Sridar Paramalingam

The Super Expedited Procedure
ISBN 978-3-906940-54-0

Editions Weblaw
Bern 2018

Zitiervorschlag:
Sridar Paramalingam, The Super Expedited Procedure,
in: Magister, Editions Weblaw, Bern 2018
The Super Expedited Procedure

A Concept for Extra-Fast Commercial Arbitration Procedures Inspired by Sports Arbitration

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For Ness

In deep Gratitude for your Support
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<th>Definition</th>
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<tr>
<td>AD</td>
<td><em>anno Domini</em> (in the year of the Lord)</td>
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<td>Art./Arts.</td>
<td>Article/Articles</td>
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<td>BAT</td>
<td>Basketball Arbitral Tribunal</td>
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<td>BGE</td>
<td>Decision of the Swiss Federal Supreme Court</td>
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<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<td>CAS-ahd</td>
<td>Court of Arbitration for Sport-ad hoc division</td>
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<td>CAS-ahd Rules</td>
<td>Court of Arbitration for Sport, Arbitration Rules for the Olympic Games</td>
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<td>CAS Code</td>
<td>Court of Arbitration for Sport, Code of Sports-related Arbitration in force as from 1 January 2017</td>
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<tr>
<td>cf.</td>
<td>confer (compare)</td>
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<td>CHF</td>
<td>Swiss Franc</td>
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<tr>
<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission</td>
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<td>CIETAC Rules</td>
<td>China International Economic and Trade Arbitration Commission Arbitration Rules</td>
</tr>
<tr>
<td>CMC</td>
<td>case management conference</td>
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<td>COIA</td>
<td>Court of Innovative Arbitration</td>
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<tr>
<td>e.g.</td>
<td><em>exempli gratia</em> (for example)</td>
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<tr>
<td>EPP</td>
<td>Expedited Procedure Provisions</td>
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<tr>
<td>etc.</td>
<td><em>et cetera</em> (and so on)</td>
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<tr>
<td>et seq./et seqq.</td>
<td><em>et sequens/et sequentia</em> (and following/and multiple following)</td>
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<tr>
<td>EUR</td>
<td>Euro</td>
</tr>
<tr>
<td>FIBA</td>
<td>Fédération Internationale de Basketball</td>
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<td>FIFA</td>
<td>Fédération Internationale de Football Association</td>
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<tr>
<td>fn.</td>
<td>footnote (Where the word “footnote” is spelled out, reference is made to a footnote in a source outside of this thesis.)</td>
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<tr>
<td>ibid.</td>
<td><em>ibidem</em> (same source and same place)</td>
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<td>ICA</td>
<td>International Court of Arbitration</td>
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<td>ICAS</td>
<td>International Council of Arbitration for Sport</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICC Rules</td>
<td>International Chamber of Commerce Arbitration Rules 2017</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>id.</td>
<td>idem (same source but different place)</td>
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<tr>
<td>i.e.</td>
<td>id est (that is)</td>
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<tr>
<td>IOC</td>
<td>International Olympic Committee</td>
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<tr>
<td>JPY</td>
<td>Japanese Yen (Japanese currency)</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>M&amp;A</td>
<td>Mergers and Acquisitions</td>
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<td>OG</td>
<td>Olympic Games</td>
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<td>p./pp.</td>
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<td>para./paras.</td>
<td>paragraph/paragraphs</td>
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<tr>
<td>PRC</td>
<td>People’s Republic of China</td>
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<td>PT</td>
<td>procedural timetable</td>
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<td>RMB</td>
<td>Renminbi (Chinese currency)</td>
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<td>SCAI</td>
<td>Swiss Chambers’ Arbitration Institution</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<tr>
<td>SGD</td>
<td>Singapore Dollar</td>
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<tr>
<td>SIAC</td>
<td>Singapore International Arbitration Centre</td>
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<td>Swiss Rules</td>
<td>Swiss Rules of International Arbitration 2012</td>
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<tr>
<td>UEFA</td>
<td>Union des Associations Européennes de Football</td>
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<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Wales</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
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<tr>
<td>USD</td>
<td>United States Dollar</td>
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<tr>
<td>24HA</td>
<td>24-Hour Arbitration</td>
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<tr>
<td>24HAIM</td>
<td>24-Hour Arbitration Insurance Model</td>
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<tr>
<td>24HA-Arb Model</td>
<td>24-Hour Arbitration-Arbitration Model</td>
</tr>
<tr>
<td>24/7</td>
<td>24 hours, 7 days per week</td>
</tr>
<tr>
<td>48HA</td>
<td>48-Hour Arbitration</td>
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I. Introduction

“This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.”

These words were written at the founding of the City of London Chamber of Arbitration in 1893 and describe the original intention of having a private court system. Arbitration was supposed to be fast, cheap and simple. Nowadays, arbitration has become as complex, lengthy and expensive as regular court proceedings. However, the last few years have shown an increased interest in expedited procedures. Thus, the words written in 1893 could have been written today. Arbitration is on its way back to its roots.

Within the last two decades, the world of sports’ inherent need for a fast dispute resolution has created the most rigorous and cutting edge expedited procedures in international arbitration. This has led to the scientific question of this thesis: Can some of the key elements of sports arbitration be transferred into the world of commercial arbitration, in order to create a new model for a super-fast expedited procedure?

In order to answer this question, it is important to find out what already exists in the world of commercial arbitration (II.) and sports arbitration (III.). The key elements responsible for the efficacy of the procedures need to be examined. Furthermore, an already existing approach in commercial arbitration is analysed and discussed. Focus is placed on the principle of *ex aequo et bono* in commercial arbitration and its feasibility examined (IV.).

The heart of this thesis is the synthesis of all results found in II.–IV. A new super expedited procedure and three spin-off models are developed, presented and discussed (V.). To test the

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2 *Abdel Wahab*, p. 133.
3 *Banifatemi*, p. 9; QMUL 2018, p. 31.
4 *Partasides/Prewett*, p. 123 et seq.
5 *Rigozzi*, p. 88.
6 *Levy/Polkinghorne*, p. 8.
initial feasibility of the models, a number of arbitrators and practitioners have completed a questionnaire and provided valuable feedback.

Using a wide international and interdisciplinary scope, this thesis provides a broad overview about expedited procedures, which are already in place. Using this as the base line, the aim is to take commercial arbitration to another level and to show the possibilities for expedited commercial arbitrations in the future.
II. Expedited Procedures in International Commercial Arbitration

In this section, the arbitration rules of six commercial arbitral institutions will be analysed and discussed with particular focus on the expedited procedures and their application. These six institutions have been chosen due to their variety of expedited procedure provisions.

1. China International Economic and Trade Arbitration Commission (CIETAC)
   a. General Remarks and Statistics

The China International Economic and Trade Arbitration Commission (“CIETAC”) was founded in 1956. The CIETAC is the biggest arbitral institution of the People’s Republic of China and arguably processes the highest number of cases worldwide. The CIETAC has experienced a remarkable growth within the last thirty years. In 1976, 75 new cases were filed, whereas in 2016, 2183 new cases were filed, 485 being international.

b. Applicable Rules

The current rules are the “China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules” (“CIETAC Rules”) effective as of 1 January 2015.

c. Expedited Procedure

The provisions outlining a fast-track procedure are contained in Chapter IV under the title “Summary Procedure” (Arts. 56 – 64 CIETAC Rules). The Summary Procedure is applied automatically if the amount in dispute does not exceed RMB 5 million. Parties can opt-in or out by means of agreement. After receipt of the notice of arbitration, the respondent is required to file its statements of defence within 20 days. The statement of defence has to contain evidence and supporting documents. If the respondent intends to file a counterclaim, the same time frame applies and triggers another 20-day time limit for the claimant to

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7 BRÖDERMANN/ETGEN, II. para. 16.
9 CIETAC RULES, Art. 56 para. 1; USD 786,317.00 as per 5.05.2018 on <https://www.xe.com/currencyconverter/>.
10 CIETAC RULES, Art. 59 para. 1.
respond to the counterclaim.\textsuperscript{11} Especially in international proceedings, these time frames are rarely complied with. Thus, parties often request extensions in the sense of Art. 59 para. 3 CIETAC Rules, which are usually granted.\textsuperscript{12}

Summary procedures are generally dealt with by sole arbitrators\textsuperscript{13} who can decide the case on a documents-only basis or hold a hearing.\textsuperscript{14} The rules provide for a 3-month time frame from the time the tribunal is constituted to render the award.\textsuperscript{15} However, in practice, tribunals often request multiple time extensions.\textsuperscript{16}

d. Discussion

The CIETAC Rules provide for a relatively small amount in dispute for the Summary Procedure to apply by default compared to other rules.\textsuperscript{17} However, when considering that the default time limit of three months is rarely complied with, it becomes apparent that a low amount in dispute alone does not mean a faster procedure. It is worth noting that the time limit of three months to render the award is ambitious in commercial arbitration.\textsuperscript{18} Also, the minimalistic approach to regulating the Summary Procedure may be too minimalistic, as large parts of the regular rules still apply to the Summary Procedure.\textsuperscript{19} A complete separation of expedited from general procedures could help to better comply with the 3-month time limit.\textsuperscript{20}

2. International Chamber of Commerce (ICC)

a. General Remarks and Statistics

The International Court of Arbitration (“ICA”) was founded by the International Chamber of Commerce (“ICC”) in 1923.\textsuperscript{21} It is considered the leading and most international institution in

\begin{footnotesize}
\begin{enumerate}
\item CIETAC \textsc{rules}, Art. 59 para. 2.
\item \textsc{brodermann/etgen}, Article 59, para. 1.
\item CIETAC \textsc{rules}, Art. 58.
\item Id., Art. 60.
\item Id., Art. 62.
\item \textsc{brodermann/etgen}, Article 62 para. 1.
\item Cf. \textit{infra} fn. 28, 77, 137.
\item See \textit{supra} fn. 12; within the scope of this thesis, only the SCC seems to successfully comply with a 3-month time limit, cf. \textit{infra} Image 2.
\item CIETAC \textsc{rules}, Art. 64.
\item Cf. \textit{infra} fn. 122.
\item \textsc{reiner/petkute/kern}, Article 30 para. 1.
\end{enumerate}
\end{footnotesize}
commercial arbitration. In the 2018 survey by Queen Mary University of London and White & Case, 77% of the 922 respondents answered that the ICC was their preferred institution.

In 2017, 810 claims were registered with the ICA. These were comprised of 2,316 parties from 142 countries. The arbitrators were of 85 different nationalities, 16.7% being female. The average amount in dispute was USD 45 million, with over 60% of cases being above USD 2 million. In 2016, 19.8% were construction claims, 19.4% were claims in the financial and insurance sector and 12.8% of the claims were from the energy sector.

b. Applicable Rules

The current rules are the 2017 Arbitration Rules (“ICC Rules”).

c. Expedited Procedure

The Expedited Procedure Provisions ("EPP") in the ICC Rules are contained in Art. 30 in conjunction with Appendix VI ICC Rules. These provisions were inserted during the latest amendment in 2017 and show that the ICC is following the current trend of providing more efficient dispute resolution procedures. According to Art. 30 para. 1 ICC Rules, the parties automatically agree on the applicability of the EPP by submitting their dispute to the ICC Rules in their arbitration clause if the amount in dispute does not exceed USD 2 million and the arbitration agreement was signed after 1 March 2017. This provision even “take[s] precedence over any contrary terms of the arbitration agreement.” Statistically, this means that about one third of the ICA’s caseload falls under the EPP.

22 BORN, pp. 175-176.
25 REINER/PETKUTE/KERN, II. para. 1.
26 Official reference in Art. 30 para. 1 ICC RULES.
27 LÉVY/POLKINGHORNE, p. 7.
28 ICC RULES, Appendix VI Art. 1 para. 2; SERAGLINI/BAETEN, para. 14; for determining the amount in dispute consult ICC NOTE, paras. 70 et seqq.
29 ICC RULES, Art. 30 para. 1.
30 See supra fn. 24; SERAGLINI/BAETEN, para. 27; also BÜHLER/HEITZMANN, p. 128.
Art. 30 para. 3 (b) ICC Rules allows parties to opt-out. However, this has to be declared explicitly in the arbitration agreement or at any time thereafter. Parties can also opt-in. This must also be done explicitly in an agreement. Another significant tool to streamline the procedure is the appointment of a sole arbitrator per default directly by the ICA if the parties fail to nominate one. Surprisingly, according to Appendix VI Art. 2 para. 1 ICC Rules, the ICA has the authority to appoint a sole arbitrator “notwithstanding any contrary provision of the arbitration agreement”.

After the tribunal has been constituted, new claims can only be filed upon authorisation of the tribunal. Tribunals are to hold a case management conference (“CMC”) and to establish a procedural timetable (“PT”). CMCs can be held via videoconference, telephone or other means of electronic communication. Tribunals need to hold a CMC within 15 days after receiving the case file. The EPP authorise the tribunal to further accelerate the proceedings, e.g., refuse requests for document production; limit number, length and scope of the parties’ written submissions, witness statements and expert reports; and to either not hold a hearing and decide the case on a documents-only basis, or to hold a hearing using electronic means as described above. Contrary to Art. 25 para. 6 ICC Rules, the tribunal can decide to not hold a hearing, even if a party demands to hold one. However, the tribunal should apply caution and ensure that the award remains enforceable at the seat of arbitration or the country where the award is to be enforced, taking into account the requirements of the respective lex arbitri.

31 ICC NOTE, para. 67 (c).
32 ICC RULES, Art. 30 para. 2 (b).
33 REINER/PETKUTE/KERN, Article 30 para. 6.
34 ICC RULES, Appendix VI Art. 2 para. 1; ICC NOTE, para. 84.
35 REINER/PETKUTE/KERN, Article 30 paras. 17 et seqq.; ICC NOTE, para. 82.
36 ICC RULES, Appendix VI Art. 3 para. 1.
37 Id., para. 3 in conjunction with Art. 24.
38 See BÜHLER/HEITZMANN, figure 1, for a tentative timetable under the EPP.
39 ICC RULES, Art. 24 para. 4.
40 Id., Appendix VI Art. 3 para. 3.
41 Id., paras. 4, 5.
42 REINER/PETKUTE/KERN, Article 30 para. 28; cf. infra fn. 52.
Furthermore, arbitrators are required to submit the final award within six months from the date of the CMC.\textsuperscript{43} Factually, this means that the tribunal has to submit the draft award to the ICA within five months from the date of the CMC, in order to be scrutinised by the ICA and distributed to the parties, within the 6-month time frame.\textsuperscript{44} If the tribunal does not comply, the ICA can reduce the fees of the tribunal by more than 20\% in extreme cases.\textsuperscript{45} The awards rendered under the EPP still need to be given with reasons. However, tribunals may limit the statement of facts and the procedural section to the essential elements needed to understand the award.\textsuperscript{46} For all matters, which are not expressly regulated by the EPP, the general ICC Rules are applicable.\textsuperscript{47}

d. Discussion

When the EPP were first released, there was concern that the ICC’s new fast and low-cost approach could be problematic in terms of legal quality and enforceability of the awards on the one hand and in terms of party autonomy on the other hand.\textsuperscript{48} The automatic application of the EPP based on the amount in dispute (i.e., USD 2 million) is not generally well received since “the value of a claim is not necessarily indicative of the complexity of the dispute.”\textsuperscript{49} The automatic application of the EPP might feel like an imposition,\textsuperscript{50} violating party agreement, especially if the ICA overrules the parties’ agreement to have a three-arbitrator tribunal and appoints a sole arbitrator instead.\textsuperscript{51} This is markedly so if the award is to be enforced in a country, in which party autonomy is regarded as an absolute principle, e.g., China.\textsuperscript{52}

\textsuperscript{43} ICC RULES, Appendix VI Art. 4 para. 1.
\textsuperscript{44} ICC NOTE, para. 98.
\textsuperscript{45} Id., para. 100; BANIFATEMI, p. 15.
\textsuperscript{46} ICC NOTE, para. 90.
\textsuperscript{47} ICC RULES, Appendix VI Art. 5.
\textsuperscript{48} SERAGLINI/BAETEN, paras. 16 et seqq.
\textsuperscript{49} Id., para. 25; BÜHLER/HEITZMANN, p. 125; ABD EL WAHAB, p. 134.
\textsuperscript{50} SERAGLINI/BAETEN, para. 27.
\textsuperscript{51} See supra fn. 35.
\textsuperscript{52} SERAGLINI/BAETEN, paras. 47 and 91 (The authors cite a decision rendered on 11 August 2017 by the Shanghai Municipal No. 1 Intermediate People’s Court, where the Court held that a similar provision in the Singapore International Arbitration Centre Rules of Arbitration 2013 [Art. 5 para. 2 (b), “the case shall be referred to a sole arbitrator, unless the President determines otherwise”], does not allow the Court to override the parties’ agreement to have their case heard before a three-arbitrator tribunal. Subsequently the court refused to enforce the award).
Another concern is that of quality. Although arbitrators can take some procedural measures to limit the parties’ submissions and documents, they still have the duty to issue an enforceable award with reasons. Not only may there be financial repercussions for them if they do not comply with the 6-month period, the scales of arbitrator’s fees for the EPP have been reduced by 20% compared to the general table. Arguably, this provision could be detrimental to the quality of the awards, as experienced high-profile arbitrators might be reluctant to take on a case under the EPP. Additionally, the main expenditures by parties in arbitration are their respective legal fees, accounting for approximately 80-90% of their incurred costs. Thus, the main reason why the EPP will bring down costs for the parties is because their legal counsel will spend less time deciding on arbitrators, only disclose essential documents, write less and shorter submissions and will not have to attend or travel to hearings. Saving on arbitrators’ fees seems to be a wrong measure.

