

Section III. Arbitral Proceedings

GENERAL PROVISIONS

Article 15

1. **Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard.**
2. **At any stage of the proceedings, the arbitral tribunal may hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. After consulting with the parties, the arbitral tribunal may also decide to conduct the proceedings on the basis of documents and other materials.**
3. **At an early stage of the arbitral proceedings and in consultation with the parties, the arbitral tribunal shall prepare a provisional time-table for the arbitral proceedings, which shall be provided to the parties and, for information, to the Chambers.**
4. **All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.**
5. **The arbitral tribunal may, after consulting with the parties, appoint a secretary. Article 9 of these Rules shall apply by analogy to the secretary.**
6. **All participants in the arbitral proceedings shall act in accordance with the requirements of good faith.**

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BLESSING Marc, Comparison of the Swiss Rules with the UNCITRAL Arbitration Rules and others, ASA Special Series No 22, 17-65; FRANK/STRÄULI/MESSMER, Kommentar zur zürcherischen Zivilprozessordnung, 3. ed., Zurich 2000/2004; JERMINI Cesare, Die Anfechtung der Schiedssprüche im internationalen Privatrecht, Zurich 1997 (cit. JERMINI, Anfechtung); JERMINI Cesare, Witnesses and the right to be heard in international arbitration: some remarks on recent decisions of the Swiss Federal Court, ASA Bull 3/2004, 605-609; PETER Wolfgang, Some Observations on the New Swiss Rules of International Arbitration, ASA Special Series No 22, 1-15; WEHRLI/KOENIG/TRIEBOLD, Management of the Proceedings and Quality Control under the Swiss Rules, ASA Special Series No 22, 87-109.

Other Institutional Rules

- par. 1: Art. 15 ICC; Art. 14(1)(i), 14(2) LCIA; Art. 30(a+b) AAA; Art. 38(a+b) WIPO.
 par. 2: Art. 20(2, 3+6) ICC; Art. 19(1) LCIA; Art. 30 (in particular (c)) AAA; Art. 53(a) WIPO.
 par. 3: Art. 18(4) ICC; Art. 9 and 20(b) AAA; Art. 47 WIPO.
 par. 4: Art. 14(2) LCIA; Art. 32(b) AAA.
 par. 5: ICC Court Secretariat's Note concerning the appointment of administrative secretaries by arbitral tribunals (1 October 1995).

I. Comparison to UNCITRAL Rules

- 1 Compared to Art. 15 UNCITRAL, the Swiss Rules explicitly require the arbitral tribunal to prepare a provisional time-table for the arbitral proceedings (par. 3), allow for the appointment of a secretary (par. 5) and stipulate the general duty of all participants in the arbitral proceedings to act in good faith (par. 6). Par. 1 in substance reflects Art. 15(1) UNCITRAL, but as to the minimum requirements of due process mirrors the wording of Art. 182(3) PILS. Par. 2 leaves more discretion to the arbitral tribunal whether or not to hold hearings than Art. 15(2) UNCITRAL.

II. Power of the Arbitral Tribunal to Set Procedural Rules (par. 1)

- 2 In principle, the arbitral tribunal enjoys **wide discretion** with respect to the determination of the rules governing the arbitral proceedings. Choosing the appropriate manner to conduct the arbitration is, however, a basic duty of the arbitral tribunal.
- 3 The *ratio legis* underlying this widely recognised principle is that good arbitration is made by sound arbitrators who should be permitted to use their expertise and to work with a regime that is **flexible** enough

to allow them to take the peculiarities of each case into due consideration (VAN HOF, 102).

- 4 The discretionary power of the arbitral tribunal is, nevertheless, subject to some important **limitations**:
 - (i) the Swiss Rules themselves provide for some guidance in Sect. III where, apart from the general provisions covered in Art. 15, the basic structure of the arbitral proceedings is defined (exchange of briefs [Art. 18-20, Art. 22], pleas as to jurisdiction [Art. 21], periods of time [Art. 23], evidence and hearings [Art. 24], experts [Art. 27]); it is submitted that these procedural provisions are binding on the arbitral tribunal ("*Subject to these Rules...*"), i.e. the arbitral tribunal may only deviate from these procedural provisions with the parties' consent;
 - (ii) the basic procedural principles of international arbitration, i.e. equal treatment of the parties and the right to be heard (cf. Art. 15 N 7-11);
 - (iii) other fundamental procedural principles falling within the scope of procedural public policy, like the requirement to act in good faith (cf. Art. 15 N 24-29 and, from a Swiss point of view, JERMINI, *Anfechtung*, N 602-619);
 - (iv) procedural agreements of the parties.
- 5 It has to be noted that a **violation of these limitations** can have different consequences depending on what rules have been disregarded by the arbitral tribunal and on whether the violation is invoked by a party in a motion to set aside an award or at the recognition and/or enforcement stage. Under the PILS, only violations of the basic procedural principles set forth in Art. 182(3) PILS or of procedural public policy rules constitute grounds for setting aside an award (Art. 190(2)(d+e) PILS). On the other hand, pursuant to Art. V(1)(d) NYC, the recognition and/or enforcement of an award can be denied if "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*", thus encompassing also violations of the Swiss Rules or of other procedural agreements of the parties.
- 6 Another issue is whether the parties can opt out of or **deviate from the Rules** by agreement, when this is not expressly provided for in the Rules themselves (Art. 1(3), 7(1), 8(1+2), 17, 25(4), 32(3), 42(1)(c+e), 43(1); cf. hereto also Introduction N 30-37). It is submitted that - subject to the provisions concerning the powers of the Chambers, of the Arbitration Committee and of the Special Committee (Introduction, Art. 3(6), 11-13, 16), probably including the duty to prepare a provisional time-table according to Art. 15(3) (WEHRLI/

KOENIG/TRIEBOLD, ASA Special Series No 22, 97) – the answer is affirmative (BLESSING, ASA Special Series No 22, 27; SCHÄFER/VERBIST/IMHOOS, ICC Arbitration in Practice, 76–77). Still another (rather academic) question is whether the parties can impose such deviations from the Rules on the arbitral tribunal after its acceptance of the appointment: The (practical) answer is that the arbitrator(s) opposing such deviations, when they are agreed by the parties, will have to resign (DERAINS/SCHWARTZ, 210 fn 435).

