

gericht und der Bestimmung der Verfahrensordnung aufrecht erhalten, denn der AGB-rechtswidrige Bestandteil über die Bestimmung der Entscheidung nach Billigkeit kann herausgestrichen werden, ohne dass der verbleibende Teil sinnlos wird: Übrig bleibt eine Schiedsvereinbarung, nach welcher das Schiedsgericht nach der benannten Schiedsgerichtsordnung zu verfahren hat.

Hinsichtlich des unwirksamen Teils, d. h. hinsichtlich der Bestimmung des anwendbaren Rechts, wäre gem. § 306 Abs. 2 BGB auf die gesetzlichen Vorschriften zurückzugreifen. Anwendbar wäre folglich § 1051 Abs. 2 ZPO, der bestimmt, dass das Schiedsgericht das Recht des Staates anzuwenden hat, mit dem der Gegenstand des Verfahrens die engsten Verbindungen aufweist. Ferner ist denkbar, dass die Parteien das Schiedsgericht nunmehr nachträglich noch einmal ausdrücklich und damit wirksam zur Entscheidung nach Billigkeit ermächtigen (§ 1051 Abs. 3 ZPO).

V. Empfehlungen für die Praxis

Für die Vertragsgestaltung und die Prüfung im Streitfall folgt aus dem oben Gesagten, dass bei AGB-Schiedsklauseln über das bei individualvertraglichen Schiedsvereinbarungen gewohnte Maß hinaus die formgerechte Vereinbarung und inhaltliche Wirksamkeit besonders sorgfältig zu prüfen sind.

Die formgerechte Einbeziehung der Schiedsklausel in den Vertrag erfordert bei einer Bezugnahme auf die AGB in dem Hauptvertrag die konkrete Möglichkeit der Kenntnisnahme der Schiedsklausel durch den Vertragspartner, z. B. durch Beifügung der AGB als Vertragsanlage.

Um insbesondere im internationalen Verkehr jedwede Zweifel an der formwirksamen Vereinbarung der AGB-Schiedsklausel auszuschließen, ist zu empfehlen, die Schiedsklausel zum Bestandteil des Hauptvertrages zu machen oder aber zumindest in der Bezugnahme die Schiedsklausel gesondert hervorzuheben und die AGB mit dem Vertrag dem Vertragspartner auszuhändigen.

Zum anderen muss bei der Vertragsgestaltung bzw. Überprüfung von AGB-Schiedsklauseln darauf geachtet werden, dass die sich aus dem AGB-rechtlichen Charakter der Klausel ergebenden Anforderungen an die inhaltliche Gestaltung der Klausel bzw. der durch sie inkorporierten Verfahrensordnungen gewahrt sind. Hier ist zwischen unbedenklichen, risikobehafteten und per se unwirksamen formularmäßigen Vereinbarungen zu unterscheiden.

Stets sollte auch im konkreten Streitfall die Gelegenheit genutzt werden, die geschilderten Fehlerquellen zu identifizieren. Die mögliche (Teil-)Unwirksamkeit der AGB-Schiedsklausel kann hierbei gegebenenfalls in den folgenden Verfahrenskonstellationen geltend gemacht werden: im Schiedsverfahren selbst als Einrede der Unzuständigkeit des Schiedsgerichts (§ 1040 Abs. 2 ZPO); vor dem staatlichen deutschen Gericht als Reaktion auf die Erhebung der Schiedsereide (§ 1032 Abs. 1 ZPO); im auf Feststellung der Wirksamkeit/Unwirksamkeit der Schiedsklausel gerichteten Gerichtsverfahren (§ 1032 Abs. ZPO); im Verfahren zur Aufhebung des Schiedsspruches (§ 1059 Abs. 2 Nr. 1 a ZPO); und schließlich im Vollstreckbarerklärungsverfahren (§§ 1060, 1061 ZPO).

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Acceleration of Arbitration Proceedings – The Swiss Way: The Expedited Procedure under the Swiss Rules of International Arbitration

Eine der wichtigen Neuerungen der Anfang 2004 in Kraft getretenen Swiss Rules of International Arbitration ist die Einführung eines beschleunigten Verfahrens nach Art. 42. Vorbehaltlich einer abweichenden Parteivereinbarung ist dieses bei Streitigkeiten mit einem Gesamtstreitwert von unter 1 Million CHF obligatorisch. Den Parteien steht es aber offen, sich auch bei höheren Streitwerten auf die Durchführung eines beschleunigten Verfahrens zu verständigen. Das beschleunigte Verfahren zeichnet sich durch verkürzte Fristen, etwa bei der Bildung des Schiedsgerichts aus. In der Regel soll der Streit durch einen Einzelschiedsrichter innerhalb von 6 Monaten entschieden werden, wobei die Begründung des Schiedsspruchs in einer zusammenfassenden Kurzform erfolgen kann. Nachfolgend werden die Besonderheiten des beschleunigten Verfahrens erläutert und praktische Empfehlungen für den Umgang mit diesem prozessualen Instrumentarium gegeben.

One of the important innovations of the Swiss Rules of International Arbitration, which entered into force on 1 January 2004, is the implementation of the Expedited Procedure pursuant to Art. 42. Unless otherwise agreed by the parties, disputes in which the aggregate amount in dispute does not exceed CHF 1 million, will be subject to the Expedited Procedure. In addition, the parties are free to opt in the expedited procedure in case of an amount in dispute exceeding CHF 1 million. This kind of procedure is characterised by shortened time-limits, e. g. concerning constitution of the arbitral tribunal. The dispute shall be referred to a sole arbitrator who shall make an award within six months. In the following the characteristics of the Expedited Procedure are described and practical recommendations for the use of this new procedural instrument given.

