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A Breakthrough in International Arbitration: Switzerland's New Act

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As of January 1, 1989, international arbitration in Switzerland is governed by a federal statute: Chapter 12 of the Private International Law Act, Articles 176 to 199 (the Act). The Act preempts cantonal (i.e., state) law in the field of international arbitration.[1] Although it is short, the Act is comprehensive.[2] Due to the dramatic expansion in volume and importance of international arbitration in the 1970s and 1980s, there was a need for specific legislation in this area.[3]

The Act applies if: (1) the place of arbitration is in Switzerland; and (2) at least one of the parties is a nonresident of Switzerland at the time of entering into the agreement to arbitrate. There are so far few court decisions about the Act, but many legal writings.[4] The purpose of this article is to highlight the key features of the Act and of the current practice.

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1. Domestic arbitration continues to be governed by a uniform arbitration act known as the "Concordat" that is adopted in all cantons except Lucerne.

2. The Swiss situation thus differs from the current situation in the United States, where several states have enacted international arbitration statutes. Unlike chapter 2 of the United States Arbitration Act, which also deals with international arbitration, the Swiss Act is not limited to court enforcement of arbitral agreements and awards.

3. For a similar need in the United States, see Tschanz, *International Arbitration in the United States: The Need for a New Act*, 3 ARB. INT'L 309 (1988). Switzerland did not enact the UNCITRAL Model Law because it was found to be too detailed and, being an international compromise, less progressive overall than the Act.

4. One book and several articles have been published in English: A. BUCHER & P.-Y. TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND (1988); Briner, *Switzerland*, in INT'L HANDBOOK ON COMM. ARB. (Kluwer) (Supp. 9, Sept. 1988); Blessing, *The New International Arbitration in Switzerland*, 5(2) J. INT'L ARB. 9 (1988); Gaillard, *A Foreign View on the New Swiss Law on International Arbitration*, 4 ARB. INT'L 25 (1988); Lalive, *The New Swiss Law on International Arbitration*, 4 ARB. INT'L 2 (1988); Reymond, Tschanz, Karrer, Bucher, Bond & Gaillard, *Le nouveau droit suisse de l'arbitrage international*, 1989 INT'L BUS. L.J. 739 (bilingual French/English edition); Schneider & Patocchi, *The New Swiss Law on International Arbitration*, 55 ARB. 268 (1989); Tschanz, *The New Swiss International Arbitration Act*, 1988 INT'L BUS. L.J. 437.

I. User-Friendly Arbitration

The Swiss Parliament drew on Switzerland's experience as a long-standing and highly respected arbitration center and has aimed to enact a "user-friendly" arbitration framework. The Secretary General of the ICC International Court of Arbitration has described the Act as follows:

> The presentation of the Law [i.e., the Act] is such (brief, straightforward, readily understandable by non-Swiss) that for the arbitral institutions and the parties it is accessible rather than foreboding, as is the Concordat. The very real improvements in the Law go far in assuring the arbitral institutions and the parties that they can be confident of obtaining in Switzerland what they have every right to expect from international arbitration, such as relative speed and economy in comparison to national courts as well as predictability of procedure and finality of the arbitral award.[5]

Another arbitration expert and foreign user summed up the changes as follows:

> By radically simplifying its law on arbitration and by giving unprecedented scope to the principle of party autonomy, the new Swiss statute on Private International Law will grant each participant in the arbitral process sufficient control to feel just as comfortable in Switzerland as in his own country, with, in many instances, the additional advantage of avoiding the constraints of such country.[6]

It would thus be a mistake to view Swiss arbitration as taking place in a faraway foreign jurisdiction. Swiss arbitration is a legal concept. Hearings do not necessarily have to take place in Switzerland.[7] Arbitrators and counsel are very often foreigners.

II. Fairness

One party from the United States asked this writer: "If I arbitrate in Switzerland, will I have a fair shake?" With respect to fairness in the conduct of the proceeding, article 182(3) provides: "Whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversary procedure." The fairness of the arbitrators' substantive findings will depend on several factors. Findings of fact need to be based on effective procedures to establish all the relevant facts. These procedures are discussed later (*see infra* sections VII and VIII).

