

International Commercial Arbitration Practice: 21st Century Perspectives

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CHAPTER 50

Review of the Swiss Rules of International Arbitration and Commercial Mediation*

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§ 50.01 General Editor's Introduction: The Swiss Rules of International Arbitration and Commercial Mediation

As this Part of the book deals with major arbitration institutions such as the ICC, ICDR, LCIA, WIPO and CPR, we believe that the arbitration and mediation rules of the Swiss Chamber of Commerce (Swiss Rules of International Arbitration; Swiss Rules of Commercial Mediation) also bear inclusion here because of the key neutral role Switzerland has traditionally played in international diplomacy, commerce, and commercial arbitration. A number of prominent arbitral institutions are located in Switzerland (CAS, WIPO, and others), and the decisions of the Swiss-based arbitral tribunals and of the Swiss Federal Supreme Court dealing with arbitration have attracted worldwide attention for many years.

§ 50.02 Historical Background of the Swiss Chamber of Commerce

The Swiss Chambers of Commerce ("Chambers") have administered international arbitration proceedings since 1911. Historically, Geneva and Zurich hosted legions of institutional and *ad hoc* arbitration proceedings and continue to do so. Lausanne is a second runner-up with the Court of Arbitration for Sport (CAS/TAS) that handles the majority of sports-related disputes on an international level, including fast-track dispute resolution during the Olympic Games.

In 2004, six Swiss Chambers of Commerce¹ harmonized their procedural rules and adopted uniform rules for international arbitration proceedings, the Swiss Rules of International Arbitration ("Swiss Rules"). The Swiss Rules are based on the UNCITRAL Arbitration Rules, which are the most popular *ad hoc* arbitration rules. The Swiss Rules have been adapted by the Chambers for use in an institutional framework and provide some novel features, including the possibility of consolidation and joinder which will be addressed in more detail below.²

Originally, the Swiss Rules provided that the place of arbitration of all Swiss Rules arbitrations was Switzerland. In August 2004, the Chambers decided to afford the parties a possibility of choosing a place of arbitration outside of Switzerland. Article 1.2, as well as the model arbitration clause, were modified accordingly. The parties are now free to designate that the place of arbitration be Switzerland or elsewhere.

It should be noted that the Swiss arbitration law (Chapter 12 of the Private International Law Act, hereinafter "PIL Act") only applies if the place of arbitration is Switzerland.

The Chambers administer disputes unless "there is manifestly no agreement to arbitrate referring to" the Swiss Rules (Article 3.6). Clauses referring to arbitration "of the International Chamber of Commerce of (Swiss city)" and "to the appropriate

¹ The Chamber of Commerce of Basel, Berne, Geneva, Lausanne, Lugano, and Zurich, joined more recently by the Chamber of Neuchâtel. See <https://www.sccam.org/sa/en/>.

² For a comparison between the UNCITRAL Arbitration Rules and the Swiss Rules, see Mark Blessing, Comparison of the Swiss Rules with the UNCITRAL Rules and others, in: ASA / Gabrielle Kaufmann-Kohler (eds.), *The Swiss Rules of International Arbitration*, ASA Special Series, Basel 2004, p. 17 ff.

arbitration board in the Canton of X" have been accepted by the Chamber.

Although the case load of the Swiss Chambers steadily increased, only few details are known about the awards rendered by arbitral tribunals sitting under the aegis of the Swiss Rules. The main reason for the dearth of published case law is the confidential nature of arbitration proceedings and awards (Article 43). Another reason is the relative novelty of the Rules, which only came into force in 2004. A third reason is that the published case law of Swiss courts (which are public) regarding the Swiss Rules awards is scarce, yielding little information on the underlying arbitration proceedings.

In fact, contrary to all other countries that regularly host international arbitration proceedings, there is only one court in Switzerland that deals with applications to set aside international arbitral awards, namely the Swiss Federal Supreme Court ("Supreme Court"). The chances of success of any challenges are slim. The Supreme Court confirms more than 90% of the awards that are challenged. Therefore, parties dissatisfied with the outcome of an arbitration usually think twice before initiating proceedings before the Supreme Court. Consequently, the number of requests to set aside arbitral awards is relatively small.³

§ 50.03 Salient Features of the Swiss Rules

[1] Three Key Features Beyond UNCITRAL

The Swiss Rules are based on the UNCITRAL Arbitration Rules with certain important features added. Three of them merit specific discussion: the expedited proceeding; consolidation and joinder; and set-off.

[2] The Expedited Proceeding

One of the important innovations of the Swiss Rules as compared to other institutional rules is the mandatory expedited procedure for small claims (amount in dispute of less than 1 million Swiss Francs).⁴ Especially for disputes in commodity trading the expedited proceedings play an important role, as disputes are frequent, and as Geneva is, with London, one of the most important trading hubs.

Article 42(1) also allows for voluntary expedited proceedings. The parties are free to agree to subject their disputes to expedited proceedings even if the amount in dispute exceeds 1 million Swiss Francs.

According to Article 42(2) of the Swiss Rules, disputes in which the aggregate amount in dispute (including claim, counterclaim, set-off defences) does not exceed

³ For an overview of the case law of the Supreme Court in relation to Swiss Rules awards, see Matthias Scherer & Domitille Baizeau, *Swiss Rules of International Arbitration Awards Before the Swiss Federal Supreme Court*, in *The Swiss Rules of International Arbitration—Five Years of Experience* (Rainer Függen (ed.) 2009).

⁴ E. GEISINGER, "The Expedited Procedure under the Swiss Rules of International Arbitration", in ASA Special Series No. 22, at 67; F. LA SPADA, in T. ZUBERBÜHLER/C. MÜLLER/P. HABEGGER, *Swiss Rules of International Arbitration—Commentary*, Zurich 2005, p. 351; M. SCHERER, "Acceleration of Arbitration Proceedings—The Swiss Way: The Expedited Arbitration Procedure under the Swiss Rules of International Arbitration", in *SchiedsVZ* 5/2005, at 229.

one million Swiss Francs shall be subject to expedited procedure under Article 42(1). The amount is calculated by the Chambers upon receipt of the Answer to the Notice of Arbitration (Article 3(10)), irrespective of any subsequent increase or counterclaim, for instance in the Statement of Defence.