So far, 50 requests to opt into the EPP were submitted, from which ten resulted in agreements to apply the EPP, involving 20 parties from 16 countries. Three of these cases were concluded within the 6-month time frame.

3. London Court of International Arbitration (LCIA)

a. General Remarks and Statistics

The City of London Chamber of Arbitration was founded in 1892 and its name changed into London Court of International Arbitration (“LCIA”) in 1975. Until today, London remains the world’s preferred seat of arbitration, with the LCIA as runner up in the category of preferred institutions, after the ICC. In 2017, the LCIA registered 285 cases with 80% of parties coming from outside the UK. More than half of the LCIA’s caseload came from the banking and

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53 ICC RULES, Appendix III.
54 REINER/PETKUTE/KERN, Article 30 para. 34; ICC NOTE, para. 78.
55 SERAGLINI/BAETEN, para. 33 with further references in footnote 47; BRUNNER, para. 40.
56 SERAGLINI/BAETEN, para. 32.
57 See supra fn. 24.
58 Official LCIA website, <http://www.lcia.org/LCIA/history.aspx>, accessed on 12.05.2018; KONRAD/HUNTER, II. para. 2; also supra fn. 1.
59 QMUL 2018, pp. 9 and 13.
60 LCIA REPORT 2017, p. 3.
finance (24%), energy and resources (24%) or transport and commodities sectors (11%).\(^{61}\) 31% of all claims had more than USD 20 million in dispute.\(^{62}\) In 2017, the LCIA registered 24% of arbitrators appointed as being female.\(^{63}\)

b. Applicable Rules

The current applicable rules are the LCIA Arbitration Rules 2014 ("LCIA Rules").

c. Expedited Procedure

The LCIA Rules’ only provision regarding an expedited procedure is Art. 9A LCIA Rules, the expedited formation of an arbitral tribunal in cases of exceptional urgency. This provision is mostly used, when parties apply for the application of provisional measures in connection with appointing an emergency arbitrator.\(^{64}\) In these cases, the LCIA is able to appoint an emergency sole arbitrator within 24 hours and a fully-fledged tribunal within two to three days.\(^{65}\) In 2017, a total of 16 applications for expedited appointment of a tribunal were filed of which four were granted.\(^{66}\) Otherwise the LCIA does not provide a separate set of rules for fast-track arbitrations. However, the LCIA recommends adapting the LCIA Rules if the parties wish to achieve an expedited process.\(^{67}\) The average duration of an LCIA arbitration is 16 months.\(^{68}\) Cases with an amount in dispute below USD 1 million are resolved within nine months in average.\(^{69}\)

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\(^{61}\) LCIA REPORT 2017, p. 5.
\(^{62}\) Id., p. 3.
\(^{63}\) Ibid.
\(^{64}\) KONRAD/HUNTER, Article 9A para. 4.
\(^{66}\) LCIA REPORT 2017, p. 18.
\(^{68}\) LCIA REPORT COSTS, p. 3.
\(^{69}\) Ibid.
d. Discussion

The LCIA stands as an example for minimalistic involvement and light administration.\(^{70}\) It does not have any authority to decide on the validity of an arbitration agreement or its extension to third parties and does not scrutinise the awards.\(^{71}\) Thus, the necessary level of expediency adequate for the individual dispute is left wholly to the tribunal and the parties.

When the statistics are considered, however, the LCIA cannot claim to be particularly fast in resolving the disputes.\(^{72}\) Having a separate set of rules or particular provisions within the general rules, which limit some procedural rights of the parties and streamline the whole process, contributes to efficiency.\(^{73}\) However, the LCIA’s \textit{laissez-faire} arbitration style with minimal involvement of the institution seems to be very attractive, even though the procedures might take longer.\(^{74}\)

4. Swiss Chambers’ Arbitration Institution (SCAI)

a. General Remarks and Statistics

In 2008, the Swiss Chambers’ Court of Arbitration and Mediation was created and renamed to Swiss Chambers’ Arbitration Institution (“SCAI”) in 2012.\(^{75}\) From 2004-2015, 937 cases were submitted of which 39\% were administered under the expedited procedure. 30\% of cases were concerning the sale of goods, 19\% the area of “Corporate/M&A/Joint Ventures” and 17\% were dealing with service agreements. 90\% of cases were international arbitrations with 70\% of parties and 22\% of arbitrators coming from outside Switzerland. 56\% of cases were decided by a sole arbitrator. In 2015, 19.7\% of all appointed arbitrators were female. The average amount in dispute from 2004-2015 was > CHF 15 million.\(^{76}\)

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\(^{70}\) Konrad/Hunter, II. paras. 65 et seqq.; cf. infra fn. 99.

\(^{71}\) Konrad/Hunter, II. para. 35.

\(^{72}\) See supra fn. 68.

\(^{73}\) See supra fn. 57, infra fn. 96 and Image 2.

\(^{74}\) QMUL 2018, p. 13.

\(^{75}\) Brunner, paras. 1 and 8.

b. Applicable Rules

The current applicable rules are the Swiss Rules of International Arbitration, in force since June 2012 ("Swiss Rules").

c. Expedited Procedure

The expedited procedure is found in Art. 42 Swiss Rules. Art. 42 Swiss Rules applies by agreement (para. 1) or by default if the amount in dispute is not above CHF 1 million (para. 2).\textsuperscript{77} As with the ICC EPP, the amount in dispute is not really an accurate indicator of the complexity of the case\textsuperscript{78}, but it does serve as an objective threshold. However, parties can always opt-in or out.\textsuperscript{79} The mandatory character of Art. 42 was already contained in the 2004 version of the rules and was thus quite avant-garde, compared to other rules at the time.\textsuperscript{80}

As soon as the provisional deposit of CHF 5,000.00 has been paid, the case file is transmitted to the tribunal.\textsuperscript{81} A sole arbitrator is appointed, unless the parties’ arbitration agreement provides for more than one arbitrator and the parties refused the court’s invitation to change their agreement.\textsuperscript{82} Upon transmission of the case file by the Secretariat (not receipt by the tribunal), the tribunal has six months to render the award.\textsuperscript{83} After the parties have submitted their notice of arbitration and the respective answer, there is generally only one round of written submissions (unless there is a counterclaim).\textsuperscript{84}

The parties can agree that the tribunal decides on a documents-only basis.\textsuperscript{85} Upon party agreement the tribunal can render an award without reasons. This is permissible under Swiss

\textsuperscript{77} \textsc{Brunner}, para. 35; \textsc{Müller-Chen/Pair}, para. 37; CHF amount equivalent to USD 999,962.00 as per 05.05.2018 on <https://www.xe.com/currencyconverter>.
\textsuperscript{78} \textsc{Müller-Chen/Pair}, para. 39.
\textsuperscript{79} \textsc{Brunner}, para. 36; \textsc{Müller-Chen/Pair}, paras. 7 et seqq.
\textsuperscript{80} \textsc{Von Segesser/Menz}, Article 42 para. 3.
\textsuperscript{81} \textsc{Swiss Rules}, Art. 42 para. 1 (a) in connection with Appendix B section 1.4; cf. \textsc{Müller-Chen/Pair}, para. 19.
\textsuperscript{82} \textsc{Swiss Rules}, Art. 42 para. 2 (b) and (c).
\textsuperscript{83} Id., Art. 42 para. 1 (d); cf. \textsc{Müller-Chen/Pair}, para. 27.
\textsuperscript{84} \textsc{Swiss Rules}, Art. 42 para. 1 (b); \textsc{Müller-Chen/Pair}, paras. 20 et seqq.
\textsuperscript{85} \textsc{Swiss Rules}, Art. 42 para. 1 (c); \textsc{Müller-Chen/Pair}, paras. 23 et seqq.
law and does not weaken the enforceability of the award. If there is no such agreement, the tribunal can state the reasons in summary form.

Additionally, Art. 3 Swiss Rules also provides that the statement of claim may already be included in the Notice of arbitration. This tool is also known as “Front-Loading” and reduces the duration of the procedure considerably. Arbitrator challenges need to be filed within 15 days after the challenging party has discovered a compromising fact and the court may decide on the challenge without stating its reasons. Witnesses and experts can be heard using videoconferences and arbitrators are officially given the option to offer settlement facilitation during the process. Lastly, the arbitrator is authorised to sanction recalcitrant behaviour.

d. Discussion

40% of the SCAI’s cases are administered under the expedited procedure, showing that this procedural tool is applied frequently. The provisional advance fee has the advantage that the court can initiate the proceedings immediately and does not have to wait for the parties to transfer their deposits. The 6-month time frame is ambitious but achievable. The average duration for an expedited procedure from 2004-2009 was around eight months. In contrast to the ICC Rules, there are no sanctions if the time limit is exceeded by the arbitrator(s). According to Brunner, the main reason for the efficiency of the Swiss Rules is the “light administration of the Swiss Rules”.

References:

86 Molina, para. 53; Girsberger/Voser, para. 1520 with further references.
87 Swiss Rules, Art. 42 para. 1 (e); Müller-Chen/PAIR, para. 36.
88 Swiss Rules, Art. 3 para. 4 (b).
89 Havedal IPP, para. 3.
90 Swiss Rules, Art. 11.
91 Id., Art. 25 para. 4.
92 Id., Art. 15 para.8.
93 Brunner, para. 13 with reference to Swiss Rules Art. 40 paras. 1 and 2.
94 Brunner, paras. 11 et seq. with further information regarding the advance on costs.
95 Ibid.
97 Müller-Chen/PAIR, para. 35; cf. supra fn. 45.
98 Brunner, para. 34 (emphasis contained).
Generally speaking, each intervention by the arbitration institution carries the potential for delays since the relevant matter has to be sent up from the tribunal and the parties to the institution, which then has to form a decision and send it back down before the proceedings can continue.”

This is also the approach of the LCIA, as seen above. However, the Swiss Rules do contain more specific provisions and a separate expedited procedure, which applies by default and compared to the LCIA, the SCAI on average takes one month less than the LCIA to render an award. It seems that the Swiss Model tries to strike a moderate balance between an unregulated approach (as taken by the LCIA) and an arguably overregulated approach (as taken by the ICC).

5. Stockholm Chamber of Commerce (SCC)

a. General Remarks and Statistics

The Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) was created in 1917. In 2017, the SCC administered 200 cases, of which 48% were international. In 36% of cases the SCC Rules for Expedited Arbitrations were applied. The parties were comprised of 40 different nationalities and most disputes were concerning agreements of delivery, service or business acquisitions. In 36% of the cases commenced in 2017, a sole arbitrator was appointed and 18% of total appointed arbitrators were female. In 2017, the SCC recorded six arbitrator challenges of which five were rejected. Furthermore, the SCC provides two interesting diagrams regarding the duration of the procedures under regular and expedited rules, which are of particular interest for the purposes of this thesis:

99 BRUNNER, para. 34 (emphasis contained).
100 See supra fn. 70.
101 Cf. supra fn. 69.
TIME FOR RENDERING AWARD
– ARBITRATION RULES 2017

The diagram shows the time from referral of a case to the tribunal until the rendering of an award.


TIME FOR RENDERING AWARD
– EXPEDITED RULES 2017

The diagram shows the time from referral of a case to the arbitrator until the rendering of an award.

b. Applicable Rules


c. Expedited Procedure

The SCC EP Rules are applied if the parties have provided for their application in the arbitration clause.\textsuperscript{104} Notices or other communications can be sent by mail, e-mail or any other means which records the sending of the communication.\textsuperscript{105} The request for arbitration automatically serves as the statement of claim and needs to state, inter alia, the prayers for relief, estimate of the monetary value, factual and legal basis and contain the evidence relied upon (front-loading).\textsuperscript{106}

After filing the request for arbitration, a EUR 2,500.00 registration fee needs to be paid to start the proceedings.\textsuperscript{107} Additionally, the respondent’s answer to the request for arbitration constitutes its statement of defence and should thus entail all relevant information and evidence. The time limit to render an answer is set by the SCC Secretariat and is usually four weeks. \textsuperscript{108}

It is not until the SCC Secretariat has received the answer that it counsels with the parties to appoint a sole arbitrator or a three-member panel. However, the default rule is to have the case heard by a sole arbitrator.\textsuperscript{109} It is also the SCC Board, which initially decides whether the SCC has jurisdiction to decide the case or not.\textsuperscript{110} The parties are given ten days to jointly appoint an arbitrator. Otherwise the SCC Board will do so.\textsuperscript{111} After the appointment is made and the advance on costs is paid, the case file is transferred to the arbitrator and he or she is then in charge of the conduct of the arbitration.\textsuperscript{112}

\textsuperscript{104} SCC EP Rules, p. 2.
\textsuperscript{105} Id., Art. 5 para. 2.
\textsuperscript{106} Id., Art. 6; HAVEDAL IPP, para. 3.
\textsuperscript{107} SCC EP Rules, Art. 7 in conjunction with Appendix III Art. 1.
\textsuperscript{108} Id., Art. 9; HAVEDAL IPP, para. 3.
\textsuperscript{109} SCC EP Rules, Art. 11 in conjunction with Art. 17.
\textsuperscript{110} Id., Art. 12 (i) in conjunction with Art. 13 (i).
\textsuperscript{111} Id., Art. 18.
\textsuperscript{112} Id., Arts. 23 – 24.
The arbitrator can choose when to hold a CMC. The only stipulation is that it must be held “promptly”. However, he or she has to establish a PT within seven days of having received the case file. An arbitrator can allow additional written submission if deemed necessary. Such submissions are to be filed within 15 days by either party. The arbitrator additionally has a tool to determine a final cut-off date for submitting any claims, evidences or facts, after which neither party may change or amend anything (except in the case of having compelling reasons). The arbitrator may order a party to produce evidence he or she deems relevant to the case.

The default rule is that no hearings are to be held, except if a party so requests and the arbitrator finds the reasons for the request to be compelling. Furthermore, the arbitrator can decide the case on an ex aequo et bono basis if the parties so agree.

The award is without reasons by default, however, a party may request an award with reasons. The default time limit to render the award is three months after the case has been referred to the arbitrator. The award is considered to be binding and final upon being rendered.

If a party is of the opinion that certain claims presented during the arbitration were not determined in the award, it may, within 30 days of receiving the award, request that the arbitrator issues an additional award regarding these claims. After hearing the other party’s comments, and if he or she deems the request to be justified, the arbitrator is to issue the additional award within 30 days of receiving the request.