An award cannot be challenged because it contains biased findings. It is therefore crucial to appoint an independent arbitrator. An arbitrator not independent from the parties can be challenged (*see infra* section XIII). Further, in order to avoid any bias, an arbitrator should be not only independent but also truly neutral. Neutrality goes beyond independence from the parties in the case. Fre-

5. Bond, *The New Swiss Law on International Arbitration and the Arbitral Institutions*, 1989 INT'L BUS. L.J. 785, 791.

6. Gaillard, *The Point of View of a Foreign User*, 1989 INT'L BUS. L.J. 793.

7. Hearings can take place in another country, provided that the law of such country does not hold that such hearings on its territory make the arbitration subject to its law.

quently, arbitral tribunals consist of an arbitrator from the country of each of the parties and a neutral chairman.

In practice the chairman often happens to be Swiss. The experience of the International Court of Arbitration of the ICC bears this out. According to its Secretary General, out of 237 cases brought before the ICC in 1987, "only three clauses in 1987 specified the nationality of the chairman and each time he had to be Swiss."[8] This was explained by the fact that for many parties Switzerland "symbolizes neutrality, independence and confidentiality."[9] Switzerland's neutrality also applies vis-á-vis the European Community, of which Switzerland is not a Member State. For this reason, Switzerland, like Sweden, is very often chosen for East-West arbitrations. According to Professor E. Gaillard, feeling "just as comfortable in Switzerland as in his own country," goes beyond neutrality. In order to meet this challenge, many neutral arbitrators have acquired an international background going far beyond the mere ability to speak a foreign language.

Fairness does not, however, mean compromise. It would be mistaken to believe that international awards generally tend to be compromises. Moreover, substantial orders for costs are often made against losing parties.[10] Only poor arbitrators would try to compromise in order to reach a unanimous award. The chosen procedural rules most often do not require such unanimity.

III. Predictability

The days of the amateur in arbitration are gone, along with the attendant mystery, adventure, and all too frequently, the unpredictable final result. Tried and tested procedures have been established over the years. The Litigation Risk Analysis method has been successfully applied to international arbitration.

The conduct of an international arbitration nevertheless requires extensive experience with the variety of problems that can arise in international arbitration. Failing such experience, it would not be realistic to expect a speedy, economical, and successful arbitration. Very few unsatisfactory arbitrations cannot be traced to a lack of experience either in conducting the proceedings or in drafting the agreement to arbitrate.

Advocacy skills should also be suited to the arbitrators' backgrounds and to the type of case. There are some similarities, but also major differences, between convincing international arbitrators and presenting a case before a court or a jury. There is now a specialized, although informal, international arbitration bar.

8. *How to Draft an Arbitration Clause*, 6 J. INT'L ARB. 65, 76 (1989).

9. Bond, *supra* note 5, at 786.

10. For instance, a 100 percent win should result in an award of costs including 100 percent of attorneys' fees, unless the winning party caused unjustified procedural costs.

IV. Costs

The cost of arbitrating in Switzerland, as elsewhere, depends on the type of procedure followed. Currently, the main expense incurred by the parties is the cost of representation by counsel. Therefore, a full adversarial procedure preceded by pretrial discovery will be the most costly.

Absent a formal trial setting, however, pretrial discovery does not save time or money. Arbitrators eventually find a great deal of the discovered facts and evidence to be irrelevant. Conversely, the arbitrators might be interested in evidence that was not discovered.

Very substantial savings can be made if pretrial discovery is replaced by the active involvement of competent arbitrators from the outset of the case. As specialized finders of fact and law, arbitrators can conduct a more focused search for the truth. The early and active involvement of arbitrators will also minimize the potential for procedural battles between opposing counsel and result in a shorter proceeding. The same points have been made in a comparison between English and German arbitration practice.[11]

In ad hoc arbitrations, arbitrators tend to charge more or less the usual hourly rate of a practitioner, taking into account the size of the case. In institutional arbitration, such as the ICC, the arbitrators' fees are set by the institution according to a scale that includes various factors. Generally, the fees set by institutions work out to an hourly rate that is lower than ad hoc arbitrators would charge for working on the same case.

A particular risk of cost overruns and delays exists when counsel tries to broaden and multiply the issues, include new parties, escalate the dispute, or extend the battlefield by initiating simultaneous court proceedings. Such aggravation of the dispute is inconsistent with an agreement to arbitrate (*see infra* section XX).

