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Expedited Procedures in International Commercial Arbitration

Swiss and International Perspectives

Andreas Wehowsky

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Foreword and Acknowledgments

The present thesis is an attempt to support arbitrators, counsel, and institutions in their demanding daily tasks in the vibrant world of international arbitration. Unsurprisingly, the person who proposed the topic for this thesis is a terrific practitioner, Dr. Johannes Landbrecht. Without his input in the beginning, this book would never have been written.

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List of Abbreviations

ACICA	Australian Centre for International Commercial Arbitration
AIAC	Asian International Arbitration Centre
AO	Arbitration Ordinance
ARB	Arbitration
art./arts.	article(s)
BAIAC	Beihai Asia International Arbitration Centre
BCDR	Bahrain Chamber for Dispute Resolution
BGH	Bundesgerichtshof (=German Federal Supreme Court)
BK	Berner Kommentar
BSK	Basler Kommentar
CC	Swiss Civil Code
CEPEJ	Council of Europe European Commission for the Efficiency of Justice
cf.	confer
CHF	Swiss Franc(s)
CHK	Handkommentar Schweizer Privatrecht
CIETAC	China International Economic and Trade Arbitration Commission
CO	Swiss Code of Obligations
Comm	Commercial
CPC	Civil Procedure Code
CPR	Civil Procedure Rules
DFT	Decision Swiss Federal Tribunal
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V.
Diss.	Dissertation
ECHR	European Convention on Human Rights
ed./eds.	editor(s)
edn.	edition
EU	European Union
e.V.	eingetragener Verein
EWCA	England and Wales Court of Appeal (UK)
EWHC	England and Wales High Court
fn.	footnote
FOSFA	Federation of Oils, Seeds and Fats Associations
FRCP	Federal Rules of Civil Procedure
GAFTA	Grain and Feed Trade Association
HKCFAR	Hong Kong Court of Final Appeal Reports

HKIAC	Hong Kong International Arbitration Centre
IAA	International Arbitration Act
IBA	International Bar Association
ibid	*ibidem*
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
JAMS	Judicial Arbitration and Mediation Services
JCAA	The Japan Commercial Arbitration Association
KCAB	Korean Commercial Arbitration Board
KLRCA	Kuala Lumpur Regional Centre for Arbitration
KuKo	Kurzkommentar
LCIA	London Court of International Arbitration
LLP	Limited Liability Partnership
ML	Model Law
no.	number(s)
NYC	New York Convention
OG	Obergericht
p./pp.	page(s)
para./paras.	paragraph(s)
PILA/PILS	Private International Law Act of Switzerland
PRC	People's Republic of China
QC	Queen's Counsel
SAC	Swiss Arbitration Centre
SCAI	Swiss Chambers' Arbitration Institution
SCC	Stockholm Chamber of Commerce
SGHC	Singapore High Court
SIAC	Singapore International Arbitration Centre
SR	Systematische Rechtssammlung
St.	Saint/Sankt
TAS/CAS	Tribunal Arbitral du Sport / Court of Arbitration for Sport
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law,
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
US$	US Dollar
v.	versus
VIAC	Vienna International Arbitration Centre
vol.	volume

WIPO	World Intellectual Property Organization
ZH	Zurich
ZK	Zürcher Kommentar
ZPO	Zivilprozessordnung
ZR	Zivilrecht

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Introduction

I. Relevance of the Topic and Scope of Analysis

Over the past several decades, international arbitration has enjoyed remarkable success.[1] However, in recent years the users of this method of dispute resolution have repeatedly raised concerns relating to the efficiency[2] of the proceedings. Specifically, a growing number of users have voiced their discontent regarding the length and costs of proceedings.[3] 1

These concerns have prompted a lively discourse in the arbitration community[4] and caused the leading arbitral institutions to introduce provisions for expedited arbitral procedures.[5] While at first glance this measure seems to have answered the demand for improved procedural efficiency, some unanswered questions remain that this thesis will address. These queries include the following: 2

The first and most obvious question is what actually constitutes an expedited procedure. The answer to this question includes a study of the origin and history of expedited proceedings as well as general concepts in international arbitration. The answer will also address whether expedited procedures are a new phenomenon or have rather existed for decades already.[6] 3

Moreover, it goes without saying that one of the most pressing and controversial questions is to what extent the adoption of expedited proceedings may justify the restrictions of procedural guarantees such as the parties' right to be heard and their right to equal treatment. One cannot help but notice that an increase in procedural efficiency often comes with a curtailment of 4

1 BREKOULAKIS, 5-12; KAPLAN, The Arbitrator and the Arbitration Procedure, 99; Queen Mary Study 2018, 5-6; RISSE, The Future of Arbitration, 679-680.

2 Being understood here as time- and cost-effectiveness. In the further course of this thesis, general references to 'efficiency' include both the time and cost aspect. When only one component is meant, an express reference is made.

3 Queen Mary Study 2018, 7-8.

4 AKSEN, *passim*; MORTON, 104-105; RISSE, Saving Cost and Time, 453-454; SERAGLINI/BAETEN, paras. 1-6; TERAMURA, 18-20.

5 See in detail below paras. 67-70.

6 Similarly questioning the notion of expedited arbitration being novel FISCHER/WALBERT, 24.

the parties' rights – or at least this is the perception.[7] In this context, several specific questions remain: what is the interplay between efficiency and the parties' rights? What concepts exist for the tribunal[8] to reconcile efficiency and the parties' rights and render a reasonable award in the end? Even more so, what constitutes a reasonable award?

5 In addition, one might wonder whether the application of expedited proceedings justifies derogating from the parties' specific agreements, even regarding issues as fundamental as the number of arbitrators. Thus, the basis for expedited procedures and for potential limitations on the parties' rights and effects of their agreements will be analysed in this thesis.

6 Furthermore, one may legitimately question whether the adoption of expedited proceedings merely touches upon simple aspects of procedure such as a shortening of time limits or rather whether the adoption of such proceedings contain broader consequences, for instance, the imposition of additional duties on the parties and the arbitrator(s). The basis and potential consequences of such duties represent a significant area of legal analysis in need of fuller explanation.

7 The usage of more efficient proceedings may open the possibility of an introduction of instruments that were traditionally confined to litigation proceedings such as summary judgments and striking-out motions (hereafter referred to as 'early determination procedures'). Whether or not such new instruments are appropriate and permissible is a question that may lead to different answers depending on the circumstances of the case. Also, it must be examined whether early determination procedures are a part of expedited procedures or whether they merely complement expedited procedures.

8 However, it must be noted that uncertainties and open questions are not confined to the stage of the arbitral proceedings before the tribunal. To the contrary, what is the benefit of successfully going through a more expeditious legal process, only to end up with a worthless piece of paper titled 'award'? Such risk does exist in international arbitration, where an award may usually be challenged in a setting aside proceeding and where the award debtor may afterwards try to resist enforcement. Therefore, the effects of expedited proceedings on the award in setting aside and enforcement proceedings require a closer examination. Of particular importance in this context are the questions around whether the standard of review in setting aside and enforcement

7 ALVES, 180–181; KIRBY, Efficiency, 690.

8 The term 'tribunal' in this thesis generally refers to tribunals consisting of a sole arbitrator as well as those with three arbitrators. Where the term encompasses only tribunals consisting of three arbitrators, this will be specified.

proceedings should be stricter and whether the parties waive certain grounds for setting aside by choosing expedited proceedings.

The answers to these open questions should, in addition, serve the purpose of answering whether or not expedited proceedings keep their promise and actually increase of time-efficiency and decrease financial costs. 9

II. Method

This thesis analyses the character and content of expedited proceedings in international commercial arbitration proceedings by answering all of the foregoing questions. Through analysing various arbitration rules, this thesis will examine the requirements under which an expedited procedure is admissible, what its central characteristics are, and how expedited proceedings can be classified and described in comparison to a conventional (hereafter termed 'ordinary') arbitral procedure.[9] In the course of the analysis, this thesis will focus particularly on the tension between procedural efficiency[10] on the one hand and quality[11] of the procedure and award on the other. Over the course of this analysis, early determination procedures will be examined in greater detail as well. 10

Based on the analysis, a statement on the *raison d'être,* the appropriateness, the practical significance, and the usefulness of expedited procedures is to be made. 11

In defining the scope of this thesis, it is important to mention here that the thesis will not provide a commentary on the specific provisions of institutional arbitration rules, on which a considerable body of excellent authority already exists. 12

The analysis will primarily focus on international arbitrations seated in Switzerland. Accordingly, the scope will be limited to an analysis of the above questions against the background of art. 176 et seqq. Swiss PILA.[12] Never- 13

9 Cf. for a similar comparison FISCHER/WALBERT, 24 (though using the term 'conventional' instead of 'ordinary').

10 Again, general references to 'procedural efficiency' encompass both time-efficiency and cost-effectiveness.

11 Understood as a reasonably correct decision, respect for procedural guarantees and party autonomy, and a reasonable use of procedural tools; see in detail below in paras. 108-118.

12 See art. 176 para. 1 Swiss PILA, according to which the provisions of [the 12th Chapter Swiss PILA] shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

theless, where appropriate and beneficial, other laws and statutes will complement the analysis, including those of other jurisdictions and the Swiss CPC.

14 As will be explained in further detail,[13] an analysis of expedited procedures is primarily relevant for institutional arbitration. Thus, this thesis will primarily compare expedited arbitrations under institutional rules to proceedings under the rules of the same institution that are conducted in an ordinary manner.

13 See below para. 85.

Part 1
Basics

Chapter 1
Arbitration: Theory and Reality

This chapter will introduce the topic of arbitration by providing a brief overview of the rise of arbitration and how it has become the preferred mechanism of international dispute settlement. The chapter will also describe the challenges that arbitration faces in maintaining this status. For this purpose, this analysis will describe the traditional reasons for the success of international arbitration (below section I), highlight the existing problems of contemporary arbitration and the factors underlying these problems (below section II), before briefly turning to examine developments in litigation (below section III). 15

I. International Arbitration: Reasons for Its Success

Within the last several decades, arbitration has become the bedrock of international dispute resolution. Not only do international businesspeople on average prefer arbitration over litigation,[14] but arbitral tribunals play a vital role in the system of international investment protection.[15] Furthermore, the international sports system relies heavily on arbitration as a dispute resolution mechanism.[16] The increased popularity of arbitration is demonstrated by significant increases in case numbers in international commercial,[17] investment,[18] and sports[19] arbitration. 16

The reasons for the prevalence and positive reputation of arbitration in the international system of dispute resolution are manifold. The 2018 International Arbitration Study by the Queen Mary University of London, which examined the answers of 922 respondents, concluded that the primary reasons for the preference for international arbitration over litigation were the enforceability of awards, the avoidance of specific legal systems or national 17

14 Queen Mary Study 2018, 5.

15 For a (critical) overview KAUFMANN-KOHLER/POTESTÀ, paras. 17-19.

16 Cf. in general LAFRANCHI, *passim*.

17 For a statistical overview ALTENKIRCH/JOHN.

18 For a statistical overview ICSID, Statistics, 7.

19 For a statistical overview TAS/CAS Statistics.

courts, the confidentiality and privacy of the proceedings, as well as the flexibility and the parties' ability to select who the arbitrators are.[20] These findings confirmed the results of the study conducted by the same university in 2015.[21] In addition to these currently often-stated causes, traditionally, there have been further reasons that have contributed to the popularity of arbitration. The most commonly cited include the cost-effectiveness and speed of the dispute resolution process.[22] Indeed, as early as 1923 the ICC recommended a widespread application of arbitration in order to avoid expensive and lengthy litigation proceedings.[23]

18 Out of all of these reasons explaining the success of arbitration, three are of particular relevance to this thesis and will therefore be examined in greater detail in the following sub-sections: enforceability (below sub-section 1), flexibility as a result of party autonomy (below sub-section 2), and cost and time savings (below sub-section 3).

1. Enforceability

19 In international dispute resolution, the enforcement of a binding decision should always be a key consideration.[24] The binding decision may take the form of a court judgment or an arbitral award.[25] When the enforcement of the decision is sought in the same jurisdiction where the decision was rendered (hereafter termed 'domestic enforcement'), the defences of the party against whom enforcement is sought (hereafter termed 'award debtor') are usually rather limited and the enforcement of the decision is unproblematic.[26]

20 The enforcement of a decision outside the jurisdiction where the decision was rendered (hereafter termed as 'international enforcement'), is more difficult because the jurisdiction of enforcement will be required to vest a foreign decision with similar effects as those of a domestic decision. This is one of the reasons why the international enforcement of court judgments faces many obstacles.[27] Yet the situation is fundamentally different for the international

20 Queen Mary Study 2018, 41.

21 Queen Mary Study 2018, 7; Queen Mary Study 2015, 6.

22 BORN, International Commercial Arbitration, 83-84 with further references; RISSE, Ten Drastic Proposals, 453; TIBELL, 69, with reference to HANOTIAU, International Arbitration in a Global Economy, 99-100.

23 PARTASIDES/PREWETT/REDFERN/HUNTER, 110.

24 This is presumably the reason why the enforceability of awards is the most important aspect for the success of arbitration according to the Queen Mary Study 2018, 7.

25 Cf. in general PFISTERER/SCHNYDER, 1.

26 Cf. in general LANDBRECHT/WEHOWSKY, 683-686.

27 For everything *ibid*, 683-686.

enforcement of arbitral awards, which is primarily governed by the NYC. This treaty has become one of the most successful treaties in history and has contributed to the near universal and easy international enforcement of awards as well as the popularity of international arbitration.[28]

2. Flexibility and Party Autonomy

The flexibility of the parties to decide on the conduct of the proceedings has its ultimate base in the concept of party autonomy. Party autonomy is often referred to as the most fundamental principle in arbitration.[29] The principle can be broken down into various aspects,[30] which together allow for the parties to shape the proceedings. 21

First, it is typically the parties' decision and within their autonomy to conclude an arbitration agreement,[31] which marks the very beginning of the arbitral process. Second, arbitration allows the parties to tailor the proceedings to their needs,[32] which may ultimately increase the efficiency of the process.[33] The parties can either design the procedural rules themselves or they can agree on a pre-existing set of institutional[34] or ad hoc[35] rules.[36] This second feature in particular – namely that the parties do not have to abide by strict codes of civil procedure applicable in civil litigation but may instead choose the rules that best fit the resolution of their dispute – is a key feature that distinguishes arbitration from litigation.[37] It goes without saying that the possibility of deciding on the applicable procedure significantly increases the number of choices the parties can make, which in turn provides them with greater flexibility. Third, the parties are often able to choose the arbitrator(s) 22

28 Cf. BORN, New York Convention, 115, 184; GREENWOOD, Rise, Fall and Rise, 436; PAULSSON, 13-16; the NYC currently has 164 contracting states. See in detail on the issue of (international) enforcement below Chapter 13.

29 For everything BERGER/KELLERHALS, para. 11; BORN, International Commercial Arbitration, 81-83; FAGBEMI, *passim*; BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 6.07.

30 Cf. for different components BERGER/KELLERHALS, para. 11; MALACKA, 94-95.

31 Cf. BORN, International Commercial Arbitration, 251; however, cf. art. 335j Swiss CO for a rare case of mandatory arbitration; cf. further on the topic of mandatory arbitration CUNIBERTI, *passim*.

32 GIRSBERGER/VOSER, para. 144.

33 WEISS/KLISCH/PROFAIZER, 268.

34 For example the Swiss Rules.

35 For example the UNCITRAL Rules.

36 MOSES, International Commercial Arbitration, 10; cf. already LEW/MISTELIS/KRÖLL, paras. 3.4-3.6; cf. also art. 182 para. 1 Swiss PILA.

37 GIRSBERGER/VOSER, paras. 24-25, 142-143.

administering their dispute.[38] Lastly, the parties are usually free to choose the substantive law applicable to their dispute.[39]

3. In Theory: Faster and Cheaper Proceedings Compared with Litigation

23 It has widely been held that arbitration is a faster and cheaper alternative to litigation.[40] This statement is usually based on a combination of the (perceived) advantages of arbitration as well as the disadvantages of litigation. As for the advantages of arbitration, a common characteristic of arbitration is the lack of a full appellate procedure, which has caused some commentators to refer to arbitration as a 'one-stop shop.'[41] While a state court, based on an application to have the award set aside for alleged defects,[42] may review an arbitral award, the state court itself does not decide on the merits of the dispute. Rather, its authority is limited to setting the award aside. This judicial control typically excludes a review of the application of substantive law by the arbitral tribunal.[43] Therefore, a full *de novo* review of the case – which is a common characteristic in civil litigation – is not a typical feature of arbitral proceedings.[44] This lack of a second, much less a third, instance review is said to increase the speed and decrease the costs of proceedings compared to litigation.[45]

24 As regards the disadvantages of litigation, one heavy downside of litigation is that some national courts are infamous for lengthy proceedings.[46] This problem arises not only in situations where a court of this kind is actually the proper instance to decide the dispute. Instead, it may also arise in situations where the court that would be competent to decide an action cannot accept jurisdiction because one party already filed a claim with another court, which

38 MALACKA, 94.

39 POUDRET/BESSON, para. 679; cf. art. 187 para. 1 Swiss PILA. However, this aspect is not uncommon in litigation either, see for example art. 116 para. 1 Swiss PILA.

40 See the references above in fn. 22.

41 For example OLDENSTAM, 125. However, some arbitration rules provide for an internal appeal procedure, for example the GAFTA Rules, art. 10.

42 See in detail Chapter 13.

43 See for example art. 190 Swiss PILA; for everything KAUFMANN-KOHLER/RIGOZZI, para. 8.01; however, see the non-mandatory section 69 of the English Arbitration Act for an appeal on a point of law.

44 See for this art. 310 Swiss CPC; cf. ARROYO, 12 PILS, Article 190, in: Arroyo, para. 15.

45 KAUFMANN-KOHLER/RIGOZZI, para. 1.50; ST. JOHN SUTTON / GILL / GEARING / RUSSELL, para. 1.030.

46 See CHK IPRG-BUHR/GABRIEL/SCHRAMM, art. 9 para. 18.

then gives rise to a *lis pendens* blocking effect on subsequent proceedings.[47] In addition to this problem of excessively long proceedings, some litigation costs may be particularly high when the court costs and compensation for party representation depend on the amount in dispute.[48]

II. The Reality Nowadays: Expensive and Slow Proceedings

1. The Existing Problems and Their Components

Although arbitration has thus traditionally been viewed favourably with regard to speed and costs, the contemporary reality of arbitral proceedings often appears to be in stark contrast to this notion. As surveys have repeatedly shown, the actual length and costly nature of arbitrations are constantly viewed as some of the worst features of arbitration. Specifically, the costs are typically highlighted as the biggest drawback of arbitration.[49] The following section examines more closely the time and costs that the arbitral process may entail, in order to better address the related criticism. 25

1.1 Time and Delay

Regarding the duration of the arbitral process, it is important to understand the various potential steps of the process. Since arbitral proceedings require the constitution of an arbitral tribunal in the first place, the process begins with the choice, appointment, and (usually in the context of institutional arbitration) confirmation of the arbitrators.[50] 26

Subsequently, the proceedings take place. Over the course of the arbitration, the tribunal may issue several procedural orders, interim and partial awards and grant provisional measures.[51] The proceedings before the tribunal end with the rendering of the final award.[52] Yet due to the nature and prevalent legal concept of arbitration, the proceedings before an arbitral tribunal are not necessarily the last step in the legal dispute. The final award, just like the 27

47 This strategy is commonly known as a torpedo action; see DFT 144 III 175 c. 5.3.3.

48 See for example § 2 lit. a GebV OG ZH.

49 Queen Mary Study 2018, 8.

50 Cf. for these steps arts. 11–13 ICC Rules; arts. 9–11 SIAC Rules; arts. 7–10 UNCITRAL Rules; PFISTERER/SCHNYDER, 60–65.

51 See in detail below para. 756; in general for the distinction between awards and procedural orders decision Swiss Federal Tribunal no. 4A_446/2014 of 4 November 2014 c. 3.

52 GÖKSU, para. 1616; DFT 136 III 597 c. 4.1; see in detail below Chapters 12 and 13.

partial and interim awards, may be challenged at the seat of arbitration in setting aside proceedings, and the award debtor may nationally and internationally resist enforcement.[53]

28 As this description of the legal process related to arbitral proceedings highlights, dispute resolution by means of arbitration potentially includes a variety of steps before several different instances that drag on for years,[54] raising doubts about the accuracy of characterising arbitration as a 'one-stop shop'.

1.2 Costs

29 Not entirely unlike the length of the proceedings, the aspect of the costs of the arbitral process can be broken down into various components. The costs of the proceedings before an arbitral tribunal usually include the costs for party representation, the fees of the arbitrator(s), and the expenses associated with the proceedings.[55] Such expenses include for instance the organisation and lease of the hearing facilities, costs related with the gathering of evidence at the hearing, e.g. the fees of tribunal-appointed experts, as well as the administrative fees of the arbitration institution incurred in institutional arbitration.[56] In relation to the various stages of the process surrounding an arbitration mentioned earlier, such as setting aside and enforcement proceedings,[57] costs for court proceedings are often added to the overall arbitration costs. These litigation costs usually also include court fees and party compensations.[58]

2. Reasons

30 Users and commentators are unanimous in their view that the main reasons for the increase in the length and costs of arbitral proceedings are so-called due process paranoia (partially as a result of guerrilla tactics) and the 'judicialisation' or formalisation of proceedings.[59] Yet it can be argued that the

53 For everything LANDBRECHT/WEHOWSKY, 684-686.

54 An instructive example was the dispute of Astro v. Lippo in Hong Kong; cf. on this Astro Nusantara International BV and others v. Pt Ayunda Prima Mitra and others (2018) 21 HKCFAR 118, [2018] 3 HKC 458, FACV 14/2017 (11 April 2018); CACV 272/2015 (5 December 2016); Astro Nusantara International BV and others v. Pt Ayunda Prima Mitra and others HCCT 45/2010 (17 February 2015); cf. on these cases MONICHINO, *passim*.

55 Cf. for everything BÜHLER, 250.

56 BÜHLER/STACHER, Costs in International Arbitration, in: Arroyo, para. 62; GREENBERG/KEY/WEERAMANTRY, para. 8.81.

57 See above paras. 26-27.

58 See art. 95 para. 1 Swiss CPC.

59 GERBAY, Judicialization, *passim*; HORVATH, Judicialization, 259-269; NOTTAGE, A Weather Map, 60-62; STONE/GRISEL, 56-57; TERAMURA, 11-21.

explanatory power of such an analysis is limited in so far as it ignores the effect the unintentional (mis)use of party autonomy and arbitrator availability. This section will shed light on all these different factors.

2.1 Due Process Paranoia

The term due process paranoia generally describes an excessive effort on the 31
part of arbitrators to safeguard due process in arbitral proceedings when making case-management decisions.[60] This effort results in an overall attitude geared towards overemphasising due process,[61] causing a tribunal not to act in a decisive manner. Due process rights typically invoked in the context of due process paranoia are the parties' rights to be heard and to equal treatment.[62] Reasons for the emergence of such paranoia include (1) fears of requests to challenge an arbitrator/challenges to an arbitrator by a disgruntled party, (2) reputational repercussions that may lead to non-appointments of the arbitrator in the future,[63] and (3) fears that an award may be set aside[64] or not be enforced,[65] whereby (4) the arbitrators might violate a potential duty to make every effort to render an enforceable award.[66]

It is important to stress that a tribunal's decision to overly respect due 32
process rights is usually the result of a procedural request by a party in the first place. While it is true that even in the absence of such a request, the tribunal needs to ensure that the procedural decisions without a prior request by a party are in accordance with the parties' due process rights,[67] a tribunal is less likely to be paranoid when making a decision on its own volition. In contrast, when the parties repetitively make procedural requests, a tribunal may feel greater pressure – and, on a certain level, paranoia – to accede to such requests for fear of violating the due process rights of the applying party. In fact, the requests might even be accompanied by the threat that a denial of the request would result in a violation of due process, eventually leading to the setting aside of the award and refusal to enforce it.[68]

60 BAO, 68; BERGER/JENSEN, 421-428; GERBAY, Due Process; OLDENSTAM, 122; POLKINGHORNE/GILL, 938-940; REED, Ab(use) of due process, 373.

61 BANIFATEMI, 19-20; GENTELE, 166; GERBAY, Due Process; OLDENSTAM, 121-122.

62 See in detail below paras. 284-291.

63 For everything GERBAY, Due Process; PARTASIDES/PREWETT, 111.

64 BANIFATEMI, 20-21; GENTELE, 155; OLDENSTAM, 122.

65 BERGER/JENSEN, 420; GERBAY, Due Process.

66 BERGER/JENSEN, 420; see for a critical evaluation of this duty below paras. 249-261.

67 See in detail below para. 233.

68 Cf. for everything CREMADES, 662; METSCH/GERBAY, 237; REED, Ab(use) of due process, 375.

2.2 Increased Judicialisation and Complexity

33 As another major reason for the increasing length and costs of arbitral proceedings, authors have identified the so-called (over)judicialisation and (over) formalisation of proceedings. These terms describe the phenomenon of an increasing volume of norms regulating arbitration as well as the introduction of practices stemming from litigation proceedings particularly known in the US.[69]

34 Historically, arbitration was a relatively simple and informal process designed to result in a satisfactory solution within a reasonable period.[70] However, this practice has shifted towards more formalised processes increasingly resembling national litigation proceedings.[71]

35 This development hardly comes as a surprise. States have taken some significant regulatory steps to support international arbitration, *inter alia* by concluding several treaties like the Geneva Protocol of 1923, the Geneva Convention of 1927,[72] and the NYC of 1958. Furthermore, the number of international arbitral institutions increased over time, which started to compete with ad hoc arbitrations as well as with the ICC, that had long been the only true international arbitration centre.[73] In addition, in 1985 the UNCITRAL adopted the UNCITRAL Model Law on International Commercial Arbitration. The purpose was to present a comprehensive set of provisions for states trying to reform and modernise their arbitration laws and to unify the arbitral procedure.[74] While these developments include highly successful innovations like the NYC,[75] the growing volume of norms regulating the arbitral proceedings has resulted in a more formalised arbitral process.[76]

36 Along with these institutional shifts came changes to the conduct of arbitrations. Arbitrations have not only become increasingly formalised and institutionalised, but also increasingly reliant on lawyers as arbitrators and counsel.[77] Furthermore, the field of arbitration has seen an increased use of

69 For everything DEZALAY/GARTH, 51-57; MEYER, 141-142; NOTTAGE, A Weather Map, 60-61; TERAMURA, 11-17.

70 See for the specific examples of the US and England NOUSSIA, 11-14.

71 MUSTILL, History of International Commercial Arbitration, 31-32; BLACKABY/ PARTASIDES/REDFERN/HUNTER, paras. 1.118-1.121; see already MUSTILL, Comments on Fast-Track Arbitration, 122-124.

72 See on this in general BORN, International Commercial Arbitration, 18.

73 BREKOULAKIS, 6; STONE/GRISEL, 45-48; TERAMURA, 15; however, see GERBAY, Judicialization, 245, who is critical of the proposal that the phenomenon of judicialization in arbitration is attributable to a specific period.

74 BINDER, 13-15.

75 See above para. 20 and POUDRET/BESSON, paras. 67-74.

76 Cf. for an overview MEYER, 38-143.

77 DEZALAY/GARTH, 51-57.

approaches commonly belonging to the area of litigation.[78] One of the main drivers of this development has been the rush into the arbitration market, up until then European-dominated, by big US law firms. It is said that some of these large firms viewed (and continue to view) arbitration as merely another form of litigation. This explains why these firms have started to implement a number of sometimes highly formalistic procedural elements from US litigation practice such as motions and objections, pre-trial document discovery, and pre-trial witness deposition.[79] Yet it would be short-sighted to only criticise the changes prompted by the US practitioners. In fact, they have also contributed significantly to the transparency of the arbitral process, which today is automatically assumed in areas like conflicts of interests of arbitrators.[80]

As practice has further shown, in addition to the agreed-upon number 37
of submissions there are frequently further submissions on the facts or the law nowadays. The parties often justify these additional submissions by drawing upon the unlimited right to reply to the submissions of the other party established in European litigation proceedings.[81] While such an analogous use of litigation may be problematic, several authors rightly pointed out that arbitration has to a certain degree fallen victim to its own success: whereas arbitration in the past was used for only a few types of rather straightforward disputes, it is now common practice to submit a wide variety of increasingly complex disputes to arbitration as well.[82] Hence, it is understandable that some disputes require more elaborate submissions, sometimes even in addition to the agreed-upon numbers.

2.3 Unintentional (Mis)Use of Party Autonomy

It is submitted that the increasingly formalised nature of arbitral proceedings 38
is not exclusively the result of changes in the arbitral legal order. Rather, it appears that the formalisation of arbitration can be partially attributed to the unintentional (mis)use of party autonomy.[83]

Examples of this (mis)use include agreements on specific procedures and 39
tools that are neither required nor beneficial to the resolution of a specific dispute: for instance, the arbitration rules of institutions usually do not necessitate

78 See above fn. 69.

79 For everything DEZALAY/GARTH, 50–57; HORVATH, Judicialization, 260; NOTTAGE, In/formalisation and Glocalisation, 215; BLACKABY/PARTASIDES/REDFERN/HUNTER, paras. 1.119–1.120.

80 For everything DEZALAY/GARTH, 48–50; see further IBA Guidelines on Conflicts of Interest.

81 See in detail on this topic below paras. 579–590.

82 GERBAY, Judicialization, 244; RISSE, An Inconvenient Truth, 296.

83 See for everything ABDEL WAHAB, 137.

document production, even though they sometimes mention this tool as a means for collecting evidence.[84] Similarly, the use of expert witnesses and the hearing of a large number of witnesses is not directly mandated by the arbitration rules either.[85] Yet, there is often a (tacit) agreement between the parties that the use of such tools is accepted and even warranted.[86] The agreement may, for instance, be the result of a case-management conference where the parties agree on the type and extent of discovery and the details of the hearing. However, it may be highly doubtful whether the use of such procedural tools is beneficial for the resolution of a specific dispute. There is thus doubt over whether such standardized agreements on the use of these tools are a wise use of party autonomy. Another example of potentially unwise agreements is the standardized agreement on an arbitral tribunal consisting of three arbitrators.

40 Hence, the parties could rather limit or exclude the use of these tools altogether to increase the efficiency of the procedures.[87] By the same token, the parties could agree on a sole arbitrator[88] in their arbitration agreement instead of merely making reference to the rules of an arbitration institution, which may, depending on the circumstances, provide for a default of three arbitrators.[89] As will be explained in Chapter 9, a sole arbitrator may significantly reduce the time and costs of the proceedings compared to a three-member tribunal.

41 Therefore, the effect of the parties' agreements should not be underestimated when considering the factors that increase the length and costs of arbitration proceedings. Similar problems are less frequent in litigation, where for example the number of judges or the rules on the taking of evidence are mandatory and hence not at the disposal of the parties.[90]

42 It is important to stress, though, that agreements that lead to the superfluous use of procedural tools are not necessarily a malicious attempt by the parties to complicate the proceedings. Instead, such agreements may be the

84 See art. 22.3 HKIAC Rules; the general provision of art. 25 ICC Rules in contrast with (d) Appendix IV and art. 3(4) Appendix VI ICC Rules; the general provision of art. 22.1(v) LCIA Rules; the general provisions of art. 19.2 and art. 27(f) SIAC Rules; the general provision of art. 26.2 Swiss Rules; in detail below paras. 619–633.

85 See the 'may' provisions of arts. 22.5 and 25 HKIAC Rules; art. 25.3 ICC Rules; arts. 20.1. and 21 LCIA Rules; arts. 5.2(c) and 25.2, 25.4, 26 SIAC Rules; arts. 19.2 and 27.4 Swiss Rules.

86 Cf. BÜHLER/HEITZMANN, 130.

87 Cf. WEISS/KLISCH/PROFAIZER, 261.

88 CLAXTON, 152; ELSING, 116; KIRBY, Efficiency, 693.

89 See rule 7.1 AIAC Rules; art. 10.2 DIS Rules; however, see art. 5.8 LCIA and art. 9.2 Swiss Rules providing for a sole arbitrator; see in detail below paras. 524–545.

90 See arts. 14, 19–33 GOG ZH; arts. 150–193 Swiss CPC; however, the SICC allows for an agreement of the parties on the number of judges, see SICC Rules of Court, Order 1, Rule 10(a).

result of a (subjectively) justified concern of a party to exercise its procedural rights. Yet, the road to failure is often paved with good intentions, meaning that although the parties' agreements may stem from valid concerns, these agreements may have highly detrimental effects on the speed and costs of an arbitration. Therefore, the parties in arbitration need to understand that while they can agree on a myriad of issues, these choices may have (unwanted) consequences if they are made unwisely.

2.4 Intentional (Mis)Use of Party Autonomy: Guerrilla Tactics

Another phenomenon that is commonly invoked as a factor decreasing the 43
efficiency of the proceedings are so-called 'guerrilla tactics'.[91] While arriving at an exact definition of what constitutes such tactics is difficult, these tactics have been described as typically including the following elements: (1) a violation or unethical (ab)use of the law or procedural rules, (2) whose goal is to obstruct, delay, derail, and/or sabotage the arbitral proceedings (3) and which is a conscious tactical decision.[92] This definition therefore highlights the difference between the unintentional (mis)use of party autonomy in the form of ultimately unwise procedural agreements and guerrilla tactics: while both factors are the result of the use of party autonomy in a way that conflicts with efficiently resolving the dispute, guerrilla tactics are directly aimed at such obstruction whereas other procedural agreements that lead to inefficiencies inadvertently result from parties not knowing better.

Guerrilla tactics may include frivolous challenge requests of arbitrators 44
and procedural delay tactics such as repeated and abusive requests for time extensions, submitting excessive amounts of documents for the mere purpose of obstruction, constantly refusing to comply with agreed deadlines, disregarding orders of the tribunal, filing baseless objections, as well as other vexatious procedural requests with the sole purpose of thwarting and delaying the proceedings.[93] These guerrilla tactics need not be confined to the arbitral proceedings. For example, a party may in the arbitral proceedings file numerous procedural requests devoid of merit, leading to the rejection of every request. This party may then try to have the award set aside because the tribunal allegedly violated this party's right to be heard or even showed bias in rejecting all of the requests.[94]

91 HOCHSTRASSER, 130–131; KAPLAN, The Arbitrator and the Arbitration Procedure, 100–101.

92 For everything HORVATH/WILSKE/NETTLAU/LEINWATHER, 5–12; MOHTASHAMI, 105; ROWLEY, 21.

93 HORVATH/WILSKE/NETTLAU/LEINWATHER, 9–11.

94 Cf. for everything METSCH/GERBAY, 237; REED, Ab(use) of Due Process, 375.

45 One of the problems with guerrilla tactics is that when they take the form of procedural requests, it may often be difficult to determine whether an unsolicited request is the result of a legitimate concern of the applying party or whether it is merely intended to obstruct the proceedings.[95] Indeed, some disputes may require additional requests from the parties.[96] This puts the tribunal in a bind: when it grants a request that with hindsight must be considered abusive, the tribunal unnecessarily delays the proceedings. This delay, from an objective point of view, has no justification because rejecting an abusive procedural request should not endanger the validity of an award.[97] Yet if a tribunal incorrectly rejects a justified request, the respective party may have a case for having the award set aside.[98] Accordingly, arbitrators may be naturally inclined to decide a conflict between considerations of time-efficiency and cost-effectiveness on the one hand and due process on the other in favour of the latter.[99] This means that they may be ready to grant a procedural request whenever they cannot clearly conclude that the request is abusive.

46 Whether guerrilla tactics constitute a separate factor contributing to the cost and delay of proceedings, or whether they are part of the wider phenomenon of due process paranoia, might be debatable.[100] However, unlike with legitimate procedural requests, due process concerns on the part of the tribunal should be unnecessary in the context of guerrilla tactics because an abuse of rights by a party does not merit any protection.[101] This can be distinguished from a scenario where a tribunal is overly careful in every decision it takes, regardless of potential guerrilla tactics by a party. Thus, whereas due process paranoia is a matter of the tribunal's attitude and actions (or inaction), guerrilla tactics are actions taken by the parties. In this light, these tactics will be treated separately in this thesis.

2.5 Arbitrator Availability

47 Some arbitrators are in very high demand, which may sometimes make it difficult for them to schedule hearings, especially when the tribunal consists of several arbitrators. Moreover, when these arbitrators administer a large number of cases, there may be delays in rendering the award. Therefore, the

95 BERGER/JENSEN, 417.

96 See above para. 37.

97 WELSER/MIMNAGH, 139-140; see in detail below paras. 213-221.

98 See in detail below paras. 816-819.

99 BERGER/JENSEN, 417-418; GREENWOOD, Rise, Fall and Rise, 437.

100 In favour of the categorization as part of due process paranoia REED, Ab(use) of due process, 365; see also SINGH/JHA/VIDYARTHI, 64.

101 Below para. 360.

availability of well-known arbitrators may also lead to an increase in the length of proceedings.[102] Nevertheless, it is proposed in this thesis that, based on practical experience, this reason is only of secondary importance as a factor contributing to the delay in proceedings.

III. Comparison with Litigation: Developments towards More Efficiency?

In light of growing concerns around increased delays and costs in arbitration, a comparison with recent developments in litigation is warranted. Several studies and statistics have examined the performance of courts in terms of clearance rates and length of proceedings. While these examinations offer some insights, the results of these studies may be of limited informative value for the present examination. This may be attributed to vastly different national legal systems as well as the fact that not all disputes litigated in civil proceedings could as an alternative be resolved through arbitration.[103] Moreover, statistical changes, for example, in the clearance rate of cases may be attributed to a variety of reasons such as judicial reforms,[104] variations in the judicial budget,[105] and the increased usage of (information) technology.[106] Lastly, litigation proceedings often feature high settlement ratios, which drastically increases the efficiency of proceedings. The same cannot be said of arbitration.[107] Despite all these caveats, certain trends can nevertheless be deduced from the literature on litigation efficiency. 48

1. Faster Proceedings

Amongst the most comprehensive studies is the CEPEJ's study titled 'European judicial systems: Efficiency and quality of justice'. As of the time of writing, 49

102 For everything KAPLAN, The Arbitrator and the Arbitration Procedure, 104; MORTON, 106–107.

103 For example due to lacking arbitrability, such as divorce proceedings when they concern the marital status (for Switzerland see ORELLI, Chapter 12 PILS, Article 177, in: Arroyo, para. 13).

104 For example the proposal in BUNDESMINISTERIUM DER JUSTIZ, Wertgrenze.

105 CEPEJ, Studies No. 26, 35–45.

106 For example the Swiss judicial project Justitia 4.0, cf. on this subject GYSIN; ROBERT-TISSOT, 206.

107 GREENWOOD, Rise, Fall and Rise, 438; however, the topic and ratio of settlements in arbitration will not be considered further due to a lack of data on recent developments.

the CEPEJ has so far conducted 28 studies on the efficiency of judicial systems among the Council of Europe member States.[108] Its latest study in 2018 compared the data collected in the years 2010, 2012, 2014, and 2016. The study, *inter alia*, found on average (1) a decrease in disposition time for first instance civil and commercial litigious cases (267 days in 2010 compared to 233 days in 2016)[109] and a reduced number of pending cases per 100 inhabitants (1.8 in 2010 compared to 1.6 in 2016);[110] and (2) for second instance civil and commercial litigious cases a decrease in disposition time (293 days in 2010 compared to 244 days in 2016)[111] combined with an increase in clearance rates (94% in 2010 compared to 101% in 2016).[112]

2. Institutional Improvements

50 It is also possible to identify deliberate efforts towards higher efficiency in litigation on a more institutionalised level.[113] For example, the establishment of international commercial courts has recently gained a lot of traction.[114] These specialised courts are aimed at providing international commercial parties with an attractive alternative to international arbitration, which is *inter alia* to be achieved by offering time-efficient and cost-effective proceedings.[115] Whether these courts can live up to such expectations[116] remains to be seen, but their establishment has received sufficient attention from the arbitration community to already conclude that these courts are viewed as potential competitors to arbitral tribunals.[117]

108 In addition, CEPEJ published another report in 2020 based on data from 2018. However, the evaluation of data from 2010-2016 slightly varied compared to the previous studies. This also affects the comparability of the 2018 data with the data from the previous studies. Therefore, the 2018 data is not reproduced in detail here. Yet, on average a slight increase in disposition time and slight decrease in disposition rates in 2018 could be observed, see CEPEJ Report 2020, 107-133.

109 With Bosnia and Herzegovina, Croatia, Malta, Portugal, Switzerland, and Israel constantly reducing the disposition time every cycle, CEPEJ, Studies No. 26, 250-251.

110 *Ibid*, 252.

111 *Ibid*, 264.

112 *Ibid*, 262.

113 See for several examples in Germany RAESCHKE-KESSLER, 236-239.

114 See for example for a proposed amendment of several laws regarding civil procedure in Germany to establish commercial courts DEUTSCHER BUNDESRAT, Beschluss 79/22.

115 WALKER, 597-603, 607-608, 610.

116 Strongly in favour of the creation of commercial courts in Switzerland BERNET/CHANDRASEKHARAN/GIROUD, 474-479 (in particular 476-477).

117 Rather cautiously LANDBRECHT, The Singapore International Commercial Court, 124; RUCKTESCHLER/STOOSS, 448-449.

3. Innovations

The entering into force of the Hague Convention on Choice of Court Agreeements on 1 October 2015 and the conclusion of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters on 2 July 2019 have been further important developments.[118] While the former convention is meant to regulate the acceptance, recognition, and enforcement of choice-of-court agreements, the latter is aimed at unifying the recognition and enforcement of court judgments in foreign jurisdictions. This attempt at unifying the transnational litigation framework bears some resemblance to the unifying effect of the NYC. Unsurprisingly, the arbitration community has closely observed these developments. Yet *inter alia* due to the limited scope of these conventions,[119] a certain scepticism is warranted as to whether their success will match that of the NYC.[120] 51

4. Interim Conclusion

As an interim conclusion, a shift in international dispute settlement can be observed. Whereas arbitration was once the default and unrivalled solution for solving international disputes, the system appears to have fallen victim to its own success. This gave rise to new developments and efforts to increase efficiency in litigation, which have already produced some promising results.[121] 52

IV. Conclusion

Arbitration has enjoyed great success and evolved from a specialised dispute resolution mechanism for certain industries to a widely accepted way of resolving international disputes, and rightly so. Arbitration does offer its users a variety of benefits. Nonetheless, and in light of recent developments, litigation may regain its appeal as arbitration is arguably moving away from its original design and purpose. The increase in the length and costs of arbitration proceedings is symptomatic of this shift. 53

118 Cf. for the significance and impact of such treaties on the appeal of arbitration in general GREENWOOD, Rise, Fall and Rise, 439-440.

119 See art. 1 Hague Convention on Choice of Court Agreements and art. 1 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

120 LANDBRECHT, Singapore Convention and the Hague Court Conventions, 880-881; PALERMO, 364-369 (leaving some room for optimism though).

121 See for a similar analysis CLARKE, 148.

54 This shift is the result of a combination of problematic developments such as over-judicialisation and over-formalisation, the idea of due process as a threat instead of a right, and unwise uses of party autonomy as well as the increasingly deliberate abuse of party autonomy in the form of guerrilla tactics. Therefore, it may be argued that procedures whose purpose is to reduce the duration and costs associated with arbitral proceedings will require features that provide useful solutions to these problems.

Chapter 2 The Origin and Concept of Expedited Proceedings in Arbitration

55 This chapter will explore the origin and concept of expedited procedures in order to provide a foundation for the analysis of these procedures that features throughout the rest of this thesis. Furthermore, by providing an understanding of the historical development of expedited arbitration, this chapter will help contextualise current trends and tools in order to meaningfully discuss their merit nowadays. Moreover, a clear definition of what constitutes expedited procedures in arbitration is crucial for an in-depth analysis of this topic.

56 To this end, the very idea of expedited proceedings in arbitration and its historical development will be presented (below section I), followed by a summary of the common features of (today's) expedited procedures (below section II). Based on these considerations, a definition of expedited procedures will be provided (below section III), before moving on to analysing how expedited procedures can be distinguished from other features in international arbitration (below section IV).

I. The Idea and Development of Expedited Proceedings in Arbitration

1. Starting Point: The Lack of a General Definition

57 For all the talk about expedited procedures, what is striking is that there is no agreed definition as to what expedited procedures in international arbitration

are.[122] Granted, the current major arbitration rules almost all include largely similar provisions on expedited procedures,[123] yet they do not expressly define what the term 'expedited procedures' means.

At first glance, the quest for a definition might seem like a purely academic endeavour without any practical implications. However, upon closer inspection, it becomes imperative to define what in fact constitutes an expedited procedure in order to determine whether a certain feature is compatible with it or not. For example, where an arbitration agreement provides for an arbitration that is supposed to be conducted in an 'expedited way', the tribunal might be asked in the course of the arbitration to decide whether a motion is compatible with the type of proceedings it has adopted.[124] Furthermore, when the arbitration agreement does not provide for 'expedited' but rather 'fast-track' proceedings, the question may arise whether the parties meant expedited proceedings or another form of arbitration.[125] 58

As a consequence, it is necessary to examine in greater detail the nature of expedited procedures in international arbitration. In the absence of an accepted definition at present, a closer look into the (recent) past will provide important indicators for a definition. 59

2. The Historical Development of International Arbitration and the Introduction of Expedited and Summary Procedures

The following overview is intended to shed light on developments in the sphere of international arbitration that are aimed at providing fast and efficient legal protection. As will be seen, these developments culminated in what is today known as 'expedited arbitration'. 60

2.1 Traditional Understanding of International Commercial Arbitration

While international commercial arbitration has various origins and has been used for the resolution of a wide variety of disputes by vastly different users in history, it was a particularly popular form of dispute resolution amongst 61

122 BANIFATEMI, 9; BROICHMANN, 144; WELSER/KLAUSEGGER, 259.

123 See Annex 4 DIS Rules; art. 42 HKIAC Rules; Appendix VI ICC Rules; arts. E-1 till E-10 ICDR Rules; art. 21 JAMS International Rules; arts. 83-90 JCAB Rules; arts. 43-49 KCAB International Rules; art. 5 SIAC Rules; art. 42 Swiss Rules; art. 45 VIAC Rules; see for a detailed discussion below Chapters 9 and 10.

124 See for such an ad hoc agreement CLAXTON, 153.

125 Cf. BANIFATEMI, 9; see for general distinctions of 'fast-track' and 'expedited procedures' from 'normal' or 'ordinary' procedures BROICHMANN, 144; FISCHER/WALBERT, 24.

merchants dating back to the Middle Ages.[126] One reason that has contributed significantly to the development of arbitration was the merchants' desire for a quick and low-cost form of dispute resolution, something they considered courts could not offer.[127] Arbitration was able to fulfil this promise due to its reliance on simple and informal procedures with arbitrators who themselves were usually merchants and experts in their respective trades. These merchants often conducted fact-heavy arbitration proceedings, with the law being of limited importance.[128]

62 This expert-based, informal, and speedy form of arbitration focused on facts rather than law continues to prevail in certain forms of commercial arbitration today.[129] For instance, these characteristics of international arbitration remain popular amongst merchants within the shipping and commodities industries. In fact, certain commodity trade associations even go as far as to at least partially prohibit representation by legal professionals in oral proceedings.[130]

2.2 From Complication to the Panhandle Case (ICC) and Formula One Racing (ICC)

63 Yet the informal and merchant-based focus of arbitration as it had existed since the Middle Ages began to change significantly during the twentieth century which led to the increased regulation (judicialisation) of arbitration already touched upon above. As has already been outlined, starting from 1923, several conventions regulating arbitration came into existence while more arbitration centres, each with their own rules, entered the fray.[131] These developments went hand in hand with rapidly growing case numbers in international and institutionalised arbitrations as well as an increasing complexity of disputes.[132]

126 For everything BORN, International Commercial Arbitration, 34-38; NOUSSIA, 11-15, BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 1.13.

127 BORN, International Commercial Arbitration, 34-35; GREENWOOD, Rise, Fall and Rise, 435.

128 For everything BORN, International Commercial Arbitration, 33; NOUSSIA, 11-12; however, in England specialised merchant courts existed as well, see PARTASIDES/PREWETT, 114-116.

129 TRABALDO-DE MESTRAL, Arbitrating Commodity Trading, Shipping and Related Disputes, in: Arroyo, para. 7.

130 Article 4(e) FOSFA Arbitration Rules; art. 4.8 GAFTA Rules; art. 4.7 GAFTA Expedited Rules.

131 See above para. 35.

132 GERBAY, Judicialization, 236-238; STONE/GRISEL, 45-48; see also RAESCHKE-KESSLER, 229, who notes that *'[a]rbitration proceedings conducted 40 years ago have little in common with those conducted today.'*

Adding to the complexity was the introduction of litigation-style instruments likewise already discussed.[133]

Together, these developments led to an increase in the length and cost 64
of arbitration, resulting in a growing demand for faster and cheaper proceedings, i.e. expedited and fast-track arbitrations. Only in 1992 was this call to be officially answered. The so-called 'Panhandle case'[134] and the 'Formula One Racing case'[135] are the most often cited 'early examples' of expedited and fast-track arbitrations.[136]

In the Panhandle case of 1992, the underlying dispute concerned a redeter- 65
mination of the price for a long-term gas supply contract. The arbitration clause providing for ICC arbitration stipulated that the tribunal had to render an award within 60 days after the submission of the request for arbitration. Due to the flexibility of the ICC as the administering institution, the disciplined and well-organised three-member tribunal, and the cooperation of the parties and their counsel, the tribunal was able to comply with this time limit. In fact, the tribunal rendered its award within two-and-a-half weeks after its formation. In doing so, the tribunal focused only on the price redetermination mechanism in the contract, to the exclusion of any other issues such as the validity of the contract.[137]

In the Formula One Racing case, decided in the mid-1990s, a dispute arose 66
about the painting of racing cars only a few months before the first Formula One race of the season. Due to the fact that the racing season was fast-approaching, a quick decision was required and eventually reached. After the filing of the request for arbitration between Christmas Day and New Year's Eve, the three-member tribunal was appointed on New Year's Day. Within only 48 hours of the hearing, the tribunal submitted its draft award to the ICC for scrutiny. Thereafter, the tribunal rendered its award so that the parties were notified of the decision on the last day of January, which meant that the whole proceeding took just one month after the appointment of the tribunal to render the award. This was eventually fast enough to guarantee a smooth start to the racing season. Again, the speedy resolution of the dispute was made possible due to a combination of cooperative parties and counsel, a capable tribunal, and a flexible arbitral institution.[138]

133 See above para. 36; cf. further BRAGHETTA, 434-436.

134 ICC Case No. 7385/7402, 1992.

135 ICC Case No. 10211/AER, 1993.

136 See for example BANIFATEMI, 10-11; TARJUELO, 106-107; WELSER/KLAUSEGGER, 261-263; whether citing these two cases as early examples of today's expedited procedures is warranted will be discussed more in more detail below in para. 84.

137 See for everything and the discussion of this case WELSER/KLAUSEGGER, 261-262; see, however, SILVERMAN, 118 for other examples.

138 For everything TARJUELO, 107-108; WELSER/KLAUSEGGER, 262.

2.3 The Revision of Most Major Commercial Arbitration Rules

67 Responding to the concern that arbitral proceedings had become too expensive and time-consuming, the major arbitral institutions at around the same time as the Panhandle and Formula One Racing case gradually started to each revise their arbitration rules. It was the Geneva Chamber of Commerce that marked the start of this process in 1992 by introducing provisions on expedited procedures in its arbitration rules.[139] The HKIAC swiftly followed in the same year with its Short Form Arbitration Rules.[140] The WIPO followed suit in 1994 by modifying certain provisions of the WIPO arbitration rules,[141] and in 1995 the SCC introduced a stand-alone set of expedited rules.[142] They deviated from the ordinary SCC Rules of 1988 in numerous aspects such as providing for a sole arbitrator as opposed to a three-member tribunal,[143] the use of a time schedule combined with at least partially stricter cut-off dates,[144] considering the holding of an oral hearing the exception and not the rule,[145] and a time limit of three months for rendering the award as opposed to a twelve-months limit.[146]

68 This revision process was accompanied – and, in the case of most rules, preceded – by complementary tools aimed at increasing efficiency. These included the issuance by the ICC of non-binding guidelines on the administration of small claims disputes in 2003,[147] a report titled 'Techniques for Controlling Time and Costs in Arbitration' in 2007,[148] as well as the introduction of special rules for procedures like 'Small Claims' and 'Documents only' arbitration by the HKIAC in 2000.[149]

69 What then followed was a wave of revisions, rather late in some instances, of most major commercial arbitration rules, with the SCAI Rules in 2004,[150] the

139 Article 31 Geneva Chamber of Commerce Rules 1992; cf. on this subject BÜHLER/HEITZMANN, 146; KAUFMANN-KOHLER, 75-76; TSCHANZ, 52.

140 HKIAC Short Form Arbitration Rules.

141 WIPO Expedited Rules 1994; cf. on this subject BANIFATEMI, 10.

142 SCC Expedited Rules 1995.

143 Section 1 SCC Expedited Rules 1995; art. 5 SCC Rules 1988.

144 Sections 8 and 12 SCC Expedited Rules 1995; art. 12 SCC Rules 1988.

145 Section 16 SCC Expedited Rules 1995; art. 20 SCC Rules 1988.

146 Section 21 SCC Expedited Rules 1995; art. 26 SCC Rules 1988.

147 ICC, Guidelines for Arbitrating Small Claims.

148 ICC, Techniques for Controlling Time and Costs 2007.

149 HKIAC Small Claims Procedures and Documents Only Rules.

150 Article 42 Swiss Rules 2004.

HKIAC Rules in 2008,[151] the SIAC Rules in 2010,[152] the VIAC[153] and AIAC Rules in 2013,[154] the ICC Rules in 2017,[155] and the DIS Rules in 2018,[156] to mention only a few. Despite these developments, notably the LCIA has not yet implemented any corresponding provisions in its rules.[157]

As a result of these revisions, expedited procedures are now an established feature within the institutionalised arbitral framework, although it took some centres considerably more time than others to respond to the need for provisions leading to an expedited resolution of disputes. In addition, the issue of reducing the cost and length of international arbitration proceedings has become an ever-present feature of professional discussions.[158] 70

2.4 Interim Conclusion: Back to the Future – Again?

As this historical overview has revealed, arbitration has traditionally been an informal and efficient process – a quality that has partially changed over time. What can be observed from this overview is that users of arbitration have criticised an increase in the cost and time of arbitration proceedings not only in recent years but since the end of the last century. This criticism sparked a reform of several institutional rules and the creation of additional rules as well as other initiatives, leading to the introduction of 'expedited procedures' in one way or another at the end of the twentieth century. This process was largely replicated in the twenty-first century. 71

This development begs the question of whether the current focus on expedited proceedings represents a new phenomenon or whether history is merely repeating itself. This question is not just of purely theoretical interest but will be relevant when addressing controversies and open issues regarding expedited proceedings. If the developments of the 2000s are comparable to those in the 1990s, then it would be reasonable to resort to the approaches that followed the wave of reforms of the 1990s. 72

It is submitted that even though there may be some parallels between the reform processes of the 1990s and those since the 2000s, there are at least three significant differences between the two phases. First, the developments 73

151 Article 38 HKIAC Rules 2008.

152 Article 5 SIAC Rules 2010.

153 Article 45 VIAC Rules 2013.

154 AIAC Fast Track Rules 2013 (in general).

155 Article 30 and Appendix VI ICC Rules.

156 Article 27.4 and Annex 4 DIS Rules.

157 See at least arts. 9A and 9C LCIA Rules.

158 Cf. only AKSEN, *passim*; ICC, Techniques for Controlling Time and Costs 2018, *passim*; RISSE, Ten Drastic Proposals, *passim*.

since the 2000s have been more widespread because a bigger number of arbitral institutions have revised their rules to include provisions on expedited procedures. Hence, this can be seen as more of a general move as opposed to innovative steps by a few institutions in the 1990s. Second, the general concern for time-efficiency and cost-effectiveness seemed to be even stronger and more widespread in the 2000s than it was in the 1990s. Third, and relatedly, whereas concerns about the formalisation and judicialisation of arbitration were already voiced prior to the developments in the 1990s, the threats of 'due process paranoia' and guerrilla tactics have received considerably more coverage in recent years.[159] This seems to indicate that these issues have become more prominent only in the recent past.

74 Nevertheless, the fact remains that the provisions on expedited procedures introduced in the 1990s already had characteristics similar to the more modern ones of the 2000s. Therefore, even though it might not always be possible to draw upon the experiences from the 1990s for a discussion of today's provisions on expedited proceedings – most notably due to a lack of an in-depth discussion of the expedited provisions back then –, some parallels on a case-by-case basis might be warranted.[160]

75 Irrespective of these details, a general statement that can be made at this point is that the foregoing historical analysis calls into question whether expedited procedures are a new phenomenon in international commercial arbitration.[161] The question remains as to whether the implementation of, and increased reliance on, expedited procedures in international commercial arbitration will lead to a new era of dispute resolution, or whether the future of international commercial arbitration will see a return to its origins as a simplified and informal legal procedure.

II. An Overview of the Common Features of Expedited Proceedings

76 To date, the author has not found any statutory provisions of a national law that provide specific rules for the conduct of expedited arbitration proceedings. Therefore, the only basis providing for and regulating such proceedings are the agreements of the parties and the (institutional) arbitration rules applicable to

159 See above paras. 31-32 and 43-46.

160 Of course all parallels are subject to an absence of changes in the statutory law.

161 See for example LÉVY/POLKINGHORNE, 7-8, who suggest looking for guidance on the conduct of expedited procedures in areas such as domain name disputes and sports arbitration.

a dispute. Although the details and even the designation of expedited proceedings in these arbitration rules vary, it is nevertheless possible to make some general observations about their approach to expedited procedures.

77 The first observation concerns the implementation of provisions on expedited procedures into these institutional rules. There are generally two approaches: the provisions either constitute a separate set of rules complementing the 'ordinary' arbitration rules of the institution[162] or they are incorporated into the arbitration rules as separate articles.[163] The DIS, ICC, and ICDR Rules represent a middle ground by providing for the possibility of expedited procedures in the 'ordinary' rules and then regulating the details in an appendix[164]. Even though the formalities of the way of implementation may seem irrelevant at first glance, a separate set of rules comprehensively regulates the expedited proceedings directly instead of merely making reference to the provisions of the ordinary rules. This has the advantage of clarity insofar as it avoids potential discussions as to whether or not a provision of the ordinary rules should also apply under expedited procedures. Moreover, and as the following paragraph sets out, separate sets of rules are by definition more comprehensive and regulate the expedited procedure in more detail. Otherwise, however, the way of implementation should not have any practical consequences for the parties.

78 The second observation concerns the preconditions for expedited procedures to apply. Some rules provide for an application of expedited procedures only based on an agreement by the parties[165] whereas others provide for an application either based on an agreement or by default, based on objective factors.[166]

79 The third observation concerns the typical content of expedited procedures. The respective provisions are naturally intended to increase the time-efficiency and cost-effectiveness of the proceedings, *inter alia* by granting the tribunal more competences or directly regulating certain issues. Unsurprisingly, these provisions include rules on the shortening of deadlines,[167] a

162 ACICA Expedited Arbitration Rules; AIAC Fast Track Arbitration Rules; SCC Expedited Arbitration Rules; WIPO Expedited Arbitration Rules.

163 See art. 42 HKIAC Rules; art. 21 JAMS International Rules; arts. 83-90 JCAB Rules; arts. 43-49 KCAB International Rules; art. 5 SIAC Rules; art. 42 Swiss Rules; art. 45 VIAC Rules.

164 See arts. 1.3, 27.4, and Annex 4 DIS Rules; art. 30 and Appendix VI ICC Rules; arts. E-1 till E-10 ICDR Rules.

165 Specifically the SCC, VIAC, WIPO Expedited, and DIS Rules; see in detail below para. 436.

166 See in detail below paras. 437 and 462-484.

167 See for example art. 1 Annex 4 DIS Rules; art. 42.2(c) HKIAC Rules; art. 5.2(a) SIAC Rules; arts. 45.3, 45.7, and 45.8 VIAC Rules.

tribunal consisting of only a sole arbitrator,[168] restrictions on the number of submissions[169] and on admissible evidence (usually documents-only),[170] a limitation on the tribunal's duty to render a reasoned award,[171] as well as a shortened time limit for the rendering of the award.[172] Otherwise, however, expedited procedures leave the arbitral process largely unchanged. For example, the parties still have the right to submit a statement of claim and defence,[173] they may make counterclaims,[174] challenge arbitrators,[175] and apply for interim measures of protection.[176] Likewise, the rules do not provide that expedited proceedings have any special provisions on the effect of awards.[177]

80 Similarly, something that is not a general characteristic of expedited proceedings is a limitation on, or even exclusion of, procedural motions like applications for challenges of arbitrators, unsolicited submissions, or requests for time extensions. This is to a certain extent surprising as such motions may often prove quite disruptive for the arbitral process, are time-consuming to deal with, and are not infrequently used as mere guerrilla tactics in practice.[178] At the same time, though, some rules allow the arbitration institution to derogate from some party agreements like the non-application of expedited procedures and the number of arbitrators.[179] As shall be seen further below this thesis,[180] this is in fact a recurrent and significant feature of expedited procedures under some institutional rules.

168 See for example art. 2 Appendix VI ICC Rules; art. E-6 ICDR Rules; art. 17 SCC Expedited Rules; art. 42.2(b) Swiss Rules; see in further detail below para. 525.

169 See for example art. 3 Annex 4 DIS Rules and 42.2(d) HKIAC Rules; art. 45.9.1 VIAC Rules, see in further detail below para. 577.

170 See for example art. 3.4 Appendix VI ICC Rules, art. E-8 ICDR Rules; art. 33 SCC Exper dited Rules; art. 5.2(c) SIAC Rules, see in further detail below paras. 635-636.

171 See for example art. 42.2(g) HKIAC Rules; art. 42(1) SCC Expedited Rules; art. 42.2(f) Swiss Rules; see in further detail below paras. 780-781.

172 See for example art. 88.1 JCAA Rules; art. 5.2(d) SIAC Rules; art. 45.8 VIAC Rules; see in further detail below para. 761.

173 See for example art. 42.2(d) HKIAC Rules; arts. 6 and 9 SCC Expedited Rules; art. 42.2(c) Swiss Rules; see in further detail below paras. 512-513.

174 See for example expressly rule. 11.3(b) AIAC Fast Track Rules; art. E-5 ICDR Rules; art. 5.1(a) SIAC Rules.

175 See for example art. 20 SCC Expedited Rules; arts. 19-24 WIPO Expedited Rules.

176 See for example art. 25 ACICA Expedited Rules; art. 38 SCC Expedited Rules.

177 See for example art. E-10 ICDR Rules; art. 45.8 VIAC Rules; art. 59 WIPO Expedited Rules; see in further detail below paras. 757-759.

178 Cf. HORVATH/WILSKE/NETTLAU/LEINWATHER, 10.

179 See for example art. 30.3(c) ICC Rules and art. 2.1 Appendix VI ICC Rules; see in detail below paras. 494 and 527.

180 See below paras. 492-497 and 528-545.

III. Comment and Self-Conceived Definition

In order to have a meaningful discourse on the details of expedited procedures in the following chapters, it is necessary to define what expedited procedures in arbitration are. The lack of a generally accepted definition combined with heterogeneous terminology make such a definition not only even more relevant but also more challenging. In the following, a distinction shall be drawn between expedited procedures, fast-track/accelerated arbitration and summary/early determination procedures.[181] 81

1. Flexible Term

Building on the historical overview provided earlier, it is submitted that the notion of expedited procedures is not a fixed term but rather a flexible expression subject to the procedural realities of its time. As the late Lord Mustill stated already in 1993 about arbitral practice in the past, *'[t]he procedure was, by definition, fast-track'*.[182] This coincides with the informal character that had been attributed to arbitration for centuries, something that changed over the course of the twentieth century.[183] In other words, whereas procedures for a simple and efficient conduct of arbitral proceedings were normal in the past,[184] such procedures have more recently become a novelty and innovation. Hence, the term 'expedited procedures' will, for the purposes of this analysis, be defined based on the current practice of arbitration and in light of the current legislative environment – knowing that in a couple of decades this term may again have a different meaning. 82

Based on the common features of expedited proceedings, such proceedings can be defined as procedures that provide for a number of mechanisms 83

181 Yet, the terminology used in this analysis is primarily meant for cataloguing purposes and not intended to provide a binding definition of what parties mean when they refer to any such terms in their arbitration agreements; see in detail on this problem below paras. 446-450.

182 MUSTILL, Comments on Fast-Track Arbitration, 122.

183 See above paras. 33-37 and 63-66.

184 No empirical data seems to exist on the average duration of international commercial arbitration proceedings a few decades ago, which makes it hard to define a 'benchmark' of what constituted simple and efficient proceedings in the past. However, practitioners' experiences and institutional statistics suggest that in the past, disputes arising out of cross-border sales and purchases of goods between merchants constituted a significant number of arbitration cases (GERBAY, Judicialization, 239-240). These types of disputes were often decided by merchants within a matter of days and weeks, usually without hearings. If a hearing was conducted, it lasted for a few hours only (for everything MUSTILL, Comments on Fast-Track Arbitration, 123).

departing from ordinary arbitration procedures while still adhering to the basic features[185] of arbitration. This means that a distinction must be made between (1) provisions merely shortening deadlines while still conducting a 'full' arbitration and (2) provisions modifying the arbitral procedure in a way that still allow the parties to actively engage in the arbitral process but at the same time reduce the time and costs of this process as a result of structural changes. Only the latter is what nowadays qualifies as an expedited procedure according to the provisions of institutional rules.[186] The former can rather be seen as a form of fast 'ordinary' arbitration. Consequently, while expedited procedures are intended to make the arbitral process more efficient, they are supposed to do so based on structural changes to the proceedings instead of merely shortening deadlines while leaving the rest of the procedure untouched.[187] The mere shortening of deadlines should thus not be considered to constitute expedited procedures but rather a form of fast-track/accelerated arbitrations.[188]

84 This distinction casts doubt upon whether the Panhandle and Formula One Racing cases are in fact suitable early examples of expedited arbitrations. As outlined, these cases included a hearing and three-member tribunal, both characteristics that are according to the provisions of the institutional rules examined in this analysis[189] exceptional rather than the norm in expedited procedures. In addition, an essential element of both cases was the remarkable level of cooperation between the parties, the tribunal, and the arbitral institution. This cooperation, however, occurred within the existing framework of the applicable arbitration rules. The provisions on expedited proceedings currently in force, however, contain rules restricting the (due process) rights

185 Meaning an arbitration procedure with the exchange of submissions, the appointment of the arbitrator(s), the submission and taking of evidence (even though the types of evidence may be restricted), and the rendering of an award.

186 However, the expedited procedures of art. 45 VIAC rules are to a certain extent a hybrid form because they put a strong focus on shortened deadlines but alter the procedural features only slightly compared to the ordinary procedure, by providing for a sole arbitrator and a restriction on submissions and counterclaims. At the same time, they hardly amend other aspects such as the submission of oral evidence and the reasoning of the award; concurring HAUGENEDER/NETAL, in: Vienna International Arbitral Centre, Art. 45, 347, who consider the expedited procedure under the VIAC Rules '*not a simplified procedure.*'

187 See also PETTIBONE, 183.

188 See for example art. 39 ICC Rules, which allows the parties to agree to shorten the various time limits set out in the Rules. This rule does not distinguish between ordinary and expedited procedures, which indicates that the mere shortening of deadlines is not determinative for the question of whether a procedure is considered an ordinary or expedited one.

189 See in detail below paras. 525-527 and 634-657.

of the parties to a certain extent[190] and granting the tribunal wide (unilateral) competences.[191] This, it is argued here, is precisely the opposite of what happened in the two cited cases, since current provisions on expedited procedures are in fact safeguards against either obstructive party behaviour or inefficient arbitrators. Therefore, from today's perspective, it is submitted that the Panhandle and Formula One Racing cases should be qualified as fast-track/accelerated arbitrations rather than as expedited ones.

Lastly, it must be stressed that the prior discussion on expedited proce- 85
dures focused exclusively on expedited procedures in institutional arbitration. Nevertheless, it is of course possible to conduct an ad hoc arbitration in an expedited manner as well.[192] Yet, the question is when an ad hoc arbitration may be qualified 'expedited'. In institutional arbitration, this qualification is straightforward: One just needs to determine whether the proceedings were conducted according to the expedited provisions of the institutional rules (hence, the 'ordinary rules' serve as a comparative yardstick). Where the parties in ad hoc arbitration agreed on ad hoc arbitration that also provide for expedited arbitration (for example the UNCITRAL Rules and UNCITRAL Expedited Rules), the qualification of a proceeding as 'expedited' is done in the same manner as under institutional arbitration. However, where the parties have conducted ad hoc proceedings in the past not based on a fixed set of ad hoc rules but based specific procedural agreements on all relevant aspects for the arbitration, the qualification is not straightforward as the comparative yardstick is less obvious. As a solution in such a scenario, one could compare a pending proceeding with the way in which the parties conducted other proceedings in the past. If the pending proceeding is based on specific procedural agreements providing for a more efficient conduct, one could qualify such a proceeding as 'expedited'. However, in such a case one might justifiably ask the question as to whether there is any benefit in labelling such an ad hoc arbitration 'expedited'.

2. Proposed Definition

Combining all of the foregoing considerations, the following definition of ex- 86
pedited arbitration proceedings appears to be warranted: expedited proceedings are a – currently – more or less detailed, special procedure that deviates

190 See in detail the discussion in Chapter 10.

191 Especially with regard to the conduct of the proceedings and the admissible evidence; see in detail the discussion in Chapter 10.

192 See for such an example CLAXTON, 153; notably, the UNCITRAL Expedited Rules have recently been enacted, on which see BORDACAHAR/PULKOWSKI; and PETTIBONE, 178-179.

to a certain extent from ordinary arbitration procedures by partially modifying certain procedural aspects in order to simplify the arbitral process. In addition, these modifications are supposed to achieve the goal of reversing some of the developments that have occurred over the last few decades.[193]

87 This goal is achieved by strengthening the powers of the tribunal – while at the same time being more demanding on the tribunal – and curtailing some of the due process rights of the parties.[194] Furthermore, at least some procedural frameworks of expedited rules curtail party autonomy in an effort to make proceedings more efficient – something that would be prevented by unconditionally following the agreement of the parties. Expedited proceedings are a standalone procedure insofar as they are more than simple procedural tools within a bigger procedure – such is the case with early determination procedures.[195] In addition, expedited procedures may in principle be relevant to any kinds of dispute when the condition precedent for their application is met.

IV. Distinctions

88 In shedding light on the characteristics of current expedited procedures and drawing up a definition of what these procedures are, it remains to be defined what other mechanisms are distinct from expedited procedures. In this section, a number of features that are either considered more efficient forms of arbitration themselves or instruments to increase the efficiency of the arbitral process will be distinguished from expedited procedures.

1. Early Determination Procedures

89 A distinction must be made between expedited procedures and special procedural tools within an ordinary arbitration that enable the determination of a certain issue within the arbitration on a summary basis. The latter include

193 See for a similar approach (while also distinguishing 'fast-track' procedures) BROICHMANN, 144.

194 This also means that expedited proceedings to a certain extent are based on the assumption that the parties and the tribunal will not be able to fully and efficiently cooperate. Yet, it is of course possible to conduct an arbitration in an expedited form based on institutional rules that do not expressly provide for expedited procedures or in an ad hoc arbitration by mimicking the features of expedited rules. This arbitration would then be an expedited one as well.