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113 SCC EP RULES, Art. 29.  
114 Id., Art. 30.  
115 Id., Art. 32 para. 3.  
116 Id., Art. 33 para. 1.  
117 Id., Art. 28 para. 3; for ex aequo et bono see infra IV.  
118 Id., Art. 42 para. 1.  
119 Id., Art. 43.  
120 Id., Art. 46.  
121 Id., Art. 48.
d. Discussion

The SCC EP Rules are the most resolute commercial expedited procedures featured in this thesis. Statistics show that it actually works, since 54% of cases decided under the SCC EP Rules are concluded within three months. 92% of cases are concluded within six months. This procedure works well, as most of the essential tools which accelerate a procedure are set by default.\textsuperscript{122} The tool of the additional award gives parties the certainty that their arguments will be considered, even though the procedure is extremely streamlined. It seems that a complete separation of the expedited procedure from the regular procedure proves to be most efficient. So far, 72 cases were decided under the new rules in 2017.\textsuperscript{123} They definitely stand in stark contrast to other expedited procedure provisions and signify a bold leap, which might pave the way for other institutions to follow.

6. Singapore International Arbitration Centre (SIAC)

a. General Remarks and Statistics

The Singapore International Arbitration Centre ("SIAC") has become one of the top places for international arbitration in the world.\textsuperscript{124} Singapore is ranked to be among the five preferred seats of arbitration,\textsuperscript{125} with the SIAC being within the top three arbitral institutions.\textsuperscript{126} In 2017, 421 cases were administered.\textsuperscript{127} Since its introduction in 2010, 414 applications for expedited procedure were filed of which 236 were accepted.\textsuperscript{128} Around 25% of these applications were filed in 2017, which shows the recent increase in demand for fast-track arbitration.\textsuperscript{129} In 2017, the average amount in dispute was USD 14.47 million\textsuperscript{130} and 83% of cases were international in nature with parties from 58 different jurisdictions.\textsuperscript{131} Parties from India, China and Switzerland were the three most frequent users in 2017.\textsuperscript{132} 31% of cases in 2017 were trade

\textsuperscript{122} I.e., front-loading, sole arbitrator, jurisdictions decided by the SCC before the appointment of the arbitrator, documents-only, award without reasons, clear expedited procedure provisions.
\textsuperscript{123} See supra fn. 103.
\textsuperscript{124} HIRTH, para. 1.
\textsuperscript{125} QMUL 2018, p. 9; Singapore was ranked in third place just after London and Paris.
\textsuperscript{126} Id., p. 13; the ICC is the preferred Institution, followed by the LCIA.
\textsuperscript{127} SIAC REPORT, p. 13.
\textsuperscript{128} Id., pp. 11 and 18.
\textsuperscript{129} Id., p. 11; in 2017, 107 applications for expedited procedure were filed of which 55 were accepted.
\textsuperscript{130} SIAC REPORT, p. 14.
\textsuperscript{131} Id., p. 15
\textsuperscript{132} Id., p. 14.
related disputes, 22% commercial disputes, and 20% maritime or shipping disputes.\textsuperscript{133} The 145 appointed arbitrators in 2017 were spanning 18 different nationalities, 29.7% being female. SIAC also provides another interesting statistic, namely the dates of the contracts for cases filed in 2017:

![Dates of contracts for cases filed at SIAC in 2017](Image 3; Dates of contracts for cases filed at SIAC in 2017; source: SIAC REPORT, p. 20)

Considering this graph, it becomes clear that most disputes filed with SIAC in 2017 were erupting within the first four years, in particular within the second year after contract conclusion. This occurrence has been consistent within the past eight years.\textsuperscript{134}

b. Applicable Rules

The current rules are the Arbitration Rules of the Singapore International Arbitration Centre in their sixth edition of 1 August 2016 ("SIAC Rules").

\textsuperscript{133} SIAC REPORT, p. 15.

c. Expedited Procedure

Rule 5 SIAC Rules is concerned with the expedited procedure and was inserted into the fourth edition of the SIAC Rules in July 2010.\textsuperscript{135} The expedited procedure only finds application upon a party’s request before the constitution of the arbitral tribunal, which is generally done within its request for arbitration.\textsuperscript{136} Furthermore, the amount in dispute cannot exceed SGD 6 million.\textsuperscript{137} This amount does encompass the entirety of claim, counterclaim and any set-off defences.\textsuperscript{138} If a later counterclaim exceeds this threshold, a party can request to fall back on the regular procedure.\textsuperscript{139} Nonetheless, the parties can opt-in if the value is higher.\textsuperscript{140} Naturally, the provision applies in “exceptional urgency”.\textsuperscript{141}

After the request, stating the reasons why the expedited procedure should be applied in the case at hand is filed, the SIAC usually waits with the decision until the advance on costs is paid. The respondent is granted 14 days to file an answer to the request for expedited procedure after which the claimant is granted another seven days to respond thereto.\textsuperscript{142}

Rule 5.2 (b) provides for a sole arbitrator. This provision even applies if the parties agreed on a three-arbitrator panel in their arbitration clause while subduing the dispute to the SIAC Rules without specifying that Rule 5.2 (b) should \textit{not} be applied.\textsuperscript{143} This rule is further protected by Rule 5.3, which states that “the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms”, if the parties have agreed to apply the expedited procedure.

The tribunal is further authorised to decide on a documents-only basis. However, if the parties insist to hold a hearing, the tribunal will most certainly do so in order to protect the award.\textsuperscript{144}

\begin{flushleft}
\textsuperscript{135} HIRTH, para. 42.
\textsuperscript{136} SIAC RULES, Rule 5.1; HIRTH, para. 43.
\textsuperscript{138} SIAC RULES, Rule 5.1 letter a.
\textsuperscript{139} Id., Rule 5.4 in conjunction with Rule 20.3; HIRTH, paras. 43 and 54.
\textsuperscript{140} SIAC RULES, Rule 5.1 letter b; HIRTH, para. 44.
\textsuperscript{141} SIAC RULES, Rule 5.1 letter c.
\textsuperscript{142} HIRTH, para. 46.
\textsuperscript{143} SIAC RULES, Rule 5.2 letter b in conjunction with Rule 5.3; Decision of the Singapore High Court of 13 February 2015 in AQZ v ARA [2015] SGHC 49, paras. 135 et seq.
\textsuperscript{144} SIAC RULES, Rule 5.2 letter c; HIRTH, para. 49.
\end{flushleft}
The tribunal is given six months after its constitution to render the award and it may do so in summary form. However, the parties can empower the tribunal to render an award without reasons.\textsuperscript{145}

d. Discussion

What sticks out in the SIAC expedited procedure is the definite cap of the amount in dispute for expedited procedures. On the one hand, the amount is higher than in other rules\textsuperscript{146} which specify a certain amount. On the other hand, claimants with a higher amount in dispute who would like to arbitrate using the expedited procedure are barred from doing so. Also, respondents could abuse this provision as a dilatory tactic by bringing a counter claim or set-off defences which raises the amount to exceed SGD 6 million in order to escape the expedited procedure.\textsuperscript{147} Besides, the fact that the parties can file three submissions solely on the issue of whether the expedited procedure applies or not, does not seem very expeditious.

Another interesting fact is that almost half of the applications for the expedited procedure were rejected. Uncertainty, as to what constitutes “exceptional urgency”,\textsuperscript{148} is most probably the cause for this high rate of refusals.

As with the ICC EPP,\textsuperscript{149} SIAC is authorised to override party agreement in appointing a sole arbitrator, even if the parties have provided explicitly for a three-member tribunal. This can cause problems during the execution stage of the arbitration as seen in case law.\textsuperscript{150} Even though the SIAC Rules with Art. 5.3 protect the award, it can still constitute a roadblock, slowing down the parties in enforcing the award.

\textsuperscript{145} SIAC RULES, Rule 5.2 letters d and e.
\textsuperscript{146} Cf. supra fn. 28 and 77.
\textsuperscript{147} HIRTH, para. 43.
\textsuperscript{148} See supra fn. 52 and 141; HIRTH, para. 45.
\textsuperscript{149} Cf. supra fn. 35.
\textsuperscript{150} See supra fn. 143.
III. Expedited Procedures in Sports Arbitration

In this section, the three best established and applied procedures in sports arbitration will be analysed. Namely, the procedure of the Basketball Arbitral Tribunal ("BAT"), the Court of Arbitration for Sport ("CAS") and the CAS ad-hoc division ("CAS-ahd").

1. Basketball Arbitral Tribunal (BAT)

a. General Remarks and Statistics

Before the BAT existed, basketball players who were playing outside of the USA had to bring claims against their clubs before local national courts. This process often took years and was very unsatisfying for the players and very much in favour of the clubs' interests.\textsuperscript{151} The clubs often abused the players' predicament and refused to pay them, knowing that the players had virtually no chance of pursuing their claims in front of a national court. Although at the time, the CAS was already operating, also the CAS procedures were deemed too slow.\textsuperscript{152} Thus, players, their agents and the Fédération Internationale de Basketball ("FIBA") saw a need to change this situation. In 2007, the FIBA in collaboration with DIRK-REINER MARTENS and his team from Martens Rechtsanwälte Munich, which administers the cases for the tribunal, created the BAT.\textsuperscript{153}

The BAT is an independent arbitral tribunal with seat in Geneva, Switzerland, and solely decides on basketball related contractual disputes.\textsuperscript{154} In its 10-year history, it has processed over 1100 cases and it currently registers approximately 150 cases per year.\textsuperscript{155} Between 2007 and 2015, 70.4% of the requested arbitrations led to an award or a termination order. In 17.2% of cases, the parties were able to agree on a settlement. 35.6% of all cases were so called “Low Value Cases” (value below EUR 30,000.00\textsuperscript{156}), were an award without reasons (only operative

\textsuperscript{151} ROSEN, paras. 15 et seqq.
\textsuperscript{152} MARTENS, Question 2; ROSEN, paras. 16 et seq.
\textsuperscript{153} Official website Martens Rechtsanwälte, <http://martens-lawyers.com/basketball-arbitral-tribunal/>, accessed on 15.05.2018; MARTENS, Einführung; BAT RULES, Preamble para. 0.1; BAT REGULATIONS, para. 324.
\textsuperscript{154} Official FIBA website, <http://www.fiba.basketball/bat>, accessed on 16.05.2018; BAT RULES, Preamble para. 0.1, Art. 2 para. 2.1; RIGOZZI, p. 101.
\textsuperscript{156} Under the new BAT RULES 2017, the threshold is now EUR 100,000.00; BAT RULES, Art. 16 para. 16.2.
clauses) was issued. Between 2007 and 2016, 50% of cases had EUR 50,000.00 or less in the aggregate. The BAT operates with a closed arbitrator list comprised of eight individuals from five different nations who are all specialised in matters of sports law and arbitration. Probably the most distinctive element of BAT arbitration is that the arbitrators make their decisions on the basis of *ex aequo et bono* and are thus not bound to apply any national law.

b. Applicable Rules

The current rules are the Basketball Arbitral Tribunal Arbitration Rules 2017 ("BAT Rules").

c. Expedited Procedure

The BAT Rules are a complete set of expedited procedure rules and do not provide for two different kinds of procedure. They “are designed to provide for a simple, quick and inexpensive means to resolve [...] disputes.” Their key elements are already set out in the proposed arbitration clause:

"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a *single arbitrator appointed by the BAT President*. The *seat* of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. *The arbitrator shall decide the dispute ex aequo et bono.*"

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158 *HASLER*, footnote 32


160 For *ex aequo et bono* see infra IV.

161 BAT RULES, Preamble para. 0.2; HASLER, p. 102.

162 BAT RULES, Preamble para. 0.3 (emphasis added); see FIBA REGULATIONS, p. 62 for a standard contract.
Arbitration is initiated by filing the request for arbitration together with the statement of claim and all written evidence on which the requesting party intends to rely (front loading). After the advance on costs has been received by the tribunal and the BAT President has determined that the arbitration can proceed, he or she appoints a sole arbitrator from the closed list and refers the case. It is the BAT Secretariat which then issues the time limit for the respondent to provide its answer, which in essence, is a fully fledged reply to the statement of claim. Unless otherwise decided by the arbitrator, parties are limited to one set of written submissions. No hearings are held unless the arbitrator deems it necessary, in which case it can be done by telephone, video conference or in person. Unless the parties have opted-out, the arbitrator is admonished to decide the dispute “ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.” If the amount in dispute does not exceed EUR 100,000.00 and the parties have not opted-out, the award will be limited to the operative clauses, not stating the reasons which led to the decision. After the completion of the proceedings, the arbitrator has to render the award within six weeks. The BAT Rules also have a rule providing for a capped amount which the prevailing party can recuperate from the losing party towards their legal fees, which is fixed at a maximum of EUR 40,000.00 for claims above EUR 1 million. Up until the end of 2016, BAT arbitrations were concluded within six to seven months on average, with a cost/value ratio of approximately 6%.

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163 BAT RULES, Art. 9 para. 9.1.
164 BAT RULES, Art. 6 para. 6.1; MARTENS, Question 1.
165 BAT RULES, Art. 11 para. 11.2.
166 Id., Art. 8 para. 8.1; HASLER, p. 102; RIGOZZI, p. 103.
167 BAT RULES, Art. 11 para. 11.2.
168 Id., Preamble para. 0.2, Art. 12 para. 12.1.
169 Id., Art. 13 paras. 13.1, 13.2; MARTENS, Question 12.
170 BAT RULES, Art. 15.
171 Id., Art. 16 para. 16.2; e.g., BAT Award No. 0951/16 of 8 March 2018.
172 BAT RULES, Art. 16 para. 16.3.
173 Id., Art. 17 para. 17.4.
174 HASLER, p. 102; MARTENS, Question 15.
d. Discussion

It is the interrelation of various elements which makes this model of expedited procedure efficient and successful. The most noteworthy and unique element is that arbitrators are to decide *ex aequo et bono*. Arbitrators do not need to invest time to familiarise themselves with provisions of foreign law. Because the parties do not have to provide expert advice regarding the application of foreign domestic law, nor do they have to write submissions on the application, the whole process is narrowed down to resolving the core dispute. This brings down costs and speeds up the process.\(^\text{175}\)

The fact that less than 0.5% of cases were appealed to the Swiss Federal Tribunal shows a high rate of satisfaction with this extremely streamlined process.\(^\text{176}\) Additionally, the default rule that the cases are decided on a documents-only basis is rarely derogated by the parties. So far, out of 1100 cases, only about 1.5% held a hearing. These hearings were all closed within a day.\(^\text{177}\)

Under the 2014 version of the BAT Rules, statistics have shown that claimants preferred a fast and cheap procedure over an award with reasons. In almost 90% of cases, claimants opted for an award without reasons.\(^\text{178}\) Thus, the BAT raised the threshold for an award without reasons per default from claims worth up to EUR 30,000.00, to claims worth up to EUR 100,000.00. However, under the 2017 BAT Rules, in cases with a higher value (i.e. > EUR 100,000.00), an award with reasons is mandatory. This seems contradictory, since under the 2014 Rules the threshold was EUR 200,000.00. The BAT justifies this amendment with the purpose of providing “users again with more publicly available jurisprudence, given that under the 2014 edition of the BAT Rules, more than half of the awards were rendered without reasons.”\(^\text{179}\) An award without reasons is limited to the operative part of the decision. This means that besides the ordinary information regarding the parties, their respective counsel, issuing arbitrator and available remedies against the award, the award only states the arbitrator’s direct ruling with

\(^{175}\) Hasler, p. 102; Martens, Question 2.

\(^{176}\) Martens, Question 14.

\(^{177}\) Id., Questions 5 and 11.

\(^{178}\) BAT Circular, para. 2.

regard to the parties’ prayers of relief and his or her decision on costs.\textsuperscript{180} Thus, the award is void of procedural history, statement of facts and the legal reasoning which lead the arbitrator to his or her decision.