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11. Kühn, *Practical Experiences with English Arbitration Proceedings*, in COMMERCIAL ARBITRATION IN THE FEDERAL REPUBLIC OF GERMANY AND IN ENGLAND 121, 125–26 (1987):

> The costs of an English arbitration can reach astronomical proportions. This is due to the proceeding itself and to the requisite costs involved in preparing a case, and is not due to the solicitor, barrister, judge and other involved parties, whose hourly fees are quite reasonable. Civil law procedures, at least in Germany, are noted for an early gathering of the evidentiary material and for the granting of evidentiary Orders by the tribunal. In contrast, the English arbitration proceeding appears at first to lack direction. . . . An arbitration involving, for example, the construction of an industrial plant, requires months of preparation, involving in particular the deposing of witnesses and experts. As a result of this (from the German viewpoint) relative lack of direction, a considerable amount of work is involved. Discussions with witnesses and experts (local as well as foreign) lasting weeks and taking place well before the hearing are too much for one solicitor to manage on his own. This is especially true when there is an additional need for extensive correspondence with the opposing side regarding the continuation of the proceeding and the actions that must be undertaken by the tribunal regarding the conduct of the arbitration. It is particularly in this area that lawyers exhibit their tactical skills.

V. The Arbitrators

For an arbitrator-driven procedure to work well, the personality and skills of the arbitrators are obviously a crucial factor.[12] Some arbitrators make it their business to elucidate all the relevant facts from the parties and will examine witnesses thoroughly. Others prefer to let counsel present the case and generally determine how the arbitration will be conducted.

It is up to the parties to choose the type of arbitrator they wish to have. When an arbitrator is to be appointed by an arbitration institution, or other appointing authority, the parties may, and should, indicate the profile they wish the arbitrator to have. Obviously, the choice of arbitrators should match the choice of procedure.[13]

VI. Procedural Freedom

The parties can agree on any procedure they wish.[14] For instance, they can agree to have discovery and a full trial. Again, the chosen arbitrators will need to be familiar with such procedure.

Failing an agreement of the parties, the arbitrators will select appropriate procedural rules. They must always comply with minimum guarantees of due process.[15]

VII. Effective Search for the Truth

The basic division between trial and pretrial stages is not usually followed. Discovery is not effective when the parties are represented by counsel who are not strictly bound by the duty to comply fully and fairly with discovery orders.[16] Generally, the facts may be ascertained more effectively by getting the arbitrators to involve themselves in the procurement of evidence from the very beginning of the proceeding. Arbitrators can conduct a continuous and adversary investigation process without the constraints of a trial. Arbitrators are, after all, handpicked specialists willing and able to find the facts "by all appropriate means."[17] Unlike a jury, arbitrators can be constantly available. Why save their time? There is no reason to keep arbitrators out of the gathering of evidence in a pretrial stage.

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12. Obviously, there are other factors, such as education, experience, skills, availability, energy, health, outlook, and cost-consciousness.

13. Continental lawyers would not feel comfortable applying the Federal Rules of Civil Procedure, unless they have recently practiced litigation in the United States. Article 180(1)(a) of the Act further permits the parties to define in advance the requirements to be met by the arbitrators and failing which such arbitrators may be challenged.

14. Private International Law Act art. 182(1) (1989).

15. *Id.* arts. 182(2)–(3), *quoted supra* in text section II.

16. M. MUSTILL & S. BOYD, COMMERCIAL ARBITRATION 325 (2d ed. 1989).

17. ICC Rules, art. 14(1). As pointed out by Mustill & Boyd, "[Discovery] compensates for the tribunal's lack of inquisitorial powers." M. MUSTILL & S. BOYD, *supra* note 16, at 324 n.13.

VIII. Usual Procedure

Detailed written briefs are usually essential in making a case. Each party is supposed to produce with its briefs all the documentary evidence supporting its case. The parties can also offer to produce witnesses and any other type of evidence to prove their case.