The distinctive features of expedited procedures under Article 42(1) are as follows:

1. Shortened time limits: The Chambers may shorten the time limits for the appointment of arbitrators. The award shall be made within six month of transmission of the file to the arbitrators (Article 3(12)). In exceptional circumstances, the Chambers may extend this time limit. Contrary to other institutions, the Chambers apply strict control over time limits, and almost all accelerated proceedings are completed within the original six months period.
2. Limited submissions and hearings: Unless the parties agree that the award shall be rendered on the basis of written submissions and documentary evidence, the arbitral tribunal will hold a single hearing for all expert and fact witnesses. The general principles of due process and the right to be heard apply in the expedited procedure. Awards rendered under expedited proceedings that are inconsistent with these rights can be challenged under Article 190 PIL Act like any other award made under ordinary proceedings. The Swiss Rules provide for one round of pleadings "in principle", which means that further briefs may be submitted in appropriate circumstances. There are no time limits set in advance by the Swiss Rules for the submission of briefs in accelerated proceedings.
3. Single arbitrator: Where the amount in dispute is below one million Swiss Francs, the case shall be referred to a sole arbitrator.⁵ If the arbitration agreement provides for three arbitrators, the Chambers will invite the parties to agree on a sole arbitrator. As an incentive for the parties to accept, the Swiss Rules provide that failing an agreement, the fees of the arbitrators will not be less than the fees resulting from an hourly rate of (currently) 350 Swiss Francs.
4. Summary award: The arbitral tribunal shall state the reasons upon which it relies in summary form, unless the parties have agreed that no reasons need to be given. However, the award still needs to decide all claims, failing which the award can be set aside under Article 190 PIL Act (*infra* and *ultra petita*).

A Supreme Court decision dealing with a Swiss Rules award rendered under the expedited procedure of Article 42 addressed complaints about alleged procedural vices, which to some extent are inherent to any expedited arbitration (*e.g.*, short time limits). In case 4A_294/2008 28 October 2008, the plaintiff raised a number of alleged due process violations, including lack of reasoning in the award, unequal time limits,

⁵ This does not apply to cases involving amounts in excess of one million Swiss Francs that the parties, under Article 42(1), submit voluntarily to expedited procedures.

and the striking of all affidavits produced by the parties. The Supreme Court rejected all grounds.⁶

The plaintiff (respondent in the arbitration) alleged that the arbitrator had proceeded with the arbitral proceedings without waiting for the expiration of the time limit that he had set for the plaintiff's comments on a new brief filed by the claimant. The objection was rejected because the plaintiff had sent a fax with detailed remarks within two days of having received the claimant's brief and had not indicated any intention to submit further comments. In these circumstances, the arbitrator had no reason to believe that the plaintiff would file an additional brief within the set time limit.

Further, the plaintiff objected to the purportedly unequal treatment of the parties on two accounts. The arbitrator rejected all of the plaintiff's affidavits, while admitting one of the claimant's. The Supreme Court rejected the unequal treatment claim because the "affidavit" ultimately accepted was in fact a document that had been prepared prior to the commencement of the arbitration. The plaintiff also alleged that the arbitrator set unequal time limits for the filing of the parties' submissions claiming that the claimant was given six weeks to submit its response to allegedly new arguments contained in the plaintiff's statement of defence whilst the plaintiff was only granted two weeks to respond to the claimant's additional submission. Again, the Supreme Court rejected this argument because both parties were granted two weeks from the (relevant) date on which the arbitrator had admitted the claimant's request for leave to file comments. The Supreme Court also noted that the plaintiff had at no point asked the arbitrator to extend the purportedly unequal time limit.

As to the purported lack of reasons, the Supreme Court simply referred to its standing case law under which lack of reasoning is not a ground to set aside an arbitral award. The Supreme Court also asserted that the argument was, in any event, unfounded and that the award was properly reasoned. In addition, one should note that, pursuant to Article 42 of the Swiss Rules, awards have to state reasons "in summary form" only.

[3] Consolidation of Proceedings and Joinder of Third Parties

Article 4 of the Swiss Rules is undoubtedly a daring provision in that it allows for far reaching joinder and consolidation. According to Article 4(1), new cases may be consolidated with an already pending and related arbitration under the Swiss Rules, but not, failing agreement of the parties, with proceedings pending under the rules of another institution. Consolidation is possible even among different parties. Pursuant to this provision, "[w]hen rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings." Consolidation is also possible provided an arbitral tribunal has not yet been constituted in the first proceedings. In that event, the Chambers will order consolidation once the tribunal is operational. Prior to a decision on consolidation, the Chambers will have to consult the parties and the Chambers'

⁶ 4A_294/2008 of 28 October 2008, ASA Bull. 1/2009, pp. 144-152. Sole Arbitrator: Bernd Ehle, Geneva. English translation to be published in 2 Swiss Int'l Arb. L. Rep. 2 (2008).

Special Committee. Albeit not expressly stated, the Chambers will also consult the arbitral tribunal.

Article 4(2) allows for the joinder of third parties upon request of such party or a party to the arbitration. The arbitral tribunal “shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.” However, the consent of all parties is not required. Arbitral tribunals should also consult with the Chambers although this is not expressly stated in Article 4(2).

In practice, contrary to the concerns expressed by certain authors when the Swiss Rules were first introduced in 2004, Article 4 is regularly applied and has not given rise to insurmountable obstacles or jurisdictional challenges to awards.

[4] Set-off

According to Article 21(5) of the Swiss Rules:

The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause.

This is a notable change compared to Article 19(3) of the UNCITRAL Arbitration Rules, which requires that a set-off defence arise from the same contractual relationship. If a counter-claim is brought independently rather than as a set-off, however, it must be covered by the arbitration agreement on which the main claim is based.

§ 50.04 Jurisdictional Issues

[1] Scope of Arbitration Agreements

In an award on 28 September 2007, considered by the Supreme Court in 4A_452/2008 of 29 February 2008,⁷ an arbitral tribunal determined the respective scope of application of conflicting dispute resolution clauses in related contracts. The arbitral tribunal partially denied its jurisdiction to hear a dispute arising out of a group of contracts.