195 See for this below paras. 89-90.

the early determination procedures of ICSID rule 41 (former 41[5] ICSID Rules 2006) and SIAC rule 29.[196]

Even though early determination procedures and expedited procedures 90
are both aimed at improving the efficiency of the proceedings, and even though they sometimes rely on similar methods to achieve this goal, these two types of procedures must not be confused with each other. Early determination procedures are a special type of proceeding that may apply only when certain substantive requirements are fulfilled – typically when a claim is manifestly without merit. When this precondition is met, the tribunal may adopt the procedures it considers most appropriate under the circumstances for an expeditious determination of the disputed issue.[197] This enables a party to obtain a quick and early determination on the respective issue without going through the entire arbitral process with full submissions of evidence and arguments.[198] Early determination procedures may also just apply to certain claims within a broader dispute to be determined by the tribunal, whereas expedited proceedings apply to a dispute as a whole. Expedited procedures are, in contrast, primarily pre-described procedural modifications of ordinary arbitral proceedings.[199]

2. Emergency Arbitration

The area of emergency arbitration has, just like expedited procedures, re- 91
ceived considerable attention in the arbitration community in the past few years for increasing the effectiveness of arbitration.[200] Emergency arbitration is a form of interim relief that is granted prior to the constitution of a tribunal by an emergency arbitrator, so that the party seeking interim relief does not have to await the constitution of the tribunal.[201]

Emergency arbitration procedures resemble expedited procedures in 92
various regards: the tribunal consists of a sole arbitrator,[202] procedural steps have to be conducted under (heavily) shortened time limits compared to ordinary proceedings,[203] and the circumstances often require a limitation

196 See in detail below Chapter 11 and specifically paras. 680-682.

197 See for example arts. 43.1 and 43.5 HKIAC Rules; WALLACH, 836; see further in detail paras. 685-687 and 692-697.

198 HORNYOLD-STRICKLAND/SPELLER; MOUAWAD/SILBERT, 95; TIBELL, 91.

199 As just defined above in paras. 86-87.

200 See in general ALNABER, *passim*; HANESSIAN/DOSMAN, *passim*; LAL/CASEY, 327-332.

201 VOSER/BOOG, 82.

202 See for example art. 2.1 Appendix V ICC Rules; section 4 Schedule 4 HKIAC Rules; art. 4 Appendix II SCC Rules.

203 See for example art. 9B.8 LCIA Rules; sections 7 and 9 Schedule 1 SIAC Rules.

of evidence or the right to be heard.[204] Nonetheless, emergency arbitration and expedited procedures must not be confused for one another because the former is a type of proceeding from which only an interim ruling on a dispute rather than an award, will result. This ruling can be modified and lifted at any time if a change of circumstances justifies such a modification, and the ruling will be replaced by a final award that will be rendered after a non-interim proceeding, so to speak.[205] Expedited procedures, however, are independent of any interim measures and are a final determination of a dispute leading to an award that has all the qualities attributed to an arbitral award.[206] Lastly, while expedited procedures are supposed to reduce the length and costs of the proceedings, they are not primarily meant to deal with matters of urgency.[207] For urgent matters, emergency arbitration may be the suitable option,[208] although this dichotomy is not convincing under all circumstances.[209]

3. Expert Determination

93 Expert determination is the binding determination of a disputed question of fact or law by an expert in their respective field.[210] This determination binds the parties and, depending on the legal framework, also a court[211] or tribunal[212] in a subsequent proceeding. As such, expert determination may also lead to a fast and cost-effective resolution of the dispute. Although there are some parallels between arbitration and expert determination, like the requirement of an agreement and the binding nature of the decision, expert determination is not a form of arbitration.[213]

4. Baseball Arbitration (Last-Offer Arbitration)

94 Baseball arbitration (also referred to as last-offer arbitration) is a special mechanism wherein parties agree to arbitrate and then themselves submit a

204 See for example section 10 Schedule 4 HKIAC Rules; art. 43.6 Swiss Rules.

205 For everything VOSER/BOOG, 91.

206 Cf. BANIFATEMI, 9-10.

207 See, however, as an exception art. 42.1(c) HKIAC Rules and art. 5.1(c) SIAC Rules.

208 MARCHISIO, 77.

209 See in detail the discussion in below paras. 488-491.

210 MOSES, International Commercial Arbitration, 18.

211 See for example art. 189 Swiss CPC.

212 For Switzerland see BSK ZPO-DOLGE, art. 189 para. 4.

213 For everything BERGER/KELLERHALS, paras. 150-155; BSK IPRG-HOCHSTRASSER/FUCHS, Einleitung zum Zwölften Kapitel: Grundlagen der Internationalen Schiedsgerichtsbarkeit, paras. 297-302.

proposed award to the tribunal.[214] The proposal can simply consist of a sum of money that should be awarded but it can also be a fully reasoned award. The tribunal must, however, choose one of the proposed awards after the closing of the proceedings, without altering it. Therefore, the parties have an incentive to submit reasonable proposals.[215] Yet, the submission of these award proposals does not mean that there will be no taking of evidence or party submissions. The opposite is true because the tribunal will require a gathering of the necessary facts in order to know which proposal to choose.[216]

This description should make it clear that, even though the rendering of 95
the award is usually a quick process in baseball arbitration, this form of arbitration cannot be considered an expedited procedure. The heavily simplified procedure is meant only to provide guidance to the tribunal as to which offer it should choose as the award. Other than that, however, baseball arbitration does not have any other specific procedural features that are designed to reduce the time and cost of the proceedings.

5. Look-Sniff Arbitration

Look-sniff arbitration has traditionally been used between merchants in trade 96
associations for determining the quality of goods.[217] The resolution of the dispute was typically highly informal and essentially consisted of a brief exchange of documents and agreeing on an arbitrator who was an expert in the respective commodities field and, by means of a direct examination of the goods (including looking and sniffing), determined whether the quality of the goods conformed to the underlying agreement.[218]

This highly informal form of dispute resolution bears a strong resem- 97
blance to expert determination but is nevertheless considered a form of arbitration[219] and is still present in modern trade associations.[220] Thus, one could consider this as reminiscent of the traditional form of arbitration that was considered fast-track by definition.[221] Nevertheless, look-sniff arbitration is suited only for one specific type of dispute and focused on only one aspect of

214 ELSING, 116; WELSER/STOFFL, 94–95.

215 For everything WELSER/STOFFL, 94–95.

216 For everything BOTTEGA DI BELLA.

217 Cf. SMID, 62.

218 BLAKE/BROWNE/SIME, para. 28.26.

219 *Ibid*, para. 28.27.

220 See for example section 5 GAFTA Rules.

221 MUSTILL, Comments on Fast-Track Arbitration, 122.

the arbitration process, namely the brief taking of evidence with an immediate rendering of a decision. This is not comparable to the more comprehensive and widely applicable provisions of expedited procedures.

6. Efficient Case Management

98 The term 'case management' in this context refers to all measures and techniques used for planning, scheduling, and managing the arbitral proceedings.[222] Although this is of course an essential task of the tribunal,[223] the parties and their representatives, too may contribute to an efficient case management by the tribunal.[224] From the tribunal's perspective, efficient case management concerns the more administrative aspects of the proceedings such as the scheduling of a hearing. However, it may also affect the parties' rights significantly because as part of the case management, the tribunal is required to rule on the procedural motions of the parties as well.[225]

99 There may be overlaps between efficient case management and expedited procedures,[226] such as short deadlines and a tough stand against dilatory tactics.[227] However, these two concepts must not be seen as equivalent. While good case management is crucial for an efficient conduct of the proceedings, it must be distinguished from expedited procedures. On the one hand, case management is a component of any arbitral proceeding. On the other hand, expedited procedures are the result of a comprehensive set of special rules providing for a conduct of the proceedings that is supposed to differ from the ordinary – less efficient – conduct of proceedings.

V. Conclusion

100 The historical overview presented in this section has shown that the increased focus on expedited procedures may, at least partially, represent a return to the origins of arbitration as a considerably simplified dispute resolution process as opposed to just a different form of litigation in another forum. Reform

222 BORN, International Commercial Arbitration, 2402; MARZOLINI, 99.

223 Cf. GIARETTA, 73-74; HUNTER/PHILIP, 482-485; ZACHARIASIEWICZ/KOCUR.

224 See ICC, Effective Management of Arbitration, *passim*.

225 Cf. for everything HUNTER/PHILIP, 482-486.

226 Similarly WEISS/KLISCH/PROFAIZER, 262-263, referring to expedited procedures within the discussion of efficient case management.

227 WYSS, 3-4.

processes further away in the past already emphasized expedited procedures, but not to the extent that recent reforms and developments have done. Accordingly, an understanding of what constitutes expedited procedures may be flexible over the course of time.

It also follows from the above considerations that expedited procedures 101
are a comprehensive set of provisions with the purpose of conducting a complete arbitration, in a more efficient way as compared to how arbitral proceedings would ordinarily be conducted. This conclusion is a prelude to what is to be confirmed in the next chapter: achieving the goal of expedited procedures requires the interplay of a variety of factors.[228] Expedited procedures are more than just simple tools of a tribunal – they in fact require a concerted effort by several actors in order to be successful.

228 ALVES, 182-184.

Part 2
General Procedural Considerations

Chapter 3
The Challenges for Expedited Procedures

The objective of this chapter is to highlight the challenges that expedited pro- 102
cedures have to overcome in order to be successful: combining high-quality proceedings with time-efficiency and low costs. As will be seen in this section, these three factors are significant and interrelated. The general discussion in this chapter will pave the way for the discussion of specific subjects of study in the following chapters because every aspect of expedited procedures should be aimed at combining a high quality of the proceedings with time-efficiency and low costs.

In order to conduct the analysis, some general considerations on the con- 103
duct of expedited procedures are warranted (below section I). Subsequently, the idea of combining quality, time-efficiency, and low costs will be further explored (below section II), followed by a more detailed assessment of what constis tutes the quality of the proceedings (below section III) as well as time-efficiency and costs (below section IV). This leads on to an evaluation of how these factors ought to be combined (below section V). The conclusion (below section VII) also serves as an introduction to the analysis carried out in the next few chapters.

I. General Considerations for the Conduct of Expedited Procedures

The major challenge facing expedited arbitration is how to offer a dispute res- 104
olution process that is not only comparable in quality to an ordinary arbitration but also achieves this with greater efficiency. The question, therefore, is how quality and efficiency can be combined. There is no simple answer to this. To the contrary, the following chapters will illustrate that for expedited arbitration to succeed, either different actors in the arbitral process need to cooperate or certain actors are required to take specific measures offsetting a lack of cooperation.

The foregoing raises the questions of (i) what the quality of arbitration 105
proceedings means, (ii) how an acceleration of the proceedings can in general

be achieved while maintaining quality, and (iii) whether combining time-efficiency, cost-effectiveness, and quality imposes special duties on the parties, the tribunal, and the arbitral institution. A clarification of these three general questions is warranted in order to better assess specific features of expedited procedures in the later chapters.[229]

II. Combining Quality, Efficiency, and Low Costs

106 It is hardly controversial to state that the answer to the urgent call for faster and cheaper arbitrations cannot be measures at the (significant) expense of the quality of the process. Notably KIRBY illustrated the relationship between time- and cost-efficient as well as high-quality arbitration proceedings with a Venn diagram consisting of three major circles, for 'good', 'cheap', and 'fast' dispute resolution, respectively.[230] KIRBY referred to the overlap of all of these three circles as 'keep dreaming'. She further referred to the overlap of 'good' and 'fast' arbitration as 'high costs'; to the overlap of 'good' and 'cheap' arbitration as 'slow'; and to the overlap of only 'fast' and 'cheap' as 'crappy results'.[231] Other authors, in referencing KIRBY's diagram, seemed equally pessimistic and considered the combination of the good, the cheap, and the fast in expedited procedures to be a utopian dream rather than a realistic option in the near future.[232]

107 Leaving aside the pessimism momentarily, if (expedited) arbitration is to become (again) the success it once was, there is no way around a serious attempt at *combining* quality with time-efficiency and cost-effectiveness instead of focusing on just one characteristic.[233] As aptly pointed out by SCHERER, speed is not a goal in itself,[234] even though time is of course an essential element of dispute resolution.[235] By the same token, and in reference to what KIRBY defined as 'crappy', a process that overly focuses on cost-effectiveness

229 See in particular Chapters 9, 10, and 12.

230 KIRBY, Efficiency, 690; KIRBY did not expressly refer to expedited procedures but essentially described this form of arbitration. With a similar depiction (and before KIRBY) as a 'magic triangle' RISSE, Ten Drastic Proposals, 455; see also LANDBRECHT, Recalibrating, para. 8, with express reference to KIRBY, Efficiency.

231 For everything KIRBY, Efficiency, 690.

232 BÜHLER/HEITZMANN, 147-148.

233 Cf. for an attempt to combine these factors (though not under expedited procedures) VAN DEN BERG, Organizing, 416-418.

234 SCHERER, 230; similarly PARK, Arbitrators and Accuracy, 27.

235 DARWAZEH, 60-61, with numerous references; HABEGGER, 123-124; PARK, Arbitrators and Accuracy, 30-31; RESPONDEK, 507-509; for litigation see SPICHTIN, 7.

but disregards quality will hardly ever leave the parties satisfied. After all, even a prevailing party might get the sense that such a process was a badly organised lottery with significant shortcomings rather than a professional resolution of the dispute. This lottery may well be to the detriment of this party in the next arbitration.[236] Thus the quality of arbitration, and the definition of what makes quality a crucial element for expedited procedures, requires a closer examination.

III. Quality of the Proceedings: Conflict of Objectives or Symbiosis?

1. Measuring the Quality of Arbitration

How is the quality of arbitration defined? Providing a general answer to this question may be difficult due to the vastly different expectations[237] of the users of arbitration.[238] Nevertheless, it should still be possible to make a number of general remarks that have a chance to receive general approval. 108

1.1 The Perspective Relevant for Determining Quality

First, it is proposed that the perception of quality depends on the users of the process. It should primarily be up to the parties to define in advance what they expect from arbitration in order to consent to this form of dispute resolution.[239] Indeed, the parties already express a certain wish for a high-quality judicial process when they choose a neutral country with an independent judiciary and a professional arbitration community as the seat of arbitration in order to have a fair and professional arbitration, for example. This is despite the fact that they could theoretically also choose a country under a dictatorship with a corrupt judiciary and an ill-spirited arbitration community. 109

In other words, it is submitted that engaging in an analysis of quality in arbitration inevitably leads to a management of expectations from the parties' perspective.[240] Considering the paramount importance of party autonomy 110

236 See for the opposite effect with excessively long proceedings OLDENSTAM, 127.

237 Cf. for a discussion of quality from a cultural perspective KIDANE.

238 GIARETTA, 68; KIRBY, Efficiency, 691-692.

239 Similarly DE LY, para. 2.51; MARGHITOLA, 129-133 with numerous references; WELSER/MIMNAGH, 130; WYSS, 2.

240 See also FONCKE, 121-123, who stresses the importance of the parties' consideration of the relationship between a correct award and a reasonable degree of time and cost required in order to arrive at such award.

in arbitration,[241] the parties have to define the direction in which they want to use their autonomy. If, for example, the parties are content with having an unduly long process in which the arbitrators investigate every eventuality and go at great lengths to find the 'perfect' solution (whatever this term may entail), it should not be for 'outsiders' to question this decision. Then again, when the parties express such a desire, they also have to accept the consequences that come with this desire. Therefore, the parties cannot require that an extensive judicial process be conducted within a timeframe that is realistic only under expedited procedures. Hence, the parties need to be cognisant of their choices as well as the consequences of these choices and realistically manage their expectations accordingly.

111 Putting the focus on the parties' perspective in addition to the overarching principle of party autonomy finds further support in the specific modern legal framework for arbitration. Revoking the effects of an arbitration and ensuing award is usually possible only via a setting aside of the award[242] or via a refusal of recognition and enforcement of the award.[243] Such setting aside proceedings occur only at the request of the parties. Furthermore, the recognition and enforcement may primarily be refused upon the request of a party. The interests of the state are protected only insofar as a state may ordinarily refuse recognition and enforcement of an award if said award violates the notion of arbitrability or public policy of that state.[244] Hence, the parties' perspective is determinative.

1.2 Factors Defining the Quality and Various Forms of Quality

112 The modern legal framework not only serves as an indicator for whose perspectives are relevant for the determination of the quality of an arbitral process; it is, in addition, at least partially an indicator of what likely constitutes the quality of an arbitration:[245] a (reasonably) legally correct award,[246] which

241 See in detail above paras. 21-22 and below Chapter 7.

242 Cf. for Switzerland GEISINGER/MAZURANIC, in: Geisinger/Voser, 223; see in detail below paras. 810-828.

243 Cf. for Switzerland BERNET/MEIER, in: Geisinger/Voser, 202; see in detail below paras. 829-842.

244 For everything see art. 190 para. 2 lit. e Swiss PILA; art. V para. 2 lit. b NYC; for the cone troversy regarding the interpretation of the meaning of public policy under the NYC see below para. 840.

245 As has just been pointed out (see above para. 110), the specific definition of the quality of an arbitration may nonetheless vary significantly depending on the specific parties to the proceedings and their expectations.

246 KIRBY, Efficiency, 692; METSCH/GERBAY, 239; PARK, Arbitrators and Accuracy, 27.

is enforceable[247] insofar as the procedure respected the parties' most fundamental rights like the right to equal treatment and the right to be heard. These two factors need to be supplemented by a third and fourth one, namely a reasonable use of procedural tools as well as respect of party autonomy.[248] Accordingly, the quality of 'an arbitration' relates to both the result of the arbitration and the process leading to the result.

a A (Reasonably) Correct Award

That the parties require an award that is, from a legal perspective, (reasonably) correct should be self-explanatory.[249] If the parties wanted any form of decision regardless of its legal accuracy, they could also just flip a coin and call it an arbitration instead of going through a comprehensive legal process.[250] This argument draws further support from provisions in numerous national laws that require the tribunal to rely on the applicable law and enable the tribunal to decide *ex aequo et bono* only with the agreement of the parties.[251] Of course, there are inherent limits to the correctness of the decision as the tribunal is at least in principle limited by the facts pleaded by parties *('Verhandlungsmaxime'),* for example; this is because a tribunal is normally not competent to conduct an *ex officio* examination of the facts.[252] However, for the sake of completeness it must be mentioned that a tribunal has the right to ask the parties to clarify unclear parts of their submissions *('richterliche Fragepflicht')*[253] or where the tribunal suspects that corruption or other illegal practices could be affecting the (merits of the) dispute.[254] 113

b Enforceability of the Award: Respect for Due Process Rights

The enforceability of the award depends on various factors including the jurisdiction to decide a dispute, the respect for public policy, and – often the most important one in practice – the respect for the parties' due process rights, 114

247 KIRBY, Efficiency, 692; METSCH/GERBAY, 239.

248 Similarly PARK, Arbitration in Autumn, 290-293.

249 *Ibid*, 292-293.

250 Cf. PARK, Arbitrators and Accuracy, 33.

251 For Switzerland art. 187 Swiss PILA; see further section 46(1) English Arbitration Act; art. 28 UNCITRAL ML.

252 BERGER/KELLERHALS, para. 1307, with reference to decision Swiss Federal Tribunal no. 4A_597/2013 of 19 June 2014 c. 3.2.2; KNOLL, 12 PILS, Article 182, in: Arroyo, para. 38; STACHER, Einführung, para. 277.

253 KNOLL, 12 PILS, Article 182, in: Arroyo, para. 38.

254 MARCENARO, 144-145; see, however, for a more hesitant view MAYER, Duty and Power, 65.

namely the right to be heard and the right to equal treatment.[255] As numerous national laws stipulate for setting aside grounds[256] and as the NYC sets forth for transnational recognition and enforcement,[257] an award is subject to setting aside and may be refused recognition and enforcement *inter alia* if the tribunal violated the parties' rights to equal treatment and to be heard. Therefore, respect of these rights during the arbitral proceedings is essential.

115 This proposition finds further support in the jurisprudence of the Swiss Federal Tribunal. The court has in constant jurisprudence ruled that the right to be heard is a person-related participation right.[258] This confirms that the participation of the parties in the process is essential and has a value on its own.[259]

c Reasonable Use of Procedural Tools

116 Another factor that is relevant to the process rather than just the result of an arbitration is a sensible and carefully deliberated use of the procedural tools by the tribunal and, where applicable, the arbitral institution. A procedural decision should never be 'automatic' but instead should be the result of a well-thought-out deliberation of pros and cons. Well-considered procedural steps may significantly facilitate the resolution of a certain dispute. Further support for this proposal in arbitration can be drawn from postulates for decisive case management by the tribunal in appropriate instances.[260] Decisive case management in appropriate instances can, by definition, not be the result of automatic, un-reflected default behaviour.

117 Incidentally, a reasonable use of procedural tools on the part of the tribunal and arbitral institution may also add to the efficiency of the proceedings. This will be examined in greater detail in Chapter 10.

d Respect for Party Autonomy

118 The fourth factor that defines the quality of the process is its respect for party autonomy. While the first three factors are arguably applicable as indicators to any judicial process, and thus to litigation as well, party autonomy is a

255 Cf. art. V NYC; see in general PAULSSON, 217-218; SCHERER, in: Wolff, NYC, art. V para. 130.

256 Article 190 Swiss PILA; sections 67-69 English Arbitration Act; section 81 Hong Kong AO; section 24 Singapore IAA; art. 34 UNCITRAL ML.

257 Article V NYC; see on due process under the NYC STEINDL, 257-281.

258 See in general DFT 142 I 86 c. 2.2; 119 Ia 260 c. 6a; decision Swiss Federal Tribunal no. 1C_506/2018 of 3 May 2019 c. 3.1; decision Swiss Federal Tribunal no. 4A_307/2016 of 8 November 2016 c. 2.1.

259 Cf. further PARK, Arbitral Duty, 27.

260 For everything CLAXTON, 156; HABEGGER, 124; RISSE, An Inconvenient Truth, 217; WYSS, 3-4.

distinctive factor of arbitration.[261] As the focus on the parties' definition of the quality of arbitration indicates, the role of the parties is, on average, more relevant in arbitration than in litigation because of party autonomy.[262] Therefore, respecting this element appears to be a reasonable demand for any arbitration procedure.

e Interim Conclusion

This breakdown shows that the quality of arbitration rests on four main pillars. 119
The first one is the quality of the award as a (reasonably) correct decision. In other words, this aspect concerns the quality of the eventual result. The second factor is respect for the parties' due process rights, while the third one is the well-thought-out use of procedural instruments and steps that suit a particular dispute. The last factor is the respect for party autonomy.[263]

1.3 Interdependence of Factors

It is worth noting that the quality of the proceedings cannot be defined by the 120
degree of one of the four factors alone, as they may conflict with each other.[264] In particular, a high procedural quality cannot, on average, be equated with an unfettered exercise of the parties' due process rights. For example, limiting the number of times that the parties can exercise their right to be heard may, as will be explained in further detail in Chapter 10, amount to interfering with their right to be heard. Such a violation may based on the above considerations result in a decrease in the quality of an arbitration. However, if the parties are automatically allowed unlimited and, at a certain point, useless submissions, the resulting prolongation of the process and the inevitable increase in costs will by no means increase the quality of the process.[265] Instead, the quality decreases *inter alia* because of a bad use of procedural tools. By the same token, this sort of poor case management will have no positive effect on the enforceability and correctness of the award.[266]

261 BERMANN, 223; see in detail below Chapter 7.

262 Cf. ARROYO, 201; cf. further above para. 22.

263 Cf. for everything also RISSE, Ten Drastic Proposals, 455.

264 Similarly DE LY, para. 2.42.

265 As BERGER/JENSEN, 422, observe, *'[…] it is also important to understand that these rights* [=right to be heard and right to equal treatment] *are not ends in themselves'.*

266 See for everything *ibid*, 423, *'While this emphasis on efficiency might seem counter-intuitive to some arbitrators, it should not be misunderstood as a limitation of due process and party autonomy. Rather, quite to the contrary, it should be understood as their realization. Only by weighing a party's procedural request against the efficient resolution of the dispute can the other party's rights and both parties' initial agreement to efficiently resolve their dispute in arbitration be respected.'*

121 Therefore, the quality of the process must not be equated with a disproportionate respect for (potential) rights of the parties but rather with a sensitive and reasonable balance between respect for the rights of the parties and a well-thought-out conduct of the proceedings.[267] Anything else only amounts to further increasing due process paranoia with all its known detrimental consequences.

122 Similarly, it is also possible for the parties' due process rights to conflict with one other. For example, if a party requests more opportunities to exercise its right to be heard in comparison to the other party, this might lead to a violation of the right to equal treatment of the other party.[268] In any event, this problem is not specific to expedited procedures but may arise in any type of arbitration procedure.[269]

123 Lastly, it should be noted that the exercise of due process rights, in particular the right to be heard, will ultimately also serve the purpose of enabling the tribunal to reach a legally correct decision. It is the parties who have to establish the facts based on which a tribunal will render an award.[270] Thus, some components of quality, namely a legally correct decision and the respect for the parties' due process rights, are to a certain extent interlinked.

IV. Time-Efficiency and Costs

124 The factors of time-efficiency and costs, in contrast to the factor of quality, seem more tangible and thus straightforward to define, although the term 'efficiency', too, can take on a variety of meanings.[271]

1. Time-Efficiency

125 Time-efficiency in this analysis refers to the time that is required for a tribunal to resolve the dispute between the parties. It is submitted that the relevant timeframe starts at the moment of commencement of the arbitration[272] and finishes with the rendering of the award. Nevertheless, the rendering of the

267 BERGER/JENSEN, 422; HOCHSTRASSER, 131.

268 BK ZPO III-GABRIEL/BUHR, art. 373 paras. 62-63.

269 See the general considerations *ibid*, paras. 62-67.

270 Cf. for everything BSK IPRG-SCHNEIDER/SCHERER, art. 184 para. 5.

271 Cf. for different definitions of efficiency (also in the arbitral context) LANDBRECHT, Recalibrating, paras. 3-11.

272 Which usually follows from the submission of the notice of arbitration, see for example art. 3.1 Swiss Rules.

award might not be the end of disputes between the parties. The award debtor might apply for a setting aside of the award and oppose its enforcement.[273] Even though these additional steps considerably complicate the overall resolution of the dispute between the parties and prolong the resolution significantly, such further steps cannot be directly relevant to an analysis of expedited proceedings because the tribunal has no influence on the parties' decisions after the rendering of the award.

In reference to a finding of the 2015 Queen Mary Study, it must be emphasised that time-efficiency should be viewed not only in terms of the absolute time that is needed to resolve a dispute. Indeed, as a rightly observed, the absolute length of the proceedings is not the only decisive factor but needs to be considered in relation to the complexity of the dispute as well.[274] 126

2. Costs

As previously established, the costs of institutional arbitration proceedings consist of the administrative fees of the arbitral institution, the fees and expenses of the arbitrators, and the parties' legal and other fees.[275] The factor of costs is special for two reasons: 127

First, the factor of costs is to a certain degree independent of the distinction between ordinary and expedited procedures for several reasons: (1) the administrative fees of an arbitration institution overall do not usually account for a significant amount of the total costs of proceedings.[276] (2) the various rules differ in whether they expressly provide for different scales of administrative fees for those two types of procedures.[277] (3) likewise, the expenses for booking a hearing venue, in case a hearing is to be held, are the same irrespective of the procedure. 128

Second, the factor of costs is to a certain extent a direct consequence of the quality and speed of the proceedings: the biggest component of the arbitration costs results from party representation.[278] Naturally, these costs increase with 129

273 See above para. 27; see also LANDBRECHT, Recalibrating, para. 7, who qualifies enforcement considerations as part of the (time) efficiency component.

274 For everything Queen Mary Study 2015, 7, 26; further BANIFATEMI, 9.

275 See above para. 29.

276 ICC, Decisions on Costs, 3; KIRBY, Efficiency, 693.

277 Not distinguishing: Schedule of Fees SIAC Rules; Schedule of Fees HKIAC Rules; howd ever, see Administrative Expenses Expedited Procedure Appendix III ICC Rules. Yet, even when the rules provide for the same schedule of fees and costs, it is still possible for the institution to take into account that the arbitration was conducted under expedited procedures (GUSY/HOSKIN, para. 40.04).

278 ICC, Decisions on Costs, 3; KIRBY, Efficiency, 693.

a higher number of procedural steps such as submissions and extended hearings. Hence, limiting these steps by shortening for example the length of the proceedings should also have a positive effect on cost-effectiveness.

V. Evaluating the Relationship between Quality, Speed, and Costs

130 With the above definition of the criteria that pertain to the quality of the arbitral process, the issue of how the factors of quality, speed, and low costs of the proceedings can be reconciled remains. As explained at the outset of this chapter, combining these three factors must be the goal of expedited procedures even though this may be a challenging endeavour. Achieving a satisfactory combination must be attempted at the level of arbitration rules as well as by the tribunal in the course of an expedited arbitration. Whether this goal may be achieved – and, if so, how – will be examined in greater detail in the respective specific sections.[279] Nevertheless, at this point, three general observations on this topic are submitted.

1. Mutual Exclusivity May but Need Not Exist

131 Whether an increase in time-efficiency and cost-effectiveness inevitably comes with limitations to the quality of the proceedings, as numerous commentators have pointed out,[280] seems doubtful. On the one hand, it appears axiomatic to hold that at a certain point, it is not possible to further reduce the amount of time devoted to a complex issue without compromising the overall result – be it that the ultimate decision is legally flawed or might (miraculously) be correct even though it comes about only in a grave violation of the parties' rights.[281] Plainly speaking, quality and efficiency may, at least under certain circumstances, indeed be mutually exclusive.[282]

132 On the other hand, some disputes may be straightforward and require neither elaborate nor numerous submissions.[283] Under such circumstances,

279 See especially below Chapters 7, 10, and 13.

280 BÜHLER/HEITZMANN, 147-148, with further references; GIARETTA, 69; KIRBY, Efficiency, 690-692; RISSE, Ten Drastic Proposals, 455.

281 Similarly FISCHER/WALBERT, 25.

282 As aptly put by PARK, Truth-Seeking, 11-12, utilizing the quote *'one person's delay is another's due process.'*

283 For instance certain disputes arising out of commodities trading, cf. TRABALDO-DE MESTRAL, Arbitrating Commodity Trading, Shipping and Related Disputes, in: Arroyo, paras. 11-20.

it is perfectly possible to conduct the proceedings in a speedy and cost-effective manner. Additionally, even more complex disputes may be decided with a suitable combination of quality, speed, and cost-effectiveness if all the actors involved cooperate, as the examples of the Panhandle and Formula One Racing cases show. As a result, although high quality and high efficiency of the process *can* be mutually exclusive, this is not necessarily always the case.

2. The Recurrent Relevance of the Parties' Perspective

The relationship between quality, speed, and low costs and the weighting of these factors also depend, to a certain degree, on the parties' understanding and expectations of arbitration. It must be stressed that highly institutionalised and often legally-focused proceedings are by no means the only way commercial arbitrations are conducted.[284] On the contrary, in the commodity industry, for instance, both ordinary and expedited procedures are considerably less formalised.[285] 133

Therefore, it stands to reason that the expectations that users of common commercial arbitration rules like the ICC, SIAC, or Swiss Rules have of arbitration may differ from the expectations of merchants in a special sector like the commodity sector.[286] Whereas for the first group, arbitration may be a version of litigation in a different forum that is better suited to solve international disputes,[287] for the second group arbitration is potentially more of a quick and simple form of dispute resolution that is not at all related to litigation but instead designed to avoid any processes resembling litigation.[288] As a consequence, if it can be established that all parties have – due to their background, for example – a similar understanding of the function of arbitration, this understanding may be decisive in approaching potential conflicts between quality, speed, and cost-effectiveness. Whether this understanding may amount to an implied, binding contractual term for the conduct of the arbitration is another question.[289] 134

284 Cf. HOCHSTRASSER, 122.

285 TRABALDO-DE MESTRAL, Arbitrating Commodity Trading, Shipping and Related Disputes, in: Arroyo, paras. 5–7.

286 See for the general idea of a flexible approach towards conducting an arbitration based on the parties' expectations WELSER/MIMNAGH, 131-132.

287 Cf. for the description of this position TERRAMURA, 11-12.

288 For example in the regulated commodities industry, TRABALDO-DE MESTRAL, Arbitrating Commodity Trading, Shipping and Related Disputes, in: Arroyo, paras. 5–7.

289 See in detail below paras. 312–316.

3. Realistic Expectations

135 As a final remark, when quality (or, more accurately, the quality of the result) is to be understood as a reasonably correct legal decision, one must be careful not to impose an expectation on expedited procedures that would be ill-conceived even under ordinary procedures: the facts are usually established based on the parties' submissions and evidence (the principle that the parties have to present their case, *'Verhandlungsmaxime'* in German, applies, although the tribunal has a right to ask the parties to clarify their submissions).[290] Save for limited exceptions like the use of expert witnesses appointed by the tribunal, there is no *ex officio* gathering of the facts.[291] As a result, the tribunal's final decision can only be as correct as the facts submitted by the parties allow the decision to be.[292] This phenomenon in litigation is often referred to as the relative truth (as opposed to the material or absolute truth that would result from an *ex officio* establishment of the facts).[293] Hence, when the quality of the proceedings and of the resulting award are assessed, one must be careful not to criticise a tribunal for rendering an award in expedited proceedings that is in contradiction to the material truth when the award would (likely) be the same in ordinary proceedings.

VI. Situating Expedited Procedures

136 In view of the foregoing, the following question can be asked: what function do expedited procedures have in the context of quality, time, and costs, and how do they fit into these categories? Notwithstanding the risk of engaging in trivialities, it is submitted that expedited procedures apply based on the parties' underlying expectation of increases in efficiency compared to ordinary procedures. At least this is the case when none of the parties is recalcitrant.

137 Yet, considering the above remarks on the interdependence of quality, time, and costs, the issue further arises as to how this increase in efficiency affects the quality of the proceedings. As has been seen, an increase in efficiency may affect the quality of the proceedings.[294] Consequently, the decisive issue is to define which yardsticks of quality must not compromised and which ones are indeed subject to restrictions in the interest of reducing length and costs.

290 See above fn. 252 and 253.

291 See above para. 113.

292 HANOTIAU, Truth, paras. 12 and 16.

293 Staehelin/Staehelin/Grolimund-STAEHELIN/BACHOFNER, § 10 paras. 16 and 24; TERCIER/BERSHEDA, 83.

294 See above para. 131.

VII. Interim Conclusion and Outlook

138 The previous discussion revealed the challenge of combining quality, time-efficiency, and low costs in expedited proceedings. A potentially successful method for achieving this goal is a closer examination of the intricacies of the parties' due process rights and party autonomy, as well as of measures to ensure a correct award.

139 What is more, for a meaningful discussion of how to achieve the combination of quality, time-efficiency, and low costs in expedited proceedings, a holistic view is necessary. It is of little value to propose general and abstract ideas of how proceedings should be managed without engaging in a more fundamental and detailed discussion of the concepts, rules, and duties that affect the conduct of arbitral proceedings in general. It is submitted that a successful conduct of expedited procedures requires more than simply adhering to shortened deadlines without further ado. Instead, it is necessary to examine more closely the framework that affects the conduct of arbitration as well as the potential conflicts within this framework. This is why the following four chapters will, at least partially, address some of the basic aspects of arbitration. Yet this only serves the purpose of building upon these basic aspects in order to develop concepts that enable a tribunal to combine quality and time-efficiency while limiting costs. As shall be seen, a particular focus will be on the tribunal's handling of the parties' due process rights. This delicate task in particular warrants a more comprehensive analysis of the different factors affecting the conduct of the proceedings.

Chapter 4
Legal Sources Relevant for the Conduct of the Proceedings

140 The focus of this chapter will be on the question of how the goal of combining quality with efficiency can be achieved. It is argued that expedited arbitration can live up to the promise of combining quality with efficiency only if different actors make efforts and in addition use various procedural measures. In order to determine the role and responsibility of each actor in the arbitral process and the tools available to a specific actor, all relevant legal sources for the conduct of an arbitration proceeding need to be analysed. As will be explained in

the following sections, the interplay between the arbitration agreement and the arbitration rules in particular is crucial for the conduct of arbitral proceedings and, by extension, for the conduct of expedited proceedings, which will be explained further below in this thesis.[295] Hence, the following sections provide a general overview of the sources for provisions and principles that may affect the conduct of the proceedings. This overview is necessary for the ensuing discussion in Chapters 9–13 on how different duties and goals can be combined for an efficient conduct of the proceedings that simultaneously ensures a high quality of the process.

141 This chapter begins by briefly examining the foundation of international arbitration (below section I), before analysing in more detail the various legal sources affecting the conduct of arbitral proceedings (below section II).

I. Foundation of International Arbitration

142 Although an undisputed characteristic of international arbitration as a private form of dispute resolution is the focus on the consent of the parties,[296] the ultimate source of authority and basis of arbitration continue to be the subject of scholarly debate.

143 One school of thought has characterised arbitration as a system of contractual relationships and thus primarily founded in the private autonomy and the will of the actors within the arbitral process, particularly the parties in dispute[297] and the arbitrators. From this perspective, the arbitrators perform a primarily contractual function. The ultimate sources of authority are thus the agreements between the different actors, most notably the arbitration agreement.[298]

144 In contrast to this approach, the jurisdictional analysis considers arbitration to depend primarily on the authority of a state, particularly the one of the seat of arbitration. According to this view, the arbitrators are private judges who ultimately derive their authority from the state, which in turn allows the parties to avoid its courts and instead submit to arbitration.[299]

295 See in detail Chapters 9–13.

296 ARROYO, 201; BÖCKSTIEGEL, 2–3.

297 The term 'parties' in this thesis usually refers only to the 'parties in dispute' (the 'arbitrants', so to speak; see for this term LENDERMANN, 233), as is the case here. Where the arbitrants are mentioned alongside parties in a contractual relationship other than the arbitration agreement or the underlying substantive contract, the latter are referred to as the 'parties' whereas the arbitrants are referred to as the 'parties in dispute'.

298 For everything BARRACLOUGH/WAINCYMER, 209–210; BORN, International Commercial Arbitration, 240.

299 For everything BERMANN, 229; GAILLARD, paras. 11–22.

A third school of thought, which is, however, less prevalent than it used to be, argues that arbitration is integrated neither in a contractual nor in a particular national order but is instead based on a transnational order. The source of this order is primarily the so-called *lex mercatoria*.[300] 145

It would exceed the scope of this analysis to weigh these approaches against each other. Fortunately, this is not necessary because a detailed examination of these approaches would not facilitate the understanding of expedited procedures. Nonetheless, certain aspects of these three different schools of thought are relevant to the conduct of arbitration proceedings, such as the qualification of the relationship between the arbitrators and the parties in dispute. Therefore, where necessary, such differences between the varying approaches will be highlighted in order to better understand potential problems under expedited procedures. 146

II. Sources of Law Affecting the Conduct of Arbitral Proceedings

Regardless of the approach concerning the foundation of arbitration, at least four sources of law[301] affect the conduct of arbitral proceedings (as well as other aspects) by imposing duties on and granting rights to the different actors[302] in an arbitration. In what follows, the relationship between these sources will be explained in a first step (below sub-section 1). In a second step, these sources will be presented: the arbitration agreement (below sub-section 2), arbitration rules and other contractual relationships (below sub-section 3), the law of the seat of arbitration (the so-called *lex arbitri;* below sub-section 4), and international treaties (below sub-section 5).[303] 147

1. Relationship between the Sources

During an arbitral proceeding, all four sources of law just mentioned may be relevant for, and indeed affect the conduct of, the proceedings. The importance of these sources of law for the actual conduct of the proceedings is often in inverse proportion to their binding force though: the arbitration agreement 148

300 For everything GAILLARD, paras. 40-66; HENDERSON, 893-894.

301 'Law' in this context is not to be understood as a formalised legal act passed by the legislature of a state but rather as a source for binding legal obligations.

302 Being understood as the parties in dispute, the arbitrators, and the arbitral institution.

303 For everything MOSES, International Commercial Arbitration, 6; GÖKSU, paras. 183, 238; PFISTERER/SCHNYDER, 11-12.

and the arbitration rules may frequently in much greater detail regulate the conduct of the proceedings and define the rights and duties of the parties in dispute with numerous provisions and stipulations. Yet ultimately the mandatory provisions of the *lex arbitri* and international treaties take precedence over mere private agreements like arbitration agreements and arbitration rules.[304]

149 The consequence of this finding is that the arbitration agreement and the arbitration rules as private agreements must respect the mandatory provisions of the seat of arbitration and potentially the place of enforcement, which is usually the NYC. Not doing so will risk a setting aside of the award and refusal of its enforcement.[305]

2. The Cornerstone: The Arbitration Agreement

150 The agreement of the parties to arbitrate forms the basis of arbitration.[306] The arbitration agreement is of such fundamental importance for the principle of party autonomy that a closer examination of such agreements is necessary at this point.

2.1 Definition and Separate Nature

151 An arbitration agreement can be defined as an agreement under which the parties agree to submit some or all disputes arising out of a defined legal relationship to arbitration to the exclusion of the jurisdiction of state courts.[307] The contractual qualification of an arbitration agreement under Swiss law is controversial though.[308]

152 Under Swiss law, as well as under the laws of many other countries, the arbitration agreement forms a contract that is separate from the underlying substantive contract it relates to.[309] This so-called doctrine of severability implies that the substantive contract and the arbitration agreement must be considered as legally separate from each other. This separate nature requires a separate qualification of the arbitration agreement and the law applicable to it as well as a separate determination of the validity of the arbitration agreement and the substantive contract.

304 For everything HENDERSON, 898; MOSES, International Commercial Arbitration, 6-8; cf. for the importance of international treaties for international arbitrations seated in Switzerland art. 194 Swiss PILA.

305 See in detail below Chapter 13.

306 BÄRTSCH/PETTI, in: Geisinger/Voser, 25; BORN, Law and Practice, 1-3.

307 Article 7 Swiss PILA; STACHER, Schiedsvereinbarung, paras. 150-153.

308 See immediately below paras. 156-158.

309 Article 178 para. 3 Swiss PILA; BSK-GRÄNICHER, art. 178 paras. 90-92; KAUFMANN-KOHLER/RIGOZZI, 3.07-3.09; STACHER, Schiedsvereinbarung, para. 9.

2.2 Elements

An arbitration agreement consists of various elements. Some of them are essential elements, whereas others are merely supplementary components that may nevertheless be useful.[310] 153

Among the essential elements, or the *essentialia negotii,* of an arbitration agreement are: the agreement on the resolution of a dispute by arbitration, the determination of the parties bound by the agreement, and a description of the dispute referred to arbitration. In addition, the seat of arbitration must be determinable.[311] 154

Additional features of the arbitration agreement may include *inter alia* the choice of arbitration rules or procedural agreements relating to the conduct of the proceedings, the law governing the arbitration agreement, specific requirements for the appointment of arbitrators or a waiver of judicial recourse against an award.[312] All of these aspects are non-essential elements of an arbitration agreement. Yet the choice of arbitration rules is an especially common and useful element in arbitration agreements.[313] 155

2.3 Qualification

a Controversy

In regard to the qualification of arbitration agreements, the Swiss Federal Tribunal initially considered the arbitration agreement to constitute a substantive agreement.[314] A substantive agreement is to be understood as an agreement that creates mutual obligations among the parties who have to perform these duties. If a party fails to perform these obligations, that party becomes liable for damages.[315] 156

Subsequently, the court abandoned this position and followed[316] authorities that considered the arbitration agreement to be a procedural agreement.[317] A procedural agreement, in contrast to a substantive agreement, does not 157

310 For everything BERGER/KELLERHALS, paras. 284-308; GIRSBERGER/VOSER, paras. 466-469; in detail BORN, Drafting and Enforcing, 36-133.

311 For everything BSK-GRÄNICHER, art. 178 para. 30; MÜLLER/RISKE, Chapter 12 PILS, Article 178, in: Arroyo, paras. 47-49; DFT 142 III 239 c. 3.3.1.

312 BÄRTSCH/PETTI, in: Geisinger/Voser, 41-44; BERGER/KELLERHALS, para. 308; BORN, Law and Practice, 47-42, 83.

313 For everything GIRSBERGER/VOSER, para. 470; KAUFMANN-KOHLER/RIGOZZI, para. 3.24; BLACKABY/PARTASIDES/REDFERN/HUNTER, paras. 2.79-2.80.

314 DFT 40 II 77 c. 2.

315 GABRIEL, Damages for Breach of Arbitration Agreements, in: Arroyo, para. 21.

316 DFT 116 Ia 56 c. 3a; DFT 101 II 168 c. 1; originally: DFT 41 II 534 c. 2.

317 See the references in GIRSBERGER/GABRIEL, 820.

directly create mutual obligations between the contracting parties. Instead, it regulates the parties' relationship before an adjudicative body such as state courts or arbitral tribunals seated in Switzerland.[318] Ordinarily, with arbitration agreements or choice-of-court agreements, this relationship consists of the access to a court or tribunal to the exclusion of other courts and tribunals.[319]

158 Increasingly, however, a prevailing number of commentators have argued that an arbitration agreement cannot be qualified as either a substantive or a procedural agreement but rather is a mixed contract with both substantive and procedural aspects.[320] The Swiss Federal Tribunal has not expressly reversed its position.[321]

b Relevance of the Qualification

159 The qualification of arbitration agreements under Swiss law has traditionally been significant for remedies for breaches of such an agreement. According to the traditional view, if the arbitration agreement is considered a mere procedural agreement, it is not possible to claim damages for a breach of the agreement as Swiss law does not recognise compensation for damages as a remedy for a breach of procedural duties.[322] If, however, the arbitration agreement (at least partially) constitutes a substantive contract, a breach of the arbitration agreement may lead to a valid claim for damages.

160 In contrast, however, for choice-of-court clauses in international litigation, HABERBECK pragmatically argues that the qualification of such clauses as substantive, procedural, or mixed agreements is irrelevant. According to this author, the obligation to seize the agreed upon state court is enforceable, and a violation of this obligation may justify a claim for damages as long as the parties to the choice-of-court clause cannot reasonably doubt that they are bound by that clause.[323]

c Comparison with Choice-of-Court Agreements

161 The qualification of choice-of-court agreements could by analogy help to decide the controversial qualification of arbitration agreements. Unfortunately,

318 For everything GABRIEL, Damages for Breach of Arbitration Agreements, in: Arroyo, para. 21; GABRIEL/GIRSBERGER, 820–822.

319 *Ibid*; HABERBECK, paras. 2–3; MANNER/MOSIMANN, 1198–1199.

320 BERGER/KELLERHALS, para. 309; BSK-GRÄNICHER, art. 178 para. 4; GIRSBERGER/VOSER, para. 272.

321 See DFT 116 Ia 56 c. 3a.

322 See for a description of this position GABRIEL, Damages for Breach of Arbitration Agreements, in: Arroyo, para. 7.

323 For everything HABERBECK, para. 3.

under Swiss law the qualification of choice-of-court agreements is controversial as well, with the same three potential qualifications as for arbitration agreements being proposed for choice-of-court clauses.[324] A recent decision by the German Supreme Court for German law qualified such agreements as substantive contracts concerning procedural aspects. Furthermore, the court considered choice-of-court clauses as a valid basis for damages claims for breaches of such clauses. The court added that a damages claim would be possible even if one were to qualify the choice-of-court agreement as a purely procedural agreement.[325]

d Evaluation

In accordance with the prevailing view, it is submitted that an arbitration agreement is a mixed contract with both procedural and substantive elements. The qualification of an arbitration agreement partially follows from the various elements such an agreement may contain. For example, in addition to the consent to arbitration, an arbitration agreement may provide for the language of the arbitral proceedings. Such a language requirement is not primarily meant to oblige the parties to use this specific language towards each other, but rather to determine which language the tribunal has to implement vis-à-vis the parties.[326] By contrast, the consent to arbitrate a dispute requires the parties to refrain from litigating the same dispute. In other words, such a stipulation is meant to require certain actions of the parties and to prohibit others.[327] This is in conformity with the finding of the German Supreme court concerning choice-of-court agreements under German law.[328] 162

In conclusion, an arbitration agreement forms a mixed contract with both procedural and substantive elements. As a result, a breach of an arbitration agreement may, when it concerns substantive obligations, lead to liability for damages of the party in breach.[329] 163

324 HABERBECK, paras. 2-3.

325 For everything BGH III ZR 42/19 of 17 October 2019 c. 26-27.

326 Cf. for everything GABRIEL, Damages for Breach of Arbitration Agreements, in: Arroyo, paras. 21-22.

327 Cf. for everything GIRSBERGER/GABRIEL, para. 828; PFISTERER/SCHNYDER, 42-43; STACHER, Schiedsvereinbarung, paras. 176-187.

328 BGH III ZR 42/19 of 17 October 2019 c. 26-27.

329 See for everything also GABRIEL, Damages for Breach of Arbitration Agreements, in: Arroyo, paras. 20-24, with reference to decision Swiss Federal Tribunal no. 4A_444/2009 of 11 February 2010 (confirming that the awarding of damages by a tribunal for a breach of an arbitration agreement is not contrary to Swiss public policy) and Swiss Federal Tribunal no. 4A_232/2013 of 30 September 2013 (confirming that a tribunal seated in

2.4 Validity

164 In order to be valid, an arbitration agreement must be formally and substantively valid and the requirements of subjective and objective arbitrability must be fulfilled.[330]

a Formal and Substantive Validity

165 The formal validity of the arbitration agreement is subject to the mandatory form requirements of the respective *lex arbitri*.[331] Swiss law requires an arbitration agreement to be in writing.[332] This formal requirement is *inter alia* supposed to protect the parties.[333] Yet, these formal requirements under Swiss law apply only to the essential elements of the arbitration agreement,[334] discussed in the next paragraph. The formal requirements of art. 178 para. 1 PILA are, according to the majority view, a precondition for the validity of the arbitration agreement. Accordingly, the form requirement does not merely serve evidentiary purposes.[335]

166 The substantive validity of an arbitration agreement concerns the question of whether the parties consented to arbitrate a dispute and thereby excluded the jurisdiction of state courts for this dispute.[336] In order for such consent to exist, it is generally accepted that the parties need to specify the disputes they subject to arbitration and the tribunal competent to decide the dispute. For the second aspect, it is sufficient if the tribunal is determinable. Thus, the consent to arbitrate and the designation of the legal relationship to be submitted to arbitration form the essential elements of the arbitration agreement.[337]

167 The question of whether or not the parties actually reached consent to arbitrate is subject to the law applicable to the substantive validity of the

Switzerland has the jurisdiction to award damages for such a breach); see further below paras. 209-210.

330 PFISTERER/SCHNYDER, 23.

331 See in general BORN, International Commercial Arbitration, 736-751.

332 Article 178 para. 1 Swiss PILA: *'As to form, the arbitration agreement shall be valid if it is made in writing or any other means of communication that establishes the terms of the agreement by a text.'*

333 CHK IPRG-FURRER/GIRSBERGER/AMBAUEN, art. 178 para. 18; ZK IPRG-OETIKER, art. 178 para. 12.

334 BERGER/KELLERHALS, para. 431.

335 For everything, with a comprehensive overview, see GIRSBERGER/VOSER, para. 337; see, however, for a different view on the lack of signature BERGER/KELLERHALS, para. 423.

336 Article 178 para. 2 Swiss PILA; GIRSBERGER/VOSER, para. 283.

337 For everything BSK IPRG-GRÄNICHER, art. 178 paras. 53-54.

arbitration agreement.[338] This law is also relevant to the interpretation of the arbitration agreement.[339] Article 178 para. 2 Swiss PILA, in the spirit of a *favor validitatis*[340] provision, sets forth that the arbitration agreement is substantively valid if it conforms to the law chosen by the parties, the law applicable to the dispute (in particular the underlying substantive contract), or Swiss law.

b Objective and Subjective Arbitrability

In order for an arbitration agreement to be valid and operable, it is further required that the subject matter of the dispute is capable of being resolved by arbitration according to the laws of the seat of arbitration (objective arbitrability).[341] Moreover, the parties to the arbitration agreement must have the capacity to enter into such agreement (subjective arbitrability).[342] 168

2.5 Formalities and Timing of Concluding the Agreement

An arbitration agreement can be concluded in two differing ways: it can either be a clause contained in an underlying substantive contract (for which the term 'arbitration clause' is common) or it can form an agreement that is physically separate from the underlying substantive agreement.[343] 169

The parties can conclude the arbitration agreement either before or after a dispute occurs. An arbitration clause is ordinarily concluded before a dispute has arisen whereas a separate agreement can, depending on the circumstances, be concluded before or after a dispute arises.[344] 170

2.6 Interpretation

An arbitration agreement, like any other type of agreement, is subject to interpretation. In particular, it may be necessary to interpret the validity, scope, and content of the agreement.[345] The rules of interpretation follow from the law applicable to the aspect in question. This is usually the law governing the substantive validity of the arbitration agreement.[346] 171

338 See art. 178 paras. 1 and 2 Swiss PILA; further KAUFMANN-KOHLER/RIGOZZI, paras. 3.75-3.80.

339 MÜLLER/RISKE, Chapter 12 PILS, Article 178, in: Arroyo, paras. 59-60.

340 CHK IPRG-FURRER/GIRSBERGER/AMBAUEN, art. 178 para. 20.

341 GIRSBERGER/VOSER, para. 317.

342 PFISTERER/SCHNYDER, 23-26.

343 FOUCHARD/GAILLARD/GOLDMAN, para. 386; GIRSBERGER/VOSER, para. 271.

344 For everything GIRSBERGER/VOSER, para. 271.

345 BORN, Law and Practice, 105-108; GIRSBERGER/VOSER, paras. 284-316; see in general for these different aspects BLESSING, 168-169.

346 For everything GIRSBERGER/VOSER, para. 374.

172 The interpretation of an arbitration agreement under Swiss law primarily follows the ordinary rules of contract interpretation. In particular, where the parties have a mutual understanding of the arbitration agreement, this understanding must prevail. When, however, the parties disagree on the interpretation of the agreement, the arbitration agreement must be interpreted in an objective manner based on the principle of trust. It must hence be determined how each of the parties must and should have understood each other's declarations.[347]

173 In addition to these general rules, the Swiss Federal Tribunal has developed further rules for the interpretation of arbitration agreements. Specifically, the court applies a restrictive interpretation in determining whether or not the parties have concluded an arbitration agreement. Once this is established, the court applies an extensive or liberal interpretation of the content and scope of disputes that the agreement covers.[348]

3. Arbitration Rules and Other Agreements

174 In addition to the arbitration agreement, in institutional arbitration the rules of the respective arbitration institution are of great significance for the conduct of the proceedings. This phenomenon will be analysed in greater detail in Chapter 7.

175 Two further contractual relationships that may prove important for the conduct of the arbitration are the agreements between the parties in dispute on the one side and the arbitrators on the other, and the agreements between the arbitrators and the arbitration institution. These relationships will be examined more closely in Chapter 5.

4. The Lex Arbitri

176 The *lex arbitri* is the arbitration law of the country the arbitration is legally attached to, i.e., where the seat of the arbitral tribunal is.[349] While each country has its own *lex arbitri* with potentially differing rules,[350] it can nonetheless

347 For everything DFT 142 III 239 c. 5.2.1; 140 III 134 c. 3.2; decision Swiss Federal Tribunal no. 4A_342/2019 of 6 January 2020 c. 3.

348 For everything DFT 140 III 134 c. 3.2; decision Swiss Federal Tribunal no. 4A_150/ 2017 of 4 October 2017 c. 3.2.

349 HENDERSON, 886-887.

350 GIRSBERGER/VOSER, para. 22; although for example the UNCITRAL ML promotes unifying tendencies, cf. its art. 2A para. 1; cf. further on the unifying tendencies LEWIS, 30-48.

be concluded that most *leges arbitri* contain provisions that at least pertain to the same subject matter.[351] These provisions can be mandatory or non-mandatory.[352]

The *lex arbitri* serves different functions, which *inter alia* has consequences for the qualification of these provisions as mandatory rules. In arbitration-friendly jurisdictions, the *leges arbitri* mostly contain non-mandatory provisions that apply only absent an agreement by the parties. As such, these provisions are meant to facilitate the arbitral process. While arbitration-friendly jurisdictions also contain mandatory provisions, their number and scope are limited. Regularly, mandatory provisions concern fundamental procedural guarantees and rights of the parties such as the right to apply for a setting aside of the award.[353] 177

Usually, the *lex arbitri* is primarily relevant for the procedural aspects of the dispute and thus for the conduct of the arbitration. Therefore, the *lex arbitri* qualifies primarily as procedural law.[354] The substantive aspects of the dispute depend on the applicable substantive law, which may very well be different from the *lex arbitri*.[355] 178

5. Treaties

Treaties may, like the *lex arbitri*, affect the arbitration proceedings with mandatory provisions. Yet at least in commercial arbitration, the effect of treaties on the proceedings is rather indirect because the most important treaty is the NYC, which is meant to regulate only the enforcement of an award and primarily addresses and binds the contracting states.[356] 179

However, if an award needs to be enforced against a party in a jurisdiction other than the seat of arbitration, the provisions of the NYC become relevant for the conduct of the arbitration:[357] in order to increase the chances of enforcement, the arbitration should be conducted in conformity with the provisions of this treaty. 180

351 Cf. arts. 176-194 Swiss PILA; further Hong Kong AO; English Arbitration Act; Singapore IAA; UNCITRAL ML.

352 AMBAUEN, paras. 160-166; HENDERSON, 898.

353 For everything AMBAUEN, para. 242; HOFBAUER, History of Arbitration, in: Arroyo, para. 8; cf. further art. 182 para. 3 and art. 190 Swiss PILA.

354 For everything HENDERSON, 887-888.

355 See for example for Switzerland art. 187 Swiss PILA.

356 LANDBRECHT/WEHOWSKY, 693-694.

357 See especially art. V para. 1 lit. b NYC.

III. Conclusion

181 The preceding section has shed light on the various sources of provisions that are relevant to the conduct of arbitration proceedings. The most important ones are private agreements such as the arbitration agreement and the arbitration rules chosen by the parties.

Chapter 5
Duties in Institutional Arbitration

182 In institutional arbitration, three actors are crucial: the parties in dispute, the arbitrators, and the arbitral institution.[358] As the next section will explain, these actors may over the course of arbitral proceedings have various duties. It goes without saying that these duties are essential for the conduct of the proceedings. In expedited proceedings, some of these duties may be of even greater importance than in ordinary procedures. Consequently, in order to discuss how expedited proceedings should be conducted (see Chapter 10), it is first necessary to assess which duties are relevant during these proceedings. The present chapter attempts to clarify this question.

183 This chapter begins with general considerations that explain in detail the significance of this Chapter (below section I); the analysis then addresses the duties of the parties (below section II), the duties of the arbitrators (below section III), and the duties of the arbitral institution (below section IV). Finally, this chapter provides a conclusion and outlook for the subsequent chapters (below section V).

I. General Considerations and Significance of this Chapter

184 In order to determine the special features that exist under expedited procedures as well as to determine how a tribunal, the parties, and, where appropriate, the arbitral institution should approach them, the consequences of

358 See in detail ONYEMA, The Arbitrator's Contract, 60–76.

the general legal framework affecting arbitration described in Chapter 4 need to be examined more closely. More specifically, under what duties the different actors in an arbitration are must be analysed in order to determine: (1) by what means the goal of combining quality with time-efficiency and cost-effectiveness in expedited procedures can be achieved based on the existing duties of the parties, arbitrators, and institutions, and (2) what potential limits exist. After all, quality and efficiency cannot exist in a legal void but rather need to conform to the existing boundaries of the duties of the different actors in arbitration. The question, however, is whether these boundaries can be used to achieve the goal of combining quality with efficiency.[359]

Accordingly, whether the duties of the parties, arbitrators, and arbitral 185
institutions contribute to the quality and efficiency of the proceedings, or if these duties can at least be employed for the purpose of combining quality and efficiency, requires further examination. Conversely, it is also possible for these duties negatively affect the quality and efficiency of the proceedings.

This analysis will form the basis for the discussion that features in the 186
next two chapters, which will examine how party autonomy, due process, and efficiency can be combined in a meaningful way in order to achieve the goal of high-quality expedited arbitration. Only after defining in the first place which duties each actor in the arbitral process has to comply with will it then be possible to discuss in a meaningful way what these actors should and should not do in expedited arbitration.

II. Duties of the Parties

This sub-section analyses the duties that the parties have during an arbitration. 187
Of particular relevance is the question of whether the parties have a specific duty to contribute to the efficiency of the proceedings.

1. General Basis and Nature of the Duties

1.1 Basis of the Duties Towards Each Other

The primary source of the duties that the parties have towards each other is 188
the arbitration agreement.[360] As shall be seen, the arbitration agreement may directly contain rules in the form of specific provisions (for example the duty

359 Similarly DE LY, para. 2.31.

360 Cf. GABRIEL, Damages for Breach of Arbitration Agreements, in: Arroyo, *passim*; GIRSBERGER/GABRIEL, 822-825; STACHER, Schiedsvereinbarung, paras. 159-172.

to arbitrate) or it may indirectly contain rules (e.g. by referring to arbitration rules contain specific provisions on the conduct of the proceedings).

189 In addition to this contractual basis, statutory provisions of the *lex arbitri*, treaties, or general legal principles may impose further duties on the parties or merely complement the existing contractual duties.

1.2 Basis of the Duties Towards the Arbitrators and the Institution

190 As far as the relationships between the parties on the hand and the arbitrators and the institution on the other hand are concerned, these relationships and their content primarily follow from the specific contracts between the parties and the arbitrators and between the parties and the institution.[361]

2. General Duty to Comply with the Arbitration Agreement

191 The conclusion of an arbitration agreement leads to what is known as the positive legal effect of the arbitration agreement. Under this positive effect, the parties are under the already mentioned obligation to arbitrate a dispute that is within the scope of the arbitration agreement.[362] The underlying justification of this duty is the principle of *pacta sunt servanda*. In other words, the parties need to comply with the arbitration agreement as a contract.[363] This duty enjoys universal recognition and may, in different jurisdictions, be enforced by various means including court orders and damage claims.[364]

3. Specific Contractual Duty to Cooperate in the Arbitral Proceedings

192 Following from the general duty to comply with the arbitration agreement, it has been further suggested that the parties have a contractual duty to cooperate in arbitral proceedings.[365]

361 See for this in detail BERGER, 339-340; LENDERMANN, 233-234; ONYEMA, The Arbitrator's Contract, 60-83.

362 See above paras. 157 and 162; cf. for an international overview FORTESE, *passim*.

363 GIRSBERGER/VOSER, para. 267; PACZOSKA KOTTMANN, paras. 96, 153-156, 168-169; STACHER, Schiedsvereinbarung, para. 183.

364 BORN, International Commercial Arbitration, 1368-1410; PACZOSKA KOTTMANN, paras. 373-395.

365 BORN, International Commercial Arbitration, 1356-1359; PACZOSKA KOTTMANN, para. 195; STACHER, Einführung, 287.

3.1 General Content

The specific duty to cooperate in arbitration is said to include cooperative and thereby also efficient participation in the arbitral process.[366] Aspects of such cooperative behaviour include participation in the constitution of the tribunal,[367] compliance with the tribunal's orders, directions, and awards,[368] as well as desisting from obstructive behaviour in the form of an abuse of rights[369]. As a result, the duty to comply with the arbitration agreement is both a positive and a negative one: a party must perform certain actions as well as refrain from others. 193

3.2 Basis

Notwithstanding the risk of engaging in truisms, the basis for a duty to comply with the arbitration agreement and to participate in arbitration proceedings is the arbitration agreement itself.[370] Thus, this duty is contractual in nature and ultimately rests on the principle of *pacta sunt servanda* as well.[371] 194

If one follows the qualification of the arbitration agreement under Swiss law as a mixed contract, as proposed in this thesis,[372] accepting an obligation of the parties to submit a dispute within the scope of the arbitration agreement to arbitration is a logical conclusion. A violation of this duty may even lead to damage claims.[373] Whether one may further infer a more specific and enforceable duty to subsequently cooperate in proceedings from this general duty is, however, more doubtful. This will be examined in the following sub-section. 195

3.3 An Obligation to Cooperate, Not Mere Incumbency?

Even if the conclusion of an arbitration agreement has some effect on the legal relationship between the parties, the question is whether the parties have a binding duty to cooperate or whether the effect of the arbitration agreement is of a less rigorous nature Specifically, the parties bound by an arbitration agreement could either have an obligation or a mere incumbency to cooperate. 196

366 BORN, International Commercial Arbitration, 1353–1354.

367 KAUFMANN-KOHLER/RIGOZZI, para. 3.33; STACHER, Schiedsvereinbarung, paras. 300–307.

368 JERMINI/GAMBA, in: Zuberbühler/Müller/Habegger, art. 15 para. 31; cf. further KAUFMANN-KOHLER/RIGOZZI, para. 4.187.

369 DFT 108 Ia 193 c. 3; KAUFMANN-KOHLER/RIGOZZI, para. 3.33.

370 KAUFMANN-KOHLER/RIGOZZI, para. 3.33.

371 See above para. 191.

372 See above para. 162.

373 For everything GABRIEL, *passim*; MANNER/MOSIMANN, 1201; PACZOSKA KOTTMANN, para. 197.

a Obligations and Incumbencies under Swiss Law

197 Under Swiss law, an agreement creates binding obligations for the parties. These obligations can be further divided into main obligations and primary and secondary ancillary obligations.[374] Main obligations are the obligations that are characteristic for an agreement. They can be enforced by means of an independent action for specific performance and may trigger damage claims in case of non-compliance.[375]

198 Primary ancillary obligations are also capable of being enforced with an action and may in case of violation give rise to a liability for damages. Nevertheless, primary ancillary obligations differ from main obligations in that they are not the characteristic obligations under an agreement. Lastly, secondary ancillary obligations may in case of violation lead to damage claims as well. However, unlike primary ancillary obligations, they cannot be enforced by way of specific performance independently of other obligations.[376]

199 Incumbencies, in contrast, are neither capable of enforcement nor does a violation of an incumbency trigger a damage claim. The only consequence of non-compliance with an incumbency is a loss of rights for the non-compliant party.[377]

b Evaluation of an Obligation to Cooperate in Arbitral Proceedings

200 It has been established in the foregoing that the conclusion of an arbitration agreement as a mixed contract with substantive and procedural elements under Swiss law may lead to obligations of the parties, whose violation may even lead to a right to damages. Particularly, the principle of *pacta sunt servanda* requires the submission of disputes within the scope of the arbitration agreement to arbitration. However, using the mere consent to arbitration as a basis for establishing an obligation to actively participate in the proceedings might, at first glance, rather far-fetched.

201 Indeed, numerous authors point out that neither an interpretation of the parties' mere consent to arbitration nor the Swiss *lex arbitri* contain a sufficient basis for assuming such a far-reaching obligation. Accordingly, the 'obligation' to arbitrate in good faith or the duty to cooperate in arbitration proceedings is said to be a mere incumbency, whose violation does not lead

374 HUGUENIN, para. 97.

375 For everything *ibid*, para. 98.

376 For everything *ibid*, para. 106.

377 For everything *ibid*, para. 107.

to any consequences other than a potential loss of rights.[378] Yet other commentators argue that arbitration, as a consensual form of dispute resolution, depends on the parties' cooperation. Therefore, the parties are under an actual obligation to cooperate. A violation of this cooperation only leads to damage claims though. Hence, according to that view, this obligation is classified as a secondary ancillary obligation.[379]

It is proposed that the stronger arguments speak against a contractual 202
obligation to cooperate in arbitral proceedings based on the mere consent to arbitrate.

First, a focus on arbitration as a consensual form of dispute resolution 203
seems to overemphasise the basis of arbitration, namely the arbitration agreement. Once the arbitration agreement is invoked, i.e., a dispute is submitted to arbitration, the parties are, by definition, in dispute. It would be too much to ask from the parties that they still consider their relationship to be subject to a cooperative consensus. This is not to say that the parties necessarily need to consider each other as enemies. On the contrary, oftentimes the parties are interested in preserving a business relationship. Yet where the parties are not willing to cooperate, it does not seem appropriate to blame the respondent for not helping the claimant in receiving an award in its favour even faster, which is, however, not to validate guerrilla tactics.

Second, some national laws like the English Arbitration Act require the 204
parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.[380] The necessity to set forth such statutory requirements in the *lex arbitri* further indicates that the mere consent to arbitration is insufficient to affirm a contractual obligation to cooperate.

This, however, does not mean that a contractual obligation to actively 205
cooperate in arbitration never exists. When the parties choose institutional arbitration, the parties' agreement also encompasses the rules of the institution. A number of arbitration rules contain provisions that require not only the tribunal but also the parties to conduct the proceedings in an efficient manner and in good faith.[381] Based on the principle of *pacta sunt servanda,*

378 For everything BERGER/KELLERHALS, para. 1159; KAUFMANN-KOHLER/RIGOZZI para. 6.42 (only regarding the loss of rights); POUDRET/BESSON, para. 375; STACHER, Schiedsvereinbarung, para. 372.

379 For everything PACZOSKA KOTTMANN, paras. 194–197.

380 Section 40(1) English Arbitration Act; for further jurisdictions see BORN, International Commercial Arbitration, 1355 fn. 37.

381 See for example art. 9 CIETAC Rules; art. 14.2 LCIA Rules; art. 16.1 Swiss Rules.

the parties will have to comply with these kinds of provisions as well.[382] Where the rules contain provisions that require the parties to conduct the proceedings in an efficient manner and in good faith, it therefore seems plausible to affirm the existence of a secondary ancillary obligation. Absent such provisions, however, there seems to be neither a main nor an ancillary contractual obligation to actively cooperate in arbitration.

3.4 Usefulness for Increasing Procedural Efficiency

206 Regardless of whether or not the conclusion of an arbitration agreement is sufficient to affirm an obligation to actively cooperate, the question is whether such an obligation would add at all to the efficiency of proceedings. Evaluating the merit of the obligation to cooperate and its benefits in increasing the efficiency of arbitral proceedings leads to two observations.

207 First, even though an obligation to cooperate provides a theoretically attractive concept for increasing procedural efficiency, its use in practice appears limited. The reason is that the determination of such an obligation is difficult. An obligation to cooperate, and thereby to promote the efficiency of the proceedings, may require cooperation only where the parties do not have legitimate reasons for a refusal to cooperate.[383] For example, if a proposed procedural timetable is too strict, it might restrict a party in the exercise of its due process rights. In such a scenario, a party's refusal to accept the timetable is not a violation of the duty to cooperate. Furthermore, while such an obligation may be workable in theory, parties may in practice always put forward seemingly legitimate reasons as to why it is impossible for them to cooperate in this very instance.[384] Thus, the obligation to cooperate may be viable as a way of prohibiting obstructive actions but not to actively demand supportive actions.

208 Second, it appears questionable as to whether there is any additional benefit of a specific contractual obligation to cooperate. While it might, for the foregoing reason, be difficult to compel a party to an active action based on the obligation to cooperate, it should nonetheless be possible to disallow an action based on this obligation when the action constitutes a clear abuse of rights.[385] As will be explained in further detail in paras. 213-222, it can be argued that the parties are under a statutory duty of good faith. A clearly abusive action likely conflicts with said statutory duty to arbitrate in good faith.

382 See for example for the Swiss Rules JERMINI/GAMBA, in: Zuberbühler/Müller/Habegger, art. 15 paras. 24-31; cf. further STACHER, Einführung, para. 287.

383 See for this thought already DFT 108 Ia 197 c. 3.

384 Cf. for an instructive example (regarding the compliance with deadlines for the filing of submissions) BÜHLER/HEITZMANN, 131.

