, may be enforced by directly initiating an enforcement procedure according to the Federal Debt Enforcement Act (DEA). The request is addressed to the competent first instance court at the debtor's seat in Switzerland, who serves the debtor with a payment order. If the debtor objects to the payment order, the claimant – or creditor – can initiate a summary proceeding on the basis of his arbitral award (*definitives Rechtsöffnungsverfahren*) which, if successful, leads to a seizure of the debtor's assets or to the debtor's bankruptcy in case it is a company. If the respondent merely has assets but no seat located in Switzerland, an enforcement based on this procedure is only possible if the claimant has first been granted a freezing order in Switzerland.

2. How to Obtain a Freezing Order

A powerful tool when enforcing a foreign arbitral award in Switzerland is the freezing order according to article 271 DEA, which allows for a preliminary seizure of the respondent's assets, including the freezing of bank accounts, based on a foreign arbitral award.³⁷¹

The great advantage of the freezing order is that it can be obtained in an *ex parte* proceeding without any involvement of the respondent, i.e. the re-

³⁷¹ Art. 271 para. 1(6) in connection with art. 80 para. 1 DEA; cf. Report (*Botschaft*) of the Federal Council concerning the Revised Lugano Convention of 18 February 2009, BBl 2009, pp. 1777–1834, p. 1821 and p. 1831 et seq.; AMONN KURT/WALTHER FRIDOLIN, *Grundriss des Schuldbetreibungs- und Konkursrechts*, 8th ed., Berne 2008, § 51 para. 26.

spondent can be taken by surprise. This is particularly useful in cases where the claimant has reason to believe that the respondent will attempt to avoid the enforcement of the arbitral award by moving assets to another location.

Until not too long ago, there were still a few voices in Swiss legal doctrine who contended that freezing orders based on foreign arbitral awards could not be issued *ex parte* because the recognition procedure according to the NYC requires the involvement of the respondent, even if it is just of preliminary nature.³⁷² However, in a recent decision the Swiss Federal Supreme Court clarified the issue by holding that – at the stage of the approval of a freezing order – it is sufficient if the claimant can furnish *prima facie* evidence that the conditions of the NYC are met; only during the actual enforcement proceedings, which follow at a later stage, must the respondent be involved in the proceedings.³⁷³ This decision is in line with the view of the majority of legal authors who assert that based on the very purpose of the freezing order, i.e. the surprise effect it is supposed to have on the debtor, it is imperative that the freezing order may be obtained in an *ex parte* proceeding.³⁷⁴

The request for a freezing order must be addressed to the competent court at the respondent's seat in Switzerland or at the location of the assets; the matter will be treated by a single judge in a summary proceeding (art. 272 para. 1 DEA and 251 lit. a CCP).

To obtain a freezing order based on a foreign arbitral award, the claimant must establish *prima facie* that: (i) he has a claim against the respondent; (ii) he is in possession of a foreign arbitral award confirming that claim; and (iii) the respondent has assets in Switzerland which can be seized. The assets and their location must be precisely indicated in the request (unlike in the United States, so called *fishing expeditions* are not admissible). As a preliminary question, the judge will examine *prima facie* whether the formal and substantive requirements of the NYC are met.

³⁷² For example: BSK SchKG II-STOFFEL, art. 271 para. 109; STAEHELIN DANIEL, Neues Arrestrecht ab 2011, Jusletter of 11 October 2010, para. 39 et seq.

³⁷³ BGE 139 III 135 cons. 4.5.2.

³⁷⁴ Among others: BOLLER URS, Der neue Arrestgrund von Art. 271 Abs. 1 Ziff. 6 SchKG, AJP 2010, pp. 187–198, p. 190; BOVEY GRÉGORY, La révision de la Convention de Lugano et le séquestre, JdT 2012 II, pp. 80–104, p. 86 and p. 89; BSK LugÜ-HOFFMANN/KUNZ, art. 47 para 71–72.

If the freezing order is granted and the respondent does not manage to successfully challenge it afterwards, the claimant has to initiate an enforcement procedure in accordance with the DEA within 10 days – otherwise the freezing order is lifted (*Arrestprosequierung*: art. 279 DEA). As part of this procedure, the competent court will use the full standard of proof to verify whether the conditions of the NYC are met and the respondent will have the opportunity to assert his objections.

D. Common Pitfalls to be Avoided

More often than not, parties involved in an arbitration merely focus on the arbitration proceedings without paying proper attention to what follows after the award is rendered. As a result of this, a number of issues may arise during the enforcement proceedings. Many of those issues can be avoided if claimants and their legal counsel stop to consider the requirements of a cross-border enforcement of the award already at an early stage in the arbitration.

In general terms, it is important that a party to an arbitration determine the likely place of enforcement as early as possible during the arbitration proceedings. If the respondent has assets located in various places across the globe, the claimant should whenever possible choose a member country of the New York Convention. Given the NYC's broad global reach, this rarely constitutes a problem in practice.

Once the likely place of enforcement is determined, it is advisable to involve a local counsel early on during the proceedings. A local counsel from the likely place of enforcement may provide very useful advice on aspects that must be given particular attention to during the arbitration in order to pre-empt possible difficulties at the enforcement stage. This relates in particular to issues of due process, which frequently lead to unenforceable arbitral awards, as well as questions of procedural and substantive *ordre public* – both of these aspects will be examined by the court of enforcement in accordance with the national law of the forum.³⁷⁵

³⁷⁵ See section B.2.1b) above regarding due process.

1. Issues Related to the Jurisdiction of the Arbitral Tribunal

Arbitral tribunals are frequently confronted with pathological arbitration clauses. If such a clause is at stake, it warrants particular attention not only by the arbitral tribunal but also by the parties in view of a subsequent enforcement of the award.

Arbitration clauses which are pathological to the extent that they lack an essential element, i.e. the submission to arbitration or a designation of the place of arbitration, clearly lead to a refusal of enforcement. In such cases, the arbitration agreement must be considered not valid in accordance with art. V(1)(a) NYC and the law applicable to the agreement.

The situation is less obvious where a non-essential element is missing, e.g. where the number of arbitrators or the identity of the arbitral institution is uncertain. In such a case, the arbitration agreement is not invalid in the strict sense since all the essential elements are specified in the clause. In most arbitration friendly jurisdictions, this type of pathological arbitration clause is preserved by way of interpretation or by letting the arbitral institution or a state authority make the necessary determinations.³⁷⁶ As this type of pathological clause can be considered valid and executable, the mere wording of art. V(1)(a) NYC would suggest that the enforcement of arbitral awards relying on such clauses may not be refused.

However, courts and legal authors do generally not appear to make the distinction outlined above. Rather, they tend to read art. V(1)(a) NYC as a general basis for courts to refuse enforcement of an arbitral award if the arbitral tribunal in question lacked jurisdiction.³⁷⁷

³⁷⁶ Cf. Poudret/Besson, *supra* footnote 23, para. 159.

³⁷⁷ Cf. Berger/Kellerhals, *supra* footnote 1, para. 2059; Born, *supra* footnote 25, pp. 2777 et seq.; in a recent case of our firm, the Cantonal Court of Zug lifted a freezing order, which had been granted based on a foreign arbitral award, by virtue of art. V(1)(a) NYC because the respondent argued that the arbitral tribunal had no jurisdiction as the arbitration clause did not clearly designate the competent arbitral institution – the Cantonal Court saw this as a ground for refusal under art. V(1)(a) NYC despite the fact that the arbitration clause clearly indicated a submission of the parties to arbitration as well as a seat, i.e. despite the fact that the arbitration clause was valid in the strict sense of the term (the decision was upheld by the Superior Court of the Canton of Zug).

As a consequence of this broad interpretation of art. V(1)(a) NYC by the courts, parties dealing with a pathological arbitration clause must be particularly mindful during the early stages of the arbitration, when the jurisdiction of the arbitral tribunal is established, of any issues that could later lead the court of enforcement to question the tribunal's jurisdiction. Claimants in particular must pay attention that the fall-back procedures stipulated in the *lex arbitri*, which are relied upon in order to uphold a pathological arbitration clause, are closely followed by the arbitral tribunal. For example, it must be ensured that a state authority designating an arbitral institution in lieu of the parties is in fact competent to do so under the applicable law. Furthermore, it is crucial that a close record is kept of all preliminary deliberations by all authorities involved in the establishment of the arbitral tribunal's jurisdiction – this includes the arbitral tribunal itself. If the jurisdiction is later challenged at the enforcement stage as a result of a pathological arbitration clause, it will be important for the claimant to be able to evidence in detail what grounds the arbitral tribunal's jurisdiction was based on. In very complex cases, it may even be advisable to request a partial award on jurisdiction with a view to subsequent enforcement proceedings.

2. Due Process

One of the most common grounds for refusal of enforcement are violations of due process during the arbitration, in particular instances in which the respondent was not properly notified. A proper notification of the respondent becomes especially crucial where the respondent is absent from the arbitral proceedings. All well-known arbitration rules provide for the option to pursue the arbitration in an *ex parte* proceeding in cases where a party is in default.³⁷⁸ However, in such a case the arbitral tribunal must ensure at every step that the defaulting party receives notice of the ongoing proceedings.³⁷⁹

Even though the requirements set by arbitration rules are often minimal in this respect, it is strongly recommended that the arbitral tribunal always make several, i.e. at least two service attempts if the first attempt of notifying the respondent fails. Whereas arbitration rules usually deem it sufficient if a no-

³⁷⁸ For example: art. 28 of the Swiss Rules of International Arbitration or art. 5(2) and 26(2) of the ICC Rules.

³⁷⁹ Cf. SCHERER, *supra* footnote 360, art. V paras. 155–168; BORN, *supra* footnote 25, p. 1867.

tice is served at the respondent's last-known residence or place of business,³⁸⁰ it may be in the claimant's interest to make further efforts if a service fails at such address. Especially in cases where the respondent is absent during the arbitration proceedings, the claimant may want to make investigations about an alternative address for a further attempt of service or ask the arbitral tribunal to do so.³⁸¹

Also, it should be made sure that important deadlines are sufficiently long and that a defaulting party is granted additional grace periods where necessary. Waiting a little longer for the final award is certainly worth it if it can help to avoid unnecessary difficulties at the enforcement stage. With regard to deadlines, a common rule of thumb is a time limit of at least 7–14 days to appoint an arbitrator and at least 2–3 weeks to appear at a hearing before the arbitral tribunal, depending on the jurisdiction.³⁸²

While arbitration rules are generally open as regards the form of the notice,³⁸³ the best and the standard way to ensure a proper record of notification is service by courier with delivery against receipt (even though this form of service is more expensive than its alternatives). The notice may be served in the

³⁸⁰ For example: art. 3(2) ICC Rules, art. 4.2 LCIA Rules.

³⁸¹ Art. 2(1) of the Swiss Rules explicitly require the arbitral tribunal to make „reasonable inquiry“ with regard to a party's actual address; in a recent case in our practice, an arbitration in Kazakhstan against an absent (Swiss) respondent failed to be enforced in Switzerland, among other reasons, because the respondent changed its address in the course of the proceedings without notifying the arbitral tribunal: even though the Swiss court held that the respondent was properly notified of the arbitration's initiation, it found that a subsequent (failed) attempt to notify the respondent of a hearing at its address on record was insufficient, instead the arbitral tribunal should have undertaken investigations concerning the respondent's actual address and a further attempt to effect service at such address.

³⁸² Cf. SCHERER, *supra* footnote 360, art. V para. 166.

³⁸³ According to art. 3(2) ICC Rules and 4.1 LCIA Rules, any means of communication providing a record of transmission, including registered mail, courier service, fax or e-mail etc., are in order; also see SFT 5P.292/2005 of 3 January 2006 cons. 5.2.2.

language agreed by the parties, i.e. usually the language of the arbitral proceedings, or another language understood by the party in question.³⁸⁴

For claimants it is essential to make sure that they can prove that proper notice was given to the respondent throughout the arbitration and that the respondent was always given the opportunity to present its case. One basic way to achieve this is to remind the arbitral tribunal to establish a close record of all notifications made to the respondent. For example, claimants may ask the arbitral tribunal to include in every procedural order and communication to the respondent a confirmation of its proper notification. Aside from this, claimant may – in case of a respondent's absence – ask the arbitral tribunal to record in the award the circumstances of the default, the opportunities given to the respondent to state its case, and the tribunal's satisfaction on all these points.

For either party in an arbitration, it is important to object to any violation of due process during the arbitral proceedings, otherwise the party is considered as having irrevocably waived its right to object with a view not only to subsequent setting aside proceedings but also to proceedings for the recognition and enforcement of the arbitral award.³⁸⁵

3. Procedural Irregularities

It is equally advisable to keep a detailed record of the arbitration proceedings with regard to any procedural irregularities in general. Such a record will put the claimant into a position to successfully counter objections under art. V(1) (d) NYC put forward by the respondent during the recognition and enforcement proceedings. Equally, it will enable a respondent trying to resist the enforcement of an arbitral award to support its arguments with suitable evidence.

³⁸⁴ In a case our firm was recently involved in, a Swiss respondent, who was in default during the arbitration proceedings, attempted to resist enforcement of the arbitral award because all notifications were served in Russian, which the respondent claimed not to understand. The competent court held that such defence was invalid because all the relevant contracts as well as the arbitration proceedings were held in Russian.

³⁸⁵ Cf. BERGER/KELLERHALS, *supra* footnote 1, para. 2066; SFT 4A_374/2014 of 26 February 2015 cons. 4.2.2; 4A_203/2014 of 9 April 2015 cons. 5.2.

As in the context of due process, it is essential that any violations of the arbitral procedure or any irregular composition of the arbitral tribunal are immediately and explicitly objected to and that the objection is properly reflected in the record. A party failing to object during the arbitral proceedings is precluded from resisting recognition and enforcement of the arbitral award on the same grounds.³⁸⁶ As to the form of the objection, the Swiss Federal Supreme Court has put the bar quite high in a recent decision in which it held that the appellant must be considered as having waived its procedural objection because cautiously voiced concerns about the non-appearance of a witness should have been raised more forcefully in the arbitration.³⁸⁷

4. Timing of the Request for Recognition and Enforcement

For a claimant seeking enforcement of an arbitral award based on the New York Convention, art. V(1)(e) NYC has important practical implications with regard to the timing of the request for recognition.

While in the majority of jurisdictions, such as in Switzerland, an arbitral award becomes binding and enforceable immediately and automatically,³⁸⁸ claimants must bear in mind that certain countries may require a formal act of confirmation by a state authority for the award to be binding.

Furthermore, the award is usually subject to appeal during a certain period after it is issued. Whereas in most countries only an extraordinary appeal relating to grave procedural irregularities is available, some countries allow for an ordinary appeal deferring any binding effect of the arbitral award to the date of the final decision by the competent appeal court.³⁸⁹ Depending on the

³⁸⁶ Cf. BERGER/KELLERHALS, *supra* footnote 1, para. 2076.

³⁸⁷ SFT 4A_407/2012 of 20 February 2013 cons. 3.2.2; cf. THOMSON DOUGLAS, An excess of politeness: Swiss court upholds Cemex award, *Global Arbitration Review* of 24 May 2013.

³⁸⁸ Cf. art. 387 CCP.

³⁸⁹ Examples include Argentina, where a full appeal on the merits is possible unless waived by the parties, or Romania, where violations of any „mandatory provision of law“ may be grounds for an appeal. Sect. 69 of the English Arbitration Act of 1996 allows for appeals „on a point of law“ by agreement of both parties or in cases where the arbitral award is considered „obviously wrong“ or of „general public importance“, *inter alia*. However, the parties can opt out of this ground for appeal. At the same time, English courts have applied the provision in an increasingly restrictive manner. Other common law jurisdictions, such as Australia, New Zealand or Hongkong, have similar provisions.

law of the country in which the award was made this may mean that until the deadline for the appeal has passed and, in case an appeal has been lodged, until the appeal court has reached its decision, the arbitral award does not become binding upon the parties and may therefore not be enforced.

Even where this is not the case as a matter of law, filing a request for enforcement before the deadline for an appeal has passed or before the appeal court has decided entails the risk that the appeal court may suspend the award's enforceability for the duration of the appeal proceedings or that the award will be overturned eventually.

In cases where time is not of the essence, it is therefore advisable for claimants to await the appeal deadline and, as the case may be, the final decision by the appeal court before filing a request for enforcement of the arbitral award.

E. Conclusion

By establishing an internationally applicable, common set of rules for the recognition and enforcement of arbitral awards, the New York Convention has been paramount in the effort to modernize and harmonize the legal framework for cross-border arbitration on a national and international level. However, navigating the rules of the Convention when seeking enforcement of an arbitral award in various countries requires a great deal of attention as there are national differences in the application of the rules and a number of procedural traps expecting the unwary practitioner.

Avoiding those pitfalls is a crucial task facing not only the legal counsel enforcing an arbitral award on behalf of a party, but also – at a very fundamental level – the counsel conducting the arbitration proceedings. Leading an arbitration to its successful conclusion, i.e. a financial reward for the client, means that a respondent's possible defences under art. V NYC should be anticipated as the arbitration proceeds, procedural tactics adapted accordingly and the legal framework of the likely place(s) of enforcement taken into consideration at an early stage in the arbitration.

IX. Potential of Evaluative Mediation to Supersede Arbitration in International Commercial Disputes³⁹⁰

By Andreas D. Blattmann

A. Introduction

1. Disputes and Their Resolution

Modern societies have established a framework of legal and non-legal processes to resolve disputes, ranging from war or self-help to complex state court litigation. Of course, at least since the shift of the monopoly on the use of force to state authorities state court litigation (hereinafter “litigation”) could be seen as the most important process for the resolution of disputes. This picture, though, falls short in several ways, as will be shown below. Undoubtedly, the way humans react to legal disputes depends, to a large extent, among others, on their personality, preferences, experiences, education, values, and, most importantly, culture (which influences all other aspects).³⁹¹

2. Resolution Processes

Modern theories of dispute resolution or, more precisely, of Alternative Dispute Resolution (ADR), regularly distinguish between three dispute resolution processes in addition to litigation: Negotiation, mediation and arbitration (adjudication), whereby negotiation is thought to be the most common form of dispute resolution.³⁹² The reason why these processes are termed *alternative* is because they were thought to be alternatives to litigation.³⁹³ It is undisputed, though, that most legal disputes are resolved by using an ADR process

³⁹⁰ This article is based on a research paper submitted by the author to the National University of Singapore.

³⁹¹ SOURDIN TANJA, *Alternative Dispute Resolution*, 4th ed., Sydney 2012, p. 9.

³⁹² SOURDIN, *supra* footnote 391, p. 41.

³⁹³ SOURDIN, *supra* footnote 391, p. 2.

rather than litigation. Against this background, it is litigation that is, effectively, an alternative to ADR.

Indeed, negotiation is certainly important and present in our everyday life. One of the advantages of negotiation is that it allows the disputing parties to control both the procedure and the outcome.³⁹⁴ If the parties cannot settle their dispute by themselves, they often invoke a (mostly) neutral third party, such as a mediator (mediation), an arbitrator (arbitration) or, ultimately, the judge of a state court (litigation). Even though all these processes have in common that a neutral third party becomes involved, their nature differs substantially. The decisive distinction is whether the third party is entitled to impose its findings (arbitration, litigation) or only to assist the parties in finding their own solution (mediation).

ADR methods can be found throughout history, thus way before the establishment of modern state courts. Mediation, for example, is said to have roots in Confucianism.³⁹⁵ Arbitration, was already described in the Bible in the passage where King Solomon had to decide a dispute between two women about a baby.³⁹⁶ Furthermore, as far back as the thirteenth century, English merchants used arbitration to have their disputes resolved in accordance with their own customs instead of the applicable (public) law.³⁹⁷

Thus, both mediation and commercial arbitration are neither new nor alternative but rather common methods to solve disputes. For many years, commercial arbitration was seen to be superior to litigation. Characteristics such as expertise of the decision maker, finality of the decision, privacy of the proceedings and procedural informality were deemed to be advantages compared to litigation. Arbitration proceedings were also said to be cheaper and faster.³⁹⁸ Experts in the field even believe that we are now (or still?) in the

³⁹⁴ GOLDBERG STEPHEN B./SANDER FRANK E./ROGERS NANCY H./COLE SARAH RUDOLPH, *Dispute Resolution – Negotiation, Mediation, and Other Processes*, 5th ed., New York 2007, p. 3.

³⁹⁵ LEE JOEL/HWEE THE HWEE, *An Asian Perspective on Mediation*, Singapore 2009, p. 4.

³⁹⁶ XAVIER GRACE, *Evolution of Arbitration as A Legal Institutional And The Inherent Powers of the Court*, Working Paper Series No. 009, Singapore 2010, p. 1 with reference to The King James Bible 1 Kings 3:16–28.

³⁹⁷ GOLDBERG/SANDER/ROGERS/COLE, *supra* footnote 394, p. 213; XAVIER, *supra* footnote 396, pp. 2 et seq.

³⁹⁸ GOLDBERG/SANDER/ROGERS/COLE, *supra* footnote 394, p. 214.

Golden Age of commercial arbitration. The latest PricewaterhouseCoopers (PwC) International Arbitration Survey (2013), hereinafter “survey”, seems to confirm this view. It shows that major corporations across industry sectors continue to affirm the advantages of arbitration in transnational commercial disputes.³⁹⁹ However, the survey also highlights that these corporations have significant concerns over costs and delays in arbitration proceedings. Some interviewees also expressed concerns over the “judicialisation” of arbitration. In other words, their perspective is that arbitration proceedings became more formal and therefore similar to litigation. The survey holds that this trend is potentially damaging the attractiveness of arbitration.⁴⁰⁰ However, due to the confidentiality of the proceedings it is nearly impossible to find persuasive evidence for the aforementioned concerns, especially regarding costs.

3. Dispute Resolution Processes, Globalization and Culture

The mentioned concerns, nevertheless, put other dispute resolution proceedings involving neutral third parties center stage, especially mediation. Indeed, mediation has gained attention not only because of the alleged negative aspects of arbitration but especially because of recent developments in international commercial relationships. Globalization and the progress of Asian countries in international trade have increased the trade volume across the globe. Needless to say, that an increase in trade between “western” and Asian countries, such as China, India, Singapore, and Indonesia, naturally leads to an increase in disputes. Therefore, cultural differences in dispute resolution must be taken into account.

“The influence of culture is pervasive. It affects how we think, speak and act. It is unseen and silent, and therefore easy to overlook. But we disregard it at our peril. The saying ‘When in Rome, do as the Romans do’, is sound advice,

³⁹⁹ <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> (last visited on 14 August 2015).

⁴⁰⁰ See Survey p. 5; this was already observed in 2002, see BARUCH BUSH ROBERT A., Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field, *Pepperdine Dispute Resolution Law Journal*, 3 (1), 2002, pp. 111–131, p. 118 et seq.; further NOLAN-HALEY JACQUELINE, Mediation, The „New Arbitration“, *Harvard Negotiation Law Review* Vol. 17/61 pp. 61–95, p. 66 et seq.

particularly for those of us who are involved in dispute resolution [...]”.⁴⁰¹ Even though the saying is referenced here in its short form, it is clear what it means: One should abide to the local customs since this is not only polite but may also be advantageous. In fact, taking cultural differences into account is imminent during business meetings, general negotiations and progressed disputes. Whereas a forceful argument may be acceptable in one culture, this might be seen as a lack of social maturity and trustworthiness in the other.⁴⁰² Put in other words: In disputes with trading partners whose culture, for example, emphasizes social harmony, arbitration or litigation may not be the best processes. In these cases, mediation could be a viable alternative.

B. What is Evaluative Mediation

1. Empowering a Third Party

To capture the characteristics and the scope of the different dispute resolution processes it is necessary, at this juncture, to define and describe these processes in more detail. As described above, negotiation, mediation and arbitration are usually subsumed under the term ADR, as opposed to state court litigation. However, the latter and arbitration have one decisive aspect in common: Both processes lead to a binding decision which is normally enforceable, and both involve a neutral third party (arbitrator, judge). In contrast, negotiation takes place only between the disputing parties. The result is either an agreement between the parties or the disputes goes on. Mediation, finally, is somewhere in between: Of course, here too, the process consists primarily of direct negotiations between the parties and the “positive” outcome is an agreement (settlement). But mediation also involves a neutral third party (mediator) without, however, the empowerment to make binding decisions. Agreements resulting out of mediation are, in most jurisdictions, not subject to specific rules for enforcement. Thus, such agreements must be considered as “normal” contracts and enforced accordingly.

⁴⁰¹ See the foreword of PROF. THOMMY KOH, Ambassador-At-Large, Ministry of Foreign Affairs, Singapore, in LEE/HWEE, *supra* footnote 395, p.vii; the saying is attributed to Saint Ambrose, an archbishop of Milan in the 4th century.

⁴⁰² TAYLOR VERONICA/PRYLES MICHAEL, *The Cultures of Dispute Resolution in Asia*, in: Pryles Michael (ed.), *Dispute Resolution in Asia*, 3rd ed., Alphen aan den Rijn 2006, pp. 1–34, p. 4.

2. Mediation Practices

Mediation can, therefore, best be described as negotiation between disputing parties with a mediator assisting them, and the mediator is not entitled to impose an outcome on the parties.⁴⁰³ As mentioned earlier, mediation has been common in Asia for centuries. In fact, not only China looks back on traditional mediation as a means of peaceful problem solving. Rather, mediation also occupies an important place in South Korea and Japan. The Japanese proverb “In a quarrel both parties are to blame” illustrates the attitude of the Japanese society which expects tolerance and empathy for others. This is further reflected in the fundamental sociological concept of saving and giving face (Chinese “*mianzi*”) and of relationships (Chinese “*guanxi*”), including self-identity and social-identity.⁴⁰⁴ State court litigation or arbitration are viewed as open confrontations and can be considered as admissions of personal failure.⁴⁰⁵ But also in Western Europe informal, business and community-based dispute resolution processes have a long standing tradition despite “litigation” being deemed as the conventional way to solve legal disputes.⁴⁰⁶ In any case, mediation is now an accepted dispute resolution process in commercial disputes around the globe and various mediation centers, such as the WIPO Arbitration and Mediation Center based in Geneva or the Singapore International Mediation Center, have been established. Furthermore, mediation is gaining increased importance in high-value commercial disputes.⁴⁰⁷

In recent years, mediation has gone through a multifaceted development. In doctrine, many terms like settlement, facilitative, transformative, evaluative or even manipulative mediation have been used.⁴⁰⁸ These terms attempt to illustrate different types of practices that developed over years, for mediators’ strategies vary significantly. While some mediators focus on satisfying all interests of the parties involved, others concentrate on legal rights. In this case, mediators sometimes also provide a neutral assessment of the case and, thus,

⁴⁰³ GOLDBERG/SANDER/ROGERS/COLE, *supra* footnote 394, p. 214.

⁴⁰⁴ LEE/HWEE, *supra* footnote 395, p. 173 et seq.

⁴⁰⁵ See LEE/HWEE, *supra* footnote 395, p. 4 et seq., with various references.

⁴⁰⁶ BOULLE LAURENCE, *Mediation; Principles Process Practice*, 3rd ed., Chatswood 2012, p. 59 et seq.

⁴⁰⁷ BOULLE, *supra* footnote 406, p. 61 et seq.; regarding the state of affairs in 2002, BARUCH BUSH, *supra* footnote 400, p. 111 et seq.

⁴⁰⁸ BOULLE, *supra* footnote 406, p. 43.

of the possible outcome in litigation or arbitration.⁴⁰⁹ However, it appears to be a chicken-and-egg debate about what came first, the term or the practice. Furthermore, drawing a distinction between the different “models” is, in practice, probably often not possible and a mediator might even start with facilitating negotiations but ending up predicting the outcome of the dispute in court. Rather than categorizing mediation practices as various theoretical models, it would be more accurate to refer to them as a continuous spectrum.

However, merely for the purpose of analyzing different practices and a better understanding, the “model based approach” has significant advantages. This article will focus on the model (strategy) often referred to as evaluative mediation. In contrast to pure facilitative mediation that aims solely at facilitating negotiations between the parties, evaluative mediation provides the parties with a neutral assessment of the case and a prediction of the outcome in court or arbitration.⁴¹⁰

3. Evaluative Mediation

Commercial and industry-based mediation is often conducted as evaluative mediation.⁴¹¹ The main objective of an evaluative mediator is to reach a settlement according to (mostly) legal rights and duties of the parties. This includes an assessment of the case within the anticipated range of court, tribunal or industry outcomes. The mediator in these cases is regularly an expert in the main areas of the dispute which enables him to provide information, advise and persuade the parties and predict the outcomes of state court or arbitral proceedings.⁴¹² Even though there might, theoretically, not be any further qualification requirements, it is probably inevitable that the mediator also has strong legal skills or a broad litigation *and* arbitration experience, otherwise she or he would lack authority to predict the outcome. Thus, the mediator has, ideally, both longstanding commercial or industry and dispute resolution experience – naturally apart from important personal skills, such as cultural knowledge.

⁴⁰⁹ Regarding the different practices see GOLDBERG/SANDER/ROGERS/COLE, *supra* footnote 394, p. 108.

⁴¹⁰ SPENCER DAVID/BROGAN MICHAEL, *Mediation Law and Practice*, Port Melbourne 2006, p. 99; see also recently NOLAN-HALEY, *supra* footnote 400, p. 61 et seq.

⁴¹¹ BOULLE, *supra* footnote 406, p. 43.

⁴¹² See the illustrative table in BOULLE, *supra* footnote 406, p. 44 et seq.

Therefore, evaluative mediation could be deemed to focus, in substance, on rights, for the mediator provides opinions with respect to the merits. This, of course, requires the parties to present their point of view at an early stage of the mediation process. Some critics argue that this adversarial aspect leads to a quasi-arbitral style of the evaluative mediation, blurring the line between those two ADR processes.⁴¹³ Finally, it is important to note that mediation is, mostly, a consent based process. Therefore, parties have to agree not only on the process itself but also on the mediator and whether they wish to have an evaluation or not.⁴¹⁴ Of course, evaluative mediation may be seen as an increasingly directive process, meaning that the mediator not only offers judgments but also exerts substantial pressure on the parties to accept them.⁴¹⁵ This aspect will be considered below in the course of the evaluation.

