

Belated Nomination of Arbitrator
Before the Swiss *juge d'appui*:
Three Recent Decisions

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1. Introduction

The parties' right to designate an arbitrator of their choice is one of the distinctive and crucial advantages of arbitration over litigation: party autonomy stretches all the way to the determination of who is judging a dispute. Swiss international arbitration law guarantees this fundamental principle in Art. 179(1) of the Federal Statute on Private International Law ("PIL Act").

Where arbitration agreements provide that each party or group of multiple parties nominates one arbitrator, such nomination is not only a right but also a contractual obligation.¹ Still, it frequently occurs that a party – in practice naturally the respondent – fails or refuses to designate its arbitrator. The reasons for such conduct can be multiple; sometimes it may simply be a delaying tactic.

Since arbitral proceedings cannot commence without a tribunal in place, the rules of arbitration institutions generally provide for mechanisms whereby the respondent's default is compensated through a swift substitute

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¹ Christoph Müller, *International Arbitration – A Guide to the Complete Swiss Case Law* (Unreported and Reported), Zurich etc. 2004, para. 1.7, p. 56. See also Karl Heinz Schwab / Gerhard Walter, *Schiedsgerichtsbarkeit*, 7th ed., Munich 2005, Ch. 10, p. 86, N. 21, who opine with regard to § 1035 of the German Code of Civil Procedure that the obligation to nominate an arbitrator is a burden subject to forfeiture rather than a real obligation.

nomination by the institution.² Where the arbitration rules do not provide for such a solution, however, or in *ad hoc* proceedings where the parties have not entrusted a third party with the nomination, the claimant has no choice but to resort to the competent court at the seat of the arbitration (*'juge d'appui'*; *support judge*) and request that it appoint an arbitrator on behalf of the defaulting respondent.

Under Swiss domestic and international arbitration law, the role of the support judge is assigned to certain Cantonal judges,³ who act in their capacity as state officials and not as private persons.⁴ The Swiss *juge d'appui* is under a duty to grant a request for nomination of an arbitrator, unless an *ex officio* summary examination reveals that no arbitration agreement exists between the parties.⁵

2. Three recent decisions of Cantonal support judges

The way the courts apply the law generally constitutes an important factor for determining a party's strategy. Three recent decisions, which are summarized below and fully published in this volume,⁶ demonstrate that the parties to an arbitration agreement specifying a seat in Switzerland may confidently rely on the Cantonal judges' efficiency in fulfilling their role as *juge d'appui* while respecting both parties' interests.

² See e.g. Article 9(6) *ICC Rules of Arbitration*, Article 8(2) *Swiss Rules*, and Article 7.2 *LCIA Arbitration Rules*.

³ Art. 179(2) PIL Act; Art. 12 and 3(a) *Intercantonal Concordat on Arbitration*; see also Gabrielle Kaufmann-Köhler / Antonio Rigozzi, *Arbitrage International, Droit et pratique à la lumière de la LDIP*, Zurich etc. 2006, pp. 117-118, N. 312. Christoph Müller, op. cit., para. 2.4, p. 62.

⁴ Swiss Federal Tribunal Decision 118 Ia 20, cons. 2b; Paul Volken, *Zur Ernennung von Schiedsrichtern durch den staatlichen Richter*, ASA Bull. 1992, pp. 466, 467; idem, *A propos de la nomination d'arbitres par le juge étatique*, ASA Bull. 1993, pp. 8, 9; Bernhard Berger / Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern etc. 2006, p. 268, N. 751; Wolfgang Peter / Thomas Legler, in: Stephen Berti (ed.), *International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute*, Basel etc. 2000, Art. 179, p. 373, N. 43.

⁵ Art. 179(3) PIL Act; Art. 12 *Intercantonal Concordat*; Pierre Jolidon, *Commentaire du Concordat suisse sur l'arbitrage*, Bern 1984, p. 215; Pierre Lalive / Jean-François Poudret / Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, pp. 82-83; Jean-François Poudret / Sébastien Besson, *Comparative Law of International Arbitration*, 2nd ed., Zurich etc. 2007, para. 400, p. 337; Bernhard Berger / Franz Kellerhals, op. cit., pp. 273-274, N. 765 *et seq.*; Wolfgang Peter / Thomas Legler, op. cit., p. 371 N. 38; Thomas Rüede / Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 2nd ed., Zurich 1993, § 21 VI, 3.a), p. 135. The provisions dealing with the appointment of an arbitrator do not apply to the nomination of experts; see Michael Schöll, *Réflexions sur l'expertise-arbitrage en droit suisse*, ASA Bull. 4/2006, pp. 621-645.

⁶ ASA Bull. 2/2008, pp. 400-414.