Furthermore, each party may request that the arbitrators order the opponent to produce additional evidence. Such requests are usually included in the above-mentioned written briefs. The requests should specify: (1) which additional evidence the arbitrators are requested to take; (2) the allegation to which the evidence refers; and (3) the content of such evidence, insofar as possible. The arbitrators then decide whether they will order production of the requested evidence and take other evidence offered by the parties. The arbitrators' discretion is not unlimited. The party who bears the burden of proof has a right to have proof taken. Such right may be based on substantive law or procedural law, or both.

Arbitrators will ordinarily not deny a request to take evidence without stating grounds for the denial such as that the request was not timely made or that it does not relate to relevant facts still in dispute. If the arbitrators agree that the requested evidence is relevant, their decision states what evidence shall be produced and when and how it shall be produced (for example, witnesses at a hearing or documents within a set time limit).

Arbitrators may, and often do, request additional evidence on their own motion. They may do so only with respect to facts that have been alleged by a party. In addition the parties must always receive notice that evidence will be taken and must be afforded an opportunity to discuss such evidence.

The arbitrators thus conduct the taking of additional evidence. They can order production of documents, examine witnesses,[18] interrogate the parties, inspect real evidence, visit a site, appoint an expert, and so on. The often active involvement of arbitrators sitting in Switzerland can be contrasted with the adversarial procedure as it is applicable in England when the parties have not otherwise agreed.[19]

Unless the parties and the arbitrators agree to dispense with it, there will be at least one hearing. Such hearing is part of the continuous investigation process and does not resemble a trial. At the hearing, the arbitrators will be—or should

18. It is very common, however, for counsel to be permitted to conduct direct, cross, and redirect examinations.

19. *See* M. MUSTILL & S. BOYD, *supra* note 16, at 288–89 (footnote omitted):

> First, the procedure must be of an adversarial nature. That is to say, the function of the arbitrator is not to exercise his own initiative by carrying out an enquiry into the factual and legal issues, but instead to act as the passive recipient of evidence and argument presented by the parties, and to arrive at his decision by choosing between them.

be—fully familiar with the matters referred to them. It would therefore be redundant to have opening statements followed by a full presentation of the case. The sole arbitrator or chairman usually conducts the hearing throughout, not counsel. The hearing often concludes with oral argument.

This rather continental procedure is very often followed. But, again, the parties can agree to any other procedure. In this writer's experience, good arbitrators have not abused their leading role. In sum, the above procedure is, by and large, fair and cost-effective and produces good results.

IX. Absence of Rules of Evidence

The Act does not state what evidence is admissible. In practice, the main limitations on the admissibility of evidence occur due to its lack of relevance and the failure to produce or request it in a timely fashion. Rules of evidence applicable in England or the United States do not apply as such.[20] Instead, the underlying rationale of evidentiary rules goes to the weight of the evidence. For instance, hearsay can come in, but it is unlikely to have any weight unless there is some circumstantial guarantee of trustworthiness. Similarly, the parole evidence rule does not limit admissibility, but documentary evidence will generally outweigh evidence of prior negotiations, except in case of alleged fraud.

Only rarely will arbitrators refuse to take evidence on the ground that it lacks evidentiary value. To do so might give a party the impression that the arbitrators are prejudiced since they cannot rely on mechanical rules of evidence to shut out evidence.

X. Arbitrators' Powers in Relation to Evidence

Arbitrators do not themselves have the power to apply coercive measures to enforce their orders. Nevertheless, either the arbitrators or a party with their permission can request the assistance of the Swiss courts with respect, for instance, to reluctant witnesses. The court can either impose penalties or examine the reluctant witness itself.[21] The court at the place of arbitration may also issue letters rogatory to a foreign country. Often, the issuance of such letters, or the threat thereof, has proved sufficient to convince a witness to appear.

When the reluctance to produce evidence comes from a party, arbitrators may draw adverse inferences with respect to the content of such evidence. The other party may thus be able to discharge its burden of proof even though it has not been able to produce fully convincing evidence. This sanction is, however, a last resort.

20. This is another significant difference with arbitration in England, where arbitrators are required to apply English rules of evidence unless otherwise provided in the arbitration agreement. M. MUSTILL & S. BOYD, *supra* note 16, at 289; Kühn, *supra* note 11, at 132–35.

21. A. BUCHER & P.-Y. TSCHANZ, *supra* note 4, at 92–93.

Should a party deny that it has the requested evidence, the arbitrators will usually want to investigate the circumstances and might examine the party about it.