III. Minimal Procedural Requirements (par. 1)

- 7 The wording of Art. 15(1) reflects **fundamental procedural notions** in international arbitration, i.e. the equal treatment of the parties and their right to be heard (cf. Art. 182(3) PILS).
- 8 The arbitral tribunal has to ensure the **equal treatment of the parties**. What is required is a relative equal treatment, in the sense that only comparable situations have to be treated equally, while different situations should be treated differently, taking all relevant circumstances into consideration.
- 9 The equal treatment of the parties implies – among other things – that the arbitral tribunal should **adhere to the procedural rules it has set** and that extensions of deadlines be granted to both parties if the grounds they invoke are comparable.
- 10 The principle of equal treatment of the parties is closely linked with the **right to be heard**: The arbitral tribunal must conduct the proceedings in such a manner that both parties are given the same opportunities to express themselves and present their case.
- 11 The Federal Supreme Court has developed a **standard formula** detailing Art. 182(3) and 190(2)(d) PILS, which both deal with the two fundamental procedural principles at stake:

"The right to be heard, as it is guaranteed by Art. 182(3) and Art. 190(2)(d) PILS, has in principle the same content as the one stated by the Federal Constitution [...]. So it was admitted, with respect to arbitration proceedings, that each party has the right to express itself on the facts that are essential for the decision, to present its legal arguments, to propose its evidence with respect to relevant facts and to participate in the hearings of the arbitral tribunal. On the other hand, the right to be heard does not encompass the right to express oneself orally. As to the right to propose evidence, it is necessary that it be exercised in a timely way and respect the applicable formal rules. The arbitral tribunal can refuse to admit a piece of evidence if the latter is not apt to prove the facts that the party proposing it purports to prove, if the relevant fact

has already been proved, if it is not relevant or if the arbitral tribunal – on the basis of a so-called «anticipated weighing of the evidence» – concludes that it has already formed its conviction and that the new piece of evidence cannot modify it. The Federal Court cannot review an «anticipated weighing of the evidence», except where there is a violation of public policy.

The equal treatment of the parties, also guaranteed by Art. 182(3) and Art. 190(2)(d) PILS, implies that the proceedings be regulated and conducted in such a way that each party has the same opportunities to present its case.

The principle of adversarial proceedings, guaranteed by the same provisions, requires that each party can comment on the other party's presentation of its case, examine and discuss the evidence produced by the other party and refute it with its own proofs."

(DFT of 7 January 2004 [4P.196/2003]; translation by the authors; for further details, in particular with respect to what does not fall under the two fundamental procedural principles, cf. JERMINI, *Anfechtung*, N 453 ss and JERMINI, *ASA Bull* 3/2004, 605–609).

IV. Hearings or "Documents-Only" Proceedings (par. 2)

- 12 The Swiss Rules **leave it to the arbitrators to decide whether to hold hearings** for the presentation of evidence or for oral argument even where one of the parties has expressly asked for such a hearing (as to the consequences of both parties wanting to "impose" a hearing on the arbitrators cf., by analogy, Art. 15 N 6).
- 13 After consulting with the parties, the arbitral tribunal may therefore decide to limit the proceedings to an **exchange of written submissions and documents**.
- 14 Such **limitations of the parties' opportunities to present their case** might be based on considerations such as: (i) the unsuitability of a hearing (for instance if a witness is known to be mentally unstable) (SANDERS, *Work of UNCITRAL*, 10–11), (ii) the irrelevance of the proposed evidence (Weigand-TRITTMANN/DUVE, Art. 15 UNCITRAL N 6), (iii) the so-called principle of "anticipated weighing of the evidence" (cf. Art. 15 N 11), or (iv) the plain abusiveness of the request to hold a hearing (BLESSING, *ASA Special Series No 22*, 39; cf. Art. 15 N 24). As such, these limitations of the parties' opportunities to present their case are in line with the case law developed by the Federal Supreme Court concerning the parties' right to be heard (cf. Art. 15 N 11).
- 15 In practice, however, arbitrators will tend to be **rather generous** if faced with an explicit request to hold a hearing, also to minimize the

risk that the award be set aside at the place of arbitration or refused recognition and/or enforcement abroad (BLESSING, ASA Special Series No 22, 39; SANDERS, Work of UNCITRAL, 11). Experienced arbitrators will discern and refuse requests for a hearing masking bare dilatory tactics by the parties, which constitute clear violations of the duty to act in good faith (Art. 15(6)).

V. Provisional Time-table (par. 3)

- 16 This provision is clearly inspired by Art. 18(4) ICC and aims at **accelerating** the arbitration proceedings. The provision is quite flexible, since it does not state when exactly the provisional time-table has to be prepared by the tribunal (in consultation with the parties). It is in the interest of all involved persons to set a timeframe for the different steps in the proceedings as soon as possible.
- 17 Typically, the time-table will be updated from time to time. Although not expressly required, the **updates** should also be provided to the Chambers, for information and monitoring purposes (cf. Art. 18(4) ICC).