C. But what about the Potential?

1. Evaluation of the Processes

1.1 *Evaluative Mediation v. Arbitration?*

Ten years ago, BARUCH BUSH, reputable scholar in the field of alternative dispute resolution, recognized two possible – or alternative – reasons for the rise of evaluative mediation: One is the “better informed customer story”, the other the “goodbye arbitration, hello mediation story”. The first story suggests that customers have, through the increased use of (originally facilitative) mediation processes, discovered the value of a more substantive involvement of the mediator. It assumes that mediation clients have become frustrated and dissatisfied with merely facilitative processes. Customers therefore *demand* such evaluation services, including the pressure to close a deal – especially when they are conducted in the “shadow of the law”, that is, in court

⁴¹³ SPENCER/BROGAN, *supra* footnote 410, p. 102 and 105; some critics even take the view that evaluative mediation should, because of the evaluative component, not be termed as mediation.

⁴¹⁴ MERRILLS J. G., *International Dispute Settlement*, 5th ed., Cambridge 2011, p. 29 et seq.; BOULLE, *supra* footnote 406, p. 63 et seq., in contrast to the mandatory or coercive aspects of litigation. Rightly, BOULLE points out that in some jurisdictions mandatory mediation systems have been established.

⁴¹⁵ BARUCH BUSH, *supra* footnote 400, p. 113 et seq.

related venues.⁴¹⁶ The other story suggests that the rise of evaluative mediation is directly linked to the fall of arbitration.⁴¹⁷ Thus, this story considers a larger context of the general market for ADR processes. BARUCH BUSH points out that the move towards a more protective (or perhaps legalistic) process of arbitration, triggered by, among others, tendencies to treat arbitration awards like state court decisions (at least with respect to the enforcement) may have accomplished precisely, and ironically, what it was intended to avoid: “Making the arbitration process more protective automatically and inevitably makes it more formal, cumbersome, expensive and contingent”.⁴¹⁸

BARUCH BUSH concludes that, as arbitration went down in popularity, mediation went up, and that was no coincidence: “In short, evaluative mediation has expanded not because it is a preferred alternative to facilitative mediation, but because it is a substitute for the arbitration process as that process used to operate”.⁴¹⁹ However, is this the last word on the matter? If it was, the answer to the question whether evaluative mediation has the potential to supersede arbitration would be “yes”. This is too simplistic, though, as the Survey already shows.

1.2 Conceptual Differences

The reason why evaluative mediation and arbitration are not real substitutes is, as even BARUCH BUSH notes, that they have substantial conceptual differences. *Firstly*, an arbitration proceeding leads, basically, to a final and binding decision – which is mostly enforceable and outside of the control of the parties. This is obviously not the case in evaluative mediation processes. Whether or not the dispute will end depends solely on the will of the parties to enter into a settlement agreement. *Secondly*, arbitration is, as litigation, an adversarial process, thus having a few destructive features. Of course, since the parties have to present their point of view to the mediator, evaluative mediation also includes an adversarial aspect. And it might be true that the parties will try to persuade the mediator during the evaluation. However, both aspects are im-

⁴¹⁶ BARUCH BUSH, *supra* footnote 400, pp. 116 et seq.

⁴¹⁷ This argument has recently been put forth also by NOLAN-HALEY, *supra* footnote 400, pp. 66 et seq.

⁴¹⁸ BARUCH BUSH, *supra* footnote 400, p. 118 et seq.; see similar also NOLAN-HALEY, *supra* footnote 400, pp. 61 et seq., esp. p. 66 et seq.

⁴¹⁹ BARUCH BUSH, *supra* footnote 400, p. 122; this is also the opinion of NOLAN-HALEY, *supra* footnote 400, pp. 66 et seq.

minent to each and every dispute. Even during negotiations and facilitative mediation parties have to outline and argue why they take up a specific position. Nevertheless, one would never argue that negotiation and facilitative mediation are shifting towards arbitration. *Thirdly*, arbitration is mostly about legal rights and arguing for winning the case. Evaluative mediation, in contrast, even though having a strong focus on legal rights as well, *allows* including other aspects of the dispute or the relationship between the parties into the negotiations. It is worth remembering, at this juncture, that, although termed in the context of this article as evaluative mediation, the mediator is not prohibited from including other styles in his practice – subject to different instructions of the parties, of course. Critics scathing the rights-based approach and, thus, evaluative mediation, seem to forget not only that the different mediation models constitute a continuous spectrum but also that each party is, ultimately, free to leave the negotiation table at any time. This is not possible in arbitration or in litigation. Thus, the parties to an evaluative mediation are fully in control of the process. Naturally, the outcome of the dispute may be *influenced* by the mediator's opinion. This does not, however, transform evaluative mediation into a "new arbitration", and without the consent of both parties to the evaluation the latter will not take place at all. *Finally*, mediation has, unlike litigation and, at least partly, arbitration, the advantage that parties can reach settlements not possible within the normal legal framework. A court, in contrast, is bound by the law.⁴²⁰ Therefore, evaluative mediation and arbitration are *not* substitutes for one another.

2. Promoting a New Understanding of Dispute Resolution

2.1 Are Evaluative Mediation and Arbitration Rivals?

The introductory question is yet to be answered if the answer should include reasons why one process is *better* than the other *with respect to the same dispute*: If evaluative mediation and arbitration are not substitutes (and satisfy, thus, not the same demand), then neither the former nor the latter can supersede the other.

It will be shown in what follows that the reason for this sobering outcome is not that there is no answer to the question of whether or not evaluative mediation can supersede arbitration, but that the question has been put the

⁴²⁰ SPENCER/BROGAN, *supra* footnote 410, p. 99.

wrong way. “Supersede” or “Evaluative Mediation v. Arbitration” imply some sort of rivalry or competition between the processes. But, do evaluative mediation and arbitration really compete for the favor of “customers”? I believe not, and that is why the question has been put the wrong way. Instead, it is important to realize that a more comprehensive or holistic understanding of dispute resolution mechanisms is necessary.

2.2 Towards a More Holistic Approach

Often, the different dispute resolution processes are regarded as separate subject matters. Consequently, lawyers in practice refer to themselves as litigators, arbitrators or mediators. When drafting contracts, for example, parties often forget to think of what would be an appropriate dispute resolution process. At the most, they include an ordinary jurisdiction clause or they agree on an arbitration clause. Practice shows, therefore, that both lawyers and parties to a contract often either think of strict categories of dispute resolution mechanism or they do not consider different mechanisms at all. However, it is not evident why such a strict distinction between dispute resolution processes should be drawn.

On the contrary, this even seems to be an unfavorable approach, at least when drafting contracts: If it is true that the appropriateness of a dispute resolution mechanism always depends on the specific dispute and the background of the parties, and assuming that both parties are willing to resolve the dispute, then determining the process before knowing the dispute is like choosing a rugby ball to play tennis. It is not inconceivable that the ball travels over the net but the game is certainly not enjoyable. Therefore, it would be more advisable to first think of possible disputes and subsequently describe and agree upon those resolution processes that seem appropriate. This, however, requires both parties and lawyers to strive towards the best choice of dispute resolution process that fits their needs and the dispute in question.

Of course, one could argue that, while drafting a contract, it is not possible to determine all kinds of disputes that could arise. This might be true, but in most cases it would at least be possible to define those issues which are more likely to cause disputes, considering the background of the parties involved and the main issues. For those issues specific resolution processes can be determined. Ultimately, it is in the very own interest of the parties to choose the process that is appropriate to solve their dispute, independent of what a contract clause says.

In some cases, for example, a dispute demands for the pressure of a state court or arbitration proceeding just to actuate the resolution process and bring the parties to the negotiation table. In addition, legal rules might require one party to take legal actions in this respect to secure a legal position. In other cases, however, it is advisable to choose a more constructive approach. For example, when the parties are still in an ongoing relationship or when cultural differences require doing so, an adversarial process would be a threat to the relationship. In this case, (evaluative) mediation would probably be the best response to the dispute. Of course, one might argue that mediation lacks enforceability. Even though this is true, this argument falls short in several ways. A judgment is not useful when it destroys the trust between parties in an ongoing relationship. Furthermore, in the event one party owes money to the other, enforceability is not useful when the party subject to the enforcement is not able to pay. In these cases, it is often more advisable to seek a solution that ensures at least a partial payment. Finally, as practice shows very clearly, many disputes cannot be resolved by the parties themselves because of hardened fronts and because neither party trusts in what the other says. In such cases, a purely adversarial process is neither necessary nor advisable in terms of time and costs because most of the parties would heed the advice of a neutral and competent mediator. Furthermore, as has been shown above, economic and globalization imperatives as well as efficiency and cost benefit advantages might call for (evaluative) mediation.⁴²¹

Finally, aspects of confidentiality and procedural issues must be considered. Although arbitration normally ensures confidentiality (e.g. art 6 appendix I of the ICC rules), the degree of confidentiality in mediation is probably higher, also because there is neither a judgment to be published (even if anonymized) nor a higher court that could review the matter on appeal. As to procedural issues, whether or not litigation, arbitration, mediation, or another process should be chosen depends also on whether certain procedural instruments are advantageous. This applies especially to U.S.-style litigation means, such as discovery or expert witnesses that are, more and more, becoming part of arbitration proceedings albeit in much modified form and extent.⁴²²

⁴²¹ BOULLE, *supra* footnote 406, pp. 60 et seq.

⁴²² NOLAN-HALEY, *supra* footnote 400, p. 68.

2.3 Conclusion: Are We Wiser Yet?

It is important not to lose a pragmatic eye on how to deal with present or future disputes. Therefore, this article does not suggest extensively assessing in each and every case which resolution process would be appropriate. Rather, it is geared towards increasing the awareness for the wide range of possible dispute resolution processes, and to show that mediation is able to play an important role.

Evaluative mediation is not only a “new” playground for lawyers that only benefits them.⁴²³ It is in the disputing parties’ own interest to choose the process fitting the nature of their dispute best, and that might be evaluative mediation too. Furthermore, it is not evident at all that evaluative mediation always brings along a directive element. Of course, if the parties ask for pressure, they shall have it. Practice not only shows that this pressure is needed in some cases but also that the neutral evaluation, based on legal rights, increases the acceptance of the settlement. Certainly, at first, parties may be satisfied with an agreement that is situated outside the law. However, over the long run, it is easier to accept a predefined legal situation. It avoids the feeling of being pulled over the barrel. Finally, there is no need to be concerned about mediators losing their identity due to the increasing importance of evaluative mediation.⁴²⁴ Dispute resolution processes are designed to serve the disputing parties, not the arbitrators, litigators, or mediators.

Against this background, the answer to the question of whether or not evaluative mediation can supersede arbitration is thus “no”; evaluative mediation has not the potential to supersede arbitration. Both arbitration and evaluative mediation have the potential to stand by themselves, contributing in their own way to a wide range of different dispute resolution processes and offering therefore the disputing parties the appropriate process needed to settle their disputes.

There is neither an ideal dispute nor an ideal dispute resolution process. Instead, the nature of the dispute and the background of the disputing parties, that is, the circumstances of the dispute, must be taken into account to examine which resolution process is the best response to the dispute. This holistic approach to dispute resolution supports, therefore, a “process plural-

⁴²³ BARUCH BUSH, *supra* footnote 400, p. 116.

⁴²⁴ NOLAN-HALEY, *supra* footnote 400, pp. 62 et seq.

ism" benefitting the disputing parties and, ultimately, international commerce. Of course, realizing this does not make us wiser, but at least more considerate with respect to the choice of an appropriate dispute resolution process.

X. Can Labour Law Disputes Be Submitted To Arbitration?

By Ernst F. Schmid

A. Introduction

In practice there is considerable uncertainty as to whether arbitration can be validly provided for in employment agreements governed by Swiss Law.⁴²⁵ Swiss law is dominated by the principle of party autonomy and linked thereto a very liberal attitude towards private arbitration. However, it is also a principle of Swiss law that the employee as the generally weaker party requires a certain degree of protection.⁴²⁶

The arbitrability of labour law disputes is of particular relevance in the context of international sport. Professionals in sports often conclude employment agreements⁴²⁷ with their clubs that contain arbitration clauses or are members in associations which provide for arbitration in their articles of association and/or agreements. Given the market position of such sport organisa-

⁴²⁵ BÄRTSCH PHILIPPE/PETTI ANGELINA M., The Arbitration Agreement, in: Geisinger/Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed., Biggleswade 2013, p. 25 et seq. at p. 39; FRÖHLICH STEPHAN, *Individuelle Arbeitsstreitigkeiten in der neuen Schweizerischen Zivilprozessordnung*, Berne 2014, para. 90; GEISER THOMAS, *Arbeitsrechtliche Rechtsprechung 2010*, AJP 2011, p. 243 et seq. at p. 250; GEISER THOMAS/HÄFLIGER BENEDIKT, *Entwicklungen im Arbeitsrecht*, Schweizerische Juristen-Zeitung 107 (2011), p. 336 et seq. at p. 340; HASLER ERNST, *Die Zuständigkeit bei arbeitsvertraglichen Streitigkeiten im Kanton Zürich*, ArbR, Mitteilungen des Schweizerischen Instituts für Arbeitsrecht, 1988, p. 41 et seq. at p. 56.

⁴²⁶ BERGER/KELLERHALS, *supra* footnote 1, para. 11; BSK OR I-HUGUENIN, art. 19 para. 2; BSK OR I-PORTMANN, art. 320 para. 26.

⁴²⁷ GEISER THOMAS, *Arbeitsverträge mit Sportlern*, in: Arter/Baddeley (eds.), *Sport und Recht*, Berne 2007, p. 79 et seq., p. 86; VALLONI LUCIEN/PACHMANN THILO, *Sports Law in Switzerland*, 2nd ed., Berne 2014, p. 69; WENGER SARAH/KAISER MARTIN, *(Arbeits-)rechtliche Aspekte des Berufssports*, in: Bani/Obrist (eds.), *Festschrift Jean-Fritz Stöckli*, Zurich/St. Gallen 2014, p. 751 et seq. at p. 753.

tions and the imbalance of power between the association and the sports individual, such arbitration clauses are sometimes problematic.⁴²⁸

At the same time, a special need for arbitration may arise in certain situations where a particular expertise is required which ordinary labour law courts may not possess. An example is the usually complex computation of employee benefits under sophisticated stock option plans. Another driver for arbitration may be an increased need for confidentiality. A dismissed senior executive for instance, under the impression that his extremely high salary claims might displease a state court judge, may think that his chances of success improve before an arbitral tribunal. The inclination to prefer arbitration may also be on the side of the employer aiming at a strict confidentiality of the details of the dispute.

This contribution discusses the legal situation both on an international and a domestic level.

B. The Position under the Swiss Private International Law

The matter is straightforward on the international level, where basically at least one party to the dispute is not domiciled in Switzerland. In such international matters it is generally recognised⁴²⁹ that employment disputes can be submitted to arbitration, as the respective claims are deemed pecuniary in the sense of art. 177 para. 1 Swiss Private International Law Act (PILA).

⁴²⁸ HAAS ULRICH/HAUPTMANN MARKUS, Schiedsvereinbarungen in „Ungleichgewichtslagen“, SchiedsVZ 2004, p. 175 et seq. at p. 176; VALLONI/PACHMANN, *supra* footnote 427, p. 70.

⁴²⁹ Cf. BGE 136 III 467 cons. 4.2; AUBERT GABRIEL, L'arbitrage en droit du travail, ASA Bulletin 2000, no. 1, p. 2 et seq. at p. 7; GIRSBERGER/VOSER, *supra* footnote 73, para. 329b; OETIKER CHRISTIAN/HOSTANSKY PETER, Die neue Binnenschiedsgerichtsbarkeit, Aktuelle Juristische Praxis 2013, p. 203 et seq. at p. 204; RYTER FILIPPO, Article 343 CO et procédure civile vaudoise en matière de conflit de travail, Diss. Lausanne 1990, para. 395.

C. The Position under Domestic Law

1. Introduction

Whilst arbitration in tenancy matters is explicitly excluded by the law,⁴³⁰ it is all but clear on the domestic level whether labour law disputes can be submitted to arbitration.

2. The Intercantonal Concordat

Prior to the enactment of the Swiss Code of Civil Procedure (CCP) in 2011 domestic arbitration was governed by the Intercantonal Concordat of 27 March 1989 on arbitration (KSG). Under art. 5 KSG all claims were arbitrable which the parties could freely dispose of, unless the suit fell within the exclusive jurisdiction of a State authority by virtue of a mandatory provision of the law.⁴³¹

Under the KSG, the Swiss Federal Supreme Court,⁴³² in a decision of 28 June 2010,⁴³³ has ruled that employment disputes that relate to claims which the employee cannot validly waive by virtue of art. 341 para. 1 CO⁴³⁴ are not arbitrable, i.e. cannot be submitted to arbitration.⁴³⁵ This decision was later

⁴³⁰ Art. 361 para. 4 CCP provides that only the conciliatory authorities may be appointed as arbitral tribunal.

⁴³¹ In the German original text: „Gegenstand eines Schiedsverfahrens kann jeder Anspruch sein, welcher der freien Verfügbarkeit der Parteien unterliegt, sofern nicht ein staatliches Gericht in der Sache ausschliesslich zuständig ist.“ In the French original text: «L'arbitrage peut porter sur tout droit qui relève de la libre disposition des parties, à moins que la cause ne soit de la compétence exclusive d'une autorité étatique en vertu d'une disposition impérative de la loi.»

⁴³² Likewise earlier the Cantonal Court of Vaud on 2 November 2009 cons. 3b, reported in JAR Jahrbuch des Schweizerischen Arbeitsrechts 2010, p. 657 et seq.

⁴³³ Reported as BGE 136 III 467 et seq.

⁴³⁴ In the German original text: „Während der Dauer des Arbeitsverhältnisses und eines Monats nach dessen Beendigung kann der Arbeitnehmer auf Forderungen, die sich aus unabdingbaren Vorschriften des Gesetzes oder aus unabdingbaren Bestimmungen eines Gesamtarbeitsvertrages ergeben, nicht verzichten.“ In the French original text: «Le travailleur ne peut pas renoncer, pendant la durée du contrat et durant le mois qui suit la fin de celui-ci, aux créances résultant de dispositions impératives de la loi ou d'une convention collective.»

⁴³⁵ BGE 136 III 467 et seq. cons. 4.6.

confirmed by the Swiss Federal Supreme Court in a decision of 17 April 2013,⁴³⁶ i.e. under the new CCP.

3. Art. 341 para. 1 Swiss Code of Obligations

As per art. 341 para. 1 CO, for the period of the employment relationship and for one month after its end (“blocking period”), the employee may not waive claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract. The provision encompasses all sorts of claims the employee may have against the employer and includes explicit and implied waivers of such claims.⁴³⁷ An invalid waiver does not become valid after the lapse of the blocking period.⁴³⁸ However, as a matter of substantive law, the employee may waive his or her claim after the lapse of the blocking period.⁴³⁹

The non-waivability rule of art. 341 para. 1 CO may also affect settlement agreements between employer and employee. Only to the extent that it clearly contains concessions by both parties and the settlement appears adequate,⁴⁴⁰ can a settlement agreement be validly entered into by the parties during the blocking period.⁴⁴¹

⁴³⁶ SFT 4A_515/2012 of 17 April 2013.

⁴³⁷ Schweizerischer Gewerbeverband (ed.), *Der Einzelarbeitsvertrag im Obligationenrecht*, Muri 1991, art. 341 para. 1 and 9.

⁴³⁸ Implied from BGE 136 III 467 where the employee sued two years after termination of the employment, thus after the blocking period, but based on an arbitration clause in his original employment agreement. Without discussing the issue, the Federal Supreme Court held the arbitration agreement invalid.

⁴³⁹ STREIFF ULLIN/VON KAENEL ADRIAN/RUDOLPH ROGER, *Arbeitsvertrag – Praxiskommentar zu Art. 319 et seq. OR*, 7th ed., Zurich 2012.

⁴⁴⁰ BGE 136 III 467 cons. 4.5; cf. also PORTMANN, *supra* footnote 426, art. 341 para. 6.

⁴⁴¹ SFT 4A_103/2010 of 16 March 2010 cons. 2.2 and 4C.27/2002 of 19 April 2002 cons. 3.c; and BGE 136 III 467 cons. 4.5, 110 II 168 cons. 3b and 106 II 222 cons. 2; REHBINDER MANFRED/STÖCKLI JEAN-FRANÇOIS, in: Hausheer/Walter (eds.), *Berner Kommentar zum Schweiz. Privatrecht, OR, Der Arbeitsvertrag*, Berne 2014, art. 341 para. 18.

4. Art. 354 Swiss Code of Civil Procedure and Its Relationship with Art. 341 para. 1 Swiss Code of Obligations

Under art. 354⁴⁴² CCP any claim the parties can freely dispose of is arbitrable.

The relationship between art. 354 CCP and art. 341 para. 1 CO is heavily debated in legal literature. One opinion follows the position taken by the Federal Court in its 28 June 2010 decision,⁴⁴³ namely that an agreement to arbitrate claims that cannot be waived by virtue of art. 341 para. 1 CO is invalid.⁴⁴⁴ Others⁴⁴⁵ criticise the Federal Supreme Court's view, basically due to a lack of coherence between domestic and international order.

What remains undisputed, however, is the fact that after the lapse of the blocking period the parties are free to submit their dispute to arbitration.⁴⁴⁶

The authors also disagree on whether the Federal Supreme Court should continue the position expressed in BGE 136 III 467 under the new CCP or not.⁴⁴⁷

⁴⁴² In the German original text: „Gegenstand eines Schiedsverfahrens kann jeder Anspruch sein, über den die Parteien frei verfügen können.“ In the French original text: «L'arbitrage peut avoir pour objet toute prétention qui relève de la libre disposition des parties.»

⁴⁴³ Cf. above, footnote 433.

⁴⁴⁴ HAAS ULRICH/HOSSFELD ANNE, Die (neue) ZPO und die Sportschiedsgerichtsbarkeit, ASA Bulletin 2012, no. 2, p. 312 et seq. at p. 332; HÄBERLI CHRISTOPH, Verfahrensfragen im Zusammenhang mit Gesamtarbeitsverträgen, ArbR Mitteilungen des Schweizerischen Instituts für Arbeitsrecht, 2007, p. 35 et seq. at p. 44; MEIER KURT, Schiedsgerichtsbarkeit in arbeitsrechtlichen Streitigkeiten, in: Donatsch et al. (eds.), Festschrift 125 Jahre Kassationsgericht des Kantons Zürich, Zurich 2000, p. 267 et seq. at p. 272 et seq.; PFISTERER STEPHANIE, in: Hausheer/Walter (eds.), Berner Kommentar ZPO, art. 354 para. 26; STACHER MARCO, DIKE-Komm-ZPO art. 354 para. 11; STREIFF/VON KAENEL/RUDOLPH, *supra* footnote 439, p. 66.

⁴⁴⁵ WENGER WERNER, Die Schiedsgerichtsbarkeit im Entwurf zur Schweizerischen Zivilprozessordnung, ZZZ, Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht, 2007 p. 401 et seq. at p. 406; SCHWANDER IVO, Arbeitsrechtliche Streitigkeiten in Zivilprozessverfahren, ZZZ 2007 p. 195 et seq. at p. 208.

⁴⁴⁶ WENGER WERNER, in: Sutter-Somm/Hasenböhler/Leuenberger (eds.), Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), 2nd ed., Zurich/Basel/Geneva 2013, art. 354 para. 20; GEISER, *supra* footnote 427, p. 117; MEIER, *supra* footnote 444, p. 274.

⁴⁴⁷ As per DASSER, *supra* footnote 70, art. 354 para. 15, the Federal Supreme Court should give up its former view given the more liberal new CCP. The majority view is, however, to expect the Federal Supreme Court to continue its jurisprudence, cf., e.g., STREIFF/VON KAENEL/RUDOLPH, *supra* footnote 439, p. 66; OETIKER/HOSTANSKY, *supra* footnote 429, p. 204 footnote 2; GEISER, *supra* footnote 425, p. 251, WENGER, in: Sutter-Somm et al. (eds.), *supra* footnote 446, art. 354 note 19.

In fact, it is hardly explainable why the matter in question is arbitrable in an international context as per art. 177 para. 1 PILA, but not arbitrable in a national context. In the Government's draft for the new CCP the point was made that the same legal disputes should not be decided differently on a national level and on an international level.⁴⁴⁸

The drafters of the new CCP also wanted to enhance the attractiveness of domestic arbitration by providing for greater flexibility and a high degree of party autonomy.⁴⁴⁹

On the same notes, it is said that while an employee may not be able to validly waive his claims as per art. 341 para. 1 CO, he or she may nevertheless validly submit to arbitration.⁴⁵⁰ Only situations where the employee is in an unduly manner prevented or hampered in putting forward her/his claims,⁴⁵¹ she/he can be excluded from arbitration. This may in particular apply in situations where the costs of arbitration prevent the employee from seeking and getting judicial relief.⁴⁵²

Other authors are of the opinion that the parties should be free to enter into a valid arbitration agreement once the dispute has arisen,⁴⁵³ despite the blocking period as per art. 341 para. 1 CO not having lapsed yet.

The strict opinion of the Swiss Federal Supreme Court does not take into account the fact that situations occur where the employee does not need to avail him- or herself of the allegedly weaker position as an employee. This is the case where also the employee wishes to bring the dispute before an arbi-

⁴⁴⁸ Report (*Botschaft*) of the Federal Council concerning the Swiss Code of Civil Procedure (CCP) of 28 June 2006, BBl 2006, p. 7221 et seq. at p. 7393.

⁴⁴⁹ VOSER NATHALIE, New Rules on Domestic Arbitration in Switzerland, ASA Bulletin 2010, no. 4, p. 753 et seq. at p. 754 with reference to *Botschaft*, *supra* footnote 448, p. 7391.

⁴⁵⁰ SCHWANDER, *supra* footnote 445, p. 208 et seq.; BSK ZPO-WEBER/STECHE, art. 354 para. 24 et seq.

⁴⁵¹ BSK ZPO-WEBER/STECHE, art. 354 para. 24 et seq.

⁴⁵² WILDHABER ISABELLE/JOHNSON WILCKE ALEXANDRA, Die Schiedsfähigkeit von individual-arbeitsrechtlichen Streitigkeiten in der Binnenschiedsgerichtsbarkeit, ARV Zeitschrift für Arbeitsrecht und Arbeitslosenversicherung, 2010, p. 160 et seq. at p. 161.

⁴⁵³ WENGER WERNER, The New Swiss Law on Domestic Arbitration, in: Müller/Rigozzi (eds.), New Developments in International Commercial Arbitration 2010, Zurich 2010, p. 55 et seq. at p. 70.

tral tribunal to protect his or her particular needs for privacy or to ensure that his or her case is heard by a panel knowledgeable in a certain area, such as stock option plans. In such circumstances, it seems inadequate to qualify the employee as the socially weaker party and prevent him or her from benefiting from the advantages of a dispute resolution by means of arbitration.

Likewise, it often seems at random whether in today's globalised world a certain fact pattern is qualified as national or international. If for example an employee works in Switzerland for an employer domiciled in Switzerland, such situation is clearly a domestic one. If, however, the same employee works at the same place in Switzerland for say an employer domiciled in Liechtenstein, such employment relationship is international. In the former case it seems unlikely that the Federal Supreme Court upholds an arbitration agreement, in the latter an arbitration agreement would seem perfectly valid. Similarly, employment agreements of Swiss sports federations with sports individuals domiciled outside of Switzerland can validly include an arbitration agreement, whereas a sportsman domiciled in Switzerland cannot validly enter into an arbitration agreement.

An argument against the protection of the employee is also the fact that in the new CCP its third part on arbitration seems to be an independent constituent: As opposed to the law on tenancy,⁴⁵⁴ no provision was included to cater for special needs of employees.⁴⁵⁵

As a result, one cannot deny that for an ordinary employee with limited financial funds arbitration might create an obstacle too high for him or her to pursue his or her rights. In such circumstances, the decision of the Swiss Federal Supreme Court seems just in its result. However, in situations of top managers or professional sports people who expect a knowledgeable panel to decide their case arbitration might be a suitable option. The Federal Supreme Court's ruling in BGE 136 III 467 et seq. seems inadequate and not modern enough for today's professional and financial market situation.

⁴⁵⁴ Art. 361 para. 4 CCP, earlier art. 274c CO in conjunction with art. 274a para. 1 lit. e CO.

⁴⁵⁵ This is especially remarkable since in the legislation process the issue was addressed, e.g. consultation by the University of Zurich, in: Bericht Zusammenstellung der Vernehmlassungen zum Vorentwurf für ein Bundesgesetz über die Schweizerische Zivilprozessordnung (ZPO), p. 799 et seq.

5. Choice of Foreign Law?

As per art. 381 CCP the parties can freely agree on the applicable substantive law in their arbitration clause. The question has therefore arisen whether the parties could contract out of art. 341 para. 1 CO by agreeing on some foreign law where claims that cannot be waived and as a result all the labour law disputes become arbitrable. This solution is in fact supported by some authors,⁴⁵⁶ however, it is also submitted by others⁴⁵⁷ that the parties are not at liberty to agree on the applicable law in this respect. As a result, it seems doubtful that agreeing on a foreign law in lieu of the Swiss law, which would apply without a choice of law clause, does in fact make the dispute arbitrable.

6. Opting-Out under Art. 353 para. 2 CCP and Opting-In into PILA?

Under art. 353 para. 3 CCP the parties are allowed to opt out of the CCP in favour of the applicability of the PILA. This is of particular relevance in the area of sports: International sports associations domiciled in Switzerland can treat Swiss and non-Swiss athletes alike by providing that also the relationship between the Swiss sports association and the Swiss athlete is governed by the PILA.⁴⁵⁸ The legal doctrine is split on the issue as to whether art. 341 para. 1 CO can be circumvented by an opting-out under art. 353 para. 3 CCP.⁴⁵⁹

7. Right of Employee to Select Arbitration

A clause providing for a unilateral right, i.e. an option by the employee to bring the case before the arbitral tribunal instead of the state court, seems

⁴⁵⁶ GEISER, *supra* footnote 425, p. 117; STAEHELIN/STAEHELIN/GROLIMUND, *Zivilprozessrecht*, 2nd ed., Zurich 2013, § 29 para. 13.