Another innovative element is that “[i]n the interest of the development of consistent BAT case law”,\textsuperscript{181} the BAT President can give a sole arbitrator permission to consult with the other listed arbitrators when new issues or questions arise during a dispute. This ensures a coherent BAT case law and allows counsel to more accurately foresee the results of a case, given that this is considered a weak element of \textit{ex aequo et bono} decision making.\textsuperscript{182}

Last but not least, a significant reason why the BAT procedure works exceptionally well is that there are heavy sanctions in place for non-compliance with a BAT award.\textsuperscript{183} Not only can the FIBA impose a monetary fine of up to CHF 150,000.00,\textsuperscript{184} if the non-compliant party is a player, the FIBA can ban this player from international transfers and/or participation in international competitions with his or her national team or club. If the non-compliant party is a club, the FIBA can ban this club from registering new players and/or from participating in international club competitions. All these sanctions can be applied multiple times and cumulatively if necessary.\textsuperscript{185} Those sanctions, can have far reaching and immediate consequences. Sponsorships, for example, when bound to the player’s or club’s participation in international competitions could be withheld. All players and clubs which are currently under such ban are listed on the FIBA’s website.\textsuperscript{186}

What needs to be kept in mind about the BAT is that it operates in a very narrow market. It solely resolves contractual disputes connected to basketball.\textsuperscript{187} Strict limitation of the industry sector and overarching world-wide organisational regulation through the FIBA are definitely strong contributors to the BAT’s success. Thus, the BAT procedure is specifically tailored to

\textsuperscript{180} HASLER, footnote 39.
\textsuperscript{181} BAT RULES, Art. 16 para. 16.1.
\textsuperscript{182} HASLER, p. 105; MARTENS, Question 2.
\textsuperscript{183} MARTENS, Question 13.
\textsuperscript{184} USD 151,057.00, as per 06.07.2018 on <https://www.xe.com/currencyconverter/>.
\textsuperscript{185} FIBA REGULATIONS, Art. 335.
\textsuperscript{187} See \textit{supra} fn. 154.
the industry sector of basketball and its recurrent types of disputes.\textsuperscript{188} It could, however, stand as a role model for other specialised tribunals which are also tailored to individual industry sectors and deal with typical and recurring types of disputes.\textsuperscript{189}

2. CAS Procedure

a. General Remarks and Statistics

The Court of Arbitration for Sport (CAS) was created in 1983 by the International Olympic Committee ("IOC").\textsuperscript{190} It has its headquarter in Lausanne, Switzerland and is only concerned with resolving sport related disputes. The disputes span from financial disputes, disciplinary matters, anti-doping disputes to general applications of sports specific regulations.\textsuperscript{191} Following a decision by the Swiss Federal Supreme Court, CAS is now administrated by the International Council of Arbitration for Sport ("ICAS"\textsuperscript{192}, created in 1994), as a way to further detach the CAS from the IOC and make it independent.\textsuperscript{193} There were two main reasons which led to the creation of the CAS. The first reason was the growing need to bypass the state court system in order to ensure a smooth dispute resolution procedure which would keep up with the short durations of competitions and athletes’ careers. The second reason was the need to provide a uniform jurisprudence for international athletes from differing jurisdictions and legal systems, competing within the same competition.\textsuperscript{194} Between 1986 and 2016, the CAS administered 790 ordinary procedures; between 1995 and 2016, the CAS administered 4053 appeal procedures (appeals against decisions of sports federations\textsuperscript{195}), seeing a steady increase in both divisions.\textsuperscript{196}

\textsuperscript{188} Rigozzi, p. 103.
\textsuperscript{189} Ibid.
\textsuperscript{191} Rigozzi, p. 88; cf. CAS Code, Art. R27.
\textsuperscript{192} CAS Code, Art. S2; see CAS Code Art. S6 for the functions of ICAS; cf. Rigozzi, p. 90.
\textsuperscript{193} BGE 119 II 271, consideration 3, pp. 276 et seqq. (The fact that all the arbitrators on the closed list were selected by the International Olympic Committee, which itself could be party to a proceeding negated that the CAS procedure was a genuine arbitration system); also Rigozzi, p. 89.
\textsuperscript{194} Rigozzi, p. 88.
\textsuperscript{195} CAS Code, Art. S12; cf. Schmidhauser, Question 1.
b. Applicable Rules

The current arbitration rules are contained in the Code of Sports-related Arbitration in force as of 1 January 2017 (“CAS Code”).

c. CAS Ordinary and Appeals Procedure

The CAS Code contains two separate proceedings; the ordinary procedure and the appeals procedure. Both will be analysed in this section.

1. CAS Ordinary Procedure

The seat of arbitration of any CAS procedure and its panels is always Lausanne, Switzerland and consequently, the *lex arbitri* is always Chapter 12 of the Swiss International Private Law Act (“PILA”), which is known to be an innovative and user-friendly arbitration law. Furthermore, it ensures a stable legal framework for CAS arbitrations, independently of the origin of the parties.

The ordinary procedure consists of one written round and one hearing, although the hearing is optional. Parties, witnesses and experts can be heard via telephone- or video-conference and hearings are usually conducted within one day. No transcripts of the hearings are made but the parties can request an audio recording. The parties can determine the applicable law or authorise the panel to decide *ex aequo et bono*. In the absence of both, Swiss law is applied. The award is to be in written form and briefly state

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198 CAS Code, Art. R28; for CAS *ad hoc* Division see infra fn. 238; Rigozzi, p. 91.
199 Girssberger/Voser, para. 1922; Kaufmann-Kohler, p. 101; cf. Art. 176 para. 1 PILA.
200 Krek/Kostkiewicz/Markus, pp. 5-6; Rigozzi, p. 92; Chapter 12 of the PILA is in the process of being revised at the moment. It is expected to become even more innovative, such as that jurisdiction is granted, even if the arbitration clause is only unilaterally in written form (IPRG Vorentwurf, Draft Art. 178 para. 1 PILA). Another change which will make the Swiss *lex arbitri* more attractive for international arbitration is that appeals to the Swiss Federal Supreme Court in arbitration matters will be able to be filed in English as opposed to one of the national languages of Switzerland (IPRG Vorentwurf, Draft Art. 77 para. 2bis BGG).
201 See infra fn. 239.
202 Mavromati/Reeb, p. 326; Rigozzi, p. 93; cf. CAS Code, Art. R44.1 and R44.2.
203 CAS Code, Art. R44.2.
204 Rigozzi, p. 94.
205 Ibid.
the reasons. The panel can communicate the operative parts of the award and provide the parties with the reasons at a later date if time is urgent. The operative parts are enforceable upon receipt by the parties.\textsuperscript{207} The expedited procedure for ordinary proceedings is set out in Art. R44.4 CAS Code and simply states: “With the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor.”\textsuperscript{208}

2. The CAS Appeals Procedure

If a party appeals a CAS decision (CAS acting as first instance) or a decision of a sports federation based on the statute of that federation or based on an individual arbitration agreement, the procedure is slightly different.\textsuperscript{209} The main differences are as follow:

- In the appeals procedure, the Appeal Brief is to be filed within ten days after the appeal has been lodged with the CAS. Upon receipt of the Appeal Brief, the respondent has to file its answer within 20 days. Time extensions are possible but must be requested before the end of the deadline.\textsuperscript{210} All evidence relied upon must be presented together with the first written submission. Exceptions to this rule are only granted if a party wishing to introduce new evidence at a later stage can prove that the new evidence did not exist at the filing date or that it could not have been identified.\textsuperscript{211}

- There is a 21-day time limit from the receipt of the decision appealed against, to file the appeal;\textsuperscript{212}

- The ordinary procedure provides the right to file a counterclaim, which is not possible in the appeals procedure;\textsuperscript{213}

- In the appeals procedure the president of the panel is appointed by the President of the Appeals Division, while in the ordinary procedure the parties can decide themselves;\textsuperscript{214}

\textsuperscript{207} Id., Art. R46.
\textsuperscript{208} CAS CODE, Art. R52 for the expedited procedure in the appeals procedure is largely the same.
\textsuperscript{209} For an extensive list see GIRSBERGER/VOSER, para. 1919.
\textsuperscript{210} CAS CODE, Arts. R51 and R55; RIGOZZI, pp. 93-94.
\textsuperscript{211} CAS CODE, Art. 56; RIGOZZI, p. 95.
\textsuperscript{212} CAS CODE, Art. R49; RIGOZZI, p. 93: “the CAS will not hear an appeal that is out of time.”.
\textsuperscript{213} CAS CODE, Art. R44.1 cf. to Art. R55.
\textsuperscript{214} Id., Art. R54 compared to Art. R40.3; RIGOZZI, p. 95.
- Awards rendered under the ordinary procedure are confidential whereas awards rendered under the appeals procedure are generally made public.215

One of the most prominent features of all CAS procedures is that the arbitrators have to be selected from a closed list.216 The list is constituted by the ICAS which appoints arbitrators with, *inter alia*, experience in the field of sports law and arbitration and with good knowledge of sport in general.217 Arbitrators are appointed for a four-year term and are barred from representing parties as counsel before the CAS.218 Another prominent feature is that although the appeals procedure deals with a previous decision, the panel decides the case on a *de novo* basis, which means the panel is authorised to conduct a full review on the law and the facts and replace the old with a new decision. There is, so to speak, *no res iudicata*.219

d. Discussion

In the CAS procedures, especially in the appeals procedure, the tools which contribute to a fast process are set by default. The parties give up large parts of their autonomy in order to speed up the proceedings.220 What stands out are the short time limits to file the written submissions and of course the closed arbitrator list. This closed list is often subject of debate as seen during the ‘Pechstein-Saga’.221 However, it is precisely this closed list, which heavily contributes to the efficiency of the CAS, as a number of specialists in the field have made themselves available to be appointed as arbitrators on short notice and are duly instructed by the CAS to render consistent awards in an expedited manner.222 This is also the opinion of the Swiss Federal Supreme Court.223 Lastly, the simplicity of Arts. R44.4 and R52 CAS Code

218 CAS CODE, Arts. S13 and S18; Rigozzi, p. 95: “this prohibition is only effective against the arbitrator ad personam and does not extend to the law firm where the arbitrator works.”.
219 CAS CODE, Art. R57; Rigozzi, p. 93; see infra fn. 253 for case law.
220 Rigozzi, p. 106.
221 Guandalini/De Faro Nunes, paras. 3 et seqq.; Rigozzi, p. 95; Claudia Pechstein is a German speed skater who appealed against a CAS decision at the Swiss Federal Supreme Court in 2010 mainly on accounts of the closed arbitrator list; see <https://www.isu.org/claudia-pechstein-case> for a complete case history. Her case is still pending at the European Court of Human Rights, see <https://www.echr.coe.int/Documents/CP_Switzerland_ENG.pdf>, both accessed on 14.07.2018.
222 Schmidhauser, Question 21.
223 Ibid.; BGE 129 III 445, consideration 3.3.3.2., pp. 455 et seqq.
(expedited procedure) gives the arbitrators the necessary freedom to tailor the procedure to the individual needs of the parties if the matter is of exceptional urgency.  

3. CAS ad hoc Division

a. General Remarks and Statistics

Due to the inherent need for fast and efficient dispute resolution during time-sensitive sports events like the Olympics, in 1996, the IOC requested the CAS to envoy a selected number of CAS arbitrators directly to the Olympic Games (“OG”) in Atlanta, USA. These arbitrators were on-site permanently and were able to directly adjudicate disputes during the whole event. Thus, the CAS created the CAS ad hoc Division (“CAS-ahd”) “with the task of settling finally and within a 24-hour-time-limit any disputes arising during the Olympic Games in Atlanta”. Since 1996, a CAS-ahd has been sent to all Olympic Summer and Winter Games. Since 2006, a CAS-ahd has been sent to every FIFA World Cup and since 2012 to all UEFA European Championships. CAS arbitrators have also been sent to every Commonwealth and Asian Games since 2014. Between 1996 and 2016, 119 CAS ad hoc procedures were conducted. There was a sudden increase of arbitrations in the 2016 OG in Rio de Janeiro, Brazil. Before 2016, the number of arbitrations for one edition of the OG was between five and 15. In 2016, there were a record number of 28 arbitrations, eleven of which were conducted already within the 10-day period prior to the Opening Ceremony. Most of those cases concerned the participation of Russian Athletes in the Rio OG, due to the uncovered ‘systematic doping’ scandal. During the most recent Olympic Winter Games 2018, held in PyeongChang, South Korea, the CAS-ahd rendered six awards. The CAS-ahd is usually concerned with disputes

224 E.g., CAS 2017/A/5063 Deutscher Fussball-Bund e.V. (DFB) & 1. FC Köln GmbH & Co. KGaA (FC Köln) & Nikolas Terkelsen Nartey v. Fédération Internationale de Football Association (FIFA), award of 22 May 2017, where the parties were notified of the operative parts of the award within 16 days of having filed the appeal; MAVROMATI/REEB, p. 338.


226 RIGOZZI, p. 99; for the purposes of this thesis only the procedure governing the CAS-ahd during the Olympic Games are analysed and commented.

227 See supra fn. 196.

228 Ibid.

229 KEIDEL/ENGELHARD, para. 23.

arising out of the participation rights of athletes, qualification and ranking, anti-doping, and appeals against decisions of national sports federations.\textsuperscript{231}

b. Applicable Rules

The current rules governing procedures under the CAS-ahd are the CAS Arbitration Rules for the Olympic Games ("\textit{CAS-ahd Rules}”).

c. Expedited Procedure

The process begins when the athletes sign the “Entry/Eligibility Conditions Form” issued by the IOC before every OG in order to participate.\textsuperscript{232} By signing the form, athletes agree to an arbitration clause, which establishes the jurisdiction of the CAS regarding disputes arising during the OG.\textsuperscript{233} The CAS-ahd receives jurisdiction to decide disputes in the respective OG ten days prior to the Opening Ceremony of such and remains present on site and on call 24 hours a day during the OG until the Closing Ceremony.\textsuperscript{234} Although, Art. 1 CAS-ahd Rules provides for an internal exhaustion of remedies within the respective sports federation before filing a request with the \textit{ad hoc} division, Art. 1 also provides that this rule does not apply if the time needed to do so would render an appeal to the CAS-ahd ineffective. In practice, almost all cases during the OG are appeals of decisions by an international sports federation.\textsuperscript{235}

The language of the proceedings is either English or French.\textsuperscript{236} The seat of the CAS-ahd and its panels is, like in the ordinary CAS procedure, always Lausanne, Switzerland\textsuperscript{237} and the \textit{lex arbitri} therefore Chapter 12 PILA.\textsuperscript{238} This ensures a stable legal framework for CAS-ahd arbitrations, independent of where the OG are held.\textsuperscript{239} Notifications and communications from the panel to the parties can be either by delivered or electronic mail or by telephone.\textsuperscript{240}

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\textsuperscript{231} RIGOZZI, p. 99; KANTOR, para. 4.
\textsuperscript{232} KEIDEL/ENGELHARD, para. 6.
\textsuperscript{233} SCHMIDHAUSER, Question 3.
\textsuperscript{234} CAS-ahd Rules, Arts. 1 and 12; KANTOR, para. 2; KEIDEL/ENGELHARD, para. 5; SCHMIDHAUSER, Questions 3 and 4.
\textsuperscript{235} RIGOZZI, p. 99; KANTOR, para. 9; SCHMIDHAUSER, Questions 3 and 10.
\textsuperscript{236} CAS-ahd Rules, Art. 6.
\textsuperscript{237} Id., Art. 7.
\textsuperscript{238} Ibid.; KREN KOSTKIEWICZ/MARKUS, pp. 5-6; also supra fn. 200.
\textsuperscript{239} KEIDEL/ENGELHARD, para. 9.
\textsuperscript{240} CAS-ahd Rules, Art. 9 para. a.
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If a party wishes to file a request for arbitration before the CAS-ahd, it must do so by delivered mail with the Court Office. The request for arbitration also entails the claimant’s statement of claim, which will naturally be brief (i.e., between one and ten pages), given the time-sensitive circumstances. An interesting detail is that within the request for arbitration, a claimant can also apply for “a stay of the effects of the decision being challenged or for any other preliminary relief of an extremely urgent nature”. A similar more comprehensive provision is contained in the CAS Rules Art. R37 and has contributed to the development of so-called “emergency arbitration systems” in commercial arbitration such as for instance Art. 29 ICC Rules.