VI. Transmission of Documents and Information (par. 4)

- 18 The duty to communicate all documents or information supplied to the arbitral tribunal also to the other party emanates directly from the right to be heard (Art. 15(1); VAN HOF, 103). This duty is therefore **also binding on the arbitral tribunal** (ADEN, 611; RÜEDE/HADENFELDT, 242).

VII. Secretary (par. 5)

- 19 In complex arbitration cases it is quite customary that the arbitral tribunal is assisted by an administrative secretary, whose duties are **limited to administrative tasks**.
- 20 In contrast to the ICC Court Secretariat's Note concerning the appointment of administrative secretaries by arbitral tribunals (1 October 1995), according to which it is within the tribunal's sole discretion to appoint a secretary, the Swiss Rules provide for a **consultation** with the parties prior to the appointment of a secretary. In practice, it is

likely that an appointment will be made only with the consent of the parties.

- 21 The reference to Art. 9, requiring also that the secretary be impartial and independent of the parties, is important for the integrity of the procedure, even if the secretary is **not allowed to exercise any influence on the decisions** of the arbitral tribunal (cf. ICC Court Secretariat's Note concerning the appointment of administrative secretaries by arbitral tribunals).
- 22 Once appointed, the secretary will be allowed to be present at the hearings and the deliberations of the arbitral tribunal (the secretary will often record them). He is subject to the **duty of confidentiality** (Art. 43(1) and (2)).
- 23 As to the **costs** of the administrative secretary, they fall under Art. 38(c) (costs "of other assistance required by the arbitral tribunal") and are to be paid in addition to the fees of the arbitral tribunal, like the other expenses of the arbitrators (cf. Art. 38 N 9).

VIII. Duty to Act in Good Faith (par. 6)

- 24 The duty to act in good faith is a **universally recognised principle of law** that applies also in the framework of arbitral proceedings (DTF 111 Ia 259, 262; RÜEDE/HADENFELDT, 241) and is part of both substantive and procedural public policy (JERMINI, Anfechtung, N 564 ss and 602).
- 25 The **bona fides principle** encompasses the duty to act in good faith and the prohibition of abuse of rights, which bans the misuse of legal institutions, as well as contradictory behaviours (*venire contra factum proprium*). A manifest abuse of rights does not deserve legal protection (Art. 2(2) CC).
- 26 The duty to act in accordance with the requirements of good faith **applies to both the arbitral tribunal and the parties** ("all participants"). For instance, the arbitral tribunal cannot depart from the procedural rules it has set, once one or more parties have abided by them (LALIVE/POUDRET/REYMOND, Art. 182 N 12; FRANK/STRÄULI/MESSMER, intro §§ 238-258 N 69). As this example shows, the duty of the arbitral tribunal to act in good faith is closely linked to its duty to ensure equal treatment of the parties and to guarantee their right to be heard.
- 27 The parties, in their turn, must **immediately object** to any alleged non-compliance of the arbitral tribunal with the applicable rules. Otherwise they shall be deemed to have waived their right to object

(Art. 30). It is, for example, incompatible with the duty to act in good faith if one party attempts to have certain documents, presented by the other party, declared inadmissible, while it explicitly refers to them in its own arguments (ICC Award No 7047 of 28 February 1994, ASA Bull 2/1995, 301, 315). Requests for extensions of deadlines (or even for stay of proceedings) serving mere dilatory intentions are also unwarranted, since the principle of good faith requires parties bound to an arbitration agreement to avoid, unless strictly necessary, anything that may slow down the normal progress of the arbitral proceedings (DFT 111 Ia 259, 262).

- 28 In another case, after having claimed that it did not have to pay for some defective equipment and having obtained an award to that effect, one party challenged the award on the ground that the arbitral tribunal had ordered the restitution of the defective equipment to the opposing party even though the latter had not made such a claim. The basis of the challenge was that the arbitral tribunal acted *ultra petita*. The Federal Supreme Court found the challenging party's conduct contradictory, holding that its reliance on Art. 190(2)(c) PILS was clearly **abusive**. The Federal Supreme Court therefore denied the application for setting aside the award (DFT of 18 September 2001, 4P.143/2001, cons. 3c).
- 29 This provision thus reinforces "*the authority of the arbitral tribunal to remind the parties that **not everything is admissible on the arbitral battlefield***" (PETER, ASA Special Series No 22, 8; emphasis added).

*SEAT OF THE ARBITRATION***Article 16**

1. **If the parties have not determined the seat of the arbitration, or if such designation is unclear or incomplete, the Special Committee shall determine the seat of the arbitration taking into account all relevant circumstances, or shall request the arbitral tribunal to determine the seat.**
2. **Without prejudice to the determination of the seat of the arbitration, the arbitral tribunal may decide where the proceedings shall be conducted. In particular, it may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.**
3. **The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.**
4. **The award shall be deemed to be made at the seat of the arbitration.**

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Other Institutional Rules

Art. 14 ICC; Art. 16 LCIA; Art. 13 AAA; Art. 39 WIPO.

I. Comparison with UNCITRAL Rules

- 1 The Swiss Rules replaced the term "place of arbitration" (Art. 16 UNCITRAL) by the term "seat of the arbitration". If the parties' designation is unclear or incomplete, it is in principle the Special Committee's duty (and not the arbitral tribunal's as under the UNCITRAL Rules) to determine the seat of the arbitration. Art. 16(4) UNCITRAL requires the arbitrators to make the award at the place of arbitration. In contrast, Art. 16(4) recognises the modern practice that arbitrators need not travel to the seat of arbitration just to sign the award.