⁴⁵⁷ DASSER, *supra* footnote 70, art. 354 para. 7.

⁴⁵⁸ HAAS/HOSSFELD, *supra* footnote 444, p. 318; WENGER, in: Sutter-Somm et al. (eds.), *supra* footnote 446, art. 353 para. 12, DASSER, *supra* footnote 70, art. 353 para. 5; PFISTERER, *supra* footnote 444, art. 353 para. 29.

⁴⁵⁹ *Pro* WEBER/STECHER, *supra* footnote 450, art. 353 para 17b; DASSER, *supra* footnote 70, art. 353 para. 15. Hesitant WENGER in: Sutter-Somm et al. (eds.), *supra* footnote 446, art. 353 para. 17 and art. 354 para. 21; *contra* STACHER MARCO, DIKE-Komm-ZPO, art. 353 para. 15 et seq., GÖKSU, *supra* footnote 142, para. 356; LEUENBERGER CHRISTOPH, Die Rechtsprechung des Bundesgerichts zum Zivilprozessrecht im Jahre 2010, *Zeitschrift des Bernischen Juristenvereins* 148 (2012), p. 123 et seq. at p. 129. Against circumvention STREIFF/VON KAENEL/RUDOLPH, *supra* footnote 439, p. 68.

valid.⁴⁶⁰ Such a clause can also be entered into during the blocking period of art. 341 para. 1 CO.

D. Results

Labour law disputes are generally arbitrable if they are international, and as a rule, if at least one party is not domiciled in Switzerland.

Despite criticism, the courts in a domestic context must be assumed to hold an arbitration clause invalid which was entered into prior or during the blocking period of art. 341 para. 1 CO. However, an arbitration clause concluded after the blocking period of art. 341 para. 1 CO seems valid.

Finally, a clause which gives the employee the option to go to arbitration seems valid and could therefore solve the problem arising from BGE 136 III 467.

⁴⁶⁰ DASSER, *supra* footnote 70, art. 357 para. 10. In SFT 4A_515/2012 cons. 5.2 of 17 April 2013 the Federal Supreme Court held: «Ainsi, la convention peut disposer que le recours à l'arbitrage est facultatif, en ce sens que les deux parties ou l'une d'elles se voient accorder le choix entre l'arbitrage et la juridiction ordinaire (...).»

XI. Excursion: Arbitration in the U.S. – Mandatory and Inequitable?

By Danièle Müller

“The arbitrator sees equity, the juror the law; indeed that is why an arbitrator is found--that equity might prevail.”
Aristotle

A. Introduction

Arbitration in the U.S. is confronted with a major critic: The inequity of mandatory arbitration. In a wide variety of areas, including franchising, consumer goods, and employment, so-called mandatory arbitration experienced steady growth⁴⁶¹. In mandatory arbitration, employers or providers of consumer goods include arbitration provisions in their standard form contracts and present these contracts to an individual on a take-it-or-leave-it basis. In other words: The arbitration clause represents a non-negotiable condition of the respective contract and can be avoided only by means of refusing the contract as a whole⁴⁶². In light of these developments, calls are made for amending the Federal Arbitration Act (“FAA”). The central part of the proposition of the House of Representatives reads as follows⁴⁶³:

Sec. 2 Validity and enforceability

(...)

(b) No predispute arbitration agreement shall be valid and enforceable if it requires arbitration of

- (1) an employment, consumer, or franchise dispute; or
- (2) a dispute arising under any statute intended to protect civil rights.

⁴⁶¹ See Leonhard L. Riskin, James E. Westbrook et al., *Dispute Resolution and Lawyers* 364 et seq. (4th ed. 2009).

⁴⁶² Id.

⁴⁶³ The entire legislative proposal is available under <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.1020>: (last visited on October 13, 2015).

(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

To address the central question of this paper, whether the mentioned legislative prohibition of pre-dispute arbitration agreements is appropriate or not, Section B first deals with the question why mandatory arbitration is controversial, whether the expressed concerns seem to be reasonable, and whether they outweigh the arguments advanced to protect mandatory arbitration. Section C then analyses how the common law deals with the identified concerns. Do courts already offer enough solutions to the problems or is there need for a change in legislation? After the finding that there is need for action, Section D identifies two possible approaches to resolving the problems and reaches the conclusion that the proposed amendment of the FAA should, at least in its major parts, be supported.

B. Concerns regarding mandatory arbitration of employment and consumer disputes

1. No due process

1.1 The perceived problems

Mass-produced standard clauses to arbitrate statutory claims in employment and consumer contexts have generated a high controversy in recent years. While most of the below identified concerns might be raised for all legal claims, scholars contend that they are particularly significant for statutory rights, such as employment and consumer claims, representing legislatively conferred privileges and thus deserving special protection ⁴⁶⁴.

One of the main concerns raised in connection with arbitration agreements in consumer or employment transactions includes the alleged unsuitability of

⁴⁶⁴ Leonhard L. Riskin, James E. Westbrook et al., *supra* note 461, at 600.

the decision-maker⁴⁶⁵. Arbitrators, applying statutes without judicial instructions, are suggested to be highly inappropriate for enforcing statutory rights. They need not to be lawyers, might be wholly unqualified to decide legal issues and, even if they are qualified to apply the law, they are not bound to do so⁴⁶⁶.

The nature of the arbitration process is arguably even increasing the problem of the inappropriate decision-makers. Incompetent arbitrators may create their award without explanations of their reasons and without complete record of the proceedings⁴⁶⁷. Other issues of due process that might lack in arbitration or at least assume critical dimensions involve the ability to obtain necessary information in the hands of the other party (discovery), the ability to confront and question witnesses, or the opportunity to challenge positions in an open hearing⁴⁶⁸. Since statutes creating civil rights and protections for weaker bargaining parties require careful legal analysis, they are perceived to be “ill-adapted to strengths of the arbitral process, *id est*, expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity”⁴⁶⁹.

The lack of certain minimum standards in arbitration is arguably even more problematic in light of the fact that the grounds for reviewing and vacating the award are narrow⁴⁷⁰. Since the interpretation of the law and plain legal errors is not subject to judicial review pursuant to section 10 FAA, there is no possibility to establish equity and correct mistakes arising out of the above-mentioned weaknesses.

Another particular concern regarding arbitration between unequal bargaining parties is that high arbitration costs may present an obstacle to fair and

⁴⁶⁵ See Judith P. Vladeck, *Employment Discrimination*, 63 Fordham L. Rev. 1613, 1625–26 (1995).

⁴⁶⁶ *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 407 (1967) (Douglas, Stewart, J., dissenting).

⁴⁶⁷ *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

⁴⁶⁸ Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 Wis. L. Rev. 831, 889 (2001).

⁴⁶⁹ *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth*, 473 U.S. 614, 621 (1985) with regard to antitrust claims.

⁴⁷⁰ Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. Cin. L. Rev. 383, 427 et seq. (2007).

effective resolution of conflicts⁴⁷¹. It is a basic principle of civil justice that no person should be denied access to court due to an inability to pay court costs. The public justice system in the U.S. is highly subsidized and users pay only minor filing fees⁴⁷². In arbitration, on the contrary, the parties may not only bear the costs of the arbitrators but also administrative fees. These costs can run to thousand of dollars and might deny consumers access to a forum in which to effectively vindicate their rights⁴⁷³.

The mentioned cost issue is intertwined with another concern raised in connection with arbitration agreements in consumer or employment transactions: The use of arbitration clauses to defeat class actions. Employees and consumers argue that many claimants lack the resources to pursue individual claims because the very high arbitration costs are not worthy in relation to the potential gain⁴⁷⁴. Allowing arbitration to defeat class action will thus allow defendants guilty of illegal conduct to defeat valid claims⁴⁷⁵. Even if employees and consumers could afford individual litigation, it is suggested that, in the absence of class action, there is still no impunity for large companies. The costs of even a thousand of small cases are manageable for commercial companies and do not provide an incentive to change the criticized and unjust behavior. Class actions are the only therapeutic effect on sellers who act fraudulently in exacting wrongfully a dollar from each of millions of customers and in so having a great profit.

Final concerns of mandatory arbitration relate somewhat to substantive rather than procedural issues. These concerns involve the limited nature of arbitral remedies, including the possible unavailability of punitive damages in cases where they would be available in court, as well as the lack of binding precedents for the future guidance of actors in various arenas⁴⁷⁶. The absence of such and other elements might undermine the perception that a process is fair. In short: One of the recurring arguments against mandatory arbitration is

⁴⁷¹ Thomas J. Stipanowich, *supra note 468*, at 904.

⁴⁷² Id.

⁴⁷³ Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 *Law & Contemp. Probs.* 133, 161 (2004); see also *Green Tree Financial Corp. V. Randolph*, 531 U.S. 79, 93 (2000) (Ginsburg, J., dissenting).

⁴⁷⁴ *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 156 (Sub. Ct. 2005) abrogated by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁴⁷⁵ Leonhard L. Riskin, James E. Westbrook et al., *supra note 461*, at 624.

⁴⁷⁶ Thomas J. Stipanowich, *supra note 468*, at 889 and 904.

that arbitration is an “inferior system of justice, structured without due process, rules of evidence, accountability of judgment or rule of law”.⁴⁷⁷

1.2 Counterarguments

Even though some of the mentioned concerns seem valid, there are also good arguments to reject them. With regard to the inappropriate person of the decision-maker, it can be advanced that many arbitrators are very experienced in legal issues⁴⁷⁸. In fact, the possibility to choose decisions-makers with subject matter expertise represents one of arbitration’s mostly praised advantages over litigation. In a survey of the American Bar Association regarding attitudes toward commercial arbitration in 1985-86, most attorneys rated arbitrator qualifications as “good” or “excellent”⁴⁷⁹. Whether the decision-maker is just, experienced, and sophisticated, depends on the chosen person – as it does on the particular judge in a court proceeding.

Moreover, the identified weaknesses of the arbitration process can also be characterized as strength. For example, the absence of strict rules of evidence may well be criticized because of the “looseness” it produces in hearings, but may also be praised as promoting informality and allowing parties to “get things off their chest”.⁴⁸⁰ The possible lack of broad discovery, of the ability to fully confront witnesses, and of the opportunity to challenge positions in an open hearing guarantees an abbreviated and more streamlined proceeding and allows to promptly reaching a decision. The relaxed rules of procedure enhance flexibility and permit a process that is more directly tailored to the type of dispute⁴⁸¹.

With regard to the concern of the lack of appeal, it is argued that the present possibility of judicial review, although limited, is sufficient to ensure arbitrator compliance with statutes⁴⁸². At least employment discrimination cases are mostly fact-based and involve well-settled legal principles⁴⁸³. Hence, an ex-

⁴⁷⁷ LEONHARD L. RISKIN, JAMES E. WESTBROOK ET AL., *supra note 461*, at 608.

⁴⁷⁸ Theodore O. Rogers Jr., *Employment Discrimination*, 63 *Fordham L. Rev.* 1613, 1617–22 (1995).

⁴⁷⁹ LEONHARD L. RISKIN, JAMES E. WESTBROOK ET AL., *supra note 461*, at 730.

⁴⁸⁰ *Id.* at 732.

⁴⁸¹ Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 *Yale L.J.* 2346, 2353 (2012).

⁴⁸² *Gilmer v. Interstate*, 500 U.S. 20, 32 n. 4 (1991).

⁴⁸³ *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997).

tended review for legal errors does arguably not seem necessary. Furthermore, limited review is a hallmark of arbitration. It is tightly intertwined with the basic principles of speed, finality, and efficiency⁴⁸⁴. An expanded judicial review might entail further transaction costs to all parties. This is even truer in light of the fact that effective review is dependant upon the production of a record of the arbitration proceeding and a detailed written reasoning of the award⁴⁸⁵. As far as the costs are concerned, one can argue that, in total, arbitration is not necessarily more expensive than litigation. Since the arbitration process is generally shorter, the costs for lawyers will be lower and the high fees of the arbitrators can be equalized. In fact, arbitration is commonly praised for its cost-effectiveness and is widely deemed less expensive than litigation⁴⁸⁶. With regard to the defeat of class actions, it can be advanced that class actions frustrate the legitimate purpose of an arbitration clause – uniform, inexpensive, efficient dispute resolution⁴⁸⁷. Additionally, class actions are criticized for their potential to be used to extort settlements from innocent defendants⁴⁸⁸.

The fact that arbitration is often conducted under well established, experienced arbitration rules might calm the situation even more. Such rules guarantee some basic aspects of fairness and due process and provide for equal treatment⁴⁸⁹. Finally, civil law countries do not know class actions, pre-trial discoveries, cross-examinations and others of the mentioned features neither. Even in the U.S. court system, small claims may permit or even require the use of processes that place a premium on efficiency and speed⁴⁹⁰. Nevertheless, those dispute resolution systems are not perceived to be unfair.

1.3 Conclusion

There are valid counterarguments to the no less valid concerns regarding mandatory arbitration. The identified disadvantages can often also be characterized as advantages. Whether a particular characteristic is an advantage or

⁴⁸⁴ Thomas J. Stipanowich, *supra note 468*, at 914.

⁴⁸⁵ *Id.* at 914 et seq.

⁴⁸⁶ LEONHARD L. RISKIN, JAMES E. WESTBROOK ET AL., *supra note 461*, at 709 et seq.

⁴⁸⁷ *Discover Bank*, 36 Cal. 4th at 184 (Baxter, J., dissenting).

⁴⁸⁸ LEONHARD L. RISKIN, JAMES E. WESTBROOK ET AL., *supra note 461*, at 624.

⁴⁸⁹ *Id.* at 733.

⁴⁹⁰ Thomas J. Stipanowich, *supra note 468*, at 906.

disadvantage depends on one's perspective and the circumstances⁴⁹¹. Furthermore, court litigation is subject to critics as well. In fact, it is even suggested that the "broken court system" itself gave rise to widespread arbitration⁴⁹².

For these reasons, I consider the identified weaknesses of the arbitration procedure, standing alone, not sufficiently valid arguments against arbitration of employment and consumer disputes. Absent additional concerns, they do not justify a legislative intervention.

2. Lack of consent

2.1 *The perceived problem*

However, the inherent weaknesses – as discussed above – are not the only serious concerns regarding arbitration between unequal bargaining parties. On the contrary: a major issue also lies in the mostly coercive nature of arbitration in employer and consumer disputes. Unnegotiated arbitration clauses in form contracts contradict the consensual nature of arbitration and allow for the exploitation of power imbalances⁴⁹³. More specifically: When arbitration becomes an exercise in which one party to a dispute has the unilateral ability to shape the resolution system, there is a great danger that the characteristics and advantages of arbitration, its flexibility and informality, are being misused⁴⁹⁴. Indeed, experience has demonstrated that companies have used arbitration as a means of skewing proceedings in their favor⁴⁹⁵.

The most direct manner in which an employer or provider of consumer goods can influence the process in his favor is by controlling the choice of the arbitrator, *id est* by selecting biased decision makers who will systematically prefer the drafting party over the party signing the mandatory arbitration clause⁴⁹⁶. While selection bias is obvious in such cases, it can also take place somewhat

⁴⁹¹ LEONHARD L. RISKIN, JAMES E. WESTBROOK ET AL., *supra note 461*, at 732 et seq.

⁴⁹² Theodore O. Rogers Jr., *supra note 478*, at 1619.

⁴⁹³ Lewis Maltby, *Private Justice: Employment arbitration and civil rights*, 30 Colum. Hum. Rts. L. Rev. 29, 32–33 (1998).

⁴⁹⁴ *Id.* at 34.

⁴⁹⁵ Miles B. Farmer, *supra note 481*, at 2348.

⁴⁹⁶ Lewis Maltby, *supra note 493*, at 33.

more subtle⁴⁹⁷. The so-called “repeat player syndrome” suggests that in a dispute between a commercial party (for example an employer) and an individual (an employee), the arbitrator has a financial incentive to satisfy the employer. While the employee is highly unlikely to have another opportunity to choose an arbitrator, the employer is likely to be a repeat player with the opportunity to reject an arbitrator whose prior awards displeased him⁴⁹⁸. The concern that arbitrators favor parties who are more likely to provide future business, is only partially supported by data. Several studies conducted by the American Arbitration Association (“AAA”) between 1992 and 1995 find that employees prevail more often in arbitration than they do in court⁴⁹⁹. However, other statistics seem to prove that awards against repeat players are very rare in kind⁵⁰⁰. Although there are reasons to be skeptical with both empirical studies, the possibility that the neutrality of arbitrators in disputes between unequal bargaining parties is constantly endangered, remains concerning.

Besides the selection of the arbitrator, the commercial party can also bend the system to its advantage by specifying the substantive law to be applied, by limiting the remedies the arbitrator can award, or by limiting discovery when he knows that the employee or consumer lacks important information⁵⁰¹.

To sum up: Where the arbitration system of the commercial party is a condition of the contract offered to the individual, and the individual must agree or deny the contract as a whole, the potential for abuse is obvious⁵⁰². The characteristics of arbitration identified under Section B.1., which usually cannot only be perceived as disadvantages but also as advantages of arbitration, necessarily become weaknesses, when unilaterally being (mis-)used to favor one of the parties. In other words: The advantages of arbitration are potential rather than guaranteed. They will be fully realized only if the parties cooperate, consent, and communicate⁵⁰³, but turn into debilities if the parties do not.

⁴⁹⁷ Miles B. Farmer, *supra note 481*, at 2356.

⁴⁹⁸ Lewis Maltby, *supra note 493*, at 33–34.

⁴⁹⁹ LEONHARD L. RISKIN, JAMES E. WESTBROOK ET AL., *supra note 461*, at 725.

⁵⁰⁰ Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 L. & Contemp. Probs. 105, 131 (Winter/Spring 2004).

⁵⁰¹ Lewis Maltby, *supra note 493*, at 33 (1998).

⁵⁰² *Id.* at 34 (1998).

⁵⁰³ *Id.* at 63–64 (1998).

2.2 Counterarguments

The concern of misuse due to the lack of consent is faced with counterarguments as well. The proponents of mandatory arbitration underline its social benefits, which, due to the still existing conspicious of arbitration, cannot be fully realized when arbitration is voluntary. By offering the potential for a faster and less costly means of dispute resolution⁵⁰⁴, mandatory arbitration allows cheaper production of goods, which, at the end, benefits the consumers. Mandatory arbitration also saves government resources, because arbitrators are funded privately and not through taxpayer dollars⁵⁰⁵. The proponents of mandatory arbitration thus seem to have accepted the notion that mandatory arbitration is, as a public policy matter, beneficial for society even if it might be unfair on an individual basis.

2.3 Conclusion

The dispute around mandatory arbitration thus ends up to be a philosophic question of value: what is of greater importance, individual access to justice or economic advantages for society? Without presuming that there is an answer to this question, I am of the opinion that justice must start with the individuals. What else is "society" than the sum of its individuals? And how do we really know whether the alleged benefits of mandatory arbitration for society actually exist? While I do not see clear evidence for this suggestion, I do see evidence that mandatory arbitration creates individual injustice by providing a great potential for misuse.

C. Protection offered today

After having found that the danger of misuse outweighs the potential benefits of mandatory arbitration, it must be analyzed, in a second step, whether the protection offered by courts and other authorities is already sufficient. Only if the common law does not offer an adequate solution, must legislature intervene.

⁵⁰⁴ Miles B. Farmer, *supra* note 481, at 2348.

⁵⁰⁵ *Id.* at 2354.

1. Not enough protection in common law

A short glance to the common law makes clear that, by now, almost all statutory claims may be subject of (mandatory) arbitration. *Wilko v. Swan*, where the Supreme Court denied subject matter arbitrability of claims under the Securities Act of 1933⁵⁰⁶, has long been overruled⁵⁰⁷. Ever since courts extended (mandatory) arbitration to diverse other disputes between parties of disparate economic power, such as employment⁵⁰⁸ and consumer disputes⁵⁰⁹. The glance to the common law further reveals that even though the lower courts seem to be sympathetic to challenge mandatory arbitration, the Supreme Court safeguards forced arbitration clauses without offering substantial protection for the weaker bargaining party.

Accepting the Supreme Court's decision in *Gilmer v. Interstate* as a qualified mandate for mandatory arbitration of employment disputes⁵¹⁰, the U.S. Court of Appeals of Columbia Circuit, for example, in *Cole v. Burns International Securities Services*, enforced arbitration of a claim of employment discrimination pursuant to Title VII of the Civil Rights Act of 1964⁵¹¹. In this decision, Judge Edwards sets out a number of "minimal standards of procedural fairness" for employees entering into binding arbitration⁵¹². According to Edwards, such standards must be met before federal courts should enforce arbitration agreements⁵¹³. The Supreme Court, however, has adopted none of these suggestions and has expressly rejected one of the most important suggestions of the *Cole* decision: the suggestion that the commercial party has to bear the full costs of arbitrator fees⁵¹⁴. In *Green Tree Financial Corp. v.*

⁵⁰⁶ 346 U.S. 427 (1953).

⁵⁰⁷ At first in 1989 in *Rodriquez de Quijas v. Shearson/American Express*, 490. U.S. 477 (1989).

⁵⁰⁸ See, e.g., *Gilmer*, 500 U.S. at 20 et seq., where the Court compelled arbitration of a claim under the Age Discrimination in Employment Act; *Cole*, 105 F.3d at 1465 et seq., where a compulsory arbitration clause was held up with respect to claims of disputes relating to recruitment, employment, termination, and discrimination.

⁵⁰⁹ See, e.g., *Hill v. Gateway 2000*, 105 F. 3d 1147 (7th Cir. 1997), where the court enforced an arbitration clause contained in terms that were enclosed in the box of a shipped computer.

⁵¹⁰ 500 U.S. at 20 et seq.

⁵¹¹ *Cole*, 105 F.3d at 1465 et seq.

⁵¹² *Id.* at 1483.

⁵¹³ *Id.*

⁵¹⁴ *Id.*

*Randolph*⁵¹⁵, the Supreme Court overturned an Eleventh Circuit opinion according to which the silence of the agreement regarding arbitration costs rendered the agreement unenforceable because it posed a risk that too high arbitration costs would bar the plaintiff from vindicating her statutory rights. The Supreme Court found said risk to be too speculative to justify the invalidation of an arbitration agreement and held that the plaintiff failed to meet the burden of showing prohibitively high costs⁵¹⁶. Bearing the burden of prove that arbitration agreements should be unenforceable due to the high arbitration costs, consumers and employees are forced to estimate the expected costs based on rules and fee schedules of the arbitration service provider and the common term of the arbitration agreement – a task extremely difficult if not impossible⁵¹⁷. It thus gets clear that the common law does not offer substantial protection of the weaker bargaining party as far as cost issues are concerned.

The protection offered by the Supreme Court with regard to class actions is not more elaborated. Very recently, in *American Express v. Italian Colors Restaurant*, the Court affirmed his opinion that mandatory arbitration clauses can be used to preempt class-action lawsuits⁵¹⁸. The Court held that a contractual waiver of class-arbitration is valid under the FAA even when plaintiff's costs of individual arbitrating of a federal statutory claim (here, an antitrust claim) exceeds the potential recovery and even though antitrust claims are facilitated by Congress⁵¹⁹. This recent ruling came two years after the landmark case *AT&T Mobility LLC. v. Concepcion*, in which the Supreme Court enforced the prohibition on a class action in an arbitration clause⁵²⁰. As in the context of the arbitration costs, the Supreme Court denies protection of the weaker bargaining party with regard to class action while lower courts recognized the need for such protection⁵²¹.

⁵¹⁵ 531 U.S. at 79 et seq.

⁵¹⁶ *Id.* at 91.

⁵¹⁷ Mark E. Bidnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 *Law & Contemp. Probs.* 133, 161 (2004).

⁵¹⁸ 133 S. Ct. 2304 (2013).

⁵¹⁹ *Id.*

⁵²⁰ 131 S. Ct. at 1740 et seq.

⁵²¹ *See, e.g., Discover Bank*, 36 Cal. 4th at 169, holding that Californian law, which, under certain circumstances, considers class action waivers in consumer contracts to be substantively unconscionable, is not preempted by § 2 FAA.

With regard to the concern of the lack of judicial review, the Supreme Court assumes that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law⁵²². Once again, the Supreme Court does not offer further protection contrary to the opinion of lower courts, which acknowledge that certain legal issues in employment contexts might demand judicial judgment and thus unlimited review⁵²³.

The Supreme Court summarizes its jurisprudence regarding mandatory arbitration in *Gilmer* as follows: "Although those procedures might not be as extensive as in federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"⁵²⁴. Thus, a party must be held to the terms of the agreement unless "Congress intended to preclude a waiver of a judicial forum" for the statutory claims at issue⁵²⁵. Hereby, "it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration'."⁵²⁶ In short: the Supreme Court basically extends judicial protection to arbitral agreements relating to statutory claims between unequal bargaining parties even if the agreement is one sided and lacks measures to protect the weaker party.

There are, however, also exceptions, in which such arbitration agreements were considered unenforceable. Like other contracts, arbitration agreements are subject to standard contractual formation defenses. Where, for example, provisions in a standardized pre-dispute arbitration agreement fail to meet the reasonable expectations of consumers, there is authority for the court to properly refuse enforcement of the arbitration agreement. This was the case in *Broemmer v. Abortion Services of Phoenix*, where an arbitration agreement was held unenforceable because the plaintiff signed it under a great deal of emotional stress prior to undergoing a clinical abortion⁵²⁷. Fraud and misrepresentation may also present viable grounds for non-enforcement, as it was the case in *Engalla v. Permanente Medical Group*⁵²⁸. Furthermore, in *Badie v.*

⁵²² *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).

⁵²³ *Cole*, 105 F.3d at 1469.

⁵²⁴ 500 U.S. at 31.

⁵²⁵ *Id.* at 26.

⁵²⁶ *Id.*

⁵²⁷ 173 Ariz. 148 (Sup. Ct. 1992).

⁵²⁸ 938 P.2d 903 (Cal. 1997).

America, the court refused the arbitration agreement due to a violation of the duty of good faith and fair dealing⁵²⁹. Finally, a finding that an arbitration agreement is unconscionable is also a basis for judicial rescission⁵³⁰. In *Hooters of America v. Phillips*, the court refused to compel arbitration on the basis, that Hooters set up “a dispute resolution process utterly lacking in the rudiments of evenhandedness”⁵³¹ and created “a sham system unworthy even of the name of arbitration”⁵³².

Other cases exist, in which courts denied enforcement of arbitration clauses based on general principles of contract law⁵³³. In fact, there is even a tendency that courts, in recent years, have become more receptive to deny enforcement of arbitration clauses⁵³⁴. Unconscionability – the fact that the provision is substantively and procedurally too one-sided or unfair to be enforced – is the most common defense associated with arbitration provisions⁵³⁵. However, the courts generally require a fact-intensive showing that an arbitration provision is both substantively and procedurally unconscionable before striking it down⁵³⁶. According to Section 6, Comment 7 revised Uniform Arbitration Act and other observers⁵³⁷, the great majority of such claims are thus still unsuccessful.

2. Not enough protection by advocacy groups

In response to the described dealing with mandatory arbitration in common law, some arbitration institutions and other groups, such as the National Consumer Disputes Advisory Committee, have promulgated rules and protocols designed to regulate arbitration procedures and produce due process standards for consumer and employment arbitration⁵³⁸. Specifically, an advo-

⁵²⁹ 67 Cal. App. 4th 779 (1998).

⁵³⁰ See, e.g., *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83 (Sup. Ct. 2000).

⁵³¹ 173 F.3d 933, 940 (4th Cir. 1999).

⁵³² Id. at 935.

⁵³³ See, e.g., *Shankle v. B-G Maint. Mgt., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998).

⁵³⁴ Leonhard L. Riskin, James E. Westbrook et al., *supra* note 461, at 628.

⁵³⁵ Id. at 627.

⁵³⁶ Id. at 627–28.

⁵³⁷ Id. at 628.

⁵³⁸ Thomas J. Stipanowich, *supra* note 468, at 889.

cacy group decided to attack the problem by organizing a boycott of any provider organizations that accepted mandatory arbitration agreements without due process. The action was successful and many arbitration providers, such as JAMS and AAA, adopted “mandatory” due process rules.

Despite these attempts to prevent the use and enforcement of unfair arbitration clauses in consumer and employment contracts, the problem is not yet resolved. In all those cases, where the arbitration agreement provides for no institution or for an institution that did not commit itself to the principles of due process, employees and consumers are still left without protection.

In summary, it must be concluded that the actual protection offered by common law, private institutions, and advocacy groups, is not sufficient. In light of the still broad spread of all kinds of mandatory arbitration without protective mechanism of due process, mandatory arbitration often falls short of parties’ reasonable expectations of fairness.⁵³⁹ A legislative intervention thus seems necessary.

D. Possible Solutions

According to the described two-part nature of the concern related with mandatory arbitration – the lack of an appropriate dispute resolution process on the one hand and the lack of consent on the other hand – there are also two possible approaches to respond to this concern. The legislative intervention can either establish special procedures for consumer and employment arbitration, as invoked by the aforementioned private institutions, or limit enforceability of pre-dispute arbitration agreements, as suggested by the House of Representatives.

1. Approach 1: Special procedures for consumer and employment arbitration

There is a great number and variety of suggested procedural guidelines that arbitrators should follow in consumer and employment disputes. In the *Cole* decision, Judge Edwards suggests the following “minimal standards of proce-

⁵³⁹ Id. at 888.

dural fairness”⁵⁴⁰: a neutral arbitrator experienced in the relevant law; a fair method for securing the necessary information to present a claim; affordable access to the arbitration system; the right to independent representation; a range of remedies equal to those available in litigation; a written award explaining the rationales for the result; and sufficient judicial review to ensure consistency with governing laws⁵⁴¹. Further proposals include the allowance of class actions, the necessity to have legal advice from a lawyer, and various stipulations and clarifications of the rules of evidence and the conduct of the hearings⁵⁴².