In procedures administered by the CAS-ahd, its President usually appoints a three-arbitrator tribunal but could also appoint a sole arbitrator to render a decision. Related cases can be decided by the same tribunal. All six of the published awards rendered by the CAS-ahd during the 2018 OG in PyeongChang were rendered by a three-arbitrator panel.

The arbitrators must be on the general CAS list of arbitrators and must have enjoyed legal training and “possess recognized competence with regard to sport”. Arbitrator challenges are heard and decided immediately by the President of the CAS-ahd with immediate effect. According to Art. 15 CAS-ahd Rules, the tribunal enjoys full discretion with regards to organisation of the procedure, in particular the time schedule and the evidentiary proceedings. The panel can thus decide whether or not they hold a hearing. As in regular CAS and CAS ad hoc proceedings, the panel has de novo-competence, which means that it is

241 Id., Art. 9 para. b in conjunction with, Arts. 1 and 10; SCHMIDHAUSER, Question 15.
242 SCHMIDHAUSER, Question 13.
243 CAS-ahd RULES, Art. 10.
244 CAS-ahd RULES, Art. 10 in conjunction with Art. 14; SCHMIDHAUSER, Question 18.
245 RIGOZZI, p. 98.
246 CAS-ahd RULES, Art. 11; SCHMIDHAUSER, Question 16.
247 CAS-ahd RULES, Art. 11.
248 See supra fn. 230; during the OG 2018, only one decision (partial award) by a sole arbitrator was published in CAS ADD 18-03 IOC & WCF v. Aleksandr Krushelnitckii (Russian athlete competing in the mixed doubles curling competition). This decision, however, was rendered by the CAS Anti-Doping Division.
249 CAS-ahd RULES, Art. 3 in conjunction with Art. 12; SCHMIDHAUSER, Questions 7, 8 and 21.
250 CAS-ahd RULES, Art. 13; SCHMIDHAUSER, Questions 11 and 17.
251 CAS-ahd RULES, Art. 15 paras. b and d.
252 Id., Art. 15 para. c; SCHMIDHAUSER, Questions 14 and 19.
not bound by any findings of the body issuing the disputed decision (factual or legal). The tribunal also has the opportunity to draw from a wide range of legal resources. Art. 17 CAS-ahd Rules provides:

“The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”

Most decisions are based on specific sports regulations, which the parties call upon in their submissions. However, the principle of *ex aequo et bono* is also applied, although not very frequently.

An element, which in practice works exceptionally well is the 24-hour time frame in Art. 18 CAS-ahd Rules, which provides that “[t]he Panel shall give a decision within 24 hours of the lodging of the application.” Some decisions are even rendered within three to four hours of them being filed. The award should in principle state brief reasons. However, the tribunal can also communicate the operative parts of the award before it renders the award with reasons. Before it is communicated, the award is reviewed by the President of the ad hoc division, who may make amendments and suggestions regarding points of substance. The decision is final and binding and immediately enforceable.事实上，没有针对决定的补救措施。如果一方仍然希望上诉决定，它可以在30天内向瑞士联邦法庭提出上诉。

The services of the CAS-ahd during the OG are free of charge. This ensures that arbitrators can operate immediately upon having received a request, as they do not have to wait for the

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253 CAS RULES, Art. R57; CAS-ahd RULES, Art. 16; Keidel/Engelhard, paras. 12 and 13; Schmidhauser, Question 20; CAS 2007/A/1394 Landis v. USADA, para. 21; also supra fn. 219.

254 Schmidhauser, Questions 14 and 24.

255 Kantor, para. 13; Schmidhauser, Question 5.

256 CAS-ahd RULES, Art. 19; Schmidhauser, Question 22.

257 CAS-ahd RULES, Art. 19; Schmidhauser, Question 27.

258 CAS-ahd RULES, Art. 21.

259 Ibid.

260 CAS-ahd RULES, Art. 22.
parties to pay the advance on costs.\textsuperscript{261} Also, it ensures that all athletes have equal access to legal proceedings. During the OG, lawyers often offer \textit{pro bono} legal advice and representation to the athletes.\textsuperscript{262}

d. Discussion

The main reason why the concept of the CAS-ahd works so well is because both parties, the athletes and the sports federations have an interest in a fast and uncomplicated dispute resolution, especially during an event like the OG. The athletes are dependent on a decision within a short time frame in case they want to compete again, and the sports federations are committed to presenting an uninterrupted event to the public. Neither of the parties are interested in engaging in dilatory tactics in order to procrastinate a decision. Thus, there is a high level of consent to have a smooth procedure.

The second reason why this concept works is that the tribunal is a standing tribunal, already in place, which can be activated within an hour.\textsuperscript{263} The arbitrators are not engaged in any other work during the OG and are prepared to convene at any hour of the day to render a decision as fast as possible. Further, the arbitrators are specialists in the field and carefully selected for their expertise.

A further positive feature is that no advance on costs is required to activate the arbitration procedure. Additionally, the extreme time pressure is also on the parties, which keeps submissions short and on point, only specifying the essentials.

The greatest challenge to the procedures is that, collectively, 15 arbitrators represent the world. These arbitrators have different cultural backgrounds and different approaches to doing things. Harmonizing decisions is a challenge. However, decisions are mostly based on sports regulations and there is also a control mechanism by the CAS-ahd President.\textsuperscript{264}

\textsuperscript{261} \textsc{Kantor}, para. 15.
\textsuperscript{262} \textsc{Ibid.}; \textsc{Guandalini/De Faro Nunes}, para. 2.
\textsuperscript{263} \textsc{Schmidhauser}, Question 4.
\textsuperscript{264} \textsc{Schmidhauser}, Question 8.
IV. *Ex aequo et bono* in Commercial Arbitration – A new Approach?

The principle behind *ex aequo et bono* or of what is ‘fair and good’ is that a judge or arbitral tribunal is authorised to bypass the law, if its application creates a situation which seems unfair and/or unjust. Thus “decisions *ex aequo et bono* go beyond the realm of legal rules, are external to the law, and can even be contra legem. [...] Furthermore, *ex aequo et bono* holdings can be described as a result-oriented equity approach, leaving the court broad room for subjective appreciation and discretion.”

The concept of *ex aequo et bono* is not a new concept but can be found in various ancient cultures and societies such as the ancient Greek, Roman, Chinese, Hindu and Islamic philosophies. In Medieval Europe, parties were also able to choose between having their dispute decided either according to formal law in a court or according to equity through arbitration. In a more modern interpretation, the American Philosopher John Rawls picked up the same concept and defined “justice as fairness”. Nowadays, commercial arbitration rules, but also international conventions provide for decisions on an *ex aequo et bono* basis, however, so far tribunals have only reluctantly applied the principle.

What all these rules and conventions have in common is that the parties have to authorise the tribunal to decide on an *ex aequo et bono* basis. The principle can thus only be applied upon consent of the parties. Only the BAT applies the principle by default. The BAT provides a unique example of successful regular application of the *ex aequo et bono* principle in the field of sports arbitration. The question is, could the principle also find broader and more regular application in classical commercial arbitration?

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265 KOTZUR, paras. 1 and 13, emphasis contained; also BORN, pp. 284-285.
266 KOTZUR, para. 2.
267 BORN, p. 284 footnote 292; PARTASIDES/PREWETT, p. 110.
269 E.g., UNCITRAL Model Law, Art. 28 para. 3; ICSID Convention, Art. 42 para. 3.
270 KOTZUR, para. 15.
271 See *supra* fn. 162.
Court of Innovative Arbitration (COIA)

a. General Remarks

One existing approach of transferring this particular arbitration style into commercial arbitration practice has been taken by DIRK-REINER MARTENS. As the founder of the BAT, he and his team have gained extensive experience in deciding numerous cases *ex aequo et bono*.\(^{272}\) Transferring this know-how and adapting it to the needs of commercial arbitration was the next step. This led to the founding of the Court of Innovative Arbitration ("COIA") in 2015, which is a mirror image of the BAT with a few modifications tailored to the needs of commercial arbitration.\(^{273}\)

b. Applicable Rules

The current rules are the Court of Innovative Arbitration, Arbitration Rules in force as of 1 October 2015 ("COIA Rules").

c. COIA Procedure

Just like the CAS procedures and the BAT procedure, the COIA Rules provide a mandatory Swiss seat located in Zurich, making Chapter 12 PILA the applicable *lex arbitri* for COIA procedures.\(^{274}\) All correspondence and submissions between the parties, the court and the arbitrator are to be made by e-mail (as are exhibits, whenever feasible).\(^ {275}\) There are no specific time limits set out in the COIA Rules. They are to be determined by the arbitrator or the COIA Secretariat. However, when choosing COIA arbitration, the parties and their counsel should be aware that the aim is to work efficiently and in a spirit of cooperation and that they have to be ready to deal with short time limits.\(^ {276}\) The case is decided by a sole arbitrator from COIA’s closed list.\(^ {277}\) The default rule is that the COIA Secretariat appoints one of their arbitrators. However, if the parties agree to appoint an arbitrator beforehand, they can select

\(^{272}\) MARTENS, Question 1.

\(^{273}\) Id., Questions 1 and 17.

\(^{274}\) See *supra* fn. 199 and 200; COIA RULES, Art. 2.3.

\(^{275}\) COIA RULES, Art. 5.2.

\(^{276}\) Id., Arts. 6.1-6.4 in conjunction with Art. 0.1.

\(^{277}\) See *infra* fn. 297.
him or her between themselves.278 A potential arbitrator challenge has to be brought within seven days after the grounds for challenge have become known to the challenging party.279 The arbitration commences upon receipt of the request for arbitration, which should be of the quality of a statement of claim since the parties are encouraged to only have one round of written submissions. The request should also state whether the claimant wishes to hold a hearing.280 The advance on costs is determined by the COIA Secretariat on a case by case basis taking into account the disputed amount and the complexity of the case. However, this is done after the arbitration is initiated, i.e., after the request for arbitration has been filed and the handling fee is paid.281 The COIA Rules also provide for provisional and conservatory measures in extreme urgency and give the parties the right to call upon support by state courts if necessary.282

After the arbitration has been initiated, the respondent is to file its answer, which should also be of the quality of a statement of defence (since there might only be one written round), and which should also state whether a hearing is to be held.283

After the filing of both submissions there is no document production phase except if the arbitrator deems it to be necessary. The same applies to further submissions or the production of evidence.284 The default rule is that the arbitrator decides on a documents-only basis, except if both parties request a hearing or the arbitrator deems it to be necessary. Hearings can be held in person or by telephone or video-conference.

One of the key provisions of the COIA Rules is contained in Art. 16.1 – 16.3, the provision regarding the law applicable to the merits. The arbitrator is authorised by default to decide the case ex aequo et bono if the parties fail to agree on a law applicable to the merits.286 If the

278 COIA RULES, Art. 7.1.
279 Id., Art. 7.4.
280 Id., Arts. 8.1-8.2.
281 Id., Arts. 9.1 and 11.1-11.3; the handling fee is minimum EUR 2,000.00 for cases up to EUR 50,000.00. For a detailed cost schedule see COIA COST SCHEDULE.
282 COIA RULES, Arts. 10.1-10.3.
283 Id., Art. 12.1.
284 Id., Arts. 13.2.-13.3.
286 Id., Art. 16.2; MARTENS, Question 3.
principle finds application, an arbitrator “shall apply general considerations of justice and fairness instead of any particular national or international law. When deciding ex aequo et bono, the Arbitrator shall be authorized to depart from the agreement(s) between the parties if he deems that justice and fairness so require.”

Similar to the processes in the BAT and CAS-ahd procedures, the COIA arbitrators can exchange opinions and discuss matters during the drafting phase. When issuing the award an arbitrator shall state concise reasons for his decision. However, upon request, an arbitrator can issue an award without reasons if a party fails to pay its share of advance costs. Before the award is rendered and final, it is submitted to the COIA Secretariat which may make suggestions to form and substance but “[w]ithout affecting the arbitrator’s freedom of decision-making”. The arbitrators are admonished to render the awards within six months after the payment of the advance on costs and the rendered award is considered final and binding upon receipt thereof by e-mail.

If not derogated by party agreement, the COIA Rules also provide for a detailed schedule regarding contributions to legal fees and expenses, setting a maximum amount in relation to the amount in dispute, which the prevailing party can recover from the losing party.

d. Discussion
So far, COIA has not resolved any disputes. There are some contracts containing arbitration clauses referring to COIA, but no dispute has arisen (yet) out of these contracts. Ex aequo et bono, just like in the BAT procedure, has the potential to make the resolution of the dispute faster and cheaper, because the arbitrator does not need any costly expert reports regarding

\[\text{\textsuperscript{287}}\text{COIA RULES, Art. 16.3.}\]
\[\text{\textsuperscript{288}}\text{Id., Art. 17.2; upon authorisation by the COIA President in the interest of the development and consistency of COIA case law, provided that the parties remain anonymous; for CAS-ahd see SCHMIDHAUSER, Question 4; for BAT see supra fn. 181.}\]
\[\text{\textsuperscript{289}}\text{COIA RULES, Art. 17.1.}\]
\[\text{\textsuperscript{290}}\text{Id., Art. 17.3.}\]
\[\text{\textsuperscript{291}}\text{Id., Art. 17.1.}\]
\[\text{\textsuperscript{292}}\text{Id., Art. 17.4.}\]
\[\text{\textsuperscript{293}}\text{Id., Art. 17.6.}\]
\[\text{\textsuperscript{294}}\text{Id., Art. 18.5. in conjunction with COIA COST SCHEDULE.}\]
\[\text{\textsuperscript{295}}\text{MARTENS, Einführung and Question 6.}\]
the application of the respective national law. There is the argument that COIA decisions are unpredictable, because they are not founded on national or case law, since there is no jurisprudence (yet). However, the BAT regularly publishes its decisions online and the arbitrators are largely the same. Thus, one can have a look at the resolution of contractual disputes by studying BAT jurisprudence which is only concerned with contractual disputes, similar to commercial monetary disputes. However, when studying BAT cases, it is hard to find the legal reasoning which has led to the operative parts of the award, since most awards are rendered without reasons.

296 See supra fn. 175.
298 MARTENS, Question 2.
299 See supra fn. 179.
V. Combining the Elements – The Super Expedited Procedure

After having done the ground work by delineating existing procedures, this section is the innovative synthesis of all elements conducive to a fast procedure. The Super Expedited Procedure, developed in this thesis, fuses the cutting-edge elements of commercial and sports arbitration procedures into four new models. The core model is the 24-Hour Arbitration model. Three additional spin-off models are presented and discussed in this section.

1. The 24-Hour Arbitration

The 24-Hour Arbitration (“24HA”) is largely modelled after the procedure of the CAS-ahd and aims at issuing an award within 24 hours\textsuperscript{300} for commercial disputes. A solution needed to be found, which could mirror the immediacy of the CAS-ahd arbitrators, which are on site during the OG.\textsuperscript{301} Of course, the scenarios of commercial disputes are different to sports events. However, some elements can be transferred.\textsuperscript{302}

One of the most dominant elements of this model is the ‘On-Call’ element.\textsuperscript{303} The 24HA is administered by a secretariat which is available 24/7. To start the procedure, the claimant calls a hotline and submits a brief request for arbitration in the form of an online-form, stating the arbitration clause which refers to the 24HA, the parties involved, the contact details of their respective counsel, the commercial branch, the amount in dispute and a brief statement of facts. The claimant can also directly upload a complete statement of facts (front-loading).\textsuperscript{304} The secretariat then immediately contacts the most suitable ‘On-Call Arbitrator’ and checks his or her availability and independence. This model operates with a closed arbitrator list,\textsuperscript{305} with arbitrators which are ready to be contacted 24/7 and act immediately upon being contacted. The secretariat also immediately contacts and informs respondent’s counsel about the request.