II. Determination of the Seat of the Arbitration (par. 1)

- 2 It is primarily for the parties to determine the **seat of the arbitration** in Switzerland or elsewhere (cf. Art. 1(2)). They may do so with an arbitration clause in their contract or in a separate agreement after a dispute has arisen. In view of the importance of the seat of the arbitration (cf. Art. 1 N 11 and 13), the parties should not leave it to the Special Committee or the arbitral tribunal to make such determination. As recommended in the standard model clause, the parties should preferably designate a specific city either within Switzerland (including any city outside the territory of the six cantons of the Chambers) or abroad. While the parties may provide in the arbitration clause that one of them determines the seat of the arbitration, a party cannot unilaterally make such designation (decision of the Zurich Superior Court of 13 August 1990, cited in MÜLLER, *International Arbitration*, 16).
- 3 Art. 16(1) deals with the situation where the parties have not designated the seat of the arbitration or where such designation is unclear or incomplete and, once a dispute has arisen, the parties are not able to agree on a seat. The Swiss Rules confer upon the **Special Committee** the authority to make the relevant determination in the absence of a properly agreed designation by the parties. The Special Committee, however, may also request that the **arbitral tribunal** determine the seat. This may apply for example if the parties themselves

provided in their arbitration clause that the seat of the arbitration shall be fixed by the arbitral tribunal. Likewise, the Special Committee may be reluctant to take a decision but would rather leave the interpretation of the arbitration agreement regarding the seat of the arbitration to the arbitral tribunal, especially where there are complex factual and legal issues dividing the parties.

- 4 Art. 16(1) is in line with Art. 176(3) PILS, according to which the seat of the arbitration shall be designated by the parties, by the arbitration institution designated by them or, failing both, by the arbitrators. It is debated whether the list in Art. 176(3) PILS is exhaustive; in any case, it is submitted that – failing a specific agreement of the parties in this sense – **Swiss state courts** are **not competent** to determine the seat of the arbitration since the possible interventions by state courts are limited under the PILS (PILS (Basel)-EHRAT, Art. 176 N 24; critical LALIVE/POUDRET/REYMOND, Art. 176 N 6; cf. also PILS (Zurich)-VISCHER, Art. 176 N 7, who supports the view that the Swiss state court that is competent to appoint the arbitrators [Art. 179(3) PILS] may also determine the seat of the arbitration upon request by the parties).
- 5 By way of **comparison**, Art. 14(1) ICC essentially provides that the place of arbitration is fixed by the ICC Court, unless agreed upon by the parties; while under Art. 16(1) LCIA, if the parties have not agreed on a seat, the seat is London, unless the LCIA Court determines that another seat is more suitable in view of all the circumstances. According to the corresponding provision of the UNCITRAL Rules, failing an agreement by the parties, the determination of the proper place of arbitration is to be made by the arbitral tribunal.
- 6 Whereas the Special Committee's determination of the seat is likely to take place before the constitution of the arbitral tribunal (WEHRLI/KOENIG/TRIEBOLD, ASA Special Series No 22, 96), any request for that determination to be made by the arbitral tribunal (as provided for in Article 16(1)) is contingent upon the proper **constitution of the arbitral tribunal**, be it by the parties or by the Chambers in accordance with Art. 5-8 (PILS (Basel)-EHRAT, Art. 176(3) N 23).
- 7 The Swiss Rules do not specify the **procedure** to be followed by the Special Committee or the arbitral tribunal when determining the seat. The Special Committee can be expected to invite the parties to give their comments (cf. Art. 15(1)) and also consider the arbitral tribunal's view before making its determination (provided that the arbitral tribunal is already constituted).
- 8 While the parties are free in their choice of the seat of the arbitration, the Special Committee or arbitral tribunal, when making a designation

pursuant to Art. 16(1), must take into account **all relevant circumstances** of the arbitration. It is submitted that the Special Committee or the arbitral tribunal should follow the practice established under the UNCITRAL Rules, which is in line with the approach adopted by arbitral institutions such as the ICC. Accordingly, factors such as the legitimate expectations of the parties, the relevant local law governing international arbitration (e.g. with respect to the extent of interventions of local courts), the object of the dispute, the evidence likely to be gathered, the neutrality of the seat, political and economic factors (such as visa accommodations), the business residence of the arbitrators and of the parties, the language of the arbitration or the availability of support services, may influence the Special Committee's or the arbitral tribunal's decision (DORE, Arbitration and Conciliation, 20; DERAÏNS/SCHWARTZ, 202-204; JARVIN, ICC Bull 2/1996, 55; VERBIST, ArbInt 3/1996, 350-356; REDFERN/HUNTER, N 6-13).

- 9 With regard to arbitrations that arise from contracts referring to the **previous arbitration rules** of the Zurich, Geneva or Lugano Chambers of Commerce and Industry (which, as a catch-all clause, provided for a seat in the respective cities), it is to be expected that the Special Committee or the arbitral tribunal would consider designating the respective cities as the seat of the arbitration, whichever corresponds best to the legitimate expectations of the parties.
- 10 The designation "Arbitration in Switzerland" or a clause referring to a Swiss Canton as the seat of the arbitration are typical examples of an **incomplete designation of the seat** of the arbitration. The Swiss Rules easily "salvage" such clauses by way of Art. 16(1) (BESSON, Efficacité, 12; PILS (Zurich)-VISCHER, Art. 176(3) N 12; JERMINI, Anfechtung, N 13; cf. also PILS (Basel)-EHRAT, Art. 176 N 27; PILS (Basel)-WENGER, Art. 178 N 34; PILS (Basel)-PETER/LEGLER, Art. 179 N 3).
- 11 Sometimes it may be **unclear whether the parties have in fact agreed on a seat** or there may be uncertainty on what the parties have agreed in this regard. For example, there may be cases where the original contract specified one seat and an amendment to the contract mentioned another seat of the arbitration. In other cases, the parties may stipulate that the seat of the arbitration would depend on the nature of the dispute, and they may then provide a series of potential seats depending on the type of dispute which might arise (MÜLLER, International Arbitration, 17). Finally, there may be versions of the arbitration agreement in various languages that differ from each other in relation to the seat of the arbitration (VERBIST, ArbInt 3/1996, 349). In such cases the Special Committee or the arbitral tribunal (cf. Art. 16 N 3) will construe the parties' agreement in accordance with the princi-