Two of the cases are international, one is domestic. All three follow the same pattern which seems to reflect a frequent practice: the respondent, who initially refused to designate an arbitrator, makes a nomination – at least in the form of an alternative prayer for relief – once the claimant has filed a request for nomination with the support judge.

2.1. Tribunal de première instance, Geneva, Decision of 10 July 2002 ⁷

The respondent refused to designate an arbitrator because it saw no need to enter into arbitration proceedings. It favored an amicable settlement instead. The claimant, who had already nominated its arbitrator, requested the *Tribunal de première instance* to make a nomination on behalf of the respondent.⁸

A few days prior to the hearing fixed by the Court, the respondent nominated an arbitrator in a letter to the claimant and stated that this person had accepted the mandate. On the same day, the respondent informed the Court of its nomination and argued that in view of these changed circumstances the appointment proceedings had become *sans objet* (otiose). The claimant, even though it accepted the respondent's choice, requested that the Court maintain the hearing already scheduled in view of the risk of the respondent withdrawing its nomination, and to ensure that the costs, in particular translation costs incurred in connection with the request for nomination, would be borne by the respondent.

In a decision of 10 July 2002 the judge held that the request for nomination had indeed lapsed since the respondent's belated nomination was in effect and could only be revoked in accordance with the rules of the Intercantonal Concordat on Arbitration.⁹ The judge further held that the Court's confirmation did not offer any additional comfort to the claimant. Accordingly, the operative part only attests to the respondents' nomination (*'donne acte'*). Given its "dilatatory attitude", the respondent was ordered to

⁷ Decision of 10 July 2002, *Tribunal de première instance* of Geneva, JTP1/8403/2002, ASA Bull. 2/2008, pp. 400-405.

⁸ The *Tribunal de première instance* is the competent Cantonal court in Geneva. Art. 458 para. 1, 461B para. 1 lit. a and para. 2 of the Code of Civil Procedure of the Canton of Geneva; Swiss Federal Tribunal Decision 121 I 81, 83, dated 20 March 1995.

⁹ As noted in the decision, the Parties had agreed that the Intercantonal Concordat on Arbitration shall apply exclusively. The Court interpreted this agreement to be an exclusion of Chapter 12 of the PIL Act pursuant to Art. 176(2) PIL Act. Whether or not the arbitration agreement expressly excluded Chapter 12 of the PIL Act, which according to the Swiss Federal Tribunal is a necessary prerequisite for such an exclusion (decisions 115 II 390 and 116 II 721), does not emerge from the decision.

bear the costs of the proceedings, including all necessary costs incurred by the claimant.

2.2. Cantonal Court of Valais, Decision of 27 April 2006¹⁰

The President of the Chamber for Arbitration of the *Cantonal Court of Valais* was asked to deal with a matter in which the respondent refused to nominate its arbitrator on the ground that the claimant lacked standing. The respondent contended that the claimant's right to commence arbitration was time-barred because it had failed to bring an action for definitive registration of a contractor's lien (*Bauhandwerkerpfandrecht*) within the time limit fixed in a prior judgment by the District Court of Visp. In its alternative prayers for relief, however, the respondent made a nomination and requested that the claimant's motion be found to be otiose, or – as a further alternative – that the Court appoint the proposed person as arbitrator.

In its decision of 27 April 2006 the Court rejected the respondent's arguments on standing and found that the claimant, in light of its claim for payment under the contract, did have a legitimate interest to initiate arbitration proceedings. In the absence of objections by the claimant, the Court accepted the respondent's alternative proposal. Similarly to the above described Geneva decision, the Court certified the respondent's nomination (*'Es ist davon Kenntnis zu nehmen und zu geben'*) and declared that the proceedings had become otiose. The respondent, as the party who had instigated the proceedings, was ordered to bear the costs.

2.3. Tribunal de première instance, Geneva, Decision of 21 March 2007¹¹

In this third case, the respondent refused to participate in the constitution of the arbitral tribunal until and unless the claimant clarified the nature of its activities under a "Consultancy Agreement" and the use of payments received in connection therewith. Accordingly, the respondent sought a declaration from the Court that the request for nomination was premature;

¹⁰ Decision of 27 April 2006. *Cantonal Court of Valais*, C2 06 10, ASA Bull. 2/2008, pp. 406-410.

¹¹ Decision of 21 March 2007, *Tribunal de première instance of Geneva*, JTPI/4437/07, ASA Bull. 2/2008, pp. 411-414. By way of disclosure, the author notes that his firm LALIVE represented one of the parties in this case.

alternatively, it requested that a certain arbitrator be appointed. The claimant consented to the respondent's nomination, subject to the Court's appraisal of the nominee's independence.