\textsuperscript{300} Cf. CAS-ahd Rules, Art. 18.
\textsuperscript{301} See supra, fn. 225.
\textsuperscript{302} Martens, Question 16; Rigozzi, pp. 104 and 106.\textsuperscript{303} See supra fn. 263.
\textsuperscript{304} See supra fn. 89 and 106.
\textsuperscript{305} See supra fn. 159, 216 and 297.
As soon as an arbitrator has been appointed, the procedure is fully in the arbitrator’s hands. He or she has to inform the parties about the appointment and provide a declaration of independence and impartiality together with his or her banking details. The 24-hour time limit starts to run once the advance fee has arrived in the arbitrator’s bank account and the statement of claim (and documentary evidence) has arrived at the arbitrator’s and the respondent’s e-mail account. This is the moment of initiation of the arbitration. The advance fee amounts to USD 25,000.00 by calculating an arbitrator’s hourly rate of USD 1,000.00 (taking into account 24/7 availability of the arbitrator and the extreme time pressure) and adding USD 1,000.00 for administrative fees of the case (i.e., hotline, online-form and appointment procedure). In the interest of time, the claimant pays the full amount of the advance fee. The prevailing party can be awarded a refund of the advance fee in the decision on costs, which can be issued after the 24-hour time limit.

The statement of claim is limited to a maximum of 40 pages. All evidence relied upon has to be sent together with the statement of claim via e-mail or via a virtual data room containing all documents relied upon which is made available to the arbitrator and the respondent. The respondent receives a 10-hour window to file its statement of defence including matters concerning jurisdiction, also limited to 40 pages. All evidence relied upon by the respondent needs to be made available to the arbitrator and the claimant together with the statement of defence by the same electronic means. If the respondent fails to submit its statement of defence, the arbitrator is authorised to continue with processing the claim according to the available information and can take a belated statement of defence into consideration, as far as is feasible.

The parties can choose whether the arbitrator is to decide ex aequo et bono or based on Swiss law. If the parties fail to find an agreement prior to the initiation of the arbitration or within four hours after the initiation, the arbitrator is authorised to decide whether the decision will be ex aequo et bono or based on Swiss Law. The arbitrator will decide the case on a

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306 See supra fn. 70 and 71.
307 See supra fn. 41 and 168.
308 See supra fn. 105 and 106.
309 MARTENS, Question 16; also supra fn. 117 and 160 and 170.
310 See supra fn. 286.
documents-only basis\textsuperscript{311} and is authorised to include only the operative parts in the award,\textsuperscript{312} which has to be in written form. If the arbitrator decides to issue an award without reasons, either party can file a request for an award with reasons within 48 hours after having received the award without reasons. If a party requests such and pays an additional fee to be determined by the arbitrator, the award with reasons has to be sent to the parties within 14 days after the additional fee has arrived in the arbitrator’s bank account. The seat of arbitration is Geneva Switzerland and the \textit{lex arbitri} Chapter 12 PILA.\textsuperscript{313} This is how an arbitration clause referring to the 24HA could be formulated in a contract:

‘Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by a sole arbitrator, offering ad hoc arbitration in accordance with the Super Expedited Procedure (SEP) Arbitration Rules, within 24 hours of receipt of the statement of claim (24HA).

The seat of the arbitration shall be Geneva, Switzerland;

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile.

The arbitral proceedings shall be conducted in English.

Within ten hours from receipt of the statement of claim, the Respondent shall submit to the arbitrator a statement of defence together with any counterclaim or set-off defence. The dispute shall be decided on the basis of documentary evidence only and the arbitrator is authorised to decide the dispute ex aequo et bono and only state the operative parts of the award.’\textsuperscript{314}

The functionality of this model and all the other variations following, hinge mainly on two factors. One, \textit{both} parties need to be interested in a fast and efficient resolution of the dispute and need to display a high level of cooperation. Two, there must be an array of arbitrators

\textsuperscript{311} MOLINA, para. 53; see also supra fn. 14, 41, 85 and 144.
\textsuperscript{312} See supra fn. 86, 118 and 145.
\textsuperscript{313} See supra fn. 199 and 200.
\textsuperscript{314} Cf. SCAI RULES, p. 7; SCAI Model Arbitration Clause with modifications by the author.
who are willing to work under extreme time pressure and who have the flexibility to postpone their current workings and dedicate 24 hours to a completely different case and render a legally sound and enforceable award.

The first point can be achieved, if the parties agree on the application of a very tight procedure such as the 24HA already during contract negotiation, when the relationship is still intact, and no dispute has arisen yet. The second point depends on the question of how much the parties are willing to pay an arbitrator for this service and immediate availability.\footnote{Cf. SCHMIDHAUSER, Question 27.} This amount is difficult to gauge and is very individual. The general approach used in this thesis (see above, i.e., USD 25,000.00) is a hypothetical figure which would need testing and adjusting during its application in practice.

2. \textbf{The 48-Hour Arbitration}

The 48-Hour Arbitration model ("48HA") varies to the 24HA model in four ways. Firstly, the arbitrator has 48 hours to render the award after the arbitration has been initiated. Secondly, the respondent is given 24 hours to file its statement of defence and documentary evidence after having received the statement of claim. Thirdly, the advance fee amounts to USD 34,600.00 calculating an arbitrator’s hourly rate of USD 700.00 and adding USD 1,000.00 for administrative fees of the case. Fourthly, the arbitrator includes brief reasons for his or her decision.\footnote{See supra fn. 46.} The 48HA, would give the respondent more time to respond and thus provide a more balanced procedure, while still retaining an extremely fast dispute resolution process. Of course, the time frame is flexible and can be adjusted according to party agreement, e.g., to 72 hours, 96 hours, etc.\footnote{Considering the similarities to the 24HA, an example of an arbitration clause is omitted.}

3. \textbf{The 24-Hour Arbitration Insurance Model}

The 24-Hour Arbitration Insurance Model ("24HAIM") is effortful during the contract negotiation phase but simplifies the process as soon as a dispute arises, and arbitration is initiated. If the parties agree to incorporate the 24HAIM into their contract, they agree to
precautionarily set up a specific dispute resolution mechanism during the contract negotiation phase. This means that the parties agree on and appoint a sole arbitrator during contract negotiation. Upon appointment, the parties provide the arbitrator with the contract and important documentation, which led to the contract. Thus, the arbitrator can already anticipate the legal questions and disputes which may arise and take measures to prepare him- or herself for the eventuality of a dispute. The arbitrator must be paid an annual or monthly lump sum (to be determined by the arbitrator), similar to an insurance policy. This lump sum starts high and remains high for the first two years after contract conclusion. After two years without a dispute, the lump sum will decrease by a rate of 10%/year until it stagnates at an amount of 25% of the amount in year one.

If a dispute arises, the procedure is the same as in the 24HA model or the 48HA model respectively. However, the arbitrator can be contacted directly, and no advance or additional fee must be paid. The arbitration is initiated by the submission of the statement of claim only. After the dispute is resolved, the parties can choose whether to renew the policy with the initial arbitrator or appoint another arbitrator for future disputes. Either way, the lump sum will again be at its highest level.

During the duration of the contract, the parties need to ensure that they regularly update the arbitrator regarding contract modifications, mergers or general changes. The arbitrator on his or her side needs to ensure to always stay current with the situation and the applicable law with respect to the contract.

The arbitration clause, which must *inter alia* make reference to this model and the appointed arbitrator, must entail a fall-back provision, specifying the applicable dispute resolution procedure in case a party does not continue to pay its annual policy or in case the parties agree on a timely limitation of the 24HAIM. This is how an arbitration clause referring to the 24HAIM could be formulated in a contract:

318 Cf. Image 3; also supra fn. 134.
Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by ad hoc arbitration. The dispute shall be submitted to the sole arbitrator Prof. Dr. Vanessa Cook of Cook & Partners, Advocatengasse 24, 3007 Bern, Switzerland and shall be resolved in accordance with the 24HAIM Super Expedited Procedure (SEP) Arbitration Rules within 24 hours of receipt of the statement of claim.

Within ten hours from receipt of the statement of claim, the Respondent shall submit to the arbitrator a statement of defence together with any counterclaim or set-off defence. The dispute shall be decided on the basis of documentary evidence only and the arbitrator is authorised to decide the dispute ex aequo et bono and only state the operative parts of the award.

The above arbitration clause is limited to two years after contract conclusion. After expiry of the mentioned time limit or if a party to this contract fails to pay the annual fee as specified in Annex I of this contract, all disputes shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.

In any case, the seat of the arbitration shall be Bern, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute according to Swiss Law. 319

This model is suitable for contracts with a high dispute risk within the first two years after contract conclusion and with an inherent need for a speedy resolution. It could work well for any disputes which arise within the first six months after contract conclusion, since workload and mandates can reasonable be foreseen by arbitrators for such a time period. Any agreement which would last longer could be difficult for an arbitrator, especially as it would potentially bar the arbitrator from accepting other mandates, which have a connection with the two parties, in order to preserve his independence and impartiality. Thus, it would be essential that either the arbitration clause itself, or an annex to the arbitration clause (as in

319 Cf. SCAI RULES, p. 7 and ICC RULES, p. 76; SCAI and ICC Model Arbitration Clauses with modifications by the author.
the example above), would specify the type of connections and relations the arbitrator is and is not allowed to enter into. The level of independence which is given to the arbitrator would then have a direct impact on the annual lump sum.

4. The 24HA-Arb Model

It is common practice in alternative dispute resolution to combine different methods with each other and include multi-tier dispute resolution clauses in contracts. A commonly used model is med-arb, where the first tier is a mediation process and the second tier is a fully-fledged arbitration if no satisfactory result was achieved beforehand. Another alternative dispute resolution method is the dispute adjudication board (a board of technical experts and engineers aiming to resolve contractual disputes, used particularly in the construction industry). The purpose of these clauses is for the parties to engage in a preliminary attempt to settle the dispute amicably, before engaging in lengthy and costly arbitration proceedings. There is some discussion, however, regarding the binding nature of such clauses.

The 24-Hour Arbitration-Arbitration Model ("24HA-Arb Model") has the 24HA as its first tier, almost like a court of first instance with the aim to resolve the dispute efficiently and incur low costs for the parties. However, if a party is not content with the outcome of the streamlined procedure, it may (after requesting the reasons for the decision in brief) resort to classical *ad hoc* or institutional arbitration, according to the agreement in the arbitration clause. The second-tier tribunal would then decide the case *de novo* with full competency, to decide the case anew without being bound by the award of the first-tier tribunal. This is how an arbitration clause referring to the 24HA-Arb Model could be formulated in a contract:

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320 BLACKABY/PARTASIDES ET AL., paras. 2.88 et seqq.; BORN, pp. 278-281.
321 BORN, pp. 281-282, with further examples of alternative dispute resolution methods.
322 BLACKABY/PARTASIDES ET AL., para. 2.89.
323 Id., para. 2.90 et seqq.; BORN, pp. 279-281; cf. BGE 142 III 296 considerations 2.4.1.2, 2.4.3.2 and 2.4.4.1, pp. 305-318, where the Swiss Federal Supreme Court decided to stay the pending arbitration, until the mediation process had been opened and officially closed.
324 See supra fn. 219 and 253.
‘Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by a sole arbitrator, offering ad hoc arbitration in accordance with the Super Expedited Procedure (SEP) Arbitration Rules, within 24 hours of receipt of the statement of claim (24HA).

The seat of the arbitration shall be Geneva, Switzerland;

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile.

The arbitral proceedings shall be conducted in English.

Within ten hours from receipt of the statement of claim, the Respondent shall submit to the arbitrator a statement of defence together with any counterclaim or set-off defence. The dispute shall be decided on the basis of documentary evidence only and the arbitrator is authorised to decide the dispute ex aequo et bono and only state the operative parts of the award.

If a party wishes to pursue its claim further, it must request an award with reasons within five days of having received the SEP award. The party may then, within 14 days of having received the award with reasons, submit the dispute to arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution (SCAI) in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

The SCAI tribunal is not bound by the SEP-award and is competent to decide the dispute de novo.\(^\text{325}\)

As in any other multi-tier system, a party who has no interest in a speedy resolution of the process can take advantage of such a dispute resolution clause and make the process even longer. Thus, it only finds application in contractual relationships, where a speedy resolution is a reciprocal need of both parties. However, this system is intended for parties who are

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\(^{325}\) Cf. SCAI Rules, p. 7; SCAI Model Arbitration Clause with modifications by the author.
interested in applying the super expedited procedure, but who would like to have a ‘safety-net mechanism’ in case the result is unacceptable.\textsuperscript{326}

5. Initial Evaluation

In order to evaluate the individual models upon their feasibility and applicability, a number of arbitrators and practitioners have provided feedback by filling out a questionnaire.\textsuperscript{327}

An analysis of the responses to the questionnaires showed that all respondents would be willing to make themselves available to act as on-call arbitrators. Some stated that the periods in which they would be on call needed to be defined and limited to specific weeks.\textsuperscript{328} In principle, all respondents would be willing to resolve a dispute within 24 hours, however one respondent specifically mentioned that this would only be possible if it would be a decision \textit{ex aequo et bono}. But this should not be a problem as all respondents stated unanimously that they would be willing to decide a dispute on the basis of \textit{ex aequo et bono} without reservation.\textsuperscript{329}

Surprisingly, all of the respondents would charge less than USD 25,000.00 to decide a case within 24 hours.\textsuperscript{330} Estimated fees were USD 3,000.00 at the low end and USD 15,000.00 at the top end. Fees for an award with brief reasons, within 48 hours,\textsuperscript{331} ranged from USD 4,000.00 to USD 30,000.00, still lower than the calculated fee in this thesis, pitched at USD 34,600.00.

When the respondents were asked, for which type of disputes the 24HA model would be suitable,\textsuperscript{332} their responses included consumer contracts, domain name disputes, construction cases, disputes within long-term contracts continuing after the dispute is settled, and any

\begin{footnotesize}
\textsuperscript{326} See supra fn. 121.
\textsuperscript{327} All completed questionnaires can be found in the annex of this thesis.
\textsuperscript{328} QUESTIONNAIRE, Question 4.
\textsuperscript{329} Id., Question 6.
\textsuperscript{330} Id., Question 7; contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 24 hours (sole arbitrator, documents-only, one round of submissions max. 40 pages each, award without reasons, \textit{ex aequo et bono} or CISG or Swiss law applicable; \textsuperscript{331} Id., Question 8; same case as fn. 330 but within 48 hours and award with brief reasons.
\textsuperscript{332} Id., Question 9.
\end{footnotesize}
contract with an amount in dispute not exceeding USD 300,000.00 where time was of the essence.

With regards to the 24HAIM, all respondents stated that they would make themselves available to be appointed as arbitrator already during contract negotiations before a dispute has arisen. However, some expressed reservation about the duration and termination of such appointment, suggesting that giving an advance notice of five days before submission of the dispute to the arbitrator would be necessary. With regards to the maximum duration of such appointment, the responses ranged between six months, three years and an unlimited duration. The estimated fee for such a service varied significantly; from USD 2,000.00 – 3,000.00 per year (plus an additional fee for the award), to USD 3,000.00 per month. But as specified above, the fee would heavily depend on the terms of such appointment, i.e., the required level of independence or complexity of the case and is thus hard to estimate. Some respondents stated that they would recommend the 24HAIM to their clients for every kind of contract. Other respondents mentioned its application for long term contracts and cases where an immediate resolution of the dispute is paramount.

Respondents were more apprehensive with regards to the 24HA-Arb Model. A constructive comment specified that this model would only make sense if the initial award contained reasons and if a party could only be admitted to the second tier if their right to be heard was violated through the tribunal ignoring some of its arguments. Thus, it does not come as a surprise that the respondents would be reluctant to recommend this model to their clients.

6. Discussion and Possible Fields of Application

Although the world of sports arbitration is a very particular field of arbitration, some of its elements can be transferred into the commercial world if the venture follows a very strict time

333 QUESTIONNAIRE, Question 10.
334 Id., Question 11.
335 Id., Question 12; contract based on the CISG/Swiss law worth USD 50 million (documents-only, one round of submissions max. 40 pages each, award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable.
336 Id., Question 13.
337 Id., Questions 14 and 15.
schedule similar to the situation in an Olympic setting and if the speedy resolution of a dispute is absolutely paramount to the continuation or success of the venture.

