Expedient and Efficient Arbitrations Need Strong Arbitrators—But How "Strong" Should and May Arbitrators Get? Some Thoughts on Best Practice in International Commercial Arbitration Part II

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Arbitrators' powers and duties; Case management; International arbitration; Switzerland

Introduction

Arbitrators are retainted by parties to efficiently resolve their disputes. It is also commonly acknowledged that the parties have at least the same interest in correct (accurate) decisions than in efficient proceedings. This article discusses "best practice" in the conduct of international arbitration within the sidelines of both the latest development of standards and practices, and Swiss law. Given the diversity of parties and their counsels, the involved subject-matter, the personalities and cultural backgrounds of arbitrators as well as the chosen arbitration rules, there is *no one-size-fits-all solution* for the conduct of an arbitration proceeding. Many procedural choices are a matter of preference and taste. Nevertheless, the case management techniques discussed in this article are well tested in practice and help to ensure a fair and efficient proceeding as well as the quality of the award.

Part I of this article, which was published in Int. A.L.R. 2017 Issue 2, first discussed general procedural principles and efficienty issues and the way they are reflected in local arbitration law and international arbitration rules. It then presented the *first four of seven case management recommendations* and a number of techniques derived thereof, designed to allow parties and arbitrators to apply them both in an efficient fashion and to avoid legal pitfalls which might later jeopardize the enforcibility of the award. These recommendations are: (1) to clarify the rules of the game early; (2) to be firm against manipulations of the procedure ("guerillia tactics"); (3) to set short, but adequate deadlines; and (4) to consider front-loading the arbitration and limiting the length as well as the number of submissions.

(5) Consider clarifying and narrowing down the subject-matter of the case in the course of the arbitration and, if requested by the parties, promote settlement

• Try to clarify and narrow down the subject-matter of the case in the course of the arbitration

Further to limiting the number and length of briefs as discussed in section V.(4) (see Pt I), clarifying and narrowing down the subject matter may increase the efficiency of an arbitration as well. In this context, art.23(1)(c) ICC Rules provides that the *terms of reference* should include a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims, which in connection with art.23(4) ICC Rules limits the subject matter of the case. Other arbitration rules provide for provisions which aim in the same direction.[1]

Authors like Risse and Rees have submitted suggestions to further limit the subject-matter and legal positions of the parties. Risse proposes that the tribunal may, after the closing of pleadings (i.e. the filing of briefs), actively manage the hearing by *specifying which issues are crucial to the outcome of the case and only hear evidence relating to those issues*. Requiring the tribunal to make these tough decisions early on would avoid time and costs expended on irrelevant discussions and unnecessary evidence.[2] Rees has a modified proposal: After two rounds of submissions, and before document requests, witness lists or expert reports, the tribunal should *list the issues in dispute in a table and invite the parties to identify in that table how their case on each issue will be established*: by a document, a factual witness, an expert witness or a legal submission. Rees contends that this would clarify the parties' approach to the case, enable the tribunal to assess the extent of document production necessary,[3] ensure only necessary witnesses are called and force the tribunal, ahead of the hearing, to understand the issues material to the outcome. Rees' proposal

[1] See, e.g. art.20(1) Swiss Rules, which provides that "[d]uring the course of the arbitral proceedings, a party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it, the prejudice to the other parties, or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."

[2] See GAR 10 July 2014, 10 drastic commandments, discussing Jörg Risse's and Peter Rees' proposals on efficient arbitration, Risse Proposal 6 ("Directives by tribunal as to material issues"). See also Michael E. Schneider, "The Uncertain Future of the Interactive Arbitrator" in *The Evolution and Future of International Arbitration* (Wolter Kluwer, 2016), p.380 et seq., who discusses ways to actively manage an arbitration.

[3] See also the IBA Rules on the Taking of Evidence in Intrnational Arbitration, art.3, which gives detailled guidance on document production issues; Girsberger and Voser, *International Arbitration* (Zurich, 2016), N 990 et seq.

resembles a "beefed up" procedural order of state courts regarding the burden of proof or of the evidence to be administered.

Although these proposals are worth considering, caution warrants to *apply such tools in a flexible way:* Experience shows that the facts of a case are rarely clear at the early stages of the proceedings. In addition, they may appear in a new light during the taking of evidence, causing the focus of the arbitration to shift. Narrowing down the subject matter of an arbitration may lead to a situation where, because of the understanding of the case deepening during the proceeding, "carved out" facts become important, which might undermine the legitimacy of the proceeding. The arbitral tribunal then has to decide on facts which due to its (too) early appreciation have not been duly established in the evidentiary proceeding. Therefore, (too) early or rigid limitation of the factual issues on which evidence is being taken at the hearing may lead to unsatisfactionary results or even a violation of a party's right to be heard. In my view, it is preferable *to educate the parties early on the issues, which, in the opinion of the arbitral tribunal and on a preliminary basis, may be of interest.* This may happen after the first round of full briefs, at the outset of the hearing or after the hearing with a view to the final written submissions.[4] If the initial briefs of the parties amount to full-fletched written submissions (as we see from time to time), a preliminary discussion of issues may even take place at the case management conference.[5] The discussion may then be deepened during the arbitral proceeding as discussed above.[6]

Although such guidance may be helpful to the parties, the arbitral tribunal is *not obliged* to inform a party of the decisive character of a factual element on which it intends to base its decision.[7] The Swiss Federal Tribunal in particular denies a right of the parties to the issuance of a formal procedural order regarding the burden of proof or regarding the evidence to be administered,[8] but allows it. The same holds true with the anticipated assessment of evidence by the arbitral tribunal.[9] The arbitral tribunal should therefore make sure that the parties fully understand the preliminary nature of an early discussion of issues and that the list of issues is in no way binding on the arbitral tribunal.

The arbitral tribunal may consider *discussing this approach with the parties*, because it results in costs, which have to be borne by the parties even if the case is settled at an early stage.

Another means to limit the subject-matter is the *bifurcation* of the case.[10] This is typically done when a party raises jurisdictional objections, when statute of limitation issues arise, or when the arbitral tribunal first decides on liability thus carving out quantum.[11] Bifurcation increases the efficiency of a proceeding where deciding on a decisive factual or legal issue would considerably speed up the proceeding and cut costs. However, in particular jurisdictional issues are often closely linked to issues of law or fact relating to the merits and should then best be dealt with when deciding on the merits. Furthermore, such objections are sometimes raised as a dilatory tactic. Therefore, the arbitral tribunal should carefully considered whether bifurcation increases the efficiency of the arbitration or would rather have the adverse effect and should be avoided[12].

• If requested by the parties, promote settlement

Whether or not the arbitral tribunal should promote settlement is not only a matter of legal culture,[13] but also—and above all—of the arbitral tribunal's mandate.[14] The extent of the mandate is defined by the *lex arbitri* (which, however, usually is silent on this point), the terms of reference and the applicable arbitration rules.

Article 21(3) ICC Rules, for instance, provides that "[t]he arbitral tribunal shall assume the powers of an amiable compositeur (...) only if the parties have agreed to give it such powers." Sometimes, the terms of reference empower the arbitral tribunal to conduct settlement negotiations between the parties and even provide for a "settlement" or "mediation window". The ICC further recommends that the arbitral tribunal should consider *informing* the parties that they are free to settle all or part of the dispute at any time during the ongoing arbitration either through direct negotiations or through any form of alternative dispute resolution proceedings (ADR proceeding), for example under the ICC Mediation Rules.[15] The parties may also request the arbitral tribunal