In its decision of 21 March 2007 the *Tribunal de première instance* found, firstly, that it had no jurisdiction to examine the respondent's principal arguments and for this reason disregarded them. Secondly, however, given that (a) an arbitration agreement existed between the parties, (b) the claimant had not objected to the respondent's (alternative) nomination, and (c) in the Court's *prima facie* assessment the nominated arbitrator had the required impartiality, the Court acted on the respondent's proposal and actually nominated the proposed arbitrator in the operative part of the decision. Nonetheless, as in the other two cases, the Court ordered the respondent to bear the costs of the proceedings.

3. Comments

From an arbitration perspective, these decisions must be welcomed for a number of reasons.

First, the support judges in all three cases, satisfied that an arbitration agreement existed, complied with their statutory obligation and assisted the claimant in its efforts to initiate arbitration proceedings where its opponent attempted to hinder this – as “substitute performance” of the arbitration agreement¹² or “enforcement” of the principle *pacta sunt servanda*.¹³ The only valid reason to refuse a nomination, namely the manifest invalidity of the arbitration agreement, was invoked by neither of the respondents.

Unlike in the first two decisions, where the judges followed the respondents' argument and declared that the request for nomination had become otiose, the Court in the third case actually *nominated* the proposed arbitrator. This difference, however, which may simply be due to the fact that the respondent in the third case did not argue that the matter had become otiose, is without consequence for the outcome of the case. It is therefore submitted that a theoretical discussion whether the request for nomination had become *sans objet* or whether the judge must make a decision actually

¹² Paul Volken, op. cit., ASA Bull. 1992, p. 467; idem, op. cit., ASA Bull. 1993, p. 9.

¹³ Paul Volken, op. cit., ASA Bull. 1992, p. 471; idem, op. cit., ASA Bull. 1993, p. 13; see also Christoph Müller, op. cit., p. 60.

granting the requested nomination,¹⁴ is of little practical importance: the main objective, namely the nomination of the second co-arbitrator, has been achieved in all three cases; and the respondents, who had instigated the nomination proceedings, were ordered to bear the costs.

Second, the judges in Geneva and Valais rightly understood their role to be of a purely auxiliary nature. They remained within the scope of their duties to secure the efficient constitution of an arbitral tribunal, without prejudging issues that will be dealt with in the arbitration and thus fall exclusively within the jurisdiction of the arbitral tribunal to be constituted. The findings of the *Cantonal Court of Valais* with respect to the claimant's standing and its legitimate interest to conduct arbitration proceedings do not predetermine the existence or scope of the arbitration agreement or other matters which will have to be dealt with by the arbitral tribunal.

Third, despite their wide discretion,¹⁵ the Cantonal courts did not nominate other persons of their choice, but gave preference to the defaulting respondents' – belated and alternative – nominations or nomination proposals.¹⁶ This approach is clearly in accordance with the prevailing doctrine.¹⁷ It makes allowance, to the fullest extent possible, for the principle of party autonomy and the right to equal treatment¹⁸ – and thus both parties' proportionate influence – in the appointment process. At the same time it precludes further dilatory tactics and enforces the claimant's right to see an arbitral tribunal constituted as quickly as possible. The underlying reasoning for this approach was well described by the Obergericht (Appellate Court) of the Canton of Aargau when dealing with a similar situation:

¹⁴ Decision of the Obergericht of the Canton of Aargau, dated 4 May 1998, Aargauische Gerichts- und Verwaltungsentscheide (AGVE) 1998, p. 105, also published in ASA Bull. 2000, p. 781, cons. 4: „Nachdem die Gesuchsgegnerin bei der Ernennung des Schiedsrichters säumig geblieben ist, handelt es sich um eine Gutheissung des Begehrens auf richterliche Bestellung eines Schiedsrichters. Demzufolge hat die Gesuchsgegnerin die Kosten des vorliegenden Verfahrens nach den einschlägigen Verfahrensbestimmungen zu bezahlen.“ English translation: „Since the Respondent has defaulted on the nomination of an arbitrator, the request for judicial nomination is granted. Hence, the Respondent must bear the costs of the proceedings in accordance with the pertinent procedural rules.“

¹⁵ See Gabrielle Kaufmann-Kohler / Antonio Rigozzi, op. cit., p. 120, N. 321-322.

¹⁶ Obviously, the Courts saw no objective reasons to refuse the respondents' nominees.

¹⁷ See e.g. Christoph Müller, op. cit., p. 61; Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, Kluwer 2001, p. 326; Gabrielle Kaufmann-Kohler / Antonio Rigozzi, op. cit., p. 120, N. 323; Bernhard Berger / Franz Kellerhals, op. cit., p. 272, N. 764. This approach is also the prevailing one in Germany; see OLG München, Decision of 26 April 2006 (case no. 34 SchH 04/06), MDR 2006, p. 1308; Richard Kreindler / Jan Schäfer / Reinmar Wolff, *Schiedsgerichtsbarkeit – Kompendium für die Praxis*, Verlag Recht und Wirtschaft GmbH 2006, Ch. 5, p. 130, N. 432.