XI. Arbitrators May Order Provisional Remedies in Relation to the Dispute[22]

This power may be partly or fully excluded by the parties. If a party does not comply with an order, the arbitrators can request the courts to assist with enforcement. Outside Switzerland, enforcement is subject to foreign law and is an open question.

Attachments may only be ordered by the courts. Prearbitration attachment is available in Switzerland under the ordinary conditions.

XII. Absence of Court Interference

Under the Act, foreign parties can conduct their arbitrations in complete discretion, unhampered by any intervention of the local courts.[23] Swiss courts also may not stay or enjoin arbitration. Therefore, Swiss courts may not prevent arbitrators sitting in Switzerland from deciding on their own jurisdiction.[24] Once an award on jurisdiction is made, however, it can be challenged.[25] As a result, it has been said that the arbitrators have "priority jurisdiction" to decide on their own jurisdiction.[26] Assuming a dispute is brought before a Swiss court, such court should refer the parties to arbitration without reviewing whether the alleged arbitration agreement is valid and applicable to the dispute.[27]

XIII. Challenges Against Arbitrators May Be Referred to an Arbitration Institution Instead of the Courts

For instance, if the parties have chosen to arbitrate under the ICC Rules, the ICC International Court of Arbitration may decide on challenges against arbitrators. The Swiss courts then have no jurisdiction with respect to such challenges.[28]

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22. Private International Law Act art. 183 (1989). The type of measures that can be ordered depends on the nature of the dispute referred to arbitration and the applicable procedure. For examples, see A. BUCHER & P.-Y. TSCHANZ, *supra* note 4, at 87.

23. Swiss courts may, however, be petitioned in aid of arbitration. Private International Law Act arts. 183(2), 184(2) & 185 (1989). Swiss courts may also be asked to appoint arbitrators, but there is no room for a motion to compel arbitration of the kind provided by 9 U.S.C. § 4 (1988). Private International Law Act art. 179(3) (1989).

24. Private International Law Act art. 186 (1989).

25. *Id.* art. 190(3) & 186(3).

26. Tschanz, *supra* note 4, at 443.

27. Private International Law Act art. 186 (1989) and previous case law. However, if the agreement provides for arbitration outside Switzerland, ch. 12 of the Act does not apply. Instead, art. 7 of the Act provides for a preliminary review by the Swiss court in accordance with art. II(3) of the New York Convention.

28. Private International Law Act. art. 180(3) (1989); ICC Rules art. 2(8) & 2(9) (1988).

XIV. Arbitrability

The Act contains a substantive definition of arbitrability that applies to all disputes being arbitrated in Switzerland. The test is simple: all disputes that have some financial consequence for the parties are arbitrable.[29]

XV. The Validity of an Agreement to Arbitrate in Switzerland Is More Difficult to Challenge than the Validity of an Agreement to Arbitrate Elsewhere

Article 178(2) of the Act is designed to cut short dilatory arguments. For an agreement to arbitrate in Switzerland to be valid, it is sufficient that it be valid under the law chosen by the parties to govern such agreement, or under the law applicable to the substantive issues, or under Swiss law.[30] Only if the agreement to arbitrate is invalid under all three laws must the arbitrators dismiss the case for lack of jurisdiction. This favorable choice-of-law rule appears to be unique worldwide. It differs from the federal policy favorable to arbitration agreements that is applied by U.S. courts when deciding to refer parties to arbitration.[31]

XVI. Challenges Against Awards Go Directly Before the Swiss Supreme Court

This is another major innovation worldwide. No other country has such a one-step jurisdiction for challenges against awards.[32] Awards are reviewed directly by the highest tribunal in the country. The procedure is expeditious.[33] The filing of a challenge does not automatically result in a stay of enforcement of the award.[34]

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29. Private International law Act art. 177(1) (1989). In other words, it is sufficient that the dispute can be valued in monetary terms, regardless of public policy issues that might be involved. Arbitrators may not, however, make orders involving third parties, such as a judgment of bankruptcy.