[4] See also the UNCITRAL Notes on Organizing Arbitral Proceedings 2016, section 11, para.68–71 "Defining points at issue; order of deciding issues; defining relief or remedy sought", and section (6) below.
[5] For the issues to be discussed at the case management telephone conference, see, e.g. Gabrielle Nater-Bass, "The Initial Discussion with the Parties: How Should It Be Done? Which Topcs Must or May Be Addressed" in Domitille Baizeau and Frank Spoorenberg (eds), *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, ASA Special Series No.45, p.31 et seq.; see also IBA Rules on the Taking of Evidence in International Arbitration art.2.
[6] See section (6) below.
[7] See FTD 130 III 35, E. 5.; FTD 4A_342/2015 of April 26, 2016, E. 4.1.1 and 4.1.2.
[8] FTD 116 II 630, E. 4.c.
[9] FTD 4A_550/2009 of 29.1.2010; FTD 5A_634/2011 of 16 January 2012, E 2.2.2.
[10] See, e.g. the ICC Commission Report, section 39 (Bifurcation and partial awards), which suggests that the arbitral tribunal should consider, or the parties could agree on, bifurcating the proceedings or rendering a partial award when doing so may genuinely be expected to result in a more efficient resolution of the case.
[11] See UNCITRAL Notes 2016, section 70.
[12] See, e.g. The Secretariat's Guide to ICC Arbitration, sections 3–264, 3–923 and 3–1127 and Appendix IV to the Rules, section a; Phillip Habegger, "Saving Time and Costsin Arbitration" in Manuel Arroyo (ed.), *Arbitration in Switzerland, The Practitioner's Guide* (Wolters Kluwer, 2013), N 37.
[13] Whereas common law parties rather do not expect an arbitral tribunal to engage in settlement efforts, civil law parties are more open because of their court tradition, which includes settlement negotiations conducted by the court. In Swiss courts, e.g. the settlement quota are above 60%. See, e.g. Ernst Platz, Der Vergleich im Schweizerischen Recht, DISS 2014, p 1.
[14] See, e.g. Christopher Harris, "Arbitrators and Settlement — A Common Law Perspective" in Domitille Baizeau and Frank Spoorenberg (eds), *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, ASA Special Series No.45, p.37 et seq.; Paolo Marzolini, *The Arbitrator as a Dispute Manager — The Exercise of the Arbitrator's Powers to Act as Settlement Facilitator*, p.99 et seq.
[15] See the ICC Commission Report, section 41 (Arbitral tribunal's role in promoting settlement).

to *suspend* the arbitration proceedings for a specific period of time while settlement discussions take place.[16] Finally, the parties are free to agree that the arbitral tribunal should take other steps to facilitate the settlement of their dispute, as long as such steps are consistent with the tribunal's duty under art.41 of the Rules to make every effort to ensure that its award is enforceable at law.[17]

Article 15(8) of the Swiss Rules goes into the same direction, stipulating that

> "[w]ith the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps."

While the UNCITRAL Notes on Organizing Arbitral Proceedings 1996 recommended that tribunals "only suggest settlement negotiations with caution" (para.47), in the revised Notes, the UNCITRAL working group considered it important to "reflect more positively the possibility of amicable settlements during arbitral proceedings". It considered that approaches to this matter had evolved to such an extent that—in some instances—it might even be appropriate for arbitrators to get involved in mediating the settlement (para.72).[18] Another possibility is to include a mediation window after the first round of written submissions where an external mediator conducts a mediation in accordance with the rules agreed between the parties. Guidance may be drawn in this respect, e.g. from the CEDR Rules for the Facilitation of Settlement in International Arbitration.

This all said, in order to preserve the integrity of the arbitral procedure, arbitral tribunal should consider engaging in settlement facilitation only: (i) if, and as far as the parties wish it to do so. In no event should the arbitral tribunal try to "twist the arm" of a party, or the parties, into a settlement against its or their wish; and (ii) if the agreed terms of such engagement are clear and do not jeopardise the arbitral tribunal's impartiality and the integrity of the arbitral proceeding.

(6) Plan the hearing diligently and take an active role as arbitrator

Hearings play an important role in international commercial arbitration. Because hearings are complex and surprises frequent, hearing preparations should be done diligently and started early: "Il faut preparer pour mieux improviser".

The first issue that needs to be resolved early is to fix the *place of the hearing*. In order to save time and costs, the Arbitral Tribunal should, in consultation with the parties, fix a hearing venue that is convenient for all concerned. Certain hearings (such as, for example, procedural conferences) may be also held by telephone or video conference rather than in person.[19] The Arbitral Tribunal might also want to consider allowing *certain attendees* to participate by video conference rather than in person (for example, a witness who is unable or refuses to travel). Because for the weighing of evidence the personal impression of the Arbitral Tribunal is important, key witnesses and key experts are rarely heard via video conference.

The Arbitral Tribunal and the parties should then agree on a *realistic schedule and timeframe* for hearings, so as to avoid rescheduling and costs related thereto (including, for example, the imposition of cancellation charges).[20] For efficiency reasons, a hearing should be held on consecutive days whenever possible, instead of breaking it up into several dates.

During the *pre-hearing organisational telephone conference*,[21] the arbitral tribunal may discuss with the parties whether they would present *opening statements,* possibly followed by a discussion with the arbitral tribunal on the merits[22] to clarify the subject-matter and legal issues at the beginning of the hearing as proposed by the UNCITRAL Notes 2016, section 17 or the LCIA Notes for Arbitrators, section 32 et seq.[23] Taking the tribunal through the evidence and discussing the merits of the case before the hearing enables the tribunal to indicate to the parties what holds its particular interest, allowing the parties to adapt their witness questioning and post-hearing submissions accordingly.[24] Ideally, this discussion is followed by a preliminary list of issues drafted and distributed by the arbitral tribunal at least one or two weeks prior to the hearing.[25]

[16] See also Habegger, "Saving Time and Costs in Arbitration" in Arroyo (ed.), *Arbitration in Switzerland, The Practitioner's Guide* (2013), N70. Not suspending the proceeding, though, does not constitute a violation of the parties' right to be heard even if the arbitral procedure may be influenced by another pending (criminal or civil) procedure, See, e.g. FTD 133 III 139 E. 6.1; 119 II 386 E. 1b.

[17] See also the *ICC Commission Report*, section 42 et seq. for quidance in this respect.

[18] Article 32.1 DIS Rules even provide that at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.

[19] Whenever possible, though, the organizational meeting should be held in person to facilitate the efficient designing of the arbitral proceeding. In addition, cost- and time-efficient proceedings are furthered if the parties' representatives attend the meeting.

[20] See also above, section V.(3).

[21] See also Habegger, "Saving Time and Costs in Arbitration" in Arroyo (ed.), *Arbitration in Switzerland, The Practitioner's Guide* (2013), N 62.

[22] See GAR 10 July 2014, Ten drastic commandments, discussing Jörg Risse's and Peter Rees' proposals on efficient arbitraiton.

[23] See also Teresa Giovannini, "Ex Officio Powers to Investigate: When do the Arbitrators Cross the Line" in Bernd Ehle and Domitille Baizeau (eds), *Essays in Honour of Michael E. Schneider* (Wolters Kluwer, 2015), p.219, S.59ff.; William W. Park, "Truth-Seeking in International Arbitration" in Markus Wirth, Christiana Rouvinez and Joachim Knoll (eds), *The Search for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is About?*, ASA Special Series, No 35, p.1 et seq.; Peter Schlosser, "The 'Search for Truth' in Arbitration: The Civil Law View — the German Perspective" in Markus Wirth, Christiana Rouvinez and Joachim Knoll (eds.), *The Search for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is About?*, ASA Special Series, No.35, p. 39 et seq. The arbitral tribunal may also investigate facts which are not directly addressed by the terms of reference, but are important to the case (see ASA-Bulletin 3/2011, S.623 f).

[24] These suggestions, though, have also met criticism. For instance, Rees, argues that an overreliance on opening statements by the tribunal would be at the expense of thorough review of the hearing bundle.

[25] See also section V.(5), above and section V.(7) below.

• Time management — "chess clock hearing procedures" and the "Böckstiegel Method" on time control at the hearing

It has become common in international arbitration to limit the time of the hearing by allocating a defined and equal amount of time to the parties. It is left to the parties to manage the alloted time. Once a party has run out of time, it should not expect to be given additional time, except in exceptional circumstances. This "chess clock" method[26] has been refined by Karl-Heinz Böckstiegel who bases his time management practice on two cornerstones: anticipation and planning.[27]

The seeds of a successful hearing must be planted at an early stage of the arbitration. Already during the pre-hearing telephone conference, *the tribunal should inform the parties that each will dispose of a finite amount of time during the hearings*.[28] In general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers that a different allocation is justified. It is useful to determine the manner in which time would be kept throughout the hearing. The UNCITRAL Notes rightly emphasise that such time limits must be *realistic, fair and subject to supervision by the arbitral tribunal*. The same provide, e.g. art.25(1) Swiss Rules, art.26(1) ICC Rules, art.28(1) UNCITRAL Arbitration Rules, art.24.2 SIAC Rules and art.27(2) SCC Rules.