In 2000 and 2004, a German and Russian corporation entered into two exclusive sales agreements for the supply of metals. The agreements provided for disputes to be subject to Swiss law with the jurisdiction of the courts of Zurich. Between 2002 and 2005, the parties entered into five supply agreements, subject to Russian law. In 2006, the parties agreed on an amendment to the exclusive sales agreement and replaced their forum selection clause with a Swiss Rules arbitration clause. In 2007, the German party commenced arbitration under the Swiss Rules, claiming amounts under the exclusivity agreement and one of the supply agreements. The Russian party objected to the arbitral tribunal's jurisdiction. The arbitral tribunal rejected all claims under the supply agreements for lack of jurisdiction.

⁷ 4A_452/2008 of 29 February 2008, ASA Bull. 2/2008, at 376; Tribunal: D Wehrli, P.A. Karrer, D Girsberger.

The German party challenged the award, but the Supreme Court rejected the application. It found no fault in the arbitral tribunal's analysis of the arbitration agreement. The parties did not refer to the earlier supply agreements when amending the arbitration clause in the exclusive sales agreements. The Court ruled that there was no evidence that the parties meant to extend the amended arbitration agreement to the old contract. Furthermore, the arbitral tribunal and the Supreme Court rejected the German party's argument that the clause in the amended agreement had to be construed widely so as to encompass disputes under related agreements. The relevant German terms "*aus oder im Zusammenhang mit diesem Vertrag*," which translate into "under or in relation to this contract," could cover disputes under other agreements, but not in the event that such other agreements themselves contain a specific dispute resolution mechanism.

Another case that was brought before the Supreme Court in 4A_376/2008 of 5 December 2008,⁸ raised two interesting jurisdictional issues: the interpretation of a pathological clause referring to an inexistent institution (with proceedings administered by the ICC, but the defendant arguing that a Swiss Rules tribunal should hear the case), and the personal scope of application of the arbitration clause.

In 2006, an Italian individual (A) entered into a sales contract with C Ltd (UK), in its capacity as trustee of D and owner of all the shares of B Ltd (UAE) and B (Canada). A acquired the shares in B Ltd through a sales contract. On the same day, A and B Ltd executed an employment contract whereby A was appointed as director of B Ltd. The employment contract contained the following arbitration agreement:

In case of any disputes deriving from the Contract, the parties agree that it should be competence (sic) of the Arbitration Court of the International Chamber of Commerce of Zürich in Lugano. The language of arbitration will be Italian. The law applied will be Swiss law.

In 2007, B Ltd commenced arbitration before the ICC against A based on the employment contract. According to B Ltd, A had unlawfully used assets of B Ltd for its own purposes. A objected to the jurisdiction of the ICC, and in the alternative, asserted a counterclaim against D, B and C Ltd. According to A, the arbitral tribunal had jurisdiction over these parties, even if they had not signed the employment contract, since they had—on the same day—signed the sales agreement that was inextricably linked to the employment contract. However, the ICC found *prima facie* that there was no arbitration agreement binding D, B and C Ltd and decided that the arbitration should not proceed with regard to these parties (pursuant to Article 6.2 of the ICC Rules).

In an interim award, the sole arbitrator appointed by the ICC eventually confirmed that he had jurisdiction under the ICC Rules to hear the dispute between A and B Ltd, but lacked jurisdiction over D, B, and C Ltd. A filed a request to set aside the award before the Supreme Court, arguing that the arbitration clause did not refer to the ICC, but to the Zurich Chamber of Commerce as the institution that was supposed to

⁸ 4A_376/2008 of 5 December 2008, in ASA Bull. 4/2009, at 745. See also C KOCH, "Judicial Activism and the Limits of Institutional Arbitration in Multiparty Disputes", in ASA Bull 2/2010, at 380.

administer disputes in accordance with the Swiss Rules under the employment contract. Furthermore, A asserted that the arbitrator had wrongly denied his jurisdiction with regard to D, B, and C Ltd.

Regarding the first issue, the Supreme Court found that the clause was pathological because there was no "Arbitration Court of the International Chamber of Commerce of Zürich in Lugano." However, in line with previous case law, it added that improper designation of the arbitral institution, or the choice of a body of law that does not exist, did not necessarily render the arbitration clause void. Rather, the arbitral tribunal and the Supreme Court are required to try to find a solution that gives the clause meaning and keeps it alive ("*Utilitätsgedanke*"). The parties had clearly expressed their wish to submit disputes to an arbitral tribunal, as opposed to the State courts, and to refer to the rules of an arbitration institution, rather than proceed with *ad hoc* proceedings. The only point of disagreement was whether the institution was the ICC or the Zurich Chamber of Commerce.

The arbitrator analyzed this issue thoroughly and acknowledged that the clause was ambiguous. Relying on existing case law, he ruled that, to the extent that the clause could be construed as referring to more than one institution, the institution first seized by the claimant had jurisdiction. He further found evidence that the parties had, in any event, meant to vest jurisdiction in an ICC tribunal, not in a Zurich Chamber of Commerce panel. Indeed, a first draft of the arbitration clause had mentioned the ICC in Paris.

The arbitral award was nevertheless set aside because the arbitrator had erred in not admitting his jurisdiction over the third parties, D, B and C Ltd. The Supreme Court recalled that under Swiss law it is possible to extend an arbitration agreement to non-signatories in certain circumstances, including on the basis of the conduct of such parties. The Supreme Court found that the two contracts were inseparably linked, as evidenced by their content and signatories.