I. A challenge for modern-days arbitration: Speed without loss of quality

In recent years users of international arbitration services have voiced criticisms as to the length of some arbitration proceedings. A number of publications and seminars have been devoted to the topic.¹ Has arbitra-

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1) Including an ICC conference in 1998 in honour of Michel Gaudet (contributions are compiled in *Improving International Arbitration, Liber Amicorum Michel Gaudet* (Benjamin G Davis, Ed.), ICC Publication 598, Paris 1998), the IBA Arbitration Day held in March 2005 in Geneva and the Paris seminar of the Chartered Institute of Arbitrators Young Members Group of 3 June 2005. The present paper is a revised version of a speech delivered at this occasion.

tion lost its momentum? It is submitted that this is not the case. At least in the writer's experience, arbitration proceedings are not taking longer than they did ten years ago. The principle stated by the Swiss Supreme Court (the Federal Tribunal) that speed is axiomatic for international arbitration is still valid.² However, the users of arbitration are no longer the same than in the past, where mainly states and multinational corporations resorted to arbitration. Business is more global than ever. Trust in the other contracting parties' courts did not increase for that. Arbitration clauses have become a common feature in all kinds of cross-border transactions, even if they involve relatively small companies and/or amounts. On the other hand, major investment projects, mergers and acquisitions, high-tech contracts, complex construction contracts continue to be submitted to arbitration. State-investor disputes have also known a considerable increase. Obviously, the needs of the users are a function of the particularities of their cases. Speed is only one aspect of the arbitration. The most important requirement is that the users' trust in the arbitration process is honored. This means in particular that they are given an appropriate opportunity to present their case to the arbitral tribunal of their choice. In complex cases and in disputes involving states the parties regularly need more time to present their case than in cases of little complexity. Excessive speed may not only clash with the parties' right to be heard but also diminish one of the main advantages of arbitration: freedom and flexibility in the constitution of the arbitral tribunal and the organisation of the arbitration.

Speed should not be overrated either for another reason: speed is not a goal in itself. The goal is to obtain an enforceable award putting an end to a dispute among the parties. Arbitration has an undeniable advantage over litigation in this respect: arbitral awards are enforceable in most countries under a multilateral enforcement treaty (The 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards). There is no comparable instrument for decisions rendered by ordinary courts.

The fact that there is simply no alternative to arbitration must of course not lead to complacency. Indeed, arbitration is continuously evolving and developing products answering to the need of its users. Examples of innovation are numerous and include the World Intellectual Property Organization's (WIPO) widely used rules for the settlement of internet domain names,³ the increasingly popular Court of Arbitration for Sport (CAS/TAS) in Lausanne with its rules tailored for sport-related disputes,⁴ the ICC Pre-arbitral Referee Rules, the ICC Dispute Boards⁵ and, last but not least, the Expedited Procedure under the Swiss Rules of International Arbitration. All these mechanisms strive to afford the parties a flexible framework for the resolution of their disputes through a fast decision or recommendation while respecting the parties' right to be heard.

II. The Swiss Rules of International Arbitration and their expedited procedure (Article 42)

In 2003, the Chambers of Commerce of Basel, Bern, Geneva, Ticino, Vaud and Zurich agreed to adopt a

common set of arbitration rules. These rules, the "Swiss Rules of International Arbitration", entered into force on 1 January 2004 and replaced the arbitration rules of the six Chambers of Commerce.⁶ One of the important innovations of the Swiss Rules compared to other institutional rules is a mandatory expedited procedure for small claims.

While many disputes submitted to arbitration involve several million USD, others can be quite small. In disputes arising out of simple cross-border sales, commodity trading, freight contracts or bank guarantees, all of which are frequently subject to arbitration, often less than 1 million are at stake. Experience shows that full-fledged arbitration is seldom the most effective way to resolve these disputes.

In order to increase the effectiveness of arbitration as a dispute settlement mechanism in these kinds of disputes, the Swiss Rules allow for expedited proceedings.⁷ According to Art. 42.2 of the Swiss Rules, disputes in which the aggregate amount in dispute (claim, counterclaim, set-off defences added) does not exceed CHF 1 million (approximately Euro 647'000, USD 816'000 at the end of May 2005, at the time this paper was completed) will be subject to the Expedited Procedure of Art. 42.1.

If a dispute involves amounts exceeding the 1 million-threshold, the parties may nevertheless benefit from the Expedited Procedure if they agree (Art. 42.1). Such opting in may be in the arbitration agreement or in a subsequent agreement provided it is made before the constitution of the arbitral tribunal. Once the tribunal is in place, it is in its power to decide on the applicable procedural rules, within the limits of the mandatory provisions in Art. 182.3 Swiss Private International Law Act ("PIL Act") and Art. 15.1 Swiss Rules (equal treatment).⁸

In 2004, 46% of all new arbitration filed with the Swiss Chambers and subject to the Swiss Rules were Expedited Procedures based on the express agreement of the parties or the amount in dispute.

Clauses entered into prior to the coming into force of the Swiss Rules on 1 January 2004, referring to expedited arbitration under the old arbitration rules of the Swiss Chambers, are deemed to refer to Art. 42 ff. of the Swiss Rules, unless the parties agree otherwise.⁹

2) *Swiss Supreme Court (Federal Tribunal)*, Decision published in the Official Court Reporter ("OCR") 108 Ia 197, 201.

3) <http://arbitrator.wipo.int/center/>.

4) <http://www.tas-cas.org/>. During the Olympic Games, ad hoc tribunals are set up to decide in matters of hours disputes arising during the Games. While the proceedings of the ad hoc tribunal will physically be held at the location of the Games, they remain Swiss: All arbitrations have their legal venue in Lausanne/Switzerland even if the actual proceedings may take place elsewhere (see, for instance, the decision of the *Supreme Court of New South Wales*, in: *Raguz v. Sullivan*, ASA Bull. 2001, p. 335).

5) Available at the ICC's web page: <http://www.iccwbo.org/court/english/rules/rules.asp>.

6) The Rules are posted at the Chambers web page: <http://www.swissarbitration.ch/>.

7) *Elliott Geisinger*, The Expedited Procedure under the Swiss Rules of International Arbitration, in: ASA Special Series No. 22 – The Swiss Rules of International Arbitration (Ed. *Gabrielle Kaufmann-Kohler and Blaise Stucki*), p. 67 f.

8) *Fabrizio la Spada*, in: Swiss Rules of International Arbitration, (*Tobias Zuberbühler/Christoph Müller/Philipp Habegger*, Eds.), Schulthess, Zürich 2005, n. 3 ff ad Art. 42.

9) *La Spada*, loc.cit., n. 5.

Clauses referring to the old rules *without* referring to the old expedited proceedings are more delicate. A party could argue that to the extent that the Expedited Procedure is a novelty, it should not apply. However, in light of the case law of the Swiss Federal Tribunal, the chances of success of this argument are compromised.

In *Komplex v. Voest-Alpine Stahl* the Federal Tribunal addressed how an arbitration agreement referring to the rules of an arbitration institution should be interpreted if arbitration is initiated after the arbitration rules were revised. The Federal Tribunal held that arbitration agreement shall be construed like any contract, i. e. in accordance with the common intention of the parties.¹⁰ Consequently, a clause that stipulates explicitly that arbitration should be subject to the arbitration rules as in force at the time of the conclusion of the contract is likely to be enforced by the Chambers.