The underlying reason for the hering is the right of the parties to present their case.[29]Article 22(4) ICC Rules summarises this cornerstone of arbitration by stating that "[i]n all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[30] The statement of the principle, though, includes its limits: Each party shall have a *reasonable*, and not a full opportunity, to present its case. The fundamental procedural right of the parties to be heard includes to duly present their case in an adversarial procedure.[31]

Having this in its mind, the arbitral tribunal may indicate to the parties before the hearing that all written materials should be taken as having been studied by the arbitrators, and that the overriding purpose of the hearing is: (i) to highlight the major points of the parties' positions; (ii) to provide clarification, in particular upon the arbitral tribunal's questions; (iii) to present and examine witnesses; (iv) to present final conclusions and—to extent permitted by the rules—updated requests for relief such as the actual computation of damages. Such indications helps streamlining the conduct of the hearing considerably.[32]

• Hearing of witnesses

The hearing of witnesses plays an important role in international commercial arbitration. Today, it is common both in international arbitrations between civil and common law country based parties to replace direct witness examination by written witness statements and then to test the written statements in cross examination.[33]

Whereas the UNCITRAL Notes on Organizing Arbitral Proceedings 2012, section 14 para.86-91 and the IBA Rules on the Taking of Evidence in International Arbitration, art.4 offer general guidance on the hearing of fact witnesses, some *specifica* under Swiss law are worth recalling for the sake of arbitral tribunals having their seat in Switzerland: The parties have neither an absolute right to cross examine witnesses which have submitted written witness statements,[34] nor to ask an unlimited number of questions without any time restrictions.[35] According to the Swiss Federal Tribunal, the right to be heard is not violated if, pursuant to agreed procedural rules, the arbitral tribunal denies a party the opportunity to call one of its own witnesses for direct examination if the other party has waived its right to cross-examine that witness.[36] Based on its power to conduct the arbitral proceeding, the arbitral tribunal also has a right to ask questions by its own. Furthermore, the arbitral tribunal can chose not to hear witnesses if it considers that witness' testimony to be irrelevant to the resolution of the case, obviously unfit to prove the party's factual allegations, or if the arbitral tribunal, based on the evidence already on the file, concludes that further taking of evidence would not alter its conclusions (*anticipated assessment of evidence*).[37]

[26] Doug Jones, "Improving Arbitral Procedure" in Bernd Ehle and Domitille Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice Essays in Honour of Michael E. Schneider* (Wolters Kluwer, 2015), p.101.
[27] Jan Paulsson, "The Timely Arbitrator: Reflections on the Böckstiegel Method" (2006) 22(1) *Arbitration International* 19 et seq.
[28] This proposition is reflected in the UNCITRAL Notes 2016, which provide in section 17(b), para.118 that it may "be useful to limit the aggregate amount of time each party has for making oral statements, questioning witnesses and experts it presents, and questioning witnesses and experts of the other party or parties.
[29] See section IV. above.
[30] This principle flows from the right of the parties to be heard as discussed in section IV. above.
[31] Joachim Knoll, in Manuel Arroyo (ed.), *Arbitraiton in Switzerland, The Practitioner's Guide* (Wolters Kluwer, 2013), Ar.182 PILA N 31.
[32] A typical Böckstiegel Method order issued in another case well before the hearings—in what one may surmise was a routine matter—may read as follows: "Each Party will have a maximum of 4 hours for its first round presentation and a maximum of 1 hour for its rebuttal presentation, after deduction of time for breaks and other business. Each side is free to determine how much time it will spend on the presentation of evidence, including witnesses and experts, and on argument, respectively. Time not used by a party for its first round presentation may be transferred to its rebuttal time. Time used by a Party examining witnesses or experts presented by the other Party will be deducted from the time allotted to the examining Party … As the Hearing has to end after 2 days, the Tribunal does not intend to grant any extensions of the above time periods. It is left to the Parties how and to which extent they use the (limited) time allotted to them for these various purposes." See Paulsson, "The Timely Arbitrator: Reflections on the Böckstiegel Method" (2006) 22(1) *Arbitration International* 19 et seq.
[33] See, e.g. Girsberger and Voser, *International Arbitration* (2016), N 1007 et seq.
[34] FTD 4A_199/2014 of 8.10.2014, E. 6.2.3.; FTD 4P.196/2003 of 7 January 2004, E. 4.2.2.2.
[35] FTD 4A_544/2014 of 29 April 2015, E. 3.4.
[36] FTD 4A_199/2014 of 8 October 2014.
[37] FTD 4A_544/2014 of 24 February 2015, E. 3.2.1.

• Expert evidence

A party's right to be heard includes the right to present expert reports and experts before the arbitral tribunal.[38] The role of the arbitral tribunal, though, goes beyond hearing experts presented by the parties: In order to render a decision, it must be in a position to understand the evidence duly presented by the parties. An arbitral tribunal that does not itself have the required technical or other expertise and refuses to hear party experts or to commission a tribunal-appointed expert violates the parties' right to be heard.[39] The tribunal-appointed experts must be independent of the parties and observe the parties' right to be heard and of equal treatment. This includes that the parties must be copied into all correspondence from the expert to the arbitral tribunal.[40] Before relying on a report of "its" expert, the arbitral tribunal must give the parties the opportunity to read the expert report and to comment on it.[41]

It goes without saying that the arbitral tribunal *cannot delegate the making of the decision* to such experts.[42]

Regarding expert evidence, the IBA Rules on the Taking of Evidence provide a tested basis upon which arbitral tribunals can design their evidentiary procedure.[43] Another useful tool is the CIArb Protocol for Party Appointed Experts.[44] Both advocate for the *independence of party-appointed experts*. In an ideal world, the parties jointly appoint the expert,[45] or party-appointed experts meet before they deliver their reports, or at least before they are heard at the hearing.[46] Furthermore, and particularly in cases where no such pre-hearing communications between the experts has taken place, expert witness conferencing ("hot tubbing") may be helpful for the arbitral tribunal to understand the evidence presented in expert reports and by expert witnesses.[47] The arbitral tribunal can increase the quality of expert reports considerably by *giving the parties directions as to the best practices in terms of the effective use of party appointed experts*.[48]

Another approach is the "Sachs protocol" on expert evidence,[49] which offers further options to ensure neutral experts in the proceeding. It suggests that after the parties have submitted their first briefs, the tribunal invites both parties to provide the tribunal and the opposing party with a list of three to five persons they consider fit to serve as an expert for the determination of a particular question. It then lies in the discretion of the tribunal to invite the parties to comment briefly on the experts proposed by the respective other party. In a second step, the tribunal will choose two experts, one from each of the two lists, and appoint these experts together as an "expert team". Following such appointment, the tribunal will meet with the expert team and the parties in order to finalise the expert team's terms of mandate. These terms of reference may include, inter alia: (i) the matters and questions which shall be submitted for determination by the expert team; (ii) the documentation and information required by the expert team and to be submitted by the parties; (iii) the form and mode of communication among the tribunal, the expert team and the parties[50]; (iv) the remuneration of the expert team; and (v) the duties of the expert team vis-à-vis the tribunal and the parties. In this context, to avoid differences among the parties and surprises in terms of document production requests and questions at the hearing regarding the instruction of the experts, it is of great importance to agree with the parties, or to order, on the issue whether or not expert-party communication is to be disclosed.[51]

Before testifying, the arbitral tribunal instructs the experts on their *duty to state the truth*.

[38] See, e.g. UNCITRAL Notes on Organizing Arbitral Proceedings 2012, section 15 para.92–107; Nessi, p.71 et seq.
[39] FTD 4A_27/2007 of 28 March 2007, E. 3.1; Haberbeck, "Verletzung des Grundsatzes des rechtlichen Gehörs in internationalen Schiedsverfahren" [2015] AJP 1413, 1417.
[40] See arts 6(2) and 6(5) IBA Rules on the Taking of Evidence; Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (Paris, 2012), N 3-975.
[41] Article 6(5) IBA Rules on the Taking of Evidence; Girsberger and Voser, *International Arbitration* (2016), N 1015; Dieter Hofmann and Oliver M. Kunz in Manuel Arroyo (ed.), *Arbitration in Switzerland — The Practitioner's Guide*, N 13 and 54 to art.27 Swiss Rules.
[42] Girsberger and Voser, *International Arbitration* (2016), N 1014; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd edn, N 1344, 1347 and 1350; Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2016), para.6.136; Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (Paris 2012), N 3-972-976; Hofmann and Kunz in Arroyo (ed.), *Arbitration in Switzerland — The Practitioner's Guide*, N 30 to art.27 Swiss Rules.
[43] See also Sebastiano Nessi, in Christoph Müller and Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (2016), pp.74 and 80 et seq. on party and court appointed experts; Jones, "Improving Arbitral Procedure" in Ehle and Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice Essays in Honour of Michael E. Schneider* (2015), p.95.
[44] See Nessi, p.83; Jones, "Improving Arbitral Procedure" in Ehle and Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice Essays in Honour of Michael E. Schneider* (2015), p.96.
[45] See, e.g. the UNCITRAL Notes 2016, section 15(b) para.98. The UNCITRAL Notes 2016, suggest that "[w]hen agreeing on a single joint expert or the issuance of a single joint report, it may be necessary to clarify at the outset whether the parties would be bound by the conclusions of the joint expert or those contained in the joint report." Nessi, pp.85 and 91.
[46] See, e.g. the UNCITRAL Notes 2016, section 15(b) para.97.
[47] See Nessi, 92 et seq. When assessing quantum, this approach makes particularly sense if the parties, or the experts, have agreed on a common method of calculating damages (e.g. DCF or the market-based method) and found at least some common grounds regarding the facts underlying the calcuation of damages. In the best case, scenarios taking into various assumptions can be developed. It is then for the parties to prove that « their » scenario applies.
[48] Jones, "Improving Arbitral Procedure" in Ehle and Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice Essays in Honour of Michael E. Schneider* (2015), p.96 et seq.
[49] See, e.g. Nessi, p.89 et seq.
[50] See also the UNCITRAL Notes, section 7.
[51] See the UNCITRAL Notes 2016, section 15(b) para.100, which states that "[i]n addition, the arbitral tribunal may wish to clarify the nature and extent of communication between the parties or their representatives and their experts, and whether a party might be requested to disclose such communications." Nessi states that in the absence of an agreed or ordered rule, there is generally a presumption in favor of non-disclosure (with some exceptions, e.g. regarding documents referrred to in the expert report, or the scope of the experts engagement, in particular the instruction by counsel; see Nessi, p.94).