It should be noted that, under the ICC Rules, the sole arbitrator did not really have any other option but to reject its jurisdiction *vis-à-vis* the third parties since the ICC had previously decided that there was no *prima facie* arbitration agreement including such parties. The arbitrator pointed out in the proceedings that A could start a new arbitration under the sales agreement, which may have allowed for a consolidation of the two proceedings with the consent of the parties. On this point, Article 4.2 of the Swiss Rules would have certainly granted more latitude to the tribunal as it provides that:

[. . .] where a party to arbitration proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

[2] Interim Measures, Including Anti-suit Injunctions

The Swiss Rules, like all other modern arbitration rules, authorize the arbitral tribunal to issue interim measures (Article 26). As to the form of such measures, the tribunal can issue either an interim award or a procedural order (Article 26(2)). For

instance, in a case summarized below, the production of documents was ordered in a partial award.⁹

It is commonly accepted that for arbitral tribunals in Switzerland this power includes the right to enjoin a party from pursuing court or arbitration proceedings (anti-suit and anti-arbitration injunctions).¹⁰ Swiss Rules tribunals have made use of this power too, as is illustrated by a decision of the United States District Court for the Southern District of New York of 28 February 2007 in the *Mastercard v. FIFA*¹¹ case. In that case, Mastercard ("MC") and FIFA were bound by a partnership agreement whereby FIFA granted MC certain sponsorship rights. MC applied to the US court for preliminary and permanent injunctive relief directing FIFA to specifically perform its obligation to grant MC (and not VISA) a sponsorship rights package. The agreement contained an arbitration clause providing for arbitration before the Zurich Chamber of Commerce. The US court nevertheless granted the injunction. FIFA commenced arbitration before the Zurich Chamber of Commerce under the contract, seeking a declaration that it had not breached the contract. The arbitral tribunal issued a preliminary award on 27 November 2007, concluding that it, and not the US court, had jurisdiction to order permanent relief, and that the New York decision would most likely not be recognized in Switzerland. MC responded by seeking a permanent order from the New York court directing FIFA to withdraw its Notice of Arbitration in the Zurich arbitration. The New York court issued a temporary anti-arbitration injunction. A key consideration for the New York court was that the Swiss arbitral tribunal had attempted "to carve out exclusive jurisdiction" and that an injunction was necessary to protect the New York court's jurisdiction. The New York court also questioned FIFA's good faith as it had only initiated the arbitration after it had lost the injunction proceedings in New York.

The Swiss Rules arbitral tribunal's position will most likely not strike the average arbitration practitioner as being incorrect. The parties had agreed to submit their disputes to arbitration in Switzerland and issues pertaining to the merits, such as whether a contract was breached, should only be brought before and decided in this agreed forum.

§ 50.05 Procedural and Evidentiary Issues

[1] Counterclaim Filing Deadlines

Most arbitration rules provide a time limit for new claims and counterclaims, e.g. Art 5(5) of the ICC Rules or Article 20 of the Swiss Rules. In cases of claims made after the expiry of the time limit, the arbitral tribunal decides on the admissibility of such claims. In an order issued under the aegis of the Swiss Chambers on 22 May 2008, the arbitral tribunal accepted to hear a counterclaim that had been raised only in

⁹ Swiss Federal Supreme Court, Decision of 28 March 2007, 4A_2/2007, ASA Bull. 3/2007, at 610.

¹⁰ See the case law cited in M. Scherer & W. Jahnel, Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: a Swiss Perspective, [2009] Int.A.L.R. 66-73.

¹¹ 2007 U.S. Dist. LEXIS 14208 (Feb. 28, 2007).

the second exchange of briefs (Statement of Defence).¹² The Claimant requested that the Tribunal not admit the claim because, according to Article 20 of the Swiss Rules,¹³ claims and defences must be made in the Answer to the Opponent's Claim. The Tribunal admitted the counterclaim since it had already been mentioned in the Answer to the Notice of Arbitration as a possible set-off defence; it presented no inconvenience to the claimant and did not entail any delay in proceedings.

In another case, prior to the hearing, a tribunal accepted the extension of a claim after the first exchange of submissions because the facts underlying the claim were known to the other party.¹⁴

[2] The IBA Rules on the Taking of Evidence

Typically, parties will apply for interim measures to obtain access or to preserve evidence. International arbitral tribunals frequently refer to the IBA Rules on the Taking of Evidence in International Commercial Arbitration. These Rules have not been incorporated in the Swiss Rules. However, it is generally assumed that the IBA Rules reflect good practice. Although this is debatable, it is a fact that Swiss Rules' tribunals also rely on the IBA Rules. In most instances, the tribunal will seek inspiration or guidance from the IBA Rules, but will stress that it is not bound by them.

The IBA Rules provide that, in certain limited circumstances, a party can obtain the production of documents from the other party, which are relevant to its claim. The failure to produce documents upon request of the arbitral tribunal can lead to an adverse inference against the recalcitrant party. The arbitral tribunal might assume that the facts purportedly mentioned in the documents, are averred. In a decision of 28 March 2007,¹⁵ the Swiss Supreme Court addressed certain objections against an award that were based on facts established by the arbitral tribunal by an adverse inference. In a principal-agent dispute, the agent (Iran) had requested the production of documents from the principal (Germany) and all its affiliates showing sales in the territory contractually allocated to the agent. Under the agency agreement, such sales were the triggering event for the agent's fees. The Tribunal found that the principal was obliged under the agreement to provide access to its sales figures. It ordered the production of documents under the following terms (Partial Award of 24 June 2005):

Respondent is ordered to submit to the Arbitrator and Claimant, by 29 July 2005, a comprehensive list,

¹² Zurich Chamber of Commerce Order of 22 May 2008, Swiss Rules, ASA Bull. 4/2008, at 731.

¹³ Article 20, Swiss Rules states: "1. During the course of the arbitral proceedings either 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 or prejudice to the other party 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."

¹⁴ Procedural Order (2009, unpublished) "Dass der der Klageerweiterung zu Grunde liegende Sachverhalt der Beklagten bekannt war und sie in ihrer Duplik sowie an der mündlichen Verhandlung dazu Stellung nehmen kann, ihr somit keine prozessualen Nachteile erwachsen und die Klageerweiterung angesichts aller Umstände als zulässig erscheint."

¹⁵ Decision of 28 March 2007, 4A_2/2007, ASA Bull. 3/2007, at 610.

duly signed by Respondent, showing all sales or economically equivalent transactions (such as leasing agreements) made by Respondent and/or any of its affiliates, including Y. S.p.A. and/or any company owned or controlled by the Y. -Group, into the territories of Saudi Arabia, the United Arab Emirates, Oman, Qatar, Bahrain and Kuwait from 1 January 2002 until 13 December 2004, and into the territory of Iran from 1 January 2002 until 6 April 2006, with respect to (i) products produced by Respondent, or (ii) to the extent produced by a different manufacturer, products identical or similar in their function and design to products formerly manufactured by Respondent.

The arbitrator further directed the principal to grant access to the list to an independent auditor in order to verify its completeness and accuracy.