Judicially enforced minimum standards might be a workable proposition to address the concerns associated with mandatory arbitration. However, judicial intervention in the arbitration process also bears risks. First, there is a great danger that imposing constraints, specifications and measures is likely to destroy, or at least reduce, the distinctive values and advantages of arbitration – its flexibility, speed, efficacy, and informality. When looking at the high number and diversity of the identified concerns and the suggested measures, it becomes obvious that the task to tailor the minimum standards only to those circumstances where they are clearly justified and needed is a difficult one⁵⁴³. Where should we draw the line between a protective intervention on the one hand and the preservation of the hallmarks of arbitration on the other hand? Second, care must be taken to not import the judicial constraints into commercial arbitration where such measures are not needed⁵⁴⁴. How do we exactly identify the cases, where the imposed due process rules should be applicable?

Because of said concerns and difficulties, I reject this approach. Instead of creating a “para-judicial” nature of arbitration, arbitration should, in my opinion, remain a distinct and different, or as the umbrella term states, an *alternative* dispute resolution mechanism.

⁵⁴⁰ 105 F.3d at 1483.

⁵⁴¹ Id at 1483 n 11.

⁵⁴² Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 Ohio St. J. on Disp. Resol. 343, 375 (1995) who suggest a more adequate description and working definition of the evidentiary standard of relevancy, a defined version of the “hearsay evidence”, and a rule clearly defining cumulative evidence.

⁵⁴³ Thomas J. Stipanowich, *supra note 468*, at 916.

⁵⁴⁴ Id.

2. Approach 2: Preclusion of pre-dispute arbitration agreements

In accordance with the above statement that the concerns raised in connection with due process get manifest only (or at least mostly) in combination with the coercive nature of arbitration, I consider it more appropriate to approach the problem with a focus on the “consent-issue”.

2.1 Different degrees of legislative interference

Various possible solutions mitigating the concerns of coerced arbitration involve different degrees of legislative interference into party autonomy. Some might suggest that the consent problem be sufficiently resolved when consumer contracts include “clear and adequate notice of the arbitration provision and its consequences” as well as “reasonable access to information regarding the arbitration process, including distinctions between arbitration and court proceedings.”⁵⁴⁵ Such a regulation certainly ensures that reasonable people see, read, and consider the arbitration clause⁵⁴⁶. However, it might not be of great help for the consumer or employee to understand the nature and “dangers” of arbitration, but to still have no other choice than accepting the arbitration clause or refusing the contract as a whole. A higher level of interference involves the suggestion that pre-dispute arbitration agreements in adhesion contracts should be revocable “at least until a dispute to which they purport to apply has been submitted in writing to the specified forum of procedure.”⁵⁴⁷ While such a solution might give rise to complicated questions such as the waiver of the revocation right, implicit revocation, timely objection, or similar issues, the next possible degree of intervention seems to be more straight forward and thus favorable: the preclusion of pre-dispute arbitration clauses as suggested by the House of Representatives. An even higher level of interference, such as the additional demand that a post-dispute consent to arbitrate is an informed one or even a complete preclusion of (pre- and post-dispute) arbitration clauses, does not seem necessary. Given the today’s great accessibility of information through internet and the fact that a growing number of state consumer protection agencies host web sites with

⁵⁴⁵ Principle 11 of the Due Process Protocol for Mediation and Arbitration of Consumer Disputes of the National Consumer Disputes Advisory Committee.

⁵⁴⁶ Thomas J. Stipanowich, *supra note 468*, at 897.

⁵⁴⁷ Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between Parties*, 67 *Law & Contemp. Probs.* 207, 207 (2004).

considerable information about consumer arbitration, the requirement of an *informed* post dispute consent is, in my opinion, not justifiable⁵⁴⁸. A general prohibition of consumer and employment arbitration would not only completely erase the alleged social benefits of arbitration but also bear the parties from individually benefitting of the various advantages of arbitration that can doubtlessly be present when parties consent and communicate.

The suggested preclusion of pre-dispute arbitration clauses thus seems to be the most appropriate solution to the problems related with mandatory arbitration. It contains as much intervention as needed, but not more than necessary and hence complies with the principle of proportionality.

2.2 Who decides issues of validity?

The suggestion that pre-dispute arbitration clauses in consumer, employment, and franchise contexts shall be invalid and unenforceable leads necessarily to an important follow up question: Who decides the validity of an arbitration agreement, the court or the arbitrator? The question of “who decides which kind of ‘threshold issues’ at what point in time” is not uniformly answered and U.S. courts have developed a complex and sometimes confusing body of case law.

In *First Option v. Kaplan*, the Supreme Court held that the question of the arbitrator’s jurisdiction is basically decided by courts unless there is “clear and unmistakable evidence” that the parties agreed to submit the question to the arbitrator⁵⁴⁹. Clear and unmistakable evidence of a respective agreement is for example present if the adopted institutional rules (if any) provide for the principle of “Kompetenz-Kompetenz”. Nonetheless, the Supreme Court, in a number of decisions, made it clear that even in the absence of such an agreement many “threshold” questions are for the arbitrator to decide. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, for example, the Supreme Court adopted the so-called separability doctrine in holding that arbitrators can decide over the validity of the main contract, as long as the defect is not alleged specifically with regard to the arbitration agreement⁵⁵⁰. The applicability of the separability doctrine was reaffirmed in *Buckeye Check Cashing v.*

⁵⁴⁸ Thomas J. Stipanowich, *supra note 468*, at 897.

⁵⁴⁹ 514 U.S. 938, 945 (1995).

⁵⁵⁰ 388 U.S. 395 (1967).

*Cardegna*⁵⁵¹. Additionally, the Supreme Court found that “procedural questions which grow out of the dispute and bear on its final disposition”, are for the arbitrator to decide. This finding of *Howsam v. Dean Witter Reynolds*⁵⁵², which has also been codified in § 6 of the revised Uniform Arbitration Act (2000), is, however, at least implicitly questioned in a recent decision of the US Court of Appeals of Columbia Circuit. In that case, the court held that the question whether the disregard of a condition precedent destroys the jurisdiction of the arbitrator, is for the courts to decide⁵⁵³.

Due to the lack of clarity in the common law and for the sake of predictability and certainty, it seems desirable to address the question of “who decides the validity of an arbitration agreement” in the FAA. The allocation of this power between arbitrator and courts ultimately represents a tension between legitimacy interests and arbitration’s efficacy⁵⁵⁴. If a party is compelled to arbitrate despite its not having agreed to arbitration, the legitimacy of the arbitration and the award is compromised, because arbitration is only legitimate if based on consent⁵⁵⁵. If, on the other hand, parties may recourse to courts to advance reasons why arbitration should not go forward, arbitration becomes less efficient due to delay and additional costs⁵⁵⁶.

The proposition of the House of Representatives confers the power to decide over jurisdiction on the courts, “irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement”. This solution might seem sound for two reasons. First, it praises the aforementioned legitimacy of arbitration: It does not compel parties to arbitrate the question of jurisdiction without them having a valid consent to do so and it avoids the risk that arbitrators, having a financial incentive to take the case, affirm their jurisdiction even absent a valid arbitration clause. Second, it rejects the separability doctrine, which, in the U.S., is sometimes perceived to be counter-intuitive,

⁵⁵¹ 546 U.S. 440 (2006).

⁵⁵² 537 U.S. 79 (2002).

⁵⁵³ *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363 (D.C. Cir. 2012) cert. granted, 133 S. Ct. 2795 (U.S. 2013).

⁵⁵⁴ George A. Bermann, *Forum Shopping at the “Gateway” to International Commercial Arbitration*, in *FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT* 69, 71 (Franco Ferrari ed., 2013).

⁵⁵⁵ *Id.* at 73.

⁵⁵⁶ *Id.* at 73 et seq.

and as a result, has been difficult for many lower courts to implement or has simply been rejected by others as bad policy⁵⁵⁷. On the other hand, as mentioned above, the proposed solution can lead to high efficacy costs, since intervening court proceedings cause delay and additional need for funds.

To better balance the mentioned tension between efficacy and legitimacy, I would suggest to amend the proposition of the House of Representatives with regard to the “who decides” question in either one of two ways. The first possible way consists in adding a time period in which the jurisdiction question may be brought to court. Instead of permitting parties recourse to a court at any time they wish, it could be stipulated that judicial recourse is the exclusive way to question the tribunal’s jurisdiction only prior to the commencement of arbitration. As soon as the tribunal is constituted, the question is for the arbitrator to decide⁵⁵⁸. A second possible way to better honor efficacy consists in adding a provision that judicial intervention, once triggered, does not cause the arbitration proceeding to be suspended until the court finally resolves the question of jurisdiction⁵⁵⁹. Admittedly, some arbitral resources will have been wasted if the court denies the tribunal’s jurisdiction⁵⁶⁰, but that may be a small price to pay for the gain of efficacy if the tribunal’s jurisdiction is affirmed. Furthermore, the solution would discourage from frivolous or abusive recourse to courts⁵⁶¹. It even might be adequate to adopt both of the proposed amendments. Such a solution is, for example, adopted in Section 1032 of the German Civil Procedure Code and has proven to work well.

E. Overall conclusion and summary

Unilaterally imposed arbitration provisions in contracts between unequal bargaining parties might have dramatic impacts on consumers’ and employees’

⁵⁵⁷ Richard C. Reuben, First Option, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts With Arbitration Provisions, 56 SMU L. Rev. 819, 825 (2003).

⁵⁵⁸ See George A. Bermann, *supra* note 554, at 78.

⁵⁵⁹ *Id.* at 79.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

rights and remedies⁵⁶². While the lack of stare rules of procedure can, standing alone, be considered as an advantage of arbitration, the same flexibility becomes necessarily a weakness when viewed in combination with the fact that arbitration in employment and consumer disputes is mostly coerced and that the process is unilaterally shaped in favor of the commercial party. Since the common law and private institutions do not offer sufficient protection of the less powerful individual, a legislative intervention seems necessary. The prohibition of pre-dispute arbitration clauses, as suggested by the House of Representatives, solves the problem without a “deformation” of the arbitration process and with the right degree of interference into party autonomy. The question, whether a specific arbitration agreement is valid, should be decided by courts until the arbitral tribunal is constituted. Afterwards the question of jurisdiction should be for the arbitrator to decide. Alternatively, the “who decides” question could be conferred to courts at any point in time while arbitration should be ongoing during the parallel court proceeding.

⁵⁶² Thomas J. Stipanowich, *supra* note 468, at 888.

XII. 10 Reasons for Choosing Arbitration in a U.S. – Swiss Context

By Peter Honegger*

Switzerland, about the size of a pinhead compared to the globe, is not only a primary hub for international arbitration.⁵⁶³ Far more, it headquarters global players like Nestle, Novartis, Roche, UBS, Credit Suisse, Zurich Insurance, Swiss Re, ABB, Holcim, leading international sports federations like FIFA, IOC and UEFA, and increasingly became a global or regional hub for foreign multinationals such as Glencore, Transocean, Altria, Dow Chemical and Google.

Most of these global players and other Swiss companies doing business abroad are concerned of being sued in the U.S. based on the concept of “minimum contacts”⁵⁶⁴ or “doing business”,⁵⁶⁵ respectively, and of being confronted with abusive and expensive U.S.-style discovery and multi-million jury awards, such as the recent USD 23.6 billion jury award rendered in 2014 in the “Florida Smoking Case”. Cynthia Robinson, the widow of the deceased smoker and plaintiff winning the litigation, when being interviewed by CNN on the USD 23 billion jury award, answered:⁵⁶⁶

* The author would like to thank Bernhard F. Meyer and Georg Friedli for reviewing the manuscript with sharp eyes and for giving valuable comments.

⁵⁶³ LIVSCHITZ TAMIR, *Switzerland – as Arbitration Friendly as It Gets*, *supra*, pp. 9–11.

⁵⁶⁴ BORN GARY B./RUTLEDGE PETER B., *International Civil Litigation in U.S. Courts*, 5th ed., New York 2011, p. 116 *et seq.*; FELLAS JOHN, *Transnational Commercial Litigation and Arbitration*, Oceana Publications Inc., New York 2004, pp. 79–109; KREINDLER RICHARD H., *Transnational Litigation, A Basic Primer*, Oceana Publications Inc., New York 1998, pp. 28–29.

⁵⁶⁵ The U.S. Supreme Court recently, in *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n. 19 (2014), substantially increased the requirement of U.S. *in personam* jurisdiction to an „at home” standard noting that only in an exceptional case can „a corporation’s operation in a forum other than its formal place of incorporation or principal place of business ... be so substantial and of such a nature as to render the corporation at home in that state.”

⁵⁶⁶ <http://edition.cnn.com/2014/07/19/us/florida-tobacco-verdict/> (last visited on 14 August 2015).

“Fist I heard ‘millions’, I didn’t know it was ‘b’, with a ‘b’, ‘billions’, and I still can’t believe this.”

In that context it is noteworthy that when negotiating commercial contracts, the jurisdiction or arbitration clause – mostly placed at the very end of a contract – is often seen as a mere boilerplate issue.

Swiss-based companies must, quite to the contrary, consider the following factors, many of which have not found their way into publications, when choosing dispute resolution clauses in contracts with foreign, particularly U.S., business partners:

1. Exclude Jurisdiction of U.S. Courts in the First Place

In the international context, Swiss companies increasingly choose arbitration not only to bridge different legal systems but more recently to specifically avoid being sued before U.S. courts.

Swiss companies experienced that a forum selection such as “*exclusive jurisdiction of the courts in Zurich*” does not always shield them from being sued in the U.S. as U.S. courts historically disfavour forum selection clauses.⁵⁶⁷ That rule still applies after the *Atlantic Marine* case, recently decided by the U.S. Supreme Court.⁵⁶⁸

However, U.S. courts consistently show deference to arbitration clauses.⁵⁶⁹ It is noteworthy that under U.S. law, even issues that might not be arbitrable in a domestic transaction may be covered by arbitration in an international transaction.⁵⁷⁰ The Restatement of Foreign Relations, in the context with recognition of foreign judgments, says⁵⁷¹:

⁵⁶⁷ BORN/RUTLEDGE, *supra* footnote 564, pp. 464 *et seq.*

⁵⁶⁸ *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), 571 U.S. _ (2013). But see also Restatement of the Law, Third, The Foreign Relations Law of the United States (St. Paul 1987), § 421 Comment h and Reporter’s Note 6.

⁵⁶⁹ KREINDLER, *supra* footnote 564, pp. 36–37; RUBINO-SAMMARTANO MAURO, *International Arbitration Law and Practice*, 3rd ed., JurisNet, New York 2014, pp. 1426–1432.

⁵⁷⁰ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L.Ed. 2nd 270 (1974).

⁵⁷¹ Restatement of the Law, Third, *supra* footnote 568, § 488 Reporter’s Note 1.

“Under United States law, however, even issues that might not be arbitrable in a domestic transaction may be covered by arbitration in an international transaction ... Furthermore State or local statutes removing certain kinds of disputes, e.g., those between a manufacturer and a dealer, from arbitration cannot prevail over an agreement to arbitrate that is covered by the New York Convention.”

Quite strikingly, no publication explicitly recommends arbitration, particularly the Swiss arbitration hub, as an effective tool to exclude jurisdiction of U.S. courts in the first place.⁵⁷²

2. Arbitrator Selection in Lieu of Jury Trials

Excessive awards rendered by U.S. juries are a nightmare of Swiss companies. Many wild and outrageous awards have been reported throughout the world, such as the famous Stella award: In 1992, Ms. Stella Liebeck, then 79, spilled a cup of McDonald’s coffee onto her lap, burning herself. A New Mexico jury awarded her USD 2.9 million in damages.⁵⁷³ In 2013, the most frivolous but successful lawsuit has been reported as follows: Ms. Merv Grazinski of Oklahoma City sued Winnebago because she set the brand new motorhome’s cruise control to 70 while driving on the freeway and got up from the driver’s seat to go make herself a sandwich. The vehicle crashed and overturned. The jury awarded her USD 1.75 million plus a new motor home. Winnebago actually changed their manuals on the basis of this suit.⁵⁷⁴

Arbitration proceedings *per se* exclude jury trials. Much rather, the parties select arbitrators based on their knowledge and insight in the relevant commercial practices. PwC’s “International Arbitration Survey 2013: Corporate

⁵⁷² Bernhard F. Meyer has drawn my attention to the fact that he has been teaching this recommendation in the seminar of the Swiss-American Chamber of Commerce „USA Wirtschaftsrecht“ the manuscript of which remained unpublished http://amcham.ch/events/p_past_events_ch.asp?year=2011 (last visited on 14 August 2015).

⁵⁷³ See www.stellaawards.com (last visited on 14 August 2015).

⁵⁷⁴ <http://www.mclaughlinlawyers.com.au/McLaughlinAssociates888/Page/29789/Only+in+America!.aspx> (last visited on 14 August 2015).

Choices in International Arbitration” showed the following three key factors companies consider when appointing an arbitrator.⁵⁷⁵

“The most influential factors in the appointment of arbitrators were the individual’s (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitral process; technical (non-legal) knowledge and language were also cited but were less influential.”

However, when selecting a (party appointed) arbitrator, it is equally decisive to take into consideration the personal *impetus* the arbitrator enjoys based on his professional and academic standing and his rainmaker skills.

In the international context, where parties of different jurisdictions are involved, predictability of the judgment is generally increased by the selection of learned arbitrators.

In a U.S.-Swiss context the parties can, by appropriate arbitrator selection, increase predictability of an award as compared to judgments rendered by U.S. courts in general and as compared to U.S. jury trials in particular.

Quite strikingly, no publication explicitly recommends arbitration, particularly the Swiss arbitration hub, as an effective tool to exclude jury trials in general and frivolous jury awards in particular.

3. Exclude U.S.-style Discovery and Related Sanctions

In the international context, Swiss companies increasingly seek to shield themselves against U.S.-style discovery that has become (another) ultimate nightmare.

Liability cases in the U.S. are investigated by the parties and their lawyers (not by the judge). Pre-trial discovery is a technique by which each side in a civil litigation seeks, prior to trial, to obtain from the other side information useful

⁵⁷⁵ <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> (last visited on 14 August 2014) pp. 5, 21, 22; see also <http://www.pwc.com/gx/en/arbitration-dispute-resolution/> (last visited on 14 August 2015).

in establishing its position.⁵⁷⁶ The discovery process is broad and wide-ranging: it may include “fishing expeditions”, and requests may require the production of thousands or even millions of documents, particularly emails. For Swiss companies that find themselves as defendants in U.S. liability litigation, the discovery process is not only burdensome, but also extremely expensive. On top, violations to comply with discovery requests notoriously triggers draconic sanctions under U.S. law, particularly in case of failure to comply with a court order.⁵⁷⁷

In international arbitration it is quite common to rely on the IBA Rules.⁵⁷⁸ The IBA Rules are designed to exclude “fishing expeditions” and limit production to documents identified in sufficient detail and that are “relevant and material to the outcome of the case”.⁵⁷⁹

In arbitration proceedings, sanctions for not complying with discovery requests are not dealt with in UNCITRAL Model Law, the FAA and the PILA. GARY BORN states the principle:⁵⁸⁰

“Nothing in the UNCITRAL Model Law, the U.S. FAA, the Swiss Law on Private International Law, or other leading arbitration statutes empowers arbitral tribunals to impose fines or other penalties on either parties or nonparties to an international arbitration.”

⁵⁷⁶ BARRON WILLIAM M./KURTZ BIRGIT, *Litigation and Arbitration in the USA*, Prozessführung und Schiedsgerichtsbarkeit in den USA, German American Chamber of Commerce Inc., New York 2009, pp. 35–42 and 133–142.

⁵⁷⁷ Art. 37 Federal Rules of Civil Procedure, see <http://www.ilnd.uscourts.gov/LEGAL/frcpweb/FRC00040.htm> (last visited on 14 August 2015) and https://www.law.cornell.edu/rules/frcp/rule_37 (last visited on 14 August 2015); HAYDOCK ROGER S./HERR DAVID F./STEMPEL JEFFREY W, *Fundamentals of Pretrial Litigation*, 9th ed., West Publishing Co., St. Paul, MN, 2013, pp. 537 *et seq.*

⁵⁷⁸ http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited on 14 August 2015); see MEYER BAHAR VALERIE/MADONNA-QUADRI MARTINA/BOHNENBLUST EVA-VIOLA, *Drafting the Arbitration Agreement*, *supra* p. 32; Born, *supra* footnote 25, Vol. 1, p. 201.

⁵⁷⁹ Art. 3.3 a) and b) IBA Rules. The result under the ICC Rules is similar, see CRAIG W. LAURENCE/PARK WILLIAM W./PAULSSON JAN, *International Chamber of Commerce Arbitration*, ICC Publication No. 594, 3rd ed., Oceana Publication Inc., Dobbs Ferry, New York 2000, pp. 450–456.

⁵⁸⁰ BORN, *supra* footnote 25, Vol. 2, p. 2315, see also p. 2389. The same applies to the ICC Rules, see CRAIG/PARK/PAULSSON, *supra* footnote 579, p. 450.

As for Switzerland, this principle applies generally. Swiss arbitral tribunals have no coercive powers, but they can request (judicial) assistance of state courts with a view to gather evidence.⁵⁸¹ In Swiss international arbitration practice, compulsory discovery proceedings are hardly ever used. Much rather, the arbitral tribunal will take into consideration a party's refusal or failure to produce when weighting the evidence and it can draw adverse inference from such failure.⁵⁸²

In U.S. international arbitration practice, tribunals may have the power to impose monetary (but not criminal) sanctions for refusal to obey a discovery order. A number of U.S. courts, such as in *Superadio v. Winstar Radio*, have upheld orders by arbitral tribunals imposing monetary sanctions on parties refusing to comply with discovery requests.⁵⁸³ International arbitral tribunals, including U.S., rather than imposing sanctions or seeking the (judicial) assistance of state courts⁵⁸⁴ to enforce discovery orders, more likely draw adverse inferences from a party's refusal to produce requested documents or witnesses.⁵⁸⁵ CRAIG/PARK/PAULSSON state that U.S. courts have routinely upheld the right of arbitrators not to order any discovery whatsoever.⁵⁸⁶

⁵⁸¹ Art. 184 para. 2 PILA, art. 375 para. 2 CCP. Quite noteworthy, judicial assistance in evidence taking is given to locally seated tribunals only, but not to arbitral tribunals with their seats abroad. BERGER/KELLERHALS, *supra* footnote 1, para. 1370.

⁵⁸² NATER-BASS GEBRIELLE/ROUVINEZ CHRISTINA, in: Zuberbühler/Müller/Habegger (eds.), *Swiss Rules of International Arbitration, Commentary*, 2nd ed., Zurich 2013, art. 24 para. 41.

⁵⁸³ *Superadio LP v. Winstar Radio Prods., LLC*, 844 N.E.2d 246, 253 (Mass. 2001); BORN, *supra* footnote 25, Vol. 2, pp. 2316–2317, at footnotes 1052 and 1056, as well as p. 2390, at footnotes 320–322, citing various U.S. case law. See also CRAIG/PARK/PAULSSON, *supra* footnote 579, p. 452.

⁵⁸⁴ Particularly under § 7 FAA that allows subpoenas on persons within the judicial district, but *not* outside the U.S. Under 28 U.S.C. § 1782 the U.S. offer their evidence to foreign tribunals: U.S. courts may order persons within the judicial district to produce documents and give testimony „for use in proceeding in a foreign or international tribunal“. See BORN, *supra* footnote 25, Vol. 2, pp. 2408–2409.

⁵⁸⁵ BORN, *supra* footnote 25, Vol. 2, pp. 2391–2393. See also CRAIG/PARK/PAULSSON, *supra* footnote 579, pp. 452–453.

⁵⁸⁶ CRAIG/PARK/PAULSSON, *supra* footnote 579, pp. 452–453.

“Moreover, even in jurisdictions like the United States which provide the broadest scope of discovery in civil proceedings (depositions, document production, interrogatories, demand for admissions, etc.) the courts have routinely upheld the right of arbitrators not to order any discovery whatsoever: if the parties had wanted to insist on the full panoply of procedures available at law they should not have decided on arbitration.”

In the international context (outside Switzerland), it is unclear whether a tribunal can apply to a state court in the arbitral seat and ask the latter to lodge a request for international judicial assistance to a foreign state court under the Hague Evidence Convention.⁵⁸⁷ There is little reported authority on the point, one saying that the mechanism of the Hague Evidence Convention is not available⁵⁸⁸, the other saying it is.⁵⁸⁹

It is remarkable that so far no mention was made that U.S.-style discovery and “fishing expeditions” can best be avoided by choosing arbitration, preferentially by choosing the Swiss arbitration hub.⁵⁹⁰

4. Arbitration in U.S. Consumer Disputes?

U.S. law generally permits and recognizes the validity of arbitration clauses in consumer disputes⁵⁹¹, subject to restrictions based on principles of unconscionability and due notice.⁵⁹²

The U.S. Federal Arbitration Act (FAA) undoubtedly extends to disputes between merchants and consumers and there is nothing in the FAA that ex-

⁵⁸⁷ http://www.amcham.ch/members_interests/downloads/110126_CH_mutual_assistance.pdf (last visited on 14 August 2015).

⁵⁸⁸ BORN, *supra* footnote 25, Vol. 2, pp. 2422–2423.

⁵⁸⁹ LOBSIGER ADRIAN/MARKUS ALEXANDER R., Überblick zu den vier neuen Konventionen über die internationale Rechtshilfe, SJZ 92 (1996), pp. 180–182.

⁵⁹⁰ Also in this context it is noteworthy that Bernhard F. Meyer has been touching upon this advantage in the seminar „USA Wirtschaftsrecht“ the manuscript of which remained unpublished, *see supra* footnote 572.

⁵⁹¹ MÜLLER DANIELÉ, Excursion: Arbitration in the U.S. – Mandatory and Inequitable?, *supra*, pp. 157–176.

⁵⁹² BORN, *supra* footnote 25, Vol. 1, p. 1014.

cludes consumer transactions from arbitrability. The U.S. Supreme Court has unambiguously upheld the validity of arbitration clauses and recently upheld a predispute arbitration agreement covering personal injury and wrongful death claims.⁵⁹³ Lower U.S. courts have criticized the arbitration friendly approach of the Supreme Court, an Alabama court quite openly excoriated⁵⁹⁴:

“Enforcement of arbitration contracts for the purchase of consumer goods or services is beset by a number of problems implicating the Seventh Amendment. The reality that the average consumer frequently loses his/her constitutional rights and rights of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises a putrid odor which is overwhelming to the body politic.”

Criticism and recent legislative proposals, such as the Arbitration Fairness Act of 2013, restricting consumer arbitration, have induced arbitral institutions to adapt their rules with the aim to conduct proceedings at reasonable cost, in reasonably convenient locations, within a reasonable time and without delay, taking into account the right of each party to be represented by a spokesperson of their choosing.⁵⁹⁵

It is quite noteworthy that most versions of the proposed Arbitration Fairness Act exclude international arbitration agreements, confirming the deference given by U.S. courts to arbitration clauses in the international context.⁵⁹⁶

It is therefore quite surprising that no voices have been raised and no publications can be found encouraging Swiss companies to make use of arbitral dispute resolution also in the context with U.S. consumer disputes.

⁵⁹³ *Marmet Health Care, Inc. v. Brown*, 132 S.Ct. 1201 (U.S. S.Ct. 2012).

⁵⁹⁴ *In re Knepp*, 229 B.R. 821, 827 (N.D. Ala. 1999).

⁵⁹⁵ BORN, *supra* footnote 25, Vol. 1, pp. 1017–1018. See, e.g., the JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness <http://www.jamsadr.com/rules-consumer-minimum-standards/> (last visited on 14 August 2015).

⁵⁹⁶ BORN, *supra* footnote 25, Vol. 1, p. 1018. The current text of the Arbitration Fairness Act of 2015, a bill assigned to a congressional committee on April 29, 2015, however, does not seem to exclude international arbitration agreements, see <https://www.govtrack.us/congress/bills/114/hr2087/text> (last visited on 14 August 2015).

5. Exclude Sanctions Under Art. 271 PC

In Switzerland, major legislation relating to sovereignty and secrecy, including articles 271 and 273 of the Swiss Penal Code (PC), was put into force in the 1930s in order to effectively protect the privacy and assets of Jews pursued by Gestapo agents.⁵⁹⁷

Art. 271 PC⁵⁹⁸ generally prohibits both service of process Swiss territory for use in foreign proceedings.⁵⁹⁹ U.S. practitioners and well-known authors, in this context, speak of Switzerland's extreme view of judicial sovereignty⁶⁰⁰:

“Switzerland, like some other civil law countries, views service of process as a judicial function; therefore, any manner of service, including mailing process into Switzerland from the United States, is viewed as the assertion within its territory of U.S. judicial authority and a violation of its sovereignty. Since this procedure also violates the Swiss Penal Code, Swiss authorities could arrest a process server attempting to effect personal service of foreign process within Switzerland. Under Switzerland's extreme view of judicial sovereignty, letters rogatory are the only service method available in any litigation involving Swiss parties.”

Art. 271 PC not only prohibits the service of process, but also the gathering of evidence on Swiss territory for use in foreign proceedings. The website of the U.S. Embassy to Switzerland warns U.S. attorneys that the gathering of evidence in Switzerland may trigger criminal liability under art. 271 PC:⁶⁰¹

⁵⁹⁷ Arts. 271 and 273 PC in fact reach back to the so-called Informers Law („Spitzelgesetz“) of 1935 that was transferred in the Swiss Penal Code of 1937, see HAFTER ERNST, *Schweizerisches Strafrecht, Besonderer Teil, Zweite Hälfte*, Zürich 1942, p. 626. Equally, Swiss banking secrecy legislation was introduced in the 1930s to shield Jewish property from confiscation by the Third Reich, see MEYER BERNHARD F., *Swiss Banking Secrecy and Its Legal Implications in the United States*, 19 *New Engl. L. Rev.* pp. 18 *et seq.*, at pp. 26, 28 (1978).

⁵⁹⁸ The text of art. 271 PC is available under https://www.admin.ch/ch/e/rs/311_0/a271.html (last visited on 14 August 2015).

⁵⁹⁹ BSK StGB-HUSMANN, art. 271 para. 26–34.

⁶⁰⁰ NEWMAN LAWRENCE W./BURROWS MICHAEL, *The Practice of International Litigation*, 2nd ed., Juris Publications Inc., New York 2002, at III-62 *et seq.*

⁶⁰¹ http://bern.usembassy.gov/obtaining_evidence.html (last visited on 14 August 2015).