If, on the other hand, the parties had not explicitly dealt with the question of what version of the rules should apply, the *Komplex* test would apply: the relevant provision of the old version takes precedence over the new one only if the changes in the new one result in structural and fundamental differences.¹¹ As *Geisinger* explains, the Expedited Procedure of Art. 42 closely follows the model contained in the old rules of certain Chambers.¹² The principle of expedited proceedings can hardly be a surprise and the six-month time-limit is not compressed enough to be called extraordinary.

The general principle that new rules prevail was confirmed in a judgment of 25 March 2004.¹³ The Federal Tribunal discussed the validity of a statutory arbitration clause in the FIFA statutes. The clause was referred to in a contract between a sports manager and his employer, a football club. The federal judges decided that in general and also in the case of an arbitration agreement by reference to statutes of an association, the parties were deemed to have accepted in advance revisions that the rules may undergo from time to time.¹⁴

III. The characteristic features of the expedited procedure

The distinctive features of expedited procedures under Art. 42.1 are the following:

- **Shortened time-limits:** the Chambers may shorten the time-limits for the appointment of arbitrators. The award shall be made within six months of the transmission of the file to the arbitrators (Art. 3.12). In exceptional circumstances the Chambers may extend this time-limit.
- **Limited submissions and hearings:** unless the parties agree that the award shall be rendered on the basis of written submissions and documentary evidence, the tribunal shall hold a single hearing for all expert and fact witnesses. Of course the general principles of due process and right to be heard also apply in the Expedited Procedure. Awards rendered in expedited procedures that were inconsistent with these rights can be challenged under Art. 190 PIL Act like an award made in ordinary proceedings.

- **Summary award:** the arbitral tribunal shall state the reasons upon which it relies in a summary form, unless the parties have agreed that no reasons need to be given.
- **Single arbitrator:** where the amount in dispute is below CHF 1 million, the case shall be referred to a sole arbitrator. If the arbitration agreement provides for three arbitrators, the Chambers invite the parties to agree on a sole arbitrator. As an incentive for the parties to agree, the Rules provide that failing an agreement, the fees of the arbitrators will in no event be less than the fees resulting from an hourly rate of (currently) CHF 350.–.

If the seat is in Switzerland, an expedited arbitration is governed by the Swiss *lex arbitri*, i. e. Chapter 12 of the 1987 PIL Act, provided that at least one party to the arbitration had no seat in Switzerland when it entered into the agreement to arbitrate. Under the PIL Act the parties have much leeway to decide on the procedure directly or by reference to the rules of an arbitration institution, such as the Swiss Chambers of Commerce having issued the Swiss Rules. The Swiss Rules as well as any procedural orders issued by the arbitral tribunal will therefore govern any arbitration under the Swiss Rules, expedited or not, subject only to the mandatory rules of the PIL Act.¹⁵ It is important to note that Art. 42 is not a self-standing procedural regime but embedded in the general context of the Rules as the wording of Art. 42 makes abundantly clear: "based upon the foregoing provisions of these Rules".

10) It should be noted that for this exercise only the intention at the time the contract was concluded is relevant (*Federal Tribunal*, Decision of 8 July 2003, OCR 129 111 675, par. 2.3).

11) *Federal Tribunal*, Decision of 14 June 1990, *Komplex v. Voest-Alpine Stahl*, in: ASA Bull. 1994, p. 226, Commentary by *Sebastien Besson*, p. 230. In the case at hand, the parties had signed a contract in 1978. At that time the ICC Rules of 1975 were in force. When in subsequent arbitration proceedings an arbitrator withdrew, one of the parties claimed that the replacement procedure should be the one provided for in the ICC Rules in their version of 1988. The other party argued that the 1975 Rules continued to apply. The Federal Tribunal analysed both sets of Rules and came to the conclusion that the parties would have entered into their contract irrespective of what version of the ICC Rules applied since their principal choice was arbitration as opposed to litigation. The judges found that the 1988 revision did not fundamentally alter the ICC system nor was the new rule on the replacement of arbitrators surprising or untenable. Consequently, the Federal Tribunal confirmed that the new rules were to apply.

12) *Geisinger*, loc.cit., p. 68.

13) The principle that the rules governing the proceedings are those in force at the time the arbitration is initiated has also been applied by English courts. An arbitration clause providing for appeals on questions of law under the 1979 Arbitration Act was interpreted as referring to the 1996 Act. Similarly, a Commercial Court considered that when parties agreed on the London Maritime Arbitrators' Association Small Claims Procedure of 1989 they must have intended that "the procedure current at the relevant date would be the procedure used." (*Taylor Woodrow Civil Engineering v. Hutchison IDH Development Ltd* [1998] C.I.L.L. 1434; *Ranko Group v. Antarctic Maritime SA*, 12 June 1998, Comm. Ct., Toulson J., unreported, both quoted after *Stewart Shackleton*, *Global Warming: Milder Still in England (Part I)*, Int. A. L. R. 1999, p. 60).

14) Decision 4P.253/2003, ASA Bull. 1/2005, p.128. The Federal Tribunal stated, however, that only revisions which are duly made in accordance with the internal rules of the association can bind the members. This was not the case of the relevant modification of the FIFA Rules.

15) Especially, the independence of the members of the tribunal and their duty to grant the right to be heard and equality of the parties. The Swiss Rules fully endorse these fundamental principles.

As *Geisinger* rightly points out, certain of these rules may be difficult to reconcile with the specific rules of Art. 42; for instance, the appointment of experts, site visits, consolidation or joinders.¹⁶

IV. The amount in dispute

1. How, when and by whom is the amount in dispute calculated?

a) *Who?*

According to Art. 42.2 it is for the Chambers to calculate the amount in dispute.

b) *How?*

In order to determine whether the amount in dispute exceeds the threshold of CHF 1 million, the Chambers add claim, counterclaim and any set-off defence. While set-off defences that do not require substantial work can be excluded when calculating the amount in dispute relevant for the calculation of the fees and costs of the arbitration (Appendix B, 2.4), no such allowance is possible when assessing the threshold of Art. 42.2.¹⁷ Although Art. 42.2 does not mention whether interest claims should be taken into account, it is submitted that the rule of Appendix B, 2.5 should also apply: they are not considered unless they exceed the principal amount claimed.

c) *When?*

Obviously the Chambers have to wait until all of the Respondents file their Answer(s) to the Notice of Arbitration. Both Answer and Notice must contain an indication of the amounts claimed or counterclaimed or involved in a set-off defence (Arts. 3.3.e and 3.9). If neither counterclaim nor set-off defence are raised, the Chambers will calculate the amount based only on the amount stated in the Claimant's Notice of Arbitration in order to decide whether or not to apply Art. 42 (Art. 3.10).