To get a full understanding of the expert reports, the arbitral tribunal should devote sufficient time to ask questions by its own and not limit expert examination to cross.

The Swiss Federal Tribunal has confirmed over the years the arbitral tribunal's power and discretion to conduct the taking of evidence. In a recent decision, it held that arbitral tribunals are entitled to *refuse to allow certain questions a party* wants to put to the opposing party's expert. The tribunal may do so where it anticipates that the additional evidence obtained by further questioning would not affect the arbitral tribunal's findings, or if the evidence in question is irrelevant or unsuitable to prove the facts in question.[52] In another recent decision, the Swiss Federal Tribunal held that not giving access to an indemnification system utilised by the experts where the data were owned by a third party does not constitute a violation of the right to be heard, provided that neither party had access to the information in question,[53] which in my view under right to be heard-considerations is questionable: Allowing "black box" calculations to form the basis of an arbitral tribunal's decision deprives a party's possibility to comprehend a significant part of the award (and to challenge it in setting aside proceedings, if need be).

The *arbitral tribunal may also appoint experts by its own*. The function of such experts usually consists in preparing a report on one or several specific points requiring specialised knowledge or assisting the arbitral tribunal in understanding certain technical issues.[54] As shown above, the arbitral tribunal is even obliged to appoint an expert if it does not have the required technical or other expertise and cannot get it from the evidence submitted by the parties.[55]

The parties, or a party, may further *request the arbitral tribunal to appoint an expert,* who then acts as an "assistant" to the arbitral tribunal to make certain findings which the arbitrators, for lack of special knowledge, are unable to make themselves.[56] Upon request of one of the parties, the arbitral tribunal usually must appoint an expert if the issue to be determined by the expert is relevant to the outcome of the case and does not yet appear to be sufficiently proven by other evidence.[57] If both parties request the arbitral tribunal to appoint an expert, the reasons for not doing so must be even more compelling.[58] An arbitral tribunal violates the parties' right to be heard if it rejects a timely and well-founded request for the appointment of a tribunal-appointed expert if its members do not have the necessary technical or other special knowledge themselves.[59]

• Document production

For years, the extensive and in some instances heated discussion on the "why and how" of document production in international arbitration has illustrated the cultural divide between common law and civil law practitioners.[60] Since the publication of the IBA Rules on the Taking of Evidence in International Arbitration in 2010, the discussion has focused on how these rules should reasonably be applied. Today, we may state that *some degree* of document production is generally accepted in international commercial arbitration.[61] The extent of the degree, of course, is still subject to discussion and must be decided on a case-by-case basis. It is noteworthy that for example e-discovery is a concept which still enjoys little acceptance in civil law countries.[62] The prudent approach is reflected in the ICC Commission Report, section 51 ("Establishing procedure for requests for production"), which suggests to consider whether requests for production of documents are *genuinely necessary*. If they are, the parties and the arbitral tribunal should consider establishing a clear and efficient procedure for the submission and exchange of documents. Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration provides valuable guidance when it comes to the shaping of the document production procedure. The UNCITRAL Notes 2016 also extensively deal with this issue in section 13, para.76-85. One of the standard tools applied in many arbitrations to limit and structure document production requests and the arbitral tribunal's

[52] See, e.g. FTD 4A_544/2014 of 24 February 2015; for a more detailed discussion, see, e.g. Philipp Haberbeck, "Verletzung des Grundsatzes des rechtlichen Gehörs in internationalen Schiedsverfahren" [2015] AJP 1413, 1422 and 1426.
[53] FTD 4A_34/2015 of 6 October 2015.
[54] See also UNCITRAL Notes 2016, section 15(c) para.101; ICC Rules section 25(1) and (3); Swiss Rules art.27; art.29 UNCITRAL Arbitration Rules; art.26 SIAC Rules; art.29 SCC Rules; art.27.2 DIS Rules. For a discussion of the questions to be submitted to the expert, see ASA-Bulletin 3/2004, S.479 ff. On the qeustion whether such experts may partake in the deliberation of the case, see Spühler and Gehri, Zulassung von Experten zur Urteilsberatung im Schiedsverfahren, ASA-Bulletin 1/2003, S.16 ff.; Girsberger and Voser, *International Arbitration* (2016), N 1014 et seq.; For an example of a mandate of the tribunal-appointed expert, see Bernhard Berger and Michael E. Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No.42, pp.146–159.
[55] FTD 4A_27 of 28 March 2007, E. 3.1. This may be the case where the subject matter is higly technical and the expert reports and expert examination are not sufficient to educate the arbitral tribunal on it, or to put it into a position to decide thereon (e.g. because the experts of the parties do not find any common ground).
[56] Berger and Kellerhals, *International and Domestic Arbitration* in Switzerland, N 134; Hofmann and Kunz in Arroyo (ed.), *Arbitration in Switzerland — The Practitioner's Guide*, N 4 to art.27 Swiss Rules.
[57] Hofmann and Kunz in Arroyo (ed.), *Arbitration in Switzerland — The Practitioner's Guide*, N 16 to art.27 Swiss Rules.
[58] Hofmann and Kunz in Arroyo (ed.), *Arbitration in Switzerland — The Practitioner's Guide*, N 30 to art.27 Swiss Rules.
[59] FTD 4A_2/2007 of 28 March 2007, E.3.1.; FTD 4P.23_1991 of 25 May 1992, E.5b; 102 Ia 493 E.8.; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, N 1346.
[60] See, e.g. the Commentary on the revised text oft he 2010 IBA Rules on the Taking of Evidence in International Arbitration, established by the 1999 IBA Working Parti and the 2010 IBA Rules of evidence Review Subcommittee; Pierre Tercier and Tetiana Bersheda, *Document Production in Arbirtration: A Civil Law Viewpoint*, Ch.7, The Search for "Truth" in Arbitration — ASA Special Series No.35, 2011; Reto Marthitola, *Document Production: NewFindings on an Old Issue*, ASA Bulletin 1-2016, p. 78 et seq.; Girsberger and Voser, *International Arbitration* (2016), N 992 et seq.; Lukas Wyss, "Trends in Documentary Evidence and Consequences for Pre-arbitration Document Management" [2010] Int. Arb.L.R. 111.
[61] Bernard Hanotiau, "Massive Productions of Documents and Demonstrative Exhibits" in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration* (ICC Publications, 2009), p.358; Habegger, "Saving Time and Costs in Arbitration" in Arroyo (ed.), *Arbitration in Switzerland, The Practitioner's Guide* (2013), N 46; Wyss, "Trends in Documentary Evidence and Consequences for Pre-arbitration Document Management" [2010] Int. Arb.L.R. 111.
[62] See s.12(b) IBA Rules. For the civil law countries' approach on document production, see also Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, N 1216 et seq.; ASA Special Series No.35, p.93 et seq.; section 13 para.73-85 of the UNCITRAL Notes 2016.

decision thereon is the "Redfern Schedule", which helps to efficiently apply the IBA Rules on the Taking of Evidence in this context.[63]

• To investigate or not to investigate?