385 See above para. 193.

3.5 Consequences and Enforcement

The preceding section established that an actual obligation to cooperate in the arbitral proceedings does not exist unless there are express provisions and therefore agreements on such an obligation. Otherwise, this duty to cooperate is, at most, an incumbency. However, if one were to consider this duty as a secondary ancillary obligation, a violation thereof may lead to a damage claim by the other party.[386] 209

The requirements for the damage claim for breach of contract under Swiss law follow from art. 97 CO.[387] They include a breach of a contractual obligation, a damage, causation between the breach and the damage, as well as a fault of the party in breach. In any event, it appears that such a claim for damages for the breach of an arbitration agreement will be successful only in the rarest of cases. An often-difficult problem will be the quantification of the damage caused by an unjustified refusal to cooperate.[388] Moreover, establishing that the party at fault unjustifiably refused to cooperate will likewise encounter many obstacles. 210

3.6 Modification of the Duty in Expedited Procedures?

It might be proposed that the parties' duty to cooperate is enhanced under expedited procedures in order to achieve the goal of increased efficiency. The argument would be that since the procedure is supposed to be faster and cheaper than in ordinary arbitration, the standard for the parties' cooperation must also be higher, thereby potentially turning the incumbency into an obligation. Yet, the provisions on expedited procedures of institutional rules do not support such a position, and it seems that no scholar is advocating for such a modification or extension of this duty based on the respective provisions. 211

Whether the parties may, in addition, specifically agree, on an enhanced duty to cooperate is a related but separate question that is particularly relevant under expedited procedures. As will be explained in further detail below in paras. 313–316, an interpretation of the parties' mere choice of expedited procedures usually does not support an intention to agree on an increased duty to cooperate. 212

386 See above para. 198.

387 GABRIEL, 2818–2819; GIRSBERGER/GABRIEL, 826; MANNER/MOSIMANN, 1201–1203.

388 MANNER/MOSIMANN, 1203–1204; PACZOSKA KOTTMANN, para. 198.

4. Statutory Duty to Arbitrate in Good Faith

213 In addition to a potential contractual duty to cooperate in the arbitral proceedings, it is plausible that such cooperation may also be achieved via a statutory duty to arbitrate in good faith.

4.1 General Content

214 When analysing a statutory duty of good faith or duty to arbitrate in good faith, one of the main challenges is to identify the content of the rather vague and potentially far-reaching principle of good faith.[389] An express reference to the principle in private law is found in the substantive provision of art. 2 CC, which, however, does not expressly set forth the content of the principle of good faith. It is nevertheless accepted that the principle of good faith under Swiss (private) law includes *inter alia* a prohibition of contradictory behaviour *(venire contra factum proprium)*.[390]

215 In addition to the principle enshrined in the substantive provision of art. 2 CC, there is also a generally recognized procedural duty of the parties to act in good faith in Swiss-seated arbitrations.[391] This duty includes a prohibition to act in a contradictory way. Generally, the prohibition to act in a contradictory way in arbitration procedures prevents the parties from reaching an agreement on an issue in the first place and acting in direct contradiction of this agreement in the second place.[392] In addition, a party that first does not object to an issue is prohibited from later opposing this very issue. This aspect of good faith is generally known as a forfeiture of rights.[393]

216 Beyond these elements of the principle of good faith, other (potential) components of this principle in arbitration receive little attention amongst commentators.[394] A few argue that further components may be derived from the principle of good faith set forth in substantive law (art. 2 Swiss CC)[395] as well as from the corresponding principle in litigation proceedings (for example art. 52 Swiss CPC).

389 See on this problem LANDBRECHT/WEHOWSKY, 692.

390 Decision Swiss Federal Tribunal no. 4A_597/2013 of 19 June 2014 c. 2.1; BSK ZGB I-HONSELL, art. 2 para. 43.

391 BERGER/KELLERHALS, para. 1167, with reference to DFT 102 IA 574 c. 6.

392 For everything BK ZPO III-GABRIEL/BUHR art. 373 para. 101.

393 For everything KNOLL, 12 PILS, Article 182, in: Arroyo, para. 27.

394 See however PACZOSKA KOTTMANN, paras. 188-198.

395 See e.g. PACZOSKA KOTTMANN, paras. 188-198. In any event, article 2 Swiss CC, although technically only the first para. of the provision refers to good faith whereas the second para. refers to the abuse of rights.

In application of art. 2 Swiss CC, it is for example submitted that an exercise of a right without a legally protected interest, the latter being a violation of the principle of good faith in substantive law,[396] should also be considered a violation of the statutory duty to arbitrate in good faith. A prime example of this kind of abuse is a procedural motion whose only purpose is to delay the proceedings; i.e. a guerrilla tactic.[397] 217

Lastly, it must be emphasised that the general principle of good faith as is understood in substantive law according to the majority view does not require the parties to positively act in a certain way. Rather, the principle functions in a negative way, by denying legal protection only for certain types of actions (negative function of good faith).[398] 218

4.2 Basis

As already set out above, it is accepted in doctrine and case law that the principle of good faith is applicable in arbitration proceedings in Switzerland. The principle concerns all actors in the proceedings, i.e., not only the tribunal but the parties as well.[399] Yet the basis of the principle is not entirely clear. Some commentators seem to rely on the general (substantive) norms of art. 2 CC,[400] whereas the Swiss Federal Tribunal considers the principle of good faith to be a general rule of procedure that is also applicable in arbitration.[401] 219

4.3 Usefulness for Increasing Procedural Efficiency

A statutory duty to arbitrate in good faith may contribute to the efficiency of the proceedings. The increase in efficiency results from a denial of legal protection for certain actions: for instance, if a party does not promptly object to a decision by the tribunal, a later objection will not successfully interfere with the conduct of the proceedings. Yet, the potential effect of the duty to arbitrate in good faith should not be overstated due to the negative function of the principle of good faith. The principle does not, and cannot, require the parties to actively contribute to smooth conduct of the proceedings. 220

396 BSK ZGB I-HONSELL, art. 2 paras. 38-39, with reference to DFT 143 III 279 c. 2.1

397 See for a comprehensive discussion of (procedural) abuse of rights BRANSON, 187-192.

398 For everything HÜRLIMANN-KAUP/SCHMID, para. 309 with further references.

399 For everything DFT 130 III 66 c. 4.3; 102 Ia 574 c. 6, BERGER/KELLERHALS, para. 1156; KNOLL, 12 PILS, Article 182, in: Arroyo, para. 27.

400 KNOLL, 12 PILS, Article 182, in: Arroyo, para. 27.

401 DFT 102 Ia 574 c. 6.

4.4 Consequences and Enforcement

221 Just like with the analysis whether the parties have a duty or mere incumbency to cooperate, it could be asked whether the statutory duty to arbitrate in good faith is directly enforceable or whether a violation of the duty leads only to a claim for damages. As a further alternative, it could be considered whether a violation of the statutory duty to arbitrate in good faith leads only to a loss of rights. Based on the negative effect of the principle of good faith, it appears that the primary sanction is a loss of rights for the party violating the duty, for example when this party applies for a procedural decision out of a motivation to delay proceedings. Theoretically, a party could also claim damages under art. 41 para. 2 CO for a violation of the statutory duty to arbitrate in good faith. According to art. 41 para. 2 CO, a person who wilfully causes damage to another in an immoral manner is obliged to provide compensation. It is accepted that a party's violation of good faith (in legal proceedings) qualifies as an immoral act, making this party liable for the damage if it acted in an immoral manner.[402]

4.5 Modification of the Duty in Expedited Procedures?

222 A modification or extension of the duty to arbitrate in good faith under expedited procedures does not seem warranted. There is nothing in the Swiss *lex arbitri* to suggest the permissibility of such a modification. Furthermore, in Swiss court proceedings, the type of procedure has no effect on the standard of good faith imposed on the parties.[403]

III. Duties of Arbitrators

1. General Basis and Nature of the Duties

1.1 Basis of the Duties Towards the Parties

223 It is widely accepted that arbitrators have a variety of duties towards the parties,[404] some of which will be examined more closely in this section. These

402 For everything BSK ZPO-GEHRI, art. 52 para. 17; DIKE-Comm. ZPO-GÖKSU, art. 52 para. 31; cf. further SCHNYDER/PORTMANN/MÜLLER-CHEN, para. 170, with reference to decision Swiss Federal Tribunal no. 4C.353/2002 of 3 March 2003 c. 5.1.

403 See for the differences in procedures arts. 243-270 Swiss CPC.

404 BERGER/KELLERHALS, paras. 970-999; GIRSBERGER/VOSER, paras. 833-834, 855-856; POUDRET/BESSON, 443-444; BLACKABY/PARTASIDES/REDFERN/HUNTER, paras. 5.44-5.90.

duties may either directly follow from the *lex arbitri* or be a result of the arbitrator's contract with the parties, the *receptum arbitri*.[405]

1.2 Basis of the Duties Towards the Institution

In addition to duties towards the parties, the arbitrators in institutional arbitration also have duties towards the institution. These duties largely depend on the particular contract between the arbitrators and the institution.[406] However, these features lie beyond the scope of this analysis because they do not directly affect the parties' interest in a meaningful combination of quality, due process, and efficiency in a specific proceeding. It suffices to say that a violation of the arbitrators' duties may at least result in a reduction of the arbitrators' fees.[407] 224

2. Duty of Care, Diligence, and Efficiency

2.1 General Content

Arbitrators are under a general duty of care, diligence, and expedition. According to this duty, an arbitrator must possess the necessary skills and devote the required time to resolve the dispute in an efficient manner.[408] This multifaceted duty resembles the requirement to render a reasonably correct award in time-efficient and cost-effective proceedings as discussed in Chapter 3. The weighting of these factors is for the arbitrators to determine and depends on the circumstances of the case.[409] 225

2.2 Basis

The duty of care, diligence, and efficiency for arbitrators finds its basis in the contract between the arbitrators and the parties, *receptum arbitri*.[410] Under Swiss law, it is disputed whether the *receptum arbitri* is a contract of a procedural nature or whether it constitutes a so-called substantive mandate agree- 226

405 GIRSBERGER/VOSER, para. 852; contrary, however, BERGER/KELLERHALS, paras. 965 and 967, who qualify the relationship between the parties and the arbitrators as a statutory legal relationship that may be complemented with further contractual agreements.

406 See in general ICC, Report on the Status of the Arbitrator, 5; JAROSSON, 448; ONYEMA, The Arbitrator's Contract, 113.

407 Cf. for example art. 2.2 Appendix III ICC Rules; ARROYO, ICC Rules Art. 38, in: Arroyo, para. 19.

408 For everything BERGER/KELLERHALS, paras. 971–973.

409 See in general above paras. 120–123.

410 WOLFF, para. 4.

ment *sui generis*.[411] Yet, it is accepted that the *receptum arbitri* is subject to the provisions of a mandate agreement according to arts. 394 et seqq. CO, meaning that the arbitrators do not owe a particular result but rather only their best efforts.[412]. A mandate agreement requires the best efforts of the arbitrators in the completion of their mandate,[413] which undoubtedly includes a duty of care, diligence, and efficiency for arbitral proceedings.[414]

227 In addition, arbitration rules usually contain provisions that require the arbitrators to conduct the proceedings in a cost-effective and time-efficient manner.[415]. Where the arbitration agreement contains a choice of institutional arbitration, the arbitrators as part of the *receptum arbitri* must therefore also comply with these institutional rules. By accepting their appointment under these rules, the arbitrators are bound by these provisions as well.

2.3 Consequences and Enforcement

228 If an arbitrator fails to comply with any of the aspects of the duty or obligation of care, diligence, and efficiency, they may face several consequences.

a Removal

229 The first consequence is a removal of the respective arbitrator. This is possible only until the completion of the mandate, i.e., until the rendering of the final award. This means it is not possible to remove an arbitrator for rendering an incorrect decision.[416] Consequently, a removal is relevant primarily where an arbitrator lacks skill at the outset or while the arbitrator conducts the proceedings inefficiently.

b Liability

230 Arbitrators may furthermore be liable for a breach of their duties under the *receptum arbitri*.[417] The preconditions follow from art. 97 CO. Nevertheless, under Swiss law there is a lively debate regarding the possibilities to grant immunity to arbitrators, with strong support for limiting the arbitrators' liability

411 For everything BERGER/KELLERHALS, paras. 963-964; KAUFMANN-KOHLER/RIGOZZI, paras. 4.183-4.185; PACZOSKA KOTTMANN, para. 184; PFISTERER/SCHNYDER, 75. Even though this controversy may have consequences for certain aspects of the arbitral process, it is of no materiality for the present analysis.

412 See only SMAHI, Arbitrator I, 886, with further references.

413 Cf. art. 398 para. 2 Swiss CO; SMAHI, Arbitrator I, 886.

414 Cf. GIRSBERGER/VOSER, para. 835; KAUFMANN-KOHLER/RIGOZZI, para. 4.188.

415 See for example art. 22.1 ICC Rules; art. 19.1 SIAC Rules; art. 16.1 Swiss Rules.

416 See for example art. 180 paras. 1 and 2 Swiss PILA; see for everything in general BORN, International Commercial Arbitration, 2077-2079.

417 See for a comprehensive analysis KARRER, 166-173.

to acts of gross negligence and wilful intent.[418] Although the potential sources of such proposed immunity differ, this controversy is of limited relevance in institutional arbitration because institutional rules usually contain a provision limiting the arbitrator's liability.[419]

c Reduction of Fees

A more useful tool to ensure the diligence and efficiency of arbitrators are financial sanctions against the arbitrators in the form of a reduction of fees.[420] Some rules expressly provide for a competence of the institution to adjust the arbitrator fees based on the diligence and efficiency of the conduct of the proceedings.[421] Other rules do not contain such express provisions but nonetheless enable the institution to amend the arbitrator fees depending on the circumstances of the case.[422] 231

2.4 Modification of the Duty in Expedited Procedures?

A modification of the arbitrators' duty of care, diligence, and efficiency in expedited procedures does not seem warranted *per se*. The mode of the proceedings should not have any influence on the duty and care the tribunal applies. Nonetheless, objective time constraints may be circumstances that warrant a greater emphasis on efficiency rather than on care and diligence, but only to a certain extent. The details must be decided on a case-by-case basis. 232

3. Duty to Safeguard Due Process Rights

3.1 General Content

Arbitrators under Swiss law are not only required to ensure efficient proceedings; they simultaneously must respect the parties' due process rights, namely the right to be heard and the right to equal treatment.[423] The duty to safeguard the parties' due process rights is an obligation rather than a mere incumbency.[424] 233

418 Cf. for an overview BSK ZPO-HABEGGER, art. 366 para. 12; SMAHI, Arbitrator II, 73-80; see in general WOLFF, paras. 49-52a.

419 See for example art. 45.1 DIS Rules; art. 46.1 HKIAC Rules; art. 31.1 LCIA Rules.

420 Out of a total of 115 final awards rendered in expedited procedures under the ICC Rules, 38 were rendered with a delay of more than one month. In five cases, this delay resulted in a fee reduction (ICC Statistics 2020, 19); see below para. 848.

421 Cf. for example art. 37 DIS Rules; art. 2.2 Appendix III ICC Rules; cf. ARROYO, ICC Rules Art. 38, in: Arroyo, para. 19; further BSK ZPO-HABEGGER, art. 366 para. 12.

422 Cf. CHOONG/MANGAN/LINGARD, para. 15.56; art. 15 SIAC Rules.

423 Article 182 para. 3 Swiss PILA; see in detail below paras. 284-291.

424 BERGER/KELLERHALS, para. 985.

3.2 Basis

234 The obligation to safeguard the parties' due process rights has an express basis in art. 182 para. 3 Swiss PILA. In addition, institutional rules regularly contain provisions requiring the protection of these rights by the tribunal.[425] Based on the considerations in para. 226 above, provisions in institutional rules may form part of the *receptum arbitri,* too. Consequently, this duty is a contractual one, which may in addition, however, be influenced by the provisions of the *lex arbitri*.[426]

3.3 Consequences and Enforcement

a Removal and Challenge

235 The removal of the arbitrator could be a remedy against a violation of due process rights. In particular, where the arbitrator violates one party's due process rights repetitively or severely, it is possible to successfully launch a challenge against the arbitrator based on a perceived lack of impartiality or independence.[427]

b Liability

236 A liability of the arbitrator is also possible according to the observations made above under para. 230. Yet, it appears to be often difficult to quantify a specific damage or loss as a result of the violation of due process. A potential damage or loss could be the monetary value of the award to the award-debtor, i.e., the amount of money either awarded to the other party or not awarded to the succumbing party. However, the aggrieved party would then need to prove that the violation of its due process rights caused the decision to its detriment, which may again be a very difficult task.[428]

c Reduction of Fees

237 Once more, financial consequences in the form of reduced fees as discussed above under para. 231 might seem to be a more reliable option for sanctioning a violation of the arbitrator's obligation to safeguard due process rights. However, this would require an either express or implicit basis for a reduction of fees based on a due process violation. Such a basis is difficult to identify since

425 See for example art. 21.1 DIS Rules; art. 23.2 SCC Rules; art. 31(b) WIPO Expedited Rules.

426 See in general WOLFF, Rights and Duties of Arbitrators, in: Arroyo, para. 10.

427 Cf. decision Swiss Federal Tribunal no. 4A_54/2012 of 27 June 2012 c. 2.2.3; cf. in general MEIER/GERHARDT, Chapter 2.03, in: Flecke-Giammarco/Boog/Elsing/Heckel/Meier, para. 33.

428 Cf. for everything SMAHI, Arbitrator I, 887-888.

a violation of due process rights first needs to be established, which usually happens only in setting aside and enforcement proceedings after the arbitrator's mandate has terminated.

d Setting Aside and Refusal of Enforcement

Lastly, an award which the tribunal renders in a proceeding where the tribunal violated the parties' due process rights may be subject to setting aside proceedings.[429] Moreover, such an award risks being unenforceable.[430] 238

3.4 Modification of the Duty in Expedited Procedures?

A modification of the arbitrator's duty to safeguard the parties' procedural rights in expedited procedures again seems inappropriate. A tribunal cannot without further ado justify a violation of due process rights exclusively based on considerations of efficiency. Yet the circumstances of a case, particularly time constraints, may lead to a different understanding of what a 'reasonable' opportunity to exercise due process rights constitutes as compared to 'ordinary' proceedings.[431] 239

4. Duty to Conduct the Arbitration in Accordance with the Parties' Agreement

4.1 General Content

In instances where the parties have reached an agreement on the conduct of the proceedings, the tribunal is required to respect this agreement.[432] The agreement may be reached directly in the arbitration agreement or in the form of a procedural agreement in the course of the proceedings. Alternatively, it can be reached indirectly by reference to arbitration rules regulating the conduct of the proceedings.[433] In the absence of an agreement, however, the tribunal may decide on the conduct of the proceedings.[434] In any event, the duty to conduct the arbitration in accordance with the parties' agreement exists only where the parties' agreement does not conflict with mandatory provisions of the *lex arbitri*.[435] 240

429 See in detail below paras. 816–819.

430 See in detail below paras. 831–835.

431 See in detail below para. 295.

432 Article 182 para. 1 Swiss PILA; PATOCCHI, 134; SMAHI, Arbitrator I, 886; WOLFF, paras. 32–33.

433 For everything WOLFF, para. 32.

434 See expressly art. 182 para. 2 Swiss PILA.

435 BSK IPRG-SCHNEIDER/SCHERER, art. 182 para. 10.

4.2 Basis

241 The duty to conduct the arbitration in accordance with the parties' agreement finds its basis in express provisions of various national laws[436] as well as in some provisions of institutional rules.[437]

4.3 Exceptions in the Interest of Efficiency?

242 Even though the duty to conduct the arbitration in accordance with the parties' agreement is rooted in statutory and contractual provisions, under Swiss law this duty is not absolute. The Swiss Federal Tribunal has ruled that an award may be set aside for a disregard of the parties' agreement only where this disregard at the same time amounted to a violation of the parties' due process rights.[438] This is consistent with the position under the NYC that requires an effect of the violation of this duty on the outcome of the arbitration in the form of detriment to a party.[439]

243 This restrictive approach appears reasonable where the parties' agreement is disregarded in order to increase the efficiency of the proceedings in appropriate cases and only as an *ultima ratio* measure. Critics of this proposal may argue that the ultimate foundation of arbitration is party autonomy.[440] Moreover, it might be said that a tribunal may always resign if it finds a procedural agreement unbearable and if the parties are not willing to amend the agreement.[441]

244 However, such objections do not appear justified upon closer observation of the idea of party autonomy. As PATOCCHI correctly notes, the relevance of party autonomy or, more accurately, procedural autonomy has shifted over the centuries. Whereas in the past hardly any rules regulating the conduct of the procedure existed, arbitration has recently become more judicialised. Hence, respecting the procedural autonomy of the parties in order to ensure a judicial and fair process may be less important nowadays than it used to be.[442]

436 Article 182 para. 1 Swiss PILA; Section 34(1) English Arbitration Act; art. 19 para. 1 UNCITRAL ML.

437 See for example art. 21.3 DIS Rules; yet see art. 14.4 LCIA Rules for a different approach.

438 For everything DFT 126 III 249 c. 3b; 117 II 346 c. 1a; decision Swiss Federal Tribunal no. 4P.196/2003 of 7 January 2004 c. 4.2.2.2.

439 PAULSSON, 191; see in detail below para. 839.

440 BORN, International Commercial Arbitration, 2305-2306.

441 *Ibid*, 2142; see for further references PATOCCHI, 143.

442 For everything PATOCCHI, 157; see in addition for an analysis of the issue with reference to different views MAYER, Arbitrator's Initiative, 6-7.

In addition, litigation practice also furnishes arguments against slavish obedience to unreasonable agreements of the parties just for the sake of it. For example, procedural errors in Swiss litigation do not justify an annulment[443] of a judgment where such an error had no effect on the outcome of the case.[444] In other words, such an application for annulment would lack the required interest worthy of legal protection. Since a review of the arbitrator's decision to disregard an agreement would be conducted in a court proceeding (specifically a setting aside or enforcement proceeding), the requirement of an interest worthy of legal protection as known in litigation applies to the review of an arbitrator's procedural decision as well.[445] 245

As a last point, some arbitration rules have even directly recognised the tribunal's authority to disregard a direct agreement of the parties on the conduct of the proceedings. A notable example is art. 19.1 SIAC Rules.[446] Yet, this provision might give rise to a situation of a party autonomy paradox, which will be examined more closely below in paras. 403-423. 246

4.4 Consequences and Enforcement

Reference can be made to the comments in paras. 235-238. Consequently, if arbitrators do not conduct the proceedings in accordance with the parties' agreement, the arbitrators may face the risk of a reduction of fees, of civil liability, and of their award being set aside and refused enforcement. Nevertheless, as will be seen, a setting aside of the award is possible only where a violation of the duty to conduct the arbitration according to the parties' agreement in addition resulted in a due process violation.[447] 247

4.5 Modification of the Duty in Expedited Procedures?

A modification of the duty to conduct the arbitration in accordance with the parties' agreement does not seem necessary in expedited procedures because of the exception of the duty discussed in paras. 242-245. If a tribunal considers a procedural agreement of the parties unnecessarily detrimental to the efficiency of the proceedings, it should first try to convince the parties to modify the agreement. Should this attempt fail, the tribunal can exceptionally decide to disregard the agreement in the interest of efficiency. 248

443 Being understood as a result of a successful judicial recourse against the judgment.

444 BK ZPO I and II-STERCHI, art. 310 para. 6.

445 See for a detailed discussion of the concept of interest worthy of legal protection and the requirement of reliance on state courts STACHER, Rechtsschutzinteresse, paras. 37-41.

446 Cf. CHOONG/MANGAN/LINGARD, paras. 9.04-9.05.

447 See in detail below para. 818.

5. Duty to Render an Enforceable Award

5.1 General Content

249 Various commentators have advocated for a duty of arbitrators to make every effort in order to render an enforceable award.[448] What this duty entails follows from the grounds for setting aside an award at the respective seat of arbitration as well as from the grounds for refusing enforcement.[449] As a review of the most common of these grounds reveals, the focus will be on the parties' due process rights, or on compliance with the arbitration agreement.[450]

250 Unlike the previously discussed duties of the arbitrators, the existence of this duty is actually controversial, with some authorities rejecting it outright.[451] Therefore, in what follows, it will primarily be assessed if a basis for such a duty actually exists and in any event, the flaw of such a duty will be described.

5.2 Basis

a Proposed Solutions

251 While some commentators readily agree on the existence of the duty to render an enforceable award, they rarely state an express basis for it.[452] The majority of these commentators propose the existence of an implicit basis for the duty. Depending on whether the ultimate jurisdictional basis of arbitration is considered contractual or statutory,[453] the implicit basis rests in either the *receptum arbitri*, the national law conferring jurisdictional authority on the arbitrator, or the arbitral rules.[454] The justification of the duty, regardless of its basis, is the implicit expectation of the parties that the tribunal's decision will eventually be enforceable. This enforceability, according to the proponents of this duty, is the ultimate goal of arbitration.[455] Nevertheless, other commentators are more sceptical about the existence of such a duty and point out that there is simply no basis for affirming its existence.[456]

448 HORVATH, *passim*; PLATTE, *passim*; SMAHI, Arbitrator I, 886.

449 See in general art. 190 Swiss PILA and art. V NYC.

450 See art. V para. 1 lit. (a), (b), and (c) NYC.

451 BOOG/MOSS; however, in favour of such a duty SABATER/REZENDE, 20–23.

452 HORVATH, *passim*; PLATTE, *passim*; SMAHI, Arbitrator I, 886.

453 See above paras. 142–146.

454 As PLATTE, 308, correctly points out, though, this controversy is of no practical relevance for the mere question of whether such a duty exists.

455 For everything HORVATH, Duty to Render an Enforceable Award, 136; PLATTE, 309, with further references.

456 BOOG/MOSS.

b General Considerations under Swiss Law

In concurrence with the proponents of the existence of an implicit duty to render an enforceable award, it can be said that, indeed, the award is the *raison d'être* of every arbitration.[457] Without a binding decision that can ultimately coerce a party into compliance, the added value of arbitration is close to zero compared to other forms of dispute resolution where the eventual result is not necessarily binding on the parties in dispute either. Likewise, the primary goal of the world's most successful treaty, the NYC, was to increase the international enforcement of arbitral awards.[458] This, in turn, was one of the main drivers that contributed to the success of international arbitration.[459] 252

However, one must be careful not to confuse the goal (enhanced enforcement) with the means (a duty to render an award enforceable). As shall be seen in the following section, this is, unfortunately, exactly what is happening in the discussion of this duty. It is suggested here that at least under Swiss law, an approach affirming an implicit duty to render an enforceable award appears to lack merit, especially where enforceability outside of the seat of arbitration is concerned. This conclusion is irrespective of whether one considers the authority of a tribunal to follow from the *lex arbitri* or the *receptum arbitri*. 253

To begin with, there are no indications in the Swiss PILA to suggest the existence of any such implied duty. What is more, if an award's enforceability is as crucial to arbitration as suggested above in paras. 19-20, the duty to render an enforceable award would have to be considered a primary obligation of the arbitrators rather than an ancillary one. Yet in Swiss contract law, implying primary obligations in addition to express statutory provisions is unusual.[460] 254

Similarly, if one considers the *receptum arbitri* as the basis for the arbitrator's authority,[461] the provisions of the mandate agreement (arts. 394-406 CO) do not imply such a duty. Instead, it is proposed that the nature of the mandate agreement itself militates against the existence of such a duty and instead indicates that enforceability of the award is only the goal, not a duty. This goal may be achieved through the arbitrators' compliance with other duties under the mandate agreement such as the duty of care. The distinctive feature of a mandate agreement in Swiss law already mentioned is a duty of best efforts, 255

457 See for this PLATTE, 309, quoting Julian D.M. Lew QC.

458 See above para. 20.

459 See above paras. 19-20.

460 See for example DFT 91 II 298 c. 6a denying a duty of loyalty of the shareholder towards the company; see for another example HUGUENIN, para. 2452 regarding the inexistence of a duty of the buyer to accept the object of purchase under a purchase contract.

461 See above para. 143.

to the exclusion of a duty of result.[462] Qualifying the goal of rendering an enforceable award as a duty would turn the obligation of best efforts into an obligation of result, which would be incompatible with the qualification of the *receptum arbitri* as a mandate agreement. The enforceability of an award *may* be the result of a thorough conduct of the proceedings and a careful drafting of the award. Nonetheless, regardless of how carefully and thoroughly the tribunal acted, it is simply beyond the tribunal's power to ensure absolute enforceability. Consequently, affirming an implicit actual duty of the tribunal to render an enforceable award does not seem justified under Swiss law.[463] This being said, though, the arbitrators should make every effort to ensure enforceability at the seat of arbitration because this enforceability is often among the minimum expectations the parties may have towards arbitration.

c Basis in the Arbitration Rules?

256 Advocates of an arbitrators' duty to render an enforceable award regularly refer to provisions in the rules of arbitration institutions in order to find a (further) basis justifying the existence of this duty. Among the most prominent examples of such provisions are art. 42 ICC Rules (or the corresponding art. 41 under the ICC Rules 2012)[464] and art. 32.2 LCIA[465] Rules.

257 Tellingly, however, the ICC Secretariat's Guide clarifies that art. 42 ICC Rules (or the corresponding art. 41 under the 2012 ICC Rules) is not meant to impose a general best-efforts duty on the tribunal. Instead, the provision serves only as a guideline for filling gaps regarding the conduct of the proceedings. Other commentaries reach similar conclusions.[466] It is submitted that the reluctance to accept such provisions as a basis for a duty to render an enforceable award is justified. As the wording of the provisions already suggests, these provisions are meant to guide the tribunal only when filling gaps. Moreover,

462 HUGUENIN, para. 3133.

463 See for everything BOOG/MOSS.

464 *'In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.'*

465 *'For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.'*

466 For everything FRY/GREENBERG/MAZZA, para. 3.1537 (for the ICC Rules 2012); for the corresponding provision under the ICC Rules 2017 BOND/PARALIKA/SECOMB, art. 41 ICC Rules, in: Mistelis, Concise Arbitration, para. 2; however, see also for a more critical view SPOORENBERG, Art. 42 ICC Rules, in: Arroyo, paras. 6–12.

the rules usually list the duties of the arbitrators in central provisions at the beginning of a thematically coherent section.[467] In contrast, efforts to render an enforceable award are only mentioned toward the very end of the rules.[468] Consequently, the better arguments are against the use of these provisions as a basis for a duty to render an enforceable award.

5.3 Conceptual Flaws of the Existence of Such Duty

Although the lack of a sufficient basis for a duty to render an enforceable award should suffice to conclude that such a duty does not exist, it may also be observed that such a duty itself is conceptually flawed for at least two reasons. 258

First, it appears impossible to control and, if need be, sanction a violation of the duty. While some authors hold that the tribunal is required to ensure the enforceability of the award only at the seat of arbitration and the likely places of enforcement,[469] this may in theory be a workable approach. In fact, a tribunal should make every effort to render an award that is enforceable at the seat. However, an actual duty of the tribunal to render a generally enforceable award poses immense practical difficulties. For instance, it is close to impossible to predict in advance how a setting aside proceeding may unfold. In addition, what constitutes a 'likely place of enforcement' may be highly uncertain.[470] An example is a respondent company that has hardly any paid-up company capital at the company seat but further assets in an unknown location. Considering the seat of the company a 'likely place of enforcement' seems problematic and its alternatives are not obvious. This is not to deny the existence of a duty merely because of practical difficulties. Yet this concern begs the question of whether this kind of duty could ever be of any practical relevance. 259

Second, if one were to affirm such a duty, due process paranoia would likely reach a new level. As explained above,[471] due process violations may endanger the enforceability of an award. Hence, if a tribunal is under a duty to make every effort to render an enforceable award, the tribunal will hardly make robust procedural decisions. Instead, it will be more inclined to give in to the parties' procedural requests at the expense of procedural efficiency, even though the merit of such requests may be questionable at best. 260

As a result, a duty of the arbitrators to render an enforceable award does not exist under Swiss law, and it seems doubtful that such a duty is well founded 261

467 See for example arts. 11 and 22 ICC Rules, as well as arts. 5 and 14 LCIA Rules.

468 Similarly BOOG/MOSS.

469 Cf. HORVATH, Duty to Render an Enforceable Award, 158; PLATTE, 312.

470 Cf. PLATTE, 312.

471 See above para. 31.

under other laws absent any express basis. Nevertheless, the arbitrators should make every effort to ensure the enforceability of the award at least at the seat of arbitration, even though they have no duty to do so.

IV. Duties of Arbitral Institutions

1. General Basis and Nature of the Duties

262 Neither have the duties of arbitral institutions towards the arbitrators and the parties received considerable attention in legal writing[472] nor is this analysis intended to comprehensively examine this topic. This is because these duties largely depend on the arbitration rules and the specific contract between the institution and the parties in dispute as well as between the institution and the arbitrators.

263 Nevertheless, it may be said that arbitral institutions have a highly versatile role in the arbitral process and beyond.[473] Theoretically, at least, the institutions should not have many tasks directly affecting the parties' due process rights because the arbitrators are the managers of the dispute. Yet, as will be seen, this assessment may partially differ under expedited procedures.[474] Less surprising is the conclusion that institutions may be involved in the overall administration of the dispute, a role in which they will have an influence on the overall efficiency of the process. What the institutions are not tasked with, however, is the rendering of the award and its correctness.[475]

1.1 Basis of the Duties towards the Parties

264 The institution may have several obligations towards the parties in dispute based on a contract between itself and the parties in dispute.[476] Accordingly, these duties are all of a contractual nature. It is submitted that this contract under Swiss law is, like the *receptum arbitri,* subject to the provisions of the mandate agreement.[477] In addition, it seems possible to impose duties of the

472 LENDERMANN, 233-234.

473 GERBAY, Arbitral Institutions, 55-116; LEE, 239-241; ONYEMA, Arbitration Institutions, 30-35.

474 See below paras. 270-274.

475 Yet, under rules that provide for a scrutiny of the award, like art. 34 ICC Rules, the institution is tasked with safeguarding the integrity of the formal aspect of the award. Whether this may increase the quality of the award does not have to be determined at this point.

476 See in general GERBAY, Arbitral Institutions, 188-196; LEE, 237-238; JAROSSON, 448; LENDERMANN, 236.

477 See above para. 226; cf. for the situation under German law LENDERMANN, 235.

lex arbitri on an institution where it performs duties that would usually belong to the arbitrators. A detailed discussion of this idea will follow below in paras. 270–274.

1.2 Basis of the Duties towards the Arbitrators

Reference can be made to the observations noted above in para. 224. Hence, the duties of the institution towards the arbitrators follow from the specific contract between the institution and the arbitrators. 265

2. Duty of Care, Diligence, and Efficiency

2.1 General Content

In its performance of the administration of the dispute, the institution faces the same duty of care, diligence, and efficiency as the arbitrators. Regarding the details of this duty, reference is made to the observations above in para. 225. 266

2.2 Basis

The contract between the institution and the parties forms the basis of this duty. The general duty from the mandate agreement to use reasonable best efforts also encompasses the duty of care, diligence, and efficiency.[478] In addition, provisions in arbitration rules occasionally require of the institution an expeditious or otherwise prudent performance of its tasks.[479] 267

2.3 Enforceability

a Replacement

In case the arbitral institution fails to act efficiently, the parties may agree to the administration of the dispute by another institution. However, as experience shows, the practical use of this proposal is doubtful. 268

b Liability

Considering the nature of the institutional contract as a mandate agreement, it would be possible to impose civil liability for the institution in case of delay or careless actions.[480] Nevertheless, the same difficulties as described above under para. 230, including waivers of liability, arise in this context as well. 269

478 See in detail above para. 225; see further WEBSTER/BÜHLER, para. 31.24, referring to a Paris Court of Appeal case where the court held that the ICC was contractually obliged to organise and administer the proceedings in an efficient manner.

479 Cf. art. 2.1 DIS Rules; art. 42 ICC Rules; art. 32.2 LCIA Rules.

480 See for a comprehensive analysis KARRER, 173-174; WARWAS, *passim*.

3. Duty to Safeguard Due Process Rights

270 Returning to the comment at the beginning of this section, namely that arbitral institutions may increasingly have functions akin to those of a tribunal, it is important to note that arbitral institutions may need to take decisions that affect the conduct of arbitral proceedings and thereby qualify as procedural decisions. For instance, an institution may be tasked with determining whether expedited procedures shall be applicable in a dispute.[481] Therefore, the question arises of whether an institution is under the same duty to safeguard the parties' due process rights as an arbitral tribunal. As rightly pointed out by GERBAY, the decisions that an institution may take over the course of a proceeding may be of the same adjudicatory nature as those of the arbitrators.[482] Hence, it would only be fair to subject the institution's decision to the same standards as the ones by the arbitrators, meaning that the institution's decisions, too, will have to respect the parties' due process rights.

3.1 Basis

271 The crucial question, however, is what constitutes the basis for this equal standard. Specific provisions do not appear to exist. A review of the Swiss and other *leges arbitri* reveals that the law expressly requires only the tribunal to respect the parties' due process rights.[483] A similar situation exists under arbitration rules which exclusively require the tribunal to treat the parties equally and to grant them the right to be heard.[484] The NYC is less clear[485] but does not expressly impose this duty on institutions either.

272 Therefore, it seems necessary to engage in a more general analysis, relying on the basis of arbitral authority. If arbitrators are considered to perform judicial functions and thus derive their authority from the state,[486] one could make the argument that when an arbitral institution substitutes for the arbitrators in making a decision, the institution not only obtains the arbitrators' authority but also the arbitrators' responsibilities conferred upon them by the state.

481 See below para. 494.

482 GERBAY, Arbitral Institutions, 147-173, 196-199; see also LEE, 242.

483 See art. 182 para. 3 Swiss PILA; section 33(1) English Arbitration Act; art. 1510 French CPC; cf. however art. 18 UNCITRAL ML, only stating that *'[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'*

484 See for example art. 13.1 HKIAC Rules; art. 23.2 SCC Rules; art. 19.1 Swiss Rules.

485 See art. V para. 1 lit. b NYC: *'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.'*

486 See above para. 144.

If, however, one considers arbitration to rest exclusively upon the parties' agreement,[487] one could argue that the parties have the expectation – and thereby implicitly require – that the institution adheres to the same standards as the arbitrators. Yet, it is proposed that implying such a crucial obligation into the service agreement, at least under Swiss law, lacks convincing force. Another possibility would be a qualification of the institution as an associate of the tribunal *(Hilfsperson)* in the sense of art. 101 CO. The problem with this construction, however, is that the institution may be tasked with performing adjudicatory tasks before the arbitrators are appointed.[488] 273

As a last possibility, one could consider whether the reality of the enforcement of awards either serves as basis for the institution's duty to safeguard due process rights or at least indicates that some form of basis must exist. An award that is based on a violation of due process by a decision of the arbitral institution will likely face difficulties at the enforcement stage.[489] Although it is pragmatic to accordingly consider that an institution must respect the parties' due process rights in order to preserve the enforceability of the award, the consequence of this finding is limited. Using the NYC – which primarily obliges the contracting states – as a basis for imposing duties on an arbitral institution appears problematic.[490] Nonetheless, the reality of enforcement practice could in fact serve as a basis for implying a term into the agreement between the parties in dispute and the institution towards the affirmation of such duty. The obvious reason is that an award that was rendered based on a decision by an institution in violation of a party's due process rights may be at a risk of refusal of enforcement. 274

3.2 Consequences

a Liability

If one affirms the existence of an institution's duty to safeguard the parties' due process rights, the consequences of a violation of such a duty are the same as described above in para. 236, i.e., a contractual liability of the institution. 275

b Setting Aside and Refusal of Enforcement

In addition, an award that was *inter alia* based on a decision by the institution that may have violated the parties' due process rights may be subject to setting aside and a refusal of enforcement. Under Swiss law, the decision by the 276

487 See above para. 143.

488 See for example arts. 6.4 and 10 ICC Rules.

489 Cf. GERBAY, 198-199; see also the discussion of two court judgments below in paras. 529-544.

490 See in general LANDBRECHT/WEHOWSKY, 693-694.

institution cannot be set aside.[491] Yet, an award that is based on such a decision may ultimately face the risk of a refusal of enforcement.

V. Conclusion and Outlook

277 The discussion above has revealed that if the parties decide they do not want to contribute to the efficiency of the proceedings, there are only limited countermeasures available. In particular, a duty to actively cooperate is difficult to enforce since the duty to arbitrate in good faith primarily serves as a defence against obstructive behaviour but is unsuitable for requiring active actions.

278 This shifts the focus on the tribunal and replicates the problem under expedited procedures of combining quality with efficiency as already described: the tribunal needs to act diligently and efficiently while at the same time safeguarding the parties' due process rights and respecting party autonomy. This combination of different duties may be prone to conflict, with a particular difficulty being the combination of respecting the parties' due process rights with conducting the proceedings efficiently. The arbitral institution might under certain circumstances face the same demanding combination of duties.

279 Consequently, the arbitrators (and potentially the institutions) are in a difficult position in that they are required to find a way to combine efficiency with quality while at the same time being unable to invoke duties of the parties to effectively demand support for this task. As will be explored in further detail in the following section, the main focus of the arbitrators must be on the methods that allow them to move the proceedings forward without violating the parties' due process rights. At the very least, it seems that party autonomy is not necessarily an additional obstacle for the tribunal because the arbitrators may occasionally disregard unreasonable party agreements.

491 DFT 126 III 249 c. 3; decision Swiss Federal Tribunal no. 4A_586/2014 of 25 November 2014; yet, in its decision no. 4A_282/2013 of 13 November 2013 c. 5.3.2, the Swiss Federal Tribunal rendered a ruling conflicting with its previous position, but it ultimately clarified its position in decision no. 4A_546/2016 of 27 January 2017 c. 1.3 by limiting the effects of the 4A_282/2013 decision; cf. for a detailed discussion BERGER/KELLERHALS, paras. 908-909, and GABRIEL, Procedural Order, paras. 23-31.

Chapter 6
Due Process (Paranoia) and Efficiency

It follows from the considerations so far that a balance must be struck between procedural efficiency on the one hand and the parties' due process rights on the other in order for expedited procedures to live up to the expectations of the parties. Accordingly, the purpose of this chapter is to examine due process rights in arbitration more closely in order to facilitate an evaluation of possibilities that justify a greater emphasis on efficiency and a smaller emphasis on due process where this is appropriate. 280

For this purpose, after addressing some general considerations (below section I), due process rights (below section II) and general restrictions to these rights will be examined (below section III). Thereafter, proposed solutions for respecting due process under expedited procedures will be explored (below section IV). 281

I. General Considerations

1. Focus on the Tribunal

Expedited procedures are meant to accelerate and simplify the proceedings without compromising the quality of the arbitration. One of the main takeaways from the previous chapter is the finding that the parties are under no practically viable duty to actively promote the efficiency of the proceedings. Therefore, it appears that the onus is on the tribunal to combine quality and efficiency of the proceedings. 282

2. Due Process as the Key Consideration

As discussed in Chapter 3, the concept of due process is key in any arbitration.[492] The concept of due process can be at odds with the concept of efficiency and 283

492 See above paras. 114-115.

even rule it out, but the two concepts may also be complementary.[493] As a further option, it might be possible to favour one concept over the other but only to the extent that both concepts are still sufficiently respected.[494] As a result, a reasonable analysis of expedited arbitration is not possible without a comprehensive discussion of the role of due process.

II. Due Process Rights

284 This sub-section will examine the parties' due process rights in arbitration, namely the right to be heard and the right to equal treatment.[495] After clarifying the law applicable, the nature of these rights, and their specific content, it will be further examined whether due process rights under expedited procedures ought to be subject to a different standard than under ordinary procedures.

1. Applicable Law and Mandatory Nature

285 Both the right to be heard and the right to equal treatment during arbitral proceedings are primarily governed by the *lex arbitri*. This law determines the nature, content, and requirements for potential restrictions of these fundamental procedural rights.[496] Nevertheless, if recognition and enforcement of an award are sought in a country other than the seat, the law of the country of enforcement may be relevant as well.[497]

286 As the term 'fundamental' implies, the right to be heard and the right to equal treatment are of utmost importance during arbitration proceedings.

493 See above paras. 131-132.

494 See above paras. 120-123.

495 On the meaning of due process rights BERGER/KELLERHALS, paras. 1135-1155; BSK IPRG-SCHNEIDER/SCHERER, art. 182 paras. 51-72; KAUFMANN-KOHLER/RIGOZZI, paras. 6.21-6.38. Some authors have a wider understanding of due process rights in arbitration. See for example REED, Ab(use) of due process, 366, who additionally includes the separate right of a party to receive notice of a case against it and the right to an impartial and independent tribunal. This will, however, not be followed here.

496 For everything POUDRET/BESSON, para. 546; see for a comprehensive overview *ibid*, paras. 547-554. Yet, particularly for an enforcement proceeding under the NYC it has been suggested that the Convention leads to the additional application of internationally recognised standards to promote the international enforcement of awards, cf. BORN, International Commercial Arbitration, 3833-3836.

497 JANA/ARMER/KLEIN KRANENBERG, Art. V(1)(b), in: Kronke/Nacimiento/Otto/ Port, 237-240.

These rights constitute minimal guarantees and are thus mandatory. As a consequence, an arbitral tribunal may not disregard minimal guarantees.[498]

Following from the mandatory nature of these rights is a prohibition for the parties to generally waive their right to be heard and their right to equal treatment in advance. Yet, this must be distinguished from a permissible waiver of these rights in a specific situation.[499] Furthermore, the mandatory nature of these rights does not prohibit a general *ex ante* waiver according to art. 192 Swiss PILA to have the award set aside based on a violation of these rights.[500] 287

2. Right to Be Heard

The right to be heard, as a fundamental procedural guarantee, protects the parties' rights to express themselves during the proceedings. As such, this right serves the function of enabling the parties to participate in the dispute. In addition, it acts as an instrument for establishing the facts of the case,[501] which are ultimately supposed to support the tribunal in making a correct decision.[502] 288

The right to be heard consists of two core components: the parties' right to express themselves during the proceedings, and the right to contradictory proceedings.[503] The core components of the parties' right to express themselves during the proceedings include the right to make submissions of fact and on the law, the right to legal representation, access to files, the right to participate in the proceedings, the right to submit and present evidence, as well as a prohibition for the tribunal to apply the law in a surprising way without prior consultation of the parties.[504] The essential components of the right to contradictory proceedings are the rights to comment on submissions by 289

498 For everything BERGER/KELLERHALS, para. 1128; KNOLL, 12 PILS, Article 182, in: Arroyo, para. 26.

499 For Switzerland BERGER/KELLERHALS, para. 1128.

500 Cf. RUCH, 30.

501 For everything DFT 142 III 360 c. 4.1.1; DFT 130 III 35 c. 5; decision Swiss Federal Tribunal no. 4A_74/2019 of 31 July 2019 c. 3.1.

502 For litigation proceedings see Staehelin/Staehelin/Grolimund-STAEHELIN/BACHOFNER, § 10 para. 52.

503 BSK IPRG-SCHNEIDER/SCHERER, art. 182 paras. 51-66; ZK IPRG-OETIKER, art. 182 paras. 38-62.

504 For everything BERGER/KELLERHALS, paras. 1120-1127 (with further references); BSK IPRG-SCHNEIDER/SCHERER, art. 182 paras. 54-59; CHK IPRG-FURRER/GIRSBERGER/AMBAUEN, art. 182 paras. 7-9; ZK IPRG-OETIKER, art. 182 paras. 38-57; DFT 142 III 360 c. 4.1.2; decision Swiss Federal Tribunal no. 4A_74/2019 of 31 July 2019 c. 3.1.

the other party and to submit evidence contradicting the evidence submitted by the other party.[505]

3. Right to Equal Treatment of the Parties

290 The right to equal treatment is sometimes equated with the parties' rights to present their case,[506] which renders an exact and separate definition of the content of the right to equal treatment difficult.

291 Yet the core content of this right requires that both parties are guaranteed the same status before the tribunal and that no party is favoured with regard to procedural rights.[507] While the right to equal treatment cannot directly be restricted, it is important to understand that the right is not absolute. Specifically, equal treatment is not necessarily tantamount to the 'same' treatment.[508] Instead, it only requires the tribunal to handle similar situations in a similar manner.[509]

4. Violation of Due Process Rights and Practical Consequences

292 A violation of any party's due process rights will make the award susceptible to an application for a setting aside of the award and may cause a refusal of enforcement.[510] As already described above in paras. 31–32, these risks have caused some arbitrators to disproportionately favour due process concerns over considerations of efficiency, leading to what is now known as due process paranoia.

III. Possibilities for Limiting the Impact of Due Process Rights

293 A key question that arises in relation to the interplay between due process rights and efficiency in expedited procedures is whether the traditional understanding of the scope of the right to be heard and the right to equal treatment

505 BSK IPRG-SCHNEIDER/SCHERER, art. 182 paras. 60–66; ZK IPRG-OETIKER, art. 182 paras. 58–62.

506 BERGER/KELLERHALS, para. 1122; BSK IPRG-SCHNEIDER/SCHERER, art. 182 para. 69; cf. for an international perspective KOTUBY/SOBOTA, 176–177.

507 BORN, International Commercial Arbitration, 2337; GEISINGER/DUCRET, in: Geisinger/Voser, 89–90; GIRSBERGER/VOSER, para. 904.

508 For everything BORN, International Commercial Arbitration, 2338; ZK IPRG-OETIKER, art. 182 para. 35.

509 GIRSBERGER/VOSER, para. 904.

510 See for a detailed discussion below paras. 816–819 and 831–835.

also applies in expedited procedures. This question is warranted because with the recent re-emergence of expedited procedures, an increased focus has been placed on the efficiency of proceedings. To a certain extent, this focus may conflict with the right to be heard and the right to equal treatment in their traditional form and their scope. Despite their importance, due process rights are not infinite, and rightly so. With an unfettered exercise of due process rights, it might be nearly impossible for a tribunal to bring an arbitral procedure to an end. Thus, a middle ground must be found or otherwise the idea of expedited procedures risks turning into a paper tiger. This middle ground will at least partially entail a restriction of due process rights.

Accordingly, this sub-section will explore the already existing limits on 294
due process rights (below sub-section 1) and analyse the existing additional instruments and principles that further limit these rights. An important instrument are procedural agreements, by which the parties agree in advance to limit their due process rights to a certain extent. As will be seen, certain requirements must be fulfilled in order for such agreements to be valid (below sub-section 2). A further option to restrict due process rights is the already-touched-upon duty to arbitrate in good faith (below sub-section 3). Lastly, a waiver of remedies, which, similarly to specific procedural agreements, needs to conform to certain requirements, is a potentially significant option (below sub-section 4). The following analysis will examine how these concepts may help a tribunal to generally resolve conflicts under expedited procedures between due process rights and efficiency.

1. Inherent Limits to Due Process Rights

1.1 General Considerations

Neither the right to be heard nor the right to equal treatment are unfettered.[511] 295
On the contrary, authorities consistently stress that the right to be heard in terms of the opportunity to present one's case is not tantamount to a full opportunity,[512] even though the wording of notably the UNCITRAL Model Law suggests so.[513] Rather, there is a controversy surrounding what degree is still acceptable before a violation of the right to be heard will be affirmed.[514]

511 KAUFMANN-KOHLER/RIGOZZI, paras. 6.25 and 6.32; cf. for an international perspective KOTUBY/SOBOTA, 182-183.

512 DFT 142 III 360 c. 4.1.2; BAO, 68-69; BERGER/JENSEN, 422; REED, Ab(use) of due process, 367-372.

513 See art. 18 UNCITRAL ML; see for a comprehensive discussion BAO, 68-70.

514 See for a comprehensive overview BORN, International Commercial Arbitration, 2338-2344; REED, Ab(use) of due process, 367-372.

The majority of authorities argue that a party's opportunity to be heard needs to be merely reasonable,[515] a stance that also draws support from national laws[516] and arbitration rules.[517] What is more, there is a growing tendency to sanction a violation of the right to be heard by means of a setting aside or refusal of enforcement only if the alleged violation was or at least likely could have been material to the outcome of the case.[518] Similarly and as established, the right to equal treatment does not demand absolute equality of treatment.[519]

296 These restrictions are not supposed to hinder the legitimate exercise of the parties' procedural rights but rather prevent unreasonable and potentially abusive procedural requests.[520] For example, the tribunal may deem certain evidence irrelevant because it has made up its mind based on other evidence that cannot be modified by any further evidence (so-called anticipated assessment of evidence).[521] In any event, these inherent limits of the parties' due process rights reveal that a tribunal may decide a procedural issue against a party, without causing a violation of that party's due process rights.

1.2 Potential for Increasing Efficiency under Expedited Procedures

297 In further developing the idea that due process rights are limited, one could argue that the standard for affirming a violation of the parties' due process rights must be generally higher in expedited procedures than in ordinary procedures. The underlying reason is the ambiguity of what constitutes a 'reasonable' opportunity to be heard as well as 'equal' treatment.

298 When an arbitration is conducted under provisions that focus on increasing time-efficiency and cost-effectiveness, it might be asked if the parties may 'reasonably' expect the same scope of their due process rights as in proceedings that lack such a focus.[522] PARTASIDES/PREWETT aptly point out in the context of a reasonable opportunity to be heard, *'[w]hat is "reasonable" falls to be assessed in the circumstances, weighed against the efficient resolution of*

515 BERGER/JENSEN, 421-423; KNOLL, 12 PILS, Article 182, in: Arroyo, para. 33; POUDRET/BESSON, para. 547; REED, 368-371.

516 See English Arbitration Act section 33(1) lit. a.

517 Article 13.1 HKIAC Rules; art. 22.4 ICC Rules; art. 17 UNCITRAL Rules.

518 For setting aside see Swiss Federal Tribunal, decisions no. 4A_424/2018 of 29 January 2019 c. 5.2.2 and no. 4A_247/2017 of 18 April 2018, c. 5.1.3; for refusal of enforcement see JANA/ARMER/KLEIN KRANENBERG, Art. V(1)(b), in: Kronke/Nacimiento/Otto/Port, 252-253; SCHERER, in: Wolff, NYC, art. V, paras. 142-144.

519 See above para. 291.

520 BERGER/JENSEN, 422-423; REED, Ab(use) of Due Process, 368.

521 KNOLL, 12 PILS, Article 182, in: Arroyo, para. 45; cf. for an international perspective KOTUBY/SOBOTA, 182.

522 Cf. above paras. 133-135.

the dispute in accordance with the other party's rights and both parties' initial agreement to efficiently resolve their dispute in arbitration'.[523] Therefore, the decisive issue is whether the standard according to which a violation of the right to be heard and the right to equal treatment is affirmed is higher in expedited proceedings than in ordinary proceedings.

a The vague notion of reasonableness

Before discussing the practical usefulness of different standards for the violation of the parties' rights, the theoretical basis on which these different standards can be justified must be examined. It could be argued that the specific circumstances of the case exclusively determine what is a reasonable opportunity to present one's case.[524] 299

Such a proposal does not seem far-fetched. For example, a similar phenomenon is sometimes found in civil litigation. Under so-called summary procedures of the Swiss CPC (which are neither equivalent to summary nor to expedited procedures in arbitration), the right to be heard applies as well but is subject to more restrictions than under ordinary procedures due to the focus on conducting the proceedings in a timely manner.[525] Even more so, it is proposed for arbitration proceedings as well that a tribunal or emergency arbitrator may, under utmost urgency, issue a time-restricted interim relief order to preserve the status quo without first granting the non-applying party an opportunity to present its case, provided that the party is granted a subsequent opportunity to be heard.[526] 300

What is 'reasonable' thus depends, at least partially, on external circumstances such as urgency. Accordingly, if the proceedings require short timespans and therefore allow only for brief and limited party submissions, the parties may under such circumstances still be considered to have had a reasonable opportunity to be heard. In contrast, these submissions could be considered insufficient in situations where no strict exogenous time constraints exist. This proposed distinction may prove significant for expedited procedures as well insofar as the increased focus on efficiency may suggest that the standard for the parties' 'reasonable' opportunity to present their case may be different. 301

523 PARTASIDES/PREWETT, 111 (though in the context of early determination procedures), with reference to BERGER/JENSEN, 422–423.

524 Cf. PARTASIDES/PREWETT, 111.

525 BSK ZPO-GEHRI, art. 53 para. 14.

526 BOOG, 12 PILS, Article 183, in: Arroyo, para. 15; GÖKSU, para. 1927; ICC, Report Emergency Arbitration, paras. 106–117 (though allowing this possibility only restrictively); BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 5.34; VON SEGESSER / BOOG, in: Geisinger/Voser, 116–118; cf. further art. 17B para. 2 UNCITRAL ML.

302 The definition of what is 'reasonable' would be incomplete, however, without taking the parties' perspective into account.[527] At least in situations where the parties deliberately choose expedited arbitration, it is realistic to assume they did so based on considerations of efficiency. However, whether this assumption leads to the conclusion that the parties also agreed to a restriction of their due process rights is doubtful, as will be discussed in the following sub-section.

b Different Standard, Procedural Agreement, or Waiver?

303 While the sub-section above was intended to demonstrate that there may indeed be good reasons to legitimise an elevated standard for finding a violation of the parties' due process rights especially under expedited procedures, this approach is not without its downsides. When a higher degree of urgency or a desire for greater efficiency is equated with a higher standard for affirming a due process violation, the result is that certain decisions by the tribunal should, under the new standard, not be considered a violation of the parties' due process rights in the first place. In other words, the elevation of the relevant standard leads to the same result for certain decisions by the tribunal as a procedural agreement to specifically restrict the exercise of due process rights, described in the following below in paras. 306-308, and a waiver of remedies, described in the following below in paras. 323-329.

304 With these similar outcomes arises the question of whether an agreement on a heightened standard for affirming a violation of due process rights should be subject to the same requirements as a procedural agreement or even a waiver of remedies that will be discussed in the following paras. From a pragmatic point of view, this question could easily be answered in the negative because a more flexible understanding of reasonableness would likely lead to a more efficient conduct of the proceedings. Nevertheless, as will be established later, the parties may make procedural agreements modifying their due process rights in advance for only limited occasions and in knowledge of the restrictions that they accept.[528] In consideration of this, it seems doubtful that a direct or indirect choice of expedited procedures gives the tribunal a *carte blanche* to generally rely on a higher standard for affirming a violation of due process rights. Similarly, if an agreement on expedited procedures does not fulfil the statutory requirements for a waiver of remedies,[529] it is impermissible to still grant the agreement on expedited procedures the same effect as a waiver. As a consequence, and while it is an attractive proposal in some

527 Cf. above paras. 133-135.

528 See below para. 584.

529 See art. 192 Swiss PILA.

regards, it does not appear that a *generally* heightened standard for assessing violations of the parties' due process rights under expedited procedures will find broad support.

As a last remark, and to clear any doubt, it must be stated that rejecting the proposal of a generally elevated standard for affirming a violation of due process rights is not the same as concluding that reasonableness will always be determined according to the same standard. Instead, it may well be the case that what is reasonable depends *inter alia* on the urgency of a case. However, there is no sufficient theoretical basis for generally affirming such urgency merely because expedited procedures are applied.[530] 305

2. Procedural Agreement

2.1 General Considerations

While the parties may agree on a wide range of issues in arbitral proceedings, they may in particular do so on certain aspects of the proceedings directly affecting the due process rights. Examples include agreed limits on the number of admissible submissions or the exclusion of document production.[531] When the parties reach such an agreement, they may pre-empt concerns on the part of a tribunal that a procedural decision on the same subject matter may violate the parties' due process rights, since the parties have expressed their consent to a restriction of the due process rights in this regard. 306

Such modifications of due process rights are, however, only possible if the parties are aware of these modifications and if the modifications refer to certain aspects of due process rights. Following from the mandatory nature of due process rights, it is not permissible to exclude all aspects of these rights.[532] 307

An agreement containing restrictions on the exercise of due process rights thus constitutes an agreement as to the procedure of the arbitration. A violation of this agreement could be considered a violation of the parties' agreement on the conduct of the arbitration, justifying a setting aside of the award and a refusal of enforcement. Nevertheless, in several decisions the Swiss Federal Tribunal has allowed a setting aside of the award *only* when the disregard of procedural agreements at the same time amounted to a violation 308

530 Considering as well that the application of expedited procedures under most rules does not require urgency (see below paras. 484-490).

531 Cf. BSK IPRG-SCHNEIDER/SCHERER, art. 182 para. 73; CLAXTON, 153-154; SERAGLINI/BAETEN, para. 75.

532 For everything BERGER/KELLERHALS, para. 1128; GÖKSU, para. 1280; ZK IPRG-OETIKER, art. 182 para. 67.

of due process for a party.[533] This is noteworthy because it means, in turn, that procedural modifications leading to a restriction of the parties' due process rights are as such not reinforced by the possibility of having the award set aside where the tribunal ignored such modifications. Thus if a tribunal disregards an agreement aimed at restricting due process rights (and thereby increasing the efficiency of the proceedings), this disregard will have no effect on the validity of the award, provided that the tribunal's decision does not violate any other aspects of due process.

2.2 Potential for Increasing Efficiency under Expedited Procedures

309 An agreement to modify the due process rights of the parties could substantially help the tribunal resolve specific conflicts between due process rights and efficiency. As pointed out previously, when the parties have agreed on a procedural modification to the effect of restricting their due process rights, the tribunal may rely on this agreement.[534] The parties may reach a procedural agreement either in the arbitration agreement (below sub-section a) or based on an agreement with the tribunal during the proceedings (below sub-section b).

a Arbitration Agreement

310 The first option for the parties to agree on modifying their due process rights is to do so in the arbitration agreement. The parties may reach such an agreement either expressly or implicitly by choosing arbitration rules that contain provisions to this kind of effect.

311 The most straightforward way is for the parties to expressly agree on specific measures like a limitation to one round of submissions or a prohibition of document production.[535] Nevertheless, such agreements rarely exist in practice, and they may even turn out to be unsuitable for a particular dispute if made in advance.[536]

312 Thus, the parties will typically, if ever, have implicitly consented to a different standard of their due process rights. Particularly, one could be tempted to presume such implied consent in the choice of arbitration rules that contain expedited procedure provisions or even when the parties expressly agree on the application of expedited procedures. At first glance, there may,

533 For everything DFT 117 II 346 c. 1b/aa; decisions Swiss Federal Tribunal no. 4A 308/2018 of 23 November 2018 c. 5.3.1; no. 4A 405/2016 of 2 March 2018 c. 3.3; no. 4A 554/2014 of 15 April 2015 c. 2.2; see further ZK IPRG-OETIKER, art. 182 para. 32.

534 See above para. 306.

535 Cf. ICC, Techniques for Controlling Time and Costs 2018, 7; CLAXTON, 153-154; SERAGLINI/BAETEN, para. 75.

536 ICC, Techniques for Controlling Time and Costs 2018, para. 4.

on a pragmatic level, be good reasons to assume such implied consent. In order to combat the phenomenon of due process paranoia, commentators have suggested that the standard for a sufficient or reasonable opportunity to be heard should not be too strict. Rather, these commentators advocate for a balance to be found between the right to be heard and the parties' interest in an expeditious resolution of the dispute.[537] This is corroborated by the previous observation that the application of expedited procedures may sometimes conflict with the parties' fundamental procedural rights.[538]

Nonetheless, it would be a shortcut to assume implied consent where 313
such consent might just be practical in some regard.[539] Therefore, it must be specifically determined if the parties, by agreeing on expedited procedures or at least choosing rules providing for such procedures, have also agreed to prioritise time-efficiency and cost-effectiveness over their procedural rights to the extent that they wanted to limit their due process rights. The answer to this question lies in the interpretation of the arbitration agreement.[540]

This interpretation will likely only in rare cases lead to the conclusion 314
that, merely by agreeing on rules providing for such procedures, the parties have agreed to specific restrictions to their due process rights. Oftentimes, when agreeing to arbitration, the parties are likely to be unaware of the details of the arbitration rules they choose.[541] Furthermore, if the parties, at the time of conclusion of the arbitration agreement, want to ensure higher procedural efficiency, they could do so by making specific stipulations in the arbitration agreement.[542] In addition, it must be stressed that courts under some laws, notably English and Singapore law, are extremely reluctant to imply a term into an agreement.[543] Thus, assuming theoretical agreements on the scope of the parties' fundamental procedural rights based merely on the parties' consent to expedited arbitration appears to be an uphill battle, in particular under such laws.

537 For everything BERGER/JENSEN, 422-423; KAPLAN, The Arbitrator and the Arbitration Procedure, 105; PARTASIDES, 111; POLKINGHORNE/GILL, 945-946; SERAGLINI/BAETEN, para. 120; see in general WAINCYMER, 12-26, 81.

538 See above para. 4; cf. further in general DODGE/SCHRAMM, ICC Rules, Article 22, in: Arroyo, para. 14; FORTESE/HEMMI, 116, 122.

539 Cf. for the general common law approach House of Lords, Liverpool City Council v. Irwin [1977] A.C. 239 [Liverpool City] at para. 9.

540 See above paras. 171-173.

541 SERAGLINI/BAETEN, para. 51.

542 ICC, Techniques for Controlling Time and Costs 2018, 7; CLAXTON, 153-154; SERAGLINI/BAETEN, para. 75; WEISS/KLISCH/PROFAIZER, 261.

543 Yam Seng Pte Limited v. International Trade Corporation Limited [2013] EWHC 111 (QB), paras. 123-131; House of Lords, Liverpool City Council v. Irwin [1977] A.C. 239 [Liverpool City] at para. 9; Ng Giap Hon v Westcomb Securities Pte Ltd [2009] 3 SLR(R) 518.

315 Despite these concerns, however, it would be remiss to exclude any potential for implied consent. Instead, where the parties specifically agree on the application of expedited procedures, one can infer that the parties deliberately chose the expedited procedure rules for a reason, the most likely being the efficiency of the proceedings. The same cannot be said when the parties have merely chosen arbitration rules that also contain provisions on expedited procedures.

316 Yet whether the parties, by choosing expedited procedures, actually intended to modify their fundamental procedural rights appears doubtful. By the same token, an express choice of expedited procedures will not suffice either to conclude that the parties have agreed on an increased duty to actively cooperate. While it stands to reason that the parties wanted to ensure efficient proceedings by expressly choosing corresponding rules, it can be argued that the parties intended to achieve this goal by means of the express provisions in the chosen rules – instead of imposing on themselves a hazy, implicit duty to additionally promote this efficiency derived from a general choice of expedited procedures.

b Agreement with the Tribunal During the Proceedings

317 A clearer and more reliable option for affirming the parties' consent to a modification of their procedural rights is an agreement between the parties and the tribunal during the proceedings.[544] The most straightforward way to reach such an agreement will be at the case-management conference. Therein, a tribunal would be well-advised to draw the parties' attention to the focus on time-efficiency and cost-effectiveness.[545] Based on this focus on efficiency, the tribunal and the parties can and should agree on the procedural steps, potentially limiting the parties' due process rights. Moreover, even the parties' agreement to a strict procedural timetable could theoretically be considered as an agreement on granting the authority to the tribunal to take robust procedural decisions in order to comply with the timetable.[546]

318 While it may in practice only occasionally be possible for the parties and the tribunal to reach agreements specifically restricting due process rights, such agreements nonetheless are a promising method for increasing procedural efficiency.

544 Cf. KNUTS, in: Schregenberger, 3-4, who, however, refers to waivers.

545 See for example expressly art. 27.4 DIS Rules; see also BERGER/JENSEN, 430.

546 See for an illustrative example of a related scenario DFT 142 III 360 c. 4.2.2.

3. Duty to Arbitrate in Good Faith in General and Forfeiture of Rights in Particular

3.1 General Considerations

The duty to arbitrate in good faith and the prohibition to act in a contradictory way was already discussed earlier.[547] A consequence of this duty is that a violation of the parties' due process rights may be inconsequential where one party in the first place does not object to an issue but decides to raise an objection to the very issue later on, as the party is deemed to have forfeited its right to oppose this issue.[548] No special form requirements exist for this kind of forfeiture because it is not based on an agreement but rather on a party's actions or inactions. 319

In contrast to the previous concept of a procedural agreement, a forfeiture of rights does not limit due process rights as such but instead only the remedies to a violation of these rights, ultimately immunising the violation from legal consequences. Hence, the principle of forfeiture is applicable in any arbitration procedure and is not something that the parties may agree on or vary in advance. 320

3.2 Potential for Increasing Efficiency under Expedited Procedures

It appears that the principle of a forfeiture of rights may only occasionally be useful for the conduct of the proceedings. It should be apparent that the *general* conduct of the proceedings cannot reasonably be built on a forfeiture of rights. This is because the underlying idea is that a party is barred from relying on a violation of rights due to it not having opposed that *specific* violation. 321

The more general concept of good faith may be more promising but ultimately will likely play only a subsidiary role compared to procedural agreements. The concept of good faith could be relevant where the parties reached an express agreement with the tribunal regarding the conduct of the proceedings in the first place but at least one party subsequently alleges a violation of its due process rights based on this agreement.[549] For a situation of this kind, the concept of a valid procedural agreement as described above in paras. 306-308 should be appropriate. 322

547 See above paras. 213-222.

548 DFT 142 III 360 c. 4.2.2; DASSER/GAUTHEY, 249; GIRSBERGER/VOSER, para. 966.

549 BK ZPO III-GABRIEL/BUHR art. 373 para. 63.

4. Waiver of Remedies

4.1 General Considerations

323 The third concept for limiting the impact of due process rights is a waiver of remedies. The details of this instrument will be examined further below in paras. 824–828. Yet at this point the following observations are to be made.

324 The instrument of a waiver of remedies focuses on an agreement by the parties not to apply for a setting aside of the award (so-called setting aside waiver) or not to resist enforcement of the award (so-called enforcement waiver).[550] Therefore, the parties agree before the rendering of the award not to exercise any remedy against the binding effect of the award.[551] A waiver of remedies may be either comprehensive (i.e. it encompasses a waiver for all potential defects of the award) or partial (i.e. it encompasses only certain potential defects of the award).[552] In any event, a waiver of remedies is usually admitted only under restrictive requirements, in order not to deprive the parties of a minimum level of judicial control by a state court. For example, under Swiss law an express setting aside waiver is required, while a mere reference to arbitral rules containing a general waiver is insufficient.[553]

325 The overall permissibility, details, and substantive and formal requirements of such a waiver of remedies follow from the applicable law. A setting aside waiver is subject to the *lex arbitri*.[554]. The permissibility of a waiver to resist transnational enforcement is subject to the law of the jurisdiction of enforcement, which usually incorporated the NYC.[555]

326 Like the concept of forfeiture, a waiver of remedies only affects the remedies against a violation of the parties' due process rights in the form of a judicial review. It does not, however, affect the existence of these rights as such.[556] Hence, the tribunal still has to comply with the mandatory provisions of the *lex arbitri* to respect the parties' due process rights.[557] Nonetheless, in the instance that a tribunal fails to do so, the parties may (due to their waiver) be

550 See for this distinction RYAN/DHARMANANDA, 51.

551 Cf. in general BORN, Law and Practice, 401.

552 BSK IPRG-PATOCCHI/JERMINI, art. 191 paras. 40–41; CHK IPRG-FURRER/GIRSBERGER/AMBAUEN, art. 178 para. 18; ZK IPRG-OETIKER, art. 192 para. 26.

553 For everything DFT 133 III 235 c. 4.3.1; decision Swiss Federal Tribunal no. 4A_18/2007 of 6 June 2007 c. 3.2; BAIZEAU, 12 PILS, Article 192, in: Arroyo, para. 18; BERGER/KELLERHALS, para. 1857.