Interestingly, this order took the form of an award as it was included in the operative part of a partial award. This is unusual in the case of requests for interim measures that are based solely on procedural law. Interim measures on procedural matters are usually issued in the form of a procedural order (although arbitral tribunals have the right to render an interim award under Article 26.2 of the Swiss Rules). In the present case, however, the request appears to have been founded on substantive law, *i.e.*, on the contract itself. To the extent that it orders the performance of a contractual duty, the document production order could indeed take the form of an award. In addition, the partial award ordered other points to be enforced, namely the payment of penalties.

The principal did not comply with the order for production. It refused to provide a complete list and failed to confirm that it would grant an auditor access to the list. The tribunal considered this as a violation of the procedural duty to cooperate in evidence gathering (“Verletzung der Mitwirkung bei der Beweiserhebung”) and, based on the IBA Rules, drew an adverse inference on the number of sales. The principal challenged this inference before the Supreme Court who found that an adverse inference is not a violation of the party’s right to be heard. More generally, the Court ruled that a violation of the IBA Rules or of the evidentiary rules of the local (Zurich) Procedural Code were not sufficient grounds for challenging an arbitral award.

[3] Experts

In the same decision of 28 March 2007,¹⁶ the Swiss Supreme Court dealt with a party’s right to appoint an expert. The arbitral tribunal refused a request (made in the post-hearing brief) to appoint an independent technical expert. The party challenged the award, relying on a Supreme Court decision of 11 May 1992 (ASA Bull. 1992, at 381, 397). In that decision, the Court ruled that the arbitral tribunal must appoint an expert if it lacks the technical knowledge required to render an award. The Court recalled that the 1992 holding only applied if the arbitral tribunal, based on the entire evidence submitted by the parties, was not capable of deciding the technical issue. In the present case, the technical question was not very complex. In essence, the tribunal had to decide whether two models of machines manufactured by the principal were “similar in function and design.” On this point, the tribunal had drawn on witness testimony, including that the plaintiff’s own technical expert admitted at the hearing that his written witness statement was incomplete and that the two models were much

¹⁶ Decision of 28 March 2007, 4A_2/2007, ASA Bull. 3/2007, at 610. An English translation is published in 1 Swiss Int’l Arb. L. Rep. 1 (2007), p. 135.

more similar than he had stated. The Supreme Court mentioned in *obiter* that, in any event, the plaintiff had not demonstrated that its request for an expert opinion in the post-hearing brief was timely.

§ 50.06 Investor-State Disputes Under the Swiss Rules

Switzerland regularly hosts arbitration proceedings between investors and states, based on bilateral investment protection treaties or on contracts. A Supreme Court decision dated 10 July 2006¹⁷ deals with an award made in a post-privatisation dispute between the Bulgarian Privatisation Agency and a Swiss investor (S). Under a contract with the Agency, S acquired 60% of Bulgarian share company B. The main assets of B were rights to a popular Bulgarian ski resort. The contract comprised of an Information Memorandum with background information on B. The contract further provided for a USD 2.5 million investment program to be carried out by the buyer over a three year period for the modernization of the hotels and certain equipment. The contract contained a specific default provision.

The contract was governed by Bulgarian law and provided for arbitration before the Geneva Chamber of Commerce and Industry.

In December 2004, the Bulgarian Agency initiated arbitration under the applicable rules of the Geneva Chamber, *i.e.*, the Swiss Rules of International Arbitration. It claimed that S failed to carry out the agreed investment and was liable for the contractual penalty of USD 700,000. The investor's defence was that it invested much more than contemplated under the contract and that the investment program had to be amended as a result of, on the one hand, regulatory proceedings and third party claims and, on the other hand, the investments required to make the resort profitable, which turned out to be much higher than anticipated.

The Arbitrator (Louis Degos, Paris) found that the investor had not abided by the agreed investment program and ordered that it pay the penalty.¹⁸ He specified that payment of the penalty did not relieve the investor of its obligation to make the agreed investments. He also rejected the investor's request to reduce the amount of the purportedly excessive penalty.¹⁹

The Arbitral Tribunal would emphasise that Article 10.8 is a provision in a freely negotiated contract, and specifically provides for the event of investments not being made in accordance with Appendix 4 to the Contract. Given that the article would appear to have anticipated exactly the sort of situation as that which faces the Arbitral Tribunal, the Arbitral Tribunal sees no reason to make any reduction.

The Arbitrator rejected all the investor's defences, including that of pre-contractual fault ('culpa in contrahendo') of the Privatisation Agency. The Investor argued that the Agency failed to disclose relevant information as to the full legal position with respect to the investment including with respect to a hotel (permits, ownership of the hotel). The Arbitrator found that the Information Memorandum referred to a number of

¹⁷ 4P.88/2006, ASA Bull. 2/2007, at 357.

¹⁸ 4P.88/2006, ASA Bull. 2/2007, at 357.

¹⁹ Cited in decision of 10 July 2006, 4P.88/2006 par. 5, ASA Bull. 2/2007, at 357, 366.

problems and that it would have been for S, as a responsible investor and as a drafter of the investment program, to carry out proper due diligence:²⁰

The Arbitral Tribunal does not consider it necessary to decide whether the Information Memorandum was in fact incomplete or incorrect as alleged by the Respondent. The Respondent is a professional investor and it fell to the Respondent, prior to entering into the Contract, to carry out its own due diligence regarding any possible legal or administrative problems that might eventually impede performance of its obligations under the Contract. If the Respondent failed to carry out such due diligence (and it should be noted that the Information Memorandum did highlight a number of outstanding problems), the Arbitral Tribunal considers that the Respondent should bear the consequences, particularly since it was the Respondent which prepared the investment program which was incorporated into the Contract as Appendix 4.

The general context of the dispute and the findings of the Arbitrator are noteworthy. First, this is one of the rare instances of investment arbitration proceedings being initiated by a State or a State organ, rather than an investor. Regarding the procedural rules, this was a traditional type of dispute. The arbitration was governed by a private set of arbitration rules and based on a contract. In contrast, many of the known investment-state disputes nowadays are based on a bilateral investment protection treaty, which refers to the ICSID arbitration rules or *ad hoc* arbitration (UNCITRAL).²¹

Second, the award appears to confirm a tendency that one also observes in ICSID arbitration whereby investors are increasingly held to certain standards of diligence before making their investments (*see, e.g.*, Award of 25 May 2004, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7).