- ple of *favor validitatis* under Art. 178(2) PILS (PILS (Basel)-WENGER, Art. 178 N 50; PILS (Basel)-EHRAT, Art. 176(3) N 30; RAUH, 79).
- 12 Where the parties have stipulated that the arbitration shall occur in **either place A or place B** but cannot agree between these two options, the Special Committee or the arbitral tribunal will have to decide, taking into consideration all relevant circumstances (cf. Art. 16 N 8; but cf. Decision of the Zurich Superior Court of 8 May 1998 [cited by MÜLLER, *International Arbitration*, 16], according to which such clause was interpreted as allowing the Claimant to choose either A or B as the seat of the arbitration; similarly *HZI Research Center, Inc. v. Sun Instruments Japan Co., Inc.* [S.D.N.Y. 1995] [19 September 1995]).
 - 13 The determination of the seat of the arbitration, if made by the arbitral tribunal under Art. 16(1), is **not a mere procedural step** but rather a decision that must be made by a majority of the arbitrators in accordance with Art. 31(1) (unless the parties have agreed otherwise) (cf. Art. 31 N 5-6; RAUH, 80; Weigand-TRITTMANN/DUVE, Art. 16 UNCITRAL N 3; ADEN, 612; SANDERS, *ICCA Yearbook* 1977, 194). In any event, one would expect the arbitral tribunal to confirm the seat in an organisational document such as a constituting order or terms of reference, regardless of whether the seat was determined by the parties, the Special Committee or the arbitral tribunal (WEHRLI/KOENIG/TRIEBOLD, *ASA Special Series* No 22, 98).
 - 14 Once the Special Committee or the arbitral tribunal has determined the seat of the arbitration, it is up to the arbitrators to determine the **location** where the proceedings will be conducted and where relevant meetings will be held (SANDERS, *ICCA Yearbook* 1977, 196).
 - 15 As long as the Special Committee or the arbitral tribunal has not determined the seat of the arbitration, the parties may still agree on a seat. It is debated whether a **change of the seat** is still possible once the Special Committee or the arbitral tribunal has decided under Art. 16(1). While some authors argue that such a change is permissible if agreed by the parties (PILS (Zurich)-VISCHER, Art. 176 N 10; PILS (Basel)-EHRAT, Art. 176 N 21; JARVIN, *ICC Bull* 2/1996, 58; BORN, 77; but cf. DERAIS/SCHWARTZ, 205, who point out that such a change requires the arbitrators' agreement), other scholars argue that the parties may not change the seat of the arbitration once the arbitrators have made their decision in this respect (SANDERS, *ICCA Yearbook* 1977, 194; RAUH, 78; for a practical approach cf., by analogy, Art. 15 N 6). Another writer supports the view that the arbitral tribunal may change the seat of the arbitration when new circumstances (such as state inferences with the arbitration) render the proceedings difficult or

impossible at the original place of arbitration (SCHERER, ASA Bull 1/2003, 114-119; cf. also DERAÏNS/SCHWARTZ, 205, who refer to a case in which the ICC Court decided to change the place of arbitration that it had itself fixed after discovering that an award rendered at such place would not be recognised in the country where enforcement was likely to be sought).

- 16 A **transfer within Switzerland** would appear to raise no problems, the only implication being a change in the jurisdiction of the state court acting as *juge d'appui*. In the case of an agreed transfer of the seat abroad, the arbitration proceedings would be removed from the ambit of Chapter 12 of the PILS and it would be the task of the foreign *lex arbitri* to assess the validity of the arbitration proceedings up until the transfer of the seat (PILS (Zurich)-VISCHER, Art. 176 N 10).

III. Place for the Conduct of Hearings and Deliberations (par. 2)

- 17 Art. 16(2) is in conformity with Art. 16(2) UNCITRAL, Art. 14(2) ICC and Art. 16(2) LCIA. The arbitral tribunal may conduct the **entire proceedings at any place** it deems appropriate, be it in Switzerland or abroad, without prejudice to the (legal) seat of the arbitration (PILS (Basel)-EHRAT, Art. 176 N 18; BLESSING, ASA Special Series No 22, 41; *contra* ADEN, 615, who advocates the view that under Art. 16(2) UNCITRAL only single procedural steps such as the hearing of witnesses may be conducted outside the seat of arbitration, but not the entire proceedings). In any case, it is recommended that an overly strong connection with a place other than the formal seat of arbitration is avoided, as the laws of some countries do not qualify the nationality of an arbitral tribunal based on formal criteria (such as the seat of arbitration defined under Art. 16(1)), but merely based on an actual territorial relationship, the procedural rules adopted or the place where the award was signed (PILS (Basel)-EHRAT, Art. 176 N 18; SCHERER, ASA Bull 1/2003, 112; SANDERS, Work of UNCITRAL, 106; decision of the Court of Appeal of Düsseldorf of 23 March 2000, ICCA Yearbook 2002, 270-271; cf. also *Hiscox v. Outhwaite* [1991], cited in ASA Bull 3/1991, 279-288; PILS (Zurich)-VISCHER, Art. 176 N 6; LALIVE/POUDRET/REYMOND, Art. 176 N 8; JERMINI, *Anfechtung*, N 7 fn 31).
- 18 In contrast to Art. 14(2) ICC, which allows the parties to limit the arbitral tribunal's freedom to determine the location(s) where the proceedings are to be conducted, Art. 16(2) authorises the **arbitral tribunal to decide on its own** (without reference to the parties) the