¹⁸ Bernhard Berger / Franz Kellerhals, op. cit., p. 266, N. 748.

“Die richterliche Ernennung erfolgt ... lediglich ersatzweise anstelle der säumig gebliebenen Partei. Insofern ist ein Vorschlag einer ursprünglich säumigen Partei auf Ernennung eines bestimmten Schiedsrichters nicht unbeachtlich. Im Gegenteil ist der Vorschlag von der richterlichen Instanz im Rahmen ihres freien Ermessen gebührend zu berücksichtigen (Rüede/Hadenfeldt, a.a.O., S. 125). Weil das Schiedsgericht sich dadurch auszeichnet, dass grundsätzlich beide Parteien in gleicher Weise an der Bestellung mitwirken und die richterliche Behörde lediglich zum Zwecke der Sicherstellung der Bestellung des Schiedsgerichts mitzuwirken hat, ist dem Vorschlag der säumigen Partei der Vorzug zu geben vor andern möglichen Schiedsrichtern, sofern nicht bestimmte Gründe gegen die von der säumigen Partei vorgeschlagene Person sprechen.”¹⁹

English translation:

“The nomination by the judge is effected merely as a substitute on behalf of the defaulting party. A proposal for nomination of a certain arbitrator by the initially defaulting party may therefore not be disregarded. On the contrary, the proposal must duly be taken into account by the judge within his free discretion (Rüede/Hadenfeldt, op. cit., p. 125). Given that the Arbitral Tribunal is characterized by the circumstance that, as a matter of principle, both parties contribute equally to its appointment and that the judicial authority merely assists for purposes of securing the constitution of the Arbitral Tribunal, the defaulting party’s proposal shall be preferred vis-à-vis other possible arbitrators, unless certain reasons militate against the person proposed by the defaulting party.”

Finally, the nominations were obtained rather speedily: none of the above described proceedings lasted longer than 7 months; in the third case judgment was even rendered only 5 weeks (including a hearing) after the request for nomination had been filed. The Cantonal *juges d’appui* thus also adhered to the requirement to proceed with the appointment without delay.²⁰

¹⁹ Obergericht of the Canton of Aargau, Decision of 4 May 1998, op. cit., p. 781, cons. 3. c). See also the Note by François Knoepfler in: François Knoepfler / Philippe Schweizer, RSDIE 4/2001, p. 570; idem, Arbitrage international, *Jurisprudence suisse commentée depuis l’entrée en vigueur de la LDIP*, Zurich etc. 2003, p. 586.

²⁰ Paul Volken, op. cit., ASA Bull. 1992, p. 471; idem, op. cit., ASA Bull., 1993, p. 13; Wolfgang Peter / Thomas Legler, op. cit., p. 371 N. 39. See, however, the criticism by Louis Gaillard of the “*faible efficacité*” in a case where the time span between the request and the nomination was 16 months. due to the fact that the decision on the nomination was appealed and dealt with by several court instances, in: *La nomination de l’arbitre par le juge*, ASA Bull. 1995, pp. 149-152.

In this context, it is worth mentioning that the possibilities to appeal against decisions leading to a nomination are very limited or even non-existent.²¹

4. Conclusion

The availability and efficiency of a support judge is an important quality feature of a place of arbitration. The decisions discussed in this note demonstrate that the Swiss *juges d'appui* stand up to the expectations of the users of both domestic and international arbitration and thus contribute to the arbitration-favorable climate in Switzerland. The decisions may also serve as precedents in similar cases.

Responding parties who have defaulted on their obligation to designate an arbitrator are well advised to make up for their designation in the proceedings before the support judge – at least by way of precaution (“better late than never”) – and use the necessary diligence in doing so; otherwise they risk losing their fundamental right to nomination and must bear the consequences in the arbitration.

²¹ Only a decision of the support judge *refusing* to nominate an arbitrator can be subject to a direct appeal before the Swiss Federal Tribunal. A party unsatisfied with a court nomination can only proceed pursuant to Art. 190 PIL Act, once the arbitral tribunal has rendered an award. See Federal Tribunal decisions 115 II 294, cons. 3, 118 Ia 20 (ASA Bull. 1992, p. 347), and 121 I 81, cons. 1. Some Cantons provide for Cantonal appeal proceedings, but Geneva is not one of them. See also Gabrielle Kaufmann-Kohler / Antonio Rigozzi, op. cit., pp. 118, 119, N. 315; Jean-François Poudret / Sébastien Besson, op. cit., pp. 342-343, N. 409 with further references.