§ 50.07 The Swiss Rules of Commercial Mediation

[1] Scope of the Rules

In 2007, the Swiss Chambers adopted the Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry ("*Mediation Rules*").²² The Chambers thus offer users a complete and uniform set of rules for the resolution of commercial disputes.

Parties may resort to the Mediation Rules in the event that a dispute has already arisen and for future disputes. Contrary to the model clauses of other institutional mediation rules²³, which do not specify the seat of mediation, the suggested clause of the Swiss Mediation Rules provides that the seat of the mediation may be in

²⁰ Cited in decision of 10 July 2006, 4P.88/2006 par. 3.2, ASA Bull. 2/2007, p. 357, 362.

²¹ M. Scherer & V. Heiskanen & S. Moss, Domestic Review of Investment Treaty Arbitrations: The Swiss Experience, ASA Bull. 2/2009, p. 256.

²² Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry of April 2007. The French version is published in ASA Bulletin 2/2007, p.310 with an explanatory note prepared by the Chambers (p. 330). The Rules are also available on the Swiss Chambers' webpage for mediation services (www.swisschambermediation.ch). *See also* Jeremy Lack, The New Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry: Possible Links to Arbitration, in: Müller Ch./Rigozzi A. (eds.): *New Developments in International Commercial Arbitration*, Zurich, 2008.

²³ *See* the suggested ADR clauses in the ICC ADR Rules, CPR Mediation Procedure, WIPO

Switzerland or abroad. The model clauses also address the language of the mediation proceedings. Language is a critical element of any mediation, more so than in arbitration proceedings. If interpreters are required, there will inevitably be an additional layer of complication because the mediator will not be able to discuss with the parties directly.

As the title indicates, the Mediation Rules apply only to “commercial” mediation. Although the Rules do not define “commercial”,²⁴ it should be understood as distinction from family law, matrimonial mediation or the like. The scope of the ICC ADR Rules is similarly limited to “business disputes”.²⁵ The importance of mediation practice is limited because there are few disputes that fall outside such a broad definition. The proper characterization of the dispute may be more important if the mediation fails and arbitration ensues. In that event, the scope of arbitration, and the arbitral tribunal’s jurisdiction, is limited by the rules of the *lex arbitri* regarding the subject-matter arbitrability. State courts may have exclusive jurisdiction to deal with disputes that cannot be referred to private arbitral tribunals. A non-arbitrable dispute may nevertheless be referred to mediation. In that event, the issue of availability of the right underlying the arbitration would only arise if a party seeks to enforce a settlement reached during the mediation proceedings since, at that stage, the courts will be involved.²⁶

Like arbitration, mediation requires the consent of all parties concerned. Yet, there is a noteworthy difference between mediation and most arbitration rules in that the latter affords the parties a possibility to seize the body administering the mediation even in the absence of a mediation agreement or any agreement at all (Article 4 and 5 Swiss Rules; Article 2B ICC ADR Rules). Arbitration rules typically provide that, unless there is at least a *prima facie* agreement referring (i) to arbitration (ii) under the institution’s own rules, the institution will not accept the request for arbitration and not notify the named defendants of any such request. It is not inconceivable that mediation institutions could apply the same rigorous approach. However, it is widely accepted that mediation is a first step to an attempt to settle a dispute that would otherwise be referred to a court or an arbitral tribunal. For this reason, the Swiss Mediation Rules allow the Chambers to notify a request for mediation, even where no mediation agreement exists yet. The receiving party will thus have an opportunity to accept to proceed with the mediation. As mediation may allow a quick resolution of a dispute and, contrary to arbitration, cannot take place if a party is defaulting, the party that is

Mediation Rules. AAA’s Commercial Arbitration Rules and Mediation Procedure. and LCIA Mediation Rules.

²⁴ Contrary to the UNCITRAL Model Law on Commercial Conciliation, Chapter 1, Article 1(1).

²⁵ The Guide to the ICC Rules of Arbitration, Appendix 9, ICC ADR states that “this means, for example, that they cannot be used for the resolution of family or labour disputes.” (Guide to Article 1). At least with regard to labour disputes, there may well be business issues that could be referred to mediation.

²⁶ Charles Jarrosson, Legal Issues Raised by ADR, in ADR in Business, Practice and Issues Across Countries and Cultures. Jean-Claude Goldsmith, Gerald H. Pointon, Arnold Ingen-Housz (Ed.), Kluwer 2006, p. 115.

notified of a request for mediation may wish to accept (but may not have wanted to suggest mediation on its own motion).

A party that does not wish to accept a proposal to mediate should either not reply to the Chamber's notification or refuse mediation explicitly (Article 4(3) and 5(5)). If refusal is not explicit the Chamber may proceed with the mediation.

[2] Appointment of a Mediator

The parties are free to designate any mediator they choose. Thankfully, the Chambers have resisted pressure from proponents of a closed-list of mediators from which the parties would make a selection. Closed-lists, be it for arbitrators or for mediators, lack transparency and are not recommendable.

Unless the parties provide otherwise, a single mediator is appointed. It is sometimes useful to have two mediators, especially if the parties come from different cultural backgrounds or if the mediator requires a number of skills that cannot be found in a single individual. The Rules authorize the Chambers to recommend more than one mediator.²⁷

If the parties do not jointly designate a mediator, according to Article 8(2), the Chambers must submit a list of at least three names to the parties, selected after considering the nature of the dispute and the required qualifications. It is advisable for a party who seizes the Chamber with a unilateral request for mediation to identify all qualifications that may be required (*e.g.*, industry experience, language skills, nationality).²⁸ However, in most circumstances, it is not advisable that the parties identify qualifications of the future mediator *before* the dispute arises, let alone the name of the mediator. Few candidates may meet the specified qualifications and such contractual qualifications may be irrelevant for the purposes of understanding the dispute. The named mediator may not be available at the time the dispute arises. Neither would it be wise for a party to unilaterally propose a name of its favourite mediator in a request for mediation. Should the other party refuse that mediator, the Chambers will not appoint a mediator who has not been accepted.