Arbitral tribunals have the power to investigate the facts of the case by their own.[64] However, and despite the fact that they have the power to conduct the proceeding as they seem fit (subject to the legal sidelines set forth below), as a rule, arbitral tribunal should not act as private attorney general. Particular care is needed when investigating facts that were *not introduced into the proceeding by the parties*. It is another question, though, whether the arbitral tribunal has an *obligation* to investigate when it suspects a violation of criminal or other mandatory rules by money laundering, bribery, violation of competition law, fraudulent conveyances or the defrauding of creditors, financing of terrorism, violation of embargos, traffic of cultural property, gross violation of environmental regulations or the like is at stake. While there is no one-size-fits-all answer to this issue, in any case, an arbitration should not serve as a means for defrauding other parties. In other words, the arbitrators must not be the instrument for a sham. Furthermore, it may make a difference whether an illegal practice is relevant to the outcome of the dispute or not. The latter may apply if a contract was obtained by bribery, while the contract itself does neither violate any laws, nor pursue illegal purposes. Another element to be considered in this context is the degree of suspicion: Whereas the mere possibility normally does not trigger investigations, strong suspicions may[65]: In case of clear indications, public policy concerns may impose an obligation on the arbitral tribunal to investigate *ex officio* such fundamental violations of the law.[66]

In concluding, althought arbitrators are not national state court judges, they should nonetheless be aware of public policy issues.[67] Arbitral tribunals being confronted with the suspicion of illegal practices should be aware that both an overly active, and an entirely passive, attitude may jeopardise the integrity of the arbitral tribunal, the arbitration itself, and the enforcement of the award.

• The use of evidence known by the tribunal or individual arbitrators

In some instances, the tribunal or individual arbitrators may have knowledge of certain facts which have not been introduced into the arbitration by any of the parties, for instance due to personal knowledge,[68] from other proceedings or its own investigations. The reliance on such facts may not be cricital if they are notorious, e.g. among others, natural phenomena, well known principles of mechanics, physics, chemistry, geographic facts, exchange rates, etc.[69] Knowledge of a tribunal resulting from its professional expertise or parallel proceedings may be taken into account provided this happens in a *transparent way* and the parties had sufficient opportunity to comment on the relevant issues.[70] Arbitrators may also use facts on the file in another way than intended by the parties and apply conclusions or draw inferences.[71] However, in applying his knowledge, an arbitrator must *not complement the facts submitted by a party* to the benefit of this party.

• Iura novit arbiter

As a rule, the principle of "iura novit curia" (or: "iura novit arbiter") applies in arbitrations having their seat in Switzerland.[72] This means that the arbitral tribunal applies the law applicable to the case at hand *ex officio* and may—even should—look beyond the parties' legal arguments.[73] As an example, when assessing damages,

[63] See, e.g. the UNCITRAL Notes, section 13, para.77; Girsberger and Voser, *International Arbitration* (2016), N 997 et seq.; Bernard Hanotiau, "Massive Productions of Documents and Demonstrative Exhibits" in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration* (ICC Publications, 2009), p.359.

[64] See, e.g. art.24(3) Swiss Rules or art.25 ICC Rules, and above, section II.; Paul Friedland, "Fact-Finding by International Arbitrators — Sua Sponte Calls for Evidence" in Domitille Baizeau and Frank Spoorenberg (eds), *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, ASA Special Series No. 45, p.37 et seq.; Harold Frey, *The Arbitrator's Initiative: Fact-finding*, ibid., p. 49 et seq.; See also See also Harry Ormsby, "Judicial fact-finding and the South China Sea arbitration", *Kluwer Arbitration Blog*, 6 September 2016, who extensively discusses the extensive judicial factfinding in South China Sea Arbitration (*Republic of the Philippines v Peoples' Republic of China*).

[65] Elliot Geisinger and Pierre Ducret, "The Uncomfortable truth: Once Discovered, What to Do with It?" in Markus Wirth, Christina Rouvinez and Joachim Knoll (eds), *The Seasrch for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is about?*, ASA Special Series No.35, p.115 et seq.

[66] See, e.g., Gionannini, *ibid.*, p.67 et seq., with further references; Tobias Zuberbühler and Andreas Schregenberger, "Corruption in Arbitration — The Arbitrator's Duty to Investigate" in Christoph Müller and Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (2016), p.1 et seq.

[67] Geisinger and Ducret, "The Uncomfortable truth: Once Discovered, What to Do with It?" in Markus Wirth, Christina Rouvinez and Joachim Knoll (eds), *The Seasrch for "Truth" in Arbitration: Is Finding the Truth What Dispute Resolution is about?*, ASA Special Series No.35, p.119.

[68] This holds particularly true in case arbitrators have a technical and not a legal background and were chosen because of their expertise in the field of the subject-matter at issue.

[69] See, e.g. FTD 135 III 88 E. 4.1.

[70] Frey, "The Arbitrator's Initiative: Fact Finding" in Baizeau and Spoorenberg (eds), *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, ASA Special Series No.45, p.55 et seq.

[71] Frey, "The Arbitrator's Initiative: Fact Finding" in Baizeau and Spoorenberg (eds), *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, ASA Special Series No.45, p.57 et seq.

[72] See, e.g. Manuel Arroyo, "Which is the better approach to Jura novit Arbiter — the English or the Swiss?" in Christoph Müller and Antonio Rigozzi (eds), *New Developments in International Arbitration* (unine publication, 2010), pp.27 et seq., 33 et seq.; Jenny M. Reto, "Iura Novit Arbiter — A Swiss Perspective" in Daniele Favalli et al. (eds), *Selected Papers on International Arbitration* (Berne, 2012), p.73 et seq.; Teresa Isele, "The Principle Iura Novit Curia in International Commercial Arbitration" [2010] Int. A.L.R. 14 et seq.; Paula Hodges, "Does the Applicable Law Influence Arbitrator Selections? Reflections on Party Choices and Arbitrator Practice" in Domitille Baizeau and Frank Spoorenberg (eds), *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, ASA Special Series No.45, p.61 et seq., and in particular p.69 et seq. on arbitrator tools and techniques for acertaining the content and meaning of the applicable law; Pierre-Yves Tschanz, *Selected Questions regarding Arbitrator's Initiatives*, ibid., p. 77 et seq.; FTD 4P.260/2000 of 2 March 2001, para.5b; FTD 120 II 172 para.3a; 116 II 594, para.3b; Wolfgang Wiegand, "Iura novic curia vs. ne ultra petitio: Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts" in Monique Jagmetti-Greiner, Bernhard Berger and Andreas Güngerich (eds), *Festschrift für Franz Kellerhals*, p.127 ff.

[73] Giovannini, p.70 et seq.

the arbitral tribunal may take a different view than the parties, provided that the applicable law allows it to do so, no new evidence or facts are introduced into the file and the right to be heard is respected.

Exceptions from the principle "*iura novit curia*" *may be made in case the parties have excluded a certain legal* rule or principle or when they are requested by the arbitral tribunal to substantiate the foreign law.

In principle, the wrong or erroneous *application of the law* by the arbitral tribunal seated in Switzerland is not a ground for setting aside an arbitral award. Swiss law does not know the "materially flawed" standard of English law.[74] The only exception to this principle exists when the arbitrator's application of the law comes as a *surprise* to the parties, i.e. when the arbitral tribunal relies on legal grounds which none of the parties argued and that they could not have reasonably expected.[75] In such case, the arbitrator must give the parties the *opportunity to comment*. Thus, the principle *iura novit arbiter* finds its limits in the principle of due process. The Swiss Federal Tribunal applies this exception very restrictively and denies an appeal to set aside the award if, e.g. the other party had implicitly addressed the legal issue at hand.[76]

The legal sidelines for the application of the law by the arbitral tribunal are further discussed in section (7) below.

• Concluding the proceeding

Some arbitration rules, such as the ICC rules, request the arbitral tribunal to *declare the proceedings closed* with respect to the matters to be decided in the award and to inform the institution thereof.[77] In any event, such a declaration is helpful for procedural clarety purposes and recommended in other proceedings as well.

A party must complain immediately before the arbitral tribunal if it is of the opinion that its procedural rights were violated.[78] Failure to do so results in the loss of its right to challenge the award for that particular violation of its procedural rights. Therefore, arbitral tribunals should ask the parties whether they have any objections against the conduct of the proceeding at the end of organisational meetings and the hearing(s) and document their answers in the minutes and/or hearing transcript.