554 BORN, Law and Practice, 401–405; for an overview RUCH, 66–80.

555 RYAN/DHARMANANDA, 52–53; see in detail below para. 841.

556 See above para. 320.

557 Cf. BERGER/KELLERHALS, para. 1128.

prevented from successfully applying for a setting aside of the award and resisting its enforcement.

4.2 Potential for Increasing Efficiency under Expedited Procedures

Similar to the concept of forfeiture of rights discussed above, relying on a waiver of remedies to increase the efficiency of the proceedings appears futile for two key reasons. 327

First, the fundamental problem with this tool is that it does not relieve the tribunal from the duty to respect the parties' due process rights.[558] The fact that the parties may not be able to judicially oppose a potential violation of their rights in setting aside and enforcement proceedings should not have any impact on the conduct of the arbitration proceedings because a waiver of remedies does not affect the mandatory nature of due process rights. 328

Second, the observations made in the context of a procedural agreement[559] apply to the concept of waiver as well, and even in an enhanced manner. In the absence of an express agreement on a waiver of remedies, trying to argue that the choice of expedited procedures is tantamount to a waiver of remedies for the violation of due process rights seems adventurous at best. 329

IV. Proposed Solutions

As the discussion above has revealed, finding a universal instrument for reconciling quality, time-efficiency, and cost-effectiveness is a challenging task. The most promising solution to this problem seems to be the instrument of procedural agreements. These agreements also have the benefit that they are an expression of party autonomy, which underlines the consensual character of arbitration.[560] Nevertheless, relying exclusively on procedural agreements is not without its problems and may even prove unworkable when the parties have not reached any such agreements except for the general choice of arbitration rules. 330

Does this mean that a tribunal in a scenario of this kind should refrain from taking decisions that might affect the parties' due process rights? It is submitted that exactly the opposite should be the case, as the following proposals will illustrate. Rethinking the relationship between quality and the desire for time-efficiency and cost-effectiveness (below sub-section 1), combined with the 331

558 See above para. 326.

559 See above paras. 312-316.

560 See above para. 143.

so-called 'procedural judgment rule' (below sub-section 2), appears to be a reasonable and useful tool for a tribunal to strike the balance between quality, speed, and costs. Going one step further, a tribunal could try to consider it impossible to violate due process rights (below sub-section 3). As a further safeguard, a more standardised process with less arbitral discretion will be explored (below sub-section 4).

1. Rethinking Quality, Time, and Cost: Is there Any Reasonable Basis for Due Process Paranoia?

332 The discussion above focused on methods for increasing time-efficiency and cost-effectiveness without diminishing due process rights in such a way that these rights would be considered violated. Yet the idea of increasing one of these three factors at the inevitable expense of another may seem short-sighted. In fact, a disproportionate focus on safeguarding due process appears to be unjustified paranoia (below sub-section 1.1) and clashes with party autonomy (below sub-section 1.2).

1.1 Due Process Paranoia Is Unwarranted

333 With all the attention that the concerns for due process and the increasing problem of due process paranoia have received, one may get the impression that tribunals are constantly walking on eggshells as every aspect of their procedural decisions would immediately expose their award to a potential setting aside of the overall award. However, this could not be further from the truth.

334 As various commentators have pointed out, state courts usually grant a considerable amount of deference to tribunals in their conduct of the proceedings and intervene by means of a setting aside of the award only in clear cases of denials of due process.[561] Thus, the setting aside of awards is the exception.[562] This finding might be surprising at first glance, yet a closer consideration should reveal the reasons for this conclusion. It is worth recalling that the opportunity to be heard merely needs to be reasonable, and courts usually require for the setting aside of an award that violations of the right to be heard resulted in an actual detriment to one party.[563] Against the backdrop of these two factors, it would be ill-conceived to assume that courts are only waiting to set aside awards because of a procedural decision.

561 POLKINGHORNE/GILL, 939; REED, Ab(use) of due process, 372; SCHERER, in: Wolff, NYC, art. V para. 130.

562 See for Switzerland DASSER/WÓJTOWICZ, 279-280, 284.

563 See above para. 295.

On the contrary, there is no reasonable basis for such an overly apprehensive assumption.[564] This is not to say, however, that tribunals ought to disregard due process considerations when making procedural decisions. Instead, tribunals must give close consideration to the due process rights of the parties. However, when doing so, the arbitrators should not feel as if the courts were scrutinising their every decision with the sole intention of invalidating the award. 335

1.2 Due Process Is Important – but so Is Party Autonomy

Not only is due process paranoia unwarranted, as the previous sub-section showed, but the phenomenon could also conflict with another decisive feature of arbitration, namely party autonomy. When the parties choose a certain set of arbitration rules, it is reasonable to assume that they did so *inter alia* in anticipation of a reasonably efficient dispute resolution process. This assumption is exemplified in provisions of arbitration rules that require an efficient conduct of the procedure from both the tribunal and the parties.[565] Even if the parties are unaware of such provisions (as may quite often be the case),[566] the very choice of arbitration rules, instead of agreeing on every specific procedural rule under ad hoc arbitration, shows that the parties had a preference for a reasonably efficient resolution of their dispute.[567] Similarly, arbitrators are expected to administer and manage a dispute in the course of deciding it.[568] Automatically and constantly giving in to procedural requests of a party based on a vague fear of violating due process rights can hardly be considered proper administration and management. 336

Thus, if a tribunal almost exclusively focuses on due process considerations and chooses to disregard the efficiency aspect in its procedural decisions, it risks overriding the parties' desire for a timely and cost-effective resolution of their dispute. Admittedly, under Swiss law, this would not lead to a setting aside of the award.[569] Yet, and regardless of the drastic consequence of setting aside, it is submitted that a tribunal in such a scenario will likely not have met the parties' expectations of how a dispute should be resolved by means of arbitration. A consequence of this submissino is that a tribunal must carefully 337

564 See above fn. 561.

565 See for example art. 22 ICC Rules; art. 22.2 ICDR Rules; art. 14.5 LCIA Rules.

566 See above para. 314.

567 Cf. GIRSBERGER/VOSER, paras. 77, 78, and 81.

568 GIARETTA, 68–69; MARZOLINI, 99; REED, Ab(use) of Due Process, 365; WELSER/MIMNAGH, 128.

569 See above para. 308.

weigh the merit of a procedural request by a party and assess the due process implications of a decision against efficiency considerations, without automatically prioritising potential due process concerns.

338 This proposal highlights the interdependence of factors that determine the procedural quality of an arbitration as discussed in Chapter 3.[570] The problems that arise from the complex interplay of several rights and concepts cannot be solved by systematically favouring one feature over another. Instead, a balance must be struck. A method for achieving such a balance will be discussed in the next sub-section.

2. Safe but Limited Way Forward: The Procedural Judgment Rule

339 Following from the discussion above, the salient question remains based on which criteria a tribunal should decide whether it prioritises the parties' due process rights or the parties' interest in an efficient resolution of the dispute if no specific tools applicable to a certain issue exist. It is proposed that arbitrators should take comfort in what several authorities have dubbed the 'procedural judgment rule.' In the following section, the origin of the procedural judgment rule, namely the business judgment rule, will be presented (below sub-section 2.1), followed by a discussion on how this rule can be transposed into the procedural judgment rule (below sub-section 2.2).

2.1 The Business Judgment Rule

340 The discussion so far has revealed one major difficulty of arbitral proceedings, namely the combination of quality, time-efficiency, and cost-effectiveness. This issue is even more pressing in expedited proceedings. On the one hand, certain aspects of this difficulty may be based on legitimate due process concerns. On the other hand, an overly expansive interpretation of the scope and significance of due process rights may lead to due process paranoia. Regardless of the reasons, the question for a tribunal will be whether it should use its discretion regarding the conduct of the proceedings to give priority to considerations of speed and cost, or whether it should prioritise the parties' due process rights.[571] It is precisely this discretion that may be subject to a court's review in an application for the setting aside or the refusal of enforcement of the respective award. Judging whether the tribunal exercised its discretion in a way that warrants setting aside or the refusal of enforcement of the award is a delicate task.

570 See above paras. 108-119.

571 Cf. FORTESE/HEMMI, 121; HOCHSTRASSER, 131.

Nonetheless, a court reviewing the exercise of discretion is by no means a new phenomenon or reserved to arbitration. For example, in the area of corporate law, the so-called 'business judgment rule' is a tool for assessing the merit of a discretionary business decision.[572] Although it stems from the area of substantive law, it is proposed that this rule can be transferred to arbitration, which is why the business judgment rule deserves a closer examination. 341

a The Business Judgment Rule in General

The business judgment rule is a tool in liability actions against the members of the executive organ of a company for determining whether they have breached their duty of care and whether they are liable for this breach.[573] The rule originates in US corporate law but has found its way into different legal systems, including Swiss law.[574] 342

The business judgment rule was created out of the necessity to evaluate the discretionary business decisions of company executives relating to future events. In making these evaluations, there is a constant risk of judging the decision merely based on the *ex post* outcome (so-called 'hindsight bias') instead of the necessary *ex ante* evaluation of the decision at the time of making.[575] Due to the risk of hindsight bias, courts developed a two-tiered approach known today as the business judgment rule: if the decision complies with several criteria, it is assumed that the executives complied with their duty of care. This assumption restrains the court in reviewing the exercise of discretion underlying the executive decision. If the criteria are not met, however, the decision will be evaluated without any restraint.[576] 343

b Criteria of the Business Judgment Rule

Applying the business judgment rule under Swiss law, the following criteria are relevant in determining whether an executive decision was within the permissible range of discretion: an executive organ must, based on sufficient information, take a business decision that is within its discretion; the decision 344

572 DFT 145 III 351 c. 3.1; 139 III 24 c. 3.2; decision Swiss Federal Tribunal no. 4A_268/2018 of 18 November 2019 c. 6.5.1; DERUNGS/VON DER CRONE, 703-706; FISCHER, 280; VOGT/BÄNZIGER, 611-612.

573 DFT 145 III 351 c. 3.1; 139 III 24 c. 3.2; decision Swiss Federal Tribunal no. 4A_268/2018 of 18 November 2019 c. 6.5.1; DERUNGS/VON DER CRONE, 703-706; FISCHER, 280; HOFFMANN-NOWOTNY, 455-456; VOGT/BÄNZIGER, 611-612.

574 BSK OR II-GERICKE/WALLER, art. 754 para. 31.

575 For everything DFT 145 III 351 c. 3.1; MEIER-HAYOZ/FORSTMOSTER/SETHE, para. 814; VOGT/BÄNZIGER, 609.

576 For everything BSK OR II-GERICKE/WALLER, art. 754 para. 31; MEIER-HAYOZ/FORSTMOSTER/SETHE, paras. 814-818.

must be free from conflicts of interest; and the decision needs to be made in compliance with formal and procedural rules on decision-taking.[577] Further (though more disputed) criteria include the observance of mandatory legal provisions, justifiability of the decision, and that the decision is within the purpose of the company.[578]

2.2 From the Business Judgment Rule to the Procedural Judgment Rule

a Suitability of the Business Judgment Rule to Procedural Decisions

345 The criteria of the business judgment rule should have revealed that the business judgment rule cannot, without further reflection, be directly transferred to the realm of procedural decisions in arbitration. In particular, criteria such as the exclusion of conflicts of interest and that the decision be within the purpose of the company are of no use to a tribunal when deciding on a request for document production. Moreover, the business judgment rule is a tool for determining if an executive organ violated a duty of care. In the context of procedural decisions, however, the question is not whether a duty or right is violated in isolation, but rather how quality (of which due process is a part)[579] and efficiency can be balanced.

346 Furthermore, the business judgment rule was devised to evaluate discretionary business decisions by executive organs with a view to future developments.[580] In other words, the business judgment rule concerns the quality of a prognosis of uncertain developments.[581] The uncertainty following from the prognostic character of business decisions implies that the decision may vary if the same situation were to occur again in the future because the prognosis may be different next time. In contrast, the procedural decision by an arbitral tribunal on a party's procedural request should not vary depending on whether or not a rejection of the request results in a violation of that party's due process rights, since the decision does not involve a prognosis. The tribunal does not evaluate whether a potential court review in the future will determine that the procedural decision violated due process rights. Instead, the tribunal has to assess whether its decision in and of itself is incompatible with fundamental procedural guarantees, irrespective of a potential court review.

577 For everything DFT 145 III 351 c. 3.1; Swiss Federal Tribunal no. 4A_268/2018 of 18 November 2019 c. 6.5.1; FISCHER, 280.

578 See for a comprehensive overview DERUNGS/VON DER CRONE, 703-704; GAUCH, 48-66; in particular for the question of whether the justifiability of the decision should be assessed HOFFMANN-NOWOTNY, 457-462.

579 See above paras. 114-115.

580 See above para. 343.

581 DERUNGS/VON DER CRONE, 704; SETHE, 173.

All things being equal, the tribunal should always reach the same conclusion in the same situation because the decision is not a prognosis of future events but an analysis of a current situation instead.

Nevertheless, the idea of the business judgment rule – to exercise restraint 347
when reviewing a discretionary decision – is a sound proposal that should be transferred to the realm of arbitration. Although courts in general already grant deference to the tribunals in their procedural decisions, it would be reassuring to underpin this deference with a dogmatic tool like the procedural judgment rule. In order to make such a rule useful for practice, however, the concept needs further refinement. This is especially true for the criteria to be applied in deciding whether a procedural decision must be reviewed restrictively or extensively.

b Criteria of the Procedural Judgment Rule

Accordingly, in order for the business judgment rule to successfully turn into 348
a procedural judgment rule, first the criteria for the application of the procedural judgment rule need to be defined. For this purpose, the following criteria are proposed.[582]

The first criterion, which also defines the scope of application of the pro- 349
cedural judgment rule, is that the rule applies only to decisions which concern the conduct of the proceedings and where the tribunal has discretion.

The second criterion is that the tribunal actually weighs the rights of the 350
applying party against the desire for an efficient conduct of the proceedings. While this criterion may seem obvious at first glance, its significance should not be underestimated, because it underlines the importance of the arbitrator as a manager of a dispute.[583] As stated previously, it would be insufficient for such a manager to systematically give preference to one factor over another without further reflection.

The third criterion is the documentation of the weighing of interests in 351
the respective procedural order. This is not meant to impose a duty on the arbitrators to issue procedural orders that resemble awards in length and reasons. On the contrary, that would defeat the expedience of expedited procedures. However, in the order a few sentences should be devoted to explaining why the tribunal has reached its decision.[584] This requirement is consistent

582 Although not expressly referring to this rule, but with criteria to a similar effect, GENTELE, 169.

583 Cf. in general GIARETTA, 68–69; MARZOLINI, 99; REED, Ab(use) of Due Process, 365; WELSER/MIMNAGH, 128.

584 See also GERBAY, Arbitral Institutions, 196–197, who, although for arbitral institutions, argues that for procedural decisions, a minimum of reasons should be required to safeguard due process but that detailed reasons may only slow down the arbitral process.

with other procedures in arbitration where at least summary reasons must be provided even while time-efficiency is of the essence, such as in emergency arbitration.[585]

352 The fourth criterion is directly borrowed from the business judgment rule and requires that the decision be reasonable from the perspective of the tribunal at the time of deciding on a procedural request.

353 The fifth criterion is the absence of bad faith on the part of the tribunal. Bad faith in this context typically equates to a lack of impartiality.

354 The sixth and final criterion is the absence of clear violations of due process rights. If, for example, a tribunal refuses to grant a party an opportunity to comment on additional evidence submitted by the other party for the first time, such a decision clearly violates the party's right to be heard and it is hard to see why a court reviewing the resulting award should conduct its review with a great degree of deference to the tribunal.

c Consequences for Court Review

355 If a procedural decision that is within the discretion of the tribunal meets all the criteria outlined above, a court should assume that the decision sufficiently respected the parties' due process rights when prioritising the efficiency of the proceedings. A consequence of this assumption should be an assessment of the procedural decision with restraint, which means that a court should set aside or refuse enforcement of an award only when the award was clearly affected by the procedural decision.[586]

356 Conversely, in scenarios where the above criteria are not met, a court should review the decision without any reticence. Yet this is not to say that this unfettered review needs to automatically lead to a setting aside or refusal of enforcement of the award. Rather, it is still possible for the court to conclude that the tribunal did not violate the due process rights in a way that justifies measures against the binding effect of the award. However, the standard of review is stricter.

d Evaluation and Consequences for Arbitral Practice

357 It is proposed that, overall, the procedural judgment rule is a sensible tool for deciding whether or not a tribunal exercised its discretion correctly to prioritise efficiency over due process rights. Furthermore, if one considers this proposed procedural judgment rule to be a valid approach, there is no reason why

585 See art. 6.3 Appendix V ICC Rules: *'The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.'*

586 See already for the requirement of causality in setting-aside proceedings above para. 295.

this rule should be confined to decisions rendered by a tribunal in expedited procedures. Rather, it is a viable tool for ordinary procedures as well because it provides a general approach towards assessing the exercise of arbitral discretion.

Nevertheless, the procedural judgment rule is not a panacea, and to over- 358
estimate its value would only diminish its potential. In fact, there are a number of limitations and qualifications to this rule. First, the rule itself does not directly provide arbitrators with guidance as to how to decide on a procedural request. Instead, the rule primarily applies to the court review of an award. The rule applies to the arbitral proceedings only indirectly because it indicates to the arbitrators a number of relevant factors for their decision such as proper documentation. However, these factors relate only to the process of reaching a decision and its form rather than the content of the decision.

Second, in jurisdictions in which courts already grant a considerable 359
amount of deference to tribunals regarding the conduct of the proceedings,[587] the rule risks further complicating the arbitral process because tribunals might feel the need to follow a formal checklist. This complication will hardly be offset by an increased deference of the courts. In jurisdictions where the courts do not necessarily restrict themselves in their review of awards, the rule may even make courts more likely to set aside an award or refuse its enforcement for an alleged non-compliance with the proposed criteria.

Third, and related to the second concern, is the fact that if the tribunal 360
needs to respond to an abusive guerrilla-tactical request, the rule is not necessary. When the tribunal can reasonably conclude that a procedural request is nothing but an attempt to derail the proceedings, such a request constitutes an abuse of rights and of due process. An abuse of rights does not merit any legal protection at all. This means that a tribunal does not need to avail itself of the procedural judgment rule in order to dispose of these kinds of requests.

Fourth, the procedural judgment rule is often one-sided in its applica- 361
tion. It usually applies when a tribunal denied a procedural request, but not necessarily when it granted the request. When a tribunal grants a request to safeguard the applying party's right to be heard, this party cannot have the award set aside based on this decision due to a lack of an interest worthy of legal protection.[588] The only exception would be an instance where the granting could cause an unequal treatment of the parties, in which case only the other party could apply for a setting aside.

587 See for Switzerland HOFBAUER, History of Arbitration, in: Arroyo, para. 27.

588 See above para. 245.

362 Fifth, while the procedural judgment rule may increase the quality of the proceedings by improving procedural efficiency, it does not necessarily increase the quality of the award. As has been established, the right to be heard is *inter alia* intended to support the gathering of facts, thereby increasing the chance of a legally correct award.[589] Yet a rule relating to the judicial review of awards and underlying procedural decisions is not suitable for increasing the legal accuracy of an award.

363 More generally, however, the procedural judgment rule should still not be disregarded after all. If applied in appropriate situations, the rule may indeed be a useful tool to facilitate the decision-making process of the tribunal along with a potential subsequent scrutiny of the award.

3. A Riskier but More Useful Way Forward: Consider Due Process Violations Impossible

3.1 Lack of Solutions and Proposed Method

364 As has been argued, deciding whether to prioritise due process or efficiency is a difficult task since it is largely up to the tribunal to carefully balance the different factors. Tribunals can take comfort in the procedural judgment rule to a certain extent, yet the rule is not an automatic solution for clearing concerns of setting aside and refusal of enforcement. Hence, an additional approach is desirable.

365 Consequently, if a tribunal, after assessing all the circumstances, considers a denial of a procedural request warranted, it should remind itself that due process paranoia is unjustified in many jurisdictions.[590] Accordingly, the tribunal should ask itself if it were to deny the request knowing that the applying party would neither apply for a setting aside of the award nor resist its enforcement. When a tribunal, after considering all the relevant circumstances, still concludes in good faith that, as a consequence of the request being denied, the applying party will not suffer a violation of its due process rights while the proceedings will instead benefit from greater efficiency, the tribunal should deny the request.

3.2 Evaluation and Consequences for Arbitral Practice

366 Unlike the procedural judgment rule, this approach applies directly to the decision-making of the arbitral tribunal rather than solely to the judicial review

589 See above para. 113.

590 See POLKINGHORNE/GILL, 939; REED, Ab(use) of Due Process, 372; SCHERER, in: Wolff, NYC, art. V para. 130.

of an award. In contrast to the procedural judgment rule, this approach is not only relevant when the tribunal rules against a procedural request but may in addition even increase the likelihood of the request being granted. After all, a tribunal may, regardless of the threat of setting aside, hold that granting the request is necessary in order to safeguard the applying party's due process rights. This contrasts with the procedural judgment rule that concerns whether the decision *not* to grant a request violated a party's right to be heard.

Critics of this proposal may reply that this approach is easier said than 367
done, being feasible only with fearless arbitrators since it may require them to completely ignore the prospect of a judicial review of their case management. While this concern may be understandable from a practical perspective, it is worth recalling that from a legal and statistical perspective, due process paranoia is unjustified given the (very) low rate of success of applications to have an award set aside.[591] Once rather apprehensive arbitrators also accept this fact, there is a fair chance that these arbitrators may make more robust case-management decisions as well.

4. A More Realistic but Less Appealing Approach: Standardised Procedural Decisions

While it is submitted that the approach described above is appealing and prom- 368
ising in its ability to generate reasonable results and strike a balance between quality and efficiency, that approach may nonetheless be unfeasible in practice. As practical experience shows, the arbitrators' fear of negative repercussions for strict procedural decisions is often considerable, at least among less experienced arbitrators. Interestingly, the same arbitrators may, as counsel, advise their clients of the low probability of the setting aside of an award that is unfavourable to them.[592] Nevertheless, when put in the position of the sole arbitrator, they may primarily see the sword of Damocles in the form of an application for the setting aside of their own award because of a tough procedural decision. Even if the arbitrators successfully remind themselves of the small chance of success of such an application, they may nonetheless fear that a strict procedural stance may damage their reputation in front of the aggrieved party and render future appointments by this party illusory.

591 See above para. 334.

592 For everything HOFBAUER, History of Arbitration, in: Arroyo, para. 27, with reference to DASSER/WÓJTOWICZ, 277-280.

369 This observation is not supposed to reproach more cautious arbitrators; their fears of damage to their reputation are not surprising. Indeed, as has been argued, arbitration has turned into a lucrative business,[593] and it is understandable that prudent practitioners want to be part of this thriving industry. However, the arbitrators' fear of losing future business leaves the users of arbitration with the problem of increased time and costs due to an inefficient conduct of the arbitration.

370 Thus, when the arbitrators need to decide on a procedural motion, they are faced with the conundrum of either risking their own reputation (although usually the risk is small) or disappointing at least one party in its expectation of an efficient resolution of the dispute. A panacea to this bind is not in sight. Yet one potential solution is to prevent this situation from occurring in the first place. The method to achieve this result would be a removal of arbitral discretion and its replacement with more standardised and default procedures, for example a strict limitation to one round of submissions already in the arbitral rules. As will be explained in more detail below in Chapter 10, expedited procedure rules provide for less arbitral discretion in some procedural steps. Instead, these rules often contain a default rule that ultimately gives way to a contrary decision by the arbitrators when exceptional circumstances arise. While the underlying idea of this method is not without merit, the problem that comes with this is that the arbitrators may, based on a procedural motion, always decide that exceptional circumstances exist in any given case. Hence, the default rule may hardly ever apply and instead the exception becomes the norm.

371 Therefore, the only real solution to this conundrum is to eliminate arbitral discretion altogether. However, it should be obvious that this option may lead to catastrophic results in terms of quality. In appropriate cases, it may, for example, be necessary to grant more rounds of submissions than provided for by the arbitration rules.[594] Therefore, while the proposal to eliminate arbitral discretion could lead to significant increases in the efficiency of the arbitral process as well as remove the pressure on the arbitrators, the quality of the dispute resolution process might unduly suffer. This would constitute too big of a restriction on quality yardsticks as discussed earlier.[595] In addition, the risk of a setting aside of the award may increase considerably, which may

593 See above para. 63.

594 Indeed, also for example in Swiss litigation, under summary proceedings the parties usually have the right to only one submission, but the circumstances of a particular case may warrant a second round of submissions (DFT 144 III 117 c. 2.1 with further references).

595 See above paras. 108-118

eventually lead to the need for another arbitration – something which is not in the interest of efficiency. As a consequence, it appears highly doubtful as to whether an elimination of arbitral discretion truly leads to useful results.

V. Conclusion

This chapter has revealed the challenges of combining efficiency with due process. While due process is significant, the tendency to fall into a due process paranoia is neither justified nor beneficial to the proceedings. Nonetheless, in the absence of any specific instruments guiding the tribunal in its weighing of due process rights against efficiency, the paranoia is understandable. Tools and concepts like procedural agreements and the duty to arbitrate in good faith may be helpful to a certain extent in combatting due process paranoia but ultimately lack comprehensive applicability. 372

More universal solutions that support the tribunal in its task of conducting the arbitration are the procedural judgment rule, the assumption that the award debtor will not successfully take judicial recourse against the award, or a limitation of arbitral discretion. However, none of these are truly convincing. Thus, in the end the onus is still on the arbitrators to appropriately weigh due process rights against efficiency. 373

Chapter 7
Party Autonomy in Institutional Arbitration and Expedited Procedures

The challenge of combining due process with efficiency is not the only decisive issue in expedited procedures that requires due consideration. Another pressing issue is how to safeguard the parties' autonomy to make agreements regulating the procedure while at the same time creating a mechanism that can prevent the parties from getting in their own way with unreasonable agreements that would decrease the overall efficiency of the proceedings.[596] 374

596 See for this problem already above paras. 38-41.

375 Party autonomy is a crucial element in any arbitration proceeding.[597] However, as discussed earlier, party autonomy may – either intentionally or unintentionally – end up complicating the proceedings.[598] This difficulty raises the question of whether and how the effects of party autonomy should be restricted in expedited procedures in order to increase (or at least preserve) the efficiency of the procedures. This is a delicate task, for too much restriction may come across as paternalistic and even end up jeopardising the validity of the award by risking a setting aside or refusal of enforcement of the award.[599] Unsurprisingly, the respect for party autonomy has been one of the most critical and hotly debated topics within expedited procedures. The present chapter is intended to lay the theoretical groundwork for the subsequent discussion of how the arbitral institution and tribunal should treat party autonomy in expedited arbitration.

376 Accordingly, the following section will provide general considerations on party autonomy (below section I) and then focus on party autonomy in institutional arbitration in particular (below section II), before examining the phenomenon of the so-called party autonomy paradox more closely (below section III).

I. General Considerations on Party Autonomy

377 The concept of party autonomy has been briefly introduced in previous chapters, but its significance justifies revisiting the concept in more detail. The concept finds its justification in the consensual nature of arbitration.[600] Party autonomy forms the basis of the arbitral tribunal's jurisdiction and vests the parties with the authority to *inter alia* choose the form of arbitration they want. Specifically, party autonomy allows the parties to choose a procedure that they consider most appropriate for the resolution of their (potential) dispute.[601] At the heart of this choice is the arbitration agreement that expresses the parties' general will to arbitrate. This agreement may contain further details of the configuration of this will, such as a choice of arbitration rules and deviations thereof as well as features not covered by these rules.[602]

597 See above paras. 21-22.

598 See above paras. 38-41.

599 Also cautioning BÜHLER/HEITZMANN, 141-142; see in detail below Chapter 13.

600 See above paras. 21-22 and BERMANN, 223.

601 ARROYO, 201-202; BÖCKSTIEGEL, 3.

602 See for everything in general BORN, Law and Practice, 38-42.

Nevertheless, according to the prevailing view, the power of the parties to choose the rules governing the arbitral proceedings is not unfettered.[603] The mandatory rules of the seat of arbitration constitute rules from which the parties cannot derogate.[604] Similarly, during the stage of enforcement, mandatory rules of the forum of enforcement may be relevant.[605] Moreover, some arbitration rules do not allow a partial derogation from their rules[606] – a concept that will be examined in greater detail in the second part of this chapter.[607] Lastly, the arbitrators usually have a certain amount of discretion regarding the conduct of the proceedings; this regularly allows the arbitrators to adopt measures they consider appropriate, even against the will of at least one party.[608] Consequently, the concept of party autonomy is not absolute but rather embedded in a broader legal framework, which the previous chapter focused on. 378

II. Party Autonomy in Institutional Arbitration

The understanding of party autonomy in institutional arbitration significantly depends on the arbitration rules of the respective institution. Institutional arbitration, as opposed to ad hoc arbitration, has the benefit of the availability of a pre-drafted set of rules that are designed for the administration of a dispute by this institution.[609] To a certain extent, this fixed set of rules and an available institutional body shift the focus from the parties to the institution: the institutional rules automatically regulate certain issues that would otherwise be up for the parties to decide,[610] and the institution may be empowered to perform certain tasks and take specific decisions.[611] 379

603 ARROYO, 202-206; BÖCKSTIEGEL, 2; PATOCCHI, 133-139. Delocalised arbitration would allow for an even greater degree of autonomy but is, with the exception of ICSID arbitrations, not generally accepted, GREENBERG/KEY/WEERAMANTRY, para. 2.85.

604 HENDERSON, 898; in general LAZOPOULOS, Swiss Rules Art. 15, in: Arroyo, para. 7.

605 Via art. V para. 2 NYC.

606 See for example art. 1 para. 2 ICC Rules.

607 See below paras. 394-395.

608 See for example art. 22.2 ICC Rules; art. 19.1 Swiss Rules; for the question of whether the arbitrators may disregard an agreement of all parties see above paras. 242-246.

609 BLACKABY/PARTASIDES/REDFERN/HUNTER, paras. 1.141-1.148; SCHROETER, 144.

610 For example the details of the statements of claim and defence, cf. arts. 20 and 21 Swiss Rules.

611 For example the selection and appointment of arbitrators in the absence of a party agreement, cf. art. 13 ICC Rules.

380 Some institutions have adopted a 'light touch' approach, referring to the idea that the institution rarely interferes with the proceedings and instead leaves it mostly to the parties and the tribunal to decide on the administration of their dispute.[612] Other institutions, in contrast, have been dubbed more 'interventionist', meaning they will exercise tighter control over the arbitral process.[613] This distinction shows that the authority to make decisions about the conduct of the proceedings may vary considerably depending on the design of the arbitration rules.

381 For a better understanding of this issue as well as of the party autonomy paradox, the legal nature of institutional rules will be characterised (below sub-section 1), after which the contractual relationships between the different actors will be examined (below sub-section 2). Following this, the details of the agreement on a set of institutional rules will be illuminated (below sub-section 3), the meaning of 'mandatory rules' will be clarified, and party autonomy in institutional arbitration will be analysed(below sub-section 4).

1. Characterisation of Institutional Rules

382 The rules of arbitration institutions are not law but rather a set of contractual stipulations drafted by the respective institution.[614] In other words, arbitration rules do not have the character of binding legal provisions found in the national codes and statutes of a jurisdiction. Instead, the provisions are binding only insofar as they constitute an agreement between the parties to the agreement, in this case being the institution and the parties in dispute. Thus, the rules of arbitration institutions are mere contractual provisions.

383 For the sake of completeness, it bears noting that it is controversial whether institutional rules constitute general terms and conditions, with the respective rules of protection applicable against the use of such general terms and conditions.[615] These rules include *inter alia* the rule of unclarity according to which those provisions of general terms and conditions are not accepted that the other party would not have reasonably expected when agreeing in a general manner to the general terms and conditions; the *in dubio contra stipulatorem* rule according to which an unclear provision in the general terms and conditions is given a meaning that is detrimental to the party that introduced

612 SCHERER/RICHMAN/GERBAY, para. 16; MOSER/BAO, paras. 3.31-33.2.

613 GERBAY, Arbitral Institutions, 105-106.

614 See for a comprehensive overview LENDERMANN, 110-114.

615 LENDERMANN, 114-115; TIMÁR, 118.

the general terms and conditions; a restrictive interpretation of provisions derogating from dispositive law; and a direct review of whether or not general terms and conditions are abusive in business-to-consumer contracts.[616]

384 It is submitted that institutional rules do not constitute general terms and conditions when being used between the future parties to a dispute (i.e. the arbitrants) and that hence, the rules of protection against the use of such general terms and conditions should not apply.[617] General terms and conditions are usually characterized as generalised and one-sided terms in favour of and used by the party introducing (or oftentimes rather 'imposing', due to that party's negotiating power) the terms and conditions into the contractual relationship, and are complementing transactional, substantive agreements.[618] However, it can usually not be said that institutional rules are one-sided and favouring the party that proposed the arbitration agreement. By the same token, institutional rules are not 'used' by one party but rather provided by the arbitral institution.[619] Furthermore, institutional rules are not part of transactional, substantive agreements but instead complement the arbitration agreement, which qualifies as a mixed contract with both procedural and substantive elements.[620] Therefore, applying the rules of protection against the use of general terms and conditions does not appear warranted for the relationship between the parties in dispute.[621] Finally, and in any event, it is even disputed whether companies in a business-to-business context may avail themselves of a protection against the use of general terms and conditions.[622]

385 Irrespective of the controversy around the qualification of institutional rules as general terms and conditions, institutional rules are, as per the foregoing analysis,[623] mere contractual agreements. One consequence of this characterisation is that these rules, like any contractual stipulation, must comply with the mandatory provisions of the applicable law.[624]

616 See for everything HUGUENIN, paras. 613-635m.

617 RAESCHKE-KESSLER/BERGER, paras. 630-631.

618 HUGUENIN, paras. 606-607.

619 Disagreeing WOLF, 105.

620 See above para. 163.

621 While not relevant here, it is at least conceivable that institutional rules could for certain aspects be considered as general terms and conditions between the arbitrants on the one side and the institution on the other, such as for provisions regarding costs and fees; see on this also LENDERMANN, 256; TIMÁR, 118; and below, para. 419.

622 LENDERMANN, 256; TIMÁR, 118.

623 See above para. 382.

624 Cf. for an in-depth discussion of all applicable laws LENDERMANN, 115-116.

2. Contractual Relationships in Institutional Arbitration

386 The arbitration rules in institutional arbitration lead to a number of contractual relationships between different actors[625] that are also relevant for party autonomy. For a closer examination of the details of institutional rules, it is important to mention these legal relationships here. Specifically, four different legal relationships can be identified.

387 The first relationship exists between the parties in dispute. This relationship is primarily subject to the arbitration agreement as well as to the selected arbitration rules as a result of the choice in the arbitration agreement.[626] A significant part of this choice relates to the right and duty to arbitrate and the conduct of the arbitration proceedings.

388 The second relationship exists between the parties in dispute on one side and the institution on the other side. Once again, the content of this relationship is primarily subject to the arbitration rules. This relationship regulates the liability of the institution toward the parties, the parties' duty to pay the administrative fees, and to a certain extent the conduct of the arbitration proceedings.[627]

389 The third and fourth legal relationships involve the arbitrators and do not necessarily exist at the beginning of the first and second relationship. Rather, they come into existence only upon confirmation of, and acceptance by, the arbitrators to the specific dispute.[628] On the one hand, the arbitrators have a contract with the parties in dispute regarding the administration of their dispute. On the other hand, the arbitrators have an agreement with the institution for the administration of the respective dispute.[629]

3. Agreement on Institutional Rules

390 To better understand party autonomy in institutional arbitration, it is important to clarify the details of the acceptance of institutional arbitration rules. Unfortunately, these details are disputed in practice, irrespective of the law governing the relationship.

391 One group of authorities argues that arbitration institutions with their own set of rules are deemed to make a permanent offer for the administration

625 Cf. ICC, Report on the Status of the Arbitrator, 4-5; JAROSSON, 448; LENDERMANN, 233; cf. further above paras. 223-224 and 264-265.

626 See in general GABRIEL, paras. 5-20; STACHER, Schiedsvereinbarung, paras. 150-156.

627 Cf. TIMÁR, 104.

628 BERGER/KELLERHALS, para. 1001; cf. further art. 364 para. 1 Swiss CPC.

629 For everything ICC, Report on the Status of the Arbitrator, 4-5.

of arbitrations under their rules when they publish said rules. The offer is accepted (tacitly) only when the parties initiate proceedings.[630] It is possible for the parties to modify these general rules by agreeing on features in conflict with the rules of the institution. In this case, the parties are making a counter-offer that is accepted when the institution agrees to administer the case under its rules without objecting to the changes made by the parties.[631]

Another group, however, submits that the institutional rules only constitute an invitation to make an offer. This offer is made when the claimant, based on the arbitration agreement, files the request for arbitration. Subsequently, the institution may decide whether to accept the offer, in which case the contract is concluded.[632] 392

4. 'Mandatory' Nature of Institutional Rules

Despite the characterisation of arbitration rules as purely contractual stipulations, it is sometimes said that certain provisions of institutional rules are mandatory. This means that the parties in dispute cannot derogate from these provisions.[633] Examples include the exclusive competence of certain bodies like the Court under the Swiss Rules to perform specific tasks,[634] distinctive characteristics of certain rules such as the scrutiny of awards under the ICC Rules,[635] certain minimal guarantees such as the impartiality and independence of arbitrators,[636] as well as provisions ensuring a minimum level of quality and efficiency such as the drafting of a procedural timetable.[637] 393

Yet referring to provisions of this kind as 'mandatory' is misleading. This is because the reference suggests a conflict between contractual agreements and mandatory provisions of law that take precedence over conflicting contractual provisions. In reality, these 'mandatory' provisions of institutional rules are merely non-negotiable terms from the perspective of the institution.[638] This means that an institution will simply not accept the administration of a 394

630 For everything BERGER, 339-340; LENDERMANN, 244-247; TIMÁR, 114-117; cf. for an overview JAROSSON, 449-450.

631 Cf. for everything BERGER, 350.

632 For everything TIMÁR, 115; cf. for an overview JAROSSON, 449-450.

633 For everything ABDEL WAHAB, 139; BERGER, 348-349; JAROSSON, 453; SCHROETER, 170-176.

634 See for example arts. 1.4 and 5.1 Swiss Rules.

635 Article 34 ICC Rules.

636 See art. 11.1 ICC Rules; art. 12.1 Swiss Rules.

637 See art. 19.3 Swiss Rules; BESSON/THOMMESEN. in: Zuberbühler/Müller/Habegger, Introduction to the Swiss Rules, para. 55; see for a general overview LENDERMANN, 219-230; SCHROETER, 170-176.

638 For everything JAROSSON, 453; LENDERMANN, 218-219; SCHROETER, 170-171.

dispute based on an arbitration agreement that contains terms contradicting these mandatory provisions.[639] Therefore, 'mandatory' provisions in institutional rules do not result in a conflict between contractual and mandatory legal provisions, i.e., a conflict between party autonomy and some national law. Rather, such mandatory provisions may lead to a conflict between two conflicting contractual provisions.[640] In principle, a situation like that is no different from a typical business negotiation where the party with more leverage simply refuses to give up certain proposed terms.

395 The discussion so far has helped identify how the design of the arbitration rules affects the parties' opportunity to decide on the conduct of the proceedings: the arbitration rules that the parties choose based on their autonomy contain a set of provisions regulating the arbitral process. These rules often contain either provisions that directly regulate an issue or grant authority either to the parties or a third 'actor' (the tribunal or the institution) to decide the issue. Where such provisions directly regulate an issue, they may expressly allow for a contrary agreement of the parties,[641] on the contrary exclude an opposite agreement,[642] or simply contain a ruling without stating whether or not a differing agreement by the parties should be respected.[643]

396 These three alternatives leave four scenarios for the decision on an issue during the proceedings: (1) the parties may have the exclusive competence to decide on an issue, (2) the parties can decide on an issue, but in the absence of an agreement the rules contain a default provision, (3) the parties cannot decide on an issue because the rules have 'mandatory' provisions, and finally (4) a third actor (the tribunal or institution) may decide on the issue. Consequently, the conduct of the proceedings is either subject to a direct agreement of the parties, to the decision of a third actor, or to a provision in the rules directly regulating the issue to the exclusion of any other decisions or agreements.

397 These four scenarios reveal that institutional rules ordinarily shift some competences from the parties to the tribunal and the arbitral institution (via scenarios 2–4). This is done in a pre-determined manner based on the specific provisions of the institution.[644]

639 JAROSSON, 453; LENDERMANN, 232-243.

640 For everything BERGER, 349.

641 See for example art. 21.1 SIAC Rules.

642 See for example art. 5.3 SIAC Rules.

643 See for example art. 18 SIAC Rules.

644 See for example BORN, International Commercial Arbitration, 2302-2305.

4.1 General Party Autonomy vs. Procedural Party Autonomy

What does this breakdown mean for party autonomy in terms of the parties' power to decide on the conduct of the proceedings? Based on this breakdown and the earlier discussion of the nature of arbitration rules, it should follow that, regardless of who makes the actual decision on the conduct of the proceedings, a decision on the conduct of the proceedings is the direct or indirect result of party autonomy: when the parties make the decision in line with scenario (1) described above in para. 396, it is obvious that they exercised their autonomy in doing so. By the same token, if the rules directly regulate an issue or if they grant authority to the institution or the tribunal to make the decision, the rules can validly remove the decision-making power in a specific instance from the parties only because the parties have chosen a set of rules providing for this possibility. Due to the qualification of institutional rules as mere contractual stipulations, provisions that remove the decision-making power from the parties affect the parties only if they have accepted such provisions.[645] This is in contrast to mandatory provisions of law that by definition apply irrespective of any party agreements. 398

As a result, the question is not one of whether a provision in institutional rules regulating the proceedings respects the principle of party autonomy. Rather, the question is whether a specific decision is the result of either (1) a direct decision by the parties (a direct exercise of party autonomy, so to speak, or the 'procedural autonomy' of the parties)[646] or (2) an indirect decision by the parties to accept a provision in the rules regulating the issue or delegating the decision-making power to a third actor (an indirect exercise of party autonomy, so to speak). 399

Where the parties agree with the indirect exercise of party autonomy, no controversies should occur. Where, however, at least one of the parties claims that it never agreed to a provision removing the decision-making power from the parties, the phenomenon of the party autonomy paradox becomes relevant. This will be analysed in more detail below in paras. 402–424. 400

4.2 Interim Conclusion: How Party Autonomy Affects the Conduct of the Proceedings

As an interim conclusion, it can be said that party autonomy affects the conduct of institutional arbitration proceedings in various ways and to varying 401

645 On whether the parties can reject 'mandatory' provisions of the rules, see above paras. 393–394.

646 BORN, International Commercial Arbitration, 2303; cf. further FORTESE/HEMMI, 116.

degrees. While it is correct that institutional arbitration by way of predefined rules restricts the parties' *direct* ability to decide on certain aspects of the proceedings, it would be incorrect to consider this to be in conflict with party autonomy. Rather, from a dogmatic point of view, the choice of rules containing provisions that exclude agreements of the parties in conflict with institutional rules can only itself be a specific form of party autonomy.[647]

III. The Party Autonomy Paradox

402 Despite the interim conclusion that the entire conduct of the proceedings in institutional arbitration is rooted in party autonomy, a discussion has emerged around whether such a conclusion is correct or useful. The primary question at the root of this discussion is whether parties have the autonomy to limit their own autonomy. BERGER has referred to this issue as the 'party autonomy paradox'.[648] This section will address the party autonomy paradox and lay the groundwork for solving specific disputes that have already arisen precisely because of this paradox especially in expedited procedures.

1. Overview of the Party Autonomy Paradox

403 As has been established, a common characteristic of institutional arbitration is a pre-determined shift of competences to decide on procedural questions away from the parties and towards the institution or tribunal.[649] Typically, this shift is uncontroversial. In fact, the parties are satisfied when they have a smoothly running arbitral process as a result of the choice of institutional arbitration.[650] Nonetheless, conflicts may occasionally arise when the parties have not only chosen the rules of an institution to apply to their dispute, but have made agreements in addition to these rules, even if the rules do not expressly allow for such agreements.

404 Where the additional agreement concerns an issue for which the institutional rules neither contain any provision nor exclude additional agreements, the parties should be able to make an additional procedural agreement.[651]

647 For everything BONKE, Explicit Agreement; BORN, International Commercial Arbitration, 2303; cf. further FORTESE/HEMMI, 116.

648 BERGER, 353-358.

649 See above para 395.

650 Cf. GIRSBERGER/VOSER, paras. 71 and 98.

651 See in general also JERMINI/GAMBA, in: Zuberbühler/Müller/Habegger, art. 15 para. 6.

However, when such an agreement directly contradicts a 'mandatory' provision in the rules, the same conclusion cannot be drawn – at least not without further ado. This raises the question of which provision should prevail: should it be the specific agreement of the parties to derogate from a particular provision of the arbitration rules, or should the general choice of the institutional rules have priority over any agreements in conflict with this general choice? This issue is even more pronounced where the institutional rules expressly exclude any contrary agreements.

The discussion of this problem is not new to the arbitration community[652] and arises in the wider context of the extent to which an institution or tribunal must respect a party agreement that is contrary to provisions of arbitration rules. Finding the solution to this problem is not a merely theoretical endeavour. Instead, this question, especially in the field of expedited procedures, has already resulted in diverging court decisions and observations by commentators, and even prompted amendments to arbitration rules.[653] As will be explored in greater detail below in paras. 529-536, the bone of contention in the court cases was whether an institution could appoint a sole arbitrator notwithstanding an express agreement on a three-member tribunal. Another area of potential conflict emerges in cases where the parties agree on the application or non-application of expedited procedures but the institution decides the opposite.[654] 405

2. Proposed Solutions to the Party Autonomy Paradox

2.1 Discussed Approaches

One group of authorities holds that when the institution, based on its own rules, disregards an additional party agreement in conflict with said rules, there cannot be a violation of party autonomy. The reason is that it was the parties who chose a set of arbitration rules giving the institution the authority to deviate from agreements of the parties contradicting the chosen arbitration rules. In other words, the parties in their autonomy chose a set of general rules that allows a third party to restrict the parties' autonomy to enter into further agreements incompatible with these general rules.[655] Hence, these authorities are proponents of the party autonomy paradox. 406

652 Under ordinary procedures, the problem of whether the parties may agree on the arbitral rules of one institution but on the administration of the dispute by another institution has arisen numerous times; cf. for a detailed overview LENDERMANN, 210-218.

653 Cf. for a detailed overview BERGER, 353-359; LENDERMANN, 210-218.

654 See below para. 500.

655 For everything BERGER, 358-359; BONKE, Explicit Agreement; JOSHI/CHHATROLA; LYE.

407 However, a second group of commentators espouses a different view by arguing that an express and specific agreement by the parties contrary to a provision in the general arbitration rules of an institution should prevail.[656] These commentators reject the idea of the party autonomy paradox and instead hold that it would in fact constitute a violation of party autonomy to disregard a specific agreement of the parties.[657]

2.2 Proposed Solution to the Paradox: Interpretation of the Arbitration Agreement

408 It is submitted that little is gained by *exclusively* focusing on whether parties have the autonomy to restrict their autonomy, and asking whether an institution should have the competence to disregard the parties' express agreement in conflict with the institution's 'mandatory' provisions. The reason for this is the misleading idea of 'mandatory' arbitration provisions, which is more of a misnomer than anything else. As has been shown, provisions are mandatory only insofar as the parties in dispute as well as the institution agree with the immutable character of such a provision.[658] Therefore, it should be apparent that the parties can grant the institution the authority to disregard any specific procedural agreements they have made.[659] The question, however, is whether the parties *did* in fact grant this authority to the institution. Consequently, it is imperative to conduct the analysis of the parties' consent from a different angle, with an emphasis on general principles of contract interpretation, in order to determine this consent, as there is no question of mandatory provisions contained in a formal law.[660] For this reason, the focus of the approach to the party autonomy paradox to be outlined below rests more on implied consent than on some abstract concept of autonomy. Accordingly, the main question is whether the parties' express agreement on a certain issue should have priority over, or instead yield to, the parties' choice of arbitration rules providing for a different solution. The latter can also be referred to as an implied agreement, which means that ultimately there is a conflict between an express and implied party agreement and it must be decided which of the two should take priority.

656 Noble Resources International Pte. Ltd v Shanghai Good Credit International Trade Co., Ltd., Shanghai No. 1 Intermediate People's Court, see in detail below paras. 533–535; implicitly BÜHLER/HEITZMANN, 132–133.

657 SCHROETER, 170.

658 See above para. 394.

659 Cf. BERGER, 358–359; LYE.

660 For everything BERGER, 359; BONKE, Explicit Agreement.

As a starting point, it must be emphasised that the competence of an institution to discount an express stipulation in the arbitration agreement should not primarily be considered as a unilateral decision by the institution in potential disregard of the agreement. Rather, such a decision should correctly be considered as the institution's power derived from, and thereby in respect of, the party autonomy exercised in the arbitration agreement in the form of a choice of arbitration rules.[661] 409

Thus, in order to determine whether the institution may disregard an express party agreement in conflict with the institutional rules, the arbitration agreement needs to be interpreted as to whether the express provisions (=stipulations in the arbitration agreement in conflict with 'mandatory' provisions of the institutional rules chosen) or an implied agreement (=the institutional rules) should take priority where these two are in conflict with each other.[662] The reason is that in cases where the parties have agreed on specific terms that are in direct conflict with the general terms otherwise chosen (i.e. the arbitration rules – which is, however, not to say that arbitration rules constitute general terms and conditions[663]), there is no conflict between the parties' agreement(s) and the mandatory provisions of the arbitration rules. Instead, there exists a conflict only between two different expressions of the parties' will.[664] While the contractual relationship between the parties and the institution is relevant as well, this is only the case insofar as the institution may decide not to administer the case if it considers the parties' express agreement in too much of a conflict with its 'mandatory' provisions.[665] This reveals that the party autonomy paradox is not primarily an issue of the contract between the institution and the parties to administer the case,[666] but rather one of the contract between the parties, i.e. the arbitration agreement. 410

Consequently, it must be examined, exclusively based on an interpretation of the arbitration agreement, whether the parties wanted their express agreement to prevail or whether the reference to the arbitration rules was meant to trump their express agreement. This conclusion also implies that the decision on this question is not between violating or upholding party autonomy but rather a matter of determining *how* exactly the parties exercised their 411

661 See for this position FLORES; SERAGLINI/BAETEN, para. 45, with reference to the Court D'Appel de Paris, Société Guangzhou Ocean Shipping Company v. Société Générale des Farines, 17 January 1992.

662 For this see in general above paras. 171-173.

663 Which they do not, see above para. 384.

664 SCHROETER, 171.

665 LENDERMAN, 232-236; SCHROETER, 171.

666 Cf. LENDERMAN, 121 and 236.

autonomy, i.e., what the content of the parties' agreement is. The details of this interpretation and the relevant factors affecting it depend on the circumstances of the case. Nonetheless, at this point, it is possible to make some general observations, which follow below. For these observations, it is crucial to distinguish between a situation where both parties agree on the interpretation of their arbitration agreement (below sub-section a) and one where they do not (below sub-section b).

a The Parties Agree on the Interpretation of the Arbitration Agreement

412 In a situation where the arbitration agreement contains terms that conflict with 'mandatory' provisions of the institutional rules chosen in the arbitration agreement, and where the parties in dispute agree that the individual terms should prevail, an extensive interpretation of the arbitration agreement would be unnecessary. The parties have actual consent on the content of their agreement to deviate from some provisions of the arbitration rules.

413 However, the parties' agreement on the conduct of the arbitration also affects the relationship between the parties in dispute and the institution: when the parties in dispute openly disagree with the institution's position on an issue, the parties in dispute and the institution have an express dissent, which prevents an agreement between these actors. Yet such disagreement is not a necessary consequence: the parties' agreement can, depending on the approach followed regarding the acceptance of arbitration rules,[667] be viewed as an offer or counter-offer to the arbitration rules by the institution. If the institution accepts the amendment to its rules, it is bound to administer the dispute according to this amendment.[668]

414 What happens, though, if the institution is not willing to accept the amendment and instead insists on the administration of the dispute according to its 'mandatory' provisions? Considering that the institution and the arbitrators have the authority to administer a dispute only to the extent that the parties have granted to these actors in the agreement with them,[669] in principle, there should be no justification for a deviation on the part of the institution or tribunal from the express party agreement. Doing so would, at least under certain circumstances, only risk a setting aside or refusal of enforcement of the award because of a deviation from the agreed-upon procedure.[670] Moreover, as has been seen above in paras. 271-274, where an institution performs adjudicatory functions, it is bound by the same duties as the arbitrators, such

667 See above paras. 390-392.

668 See above para. 392.

669 See above paras. 223 and 264.

670 See in detail above paras. 242-246 and below paras. 835-838.

as the duty to comply with the arbitration agreement. Therefore, if an institution refuses to accept the proposed change to its rules, a refusal to administer the dispute appears to be the only safe option.

As a result, there cannot be a paradox in this situation: either the institution accepts the (counter-)offer and thereby gives full effect to the parties' procedural agreement, or the institution refuses the offer and the administration of the dispute altogether. 415

b The Parties Disagree on the Interpretation of the Arbitration Agreement

More difficult is a situation in which the parties in dispute do not agree on the interpretation of their arbitration agreement contradicting the arbitration rules they have chosen. The institution on its part will proceed in accordance with the 'mandatory' provisions of its rules and in contradiction to the additional procedural stipulation of the parties. One party will agree with the institution's approach whereas the other party will maintain that the parties had agreed to deviate from the respective provision of the rules. While the focus is still on the interpretation of the parties' agreement, this scenario requires a different approach from the previous one. 416

To begin with, because at least one party in dispute and the institution disagree on what the parties in dispute had agreed upon in their arbitration agreement, different subjective understandings of this agreement exist. As a result, an objective understanding of the agreement from the perspective of a reasonable third person in the position of the parties is necessary.[671] The details of how to determine this objective understanding depend on the law applicable to the arbitration agreement and its interpretation. Yet, as a general rule, this interpretation will have to determine whether the parties wanted their express agreement on a certain issue in the arbitration agreement to prevail over the conflicting rule in the arbitration rules or whether the parties had, by reference to the arbitration rules, impliedly agreed that the arbitration rules should prevail in case of conflict with the parties' express provisions in the arbitration agreement. For example, when the parties choose arbitration rules that, on the one hand, provide 'mandatorily' for a sole arbitrator and, on the other hand, in the arbitration agreement include a stipulation for a three-member tribunal, a potential agreement on a sole arbitrator can be considered only as a form of implied consent to the sole arbitrator and the respective arbitration rules.[672] Therefore, there is again a conflict between the parties' express and implied agreement. 417

671 For Switzerland see above para. 173; cf. further art. 4.2 UNIDROIT Principles.

672 For everything BONKE, Explicit Agreement; cf. further SERAGLINI/BAETEN, para. 48.

418 The question in a situation like that is whether the mere reference to a general set of arbitration rules, containing provisions deviating from the express stipulation in the arbitration agreement, can revoke the agreement on such express stipulation. After all, one can in a commercially sensible manner, reasonably assume that the parties expect their express agreement to be respected.[673] This is corroborated by the assumption that where a general set of terms (like arbitration rules) conflicts with a non-general set of terms (i.e., an individual term), the individual term should, at least under certain circumstances, prevail.[674] These two assumptions are a strong indicator against an implied consent to granting the competence of the arbitration institution to decide otherwise, as the parties with their express agreement presumably demonstrate either ignorance or even deliberate disregard of a contrary provision in the arbitration rules.[675]

419 It must be pointed out, for a number of reasons, that the analysis of the party autonomy context is not connected with the protection against the use of standardised terms and conditions.[676] Whether arbitration rules even qualify as standardised terms and conditions is disputed in the first place,[677] and whether companies may avail themselves of established principles of protection against the use of such terms is questionable as well.[678] Regardless of these controversies, these principles of protection could, if at all, apply only against the user of the general terms and conditions, which would be the institution rather than one of the parties in dispute.[679] However, the underlying issue concerns the interpretation of the will of the parties in dispute, not the institution.

673 For everything LYE; SERAGLINI/BAETEN, para. 48. Nevertheless, this assumption runs precisely counter to the likewise convincing findings of the Singapore High Court in the case of ARA v. AQZ because it held that it was commercially sensitive to assume the parties accepted the SIAC's competence to appoint a sole arbitrator as otherwise the dispute could never be heard by a sole arbitrator (see in detail below paras. 530–533).

674 See in general decision Swiss Federal Tribunal no. 4A_567/2015 of 21 January 2016 c. 4.2; further art. 2.1.2.1 UNIDROIT Principles; see the discussion of the problem by LENDERMANN, 114–115. Yet, one must not confuse this priority of the specific agreement over a general agreement between the arbitrants with the usage of a general set of terms between the parties and the institution since the institution is not a party to the arbitration agreement (LENDERMANN, 256).

675 BONKE, Explicit Agreement; LYE; LENDERMANN, 256, with reference to China Natural v. Apex, 379 F.3d. 796, 800 [9th Cir. 2004].

676 LENDERMANN, 256.

677 LENDERMANN, 256; TIMÁR, 118.

678 See above para. 384.

679 See already above para. 384 and WOLF, 105.

Due consideration must also be paid to the point in time when the conflict between the parties' express and implied choice occurs: the express stipulations in the arbitration agreement may be in conflict with the arbitration rules already at the entering into of the arbitration agreement, or they may be in conflict only after the chosen institution has revised its arbitration rules.[680] It could be argued that in the first case, the parties' express choice should be of greater significance than in the second case. The justification would be that the parties in the first case at least had the possibility to know that their express stipulation conflicted with the chosen institutional rules whereas such knowledge could not exist in the second case. 420

Nevertheless, this line of argument would potentially expose the parties to the presumption that they will accept all future amendments of the chosen institutional rules even if the changed provisions contradict the express stipulations in their arbitration agreement. The risk is significant as the institution may naturally amend its rules without the parties' consent. Therefore, it could be asked whether protective mechanisms are needed against a potential presumption that the parties have agreed to subsequently changed institutional rules in conflict with the express stipulations of the arbitration agreement. Such mechanisms exist in other areas of law, for example in corporate law and the law of associations. For instance, the concept of the principle of certainty, primarily known in Germany, provides that the amendment or supplementation of the articles of association of a partnership by majority resolution shall generally be permissible only if it is clear and unambiguous from the articles of association that the relevant subject matter of the resolution is subject to the majority principle.[681] Under Swiss law, art. 74 CC provides that no member may be forced against their will to accept a change in the objectives of the association. 421

While concepts like the principle of certainty and the one contained in art. 74 CC may be reasonable for partnerships and associations, they do not seem to be directly transferrable to arbitration agreements. These concepts attempt to protect a single individual from the negative effects of a majority decision. Majority decisions are the norm in associations and partnerships. Therefore, an individual is always at the mercy of the majority if they want to be part of an association or partnership.[682] However, the parties to an arbitration agreement have to submit neither to institutional rules nor to a version of these rules that will be in force only at the commencement of an arbitration. 422

680 This was one of the issues in the Singapore High Court case of ARA v. AQZ (see in detail below paras. 530–531).

681 For everything SPILLMANN, para. 174.

682 For everything, see for example BSK ZGB I-SCHERRER/BRÄGGER, art. 74 paras. 1 and 9.

Instead, the parties could choose ad hoc arbitration or agree on the version of the arbitration rules in force at the time of conclusion of the arbitration agreement.[683] Furthermore, the situation of changing institutional rules is comparable to a situation where the parties have chosen a substantive law to govern their contract and this law changes. In such a situation, there are no specific concepts either that would protect the parties from the change (with the potential exception of error).[684] Thus, the scenario of a subsequent change in institutional rules is not comparable to the situation of a member of an association or partnership. As a result, the arbitration agreement must exclusively be interpreted as to whether the parties could have reasonably foreseen the amendment of the institutional rules and whether, in light of this foreseeability, the parties would still have wanted their express stipulation in the arbitration agreement to prevail over the institutional amendments. Accordingly, specific rules of protection against a subsequent change of institutional rules seem unnecessary.

423 Lastly, and contrary to what some commentators have observed,[685] it is argued that whether or not the wording of the arbitration rules expressly enables the institution to derogate from a specific agreement of the parties[686] is not relevant for the question of whether the specific agreement of the parties or the general reference to the rules prevails. The wording of such a provision is primarily relevant for the phase *after* it has been decided that the parties, from an objective point of view, had implicitly consented to the complete application of the arbitration rules even if the rules contradict other specific stipulations of the parties. Without an express provision granting the institution the right to disregard an express agreement, one party could still argue that a specific provision of the rules should not be considered 'mandatory' because it does not expressly exclude any agreements on the contrary. This line of argument will be precluded with an express granting of this competence to the institution.

c Conclusion

424 Although it is correct to state that party autonomy may be violated if the institution decides an issue contrary to an express agreement of the parties, the

683 See for example for the option to agree on the specific version of the rules applicable to the arbitral proceedings art. 1.2 Swiss Rules.

684 See on the subsequent change of substantive law VISCHER, 219–220.

685 Cf. FERIS, 70; MARCHISIO, 79; also sceptical about the effect of this wording for safeguarding party autonomy SERAGLINI/BAETEN, paras. 49–54 (while not referencing this wording as a safeguard for party autonomy).

686 See for example rule 8.9 AIAC Rules.

violation stems from an incorrect interpretation of the parties' consent rather than a dichotomy between party autonomy and institutional unilateralism.[687] Hence, the party autonomy paradox, as a concept that describes a transfer of decision-making power from the parties to the arbitral institution, might be less paradoxical than it initially appears to be. Party autonomy is respected only when the transfer of powers from the parties to the institution is respected, provided that this transfer is the result of a valid consent of the parties. In order to determine this consent, the parties' agreement must be interpreted and it must be assessed whether the parties' express or implied agreement should prevail.

IV. Conclusion

Party autonomy in institutional arbitration is an interesting subject because 425
of the intertwined nature of party stipulations and provisions in institutional rules. The interplay between party stipulations and institutional provisions may be beneficial but occasionally challenging as well, when potential party agreements come into conflict with essential provisions of the chosen institutional rules. Resolving the dispute is preferably done by means of an analysis of consent. As shall be seen in the following chapters, determining this consent, especially in the context of expedited procedures, may be a delicate and difficult task.

687 Cf. for the reverse application TIMÁR, 118.

Part 3
Specific Procedural Aspects

Chapter 8
Precondition for Expedited Proceedings: Competence of the Tribunal

The following analysis will examine under what circumstances a tribunal may conduct the arbitral proceedings in an expedited way. Specifically, the analysis will focus on what constitutes the basis for the tribunal's competence to employ expedited procedures, and the details of this basis. 426

Within this analysis, it is possible to observe different approaches of the arbitral institutions towards the details of the basis for the application of expedited procedures. Institutions and their rules can be grouped into categories according to the different approaches they follow. Categories can be formed on whether expedited procedures apply automatically or require an additional application or decision (below section I), and on whether the approach is an exclusive or non-exclusive system (below section II). Also, the criteria upon which expedited procedures apply deserve a closer examination (below section III), as does the question of whether the tribunal has an inherent competence to apply expedited procedures (below section IV). 427

I. Automatic Application vs. Application upon Request or Third-Party Decision

The first distinction that can be made concerning the application of expedited procedures is whether these procedures apply automatically or whether their application requires a request by the parties or a determination by another authority like the arbitral institution or tribunal. The institutional rules of various institutions follow different approaches. 428

One group of institutions provides for an automatic application of their expedited procedures where certain objective criteria are met. An additional application by the parties or determination by a third party are not necessary. Institutions that follow this approach include the DIS, VIAC, and WIPO.[688] 429

688 See art. 27.4 (ii) DIS Rules; art. 45.1 VIAC Rules; art. 2 WIPO Expedited Rules.

430 Another group of institutions requires, in addition to the meeting of certain objective requirements, a request by one of the parties for the application of expedited procedures. This request then needs to be approved by either the institution or the tribunal.[689] Only then will the arbitration be conducted under the expedited procedures. Examples of institutions currently following this approach are HKIAC, ICDR, and SIAC.[690]

431 In between these two approaches are institutions such as the ICC that, in principle, provide for the automatic application of expedited procedures if certain criteria are met, but reserve the right for the institution to nevertheless decide on the application of ordinary provisions.[691]

432 Another aspect of the distinction between an automatic application and a third-party decision is the question of who is the third party making the final decision. Under the ICDR, JAMS International, and SIAC Rules, the initial third-party decision is made by the institution, but the tribunal has the ultimate power to decide on the issue.[692] Yet it appears that under the ICDR and JAMS International Rules, the decision by the institution is of a more preliminary nature than under the SIAC Rules. In other words, the tribunals under the latter rules will reach a decision differing from the one of the institution only in the absence of new circumstances.[693] Under the HKIAC and ICC Rules, however, the decision by the ICC appears to be binding on the tribunal in the absence of new circumstances.[694]

433 The different approaches affect the distribution of authority to determine the arbitral procedure quite significantly. In situations where the parties have agreed on the application of expedited procedures, one might reasonably ask why it should be for the institution to decide whether such an agreement should be upheld. On the surface, this competence of the institution seems like an inexplicable limitation of procedural party autonomy. Yet this limitation can be justified in situations where the parties' choice of expedited procedures prior to a dispute proves impractical after the arising of a dispute, for example because the dispute proves to be too complex for expedited procedures and the parties cannot agree to revoke their agreement on expedited procedures.

689 See in general BOOG/RANEDA, 601.

690 Article 42.2 HKIAC Rules; art. E-4 ICDR Rules; art. 5.2 SIAC Rules.

691 Article 30.3(c) ICC Rules; art. 5.2 SIAC Rules (see for this provision CHOONG/MANGAN/LINGARD, para. 6.20).

692 Article E-4 ICDR Rules; art. 21 JAMS International Rules; art. 5.4 SIAC Rules; cf. further GUSY/HOSKING, para. 41.11.

693 In general CHOONG/MANGAN/LINGARD, para. 6.43.

694 Article 42.3 HKIAC Rules; art. 30.3(c) ICC Rules; cf. further GUSY/HOSKING, para. 41.11.

In any event, the final determination of whether expedited procedures apply by the institution instead of the tribunal (which is the case under the HKIAC and ICC Rules) is not unproblematic. This decision may have far-reaching consequences for the conduct of the arbitration.[695] 434

II. Exclusive Opt-In Systems vs. Non-Exclusive Opt-In Systems

The second distinguishing factor amongst institutional rules are the system and the criteria to determine if expedited procedures apply. The criteria that are relevant for the application of expedited procedures include an agreement by the parties, the maximum amount in dispute, and situations of exceptional urgency.[696] Furthermore, with regard to the relevance of these criteria, different approaches amongst the institutions can be identified. 435

For one group of institutions like the SCC, VIAC, WIPO and DIS, the choice of expedited procedures by the parties is the only possibility for such procedures to apply. Hence, the parties need to 'opt into' the application of expedited procedures. There are no other additional factors like limitations on the amount in dispute that are required for the expedited procedures to operate. This means that expedited procedures apply in any dispute, regardless of the amount in dispute or the urgency involved, if and only if the parties choose so. Consequently, this approach amounts to what is called an 'exclusive opt-in system'.[697] It is worth noting that all exclusive opt-in systems follow an automatic application of the expedited procedures. 436

The vast majority of institutions, however, considers the parties' agreement to apply expedited procedures as only one amongst several factors leading to the application of such procedures. Instead, the rules of these institutions provide for the application of expedited procedures either based on an agreement by the parties or for cases where a maximum amount in dispute is not exceeded[698] or, with certain institutions, cases of extreme urgency.[699] Therefore, these types of rules combine an opt-in system with the application of additional factors. The former is particularly relevant for disputes that 437

695 Also critical of this shift in competences HAUER/PAUKNER/GAYER, 252–253.

696 See in detail below paras. 438–503.

697 See for this term DECKER, 76; FERIS, 66; HAUGENEDER/NETAL, in: Vienna International Arbitral Centre, Art. 45, 348–349.

698 Article 30.2 ICC Rules; art. 1.4 ICDR Rules; art. 42.1(b) Swiss Rules.

699 Article 8.1(c) ACICA Rules; art. 42.1(c) HKIAC Rules; art. 5.1(c) SIAC Rules.

neither fulfil the criteria regarding the amount in dispute nor represent cases of extreme urgency. This approach can be referred to as a 'non-exclusive opt-in system.'

III. Criteria Relevant for the Application of Expedited Procedures

438 As the discussion above has revealed, different arbitration rules follow distinctive approaches for the application of expedited procedures. One aspect of these different approaches is the already referenced objective criteria that are relevant to the application of expedited procedures. A closer examination of these criteria is warranted since they are the 'gatekeepers' to the use of expedited procedures. As will be explained in this section, one criterion prioritizes procedural party autonomy by requiring an agreement of the parties (below sub-section 1). A second criterion follows the already existing approach of small-claim procedures by reserving expedited procedures only to proceedings not surpassing a certain amount in dispute (below sub-section 2). Furthermore, a third criterion responds to occasional urgent needs for final legal protection by requiring exceptional urgency (below sub-section 3).

1. First Criterion: Agreement to Choose Expedited Arbitration Procedures

439 As discussed, all institutional rules recognise an opt-in agreement by the parties on the choice of expedited procedures as a basis for the application of these procedures,[700] although the agreement may, in exceptional cases, be ignored.[701] The following analysis will examine the requirements for a valid opt-in more closely. In particular, the interrelations between the general agreement to arbitrate and the agreement on expedited procedures will be analysed.

1.1 Valid Arbitration Agreement

440 As with all arbitration proceedings, the consent to arbitrate in the form of a valid arbitration agreement is required for expedited arbitration proceedings. For details of the arbitration agreement and its validity, see above paras. 150–173.

700 See above paras. 435–437.

701 Article 30.3(c) ICC Rules, art. 5.2 SIAC Rules.

1.2 Valid Choice of Expedited Proceedings

In addition to general considerations on the validity of an arbitration agreement, particular attention must be devoted to the specific choice of expedited proceedings of the respective arbitral institution. 441

a Qualification of the Choice

The qualification of the choice of expedited procedures is decisive for the rules applicable to it. In light of the fact that expedited procedures are, according to the definition developed in this analysis,[702] a set of provisions deviating from the 'ordinary' arbitration rules of an arbitration institution, a choice of such expedited procedures is a specific agreement regarding the procedural conduct of the arbitral proceedings. As such, this choice is different from a choice that affects the substantive aspects of the resolution of the dispute, like the law governing the underlying legal relationship. Unlike the consent to arbitrate, the choice of procedural provisions is not an essential element of the arbitration agreement.[703] 442

b Law Governing the Substantive Validity of the Choice

As a consequence of the qualification of the choice of expedited procedures as an element of the arbitration agreement, albeit a non-essential one, the agreement on the application of expedited procedures is governed by the same substantive law as the arbitration agreement.[704] Hence, the law applicable to the substantive validity of the arbitration agreement is decisive for the question of whether or not the parties have agreed to the application of expedited procedures, which will be examined more closely in the following sub-sections. 443

c Formal Validity and Formalities of the Choice

Because the agreement to choose expedited procedures constitutes an agreement on the specific procedure for the conduct of arbitral proceedings, this agreement is a mere supplement to the general will to arbitrate. Therefore, it does not need to meet the form requirements applicable to the essential elements of the arbitration agreement.[705] 444

702 See above paras. 86-87.

703 Cf. for everything BSK-GRÄNICHER, art. 178 paras. 38-39; PFISTERER/SCHNYDER, 20-21; STACHER, Einführung, para. 266.

704 See for this issue above paras. 165-167.

705 In general LAZOPOULOS, Swiss Rules Art. 15, in: Arroyo, para. 6; STACHER, Einführung, para. 266; see in general above paras. 165-167.