“Evidence may be obtained in Switzerland in two ways: under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or by the letters rogatory process. In addition, the Swiss penal code 271 provides that attorneys attempting to take a deposition or serve process in Switzerland outside of these authorized methods are subject to arrest on criminal charges.”

The cumbersome restrictions of art. 271 generally apply only if the parties end up with litigation before U.S. courts, as a result of choosing a forum selection clause.⁶⁰² Quite to the contrary, if the parties agree to resolve disputes by way of arbitration, art. 271 PC will have little or no impact. This is particularly true if the seat of arbitration is in Switzerland, but also if the seat and arbitration proceedings are conducted outside Switzerland.⁶⁰³

6. Avoid Sanctions Under Art. 273 PC

Another “stumbling block” in international litigation is art. 273 PC.⁶⁰⁴ This provision prohibits Swiss companies from disclosing third party related information in foreign court proceedings.⁶⁰⁵ In fact, information relating to third parties such as clients, suppliers and employees may generally be disclosed only if

- such third party explicitly consents to disclosure⁶⁰⁶ or if
- the opposite party seeks such third party related information by way of judicial assistance, i.e. through the channels of the Hague Evidence Convention.⁶⁰⁷

⁶⁰² See above at footnote 568.

⁶⁰³ BSK StGB-HUSMANN, art. 271 para. 47. See also Website of the Swiss-American Chamber of Commerce | Members Interest | Legal | Prohibited Procedural Acts | co-authored by FREY MARTIN/LIVSCHITZ MARK.

⁶⁰⁴ The text of art. 273 PC is available under https://www.admin.ch/ch/e/rs/311_0/a273.html (last visited on 14 August 2015) but also reproduced, e.g., in Born/Rutledge, *supra* footnote 564, p. 975.

⁶⁰⁵ BSK StGB-HUSMANN, art. 273 para. 30.

⁶⁰⁶ BSK StGB-HUSMANN, art. 273 paras. 27 and 30; HONEGGER PETER/KOLB ANDREAS, *Amts- und Rechtshilfe: 10 aktuelle Fragen*, NKF Publication 13, Zürich 2009, pp. 45–46.

⁶⁰⁷ BSK StGB-HUSMANN, art. 273 para. 64; HONEGGER/KOLB, *supra* footnote 606, p. 47.

Whether art. 273 PC equally applies in international arbitration has not been decided or discussed so far, not even in the leading commentary of the Swiss Penal Code.⁶⁰⁸ In any event, it seems safe to say that art. 273 PC does not apply if the seat of the arbitration is in Switzerland. Thereby the parties avoid that the proceedings qualify as “foreign” proceedings in the first place.

Generally it may be said that in transnational litigation, much more than in transnational arbitration, arts. 271 and 273 PC are “show stoppers”⁶⁰⁹ or at least “stumbling blocks”.⁶¹⁰ More specifically, it can be said that Swiss companies, if and when being sued before U.S. courts, will be exposed to sanctions under both art. 271 and art. 273 PC, but not when choosing the Swiss arbitration hub for resolving disputes.

Thus, by choosing arbitration in transnational disputes, Swiss companies can avoid conflicts with arts. 271 and 273 PC, particularly if they choose Switzerland as seat of the arbitration. Quite surprisingly, no specific publication has particularly addressed this crucial and decisive advantage of arbitration over litigation in the international context.

7. Confidentiality in Lieu of Publicity

Confidentiality is often essential if business secrets of the parties are at stake. Particularly if the alternative to arbitration is litigation before U.S. courts where not only the judgments, but also legal briefs are available over the internet. The pertinent website of the U.S. judiciary, under “Federal Courts & The Public”, sets the publicity standard at the following benchmark⁶¹¹:

⁶⁰⁸ BSK StGB-HUSMANN, art. 273 paras. 50–56.

⁶⁰⁹ Arts. 271 and 273 PC are, however, not so-called blocking laws, BORN/RUTLEDGE, *supra* footnote 564, pp. 969 *et seq.*, 975, LOWENFELD ANDREAS F., *International Litigation and Arbitration*, St. Paul, Minn. 1993, pp. 698–708. *see also* Restatement of the Law, Third, *supra* footnote 568, § 421 Comment h and Reporter’s Notes 1, 4 and 5.

⁶¹⁰ HENRICH MARTIN, *Obtaining Evidence in Switzerland, The Dilemma and the Stumbling Blocks of Art. 271 and Art. 273 Swiss Penal Code*, Swiss-American Chamber of Commerce, Yearbook 2009/2010, pp. 75–78; HONEGGER/KOLB, *supra* footnote 606, pp. 42–50.

⁶¹¹ <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsAndThePublic.aspx> (last visited on 14 August 2015).

“... An individual citizen who wishes to observe a court in session may go to the federal courthouse, check the court calendar, and watch a proceeding. Anyone may review the pleadings and other papers in a case by going to the clerk of court’s office and asking for the appropriate case file ... Court dockets and some case files are available on the Internet through the Public Access to Court Electronic Records system (known as PACER), at www.pacer.gov ...”

Quite to the contrary, arbitration proceedings are generally held in private. Such exclusion of the public is undoubtedly one of the decisive factors why parties may wish to resolve a dispute by way of arbitration rather than litigation in state courts. Inconsistently with the perception that privacy and confidentiality are fundamental elements of arbitration proceedings, very few national laws or arbitration rules had specific rules on confidentiality for most of the 20th century.⁶¹² The ICC Rules, for example, do not contain a confidentiality undertaking (except for the members of the ICC Court)⁶¹³, and it is a matter for the parties to agree on the degree of confidentiality they wish to associate with arbitral proceedings.⁶¹⁴ Similarly, the American Arbitration Association recommends that parties seeking confidentiality enter into a confidentiality agreement, the text of which encompasses three lines only.⁶¹⁵

However, confidentiality is not confidentiality. Art. 44 Swiss Rules constitutes one of the most comprehensive regimes on confidentiality in arbitral proceedings.⁶¹⁶ Pursuant to this provision all awards and orders, all materials submitted by other parties and the deliberations of the arbitral tribunal are confidential, even the existence of arbitral proceedings is confidential. The duty of confidentiality extends not only to the parties, but also to the arbitrators, tribunal appointed experts, the secretary and staff.

⁶¹² HOLLANDER PASCAL, Confidentiality under Art. 44 Swiss Rules in: 10 Years of Swiss Rules in International Arbitration, ASA Special Series No. 44, pp. 83 *et seq.*, p. 83.

⁶¹³ Art. 6 of Appendix I and art. 1 of Appendix II to the ICC Rules of 2012.

⁶¹⁴ Art. 22 (3) ICC Rules of 2012.

⁶¹⁵ Drafting Dispute Resolution Clauses A Practical Guide, American Arbitration Association, Inc. 2013, at 32 https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited on 14 August 2015); see also MOSES MARGARET L., *The Principles and Practice of International Commercial Arbitration*, 2nd ed., Cambridge University Press, New York 2012, p. 54.

⁶¹⁶ HOLLANDER PASCAL, *supra* footnote 612, pp. 86–93.

Confidentiality may conflict with the parties' disclosure duties, e.g. of the final award, under the relevant stock exchange rules (*ad hoc*-publicity) or other disclosure statutory duties *vis-à-vis* authorities and the general public or with contractual duties *vis-à-vis* private persons or entities. The parties should address the exceptions to confidentiality, unless the institutional rules do so.

8. Increased Flexibility and Reduced Hostility

Typically, parties to arbitration proceedings participate in structuring the rules, the proceedings and the time-table. Additionally, the Chairman and the co-arbitrators are expected to stand for neutrality.

Arbitration rules are tailor-made and far more flexible than many national rules of civil procedure. Tailored rules are particularly adequate and practical in the international context, if parties of different background seek to resolve a dispute. Where parties are represented by trusted and professional counsel a simple telephone conference call may avoid cumbersome submissions and decision making.

In a nutshell: If one party is from Mars and the other from Venus, as inherent in U.S.-Swiss dispute resolution, then arbitration is an effective way to bridge cultural gaps. This aspect is not new. The Swiss-American Chamber of Commerce has issued Arbitration Rules particularly considering legal and cultural differences of business partners from common law and civil law countries.⁶¹⁷

⁶¹⁷ https://www.amcham.ch/members_interests/p_business_ch.asp?s=5&c=1 (last visited on 14 August 2015).

9. Cost and Time Impact

Historically, arbitration proceedings are an alternative expected to be more quickly and less expensive than crowded state courts and associated lengthy proceedings.

However, ongoing criticism regarding the costs and the duration of international arbitrations, in particular ICC arbitrations, recently prompted revision of both the ICC Rules⁶¹⁸ and of the Swiss Rules⁶¹⁹ to achieve greater speed.⁶²⁰

Anyhow, arbitration may be far less expensive than a court trial, if the latter should be held in the U.S. By choosing arbitration, the parties may limit rights to U.S.-style discovery that can be extremely expensive and time-consuming.

If the alternative to arbitration is a court proceeding in Switzerland, arbitration is often more expensive than litigation. Swiss courts, such as the Zurich Commercial Court, tend to limit witness hearings while witness hearings and post-hearing briefs are typical elements of arbitration proceedings that have a significant impact on cost and time of the arbitration.

In Switzerland, it is customary that the successful party in litigation is entitled to reimbursement of its attorney's fees and costs, even though these will rarely cover actual attorney's fees. In the U.S., however, attorney's fees and costs are reimbursed by the unsuccessful party only, if the contract provides so.⁶²¹

In arbitral proceedings, the parties are invited to submit their actual attorney's fees and to comment on the attorney's fees of the opposite party. The arbitral tribunal is generally granted the power to include the cost assessment in its final award. The tribunal is expected to allow the successful party to recover all or a substantial part of its actual attorney's fees from the opposite party.⁶²² This notwithstanding, there is a tendency of arbitral tribunals not to hurt ei-

⁶¹⁸ ICC Rules January 2012.

⁶¹⁹ Swiss Rules June 2012.

⁶²⁰ MÜLLER CHRISTOPH, Background of the 2012 Revision, What were the Main Objectives? in: 10 Years of Swiss Rules in International Arbitration, ASA Special Series No. 44, pp. 9 *et seq.*, p. 11.

⁶²¹ BARRON/KURTZ, *supra* footnote 576, pp. 16 and 110.

⁶²² BORN GARY B., International Arbitration: Law and Practice, The Netherlands 2012, pp. 175–176.

ther party and to end up with “50:50 solutions”. In multi-party disputes, whether national or international, arbitration is often a suitable and practical means to bundle interests and save cost.⁶²³

Aspects of time and cost efficiency are notoriously emphasized in arbitration publications, particularly with respect to the Swiss Rules.⁶²⁴

10. Finality and Enforcement

Last but not least there are two other most important advantages of arbitration for the resolution of international business disputes: Once rendered, decisions are final and enforceable.

Finality of the arbitral award and limited recourse, respectively,⁶²⁵ are a main driver inducing parties to choose arbitration rather than litigation. International arbitral awards rendered in Switzerland are only subject to a limited appeal, directly to the Swiss Federal Tribunal.⁶²⁶ The success rate is approximately 7% only, and the average appeal duration is normally less than 6 months.⁶²⁷ If both parties are domiciled outside of Switzerland, they may generally waive the right to appeal against the award⁶²⁸, thereby further shortening the arbitral proceedings.

Judgments rendered by state courts, either U.S. or Swiss, will not automatically be enforced by the courts of the other state, as there is no bilateral or multinational treaty on recognition and enforcement. Rather, enforcement of

⁶²³ LIVSCHITZ TAMIR, *Arbitration: An Efficient Solution for Multi-Party Disputes?*, *supra* at pp. 63–86.

⁶²⁴ See, e.g., ROHNER THOMAS, *Expedited Procedure under Art. 42 Swiss Rules*, in: *10 Years of Swiss Rules in International Arbitration*, ASA Special Series No. 44, pp. 55–69.

⁶²⁵ LIVSCHITZ TAMIR, *Switzerland – as Arbitration Friendly as It Gets*, *supra*, p. 9.

⁶²⁶ Art. 191 PILA.

⁶²⁷ <http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/switzerland-is-arbitration-friendly/index.html> (last visited on 14 August 2015); DASSER/ROTH, *supra* footnote 51, pp. 460–466; see also <http://www.arbitration-ch.org/pages/en/asa/news-&-projects/details/974.challenges-of-swiss-arbitral-awards-%E2%80%93-selected-statistical-data-as-of-2013.html> (last visited on 14 August 2015).

⁶²⁸ Art. 192 PILA. There is some uncertainty whether the waiver includes a request for revision, BERGER/KELLERHALS, *supra* footnote 1, paras. 1981–1987.

the foreign judgment is governed by each country's domestic laws such as, in Switzerland, public policy, fair notice, right to be heard, no re-litigation⁶²⁹ or, in the U.S., comity and reciprocity, due process, proper notice, public policy and fraud⁶³⁰.

Quite to the contrary, enforcement of arbitral awards is much easier and one of the principal advantages of arbitration as a method of resolving disputes. REDFERN/HUNTER/BLACKABY/PARTASIDES summarize this general advantage as follows⁶³¹:

“Internationally, it is generally much easier to obtain recognition and enforcement of an international award than of a foreign court judgment. This is because the network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments. Indeed, this is one of the principal advantages of arbitration as a method of resolving international commercial disputes.”

More specifically, arbitral awards are, as a result of the NYC, widely enforceable throughout the world, presently in close to 150 countries.⁶³² This obvious advantage of arbitration is dealt with in many publications, also in the U.S.⁶³³

In a nutshell: Swiss companies should seize every opportunity to choose arbitral proceedings, preferably the Swiss arbitration hub, whenever doing international business bearing a risk of minimum contacts with the U.S. Arbitration

⁶²⁹ Arts. 25–28 PILA.

⁶³⁰ FELLAS, *supra* footnote 564, pp. 537–567; BORN/RUTLEDGE, *supra* footnote 564, pp. 1090 *et seq.*

⁶³¹ REDFERN ALAN/HUNTER MARTIN/BLACKABY NIGEL/PARTASIDES CONSTANTINE, *Law and Practice of International Commercial Arbitration*, 4th ed., London 2004, paras. 10–17.

⁶³² <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states> (last visited on 14 August 2015); see also LEHMANN ANDREAS, *Recognition and Enforcement of Foreign Arbitral Awards in Switzerland – Avoiding Common Pitfalls*, *supra* pp. 119–134.

⁶³³ See, e.g. MOSES, *supra* footnote 615, pp. 211–229.

clauses are generally given deference by U.S. courts, even in case of dispute resolution between Swiss companies and U.S. consumers.⁶³⁴

⁶³⁴ There is a hearsay exception that confirms the rule: A Swiss insurance carrier, in its contracts with insureds, apparently chose jurisdiction before U.S. courts to deter the counterparties from litigation, with a view to the costs, complexity, language and other disadvantages involved with litigation before U.S. courts.

Dispute Resolution Team

Dispute resolution is, and always has been, one of the core practice areas of Niederer Kraft & Frey. We have decades of experience advising and representing clients in litigation in state (cantonal) Swiss courts and the Swiss Federal Supreme Court as well as in national and international arbitration.

Our dispute resolution group has in-depth knowledge of civil procedure as well as corporate and commercial law. We work closely with specialists from other groups, namely Banking and Finance, M&A and Corporate, if additional expert knowledge is needed.

Niederer Kraft & Frey's dispute resolution group has successfully litigated numerous leading cases before the Swiss Federal Supreme Court in the field of corporate and commercial law and is regularly involved in high-stakes arbitration proceedings.

Members of Niederer Kraft & Frey's dispute resolution group also regularly serve as chairpersons, single arbitrators, party appointed arbitrators and counsels in national and international arbitration proceedings. Our track record is particularly strong in high-stakes arbitration proceedings.

Our extensive experience with arbitral proceedings both as arbitrators and party representatives, our in-depth knowledge of the different rules governing the proceedings, and our strong ties with leading law firms all over the world allow us to effectively represent our client's interests in national and international arbitral proceedings.

Annex A: ICC Rules⁶³⁵ and Standard Clause⁶³⁶

A. ICC Rules

Introductory Provisions

Article 1

International Court of Arbitration

- 1 The International Court of Arbitration (the “Court”) of the International Chamber of Commerce (the “ICC”) is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I.
- 2 The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the “Rules”). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the “Internal Rules”).
- 3 The President of the Court (the “President”) or, in the President’s absence or otherwise at the President’s request, one of its Vice-Presidents shall have the power to take urgent decisions on behalf of the Court, provided that any such decision is reported to the Court at its next session.
- 4 As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at its next session.

⁶³⁵ In force as from 1 January 2012.

⁶³⁶ © International Chamber of Commerce (ICC). Reproduced with permission of the ICC. The text reproduced here is valid at the time of reproduction (25 September 2015). As amendments may from time to time be made to the text, please refer to the website www.iccarbitration.org for the latest version and for more information on this ICC dispute resolution service. Also available in the ICC Dispute Resolution Library at www.iccdrl.com.

- 5 The Court is assisted in its work by the Secretariat of the Court (the "Secretariat") under the direction of its Secretary General (the "Secretary General").

Article 2

Definitions

In the Rules:

- (i) "arbitral tribunal" includes one or more arbitrators;
- (ii) "claimant" includes one or more claimants, "respondent" includes one or more respondents, and "additional party" includes one or more additional parties;
- (iii) "party" or "parties" include claimants, respondents or additional parties;
- (iv) "claim" or "claims" include any claim by any party against any other party;
- (v) "award" includes, *inter alia*, an interim, partial or final award.

Article 3

Written Notifications or Communications; Time limits

- 1 All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.
- 2 All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.
- 3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).
- 4 Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country

where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

Commencing the Arbitration

Article 4

Request for Arbitration

- 1 A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.
- 2 The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.
- 3 The Request shall contain the following information:
 - a) the name in full, description, address and other contact details of each of the parties;
 - b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;
 - c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
 - d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
 - e) any relevant agreements and, in particular, the arbitration agreement(s);
 - f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;

- g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
- h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 4 Together with the Request, the claimant shall:
 - a) submit the number of copies thereof required by Article 3(1); and
 - b) make payment of the filing fee required by Appendix III (“Arbitration Costs and Fees”) in force on the date the Request is submitted.

In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant’s right to submit the same claims at a later date in another Request.

- 5 The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fee.

Article 5

Answer to the Request; Counterclaims

- 1 Within 30 days from the receipt of the Request from the Secretariat, the respondent shall submit an Answer (the “Answer”) which shall contain the following information:
 - a) its name in full, description, address and other contact details;
 - b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;
 - c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;
 - d) its response to the relief sought;

- e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
- f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 2 The Secretariat may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice and, where required by Articles 12 and 13, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules.
- 3 The Answer shall be submitted to the Secretariat in the number of copies specified by Article 3(1).
- 4 The Secretariat shall communicate the Answer and the documents annexed thereto to all other parties.
- 5 Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:
 - a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;
 - b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;
 - c) any relevant agreements and, in particular, the arbitration agreement(s); and
 - d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 6 The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat. Prior to the transmission of the file to the arbitral tribunal, the Secretariat may grant the claimant an extension of time for submitting the reply.

Article 6

Effect of the Arbitration Agreement

- 1 Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.
- 2 By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.
- 3 If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).
- 4 In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:
 - (i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and
 - (ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims

with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

- 5 In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.
- 6 Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement.
- 7 Where the Court has decided pursuant to Article 6(4) that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.
- 8 If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.
- 9 Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.

Multiple Parties, Multiple Contracts and Consolidation

Article 7

Joinder of Additional Parties

- 1 A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.
- 2 The Request for Joinder shall contain the following information:
 - a) the case reference of the existing arbitration;
 - b) the name in full, description, address and other contact details of each of the parties, including the additional party; and
 - c) the information specified in Article 4(3), subparagraphs c), d), e) and f).The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.
- 3 The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.
- 4 The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

Article 8

Claims Between Multiple Parties

- 1 In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).
- 2 Any party making a claim pursuant to Article 8(1) shall provide the information specified in Article 4(3), subparagraphs c), d), e) and f).
- 3 Before the Secretariat transmits the file to the arbitral tribunal in accordance with Article 16, the following provisions shall apply, *mutatis mutandis*, to any claim made: Article 4(4) subparagraph a); Article 4(5); Article 5(1) except for subparagraphs a), b), e) and f); Article 5(2); Article 5(3) and Article 5(4). Thereafter, the arbitral tribunal shall determine the procedure for making a claim.

Article 9

Multiple Contracts

Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

Article 10

Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

The Arbitral Tribunal

Article 11

General Provisions

- 1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
- 2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
- 3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.
- 4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.
- 5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

- 6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

Article 12

Constitution of the Arbitral Tribunal

Number of Arbitrators

- 1 The disputes shall be decided by a sole arbitrator or by three arbitrators.
- 2 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

Sole Arbitrator

- 3 Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

- 4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.
- 5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such

appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

- 6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.
- 7 Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.
- 8 In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

Article 13

Appointment and Confirmation of the Arbitrators

- 1 In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).
- 2 The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbi-

trator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

- 3 Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.
- 4 The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:
 - a) one or more of the parties is a state or claims to be a state entity; or
 - b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
 - c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.
- 5 The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

Article 14

Challenge of Arbitrators

- 1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
- 2 For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the ap-

pointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

- 3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

Article 15

Replacement of Arbitrators

- 1 An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.
- 2 An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.
- 3 When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.
- 4 When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.
- 5 Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that

the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

The Arbitral Proceedings

Article 16

Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

Article 17

Proof of Authority

At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

Article 18

Place of the Arbitration

- 1 The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
- 2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
- 3 The arbitral tribunal may deliberate at any location it considers appropriate.

Article 19

Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

Article 20

Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

Article 21

Applicable Rules of Law

- 1 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
- 2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.
- 3 The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

Article 22

Conduct of the Arbitration

- 1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
- 2 In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers

appropriate, provided that they are not contrary to any agreement of the parties.

- 3 Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
- 4 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- 5 The parties undertake to comply with any order made by the arbitral tribunal.

Article 23

Terms of Reference

- 1 As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:
 - a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;
 - b) the addresses to which notifications and communications arising in the course of the arbitration may be made;
 - c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
 - d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;
 - e) the names in full, address and other contact details of each of the arbitrators;
 - f) the place of the arbitration; and
 - g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.

- 2 The Terms of Reference shall be signed by the parties and the arbitral tribunal. Within two months of the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.
- 3 If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court, the arbitration shall proceed.
- 4 After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

Article 24

Case Management Conference and Procedural Timetable

- 1 When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.
- 2 During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.
- 3 To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.
- 4 Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal

shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.

Article 25

Establishing the Facts of the Case

- 1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
- 2 After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.
- 3 The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
- 4 The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.
- 5 At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.
- 6 The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

Article 26

Hearings

- 1 When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.

- 2 If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.
- 3 The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.
- 4 The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

Article 27

Closing of the Proceedings and Date for Submission of Draft Awards

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

- a) declare the proceedings closed with respect to the matters to be decided in the award; and
- b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 33.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

Article 28

Conservatory and Interim Measures

- 1 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.
- 2 Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent

judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

Article 29

Emergency Arbitrator

- 1 A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.
- 2 The emergency arbitrator’s decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.
- 3 The emergency arbitrator’s order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.
- 4 The arbitral tribunal shall decide upon any party’s requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.
- 5 Articles 29(1)–29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the “Emergency Arbitrator Provisions”) shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.

- 6 The Emergency Arbitrator Provisions shall not apply if:
 - a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force;
 - b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
 - c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.
- 7 The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

Awards

Article 30

Time Limit for the Final Award

- 1 The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2).
- 2 The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

Article 31

Making of the Award

- 1 When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.
- 2 The award shall state the reasons upon which it is based.
- 3 The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

Article 32

Award by Consent

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

Article 33

Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

Article 34

Notification, Deposit and Enforceability of the Award

- 1 Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.
- 2 Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.

- 3 By virtue of the notification made in accordance with Article 34(1), the parties waive any other form of notification or deposit on the part of the arbitral tribunal.
- 4 An original of each award made in accordance with the Rules shall be deposited with the Secretariat.
- 5 The arbitral tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary.
- 6 Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

Article 35

Correction and Interpretation of the Award; Remission of Awards

- 1 On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
- 2 Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.
- 3 A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 31, 33 and 34 shall apply *mutatis mutandis*.
- 4 Where a court remits an award to the arbitral tribunal, the provisions of Articles 31, 33, 34 and this Article 35 shall apply *mutatis mutandis* to any

addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

Costs

Article 36

Advance to Cover the Costs of the Arbitration

- 1 After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 36.
- 2 As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 36(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent.
- 3 Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.
- 4 Where claims are made under Article 7 or 8, the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 36, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 36(4), and the amount of any advance previously paid by any party will be considered as a partial payment

by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 36(4).

- 5 The amount of any advance on costs fixed by the Court pursuant to this Article 36 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.
- 6 When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.
- 7 If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

Article 37

Decision as to the Costs of the Arbitration

- 1 The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.
- 2 The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

- 3 At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
- 4 The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
- 5 In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.
- 6 In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

Miscellaneous

Article 38

Modified Time Limits

- 1 The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.
- 2 The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 38(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.

Article 39

Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

Article 40

Limitation of Liability

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

Article 41

General Rule

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.

Appendix I – Statutes of the International Court of Arbitration

Article 1

Function

- 1 The function of the International Court of Arbitration of the International Chamber of Commerce (the “Court”) is to ensure the application of the Rules of Arbitration of the International Chamber of Commerce, and it has all the necessary powers for that purpose.

- 2 As an autonomous body, it carries out these functions in complete independence from the ICC and its organs.
- 3 Its members are independent from the ICC National Committees and Groups.

Article 2

Composition of the Court

The Court shall consist of a President, Vice-Presidents, and members and alternate members (collectively designated as members). In its work it is assisted by its Secretariat (Secretariat of the Court).

Article 3

Appointment

- 1 The President is elected by the ICC World Council upon the recommendation of the Executive Board of the ICC.
- 2 The ICC World Council appoints the Vice-Presidents of the Court from among the members of the Court or otherwise.
- 3 Its members are appointed by the ICC World Council on the proposal of National Committees or Groups, one member for each National Committee or Group.
- 4 On the proposal of the President of the Court, the World Council may appoint alternate members.
- 5 The term of office of all members, including, for the purposes of this paragraph, the President and Vice-Presidents, is three years. If a member is no longer in a position to exercise the member's functions, a successor is appointed by the World Council for the remainder of the term. Upon the recommendation of the Executive Board, the duration of the term of office of any member may be extended beyond three years if the World Council so decides.

Article 4

Plenary Session of the Court

The Plenary Sessions of the Court are presided over by the President or, in the President's absence, by one of the Vice-Presidents designated by the President. The deliberations shall be valid when at least six members are present. Decisions are taken by a majority vote, the President or Vice-President, as the case may be, having a casting vote in the event of a tie.

Article 5

Committees

The Court may set up one or more Committees and establish the functions and organization of such Committees.

Article 6

Confidentiality

The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.

Article 7

Modification of the Rules of Arbitration

Any proposal of the Court for a modification of the Rules is laid before the Commission on Arbitration and ADR before submission to the Executive Board of the ICC for approval, provided, however, that the Court, in order to take account of developments in information technology, may propose to modify or supplement the provisions of Article 3 of the Rules or any related provisions in the Rules without laying any such proposal before the Commission.

Appendix II – Internal Rules of the International Court of Arbitration

Article 1

Confidential Character of the Work of the International Court of Arbitration

- 1 For the purposes of this Appendix, members of the Court include the President and Vice-Presidents of the Court.
- 2 The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.
- 3 However, in exceptional circumstances, the President of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court.
- 4 The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions.
- 5 The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.
- 6 Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from publishing anything based upon information contained therein without having previously submitted the text for approval to the Secretary General of the Court.
- 7 The Secretariat will in each case submitted to arbitration under the Rules retain in the archives of the Court all awards, Terms of Reference and decisions of the Court, as well as copies of the pertinent correspondence of the Secretariat.
- 8 Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator

requests in writing within a period fixed by the Secretariat the return of such documents, communications or correspondence. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.

Article 2

Participation of Members of the International Court of Arbitration in ICC Arbitration

- 1 The President and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration.
- 2 The Court shall not appoint Vice-Presidents or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.
- 3 When the President, a Vice-President or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.
- 4 Such person must be absent from the Court session whenever the matter is considered by the Court and shall not participate in the discussions or in the decisions of the Court.
- 5 Such person will not receive any material documentation or information pertaining to such proceedings.

Article 3

Relations Between the Members of the Court and the ICC National Committees and Groups

- 1 By virtue of their capacity, the members of the Court are independent of the ICC National Committees and Groups which proposed them for appointment by the ICC World Council.
- 2 Furthermore, they must regard as confidential, vis-à-vis the said National Committees and Groups, any information concerning individual cases with which they have become acquainted in their capacity as members of

the Court, except when they have been requested by the President of the Court, by a Vice-President of the Court authorized by the President of the Court, or by the Court's Secretary General to communicate specific information to their respective National Committees or Groups.

Article 4

Committee of the Court

- 1 In accordance with the provisions of Article 1(4) of the Rules and Article 5 of its statutes (Appendix I), the Court hereby establishes a Committee of the Court.
- 2 The members of the Committee consist of a president and at least two other members. The President of the Court acts as the president of the Committee. In the President's absence or otherwise at the President's request, a Vice-President of the Court or, in exceptional circumstances, another member of the Court may act as president of the Committee.
- 3 The other two members of the Committee are appointed by the Court from among the Vice-Presidents or the other members of the Court. At each Plenary Session the Court appoints the members who are to attend the meetings of the Committee to be held before the next Plenary Session.
- 4 The Committee meets when convened by its president. Two members constitute a quorum.
- 5 (a) The Court shall determine the decisions that may be taken by the Committee.
(b) The decisions of the Committee are taken unanimously.
(c) When the Committee cannot reach a decision or deems it preferable to abstain, it transfers the case to the next Plenary Session, making any suggestions it deems appropriate.
(d) The Committee's decisions are brought to the notice of the Court at its next Plenary Session.

Article 5

Court Secretariat

- 1 In the Secretary General's absence or otherwise at the Secretary General's request, the Deputy Secretary General and/or the General Counsel shall have the authority to refer matters to the Court, confirm arbitrators, certify true copies of awards and request the payment of a provisional ad-

vance, respectively provided for in Articles 6(3), 13(2), 34(2) and 36(1) of the Rules.