location of the proceedings, having regard to the circumstances of the arbitration. An agreement of the parties is not a legal requirement: the tribunal has independent authority to decide on the most appropriate place for organising the different phases of the proceedings (BLESSING, ASA Special Series No 22, 41). It may be expected in practice, however, that the arbitral tribunal – also in view of the parties' right to be heard and of the requirement of equal treatment of the parties (cf. Art. 15(1)) – would nevertheless consult the parties (for example during the arbitral tribunal's initial organisational hearing: WEHRLI/KOENIG/TRIEBOLD, ASA Special Series No 22, 97) and ensure that the parties are given sufficient notice, if the hearings are to be held at a place other than the seat of the arbitration (RAUH, 79).

- 19 In any case, the arbitral tribunal cannot choose the place(s) for the actual conduct of the proceedings randomly, but such place(s) must have a **connection to the arbitral proceedings** (Weigand-TRITTMANN/DUVE, Art. 16 UNCITRAL N 5; SANDERS, ICCA Yearbook 1977, 196). Among others, the arbitrators should take practical considerations into account (such as travelling needs of parties, of their representatives, of the witnesses and of the arbitrators). Whenever the arbitral tribunal carries out tasks in the sense of Art. 16(3), the requirement of a connection to the proceedings is always met (RAUH, 79).

IV. Inspection of Goods, Other Property and Documents (par. 3)

- 20 The arbitral tribunal may meet at any place it deems appropriate for the **inspection** of goods, other property or documents (Art. 16(3)). In a more general way, the arbitral tribunal may take evidence wherever it appears to be useful for the purposes of the arbitration (Weigand-TRITTMANN/DUVE, Art. 16 UNCITRAL N 7). This authority can, in principle, also be derived from the discretion granted to the arbitral tribunal under Art. 15(1) to conduct the proceedings as it deems fit (ADEN, 615), as well as from the general provision of Art. 16(2). In any case, consistent with their right to be heard (cf. Art. 15(1)), the parties must be given due notice to allow them to be present (SANDERS, Work of UNCITRAL, 13).

V. Place at which the Award is Made (par. 4)

- 21 In international arbitration, the arbitrators often come from different countries and an award is therefore often signed – after it has been

discussed among the members of the arbitral tribunal and edited by the chairperson – by way of circulating it among the arbitrators in their various countries, before sending it to the parties. Today it is a recognised practice that arbitrators need not travel to the seat or place of the arbitration just to **sign** the award, but that the award (and any other communication or order issued by the arbitral tribunal) may rather be signed at any place, or at different places, and that the award (or order) is deemed to have been made at the designated place of arbitration (BLESSING, ASA Special Series No 22, 41; ZULEGER, 186).

- 22 Art. 16(4) codifies this practice and makes it clear that the award shall be **deemed to be made at the seat of the arbitration** and, therefore, that the deliberations of the arbitrators and the signing of the award need not actually take place at the seat of the arbitration (BLESSING, ASA Special Series No 22, 41–42).
- 23 The Swiss Rules provide that the arbitral award has to contain the place where the award was made (Art. 32(4); cf. Art. 32 N 26). To avoid giving the wrong impression that the award was physically signed at the seat of the arbitration, it is recommended to use the **wording adopted for ICC and LCIA awards** "Date:[...]; Place of Arbitration: [Zurich]...", followed by the signatures of the arbitrators (BLESSING, ASA Special Series No 22, 52).
- 24 Yet another question is whether the *praesumptio iuris* ("fiction") set up by Art. 16(4) will be recognised under the laws of those countries which determine the place where the award was made by **reference to an actual territorial relationship** (for instance, by reference to the place where one or more arbitrators signed the award). The caveats pointed out in Art. 16 N 17 also apply in this respect.

LANGUAGE**Article 17**

1. **Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the Statement of Claim, the Statement of Defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.**
2. **The arbitral tribunal may order that any documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.**

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Literature

BLESSING Marc, Drafting an Arbitration Clause, ASA Special Series No 8, The Arbitration Agreement – Its Multifold Critical Aspects, Zurich 1994, 32-77; KHALILIAN Seyed, The Law of International Arbitration, A Jurisprudential Study of the Iran-United States Claims Tribunal, Pacific Arbitration Network, 2003; LAZAREFF Serge, The Language of Institutional Arbitration, ICC Bull 1/1997, 18-27; VON BREITENSTEIN Detlef, La langue de l'arbitrage – une langue arbitraire?, ASA Bull 1/1995, 18-21; WEHRLI/KOENIG/TRIEBOLD, Management of the Proceedings and Quality Control under the Swiss Rules, ASA Special Series No 22, 87-109.

Other Institutional Rules

Art. 16 ICC; Art. 14 AAA; Art. 40 WIPO.

I. Comparison with UNCITRAL Rules

- 1 The Swiss Rules have adopted Art. 17 UNCITRAL without any changes.