445 The most straightforward and efficient form to agree on expedited procedures is the reliance on the model arbitration clause for the application of expedited procedures provided by the respective arbitration institutions.[706] Yet it is also possible to draft a self-conceived arbitration agreement and include therein a reference to expedited procedures of the respective institution. In addition, the parties may naturally also supplement an arbitration agreement initially providing for 'ordinary' rules with a subsequent choice of expedited procedures.[707]

d Content and Interpretation of the Choice

446 The agreement to choose expedited procedures must embody the parties' consent to the expedited procedures of the respective arbitration institution. It is possible to refer all or only some disputes arising out of a legal relationship to expedited procedures. In other words, the opt-in can be total or only a partial one. For example, the parties may agree on a maximum amount in dispute to which expedited procedures shall apply.[708]

447 It does not seem necessary to choose expedited procedures expressly. Indeed, the institutional rules analysed do not require an express agreement.[709] Instead, they merely state that the expedited procedures apply when the parties have agreed that the dispute shall be resolved by arbitration under the respective rules for expedited arbitration. Therefore, an implicit choice can be sufficient, provided that the choice can be interpreted as embodying the parties' agreement to arbitration under the expedited procedures.

448 The problem, however, is the interpretation of what constitutes an implicit agreement on expedited procedures. It is difficult to derive general principles for the interpretation of such agreements, also considering that this interpretation is subject to the specific law applicable to the substantive validity of the arbitration agreement.[710]

449 What can be said, however, is that under Swiss law, an interpretation of the agreement must be primarily based on the subjective understanding of the parties. If no such mutual subjective understanding exists, an objective interpretation is necessary.[711] A consequence thereof, and of the fact that

706 In general ICC, Techniques for Controlling Time and Costs 2018, para. 2; WOLRICH, Chapter 1.03, in: Flecke-Giammarco/Boog/Elsing/Heckel/Meier, para. 8.

707 Cf. for this thought art. 45(1) sentence 1 VIAC Rules.

708 For the corresponding agreement to opt out see FERIS, 67.

709 See art. 30.2(b) ICC Rules; art. 5.1(b) SIAC Rules; art. 42.1(a) Swiss Rules; DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 19.

710 See above para. 443.

711 See above para. 172.

expressions like 'fast-track' and 'expedited' are sometimes used interchangeably,[712] is that the mere wording of the potential choice has to be interpreted with caution. For example, when the parties agree on 'fast-track' arbitration under a certain set of rules, the tribunal or arbitral institution has to carefully examine whether the parties intended only to shorten the deadlines in an ordinary arbitral procedure or whether they actually intended to agree on expedited procedures. In the absence of specific additional procedural agreements in the arbitration agreement and any other indications to the contrary, it stands to reason that the mere reference to 'fast-track' arbitration is equivalent to a choice of the expedited procedures of the respective institution.

Another question in this context is whether a default rule for the interpretation of a potential choice of expedited procedure agreements exists, i.e., whether, in case of doubt, such clauses shall be interpreted restrictively or extensively, as has been discussed in the context of arbitration agreements.[713] It is submitted that no presumption of this kind should exist. There cannot be an analogy to the discussion concerning the validity of arbitration agreements because agreements to apply expedited procedures require a valid arbitration agreement in the first place. Although the choice of expedited procedures may lead to a more restrictive approach towards the parties' due process rights compared to ordinary procedures,[714] this does not *per se* require a restrictive approach towards the choice of expedited procedures. On the contrary, there seem to be no rules supporting such an approach for the interpretation of procedural provisions of an arbitration agreement. In any event, in order to avoid such disputes concerning the interpretation of a potential choice of expedited procedures, it is recommendable to use the model clauses of the arbitration institution whose rules are chosen. 450

e Timing for Making the Choice

Following from the qualification of the choice of expedited procedures as part of the arbitration agreement, in principle the choice may be made before or after a dispute has arisen.[715] Nevertheless, many arbitration rules allow an agreement on expedited procedures only up to a certain point in time. For instance, art. 45.1 VIAC Rules, art. 42.1(b) HKIAC Rules, or art. 5.1(b) SIAC Rules allow such agreement (or the application for expedited procedures based on 451

712 See above para. 58.

713 See above para. 173.

714 See in detail below Chapter 10.

715 For the SIAC Rules CHOONG/MANGAN/LINGARD, para. 6.14; for the Swiss Rules DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 3.

such agreement) only before the tribunal is constituted. An example of institutional rules that do not expressly define the latest possible point in time for the parties to agree on the application of expedited procedures are the SCC Expedited Rules.[716]

452 A special approach is found in the DIS Rules. As in other rules following an exclusive opt-in approach, the expedited provisions apply only with the agreement of the parties, which may be reached before the dispute has arisen.[717] What is unique about the DIS Rules in this context is that they expressly provide for the possibility to agree on the expedited procedures as a result of the case-management conference, where this possibility is to be discussed.[718] Therefore, even when the parties have already commenced 'ordinary' arbitration proceedings, thy are, in appropriate cases, even encouraged to subsequently agree on the application of expedited procedures.[719]

453 With these different approaches, the question that arises is whether the parties can, irrespective of the specific rules, agree on the application of expedited procedures at any point during the proceedings, or whether the parties are bound by the rules.

454 In case of a silence of the rules on this issue, it is submitted that, from a legal point of view, the parties should be able to agree on the application of expedited procedures at any point in time until the rendering of the award. As long as the rules do not expressly prohibit such a possibility, there is no legal reason as to why the procedural autonomy of the parties should be curtailed. Yet a choice of expedited procedures after a certain phase of the proceedings may lead to unnecessary complications by, for example, altering the procedural timetable or rendering preparations for witness examinations useless. Another problem will be whether a three-member tribunal will have to be replaced by a sole arbitrator, if this is necessary according to the rules.[720] Also, it must be noted that the agreement of the parties may not necessarily have any effect on its own without the approval of the tribunal.[721] For example, if, after the closure of the ordinary proceedings, the parties were to agree on expedited procedures, the tribunal (under many rules) would be required to render the award within a shorter timeframe. At this point, however, the

716 Cf. page 2 of the introductory section to the SCC Expedited Rules.

717 DECKER, 76.

718 Article 27.4 (ii) DIS Rules.

719 Cf. DECKER, 76; TRITTMANN/SCHARDT, Chapter 2.05, in: Flecke-Giammarco/Boog/Elsing/Heckel/Meier, para. 74.

720 See for this problem art. 42.3 HKIAC and art. 5.4 SIAC Rules.

721 Cf. JERMINI/GAMBA, in: Zuberbühler/Müller/Habegger, art. 15 para. 6; see further for the contract with the institution TIMÁR, 118.

parties and the tribunal will have agreed on a procedural timetable covering the deadline for rendering the award (or the institution will have set the deadline), which means the tribunal would not be bound by an agreement of the parties. Holding otherwise would amount to a contract to the detriment of a third party.[722]

455 Where the rules provide expressly for a cut-off date for the agreement on expedited procedures, it is unclear, however, if the parties may still make such an agreement at a later stage during the proceedings. The overall question is whether the provision in the institutional rules on the time of the agreement is considered 'mandatory'.[723] It is submitted that a provision on the point in time for making such an agreement cannot be considered mandatory. BESSON and THOMMESEN rightly point out for the Swiss Rules that the parties should be free to derogate from provisions meant to simplify or accelerate the proceedings.[724] Such provisions, even though important, cannot be considered so fundamental that either the parties' fundamental rights would be affected or the administration of the dispute by the institution would be rendered impossible.[725] Even so, the problem is likely to dissipate because, in many cases, the tribunal will have to agree to the application of expedited procedures as well.

f Exception: Acceptance by Appearance

456 In addition to a written agreement on the application of expedited procedures between the parties, it is conceivable to apply expedited procedures based on an acceptance by appearance. A lack of a valid agreement to arbitrate is ordinarily replaced when the respondent files a defence on the merits before raising a plea of lack of jurisdiction with the tribunal.[726] The same approach should be followed concerning the lack of a valid agreement on expedited procedures, even though the institutional rules are silent on the issue of acceptance by appearance in the context of expedited procedures. This means that if the claimant files the request for arbitration or statement of claim[727] and invokes therein the expedited procedures of the institution, the respondent

722 See for the impermissibility of this type of agreement in general HUGUENIN, para. 1168.

723 For a detailed discussion of the topic of 'mandatory' institutional rules see above paras. 393-394.

724 BESSON/THOMMESEN. in: Zuberbühler/Müller/Habegger, Introduction to the Swiss Rules, para. 56.

725 For a general analysis of this issue under the Swiss Rules see *ibid*, paras. 53–58.

726 GIRSBERGER/VOSER, para. 348; KAUFMANN-KOHLER/RIGOZZI, para. 373; cf. further expressly art. 1031 para. 6 German CPC.

727 As will be explained below in para. 512, under certain expedited procedures it is common to file these two submissions concurrently.

who in the answer files a defence on the merits without objecting to the application of expedited procedures must be deemed to have accepted not only the competence of the tribunal but also the applicable expedited procedures.

457 Where no valid (written) agreement to arbitrate exists, the acceptance by appearance in an opt-in system is two-fold: it needs to replace both the agreement to arbitrate and the agreement to expedited procedures. The acceptance by appearance then replaces the lacking valid (written) agreement in the first place to have a dispute resolved via an expedited arbitration procedure. Conversely, where the parties have agreed to arbitrate but not chosen expedited procedures, only the agreement for the latter needs to be derived from an acceptance by appearance.

458 This approach differs from Swiss litigation, for example, where an acceptance by appearance is not possible regarding the procedure (as part of the functional jurisdiction) but only regarding the territorial jurisdiction.[728] The justification for a different approach in arbitration lies in the fact that, unlike in Swiss litigation, the procedure in arbitration is subject to the parties' disposition due to the principle of party autonomy.[729]

1.3 Evaluation

459 On the one hand, the idea of an opt-in system, be it exclusive or non-exclusive, is in conformity with party autonomy in general and procedural autonomy in particular. It should be at the parties' disposition to determine whether they want to have an ordinary or expedited arbitration. On the other hand, however, the requirement of an agreement on expedited procedures reiterates the notion that conducting an arbitration on an expedited basis is still an exception to the prevailing understanding of arbitration. This may cast doubt on hopes that expedited procedures will soon become the norm again in arbitration.

460 The emphasis on party autonomy is not necessarily a direct answer to the demand of the users of arbitration to reduce the time and cost of the proceedings. Still, one can at least assume that the parties are in a position to reasonably foresee the complexity of their disputes. Therefore, if the parties consider potential disputes arising out of their legal relationship to be suitable for expedited arbitration, the choice of such procedures may, when the parties' estimate was correct, reduce the cost and time of proceedings. For situations where the estimate was clearly incorrect, the tribunal or institution, under a

728 See art. 18 Swiss CPC; DFT 143 III 495 c. 2.2.2.3; Staehelin/Staehelin/Grolimund-GROLIMUND, § 9 paras. 16 and 61.

729 For litigation see art. 4 para. 1 Swiss CPC, which contains a conclusive rule (BSK ZPO-VOCK/NATER, art. 4 para. 5); for arbitration see above paras. 21-22.

number of rules, may decide not to apply expedited procedures despite an agreement of the parties.[730] Moreover, it must not be forgotten that the respect for party autonomy is also a factor contributing to the quality of the proceedings.[731] This justifies granting the parties' choice additional deference.

461 An advantage of opt-out systems, i.e., the default application of expedited procedures, is that these systems make expedited procedures applicable to a wide range of disputes. Although a dispute may occasionally not be suitable for a resolution via expedited procedures, a fast and relatively cheap resolution of most disputes seems beneficial, especially when the claimant has a good case and a legitimate desire for a fast ruling in its favour. If a respondent may avail itself of the possibilities that ordinary procedures offer for prolonging the proceedings just to delay its payment obligations, a default application of expedited procedures is, to a certain extent, the right response to such behaviour. This is because it would be unreasonable to expect a recalcitrant respondent to agree on the application of expedited procedures after the dispute has arisen.[732]

2. Second Criterion: Amount in Dispute

462 As an alternative to an exclusive opt-in system, the majority of arbitration rules additionally provides for an application of expedited procedures if the amount in dispute does not exceed a certain threshold.[733] The amount in dispute as a criterion for the application of expedited procedures shows the general understanding of such procedures being particularly suitable for smaller claims. Yet within this general understanding, some specific issues may be challenging and deserve a closer examination.

2.1 The Amount in Dispute and Its Calculation in General

463 Many arbitration rules define how the amount in dispute is calculated, for the purpose of determining whether a dispute should be administered under expedited procedures as well as for other purposes like determining the fees of the tribunal. Under these rules, the amount in dispute is ordinarily the aggregate of any claim and counterclaim, as well as any set-off defence or

730 See for example art. 30.3(c) ICC Rules; art. 5.2(c) SIAC Rules. For a more detailed discussion see below paras. 493–497.

731 See above para. 118.

732 HAUER/PAUKNER/GAYER, 252.

733 See for example art. 8.1(a) ACICA Rules; art. 30.2(a) ICC Rules; art. 1.4 ICDR Rules; art. 42.1(a) HKIAC Rules; art. 5.1(a) SIAC Rules; art. 42.1(b) Swiss Rules.

cross-claim.[734] The aggregated amount that must not be exceeded differs significantly between institutions, with maximum amounts of several million US$.[735] The aggregated sum is exclusive of costs and interest.[736] Other rules, however, do not aggregate the claims and counterclaims.[737]

464 The ICC Rules are a notable exception to this approach because they do not offer any further guidance on the calculation of the amount in dispute.[738] Yet the ICC's Practice Note on the Conduct of Arbitration clarifies that when deciding if the expedited procedure is to be applied, the amount in dispute includes all quantified claims, counterclaims, cross-claims, and claims based on joinder and multi-party proceedings.[739]

2.2 Issues with the Amount in Dispute and Its Calculation

465 While relying on the amount in dispute seems straightforward at first glance, the method of deciding on the application of expedited procedures is more complex upon closer examination.

a Application to Declaratory and Non-Monetary Claims

466 The first difficulty in relying on the amount in dispute arises out of the fact that not all claims can be monetarily quantified. This is the case for non-monetary claims and claims for declaratory relief. The only institutional rules examined in this thesis expressly declaring expedited procedures applicable to claims where the amount of dispute cannot (yet) be quantified are the AIAC Rules.[740] Other rules contain no express provisions on whether expedited procedures are applicable to such claims. Furthermore, there also seems to be disagreement in practice.

467 For example, the ICC Practice Note on the Conduct of the Arbitration states that expedited procedures shall not apply to declaratory or non-mone-

734 Art. 42.1(a) and section 2.2. Schedule 1 HKIAC Rules; art. 5.1(a) SIAC Rules; art. 42.1(b) Swiss Rules; contrast, however, arts. 43 and 44 KCAB International Rules, which determine the thresholds for the claim and counterclaim separately.

735 See for example art. 42.1(b) Swiss Rules (CHF 1'000'000); art. 21.1(a) JAMS International Rules (US$ 5'000'000).

736 See for example art. 1.4 ICDR Rules; section 2.a.2.2 Appendix B Swiss Rules; see also ICC, Note Conduct of the Arbitration, para. 97.

737 See for example art. 1.4 ICDR Rules; art. 84.1(a) JCAA Rules 2019 (however, the current JCAA Rules now also provide for an aggregated sum of claims, counterclaims, and set-off defences exclusive of costs and interest, see art. 84.1(a)).

738 See art. 30.2(a) and art. 1.2 Appendix VI ICC Rules.

739 ICC, Note Conduct of the Arbitration, para. 97. This leaves open the question of whether set-off claims should be taken into account, as is the case with the advance to cover the costs of the arbitration based on art. 37.7 ICC Rules.

740 Rule 8.7(c) AIAC Rules.

tary claims whose value cannot be estimated, unless such claims merely support a monetary claim or do not add significantly to the complexity of the dispute.[741] However, a commentator of the ICC expedited procedures seems to conclude that these procedures are applicable in cases when the claimant merely seeks declaratory relief.[742] Commentators of other rules do not engage expressly in the discussion either. Yet there seems to exist a position according to which it is possible to apply expedited procedures to declaratory relief, provided that a) the amount in dispute is not above the relevant monetary threshold and b) the parties or the institution can provide an estimate of the amount in dispute.[743]

It is submitted that the stronger arguments speak in favour of a potential application of expedited procedures to claims for declaratory relief as well – at least if they relate to monetary claims. When the applicable law permits a request for declaratory relief,[744] it is often possible to attach the same monetary value to the request for declaratory relief that could be attached to a request for performance or damages.[745] Where this is not possible, the parties may nevertheless be required to provide an estimate of the amount of their claims.[746] Moreover, it is argued that the complexity of the proceedings should hardly increase if a mere declaration is requested as compared to requests for performance or damages.[747] As a result, unless the arbitration rules provide otherwise, expedited procedures should also apply to declaratory relief.[748] In any event, there are no identifiable downsides to this approach. Specifically, a problem that has sometimes been encountered in litigation proceedings, namely that a counter-claim for declaratory relief would have to be tried in an ordinary proceeding whereas the claim would have to be tried in a simplified procedure,[749] cannot occur in arbitration when the claims and counter-claims are aggregated.[750] 468

741 ICC, Note Conduct of the Arbitration, para. 100.

742 MARCHISIO, 78, with reference to FRY/GREENBERG/MAZZA, para. 3.97.

743 Cf. MOSER/BAO, para. 12.11.

744 Cf. for the determination of the applicable law for declaratory relief LEIMGRUBER, paras. 220-240.

745 In general (though in the context of litigation) FREY, paras. 250-251.

746 See in general arts. 4.3(d), 5.5(b), and 23.1(c) ICC Rules; similarly MARCHISIO, 78; cf. further MOSER/BAO, para. 12.11.

747 See in general BRÜCKNER/WEIBEL, para. 23.

748 See for such a provision art. 84.2 JCAA Rules.

749 Which the Swiss Federal Tribunal has ultimately resolved in DFT 145 III 299.

750 A change of procedures based on the amount in dispute is possible only if the amount in dispute, after having been determined, changes in the course of the proceedings; see for example art. 5.4 SIAC Rules.

469 Regarding the application of expedited procedures to non-monetary claims, the scope of application is likely limited because a number of non-monetary claims lack objective arbitrability in the first place.[751] However, if the respective *lex arbitri* also considers some non-monetary disputes arbitrable, there is no apparent reason why such disputes should *per se* be excluded from expedited procedures, provided that the parties or the institution are able to attach a certain value to the claim.[752] When this is not possible, expedited procedures will likely not be applicable based on the amount in dispute. Furthermore, should a non-monetary claim be deemed too complex, the institution could still decide not to apply expedited procedures.

b Unjustified Manipulation of the Amount in Dispute

470 A potential problem is the non-applicability of expedited procedures due to the artificial inflation of counter-, cross- or set-off-claims by the respondent with the aim of preventing the expedited procedures from applying.[753] It is important,though, to distinguish this guerrilla tactic from a justified amendment of the claim or counter-claim.[754]

471 At the outset of the proceedings, it may be extremely difficult to determine whether the respondent justifiably submits counter-claims in an amount that renders expedited procedures inapplicable, or whether the respondent chooses to do so as an obstructive tactic. Yet tribunals usually have the power to sanction obstructive behaviour with costs regardless of the result of the proceedings.[755] Therefore, should a tribunal, after having conducted an arbitration in ordinary proceedings, reach the conclusion that the application of expedited procedures was prevented due to obstructive tactics, it should be able to sanction the responsible party with the additional costs of not only the proceedings but also the additional extent of the legal representation and expenses necessary to conduct an ordinary proceeding.[756]

751 Examples are matrimonial and criminal matters (BERGER/KELLERHALS, paras. 222–224; ORELLI, Chapter 12 PILS, Article 177, in: Arroyo, para. 5); cf. further art. 177 Swiss PILA, which limits objective arbitrability to monetary claims.

752 Cf. for example on the HKIAC's flexible approach MOSER/BAO, para. 12.11.

753 Cf. GUSY/HOSKING, para. 41.15.

754 See in general for example art. 18.1 HKIAC Rules; art. 22.1 Swiss Rules.

755 See for example art. 33.3 DIS Rules; art. 38.5 ICC Rules; art. 49.6 SCC Expedited Rules; art. 38.2 VIAC Rules; cf. further ICC, Decisions on Costs, 7; REED, Sanctions, 101.

756 See art. 38.5 ICC Rules; ICC, Note Conduct of the Arbitration, para. 104; on cost sanctions as a deterrent against guerrilla tactics in general see BRUCKSCHWEIGER, paras. 57–60; REED, Sanctions, 101.

2.3 Timing for Determining the Amount in Dispute

Similarly to the considerations regarding the agreement to choose expedited procedures, it must be clarified at which point in time the amount in dispute will (ultimately) be determined for the purposes of deciding on an application of expedited procedures. According to a substantial number of rules, the determinative point in time for a decision on the application of expedited procedures is in between the filing of the answer to the request for arbitration and the constitution of the tribunal.[757] 472

Despite this clear principle, it would be premature to conclude that the amount in dispute, and the (non-)application of expedited procedures, were immutable after it was decided that expedited procedures do or do not apply. On the contrary, the various rules follow different approaches, ranging from restrictive approaches to more discretionary ones. 473

The ICC Rules, in principle, prevent the increase of the amount in dispute: they state that after the arbitral tribunal has been constituted, no party shall make new claims, unless it has been authorised to do so by the arbitral tribunal.[758] The notion of new claims also covers an increase of an existing claim.[759] The Swiss Rules lie on the other side of the spectrum. They do not have any provision to this end. Yet they in general allow a party to amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate and provided that the new claim also falls within the jurisdiction of the tribunal.[760] 474

Two key questions arise from these approaches: whether an increase of the amount in dispute will render already commenced expedited procedures inapplicable, and whether a decrease of the amount in dispute will *vice versa* render already commenced ordinary procedures inapplicable. 475

a Subsequent Increase of the Amount in Dispute

With regard to an increase of the amount in dispute, several rules contain a general provision that allows either the institution[761] or the arbitrator(s)[762] to 476

757 Article 8.1 ACICA Rules; art. 42.1 HKIAC Rules; art. 30.2(a) in connection with art. 1.3 Appendix VI ICC Rules; art. 21.1 JAMS International Rules; art. 5.1 SIAC Rules.

758 Article 3.2 Appendix VI ICC Rules; even stricter art. 86 JCAA Rules 2019 (omitted in the current version of the JCAA Rules).

759 ARROYO, Commentary on the ICC Rules, Appendix VI: Art. 3, in: Arroyo, para. 23.

760 See art. 22.1 Swiss Rules; the HKIAC and SIAC Rules follow a very similar approach in their art. 18.1 and art. 20.5, respectively.

761 Article 1.4 Appendix VI ICC Rules, art. 42.3 HKIAC Rules; art. 5.4 SIAC Rules.

762 Article E-5 ICDR Rules.

decide, based on a change of circumstances, that expedited procedures should no longer apply. Such a change in circumstances may be understood *inter alia* as an increase of the amount in dispute.[763] The decision on whether such an increase[764] should lead to the application of ordinary procedures cannot be made on a general basis but rather needs to be made on a case-by-case basis. Nevertheless, some general observations can be made.

477 When the parties agree to the application of ordinary procedures due to an increased amount in dispute, the institution or tribunal should respect this agreement. If no party has any objection to more complex proceedings, it should not be for the institution or tribunal to decide otherwise.[765] This is especially because such a decision will have no negative effect on the tribunal, since the procedural deadlines are longer[766] and the fees of the arbitrators are the same and sometimes even higher in ordinary procedures.[767] Likewise, when no party asks for a change of procedure as a result of an increased amount in dispute, expedited procedures should continue to apply.[768]

478 Yet if only one party requests a change of procedure, the situation is more complex and requires a careful deliberation of all aspects, such as the state of the proceedings and the motivation of a party for submitting the motion. If the motion is not merely a dilatory tactic, the overall question should be whether the potential disruption and prolongation of the proceedings is preferable compared to the bringing of the amended claim in new proceedings.[769]

479 Special attention should be devoted to a potential *res judicata* effect as a result of a rejection of the amendment or new introduction of claims. The party applying for the amendment or new introduction of claims may, based on the relevant concept of *res judicata*[770] determined by the applicable law,

763 GUSY/HOSKING, para. 4.16; cautioning, however, regarding the standalone significance of the amount in dispute FERIS, 68.

764 In the case of an ICC arbitration, the tribunal will first have to approve such an amendment, see art. 3.2 Appendix VI ICC Rules.

765 DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 23; cf. further art. E-5 ICDR Rules, requiring *(inter alia)* an agreement of the parties on the application of ordinary procedures after an increase of the amount in dispute.

766 See below para. 761.

767 See for example the ICC and Swiss Rules Fee Schedules; yet as HAUER/PAUKNER/GAYER, 254-255, rightly noted, expedited procedures may also simplify the task of the tribunal at least to a certain extent (for example the dispense of reasons), which may compensate for the shorter deadlines, leading to the conclusion that the fees should be the same irrespective of the procedure.

768 DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 23; yet see for the effect on the tribunal's fees (at least under the Swiss Rules) *ibid*, para. 25.

769 *Ibid*, para. 24.

770 See for a general discussion of different concepts KELLMANN, 37-44; LANDBRECHT/WEHOWSKY, 701-703.

face a claim-preclusion in subsequent proceedings if the motion is rejected in the first proceeding.[771] Despite such potentially grave consequences, it is submitted that in such a scenario, the tribunal or institution should arguably not consider the detrimental consequences of the preclusive *res judicata* effect for the applying party. This is because it should not be the task of the respective adjudicatory body to mitigate the consequence of a potentially belated introduction of such claims. There would be no basis for such an obligation, since the arbitration rules do not contain provisions similar to those found in civil procedure codes such as a duty of the court to clarify ambiguities.[772] Furthermore, there is nothing to suggest that the contract between the arbitrators or institution and the parties would establish such a duty. As a result, the tribunal or institution should consider only if the amendment or introduction of such claims in the pending proceedings will cause less delay and expense than if such claims are brought forward in a new proceeding where arguments of *res judicata* may be raised.

b Subsequent Decrease of the Amount in Dispute

As far as a decrease of the amount in dispute after the cut-off date is concerned, none of the arbitration rules analysed in this thesis expressly provide for the consequences of such a decrease. Yet it is argued that the same contemplations as with respect to an increase should apply, with the exception of *res judicata* considerations: if the parties agree, the procedure should be changed to an expedited one. Similarly, when the parties are in disagreement about a change in procedure, the tribunal or institution should consider whether a change to expedited procedures is, overall, more efficient than continuing an ordinary procedure.[773] The discretion not to apply expedited procedures can be derived from provisions that grant the tribunal or institution the competence to decide against the application of expedited procedures.[774] 480

2.4 Evaluation

a Difference in Philosophies

The broad aggregation of different monetary claims as provided for in all rules is a simple method for determining the suitability of expedited procedures. It may seem surprising that a potentially rather consequential procedural 481

771 See in general SCHAFFSTEIN, Res Judicata in International Arbitration, in: Arroyo, paras. 4 and 26.

772 See art. 56 Swiss CPC.

773 See above para. 477.

774 See for example art. 42.1(b) Swiss Rules; cf. further DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 27.

decision depends on a simple accumulation of various claims and amounts. However, upon considering the procedural framework that requires a determination of whether expedited procedures shall apply at the beginning of the proceedings, it seems justified to use a simple and time-effective method for this determination.

482 An interesting aspect of the criteria concerning the amount in dispute as a precondition for the application of expedited procedures is the determination of the threshold. Two different tendencies are identifiable: one tendency that provides for a rather low upper threshold seems to follow the idea that the restrictions following from expedited procedures are justified only when the monetary stakes are not extremely high.[775] The other tendency, to use high upper thresholds, can be understood as viewing time-efficient and cost-effective proceedings as generally desirable and to be applied as widely as possible.[776] Yet what is interesting in this context is that these higher thresholds are often considerably above the amount of US$ 1'000'000 that the respondents of the 2015 Queen Mary Survey identified as the maximum limit for expedited procedures.[777] Therefore, one may legitimately ask whether the rules that provide for higher maximum thresholds overestimate the appeal of expedited procedures for users, or whether such rules start a much-needed trend towards more efficiency in arbitration. This trend may result in many other institutions raising the amounts in their arbitration rules as well.

b Informative Value of Amount in Dispute

483 One problem that the criterion of the amount in dispute poses is a potential lack of correlation between the amount in dispute and the complexity of the specific case.[778] Many commentators have rightly pointed out that the amount in dispute is not necessarily indicative of the legal and factual problems arising in a dispute.[779] However, linking expedited procedures to an amount in dispute is consistent with the so-called principle of proportionality, according to which the procedural resources invested in a dispute should be in proportion to the value in dispute.[780] Respecting this principle is arguably a

775 Cf. ARROYO, Swiss Rules, Art. 42, in: Zuberbühler/Müller/Habegger, para. 59, regarding the idea that a lower amount in dispute may imply a lower relevance of the dispute; further GERBAY, Judicialization, 244; SERAGLINI/BAETEN, para. 19.

776 See for example for the position of the HKIAC MOSER/BAO, para. 12.09.

777 Queen Mary Study 2015, 26.

778 ARROYO, Swiss Rules, Art. 42, in: Zuberbühler/Müller/Habegger, para. 59; SCHÜTT, 90.

779 BANIFATEMI, 9, 11; FERIS, 68; HAUER/PAUKNER/GAYER, 253; SERAGLINI/BAETEN, paras. 29 and 35.

780 MARCHISIO, 77; cf. further GERBAY, Judicialization, 244; PARK, Truth-Seeking, 35.

reasonable response to the criticism that arbitration proceedings are often too costly and time-ineffective compared to the type and complexity of the dispute. This is despite the fact that the amount in dispute is rarely an automatic indicator of the complexity of the dispute.[781] Similarly, if a simplified procedure means that the parties' due process rights are curtailed, this is more acceptable when the amount in dispute is low, as the stakes for the parties will tend to be lower.

Another argument in favour of connecting a comparably low amount in dispute to expedited procedures is a parallel with litigation, where simplified procedures are available as well when the amount in dispute is low.[782] The litigation approach can be considered even more restrictive because it does not usually provide for an exceptional application of ordinary procedures.[783] 484

3. Third Criterion: Exceptional Urgency

A limited number of rules provide for a situation of exceptional urgency as an additional criterion for the application of expedited procedures.[784] 485

3.1 General Observations and Content

It is for the rules and the corresponding commentaries to define when they consider the criterion of exceptional urgency to be fulfilled. Hence, this thesis will not offer any specific commentary for the respective rules. Nevertheless, at this point two observations can be made: 486

First, it must be emphasised that for this criterion to be fulfilled, a two-pronged test must be passed: a) the case must be of urgency and b) the urgency needs to be of an exceptional nature.[785] Second, it is submitted that this criterion comes close to the requirement of urgency needed for the application of provisional measures and for requesting emergency measures.[786] Therefore, it seems likely that tribunals will take guidance from decisions relating to these areas. 487

3.2 Evaluation

At first glance, the criterion of exceptional urgency seems alien to the modern idea of expedited procedures in arbitration.[787] This is likely the reason why this 488

781 Cf. for everything BANIFATEMI, 9.

782 See art. 243 para. 1 Swiss CPC.

783 To the contrary, see art. 243 para. 2 Swiss CPC.

784 Article 8.1(c) ACICA Rules; art. 42.1(c) HKIAC Rules; art. 5.1(c) SIAC Rules.

785 MOSER/BAO, para. 12.16.

786 Similarly MARCHISIO, 77.

787 *Ibid*.

criterion has only been adopted into a comparatively small number of rules. Nevertheless, a closer examination reveals that the inclusion of this criterion is not necessarily a mistaken approach.

489 First, considering that the introduction of expedited procedures into 'modern' arbitration rules represented a response to the demands of users to reduce time and cost, the criterion of exceptional urgency seems to miss the point. However, the same can be said for the requirement of a valid choice of expedited procedures, i.e., an opt-in, the justification of which primarily lies in party autonomy rather than increasing efficiency.[788] Furthermore, as the Formula One Racing case has shown, a situation of exceptional urgency, like the one underlying that case, is broadly considered to be an early example of modern expedited arbitration.[789] Consequently, dismissing this criterion as inadequate would appear rather short-sighted.

490 Second, emergency arbitration is an adequate instrument for answering calls for urgent legal relief. Yet compared to an award rendered by a tribunal, the decision of an emergency arbitrator has the considerable disadvantage of (according to the majority view) not being enforceable under the NYC.[790] Although some laws provide for the (international) enforcement of decisions by an emergency arbitrator,[791] this approach is far from being universal.[792] Hence, if one shifts the perspective on expedited procedures away from a mere response to growing costs and delays in international arbitration towards the granting of effective legal protection, the inclusion of the criterion of exceptional urgency does not seem far-fetched.

491 Lastly, although the Formula One Racing case is proof that simplified[793] procedures may provide the required resolution of a dispute within the necessary timeframe, it must be stressed that the procedural provisions for emergency arbitration allow for a faster conduct of the proceedings than provisions on expedited procedures.[794] Hence, regardless of whether one considers the criterion of exceptional urgency adequate for expedited procedures,

788 See above paras. 459–460.

789 See above para. 64.

790 BOOG, ICC Rules Art. 29, in: Arroyo, para. 53; EHLE, in: Wolff, NYC, art. I para. 71a; GARIMELLA/SOOKSRIPAISARNKIT, 81–83.

791 Part 3A Hong Kong AO; Section 2(1) in connection with section 19 Singapore IAA.

792 See for a general overview HANESSIAN/DOSMAN, 230–245.

793 As seen above in para. 84, it is debatable whether this case is an example of expedited or rather of mere fast-track procedures, which is why the term 'simplified' is used deliberately at this point.

794 See for example the extremely short time limits in sections 4, 7, and 12 Schedule 4 HKIAC Rules.

it remains to be seen whether there is, in fact, a demand for expedited procedures as a result of such urgency.

4. Fourth Criterion: No Exception to the Application of Expedited Procedures

Most of the rules studied in this analysis contain one or several exceptions to the application of expedited procedures. Thus, the fourth criterion is not a positive one that needs to be fulfilled; rather, it is a negative one that must not be fulfilled, lest the expedited procedures will not apply. A notable exception are the rules with exclusive opt-in systems like the SCC and the WIPO Expedited Rules. 492

4.1 First Exception: Decision by the Arbitration Institution or Tribunal

The arbitration rules of the various institutions differ according to whether a third party (the arbitral institution or the tribunal) has the power to decide that the arbitration be conducted under ordinary procedures notwithstanding the fact that one or more criteria for the application of expedited procedures are met. 493

a Overview

In exclusive opt-in systems, the possibility of an inapplicability of expedited procedures due to a contrary decision by a third party does not exist. This is reasonable because when a system, like exclusive opt-in systems, is exclusively based on party autonomy, it would be bizarre to limit this autonomy. In the following section, the different exceptions to the application of expedited procedures will be examined. Under non-exclusive opt-in systems however, the details vary. For example, the Swiss Rules provide for a contrary determination by the SAC only absent a party agreement, i.e., only in cases where expedited procedures would apply only because the threshold for the amount of dispute is met.[795] A third group of institutions enshrine in their rules the possibility to overrule the parties' choice of expedited procedures and instead mandate the application of ordinary procedures.[796] It is noteworthy that some rules also provide for the possibility for the tribunal or institution to decide against the application of expedited procedures at any time during the proceedings and thereby to discontinue the application of expedited procedures.[797] 494

795 Article 42.1(b) Swiss Rules.

796 See for example art. 42.2 HKIAC Rules and art. 30.3(c) ICC.

797 Article 42.3 HKIAC Rules; art. 1.4 Appendix VI ICC Rules; art. 5.4 SIAC Rules.

b Evaluation

495 The possibility to apply ordinary procedures may be reasonable and even preferable where otherwise expedited procedures would apply because of the amount in dispute notwithstanding that the case would be more appropriate for ordinary procedures. As discussed,[798] the amount in dispute need not be indicative of the complexity of a dispute. In this light, a decision not to apply expedited procedures despite the meeting of the financial threshold may be a suitable option to ensure that the procedures are adequate for a specific dispute.

496 What is more questionable, however, is whether a third party should have the power to revoke the parties' agreement on expedited procedures. When the parties have agreed on the application of expedited procedures, guerrilla tactics and judicialisation can hardly have any relevant effect on whether or not the expedited procedures shall apply. Hence, a decision by the institution to overrule the choice in favour of or excluding expedited procedures can be seen only as a response to a general exercise of party autonomy that may turn out to be unsuitable for the resolution of a particular dispute. From a legal point of view, the 'vessel' for this operation is hypothetical consent in case of a gap of contract. While the details of this operation depend on the applicable law, the institution will generally have to ask itself what the parties would have decided at the time of concluding the arbitration agreement in knowledge of the dispute eventually submitted to arbitration.

497 As discussed earlier, relying on implied consent for this determination does not result in a violation of party autonomy.[799] Nonetheless, the granting of power to an arbitration institution to decide whether to apply the expedited procedures is unusual to a certain extent. Although arbitration rules often confer a number of decision-making powers that affect the conduct of the proceedings upon the institution,[800] these decisions are not necessarily final. Rather, under some rules, the tribunal may ultimately decide on the issue in question.[801] Therefore, when an institution has the power to conclusively decide on the application of expedited procedures, the institution is given a considerable amount of power.[802]

798 See above paras. 483–484.

799 See above paras. 398–400.

800 For example joinder (art. 19.1 DIS Rules; art. 7.4 SIAC Rules;) and Consolidation (art. 8 DIS Rules; art. 8.4 SIAC Rules).

801 See for example arts. 19.1 and 19.5 DIS Rules; arts. 8.4 and 8.7 SIAC Rules (for joinder); see also above para. 432.

802 See in general arts. 5.2(c) and 19 SIAC Rules.

4.2 Second Exception: Contrary Agreement of the Parties

A number of arbitration rules expressly allow the parties to opt out of the application of expedited procedures.[803] Other rules are silent on this matter, but commentators consider an opt-out permissible as well.[804] 498

The opt-out agreement is an agreement that expedited procedures shall not apply. This means that, like an agreement to choose expedited procedures, the opt-out agreement regulates the conduct of the arbitration proceedings and thus concerns procedural aspects. In short, it is the counterpart to an opt-in agreement. Therefore, the observations made above in paras. 441–450 apply to the opt-out agreement *mutatis mutandis*. 499

A rather surprising but nonetheless crucial feature found in a small number of rules may, however, render an opt-out agreement purposeless: some rules provide that the institution may decide on the application of expedited procedures notwithstanding a contrary agreement of the parties.[805] 500

The observations regarding the decision by an arbitration institution or tribunal not to apply expedited procedures despite the parties' choice are relevant in this context as well.[806] The only justification for deviating from the parties' agreement thus seems to lie in the desire or duty[807] to conduct arbitral proceedings in an efficient manner. It is conceivable to depart from the parties' agreement, should the institution or tribunal decide that the use of ordinary procedures is inefficient and that the parties would, in retrospect, likely have intended to have the dispute resolved in an expedited manner. 501

4.3 Third Exception: Inapplicability as Provided for by the Rules

The ICC Rules provide for a non-application of the expedited procedures if the arbitration agreement was concluded before the arbitral rules entered into force.[808] This approach could already be observed with the introduction of emergency arbitrator provisions into the ICC Rules 2012. The approach prevented the feature of emergency arbitration, which was relatively new at the time, from applying in disputes where the parties had not expected it because 502

803 See for example art. 30.3(b) ICC Rules.

804 For the Swiss Rules DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 paras. 28–29.

805 See for example art. 30.3(c) ICC Rules; art. 5.3 SIAC Rules.

806 See also above paras. 495–497.

807 See above paras. 225, 242–246.

808 Article 30.3(a) ICC Rules.

they had concluded the arbitration agreement prior to the entering into force of the provision introducing emergency arbitration.[809]

503 This inapplicability based on the ICC Rules is peculiar because this restriction differs from the general approach of the ICC Rules,[810] according to which the parties are deemed to have submitted to the Rules in effect on the date of commencement of the arbitration unless otherwise agreed.[811] It is submitted that this deviation from the standard approach under the ICC Rules reiterates the special character that is still attributed expedited procedures. At the same time, it is a very sensible approach to avoid potential attacks on the validity and enforceability of the award because it may save the parties from a surprise application of expedited provisions.[812]

IV. Inherent Competence of the Arbitral Tribunal?

504 While numerous commentators have discussed the inherent competence of a tribunal, derived from either the *lex arbitri* or the relevant arbitration rules, to apply early determination procedures,[813] such a discussion seems to be missing in the consideration of expedited procedures – and rightly so. Unlike early determination procedures, which are an additional procedural tool for disposing of an issue or claim efficiently within an overall arbitration, expedited procedures are a standalone arbitration procedure.[814]

505 When the parties agree on a specific set of institutional rules, the tribunal is bound by such a choice and must apply the expedited procedures when the conditions are met. Likewise, it must not do so when the conditions are not met.[815] Mere provisions emphasising the efficient conduct of proceedings[816] are no basis for deviating from an (express) agreement of the parties.[817]

809 FERIS, 66.

810 See art. 6.1 ICC Rules.

811 Cf. for a similar observation when emergency arbitration was introduced FRY/GREENBERG/MAZZA, para. 3-1100.

812 FERIS, 66.

813 See only BORN/BEALE, 28-31; see in detail below paras. 690-696.

814 See above paras. 89-90.

815 See above paras. 240-248.

816 See for example art. 27.1 DIS Rules; art. 22.1 ICC Rules; art. 2.1 SCC Expedited Rules.

817 FIEBINGER/HAUSER, 177-178.

V. Conclusion

The discussion above has shown that the approaches towards the application of expedited procedures differ significantly, especially regarding the criteria that are relevant for this application. For instance, certain criteria (in addition to the mere choice of the arbitration rules of a certain institution) must be met in order for expedited procedures to apply. This reinforces the conclusion that expedited procedures are – contrary to the situation before the second half of the twentieth century – still considered a special procedure in international arbitration that requires specific justification as embodied in these additional criteria. 506

Among these different criteria, especially the competence to disregard and substitute the parties' opt-in agreement with a decision by a third party is remarkable. This competence stresses the idea that the exercise of party autonomy may be a cause for unnecessary costs and delay when the parties opt out of expedited procedures. At the same time, the competence to disregard an opt-in agreement may be a reminder that good intentions to reduce such costs and delay may turn out to be inadequate. Yet whether it is wise to disregard the parties' agreement appears doubtful, and doing so would, to a certain degree, conflict with the respect for the provisions in an arbitration agreement. 507

Chapter 9
Commencement of Proceedings

Once a party initiates arbitration proceedings that will be governed by expedited procedures, a number of issues arise up until the constitution of the tribunal. These issues are of particular interest because they are the result of the distinctive provisions of expedited procedures that may be found in several sets of arbitral rules. 508

Hence, these aspects will be studied more closely in the following examination by first drawing attention to the differences in the commencement of proceedings regarding the submissions of the parties (below section I) and then analysing the number and appointment of arbitrators (below section II). 509

I. Commencement of Proceedings: Submissions

510 In a manner identical to ordinary arbitration proceedings, an expedited arbitration is commenced by the claimant's submission of the request for arbitration along with the payment of the registration/filing fee.[818] Subsequently, the respondent files its answer to the request for arbitration, and only thereafter will the tribunal be constituted.[819] Yet within this standardised process there are several deviations compared to ordinary proceedings that are worth examining.[820]

1. Differences to Ordinary Procedures

511 As mentioned earlier,[821] an increased number of submissions is a factor that potentially adds to the cost and timeframe of the proceedings. In ordinary proceedings, after the submission of the request for arbitration and the answer to the request for arbitration, the parties will (following the constitution of the tribunal in a second round of submissions) file their statement of claim and statement of defence.[822] Depending on the circumstances, the parties are allowed a third round of submissions in order to answer the statement of claim and statement of defence.[823] Under expedited procedures, however, in order to reduce the number of submissions, and to eliminate the additional deadlines for filing these further submissions, the underlying idea is to make the parties set out their case as fully as possible at the outset of the arbitration. This focus on an early or earlier submission of the relevant facts and evidence has been referred to as 'front-loading'.[824] Under expedited procedures, two different approaches to this front-loading can be observed: (1) express front-

818 See for example arts. 6 and 7 SCC Expedited Rules; arts. 6 and 62(a) WIPO Expedited Rules.

819 See for example rules 8.8(b) and 8.8(c) AIAC Rules; art. 9 SCC Expedited Rules; art. 11 WIPO Expedited Rules.

820 The specific formal requirements for the submissions as per the applicable rules are not part of this analysis. For these questions reference is made to commentaries like CHOONG/MANGAN/LINGARD; FLECKE-GIAMMARCO/BOOG/ELSING/HECKEL/MEIER; MOSER/BAO; RAGNWALDH/ANDERSSON/SALINAS QUERO; SCHERER/RICHMAN/GERBAY.

821 See above para. 39.

822 See for example art. 19 KCAB International Rules; art. 15.2. and 15.3 LCIA Rules; arts. 20 and 21 Swiss Rules.

823 See for example art. 20 HKIAC Rules; art. 22.1 JAMS International Rules; art. 15.6 LCIA Rules.

824 BOOG/WIMALASENA, 17; DECKER, 77; IPP; WYSS, 4.

loading, combined with a limit of the number of permissible submissions, and (2) a specific provision directly limiting the number of permissible submissions, referred to in this thesis as implicit front-loading.

2. Express Front-Loading

512 The ACICA, ICDR Rules, SCC Expedited Rules, and WIPO Expedited Rules expressly require that in the first round of submissions, the parties submit the statement of claim and statement of defence.[825] Under the SCC Expedited Rules, the parties are entitled to a second (but not a third) round of submisu sions.[826] Under the ACICA, ICDR Rules, and WIPO Rules, the parties are entitled to only one round of submissions (save for the existence of counter-claims), yet the tribunal may allow further ones.[827]

3. Standard Approach with Potential Limitation of Submissions (Implicit Front-Loading)

513 A significant number of other institutions[828] have not expressly prescribed the feature of front-loading in the expedited provisions of their rules. Instead, they provide for the submission of the request to arbitration, the answer to the request for arbitration, and thereafter one more round of submissions with the statements of claim and defence. Yet some of these institutions also reference the technique of front-loading as a voluntary tool for increasing the efficiency of the proceedings.[829] Furthermore, it must be noted that this approach has a similar effect to the express front-loading of other institutions, which is why this approach is referenced here as implicit front-loading. If the number of permissible submissions is reduced, the parties may be naturally inclined to set out their case in detail at the outset of the proceedings in order to preserve their full opportunity to present their case.[830] In any event, the rules differ as to whether they themselves directly limit the permissible

825 Articles 18 and 19 ACICA Expedited Rules; art. E-2 ICDR Rules; arts. 6 and 9 SCC Expe1 dited Rules; arts. 10 and 12 WIPO Expedited Rules.

826 Article 30.1 SCC Expedited Rules.

827 Article 22 ACICA Expedited Rules; E-2 ICDR Rules; art. 37 WIPO Rules.

828 See for example art. 3 Annex 4 DIS Rules; art. 42.2(d) HKIAC Rules; art. 3 Appendix VI ICC Rules; art. 21.3 JAMS International Rules; art. 5.2 SIAC Rules; art. 42.2(c) Swiss Rules; art. 45 VIAC Rules.

829 ICC, Techniques for Controlling Time and Costs 2018, paras. 15 and 43; cf. further BOOG/WIMALASENA, 17.

830 Cf. for a discussion of the effects of front-loading BOOG/WIMALASENA, 17.

number of submissions[831] or merely vest the tribunal with the competence to limit the number of submissions.[832]

4. Evaluation

4.1 General Comparison of Approaches

514 Although differences between express and implicit front-loading exist, one should not overstate the disparities between the two approaches. To begin with, irrespective of whether the rules expressly require the parties to set out their full case in the first round of submissions (express front-loading) or merely limit the number of submissions (implied front-loading), under both approaches the parties and their counsel will have to take more care at the outset and be more disciplined in making their claims and defences, establishing the facts, and submitting the evidence on time.[833]

515 In particular, the express front-loading model of the SCC does not necessarily result in a smaller number of submissions than the procedures of the DIS or the HKIAC, for example. The expedited procedure provisions of those latter institutions, in principle, allow for the submission of only one more written statement after the submission of the request for arbitration or the answer to the request for arbitration (always subject to the exception of counterclaims).[834] This contrasts with the SCC solution that allows for two written submissions in addition to the request for arbitration and the answer to this request.[835] Hence, while the front-loading approach of the SCC appears to attempt to increase efficiency primarily based on the early availability of all facts and evidence in order for the tribunal to adapt appropriate case-management techniques,[836] other rules try to achieve this goal by reducing the number of submissions. Yet, the result is likely the same, i.e., an increase in efficiency by a concentrated early presentation of the case. However, within this equality of outcome, the extremely strict front-loading approach of certain rules such as the WIPO Rules is notable and may be even more beneficial to the efficiency of the proceedings. The WIPO Rules provide for a mandatory front-loading without a guaranteed right to any further submissions in addi-

831 See for example art. 3 Annex 4 DIS Rules; art. 42.2(d) HKIAC Rules; art. 42.2(c) Swiss Rules.

832 See for example art. 3.4 Appendix VI ICC Rules.

833 BÜHLER/HEITZMANN, 135-136; DECKER, 79.

834 Article 3 Annex 4 DIS Rules; art. 42.2 (d) HKIAC Rules.

835 Article 30.1 SCC Expedited Rules.

836 Cf. ICC, Techniques for Controlling Time and Costs 2018, para. 43; WEISS/KLISCH/PROFAIZER 267-268.

tion to the request for arbitration or the answer thereto,[837] which is probably the approach most likely to increase the efficiency of the proceedings in this aspect.

A problem that cannot be solved by either of these instruments is the delay between the first and second rounds of submissions. As rightly pointed out by BÜHLER/HEITZMANN, the first and second rounds of submissions differ because a procedural timetable will be established between the two rounds.[838] In the process of establishing the timetable, there is a fair possibility that the claimant will ask for an allegedly justified prolonged timeframe for its second submission. Pointing to the equal treatment of the parties, the respondent will likely ask for at least the same amount of time, which will lead to a considerably longer duration of the second round of submissions compared to the first one.[839] 516

A potential solution to this problem is to agree on provisions stipulating a fixed timeframe for the second round of submissions, irrespective of the drafting of a procedural timetable. Yet this also puts unnecessary pressure on the parties. It may hamper the parties' ability to gather and present evidence and lead to inefficiencies. This is because the procedural timetable can be a result of a case-management conference where the tribunal determines the relevant issues in dispute, a step that may increase the efficiency of the submissions and pleadings.[840] Another option would be the limitation to only a single round of submissions[841] or, to a lesser extent, the introduction of a memorial-style submission approach for the second round of submissions, meaning that the parties would have to submit their second submissions simultaneously.[842] Both options, however, risk resulting in claims of a violation of the right to be heard.[843] 517

4.2 Express Front-Loading

Express front-loading is a tool that places the onus on the parties and their counsel without fundamentally altering the core qualities of an arbitration. 518

837 Article 37 WIPO Rules; always of course subject to the absence of a counter-claim or set-off.

838 *Ibid*, 131.

839 For everything *ibid*.

840 Cf. for the increase in efficiency resulting from an identification of issues WEISS/KLISCH/PROFAIZER 267-268.

841 See already art. 31 lit. b of the 1992 Geneva Chamber of Commerce Rules.

842 Similarly WEISS/KLISCH/PROFAIZER 267; cf. for the permissibility of a memorial-style round of submissions under Swiss law ZK IPRG-OETIKER, art. 182 para. 62.

843 See in detail below paras. 579–596; BSK IPRG-SCHNEIDER/SCHERER, art. 182 para. 94.

The parties must ensure that they are on top of their case at the very beginning of the proceedings.[844]

519 By limiting the number of submissions, the natural assumption is that the amount of work both for the parties and the tribunal will be reduced.[845] This is certainly a valid point, but a risk remains that the parties will make disproportionately voluminous submissions from the beginning. This in turn may trigger more voluminous submissions in response to ensure that the parties have made all the factual and legal submissions they consider necessary for their case.[846]

520 Be that as it may, express front-loading may indeed increase the efficiency of the proceedings, as it may often allow the tribunal to better understand the relevant issues of a case at an early stage. This may in turn enable the tribunal to use the case-management techniques that are most appropriate to resolve the dispute as efficiently as possible.[847] Such techniques could, for example, include a limitation of issues that may be treated in a second round of submissions. Moreover, when the parties and the tribunal are aware of all the issues at an early stage of the proceedings, the parties may engage in early settlement negotiations.[848]

4.3 Standard Approach with Limited Number of Submissions (Implicit Front-Loading)

521 The benefit of implicit front-loading, as compared to the express front-loading option, is that it does not take the parties (or rather their counsel) by surprise. Instead, institutional rules providing for implicit front-loading do not require the parties to set out their case at the beginning, which it is more lenient with regard to the required early knowledge of the case. Nonetheless, a limitation of submissions may likewise require an earlier command of the case than under ordinary proceedings. Whether this limitation on the number of submissions is valid under all circumstances will be examined below in paras. 579–611.

522 It is worth pointing out that the innovative effect of implicit front-loading should not be overstated. This is because in ordinary proceedings, the parties and the tribunal can limit the number of permissible submissions early on in

844 BÜHLER/HEITZMANN, 135–136.

845 KAPLAN, The Arbitrator and the Arbitration Procedure, 105; RISSE, Ten Drastic Proposals, 456.

846 For everything SERAGLINI/BAETEN, para. 60.

847 For everything ICC, Techniques for Controlling Time and Costs 2018, paras. 15 and 43.

848 BAHNER, 3; see, however, WYSS, 4, who argues that front-loading may occasionally lead to unnecessary costs where the parties do in fact reach a settlement at an early stage.

the proceedings, too.[849] Hence, even when the applicable arbitration rules are moot on a limitation of submissions in ordinary proceedings, it may well be that the parties have only one round of submissions after the constitution of the tribunal.

5. Request for the Application of Expedited Procedures

As previously mentioned, some rules require, in addition to the meeting of certain criteria, a request by a party for the application of expedited procedures.[850] Hence, under rules that follow this system, the party wishing to have the expedited procedures apply needs to make such a request. Ideally, this request is made in the request for arbitration or in the answer, but in any event before the constitution of the tribunal. However, as explained above,[851] it should still be possible for the parties to apply for expedited procedures even after the constitution of the tribunal. 523

II. Number and Appointment of Arbitrators

The number of arbitrators may often turn out to be a factor that is crucial for the overall time and cost of the proceedings. Specifically, a one-member tribunal will cost the parties less, since they will have to pay only one arbitrator as compared to a three-member tribunal.[852] Therefore, the appointment of a sole arbitrator appears to be a promising and – from the standpoint of procedural efficiency – necessary solution. Yet things are rarely as simple as they seem. The arbitration rules provide for different solutions regarding the number of arbitrators under expedited procedures (below sub-section 1) and for different mechanisms to ensure compliance with these numbers, i.e., a competence to disregard potential party agreements (below sub-section 2). Moreover, the appointment of arbitrators may have a preclusive effect worth briefly describing (below sub-section 3). Lastly, the number of arbitrators and the appointment mechanism under expedited procedures have sparked controversy. Therefore, an evaluation of this feature of expedited procedures is warranted (below sub-section 4). 524

849 Cf. for example the facts underlying DFT 142 III 360.

850 See above paras. 428-434.

851 See above paras. 451-455.

852 See for example the fee schedules in Appendix III ICC Rules and Appendix B Swiss Rules.

1. Number of Arbitrators

525 One aspect (the provisions of) most[853] arbitration rules examined in this analysis have in common is that they provide for a sole arbitrator under their expedited procedures.[854] Similarly, these rules either directly provide for a sole arbitrator or at least encourage the institution to appoint only a sole arbitrator.[855] Where they differ, however, is how they treat an express party agreement that provides for a three-member tribunal.

526 The rules that respect the parties' express agreement as to the number of arbitrators without reservation under expedited rules are the CIETAC, HKIAC, and Swiss Rules. The CIETAC Rules provide for a sole arbitrator only when the parties have not agreed otherwise.[856] Under the HKIAC Rules, the institution at least invites the parties to agree on a sole arbitrator.[857] The Swiss Rules follow a similar approach but differ regarding the basis of the applicap tion of the expedited procedures. Where expedited procedures apply due to an opt-in agreement, the number of arbitrators is determined in the same way as under ordinary procedures, where the default rule is that the number of arbitrators follows form the parties' agreement. If the parties have not reached an agreement, the Court of the SAC will decide on a case-by-case basis.[858] Where the expedited procedures apply due to the amount in dispute, the default rule provides for a sole arbitrator. However, if the parties have agreed on three arbitrators, the institution will respect the parties' agreement. Nevertheless, and like under the HKIAC Rules, the institution will invite the parties to agree on a sole arbitrator.[859]

853 The DIS Rules do not contain any provisions on the number of arbitrators for expedited procedures and instead treat expedited and ordinary procedures in the same way. As such, primacy is given to the agreement of the parties and only eventually, in the absence of a contrary application by one of the parties, will the tribunal consist of three arbitrators; see art. 10.2 DIS Rules.

854 The following rules provide for a sole arbitrator only absent a contrary party agreement: Article 9.1 ACICA Expedited Rules; art. 8.5 AIAC Rules; art. 2 Appendix VI ICC Rules; art. E-6 ICDR Rules; art. 7.1 JAMS International Rules (although not distinguish; ing between expedited and ordinary procedures); art. 86.1 JCAA Rules; art. 17 SCC Expedited Rules; art. 5.2(b) SIAC Rules; art. 14(a) WIPO Expedited Rules; yet see arts. 4.2 and 4.3 AIAC Fast-Track Rules; art. 42.2(a) HKIAC Rules; art. 45 KCAB Rules; art. 42.2(a) Swiss Rules; art. 45.5 VIAC.

855 See for example art. 12.2 ICC Rules; art. 12 ICDR Rules; art. 11 KCAB Rules; art. 9.2 Swiss Rules; art. 9.1 SIAC Rules; differently, however, art. 25.2 CIETAC Rules.

856 Article 58 in connection with art. 25 CIETAC Rules.

857 Article 42.2(b) HKIAC Rules.

858 Article 42.1 in connection with arts. 9 and 10 Swiss Rules.

859 Article 42.2(b) Swiss Rules.

The opposite approach can be found, for example, in the ICC and SIAC Rules, both of which allow the institution to disregard an agreement by the parties and appoint a sole arbitrator.[860] The problems that this version causes will be examined more closely in the following sub-section. Similarly, the ICDR, SCC, and WIPO Rules state that the dispute shall be administered by a sole arbitrator but do not refer to any contrary agreements by the parties.[861] 527

2. Competence of the Institution to Derogate from the Agreement of the Parties

As the previous section has highlighted, a salient issue in connection with the constitution of the arbitral tribunal under expedited procedures is the competence of an arbitration institution to disregard the parties' stipulation regarding a three-member tribunal and instead appoint a sole arbitrator. For a closer examination of this problem, preliminary remarks and general considerations (below sub-section 2.1) will be contrasted with two recent court decisions: first, a decision by the Singapore High Court will be presented (below sub-section 2.2) , along with one by the Shanghai No. 1 Intermediate People's Court (below sub-section 2.3), followed by a critical analysis of the decisions (below sub-section 2.4). 528

2.1 Preliminary Remarks and General Considerations

As a preliminary point, it is crucial to stress that the power of an institution to disregard the parties' agreement on a three-member tribunal exists only in two situations. These are where the respective arbitration rules either (1) expressly grant this competence to the institution or (2) exclusively provide for a sole arbitrator. In the absence of such provisions, there seems to be no reason why the parties' agreement on three arbitrators should be rendered ineffective. Yet where the rules do provide for a possibility to disregard such an agreement, a question that requires clarification is how this competence can be qualified. Is it a blatant disregard of the parties' autonomy to expressly agree on the details of the composition of the tribunal, or is it in fact respectful of the parties' autonomy to agree on a specific set of arbitration rules that also grant the institution certain competences? As has been established in the context of the party autonomy paradox, a decision of the institution to insist on a sole arbitrator despite a stipulation in the arbitration agreement 529

860 Article 2.1 Appendix VI ICC Rules; art. 5.2(b) in connection with art. 5.3 SIAC Rules.

861 Article E-6 ICDR Rules; art. 17 SCC Expedited Rules; art. 14(a) WIPO Expedited Rules.

on three arbitrators does not necessarily disregard party autonomy.[862] The decisive issue is the interpretation of the arbitration agreement, on which two courts have rendered conflicting judgments.

2.2 Court Decisions on the Issue

a AQZ v. ARA [2015] SGHC 49

530 It was precisely this concept of the party autonomy paradox that, at the time of writing, led to one of the most often cited court decisions in the area of expedited procedures. In the case of *AQZ v. ARA,* the Singapore High Court had to decide on a decision by SIAC to appoint a sole arbitrator under expedited procedures notwithstanding the fact that the arbitration agreement provided for a three-member tribunal.

531 While the decision is interesting for a variety of reasons, for the purposes of this analysis it suffices to say that a dispute arose over the sale and purchase of a commodity between two Singaporean companies. Within the contractual framework underlying the dispute, a contract concluded in 2009 contained an arbitration clause reading: *'[…] the dispute shall be finally settled by arbitration upon the written request of either party hereto in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators in English Language. […]'*.[863] It is noteworthy that at the time of conclusion of this arbitration agreement, the then applicable version of the SIAC Rules did not contain any provisions on expedited procedures.[864]

532 After the dispute had arisen, the claimant initiated SIAC arbitration proceedings in Singapore and applied for expedited procedures due to the amount in dispute being under the relevant threshold according to art. 5.1(a) of the then applicable SIAC Rules 2010.[865] The respondent challenged both the validity of the arbitration agreement and the applicability of the expedited procedures and insisted on a three-member tribunal instead of a sole arbitrator. Despite the respondent's objections, the SIAC found *prima facie* jurisdiction, granted the application for expedited procedures, and, based on art. 5.2(b) SIAC Rules 2010,[866] appointed a sole arbitrator. Despite the respondent upholding its objections, the sole arbitrator conducted arbitral proceedings based on SIAC's expedited procedures (as per the SIAC Rules 2010). In a decision titled 'Ruling and Partial Award', the arbitrator *inter alia* affirmed his jurisdiction. Subse-

862 See above paras. 402–424.

863 Judgment, para. 105

864 See in general SIAC Rules 2010.

865 *'The amount in dispute does not exceed the equivalent amount of S$5,000,000, representing the aggregate of the claim, counterclaim and any setoff defence'.*

866 *'The case shall be referred to a sole arbitrator, unless the Chairman determines otherwise.'*

quently, the respondent applied for the award to be set aside on the basis of a lack of jurisdiction pursuant to art. 16(3) UNCITRAL Model Law[867] and based the application on art. 34(2)(a)(i) and (iv)[868] UNCITRAL Model Law.[869]

533 The Singapore High Court rejected the entire application to have the award set aside. For the present purposes, two parts of the judgment are relevant. The court held that both the arbitration procedure and the composition of the tribunal were in accordance with the parties' agreement by applying the expedited procedures and appointing a sole arbitrator. After holding that the 2010 version of the SIAC Rules was relevant, the court further found that expedited procedures were applicable as well because art. 5 SIAC Rules 2010 led to the application of expedited procedures.[870] As for the appointment of the sole arbitrator, the court first acknowledged the problem that, at the time the relevant arbitration agreement was concluded, the SIAC Rules provided neither for expedited procedures nor for the SIAC's competence to override an agreement of the parties on the number of arbitrators. Nevertheless, the judge then went on to say that *'[a] commercially sensible approach to interpreting the parties' arbitration agreement would be to recognise that the SIAC President does have the discretion to appoint a sole arbitrator. Otherwise, regardless of the complexity of the dispute or the quantum involved, a sole arbitrator can never be appointed to hear the dispute notwithstanding the incorporation of the SIAC Rules 2010 which provide for the tribunal to be constituted by a sole arbitrator when the Expedited Procedure is invoked.'*[871] Furthermore, the court held that the SIAC's president (as the competent authority to decide on the application of expedited procedures and the number of arbitrators) had presumably taken into account all of the relevant factors of the case. This was sufficient to uphold the award.[872]

867 Corresponding to section 10(3) Singapore IAA *('If the arbitral tribunal rules – (a) on a plea as a preliminary question that it has jurisdiction; or (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.').*

868 *'An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law';* applicable based on section 3(1) Singapore IAA.

869 Judgment, paras. 33 and 36.

870 *Ibid*, para. 127.

871 *Ibid*, para. 132.

872 *Ibid*, para. 137.

b Noble Resources International Pte. Ltd v Shanghai Good Credit International Trade Co., Ltd., Shanghai No. 1 Intermediate People's Court

534 In a case similar to *AQZ v. ARA*, the Shanghai No. 1 Intermediate People's Court reached a conclusion vastly different from the one of the Singapore High Court.

535 The underlying dispute arose out of a contract concluded in 2014. The contract included an arbitration agreement providing for SIAC arbitration with a three-member tribunal. In 2015, the claimant initiated SIAC arbitration proceedings in Singapore under the then applicable SIAC Rules 2013 and applied for expedited procedures due to the amount in dispute that was below the relevant threshold for the application of ordinary procedures. The respondent objected to both the expedited procedure and the appointment of a sole arbitrator. Subsequently, the respondent did not participate any further in the arbitration. SIAC granted the application for expedited procedures and appointed a sole arbitrator. After the rendering of the final award in favour of the claimant, the claimant tried to have the award enforced in the PRC.[873]

536 The Shanghai No. 1 Intermediate People's Court refused enforcement of the award under the NYC based on several grounds, one of them being that the composition of the tribunal was not in accordance with the parties' agreement (art. V[1][d] NYC). The court reasoned that the use of expedited procedures had been in accordance with the parties' agreement because the parties had chosen the SIAC Rules, which contained the expedited procedure provisions. Therefore, the parties had chosen the possibility to have the dispute arbitrated under expedited procedures. Yet what had not been in accordance with the parties' agreement was the composition of the tribunal, because the arbitration agreement expressly stipulated a three-member tribunal. The court argued that art. 5.2 (b) SIAC Rules 2013[874] should not be interpreted as granting the president of SIAC absolute discretion in the decision on the composition of the tribunal. Rather, the president should give full consideration to the parties' express agreement on the composition of the tribunal in order to respect party autonomy.[875]

2.3 Practical Relevance of the Court Decisions

537 In light of the otherwise scarce court decisions, the two decisions by the Singapore and the Shanghai court provided some much-needed guidance and

873 See for everything the (English) summary by KWAN.

874 *'The case shall be referred to a sole arbitrator, unless the President determines otherwise.'*

875 See the (English) summary by KWAN.

sophisticated analysis on some of the peculiarities of expedited procedures. However, for numerous reasons it is arguably doubtful whether these decisions can be considered pioneering determinations of the relationship between party autonomy and expedited procedures.

First, the direct and apparent contradiction between the factually comparable decisions makes it impossible to predict how other courts will treat the competence of an institution to derogate unilaterally from the parties' agreement on the number of arbitrators. Second, it is imperative to stress that both decisions concerned awards that were rendered under two previous versions of the SIAC Rules. These versions featured a provision 5.2 stating that under expedited procedures the case shall be referred to a sole arbitrator, unless determined otherwise by the competent body of the SIAC. The current version of the SIAC Rules contains the additional provision that a sole arbitrator shall be appointed even in cases where the arbitration agreement contains contrary terms. 538

Despite these objections, it would be short-sighted to dismiss these decisions and their potential impact on future proceedings or revisions of arbitration rules. Moreover, certain aspects of the decisions are worth examining in greater detail, as the following section will demonstrate. 539

2.4 Critical Analysis of the Court Decisions

a Analysis of the Parties' Consent

The Singapore High Court's approach in *AQZ v. ARA* is partially in line with the approach advocated previously in this thesis.[876] By engaging in what would be a commercially sensible approach to interpreting the parties' arbitration agreement, the court carried out an analysis of implied consent to the SIAC Rules in their entirety, including the provision on the sole arbitrator, and compared this with an express agreement potentially in conflict with the implied agreement. The court thereby did not rely on a conflict between party autonomy and institutional rules. Instead, the court employed the rationale and method advocated here, namely to analyse what the parties consented to from an objective point of view. 540

The Shanghai No. 1 Intermediate People's Court seems to have chosen the opposite approach and instead gave priority to the express agreement of the parties in a, with all due respect for the learned judges, potentially unnecessary attempt to preserve party autonomy.[877] While the court's approach is understandable and well-intentioned, it is proposed that an interpretation of 541

876 See above paras. 408-411.

877 See the (English) summary by KWAN.

the arbitration agreement rather than an abstract analysis of party autonomy would have been more purposeful. This is not to say that the decision of the court was ultimately incorrect. On the contrary, it may well be that an interpretation of the arbitration agreement would have led to the exact same result. Yet, the approach advocated in this thesis would have been different.

b No (Extra) Field of Application for the Institutional Judgment Rule

542 What is of little help, however, is the Singapore High Court's holding that as long as an institution takes into account all of the relevant factors when deciding on the number of arbitrators, this decision is no sufficient ground for a successful challenge to the subsequent award.[878] BERGER has referred to this reasoning as the 'institutional judgment rule' (derived from the procedural judgment rule discussed above in paras. 339-363, which itself was derived from the business judgment rule).[879] Determining the actual merit of the court's approach is not an easy task. However, it is submitted that even though the Singapore High Court's solution is pragmatic, it is ultimately not entirely convincing from a strictly dogmatic point of view.

543 The additional invention of the institutional judgment rule is unhelpful and may even be considered superfluous. The rule could be used as an impermissible shortcut bypassing the necessary interpretation of the arbitration agreement. By paying due regard to all of the relevant factors of the case, the institution necessarily has to engage in the interpretation of the parties' (implied) consent. When the institution ultimately decides on a conflict between its general rules and a potential express party agreement in conflict with these rules, the institution not only has to consider the existence of an express agreement potentially contrary to the institution's rules but also has to weigh said existence against the (implied) intent of the parties to have their arbitration administered in an efficient way, applying an expedited procedure under the chosen rules. Thus the institutional judgment rule has no additional value.

544 Even if the institutional judgment rule were to be considered a valid standalone concept, the rule is relevant only after it has been established that the parties have granted the institution the competence to derogate from their agreement as to the number of arbitrators. To pay regard to all relevant circumstances before making a decision should not be an exceptional circumstance but rather the norm. Doing otherwise would only risk the decision being considered biased or, in extreme cases, even arbitrary. This would be incompatible with the institution's general duty of care as established above in para. 266.

