

## 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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**Literature**

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).