- 2 The Secretariat may, with the approval of the Court, issue notes and other documents for the information of the parties and the arbitrators, or as necessary for the proper conduct of the arbitral proceedings.
- 3 Offices of the Secretariat may be established outside the headquarters of the ICC. The Secretariat shall keep a list of offices designated by the Secretary General. Requests for Arbitration may be submitted to the Secretariat at any of its offices, and the Secretariat's functions under the Rules may be carried out from any of its offices, as instructed by the Secretary General, Deputy Secretary General or General Counsel.

Article 6

Scrutiny of Arbitral Awards

When the Court scrutinizes draft awards in accordance with Article 33 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration.

Appendix III – Arbitration Costs and Fees

Article 1

Advance on Costs

- 1 Each request to commence an arbitration pursuant to the Rules must be accompanied by a filing fee of US\$ 3,000. Such payment is non-refundable and shall be credited to the claimant's portion of the advance on costs.
- 2 The provisional advance fixed by the Secretary General according to Article 36(1) of the Rules shall normally not exceed the amount obtained by adding together the ICC administrative expenses, the minimum of the fees (as set out in the scale hereinafter) based upon the amount of the claim and the expected reimbursable expenses of the arbitral tribunal incurred with respect to the drafting of the Terms of Reference. If such amount is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. Payment by the claimant shall be credited to its share of the advance on costs fixed by the Court.

- 3 In general, after the Terms of Reference have been signed or approved by the Court and the procedural timetable has been established, the arbitral tribunal shall, in accordance with Article 36(6) of the Rules, proceed only with respect to those claims or counterclaims in regard to which the whole of the advance on costs has been paid.
- 4 The advance on costs fixed by the Court according to Articles 36(2) or 36(4) of the Rules comprises the fees of the arbitrator or arbitrators (hereinafter referred to as "arbitrator"), any arbitration-related expenses of the arbitrator and the ICC administrative expenses.
- 5 Each party shall pay its share of the total advance on costs in cash. However, if a party's share of the advance on costs is greater than US\$ 500,000 (the "Threshold Amount"), such party may post a bank guarantee for any amount above the Threshold Amount. The Court may modify the Threshold Amount at any time at its discretion.
- 6 The Court may authorize the payment of advances on costs, or any party's share thereof, in instalments, subject to such conditions as the Court thinks fit, including the payment of additional ICC administrative expenses.
- 7 A party that has already paid in full its share of the advance on costs fixed by the Court may, in accordance with Article 36(5) of the Rules, pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee.
- 8 When the Court has fixed separate advances on costs pursuant to Article 36(3) of the Rules, the Secretariat shall invite each party to pay the amount of the advance corresponding to its respective claim(s).
- 9 When, as a result of the fixing of separate advances on costs, the separate advance fixed for the claim of either party exceeds one half of such global advance as was previously fixed (in respect of the same claims and counterclaims that are the subject of separate advances), a bank guarantee may be posted to cover any such excess amount. In the event that the amount of the separate advance is subsequently increased, at least one half of the increase shall be paid in cash.
- 10 The Secretariat shall establish the terms governing all bank guarantees which the parties may post pursuant to the above provisions.

- 11 As provided in Article 36(5) of the Rules, the advance on costs may be subject to readjustment at any time during the arbitration, in particular to take into account fluctuations in the amount in dispute, changes in the amount of the estimated expenses of the arbitrator, or the evolving difficulty or complexity of arbitration proceedings.
- 12 Before any expertise ordered by the arbitral tribunal can be commenced, the parties, or one of them, shall pay an advance on costs fixed by the arbitral tribunal sufficient to cover the expected fees and expenses of the expert as determined by the arbitral tribunal. The arbitral tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses.
- 13 The amounts paid as advances on costs do not yield interest for the parties or the arbitrator.

Article 2

Costs and Fees

- 1 Subject to Article 37(2) of the Rules, the Court shall fix the fees of the arbitrator in accordance with the scale hereinafter set out or, where the amount in dispute is not stated, at its discretion.
- 2 In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 37(2) of the Rules), at a figure higher or lower than those limits.
- 3 When a case is submitted to more than one arbitrator, the Court, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of one arbitrator.
- 4 The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules.
- 5 The Court shall fix the ICC administrative expenses of each arbitration in accordance with the scale hereinafter set out or, where the amount in dispute is not stated, at its discretion. In exceptional circumstances, the

Court may fix the ICC administrative expenses at a lower or higher figure than that which would result from the application of such scale, provided that such expenses shall normally not exceed the maximum amount of the scale.

- 6 At any time during the arbitration, the Court may fix as payable a portion of the ICC administrative expenses corresponding to services that have already been performed by the Court and the Secretariat.
- 7 The Court may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses as a condition for holding an arbitration in abeyance at the request of the parties or of one of them with the acquiescence of the other.
- 8 If an arbitration terminates before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses at its discretion, taking into account the stage attained by the arbitral proceedings and any other relevant circumstances.
- 9 Any amount paid by the parties as an advance on costs exceeding the costs of the arbitration fixed by the Court shall be reimbursed to the parties having regard to the amounts paid.
- 10 In the case of an application under Article 35(2) of the Rules or of a remission pursuant to Article 35(4) of the Rules, the Court may fix an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses and may make the transmission of such application to the arbitral tribunal subject to the prior cash payment in full to the ICC of such advance. The Court shall fix at its discretion the costs of the procedure following an application or a remission, which shall include any possible fees of the arbitrator and ICC administrative expenses, when approving the decision of the arbitral tribunal.
- 11 The Secretariat may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses for any expenses arising in relation to a request pursuant to Article 34(5) of the Rules.
- 12 When an arbitration is preceded by proceedings under the ICC Mediation Rules, one half of the ICC administrative expenses paid for such proceedings shall be credited to the ICC administrative expenses of the arbitration.

- 13 Amounts paid to the arbitrator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.
- 14 Any ICC administrative expenses may be subject to value added tax (VAT) or charges of a similar nature at the prevailing rate.

Article 3

ICC as Appointing Authority

Any request received for an authority of the ICC to act as appointing authority will be treated in accordance with the Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings and shall be accompanied by a non-refundable filing fee of US\$ 3,000. No request shall be processed unless accompanied by the said filing fee. For additional services, the ICC may at its discretion fix ICC administrative expenses, which shall be commensurate with the services provided and shall normally not exceed the maximum amount of US\$ 10,000.

Article 4

Scales of Administrative Expenses and Arbitrator's Fees

- 1 The Scales of Administrative Expenses and Arbitrator's Fees set forth below shall be effective as of 1 January 2012 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations.
- 2 To calculate the ICC administrative expenses and the arbitrator's fees, the amounts calculated for each successive tranche of the amount in dispute must be added together, except that where the amount in dispute is over US\$ 500 million, a flat amount of US\$ 113,215 shall constitute the entirety of the ICC administrative expenses.
- 3 All amounts fixed by the Court or pursuant to any of the appendices to the Rules are payable in US\$ except where prohibited by law, in which case the ICC may apply a different scale and fee arrangement in another currency.

A Administrative Expenses

Amount in dispute (in US Dollars)	Administrative expenses*
up to 50,000	\$3,000
from 50,001 to 100,000	4.73%
from 100,001 to 200,000	2.53%
from 200,001 to 500,000	2.09%
from 500,001 to 1,000,000	1.51%
from 1,000,001 to 2,000,000	0.95%
from 2,000,001 to 5,000,000	0.46%
from 5,000,001 to 10,000,000	0.25%
from 10,000,001 to 30,000,000	0.10%
from 30,000,001 to 50,000,000	0.09%
from 50,000,001 to 80,000,000	0.01%
from 80,000,001 to 500,000,000	0.0035%
over 500,000,000	\$113,215

* For illustrative purposes only, the table on page 234 indicates the resulting administrative expenses in US\$ when the proper calculations have been made.

B Arbitrator's Fees

Amount in dispute (in US Dollars)	minimum	maximum	Fees**
up to 50,000	\$3,000	18.0200%	
from 50,001 to 100,000	2.6500%	13.5680%	
from 100,001 to 200,000	1.4310%	7.6850%	
from 200,001 to 500,000	1.3670%	6.8370%	
from 500,001 to 1,000,000	0.9540%	4.0280%	
from 1,000,001 to 2,000,000	0.6890%	3.6040%	
from 2,000,001 to 5,000,000	0.3750%	1.3910%	
from 5,000,001 to 10,000,000	0.1280%	0.9100%	
from 10,000,001 to 30,000,000	0.0640%	0.2410%	
from 30,000,001 to 50,000,000	0.0590%	0.2280%	
from 50,000,001 to 80,000,000	0.0330%	0.1570%	
from 80,000,001 to 100,000,000	0.0210%	0.1150%	
from 100,000,001 to 500,000,000	0.0110%	0.0580%	
over 500,000,000	0.0100%	0.0400%	

** For illustrative purposes only, the table on page 235 indicates the resulting range of fees in US\$ when the proper calculations have been made.

Amount in Dispute (in US Dollars)	A Administrative Expenses* (in US Dollars)
up to 50,000	3,000
from 50,001 to 100,000	3,000 + 4.73% of amt. over 50,000
from 100,001 to 200,000	5,365 + 2.53% of amt. over 100,000
from 200,001 to 500,000	7,895 + 2.09% of amt. over 200,000
from 500,001 to 1,000,000	14,165 + 1.51% of amt. over 500,000
from 1,000,001 to 2,000,000	21,715 + 0.95% of amt. over 1,000,000
from 2,000,001 to 5,000,000	31,215 + 0.46% of amt. over 2,000,000
from 5,000,001 to 10,000,000	45,015 + 0.25% of amt. over 5,000,000
from 10,000,001 to 30,000,000	57,515 + 0.10% of amt. over 10,000,000
from 30,000,001 to 50,000,000	77,515 + 0.09% of amt. over 30,000,000
from 50,000,001 to 80,000,000	95,515 + 0.01% of amt. over 50,000,000
from 80,000,001 to 100,000,000	98,515 + 0.0035% of amt. over 80,000,000
from 100,000,001 to 500,000,000	99,215 + 0.0035% of amt. over 100,000,000
over 500,000,000	113,215

* See page 233.

Amount in Dispute B Arbitrator's Fees**

(in US Dollars)	(in US Dollars)	Minimum	Maximum
up to 50,000		3,000	18.0200% of amount in dispute
from 50,001 to 100,000		3,000 + 2.6500% of amt. over 50,000	9,010 + 13.5680% of amt. over 50,000
from 100,001 to 200,000		4,325 + 1.4310% of amt. over 100,000	15,794 + 7.6850% of amt. over 100,000
from 200,001 to 500,000		5,765 + 1.3670% of amt. over 200,000	23,479 + 6.8370% of amt. over 200,000
from 500,001 to 1,000,000		9,857 + 0.9540% of amt. over 500,000	43,990 + 4.0280% of amt. over 500,000
from 1,000,001 to 2,000,000		14,627 + 0.6890% of amt. over 1,000,000	64,130 + 3.6040% of amt. over 1,000,000
from 2,000,001 to 5,000,000		21,517 + 0.3750% of amt. over 2,000,000	100,170 + 1.3910% of amt. over 2,000,000
from 5,000,001 to 10,000,000		32,767 + 0.1280% of amt. over 5,000,000	141,900 + 0.9100% of amt. over 5,000,000
from 10,000,001 to 30,000,000		39,167 + 0.0640% of amt. over 10,000,000	187,400 + 0.2410% of amt. over 10,000,000
from 30,000,001 to 50,000,000		51,967 + 0.0590% of amt. over 30,000,000	235,600 + 0.2280% of amt. over 30,000,000
from 50,000,001 to 80,000,000		63,767 + 0.0330% of amt. over 50,000,000	281,200 + 0.1570% of amt. over 50,000,000
from 80,000,001 to 100,000,000		73,667 + 0.0210% of amt. over 80,000,000	328,300 + 0.1150% of amt. over 80,000,000
from 100,000,001 to 500,000,000		77,867 + 0.0110% of amt. over 100,000,000	351,300 + 0.0580% of amt. over 100,000,000
over 500,000,000		121,867 + 0.0100% of amt. over 500,000,000	583,300 + 0.0400% of amt. over 500,000,000

** See page 233.

Appendix IV – Case Management Techniques

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

- a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.
- b) Identifying issues that can be resolved by agreement between the parties or their experts.
- c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.
- d) Production of documentary evidence:
 - (i) requiring the parties to produce with their submissions the documents on which they rely;
 - (ii) avoiding requests for document production when appropriate in order to control time and cost;
 - (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;
 - (iv) establishing reasonable time limits for the production of documents;
 - (v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.
- e) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.
- f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.
- g) Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing.
- h) Settlement of disputes:

- (i) informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;
- (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Additional techniques are described in the ICC publication entitled “Controlling Time and Costs in Arbitration”.

Appendix V – Emergency Arbitrator Rules

Article 1

Application for Emergency Measures

- 1 A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the Rules of Arbitration of the ICC (the “Rules”) shall submit its Application for Emergency Measures (the “Application”) to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the Rules.
- 2 The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat.
- 3 The Application shall contain the following information:
 - a) the name in full, description, address and other contact details of each of the parties;
 - b) the name in full, address and other contact details of any person(s) representing the applicant;
 - c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;
 - d) a statement of the Emergency Measures sought;
 - e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;
 - f) any relevant agreements and, in particular, the arbitration agreement;

- g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;
- h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and
- i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

- 4 The Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.
- 5 If and to the extent that the President of the Court (the "President") considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall transmit a copy of the Application to them for information.
- 6 The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.

Article 2

Appointment of the Emergency Arbitrator; Transmission of the File

- 1 The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application.

- 2 No emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal pursuant to Article 16 of the Rules. An emergency arbitrator appointed prior thereto shall retain the power to make an order within the time limit permitted by Article 6(4) of this Appendix.
- 3 Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator. Thereafter, all written communications from the parties shall be submitted directly to the emergency arbitrator with a copy to the other party and the Secretariat. A copy of any written communications from the emergency arbitrator to the parties shall be submitted to the Secretariat.
- 4 Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.
- 5 Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Secretariat shall provide a copy of such statement to the parties.
- 6 An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application.

Article 3

Challenge of an Emergency Arbitrator

- 1 A challenge against the emergency arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
- 2 The challenge shall be decided by the Court after the Secretariat has afforded an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time.

Article 4

Place of the Emergency Arbitrator Proceedings

- 1 If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence

of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules.

- 2 Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication.

Article 5

Proceedings

- 1 The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.
- 2 The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

Article 6

Order

- 1 Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").
- 2 In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.
- 3 The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.
- 4 The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a rea-

soned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.

- 5 Within the time limit established pursuant to Article 6(4) of this Appendix, the emergency arbitrator shall send the Order to the parties, with a copy to the Secretariat, by any of the means of communication permitted by Article 3(2) of the Rules that the emergency arbitrator considers will ensure prompt receipt.
- 6 The Order shall cease to be binding on the parties upon:
 - a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;
 - b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;
 - c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or
 - d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.
- 7 The emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security.
- 8 Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.

Article 7

Costs of the Emergency Arbitrator Proceedings

- 1 The applicant must pay an amount of US\$ 40,000, consisting of US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator's fees and expenses. Notwithstanding Article 1(5) of this Appendix, the Application shall not be notified until the payment of US\$ 40,000 is received by the Secretariat.
- 2 The President may, at any time during the emergency arbitrator proceedings, decide to increase the emergency arbitrator's fees or the ICC administrative expenses taking into account, *inter alia*, the nature of the case and the nature and amount of work performed by the emergency arbitrator,

the Court, the President and the Secretariat. If the party which submitted the Application fails to pay the increased costs within the time limit fixed by the Secretariat, the Application shall be considered as withdrawn.

- 3 The emergency arbitrator's Order shall fix the costs of the emergency arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
- 4 The costs of the emergency arbitrator proceedings include the ICC administrative expenses, the emergency arbitrator's fees and expenses and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings.
- 5 In the event that the emergency arbitrator proceedings do not take place pursuant to Article 1(5) of this Appendix or are otherwise terminated prior to the making of an Order, the President shall determine the amount to be reimbursed to the applicant, if any. An amount of US\$ 5,000 for ICC administrative expenses is non-refundable in all cases.

Article 8

General Rule

- 1 The President shall have the power to decide, at the President's discretion, all matters relating to the administration of the emergency arbitrator proceedings not expressly provided for in this Appendix.
- 2 In the President's absence or otherwise at the President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President.
- 3 In all matters concerning emergency arbitrator proceedings not expressly provided for in this Appendix, the Court, the President and the emergency arbitrator shall act in the spirit of the Rules and this Appendix.

B. Standard Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Annex B: Swiss Rules and Standard Clause⁶³⁷

A. Swiss Rules⁶³⁸

Introduction

- (a) In order to harmonise their rules of arbitration the Chambers of Commerce and Industry of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich in 2004 replaced their former rules by the Swiss Rules of International Arbitration (hereinafter the “Swiss Rules” or the “Rules”).
- (b) For the purpose of providing arbitration services, the Chambers founded the Swiss Chambers’ Arbitration Institution. In order to administer arbitrations under the Swiss Rules, the Swiss Chambers’ Arbitration Institution has established the Arbitration Court (hereinafter the “Court”), which is comprised of experienced international arbitration practitioners. The Court shall render decisions as provided for under these Rules. It may delegate to one or more members or committees the power to take certain decisions pursuant to its Internal Rules⁶³⁹. The Court is assisted in its work by the Secretariat of the Court (hereinafter the “Secretariat”).
- (c) The Swiss Chambers’ Arbitration Institution provides domestic and international arbitration services, as well as other dispute resolution services, under any applicable law, in Switzerland or in any other country.

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⁶³⁸ In force as from June 2012.

⁶³⁹ The Internal Rules are available on the website www.swissarbitration.org.

Section I. Introductory Rules

Scope of Application

Article 1

1. These Rules shall govern arbitrations where an agreement to arbitrate refers to these Rules or to the arbitration rules of the Chambers of Commerce and Industry of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud, Zurich, or any further Chamber of Commerce and Industry that may adhere to these Rules.
2. The seat of arbitration designated by the parties may be in Switzerland or in any other country.
3. This version of the Rules shall come into force on 1 June 2012 and, unless the parties have agreed otherwise, shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date.
4. By submitting their dispute to arbitration under these Rules, the parties confer on the Court, to the fullest extent permitted under the law applicable to the arbitration, all of the powers required for the purpose of supervising the arbitral proceedings otherwise vested in the competent judicial authority, including the power to extend the term of office of the arbitral tribunal and to decide on the challenge of an arbitrator on grounds not provided for in these Rules.
5. These Rules shall govern the arbitration, except if one of them is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, in which case that provision shall prevail.

Notice, Calculation of Periods of Time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication, or proposal, is deemed to have been received if it is delivered to the addressee, or to its habitual residence, place of business, postal or electronic address, or, if none of these can be identified after making a reasonable inquiry, to the addressee's last-known residence or place of

business. A notice shall be deemed to have been received on the day it is delivered.

2. A period of time under these Rules shall begin to run on the day following the day when a notice, notification, communication, or proposal is received. If the last day of such a period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days are included in the calculation of a period of time.
3. If the circumstances so justify, the Court may extend or shorten any time-limit it has fixed or has the authority to fix or amend.

Notice of Arbitration and Answer to the Notice of Arbitration

Article 3

1. The party initiating arbitration (hereinafter called the "Claimant" or, where applicable, the "Claimants") shall submit a Notice of Arbitration to the Secretariat at any of the addresses listed in Appendix A.
2. Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Secretariat.
3. The Notice of Arbitration shall be submitted in as many copies as there are other parties (hereinafter called the "Respondent" or, where applicable, the "Respondents"), together with an additional copy for each arbitrator and one copy for the Secretariat, and shall include the following:
 - (a) A demand that the dispute be referred to arbitration;
 - (b) The names, addresses, telephone and fax numbers, and e-mail addresses (if any) of the parties and of their representative(s);
 - (c) A copy of the arbitration clause or the separate arbitration agreement that is invoked;
 - (d) A reference to the contract or other legal instrument(s) out of, or in relation to, which the dispute arises;
 - (e) The general nature of the claim and an indication of the amount involved, if any;
 - (f) The relief or remedy sought;

- (g) A proposal as to the number of arbitrators (i.e. one or three), the language, and the seat of the arbitration, if the parties have not previously agreed thereon;
 - (h) The Claimant's designation of one or more arbitrators, if the parties' agreement so requires;
 - (i) Confirmation of payment by check or transfer to the relevant account listed in Appendix A of the Registration Fee as required by Appendix B (Schedule of Costs) in force on the date the Notice of Arbitration is submitted.
4. The Notice of Arbitration may also include:
- (a) The Claimant's proposal for the appointment of a sole arbitrator referred to in Article 7;
 - (b) The Statement of Claim referred to in Article 18.
5. If the Notice of Arbitration is incomplete, if the required number of copies or attachments are not submitted, or if the Registration Fee is not paid, the Secretariat may request the Claimant to remedy the defect within an appropriate period of time. The Secretariat may also request the Claimant to submit a translation of the Notice of Arbitration within the same period of time if it is not submitted in English, German, French, or Italian. If the Claimant complies with such directions within the applicable time-limit, the Notice of Arbitration shall be deemed to have been validly filed on the date on which the initial version was received by the Secretariat.
6. The Secretariat shall provide, without delay, a copy of the Notice of Arbitration together with any exhibits to the Respondent.
7. Within thirty days from the date of receipt of the Notice of Arbitration, the Respondent shall submit to the Secretariat an Answer to the Notice of Arbitration. The Answer to the Notice of Arbitration shall be submitted in as many copies as there are other parties, together with an additional copy for each arbitrator and one copy for the Secretariat, and shall, to the extent possible, include the following:
- (a) The name, address, telephone and fax numbers, and e-mail address of the Respondent and of its representative(s);
 - (b) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

- (c) The Respondent's comments on the particulars set forth in the Notice of Arbitration referred to in Article 3(3)(e);
 - (d) The Respondent's answer to the relief or remedy sought in the Notice of Arbitration referred to in Article 3(3)(f);
 - (e) The Respondent's proposal as to the number of arbitrators (i.e. one or three), the language, and the seat of the arbitration referred to in Article 3(3)(g);
 - (f) The Respondent's designation of one or more arbitrators if the parties' agreement so requires.
8. The Answer to the Notice of Arbitration may also include:
- (a) The Respondent's proposal for the appointment of a sole arbitrator referred to in Article 7;
 - (b) The Statement of Defence referred to in Article 19.
9. Articles 3(5) and (6) are applicable to the Answer to the Notice of Arbitration.
10. Any counterclaim or set-off defence shall in principle be raised with the Answer to the Notice of Arbitration. Article 3(3) is applicable to the counterclaim or set-off defence.
11. If no counterclaim or set-off defence is raised with the Answer to the Notice of Arbitration, or if there is no indication of the amount of the counterclaim or set-off defence, the Court may rely exclusively on the Notice of Arbitration in order to determine the possible application of Article 42(2) (Expedited Procedure).
12. If the Respondent does not submit an Answer to the Notice of Arbitration, or if the Respondent raises an objection to the arbitration being administered under these Rules, the Court shall administer the case, unless there is manifestly no agreement to arbitrate referring to these Rules.

Consolidation and Joinder

Article 4

1. Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pend-

ing arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators and apply the provisions of Section II (Composition of the Arbitral Tribunal).

2. Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.

Section II. Composition of the Arbitral Tribunal

Confirmation of Arbitrators

Article 5

1. All designations of an arbitrator made by the parties or the arbitrators are subject to confirmation by the Court, upon which the appointments shall become effective. The Court has no obligation to give reasons when it does not confirm an arbitrator.
2. Where a designation is not confirmed, the Court may either:
 - (a) invite the party or parties concerned, or, as the case may be, the arbitrators, to make a new designation within a reasonable time-limit; or
 - (b) in exceptional circumstances, proceed directly with the appointment.
3. In the event of any failure in the constitution of the arbitral tribunal under these Rules, the Court shall have all powers to address such failure and may, in particular, revoke any appointment made, appoint or reappoint any of the arbitrators and designate one of them as the presiding arbitrator.

4. If, before the arbitral tribunal is constituted, the parties agree on a settlement of the dispute, or the continuation of the arbitral proceedings becomes unnecessary or impossible for other reasons, the Secretariat shall give advance notice to the parties that the Court may terminate the proceedings. Any party may request that the Court proceed with the constitution of the arbitral tribunal in accordance with these Rules in order that the arbitral tribunal determine and apportion the costs not agreed upon by the parties.
5. Once the Registration Fee and any Provisional Deposit have been paid in accordance with Appendix B (Schedule of Costs) and all arbitrators have been confirmed, the Secretariat shall transmit the file to the arbitral tribunal without delay.

Number of Arbitrators

Article 6

1. If the parties have not agreed upon the number of arbitrators, the Court shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances.
2. As a rule, the Court shall refer the case to a sole arbitrator, unless the complexity of the subject matter and/or the amount in dispute justify that the case be referred to a three-member arbitral tribunal.
3. If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, and this appears inappropriate in view of the amount in dispute or of other circumstances, the Court shall invite the parties to agree to refer the case to a sole arbitrator.
4. Where the amount in dispute does not exceed CHF 1,000,000 (one million Swiss francs), Article 42(2) (Expedited Procedure) shall apply.

Appointment of a Sole Arbitrator

Article 7

1. Where the parties have agreed that the dispute shall be referred to a sole arbitrator, they shall jointly designate the sole arbitrator within thirty days from the date on which the Notice of Arbitration was received by the Respondent(s), unless the parties' agreement provides otherwise.
2. Where the parties have not agreed upon the number of arbitrators, they shall jointly designate the sole arbitrator within thirty days from the date of receipt of the Court's decision that the dispute shall be referred to a sole arbitrator.
3. If the parties fail to designate the sole arbitrator within the applicable time-limit, the Court shall proceed with the appointment.

Appointment of Arbitrators in Bi-Party or Multi-Party Proceedings

Article 8

1. Where a dispute between two parties is referred to a three-member arbitral tribunal, each party shall designate one arbitrator, unless the parties have agreed otherwise.
2. If a party fails to designate an arbitrator within the time-limit set by the Court or resulting from the arbitration agreement, the Court shall appoint the arbitrator. Unless the parties' agreement provides otherwise, the two arbitrators so appointed shall designate, within thirty days from the confirmation of the second arbitrator, a third arbitrator who shall act as the presiding arbitrator of the arbitral tribunal. Failing such designation, the Court shall appoint the presiding arbitrator.
3. In multi-party proceedings, the arbitral tribunal shall be constituted in accordance with the parties' agreement.
4. If the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multi-party proceedings, the Court shall set an initial thirty-day time-limit for the Claimant or group of Claimants to designate an arbitrator, and set a subsequent thirty-day time-limit for the Respondent or group of Respondents to designate an arbitrator. If the party or group(s)

of parties have each designated an arbitrator, Article 8(2) shall apply to the designation of the presiding arbitrator.

5. Where a party or group of parties fails to designate an arbitrator in multi-party proceedings, the Court may appoint all of the arbitrators, and shall specify the presiding arbitrator.

Independence and Challenge of Arbitrators

Article 9

1. Any arbitrator conducting an arbitration under these Rules shall be and shall remain at all times impartial and independent of the parties.
2. Prospective arbitrators shall disclose to those who approach them in connection with a possible appointment any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. An arbitrator, once designated or appointed, shall disclose such circumstances to the parties, unless they have already been so informed.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator designated by it only for reasons of which it becomes aware after the appointment has been made.

Article 11

1. A party intending to challenge an arbitrator shall send a notice of challenge to the Secretariat within 15 days after the circumstances giving rise to the challenge became known to that party.
2. If, within 15 days from the date of the notice of challenge, all of the parties do not agree to the challenge, or the challenged arbitrator does not withdraw, the Court shall decide on the challenge.
3. The decision of the Court is final and the Court has no obligation to give reasons.

Removal of an Arbitrator

Article 12

1. If an arbitrator fails to perform his or her functions despite a written warning from the other arbitrators or from the Court, the Court may revoke the appointment of that arbitrator.
2. The arbitrator shall first have an opportunity to present his or her position to the Court. The decision of the Court is final and the Court has no obligation to give reasons.

Replacement of an Arbitrator

Article 13

1. Subject to Article 13(2), in all instances in which an arbitrator has to be replaced, a replacement arbitrator shall be designated or appointed pursuant to the procedure provided for in Articles 7 and 8 within the time-limit set by the Court. Such procedure shall apply even if a party or the arbitrators had failed to make the required designation during the initial appointment process.
2. In exceptional circumstances, the Court may, after consulting with the parties and any remaining arbitrators:
 - (a) directly appoint the replacement arbitrator; or
 - (b) after the closure of the proceedings, authorise the remaining arbitrator(s) to proceed with the arbitration and make any decision or award.

Article 14

If an arbitrator is replaced, the proceedings shall, as a rule, resume at the stage reached when the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Section III. Arbitral Proceedings

General Provisions

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard.
2. At any stage of the proceedings, the arbitral tribunal may hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. After consulting with the parties, the arbitral tribunal may also decide to conduct the proceedings on the basis of documents and other materials.
3. At an early stage of the arbitral proceedings, and in consultation with the parties, the arbitral tribunal shall prepare a provisional timetable for the arbitral proceedings, which shall be provided to the parties and, for information, to the Secretariat.
4. All documents or information provided to the arbitral tribunal by one party shall at the same time be communicated by that party to the other parties.
5. The arbitral tribunal may, after consulting with the parties, appoint a secretary. Articles 9 to 11 shall apply to the secretary.
6. The parties may be represented or assisted by persons of their choice.
7. All participants in the arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays. The parties undertake to comply with any award or order made by the arbitral tribunal or emergency arbitrator without delay.
8. With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps.

Seat of the Arbitration

Article 16

1. If the parties have not determined the seat of the arbitration, or if the designation of the seat is unclear or incomplete, the Court shall determine the seat of the arbitration, taking into account all relevant circumstances, or shall request the arbitral tribunal to determine it.
2. Without prejudice to the determination of the seat of the arbitration, the arbitral tribunal may decide where the proceedings shall be conducted. In particular, it may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such an inspection.
4. The award shall be deemed to be made at the seat of the arbitration.