878 Judgment, para. 133.

879 BERGER, 356-357.

When the institutional judgment rule is considered to have standalone value, the third objection against the rule refers to the special treatment of the institution's decision on the number of arbitrators. Arbitral institutions have various competences during the proceedings, such as determining whether to apply expedited procedures or whether to replace an arbitrator, as well as fixing the fees of the tribunal.[880] For these decisions, neither any specific method nor the 'institutional judgment rule' has been established. This leads to the question of whether the decision on the number of arbitrators merits special treatment. There appear to be no convincing reasons in support of such a proposal. 545

3. Preclusive Effect of the Appointment

Under expedited procedures, several institutional rules like the ICC and ICDR Rules attach a preclusive effect to the appointment of the arbitrator(s): after the appointment, no new or different claim, counterclaim, and set-off may be submitted without the consent of the tribunal.[881] 546

As compared to ordinary procedures, this approach is more restrictive under certain rules. For example, under the ICDR Rules, an amendment of claims is possible unless the tribunal considers it inappropriate to allow such amendment.[882] Under the ICC Rules, though, the same restrictions on amendments apply in ordinary proceedings as under expedited procedures, yet only after the signing of the terms of reference.[883] This signing of the terms of reference does not happen in expedited procedures, though.[884] 547

The procedural details leading to this preclusive effect under the respective rules, on which a good amount of commentary already exists, do not warrant a closer examination at this stage. However, this effect exemplifies once again, the front-loading-effect of expedited procedures. 548

4. Overall Evaluation

The standardised use of a sole arbitrator, even in cases where the parties have agreed on a three-member tribunal, is an intriguing feature of expedited procedures. As a preliminary observation, appointing only a sole arbitrator may 549

880 See only arts. 10, 11-12, and 42.2 HKIAC Rules.

881 Article 3.2 Appendix VI ICC Rules; art. E-5 ICDR Rules.

882 Article E-5 ICDR Rules.

883 Article 23.4 ICC Rules.

884 Article 23.1 ICC Rules; RAJAH, 169-170, 181.

indeed reduce the time and cost of the proceedings significantly.[885] It goes without saying that the fees of one arbitrator are lower than the fees of three.[886] In terms of the length of the proceedings, it will be easier and faster to appoint one arbitrator instead of three. However, as BÜHLER/HEITZMANN correctly point out, in the absence of a joint party appointment, it may be difficult for the institution to find an arbitrator who is not only experienced enough and willing to conduct an expedited arbitration based on the tight timetable but also able to devote enough time to the arbitration.[887] Yet, case-management conferences should be easier and quicker to schedule if just one arbitrator needs to find an available time-slot.[888] This is because procedural orders can be issued in shorter time, and after the closure of the proceedings, there will be neither a need for extended deliberations between the arbitrators nor for the drafting of dissenting opinions.[889] Accordingly, having a tribunal consisting of only one rather than three arbitrators promises to reduce the time and cost of the proceedings incurred on the side of the tribunal.

550 Nevertheless, what this measure cannot change is the actions of the parties. If one or both parties act in an inefficient manner during the proceedings, the number of arbitrators has little effect on this problem. In addition, one must be careful not to see a three-member tribunal as merely a tool for giving the parties the impression that they get to have their own advocate in the tribunal. Instead, a tribunal consisting of more than one person may significantly improve the quality of the arbitral procedure and the award. The reason is that such an arrangement allows the ideas, proposals, and perceptions of one arbitrator to be tested by colleagues.[890]

551 The elephant in the room is whether the goal of potential savings in cost and time justifies the means. Specifically, one cannot help but notice the potential psychological effect of depriving the parties of choosing 'their' arbitrator.[891] Indeed, users of arbitration have identified the choice of arbitrators

885 CLAXTON, 152; KAPLAN, The Arbitrator and the Arbitration Procedure, 101; KIRBY, Efficiency, 693.

886 See above para. 524.

887 BÜHLER/HEITZMANN, 134; cf. in general KAPLAN, The Arbitrator and the Arbitration Procedure, 104

888 WEISS/KLISCH/PROFAIZER, 264.

889 See for this aspect in general BORN, International Commercial Arbitration, 1793-1796, 1802-1803; HOCHSTRASSER, 123-125; KIRBY, Arbitrators, 344.

890 BORN, International Commercial Arbitration, 1794-1795; BÜHLER/HEITZMANN, 148-149.

891 Queen Mary Study 2018, 7; PFISTERER/SCHNYDER, 61; BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 4.16; on the problematic tendency of party-chosen arbitrators to decide in favour of the respective party see KAPLAN, The Arbitrator and the Arbitration Procedure, 104.

amongst the most important aspects of arbitration for them.[892] At the same time, however, when users identify costs and delays as the worst features of arbitration, it seems reasonable to conclude that a party cannot have its cake and eat it, too, i.e., have three arbitrators and also an extremely efficient procedure.[893] Instead, the benefits of one approach must be balanced against the benefits of another.

Despite the possibility of the institution deciding on a sole arbitrator instead of a three-member tribunal, it must not be forgotten that the parties still have the power to jointly agree on this sole arbitrator under many rules[894] and thereby are still in a position to receive an arbitrator of their choice. Furthermore, in the end the parties must take responsibility for their choices. If the parties choose a set of rules that contains expedited procedures, the parties may legitimately be held to this choice even if they expected a three-member tribunal under ordinary procedures. After all, the parties are usually participants in the commercial world and not inexperienced consumers. 552

In any event, it seems that the solution adopted by HKIAC and the Swiss Rules, to invite the parties to agree on a sole arbitrator,[895] seems preferable over the rather harsh approach of unilateral appointment of a sole arbitrator adopted by SIAC and ICC.[896] Yet, the problem is partially dissolved under the ICC Rules that provide for the application of expedited procedures, and thus the application of a sole arbitrator, only for arbitration agreements that have been concluded after the entering into force of the ICC Rules with this new provision.[897] 553

III. Conclusion

To a great extent, the commencement of the arbitral proceedings under expedited procedures follows the principles of ordinary procedures. Yet the features of express front-loading and the limitation on submissions may be significant, requiring a more focused approach of the parties and their representatives. Although the idea of limiting the number of submissions is neither 554

892 Queen Mary Study 2018, 7.

893 However, see the exceptions of the Panhandle and Formula One Racing cases above in paras. 63-66.

894 See for example rule 4.4(a) AIAC Fast-Track Rules; art. 2.2 Appendix VI ICC Rules; art. E-6 ICDR Rules; art. 18.1 SCC Expedited Rules; art. 14(a) WIPO Expedited Rules.

895 See above para. 526.

896 See LYE; SERAGLINI/BAETEN, para. 43; ABDEL WAHAB,175; above para. 526.

897 Article 30.3(a) ICC Rules.

particularly new nor revolutionary, it may be of some benefit for shortening the proceedings.

555 What may be more innovative, but also more controversial, is the appointment of a sole arbitrator despite the objection of at least one party. While a decision of this kind may be legally justifiable based on the notion of implied consent, it may prompt increased criticism from users. A sole arbitrator may be beneficial from the perspective of procedural economy, yet a three-member tribunal also has its merits. Whether the benefits to procedural economy are worth the effort for an institution to argue why it appoints a sole arbitrator, despite a stipulation on a three-member tribunal, remains to be seen. One of the hopes of this feature, however, is that the parties may increasingly agree on a sole arbitrator in their arbitration agreements or at the very least desist from including provisions on three-member tribunals.

Chapter 10
Conduct of the Proceedings

556 This chapter will provide an overview of features that are typical of expedited procedures. In terms of substance, the focus of this section will be on elements where the expedited provisions of institutional rules expressly differ from ordinary provisions. What this chapter will not cover are issues that may pose challenges to the tribunal under both expedited and ordinary procedures, such as whether to allow a joinder. The present analysis will contrast the approaches to each issue under expedited procedures with the approach under ordinary procedures. In addition, the compatibility of the measures under expedited procedures with the right to be heard will be analysed. In terms of the stage of the proceedings, this chapter will analyse issues that may arise between the constitution of the tribunal and the closure of the proceedings. Depending on the complexity of the issues, their respective analyses will vary in length and depth.

557 After providing general considerations (below section I), the analysis will cover the number of submissions (below section II), the length of submisf sions (below section III), document production (below section IV), and doco uments-only proceedings (below section V), followed by an overall evaluae tion (below section VI).

I. General Considerations

1. General Competence of the Tribunal to Determine the Conduct of the Proceedings

A widely established principle of commercial arbitration is the competence of the tribunal to determine the conduct of the proceedings. Subject to mandatory norms of the *lex arbitri*, the parties' agreements, and the provisions of the arbitration rules, the tribunal may adopt any procedure it considers appropriate to resolve the dispute.[898] Numerous arbitration rules recognise this principle and thereby contain only the most necessary provisions on the conduct of the arbitration.[899] 558

Under any arbitral procedure, but especially under expedited procedures, the arbitrators must ensure an efficient conduct of the arbitration while safeguarding the parties' due process rights and the parties' autonomy in order to render a (reasonably) correct award.[900] Therefore, the arbitrators need to design the proceedings in a way that likely guarantees this outcome. 559

2. Modified Time Limits

Modified time limits are a common feature of expedited arbitration. Under numerous rules, a tribunal must render the award within six months of a point in time early on in the proceedings.[901] Although these time limits may be extended,[902] they put the tribunal under pressure to prioritise efficiency to a considerable degree. In addition, some rules state that under expedited procedures, the tribunal and the institution may shorten ordinary time limits.[903] Furthermore, the tribunal may be specifically required to take procedural steps earlier than under ordinary procedures, such as the holding of the case-management conference.[904] 560

898 See art. 182 para. 2 Swiss PILA; POUDRET/BESSON, paras. 532; ZK IPRG-OETIKER, art. 182 para. 20.

899 See for example art. 21.3 DIS Rules; art. 20.1 JAMS International Rules; arts. 14.1 and 14.2 LCIA Rules.

900 See in detail above Chapter 3.

901 See e.g. art. 42.2(f) HKIAC Rules; art. 42.2(e) Swiss Rules; in detail below para. 760.

902 See art. 43 SCC Expedited Rules; art. 45.8 VIAC Rules.

903 See for example art. 42.2(c) HKIAC Rules; art. 5.2(a) SIAC Rules.

904 Compare for example art. 24 and art. 3.3 Appendix VI ICC Rules.

3. Tools for Achieving Efficiency in the Proceedings

561 Considering that a tribunal must generally comply with the expediency requirement in expedited arbitration and specifically with shortened deadlines, the question is how the tribunal can achieve this goal. It is submitted that certain tools for generally increasing the efficiency of arbitration are necessary. It is beyond the scope of this chapter to discuss all the potential means to this end in detail. Nevertheless, some select tools deserve a closer analysis due to their particular relevance for expedited procedures. This may be attributed to the potential of these tools for combining due process with efficiency (an issue that will be analysed in more detail in the respective sub-chapters) or to a consensus on the benefits of these tools regardless of the type of procedure.

3.1 Proactive Case Management

562 A generally recognised method for increasing the efficiency of the arbitral proceedings is a proactive case-management approach by the tribunal.[905] This includes an early familiarisation with the case, a hands-on case-management conference, tailor-made procedures upon the tribunal's initiative, the communication of a preliminary and non-binding case assessment, as well as an identification of relevant issues, facts, and legal arguments.[906] Another crucial element of proactive case management is 'timetabling', which means that the tribunal needs to establish a procedural timetable that defines the procedural steps and corresponding time limits.[907]

563 Even though a proactive case-management approach by the tribunal may be a successful strategy, it may sometimes be difficult to implement. The reason is that it requires considerable effort on the part of the tribunal. Early on in the dispute, the tribunal needs to familiarise itself with the facts as well as the legal positions of the parties in order to be able to identify the issues with the parties and make meaningful yet non-binding early assessments.[908]

564 One apparent reason for the success of proactive case management is that this strategy prevents the tribunal from becoming subject to the parties' strategies and tricks. It is the tribunal that sets the pace and indicates what it considers to be the correct approach to the management of the proceedings.

905 ELSING, 116–117; HABEGGER, 123; HAUER/PAUKNER/GAYER, 254; MORTON, 110; NEWMARK, 497; SCHNEIDER, Interactive Arbitrator, para. 25.8; WYSS, 5.

906 CLARKE, 158; ELSING, 116–117; HABEGGER, 123; HAMANN/BULKA, 27–30; HAUER/PAUKNER/GAYER, 254; MORTON, 110; NEWMARK, 497; SCHNEIDER, Interactive Arbitrator, para. 25.8; WYSS, 5.

907 BANIFAMETI, 14.

908 Cf. for everything NEWMARK, 494.

While the parties may always reject the tribunal's proactive measures, tools like an early identification of issues may prove beneficial.

3.2 Involving the Parties

Another measure that may prove useful to a tribunal is to actively cooperate with the parties, thereby involving them as well in the active case management.[909] Although this may seem to contradict the first method, it is in fact a consequence of it. The tribunal should strive to obtain the parties' approval for the proposed conduct of the proceedings.[910] In order to achieve this, the tribunal, when in doubt, should explain the reasons for, and benefits of, a certain measure.[911] This is not to say that the tribunal should adopt measures only with the approval of the parties. Yet whenever possible, a conciliatory approach is met with more acceptance than a harsh one. The case-management conference[912] represents an opportune point in time to involve the parties in the general conduct of the proceedings.[913] 565

3.3 Cost Sanctions

A further promising tool for a more efficient conduct of the proceedings are cost sanctions against a party for dilatory conduct.[914] When a tribunal needs to rule on a procedural motion, whether or not the latter is, with hindsight, justified may be unclear. Thus, when in doubt, a tribunal may understandably decide to grant the motion, especially if it may affect the parties' due process rights. 566

However, in order to deter dilatory motions, a tribunal may eventually sanction this type of motion with an adverse cost consequence. In other words, the tribunal may allocate the costs of dealing with the motion to the party that had applied for it, regardless of the outcome of the proceedings. Whether the tribunal needs the approval of the parties for doing so depends on the arbitration rules, the *lex arbitri,* and specific agreements between the tribunal and the parties.[915] 567

909 BÖCKSTIEGEL, 2-3; ICC, Effective Management of Arbitration, 13; WEISS/KLISCH/ PROFAIZER, 268; cf. also HAMANN/BULKA, 28-29.

910 BK ZPO III-GABRIEL/BUHR, art. 373 para. 37; ICC, Effective Management of Arbitration, 13.

911 Cf. LEIMBACHER, 306.

912 Cf. for everything NEWMARK, 497; see also art. 27.4 and Annex 3 DIS Rules.

913 Cf. for the example of the tribunal identifying the key issues GIOVANNINI, Reasoning, 88

914 For the sake of clarity, the term 'cost sanctions' does not refer to actual financial penalties, also known as *'astreinte'* (see for this GIRSBERGER/VOSER, para. 1109), but encompasses only the allocation of the corresponding part of the costs for the proceedings.

915 See in general BRUCKSCHWEIGER, paras. 57-60; REED, Sanctions, 99.

568 Finally, cost sanctions may not apply only to the parties but also to the tribunal. The institution may determine the fees of the arbitrators considering various factors, such as the efficiency of the conduct of the proceedings.[916] Hence, the arbitrators may also face cost consequences for conducting arbitral proceedings inefficiently.

4. Burden of Proof and Standard of Evidence

569 With provisions under expedited procedures potentially affecting the submission and taking of evidence, the question arises of whether the type of procedure (expedited or ordinary) should have any effect on the burden of proof and the required standard of evidence. For example, a party applying for interim relief needs to show, on a *prima facie* basis, only a good cause[917] but does not need to prove its claim with the same degree of certainty that it would need in order to receive an actual award in its favour. In this regard, two observations can be made.

570 First, the burden of proof and standard of evidence are not primarily subject to the type of procedure. Rather, according to the prevailing view in Switzerland, these questions are subject to the law governing the merits of the dispute.[918]

571 Second, in the absence of any express rules in this regard, it is submitted that expedited procedures should not result in a more lenient standard of evidence, i.e., a lower degree of proof. The mere fact that certain evidence may be inadmissible (for example oral evidence) does not suffice to conclude that the claiming party may avail itself more easily of legal protection.[919] On the contrary, it is for said party to explain to the tribunal why it needs oral evidence to prove its case. Should the tribunal nonetheless decide against holding a hearing, said party could still take recourse against the award based on a potential violation of the right to be heard.[920] If the tribunal acknowledges the need for certain forms of evidence, but incorrectly decides not to admit these forms of evidence, it would be incorrect to hold a failure to prove its case against said party. Instead, this party should be granted the evidence

916 See already above para. 231; cf. for the ICC rules art. 2.2 Appendix III ICC Rules and ARROYO, ICC Rules, Article 38, in: Arroyo, para. 17.

917 BERGER/KELLERHALS, paras. 1250–1252; BOOG, 12 PILS, Article 183, in: Arroyo, para. 12.

918 For everything BERGER/KELLERHALS, para. 1316; GÖKSU, para. 1540; KAUFMANN-KOHLER/RIGOZZI, para. 7.74; STACHER, Einführung, para. 278.

919 Disagreeing, however, WELSER/KLAUSEGGER, 266.

920 Yet, the parties have no general right to an oral hearing under Swiss law, see below para. 638.

facilitations following from exceptional difficulties to meet the required standard of evidence *('Beweisnotstand'),* examined right below in para. 572.

572 Furthermore, as practice has shown, if one party presents oral evidence, the other party will follow suit and present oral evidence in its own favour. Therefore, it is questionable as to whether a limitation on the permissible types of evidence could impact the required standard of evidence. For instance, if the respondent is able to rebut the claimant's oral evidence with its own evidence, the claimant may not necessarily be in a better position to prove its claims compared to a situation where neither party was allowed to submit oral evidence. Conversely, if neither party may present oral evidence, there is no reason why the standard of evidence should be lowered.

573 The proposal that the standard of evidence should be the same under ordinary and expedited procedures draws additional support from Swiss litigation procedures. In summary court proceedings, where oral evidence is often inadmissible as well, the required standard of evidence is the same as under ordinary procedures.[921] While there are occasional facilitations on the strict standard of evidence, they are either founded in statutory provisions[922] or they apply in situations where the factual circumstances render it exceptionally difficult to meet the required standard of evidence *('Beweisnotstand').*[923]

5. Interdependence of Procedural Decisions

574 Over the course of an arbitral proceeding, a tribunal renders various procedural decisions. In this section, some of these decisions will be analysed more closely. The common feature of these decisions is that they affect the parties' right to put forward facts and legal arguments as well as their right to present evidence.

575 Although each of these decisions is formally separate, they nonetheless culminate in the overall conduct of the proceedings and the possibility for a party to present its case. For example, a decision not to hold any hearing may be of greater importance if the parties have also a restricted opportunity to submit written evidence. Conversely, if the parties face no restrictions on the type and amount of permissible evidence, a missed opportunity to cross-examine a witness may not necessarily have a big impact on the parties' ability to present their case. As a result, when a tribunal renders several decisions on

921 BK ZPO I and II-GÜNGERICH, Vorbemerkungen zu Art. 248-270 para. 9; cf. in general Staehelin/Staehelin/Grolimund-STAEHELIN, § 21 para. 45.

922 See for example art. 42 para. 2 Swiss CO.

923 See for example DFT 144 III 264 c. 5.3; Staehelin/Staehelin/Grolimund-GROLIMUND, § 18 para. 40.

the conduct of the proceedings that may affect the parties' due process rights, it should not only be mindful of the consequences of each decision in and by itself but also consider the decision in the context of the proceedings in their entirety.

II. Number of Submissions

576 Numerous institutional rules contain provisions on the permissible number of submissions by the parties in expedited proceedings.[924] It is important to clarify that 'submissions' in this context refers only to the submission of facts and arguments by the parties, rather than the submission of evidence, procedural motions, or similar applications. Thus, this section concerns only the claims procedure *('Behauptungsverfahren')*.

1. Overview

1.1 Expedited Procedures

577 As established earlier, two different systems exist under expedited procedures: either the rules themselves limit the number of permissible submissions to one or two usually; or they grant the tribunal the authority to limit the number of permissible submissions in deviation from ordinary procedures.[925]

1.2 Comparison with Ordinary Procedures

578 Under ordinary procedures, the parties may typically make two submissions, one before and one after the constitution of the tribunal. However, the tribunal may allow further submissions without specific restrictions.[926] This lack of specific restrictions distinguishes ordinary procedures from expedited procedures where two rounds of submissions are permitted.

2. Right to be Heard and Limitation on Submissions

579 A problem that arises from a limitation on the number of permissible submissions is a potential restriction of the parties' right to be heard and right to equal treatment. This is because one or both parties may argue that this limitation

924 Article 22 ACICA Expedited Rules; art. 3 Annex 4 DIS Rules; art. 42.2(d) HKIAC Rules; art. 3 Appendix VI ICC Rules; art. 5.2 SIAC Rules; art. 30.1 SCC Expedited Rules; art. 42.2(c) Swiss Rules; art. 45 VIAC Rules; art. 37 WIPO Rules.

925 See above paras. 512-513.

926 See for example arts. 16, 17, and 20 HKIAC Rules; art. 29 SCC Rules.

rendered it impossible for them to reasonably present their case. The problem may be two-fold: on the one hand, a party could argue that it did not have enough opportunities to submit legal arguments and facts, regardless of the submissions by the opponent. On the other hand, a party may rely on its right to contradictory proceedings and argue that it must be allowed to respond to a previous submission by the other party.

2.1 Specific Limits on the Right to be Heard

In addition to the explanations concerning the right be heard provided above in paras. 284–292, some further considerations on the scope of this right are warranted in order to facilitate the subsequent analysis of potential restrictions and violations of this right via limitations on submissions. 580

According to the Swiss Federal Tribunal, the right to be heard, including the right to adversarial proceedings, gives each party (only) a reasonable opportunity to comment on the other party's submissions, to examine and evaluate the other party's evidence, and to offer evidence to counter the evidence submitted by the other party.[927] However, the parties have no right to indefinitely comment on the other party's submissions.[928] In particular, the parties do not necessarily have a right to a second round of submissions. 581

2.2 Jurisprudence on the Right to Reply

The above-described limits on the right to be heard raise the question of whether the 'unconditional right to reply', as it is known in Swiss court proceedings, is applicable in arbitration proceedings in Switzerland. This unconditional right to reply follows from art. 6 para. 1 ECHR and grants a party the right to reply to submissions of the other party, regardless of whether the previous submission introduced any new elements into the court proceedings or whether these elements may be relevant for the decision.[929] Yet, there are certain limits to this right. Specifically, the party wanting to rely on the unconditional right to reply either has to directly reply to the submission or within ten days of receipt of the submission or at least needs to inform the court of its intention to reply. If the respective party does not comply with this time limit, the court does not have to consider any subsequent submission.[930] The extent to which 582

927 DFT 142 III 360 c. 4.1.1; 130 III 35 c. 5; decision Swiss Federal Tribunal no. 4A_438/2018 of 17 January 2019 c. 4.1 and 4.2; cf. further KNOLL, 12 PILS, Article 182, in: Arroyo, para. 33.

928 DFT 142 III 360 c. 4.1.2; cf. also decision Swiss Federal Tribunal no. 4P.104/2004 of 18 October 2004 para. 5.3.1.

929 See for example DFT 138 I 484 c. 2.1 and 2.2; decision Swiss Federal Tribunal no. 4A_635/2018 of 27 May 2019 c. 3.1.

930 See for example decisions Swiss Federal Tribunal no. 5A_1022/2015 of 29 April 2016 c. 3.2.2; and no. 5D_81/2015 of 4 April 2016 c. 2.3.3 and 2.3.4.

this jurisprudence for Swiss civil litigation also applies to arbitration proceedings seated in Switzerland is not entirely clear, with the Swiss Federal Tribunal seemingly having difficulties in adopting a firm stance.[931]

583 In a case decided by the Swiss Federal Tribunal in 2016 relating to an application for the setting aside of an award rendered in an international arbitration, the parties in the arbitration proceedings had agreed with the arbitral tribunal on a separation of issues and on only one round of submissions for a preliminary question. After this first round of submissions, the claimants alleged an introduction of new facts and evidence *(nova)* by the respondent and hence demanded to reply to this submission notwithstanding the contrary agreement reached previously. The arbitral tribunal, based on the procedural agreement, refused to allow an additional submission.[932]

584 The Swiss Federal Tribunal held that the procedural rights following from the ECHR were not directly applicable to arbitration proceedings, although the principles developed for the right to be heard in litigation may be of guiding value.[933] It went on to say that the parties have no absolute right to a second round of submissions, *provided* that the claimant may respond to submissions by the respondent, especially counterclaims.[934] The court then concluded that an *ex ante* waiver of certain elements of the right to be heard is possible if the parties conclude the waiver in knowledge of the facts and consequences.[935] In the end, the court concluded that by specifically agreeing to a single round of submissions, the claimants had waived their right to comment on the alleged *nova*.[936] Accordingly, the Swiss Federal Tribunal rejected the notion of an unfettered right to reply in this case.

585 Just one year later, in another decision concerning an award rendered in a domestic arbitration, the Swiss Federal Tribunal seems to have taken a diametrically opposite approach. The arbitral tribunal in this case had dismissed the claimant's request for relief based on a claim withdrawal by the claimant and imposed the costs of the proceedings on both parties equally. When doing so, the tribunal served its decision to the respondent together with two additional submissions on costs that the claimant had submitted prior to the tribunal's costs decision. Before the rendering of this award, the respondent had

931 STACHER/HENSCHEL/KÖSTER, 374; cf. further MENZ/GOTTLIEB, para. 50.

932 Decision Swiss Federal Tribunal no. 4A_342/2015 of 26 April 2016 (DFT 142 III 360, however, omitting certain considerations) facts paras. A and B.

933 Decision Swiss Federal Tribunal no. 4A_342/2015 of 26 April 2016 c. 4.1.2.

934 *Ibid*.

935 *Ibid*.

936 *Ibid*, c. 4.2.2.2.

not had an opportunity to comment on the claimant's additional submissions. The respondent considered this a violation of its right to reply.[937]

In its decision, the Swiss Federal Tribunal expressly referenced the unconditional right to reply to submissions of the other party as an aspect of the right to be heard in the context of arbitration.[938] It further held that the parties could not generally waive this unconditional right to reply, despite a possible waiver of a second round of submissions.[939] As a result, the court affirmed that the unconditional right to reply to submissions applies in Swiss arbitration procedures. 586

2.3 Evaluation of the Jurisprudence

a Consequences

At the heart of the two court decisions are three key issues. The first one is whether an unconditional right to reply applicable in litigation is directly applicable in arbitration as well.[940] If so, the second issue is whether this right constitutes a minimal guarantee of the right to be heard that can neither be restricted nor waived.[941] Lastly, even if the unconditional right to reply constitutes a minimal guarantee, it must be determined whether this minimal guarantee is subject to limitations based on other principles.[942] 587

It is difficult to reconcile the two court decisions in question for finding solutions to these issues due to the two different rulings. The fact that one judgment concerns international arbitration while the other concerns domestic arbitration is of little relevance. The right to be heard contains the same aspects and is judged under the same standard irrespective of whether an arbitration is domestic or international.[943] Therefore, the key question is how a reconciliation of these two decisions can be achieved. 588

One pragmatic way is to conclude that in the first decision, the Swiss Federal Tribunal based its reasoning on the specific agreement between the parties and the tribunal, whereas in the second decision, such an agreement was missing. Although it might appear that the Swiss Federal Tribunal in the first judgment had meant to declare that the right to reply could be waived 589

937 Decision Swiss Federal Tribunal no. 4A_570/2016 of 7 March 2017 facts paras. A and B.

938 *Ibid*, c. 2.1.

939 *Ibid*, c. 2.3.

940 See below para. 590.

941 See below para. 590.

942 See below paras. 593-596.

943 Decision Swiss Federal Tribunal no. 5A_634/2011 of 16 January 2012 c. 2.2.1; GÖKSU, para. 2080.

without exceptions, this conclusion is not imperative. Instead, by pointing out in the first decision that a second round of submissions is not required *provided a party can reply to potentially new statements and evidence,* the court seems to acknowledge that some form of unconditional right to reply seems to exist. Yet, this right may be waived under certain circumstances.

590 As a result, it is submitted that in arbitration proceedings seated in Switzerland, an unconditional right to reply as an aspect of the right to be heard exists. This right is not directly founded in the ECHR because, regardless of the source of legitimacy of arbitration, arbitrators are not judges, which means that the ECHR is not directly applicable to arbitrators.[944] Thus, it appears that the unconditional right to reply follows generally from the right to be heard as set forth in the Swiss *lex arbitri*.[945] The unconditional right to reply constitutes a minimal guarantee insofar as an arbitral tribunal needs to respect this right. At the same time, though, this right is capable of a partial *ex ante* waiver, i.e., a waiver of the right in certain situations. A full waiver, however, would be incompatible with the characterisation of the right to be heard as a minimal guarantee. Furthermore, a consequence of the status as minimal guarantee is the fact that even a partial *ex ante* waiver may not be binding under all circumstances.

b Challenges for the Arbitrators

591 The two judgments of the Swiss Federal Tribunal pose a significant problem for arbitrators when the arbitration is seated in Switzerland and the award may need to be enforced in a jurisdiction outside Switzerland. As noted earlier, the arbitrators are under a duty to conduct the arbitration efficiently, to safeguard the parties' due process rights, and to conduct the arbitration in accordance with the parties' agreement.[946] These three duties may conflict with one another where the parties initially agree on a limitation of the unconditional right to reply and one party then later claims that it nonetheless has the right to reply to a submission by the other party.

592 If the tribunal grants the applying party the right to reply in a further submission because it considers the minimal guarantee of the unlimited right to reply to prevail over the parties' agreement, the tribunal might thereby not comply with the parties' agreement on an expedited resolution of the dispute. If the decision does not violate the parties' due process rights, such decision does not allow a setting aside of the award.[947] However, there is at least a risk

944 Decision Swiss Federal Tribunal no. 4P.105/2006 of 4 August 2006 c. 7.3 (with further references).

945 See art. 182 para. 3 Swiss PILA.

946 See above paras. 225-248.

947 See in detail below paras. 816-819.

that another jurisdiction may, based on art. V para. 1 lit. d NYC,[948] refuse enforcement of the award. If, however, the tribunal holds the parties to their agreement on a limitation on the rounds of submissions, it risks a violation of the applying party's right to be heard, again leading to the threat of setting aside and refusal of enforcement. Although the tribunal is not under a duty to render an enforceable award,[949] the predicament for the tribunal is apparent. Therefore, a solution is needed in order to vest the tribunal with a method that avoids this predicament.

2.4 Proposed Solution

a Existing Solutions

Commentators have proposed two solutions to combine the two differing judg- 593
ments of the Swiss Federal Tribunal. The first group argues that an *ex ante* waiver of the unconditional right to reply is possible, in principle, and should take precedence over this right but only to a certain degree. Specifically, where one party could not have reasonably and carefully anticipated the newly submitted facts, said party must be given the right to reply to these new submissions. Thus, an absolute *ex ante* waiver is not possible.[950]

The second group acknowledges the mandatory nature of the uncondi- 594
tional right to reply, which seems to exclude the possibility of a (comprehensive) *ex ante* waiver. Yet, authors belonging to this group submit that the principle of good faith, including the prohibition of contradictory behaviour, prevents a party from first agreeing to a restriction of its procedural rights and then alleging a violation of said rights. This is at least the case where the party in question asks for a change of the procedural rules after the other party has already complied with them. In other words, these authorities consider the principle of good faith as a potential limitation to the mandatory nature of the unconditional right to reply.[951]

b Evaluation

Although both approaches have their merits, it is argued that the first approach 595
is preferable where the parties *have reached* an agreement with the tribunal

948 *'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'*

949 See above paras. 258-261.

950 See above para. 590; cf. further STACHER/HENSCHEL/KÖSTER, 373-374.

951 For everything GABRIEL, Minimalgarantie, 34-38; BK ZPO III-GABRIEL/BUHR, art. 373 paras. 63-67.

on the relevant aspect of the conduct of the proceedings. It emphasises the quality of the unconditional right to reply as a minimal guarantee and is in line with the general view that partial *ex ante* waivers of minimal guarantees are not allowed. In addition, the approach is based on the notion that no agreement is absolute.[952] An agreement may be invalid based on concepts such as error or the *clausula rebus sic stantibus*.[953]

596 Moreover, the approach relying on the principle of good faith may incentivise the party who is last to submit its facts to intentionally include facts that the other party could not anticipate in order to put said party at a significant disadvantage. While the timed submission of facts in one's own favour is a legitimate tactic in any arbitration, submitting (completely) new facts knowing that the other party will not be able to respond to them may leave a bitter aftertaste.

3. Result and Proposal for the Conduct of the Proceedings

597 Based on the above considerations, the following approach is suggested for situations where the tribunal is confronted with requests for additional submissions.

3.1 General Considerations

598 While the unconditional right to reply derived from art. 6 para. 1 ECHR is not directly applicable, the jurisprudence of the Swiss Federal Tribunal imposes a duty on arbitrators to nonetheless respect the parties' right to reply. A part of this duty is the acceptance of a submission by one party in order to reply to a submission made by the other party; this is at least if the parties have not validly waived this right. Therefore, it is proposed to consider the unconditional right to reply in arbitral proceedings as an aspect of the general right to be heard in arbitration rather than an aspect of art. 6 para. 1 ECHR, which does not directly apply to arbitral proceedings.[954] Nonetheless, the problem remains that the parties may prolong and obstruct the proceedings by submitting countless statements based on their right to reply. This runs counter to the expedience of the proceedings in general and the limitation of submissions in particular. Hence, what should a tribunal do?

599 It is submitted in this section that the decisive factor for deciding whether or not to grant the request for an additional submission is whether the parties

952 See above para. 287.

953 See in general HUGUENIN, paras. 470–531.

954 See above para. 590.

in dispute and the tribunal have reached a *specific, express* agreement on the number of submissions in knowledge of the specific circumstances of the case.[955] In its judgment DFT 142 III 360, the Swiss Federal Tribunal heavily relied on the fact that the parties during the proceedings had specifically agreed on only one round of submissions in knowledge of the possibility that a wide variety of facts could be put forward in the single round of submissions. This situation fundamentally differs from the situation ordinarily encountered in expedited procedures where the parties in advance of any dispute agree on arbitration rules that may limit the number of submissions. This general consent to the arbitration rules is likely insufficient to fulfil the requirements for a valid waiver of the unconditional right to reply. Thus, it appears that in a situation where only a general choice of arbitration rules exists, a tribunal will have to grant a party requesting a right to reply within ten days an opportunity to do so.

In addition, it is proposed that a tribunal has to accept an additional sub- 600
mission only if the party submitting it did so within ten days after receipt of the document or at least informed the tribunal within these ten days that it intends to make an additional submission. In the latter case, the tribunal should set a rather short deadline for the additional submission. Critics may argue that this proposal moves arbitral proceedings close to litigation proceedings.[956] However, it is submitted that his criticism would fall flat because the proposed approach ensures that the parties act in a timely manner. Thus, even if an additional round of submissions is necessary, there will at least be clarity on the issue within a short period of time.

This, however, does not solve the follow-up problem of how one additional 601
submission may bring about a barrage of further submissions by both parties up to a point where these submissions are of no benefit anymore.[957] One way to prevent such an outcome would be for the tribunal to require the party applying for, or already making, the additional submission to explain why the additional submission is necessary for the preservation of due process rights. If the party fails to comply with this requirement, the tribunal may, and at a certain point will have to, decide that additional submissions are not permissible anymore.[958]

955 See below paras. 604-606.

956 See above para. 582.

957 See for this problem in litigation BAERISWYL, 520-521; SOGO/BAECHLER, 323.

958 This is consistent with the recently modified jurisprudence of the Swiss Federal Tribunal now requiring evidence for the setting aside of an award that an alleged violation of the right to be heard had an effect on the outcome of the proceedings; see in detail below para. 817.

602 A disgruntled party may object and eventually apply for a setting aside of the award based on the tribunal rejecting an application for an additional submission. This possibility may induce some arbitrators to again prioritise due process considerations over efficiency, thereby defeating the purpose of expedited procedures. In order to avoid this outcome, it is proposed that a tribunal should adopt the method proposed above in para. 365. In other words, the tribunal should decide on the admissibility of an additional submission under the assumption that no party will file an application for a setting aside of the award. If the tribunal concludes that the parties had a sufficient opportunity to comment on the other party's submission(s), it should hence disallow any further submissions.

603 This is not to say that a tribunal should systematically disallow additional submissions at a certain point. On the contrary, these submissions may not only be essential for the parties' right to be heard but may also support the tribunal in the rendering of a correct award. Both aspects are decisive for the quality of an arbitration.[959] Therefore, the tribunal must carefully assess the benefit of such additional submissions. In doing so, the tribunal should, however, not be guided by any form of due process paranoia, but instead determine whether the quality of the proceedings will increase in a way that justifies a slight decrease in procedural efficiency. When in doubt, it is advisable to allow the additional submission and impose cost sanctions should the submission turn out to be unjustified.

3.2 Specific Solution: Agreement on the Conduct of the Proceedings

604 Based on these general considerations and the jurisprudence of the Swiss Federal Tribunal, the following specific approach is suggested. Whenever possible, a tribunal should try to agree with the parties on the details of the proceedings, including the number of permissible submissions. In addition, the tribunal should discuss with the parties to what extent they want to be able to avail themselves of an unconditional right to reply. A suitable moment for these discussions would be an early case-management conference.[960]

605 Even if the tribunal and the parties agree on the same number of submission rounds as provided for in the respective provision of the arbitration rules, this agreement will still be of standalone value. As has been seen, it seems highly doubtful whether a mere agreement on arbitration rules is sufficient to affirm an *ex ante* waiver of the right to reply.[961] This uncertainty can be

959 See in detail above paras. 113-115.

960 On the opportunities and potential of case-management conferences in general see ICC, Effective Management of Arbitration, 13-14.

961 See above para. 304.

circumvented with a specific additional agreement. In order to reach such an agreement, the onus is on the tribunal to explain to the parties the positive effects this kind of agreement may have on the efficiency of the proceedings. Where the arbitration rules do not contain a fixed rule on the number of submissions, reaching an agreement with the parties may avoid a vast volume of discussions and problems later on in the proceedings.

When the agreement is reached, the tribunal, as a matter of principle, is required to follow the agreement. If the parties have agreed on an *ex ante* waiver of the unconditional right to reply, the tribunal may, based on the foregoing considerations, nevertheless allow an additional submission if the party requesting the submission could not have reasonably foreseen the introduction of certain facts in the last permissible round of submissions. To prevent a barrage of additional submissions, the tribunal should apply a strict standard in deciding whether the applying party could have foreseen the introduction of certain facts. In any event, before making this decision, the tribunal should give the other party a brief opportunity to comment on the application. If this party does not object to the application, the tribunal should grant it. 606

3.3 Absent an Agreement

It may not always be possible to reach this kind of agreement, though. For such a situation, the following considerations are submitted. 607

a The Rules Do Not Strictly Limit the Number of Submissions

In case the rules do not prescribe a fixed number of submissions, or leave it to the tribunal to allow further submissions, the tribunal must determine how many rounds of submissions will be necessary for the parties to sufficiently exercise their right to be heard as well as establish the facts necessary for rendering a reasonably correct award. In addition, the tribunal must weigh this determination against the need to comply with procedural time limits set by the rules. The details of this balance depend on the specific case, which makes it difficult to engage in general observations. 608

b The Rules Do Limit the Number of Submissions

Where the rules contain strict limits on the number of submissions, the tribunal is, in principle, bound by these provisions. Then again, the tribunal will have to respect the parties' unconditional right to reply. Hence, the tribunal will have to permit requests for additional submissions as described under above in para. 608. 609

4. Evaluation

610 Limiting the number of submissions can increase the efficiency of the proceedings. This increase primarily stems from omitting the periods of time that the parties have in order make their submissions. Whether this limitation also results in fewer pages submitted to the tribunal, however, is doubtful. When the parties know they only have one or, at most, two opportunities to present their facts and make arguments, they may be inclined to inflate the submissions they have.[962]

611 A limitation of the number of submissions is not a fundamentally new concept. On the contrary, this feature is a popular and efficient case-management technique under ordinary rules.[963] Yet when the rules themselves strictly provide for a reduced number of submissions, the focus is on the parties and their counsel to present their case in a disciplined way. This would likely differ in the case of ordinary procedures where a tribunal would be reluctant to limit the rounds of submission to a single one without the parties' consent. The risk of a violation of the right to be heard as a result of such a decision is usually high.

III. Length of Submissions

612 In addition to limiting the number of submissions, a related tool under expedited procedures is limitations on the length of submissions.

1. Overview

1.1 Expedited Procedures

613 While this feature often discussed by practitioners in connection with expedited procedures, only a few of the rules examined in this thesis contain specific provisions on a limit to the length of submissions. Article 3.4 Appendix VI ICC Rules enables the tribunal *inter alia* to limit the length of submissions. Similarly, the SCC Expedited Rules set forth that the parties' submissions must be 'brief', without defining this brevity.[964] Furthermore, numerous commentators propose this feature for expedited procedures.[965]

962 DECKER, 77.

963 See for example ICC, Techniques for Controlling Time and Costs 2018, para. 48.

964 Article 30.2 SCC Expedited Rules.

965 BANIFATEMI, 14; BÜHLER/HEITZMANN, 137; HAUER/PAUKNER/GAYER, 221-221.

1.2 Comparison with Ordinary Procedures

Similarly, under ordinary procedures, no specific provisions exist that expressly limit the number of pages of the parties' submissions. Yet some rules enable the tribunal to limit the length of submissions in the interest of efficiency.[966] 614

2. Right to Be Heard

It should be uncontroversial to note that a limitation on the length of submissions may, at a certain point, prevent a party from reasonably presenting its case and thereby violate said party's right to be heard.[967] Determining exactly when this happens is not possible at a general level but depends on the details of each case. Consequently, automatically reducing the number of permissible pages may be problematic when this number falls below a certain threshold. 615

However, in some court proceedings, such standardised page-limitations do exist.[968] This court practice already shows that it would be short-sighted to equate limitations on the length of submissions exclusively with a limitation of the right to be heard. As KAPLAN pointed out, limiting the length of submissions is possible in arbitration without necessarily compromising the right to be heard.[969] Nonetheless, a page limit requires a much more concerted effort from the parties and their counsel to focus on the essential aspects of the case.[970] When done correctly, a page limit may thus in fact help a party to be heard because it allows the tribunal to receive the essential arguments rather than be confronted with unnecessary repetitions and irrelevant explanations.[971] 616

A problem that is particularly relevant under expedited procedures is, however, the combination of front-loading with a limitation on the number of rounds and the length of submissions. When the parties know they have only one more round of submissions after the constitution of the tribunal, their natural inclination may often be to include every conceivable argument in this final round of submissions.[972] It is obvious that this may spell disaster for an attempt to reduce the length of the submissions. Yet, combining front-loading 617

966 See lit. e Appendix IV ICC Rules.

967 BÜHLER/HEITZMANN, 137-138.

968 For example before the European Court of Justice, see Practice Directions to Parties before the General Court, s. A.4

969 KAPLAN, If It Ain't Broke, 175.

970 KAPLAN, The Arbitrator and the Arbitration Procedure,1105-106.

971 For everything ELSING, 114; SERAGLINI/BAETEN, para. 108.

972 DECKER, 77.

with a limitation on the number of rounds and on the length of submissions may eventually result in a violation of the parties' right to be heard when the restrictions reach a level that prevent the parties from properly presenting their case. Therefore, trying to reconcile a limitation on the rounds of submissions with a page limit on the submissions, while simultaneously attempting to safeguard the parties' due process rights, might result in an attempt to square the circle.[973]

618 Conversely, a limitation on the length of submissions may not be as problematic in a situation where the parties have plenty of other opportunities to present their case, such as opening statements at the hearing or post-hearing briefs. However, when these steps are missing entirely – which is possible under expedited procedures[974] –, limiting the length of the permissible submissions may be the tipping point for affirming a violation of the right to be heard in specific cases.[975]

3. Evaluation

619 In light of the points mentioned, the potential of page limits to increase efficiency under expedited procedures may be limited. One possibility, however, is to occasionally use this tool for an early identification and limitation of issues by the tribunal. This should give the parties a clear idea on what they have to argue. Furthermore, it appears that if the parties specifically agree to limitations on both the number[976] and length of submissions, the tribunal may in principle rely on this agreement, which amounts to an *ex ante* waiver of this specific aspect of the right to be heard. The chances of reaching such an agreement generally appear intact. As the 2021 International Arbitration Study by the Queen Mary University of London based on 1218 questionnaire responses concluded, parties and counsel were in general willing to accept page limits at least for certain types of submissions, primarily post-hearing briefs.[977] In any event, though, the same restrictions as discussed above in para. 599 apply here as well: if the parties cannot have reasonably foreseen circumstances that require longer submissions, the parties must be allowed to extend their submissions.

973 Cf. BÜHLER/HEITZMANN, 138.

974 See in detail below paras. 633-656.

975 Cf. WEISS/KLISCH/PROFAIZER, 263-264, who consider a limitation on the length and number of submissions permissible if the parties have other opportunities to express themselves.

976 ICC, Techniques for Controlling Time and Costs 2018, paras. 47-48.

977 Queen Mary Study 2021, 13.

IV. Document Production

As already mentioned above, a factor that contributes significantly to the cost and delay of proceedings is the practice of document production.[978] 620

1. Overview

1.1 Expedited Procedures

There are hardly any rules containing specific provisions on document production under expedited procedures. Notable exceptions to this include the ICC Rules that grant the tribunal the competence not to allow requests for document production.[979] A (seemingly) more extreme example are the ACICA Rules that expressly exclude 'discovery' altogether,[980] although even these rules allow the production of 'relevant', i.e., specific, documents.[981] 621

1.2 Comparison with Ordinary Procedures

Document production is a common feature in ordinary arbitral procedures. Institutional rules usually contain provisions that allow the tribunal to order the production of documents.[982] Moreover, the IBA Rules on the Taking of Evidence have a specific section devoted to the issue.[983] However, it is important to consider that some rules contain restrictions on document production under ordinary procedures insofar as they expressly mention the limiting of document production in order to increase the efficiency of the proceedings.[984] 622

2. Right to Be Heard

There is little dispute that the parties' ability to submit evidence is part of their right to be heard. This right is not confined to the evidence at the hands of a party but also covers evidence that a party does not possess itself.[985] Hence, restricting the parties from requiring and obtaining such evidence may result 623

978 See above paras. 36 and 38; cf. further RISSE, Ten Drastic Proposals, 459-460.

979 Article 3.4 Appendix VI ICC Rules.

980 Article 24.4 ACICA Expedited Rules.

981 *Ibid*.

982 See only art. 3.4 Appendix VI ICC Rules; art. 22.3 HKIAC Rules.

983 Article 3 IBA Rules on the Taking of Evidence in International Arbitration.

984 See for example E. Annex 3 DIS Rules.

985 MARGHITOLA, 204.

in a violation of the right to be heard. Yet the Swiss Federal Tribunal held that for a rejected document production request to amount to a violation of the right to be heard, two requirements must be met. First, the documents in question need to be capable of proving facts that are material to the outcome of the dispute.[986] Second, if the tribunal justifiably relied on an anticipated assessment of evidence,[987] no violation of the right to be heard exists.[988]

3. Considerations for Document Production under Expedited Procedures

3.1 Challenges

624 The problem with document production is that it may contribute significantly to the time and cost of proceedings.[989] This in itself should not lead to an elimination of document production altogether. As pointed out previously, efficiency should not be measured in a vacuum but rather in relation to the overall difficulty of the case.[990] Hence, when document production is the only way to reasonably establish the facts of the case, and if the parties agree that this evidentiary measure shall take place, then banning document production altogether (solely based on efficiency considerations) appears to be misguided. Instead, such a proposal is prone to resulting in 'rough justice'[991] to the benefit of no one. In addition, where a party has a legitimate interest in the production of one or several documents by the other party, a denial of the request may result in a denial of the right to present evidence, i.e., a violation of the right to be heard.

625 Be that as it may, a problem with document production in practice are the occasionally voluminous and indiscriminate requests for documents, with their materiality to the outcome of the case often being unclear.[992] This problem highlights another tension in connection with document production: an indiscriminate and extensive document production as is rather prevalent in

986 Decision Swiss Federal Tribunal no. 4A_631/2011 of 9 December 2011, c. 3.1.2; see in general for the materiality requirement: Decision Swiss Federal Tribunal no. 4A_438/2018 of 17 January 2019 c. 4.2.

987 See above para. 296.

988 See for example decision Swiss Federal Tribunal no. 4A_220/2007 of 21 September 2007 c. 8.1.

989 DECKER, 76-77; GERBAY, Judicialization, 247; PARK, Arbitrators and Accuracy, 39; RISSE, Ten Drastic Proposals, 459-460; WEISS/KLISCH/PROFAIZER, 261.

990 See above para. 126.

991 Using the terminology of VAN DEN BERG, Fast-Track Arbitration; also referenced by BÜHLER/HEITZMANN, 148.

992 HABEGGER, 132; ICC, Techniques for Controlling Time and Costs 2018, para. 2.3; RISSE, Ten Drastic Proposals, 459-460.

common law jurisdictions may amount to what is considered an impermissible fishing expedition in civil law jurisdictions.[993]

3.2 Proposal for the Conduct of the Proceedings

As a result of these considerations, it is necessary in every arbitration proceeding to strike a balance between granting legitimate requests for document production in order to preserve the right to be heard, and rejecting illegitimate or disproportionate requests in order to conduct the proceedings efficiently. To achieve this goal, the following proposals are submitted. 626

First, a complete exclusion of some form of document production seems neither justified nor beneficial.[994] There may be cases where (some) document production may be necessary for a party to prove its case. Therefore, proposals to ban document production altogether in arbitration in the interest of efficiency, while well-intended, seem too extreme. 627

Second, it is proposed to follow a rather narrow understanding of what constitutes a permissible request for document production.[995] The civil law understanding, as highlighted earlier, requires a materiality of the document to the outcome, lest the request may qualify as an impermissible fishing expedition.[996] Similarly, the Swiss Federal Tribunal requires a materiality of a document to the outcome of the proceedings.[997] Although the common law understanding also requires some relevance of the document, the materiality threshold is lower.[998] Therefore, at least for proceedings seated in Switzerland,[999] raising the bar for the materiality of a document seems justified, which means that the document has to be material to the outcome of the case.[1000] 628

Critics of this proposal may argue that this approach merely repeats the wording of art. 3.3 IBA Rules on the Taking of Evidence,[1001] rules that have not helped curb the detrimental effects of document production. Yet, it is disputed whether the IBA Rules follow a stricter civil law (as advocated here) or a more 629

993 BAYSAL/KAĞAN ÇEVIK; CREMADES, 669; cf. for a comprehensive overview MARGHITOLA, 195-203.

994 Differing, however, RISSE, Ten Drastic Proposals, 459-461.

995 See for a similar proposal HAMANN/BULKA, 29-30.

996 See above para. 625.

997 See above para. 623; cf. further TERCIER/BERSHEDA, 86.

998 ELSING, 121-122; TERCIER/BERSHEDA, 86.

999 See for the law of the seat as the applicable law regarding the extent and the requirements of document production, and specifically on the situation in Switzerland, MARGHITOLA, 22, 209-213.

1000 Similarly TERCIER/BERSHEDA, 95-96.

1001 *'A Request to Produce shall contain: [...] (b) a statement as to how the Documents requested are relevant to the case and material to its outcome'.*

permissive common law approach towards document production.[1002] Furthermore, it has been said that tribunals frequently allow for an extensive discovery process.[1003] Hence, taking a restrictive approach as proposed here may indeed increase the efficiency of the proceedings.

630 Third, while the extent of the document-production process depends on the number of requests by the parties, the tribunal can proactively help reduce the number of requested documents in the first place. The tribunal can achieve this goal by identifying the issues it considers decisive early on in the process. Furthermore, the tribunal should make use of the opportunity to give the parties a preliminary and non-binding assessment of the case.[1004] This may indicate to the parties the instances where document-production requests may not be of any use.

631 Fourth, a request for document production should be viewed in the wider context of the whole proceeding. Particularly, the tribunal must determine if the parties have a sufficient possibility to make their case even without the request.[1005] This may not be the case if other restrictions on the taking of evidence exist, for example a decision not to hold an oral hearing.

4. Evaluation

632 The discussion above shows that expedited procedures are not at odds with document production *per se*. Indeed, most rules do not contain any specific provisions on this issue under expedited procedures.[1006] Nevertheless, the requirement to conduct expedited procedures (particularly) efficiently practically excludes excessive requests for document production. In addition, the Queen Mary Study 2021 has identified document production as the third-most-often-named feature that parties and counsel (even from common law jurisdictions) would be willing to do without to increase the speed and decrease the costs of arbitral proceedings.[1007]

633 The exact design of document production under expedited procedures significantly depends on the tribunal and its approach towards this instrument. The tribunal has a number of tools that allow it to limit the scope of document production without overly interfering with the parties' due process

1002 ELSING, 122.

1003 BANIFATEMI, 9; BÜHLER/HEITZMANN, 130; RISSE, Ten Drastic Proposals, 460.

1004 See above para. 562; see also on anticipated assessment of evidence above para. 296 and below para. 647.

1005 See in general above para. 575.

1006 See above paras. 621-622.

1007 Queen Mary Study 2021, 13-14.

rights. In particular, an early assessment of which issues may be relevant, along with preliminary assessments of issues, may help make the parties' requests more focused. This of course does not prevent abusive requests whose purpose is to prolong the proceedings. However, as established earlier, the tribunal is under no obligation to entertain any such requests.[1008]

V. Documents-Only Arbitration and Hearing

A particularly interesting feature of expedited procedures is the possibility of excluding holding hearings altogether or at least limiting their duration and significance. The result of such an exclusion of oral proceedings is that documents will have a greater weight as means of evidence. This topic therefore deserves a thorough examination. 634

1. Overview

1.1 Expedited Procedures

Most expedited rules contain provisions limiting the holding of oral hearings. As a default rule, they either provide for a documents-only arbitration or at least limit the number of oral hearings to one single hearing. 635

The details differ considerably between the rules. Under the HKIAC, ICC, and SIAC Expedited Rules, the decision whether or not to hold a hearing is within the tribunal's discretion.[1009] Similarly, the SCC Rules require a request by a party as well as a positive decision by the tribunal on the existence of compelling reasons for holding a hearing.[1010] On the other side of the spectrum are the DIS and the Swiss Rules, which require the holding of a single hearing unless agreed otherwise by the parties.[1011] A special approach can be found in the ICDR Rules and the AIAC Fast-Track Rules, which require a hearing if the amount in dispute is above a certain monetary threshold.[1012] The WIPO Expedited Rules represent a middle ground by requiring a hearing at the request of a party or if the tribunal so decides.[1013] 636

1008 See above para. 360.

1009 Article 3.5 Appendix VI ICC Rules; art. 42.2(e) HKIAC Rules; art. 5.2(c) SIAC Rules.

1010 Article 33.1 SCC Expedited Rules.

1011 Article 4 Annex 4 DIS Rules; art. 42.2(d) Swiss Rules.

1012 Rule 16.2 AIAC Fast Track Rules (see, however, the new rules 8.5(b) and 8.8(m) AIAC Rules that provide for a documents-only arbitration irrespective of the amount in dispute); art. 1.4 ICDR Rules.

1013 Article 49(a) WIPO Rules.

1.2 Comparison with Ordinary Procedures

637 Under ordinary procedures, holding a hearing is the norm.[1014] Yet some rules leave it to the tribunal's discretion as to whether it wants to hold a hearing. This discretion, however, is subject to a request by a party for a hearing, in which case a hearing must (usually) be held.[1015]

2. Right to be Heard

638 The position of Swiss law on the compatibility of documents-only arbitration with the parties' right to be heard is only seemingly clear. According to jurisprudence and doctrine, the parties have no right to an oral hearing.[1016] However, the right to adversarial proceedings does guarantee the right to examine, debate, and rebut the evidence submitted by the other party.[1017] Thus, when the parties intend to submit evidence whose evidentiary value is tested in hearings, like witnesses of fact and expert witnesses,[1018] holding a hearing *may* be necessary.

639 A limitation to a documents-only arbitration does not necessarily come with a restriction of the permissible evidence. Notably witness (of fact) evidence is still possible if the testimony is contained in written witness statements, a practice that has become standard in international commercial arbitration.[1019] Likewise, expert evidence is still available since the experts ordinarily submit an expert report.[1020]

640 Yet since witnesses of fact and expert witnesses are cross-examined at the hearing under ordinary procedures, the effect of witnesses of fact and expert witness evidence may be extremely limited in practice under expedited procedures if no oral examination of this type of evidence is possible. Usually the hearing serves the purpose of *inter alia* cross-examining witnesses (of fact) and expert witnesses as a way of testing the credibility of their testimony. When

1014 See for example only art. 35.2 CIETAC Rules; art. 29 DIS Rules; art. 26 ICDR Rules; art. 24.1 SIAC Rules; art. 27.1 Swiss Rules; more restrictively, however, art. 25.5 ICC Rules; cf. further FERIS, 72.

1015 See for example art. 32 SCC Rules.

1016 BERGER/KELLERHALS, para. 1147; GIRSBERGER/VOSER, para. 925; decisions Swiss Federal Tribunal no. 4A_404/2010 of 19 April 2011 c. 5; no. 4A_220/2007 of 21 September 2007 c. 8.1; no. 4A_160/2007 of 28 August 2007 c. 4.1; critical, however, BSK IPRG-SCHNEIDER/SCHERER, art. 182 para. 96.

1017 See above para. 289.

1018 WAINCYMER, 913, 966-967.

1019 *Ibid*, 898.

1020 See in detail *ibid*, 954-957.

this kind of cross-examination is not possible, the value of such testimony may be reduced.[1021] Nevertheless, it has been questioned as to whether witness testimony is of decisive value, irrespective of whether cross-examination has taken place. While it is beyond the scope of the present discussion to answer this question, practical experience shows that documents are often of considerable evidentiary value,[1022] although practical experience has also shown that especially some arbitrators with a common law background may attach greater significance to witness testimony than to documentary evidence.

641 As a last point, it is important to emphasise that the right to be heard is relevant not only for the right to make submissions on the other party's evidence, but also for the right to make oral statements in general before the tribunal. However, it is well established in Swiss law that the parties' right to be heard is not violated by them not having a possibility to make oral statements before the tribunal.[1023] Therefore, in this context, documents-only arbitrations are unproblematic.

3. Considerations for Holding a Hearing under Expedited Procedures

3.1 Increased Efficiency

642 Holding a hearing may incur high costs because of the need to organise and rent a venue, as well as the need for numerous people to attend the event, which may last for several days.[1024] In addition, it may be difficult for the arbitrators, parties, counsel, and witnesses to find a time slot that is suitable for everyone. Thus, not holding a hearing may significantly reduce the time and costs of a proceeding.[1025]

3.2 Beneficiaries of a Hearing

643 It goes without saying that the holding of a hearing may be in the interest of the parties. Specifically, it allows them to exercise their right to be heard. Furthermore, a repeated observation in practice by arbitrators (and by judges in state court proceedings) is that a hearing allows them to better understand the case

1021 BÜHLER/HEITZMANN, 140.

1022 RISSE, Ten Drastic Proposals, 459; SCHNEIDER, Witness Testimony, paras. 11 and 13; yet see ELSING, 119, for the importance in common law litigation.

1023 See above para. 638.

1024 See in general HOCHSTRASSER, 124.

1025 BÖCKSTIEGEL, 4-5; ICC, Effective Management of Arbitration, 51-53; ICC, Techniques for Controlling Time and Costs 2018, paras. 35-36; KAPLAN, The Arbitrator and the Arbitration Procedure, 104; MORTON, 108.

in its entirety or, at the very least, provides the decisive impulses to form an opinion on positions that had been undecided up to that point.[1026] Moreover, a hearing may enable the arbitrators to get a better understanding of the value of the submitted evidence. For example, if a witness at the hearing withstands a vigorous cross-examination, the tribunal may be more inclined to assume the correctness of the facts that the witness asserted.[1027]

644 Therefore, a tribunal may decide to hold a hearing notwithstanding the parties' preference for a documents-only arbitration. Where the rules expressly allow the tribunal to do so, this decision is not problematic. Yet, even if the rules do not expressly grant this competence to the tribunal, this kind of decision would not lead to a setting aside of the award under Swiss law because the decision does not restrict the parties' due process rights.[1028]

3.3 Relevant Factors and Proposed Solutions

645 In order to determine whether or not a hearing is to be held, it is proposed that the already discussed possibility of a procedural agreement of the parties represents a promising solution. In particular, if a tribunal concludes that a documents-only arbitration is suitable for the resolution of a specific dispute, the tribunal should endeavour to obtain the parties' approval of a documents-only arbitration. This approval would then serve as a specific *ex ante* waiver of the right to present and examine oral evidence.

646 When discussing with the parties whether to hold a hearing or not, in the absence of a party agreement the decisive factor is whether the parties submit written witness statements or expert reports, whose credibility can (and needs) to be examined at an oral hearing. For some disputes, neither written statements by witnesses nor their subsequent oral examination seem necessary. For example, in the commodity industry, where expedited procedures are a popular option,[1029] disputes on quality in particular often do not require a detailed examination of witnesses. Instead, an examination of quality by the arbitrator or an independent expert in combination with an analysis of the underlying contracts may be sufficient.[1030] In addition, highly technical legal issues often do not require witnesses of fact.[1031]

1026 BÜHLER/HEITZMANN, 140; HANOTIAU, The Conduct of the Hearings, 643; see in general SCALIA/GARNER, rule 55.

1027 For everything NEWMAN, Cross Examination, 679.

1028 See above para. 638.

1029 See above para. 62.

1030 Cf. MUSTILL, Comments on Fast-Track Arbitration, 122; cf. for another example (regarding the International Cotton Association) LATZEL, para. 27.

1031 Cf. BÜHLER/HEITZMANN, 138-139.

Even if written statements by witnesses or expert reports exist, the tribunal may propose alternatives to holding a hearing. For example, it can grant the parties a possibility to specifically comment in writing on the witness statements and the expert report. This procedure, however, may not necessarily test the (expert) witnesses' credibility. In addition, a tribunal may justifiably select the amount of evidence it deems relevant based on an anticipated assessment of evidence.[1032] If the tribunal rightly anticipates that the further evidence presented by the party will not be sufficient to prove the alleged facts, or that a fact is already proven to the effect that additional evidence will not have any further effect, the tribunal does not need to consider any further evidence on a particular issue.[1033] Hence, if a tribunal considers that oral evidence will not make any difference, it may justifiably dispense with an oral hearing. 647

When a hearing is to be held, the tribunal should endeavour to limit the length of the hearing to the maximum extent possible. The tribunal and the parties can take a series of steps to reduce the costs and time associated with a hearing without compromising its quality. In terms of organisation, for example, it would be worthwhile to consider holding a virtual (remote) hearing instead of a physical one.[1034] Moreover, the tribunal should contemplate limiting or even eliminating some procedural steps altogether in order to increase the efficiency of the proceedings. It should for example be considered whether or not extensive opening or closing statements are necessary and whether the number of witnesses, or at the very least the issues on which they are cross-examined, may be limited.[1035] 648

Preferably, a hearing should last one day, although occasionally it might be necessary to extend its duration. In addition, the tribunal should, over the course of the proceedings, hold only one hearing. Whereas some rules expressly set forth this limitation,[1036] this proposal should also serve as guidance under other rules. 649

3.4 Post-Hearing Briefs

When the tribunal decides to hold a hearing, further questions that arise are whether the tribunal shall allow post-hearing briefs and, if so, in which form. 650

These questions are directly linked to the parties' right to be heard. Post-hearing briefs must be distinguished from closing submissions. While the 651

1032 See above para. 296.

1033 Cf. decision Swiss Federal Tribunal no. 4A_220/2007 of 21 September 2007 c. 8.1.

1034 See for example art. 27.2 Swiss Rules and in general on the topic MADYOON, *passim*.

1035 CLAXTON, 161; ICC, Techniques for Controlling Time and Costs 2018, paras. 69–81.

1036 See for example art. 42.2(d) Swiss Rules.

latter are general submissions on the case as a whole, post-hearing briefs are meant to grant the parties the opportunity to comment on the evidence taken during the hearing.[1037] As such, they fulfil an important role in the exercise of the parties' right to be heard and have become standard practice in international arbitration[1038]. In addition, and as for the hearing itself, the function of a post-hearing brief may not be confined to the mere exercise of due process rights by the parties. Instead, post-hearing briefs may also help focus on the relevant issues if the hearing had the potential for a lot of side-tracking from the relevant issues.[1039] Granted, the potential for this is smaller with short hearings, but focusing on the most important points may be beneficial for the rendering of the award.

652 Although the Swiss Federal Tribunal has decided on the (non-)violation of the right to be heard in the context of whether or not to hold a hearing,[1040] it appears the court has never in fact had to rule on whether post-hearing briefs are a vital aspect of the parties' due process rights. Some authors consider these briefs occasionally necessary for safeguarding the parties' due process rights (though not specifically under Swiss law).[1041] However, it appears that such briefs are not significant to the point that disallowing them would regularly amount to a violation of due process. Skilled arbitrators should be able to determine the credibility of a witness after having experienced their examination.

653 Nevertheless, and in order not to snub the parties, the tribunal could also propose to replace the written post-hearing briefs with an oral submission at the end of a hearing. Alternatively, it may limit the length of the briefs or require a simultaneous submission of the briefs.[1042]

654 In addition to the right to be heard, other procedural agreements and provisions of the arbitration rules are relevant. In particular, some rules expressly exclude post-hearing briefs under expedited procedures.[1043] Others, as has been seen, limit the number of permissible submissions. Whether this limitation relates only to pre-hearing briefs or includes post-hearing briefs as

1037 ICC, Effective Management of Arbitration, 59.

1038 BORN, International Commercial Arbitration, 2468; BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 6.201.

1039 Cf. for everything ICC, Effective Management of Arbitration, 60.

1040 See above para. 638.

1041 CARON/CAPLAN, 494.

1042 For everything CLAXTON, 162; HABEGGER, 134; ICC, Effective Management of Arbitration, 59–60; ICC, Techniques for Controlling Time and Costs 2018, para. 81.

1043 See for example art. 45.9.4 VIAC Rules.

well needs to be decided based on an interpretation of the respective rules. When the parties and the tribunal agree on the limitation, the tribunal needs to discuss with the parties whether an *agreed* limitation on the number of submissions (for example in the procedural timetable) also covers post-hearing briefs.

4. Evaluation

Conducting an arbitration on a documents-only basis may be a promising method for increasing the efficiency of arbitral proceedings without compromising the quality of the proceedings and the award. Disputes where the parties primarily or even exclusively rely on documentary evidence are particularly suitable for such an approach. 655

In other disputes, a tribunal should discuss the advantages and disadvantages of holding a hearing. Ideally, the tribunal can convince the parties of foregoing a hearing and may offer them alternatives. However, this is not to say that a hearing should be avoided at all costs. Instead, holding one may be of special relevance when difficult and often technical issues of fact need to be understood. A hearing may be the appropriate opportunity to clarify the open questions surrounding such issues. This ultimately helps the tribunal render a correct award faster. Hence, automatically rejecting hearings may result in 'rough justice'[1044] for some disputes. 656

Admittedly, the decision *not* to hold a hearing may appear like a drastic deviation from ordinary proceedings and may even take the parties aback. However, this possibility also exists under ordinary proceedings (at least absent a party's request for a hearing).[1045] Furthermore, while the arbitrators do not have a duty to pander to a certain sentiment or desired emotional experience, they do have a duty to conduct the proceedings efficiently.[1046] 657

VI. Conclusion and Overall Evaluation

As this analysis revealed, expedited procedures need to reconcile potential restrictions to the parties' due process rights with the need to conduct the arbitral proceedings efficiently. Depending on the feature that is used to limit the parties' due process rights, this task is more or less delicate. 658

1044 See already in the context of document production above para. 624.

1045 See above para. 637.

1046 See above paras. 225-231.

659 Interestingly, under ordinary procedures a tribunal often has instructions on what it should or at least may do: it should give the parties x opportunities to make submissions,[1047] it may order document production,[1048] and it should (usually) hold a hearing.[1049] Under expedited procedures, at least for certain aspects, the situation is the opposite: the arbitral rules give the tribunal instructions on what it should not necessarily do. It should not give the parties unrestricted opportunities for submissions, it should not allow document production, nor should it necessarily hold a hearing.[1050] Whether and how these restrictions are in conformity with the parties' due process rights depends on the circumstances and the specific procedural aspect in question. This cannot be evaluated in isolation but depends on all the circumstances of the case, including the number of opportunities that the parties had to make themselves heard in the proceedings.

Chapter 11
Excursus: Early Determination Procedures

660 Early determination procedures may at first glance bear some resemblance to expedited procedures but need to be distinguished from them.[1051] Both instruments have been said to reduce the time and cost of proceedings.[1052] Like expedited procedures, early determination proceedings have attracted growing attention in international arbitration in recent years, ultimately leading to amendments to institutional rules. While the specific content and wording of these amendments vary, these new provisions share certain characteristics that will be looked at in greater detail in the following section. These new provisions have not been without controversy and, to date, still pose a number of unresolved problems. This excursus will address these problems in order to help distinguish early determination procedures from expedited procedures, as well as evaluate the potential benefits and challenges of early determination procedures.

1047 See above para. 578.

1048 See above para. 622.

1049 See above para. 637.

1050 See above paras. 577, 621, 635-636.

1051 See above para. 90.

1052 MOUAWAD/SILBERT, 78; RAVIV, 494-497; TIBELL, 91.

After clarifying the terminology (below section I), the origins of the concept of early determination procedures in litigation will be presented (below section II) before turning to the concept and its forms in arbitration (below section III). This is followed by an analysis of the scope of application (below section IV), the competence to adopt early determination procedures (below section V), the standard for granting an application for early determination procedures (below section VI), the specific procedure (below section VII), as well as the possible types of decisions under early determination procedures (below section VIII). The whole feature will be evaluated in the conclusion (below section IX). 661

I. Terminological Differences

Before turning to a detailed discussion of early determination procedures in arbitration, it is important to define what the term encompasses and what its limits are because several authorities use different terms for the instruments discussed in this chapter. Early determination procedures in arbitration, as understood in this thesis, is a collective term that refers to summary judgments as well as to striking out and motions to dismiss.[1053] Instead of the term early determination procedure, other authors use the term summary procedure or dispositive motions.[1054] 662

II. Origins in Litigation

Summary judgment and striking-out procedures and motions to dismiss are instruments originating from the common law tradition. The purpose of these instruments is to avoid a full litigation process in situations where such a process would be superfluous due to the clarity of the case.[1055] The clarity may result from either factual or legal grounds.[1056] 663

The idea to use such procedures for efficiency gains is anything from far-fetched, as history shows: in particular, summary judgment procedures in modern civil procedure codes trace their origin to the concern that litigation proceedings in the past were too slow and inefficient. One answer to this 664

1053 See for these terms and instruments below paras. 666-675.

1054 Cf. BORN/BEALE, *passim*; CHONG/PRIMROSE, *passim*; MOUAWAD/SILBERT, *passim*; RYAN/DHARMANANDA, *passim*.

1055 ANDREWS, paras. 10.70, 10.86; PARTASIDES/PREWETT, 114-119.

1056 ANDREWS, paras. 10.70, 10.86.

concern was the introduction of summary procedures that themselves date back to the merchant courts of the Middle Ages. These courts existed for the specific purpose of providing efficient legal protection to merchants. Yet at the same time, it was necessary to strike a balance between the remarkable efficiency of merchant courts that was already known in medieval times and due process.[1057]

665 The following analysis will therefore start with an overview of the concepts of summary judgment, striking out, and motions to dismiss in litigation proceedings. It will be limited to the UK and the US, as a further analysis of other countries with provisions that are at least partially similar, such as Hong Kong[1058] and Singapore,[1059] would go beyond the scope of this overview. Moreover, an analysis of litigation instruments that are potentially recommendable in arbitration would be incomplete without taking into account tools from civil law jurisdictions. In particular, the summary procedure in clear cases in Switzerland deserves a closer examination as well.[1060]

1. England: Summary Judgment and Striking Out

666 The English CPR contain two specific instruments that are intended to increase the efficiency and accelerate the speed of litigation proceedings in cases where a full trial would be unnecessary.