According to Art. 3.5, the Chambers may request the Claimant or Respondent to complete an incomplete Notice or Answer. To the extent that the amount in dispute is a compulsory content of the Notice and Answer (Art. 3.3.e) the Chambers may request that the parties specify the amounts.

2. If the amount in dispute is below CHF 1 million, is it possible to opt out of the Expedited Procedure?

The parties can agree to opt out of the Expedited Procedure even in cases where the amount in dispute is less than CHF 1 million.¹⁸ There might indeed be circumstances where both parties perceive it to be in their interest to have more time, for instance in cases with little financial stake but of great importance as a precedent, or in cases of considerable complexity.

A partial opting out may occur de facto if the arbitration agreement provides for a three-arbitrator tribunal. In that event, the Chambers will ask the parties whether they agree to submit their dispute to a sole arbitrator (Art. 42.2.c). Unless all parties agree to deviate from the initial provision in the arbitration clause, the Chambers are forced to constitute a three-member tribunal. A case that occurs frequently is that of a Respondent failing to reply to the Chamber's

letter. No agreement to a sole arbitrator can thus be assumed and three arbitrators will have to be appointed. This leads to an increase of costs of the arbitration, which is not in the interest of any of the parties. It is submitted that in an upcoming revision of the Swiss Rules it should be stated that a party that does not reply to the Chamber's request as to whether it would be agreeable to the nomination of a sole arbitrator waives its right to a three-arbitrator tribunal.

Art. 42.2 does not state whether the Chambers can decide on their own motion or only upon request of a party or the parties jointly not to apply the Expedited Procedure. In practice, the Chambers will certainly ask the parties before taking any decision. Especially, if the parties in letters to the Chamber or their briefs mention evidentiary measures or other time-consuming procedural steps, the Chambers will usually draw the attention of the parties to the time-limit of Art. 42.1.d which may be irreconcilable with the requested measures or announced steps.

3. What if the amount in dispute increases or decreases in the course of the arbitration?

The amount in dispute is subject to changes during the arbitration. It can increase due to increasing damages or new claims (Art. 20), or a revised damage calculation. It can decrease, for instance, as a result of a withdrawal of a claim following a settlement or termination of the arbitration regarding a claim for failure to pay an advance.

The Swiss Rules are silent on the impact of such change in the amount in dispute. In many instances it will not be practicable to alter the format of the arbitration once it is under way. In particular, it would seem very difficult to accelerate the arbitration once the timetable has been agreed. If the parties and the arbitrator agree they can of course at any stage revisit the timetable, for instance if a main claim has been withdrawn and a hearing can be cancelled. A six-month time-limit could be agreed to start running at a given date.

It would be easier to shift from an accelerated arbitration to a "normal" format. The parties and the arbitral tribunal are free to agree on such a change. A unilateral request from one party, however, is not sufficient to alter the format. Applying *mutatis mutandis* Art. 42.2 it should in these instances be left to the Chambers to decide on the format in view of all relevant circumstances.¹⁹

V. The six-month time-limit

1. When does the time-limit start to run and when does it expire? Can it be extended?

a) *The starting date*

According to Art. 3.12 of the Swiss Rules, once all arbitrators have been confirmed and the registration

16) *Geisinger*, loc.cit., p. 71.

17) *La Spada*, loc.cit., n. 25.

18) *La Spada*, loc.cit., n. 20f.

19) *La Spada*, loc.cit., n. 28 submits that the request of one of the parties is sufficient. *Geisinger*, loc.cit., p. 80f. considers that the decision should be left to the Chambers.

fee fully paid,²⁰ the Chambers transmit the file without delay to the arbitral tribunal.

The final award in expedited proceedings shall be made within six months "from the date when the Chambers transmitted the file to the arbitral tribunal" (Art. 42.1.d).

As to the calculation of periods of time Art. 2 provides that any period starts to run the day after a communication was physically received. Although this provision, as the wording shows, primarily deals with communication to parties, there is no reason not to apply it to arbitrators also. The relevant date is thus the one when the sole arbitrator receives the entire file, including exhibits. In case of a three-member tribunal, all members need to have received the file.

b) The expiration date

Unless it has been extended (see below), the time-limit expires six months after the arbitral tribunal received the file. The Swiss Rules do not specify whether six months refers to calendar months or six consecutive periods of 30 days. If the relevant date was doubtful and had not been identified in the timetable established by the arbitrator it is suggested to apply the European Convention on the Calculation of Time-Limits.²¹

Applying by analogy Art. 2.2 of the Swiss Rules, the period is extended to the next business day, if the period expires on a holiday at the arbitrator's place of business. Since the arbitrator must establish a timetable (Art. 15.3) which should fix the precise date when the award is rendered, the risk of disputes on the relevant date is slim. In any event, a party who does not object forthwith to the six-month period as calculated by the arbitrator in the timetable loses its right to object later in the arbitration or to set aside proceedings.

The award is "made" on the day when it is signed (Art. 32.4); in case of a three-member tribunal, when it is signed by the last of them. In case of a dissenting arbitrator, the signature of the other two are controlling; if there is no majority, that of the presiding arbitrator (Art. 31.1).

The date when the award is made must not be confused with the date it is notified to the parties, which might be later. The award is notified by the arbitral tribunal to the parties and the Chambers (Art. 32.6). If the seat is in Switzerland, the award becomes final and binding upon its notification (Art. 190.1 PIL Act).

From a purely practical point of view, it could also be argued that the relevant date is that of receipt of the award by the parties. Indeed, the time period is made to the benefit of the parties who should have a decision within a short time. However, to the extent that the arbitrators have not full control on the time that lapses between the moment they send off the award and when it is received by the parties, it is suggested that the controlling date should be that of the signature by the arbitrator. The arbitrators should then notify the award to the parties in accordance with the agreed rules for notifications on the next possible occasion.

The statutory time-limit to challenge the award before the Federal Tribunal will start only upon notification in conformity with Art. 190.1 PIL Act.

c) Extension of the time-limit

According to Art. 42.1.d, the Chambers can extend the time-limit in exceptional circumstances ("*bei Vorliegen ausserordentlicher Umstände*", "*dans des circonstances exceptionnelles*").