30. *Id.* art. 178(2). If, however, an agreement to arbitrate in Switzerland is asserted before a foreign court, such foreign court will not, or at least not only, apply art. 178(2) of the Act. In such a case, a referral to arbitration also involves the foreign court's own jurisdiction, which is not governed by Swiss law. For an example in France, see *Korsnas Marma v. Durand-Auzias*, 1989 REV. ARB. 691.

31. *See* Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 640 U.S. 1, 24–25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" and progeny. Art. 178(2) applies to the final determination of the validity of the consent to arbitrate, as determined by the arbitrators, subject to possible court review under art. 190(2)(b). Technically, art. 178(2) is in the nature of a conflict rule incorporating a substantive factor (*règle de rattachement à caractère matériel*). *See* Tschanz, *Comments on Korsnas v. Ofer*, 1989 REV. ARB. 698, 704.

32. Most countries have a two- or three-step jurisdiction, e.g. France (Cour d'appel and Cour de cassation), England (High Court, Court of Appeal, House of Lords, subject, however, to leave being granted).

33. A. BUCHER & P.-Y. TSCHANZ, *supra*, note 4, 147–53.

34. With respect to enforcement in Switzerland, a stay may be granted upon application. *See* A. BUCHER & P.-Y. TSCHANZ, *supra* note 4, at 150. For enforcement abroad, see the 1958 New York Convention, art. VI (enforcement judge may adjourn its decision on enforcement pending a challenge

XVII. The Right to Challenge Awards May Be Waived in Advance (Exclusion Agreement)

Such waiver is permitted only if all the parties are nonresidents of Switzerland. The waiver must be express and in writing. For instance, the choice of the ICC Rules does not, of itself, amount to such an exclusion agreement, notwithstanding the waiver language in article 24 of such rules.[35] The parties may choose to exclude one or more or even all of five available grounds for challenging awards.[36]

A word of caution: by agreeing to arbitrate, the parties give up any right to an ordinary appeal. Thus, if their arbitrators misevaluate the evidence or misapply the law, the parties have no recourse. An exclusion agreement is even more absolute: it makes it impossible to set aside the award no matter what the arbitrators might do.

XVIII. Grounds to Challenge Awards

These grounds are limited to very serious defects. The list is as follows:

(1) improper appointment of the arbitrators;
(2) erroneous decision on jurisdiction by the arbitrators;
(3) failure by the arbitrators to decide a claim that was made or a decision of the arbitrators on a claim that was not made;
(4) violation of due process; and
(5) violation of public policy.

XIX. States Are Barred from Relying on Their Own Law to Repudiate Their Consent to Arbitrate

This is a substantive rule applicable in all Swiss arbitrations involving a state or state instrumentality, regardless of the law that would otherwise be applicable to issues such as the state's capacity, arbitrability of the issues, or authority to bind the state.[37]

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in the country of origin) and art. V(1)(e) (enforcement judge may deny enforcement if enforcement has been suspended by judge in country of origin).

35. There is no case in point yet, but legal writers are unanimous. Contrast with the opposite result obtained in England: Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V., [1983] 2 Lloyd's Rep. 419; Marine Contractors Inc. v. Shell Petroleum Development Co. of Nigeria Ltd., [1984] 2 Lloyd's Rep. 77.

36. Contrast with English Arbitration Act 1979 § 3 (1979), which does not allow for such "cherry-picking." Further, the English exclusion agreement only relates to the right of appeal on a question of law under § 1(2) of the Arbitration Act 1979. It leaves intact the High Court's statutory jurisdiction: (1) to set aside an award for misconduct of the arbitrator under § 23(1) of the Arbitration Act 1950; and (2) to remit the award to the arbitrator under § 22 of the same Act.

37. Private International Law Act art. 177(2) (1989). A. BUCHER & P.-Y. TSCHANZ, *supra* note 4, at 49–50. The rule derives from established arbitration practice about state contracts. For a description of the effect of legislation or decrees of a state party on an arbitration, see P.-Y. Tschanz,

XX. No Aggravation of the Dispute

If skilled counsel always were to do everything that could possibly be done for their clients, all disputes would end up being fought for many years and on several continents.[38] It is generally recognized, however, that the parties have the obligation to refrain from aggravating the dispute submitted to arbitration or publicizing any aspect of the case. Violation of such obligation can result in a full award of costs.[39]

The purpose of an arbitration agreement is to dispose of disputes through adjudication. Prompt and confidential adjudication is the product that the parties bargained for. The arbitrators must ensure that this result is delivered.