II. Determination of the Language(s) (par. 1)

- 2 There is no "official" language in arbitration proceedings in contrast to court proceedings which, for the most part, are conducted in the official languages of the place where the court is situated. Art. 17(1), the UNCITRAL Rules and institutional rules such as ICC, LCIA, WIPO and AAA expressly recognise the **parties' freedom to choose the language(s)** they wish to use in arbitration. As the choice of language may have a significant impact on the control of the proceedings, and indeed on how the proceedings are conducted, it is important that such choice be settled by the parties as early as possible, preferably in the arbitration agreement itself (as suggested in the model clause of the Swiss Rules). It is helpful for example for the parties to know what the language of the arbitration will be when choosing counsel or a party-appointed arbitrator, drafting a notice for arbitration or an answer, or assessing whether the arbitration is or is not likely to involve significant translation costs (DERAINS/SCHWARTZ, 214; CRAIG/PARK/PAULSSON, 96-97).
- 3 Often the parties choose the **language in which their contract is written** (according to some authors, the language of the contract and of the parties' initial correspondence may even be considered as an implied choice of language, cf. LEW/MISTELIS/KRÖLL, N 21-60).
- 4 Some authors have advocated the view that the language of the arbitration should be the same as that of the **law selected to govern the contract** (VON BREITENSTEIN, ASA Bull 1/1995, 18). As a general principle, the parties should not only select a language that they feel comfortable with, but also carefully select arbitrators who are capable of conducting hearings, discussions and negotiations in the selected language (Weigand-TRITTMANN/DUVE, Art. 17 UNCITRAL N 2; LEW/MISTELIS/KRÖLL, N 10-42).
- 5 As stipulated in Art. 17(1), which corresponds to Art. 17(1) UNCITRAL, the parties may choose **more than one language** for the arbitration. While two languages (English and Persian) were chosen as official languages for political reasons in the U.S.-Iran Claims Tribunal proceedings (VAN HOF, 113), the choice of more than one language is generally not recommended in commercial arbitration as it may increase costs (e.g. for translators, interpreters for hearings etc.) and because it will be more difficult to find arbitrators who have sufficient knowledge of all the languages chosen (DERAINS/SCHWARTZ, 215; REDFERN/HUNTER, N 3-54; critical LAZAREFF, ICC Bull 1/1997, 26-27, who suggests that, depending on the disputes submitted to arbitration, arbitrators should not hesitate to choose more than one language and allow both the produc-

tion of documents and the hearing of witnesses without translation, whereby a combined application of the two main languages of the case – the language of the law applicable to the case and the language of the contract – would be ideal).

- 6 If more than one language is chosen, the tribunal's orders and awards will have to be drafted in the languages chosen with the **risk of inconsistent texts**. As a solution, whenever several language(s) are chosen, one language should be designated as the principal language and the other language(s) as the optional language(s) (cf. Art. 17(2) LCIA; LAZAREFF, ICC Bull 1/1997, 27): In this manner, for instance, all briefs, orders and awards will be in the principal language, whereas documents and witness statements might also be in the optional language(s), without need of translation. Where the decision as to language is to be made by the arbitral tribunal (cf. Art. 17 N 7), the arbitrators will usually adopt a single language despite having the option of conducting the procedure in several languages.
- 7 Art. 17(1) mainly deals with the situation where **the parties have not agreed** upon the language(s) to be used in the arbitration, in which case the arbitrators have to choose the language. In arriving at a decision on language(s), regard shall be had to all relevant circumstances. Like Art. 17(1) UNCITRAL, Art. 17(1) does not mention any specific element to be considered by the arbitrators when making their decision.
- 8 There is relatively scarce literature on the question of how the arbitral tribunal should use its **discretionary power**. The language of the contract (that may be relevant for explaining the parties' intentions: LAZAREFF, ICC Bull 1/1997, 26) is one factor, but not *a priori* the most important one. Other considerations such as (i) the language of the parties' correspondence (if different from the language of the contract), (ii) the language of the arbitrators and of the parties' counsels, (iii) the language of the witnesses and (iv) of the relevant documents, as well as (v) the language of the law governing the substantive issues, might be equally (if not more) important as the language of the contract (LAZAREFF, ICC Bull 1/1997, 23).
- 9 The arbitral tribunal must, in any event, have regard to the principle of **equal treatment** of the parties (cf. Art. 15(1); Art. 182(3) PILS; Weigand-TRITTMANN/DUVE, Art. 17 UNCITRAL N 5; ADEN, 616). Therefore, one party should not succeed with a request that English be chosen as the language of arbitration on the mere ground that the contract is in English, solely to disadvantage the other party's counsel, whose English is poor (Art. 15(6); DERAIS/SCHWARTZ, 216).

- 10 By way of **comparison**, Art. 14 AAA, Art. 17(1) LCIA and Art. 40(a) WIPO essentially provide that the language of the arbitration shall be that of the contract containing the arbitration clause, but subject to the power of the arbitral tribunal to determine otherwise, having regard to observations of the parties and the circumstances (thus, those various provisions operate on the basis of a presumption which, however, can be rebutted or overruled if the circumstances so suggest; PILS (Basel)-BLESSING, Introduction, N 165). The significance of the language in which the contract was drawn up is played down under the ICC Rules, which provide that due regard be given to all relevant circumstances, including the language(s) of the contract (PILS (Basel)-BLESSING, Introduction, N 165).
- 11 The determination of the language or languages by the arbitral tribunal in application of Art. 17(1) applies to the language(s) to be used in the **written pleadings**, any further written statements and in the **hearings**. The Notice of Arbitration, in principle, can be filed in any language; however, if not submitted in English, German, French or Italian, it must be translated later if so ordered by the Chambers (Art. 3(5)). The examination of **witnesses**, in principle, also needs to be conducted in the language of the arbitration and each party may require that witness examinations conducted in a language other than the language of the arbitration be translated accordingly (ADEN, 617; with regard to documents and exhibits, cf. Art. 17(2)). It is to be noted that the internal language of the arbitral tribunal, i.e. the language of the deliberations and of the correspondence between the arbitrators, can be different from the language of the arbitration (LAZAREFF, ICC Bull 1/1997, 23).
- 12 It goes without saying that the parties must be given the opportunity to comment on the issue of the language of the proceedings before the arbitral tribunal takes its decision (Art. 15(1)). The designation of the language is often the subject of the arbitral tribunal's first procedural order. The language of the arbitration, as well as the requirement to translate exhibits written in other languages (including the responsibility for translation costs, cf. Art. 17(2)) should preferably be dealt with at the **first preparatory meeting** of the arbitral tribunal with the parties (WEHRLI/KOENIG/TRIEBOLD, ASA Special Series No 22, 97-98; DERAINS/SCHWARTZ, 215; SANDERS, Work of UNCITRAL, 13). Although the decision as to the language to be used in the proceedings might at first glance be seen as touching on "*a question of procedure*" (thus falling under Art. 31(2); SANDERS, ICCA Yearbook 1977, 194), it is submitted that the impact of such a decision is so important that it exceeds the limited scope of Art. 31(2) and must therefore be made by the majority