Failing a provision to the contrary in the Swiss Rules, it is submitted that the arbitral tribunal as well as the parties, jointly or individually, may apply to the Chambers with a request for extension.²² The request must specify the exceptional circumstances that warrant an extension. The Chambers have large discretion, but should exercise it prudently. The Expedited Procedure is, not in the last, an attractive tool to parties involved in a dispute with small amounts. It is in the Chambers' interest to make sure that Art. 42 is applied in accordance with its terms and the expectations of its users. It is therefore unlikely that extensions will be too liberally granted. As Geisinger rightly points out, the six-month time-limit is not a "*délai d'ordre*" that can be extended by the arbitral tribunal or the parties.²³ It is a main stay of the Expedited Procedure, which is itself a key feature of the Swiss Rules.

Can the Chambers themselves extend the time-limit? Art. 42.1.d does not exclude it. It is submitted that the Chambers have the power but should use it with restraint. In particular, they should inquire with the arbitrator and the parties whether there are extraordinary circumstances calling for an extension.

The Chambers should carefully monitor the progress of the arbitration. In particular, they will check the timetable drawn up by the arbitral tribunal (Art. 15.3). If the timetable provides for procedural steps that are difficult to complete within the six months, they should draw the tribunal's attention to the paramount importance of complying with the time-limit. If an arbitrator turns out to be unwilling or incapable of complying with the time-limit, with or without fault, the Chambers' Special Committee may revoke the arbitrator (Art. 12).²⁴ Since in practice such replacement inevitably creates further delay, it will only occur if the delay that the acting arbitrator is likely to cause exceeds the time necessary for the new arbitrator to render the award (in principle six months). The fees of an arbitrator who needs to be replaced will be carefully reviewed by the Chambers, especially in case of fault.

Certain events may disrupt and delay the arbitration, for instance a challenge of an arbitrator, the replace-

20 Claimants should bear in mind that amounts paid in other currencies than CHF will be exchanged in CHF when transferred to the Chambers' bank account. If as a result of the exchange rate fluctuation or deductions of bank charges the amount received by the Chambers in CHF is less than the registration fee due, the Chambers will have to ask for an additional payment. If payment is received within the time-limit set by the Chambers the Notice of Arbitration is deemed to have been filed on the date it was received by the Chambers (Art. 3.5).

21 European Convention on the Calculation of Time-Limits (*Convention européenne sur la computation des délais*) of 16 May 1972 (RS 0.221.122.3), Art. 4.2: "Where a time-limit is expressed in months or in years the *dies ad quem* shall be the day of the last month or of the last year whose date corresponds to that of the *dies a quo* or, when there is no corresponding date, the last day of the last month."

22 Geisinger, loc.cit., p. 72. La Spada, loc.cit., p. 356, n. 14.

23 Geisinger, loc.cit., p. 72.

24 The possibility of removing an arbitrator who turns out to be unable to deal with the case in the applicable time period has also been suggested by the *Appellate Court of the Canton of Basel*, in the decision of 2 January 1984, published in ASA Bull. 1985, p. 19, 24 summarized in Section V.2 below.

ment procedure, an application to the courts at the seat of arbitration ("*juge d'appui*"), and a stay of the arbitration because of proceedings pending abroad.²⁵ The Rules are silent on the impact of such events. They will have to be assessed on a case-by-case basis. In many cases, a suspension of the six-month time-limit will be warranted.

An extension must remain an exception. It is the task of all parties whose acts or omissions can impact the duration of the arbitration to ensure that no extension becomes necessary. In this regard a few rules merit to be emphasized.

The rule of good faith applies in any arbitration, to all participants (Swiss Rules, Art. 15.6), and obliges the parties to refrain from any act that may delay the arbitration.²⁶ There is also a general duty on the arbitrators to render their award in due time. This has been recognized by the European Convention on Human Rights.²⁷ In expedited arbitrations, the arbitrators are dutybound to enforce the timetable they establish. As one author put it: "*the secret of speed in arbitration is timely planning and due monitoring of the timing*".²⁸

Once the arbitrator has accepted to act in an expedited procedure, he/she is bound and cannot step down for lack of time.²⁹

d) What are "exceptional circumstances" that may warrant the extension of the time-limit?

Arguably the events described above (V.1.c) may constitute extraordinary circumstances. Their extraordinary nature should be assessed against the backdrop of Art. 42, not in an abstract manner. For instance, it is quite unremarkable in international arbitration that a party or the arbitral tribunal appoints an expert. It would hardly qualify as "extraordinary". However, the threshold should be lower in case of expedited proceedings. If an expert opinion, a site visit, or other time-consuming evidentiary proceedings turn out to be absolutely indispensable for the arbitrator to make his award, this should suffice to allow an appropriate extension.³⁰

Decisions on urgent interim measures or even provisional awards (*référé provision*), may be required (even though in most cases, a party would turn to a competent court rather than to the arbitrator). A party may file voluminous briefs and exhibits, or develop entirely novel and unexpected arguments. Such cases may also warrant an extension.

2. What if an award is rendered after the time-limit (extended as the case may be) expired?

From the outset it should be stressed that under the old rules of the Swiss Chambers, compliance with the time-limits was not problematic.³¹ It can be expected that in most cases under the new Rules no insuperable problems should arise either.

In certain jurisdictions, the arbitral tribunal is *functus officio* if it does not render an award within the agreed time-limit. A tribunal sitting in Switzerland is not *functus officio* by rendering its award.³² Even if the award is annulled the case will be remitted to the existing tribunal.

There is only one Swiss³³ precedent known to the author where the issue has been addressed in the con-

text of a time-limit to render the award. In a decision of 2 January 1984, the Appellate Court of the Canton of Basel rejected a challenge to an ICC award that had been rendered after the six-month time-limit within which arbitral tribunals sitting under the auspices of the ICC are supposed to render their awards.³⁴ The Court ruled that the time-limit had been extended and was in any event a mere technicality, which did not

25) It should be noted that an arbitral tribunal sitting in Switzerland may have to stay the arbitration, in case of prior court proceedings on the same matter abroad to the extent that they may lead to a decision enforceable in Switzerland (Decision of the Federal Tribunal, *Fomento v. Colon Containers Terminal*, ASA Bulletin 2001 p. 544 (French original) and p. 555 (English translation), notes *Liatowitsch, Vulliamin, Scherer*). As to the principle according to which civil proceedings must be suspended if criminal investigations are pending, the Federal Tribunal decided that the rule "*Le criminel tient le civil en état*" is not part of public policy (119 II 386, 390). The arbitral tribunal is not obliged to stay the arbitration pending criminal proceedings abroad. A stay must be granted but in the most extraordinary circumstances considering that a speedy resolution of disputes is axiomatic for arbitration (OCR 108 la 197, 201). Regarding the stay of an arbitration in general, see *Laurent Levy et Anne Veronique Schlaepfer*, La suspension d'instance dans l'arbitrage international, *Gazette du Palais, Les cahiers de l'arbitrage*, No. 2001/2 - 1^{ère} partie - p.25.