(7) "It's the quality of the award, stupid!" — Recommendations regarding the deliberations and the issuance of the award

Whereas cost- and time-efficiency as well as fairness of the proceeding are fundamental to arbitration, the quality of the award is of paramount importance. Of course, efficiency of an arbitration helps the parties and the arbitral tribunal to focus on the relevant facts and legal issues and to save cost and time, but the quality of an award goes further than that: It requires that the arbitral tribunal fully understands the parties' positions, including all relevant facts and legal aspects of the case, carefully assesses and weighs the evidence and diligently applies the law. In this context, the following legal guidelines and suggestions may be helpful:

• Some legal guidelines on the drafting of the award for arbitral tribunals sitting in Switzerland

Whereas the PILA only provides for general principles on the conduct of an arbitration,[79] the Swiss Federal Tribunal has developed a rich body of law which gives valuable guidance for the drafting and delivery of awards. The case law underscores the wide discretion that arbitral tribunals having their seat in Switzerland enjoy.

The first reason for this discretion is the fact that the Swiss Federal Tribunal can only set aside an arbitral award for very limited grounds.[80] According to art.190(2) PILA, arbitral awards can be challenged only: (a) if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; (b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction; (c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; (d) if the equality of the parties or their right to be heard in an adversarial proceeding was not respected; and (f)if the award is incompatible with Swiss public policy (*ordre public*).[81] In general, Switzerland's highest court is very reluctant to overrule arbitral tribunals, fostering the country's pro-arbitration stance. The following principles may serve as guidelines for rendering a "Swiss award" and making it "appeal-proof":

An arbitral tribunal is expected to *consider and weigh the evidence diligently*. It may rely on facts which no party had argued without infringing the parties' right to

[74] FTD 127 III 576, E. 2.b.; BGer 4A_402/2010 of 17 February 2011, E. 3.1.
[75] FTD 4A_400/2008 of 9 February 2009; FTD 4A_305/2013 of 2 October 2013, E. 4.; FTD 4A_188/2013 of 15. July 2013, E. 2.; FTD 4A_407/2012 of 20 February 2013, E. 5.1.; FTD 4A_108/2009 of 9. June 2009, E. 2.1.; FTD 130 III 35; ATF 4P.260/2000 of 2 March 2001; Arroyo, "Which is the better approach to Jura novit Arbiter — the English or the Swiss?" in Müller and Rigozzi (eds), *New Developments in International Arbitration* (2010), pp.45–47 and 52. For a deepened discussion on this topic, see Ulrich Haas, "the Influence of EU Law on international Arbitration, in particular in Switzerland" in Christoph Müller and Antonio Rigozzi (eds), *New Developments in International Arbitration*, (unine publication, 2012), p.47 et seq.; Franz Kellerhals and Bernhard Berger, "Iura novit arbiter" in Eugen Bucher, Claus-Wilhelm Canaris, Heinrich Honsell and Thomas Koller (eds), *Norm und Wirkung*, Festschrift für Wolfgang Wiegand zum 65. Geburtstag, Berne 2005, pp.387–405.
[76] FTD 4A_322/2015 of 27 June 2016; see also Georg von Segesser, "Arbitration in Switzerland: Non-Swiss Parties Should Be Aware of the Arbitrator's Powers under the Swiss Principle of Jura Novit Curia", *Kluwer Arbitration Blog*, 15 September 2015.
[77] See, e.g., art.27 ICC Rules; art.29 Swiss Rules; art.31 UNCITRAL Arbitration Rules; art.32.1 and 3 et seq. SIAC Rules; arts 34 and 36 SCC Rules.
[78] See, e.g. FTD 4A_348/2009 of 6 January 2010.
[79] See above, section II.
[80] In this context, the article of Felix Dassser on the success rate of challenges of arbitral awards under Swiss law is very instructive. See Felix Dasser, "Challenges of Swiss Arbitral Awards - Updated and Extended Statistical Data as of 2015" (2016) 34(2) *ASA Bulletin* 280.
[81] See Girsberger and Voser, *International Arbitration* (2016), N 1594 et seq.; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, N 1702 et seq.

be heard if they are on the file.[82] It may also reject to adduce evidence without infringing a party's right to be heard: (i) if the offered evidence is unfit to prove a fact or without pertinence; (ii) if the tribnal, by assessing the evidence in anticipation, reaches the conclusion that it has already reached a conclusion as to a certain fact that the proposed evidence will not modify; or (iii) if the point has already been proven by other evidence[83]. Arbitral tribunals seated in Switzerland enjoy also wide discretion in administering evidence offered by a party.[84] In this context, it is to be noted that the *weighing of evidence cannot be challenged before the Swiss Federal Tribunal.*[85]

As a rule, international arbitration awards are issued reasoned and in written form.[86] Although the lack of the reasoning of an award generally cannot be challenged under art.190(2)(d) PILA,[87] an arbitral tribunal has, as a minimum, a duty to examine and deal with the issues raised by the parties and which are relevant for its decision. This duty is violated where—by oversight or by misunderstanding—the tribunal disregards allegations, arguments, evidence and offers of evidence presented by one party and relevant to the decision to be rendered.[88]

However, arbitral tribunals do *not need to specifically cite to certain legal provisions to address a certain point made by the parties*, and they are not required to explicitly specify the legal provisions they applied.[89] Arbitral tribunals are *not bound to the legal arguments of the parties*,[90] either. As long as the arbitral tribunal's decision lies within the scope set by the parties' claims (e.g. with regard to the currency and the awarded amount), there is *no ultra petition* decision.[91] Whether or not arbitrators are entitled to amend agreements, though, depends on the law applicable to the subject-matter (or, the contract itself).[92]

The arbitral tribunal is not required to discuss *all* of the parties' legal arguments in the award.[93] One cannot conclude from the absence of such reference that the argument was not addressed when making the award.[94] Whether or not an arbitral tribunal has interpreted the contract by applying certain legal provisions, e.g. can be determined by looking at its legal and factual considerations in the award. If an award wholly neglects elements that are apparently important for the resolution of the case, either the tribunal or the respondent must justify such omission. It is their task to demonstrate in a set-aside proceeding vis-à-vis the Swiss Federal Tribunal that the omitted elements were not relevant to the decision or, if they were, that they had been at least implicitly taken into account or rejected by the tribunal. Because of the formal nature of the right to be heard, the Swiss Federal Tribunal must not decide whether or not the decision would have resulted in a different outcome if the issues had indeed been considered, but simply annuls the award and remits it to the tribunal for re-consideration.

In FTD 4A_108/2009, the Swiss Federal Tribunal reminded the applicant that in an international arbitration held in Switzerland, there is no constitutional requirement that the parties are heard on the legal consequences to be drawn from the evidence on the file.[95] The arbitral tribunal has no obligation to submit its own legal reasoning to the parties beforehand, either.[96] On the other hand, if the arbitral tribunal feels that it would prefer collecting the parties (further) views on a particular legal issue, it has the right to order a second exchange of final written submissions, even if the parties had not agreed thereon.[97]