One may think of just-in-time manufacturing, where a complete production line is dependent on the regular delivery of goods according to a production schedule and non-compliance leads to a complete shutdown of an entire factory. A typical example for such a production strategy is found in the automobile industry, where even a two-day shut-down can cause damage in the billions. Another example could be big music or arts festivals such as the Edinburgh Festival Fringe, where over a period of three weeks thousands of artists and performers present their acts according to a very tight time schedule. Also, disputes arising during fairs and trade shows, where businesses exhibit their newest technologies and intend to acquire new clients could be resolved efficiently within a few hours. Having an on-call arbitral tribunal for such events could be of great benefit and its cost could be covered by a percentage of the fees paid by the participants.

Another field of application could be specific industry sectors, just like the BAT is specialized and limited to a very particular field. The BAT model could be extended to other kinds of sports where clubs employ international professional players, e.g., ice hockey, football, rugby etc. Furthermore, it could be extended to other narrowly defined contractual relationships with an international component, e.g., international sales contracts connected to the food industry, international employment contracts in the mining industry etc.

What has become clear through the evaluation is that the 24HA-Arb Model would probably not find much application in practice. It is rather complex and could easily defy the initial

338 “The just in time (JIT) inventory system is a management strategy that aligns raw material orders from suppliers directly with production schedules.” on [https://www.investopedia.com/terms/j/jit.asp](https://www.investopedia.com/terms/j/jit.asp), accessed on 07.07.2018.


341 See supra fn. 260 and 261.
intention of having an expedited procedure. However, the evaluation has shown, that the 24HA, 48HA and 24/48HAIM could find application in a wide range of contracts and disputes and would incur less cost than initially anticipated.
VI. Conclusion

What became apparent when analysing expedited procedures, is that there are two main components which make a procedure fast and efficient: (1) Cooperative parties, who both have an interest in a fast resolution of the dispute; and/or (2) the curtailing of party autonomy and the right to be heard.

Sports arbitration has both. The need for a speedy and effective procedure somewhat contradicts the classical right to be heard with multiple written submissions, immense amounts of evidentiary documents, lengthy hearings and extensive awards. A fair administration of justice in as short a time as possible is prized higher and thus parties are willing to sacrifice parts of their right to be heard. In commercial arbitration, both elements are weighed up carefully against each other, which can be seen in the first part of this thesis. It is exactly this weighing up which creates such diversity of different procedures on the international arbitration landscape.

Some of the tools wherewith sports arbitration operates, i.e., sole arbitrator, front-loading, one round of submissions, are already general practice in commercial arbitration. However, as seen in this thesis, also the more innovative elements of sports arbitration, such as awards without reasons, awards *ex aequo et bono*, on-call arbitrators and decisions within 24 hours could be applied in the future, if commercial parties wish to resolve their dispute in a super expedited and efficient fashion. So far, there are countless examples of successful application during global sports events such as the OG, but also for contractual disputes as applied by the BAT. The positive feedback during the evaluation of the four models developed in this thesis indicated that their actual application in reality would be feasible, that arbitrators could be found who are willing to provide such a service, and ultimately, that some of the key elements of sports arbitration can be transferred into the world of commercial arbitration, in order to create new models for a super-fast expedited procedure.

342 Rigozzi, p. 106.
The positive responses from the questionnaires constitute an invitation to develop these ideas further, to adapt to the time related needs in commercial arbitration and potentially roll out these new models in pilot programs. Commercial arbitration, like all areas of science, economy and industry, has always evolved and must evolve further.

Just as the world’s most remarkable athletes strive to be faster, higher, stronger, so must commercial arbitration progress.

*Citius, altius, fortius!*
Selbständigkeitserklärung


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Zollikofen den 18. Juli 2018

Sridar Paramalingam

\(^{343}\) Art. 42 Abs. 2 RSL RW [Fassung vom 22.05.2014].
Annex

1. Interviews

Skype-Interview mit Dr. Dirk-Reiner Martens (Martens Rechtsanwälte, München) bezüglich BAT/COIA, (cited as: MARTENS)

11.4.2018

Einführung

Dr. Martens: Ich möchte noch ein paar wenige Bemerkungen vorausschicken. Es gibt zwei verschiedene Schiedsgerichte, die ex aequo et bono entscheiden, das BAT (Basketball Arbitral Tribunal) und den COIA (Court of Innovative Arbitration).

Das BAT entscheidet nur ex aequo et bono und es gibt es jetzt seit ca. 10 Jahren.


Wir wissen, dass es bereits Verträge gibt, die in der Streitbeilegungsklausel den COIA als zuständiges Schiedsgericht bezeichnen. Bis jetzt wurde noch kein Streitfall vor dem COIA ausgetragen.

Es gibt kein Schiedsgericht, das so viele ex aequo et bono-Entscheidungen gefällt hat wie das BAT, das bis heute über 1100 Fälle entschieden hat in 10 Jahren.

1. Was hat Sie zur Idee geführt den COIA zu gründen?
Dr. Martens: Das Modell des BAT hat großen Erfolg. Bis jetzt wurden in der zehnjährigen Geschichte des BAT bereits über 1100 Fälle behandelt. Es ist schnell, bietet Raum für innovative Ideen, ist grösstenteils digitalisiert aber trotzdem kein online-Schiedsgericht. Das Modell ist daher sehr gut übertragbar auf die Bedürfnisse der kommerziellen Schiedsgerichtsbarkeit. Der COIA ist in weiten Teilen identisch mit dem BAT. Wir dachten, dass es dafür einen Markt geben sollte in der kommerziellen Schiedsgerichtsbarkeit. Das Marketing von COIA war bisher eher "handgestrickt", aber immerhin verfügen wir über die sehr reichhaltige Erfahrung mit über 1100 BAT-Fällen.

2. Stärken/Schwächen von ex aequo et bono/COIA?


3. Welche Ideen/Konzepte haben sie aus der Sportschiedsgerichtsbarkeit in den COIA einfließen lassen?
Dr. Martens: Der COIA hat sehr viele Parallelen zum BAT. Es ist praktisch eine Kopie mit ein paar Anpassungen. Beim BAT sind die Entscheidungen immer ex aequo et bono. Beim COIA jedoch nur, wenn sich die Parteien darauf einigen

4. Ist es Zufall, dass 5 der Schiedsrichter des COIA auch Schiedsrichter beim BAT sind?
Dr. Martens: Nein. Die BAT Richter haben alle über 100 Fälle ex aequo et bono entschieden. Sie haben grosse Erfahrung in diesem Bereich und bringen daher die nötige Kompetenz mit.

5. Warum sind die Handling Fees des COIA praktisch gleich hoch wie die der SCAI?

6. Wie viele Fälle wurden bereits durch das BAT/COIA entschieden?
Dr. Martens: Das BAT ca. 1100 Fälle, der COIA bisher noch keine Verfahren.

7. Wie hoch ist der durchschnittliche Streitwert eines Falles vor dem BAT?
Dr. Martens: Wir haben Entscheide ohne Gründe beim BAT (decisions without reasons). Dies weil viele Athleten nicht die finanziellen Ressourcen haben um ein ausführliches und rechtlich begründetes Urteil zu bezahlen. Meiner Meinung nach ist der Streitwert nicht so indikativ für das, was wir machen. Es kann um ein paar tausend Euros bis zu 2 Millionen gehen. Das BAT ist

8. Für welche Rechtsgebiete ist der COIA besonders prädestiniert?

9. Treten am BAT natürliche sowie juristische Personen vor die Richter?
Dr. Martens: Ja.

10. Ist das Case Law des BAT/COIA öffentlich zugänglich?

11. Bei wie vielen Fällen kommt es zu einem Hearing?
Dr. Martens: Beim BAT gab es ca. ein Dutzend Hearings unter 1100 Fällen. Die Parteien können immer ein Hearing beantragen. Ebenfalls kann der Schiedsrichter entscheiden, dass ein Hearing abzuhalten ist.

12. Beim BAT/COIA können die Hearings auch per Telefon oder Videokonferenz stattfinden. Ist das nicht ein Problem, da die Zeugen während dem Hearing unbemerkt beeinflusst werden können?
Dr. Martens: Die Zeugenbeeinflussung ist bei jedem Prozess ein Thema. Jedoch gibt es auch beim CAS Hearings per Video. Ich war gerade als Richter in einem Fall vor dem CAS. Wir hatten ein Hearing per Videokonferenz und während 6 Tagen 20-25 Parteien über skype befragt. Natürlich bestehen Bedenken, trotzdem ist es oft günstiger, als alle Parteien einfliegen zu

13. Wie sieht es aus mit der Vollstreckung, wenn eine Partei der ex aequo-Entscheidung nicht nachkommt?
Dr. Martens: Die Vollstreckung von BAT Urteilen wird durch die FIBA sehr unterstützt, da die FIBA Sanktionen gegen die Clubs oder Spieler verhängt, die sich nicht an das Urteil halten. Wenn ein Club keine neuen Spieler mehr anstellen darf, ist das ein grosses Problem. Bis jetzt wurde nur bei einem Verfahren das New Yorker Übereinkommen angewendet. Grundsätzlich sind ex aequo et bono-Entscheidungen voll vollstreckbar.

14. Wie hoch ist die Anfechtungsrate der BAT-Entscheidungen?
Dr. Martens: In Weniger als 5 Fälle wurden vor das Schweizer Bundesgericht gezogen. Am Anfang sah das Regelwerk des BAT noch eine zweite Instanz vor dem CAS vor. Diese Regel wurde jedoch schnell wieder abgeschafft. Ab und zu kommt es vor, dass eine Partei noch eine veraltete Schiedsklausel verwendet, die eine Berufung zum CAS noch vorsieht.

15. Die lange ist die Durchschnittsdauer eines Verfahrens?

16. Gäbe es ihrer Meinung nach auch eine Verwendung für eine 24h arbitration (CAS ad hoc division) in der kommerziellen Schiedsgerichtsbarkeit?
Dr. Martens: Die 24 Stunden bei der Ad Hoc Division (bei der ich mehrmals tätig war) ist ebenfalls keine bindende Frist. Manchmal werden die Entscheide innerhalb weniger Stunden vorgelegt. Ab und zu geht es aber auch deutlich länger. Es ist mehr eine Richtlinie. Es könnte aber durchaus einen Platz haben in der kommerziellen Schiedsgerichtsbarkeit. Ex aequo-Entscheide sind eine valable Alternative zu herkömmlichen Modellen.

17. Gibt es noch weitere Sportgerichte die auch schnelle Verfahren haben ähnlich wie das BAT?
Dr. Martens: Meines Wissens gibt es nichts Vergleichbares. Auf jeden Fall gibt es keine anderen Sportschiedsgerichte, die ex aequo et bono entscheiden. Das BAT ist ein echtes Schiedsgericht. In der kommerziellen Schiedsgerichtsbarkeit gibt es meines Wissens ausser dem COIA keine Schiedsordnung, die in gleichen Maße wie COIA auf ex aequo et bono abstellt.
Interview with Corinne Schmidhauser, 25.05.2018, (cited as: SCHMIDHAUSER)

1987 Slalom World Cup Winner
Athlete in the 1988 Winter Olympics in Calgary, Canada
President of the CAS Appeals Division
President of the CAS ad hoc Division

The time indication is referring to the audio copy of the interview featured on the accompanying usb-stick.

Intro (00:00 – 05:18)

Sports arbitration works well, because the parties are all part of a big community. Most world sports federations are committed to the concept of the CAS and accept it as the final instance. CAS provides procedures, which is positive for all participants, the federations and the athletes.

1. What is your role at CAS outside of the Olympic Games? (05:18-09:15)

I am a member of the ICAS for 10 years. The ICAS contains 20 members from all aspects of the sports world. 5 members are on the board (the president, two vice presidents, to presidents of the two divisions, ordinary division and appeals division). I am the president of the appeals division and member of the 5 on the board. This is also the part of CAS which has the biggest bulk of work. I am concerned with procedural matters and am not involved directly with the cases except for preliminary measures. For example, in football, if a player is allowed to play at the champions league final or not, then this goes first through FIFA, if FIFA says no, and the player appeals this comes to me directly. These matters need to be resolved quickly.

2. What has been your role at CAS during the Olympic Games? (09:15-11:46)

This is independent of the role which I usually have. It is like a small version of the regular CAS. The system is the same, there is a board with a president and co-president and then there are the arbitrators. In PyeongChang we had 15 arbitrators plus the arbitrators of the anti-doping division. We have to render the decision within 24 hours, however, this only concerns what
we can do in the whole procedure. In PyeongChang, sometimes the lawyers of the athletes had to travel to South Korea and this slowed the whole process down considerably. At the end of the day it is still arbitration, so the parties can decide how the procedures are to be conducted. At the Olympics I have never been an arbitrator. But have only participated as President of the Division.

3. When you were competing in 1988, has there been a situation in which you would have wished that there was an ad hoc division? (11:46-22:52)

No. At that time the mentality of the athletes and the community was different. In the beginning of the Ad Hoc Division, the athletes came with matters which they would not bring anymore today. At the time the athletes were appealing to find out if they can get something from it. Sometimes it also helps the parties to draw a line and move on. Today, the athletes are also advised better. What is interesting is that it is always changing. In PyeongChang we had a case where two athletes of a small island were qualified but only one was admitted to the games. So he appealed the decision. 4 years ago, we also had questions of admittance. This led to the situation that the federations are changing their regulations. The small federations however, are sometimes not on the same level which can lead to problems. 8 years ago, Switzerland could also have had problems because some issues about admittance were not regulated yet. Sometimes small federations and their athletes finance themselves to be part of the Games and so it is clear, that they try to appeal a decision. These decisions are always within the 10-day period before the Games. So that they could still travel to the Games if the decision was positive. 4 years ago, in Sochi there was a case with the French Snowboard Cross’ athletes clothing. They were not allowed to have tight dresses, but they still were wearing something like a dress. It was apparent that the French had some kind of advantage, so we had hearings and worked until 4 o’clock in the morning. The tribunal found that the dresses were within the rules of the regulations. But there was a change in regulation after the Olympics. But it was clever by the French, they also wet the dresses so they were more aerodynamic. It was smart. Also Simon Amman’s bindings were questionable a few years ago. But it is the defining element of the winner that he goes to the limit personally, but also with the gear he uses. He is only not allowed to step over the limit. We hurried so much in this case because we knew that on the next day was the last medal ceremony. We wanted to prevent them from receiving the medal and having to give it back three days later. This is for me a
great example why CAS is on site during the Olympics. On Saturday was the competition, finished at lunch time, then the protest went to FIS, they rejected it, during the afternoon they appealed the decision and at 10 pm we had the hearing. At 4 in the morning we were finished with the hearing and at 10 in the morning the award was finished. We were aware of the deadline and we wanted to render the award before. Medal ceremonies could be postponed if a party requests it. We can only decide about things which are requested. Sometimes if there is so little time only the operative clauses of the award are rendered, and the reasons come later. In the mentioned case with the French Snowboarders, the award contained reasons. Also, in the other division with preliminary measures, sometimes we first issue only the operative clauses and render the reasons later. Sometimes it takes a few months until the reasons are rendered. With the Russian athletes, it took between two and three months, usually it takes around a month.

4. How does the AHD operate, what are the inner workings? (22:52-25:39)

It is a mini CAS. All arbitrators are in the same house. They have to be available within an hour. We call them via their cell phones. The board is not always in the office. But all the arbitrators are always close together. Usually the arbitrators are spread out in various countries. The arbitrators also can exchange among themselves. The ICAS chooses the arbitrators and the criteria has become more complicated, there must be female arbitrators and arbitrators from all continents. The board discusses carefully, who will be arbitrator at the Olympics.

5. What is the average duration until the AHD renders an award? (25:39-26:57)

It depends more on the parties than on the Ad Hoc Division. Usually from the closing of the hearing until the award is finished, this can be done faster than in 24 hours. But it depends on the parties. If an athlete wants to participate at a competition he needs to know 2 days ahead whether he can participate or not. So the time frame is adapted to the needs.