1.1 Summary Judgment

667 The first instrument is the summary judgment as set forth in part 24 CPR. If a court grants a summary judgment, it will render a judgment by means of a summary proceeding in situations where a full trial is not necessary.[1061] According to part 24.2 CPR, the court may give such summary judgment on the whole of a claim or on a particular issue if the court considers that a claimant has no real prospect of succeeding on the claim or issue; or that a defendant has no real prospect of successfully defending the claim or issue; *and* that there is no other reason why the case or issue should be disposed of at a trial. As the provision highlights, a summary judgment is applicable to claims, defences, and issues. Furthermore, the claimant as well as the respondent may apply for it.

1057 For everything PARTASIDES/PREWETT, 114-121.

1058 Cf. Order 14 (summary judgment proceedings) and Order 18(19) (striking-out proceedings) Rules of the High Court.

1059 Order 9, Rule 17 (summary judgment proceedings) and Order 9, Rule 16 (striking-out proceedings) Singapore Rules of Court.

1060 Cf. for further examples PARTASIDES/PREWETT, 112 fn. 11.

1061 ANDREWS, para. 10.70; LANDBRECHT, Teil-Sachentscheidungen,163.

The prerequisites show that a summary judgment is aimed at situations in which the opposing party does not intend to defend itself in a serious manner but primarily tries to obstruct and prolong the proceedings.[1062] The crucial factor, and thereby the threshold that must be met, is the proof that there is no case with a real prospect of success.[1063] 668

The benefit of a summary judgment is in its shortened procedure: instead of going through a complete litigation procedure where evidence will be taken, the court schedules a hearing where it will decide on whether to enter into a summary judgment.[1064] In this shortened procedure lies the potentially considerable benefit of a summary judgment procedure. Yet, this procedure does not lead to an accelerated procedure at the complete expense of any taking of evidence. Rather, at the summary judgment hearing written evidence, including witness statements, is permitted.[1065] Therefore, while there may be some restrictions on the permissible and available evidence as opposed to an 'ordinary' procedure, the party facing an application for summary judgment may still present some evidence in favour of its position. 669

1.2 Striking Out

The second instrument that is noteworthy with regard to accelerated proceedings is a striking out pursuant to rule 3.4(2) CPR. Based on this provision, the court may strike out a statement of case if it appears to the court that the statement of case either discloses no reasonable grounds for bringing or defending the claim; or that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or that there has been a failure to comply with a rule, practice direction, or court order. 670

As these different grounds for striking out reveal, only the first ground leads to a material assessment of a party's position. Meanwhile, the second and third grounds result in a dismissal of a party's position as a sanction for a party's misbehaviour.[1066] The mechanism of striking out, based on the first ground, is founded in the assumption that the facts pled by the party against whom such motion is sought are true, and that despite this assumption, the case should be dismissed because of a lack of a valid claim to be determined. 671

1062 LANDBRECHT, Teil-Sachentscheidungen,163; cf. SIME, para. 24.01.

1063 Cf. Swain v. Hillman [2001] 1A11 ER 91 (92).

1064 LANDBRECHT, Teil-Sachentscheidungen, 163, fn. 24; for the exact procedure leading to the hearing see part 24.4 CPR.

1065 Cf. part. 24.5(1) and 2 in connection with 32.2(1)(b) CPR.

1066 LANDBRECHT, Teil-Sachentscheidungen, 166.

This differs from the summary judgments where no such presumption exists but rather the facts need to be proven.[1067]

672 Like a summary judgment, a striking out of a statement of case results in the superfluity of a trial. Yet these two instruments must not be conflated. Unlike a summary judgment procedure, a striking out does not lead a judgment on the issue. Rather, a striking out leads to a removal of certain or all parts of the issues to be determined by the court from the proceedings.[1068]

2. United States of America: Summary Judgment and Motion to Dismiss

673 In US federal civil procedure, two instruments that are similar to the ones of English civil procedure can be found; however, their procedural design differs in detail from their UK counterparts. These are the motion for summary judgment according rule 56 FRCP and the motion to dismiss based on rule 12(b)(6) FRCP.

2.1 Summary Judgment

674 A summary judgment according to the FRCP is a tool that avoids a jury trial,[1069] an idea that moves it close to a summary judgment under the CPR.[1070] As a justification for shortening the process, a prerequisite for granting an application for summary judgment is that the applicant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.[1071] If the applicant succeeds in demonstrating a lack of genuine dispute as to any material fact, there is no need to conduct a trial where the facts are established.[1072] Since the idea of a summary judgment is to determine whether or not disputed issues exist for which a trial would be necessary, the admissible evidence required for determining whether to enter summary judgment must correspond to the evidence that would be admissible at trial.[1073] Thus, in principle, the parties' right to present evidence is not affected. As an exception, in order to preserve the summary procedure of the process,

1067 For everything CHONG/PRIMROSE, 78; PARTASIDES/PREWETT, 112, fn. 11; TIBELL, 72.

1068 For everything LANDBRECHT, Teil-Sachentscheidungen, 166, fn. 35.

1069 GLANNON/PERLMAN/RAVEN-HANSEN, 1014.

1070 CAHER/LIM, paras. 5-7.

1071 Rule 56(a) FRCP; cf. further GLANNON/PERLMAN/RAVEN-HANSEN, 1014.

1072 FRIEDENTHAL/MILLER/SEXTON/HERSHKOFF, 656.

1073 Rule 56(c)(1) FRCP; GLANNON/PERLMAN/RAVEN-HANSEN, 1021.

affidavits and written witness statements replace the direct and cross-examination of witnesses in a trial.[1074]

2.2 Motion to Dismiss

675 Similarly to the striking out applicable in the UK, rule 12(b)(6) FRCP provides for a so-called motion to dismiss.[1075] According to this provision, as a defence to a complaint, a party may by motion assert a failure to state a claim upon which relief can be granted. Such a motion will be granted if the complaint does not sufficiently allege facts in order to establish that the defendant could be held legally liable even in case all the facts asserted in the complaint were true.[1076] Hence, rule 12(b)(6) motions, as opposed to a summary judgment under rule 56 FRCP, do not include a review of the evidence.[1077]

3. Switzerland: Legal Protection in Clear Cases

676 The Swiss CPC provides for a summary procedure in arts. 248-270 for cases of increased urgency. A characteristic of this kind of procedure is an accelerated process due to shortened deadlines, simplified procedural steps, and a limitation of claims, defences, and admissible evidence.[1078] In principle, only written evidence in the form of physical records is permissible.[1079] Other evidence is admissible only if the taking of evidence does not substantially delay the proceedings; if it is required by the purpose of the proceedings; or if the court must establish the facts *ex officio*.[1080] Furthermore, the court may decide not to hold a hearing.[1081]

677 Within the summary procedure, a party may apply[1082] for so-called legal protection in clear cases according to art. 257 CPC. This tool allows the applicant to obtain a judgment with full *res judicata* effect in a summary procedure[1083] concerning claims that, in the absence of such an application, would have to be

1074 Rule 56(c)(4) FRCP; GLANNON/PERLMAN/RAVEN-HANSEN, 1021.

1075 Cf. RAVIV, 489.

1076 CHONG/PRIMROSE, 78; PARTASIDES/PREWETT, 112, fn. 11; TIBELL, 72.

1077 RAVIV, 489.

1078 SPICHTIN, para. 36; Staehelin/Staehelin/Grolimund-STAEHELIN, § 21 para. 24.

1079 Article 254 para. 1 Swiss CPC. In Swiss civil litigation witness have to orally testify with the court leading the questioning (art. 171 para. 2 Swiss CPC).

1080 Article 254 para. 1 Swiss CPC.

1081 Article 256 para. 1 Swiss CPC.

1082 Article 252 para. 1 Swiss CPC; therefore, it is incumbent on the party in need of fast legal protection to apply for it.

1083 SOGO, in: Haas/Marghitola, para. 10.142; SPICHTIN, para. 37.

tried in an ordinary or simplified procedure.[1084] The court may grant legal protection in clear cases only where the facts are undisputed or immediately provable and where the legal situation is clear.[1085] If these prerequisites are not met, the court does not consider the case.[1086] Yet the applicant may still bring the same claim anew in an ordinary or simplified procedure.[1087] The court cannot, however, on the merits decide against the applicant. Thus, the court may decide only to grant legal protection in clear cases or not to consider the case.[1088]

III. Concept and Forms in Arbitration

1. Concept and Definition

678 As is the case with expedited procedures,[1089] no exact definition of early determination procedures in arbitration exists either. Nevertheless, it can be said that early determination procedures in arbitration are based on the same idea as their role models in litigation. These procedures are meant to dispose of unmeritorious claims and defences in a judicial proceeding without going through a full arbitration, including a full taking of evidence.[1090]

679 Consequently, unlike expedited procedures, early determination procedures are not a comprehensive system for the conduct of arbitral proceedings applicable to a wide variety of disputes. Instead, early determination procedures are special mechanisms within a proceeding to efficiently dispose of certain issues during a proceeding that may be conducted differently to the rest of the issues (i.e., under ordinary or expedited procedures). This also means that early determination procedures are applicable under both ordinary and expedited procedures.[1091]

2. Historical Development in Arbitration

680 As described in Chapter 2 of this thesis, a widespread revision of commercial arbitral rules, designed to include provisions on expedited procedures, took

1084 SPICHTIN, para. 10.

1085 Article 257 para. 1 Swiss CPC.

1086 Article 257 para. 3 Swiss CPC.

1087 For everything Staehelin/Staehelin/Grolimund-STAEHELIN, § 21 para. 58; TANNER, in: Haas/Marghitola, para. 24.31

1088 For everything DFT 140 III 315 c. 5.

1089 See above para. 57.

1090 For everything HORNYOLD-STRICKLAND/SPELLER; RAVIV, 487; cf. also art. 39.1 SCC Rules.

1091 Cf. already above para. 90.

place during the 1990s. What these revisions did not incorporate were early determination procedures. It was in the field of investment arbitration where tangible and institutionalised steps were taken to implement this instrument aimed at increasing efficiency in arbitration.

In 2006, ICSID introduced in its arbitration rules provision 41(5) ICSID Rules 2006, which allows a party to request that the tribunal decide on an expedited basis that a claim is manifestly without legal merit. What this rule does not cover is the general use of tools for conducting the arbitration in an expedited way. The rule was introduced to efficiently address the increased concern for countering frivolous claims by investors. Up until the inclusion of this provision, it was unclear whether an ICSID tribunal had the implied power to decide on such claims in an expedited manner.[1092] Ever since its introduction, this instrument has generally been received well, even though the respondent states had only used this instrument in 40 cases by the middle of 2021, with a rather low success rate.[1093] 681

In 2016, SIAC was the first major commercial arbitration institution to introduce a provision expressly granting a tribunal the power to rule on a claim or defence in the form of an early dismissal procedure in rule 29. It did not take long for some of the other major arbitration institutions to adopt the same model.[1094] Notably, however, the ICC has not introduced a similar provision in either its 2017 or 2021 Rules and instead referred to an inherent power of ICC tribunals to make such a ruling.[1095] In 2020, the LCIA introduced its revised rules. While these rules notably still do not include comprehensive provisions on expedited procedures, they now feature an express basis for the tribunal to employ early determination procedures.[1096] Therefore, the summary and early determination procedures are now, under certain rules, an official instrument. 682

3. Forms of Early Determination Procedures

As mentioned at the beginning of this chapter, early determination procedures in arbitration encompass both summary judgment decisions and decisions to strike out or to dismiss.[1097] Which one of the two tools applies depends on 683

1092 HOWES/STOWELL/CHOI, 10; POTESTÀ, 252.

1093 ICSID, Manifest Lack of Legal Merit; cf. further HOWES/STOWELL/CHOI, 15-16.

1094 See art. 43 HKIAC Rules (in 2018); art. 25 JAMS International Rules; art. 39 SCC Rules 2017 (in 2017); in general WALLACH, 837-838.

1095 ICC, Note Conduct of the Arbitration, paras. 74-78.

1096 Article 22.1(viii) LCIA Rules.

1097 See above para. 662.

the issue for which early determination procedures are sought. The main difference between the two instruments is whether a tribunal (1) renders a decision based on the assumption that, even if all pleaded facts were true, the applying party would still have no valid legal ground for its position (which is the case with decisions to strike out or to dismiss)[1098] or (2) concludes that a party obviously cannot prove its position (which is the case with summary judgment decisions).

IV. Scope of Application

684 Early determination procedures in commercial arbitration contain three scopes of application: the material scope *(ratione materiae),* the personal scope *(ratione personae),* and the temporal scope *(ratione temporis)* of application. These will be analysed in more detail in the following.

1. Material Scope of Application

685 The material scope of application defines for which issues early determination procedures are available. Although there are many similarities among the rules in their provisions on early determination procedures, they differ in the details of their material applicability. While all rules examined here allow the early determination of claims and defences based on a lack of jurisdiction, they differ in whether they allow early determination based on a manifest lack of merit or whether they require a manifest lack of *legal* merit.[1099] Whether this potential difference actually has an impact in practice remains to be seen.[1100]

686 Which claims and defences are suitable for early determination procedures must be decided on a case-by-case basis. Potential claims and defences that may qualify as suitable issues include claims and counterclaims that are outside the jurisdiction of the tribunal, time-barred, forfeited, or inadmissible. In addition, the determination of the applicable law or potentially the seat of arbitration may be suitable issues for an early determination.[1101]

1098 MOUAWAD/SILBERT, 78; RAVIV, 498; TIBELL, 76; WALTERS, 116; cf. also art. 39.2(i) and (ii) SCC Rules.

1099 Lack of merit: art. 43.1(a) HKIAC Rules; lack of legal merit: art. 29.1 SIAC Rules.

1100 Also questioning the relevance of the distinction between factual and legal merit M./RAHEJA; and POTESTÀ, 260 (though for Rule 41[5] ICSID Rules 2006).

1101 For everything BORN/BEALE, 27; GIOVANNINI, Early Disposition, 530; HORNYOLD-STRICKLAND/SPELLER; cf. further KHODYKIN/MULCAHY/FLETCHER, paras. 5.111–5.112.

The requirement of a manifest lack of either merit or jurisdiction does not *per se* exclude complex disputes and issues from a disposition by means of an early determination procedure. Yet as shall be seen below in paras. 719–724, meeting the standard of 'manifest' is difficult, which is why a tribunal in disputes that are particularly complex may conclude in most cases that an application does not meet the standard. 687

2. Personal Scope of Application

As for the personal scope of application, early determination procedures in commercial arbitration in their present form are available to both the claimant and the respondent. While the claimant may always try to obtain an early determination against a defence by the respondent, the respondent may try the same against the claimant when the respondent files a counterclaim.[1102] 688

3. Temporal Scope of Application

In terms of the temporal scope of application, the rules differ in whether they do not set any time limits for the filing of an application for early determination procedures or whether they require the application as promptly as possible after the filing of the respective claims and defences.[1103] 689

V. Competence to Adopt Early Determination Procedures

An interesting question is the basis for the competence of the tribunal to employ early determination procedures.[1104] The answer to this question is also significant for the assessment of whether the emergence of this instrument is an actual innovation or merely a cultivation of an existing possibility to structure the proceedings. As shall be seen, the competence can be deduced from either the *lex arbitri* (below sub-section 1), the arbitration agreement (below sub-section 2), or the arbitral rules (below sub-section 3). 690

1102 See the usage of *'a party'* (art. 39.1 SCC Rules; art. 29.1 SIAC Rules) or *'any party'* (art. 43.1 HKIAC Rules); cf. also RAGNWALDH/ANDERSSON/SALINAS QUERO, 125.

1103 See art. 39.1 SCC Rules and art. 29.1 SIAC Rules (no time limit); art. 43.3 HKIAC Rules *('as promptly as possible after the relevant points of law or fact are submitted').*

1104 Cf. in general CHONG/PRIMROSE, 64-72.

1. Lex Arbitri

691 The starting point for the competence of the tribunal to use early determination procedures must be the *lex arbitri*. Only if these procedures are compatible with the law of the seat of arbitration may it then be relevant if the parties have made further stipulations on the issue in their arbitration agreement. Hence, it is necessary to interpret the *lex arbitri*. For Swiss law, it seems that so far no detailed discussion of the issue has taken place, which is why a more general examination seems warranted. The discussion revolves around two aspects: whether early determination procedures may be summarised under the tribunal's general competence to conduct the proceedings in a manner it considers appropriate (below sub-section 1.1) and, if this is affirmed, whether early determination conflicts with other provisions of the *lex arbitri* (below sub-section 1.2).

1.1 The Power to Conduct the Proceedings in an Appropriate Manner

692 Various *leges arbitri* contain some basic and general rules regulating the conduct of the proceedings; the procedural powers of tribunals and the taking of evidence. For Switzerland, the relevant provisions are art. 182 para. 2 *('If the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration.')* and 3 *('Irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding.')* Swiss PILA. Provisions of other laws are similar.[1105]

693 It has been debated amongst commentators whether general provisions such as these are sufficient to vest a tribunal with the competence to adopt an

1105 See for the UNCITRAL ML art. 18 *('The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.')*, art. 19 para. 2 *('Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.')* and art. 24 para. 1 first sentence *('Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.')*; English Arbitration Act section 33 *('(1) The tribunal shall – (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.')* and section 34 para. 1 *('It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.')*.

early determination procedure.[1106] Due to the wide and general wording of this type of provisions, it is not immediately clear whether a *lex arbitri* with such general provisions allows early determination procedures. Nevertheless, it is submitted that, in principle, there are good arguments leading to the conclusion that this is the case.

As mentioned earlier, it is widely accepted that the tribunal has broad discretion to choose the procedure it considers appropriate.[1107] Therefore, when a tribunal deems an early determination procedure appropriate, it is difficult to see why it should not be able to use such a procedure. This conclusion carries even more weight when the *lex arbitri* allows the tribunal to rule on the admissibility, relevance, materiality, and weight of any evidence. This is because, ultimately, early determination proceedings may include a limitation of the admissible evidence.[1108] Furthermore, when the *lex arbitri* requires the tribunal to conduct the proceedings efficiently, like for example section 33 English Arbitration Act, it is even more compelling to conclude that a tribunal may theoretically use early determination proceedings.[1109] 694

Moreover, it has been held for the UNCITRAL Model Law that a tribunal should, in practice, use procedures likely known to the parties, which means that a tribunal should vary its approach depending on whether the parties have a common law or civil law background.[1110] While this statement, strictly speaking, is primarily aimed at the *appropriateness* of certain procedures, one can infer that a tribunal – based on the same *lex arbitri* (in this case being the UNCITRAL Model Law) – has the *competence* to employ a vast variety of different forms of procedures from both common and civil law countries. Thus, according to this view, competence and appropriateness must be distinguished. Even though a tribunal has the *competence* to employ a wide range of measures, it might not necessarily be *appropriate to use* a certain measure because the parties may not have expected it.[1111] Hence, according to this 695

1106 In favour of the position BORN, International Commercial Arbitration, 2411-2412; CHONG/PRIMROSE, 67 (with reservations, however); ICC Case no. 11413, in: ICC Arbitration Bulletin 21 (2010); RYAN/DHARMANANDA, 46; against the position RAVIV, 490, holding that it is *'difficult if not impossible'* to adopt early determination proceedings if the institutional rules do not allow such proceedings; similarly cautious (though for the Indian *lex arbitri*) SALGIA/CHANDAK, 81.

1107 See above para. 558.

1108 See below paras. 701-703 .

1109 RAWDING/FULLELOVE/MARTIN, in: Lew/Bor/Fullelove/Greenaway, paras. 18-40.

1110 HOLTZMANN/NEUHAUS/KRISTJANSDOTTIR/WALSH, 584, para. 6; Arbitration in Germany, § 1042, para. 32.

1111 Cf. also PETROCHILOS, para. 5.20 in the context of the competence to order security for costs, and the appropriateness thereof (with further references to an award rendered under the then applicable arbitration rules of the Geneva Chamber of Commerce).

position, a tribunal, regardless of whether the arbitration is seated in a common law or civil law jurisdiction, has the competence to adopt early determination procedures.

696 As a counterargument, one might say that the appropriateness of a procedure does not relate to its practical suitability but is in fact tantamount to competence. In other words, if the tribunal does not consider a procedure to be appropriate, the tribunal lacks the competence to implement such a procedure. Yet it is submitted this approach would incorrectly equate the competence to implement with the reasonableness of the measure in a specific situation.

697 Therefore, it is argued that provisions granting the tribunal wide powers for the general conduct can also include the power to use early determination procedures. Whether it is appropriate for the tribunal to do so is a different question.

1.2 The Duty to Respect the Parties' Due Process Rights

698 Having first established that there are convincing reasons to assume that a tribunal may, in appropriate cases, employ early determination procedures, the question remains whether this competence is offset by the parties' due process rights, i.e., the right to equal treatment and the right to be heard in adversarial proceedings.[1112] This would render the tribunal's competence potentially meaningless.

699 It is argued that, in principle, there is no reason why such procedures should be incompatible with these due process rights. Before going into the details of the analysis, it is worthwhile to distinguish between the request for early determination procedures (hereinafter referred to as 'request phase') and the actual conduct of the early determination procedure (hereinafter referred to as 'determination phase'). In the determination phase, one must further distinguish whether the early determination procedure resembles a motion for summary judgment or a motion to strike out or to dismiss.[1113]

a Request Phase

700 As for the request phase, an early determination procedure is available to both parties.[1114] However, the scope of application may vary as the claimant will usually rely on this procedure against *defences* that are manifestly without

1112 Cf. CHONG/PRIMROSE, 70; ST. JOHN SUTTON/GILL/GEARING/RUSSELL, para. 1.031.

1113 Also assessing these two instruments differently MOUAWAD/SILBERT, 92.

1114 See above para. 683; yet despite the wording of Rule 41(5) ICSID Rules 2006 (now Rule 41 ICSID Rules), it has been questioned whether a claimant may also apply for summary disposition, on which see POTESTÀ, 254, with further references.

merit whereas the respondent will likely avail itself of this feature against meritless *claims*. Furthermore, a request for such procedures by one party leads to an opportunity for the other party to comment.[1115] Therefore, it is submitted that an early determination procedure respects the rights of the parties equally in the request phase.

b Determination Phase

In the determination phase when a party applies for a motion to strike out or to dismiss,[1116] the tribunal assumes all of the facts pleaded by the party against whom such a motion is brought to be true and, based on these facts, assesses whether they show a legal interest worthy of protection.[1117] In such a situation, on the factual and evidential level, there cannot be a violation of the right to be heard of the party against whom the motion is sought. This is because this party is relieved from presenting any evidence.[1118] Similarly, a tribunal may adapt such procedures only after consulting with the parties.[1119] Hence, it is difficult to see how the party against whom an early determination procedure is sought may suffer a violation of its due process rights. 701

If, however, the early determination procedures resemble summary judgment procedures, a violation of the parties' right to be heard is a possible consequence. As has been seen, summary judgment procedures in litigation restrict the admissibility of oral evidence by doing away with a full hearing.[1120] Similarly, it has been argued that the usage of early determination procedures in arbitration may lead to a restriction of the admissible evidence.[1121] This restriction might, depending on the facts of the case, disproportionately disfavour, and thereby restrict, a certain party from relying on specific (means of) evidence. 702

Yet two reasons may mitigate potential violations of the right to be heard. First, as shall be seen in the following section, early determination procedures in arbitration do not necessarily exclude hearings and oral evidence. Rather, it is within the discretion of the tribunal to allow these means of evidence-gathering.[1122] Second, since the tribunal must give the parties a right to comment 703

1115 See for example art. 43.5 HKIAC Rules; art. 39.4 SCC Rules.

1116 See for example art. 43.1(a)-(c) HKIAC Rules.

1117 See above para. 683.

1118 As MOUAWAD/SILBERT, 90, correctly pointed out, a summary judgment, unlike a motion to dismiss, is premised on a review of the evidence; cf. further RAVIV, 489.

1119 See art. 43.5 HKIAC Rules; art. 39.4 SCC Rules.

1120 See above para. 669.

1121 COLLINS, 533-535; COSTÁBILE, 264-266; GILL, 516.

1122 See below para. 736; cf. further CHOONG/MANGAN/LINGARD, para. 11.45.

on the application for an early determination procedure,[1123] the party relying on crucial oral evidence in its favour has a chance and incumbency to reasonably explain why such a procedure, or at least a restriction of admissible evidence, would result in an unjustified disadvantage to this party. It seems questionable whether a sensible tribunal would grant a motion for an early determination procedure or grant it together with heavy restrictions on potentially crucial evidence.[1124]

c Interim Conclusion

704 The above considerations lead to two interim conclusions: first, when early determination procedures take the form of a motion to dismiss or strike out, such procedures are generally compatible with the parties' due process rights. Second, when these procedures resemble a summary judgment, they may be in conflict with the right to be heard. This, however, should not lead to the conclusion that early determination procedures are *per se* impermissible. Rather, the implication is that the tribunal must take the necessary steps to prevent a violation of the parties' due process rights.

1.3 Conclusion

705 As a result, general provisions of the *lex arbitri* empowering the tribunal to conduct the proceedings the way it deems appropriate include the competence of the tribunal to employ early determination procedures. This competence relates to early determination procedures in the forms of both summary judgments and motions to dismiss or strike out.

2. Arbitration Agreement

706 Apart from the *lex arbitri,* the arbitration agreement is an apparent source of competence for adopting early determination procedures. One must distinguish between express provisions granting the competence to the tribunal to adopt early determination procedures (below sub-section 2.1) and provisions implicitly granting this competence to the tribunal (below sub-section 2.2).

2.1 Express Competence

707 An obvious basis for the competence to employ early determination procedures is an express provision in the arbitration agreement allowing for early determination procedures. On the condition that this provision is unambiguous and

1123 See for example art. 43.5 HKIAC Rules; art. 39.4 SCC Rules.

1124 Also sceptical (for expedited procedures, however) BÜHLER/HEITZMANN, 140.

does not conflict with the mandatory rules of the *lex arbitri*,[1125] such a choice is likely the most straightforward example of granting competence to the tribunal to adopt early determination procedures. Nevertheless, even when the arbitration agreement contains an express choice of such procedures, uncertainties may persist. For example, it may be doubtful whether the parties intended the tribunal to apply an early determination procedure in the form of either a summary judgment or striking-out procedure, or in both forms.[1126] In order to determine the parties' intention, an interpretation of the arbitration agreement is necessary.[1127]

2.2 Implicit Competence

Instead of an express choice, the parties can also choose early determination procedures implicitly. One could, for example, ask whether the choice of a common law jurisdiction providing for such procedures in its civil procedure code as the seat of arbitration may be interpreted as an implicit agreement on the tribunal's power to use early determination procedures.[1128] Conversely, the choice of a civil law country as the seat of arbitration whose civil procedure code does not provide for early determination procedures could be interpreted as an exclusion of early determination procedures. 708

Although such general reasoning may seem appealing at first glance, the problem with this approach is that due to the autonomy of international arbitration from national litigation regimes,[1129] creating a connection to the national civil procedure code of the seat of arbitration appears doubtful. Similarly, where the parties make provisions regarding the conduct of the proceedings or the right to submit evidence, the tribunal must carefully assess whether the parties (1) thereby actually intended to grant or exclude the competence to employ early determination procedures to the tribunal or, (2) as is more likely, had no such intention at all. General answers do not seem possible, which is why, once again, a careful interpretation of the arbitration agreement is required. 709

Another problem may arise out of contradictory stipulations in the arbitration agreement. For example, in the arbitration agreement, the parties may 710

1125 Cf. for this issue above pars. 148.

1126 See for example the wording of the clause in Travis Coal Restructured Holdings v. Essar Global Fund [2014] EWHC 2510 (Comm) *'The arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part.'*

1127 See for the method above paras. 171–173.

1128 See RYAN, 46, 50.

1129 See in detail above paras. 142–145.

agree on the availability of early determination procedures but also include provisions conflicting with such a choice. An obvious example of the latter would be an agreement providing for a hearing under any circumstances. Once more, general guidelines for such a situation are difficult. However, it is submitted that if an interpretation of the arbitration agreement does not lead to a clear conclusion, the prudent approach is to give priority to the provision(s) excluding an early determination procedure. Even though such a choice may potentially deprive the parties of faster and cheaper legal protection in obvious cases, it still appears preferable.

3. Arbitration Rules

711 The third source of competence for adopting early determination procedures are the arbitration rules chosen by the parties. As will be seen, different rules have employed two different approaches regarding the competence to adopt such procedures – an express anchoring in the rules and an implicit one.

3.1 SIAC Approach: Express Competence

712 The first approach is an express mention of the competence to adopt early determination procedures in the arbitration rules. SIAC was the first commercial arbitral institution to adopt this approach in 2016.[1130] According to its rule 29.1, a party may apply to the tribunal for the early dismissal of a claim or defence, on the basis that a claim or defence is manifestly without legal merit or manifestly outside the jurisdiction of the tribunal. With such an express provision, there can be no doubt that the tribunal may use early determination procedures, provided that such a rule does not conflict with mandatory provisions of the *lex arbitri*. Other institutions have included similar provisions in their rules.[1131]

3.2 ICC Approach: Implicit Competence

713 The ICC rules at the time of writing do not contain an express provision regarding early determination procedures. According to the ICC, such a provision is not necessary because the ICC rules already vest a tribunal with a competence to employ such procedures. As the ICC explained in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, an application for the expeditious determination of manifestly unmeritorious

1130 See above para. 682.

1131 See art. 43 HKIAC Rules; art. 25 JAMS International Rules; art. 39 SCC Rules.

claims or defences may be addressed within the broad scope of article 22[1132] ICC Rules.[1133]

At this point, the question is whether the reasoning of the ICC is correct. 714
Article 22 ICC Rules differs from some national regimes insofar as it expressly mentions the conduct of the proceedings 'in an expeditious and cost-effective manner'. However, it is noteworthy that art. 22 ICC Rules is worded in a general and broad manner and is thereby similar to various national provisions relating to the general conduct of the arbitral proceedings.[1134] As has been explained in the analysis of the (Swiss) *lex arbitri,* general provisions granting the tribunal wide discretion as to the conduct of the proceedings are sufficient to affirm a competence to adopt early determination procedures. Hence, provisions like art. 22 ICC Rules are also generally sufficient to grant the tribunal the competence to use early determination procedures.[1135]

VI. Standard for Granting an Application

In order for a claim or defence to be disposed of in an early determination 715
procedure, the claim or defence needs to be 'manifestly' without (legal) merit or 'manifestly' outside the jurisdiction of the tribunal.[1136] Therefore, it must be examined what 'manifestly' means and under which law it will be decided whether an application for early determination procedures meets this standard.

1. Applicable Law

The meaning of 'manifestly' could theoretically be derived from at least three 716
different laws: The law applicable to the merits, the law of the seat of arbitration,

1132 Cf. especially arts. 22.1 *('The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.')* and 22.2 *('In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.').*

1133 ICC, Note Conduct of the Arbitration, para. 74.

1134 See above paras. 692-696.

1135 Cf. further DE WESTGAVER, with reference to Weirton Medical Center Inc v. Community Health Systems Inc., Northern District of West Virginia, 12 December 2017.

1136 See art. 43.1 HKIAC Rules; art. 39.2(i) SCC Rules; art. 29.1 SIAC Rules. The HKIAC Rules in art. 43.1 (c) contain a further standard for granting a request to apply an early determination procedure for situations where points of law or fact are submitted by a party and if they were assumed to be correct, no award could be rendered in favour of that party (see on this WALLACH, 845-846).

and the law governing the arbitration agreement.[1137] The choice of the relevant law depends on the issue that manifestly lacks merit.

717 When a party needs to show a manifest lack of legal merit of a claim or defence, it needs to show that the party making the claim or defence manifestly has no possibility to prove the factual or legal validity of the claim or defence. Therefore, for the manifest lack of legal merit of a claim or defence, the relevant standard must be determined according to the general rules on the burden of proof, which is the law applicable to the merits. The law of the seat of arbitration cannot be relevant.[1138]

718 The same is, in principle, true for claims that manifestly fall outside the jurisdiction of the tribunal. Yet in case the arbitration agreement and the underlying substantive contract are subject to different laws, the law governing the arbitration agreement may be more relevant. The reason for this is that this law determines which claims the arbitration agreement covers. Hence, it should be for the law governing the arbitration agreement to decide when this is 'manifestly' not the case.

2. Meaning of 'Manifestly'

719 An essential consideration for early determination procedures in arbitration is the meaning of 'manifestly' and thus a definition of when this standard is met.

2.1 Different Relevance of the Standard

720 Before turning to the details of how the standard of 'manifestly' is defined in the context of early determination procedures, it is important to discern the functions of the standard and its relevance based on the form of the early determination procedure sought. When an early determination procedure resembles a motion to dismiss or to strike out, the facts pleaded by the party whose claim or defence is subject to the early determination procedure are supposed to be true.[1139] Therefore, the meaning of 'manifestly' refers to the legal merit of the claim or defence as a result of uncontested facts. However,

1137 See in general for the relevance of this laws in conflict of laws issues in international arbitration LEW/MISTELIS/KRÖLL, para. 22.26.

1138 Cf. for everything BSK ZPO HOFMANN, art. 257 para. 11b; KuKo ZPO-JENT-SØRENSEN, art. 257 para. 9 for the exclusive relevance of the law applicable to the merits of the dispute (and thus *e contrario* against the qualification of the requirement of clarity as a procedural aspect) in proceedings of legal protection in clear cases in Switzerland; see for a further discussion of the distinction between the burden of proof and the standard of proof specifically in international arbitration GIRSBERGER/VOSER, paras. 987-988; LEW/MISTELIS/KRÖLL, paras. 22.25-22.26.

1139 See above para. 671.

when an early determination procedure takes the form of a summary judgment, the standard of 'manifestly' primarily pertains to the factual, rather than the legal, foundation of a claim or defence.[1140]

2.2 Defining the Standard for 'Manifestly'

721 In order to determine the meaning of 'manifestly', some guidance can be taken from decisions under Rule 41(5) ICSID Rules 2006 (now Rule 41 ICSID Rules) and from national court decisions defining the standard for early determination procedures under their national procedural codes.[1141] The ICSID case law is only of limited value, however, because various tribunals have applied different standards. Yet there appears to be a consensus that the standard to be met is *'very demanding and rigorous'*. Accordingly, 'manifestly' is tantamount to 'clear' and 'obvious'.[1142]

722 Under national law, US and English courts have had opportunities to define the standard. For motions to dismiss, the US Supreme Court held that the claimant's case should not be dismissed with a motion if, under the assumption that all of the claimant's pleaded facts were true, these facts would raise a right to relief above the speculative level.[1143] The English courts require that, for granting a summary judgment, either a claim is barred as a matter of law or the factual basis for the claim is fanciful.[1144]

723 In addition to these common law jurisdictions, it is useful to turn to some civil law jurisdictions with similar concepts. For instance, when the arbitrators have a civil law background, they might draw upon comparable concepts from their home jurisdiction. The legal protection in clear cases under the Swiss CPC, introduced earlier, may be a suitable concept for this purpose. In order to qualify as a clear case, the facts of the dispute must be undisputed or at least readily provable and the law must be clear. The law is clear when the legal consequences of the factual circumstances, without further ado, follow from the law and lead to an unequivocal result.[1145]

1140 See for the relevance of the factual underpinning BORN/BEALE, 26.

1141 See CHOONG/MANGAN/LINGARD, paras. 11.30–11.34.

1142 For everything PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, Decision on Respondent's Objections under Rule 41(5), 28 October 2014 (ICSID Case No. ARB/13/33); c. 88; Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan, The Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (ICSID Case No. ARB/07/25) c. 83; cf. for a comprehensive overview HOWES/STOWELL/CHOI, 13–16; POTESTÀ, 258–259.

1143 Bell Atlantic Corp. v. Twombly, 550 US 544 (2007).

1144 Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 3) [2003] 2 AC at 260, c. 95.

1145 For everything DFT 141 III 23 c. 3.2; decision Swiss Federal Tribunal no. 4A_25/2019 of 15 April 2019 c. 3.

724 As these positions under the foregoing national regimes confirm, the standard required to grant an application for early determination procedures is extremely high.[1146] While this standard limits the field of application of the instrument, this restrictive approach appears to be justified. This is because of the potentially significant deviation from other arbitral proceedings, as well as the fact that the determination will be final and binding.[1147] Accordingly, it appears apt to equate 'manifestly' with 'clear'.

VII. Procedure

1. Request Phase

725 Early determination procedures start with what is referred to here as the request phase.[1148] The first step is an application by the party requiring an early determination procedure in order to dispose of a claim or defence by means of an early determination procedure.[1149] Furthermore, there are good reasons to assume that the tribunal, based on its general competence to conduct the proceedings the way it deems appropriate, may adopt early determination procedures even on its own motion. However, such a decision would be highly unusual and very rare in practice,[1150] which is why early determination procedures should be adopted only upon the request of a party. The details of such a request will be analysed more closely in the following.

1.1 Request and Comments by the Other Party

726 In the application, the party requiring the early determination procedures must show that the grounds for these procedures are met, i.e., that the respective claim or defence is manifestly without legal merit or outside the jurisdiction of the tribunal, and that the adoption of early determination proceedings will be time-efficient and cost-effective.[1151] In addition, some rules also require a proposal as to the structuring of the early determination procedures.[1152]

1146 WALLACH, 842; see also ASA, Comments and Recommendations, para. 4.

1147 Cf. for everything CHOONG/MANGAN/LINGARD, para. 11.34.

1148 See for the meaning of this term above para. 698.

1149 See for example arts. 29.1 and 29.2 SIAC Rules.

1150 For everything RAGNWALDH/ANDERSSON/SALINAS QUERO, 127; see, however, COSTÁBILE, 253.

1151 See art. 43.4 HKIAC Rules; art. 39.3 SCC Rules; art. 29.2 SIAC Rules.

1152 See art. 43.4 in connection with arts. 13.1 and 13.5 HKIAC Rules.

Although this is not expressly mentioned under all rules, after the submission of the request, the tribunal first has to grant the other party an opportunity to comment on the request.[1153] Early determination procedures may significantly deviate from the otherwise agreed procedures, which is why granting the other party a right to comment, and thus to be heard, is paramount.[1154] 727

1.2 Decision by the Tribunal on whether to Allow the Request

After having received the comments by the other party, the tribunal must decide whether it will allow the request for an early determination procedure to proceed. At this point, the tribunal does not decide whether a claim or defence manifestly lacks merit or is beyond its jurisdiction. Instead, the tribunal only decides whether it allows the application for early determination procedures to go forward.[1155] 728

Accordingly, the criteria that determine whether the tribunal should allow or dismiss the request relate to the question of whether the interim step of an early determination procedure is likely to lead to savings in time and cost, as opposed to a decision on the respective claim or defence outside such a special procedure.[1156] It is submitted that the tribunal should consider the potential for time and cost savings on a *prima facie* basis.[1157] In addition to this criterion of saving time and costs, the request for early determination procedures must be admissible. This is not the case if the party applying for these procedures did not file its request in accordance with the provisions of the rules. Examples of this defect include requests submitted after the procedural deadline (where such a deadline exists) and requests that do not comply with the necessary formalities.[1158] Lastly, certain rules require the tribunal to allow or dismiss the application within a specific time limit. However, such a time limit may be extended.[1159] 729

Potential obstacles to allowing the request to proceed are contrary agreements between the parties and the tribunal in the form of a procedural timetable. As shall be seen below in paras. 732–733, allowing a request for early determination procedures may lead to a temporary suspension of the remaining 730

1153 WALTERS, 116–117; expressly: art. 43.5 HKIAC Rules; art. 39.4 SCC Rules; implicitly: art. 29 SIAC Rules.

1154 Cf. RAVIV, 505–506.

1155 Cf. art. 43.5 HKIAC Rules.

1156 Cf. art. 39.5 SCC Rules.

1157 Cf. CHOONG/MANGAN/LINGARD, para. 11.27.

1158 See for example art. 43.4 HKIAC Rules.

1159 See for example art. 43.5 HKIAC Rules.

proceedings. This suspension may conflict with an already agreed procedural timetable. Yet the tribunal may alter a timetable without compromising the integrity of the proceedings. For example, the ICC Rules expressly provide for this possibility.[1160] Likewise, under other rules, the timetable cannot – without any indication to the contrary – be meant to prevent any changes based on legitimate requests.[1161] Therefore, even if the parties and the tribunal have agreed on a timetable, this does not exclude allowing the request for early determination procedures.

2. Determination Phase

731 In the determination phase, the tribunal has two tasks: it first needs to decide on the application. For this decision, the tribunal needs to devise an appropriate procedure. Second, when the tribunal has admitted the application for early determination procedures, it then needs to devise the proceedings in a way that allows an efficient yet fair determination of the application. For this purpose, the tribunal needs to make two basic decisions, as explained below.

2.1 Stay of Remaining Proceedings?

732 The first decision for the tribunal is whether it orders a stay of the rest of the proceedings in order to focus exclusively on the early determination.[1162] This often seems to be a promising approach. If the early determination results in a complete termination (for example due to a lack of jurisdiction) or, at the very least, a simplification of the rest of the proceedings (for example because of a time-bar on most of the claims), staying the rest of the proceedings for the time being is advisable.

733 A problem that may occur in this context is an abusive use of the early determination procedure in order to delay the rest of the proceedings. Should a tribunal suspect something of this kind, it might be recommendable not to stay the remainder of the proceedings. However, this proposal may admittedly put increased pressure on the parties and their counsel in terms of time because they will then have to participate in two partial proceedings simultaneously.[1163]

1160 Article 24.2 ICC Rules.

1161 See for example art. 27.6 DIS Rules.

1162 CHOONG/MANGAN/LINGARD, para. 11.46.

1163 See for this problem SUSSMAN/EBERE, 30.

2.2 Exercise of Due Process Rights?

The second decision relates to the parties' due process rights. Specifically, 734
the tribunal needs to determine if and how the parties may make further submissions and present evidence. One possibility for the tribunal is to allow a further round of submissions. Alternatively, the tribunal may directly hold a hearing.[1164]

In deciding whether to conduct a written procedure or to hold a hearing, 735
the tribunal must weigh the parties' interest in a fast determination against the parties' due process rights. Although a hearing may be time-consuming, it may be necessary to hear from witnesses. Under such circumstances it may be almost inevitable to hold a hearing.

In appropriate cases, a tribunal could consider reaching a decision di- 736
rectly without further submissions or holding a hearing. Though such cases may be rare, a conceivable scenario would be where the tribunal considers that an issue is ripe for decision *('spruchreif')* because the parties have already extensively used their possibilities for making submissions. However, even though this approach has the benefit of efficiency, it risks resulting in an unenforceable award because of a potential violation of the parties' due process rights.[1165]

VIII. Decision on the Application

If the tribunal, after having allowed the application to proceed, rules on the 737
application, it can either dismiss or admit the application. Depending on the decision, the tribunal either renders an award or issues a procedural order.[1166] The difference is that an award is immutable and carries *res judicata* effect whereas a procedural order can be changed and therefore does not have any *res judicata* effect.[1167] In addition, an award contains a final ruling on the parties' substantive rights and possibly on the jurisdiction of the tribunal, whereas procedural orders primarily concern the parties' procedural rights.[1168]

1164 For everything RAGNWALDH/ANDERSSON/SALINAS QUERO, 125.

1165 See below paras. 816–819 and 831–835.

1166 See for example art. 43.6 HKIAC Rules; art. 29.4 SIAC Rules.

1167 See below para. 759.

1168 See in general BORN, International Commercial Arbitration, 3172–3177.

1. Dismissal of the Application

738 When the tribunal dismisses the application, it concludes that a claim or defence is not manifestly without merit. By doing so, the tribunal does not ultimately decide whether or not to grant a claim. Instead, the tribunal merely decides not to exclude a claim or defence from the proceedings at this point. Accordingly, it does not render a final decision on substantive rights or on its jurisdiction. Rather, the tribunal only decides that the issue in question will be examined later in the proceedings under a standard different from 'manifest lack of merit'. Consequently, this decision should take the form of a procedural order rather than an award. With the termination of the early determination procedures, the ordinary proceedings will continue.

2. Admission of the Application

739 If the tribunal grants the application, it concludes that a claim or defence was manifestly without legal merit. Where this concerns a claim, the tribunal dismisses the claim, which means that such a decision shall take the form of an award. The same is true for a decision that affects the only defence against a claim, which means that the claim can be granted. Therefore, this decision, too, takes the form of an award.

740 On rare occasions, the tribunal can also render a procedural order where the application is neither directly relevant to the subsequent decision on the merits of the dispute nor to the jurisdiction of the tribunal. An example includes the determination of the seat of arbitration. The reason for this limited application of procedural orders is that interim determinations during an arbitral proceeding – like the determination of the applicable law or a decision on the quantum of a damage claim – also take the form of an award, albeit an interim one.[1169]

IX. Conclusion

1. Innovative Feature?

741 For all the recent attention that the feature of early determination procedures in arbitration has received, one cannot but notice that, at least in commercial arbitration, this tool did not require a fundamental change in the regulatory landscape of international commercial arbitration. On the contrary and as

1169 See on this category in general below para. 756.

has been seen, under many arbitration rules and based on many *leges arbitri,* early determination procedures would have been available already.[1170] Nevertheless, the rule revisions following the introduction of ICSID Rule 41(5) ICSID Rule 2006 helped draw the arbitration community's attention to the potential use of this tool. In addition, an early determination procedure relies on instruments readily available in 'standard' proceedings, such as a separation of issues and limited taking of evidence.[1171] As a result, one could argue that the innovative potential of this tool is limited.

Despite these observations, it would be short-sighted to deny early determination procedures having any innovative force. In practical terms, this instrument may help increase the efficiency of the proceedings once they have commenced.[1172] Furthermore, it may proactively prevent unnecessary proceedings from commencing altogether.[1173] 742

2. Advantages and Disadvantages

Some practitioners have voiced concerns that the disadvantages of early determination procedures outweigh the benefits. While some reservations are acceptable, it appears that this pessimistic conclusion is not entirely justified. 743

As explained in the previous sub-section, the prospect of a procedure to dispose of groundless claims and defences quickly and efficiently may deter such claims and defences in the first place. This, of course, may increase the efficiency of the proceedings. The positive experiences with Rule 41(5) ICSID Rules 2006 corroborate this assumption.[1174] In addition, an early determination of certain issues may promote and facilitate settlements.[1175] 744

Nonetheless, sceptics of this tool may be correct in their fear that, if employed incorrectly, early determination procedures may actually increase the time and cost of the proceedings. In particular, the likelihood of the early determination procedures temporarily suspending the rest of the proceedings may make such procedures an attractive tool for an obstructive party to prolong the proceedings. Indeed, some have voiced the fear that early determination procedures may create secondary proceedings within the main proceedings, resulting in unnecessary prolongation.[1176] However, the tribunal 745

1170 See above paras. 691-714.

1171 See above paras. 733-736.

1172 For everything WALLACH, 840.

1173 For everything RAVIV, 496-497; TIBELL, 91.

1174 Cf. HOWES/STOWELL/CHOI, 34.

1175 WALLACH, 840.

1176 ASA, Comments and Recommendations, para. 1.

can impose cost sanctions for such actions, which in turn may prevent at least some of these dilatory requests.[1177]

746 Another risk is a misuse of this tool by the tribunal when the latter grants the request despite the requirements for it not being met. Once more, this may result in less efficient proceedings. However, the same concern can be voiced for almost any procedural tool that may, in the hands of an inapt tribunal, impede the resolution of the dispute rather than facilitate it.[1178]

747 One problem that has not received any attention in legal writing so far, but that practitioners have brought up at conferences, relates to the interplay between prevailing in the early determination procedures, on the one hand, and in the overall proceedings, on the other. Defending against an application for early determination procedures may put a party into a position in which this party compromises its position for the rest of the proceedings. Although the other party may cunningly set this kind of trap, there is no reason *per se* why this problem should militate against the use of early determination procedures. If both the early determination and remaining procedures are fair, it will be difficult to hold it against a party if the other party, due to a negligent strategy, compromises its own position. Nevertheless, a slightly bitter aftertaste remains.

748 Despite these downsides, however, it is submitted that the prospect of increasing efficiency and deterring clearly unmeritorious claims and defences may justify the use of this tool. In order for it to find acceptance and be beneficial, tribunals must carefully assess whether a dispute is suitable for early determination on a case-by-case basis.

3. Alternatives

749 Irrespective of the overall positive assessment of the occasional use of early determination procedures, alternatives may sometimes lead to better results, as well as come under less scrutiny at the enforcement stage.

3.1 Bifurcation

750 A widely accepted alternative to the introduction of a separate procedure within the overall proceedings is to divide the proceedings into different stages to deal with specific issues separately.[1179] This commonly-used practice is

1177 See above paras. 566–567.

1178 Cf. WALLACH, 841–842, who is also critical of this concern about early determination procedures.

1179 CLAXTON, 160; GREENWOOD, Bifurcation and Efficiency, 422; HABEGGER, 131–132; HINCHEY, 255–256.

called bifurcation.[1180] Bifurcation is, for example, often used in cases where the tribunal, in a first phase, decides on its jurisdiction and only in a second phase, if necessary, considers the merits of the case. Another example is bifurcation into a first phase for the determination of liability and a second phase for a determination on quantum.[1181]

The advantages of this approach lie in its adherence to a widely-accepted procedure that, at the same time, may allow for significant gains in efficiency. If the tribunal determines that it does not have jurisdiction in the first place, further proceedings are superfluous.[1182] Furthermore, bifurcation is oftentimes the result of a case-management conference where the parties and the tribunal agree on bifurcation.[1183] This may differ significantly from an early determination procedure, which the parties and the tribunal have not necessarily agreed on together. 751

However, as rightly pointed out by GREENWOOD, bifurcation usually leads to efficiency gains only when the tribunal terminates the proceedings due to bifurcation (for example, for a lack of jurisdiction). When the tribunal bifurcates the proceedings and ultimately orders the proceedings to continue, the conduct of bifurcated proceedings is often less efficient than it would have been without bifurcation.[1184] 752

3.2 Other Forms of Active Case Management

More generally, the tribunal can take further steps that may prevent the need for a unilateral party application for early determination procedures. Particularly, at a case-management conference, the tribunal may express its preliminary views on the case and propose an early determination for certain issues.[1185] 753

1180 See for example CASTAGNA, 359-360; DI GIACOMO TOLEDO, 194-195.

1181 For everything CASTAGNA, 359, 369.

1182 For everything GREENWOOD, Bifurcation and Efficiency, 422.

1183 See for example C. Annex 3 DIS Rules.

1184 For everything GREENWOOD, Bifurcation and Efficiency, 425; see also CREMADES, 666; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, art. 2 para. 20.

1185 ASA, Comments and Recommendations, para. 9; cf. for this proposal further art. 2.3(b) IBA Rules on the Taking of Evidence.

Part 4
The Effects and Review of Expedited Arbitration

Chapter 12
Closure of the Proceedings: The Award and Determination of Costs

Expedited procedures may be relevant not only for the conduct of the proceedings but also for their result, i.e., the award. Unsurprisingly, due regard must also be paid to certain aspects of expedited procedures in the award-rendering phase. Yet, and as will be seen in the following, some aspects may be different for arbitral awards rendered under expedited procedures as compared to those rendered under ordinary ones. In addition, expedited procedures may also make a difference for the final determination of the costs of the proceedings. 754

This chapter will accordingly analyse in detail the effects that expedited procedures have on the award and costs allocation. After some general considerations (see below section I), a special focus will be on the meaning and consequences of time limits for rendering the final award (see below section II), summarily reasoned and unreasoned awards that are a common feature of expedited arbitrations (see below section III), as well as costs, which may often be dealt with differently under expedited procedures compared to ordinary ones (see below section IV). 755

I. General Considerations

1. Types of Awards

The final and binding decision by the tribunal on the issues submitted to it is the arbitral award.[1186] Depending on the circumstances, the tribunal may render several different awards during a proceeding. When the tribunal conclusively decides on all the issues submitted to it, the tribunal renders a final award.[1187] When it finally decides on only some of the issues submitted to it (for example, 756

1186 MOSES, International Commercial Arbitration, 201; SCHMIDT, 83; STACHER, Einführung, para. 372.

1187 See art. 189 Swiss PILA; cf. further KAUFMANN-KOHLER/RIGOZZI; 7.105; SCHMIDT, 106–108; STACHER, Einführung, para. 372.

only a part of all submitted claims), it issues a partial award.[1188] As a third option, the tribunal can conclusively rule on a preliminary question, which, however, does not amount to a final determination of an issue (for example, the law applicable to a liability claim). In this case, the tribunal renders an interim or preliminary award.[1189]

2. Termination of Proceedings

757 The rendering of an award marks the end of the proceedings for the subject matter of the award. Thus, when the tribunal renders a final award, the proceedings are terminated entirely.[1190] If, however, the tribunal renders an interim or partial award, the proceedings are terminated only for the specific issue(s) but continue for the remaining ones.[1191]

758 A consequence of the comprehensive termination of the proceedings and the rendering of the final award is the completion of the arbitrators' mandate towards the parties (so-called *functus officio*).[1192] The contractual relationship between the arbitrator and the institution, however, often continues until the institution has determined the arbitrators' fees.[1193]

3. Res Judicata Effect

759 An arbitral award generally has *res judicata* effect, which means that it is binding on the tribunal and the parties.[1194] The details of this binding effect depend on the law applicable to *res judicata*.[1195] Under Swiss law, only the operative part of the award carries *res judicata* effect. Furthermore, the *res judicata* effect binds the parties according to the issues decided in the award and excludes any further claims that are part of the subject matter of the decision *('derselbe Streitgegenstand')*.[1196]

1188 See art. 188 Swiss PILA; cf. further PFISTERER/SCHNYDER, 130; SCHMIDT, 120-122.

1189 For everything BERGER/KELLERHALS, para. 1645; GIRSBERGER/VOSER, 1459-1460; SCHMIDT, 129-132.

1190 BORN, Law and Practice, 343.

1191 PFISTERER/SCHNYDER, 130.

1192 MOSES, International Commercial Arbitration, 202-203.

1193 See JAROSSON, 448; ONYEMA, The Arbitrator's Contract, 113.

1194 MOLINA, 12 PILS, Article 189, in: Arroyo, para. 79; see also MOSES, International Commercial Arbitration, 211.

1195 SCHAFFSTEIN, Res Judicata in International Arbitration, in: Arroyo, para. 5; cf. further for an overview LANDBRECHT/WEHOWSKY, 701-703.

1196 For everything DFT 142 III 210 c. 2.1; decision Swiss Federal Tribunal no. 4A_442/2017 of 28 August 2018 c. 2.3.2; Staehelin/Staehelin/Grolimund-STAEHELIN, § 24 para. 16.

4. Irrelevance of Expedited Procedures

Expedited procedures have no effect on any of the above. Specifically, the distinction between ordinary and expedited procedures is irrelevant for the *res judicata* effect of an award. Unlike decisions for interim relief and decisions by an emergency arbitrator, the awards rendered in expedited procedures are the result of a full, potentially faster, arbitral procedure and of a full review of the admissible evidence.[1197] Hence, the foregoing considerations apply equally to arbitrations conducted under expedited procedures. 760

II. Time Limits for Rendering the Final Award

1. Overview

1.1 Expedited Procedures

Various provisions for expedited procedures set forth time limits for the rendering of the final award. The majority of these are around six months[1198], a time period that starts running not at the end of the hearing but rather at an earlier point during the proceedings, like the transmission of the file to the tribunal,[1199] the constitution of the tribunal,[1200] or the case-management conference.[1201] A notable exception are the AIAC Rules, which state that the arbitral tribunal shall declare the closure of proceedings no later than 90 days from the tribunal's delivery of the first procedural order[1202] and that the tribunal shall submit its draft final award to AIAC for technical review within 90 days.[1203] Generally, the institutions may, under exceptional circumstances, extend the time limits for rendering the award.[1204] It is significant to note that the DIS and VIAC rules expressly state that a non-compliance with the time limit does not deprive the tribunal of its jurisdiction.[1205] 761

1197 Cf. for everything BÜHLER/HEITZMANN, 148. This contrasts with decisions on interim relief or decisions by an emergency arbitrator, both of which only have to pass a *prima facie* test (see above para. 568).

1198 Cf., however, as a notable exception art. 43 SCC Expedited Rules, which sets a three-months limit starting with the transmission of the file to the tribunal, and art. 71.1 CIETAC Rules (four months after the constitution of the tribunal).

1199 Cf. for example art. 42.2(f) HKIAC Rules; art. 42.2(e) Swiss Rules.

1200 Cf. for example art. 5.2(d) SIAC Rules.

1201 Cf. for example art. 1 Annex 4 DIS Rules; art. 4 Appendix VI ICC Rules.

1202 Article 8.8(l) AIAC Rules.

1203 Article 8.8(n) AIAC Rules.

1204 Cf. for example art. 71.2 CIETAC Rules; art. 4.1 Appendix VI ICC Rules; art. 5.2(d) SIAC Rules.

1205 Article 5 Annex IV DIS Rules; art. 45.8 VIAC Rules.

1.2 Ordinary Procedures

762 Some ordinary arbitration rules also contain time limits for the rendering of the final award. Such time limits under ordinary procedures differ significantly depending on the rules,[1206] which may in part be attributed to different starting points of the timeframe depending on the rules. The longer timeframes tend to start early on in the proceedings[1207] whereas the shorter ones start running only at the end of the hearing.[1208] Similarly as under expedited procedures, the institutions may extend this time limit.[1209]

2. Relevance of the Time Limit and Consequences for Failure to Comply

763 As the foregoing has revealed, arbitrators under expedited procedures typically need to render an award within a short period of time. Under ordinary procedures, either no such time limits exist, or they are longer. The qualification and effect of time limits for rendering an award in institutional rules are disputed under Swiss law. The question is whether the parties and the arbitrators intended that, after the lapse of the time limit, the arbitrators would have no jurisdiction anymore to render an award (jurisdiction *ratione temporis*).[1210] In order to determine this, the agreement between the parties and the arbitrators (the *receptum arbitri*) needs to be interpreted. Typically, the only specific provisions on this issue are the terms in the arbitration rules imposing said time limits. One group of commentators argues that these deadlines limit the duration of the arbitrators' mandate. In other words, once the time limit has lapsed, the tribunal is *functus officio* and has no competence anymore to render an award.[1211] In contrast, other commentators under Swiss law consider such deadlines as a mere timeframe regulating the conduct of the arbitration without terminating the arbitrators' mandate.[1212]

1206 Cf. for example art. 31.1 ICC Rules (six months); art. 31.2 HKIAC rules (three months) and art. 32.3 SIAC Rules (45 days).

1207 Cf. for example art. 31.1 ICC Rules, according to which the signing or approval of the terms of reference is decisive; and art. 43 SCC Rules, referencing the transmission of the file to the tribunal.

1208 Cf. for example art. 37 DIS Rules; art. 32.3 SIAC Rules.

1209 Cf. for example art. 31.2 HKIAC Rules; art. 31.2 ICC Rules.

1210 See for everything DE VITO / FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 17.

1211 For everything LENGGENHAGER, ICC Rules, Article 31, in: Arroyo, para. 11; see in general under the ICC Rules WEBSTER/BÜHLER, para. 31.16.

1212 ARROYO, 12 PILS, Article 190, in: Arroyo, para. 42; DE VITO / FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 17; POUDRET/BESSON, para. 454.

Three court decisions have led to some clarity in this regard for Swiss law.[1213] A judgment of the Appeal Court of Basel Stadt from 1984 seems to be the only court decision to date in which the issue was decided directly. In this judgment, the court held that a provision of the then applicable ICC Rules on the time limit for rendering the award was not meant to limit the arbitrator's mandate.[1214] In a 2014 decision,[1215] the Swiss Federal Tribunal had to rule on an award that was delivered after a potential termination of the arbitrator's mandate. Although the court did not directly engage in a discussion of institutional rules providing for deadlines for rendering the award, the Swiss Federal Tribunal analysed the various actions of the parties in detail in order to conclude that they had reached a specific agreement during the arbitration whereby they reasonably intended the arbitrator's mandate to terminate at a certain point in time, with the result that after this time limit has lapsed, any award would be rendered without jurisdiction.[1216] While it might be an overly liberal interpretation of the decision to say that the court requires a specific agreement on the termination of the arbitrator's mandate rather than just a reference to arbitration rules providing for a time limit for the rendering of the award,[1217] it is submitted that the decision nonetheless reveals a reluctance of the court to affirm such termination too easily. Yet the court ultimately clarified in a 2017 decision, albeit by implication, that the parties need to have an express agreement on the term limit of an arbitrator and that a mere time limit for rendering an award is insufficient to affirm a termination of the arbitrators' mandate after the lapse of the time limit to render the final award.[1218] 764

Based on the discussion above, it is argued that the position under Swiss law is that a mere time limit in institutional rules for rendering a final award cannot be construed as an agreement of the parties to deprive the arbitrators of their jurisdiction after the lapse of this time limit. The reason for this position is that the consequences of holding otherwise would potentially be so disastrous for procedural efficiency that it cannot be reasonably presumed that the parties intended such consequences. Equating a time limit for rendering the award with the end of the arbitrators' mandate would mean that if the 765

1213 See for a general overview ROHNER, 67–69.

1214 K. KG v. M. SA, Appellationsgericht, Basel-Stadt, 2 January 1984, printed in ASA Bulletin 3 (1985), 24.

1215 Decision Swiss Federal Tribunal no. 4a_490/2013 (DFT 140 III 75; however, without the procedural history and full considerations) of 28 January 2014.

1216 For everything *ibid*, c. 4.1.

1217 In this direction, however, ARROYO, 12 PILS, Article 190, in: Arroyo, paras. 39–51.

1218 For everything Decision Swiss Federal Tribunal no. 4A_188/2016 of 11 January 2017 c. 4.2.

arbitrators failed to comply with the time limit, and if no extension (based on either a decision of the institution or the agreement of the parties) took place, the whole arbitration would have been in vain. The parties would then have to initiate another dispute-resolution process.[1219]

766 The counterargument would be that equating the time limit for rendering the award with a temporal limit on the arbitrators' mandate would be a strong incentive for the arbitrators to render an award within this limit. Hence, the parties would have intended an efficient decision-making process of the tribunal. Yet weighing an understandable desire for efficient decision-making against the effect of an award rendered without jurisdiction *ratione temporis* should lead to the conclusion that the parties would normally not have intended the latter effect.[1220]

767 Consequently, time limits for rendering the award should reasonably be interpreted as mere provisions regulating the decision-making process of the arbitrators instead of limiting their jurisdiction. The significance of provisions of this kind is that they are a general way to determine if the tribunal complied with the duty to efficiently conduct the proceedings and to render the award. With this function, these provisions may have financial consequences that will be analysed in the next sub-section, but do not affect the validity of the award.

768 It must be noted that an interpretation of the arbitration agreement is necessary only where the rules themselves do not qualify the respective provisions. In contrast, where the rules expressly state the consequence of exceeding the time limit (for example, art. 45.8 VIAC Rules), such a provision will be decisive for the consequences of non-compliance with the time limit.

3. Consequences of Non-Compliance with the Time Limit

769 Based on the above-mentioned qualification of time limits for rendering the award as mere provisions regulating the conduct of the proceedings, non-compliance with such a time limit does not render the award invalid, unless the rules provide differently. Nonetheless, financial consequences are possible, as shall be seen in the following.

3.1 For the Arbitrators

770 Some institutional rules provide for a reduction of the tribunal's fees where the tribunal did not conduct the proceedings with sufficient efficiency.[1221]

1219 See for everything also DE VITO/FAVRE SCHNYDER, in: Zuberbühler/Müller/Habegger, art. 42 para. 17; SACHS/PRÖSTLER, 290.

1220 For everything MOSES, International Commercial Arbitration, 183; ROHNER, 68.

1221 See for example art. 37 DIS Rules; art. 2.2 Appendix III ICC Rules.

One case where this applies is that of non-compliance with the time limit for rendering the award. Thus, a belated rendering of the final award may well give rise to a reduction of the tribunal's fees.[1222]

In addition to this sanction, the tribunal may become liable for damages to the parties for a violation of the contract between itself and the parties. Yet, as already pointed above in para. 230, such contractual liability is subject to various hurdles. For instance, the tribunal could be exempt from liability based on a provision in the rules. Moreover, an aggrieved party would need to prove that it actually suffered a damage due to the violation of contract, and it would need to be examined whether the tribunal was actually at fault or whether the delay was exclusively the consequence of a party's dilatory tactics. 771

3.2 For the Parties

In the absence of express agreements on the duty to an efficient conduct of an arbitration, it seems that the parties cannot be directly held accountable if they do not arbitrate efficiently, which may ultimately lead to a belated rendering of an award. In particular, it appears that the general duty to cooperate or arbitrate in good faith, as enshrined in arbitration rules, is a not sufficient basis for establishing a contractual liability.[1223] Provisions of this sort are either too vague or cannot be understood as imposing such liability.[1224] 772

What seems possible, though, is an extra-contractual liability based on art. 41 CO. According to this provision, any person who wilfully or negligently causes damage to another unlawfully is liable to provide compensation (para. 1), and a person who wilfully causes damage to another in an immoral manner is liable to provide compensation as well (para. 2). A liability under para. 1 of the provision for purely financial damages requires the existence of a statutory provision that is supposed to specifically protect another person precisely from damages that this person suffered (so-called protective provision).[1225] Under Swiss law, no such provision seems to exist for the conduct of arbitration proceedings. Yet it is accepted in Swiss legal doctrine and writing that an abusive exercise of procedural rights in litigation proceedings may give rise to a damage claim due to an action in immoral manner.[1226] 773

1222 For everything SACHS/PRÖSTLER, 291-293.

1223 See above paras. 192-212.

1224 Cf. FRY/GREENBERG/MAZZA, para. 3.1537.

1225 DFT 141 III 527 c. 3.2; HUGUENIN, para. 1951.

1226 Judgment of the Swiss Federal Tribunal no. 4C.353/2002 of 3 March 2003, c. 5.1; BK ZPO I and II-STERCHI, art. 52 para. 74; BSK ZPO-GEHRI, art. 52 para. 17 (though not expressly referring to para. 2 of art. 41 CO); SCHNYDER/PORTMANN/MÜLLER-CHEN, para. 170.

774 Accordingly, where extra-contractual claims are subject to Swiss law, an abusive procedural action of a party that leads to a belated rendering of the final award may, theoretically, give rise to a damage claim based on art. 41 para. 2 CO. A requirement, however, is that the party making such claims can prove it suffered a damage due to the delay. This will likely be difficult to establish.[1227]

775 By the same token, it would be possible to base other damage claims on art. 41 para. 2 CO where a dilatory procedural tactic by a party caused damage to the other party, irrespective of the compliance with deadlines for rendering the award. Once again, though, one of the main difficulties may be to prove damages incurred as a result of dilatory tactics.

4. Evaluation

776 Time limits for rendering an award already exist under ordinary provisions. Thus, the innovative value of this tool is manageable. Whether it is the right solution to the problems that have led to the increase in costs and time of arbitration proceedings depends on institutional practice concerning the extension of the time limits.

777 As commentators have pointed out, institutions in ordinary procedures routinely extend the time limits for the rendering of the final award.[1228] However, institutions are understandably more reluctant under expedited procedures to extend the time limit.[1229] It goes without saying that an excessive granting of time extensions defeats the purpose of accelerating the arbitral process. Yet such extensions may be justified where the proceedings become increasingly complex and, in addition, include numerous procedural requests. Not granting extensions would result in the tribunal rushing through the proceedings, leading to presumably questionable results regarding the parties' due process rights and the overall decision of the dispute.

778 A different evaluation may result, however, when the institution extends the time limit after the conclusion of the proceedings, i.e., for the phase of drafting and rendering the final award. While there may be legitimate reasons to occasionally extend the time limit at this stage of the arbitration, this possibility provides an incentive for arbitrators to not give the highest priority to the expedient drafting and rendering of the final award. This risk may, eventually, prevent an increase in the efficiency of the process.

1227 See above para. 771.

1228 HAPP, Chapter 2.07, in: Flecke-Giammarco/Boog/Elsing/Heckel/Meier, para. 12; LENGGENHAGER, ICC Rules, Article 31, in: Arroyo, para. 12; RAGNWALDH/ANDERSSON/SALINAS QUERO, 136; WEBSTER/BÜHLER, art. 31.16.

1229 See for example MOSER/BAO, para. 12.45.

Depending on the stage of the arbitration at which the time extension takes place, the measure of time limits is only a partial remedy to the problems that have led to an increased demand for expedited procedures. Where the extension occurs while the proceedings are still ongoing, the institution that grants the extension must take into account both the conduct of the proceedings by the tribunal and the conduct of the parties. At this stage, factors like due process paranoia, misuse of party autonomy, or increased judicialisation may be relevant and may even have contributed to the length of the proceedings. If, however, the extension occurs after the closure of the proceedings, the aforementioned factors are not directly relevant. Instead, it will be the tribunal's expedience in drafting and rendering the award that is primarily decisive. 779

III. Summarily Reasoned and Unreasoned Awards

1. Overview

1.1 Expedited Procedures

Many expedited procedure rules contain special provisions regarding the reasons included in the award. The majority contain terms to the effect that a tribunal shall include summary reasons in the award, unless the parties have agreed on no reasons at all.[1230] As an alternative, the SCC Expedited Rules require the tribunal to include reasons only if a party asks for it,[1231] whereas under the AIAC Rules, the tribunal has to render a fully reasoned award.[1232] 780

In contrast to these express provisions, other rules do not contain any special terms compared to the ordinary procedures under these rules. Examples include the ICC Rules[1233] and the DIS Rules.[1234] 781

1.2 Ordinary Procedures

Under ordinary procedures, the tribunal must usually render a fully reasoned award, unless the parties have agreed otherwise.[1235] 782

1230 Article 42.2(g) HKIAC Rules; art. 21.3(d) JAMS International Rules; art. 48.2 KCAB International Rules; art. 5.2(e) SIAC Rules; art. 41.2(f) Swiss Rules.

1231 Article 42.1 SCC Expedited Rules.

1232 Rule 8.12 in connection with Rule 33.5 AIAC Rules.

1233 Cf. Appendix VI ICC Rules.

1234 Cf. art. 5 Annex 4 DIS Rules.

1235 Article 39.1(ii) DIS Rules; art. 35.4 HKIAC Rules; art. 32.2 ICC Rules; art. 34.2 JAMS International Rules; art. 32.4 SIAC Rules; art. 42.1 SCC Rules; art. 34.3 Swiss Rules; art. 36.1 VIAC Rules.

2. Right to Be Heard

783 According to the constant jurisprudence of the Swiss Federal Tribunal, the right to be heard in arbitration does not include the right to a reasoned decision,[1236] although the court has required (at least in earlier decisions) that the arbitrators have a minimum duty to assess the arguments relevant to the outcome of the case.[1237] While the parties have a right to the tribunal hearing and assessing their arguments in contradictory proceedings, the rendering of an award is not a contradictory proceeding. Therefore, there is no need for the tribunal to include reasons in the award.[1238] Similarly, the parties can agree *ex ante* that the tribunal does not have to render a reasoned award.[1239] Hence, an unreasoned or summarily reasoned award is compatible with the parties' right to be heard under Swiss law, although some authors have criticised the Swiss Federal Tribunal's approach.[1240]

3. Evaluation

784 The idea of limiting extensive reasoning of awards as a way to increase the efficiency of the proceedings is neither particularly new nor confined to expedited proceedings. Practitioners have repeatedly advocated for a limitation of reasons of awards, as most succinctly put by KAPLAN: *'[a]wards are not intended to be PhD theses'*.[1241] Indeed, it may often be enough for the parties to know why they have lost or won a case on the merits.[1242] This may be especially true in industries that continue to see arbitration as a quick and easy form of dispute resolution.[1243]

1236 DFT 134 III 186 c. 6.1; 133 III 235 c. 5.2; 130 III 125 c. 2.2; 128 III 234 c. 4b; decisions Swiss Federal Tribunal no. 4A_54/2015 of 17 August 2015 c. 4.1; no. 4A_178/2014 of 11 June 2014 c. 5.1; this contrasts to a certain extent with art. 189 para. 2 Swiss PILA, which requires the award to be reasoned. Yet, according to art. 189 para. 1 Swiss PILA, the award needs to be in the form agreed by the parties. Hence, if the parties agree on arbitral rules providing for a limitation of reasons, the tribunal may rely on this agreement, see LATZEL, para. 5.