26) *Federal Tribunal*, Decision of 10 May 1982, OCR 108 la 197 *Edok S. A. et al. v. Hydromechaniki S.à r.l. and Eupalinos S. A.*: "*L'un des buts de l'arbitrage est de permettre une solution rapide des litiges qui y sont soumis. Les parties qui compromettent sont dès lors tenues par les règles de la bonne foi d'éviter tout ce qui pourrait retarder sans nécessité absolue le déroulement normal de la procédure arbitrale.*"

27) *Commission Reg. No 10881/84*, Decision of 4. 3. 87, K.R. v. Schweiz.

28) *Mauro Rubino-Sammartano*, The arbitrator's role in securing speed in arbitration, in: *Improving International Arbitration*, Liber Amicorum Michel Gaudet (*Benjamin G Davis*, Ed.), ICC Publication 598, Paris 1998, p.147, 149.

29) See *Bernhard Berger*, Jederzeitiges Kündigungsrecht des Schiedsrichters?, in: *ASA Bull.* 2002, 5; *Eugen Bucher*, Noch einmal das Rücktrittsrecht des Schiedsrichters: Zurück zum receptum arbitri, und sodann Rezepte gegen die Untat böser Buben, in: *ASA Bull.* 2002, 413.

30) *La Spada*, loc.cit., p. 355, n. 13.

31) *Geisinger*, loc.cit., p. 68 f.

32) *La Spada*, loc.cit., p. 356, n. 16.

33) The issue of expiry of arbitration agreement has been dealt with by French courts in relation to the extensible six-month time-limit under the ICC Rules. In a decision of 6 March 2003 (*AIC v. Skanska*, *Les cahiers de l'arbitrage*, vol. II, p. 341) the Paris Court held that the parties had tacitly agreed to an extension by proceeding on the merits without reservation after the expiry of the time-limit. The Supreme Court of Quebec, in a decision of 15 February 2000, *Air France v. Arbitral Tribunal and Libyan Airlines* (extracts published in *ASA Bull.* 2000, 116,141) came to the same conclusion in relation to an arbitration governed by the UNCITRAL Rules. In another instance, however, a French court annulled an award for having exceeded the agreed time-limit since one of the parties objected to the delay timely and did not participate in the proceedings after the expiry of the initial time-limit (*SITI v. Golfy Club*, 9 March 1990, *Rev.arb.* 2001, p. 200, note *Pinsolle*). Cf. *Jean-Francois Poudret/Sébastien Besson*, *Droit comparé de l'arbitrage international*, Schulthess, Zurich 2002, p. 404, n. 454 who analyse the issue in comparative law. The authors do not consider such time-limits to be compulsory. They refer also to German case law. On the other hand, they point out that in certain countries (Italy, Sweden, Belgium, Switzerland (domestic arbitration only) and France) an award rendered after the expiry of the time-limit can be set aside. According to *Poudret/Besson*, extensions can be granted by the courts in Switzerland and France but not in Italy, Belgium and possibly in Sweden.

34) *Appellate Court of the Canton of Basel*, 2 January 1984, published in *ASA Bull.* 1985, p. 19, 24: "*Die verfügten Verlängerungen sind vom dafür zuständigen Schiedsgerichtshof erlassen worden und halten somit vor der Verfahrensordnung stand. Bei diesen Bestimmungen handelt es sich im übrigen um blosse Ordnungsvorschriften, nicht um eine zeitliche Begrenzung des Mandats der Schiedsrichter. Die Verweigerung der Verlängerung führt nämlich nicht ipso jure zur Beendigung des Schiedsrichtermandats; vielmehr muss der Schiedsgerichtshof bei Verweigerung einer Verlängerung gemäss Art. 18 Abs. 3 der Verfahrensordnung nur entscheiden, in welcher Weise das Verfahren zu Ende geführt werden soll. In diesem Zusammenhang ist auf Art. 2 Abs. 8 der Verfahrensordnung zu verweisen, wonach die Möglichkeit besteht, einen Schiedsrichter zu ersetzen, wenn er seinen Aufgaben innerhalb der auferlegten Frist nicht nachkommt.*"

intend to limit the duration of the arbitrators' mandate.

If it were argued by a party that the arbitration agreement lapses after the expiry of a six-month time-limit, the Federal Tribunal would examine what the intention of the parties was.³⁵ In case the arbitration agreement was entered into *before* the coming into force of the Swiss Rules on 1 January 2004, it is impossible to assume that the parties had this intention. In agreements concluded *thereafter* but which do not specifically mention the Expedited Procedure, it is also difficult to concede that they would have given expedited arbitration priority over arbitration at all. In these cases, the Expedited Procedure applies only as a result of the Swiss Rules' scope of application, rather than because of the parties directly referring the dispute to accelerated proceedings.

Arguably, there is hardly a conceivable case where the parties consider compliance with the six-month period of such paramount importance that they make the arbitral tribunal's jurisdiction subject to such compliance.

It should also be stressed that according to standing case law of the Federal Tribunal, a violation of agreed procedural rules contained in a set of arbitration rules, such as ICC or Swiss Rules, or in terms of reference is not a sufficient reason to set aside an award.³⁶

More likely cases of time bars relevant in arbitration are those where the parties agree on a time-limit for initiating the arbitration once a dispute has arisen.³⁷ The Swiss Rules do not deal with this hypothesis which is entirely distinct from the issue whether there is a time-limit to render the award and if such time-limit is compulsory.³⁸

In conclusion, an award rendered after the expiry of the six-month time-limit is valid if the seat of the arbitration is in Switzerland and if the parties have not made any reservation. It should in any event be valid if the Chambers have extended the original time-limit. A party who challenged the validity of the award would have to show that compliance with the initial time-limit of six months was of essence and that the validity of the arbitration agreement depended on it. In any event, a party that has caused, or contributed to delay in the arbitration cannot rely on such delay as a ground for challenge. A challenge would in this event be estopped by the principle of "venire contra factum proprium".