A party who disagrees with a default appointment made by the Chambers has a 5-day time limit to object to the appointment in writing (Article 8(3)), which is quite short. It is not sufficient for a party to object to a mediator, once appointed, but there must be reasons, in writing, that "are considered appropriate by the Chambers." Under the ICC ADR and the HKIAC Mediation Rules, for instance, the parties need not give reasons for their objection.²⁹ The rationale being that it is assumed that whatever the

²⁷ Article 7.1 of the Mediation Rules. *See also* Article 3.4 of the ICC ADR Rules. The UNCITRAL Conciliation Rules even contemplate panels of three conciliators (Article 3).

²⁸ As mediators do not adjudicate disputes, the nationality of the mediator is much less of an issue than that of arbitrators. While most arbitration rules will address the nationality of arbitrators, this is uncommon for mediation rules with the notable exception of the UNCITRAL Conciliation Rules which provide in Article 4(2)(b) that the appointing institution "shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

²⁹ *See* Article 3(3) ICC ADR Rules; Article 6 HKIAC Mediation Rules.

reason for such objection, as long as a party objects, it lacks trust in the mediator and without such trust the mediation process is compromised. As mediation depends entirely on the participation and good faith cooperation of all parties, such leniency is justifiable. For the same reason many mediation rules do not require parties to qualify a challenge of a mediator. Yet there are good reasons for the somewhat less lenient rule of Article 8(3). First, it cannot be excluded that a party objects to a mediator merely because it is unfamiliar with or ill-advised about the nature of the mediation, or was taken by the surprise by the request for mediation and the short time lines imposed by Article 8. Objection to mediation and to a mediator may be a litigious reflex rather than the fruit of a party's conviction concerning the inappropriateness of the mediator or mediation. Sometimes solutions can be found by sheer perseverance on the part of the mediator or the appointing institution.

In reality, the threshold imposed by Article 8(3) should not be difficult to reach by a party with genuine reservations. It need only state "reasons that are considered appropriate by the Chambers." It is submitted that this threshold is lower than the triple requirement of impartiality, neutrality and independence (Article 12; Article 2(1) and 2(2) of the European Code of Conduct. Consequently, the litmus test applied by the Chamber should be less stringent.

According to Article 13, all mediators must undertake to comply with the European Code of Conduct for Mediators, which is an attachment to the rules ("Code of Ethics").

[3] Procedure

According to Article 11, the Chambers invite the mediator to promptly convene the parties to a joint preliminary session. As mediation is a process that requires, or at least is most successful if direct face-to-face contacts are established, the preference for an in-person meeting is sensible. The Rules do not go so far as to *impose* a preliminary session, which is also made clear by placing Article 11 outside section IV dealing with procedural rules.

The parties are free to agree on the manner in which the mediation shall be conducted (Article 15). Usually, they do so in a mediation agreement entered into with the mediator. The possibility of such agreement is mentioned in Article 15(2), somewhat unfortunately placed as the matters addressed in such agreement are not limited to those mentioned in Article 15(2).

The mediation may be terminated by either party at any time by notification in writing (Article 20(1)(b)). Contrary to the ICC ADR Rules (Article 6(1)(b)), the Swiss Rules do not oblige the parties to convene with the mediator for a preliminary meeting. While there may be good reasons for a party not to proceed with mediation, the solution adopted by the ICC ARD Rules undeniably hold some merit. Termination of a mediation implies that it has been properly started either based on a mediation agreement or by the subsequent acceptance of parties (Articles 3 to 5 of the Rules). In such circumstances, it would not seem to be overly restrictive for a party who has agreed to mediate to at least meet with the mediator before withdrawing.

A settlement agreement only puts an end to the mediation if it is signed by all relevant parties. The parties may opt out of this formality.

[4] Two-Tier Proceedings

The Mediation Rules can be combined with arbitration. Article 23 of the Swiss Rules mentions the possibility for the parties to agree in writing at any stage during the course of the mediation to submit all or part of their dispute to arbitration under the Swiss Arbitration Rules. The Explanatory Notes rightly point out that, to the extent that the parties are already bound by an agreement to arbitrate, Article 23 is moot.³⁰ It is not the purpose of Article 23 to restrict the parties' rights under preexisting arbitration agreements, irrespective of whether they refer to the Swiss Arbitration Rules or not. Article 23 is merely a reminder to the parties that if mediation fails, arbitration, as opposed to litigation, may be an appropriate alternative. The Chambers' domestic arbitration rules would apply in the case of a domestic dispute.³¹

Neither does Article 23 intend to put in place arbitral tribunals that simply rubberstamp a settlement reached in the mediation. Article 23 requires a "dispute" and the submission of a notice of arbitration as provided for by Article 3 of the Swiss Rules. On the other hand, the parties have the possibility to obtain an award on agreed terms under Article 34 of the Swiss Rules if they settle their dispute during the arbitration.

According to Article 24, in case of arbitration pending under the Chambers' arbitration rules, the Chambers or arbitrators may suggest that the parties mediate the dispute. This provision, while well intended, should have been inserted in the Swiss Arbitration Rules rather than the Mediation Rules. By the same token, the Arbitration Rules could also have addressed the question of what happens with the arbitration, whether it will be stayed or not. Article 24 is also surprising in that it gives the Chambers the possibility to suggest mediation to the parties in an ongoing arbitration. Most often, the Chambers will be quite removed from the arbitration and hardly in a position to determine whether "mediation appears to be worth trying."

According to Article 22, unless the parties agree otherwise, the mediator cannot act as arbitrator, judge, expert, or as representative or advisor of one party in any subsequent proceedings initiated against one of the parties to the mediation after the commencement of the mediation.

Article 22 prevents mediators from acting in proceedings initiated "after the commencement of the mediation." It does not distinguish between proceedings that are initiated before and after completion of the mediation. While it is certainly justifiable

³⁰ ASA Bulletin 2/2007, p. 336.