1237 Decision Swiss Federal Tribunal no. 4A_669/2012 of 17 April 2013 c. 3.2.1; cf. further LATZEL, para. 62.

1238 For everything BSK IPRG-PFISTERER, art. 190 para. 77.

1239 BSK IPRG-WIRTH/MAGLIANA, art. 189 para. 42; GIOVANNINI, Reasoning, 89; LATZEL, 25.

1240 GIRSBERGER/VOSER, para. 1524; GÖKSU, para. 1676; LATZEL, para. 59.

1241 KAPLAN, The Arbitrator and the Arbitration Procedure, 105; cf. further LATZEL, para. 28.

1242 KAPLAN, The Arbitrator and the Arbitration Procedure, 105; cf. further GIOVANNINI, Reasoning, 89; STRONG, 47.

1243 For example the commodity (trading) industry, see LATZEL, para. 27; TRABALDO-DE MESTRAL, Arbitrating Commodity Trading, Shipping and Related Disputes, in: Arroyo, para. 3.

Nevertheless, considering reasoned awards to be unnecessary or even an obstacle does not seem correct. Reasons may be important when a party applies for a setting aside of the award, which is particularly pertinent for reasons relating to the jurisdiction of the tribunal because a setting aside for lack of jurisdiction is possible, whereas a setting aside due to an incorrect decision on the merits is usually not possible,[1244] Furthermore, reasons may help to counter arguments that an award was contrary to the public policy of a jurisdiction.[1245] Lastly, also with a view to transnational enforcement, a well-reasoned award may prevent arguments against the validity of the arbitral process in a foreign jurisdiction.[1246] 785

Apart from these specific effects of reasoned awards on withstanding judicial review, another benefit of reasoned awards is that they may improve the overall quality of the decision. The justification is that the tribunal will be aware that the parties will see its reasoning. This may motivate and discipline the tribunal to reach a transparent and comprehensible decision.[1247] 786

As a result of these considerations, it is argued that a limitation of reasons may without doubt increase the efficiency of the arbitral process. Yet, at least summary reasons may be helpful to either avoid setting aside and enforcement proceedings altogether or at least facilitate such proceedings, ultimately shortening the process for legal protection as a result of arbitration. Accordingly, it is submitted that the institutional rules that require summary reasons represent a sensible middle ground. 787

The possibility of a completely unreasoned award should, however, not be dismissed either. This option may further increase the efficiency of the arbitral proceedings, although it may also, in certain cases, make the defence of the party that prevailed in the arbitration (the award creditor) in subsequent setting aside and enforcement proceedings more difficult and time-consuming. Especially, where the parties have validly waived the right to have the award set aside, unreasoned awards may prove useful.[1248] 788

In any event, regardless of the benefits and challenges of this feature, the limiting or complete exclusion of reasons in awards is an interesting aspect of 789

1244 See art. 34 para. 2 UNCITRAL ML; art. 190 para. 2 Swiss PILA; yet see as an exception 69 English Arbitration Act.

1245 See BORN, International Commercial Arbitration, 3298-3299.

1246 STRONG, 46; however, cf. GIOVANNINI, Reasoning, 90 (with reference to decision Swiss Federal Tribunal no. 4A_198/2012 of 14 December 2012, c. 2.2), who correctly points out that a lack of reasons may also make an attack on the award more difficult.

1247 For everything LATZEL, paras. 21-31; STRONG, 46-47.

1248 For everything LATZEL, para. 64. For the sake of completeness, the agreement on an unreasoned award must be differentiated from a waiver to have the award set aside; cf. BERGER/KELLERHALS, para. 1487.

expedited procedures. Unlike previously examined measures, this feature is not aimed against an unwise use of party autonomy or guerrilla tactics. Instead, it focuses on the arbitrators and the additional time required by the arbitrators to finalise a reasoned award. Therefore, this measure does not primarily focus on the commonly identified reasons for longer and more expensive proceedings. Yet it can be seen in the wider context of judicialisation: as pointed out by KAPLAN, awards used to be much shorter but have evolved over time to resemble court judgments, including extensive reasons.[1249] Reducing the amount of reasons required in an award may be a reasonable option to limit the effects of such judicialisation where it is of no added value.

IV. Costs

790 The closure of the proceedings and rendering of the award is also the ordinary point in time for the determination of the costs of the arbitration. These include the costs that the parties owe as determined by the tribunal in an award (see below sub-section 1), the costs that the parties owe as determined by the arbitral institution, i.e. administrative fees (see below sub-section 2), and the fees that the arbitrators receive for their work (see below sub-section 3).

1. Costs Determined by the Tribunal in an Award

791 In the (final) award, the tribunal will ordinarily determine to what extent one party has to pay the costs incurred by the other party in the arbitration (provided it has not done so already).[1250] Absent a party agreement, tribunals will generally rule that the losing party has to pay (a share of) the costs that the prevailing party incurred.[1251] Ordinarily, expedited procedures have no effect on this practice.

792 As mentioned earlier, the tribunal may, independently of the outcome of the proceedings, sanction dilatory tactics of the parties by imposing costs caused by these tactics.[1252] The tribunal's right to impose such cost sanctions exists irrespective of the type of procedure, i.e., ordinary or expedited. However, it is debatable whether a tribunal should be stricter in imposing cost sanctions for behaviour resulting in delays in expedited procedures as com-

1249 KAPLAN, The Arbitrator and the Arbitration Procedure, 105; see for a detailed data analysis DASSER/IGBOKWE, 293-294.

1250 Cf. BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 9.95; art. 38 Swiss Rules.

1251 BORN, Law and Practice, 356-359.

1252 See above paras. 471 and 567.

pared to ordinary procedures. According to the view submitted in this thesis, the standard for imposing cost sanctions should be the same irrespective of the procedure. A deliberate obstructive action resulting in delay and extra costs is not more egregious and thus more sanction-worthy just because it occurred under expedited procedures.

2. Administrative Fees

The arbitral institution will also upon the rendering of the award decide on its administrative fees, although in practice the institutions usually demand advance payments from the parties already during the proceedings in the amount of the presumable administrative fees.[1253] Some rules provide for lower administrative fees when an arbitration is subject to expedited procedures as compared to ordinary procedures.[1254] Other rules, however, provide for the same fee scales.[1255] Unlike with the arbitrator fees,[1256] it is submitted that the reduced fees in expedited procedures are reasonable because the institution will not be under increased pressure under expedited procedures and the, on average, lower amounts in dispute justify a (slight) reduction of the administrative fees. 793

3. Arbitrator Fees

At the end of the proceedings, the institution will also determine the final arbitrator fees.[1257] Certain institutional rules provide for lower fees of the arbitral tribunal under expedited procedures in comparison to ordinary procedures.[1258] 794

Reducing the fees of the arbitrators apparently is a reasonable means for reducing the costs of the proceedings. Yet the previously discussed preference for a sole arbitrator over a three-member tribunal may be even more cost-effective.[1259] Furthermore, and as already mentioned, the fees of the 795

1253 See for example art. 37 ICC Rules.

1254 Cf. for example art. 3 Appendix III ICC Rules; see further above para. 128, including the exceptions mentioned there.

1255 Cf. for example art. 6.1 Appendix B Swiss Rules (though providing for higher fees in case of three arbitrators as compared to a sole arbitrator).

1256 See below paras. 795-796.

1257 Cf. for example ARROYO, ICC Rules, Article 38, in: Arroyo, para. 1.

1258 See for example Arbitrator's Fees Expedited Procedure Appendix III ICC Rules.

1259 CLAXTON, 152; ICC, Techniques for Controlling Time and Costs 2018, para. 9; KAPLAN, The Arbitrator and the Arbitration Procedure, 101.

arbitrators are often lower than the fees for party representation. Hence, the overall effect of a reduced fee for the arbitrators is limited.

796 Moreover, applying a reduced fee schedule for the arbitrator(s) under expedited procedures is questionable. The underlying idea behind this modified fee schedule is that expedited procedures lead to an easier resolution of the dispute. The persuasiveness of this statement is limited at best. With tight time limits, a sole arbitrator is under increased pressure while conducting the proceedings.[1260] Furthermore, combining the desire for efficiency with a high-quality arbitration is often a challenging task that may require an experienced arbitrator. The idea of reducing the fees for this extra effort must seem misguided from the arbitrator's perspective.[1261]

797 Finally, and as previously described, some institutions retain the right to reduce the fees of the tribunal, *inter alia* in order to sanction an inefficient conduct of the proceedings.[1262] While the details of this mechanism depend on the respective institutional rules, it can be said at this point that a sanctioning of the tribunal should *not automatically* occur where a tribunal has to ask for a time extension for rendering the final award. On the contrary, a case-by-case assessment of the conduct of the arbitral proceedings is necessary for determining whether the tribunal should have acted more efficiently.

V. Conclusion

798 The two most salient features of expedited procedures affecting awards, namely time limits and a limitation on the degree of reasons required, are both relevant under ordinary procedures as well. As such, these features are not truly revolutionary. Nevertheless, both may be beneficial for shortening the overall time of the proceedings even though they only become relevant at the very end of the arbitral process. Finally, expedited procedures lead to some peculiarities in the determination of the costs of the arbitral proceedings, although the effect of expedited procedures on this aspect is limited.

1260 Also critical WEBSTER/BÜHLER, para. 30.17, who point out that in expedited ICC arbitrations, the sole arbitrator will at least not have to draft terms of reference; yet this does not warrant a fee reduction.

1261 For everything BÜHLER/HEITZMANN, 144.

1262 See above para. 770.

Chapter 13
Setting Aside and Enforcement Proceedings

The rendering of an award may mark the end of the arbitral proceedings but not necessarily the end of the legal proceedings concerning the underlying dispute. On the contrary, the award may be subject to judicial review by state courts in setting aside and enforcement proceedings when the award debtor opposes the binding legal effect of an award. This may be relevant for any type of arbitral proceedings but is of particular importance for awards rendered in expedited proceedings. Accordingly, this chapter will examine the subject of setting aside and enforcement proceedings in more detail. The scope of this chapter is limited to issues that are of special relevance under expedited procedures. 799

After analysing the relevant legal framework and defining the scope of ana-lysis (below section I), this chapter will analyse the setting aside (below section II) and enforcement of (foreign) awards rendered under expedited procedures (below section III). 800

I. Relevant Legal Framework and Scope of Analysis

1. General Considerations

According to the modern understanding of arbitration, only the courts at the seat of arbitration are competent to review the validity of an award in setting aside proceedings. Therefore, the legal provisions of the seat of arbitration determine if and how an award may be set aside.[1263] 801

For the enforcement of awards, one must distinguish between the enforcement of awards in the jurisdiction that already served as the seat of arbitration (domestic enforcement)[1264] and the enforcement of awards that were 802

1263 For everything GREENBERG/KEE/WEERAMANTRY, para. 9.22; HILL, 167; cf. further art. 34 UNCITRAL ML.

1264 See for Switzerland merely art. 193 Swiss PILA; for Germany art. 1060 German CPC; in general LANDBRECHT/WEHOWSKY, 683.

rendered in another jurisdiction (transnational enforcement).[1265] The relevant legal framework is always the one belonging to the jurisdiction where the award creditor seeks enforcement of the award.

803 The provisions on domestic enforcement differ, ranging from no particular provisions at all[1266] to a reference to the NYC[1267] or specific rules.[1268] For the international enforcement of awards, most jurisdictions have not enacted any specific provisions but usually only reference the NYC.[1269]

804 So far, it does not appear that any jurisdiction has adopted provisions on the setting aside and refusal of enforcement of awards that specifically apply to awards rendered under expedited procedures. Consequently, the relevant legal framework for both setting aside and enforcement of awards is not different from the one applicable to awards rendered in ordinary procedures.

2. The Swiss Legal Framework

805 In Switzerland, the relevant provisions for the setting aside of an award rendered in international arbitration proceedings are arts. 190–192 Swiss PILA. Of particular relevance is art. 190 Swiss PILA, which sets out the grounds under which an award may be set aside. Pursuant to this provision, the Swiss Federal Tribunal is exclusively competent for a decision on such a setting aside.

806 According to art. 190 para. 2 Swiss PILA, an award may be set aside if the sole arbitrator was not properly appointed or the arbitral tribunal was not properly constituted (lit. a), the arbitral tribunal incorrectly accepted or declined jurisdiction (lit. b), the arbitral tribunal's decision went beyond the claims submitted to it or failed to decide one of the items of the claim (lit. c), the principle of equal treatment of the parties or the right of the parties to be heard was violated (lit. d), or the award is incompatible with public policy (lit. e).

807 For the international enforcement of awards rendered in a jurisdiction other than Switzerland (foreign awards), art. 194 Swiss PILA declares the NYC applicable. According to the NYC, a jurisdiction where enforcement of an award is sought may, upon the request of the party against whom enforcement is sought, refuse enforcement if the parties have not concluded a valid arbitration agreement (art. V para. 1 lit. a), the party against whom enforcement is sought was unable to present its case (art. V para. 1 lit. b), the award deals with

1265 See for Switzerland art. 194 Swiss PILA; in general LANDBRECHT/WEHOWSKY, 684.

1266 Which is essentially the case in Switzerland, cf. LANDBRECHT/WEHOWSKY, 688–689.

1267 For example art. 194 Swiss PILA.

1268 See for Germany art. 1060 German CPC; section 84 Hong Kong AO.

1269 Cf. for an overview LANDBRECHT/WEHOWSKY, 688–689.

a difference not contemplated by or not falling within the terms of the submission to arbitration (art. V para. 1 lit. c), the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (art. V para. 1 lit. d), the award has not yet become binding on the parties or has been set aside (art. V para. 1 lit. e). In addition, the jurisdiction where enforcement is sought may *ex officio* refuse enforcement of the award if the subject matter of the dispute is not capable of settlement by arbitration (art. V para. 2 lit. a) or recognition or enforcement of the award would be contrary to the public policy of that country (art. V para. 2 lit. b). These grounds for refusing the enforcement of an award under the NYC largely coincide with the grounds set out in art. 190 Swiss PILA, which is why reference will be made in appropriate cases to the NYC and *vice versa*.

808 It is important to note that challenging the binding force of awards in Switzerland is difficult regardless of whether a defence against an award is sought in setting aside or enforcement proceedings. The Swiss Federal Tribunal adopts a very strict approach towards applications to have an award set aside, with only a small percentage of applications being successful.[1270] Similarly, the NYC has been said to follow a pro-enforcement regime to which Switzerland is committed.[1271]

3. Scope of Analysis

809 The ensuing analysis will address issues that are particularly relevant for the potential setting aside and enforcement of awards rendered under expedited procedures. Within the analysis, the focus will be on an examination of specific grounds for setting aside an award and refusing its enforcement. The grounds include defects in the constitution of the tribunal (below paras. 810-812 and 836-839), a lack of jurisdiction (below paras. 813-815 and 830), violations of due process rights and agreed-upon procedures (below paras. 816-819 and 831-835), as well as violations of public policy (below paras. 820-822 and 840-841). Moreover, this analysis extends to certain additional factors like waivers where this is necessary for a comprehensive analysis. What this analysis will not cover, however, are general issues of setting aside and enforcement proceedings, including the procedure.

1270 For everything HOFBAUER, History of Arbitration, in: Arroyo, para. 27, with reference to DASSER/WÓJTOWICZ, 277-280.

1271 BORRIS/HENNECKE, in: Wolff, NYC, art. V para. 5; decision Swiss Federal Tribunal no. 5A_409/2014 of 15 September 2014 c. 5.2-5.3; BÜHLER/CARTIER, 12 PILS, Article 194, in: Arroyo, para. 118.

II. Setting Aside of Awards

1. Relevant Grounds for Setting Aside

1.1 The Sole Arbitrator Was Not Properly Appointed or the Tribunal Was Not Properly Constituted (art. 190 para. 2 lit. a Swiss PILA)

810 The first potential setting aside ground is that the sole arbitrator was not properly appointed or the tribunal was not properly constituted. This ground primarily covers situations where one or several arbitrators lacked impartiality or independence. Yet it also covers situations where the appointment of the sole arbitrator or constitution of the tribunal was in violation of the parties' agreement.[1272] For the purpose of this analysis, only the latter aspect is relevant.

811 The possibility for the arbitral institution to appoint a sole arbitrator in expedited procedures has been extensively analysed above in paras. 528–545. In accordance with this analysis, in instances where an interpretation of the arbitration agreement by the setting aside court leads to the conclusion that the parties had agreed on a three-member tribunal but the institution nevertheless appointed a sole arbitrator, the requirements for this setting aside ground are met.

812 This setting aside ground is of formal nature, which means that the Swiss Federal Tribunal will set aside the award regardless of whether it affected the outcome of the proceedings or not.[1273] However, it is possible for a party to forfeit the defect if said party does not oppose the appointment of a sole arbitrator after this party was made aware of the defect. Without such prompt objection, the same party cannot subsequently successfully rely on this defect.[1274]

1.2 The Tribunal Incorrectly Assumed or Denied Jurisdiction (art. 190 para. 2 lit. b Swiss PILA)

813 The second ground for setting aside comprises several reasons based on which a tribunal incorrectly assumes or denies jurisdiction. These reasons include a lack of consent to arbitration, a lack of objective arbitrability, a lack of capacity to enter into an arbitration agreement, as well as a rendering of the award after the termination of the arbitrators' mandate.[1275] At first glance, this ground for setting aside could be relevant in case a tribunal accepts or

1272 For everything DFT 139 III 511 c. 4; ARROYO, 12 PILS, Article 190, in: Arroyo, paras. 18–19; BERGER/KELLERHALS, paras. 1706–1707.

1273 DFT 136 III 605 c. 3.3.2; BERGER/KELLERHALS, para. 1710; ZK IPRG-OETIKER, art. 190 para. 39.

1274 For everything DFT 126 III 249 c. 3c–3d; KAUFMANN-KOHLER/RIGOZZI, para. 8.135.

1275 For everything decision Swiss Federal Tribunal no. 4A_310/2016 of 6 October 2016 c. 3.1; BSK IPRG-PFISTERER, art. 190, para. 41; GÖKSU, 2049.

denies jurisdiction based on a decision (not) to apply expedited procedures, or in case a tribunal fails to render an award within the deadline to do so.

814 However, a closer examination of the various elements of this ground for setting aside reveals that this ground is of little relevance to expedited procedures based on the analysis above. As has been established, the choice of expedited procedures is a procedural agreement rather than a jurisdictional one.[1276] Accordingly, when the tribunal incorrectly employs expedited procedures instead of ordinary ones, the ensuing award cannot be challenged for a lack of jurisdiction of the tribunal.

815 By the same token, as has been shown above in paras. 763-768, a time limit for the rendering of the final award in institutional rules is not supposed to limit the arbitrator's mandate but rather constitutes only a procedural rule. Consequently, a final award rendered after the lapse of this limit cannot, based on this delay, be successfully challenged for a lack of jurisdiction *ratione temporis*.

1.3 Violation of the Right to Equal Treatment and the Right to Be Heard (art. 190 para. 2 lit. d Swiss PILA)

816 An award may be set aside for a failure to respect the parties' right to equal treatment and to be heard in an adversary procedure as specifically enumerated in art. 190 para. 2 lit. d Swiss PILA. The contents of these rights have been discussed in detail above in paras. 284-292. Based on the specific enumeration, the Swiss Federal Tribunal has concluded that other procedural decisions of the tribunal that do not amount to a violation of the right to equal treatment and to be heard, such as a mere deviation from the agreed arbitral procedure, do not justify a setting aside of the award.[1277] Consequently, if a tribunal disregards a specific agreement by the parties or provision in the arbitral rules as to the conduct of the arbitration, this decision does not justify a setting aside of the award as long as it did not violate the parties' right to equal treatment and to be heard.[1278]

817 Similarly to a defective composition of the tribunal, a violation of the parties' right to equal treatment and to be heard may be forfeited. If a party does not promptly object to the violation towards the tribunal, said party may no longer rely on this defect in setting aside proceedings.[1279]

1276 See above para. 442.

1277 DFT 126 III 249 c. 3b; 117 II 346; decision Swiss Federal Tribunal no. 4P.196/2003 of 7 January 2004 c. 4.2.2.2; see in detail above para. 242.

1278 GABRIEL, Party Agreements, 167-168.

1279 For everything decisions Swiss Federal Tribunal no. 4A_54/2019 of 11 April 2019 c. 3.1; 4A_407/2012 of 20 February 2013 c. 3.1; GIRSBERGER/VOSER, para. 1618.

818 Moreover, the right to equal treatment and the right to be heard have traditionally been considered formal in nature. This means that once a violation of these rights was established, the Swiss Federal Tribunal would set aside the award irrespective of whether the violation had any effect on the award.[1280] Yet, the court has in recent years undergone a shift in perspective and, even though it still maintains the formal nature of these rights, it now refuses to set aside the award when it does not see what influence the violation had on the decision.[1281]

819 As has been pointed out numerous times in this thesis, expedited procedures may entail an increased risk of violation of the parties' due process rights.[1282] However, all of the above factors should give a tribunal seated in Switzerland comfort to take robust case-management decisions when necessary – including, or in particular, under expedited procedures.[1283] This shall not be a *carte blanche* for any rough justice,[1284] but it may support arbitrators when they have to deal with parties that are determined to complicate the proceedings.

1.4 The Award Is Incompatible with Public Policy (art. 190 para. 2 lit. e Swiss PILA)

820 Whereas the previously discussed grounds concern the procedure of the arbitration, an incompatibility with public policy at least partially concerns the outcome of the case, i.e., the merits. An arbitral award is incompatible with public policy if the result of the award (not just its reasoning) disregards the fundamental legal or moral concepts that apply in all civilised nations.[1285] The Swiss Federal Tribunal has clarified that art. 190 para. 2 lit. e Swiss PILA is not limited to a specific form of Swiss public policy but rather extends to the concept of universal transnational public policy. This includes principles of *pacta sunt servanda,* the principle of good faith, the prohibition of an abuse of rights, as well as a prohibition of discrimination.[1286]

1280 See for example decision Swiss Federal Tribunal no. 4A_247/2017 of 18 April 2018 c. 5.1.3. ZK IPRG-OETIKER, art. 190 para. 87.

1281 4A_424/2018 of 29 January 2019 c. 5.2.2 and no. 4A_247/2017 of 18 April 2018, c. 5.1.3; cf. further above para. 295.

1282 See for examples above para. 591.

1283 Cf. for example BAIZEAU with reference to decision Swiss Federal Tribunal no. 4A_294/2008 of 28 October 2008.

1284 See for the terminology above fn. 991.

1285 DFT 144 III 120 c. 5.1; 138 III 322 c. 4.1; decision Swiss Federal Tribunal no. 4A_132/2016 of 30 June 2016 c. 3.2.1; STACHER, Einführung, para. 464.

1286 For everything *ibid*.

In addition to this substantive aspect, the Swiss Federal Tribunal further clarified that the concept of public policy also includes procedural public policy.[1287] A prominent element of this aspect includes the principle of *res judicata*.[1288] The court also held that the right to a fair tribunal is part of procedural public policy.[1289] Furthermore, the Swiss Federal Tribunal concluded that the 'right to a fair' trial was an additional aspect. Yet, it is unclear what this aspect consists of in addition to the specific procedural grounds listed in the other provisions of art. 190 para. 2 Swiss PILA.[1290] 821

Expedited procedures themselves should not give rise to pleas of a violation of substantive public policy. However, as observed by other commentators, procedural measures increasing the efficiency of the proceedings and deviating from the norm may prompt concerns of procedural public policy.[1291] Thus, it is conceivable that expedited procedures might be found to be incompatible with the concept of a fair trial. Yet, it seems highly unlikely that the features of expedited procedures described in this thesis generally qualify as violations of a fair trial. The Swiss Federal Tribunal has rarely had to decide on awards rendered under expedited procedures and, so far, has not given any indication that it treats these awards any differently or that such awards may be particularly susceptible to violating procedural public policy.[1292] As a result, it is difficult to see how expedited procedures in general may violate procedural public policy. 822

2. Ground(s) of No Particular Relevance

Rulings of the tribunal that are not in accordance with the claims submitted to it (art. 190 para. 2 lit. c Swiss PILA) are of little relevance in the context of expedited procedures. It goes without saying that this defect may be relevant in setting aside and enforcement proceedings concerning awards that were rendered under expedited procedures. However, this relevance will hardly stem from the type of procedure that led to the rendering of the award but rather from other factors. As a result, these points will not be addressed in this analysis. 823

1287 DFT 144 III 120 c. 5.1; 126 III 249 c. 3a; cf. further ZK IPRG-OETIKER, art. 190 paras. 21-24.

1288 DFT 136 III 345 c. 2.1; 128 III 191 c. 4a; BERGER/KELLERHALS, para. 1780.

1289 Decision Swiss Federal Tribunal no. 4P.143/2001 of 18 September 2001 c. 3a.aa.

1290 For everything BERGER/KELLERHALS, para. 1782.

1291 In the context of early determination procedures see DERAINS, 6.

1292 Cf. for everything decisions Swiss Federal Tribunal no. 4A_188/2016 of 11 January 2017; 4A_544/2014 of 24 February 2015; 4A_294/2008 of 28 October 2008.

3. Waiver

824 In order to avoid setting aside proceedings altogether, the parties may also waive their right to seek setting aside in Switzerland. They may either do so before (*ex ante* waiver) or after the notification of the award (*ex post* waiver). Waiving the right to a setting aside of the award may significantly increase the efficiency of the overall dispute resolution because it may eliminate at least one further proceeding.[1293] These waivers raise some additional questions, however. Insofar as these questions are relevant for expedited procedures, they will be analysed in the following sub-section.

3.1 Ex Ante Waiver

825 Article 192 Swiss PILA contains the possibility of an *ex ante* waiver of a setting aside of the award. According to this provision, if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive their right to request a setting aside. Alternatively, they may limit this right to one or several of the grounds listed in art. 192 para. 2 Swiss PILA (para. 1). If the parties have agreed on such a full waiver, and if the award is to be enforced in Switzerland, the NYC applies by analogy (para. 2).

826 The waiver may either be included in the arbitration agreement or form a separate agreement. Regardless of the vessel, the waiver needs to be in writing and express. The meaning of 'express' has been the subject of debate. However, it is clear nowadays that the parties do not have to specifically reference art. 192 Swiss PILA and declare to waive the right to the setting aside of the award. Rather, it suffices if the parties record their common intention to waive any remedy at the seat of arbitration against the award.[1294] This standard is not met when the parties merely agree on arbitration rules that contain provisions for general waivers of a recourse against the award.[1295] By the same token, the mere fact that the parties express a desire for an efficient dispute resolution, be it by agreeing on expedited procedures or on other tools for accelerating the proceedings, does not suffice in order to affirm the existence of such a waiver.

1293 For everything BSK IPRG-PATOCCHI/JERMINI, art. 192 para. 1.

1294 For everything BRATIC, 107; DFT 143 III 55 c. 3.3–3.4; 134 III 260 c. 3.1.

1295 See for example decision Swiss Federal Tribunal no. 4A_93/2013 of 29 October 2013 c. 3; 4A_18/2007 of 6 June 2007 c. 3.2; 4P.62/2004 of 1 December 2004 c. 1.2; see for an example of such a provision art. 40 ICC Rules.

Whether such an *ex ante* waiver pursuant to art. 192 Swiss PILA achieves the goal of significantly improving efficiency in the post-award phase is questionable due to the reservation of the NYC in para. 2 of art. 192 Swiss PILA as a means for reviewing the award at the stage of enforcement. It has been debated amongst scholars whether the reference of art. 192 Swiss PILA to the NYC entails a stricter review of the award than the one under art. 190 Swiss PILA. If one follows this position, this could lead to the paradoxical situation that the award would be subject to a more rigorous judicial review with a setting aside waiver than would have been the case under art. 190 Swiss PILA without any such waiver.[1296] While this debate is beyond the scope of this analysis, parties that intend to have not only an efficient arbitral process but also an efficient post-arbitral phase should bear this controversy in mind. 827

3.2 Ex Post Waiver

After the notification of the respective award, each party may unilaterally waive its right to seek the setting aside of the award.[1297] This action is therefore not an agreement and does not need to comply with the specific requirements of art. 192 Swiss PILA.[1298] Indeed, this *ex post* waiver is a perfect example of the autonomy of the parties to decide on the exercise of their procedural rights, which is also known in litigation.[1299] Thus, this tool poses no specific difficulties with regard to expedited procedures. Consequently, no further analysis is necessary. 828

III. Enforcement of Foreign Awards

The enforcement of foreign awards is usually subject to the NYC. Accordingly, this section will focus on the grounds for the refusal of enforcement under the NYC. The analysis below will highlight differences between the NYC and the Swiss PILA. Where the considerations are identical, the analysis will refer to the foregoing explanations relating to setting aside. 829

1296 Cf. For everything BERGER/KELLERHALS, para. 2096.

1297 DFT 143 III 157 c. 1.2.1.

1298 BSK IPRG-PATOCCHI/JERMINI, art. 192 para. 43.

1299 Staehelin/Staehelin/Grolimund-STAEHELIN/BACHOFNER, § 25, paras. 13 and 16.

1. Relevant Grounds for Refusal of Enforcement

1.1 Invalid Arbitration Agreement (art. V para. 1 lit. a NYC)

830 The first potentially relevant ground for a refusal of enforcement of an award rendered in expedited procedures is a lack of jurisdiction of the tribunal due to an invalid arbitration agreement. This ground is generally comparable to the one of art. 190 para. 2 lit. b Swiss PILA, which is why reference can be made to the observations above in paras. 813–815. As has been established there, an application of expedited procedures, despite there being little basis for it, is not a question of jurisdiction but rather of procedure. The same conclusion can be drawn for a failure to render an award within the time limit. The position under the NYC is that unless clearly agreed by the parties, an expiry of the time limits for rendering the award does not deprive the tribunal of its jurisdiction to render an award.[1300]

1.2 The Party Against Whom the Award Is Invoked Was Unable to Present Its Case (art. V para. 1 lit. b NYC)

831 The second potential ground to refuse enforcement of an award is based on violation of the parties' due process rights.[1301] Under this ground for refusal, a party may argue that it was (1) not given proper notice of the appointment of the arbitrator, (2) not given proper notice of the arbitration proceedings, or (3) otherwise unable to present its case.[1302] Only the third alternative is relevant for the present purposes. Again, reference can, in principle, be made to the corresponding observations above in paras. 816–819. In addition to these observations, the following considerations are necessary.

832 First, although not expressly mentioned in the provision, it is undisputed that art. V para. 1 lit. b NYC not only covers the parties' right to be heard but also their right to equal treatment.[1303] Therefore, where these rights can be distinguished from each other, it must also be examined whether the parties' right to equal treatment was violated.

1300 BORN, International Commercial Arbitration, 3917; BORRIS/HENNECKE, in: Wolff, NYC, art. V para. 347 with numerous references; BÜHLER/CARTIER, 12 PILS, Article 194, in: Arroyo, para. 71; HAAS, in: Weigand/Baumann, New York Convention, para. 21.421; KRÖLL, in: Böckstiegel/Kröll/Nacimiento, § 1061 para. 124 with reference to the jurisprudence of the German Supreme Court; yet it is disputed under the NYC whether a rendering of the award after the expiration of the time limit is a matter of jurisdiction or of a procedure (not) in accordance with the parties' agreement, cf. WILSKE, 169.

1301 See in general PAULSSON, 182–183.

1302 BORN, International Commercial Arbitration, 3821.

1303 JANA/ARMER/KLEIN KRANENBERG, Art. V(1)(b), in: Kronke/Nacimiento/Otto/Port, 247; SCHERER, in: Wolff, NYC, art. V paras. 170–171.

Second, while a potential violation of the right to equal treatment and the right to be heard according to art. 190 para. 2 lit. d Swiss PILA will be examined under Swiss law, the law applicable to this determination under art. V para. 1 lit. b NYC is disputed. Suggestions include the *lex arbitri*, the law of the jurisdiction of enforcement, as well as an autonomous interpretation of the NYC leading to transnationally recognised aspects of the right to be heard and the right to equal treatment.[1304] Resolving the controversy would fall outside the scope of this analysis. What can be said at this point, however, is that various jurisdictions have adopted different approaches. Therefore, it must be evaluated which approach a jurisdiction of enforcement has adopted. 833

Despite not being mentioned in the text of the NYC, the majority view is that a violation of the due process rights should lead to a refusal of enforcement only if the party who opposes enforcement can prove that the violation had an effect on the award. In other words, causality between the violation and the result is required.[1305] This corresponds to the recent change in the jurisprudence of the Swiss Federal Tribunal for the Swiss PILA in setting aside proceedings.[1306] By the same token, under the NYC as well, a party trying to rely on a violation of its due process rights must object promptly to the tribunal, lest the right to rely on the defect is forfeited. 834

Under the NYC, it is difficult to see how expedited procedures in general may lead to a refusal of enforcement of an award based on a violation of due process rights. Courts have repeatedly affirmed the conformity of measures like time limits on presenting one's case, directions as to the admissibility of evidence, limitations on witness evidence, documents-only arbitrations, as well as unreasoned awards, with the NYC.[1307] 835

1.3 Improper Constitution of the Tribunal or Improper Procedure (art. V para. 1 lit. d NYC)

According to art. V para. 1 lit. d NYC, a court may refuse enforcement of an award if the composition of the arbitral authority (first aspect) or the arbitral procedure was either not in accordance with the agreement of the parties or, failing such agreement, not in accordance with the law of the seat of arbitration 836

1304 For everything BORN, International Commercial Arbitration, 3826-3828; HAAS, in: Weigand/Baumann, New York Convention, paras. 21.393-21.394; JANA/ARMER/KLEIN KRANENBERG, Art. V(1)(b), in: Kronke/Nacimiento/Otto/Port, 237-240.

1305 Cf. for everything only SCHERER, in: Wolff, NYC, art. V para. 142 with numerous references.

1306 See above para. 817.

1307 See for a comprehensive overview with numerous references SCHERER, in: Wolff, NYC, art. V paras. 130-195.

(second aspect). Both aspects may, depending on the circumstances, be problematic for an award rendered under expedited procedures.

837 As for the first aspect of the provision, namely the composition of the tribunal, it appears that a detailed discussion of expedited procedures allowing for the appointment of a sole arbitrator notwithstanding a contrary agreement of the parties has not yet taken place for the NYC. A notable exception is the decision by the Shanghai's People Court analysed above in paras. 534-536. The general position under the NYC is that if the arbitral rules grant the institution a discretion to disregard a party agreement on the number of arbitrators, the tribunal is properly constituted where the institution exercises this discretion.[1308] Yet as has been seen above in paras. 408-423, this reasoning can be justified only insofar as the parties' agreement is correctly interpreted as giving the institutional rules priority over the specific stipulation of the parties on a three-member tribunal. Otherwise, a court could justifiably refuse enforcement of the award.

838 The second aspect of art. V para. 1 lit. d NYC, i.e., that an arbitral procedure was not in accordance with the agreement of the parties or the *lex arbitri*, applies only where such a deviation of the procedure does not already result in a violation of the parties' due process rights, in which case art. V para. 1 lit. b NYC takes priority.[1309] This aspect may prove particularly problematic under expedited procedures. Where a tribunal in the interest of efficiency decides to disregard a specific agreement of the parties or provisions of the arbitral rules on procedure, the award may be susceptible to not being enforced. More often, however, the institutional rules and the *lex arbitri* grant the tribunal wide discretion for the conduct of the proceedings, which is why decisions in favour of efficiency should not lightly be considered as grounds to refuse enforcement of an award.

839 Moreover, not every deviation from the agreed procedure may justify a refusal of enforcement. On the contrary, as with violations of the parties' due process rights, the deviation from the agreed procedure must have had a causal effect on the award, and the standard for affirming such an effect is high.[1310] Likewise, a party must immediately object to the violation; otherwise it has waived the reliance on this defect in enforcement proceedings.[1311]

1308 For everything BORRIS/HENNECKE, in: Wolff, NYC, art. V paras. 286-290.

1309 SCHERER, in: Wolff, NYC, art. V para. 152.

1310 For everything BORRIS/HENNECKE, in: Wolff, NYC, art. V para. 319.

1311 HAAS, in: Weigand/Baumann, New York Convention, paras. 21.455.

1.4 The Award Is Incompatible with Public Policy (art. V para. 2 lit. b NYC)

A court may *ex officio* refuse the recognition or enforcement of an award that 840
would be contrary to the public policy of its country. The notion of public policy under the NYC covers both substantive and procedural aspects. Yet the difficulty is in determining the standard and content of public policy. It has been argued that art. V para. 2 lit. b NYC should not be based on a specific and potentially excessive national concept of public policy, but rather on a transnational understanding.[1312] In Switzerland, particularly, it is disputed whether the content of art. V para. 2 lit. b NYC follows a more rigorous standard of Swiss public policy than art. 190 para. 2 lit. e Swiss PILA, which is sometimes said to contain a more liberal notion of transnational public policy.[1313]

Even under a potentially stricter concept of public policy, procedural 841
aspects of public policy are unlikely to prevent the enforcement of awards rendered under expedited procedures. Under the NYC, the procedural asd pects of public policy require a grave procedural defect to preclude enforcement.[1314] When procedural decisions are concerned, they must reach such a level as to conclude that a party was deprived of a fair trial.[1315] It is submitted that the features of expedited procedures examined in this thesis do not have the potential to amount to a violation of the fair trial principle.

2. Waiver

Under the NYC, it is disputed whether the parties may waive the right to ope 842
pose enforcement in advance.[1316] Again, it is beyond the scope of this analysis to resolve the issue, but it can be said that a waiver may be possible only for the grounds that are at the parties' disposal, being those of art. V para. 1 NYC.[1317] Similarly to a setting aside waiver, a waiver to resist enforcement has the potential to increase the efficiency of the ultimate resolution of the dispute significantly.

1312 For everything BORN, International Commercial Arbitration, 4013-4015; PAULSSON, 225-231; WOLFF, in: Wolff, NYC, art. V paras. 494-498.

1313 See for everything BERGER/KELLERHALS, para. 2096.

1314 BÜHLER/CARTIER, 12 PILS, Article 194, in: Arroyo, 93-94; OTTO/ELWAN, Art. V(2), in: Kronke/Nacimiento/Otto/Port, 388-389; see for numerous examples WOLFF, in: Wolff, NYC, art. V paras. 522-558.

1315 BSK IPRG-PATOCCHI/JERMINI, art. 194 para. 281.

1316 BORRIS/HENNECKE, in: Wolff, NYC, art. V para. 71; HAAS, in: Weigand/Baumann, New York Convention, para. 21.367; KRONKE, Art. V(1)(a), in: Kronke/Nacimiento/Otto/Port, 216.

1317 KRONKE, Art. V(1)(a), in: Kronke/Nacimiento/Otto/Port, 216.

IV. Conclusion

843 This analysis has shown that expedited procedures do not significantly expose awards to being set aside or refused enforcement. Nonetheless, certain risks are increased under expedited procedures in comparison to ordinary ones. In particular, claims that an arbitral institution appointed a sole arbitrator in violation of the parties' agreement, along with complaints about violations of the parties' right to equal treatment and right to be heard, may be of greater concern with expedited procedures.

844 However, one should not be too pessimistic. The Swiss Federal Tribunal has repeatedly shown that it is reluctant to interfere with the arbitral process.[1318] Furthermore, the attitude of many courts towards the enforcement of awards under the NYC has been deemed arbitration-friendly.[1319] Therefore, it stands to reason that the susceptibility of an award to a successful court intervention in a setting aside or enforcement proceeding depends significantly on the way the arbitrators have conducted the proceedings. Even if the arbitrator(s) took some *decisive* procedural decisions that could have affected the parties' due process rights, the risk of a court in an arbitration-friendly jurisdiction sanctioning such decisions appears to be small. A bigger reason for concern is the appointment of a sole arbitrator in the presence of an agreement to the contrary. However, as the previously examined example of Singapore reveals,[1320] courts may also uphold the binding force of awards under such circumstances.

1318 See above para. 808.

1319 See for a general overview PAULSSON, 165-175; SCHERER, in: Wolff, NYC, art. V para. 130.

1320 AQZ v. ARA [2015] SGHC 49, see in detail above paras. 530-533.

Part 5
Final Considerations

Chapter 14
Concluding Assessment

The discussion so far has provided a comprehensive analysis of expedited pro- 845
cedures in international commercial arbitration at all stages of the process. This included an analysis of the idea and development of these procedures, the factors that define what constitutes successful expedited procedures, and the requirements for the success of these procedures. In addition, this thesis has provided an analysis of expedited proceedings currently known in institutional rules, beginning with the factors relevant for the application of these procedures, the procedural conduct of such arbitrations, and the considerations relevant for awards rendered in expedited procedures. The overall question remains, however, whether expedited procedures can live up to the expectations of the users to reduce the time and costs associated with arbitral proceedings.

To answer this query, this section will begin by assessing whether expe- 846
dited procedures lead to faster proceedings (below section I). It will then be explored which arbitration rules are recommendable (below section II) and what alternatives to expedited procedures exist (below section III). Finally, an overall evaluation of expedited procedures will be provided (below section IV).

I. Do Expedited Proceedings Lead to Faster Proceedings?

One crucial factor for determining the success of expedited procedures is 847
whether they achieve the aim of expediting arbitral proceedings. A selection of statistics gives reason to be optimistic.[1321]

For example, according to the 2020 ICC statistics, the average duration for 848
proceedings to reach a final award was 26 months. Under expedited procedures, however, out of a total of 115 final awards rendered in expedited proceedings, 77 were rendered within six months (counted from the case-management conference).[1322] Thus, under the ICC Rules, the time-saving objective is often met.

1321 Only a few comprehensive statistics of arbitral institutions on expedited procedures are accessible and the institutions, even upon request, usually do not have any data available.

1322 ICC Statistics 2020, 19.

849 The SCC statistics lead to a comparable conclusion. In 2021, under ordinary procedures, 56% of the final awards were rendered within six to twelve months. 19% of final awards were rendered in less than six months, whereas 25% were rendered after more than twelve months (including 6% of awards that needed more than 36 months to be rendered). Under expedited procedures, 60% of awards were rendered within three months and another 29% within six months.[1323] For the year 2020, the statistics show a similarly clear picture.[1324]

850 For the year 2018,[1325] the statistics of AIAC show an average duration of arbitral proceedings of 25.1 months with a sole arbitrator, 15.5 months with a three-member panel, and exactly six months under expedited procedures.[1326]

851 These statistics quite clearly suggest that expedited procedures lead to faster proceedings. Yet one has to be careful when interpreting these statistics, as it is not possible to determine why exactly the average length of proceedings is considerably shorter under expedited procedures in comparison to ordinary ones. When opting into expedited procedures, in particular, it may be that the parties generally are more willing to cooperate than under ordinary procedures. Nevertheless, the clarity of the numbers that show a significant disparity between ordinary and expedited procedures suggests that expedited proceedings are shorter on average than ordinary ones. Accordingly, one may conclude that expedited procedures, on average, lead to an acceleration of proceedings.

II. Which Arbitration Rules Are Recommendable and Why?

852 While most of the rules examined in this analysis largely share the same main characteristics, subtle differences exist nonetheless. Out of the institutional rules examined in this thesis, all have workable and pragmatic provisions for conducting expedited arbitrations. They all strike a reasonable balance between the parties' due process rights and procedural tools in order to increase the efficiency of the proceedings. Therefore, it is submitted that, in principle, all of them are workable in practice.

853 Yet it is proposed that those rules that follow a more restrained approach towards overriding potential party agreements (for example on the number

1323 For everything SCC Statistics 2021.

1324 SCC Statistics 2020.

1325 More recent statistics could not be considered because no international expedited arbitrations were concluded in 2019 and 2020 (AIAC Statistics 2019 and 2022, 33).

1326 AIAC Statistics 2018, 26.

of arbitrators)[1327] are probably more acceptable to parties and less contentious. Granted, overriding potentially inefficient party agreements may increase the efficiency of the proceedings even further. However, a risk exists that one of the parties ends up dissatisfied and initiates court proceedings against the award.[1328] Accordingly, frameworks like the DIS, HKIAC, or Swiss Rules may be particularly interesting to the parties.

Nonetheless, it is important that rules which are more 'interventionist' in some regard, such as the ICC or SIAC Rules, also have their appeal. Their more interventionist approach is justified by the intended increase in efficiency. After all, for the institution, it is likely of quite limited importance whether a tribunal consisted of one or three people. Hence, provisions like the ones allowing the institution to appoint a sole arbitrator, notwithstanding a parties' agreement on a three-member tribunal, are clear commitments by arbitral institutions to offer efficient and cost-effective dispute resolution services. These commitments help promote a professional and satisfactory service under their rules in the interest of the parties. 854

Despite all the praise for the noticeable efforts by institutions to provide practical and workable solutions to rising costs and delays in arbitration with expedited procedure provisions, one cannot help but notice that none of the rules offer specific concepts to counter guerrilla tactics. Even when the rules provide that the arbitrators must duly consider the effect of a decision on the efficient resolution of the dispute,[1329] a rather timid and potentially inexperienced arbitrator will still likely yield to the pressure of due process threats by a party trying to prolong the arbitration. As previously pointed out, one potential path would be to significantly restrict the discretion of the arbitrators.[1330] Such a restriction is, however, at odds with current arbitral practice and will, hence, be of little appeal to arbitral institutions. In the end, however, the decisive factor as to whether expedited procedures will lead to increased efficiency is whether the proceedings can be concluded within the time limit for rendering the final award as foreseen in the arbitration rules. Should the parties require additional steps within this timeframe without prolonging the proceedings, expedited procedures could be considered an improvement in efficiency even where arbitrators grant such additional steps. 855

1327 See above paras. 524-545.

1328 As has been seen, not only the arbitral proceeding is relevant for determining the time-efficiency of the dispute resolution process. Instead, subsequent and related proceedings such as setting-aside proceedings need to be considered as well (above para. 27).

1329 See for example art. 27.1 DIS Rules.

1330 See above paras. 368-371.

III. Alternatives

2.1 General Considerations

856 When studying what alternatives to expedited procedures exist, the focus must be on measures to increase the efficiency of the proceedings. Various publications on this topic already exist. Therefore, this section provides only a brief overview.[1331]

857 As pointed out in this thesis, one crucial factor for a successful and efficient conduct of an arbitration is a proactive tribunal that adopts such measures that are specifically useful for the type of dispute it has to decide.[1332] This requires an early familiarisation with the dispute and proactive case management. Although the focus for the case management is on the tribunal, the arbitrators should try to involve the parties regularly in the process and obtain their approval for the proposed procedure. Furthermore, a tribunal also needs to be assertive if the parties intentionally or unintentionally obstruct the proceedings. This assertiveness includes taking decisions against excessive requests to exercise due process rights as well as, where appropriate, imposing cost sanctions.

858 Additional instruments like early determination proceedings may, when used correctly, improve the efficiency of a dispute resolution through arbitration.[1333] However, it must be emphasised that the field of application of such instruments is often limited. If a case is not 'fanciful',[1334] early determination procedures may not be a workable tool for its resolution. Absent such specific tools, a general procedural framework focusing on time-efficient and cost-effective proceedings, like expedited procedures, is indispensable.

2.2 Expectation Management and Party Agreements

859 Yet one may have reservations about whether institutional rules on expedited procedures are the only instrument that guarantees such a procedural framework. In fact, it is submitted that either expectation management (in the sense that the parties may not necessarily be able to combine the fullest opportunity to present their case with highly efficient proceedings) or *ex ante* party agreements are viable alternatives to expedited procedures.

860 In recalling that arbitration in the past was '*by definition fast-track*'[1335] as opposed to some lengthy litigation proceedings, one may legitimately ask

1331 See only Techniques for Controlling Time and Costs 2018.

1332 See above paras. 562-565.

1333 See above paras. 743-748.

1334 See above para. 722.

1335 See above para. 82.

whether today's arbitrations still constitute the same form of dispute resolution as those naturally fast-track arbitrations of the past. One cannot help but get the impression that arbitration has been – and still is – designed to resolve disputes more informally, faster, and cheaper than litigation. Yet some parties (or their counsel) nowadays inflate arbitral proceedings by adopting litigation techniques. Thereby, they give the impression that they just hold litigation proceedings before a privately appointed authority. Hence, it appears that the parties often want to have their cake and eat it too: they want a fully legalised proceeding in record time at hardly any costs. It should be apparent that such a conundrum hardly ever leads to satisfying results. In order to avoid these disappointments, it would be recommendable for the parties to come to terms with what they expect from arbitration before inserting an arbitration agreement into their contract. This is because, once a dispute has arisen, ordinarily the claimant will prefer a fast resolution of the dispute whereas the respondent might be content with prolonging and complicating every tiny aspect of the arbitration.

If, on the one hand, the parties consider that they want a comprehensive dispute-resolution process with numerous opportunities to exercise their right to be heard, it may seem questionable whether expedited procedures are necessary or useful. If, on the other hand, the parties prefer a simple and fast resolution of their conflict, expedited procedures may indeed be a suitable option. 861

However, even with the best intentions, the respondent may, after the dispute has arisen, still decide to torpedo the arbitral proceedings, in which case the issue of due process paranoia may prevent a fast and cheap resolution of the dispute. In order to avoid this, the arbitrator(s) should have further support for adopting a strict approach. One way of providing such support would be additional provisions on the conduct of the arbitration that the parties include into the arbitration agreement prior to a dispute. These agreements would concern specific aspects of the proceedings and serve for instance as waivers of certain due process rights of the parties. Such agreements may also lead to a considerable increase in efficiency under ordinary proceedings. A risk exists, though, that these *ex ante* agreements turn out to be unsuitable for a specific dispute. Hence, while expedited procedures entail the risk of being rendered ineffective by guerrilla tactics and/or timid arbitrators, *ex ante* agreements entail the risk of being inapt for a dispute. Therefore, which risk to take in order to best fulfil the parties' needs is a balancing act. 862

In any event, it would be worthwhile to consider a paradigm change in arbitration. Taking into account the increased efficiency in litigation,[1336] a 863

1336 See above paras. 48-52.

movement back to the roots of arbitration could be promising. Specifically, service providers in arbitration like institutions could emphasise in their approach the benefits of arbitration as a more straightforward form of dispute resolution instead of a sort of litigation proceeding in front of privately appointed decision-makers.

IV. Overall Evaluation of Expedited Proceedings

1. General Considerations

864 The previous analysis should have highlighted that expedited procedures must not be studied in isolation. Instead, one must bear in mind the conflict of goals that underpins every arbitration, namely the relationship between the quality, time-efficiency, and cost-effectiveness of the proceedings. Hence, when applying expedited procedures to any dispute, a crucial factor will be coming to terms with what the quality of arbitral proceedings means, to what extent it should prevail over considerations of efficiency, and to what extent the latter should prevail. There are no boilerplate answers to these questions, and a special focus will be on the parties' expectations, as well as on the adequate and reasonable decisions of the arbitrators.

2. A Distinctive and Innovative Feature?

865 The analysis above should also have highlighted that expedited procedures are neither a particularly innovative nor a distinctive feature. While this is not to deny that expedited procedures have their benefits (which will be explained in the next sub-chapter), it is worth pointing out that expedited procedures are still a version of arbitration that conforms to the modern understanding of arbitration, namely a procedure with significant respect for due process rights and party autonomy. Yet the proceedings place a greater emphasis on efficiency and thereby attempt to resemble the form of arbitral proceedings that had widely existed up until the first half of the twentieth century.

866 Although one could consider the attempt to increase the use of expedited procedures in institutional arbitration an innovative step, it must be stressed that the tools offered to the arbitrators, like the option to conduct a documents-only arbitration, are not exactly revolutionary (though very practical in appropriate circumstances).[1337] Similarly, expedited procedures do not

1337 See above Chapter 10.

lead to a different form of awards, nor are awards rendered under expedited procedures susceptible to a higher probability of being set aside.[1338]

As a consequence, one may question whether it is correct to view the inclusion of expedited procedures as a highly distinctive and innovative feature. Instead, it would also suffice to qualify these procedures as a welcome attempt to counter some of the negative developments that have adversely affected the users of arbitration over the last few decades. Therefore, it is proposed that the provisions on expedited procedures in institutional rules should be qualified as a reasonable approach to return to the roots of arbitration as a more informal and straightforward method for resolving business disputes. Qualifying this idea as a highly innovative feature therefore seems questionable, though it is without doubt a promising development. 867

To a certain extent, what is more innovative is the inclusion of further instruments traditionally used in litigation, such as early determination procedures. However, the transfer of these litigation tools to arbitration may seem to contradict the conclusion that the amplified reliance on litigation techniques in arbitration has increased the time and costs of the proceedings.[1339] Nevertheless, as mentioned earlier, when used correctly, early determination procedures may decrease the time and costs of arbitral proceedings.[1340] Accordingly, it is submitted that instead of focusing on their origin, focusing on their appropriate use is more promising and useful. 868

3. Fundamental Change in Procedural Rights and Duties and Effect on the Award?

As has been explained, expedited procedures neither impose additional duties on the parties nor create additional rights for the arbitrators. In particular, the relationship between efficiency, the parties' due process rights, and the desire to render a 'correct' award does not change fundamentally under expedited procedures. Finding the correct balance between quality, time-efficiency, and cost-effectiveness is a delicate task that often poses difficult challenges for the arbitrators. Expedited procedures do not differ from ordinary procedures in this regard.[1341] 869

Likewise, the restrictions that expedited procedures may entail, such as documents-only proceedings, the exclusion of document production, and 870

1338 See above Chapters 12 and 13.

1339 See above paras. 33-35.

1340 See above Chapter 11.

1341 See above Chapter 3.

restrictions on written submissions, are neither confined to nor originate from expedited procedures. On the contrary, all of these restrictions can be – and have already been – applied under ordinary procedures. One may therefore easily be tempted to conclude that such instruments are not particularly innovative – and such a conclusion would not necessarily be incorrect. Yet the innovative effect of these provisions under expedited procedures may be found in the idea that such restrictions to the parties' rights can constitute a useful counter-proposal to rampant proceedings, which may eventually move from being the counter-proposal to being the default.

871 What may nonetheless be different under expedited procedures is the weighing of the factors of quality, time-efficiency, and cost-effectiveness. Particularly, a tribunal may be more inclined to give priority to time-efficiency than to the excessive exercise of procedural rights by the parties. In other words, the balancing of factors is more likely to tilt towards efficiency. This may then justify the limitation of the parties' rights, most notably the right to be heard. Yet, under such a balancing act, the core components of the parties' rights do not change and need to be respected. Consequently, while the tribunal may accord priority to efficiency over one party's right to be heard, such a preference is not unlimited. In any event, in order to best perform the balancing of interests in a way that conforms to the parties' expectations, the tribunal ought to engage in meaningful expectation management to the benefit of the parties.

872 Similarly, under both expedited and ordinary procedures, a tribunal may rightfully decide to disregard some party agreements when they turn out to be questionable at best.[1342] Under expedited procedures, a tribunal may at least be more inclined to do so.

873 In a similar vein, expedited procedures have no specific impact on the binding effect of the award. While it is apparent that additional restrictions on the parties' rights may make an award more vulnerable to attacks on its binding force, this issue is not confined to expedited procedures. On the contrary, under ordinary procedures, too, an assertive tribunal will open up the possibility of challenges to the validity of its award (even though such attempts rarely succeed).[1343]

874 To conclude, neither the fundamental procedural rights nor the duties under expedited procedures differ from those under ordinary procedures. Nonetheless, it is possible that the balancing of interests, especially the conflict

1342 See above paras. 242-246.

1343 See above para. 368.

between efficiency and due process, may more often be resolved in favour of efficiency. Where this balancing act conforms to the parties' expectations, expedited procedures may be of great benefit to the parties and address the concerns that users of arbitration have expressed in the recent past.

4. Advantages

The apparent key advantages of expedited procedures are the previously examined potential to shorten the time of the proceedings and to reduce their costs.[1344] 875

Another advantage is that the express powers of the tribunal under expedited procedures, such as not to hold a hearing,[1345] and the stricter provisions like limitations on the rounds of submissions[1346] make it more difficult for parties to derail the timetable of the proceedings with motions directly aimed at the obstruction of the proceedings. In addition, the express listing of the powers of the tribunal to conduct the arbitral proceedings in a certain, efficient manner may prevent applications for setting aside and refusal of enforcement based on an alleged lack of authority of the tribunal. 876

On a more general level, the specific deviations from ordinary procedures may also lead to reflections on some of the existing practices in arbitration and the question of whether they should apply by default. The apparent example is document production,[1347] but one might also contemplate whether lengthy submissions are in the interest of the parties or whether they merely facilitate the life of their counsel.[1348] Of course, general and easy solutions are hardly the answer; systematically excluding any document production may lead to unpleasant outcomes. However, it might be worth the effort to review some of the existing practices and determine how international arbitration can benefit from modifying these practices and their scope of application. Examples of such efforts include the Prague Rules, although they have been met with scepticism.[1349] 877

1344 See for example above para. 548.

1345 See above paras. 635-657.

1346 See above paras. 576-611.

1347 See above paras. 620-633.

1348 See above para. 615.

1349 See for example BONKE, Prague Rules; yet see PETTIBONE, 179-180, for a more positive assessment.

5. Disadvantages

878 Despite their advantages, expedited procedures are not without downsides. In particular, the stricter rules on time limits,[1350] on the making of submissions,[1351] and on the permissibility of evidence create the potential for unsatisfying and rushed proceedings,[1352] ultimately leading to an incorrect award on the merits. This may result in an even more protracted resolution of the dispute compared to ordinary procedures, because a party may apply for the award to be set aside and resist its enforcement. Yet and as has been established, for international arbitrations based in Switzerland, an award that is incorrect on the merits may be set aside only if the result of the award is incompatible with public policy.[1353] Thus, at least in Switzerland a judicial intervention against incorrect decisions on the merits could likely occur only for violations of the parties' rights to equal treatment and their right to be heard – and even such interventions are unlikely.[1354] A successful application for judicial review, however, could eventually make a new arbitration necessary.

879 Another potential disadvantage can be seen in a reduced ability of the parties to directly decide on the arbitral procedure as they instead hand over some decisions on the conduct of the proceedings to the institution. This is most notably exemplified in the institution's competence to decide on the application of expedited procedures regardless of a party agreement to the contrary.[1355] While this does not necessarily violate the principle of party autonomy,[1356] several commentators have observed that this shift of competence away from the parties to the institution may be met with resistance.[1357]

880 In addition to the shift of competences away from the parties, one can ask whether it should be for the institution rather than for the actual arbitrators to determine questions of procedure.[1358] Although some users of arbitration could perceive this as a disadvantage, a closer look reveals that the cause for concern is limited. It is hardly surprising that the institution may decide on questions of procedure, and these decisions usually occur only at a time

1350 See above para. 761.
1351 See above para. 577.
1352 Cf. BÜHLER/HEITZMANN, 148.
1353 See above para. 820.
1354 See above paras. 816-818.
1355 See above para. 500.
1356 See above paras. 398-400.
1357 See BONKE, Explicit Agreement; FLORES; LYE.
1358 See above para. 270.

where no tribunal that could render a decision has yet been appointed.[1359] Therefore, this concentration of competences in the hands of the institution seems acceptable, at least when it concerns the early stages of the proceedings.

6. Challenges

Expedited procedures pose at least four key challenges due to the time and procedural constraints that the respective provisions in the various rules entail. 881

The main onus under expedited procedures will be on the arbitrators who are conducting the expedited procedures. Depending on the dispute, it may be a demanding, yet definitely achievable, task to conduct a full arbitration within a shortened amount of time. Not only may this be difficult in terms of organisation and logistics, but the arbitrators have to familiarise themselves with all of the facts and issues within a short period of time. Furthermore, the arbitrators need to reach (and write) a decision within this shortened time limit.[1360] Adding to the challenges are potentially tough decisions on procedural motions by the parties. As explained above in Chapters 3 and 10, the arbitrators under expedited procedures need to be particularly mindful of the parties' due process rights while maintaining the efficiency of the dispute-resolution process. This combination may often lead to very delicate decisions that need to be made within short time. 882

Another challenge under expedited procedures concerns the parties. As discussed previously,[1361] the restrictions on submissions (front-loading) and evidence require the parties and their counsel to familiarise themselves with the facts and issues in an early phase of the case. Under this aspect, the claimant may enjoy a certain advantage, whereas the respondent will first have to familiarize itself with the dispute and the claimant's arguments. 883

Moreover, the arbitral institution, too, will at least to a certain extent be under increased pressure. It may have to comply with shortened time limits, for example, for the appointment of the arbitrator(s).[1362] Furthermore, the additional competences granted under expedited procedures will require a high degree of diligence on the part of the institution. The extensively discussed example of the appointment of a sole arbitrator by the institution, notwithstanding contradicting stipulations in the arbitration agreement, shows 884

1359 See for example art. 6.2 SIAC Rules.

1360 See above para. 761.

1361 See above paras. 511-513.

1362 See for example art. 2.2 Appendix VI ICC Rules.

the potential for attacks on the binding force of the award due to such institutional decisions.[1363]

885 Lastly, a considerable challenge for expedited procedures will be living up to the expectations projected onto them. Specifically, and as will be detailed in the next sub-chapter, one must be careful not to consider the provisions on expedited procedures as a panacea to some of the pervasive problems of arbitration, namely time, costs, judicialisation, and formalisation. When either the parties or the arbitrators are either not ready, willing, or able to conduct an arbitration in an expedited way – be it due to the parties insisting on extensive document production or a timid arbitrator giving in to any procedural request no matter how unreasonable it may be –, the provisions on expedited procedures risk turning into a paper tiger in a specific proceeding.[1364]

7. Efficacy Against Problematic Trends in Arbitration

886 An analysis of expedited procedures would be incomplete without an examination of whether they constitute a viable structural solution to the problems that led to the demand for expedited procedures in the first place, or whether they are mere cosmetic corrections.

7.1 Due Process Paranoia and Guerrilla Tactics

887 One of the main drivers for the decreased efficiency of arbitral proceedings has been the phenomenon of due process paranoia. Whether expedited procedures represent an effective remedy to this problem remains to be seen.

888 The reason for such scepticism is that due process paranoia is a factual rather than a legal problem, although it is rooted in legal considerations. Arbitrators who are overly apprehensive of due process threats by the parties and do not easily take strict procedural decisions may be hesitant to make tough decisions regardless of the procedure. Yet even cautious arbitrators can take comfort in provisions that limit the parties' right to be heard directly, such as a limitation on document production. Hence, expedited procedures may, to a certain extent, reduce due process paranoia. This effect could be amplified in the future by court decisions regularly confirming the conformity of specific provisions of expedited rules with the parties' due process rights.

889 Ultimately, however, there seem to be reasons to be sceptical about whether expedited procedures counter due process paranoia effectively. Expedited procedure provisions still grant the arbitral tribunal considerable

1363 See above paras. 530-545.

1364 See below paras. 886-901.

discretion. While prudent and experienced arbitrators may use this discretion in an efficiency-oriented manner, more defensive arbitrators may still be pressured to err on the side of caution and overemphasise due process considerations. The only readily available solution to this problem would be a radical restriction of arbitral discretion, although this may lead to unsatisfactory procedural results under certain circumstances.[1365] Nevertheless, unless the users' approach towards arbitration changes – meaning a return to the roots of arbitration as simple, fast, and informal proceedings –, a reduction of arbitral discretion may be an efficient tool to prevent the abuse of due process as a threat to derail proceedings.

7.2 Increased Judicialication

The argument that expedited procedures are an effective measure against judicialisation is, at best, only a partially correct analysis of the effects of judicialisation as far as the emergence of international conventions like the NYC, or unification tendencies such as the UNCITRAL ML, are concerned. If used correctly, expedited procedures may facilitate and accelerate the arbitral proceedings leading up to the rendering of the award. Where the proceedings have been rendered more complex due to an increase in rules affecting the conduct of the proceedings, expedited procedures can help reverse such tendencies. Yet judicialisation in the form of international unification tendencies has not *directly* led to provisions that complicate the conduct of arbitrations considerably. For example, the increased use of document production is not the result of treaties, changes in institutional rules, or amended *leges arbitri*.[1366] However, some have cautioned that the mention of this practice in the IBA Rules on the Taking of Evidence has encouraged the use of the practice.[1367] 890

Accordingly, expedited procedures by themselves are no proper measure against the form of judicialisation that results from international unification tendencies. Instead, if the consensus is that the increase of judicialisation does more harm than good, then it is up to all of the participants in the arbitral process to oppose further judicialisation tendencies and instead return to the roots of arbitration.[1368] 891

Nevertheless, expedited procedures may help reduce the effect of formalisation insofar as formalisation describes the tendency to voluntarily rely on formalities and procedures known in litigation, such as lengthy judgments 892

1365 See above paras. 368-371.

1366 TERAMURA, 17.

1367 BAYSAL/KAĞAN ÇEVIK.

1368 Similarly cautious MARCHISIO, 80.

and document production. The additional constraints imposed by expedited procedures, for example the strict(er) time limits and the reservations about fully reasoned awards, may make the adoption of increasingly formalised approaches an unattractive, if not impossible, option.

893 However, it is important to understand that increased judicialisation need not always be problematic. It has been pointed out previously that some instruments originating from litigation can be useful in arbitration.[1369] Therefore, it would be rather simplistic to reject any formalisation as judicialisation. What appears more beneficial is to evaluate on a case-by-case basis whether formalisation would be positive or negative.

894 In the end, however, the users of arbitration must come to terms with the realisation that the mere inclusion of a few provisions into a comprehensive set of arbitral rules will itself not suffice to oppose a global and persistent trend towards more formalised and judicialised proceedings when such a trend produces overall negative effects. As has been discussed in detail in Chapters 10 and 13, jurisprudence applies a high standard for affirming a violation of the right to be heard. For example, limits on the rounds of submissions and documents-only arbitration are, in principle, compatible with the right to be heard. Yet despite this reassuring standard, complaints about violations of the right to be heard are still prevalent irrespective of the type of procedure.

7.3 Unintentional (Mis)Use of Party Autonomy

895 Whether expedited procedures help reduce the effects of unwise procedural agreements between the parties depends primarily on the attitude of the parties and the courts.

896 As has been seen, expedited procedure provisions may conflict with specific party agreements.[1370] If an interpretation of these differing provisions leads to the conclusion that the parties wanted contrary provisions in the arbitral rules to prevail over other agreements the parties may have made, expedited procedures are an efficient means against the misguided use of the parties' autonomy to decide on the conduct of the arbitration. Similarly, if the tribunal can persuade the parties to revoke their cumbersome procedural agreement in order to conduct the arbitration more efficiently, expedited procedures are helpful and unproblematic.

897 Yet this proposal requires that the parties desire to have their dispute resolved efficiently. This, however, is not a given. On the contrary, a party may want to go out of its way to delay the proceedings. It may decide not to accept

1369 See above para. 868.

1370 See above paras. 492–497 and 524–545.

any proposals for a more efficient conduct of the proceedings that would entail potentially disregarding previous agreements between the parties in dispute. If the tribunal or institution subsequently take measures in potential violation of any procedural agreements, this party may apply for a setting aside of the award afterwards.

Whether such obstructive behaviour successfully defeats the purpose 898
of expedited procedures will often depend on the outcome of the court proceedings after the rendering of the respective award. If the court takes a liberal stance on the party autonomy paradox (as has been the case in the dispute of *AQZ v. ARA*),[1371] the provisions under expedited procedures that allow the tribunal and the institution to disregard a cumbersome, nonsensical party agreement may turn out to be a cure against the misuse of party autonomy.

7.4 Intentional (Mis)Use of Party Autonomy: Guerrilla Tactics

Expedited procedures do not necessarily discourage obstructive behaviour 899
in the form of guerrilla tactics. The parties, even under expedited procedures, are not necessarily obliged to contribute to the efficiency of the proceedings. Instead, and regardless of the procedure, they are under a duty to refrain from abusive procedural actions, i.e., guerrilla tactics.[1372] Therefore, expedited procedures have no direct effect in combatting these tactics. Yet by removing some competences from the parties and by limiting procedural steps (for example, by leaving it for the tribunal to decide whether or not to hold a hearing), they leave the parties with fewer opportunities to engage in obstructive behaviour.

Nonetheless, as has been seen, arbitral discretion, to a large extent, still 900
exists under expedited procedures.[1373] Accordingly, if a party decides to bombard an arbitrator with procedural motions just to apply for a setting aside of the final award because the arbitrator had rejected all motions, it does not appear that expedited procedures constitute an effective deterrent against such a non-compliant party. Thus, expedited procedures are only a limited solution to this problem.

7.5 Arbitrator Availability

It is clear that expedited procedures do not have a direct effect on the availa- 901
bility of arbitrators who are in high demand. Yet the stricter time limits, in combination with specific cost sanctions in the form of a reduced fee, may be

1371 See above paras. 530–533.

1372 See above paras. 191–222.

1373 See in detail Chapter 10.

useful incentives for arbitrators to render the final award within a few months after the start of the proceedings. Specific features of expedited procedures such as the preference for sole arbitrators, documents-only arbitrations, and the inclusion of only limited reasons in the awards may support arbitrators in their duty to conduct the proceedings efficiently. Such features may also do away with logistical challenges (for example, personal availability at a certain time for a hearing) that arbitrators face.

8. Final Considerations

902 Expedited procedures are, without doubt, a welcome tool in international arbitration. When used correctly, they reliably help render arbitration more efficient, but they cannot perform miracles. Therefore, both the criticism and effusive praise for these procedures seem excessive. One crucial factor for the continuing success of expedited procedures is a more reflected use of them. It appears neither justified nor beneficial to apply these procedures to all types of disputes. For some disputes of high complexity, these procedures are not necessarily suitable. For instance, applying expedited procedures under such circumstances will likely result in 'rough justice', leaving parties dissatisfied.

903 Another decisive factor for the popularity of expedited procedures will be the availability of capable arbitrators. They need to have various qualities that might not be necessary to the same extent under ordinary procedures. The arbitrators need to be very well-organised and have a quick comprehension in order to resolve complex disputes within the strict time limits. Furthermore, the arbitrators need to be fearless insofar as they may regularly have to make tough procedural decisions to preserve the efficiency of the proceedings. Lastly, the arbitrators must not lose sight of the parties' due process rights and understandable desire to co-shape the proceedings. In other words, the arbitrators need to be able to follow a balanced approach.

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Andreas Wehowsky is a lawyer admitted to the Swiss bar with several years of experience, specializing in dispute resolution. His main areas of practice are international arbitration, with a special focus on East Asia, as well as domestic and international commercial litigation.

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EXPEDITED IN INTERNA COMMERCIA ARBITRATIO

International arbitration has enjoyed remarkable success. However, in recent years repeated concerns relating to the efficiency of the proceedings have emerged. These concerns have led to the introduction of provisions for expedited arbitral procedures.

Through analysing various arbitration rules, this book will examine the requirements under which expedited procedures are admissible, what the central characteristics of such procedures are, and how such procedures can be classified and described in comparison to a conventional arbitral procedure. A significant part will examine the tension between procedural efficiency on the one hand and on quality of the procedure and award on the other. In an excursus, early determination procedures will be examined to complete the tool box to increase procedural efficiency.

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