VI. Will awards rendered in an expedited procedure be recognized in Switzerland?

It should be stressed that the award rendered in accordance with Art. 42 is a "real" award even if the proceedings are expedited. It is not a recommendation or a summary judgement that can be reviewed by another instance. For all purposes the decision rendered under Art. 42 is an "arbitral award" according to Art. 190 PIL Act. The award is final from the moment it is communicated. It is subject to a direct challenge before the Swiss Supreme Court (Federal Tribunal) who has exclusive jurisdiction. According to Art. 190 PIL Act, arbitral awards rendered in Switzerland³⁹ can be set aside based on five grounds only (improper constitution of the arbitral tribunal, lack of

jurisdiction, *ultra* and *infra petita*, right to be heard, and public policy). In essence, an award can be set aside only for violation of procedural or substantive public policy.

The Federal Tribunal, which has exclusive jurisdiction for any challenge, will hold an award rendered in expedited proceedings to the same standards as any other award. As no two awards are alike, and each application to set aside the award is closely tied to the challenged award, it would make little sense to explore possible scenarios on a purely hypothetical basis.

Certain challenges may nevertheless reflect the typical features of Art. 42.

- A party could try to argue that the Expedited Procedure should not have applied since it had not been part of the arbitration rules in force when the arbitration agreement was concluded.
- If the award has been rendered after the expiry of the six-month time-limit a challenge based on a purported expiry of the arbitration agreement could be considered.
- Finally, a party might argue that due to the accelerated nature of expedited proceedings it had not been granted the full right to be heard.

Whether the Expedited Procedure applies to arbitrations based on arbitration agreements entered into before 2004 has been dealt with above (Section II). In most circumstances, the parties will be deemed to have accepted the changes in the rules. The expiry of the original time-limit should not be problematic either (Section V.2). Experience shows that in any event delay will occur only exceptionally.

As to the right to be heard, it must be fully respected in any arbitration. The limitation to six months is not problematic *per se*. This being said, it cannot be overlooked that in certain circumstances, the six months can be quite difficult to reconcile with the equality of the parties and their right to be heard. The Claimant may have had many months to prepare a powerful request for arbitration, witness statements and expert opinions. It is for the arbitral tribunal to make sure that the right to be heard is respected.

A Respondent may find it difficult to reply within 30 days and to catch up with the Claimant in the short time available. The Chambers can in appropriate circumstances extend the time-limit for the Respondent to file its Answer and counterclaim. The time-limit is triggered only when the arbitral tribunal receives the file.

The fact that awards in the Expedited Procedure are only summarily reasoned, and that the parties can even

35) Geisinger, loc.cit., p. 84 f. Regarding interpretation of arbitration agreements see *Federal Tribunal*, Decision of 24 March 2004, ASA Bull. 2005, p. 128 ; Decisions in Official Court Reporter 129 III 675 and 130 III 66.

36) *Federal Tribunal*, Decision of 24 March 1997, ASA Bull. 1997, p. 316; *Federal Tribunal*, OCR 127 III 576, ASA Bull. 2002, p. 473 ; *Federal Tribunal*, Decision of 7 January 2004, ASA Bull. 2004, p. 592, 603; *Federal Tribunal*, Decision of 1 July 2004, ASA Bull. 2005, p.139.

37) In *Vekoma v. Maran Coal*, the Federal Tribunal set aside an ICC award since the arbitration had been initiated after a "drop dead" provision stipulating that arbitration must be filed within 30 days if the parties cannot agree on an amicable solution of their dispute (Decision of 17 August 1995, ASA Bull. 1996, 673 ff.).

38) Cf. *Poudret/Besson*, loc.cit., p. 403 *in fine*.

39) If the seat of the arbitration is abroad, the PIL Act will obviously not apply.

agree not to have reasons at all, is not problematic. The obligation to reason awards is not mandatory. The parties can waive their right to receive a reasoned award, explicitly or tacitly. The lack of reasons does not amount to a ground for challenge of the award.⁴⁰ Of course, the award needs to decide all claims made, failing which the award can be set aside under Art. 190 PIL Act (*infra* and *ultra petita*).

A hearing is not an indispensable part of the parties' right to be heard either. There is no absolute right to ask questions to a witness, even if he has filed a written witness statement.⁴¹

In any event, a party that considers that it is not fairly treated cannot simply wait until the award is rendered. According to the standing case law of the Federal Tribunal, a party that considers that its right to be heard has been flaunted must not only object forthwith in the arbitration but is also expected to do everything that is reasonably in its power to obtain redress by asking specifically for evidentiary proceedings and expertise. It must also try to obtain evidence from third parties. Passivity when facing a violation of one's right to be heard equates acceptance.

VII. Are awards rendered in an expedited procedure enforceable outside Switzerland?

Enforceability of a Swiss award abroad is governed by the laws of the country where enforcement is sought. In countries that have ratified the New York Convention, the latter will be controlling.

VIII. What you should know with respect to the expedited procedure if you are:

1. A drafter of an arbitration agreement providing for arbitration under the Swiss Rules

- In case that disputes that might arise under your contract are likely to involve amounts not exceeding CHF 1 million, the Expedited Procedure will apply even if you do not explicitly provide so in the contract.
- Experience of the Chambers shows that the Expedited Procedure works; in most cases, parties obtain an enforceable award within six months and have to pay considerably less for it than in "normal" proceedings.
- If you wish to take advantage of the Expedited Procedure even in cases exceeding CHF 1 million you should state so in the arbitration agreement (a subsequent agreement is possible but usually more difficult to obtain). There are, however, cases where the Expedited Procedure may not be ideal, for instance in large and complex technical claims. If your contract involves such issues, you may not want to agree in advance to submit all disputes to the Expedited Procedure.
- If you want to opt out of the Expedited Procedure in advance the other party must agree. The agreement is best made in the arbitration clause itself, although it is possible to opt out when a dispute arises. However, you should have a compelling reason to forego in advance the advantages of a quick resolution at a comparatively low cost.