³¹ Article 23 distinguishes in paragraph 1 and 2 between "international" and "domestic" mediation but the Rules do not make this distinction elsewhere. The domicile of the parties is not a relevant factor for resorting to the Mediation Rules. It is relevant, however, when parties subsequently engage in arbitration. Contrary to mediation, the Chambers have distinct arbitration rules for international and for domestic arbitration. Likewise, Swiss arbitration law provides for different regimes for international and domestic arbitration. The former is governed by chapter 12 of the PIL Act, the latter (at the time of this paper, August 2009) by a treaty among the Swiss cantons, the "Concordat". The Chambers accept to administrate domestic proceedings under the Swiss Rules if requested. However, to the extent that the latter are in conflict with mandatory provisions of the Concordat, the Concordat will prevail.

that no mediator should act in proceedings against a party during the mediation, it is less evident why this general prohibition should continue after the completion of the mediation. Although it is not explicitly stated, the prohibition should only cover disputes that have a connection with the dispute that was subject to mediation. This is the case under other mediation rules, for instance, Article 3 of the CEDR Model Mediation Procedure and Agreement, which reads “The Mediator (and any member of the Mediator’s firm or company) will not act for any of the Parties individually in connection with the Dispute in any capacity.” Similarly, the ICC ADR Rules state in Article 7.3 “unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings. . .”

The parties are free to opt out of Article 22(1) and may jointly designate the mediator “as arbitrator, judge or expert.” The main problem is that the mediator is likely to have obtained confidential *ex parte* information during the mediation. This knowledge would normally disqualify the mediator in subsequent proceedings. Therefore, pursuant to paragraph 2 of Article 22, the mediator who acts in subsequent proceedings with the parties’ consent is expressly authorized to take into account information received during the mediation. This is problematic if the mediator has met with the parties separately in caucuses and has not shared the information received with the other party.

Article 22(2) is somewhat confusing because it refers to “any subsequent arbitral proceedings.” Does this mean that judicial proceedings are not covered by this provision? There is support for the view that the use of the word “arbitral” is merely an oversight. Indeed, paragraph 1 does not qualify the proceedings covered. Moreover, paragraph 2 explicitly mentions that the mediator can act as “judge.” Just as in the case of paragraph 1, paragraph 2 applies to any subsequent proceedings, be they before a court or an arbitral tribunal.

The mediator is not bound by an agreement between the parties to appoint him or her as arbitrator. If the mediator has the slightest hesitation about his or her ability to adjudicate the dispute impartially, he or she is not only entitled, but duty-bound to decline the parties’ offer.

The Swiss Rules, like most mediation rules, do not restrict the parties’ freedom to initiate litigation or arbitration *during the mediation*.³² In fact, in jurisdictions where

³² Contrary to the LCIA Mediation Rules (Article 9) for example, the Swiss Mediation Rules do not expressly authorize such unilateral step either. It might be argued that the duty to act in good faith may in certain circumstances temporarily limit a party’s right to initiate arbitration, but practically it would be difficult to enforce such limit. It might simply result in the mediation coming to an end. Full discretion for the parties to initiate parallel court action or arbitration is not a solution universally adopted by mediation rules. The CPR Rules set the opposite principle as a non-mandatory rule. According to Clause 3(i), unless the parties “agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the mediation process or for a set period of time, insofar as they can do so without prejudicing their legal rights”. See John W. Cooley, *The Mediator’s Handbook* (NITA, 2006) at 191.

mediation does not interrupt time limits or where no clear authority to the contrary exists, a party may have to start formal proceedings to preserve its rights.

Even if the applicable mediation rules do not limit the parties' right to resort to arbitration or litigation, such limits might result from rules governing the arbitration or litigation itself. For instance, a court might decide that, unless and until the mediation is initiated, conducted in good faith and fails, arbitration is premature because the right to arbitrate has not yet arisen.³³ This would be an issue of the validity of time in the arbitration agreement (*ratione temporis*). If the mediation rules allow arbitration without any restrictions it is unlikely that arbitration would be disallowed. Especially if the arbitration rules are those of the institution that also administers the mediation, it will normally let the arbitration proceed. If the rules are ambiguous or if an *ad hoc* mediation clause does not address the issue, there is a risk that the arbitration may be deemed premature. In any event, even if the arbitration institution allows the request for arbitration to proceed, it cannot be excluded that a state court reviewing the validity of the arbitration agreement at a later stage, *e.g.*, in a challenge to the arbitral award, may consider that the arbitration agreement was not yet operative when the arbitration started. This would of course assume that the complaining party objected to arbitration from the outset and did not proceed on the merits. It would further assume that the party objecting to arbitration participated fully in the mediation otherwise its objection would be a clear case of *venire contra factum proprium* and abuse of right.

Another question that might arise in this context is whether the agreement to mediate can be enforced and whether failure to mediate in good faith or at all gives rise to a damage claim with respect to legal fees and management costs. The scope of this article is too limited to discuss this controversial issue. As a rule, it can be said that the clearer the mediation undertaking is stipulated, the more likely it will be enforced and its breach sanctioned.

The Swiss Supreme Court, in case 4P.67/2003,³⁴ dealt with an application to set aside an arbitral award where the plaintiff argued, *inter alia*, that the arbitration was premature since the arbitration agreement comprised of a pre-arbitral mediation

³³ For a discussion of the thorny issue of binding nature of mediation clauses and problems arising under multi-tier dispute resolution clauses see Dyalá Jiménez Figueres, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, in ICC Bulletin Spring 2003, p. 71 with reference to ICC awards; Alexander Jolles, Consequences of Multi-Tier Arbitration Clauses, in Arbitration (Chartered Institute) 2006, p. 329 ff; Klaus Peter Berger, Rechtsprobleme von Eskalationsklauseln, in Grenzüberschreitungen, Festschrift Schlosser, Tübingen, 2005, p. 19; Otto Sandrock, Schadenersatz wegen Verletzung von Mediationsvereinbarungen zwischen deutschen und angelsächsischen Unternehmen, in Grenzüberschreitungen, Festschrift Schlosser, Tübingen 2005, p. 821; Nathalie Voser, Sanktion bei Nichterfüllung einer Schlichtungsklausel, ASA Bull. 2002, p. 376. See also Pieter Sanders, UNCITRAL's Model Law on International Commercial Conciliation, in Arbitration International 2007, p. 105, 108 f. who clearly states that "a conciliation clause in a contract binds the parties to make an attempt to settle the dispute before they can resort to arbitral or judicial proceedings. This includes their participation in the appointment of a conciliator."

³⁴ Decision of 8 July 2003, 4P.67/2003, Official Court Reporter 129 III 675, also published in ASA 2/2004, p. 353, 361.