Language

Article 17

1. Subject to an agreement of the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the Statement of Claim, the Statement of Defence, any further written statements, and to any oral hearings.
2. The arbitral tribunal may order that any documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents or exhibits submitted in the course of the proceedings in a language other than the language or languages agreed upon by the parties or determined by the arbitral tribunal shall be accompanied by a translation into such language or languages.

Statement of Claim

Article 18

1. Within a period of time to be determined by the arbitral tribunal, and unless the Statement of Claim was contained in the Notice of Arbitration, the Claimant shall communicate its Statement of Claim in writing to the Respondent and to each of the arbitrators. A copy of the contract, and, if it is not contained in the contract, of the arbitration agreement, shall be annexed to the Statement of Claim.
2. The Statement of Claim shall include the following particulars:
 - (a) The names and addresses of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought.
3. As a rule, the Claimant shall annex to its Statement of Claim all documents and other evidence on which it relies.

Statement of Defence

Article 19

1. Within a period of time to be determined by the arbitral tribunal, and unless the Statement of Defence was contained in the Answer to the Notice of Arbitration, the Respondent shall communicate its Statement of Defence in writing to the Claimant and to each of the arbitrators.
2. The Statement of Defence shall reply to the particulars of the Statement of Claim set out in Articles 18(2)(b) to (d). If the Respondent raises an objection to the jurisdiction or to the proper constitution of the arbitral tribunal, the Statement of Defence shall contain the factual and legal basis of such objection. As a rule, the Respondent shall annex to its Statement of Defence all documents and other evidence on which it relies.
3. Articles 18(2)(b) to (d) shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

Amendments to the Claim or Defence

Article 20

1. During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it, the prejudice to the other parties, or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.
2. The arbitral tribunal may adjust the costs of the arbitration if a party amends or supplements its claims, counterclaims, or defences.

Objections to the Jurisdiction of the Arbitral Tribunal

Article 21

1. The arbitral tribunal shall have the power to rule on any objections to its jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. As a rule, any objection to the jurisdiction of the arbitral tribunal shall be raised in the Answer to the Notice of Arbitration, and in no event later than in the Statement of Defence referred to in Article 19, or, with respect to a counterclaim, in the reply to the counterclaim.
4. In general, the arbitral tribunal should rule on any objection to its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such an objection in an award on the merits.

5. The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum-selection clause.

Further Written Statements

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall set the periods of time for communicating such statements.

Periods of Time

Article 23

The periods of time set by the arbitral tribunal for the communication of written statements (including the Statement of Claim and Statement of Defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it considers that an extension is justified.

Evidence and Hearings

Article 24

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.
3. At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within a period of time determined by the arbitral tribunal.

Article 25

1. The arbitral tribunal shall give the parties adequate advance notice of the date, time, and place of any oral hearing.
2. Any person may be a witness or an expert witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses.
3. Prior to a hearing and within a period of time determined by the arbitral tribunal, the evidence of witnesses and expert witnesses may be presented in the form of written statements or reports signed by them.
4. At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal. The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by video-conference).
5. Arrangements shall be made for the translation of oral statements made at a hearing and for a record of the hearing to be provided if this is deemed necessary by the arbitral tribunal having regard to the circumstances of the case, or if the parties so agree.
6. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may order witnesses or expert witnesses to retire during the testimony of other witnesses or expert witnesses.

Interim Measures of Protection

Article 26

1. At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate. Upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative, the arbitral tribunal may also modify, suspend or terminate any interim measures granted.
2. Interim measures may be granted in the form of an interim award. The arbitral tribunal shall be entitled to order the provision of appropriate security.

3. In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.
4. The arbitral tribunal may rule on claims for compensation for any damage caused by an unjustified interim measure or preliminary order.
5. By submitting their dispute to arbitration under these Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority. A request for interim measures addressed by any party to a judicial authority shall not be deemed to be incompatible with the agreement to arbitrate, or to constitute a waiver of that agreement.
6. The arbitral tribunal shall have discretion to apportion the costs relating to a request for interim measures in an interim award or in the final award.

Tribunal-Appointed Experts

Article 27

1. The arbitral tribunal, after consulting with the parties, may appoint one or more experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for the expert's inspection any relevant documents or goods that the expert may require of them. Any dispute between a party and the expert as to the relevance of the required information, documents or goods shall be referred to the arbitral tribunal.
3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in the report.

4. At the request of any party, the expert, after delivery of the report, may be heard at a hearing during which the parties shall have the opportunity to be present and to examine the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. Article 25 shall be applicable to such proceedings.
5. Articles 9 to 11 shall apply to any expert appointed by the arbitral tribunal.

Default

Article 28

1. If, within the period of time set by the arbitral tribunal, the Claimant has failed to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time set by the arbitral tribunal, the Respondent has failed to communicate its Statement of Defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.
2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.
3. If one of the parties, duly invited to produce documentary or other evidence, fails to do so within the period of time determined by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of Proceedings

Article 29

1. When it is satisfied that the parties have had a reasonable opportunity to present their respective cases on matters to be decided in an award, the arbitral tribunal may declare the proceedings closed with regard to such matters.
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon the application of a

party, to reopen the proceedings on the matters with regard to which the proceedings were closed pursuant to Article 29(1) at any time before the award on such matters is made.

Waiver of Rules

Article 30

If a party knows that any provision of, or requirement under, these Rules or any other applicable procedural rule has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, it shall be deemed to have waived its right to raise an objection.

Section IV. The Award

Decisions

Article 31

1. If the arbitral tribunal is composed of more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone.
2. If authorized by the arbitral tribunal, the presiding arbitrator may decide on questions of procedure, subject to revision by the arbitral tribunal.

Form and Effect of the Award

Article 32

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards. If appropriate, the arbitral tribunal may also award costs in awards that are not final.
2. The award shall be made in writing and shall be final and binding on the parties.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall specify the seat of the arbitration and the date on which the award was made. Where the arbitral tribunal is composed of more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. The publication of the award is governed by Article 44.
6. Originals of the award signed by the arbitrators shall be communicated by the arbitral tribunal to the parties and to the Secretariat. The Secretariat shall retain a copy of the award.

Applicable Law, Amiable Compositeur

Article 33

1. The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.
2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the trade usages applicable to the transaction.

Settlement or Other Grounds for Termination

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on

agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in Article 34(1), the arbitral tribunal shall give advance notice to the parties that it may issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order, unless a party raises justifiable grounds for objection.
3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties and to the Secretariat. Where an arbitral award on agreed terms is made, Articles 32(2) and (4) to (6) shall apply.

Interpretation of the Award

Article 35

1. Within thirty days after the receipt of the award, a party, with notice to the Secretariat and to the other parties, may request that the arbitral tribunal give an interpretation of the award. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request.
2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The Court may extend this time limit. The interpretation shall form part of the award and Articles 32(2) to (6) shall apply.

Correction of the Award

Article 36

1. Within thirty days after the receipt of the award, a party, with notice to the Secretariat and to the other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request.

2. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.
3. Such corrections shall be in writing, and Articles 32(2) to (6) shall apply.

Additional Award

Article 37

1. Within thirty days after the receipt of the award, a party, with notice to the Secretariat and the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request.
2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request. The Court may extend this time-limit.
3. Articles 32(2) to (6) shall apply to any additional award.

Costs

Article 38

The award shall contain a determination of the costs of the arbitration. The term "costs" includes only:

- (a) The fees of the arbitral tribunal, to be stated separately as to each arbitrator and any secretary, and to be determined by the arbitral tribunal itself in accordance with Articles 39 and 40(3) to (5);
- (b) The travel and other expenses incurred by the arbitral tribunal and any secretary;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses, to the extent such expenses are approved by the arbitral tribunal;

- (e) The costs for legal representation and assistance, if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) The Registration Fee and the Administrative Costs in accordance with Appendix B (Schedule of Costs);
- (g) The Registration Fee, the fees and expenses of any emergency arbitrator, and the costs of expert advice and of other assistance required by such emergency arbitrator, determined in accordance with Article 43(9).

Article 39

1. The fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter of the arbitration, the time spent and any other relevant circumstances of the case, including the discontinuation of the arbitral proceedings in case of settlement. In the event of a discontinuation of the arbitral proceedings, the fees of the arbitral tribunal may be less than the minimum amount resulting from Appendix B (Schedule of Costs).
2. The fees and expenses of the arbitral tribunal shall be determined in accordance with Appendix B (Schedule of Costs).
3. The arbitral tribunal shall decide on the allocation of its fees among its members. As a rule, the presiding arbitrator shall receive between 40% and 50% and each co-arbitrator between 25% and 30% of the total fees, in view of the time and efforts spent by each arbitrator.

Article 40

1. Except as provided in Article 40(2), the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in Article 38(e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs among the parties if it determines that an apportionment is reasonable.

3. If the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall determine the costs of the arbitration referred to in Articles 38 and 39 in the order or award.
4. Before rendering an award, termination order, or decision on a request under Articles 35 to 37, the arbitral tribunal shall submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination on costs made pursuant to Articles 38(a) to (c) and (f) and Article 39. Any such approval or adjustment shall be binding upon the arbitral tribunal.
5. No additional costs may be charged by an arbitral tribunal for interpretation, correction, or completion of its award under Articles 35 to 37, unless they are justified by the circumstances.

Deposit of Costs

Article 41

1. The arbitral tribunal, once constituted, and after consulting with the Court, shall request each party to deposit an equal amount as an advance for the costs referred to in Articles 38(a) to (c) and the Administrative Costs referred to in Article 38(f). Any Provisional Deposit paid by a party in accordance with Appendix B (Schedule of Costs) shall be considered as a partial payment of its deposit. The arbitral tribunal shall provide a copy of such request to the Secretariat.
2. Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the arbitral tribunal may in its discretion establish separate deposits.
3. During the course of the arbitral proceedings, the arbitral tribunal may, after consulting with the Court, request supplementary deposits from the parties. The arbitral tribunal shall provide a copy of any such request to the Secretariat.
4. If the required deposits are not paid in full within fifteen days after the receipt of the request, the arbitral tribunal shall notify the parties in order that one or more of them may make the required payment. If such pay-

ment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. In its final award, the arbitral tribunal shall issue to the parties a statement of account of the deposits received. Any unused amount shall be returned to the parties.

Section V. Other Provisions

Expedited Procedure

Article 42

1. If the parties so agree, or if Article 42(2) is applicable, the arbitral proceedings shall be conducted in accordance with an Expedited Procedure based upon the foregoing provisions of these Rules, subject to the following changes:
 - (a) The file shall be transmitted to the arbitral tribunal only upon payment of the Provisional Deposit as required by Section 1.4 of Appendix B (Schedule of Costs);
 - (b) After the submission of the Answer to the Notice of Arbitration, the parties shall, as a rule, be entitled to submit only a Statement of Claim, a Statement of Defence (and counterclaim) and, where applicable, a Statement of Defence in reply to the counterclaim;
 - (c) Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the arbitral tribunal shall hold a single hearing for the examination of the witnesses and expert witnesses, as well as for oral argument;
 - (d) The award shall be made within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal. In exceptional circumstances, the Court may extend this time-limit;
 - (e) The arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.
2. The following provisions shall apply to all cases in which the amount in dispute, representing the aggregate of the claim and the counterclaim (or any set-off defence), does not exceed CHF 1,000,000 (one million Swiss

francs), unless the Court decides otherwise, taking into account all relevant circumstances:

- (a) The arbitral proceedings shall be conducted in accordance with the Expedited Procedure set forth in Article 42(1);
- (b) The case shall be referred to a sole arbitrator, unless the arbitration agreement provides for more than one arbitrator;
- (c) If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, the Secretariat shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree to refer the case to a sole arbitrator, the fees of the arbitrators shall be determined in accordance with Appendix B (Schedule of Costs), but shall in no event be less than the fees resulting from the hourly rate set out in Section 2.8 of Appendix B.

Emergency Relief

Article 43

1. Unless the parties have agreed otherwise, a party requiring urgent interim measures pursuant to Article 26 before the arbitral tribunal is constituted may submit to the Secretariat an application for emergency relief proceedings (hereinafter the "Application"). In addition to the particulars set out in Articles 3(3)(b) to (e), the Application shall include:
 - (a) A statement of the interim measure(s) sought and the reasons therefor, in particular the reason for the purported urgency;
 - (b) Comments on the language, the seat of arbitration, and the applicable law;
 - (c) Confirmation of payment by check or transfer to the relevant account listed in Appendix A of the Registration Fee and of the deposit for emergency relief proceedings as required by Section 1.6 of Appendix B (Schedule of Costs).
2. As soon as possible after receipt of the Application, the Registration Fee, and the deposit for emergency relief proceedings, the Court shall appoint and transmit the file to a sole emergency arbitrator, unless
 - (a) there is manifestly no agreement to arbitrate referring to these Rules, or
 - (b) it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the Application to it.

3. If the Application is submitted before the Notice of Arbitration, the Court shall terminate the emergency relief proceedings if the Notice of Arbitration is not submitted within ten days from the receipt of the Application. In exceptional circumstances, the Court may extend this time-limit.
4. Articles 9 to 12 shall apply to the emergency arbitrator, except that the time-limits set out in Articles 11(1) and (2) are shortened to three days.
5. If the parties have not determined the seat of the arbitration, or if the designation of the seat is unclear or incomplete, the seat of the arbitration for the emergency relief proceedings shall be determined by the Court without prejudice to the determination of the seat of the arbitration pursuant to Article 16(1).
6. The emergency arbitrator may conduct the emergency relief proceedings in such a manner as the emergency arbitrator considers appropriate, taking into account the urgency inherent in such proceedings and ensuring that each party has a reasonable opportunity to be heard on the Application.
7. The decision on the Application shall be made within fifteen days from the date on which the Secretariat transmitted the file to the emergency arbitrator. This period of time may be extended by agreement of the parties or, in appropriate circumstances, by the Court. The decision on the Application may be made even if in the meantime the file has been transmitted to the arbitral tribunal.
8. A decision of the emergency arbitrator shall have the same effects as a decision pursuant to Article 26. Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal.
9. The decision on the Application shall include a determination of costs as referred to in Article 38(g). Before rendering the decision on the Application, the emergency arbitrator shall submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination of costs. The costs shall be payable out of the deposit for emergency relief proceedings. The determination of costs pursuant to Articles 38(d) and (e) and the apportionment of all costs among the parties shall be decided by

the arbitral tribunal. If no arbitral tribunal is constituted, the determination of costs pursuant to Articles 38(d) and (e) and the apportionment of all costs shall be decided by the emergency arbitrator in a separate award.

10. Any measure granted by the emergency arbitrator ceases to be binding on the parties either upon the termination of the emergency relief proceedings pursuant to Article 43(3), upon the termination of the arbitral proceedings, or upon the rendering of a final award, unless the arbitral tribunal expressly decides otherwise in the final award.
11. The emergency arbitrator may not serve as arbitrator in any arbitration relating to the dispute in respect of which the emergency arbitrator has acted, unless otherwise agreed by the parties.

Confidentiality

Article 44

1. Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.
2. The deliberations of the arbitral tribunal are confidential.
3. An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
 - (a) A request for publication is addressed to the Secretariat;
 - (b) All references to the parties' names are deleted; and
 - (c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat.

Exclusion of Liability

Article 45

1. Neither the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, except if the act or omission is shown to constitute intentional wrongdoing or gross negligence.
2. After the award or termination order has been made and the possibilities of correction, interpretation and additional awards referred to in Articles 35 to 37 have lapsed or have been exhausted, neither the members of the board of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be under an obligation to make statements to any person about any matter concerning the arbitration. No party shall seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

APPENDIX A:

Offices of the Secretariat of the Arbitration Court

Swiss Chambers' Arbitration Institution Arbitration Court Secretariat

c/o Basel Chamber of Commerce

Aeschenvorstadt 67

P.O. Box

CH-4010 Basel

Telephone: +41 61 270 60 50

Fax: +41 61 270 60 05

E-mail: basel@swissarbitration.org

Bank details: UBS AG, CH-4002 Basel

Account No: 292-10157720.0

Clearing No: 292

Swift Code: UBSWCHZH80A

Iban: CH98 0029 2292 10157720 0

c/o Chamber of Commerce and Industry of Bern

Kramgasse 2

P.O. Box 5464

CH-3001 Bern

Telephone: +41 31 388 87 87

Fax: +41 31 388 87 88

E-mail: bern@swissarbitration.org

Bank details: BEKB

Account No: KK 16 166.151.0.44 HIV Kanton Bern

Clearing No: 790

Swift Code: KBBECH22

Iban: CH35 0079 0016 1661 5104 4

c/o Geneva Chamber of Commerce, Industry and Services

4, Boulevard du Théâtre

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CH-1211 Geneva 11
Telephone: +41 22 819 91 11
Fax: +41 22 819 91 36
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Bank details: UBS SA, Rue du Rhône 8, 1204 Genève
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Clearing No: 279
Swift Code: UBSWCHZH80A
Iban: CH13 0027 9279 HU1085331

c/o Neuchâtel Chamber of Commerce and Industry

4, rue de la Serre
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Telephone: +41 32 727 24 27
Fax: +41 32 727 24 28
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Bank details: BCN, Neuchâtel
Account No: C0029.20.09
Clearing No: 766
Swift Code: BCNNCH22
Iban: CH69 0076 6000 C002 9200 9

c/o Chamber of Commerce and Industry of Ticino

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Account No: A201021A
Clearing No: 8465
Swift Code: BSILCH22
Iban: CH64 0846 5000 0A20 1021 A

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Iban: CH44 0076 7000 U528 4781 7

c/o Zurich Chamber of Commerce

Selnaustrasse 32

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CH-8022 Zurich

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Bank details: Credit Suisse, CH-8070 Zurich

Account No: 497380-01

Clearing No: 4835

Swift Code: CRESCHZZ80A

Iban: CH62 0483 5049 7380 0100 0

APPENDIX B:

Schedule of Costs (effective as of 1 June 2012)

(All amounts in this Appendix B are in Swiss francs, hereinafter "CHF")

1. Registration Fee and Deposits

- 1.1 When submitting a Notice of Arbitration, the Claimant shall pay a non-refundable Registration Fee of
 - CHF 4,500 for arbitrations where the amount in dispute does not exceed CHF 2,000,000;
 - CHF 6,000 for arbitrations where the amount in dispute is between CHF 2,000,001 and CHF 10,000,000;
 - CHF 8,000 for arbitrations where the amount in dispute exceeds CHF 10,000,000.
- 1.2 If the amount in dispute is not quantified, the Claimant shall pay a non-refundable Registration Fee of CHF 6,000.
- 1.3 The above provisions shall apply to any counterclaim.
- 1.4 Under the Expedited Procedure, upon receipt of the Notice of Arbitration, the Court shall request the Claimant to pay a Provisional Deposit of CHF 5,000.
- 1.5 If the Registration Fee or any Provisional Deposit is not paid, the arbitration shall not proceed with respect to the related claim(s) or counterclaim(s).
- 1.6 A party applying for Emergency Relief shall pay a non-refundable Registration Fee of CHF 4,500 and a deposit as an advance for the costs of the emergency relief proceedings of CHF 20,000 together with the Application. If the Registration Fee and the deposit are not paid, the Court shall not proceed with the emergency relief proceedings.
- 1.7 In case of a request for the correction or interpretation of the award or for an additional award made pursuant to Articles 35, 36 or 37, or where a judicial authority remits an award to the arbitral tribunal, the

arbitral tribunal may request a supplementary deposit with prior approval of the Court.

2. Fees and Administrative Costs

- 2.1 The fees referred to in Articles 38(a) and (g) shall cover the activities of the arbitral tribunal and the emergency arbitrator, respectively, from the moment the file is transmitted until the final award, termination order, or decision in emergency relief proceedings.
- 2.2 Where the amount in dispute exceeds the threshold specified in Section 6 of this Appendix B, Administrative Costs⁶⁴⁰ shall be payable to the Swiss Chambers' Arbitration Institution, in addition to the Registration Fee.
- 2.3 As a rule, and except for emergency relief proceedings, the fees of the arbitral tribunal and the Administrative Costs shall be computed on the basis of the scale in Section 6 of this Appendix B, taking into account the criteria of Article 39(1). The fees of the arbitral tribunal, the deposits requested pursuant to Article 41, as well as the Administrative Costs may exceed the amounts set out in the scale only in exceptional circumstances and with prior approval of the Court.
- 2.4 Claims and counterclaims are added for the determination of the amount in dispute. The same rule applies to set-off defences, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defences will not require significant additional work.
- 2.5 Interest claims shall not be taken into account for the calculation of the amount in dispute. However, when the interest claims exceed the amount claimed as principal, the interest claims alone shall be taken into account for the calculation of the amount in dispute.

⁶⁴⁰ This is a contribution, in the maximum amount of CHF 50,000, to the Administrative Costs of the Swiss Chambers' Arbitration Institution, in addition to the Registration Fee. In the event of a discontinuation of the arbitral proceedings (Article 39(1)), the Swiss Chambers' Arbitration Institution may, in its discretion, decide not to charge all or part of the Administrative Costs.

- 2.6 Amounts in currencies other than the Swiss franc shall be converted into Swiss francs at the rate of exchange applicable at the time the Notice of Arbitration is received by the Secretariat or at the time any new claim, counterclaim, set-off defence or amendment to a claim or defence is filed.
- 2.7 If the amount in dispute is not quantified, the fees of the arbitral tribunal and the Administrative Costs shall be determined by the arbitral tribunal, taking into account all relevant circumstances.
- 2.8 Where the parties do not agree to refer the case to a sole arbitrator as provided for by Article 42(2) (Expedited Procedure), the fees of the arbitrators shall be determined in accordance with the scale in Section 6 of this Appendix B, but shall not be less than the fees resulting from the application of an hourly rate of CHF 350 (three hundred fifty Swiss francs) for the arbitrators.
- 2.9 The fees of the emergency arbitrator shall range from CHF 2,000 to CHF 20,000. They may exceed CHF 20,000 only in exceptional circumstances and with the approval of the Court.

3. Expenses

The expenses of the arbitral tribunal and the emergency arbitrator shall cover their reasonable disbursements for the arbitration, such as expenses for travel, accommodation, meals, and any other costs related to the conduct of the proceedings. The Court shall issue general guidelines for the accounting of such expenses⁶⁴¹.

4. Administration of Deposits

4.1 The Secretariat or, if so requested by the Secretariat, the arbitral tribunal, is to hold the deposits to be paid by the parties in a separate bank account which is solely used for, and clearly identified as relating to, the arbitral proceedings in question.

⁶⁴¹ The guidelines are available at www.swissarbitration.org.

4.2 With the approval of the Court, part of the deposits may from time to time be released to each member of the arbitral tribunal as an advance on costs, as the arbitration progresses.

5. Taxes and Charges Applicable to Fees

Amounts payable to the arbitral tribunal or emergency arbitrator do not include any possible value added taxes (VAT) or other taxes or charges that may be applicable to the fees of a member of the arbitral tribunal or emergency arbitrator. Parties have a duty to pay any such taxes or charges. The recovery of any such taxes or charges is a matter solely between each member of the arbitral tribunal, or the emergency arbitrator, on the one hand, and the parties, on the other.

6. Scale of Arbitrator's Fee and Administrative Costs

6.1 Sole Arbitrator

Amount in dispute (in Swiss francs)	Administrative costs		Sole Arbitrator	
	Minimum	Maximum	Minimum	Maximum
0–300,000	–	–	4% of amount	12% of amount
300,001–600,000	–	–	12,000 + 2% of amount over 300,000	36,000 + 8% of amount over 300,000
600,001–1,000,000	–	–	18,000 + 1.5% of amount over 600,000	60,000 + 6% of amount over 600,000
1,000,001–2,000,000	–	–	24,000 + 0.6% of amount over 1,000,000	84,000 + 3.6% of amount over 1,000,000
2,000,001–10,000,000	4,000 + 0.2% of amount over 2,000,000	–	30,000 + 0.38% of amount over 2,000,000	120,000 + 1.5% of amount over 2,000,000
10,000,001–20,000,000	20,000 + 0.1% of amount over 10,000,000	–	60,400 + 0.3% of amount over 10,000,000	240,000 + 0.6% of amount over 10,000,000
20,000,001–50,000,000	30,000 + 0.05% of amount over 20,000,000	–	90,400 + 0.1 % of amount over 20,000,000	300,000 + 0.2% of amount over 20,000,000
50,000,001–100,000,000	45,000 + 0.01% of amount over 50,000,000	–	120,400 + 0.06% of amount over 50,000,000	360,000 + 0.18% of amount over 50,000,000
100,000,001–250,000,000	50,000	–	150,400 + 0.02% of amount over 100,000,000	450,000 + 0.1% of amount over 100,000,000
> 250,000,000	50,000	–	180,400 + 0.01% of amount over 250,000,000	600,000 + 0.06% of amount over 250,000,000

6.2 Three Arbitrators⁶⁴²

Amount in dispute (in Swiss francs)	Administrative costs	Minimum	Maximum
0–300,000	–	10% of amount	30% of amount
300,001–600,000	–	30,000 + 5% of amount over 300,000	90,000 + 20% of amount over 300,000
600,001–1,000,000	–	45,000 + 3.75% of amount over 600,000	150,000 + 15% of amount over 600,000
1,000,001–2,000,000	–	60,000 + 1.5% of amount over 1,000,000	210,000 + 9% of amount over 1,000,000
2,000,001–10,000,000	4,000 + 0.2% of amount over 2,000,000	75,000 + 0.95% of amount over 2,000,000	300,000 + 3.75% of amount over 2,000,000
10,000,001–20,000,000	20,000 + 0.1% of amount over 10,000,000	151,000 + 0.75% of amount over 10,000,000	600,000 + 1.5% of amount over 10,000,000
20,000,001–50,000,000	30,000 + 0.05% of amount over 20,000,000	226,000 + 0.25% of amount over 20,000,000	750,000 + 0.5% of amount over 20,000,000
50,000,001–100,000,000	45,000 + 0.01% of amount over 50,000,000	301,000 + 0.15% of amount over 50,000,000	900,000 + 0.45% of amount over 50,000,000
100,000,001–250,000,000	50,000	376,000 + 0.05% of amount over 100,000,000	1,125,000 + 0.25% of amount over 100,000,000
> 250,000,000	50,000	451,000 + 0.025% of amount over 250,000,000	1,500,000 + 0.15% of amount over 250,000,000

⁶⁴² The fees of an arbitral tribunal consisting of more than one arbitrator represent those of a sole arbitrator plus 75 % for each additional arbitrator, i.e. 250% of the fees of a sole arbitrator for a three-member tribunal.

B. Standard Clause

Any dispute, controversy, or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be ... ("one", "three", "one or three");

The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country);

The arbitral proceedings shall be conducted in ... (insert desired language).

Annex C:

CAS Rules and Standard Clauses

A. CAS Rules⁶⁴³

Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*

A Joint Dispositions

S1 In order to resolve sports-related disputes through arbitration and mediation, two bodies are hereby created:

- **the International Council of Arbitration for Sport (ICAS)**
- **the Court of Arbitration for Sport (CAS).**

The disputes to which a federation, association or other sports-related body is a party are a matter for arbitration pursuant to this Code, only insofar as the statutes or regulations of the bodies or a specific agreement so provide.

The seat of both ICAS and CAS is Lausanne, Switzerland.

S2 The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS.

S3 CAS maintains a list of arbitrators and provides for the arbitral resolution of sports-related disputes through arbitration conducted by Panels composed of one or three arbitrators.

⁶⁴³ In force as from 1 March 2013.

* NOTE: In this Code, the masculine gender used in relation to any physical person shall, unless there is a specific provision to the contrary, be understood as including the feminine gender.

CAS comprises of an Ordinary Arbitration Division and an Appeals Arbitration Division.

CAS maintains a list of mediators and provides for the resolution of sports-related disputes through mediation. The mediation procedure is governed by the CAS Mediation Rules.

B The International Council of Arbitration for Sport (ICAS)

1 Composition

S4 ICAS is composed of twenty members, experienced jurists appointed in the following manner:

- a. four members are appointed by the International Sports Federations (IFs), viz. three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of Winter Olympic IFs (AIOWF), chosen from within or outside their membership;
- b. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;
- c. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
- d. four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
- e. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

S5 The members of ICAS are appointed for one or several renewable period(s) of four years. Such nominations shall take place during the last year of each four-year cycle.

Upon their appointment, the members of ICAS sign a declaration undertaking to exercise their function personally, with total objectivity and independence, in conformity with this Code. They are, in particular, bound by the confidentiality obligation provided in Article R43.

Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.

If a member of the ICAS resigns, dies or is prevented from carrying out his functions for any other reason, he is replaced, for the remaining period of his mandate, in conformity with the terms applicable to his appointment.

ICAS may grant the title of Honorary Member to any former ICAS member who has made an exceptional contribution to the development of ICAS or CAS. The title of Honorary Member may be granted posthumously.

2 Attributions

S6 ICAS exercises the following functions:

1. It adopts and amends this Code;
2. It elects from among its members for one or several renewable period(s) of four years:
 - the President;
 - two Vice-Presidents who shall replace the President if necessary, by order of seniority in age; if the office of President becomes vacant, the senior Vice-President shall exercise the functions and responsibilities of the President until the election of a new President;
 - the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS;
 - the deputies of the two Division Presidents who can replace them in the event they are prevented from carrying out their functions.

The election of the President and of the Vice-Presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The election of the President, Vice-Presidents, Division Presidents and their deputies shall take place at the ICAS meeting following the appointment of the ICAS members for the forthcoming period of four years.

3. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators; it can also remove them from those lists;
4. It resolves challenges to and removals of arbitrators, and performs any other functions identified in the Procedural Rules;
5. It is responsible for the financing of CAS. For such purpose, *inter alia*:
 - 5.1 it receives and manages the funds allocated to its operations;
 - 5.2 it approves the ICAS budget prepared by the CAS Court Office;
 - 5.3 it approves the annual accounts of CAS prepared by the CAS Court Office;
6. It appoints the CAS Secretary General and may terminate his duties upon proposal of the President;
7. It supervises the activities of the CAS Court Office;
8. It provides for regional or local, permanent or *ad hoc* arbitration;
9. It may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund;
10. It may take any other action which it deems necessary to protect the rights of the parties and to promote the settlement of sports-related disputes through arbitration and mediation.