- If your clause provides for a three-member arbitral tribunal you may have to stick with it even if a subsequent dispute falls in the ambit of the Expedited Procedure (where, normally, a sole arbitrator is appointed) unless the other party agrees to the appointment of a sole arbitrator. In case your adversary is not participating in the arbitration (defaulting) there is no such agreement. A phrase in the arbitration clause providing for the appointment of "one or more arbitrators" allows you more leeway.
- The Expedited Procedure is in line with Swiss arbitration law. If you opt for the Swiss Rules but select a seat outside Switzerland, make sure that the arbitration law of the country in which the seat is located does not harbour surprises with respect to accelerated proceedings. In certain countries, for instance, it might not be possible to extend the six-month time-limit.
- Some parties insert in their contracts rules aiming at preventing ambush tactics or streamlining the proceedings. For instance, a party wishing to file for arbitration must notify the dispute to the other party beforehand. The contract may also provide for a multi-tiered dispute resolution mechanism, mediation and/or negotiations preceding arbitration. It may provide for a (short!) "cooling off period" after negotiation where no arbitration shall be introduced. Such clauses are useful to the extent that they give the parties an opportunity to settle their dispute informally. Sometimes language can be found that addresses the length of briefs or the number of exhibits or witnesses ("Notice of Arbitration shall not exceed 20 pages A4 single space"). The parties may also agree to exchange their briefs before starting the formal arbitration. The arbitral tribunal or mediator, once appointed, receives the parties' pleadings (sometimes with a common bundle of exhibits prepared by the parties). In cases where the parties are still on speaking terms and wish to have only a very short arbitration, such preparatory work may limit the duration of the arbitration. The parties may also agree on the evidentiary value of certain documents ("The audited books shall be conclusive evidence for a claim"). Such provisions may enforce a certain discipline. They may be problematic, however, if they limit a party's right to fully plead and prove its claim. In case of controversy about the scope or validity of such provisions, the arbitral tribunal will have to decide.
- Some parties may wish to exclude any review by the courts. If the seat of the arbitration is in Switzerland, parties that are not domiciled in Switzerland can exclude any application to set the award aside (Art. 192 PIL Act). However, in most circumstances the parties should not be encouraged to enter into such exclusion agreements. Little time is won (The Federal Tribunal, who has exclusive jurisdiction for any challenge of international awards rendered in

40) Federal Tribunal, Decision of 17 February 2000, *Rhône-Poulenc Rorer v. Roche*, ASA Bull. 2001, 787; Decision of 8 July 2003, OCR 129 III 675, ASA Bull. 2004, 353; Decision of 9 December 2003, *Nachmann v. German*, ASA Bull. 2004, 583.

41) Federal Tribunal, Decision of 7 January 2004, ASA Bull. 2004, 592, 600.

Switzerland, usually deals with an application to set aside an award within 6-8 months). There is no need to exclude "ordinary" appeals since under Art. 190 PIL Act, the Federal Tribunal does not review the merits. There is no need to exclude "appeals on a point of law" or like remedies since they simply do not exist in Switzerland. The only available grounds for setting aside an award are, in essence, public policy violations. Assume that there is a dispute, brought to arbitration, and you lose. Do you really want to forego the possibility to have the Federal Tribunal check whether the award is in line with public policy in case you think it is not?⁴²

2. A party to a contract providing for arbitration under the Swiss Rules

- Make sure at all times that in case of a dispute you can identify and evidence your claims against the other party/-ies to the contract forthwith. Have a performing document management system in place, monitor performance of the contract, track breaches, prepare claims, collect witness statements. This applies obviously to any contract, but all the more so if the contract refers disputes to the Swiss Rules, the Expedited Procedure of which limits the time available for the arbitration.
- If the other party threatens you with arbitration and the likely amount at stake is below CHF 1 million, be aware that there will be little time to organize your defence once arbitration is put in motion. Be ready. Involve in-house and/or external counsel as soon as there is a serious risk of a dispute, not only when you are notified a Notice of Arbitration. Even if they are not involved on a day-to-day basis, make sure they are fully briefed and operational.
- If you are ready and if you think it gives you a strategic advantage, consider going first and file a Notice yourself. But remember: you must get it right the first time. The strategy should not change between the Notice of Arbitration and subsequent written or oral submissions.

3. The Claimant in an arbitration under the Swiss Rules

- If your claim is below CHF 1 million, the Expedited Procedure will apply unless the Respondent raises a counterclaim or set-off defence that raises the aggregate amount in dispute to more than CHF 1 million. If you do not wish the Expedited Rules to apply, you must agree so with the other party or convince the Chamber that this is an extraordinary case that should be referred to normal arbitration.
- If your arbitration clause provides for three arbitrators, but you wish to have a sole arbitrator, try to negotiate with the Respondent the appointment of a sole arbitrator.
- In any case make sure that the arbitrator you appoint is available, has the professional experience and technical knowledge required to handle the case, and any other skills required. Arbitration experience is crucial since the arbitrator must be able to handle quickly procedural and substantive issues which may be complex. If the Chambers are to appoint the arbitrator, inform them of the required profile of the arbitrator. In any event, the arbitrators must be impartial and independent.

- If you do not wish the Expedited Rules to apply, make a claim in excess of CHF 1 million, if possible. If not, try to agree with the other party to opt out of the Expedited Procedure. If this is not possible, you can try to convince the Chamber that there are grounds that require the arbitration to proceed under the ordinary rules.
- Put the time before filing the Notice of Arbitration to good use. Unlike the Respondent you can decide when you start the arbitration and prepare for it.
- Do not expect extensions once the arbitration is under way.

4. The Respondent in an arbitration under the Swiss Rules

- If you are served with a Notice of Arbitration and have not done so yet get legal advice, set up a team, prepare your defence and check whether there are counterclaims. Be quick. The clock is ticking.
- Regarding the arbitrator see above Section VIII.3.
- Apply to the Chambers for an extension of the time-limit to file your Answer and counterclaim. If the circumstances require, you might get an extension.
- Do not expect extensions once the arbitration is under way.

5. An arbitrator asked to sit/sitting in expedited proceedings

- If a party inquires whether you would be prepared to act as arbitrator under the Swiss Rules verify whether the procedure is expedited. You may also want to inquire on the general nature of the dispute and the expected volume of the file. If the arbitration is expedited, you should only accept if timewise you are available for the next six months and able to render an award. Be candid about your availability.
- Once you accept the appointment you cannot step down.
- Draw up a realistic procedural timetable as soon as possible, monitor and enforce its compliance by the parties and abide by it yourself.
- Be aware of extreme pressure on parties and their counsel. You cannot have the same expectations as to substantiation and evidence as in normal proceedings. Bear in mind that the Claimant usually had much more time to prepare its case.
- Get quickly a good grasp of the file and the relevant issues. Give directions on what issues you wish the parties to deal with in their briefs and at the hearing.
- If the circumstances require, apply for an extension to the Chambers (for instance in case of indispensable evidentiary measures and in order to preserve the parties' right to be heard).

42) Exclusion agreements must be specific in order to be valid. Until very recently the Federal Tribunal never found an agreement submitted to it to be specific enough. In a decision of 4 February 2005 it ruled for the first time that language in an arbitration clause submitted to it, amounted to an exclusion agreement (Case 4P.236/2004, ASA Bull. 3/2005). The wording of the clause was as follows: "All and any awards or other decisions of the Arbitral Tribunal shall be made in accordance with the UNCITRAL Rules and shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made..."

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