[82] FTD 4A_305/2013 of 2 October 2013.
[83] See, e.g. FTD 486/2014 of 25 February 2015, E 5.1.
[84] This limitation contrasts with the Swiss Civil Procedure Act (CPA). In its decision of 30 September 2014, the Swiss Federal Tribunal rejected an application to have a domestic arbitral award set aside on grounds of arbitrariness. It confirmed that under Swiss law, an award is only considered to be arbitrary from a factual point of view where an arbitral tribunal's findings are manifestly contradicted by the case's evidentiary record. The Swiss Federal Tribunal also confirmed that only a clear violation of the law can amount to arbitrariness (see FTD 4A_274/2014 of 30 September 2014, and FTD 4A_112/2014 of 28 April 2014; see also FTD 141 III 495). In this context, it is noteworthy that the PILA permits parties to an international arbitration to opt-out and submit the procedure to the Swiss CPA, which governs domestic arbitration, allowing for the "arbitrariness" challenge. In a decision of 23 July 2014, the Swiss Federal Tribunal accepted an application to have a domestic arbitral award set aside on grounds of arbitrariness, finding that the sole arbitrator, in awarding interest on damages, *had grossly misapplied Swiss law* on default interest by granting interest for periods of time during which the relevant amounts had not yet become due (FTD 4A_117/2014), which would not be possible under the PILA.
[85] FTD 141 III 495.
[86] See, e.g. art.189(2) PILA; art.32(3) Swiss Rules; art.34(3) UNCITRAL Arbitration Rules; art.36(1) SCC Rules; art.34(3) DIS Rules; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, N 1484.
[87] See, e.g. FTD 4A_460/2013 of 4 February 2014, E. 3.1.
[88] See also FTD 4A_342/2015 of 26 April 2016, where the Swiss Federal Tribunal held that there is no violation of the right to be heard if the arbitral tribunal does not address all arguments of a party, so long as the relevant arguments invoked by a party are addressed. See also FTD 133 III 235, E. 5.2.; FTD 121 III 331, E. 3.b.; FTD 4A_460/2013 of 4.2.2014, E. 3.1.; FTD 4A_69/2015 of 26 October 2015; FTD 4A_520/2015 od 16 December 2015; for a more detailled discussion, see, e.g. Haberbeck, "Verletzung des Grundsatzes des rechtlichen Gehörs in internationalen Schiedsverfahren" [2015] AJP 1413, 1417 et seq.; anders: art.384(1)(e) ZPO.
[89] FTD 4A_486/2014 of 25.2.2015, E. 4.3.2.
[90] FTD 4A_218/2015 of 28 October 2015; ius.focus 12/2015, p.27.
[91] See, e.g. Simon Gabriel, "Schiedsentscheid extra petitia wegen US-Doller statt Euro?" in dRSK of 21 October 2015, section 18.
[92] See, e.g. Beck et al., *Austrian Yearbook on International Arbitration 2014* (2014), pp.23 et seq., 77 et seq., 123 et seq.; FTD 133 III 235, E. 5.2.; FTD 121 III 331, E. 3.b.; see also art.27(a) SIAC Rules which provides that unless otherwise agreed by the parties, in addition to the other powers speci ed in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to: order the correction or recti cation of any contract, subject to the law governing such contract.
[93] FTD 4A_305/2013 of 2 October 2013; FTD 133 III 235, E. 5.2.; FTD 121 III 331, E. 3.b.
[94] FTA 4A_486/2014 of 25 February 2015, E 4.3.2; FTD 4A_460/2013 of 4 February 2014.
[95] See also FTD 130 III 35, E. 5., which confirms this principle.
[96] FTD 4A_305/2013 of 2 October 2013; FTD 133 III 235, E. 5.2.; FTD 121 III 331, E. 3.b.; see also FTD 4A_554/2014 of 15 April 2015, where the Swiss Federal Tribunal confirmed its longstanding case law, according to which the parties' right to be heard primarily relates to the facts and not the law. This is a consequence of the principle of iura novit curia ("the court knows the law"). Thus, an arbitral tribunal seated in Switzerland can determine the legal provisions (even under foreign law) applicable to the dispute and can thus rely on other legal provisions than those submitted by the parties. As a consequence, a party may not, in the course of the proceedings, rely on the right to be heard to comment on new legal theories introduced by one party as it could do with regard to new facts. In my view, though, it is not advisable for arbitral tribunals to submit their own draft legal reasoning to the parties beforehand in the first place. See below, section (7) "Discussion of the issues with the relevant factual and legal issues with the Parties", *in fine*.
[97] FTD 4A_424/2011 of 2 November 2011, ASA-Bulletin 4/2012, S. 771.

• First deliberations among the arbitrators prior to the hearing

Together with the taking of evidence, the deliberations are at the heart of the arbitral process. As the "Puma" case recently demonstrated, their absence or abuse may form the basis of annulment proceedings.[98]

The arbitral tribunal is a unit and should work as one. Chairpersons should therefore strive to bind the arbitral tribunal together and know early the particular experience their co-arbitrators may contribute in the case at hand, and whether one of the arbitrators is not as independent as one might wish.[99]

Early preliminary deliberations serve the arbitral tribunal to establish a list of issues and to actively manage the case,[100] later ones help to prepare the hearing and to render the award. The arbitral tribunal may discuss at an early stage what the most important issues are, how to approach them, and what the most persuasive evidence might be. The arbitrators may also discuss their *preliminary opinion* among themselves on what they have seen on the file so far. It is perfectly appropriate to opine that unless one sees evidence to the contrary, one might decide on this issue in a certain way, which adds to the transparency in the hearing and deliberation process and allows to build up trust among the arbitrators.[101] In terms of the preliminary deliberations, though, the chairperson may be well advised to be cautious about advancing his or her preliminary position on a given case, but wait for better knowledge of his colleagues.

Shortly before the hearing, the arbitral tribunal, mostly under the guidance of the presiding arbitrator, identifies the *remaining procedural as well as the factual and legal issues*. Remaining procedural issues are normally decided by an order. Although the chairperson has the power to determine on procedural issues,[102] discussing such issues with the co-arbitrators and deciding, if possible in due time, with unanimous voice, advances the "team spirit" of the arbitral tribunal and the arbitrators' understanding of the case. The initiative to initiate the preliminary deliberations or another form of dialogue among arbitrators is traditionally left to the *chairperson*.

The dialogue among arbitrators is deepened on the eve of the evidentiary hearing when the arbitrators meet in person for the hearing. At this point, the arbitrators once more review and discuss the content of the parties' written submissions and their exibits, what will be said at the hearing, and prepare a few questions for the witnesses and the experts to be heard. During the hearing, pauses allow the arbitrators to have some dialogue among them to see how to develop the further proceeding.

• Discussion of the issues with the relevant factual and legal issues with the parties

The arbitral tribunal has bascially three opportunities to discuss the relevant issues with the parties and to give them some indication on what issues should be addressed more in detail[103]: first, at the organisational meeting at the outset of the arbitration (case management conference, etc.); secondly, at the organisational (telephone) conference when organising the hearing (pre-hearing conference); and, thirdly, at the hearing itself. In my opinion, an *open and maybe in some cases even controversial discussion of the case with the parties*, including asking questions and probing the parties' core factual allegations and legal arguments,[104] is very helpful for the abitral tribunal to form its opinion on the case and, consequenctly, to write the award.

In this context, the *list of the issues* established on the basis of a preliminary analysis of the written submissions of the parties and their exhibits[105] is helpful. Ideally, the list is communicated to the parties sufficiently early before the hearing so that the issues highlighted by the arbitral tribunal can be addressed by the parties during the hearing. Such a list helps to streamline the arbitration and to educate the arbitral tribunal on the position of the parties, and vice versa. At the end of the day, the list of issues also provides a helpful checklist when it comes to drafting of the award.

Going a step further, some authors suggest submitting a draft award to the parties.[106] In my view, however, the drafting of the award is a prime task of the arbitral tribunal and should not be—in a way or the other—delegated to the parties, which speaks against the submission of a draft award to the parties.

[98] In the "*Puma*" case, the arbitral award was set aside on the basis that the arbitrator appointed by Puma AG RDS (Puma) had not participated in the final deliberation. When after several meetings between all three arbitrators, the deliberations regarding damages to be paid by Puma broke down, the other two arbitrators secretly met and rendered an award on terms on which the arbitrator appointed by Puma did not agree. The parties were notified of the award that same day. In its decision dated 15 February 2017, the Spanish Supreme emphasised that the non-participation of the third arbitrator was not the result of purposeful delay, obstruction or intervention in the final discussion in which the final award was rendered (which under most arbitration regimes would have allowed a truncated tribunal to issue an award). It therefore affirmed the ruling of the court of first instance and held that the final deliberations had violated the principle of arbitral collegiality, which qualified as a violation of the right to a fair trial (art.24 of the Spanish Constitution) and constituted a ground for annulment for violation of public policy (s.41.1(f) of the Spanish Arbitration Law). See Bryan Cave, "Improper Deliberations in International Arbitration as a Ground for Annulment", *Kluwer Arbitration Blog*, 5 May 2017, *www.kluwerarbitrationblog.com* [Accessed 11 May 2017].

[99] For an informative discussion on the role of the chairperson, see, e.g. Philipp Peters, "Preciding Arbitrator, Deciding Arbitrator — Decision-Making in Arbitral Tribunals" in Klausegger et al., *Austrian Yearbook on International Arbitration 2011*, p.129

[100] See above, section V.(4), and Nicolas Ulmer, "Six Modest Proposals before You Get to the Award" in Bernhard Berger and Michael E. Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No.42, p.115 et seq.

[101] See, e.g. David Rivkin, "Form of Deliberation" in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decision*, ASA Special Series No.42, p.22.

[102] See above, section II. and FN 57.

[103] See also above, sections IV. and V; Rivkin, p.23. In some instances, arbitral tribunals have scheduled *separate meetings* or telephone conferences for this purpose.

[104] See also sections IV. and V. above.

[105] See above, section (5), first bullet point.

[106] For a more in-depth discussion of this issue, see Werner Wenger, "Stories from the Hearing Room: Experience from Arbitral Practice" in Bernd Ehle and Domitille Baizeau (eds), *Essays in Honour of Michael E. Schneider* (Wolters Kluwer, 2015), p.219.