of arbitrators in accordance with Art. 31(1) (cf. Art. 31 N 5-6; ADEN, 616; Weigand-TRITTMANN/DUVE, Art. 17 UNCITRAL N 4).

- 13 The language chosen as the language of the proceedings does not bind the Chambers, the Arbitration Committee or the Special Committee. The **working languages of the Arbitration Committee and of the Special Committee** are English, German, French and Italian, and the Chambers are under no obligation to use any other languages. If one of these four languages is chosen as the language of the arbitration, it is to be expected that the Chambers, the Arbitration Committee and/or the Special Committee will adopt it in their correspondence with the arbitral tribunal and/or the parties.
- 14 Unless the parties agree otherwise, **once** the language of the arbitration is **determined**, the arbitral tribunal may in principle **not change** such language as, for instance, the parties may have chosen their legal counsel having regard to the language of the arbitration (ADEN, 616). Provided that the principle of equal treatment of the parties is complied with, a reservation should be made in case of exceptional circumstances, for instance if it appears – still early in the proceedings – that a number of documents (and/or witnesses) in a different language to the one which was chosen will be decisive for the outcome of the dispute.

III. Translation of Documents and Exhibits (par. 2)

- 15 Even if only one language is chosen as the language of the arbitration, multiple language issues may arise with respect to documentary evidence. Translation of **documents**, particularly where the arbitration is in one language and most of the documents in another, can be a matter of critical importance as it can place an extraordinary burden on one of the parties and cause delay (DERAINS/SCHWARTZ, 215).
- 16 Therefore, **agreement** in advance between the parties regarding the responsibility for translation(s) is desirable (DORE, Arbitration and Conciliation, 21). The parties may agree, for example, that documents may be filed in their original language if such language is, for example, English, French, German or Italian, whereas documents in any other language (e.g. a language not commonly or reasonably known to the arbitrators and/or the parties and their representatives) will have to be translated into the language in which the arbitral proceedings are being conducted. Likewise, the parties may determine in what language witnesses and/or experts may be examined without the assistance of interpreters (BLESSING, ASA Special Series No 8, 55).

- 17 Failing an agreement of the parties, the **arbitral tribunal may order that any documents** annexed to the Statement of Claim or Statement of Defence or any supplementary documents or exhibits submitted in the course of the proceedings, which are written in a language other than the language of the arbitration, **be translated**.
- 18 Art. 17(1) corresponds to Art. 17(1) UNCITRAL, which **authorises but does not oblige** the arbitral tribunal to order **the translation** of documents into the language of the arbitration (*contra* ADEN, 616-617, who expresses the view that such documents must be translated unless in the original language of the arbitration. This author refers to Art. 15(3) UNCITRAL which provides that all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. He also invokes the right to be heard, which in his view requires that the arbitral tribunal must order the translation of a document for the benefit of the opposing party if the respective document is considered to be relevant). The arbitral tribunal should, however, not order a (complete) translation (which can be expensive, particularly if certified) when the parties and/or their lawyers know the original language (SANDERS, Work of UNCITRAL, 14; critical BERGER, Wirtschaftsschiedsgerichtsbarkeit, 281; ADEN, 258; RAESCHKE-KESSLER, Recht und Praxis, 8).
- 19 In the absence of an agreement to the contrary, the **burden of the translation work** should fall on the party introducing the document in question ("*documents [...] delivered in their original language, shall be accompanied by a translation*"; cf. DORE, Arbitration and Conciliation, 21, who states that the ICC Rules are silent on the question of translation, so that the burden of translation could well fall on the party seeking translation). Following this general rule, it is submitted that if production of documents is ordered by the arbitral tribunal upon a request for production by one party, it is for this party (and not for the party submitting the documents) to carry out the translation work.
- 20 Unless a party objects, a "**free**" translation will be sufficient, otherwise a sworn or certified translation may be required (DERAINS/SCHWARTZ, 215; SANDERS, Work of UNCITRAL, 108). In case of oral evidence, simultaneous or consecutive translations by a (sworn) interpreter may be used (DERAINS/SCHWARTZ, 215).
- 21 Where a rule as to the translation of documents is not complied with by a party, the **admissibility** of the respective document **in the original language** might be seriously questioned (KHALILIAN, 381; ADEN, 616).
- 22 Unless otherwise agreed by the parties, **translation costs** are procedural costs (cf. Art. 38(c); Art. 25 N 15, Art. 38 N 11). Independent of

which party has anticipated the translation costs (the party producing the translation; the party requesting the translation; both parties, if the translator – or, more frequently, the interpreter – is charged by the arbitral tribunal after having received a down payment from both parties), they are thus subject to the arbitral tribunal's final determination on costs (ADEN, 617). The costs of the translation of one party's written submissions are not considered as procedural costs, but have to be borne by that party (ADEN, 256; LEW/MISTELIS/KRÖLL, N 21–61).