S7 ICAS exercises its functions itself, or through its Board, consisting of the President, the two Vice-Presidents of the ICAS, the President of the Ordinary Arbitration Division and the President of the CAS Appeals Arbitration Division.

The ICAS may not delegate to the Board the functions listed under Article S6, paragraphs 1, 2, 5.2 and 5.3.

3 Operation

S8 1. ICAS meets whenever the activity of CAS so requires, but at least once a year.

A quorum at meetings of the ICAS consists of at least half its members. Decisions are taken during meetings or by correspondence by a majority of the votes cast. Abstentions and blank or spoiled votes are not taken into consideration in the calculation of the required majority. Voting by proxy is not allowed. Voting is held by secret

ballot if the President so decides or upon the request of at least a quarter of the members present. The President has a casting vote in the event of a tie.

2. Any modification of this Code requires a majority of two-thirds of the ICAS members. Furthermore, the provisions of Article S8.1 apply.
3. Any ICAS member is eligible to be a candidate for the ICAS Presidency. Registration as a candidate shall be made in writing and filed with the Secretary General no later than four months prior to the election meeting.

The election of the ICAS President shall take place at the ICAS meeting following the appointment of the ICAS members for a period of four years. The quorum for such election is three-quarters of the ICAS members. The President is elected by an absolute majority of the members present. If there is more than one candidate for the position of President, successive rounds of voting shall be organized. If no absolute majority is attained, the candidate having the least number of votes in each round shall be eliminated. In the case of a tie among two or more candidates, a vote between those candidates shall be organized and the candidate having the least number of votes shall be eliminated. If following this subsequent vote, there is still a tie, the candidate(s) senior in age is (are) selected.

If a quorum is not present or if the last candidate in the voting rounds, or the only candidate, does not obtain an absolute majority in the last round of voting, the current president shall remain in his position until a new election can be held. The new election shall be held within four months of the unsuccessful election and in accordance with the above rules, with the exception that the President is elected by a simple majority when two candidates or less remain in competition.

The election is held by secret ballot. An election by correspondence is not permitted.

4. The CAS Secretary General takes part in the decision-making with a consultative voice and acts as Secretary to ICAS.

S9 The President of ICAS is also President of CAS. He is responsible for the ordinary administrative tasks pertaining to the ICAS.

S10 The Board of ICAS meets at the invitation of the ICAS President.

The CAS Secretary General takes part in the decision-making with a consultative voice and acts as Secretary to the Board.

A quorum of the Board consists of three of its members. Decisions are taken during meetings or by correspondence by a simple majority of those voting; the President has a casting vote in the event of a tie.

S11 A member of ICAS or the Board may be challenged when circumstances allow legitimate doubt to be cast on his independence *vis-à-vis* a party to an arbitration which must be the subject of a decision by ICAS or the Board pursuant to Article S6, paragraph 4. He shall pre-emptively disqualify himself when the subject of a decision is an arbitration procedure in which a sports-related body to which he belongs appears as a party or in which a member of the law firm to which he belongs is an arbitrator or counsel.

ICAS, with the exception of the challenged member, shall determine the process with respect to the procedure for challenge.

The disqualified member shall not take part in any deliberations concerning the arbitration in question and shall not receive any information on the activities of ICAS and the Board concerning such arbitration.

C The Court of Arbitration for Sport (CAS)

1 Mission

S12 CAS constitutes Panels which have the responsibility of resolving disputes arising in the context of sport by arbitration and/or mediation pursuant to the Procedural Rules (Articles R27 *et seq.*).

For such purpose, CAS provides the necessary infrastructure, effects the constitution of Panels and oversees the efficient conduct of the proceedings.

The responsibilities of Panels are, *inter alia*:

- a. to resolve the disputes referred to them through ordinary arbitration;
- b. to resolve through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide
- c. to resolve the disputes that are referred to them through mediation.

2 Arbitrators and mediators

S13 The personalities designated by ICAS, pursuant to Article S6, paragraph 3, appear on the CAS list for one or several renewable period(s) of four years. ICAS reviews the complete list every four years; the new list enters into force on 1 January of the year following its establishment.

There shall be not less than one hundred fifty arbitrators and fifty mediators.

S14 In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes.

In establishing the list of CAS mediators, the ICAS shall appoint personalities with experience in mediation and a good knowledge of sport in general.

S15 ICAS shall publish such lists of CAS arbitrators and mediators, as well as all subsequent modifications thereof.

S16 When appointing arbitrators and mediators, the ICAS shall consider continental representation and the different juridical cultures.

S17 Subject to the provisions of the Procedural Rules (Articles R27 *et seq.*), if a CAS arbitrator resigns, dies or is unable to carry out his functions for any other reason, he may be replaced, for the remaining period of his mandate, in conformity with the terms applicable to his appointment.

S18 Arbitrators who appear on the CAS list may serve on Panels constituted by either of the CAS Divisions.

Upon their appointment, CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.

CAS arbitrators and mediators may not act as counsel for a party before the CAS.

S19 CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.

ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if he violates any rule of this Code or if his action affects the reputation of ICAS and/or CAS.

3 Organisation of the CAS

S20 The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.

a. **The Ordinary Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 *et seq.*).

b. **The Appeals Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. It performs, through the intermediary of its President or his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 *et seq.*).

Arbitration proceedings submitted to CAS are assigned by the CAS Court Office to the appropriate Division. Such assignment may not be contested by the parties nor be raised by them as a cause of irregularity. In the event of a change of circumstances during the proceedings, the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division. Such re-assignment shall not affect the constitution of the Panel nor the validity of any proceedings, decisions or orders prior to such re-assignment.

The CAS mediation system operates pursuant to the CAS Mediation Rules.

- S21 The President of either Division may be challenged if circumstances exist that give rise to legitimate doubts with regard to his independence *vis-à-vis* one of the parties to an arbitration assigned to his Division. He shall pre-emptively disqualify himself if, in arbitration proceedings assigned to his Division, one of the parties is a sports-related body to which he belongs, or if a member of the law firm to which he belongs is acting as arbitrator or counsel.

ICAS shall determine the procedure with respect to any challenge. The challenged President shall not participate in such determination.

If the President of a Division is challenged, the functions relating to the efficient running of the proceedings conferred upon him by the Procedural Rules (Articles R27 *et seq.*), shall be performed by his deputy or by the CAS President, if the deputy is also challenged. No disqualified person shall receive any information concerning the activities of CAS regarding the arbitration proceedings giving rise to his disqualification.

- S22 CAS includes a Court Office composed of the Secretary General and one or more Counsel, who may represent the Secretary General when required.

The CAS Court Office performs the functions assigned to it by this Code.

D Miscellaneous Provisions

- S23 These Statutes are supplemented by the Procedural Rules adopted by ICAS.
- S24 The English text and the French text are authentic. In the event of any divergence, the French text shall prevail.
- S25 These Statutes may be amended by decision of the ICAS pursuant to Article S8.
- S26 These Statutes and Procedural Rules come into force by the decision of ICAS, taken by a two-thirds majority.

Procedural Rules

A General Provisions

R27 Application of the Rules

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.

R28 Seat

The seat of CAS and of each Arbitration Panel (Panel) is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.

R29 Language

The CAS working languages are French and English. In the absence of agreement between the parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, shall select one of these two languages as the language of the arbitration at the outset of the procedure, taking into account all relevant circumstances. Thereafter, the proceedings shall be conducted exclusively in that language, unless the parties and the Panel agree otherwise.

The parties may request that a language other than French or English be selected, provided that the Panel and the CAS Court Office agree. If agreed, the CAS Court

Office determines with the Panel the conditions related to the choice of the language; the Panel may order that the parties bear all or part of the costs of translation and interpretation.

The Panel or, prior to the constitution of the Panel, the Division President may order that all documents submitted in languages other than that of the proceedings be filed together with a certified translation in the language of the proceedings.

R30 Representation and Assistance

The parties may be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to the CAS Court Office, the other party and the Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office.

R31 Notifications and Communications

All notifications and communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office. The notifications and communications shall be sent to the address shown in the arbitration request or the statement of appeal, or to any other address specified at a later date.

All arbitration awards, orders, and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt.

The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted by facsimile in advance, the filing is valid upon receipt of the facsimile by the CAS Court Office provided that the written submission is also filed by courier within the relevant time limit, as mentioned above.

Filing of the above-mentioned submissions by electronic mail is permitted under the conditions set out in the CAS guidelines on electronic filing.

The exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail, provided that they are listed and that each exhibit can be clearly identified; the CAS Court Office may then forward them by the same means. Any other communications from the parties intended for the CAS Court Office or the Panel shall be sent by courier, facsimile or electronic mail to the CAS Court Office.

R32 Time limits

The time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location where the notification has to be made, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification is to be made, the time limit shall expire at the end of the first subsequent business day.

Upon application on justified grounds and after consultation with the other party (or parties), either the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, may

extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant and provided that the initial time limit has not already expired. With the exception of the time limit for the statement of appeal, any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General without consultation with the other party or parties.

The Panel or, if it has not yet been constituted, the President of the relevant Division may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.

R33 Independence and Qualifications of Arbitrators

Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect his independence with respect to any of the parties.

Every arbitrator shall appear on the list drawn up by the ICAS in accordance with the Statutes which are part of this Code, shall have a good command of the language of the arbitration and shall be available as required to complete the arbitration expeditiously.

R34 Challenge

An arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence or over his impartiality. The challenge shall be brought within seven days after the ground for the challenge has become known.

Challenges shall be determined by the ICAS Board, which has the discretion to refer a case to ICAS. The challenge of an arbitrator shall be lodged by the party raising it, in the form of a petition setting forth the facts giving rise to the challenge, which shall be sent to the CAS Court Office. The ICAS Board or ICAS shall rule on the challenge after the other party (or parties), the challenged arbitrator and the other arbitrators, if any, have been invited to submit written comments. Such comments shall be communicated by the CAS Court Office to the parties and to the other arbitrators, if any. The ICAS Board or ICAS shall give brief reasons for its decision and may decide to publish it.

R35 Removal

An arbitrator may be removed by the ICAS if he refuses to or is prevented from carrying out his duties or if he fails to fulfil his duties pursuant to this Code within a reasonable time. ICAS may exercise such power through its Board. The Board shall invite the parties, the arbitrator in question and the other arbitrators, if any, to submit written comments and shall give brief reasons for its decision. Removal of an arbitrator cannot be requested by a party.

R36 Replacement

In the event of resignation, death, removal or successful challenge of an arbitrator, such arbitrator shall be replaced in accordance with the provisions applicable to his appointment. Unless otherwise agreed by the parties or otherwise decided by the Panel, the proceedings shall continue without repetition of any aspect thereof prior to the replacement.

R37 Provisional and Conservatory Measures

No party may apply for provisional or conservatory measures under these Procedural Rules before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted.

Upon filing of the request for provisional measures, the Applicant shall pay a non-refundable Court Office fee of Swiss francs 1,000.—, without which CAS shall not proceed. The CAS Court Office fee shall not be paid again upon filing of the request for arbitration or of the statement of appeal in the same procedure.

The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter, the Panel may, upon application by a party, make an order for provisional or conservatory measures. In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.

Should an application for provisional measures be filed, the President of the relevant Division or the Panel shall invite the other party (or parties)

to express a position within ten days or a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order on an expedited basis and shall first rule on the *prima facie* CAS jurisdiction. The Division President may terminate the arbitration procedure if he rules that the CAS clearly has no jurisdiction. In cases of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent is subsequently heard.

When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s).

The procedure for provisional measures and the provisional measures already granted, if any, are automatically annulled if the party requesting them does not file a related request for arbitration within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit provided by Article R49 of the Code (appeals procedure). Such time limits cannot be extended.

Provisional and conservatory measures may be made conditional upon the provision of security.

B Special Provisions Applicable to the Ordinary Arbitration Procedure

R38 Request for Arbitration

The party intending to submit a matter to arbitration under these Procedural Rules (Claimant) shall file a request with the CAS Court Office containing:

- the name and full address of the Respondent(s);
- a brief statement of the facts and legal argument, including a statement of the issue to be submitted to the CAS for determination;
- its request for relief;

- a copy of the contract containing the arbitration agreement or of any document providing for arbitration in accordance with these Procedural Rules;
- any relevant information about the number and choice of the arbitrator(s); if the relevant arbitration agreement provides for three arbitrators, the name of the arbitrator from the CAS list of arbitrators chosen by the Claimant.

Upon filing its request, the Claimant shall pay the Court Office fee provided in Article R64.1.

If the above-mentioned requirements are not fulfilled when the request for arbitration is filed, the CAS Court Office may grant a single short deadline to the Claimant to complete the request, failing which the CAS Court Office shall not proceed.

R39 Initiation of the Arbitration by CAS and Answer – CAS Jurisdiction

Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion. It shall communicate the request to the Respondent, call upon the parties to express themselves on the law applicable to the merits of the dispute and set time limits for the Respondent to submit any relevant information about the number and choice of the arbitrator(s) from the CAS list, as well as to file an answer to the request for arbitration.

The answer shall contain:

- a brief statement of defence;
- any defence of lack of jurisdiction;
- any counterclaim.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Claimant of his share of the advance of costs provided by Article R64.2 of this Code.

The Panel shall rule on its own jurisdiction, irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Where a party files a request for arbitration related to an arbitration agreement and facts similar to those which are the subject of a pending ordinary procedure before CAS, the President of the Panel, or if he has not yet been appointed, the President of the Division, may, after consulting the parties, decide to consolidate the two procedures.

R40 Formation of the Panel

R40.1 Number of Arbitrators

The Panel is composed of one or three arbitrators. If the arbitration agreement does not specify the number of arbitrators, the President of the Division shall determine the number, taking into account the circumstances of the case. The Division President may choose to appoint a Sole arbitrator when the Claimant so requests and the Respondent does not pay its share of the advance of costs within the time limit fixed by the CAS Court Office.

R40.2 Appointment of the Arbitrators

The parties may agree on the method of appointment of the arbitrators from the CAS list. In the absence of an agreement, the arbitrators shall be appointed in accordance with the following paragraphs.

If, by virtue of the arbitration agreement or a decision of the President of the Division, a sole arbitrator is to be appointed, the parties may select him by mutual agreement within a time limit of fifteen days set by the CAS Court Office upon receipt of the request. In the absence of agreement within that time limit, the President of the Division shall proceed with the appointment.

If, by virtue of the arbitration agreement, or a decision of the President of the Division, three arbitrators are to be appointed, the Claimant shall nominate its arbitrator in the request or within the time limit set in the decision on the number of arbitrators, failing which the request for ar-

bitration is deemed to have been withdrawn. The Respondent shall nominate its arbitrator within the time limit set by the CAS Court Office upon receipt of the request. In the absence of such appointment, the President of the Division shall proceed with the appointment in lieu of the Respondent. The two arbitrators so appointed shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel.

R40.3 Confirmation of the Arbitrators and Transfer of the File

An arbitrator nominated by the parties or by other arbitrators shall only be deemed appointed after confirmation by the President of the Division, who shall ascertain that each arbitrator complies with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs provided by Article R64.2 of the Code.

An *ad hoc* clerk independent of the parties may be appointed to assist the Panel. His fees shall be included in the arbitration costs.

R41 Multiparty Arbitration

R41.1 Plurality of Claimants / Respondents

If the request for arbitration names several Claimants and/or Respondents, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1.

If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed and there are several Claimants, the Claimants shall jointly nominate an arbitrator. If three arbitrators are to be appointed and there are several Respondents, the Respondents shall jointly nominate an arbitrator. In the absence of such a joint nomina-

tion, the President of the Division shall proceed with the particular appointment.

If there are three or more parties with divergent interests, both arbitrators shall be appointed in accordance with the agreement between the parties. In the absence of agreement, the arbitrators shall be appointed by the President of the Division in accordance with Article R40.2.

In all cases, the arbitrators shall select the President of the Panel in accordance with Article R40.2.

R41.2 Joinder

If a Respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer, together with the reasons therefor, and file an additional copy of its answer. The CAS Court Office shall communicate this copy to the person whose participation is requested and fix a time limit for such person to state its position on its participation and to submit a response pursuant to Article R39. It shall also fix a time limit for the Claimant to express its position on the participation of the third party.

R41.3 Intervention

If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The CAS Court Office shall communicate a copy of this application to the parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.

R41.4 Joint Provisions on Joinder and Intervention

A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.

Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account,

in particular, the *prima facie* existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.

If the President of the Division accepts the participation of the third party, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall nominate the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

After consideration of submissions by all parties concerned, the Panel shall determine the status of the third party and its rights in the procedure.

After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix.

R42 Conciliation

The President of the Division, before the transfer of the file to the Panel, and thereafter the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

R43 Confidentiality

Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings

without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.

R44 Procedure before the Panel

R44.1 Written Submissions

The proceedings before the Panel comprise written submissions and, if the Panel deems it appropriate, an oral hearing. Upon receipt of the file and if necessary, the President of the Panel shall issue directions in connection with the written submissions. As a general rule, there shall be one statement of claim, one response and, if the circumstances so require, one reply and one second response. The parties may, in the statement of claim and in the response, raise claims not contained in the request for arbitration and in the answer to the request. Thereafter, no party may raise any new claim without the consent of the other party.

Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.

In their written submissions, the parties shall list the name(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, and shall state any other evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions, unless the President of the Panel decides otherwise.

If a counterclaim and/or jurisdictional objection is filed, the CAS Court Office shall fix a time limit for the Claimant to file an answer to the counterclaim and/or jurisdictional objection.

R44.2 Hearing

If a hearing is to be held, the President of the Panel shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the

Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the Respondent is heard last.

The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant. Unless the parties agree otherwise, the hearings are not public. Minutes of the hearing may be taken. Any person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person.

The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.

The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. With the agreement of the parties, he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement.

The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance.

Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanctions of perjury.

Once the hearing is closed, the parties shall not be authorized to produce further written pleadings, unless the Panel so orders.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.

R44.3 Evidentiary Proceedings Ordered by the Panel

A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant.

If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts.

The Panel shall consult the parties with respect to the appointment and terms of reference of any expert. The expert shall be independent of the parties. Before appointing him, the Panel shall invite him to immediately disclose any circumstances likely to affect his independence with respect to any of the parties.

R44.4 Expedited Procedure

With the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor.

R44.5 Default

If the Claimant fails to submit its statement of claim in accordance with Article R44.1 of the Code, the request for arbitration shall be deemed to have been withdrawn.

If the Respondent fails to submit its response in accordance with Article R44.1 of the Code, the Panel may nevertheless proceed with the arbitration and deliver an award.

If any of the parties, or its witnesses, has been duly summoned and fails to appear at the hearing, the Panel may nevertheless proceed with the hearing and deliver an award.

R45 Law Applicable to the Merits

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.

R46 Award

The award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice. Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to delivery of the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award notified by the CAS Court Office shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.

C Special Provisions Applicable to the Appeal Arbitration Procedure

R47 Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.

R48 Statement of Appeal

The Appellant shall submit to CAS a statement of appeal containing:

- the name and full address of the Respondent(s);
- a copy of the decision appealed against;
- the Appellant's request for relief;
- the nomination of the arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator;
- if applicable, an application to stay the execution of the decision appealed against, together with reasons;
- a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS.

Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.2.

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed.

R49 Time limit for Appeal

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties.

R50 Number of Arbitrators

The appeal shall be submitted to a Panel of three arbitrators, unless the parties have agreed to a Panel composed of a sole arbitrator or, in the

absence of any agreement between the parties regarding the number of arbitrators, the President of the Division decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, including whether or not the Respondent has paid its share of the advance of costs within the time limit fixed by the CAS Court Office.

When two or more cases clearly involve the same issues, the President of the Appeals Arbitration Division may invite the parties to agree to refer these cases to the same Panel; failing any agreement between the parties, the President of the Division shall decide.

R51 Appeal Brief

Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit.

In his written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise.

R52 Initiation of the Arbitration by the CAS

Unless it appears from the outset that there is clearly no arbitration agreement referring to CAS or that the agreement is clearly not related to the dispute at stake, CAS shall take all appropriate actions to set the arbitration in motion. The CAS Court Office shall communicate the statement of appeal to the Respondent, and the President of the Division shall proceed with the formation of the Panel in accordance with Articles R53 and R54. If applicable, he shall also decide promptly on any application for a stay or for interim measures.

The CAS Court Office shall send a copy of the statement of appeal and appeal brief to the authority which issued the challenged decision, for information .

With the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure.

Where a party files a statement of appeal in connection with a decision which is the subject of a pending appeal before CAS, the President of the Panel, or if he has not yet been appointed, the President of the Division, may decide, after inviting submissions from the parties, to consolidate the two procedures.

R53 Nomination of Arbitrator by the Respondent

Unless the parties have agreed to a Panel composed of a sole arbitrator or the President of the Division considers that the appeal should be submitted to a sole arbitrator, the Respondent shall nominate an arbitrator within ten days after receipt of the statement of appeal. In the absence of a nomination within such time limit, the President of the Division shall make the appointment.

R54 Appointment of the Sole Arbitrator or of the President and Confirmation of the Arbitrators by CAS

If, by virtue of the parties' agreement or of a decision of the President of the Division, a sole arbitrator is to be appointed, the President of the Division shall appoint the sole arbitrator upon receipt of the motion for appeal or as soon as a decision on the number of arbitrators has been rendered.

If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators. The arbitrators nominated by the parties shall only be deemed appointed after confirmation by the President of the Division. Before proceeding with such confirmation, the President of the Division shall ensure that the arbitrators comply with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation of the Panel and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs in accordance with Article R64.2 of the Code.

An *ad hoc* clerk, independent of the parties, may be appointed to assist the Panel. His fees shall be included in the arbitration costs.

Article R41 applies *mutatis mutandis* to the appeals arbitration procedure, except that the President of the Panel is appointed by the President of the Appeals Division.

R55 Answer of the Respondent – CAS Jurisdiction

Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS Court Office an answer containing:

- a statement of defence;
- any defence of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intends to rely;
- the name(s) of any witnesses, including a brief summary of their expected testimony; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise;
- the name(s) of any experts he intends to call, stating their area of expertise, and state any other evidentiary measure which he requests.

If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant of his share of the advance of costs in accordance with Art. R64.2.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

R56 Appeal and answer complete – Conciliation

Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.

The Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

R57 Scope of Panel's Review – Hearing

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.

The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.

If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award.

R58 Law Applicable to the merits

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

R59 Award

The award shall be rendered by a majority decision, or in the absence of a majority, by the President alone. It shall be written, dated and signed. The award shall state brief reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice.

Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award, notified by the CAS Court Office, shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel.

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.

D Special Provisions Applicable to the Consultation Proceedings

R60 [abrogated]

R61 [abrogated]

R62 [abrogated]

E Interpretation

R63 A party may, not later than 45 days following the notification of the award, apply to CAS for the interpretation of an award issued in an ordinary or appeals arbitration, if the operative part of the award is unclear, incomplete, ambiguous, if its components are self-contradictory or contrary to the reasons, or if the award contains clerical mistakes or mathematical miscalculations.

When an application for interpretation is filed, the President of the relevant Division shall review whether there are grounds for interpretation. If so, he shall submit the request for interpretation to the Panel which rendered the award. Any Panel members who are unable to act at such time shall be replaced in accordance with Article R36. The Panel shall rule on the request within one month following the submission of the request for interpretation to the Panel.

F Costs of the Arbitration Proceedings

R64 General

R64.1 Upon filing of the request/statement of appeal, the Claimant/Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.—,

without which the CAS shall not proceed. The Panel shall take such fee into account when assessing the final amount of costs.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R64.2 Upon formation of the Panel, the CAS Court Office shall fix, subject to later changes, the amount, the method and the time limits for the payment of the advance of costs. The filing of a counterclaim or a new claim may result in the calculation of additional advances.

To determine the amount to be paid in advance, the CAS Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant(s)/Appellant(s) and the Respondent(s). If a party fails to pay its share, another may substitute for it; in case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration; this provision applies *mutatis mutandis* to any counterclaim.

R64.3 Each party shall pay for the costs of its own witnesses, experts and interpreters.

If the Panel appoints an expert or an interpreter, or orders the examination of a witness, it shall issue directions with respect to an advance of costs, if appropriate.

R64.4 At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- the CAS Court Office fee,
- the administrative costs of the CAS calculated in accordance with the CAS scale,
- the costs and fees of the arbitrators,
- the fees of the *ad hoc* clerk, if any, calculated in accordance with the CAS fee scale,
- a contribution towards the expenses of the CAS, and
- the costs of witnesses, experts and interpreters.

The final account of the arbitration costs may either be included in the award or communicated separately to the parties.

R64.5 In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.

R65 Appeals against decisions issued by international federations in disciplinary matters

R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue.

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.— without which CAS shall not proceed and the appeal shall be deemed withdrawn.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses.

es incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4 If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either *ex officio* or upon request of the President of the Panel.

R66 Consultation Proceedings

[abrogated]

G Miscellaneous Provisions

R67 These Rules are applicable to all procedures initiated by the CAS as from 1 March 2013. The procedures which are pending on 1 March 2013 remain subject to the Rules in force before 1 March 2013, unless both parties request the application of these Rules.

R68 CAS arbitrators, CAS mediators, ICAS and its members, CAS and its employees are not liable to any person for any act or omission in connection with any CAS proceeding.

R69 The French text and the English text are authentic. In the event of any discrepancy, the French text shall prevail.

R70 The Procedural Rules may be amended pursuant to Article S8.

B. Standard Clauses

Ordinary arbitration procedure

1. Arbitration clause to be inserted in a contract

“Any dispute arising from or related to the present contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of sports-related arbitration.”

Optional explanatory phrases

“The Panel will consist of one [or three] arbitrator(s).”

“The language of the arbitration will be...”

2. Arbitration agreement concluded after the dispute has arisen

1. [Brief description of the dispute]
2. The dispute will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and settled definitively in accordance with the Code of sports-related arbitration.
3. **Alternative 1**

The Panel set in operation by the Court of Arbitration for Sport will consist of a sole arbitrator designated by the President of the CAS Division concerned.

Alternative 2

The Panel set in operation by the Court of Arbitration for Sport will consist of three arbitrators. Each party designates the following arbitrator:

- Claimant: Mr/Mrs ... [insert the name of a person included on the list of CAS arbitrators (see Annex I)];
- Defendant: Mr/Mrs [insert the name of a person included on the list of CAS arbitrators (see Annex I)];

These two arbitrators will designate the President of the Panel within 30 days following the signature of this agreement. If no agreement is reached within this time limit, the President of the Division concerned will designate the President of the Panel.

Appeals arbitration procedure

1. Arbitration clause to be inserted within the statutes of a sports federation, association or other sports body

“Any decision made by ... [insert the name of the disciplinary tribunal or similar court of the sports federation, association or sports body which constitutes the highest internal tribunal] may be submitted exclusively by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of sports-related arbitration. The time limit for appeal is twenty-one days after the reception of the decision concerning the appeal.”

2. Acceptance of the arbitration clause by athletes

It is important that athletes expressly accept in writing this clause of the statutes. They may do so either by means of a general written declaration applicable to all future disputes between them and the sports federation, association or other sports body (see section a below), or by a written declaration limited to a specific sports event (see section b below).

- **Standard general declaration**

“I the undersigned ... accept the statutes of ...[name of the federation], in particular the provision which foresees the exclusive competence of the Court of Arbitration for Sport.”

- **Declaration limited to an event**

“Within the framework of my participation in ... [name of the event], I the undersigned ... accept that any decision made by the highest internal tribunal in relation to this event may be the object of appeal arbitration proceedings pursuant to the Code of sports-related arbitration of the Court of Arbitration for Sport in Lausanne, Switzerland. I accept the competence of the CAS, excluding all recourse to ordinary courts.”

Note: The validity of the clause excluding recourse to ordinary courts is not recognized by all national legal systems.

Federations and organizers are recommended to check the validity of this clause within their own legal system.

NKF Series of Publications

Publication	18	(2014)	Switzerland's New Financial Market Architecture (not available in book stores)
Publication	17	(2011)	Swiss Association (not available in book stores)
Publication	16	(2010)	Das schweizerische Prozessrecht im Umbruch (not available in book stores)
Publication	15	(2010)	Die neue schweizerische Zivilprozessordnung (not available in book stores)
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Publication	12	(2007)	Neuerungen im Schweizer Wirtschaftsrecht New Features of Swiss Business Law (not available in book stores)
Publication	11	(2006)	Sport und Recht Sports and Law (also available in book stores)
Publication	10	(2002)	Corporate Governance Regeln guter Unternehmensführung in der Schweiz <i>with English summary</i> Corporate Governance Rules of a Good Corporate Management in Switzerland (out of print)
Publication	9	(2002)	Die schweizerische Stiftung <i>with English summary</i> The Swiss foundation (not available in book stores)
Publication	8	(2000)	Die schweizerische GmbH – gestern, heute und morgen <i>with English summary/avec résumé en français</i> The Swiss LLC – yesterday, today, and tomorrow (out of print)

- Publication 7 (2000) Das schweizerische Umweltrecht. Eine Übersicht
The Swiss environmental law. An overview
(also available in book stores)
- Publication 6 (1997) Einführung in das neue Schuldbetreibungs- und
Konkursrecht der Schweiz
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bankruptcy law
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- Publication 5 (1997) Statuten der Aktiengesellschaft
Articles of association of the corporation
Statuts de la société anonyme
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The revised Swiss law on investment funds
An introduction
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- Publication 3 (1994) Persönliche Haftungsrisiken nach neuem Aktienrecht
with English summary
Personal liability risks pursuant to the new corporation law
(out of print)
- Publication 2 (1992) Organisation und Organisationsreglement nach neuem
Aktienrecht
Organization and organisational regulation according to the
new corporation law
(out of print)
- Publication 1 (1992) Statuten nach neuem Aktienrecht
Articles of Incorporation pursuant to the new corporation law
Statuts conformes au nouveau droit des sociétés anonymes
Statuto secondo il nuovo diritto della società anonima
(out of print)