• Final deliberations among the arbitrators

The final deliberations are presided by the chairperson who often leads the dialogue among the arbitrators according to a *checklist* based on the list of issues prepared in advance, which enumerates the questions to be decided. For this purpose, it may be helpful to establish and discuss among the arbitrators a *decision tree* before discussing the issues themselves.[107] The discussion should then be, as a rule, separated among factual and legal issues, and one may start with some non-critical issues to get an easy start. Some arbitral tribunals deliberate immediately after the hearing when the impression of the hearing is still fresh, which makes sense if the arbitral tribunal is well prepared to do so, the case is not too complex and there were no surprises at the hearing. In complex cases, though, arbitrators may consider digesting first what they have heard at the hearing, or discussing the case on a preliminary basis to deepen their understanding thereof. Following the hearing, the arbitral tribunal may even give the parties instructions on what issues they should address in their final written submission or the oral pleadings, which helps avoiding extensive briefs covering every detail of the case, regardless of its relevance.

It is at the final deliberations when the arbitral tribunal takes its decisions and makes the award. Many chairpersons first listen to their co-arbitrators' views, try to come to an agreement by applying the "Socratic method" and only then give their personal view to bring the issue to a decision. The process of deliberation is greatly furthered when diligently prepared by the chairperson. Although discussing the case controverly helps increading the quality of the award, coming to a decision should be *a discussion-based decision-making* and not a "splitting the baby" *process*.

Drafting the award is the task and the prerogative of the chairperson. If the law at issue is not one in which the chairperson is particularly qualified, it may delegate that part to one of the co-arbitrators better suited to address these legal issues, provided that the chairperson is confident that the co-arbitrator in question is independent and impartial. The same applies in complex cases where subject to the decisions taken at the deliberations, the drafting of some parts of the award is sometimes delegated to the co-arbitrators. Being responsible for the coordination of the drafting and the issuance of the award, the chairperson will nevertheless always do some checks and balances on the issue him- or herself. For drafting purposes, the ICC Checklist for Drafting Awards[108] provides valuable guidance in ICC-as well as in non-ICC cases.[109] Further inspiration may be drawn from the IBA Toolkit for Award Writing,[110] which deals in detail with the relevant aspects of the drafting of the award.

• More is less — on the sense and nonsense to draft overly lengthy awards

It is out of question that complex cases may warrant an extensive and detailled award. In many instances, however, overly detailled awards, sometimes filling hundreds of pages, do simply not make sense. To the contrary, they may result in the arbitral tribunal losing sight of the relevant issues, forgetting arguments or even prayers of relief, coming to contradicting findings or erring in facts simply because the sheer amount of details overwhelmed the arbitral tribunal (it is somewhat ironic that such awards are often the result of the arbitral tribunal having run into time constraints and pressure to deliver the award in due time), and finally they unnecessarily delay the issuance of the award.

Therefore, limiting the length of the award makes sense: The award should give a clear overview of the procedural history, the prayers of relief of the parties, include a summary of their positions, the assessment of the evidence, the legal reasoning and finally the decision[111]—no more and no less. This allows the parties to understand the reasoning of the arbitral tribunal and the grounds for their award, and to assess the decision with respect to a challenge in the state courts. This approach is supported by Swiss law, where arbitral tribunals are not required to render a detailled award discussing all factual allegations and legal arguments of the parties.[112]

• Dissenting opinions

There are various views about whether or not dissenting opinions should be published along with the award. This article will not address this topic in detail. It suffices to note that in absence of a different party agreement, according to the Swiss Federal Tribunal, it is for the *majority* of the arbitral tribunal to decide the case.[113] The highest Swiss court does not view dissenting opinions *to form part of an arbitral award*, nothwithstanding whether such dissent has been formally integrated into the decision or not. Consequently, it does not take them into consideration when deciding on a set-aside request.[114] Likewise, comments submitted by a tribunal chair in the course of a setting aside proceeding before the Swiss

[107] Bernhard Meyer, *ibid.*, p.60; Karl-Heinz Böckstiegel, "Notes and Samples on Tribunal Deliberations" in Bernhard Berger and Michael E. Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No.42, p.129 et seq., including an example for a decision tree, *ibid.*, p.135.
[108] This checklist is made available by the ICC to arbitral tribunals in ICC cases.
[109] See also Matthias Scherer, "Drafting the Award" in Berger and Schneider (eds), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No.42, p.27 et seq.
[110] *SeeIBA Toolkit for Award Writing, IBA Arb40 Subcommittee, www.ibanet.org* [Accessed 11 May 2017].
[111] See also the *ICC Guidelines on the Drafting of the Award and the UNCITRAL Notes 2016*, section 20.
[112] See above, section (7) *Some legal guidelines on the drafting of the award for arbitral tribunals sitting in Switzerland.*
[113] See also Meyer, ibid., p.67, and votum Markus Wirth, ibid., p.65; Berger and Schneider (eds); *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No.42, p.144 (providing for an example of a dissenting opinion).
[114] FTD 4A_322/2015 of 27 June 2016.

Federal Tribunal will not be taken into consideration, for, on their own, they cannot be attributed to the majority of the tribunal.[115]

• Issuance of the award

The arbitral tribunal has to *render its arbitral award in the form and within the time limits* stated in the terms of reference or otherwise agreed with the parties.[116] The form and other formal requirements applying to the award are determined by the *lex arbitrii* and the applicable *arbitration rules*.

The draft award is circulated among the arbitrators and differences are straightened out. To what extent an institution is involved in this process is subject to the applicable arbitration rules.

Caution is warranted regarding the time limits for the issuance of the award. The arbitration contract (*receptum arbitrii* or *arbitri*) normally terminates with the case, i.e., in the vast majority of cases when the final award is issued (provided it is not null or annulled) or because the matter terminates as a consequence of a withdrawal or a settlement. It may, however, terminate *pendente lite* before it is due to expire, in particular if the arbitrator dies, if he is challenged, removed by the parties or by the Court, or if he resigns. The award also terminates if the time limit for rendering the award has expired and the parties and the arbitral tribunal have agreed that the sanction would be the termination of the contract.[117] An award issued after the mission of the arbitrator or the arbitral tribunal expired is not null, but can be annulled on appeal for the grounds stated at art.190(2)(b) PILA, namely because the arbitrator wrongly accepted jurisdiction to issue the award after his powers had expired.[118] This situation has to be differenciated, though, from the acceptance of a late cost submission, which does not allow the other party to successfully challenge the award.[119]

IV. Conclusion

International commercial arbitration has come a long way: Having evolved from a procedure with little rules and largly driven by the commercial needs of the parties and common sense in its beginnings, it became a truly international and broadly applied dispute mechanism in which all sorts of cases are decided according to rules which reflect the best of the civil and common law world. In this context, "best practices" provide an important *toolbox* for both the parties and the arbitral tribunal, allowing them to tailor-make the procedure to an individual case according to well-defined rules, thus ensuring procedural fairness and predictability and allowing the arbitral tribunal to administer justice.

[115] See also Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, N 1367 et seq.

[116] Indeed, the parties have the right to limit in the arbitration agreement. See FTD 140 III 75, E. 3.2.1.

[117] FTD 140 III 75, E. 3.2.1. It is anticipated in art.185 PILA—that the time limit can be extended by agreement between the parties or pursuant to a request by one of them. Yet, if such an extension is not applied for or not granted, the final award is issued after the deadline given to the arbitrator to carry out his mission (see *ibid.*). The consequences thereof are described above.

[118] In FTD 140 III 75, the sole arbitrator delayed the delivery of the award over and over again. Upon request of the parties, he offered to resign in case the time limit proposed by himself had expired without any award being issued and asked for a last extension of the new time limit until 2 September 2013, 17.00, which the parties accepted. The arbitrator only delivered the award one day later. According to the Swiss Federal Tribunal, the circumstances of the case clearly showed the joint will of both parties to see the arbitration contract terminate ipso facto on 2 September 2013 at 17.00 should either of them fail to receive the final award before this deadline. It held that the reason for the premature termination of the powers of the Arbitrator must be sought in a *tripartite agreement* entered into to this effect by each party with the other, on the one hand, and by both parties jointly with the Arbitrator, on the other hand, and did not constitute a resignation by the arbitrator (E. 3.2.2). Because the award was issued after the mission of the arbitrator or the arbitral tribunal expired, it was annulled on appeal of claimant. See also FTD 4A_188/2016 of 11 January 2017, where the Swiss Federal Tribunal had to decide on a case under art.42 of the Swiss Rules of International Arbitration, which provides in s.1(d) that the award shall be made *within six months* from the date on which the Secretariat transmitted the file to the arbitral tribunal. In exceptional circumstances, the Court may extend this time-limit. Due to an error, the arbitrator had set the time limits in the procedural time table wrong, and in fact, the award was issued in due time (E. 4.2.1). The application to set aside the award was thus denied.

[119] FTD 4A_636/2014 of 16 March 2015, E. 4.2; BGE 126 III 249 E. 3b.