Obviously, each party invests in a case in order to win. The "maximum overkill" approach in arguing one's case is therefore permitted. To cause the escalation of the dispute into some sort of war is, however, unacceptable and constitutes a breach of the agreement to arbitrate. If necessary, arbitrators sitting in Switzerland may order provisional measures to prevent a party from escalating the dispute submitted to arbitration.

XXI. Suggested Arbitration Clause

"Arbitration in [Geneva/Zurich/Lausanne/Basel/Lugano, etc.] according to ICC Rules" would be a suitable clause in most cases. The following example merely adds more predictability:

1. All disputes arising in connection with the present contract, including tort claims, shall be finally settled by arbitration in _____ .[40]
2. The rules of _____[41] shall apply.

Contrats d'Etat et mesures unilatérales de l'Etat devant l'arbitre international, 74 REVUE CRITIQUE DROIT INT'L PRIVÉ [R.C.D.I.P.] 47 (1985).

38. A good example is the dispute between Gabon and Swiss Oil Corporation (S.O.C.) *reported in* 1989 REV. ARB. 309, with comments by C. Jarrosson. S.O.C. initiated an arbitration and claimed U.S. $436 million in damages. The final award ordered both parties to pay various amounts with a net balance in favor of Gabon exceeding U.S. $37 million, which award was challenged by S.O.C. all the way to the French Supreme Court. Based on various assignments, S.O.C. and related companies then initiated court proceedings in Switzerland and in the Cayman Islands, as well as a new arbitration in Paris. S.O.C. was able to resist enforcement until it was about to be wound up, at which time it finally entered into a settlement involving payment of the award.

39. A. BUCHER & P.-Y. TSCHANZ, *supra* note 4, at 87. In a recent ICC arbitration, which must remain confidential, a party waged a war of attrition, initiating proceedings in the Southern District of New York and an arbitration in Paris for two aspects of the same overall dispute. It cost nearly U.S. $1 million to defend the vastly inflated arbitration, but the arbitration lasted only one year, and the award dismissed all the claims and ordered claimant to pay substantially all of the defendant's legal fees and costs. Furthermore, the collateral estoppel effect of the arbitration award "killed" the lawsuit pending in New York.

40. State either a canton or a city in Switzerland.

41. Name an arbitration institution, for instance ICC, AAA, Geneva Chamber of Commerce and Industry, or Zurich Chamber of Commerce. The choice of a reputable institution to "administer" the arbitration, buys increased security in the arbitration process and enforcement.

3. The arbitral tribunal shall consist of _____arbitrators.
4. The arbitrators shall be appointed as follows: _____ _____ .[42]
5. The language of the arbitration shall be _____ .
6. For purpose of the arbitration procedure, including the appointment of arbitrators, the following parties shall be treated as one and the same party: on the one hand, _____; on the other hand,_____ .[43]
7. Consolidation with other arbitration proceedings.[44]
8. The right to challenge the award under article 190(2)[45] of the Swiss Private International Law Act is hereby waived.[46]
9. If a party does not comply with the final award, such party shall bear all the resulting costs of enforcing the award, upon which judgment may be entered in any court having jurisdiction.[47]

An express choice of the law applicable to the substantive issues should also be included in the agreement. Such clause can save lengthy and costly argument about which law(s) should be applied to the various issues in dispute.

42. *Only* if the rules of an arbitration institution are not chosen.

43. *Only* in case of a multiparty agreement. If it is not possible to divide the parties into two camps, there are two basic alternatives. Either each camp may appoint an arbitrator, which may result in a larger number of arbitrators, or all arbitrators are to be appointed by a neutral authority.

44. As court-ordered consolidation is not available in Switzerland, any consolidation should be contractually provided for, if at all desirable.

45. State which ground, *e.g.*, a, b, etc., if only some of the grounds are waived.

46. Such waiver is optional and subject to all parties being nonresidents. A waiver is not usually advisable because the grounds to challenge an award are already limited to fundamental defects, and the review process is quick and high-quality.

47. Including further provisions regarding post-award interest could jeopardize enforcement in certain countries.