6. What has been the fastest process you have seen during your time at CAS and why has it been so fast? (26:57-28:18)
Difficult. There are cases where the legal framework is relatively simple. But that doesn’t mean that it is fast because the athlete has may be no legal representation. Sometimes there are no hearings and then it is possible to render the award within 24 hours.

7. **What are the strengths of the CAS ad hoc procedure? (28:18-30:42)**

The arbitrators are experts on the field. Not only legally but also experts in Sport. The process is fast and reasonable. Also if the parties didn’t request that the award be rendered before the medal ceremony, we know that we have to decide before. The Spirit of Sport is prevalent. The arbitrators have a high competence for sport. There is a huge pool of knowledge because all the individuals present, bring a lot of knowledge to the table.

8. **What are the weaknesses? (30:42-34:46)**

May be this strength is also a weakness. The arbitrators are not full-time judges but lawyers who also work next to their functions with the CAS. They have a good basic knowledge, but the arbitrators are very diverse. The arbitrators are on a list and they do not wait until there is a case for them. It is a challenge that all have the same level of expertise and that there is a common denominator regarding the important elements. There are big discussions regarding the Anti-Doping Divisions. The Americans have a different approach. Not only in legal systems but also in the organisation of the sports federations. The Americans are not funded by the government. Everything is privatised. We should tell this to the people of Swiss Olympic (laughs). Also colleagues from the middle east for example, there is a difference in culture. At the end of the day all have to adhere to the CAS Code and we offer seminars so that all are on the same page. We try to harmonise something which is done differently in every country. This is a challenge.

9. **What would you say needs to be changed to make it more efficient? (34:46-37:42)**

A lot hinges on the instruction of the arbitrators to have a continuous quality. CAS grew considerably within the last few years. This led to the situation that the counselors are often unavailable. Usually it’s the parties which are delaying. It is not always easy to find suitable arbitrators which are also native speakers in English and/or French.
10. Art. 1 says that the athlete must have exhausted all available internal remedies first before filing a request for arbitration. Does this actually happen in practice or do athletes go immediately to the AHD? (37:42-41:29)

The athletes always have to go through their associations first before appealing to CAS Ad Hoc Division. CAS is only the last instance. The athlete needs a decision of his association. Usually during the Olympics, the associations are quick enough. During the competition there is a jury, there the athlete can place a protest within an hour after the competition and then the association renders a decision. This is usually never a problem.

11. What are the criteria for being selected as an arbitrator to the AHD? (41:29-42:51)

An arbitrator needs to be on the CAS List. There are a lot of criteria, gender, language, provenance, also independence from certain associations. Usually they have a proximity to some associations. We try to prevent challenges. We do not have a lot of challenges.

12. Are athletes usually represented by a lawyer when they file a request for arbitration? (42:51-44:46)

I don’t know. You have to speak with Mr. Reeb. I know that it the system is in place and that athletes use it.

13. How long are the submission usually and how is the quality standard? (44:46-46:59)

This varies a lot. Sometimes there is a 10-page submission with precedent cases and sometimes there is one page and it is obvious that the lawyer had no clue what he was doing. There are not a lot of lawyers who really know what they are doing, and which are close enough.

14. What is usually the evidence which is attached to the request, how detailed? (46:59-48:55)
With the ad hoc procedure, they submit the regulations which they call upon. For everything else, we conduct a hearing. Hearings also vary in duration. Sometimes it can take 8 hours, sometimes it takes only 1 hour.

15. Why can’t the application not be sent to the Division by e-mail (Art. 9 b)? (48:55-50:08)

First, we become it via email. But it is not a problem, because we are there. If it comes in paper, it is clear who submitted it when. I don’t think it is wrong.

16. To my understanding the regular panel is a three-member tribunal. How often are sole arbitrators used and why are they not used more often? (50:08-53:47)

There are usually always three arbitrators in an ad hoc procedure. The arbitrators are already on site. The competence is there. In this specific setting it doesn’t make sense to have a sole arbitrator. With the normal CAS Appeals procedures, we often appoint sole arbitrators. Big cases are done with a three-arbitrator tribunal. I prefer to have three-member tribunals. To have three arbitrators I feel like my points are considered. If it is only one arbitrator everything gets focused on this one person. The discussions between each other as a panel are important. In the ad hoc division, the 15 arbitrators are ready. The discussion makes the procedure faster, the panel also works as a team and the arbitrators can individually work on their part and this makes the process even faster. A good team is not slower than a sole arbitrator. It works in our setting.

17. How often are AHD arbitrators challenged? Are these challenges successful? (53:47-56:06)

There are practically no challenges of the ad hoc arbitrators. We try to anticipate possible conflicts of interests. All parties have an interest, that the dispute is resolved quickly. Thus, the parties do not slow down the procedure on purpose. There is consensus between the parties which makes it possible. Both parties need to have an interest to resolve the dispute quickly, then it could also work in the commercial world.

18. What is an example where an athlete applies for preliminary relief in extreme urgency? What applications are usually granted? (56:06-58:56)
The classic case here is the question if an athlete can start or not. I didn’t experience a case so far. For example, with Simon Amman’s binding, if he uses an arbitrary binding in the first run of the competition and there is a protest against him, may be a decision before the second run on the next day is not possible. The athlete would request preliminary relief, so he can still start even though the case is not decided yet. The athlete would still have to go through his association.

19. How often is a Hearing scheduled? Do the arbitrators also decide on a documents-only basis? (58:56-59:43)

The arbitrators do both. In cases concerning admittance it is usually done on a documents-only basis, if it is during the games we usually conduct a hearing.

20. What is your opinion regarding the de novo principle in CAS arbitrations? (59:43-1:01:59)

The parties have to present all the evidence a new. Sport is relatively new in the legal sector. Sometimes associations do not have the legal expertise required. Sometimes lawyers get involved for the first time from the moment a party appeals to the CAS, and they for the first time see that there were some mistakes in the process. So it makes sense, that the parties can present everything a new before the CAS.

21. What is your opinion regarding the closed arbitrator list of the CAS? (1:01:59-1:04:33)

My opinion is that it brings big advantages. The list is extensive. It strengthens the quality of the CAS. They receive regular training. 10, 15 years ago it could have been argued, today it is not a problem anymore. Arbitrators can get on the list if they apply. There have been attempts to abolish the closed list, but it never succeeded. Having a closed list facilitates the process considerably. The arbitrators know about the process and are available. Abolishing the closed list would take an integral part of the CAS away.

22. How often does a panel communicate the operative parts of the award before it communicated the reasoned award to the parties? (1:04:33-1:05:53)
It happens regularly in urgent situations. The parties wish to just have the decision immediately, so they know if they can proceed. The reasoning can come later.

23. How often do cases get referred to the CAS and why? (1:05:53-1:06:25)

Is not used.

24. What is your opinion on decision *ex aequo et bono*? (1:06:25-1:07:56)

We use this principle as well. I feel it is an important principle. The parties need to request it. I feel it is important that the parties can chose it. During the Olympics, the principle is not used often.

25. In what way do you see that there could be an application of the AHD model in commercial arbitration? (1:07:56-1:11:50)

I can imagine that there is a possibility. Sports arbitration has a few specific features. What would be necessary is that it would be done in individual industry sectors, create closed groups. One would have to create a similar situation like in the sports community. For example, all the players in the food sector could commit to a specific tribunal. But it hinges on the trust that the parties have into this tribunal. I could imagine that this could work, but it would have to be segmented into industry sectors. CAS was created because the athletes were annoyed with the state courts who did not have the expertise in this field. Athletes could not accept the decisions. This is why it is important to conduct hearings so that the athletes feel that the arbitrators know what it is about.

26. Could you imagine being a constant (commercial) ad hoc arbitrator on call 24 hours a day, and if parties appoint you to render an award within 24 hours based on the documents they send you? (1:11:50-1:15:19)

Personally, it is a difficult question, but I feel that if some terms would be more clearly defined it could be possible. The same principle is in a way applicable at the CAS. When we appoint somebody, it is possible that we notify this person at 4 in the morning. They then revert to us usually within 2 days. It also depends on the financial remuneration. What makes these
models expensive is the independence of the arbitrators. If a lawyer is not allowed to take on
certain cases this can become very expensive. To tell a lawyer that he is not allowed to take
on new mandates is very difficult. This is by the way also a reason why certain people are not
on the arbitrator list, even though we would have liked to have them on the list. But some say
that they can represent a party but can’t afford to act as arbitrator.

27. How much would you charge as an advance on costs to do it? (1:15:19-1:22:39)

This is very difficult to answer. Being on call is not a problem. The problem is independence.
If I am not available for more than two days I notify the CAS. If something is urgent it is good
if it is done within 24 hours. But usually these things don’t take more than an hour of my time.
Having an advance on costs of CHF 20,000.00, could be an interesting idea. But it would have
to be in an area where I have the expertise. So I do not have to start from zero, when the
dispute arises. Legal expertise is usually not a problem, but the specific expertise is not so easy
to acquire. Also, at the end of the day the parties have to present the arbitrator with all the
relevant facts. The arbitrator only has to understand but not to investigate. Once also in the
ad hoc division, I clearly saw that a decision was wrong, then it is difficult to correct the
tribunal. Of course, we can revise the decisions and we would bring up the point with the
panel and discuss it.
2. Questionnaires

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Master thesis by Sridar Paramalingam

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Please write your opinions and answers directly into the document underneath the questions using red letters. Please note that your answers might get quoted in my master thesis. If there are questions which you do not want to answer just leave them blank. Please return the form to my e-mail address sridarparamalingam@gmail.com latest by 12.07.2018. Thank you very much for your participation. If you are interested in my finished thesis, please let me know and I will happily send you a copy.

Kind regards, Sridar Paramalingam

1. What is your name?
Name known to the author.

2. What is your experience in arbitration?
More than 20 years experience as arbitrator and as party counsel. ICC, WIPO, CAS, Milano Chamber, Swiss Chamber, etc.

3. What is your experience in sports arbitration?
I am CAS arbitrator since many years.

4. Could you imagine being “on call” as an arbitrator 24/7?
Yes. I did this at the 2012 London Olympic Games.
5. Would you be willing to resolve a commercial dispute and issue an award without reasons within 24 hours?
Yes. I did this at the 2012 London Olympic Games.

6. Could you imagine resolving such dispute *ex aequo et bono* (based on the principles of fairness and good faith instead of a codified law)?
Yes. I did this already in some CAS cases.

7. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 24 hours (sole arbitrator, documents only, one round of submissions max. 40 pages each, *award without reasons, ex aequo et bono or CISG or Swiss law applicable*)?
CHF 15'000

8. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 48 hours (documents only, one round of submissions max. 40 pages each, *award with brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?
CHF 30'000

9. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 7 and 8) and if yes for what type of contracts (i.e., industry sector, amount in dispute, etc.)?
To some clients yes, to others no.

10. Could you imagine being appointed as a sole arbitrator already during the contract negotiation phase and being on call for the duration of the contract and resolve an emerging dispute within 24/48 hours (parties provide you with the contract and update you about changes from the beginning of their contractual relationship, parties pay you an annual non-refundable fee for being on call, similar to an insurance policy)?
Yes.

11. Would you have a time limit for such a commitment and if yes, what would be your maximum threshold (i.e., 6 months, 2 years, 10 years)?
3 years.

12. How much would you charge (monthly/annual fee) to render this service for a contract based on the CISG/Swiss law worth USD 50 million (documents only, one round of submissions max. 40 pages each, *award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?
CHF 5'000 p.a.

13. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 10 and 12) and if yes for what type of contracts?
Same as no. 9.

14. Could you imagine inserting a multi-tier arbitration clause into a contract using the model as set out in question 7 and/or 8 as stage one, before moving to a regular commercial arbitration procedure, i.e., ICC or classical ad hoc procedure as stage two if necessary?
It is not my preferred way of action.

15. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (question 14) and if yes for what type of contracts?
Same as no. 9
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Kind regards, Sridar Paramalingam

1. What is your name?  
Name known to the author.

2. What is your experience in arbitration?  
See Website.

3. What is your experience in sports arbitration?  
No significant experience.

4. Could you imagine being “on call” as an arbitrator 24/7?  
Yes, but only for limited pre-defined time period.

5. Would you be willing to resolve a commercial dispute and issue an award without reasons within 24 hours?  
Yes.
6. Could you imagine resolving such dispute *ex aequo et bono* (based on the principles of fairness and good faith instead of a codified law)?

   Yes.

7. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 24 hours (sole arbitrator, documents only, one round of submissions max. 40 pages each, *award without reasons, ex aequo et bono or CISG or Swiss law applicable*)?

   It depends on further circumstances, but roughly CHF 3000 - CHF 6000.

8. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 48 hours (documents only, one round of submissions max. 40 pages each, *award with brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?

   It depends on further circumstances, but roughly CHF 4000 - CHF 12000.

9. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 7 and 8) and if yes for what type of contracts (i.e., industry sector, amount in dispute, etc.)?

   If time is of the essence.

10. Could you imagine being appointed as a sole arbitrator already during the contract negotiation phase and being on call for the duration of the contract and resolve an emerging dispute within 24/48 hours (parties provide you with the contract and update you about changes from the beginning of their contractual relationship, parties pay you an annual non-refundable fee for being on call, similar to an insurance policy)?

    Depends on circumstances and duration. If this lasts for one year, I would hardly be willing to accept. It it lasts for 1 or 2 weeks, or even some months, why not, depending on circumstances.

11. Would you have a time limit for such a commitment and if yes, what would be your maximum threshold (i.e., 6 months, 2 years, 10 years)?

    Yes, 6 months, except in case of special circumstances.

12. How much would you charge (monthly/annual fee) to render this service for a contract based on the CISG/Swiss law worth USD 50 million (documents only, one round of submissions max. 40 pages each, *award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?

    See ICC Scale or Swiss Rules Scale, to be adjusted to circumstances.
13. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 10 and 12) and if yes for what type of contracts?
Again if time is of the essence, depending on circumstances.

14. Could you imagine inserting a multi-tier arbitration clause into a contract using the model as set out in question 7 and/or 8 as stage one, before moving to a regular commercial arbitration procedure, i.e., ICC or classical ad hoc procedure as stage two if necessary?
No, I would rather go for medarb.

15. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (question 14) and if yes for what type of contracts?

n/a
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Kind regards, Sridar Paramalingam

1. What is your name?
Name known to the author.

2. What is your experience in arbitration?
I have represented parties at the Court of Arbitration for Sports in the last 12 years

3. What is your experience in sports arbitration?
See question 2

4. Could you imagine being “on call” as an arbitrator 24/7?
For a predefined and certain period of time yes.

5. Would you be willing to resolve a commercial dispute and issue an award without reasons within 24 hours?
I cannot answer this question in such general form. This depends on the dispute.
6. Could you imagine resolving such dispute *ex aequo et bono* (based on the principles of fairness and good faith instead of a codified law)?

Yes.

7. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 24 hours (sole arbitrator, documents only, one round of submissions max. 40 pages each, *award without reasons, ex aequo et bono or CISG or Swiss law applicable*)?

8. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 48 hours (documents only, one round of submissions max. 40 pages each, *award with brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?

9. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 7 and 8) and if yes for what type of contracts (i.e., industry sector, amount in dispute, etc.)?

*In certain cases yes.*

10. Could you imagine being appointed as a sole arbitrator already during the contract negotiation phase and being on call for the duration of the contract and resolve an emerging dispute within 24/48 hours (parties provide you with the contract and update you about changes from the beginning of their contractual relationship, parties pay you an annual non-refundable fee for being on call, similar to an insurance policy)?

Yes.

11. Would you have a time limit for such a commitment and if yes, what would be your maximum threshold (i.e., 6 months, 2 years, 10 years)?

2 years.

12. How much would you charge (monthly/annual fee) to render this service for a contract based on the CISG/Swiss law worth USD 50 million (documents only, one round of submissions max. 40 pages each, *award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?

13. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 10 and 12) and if yes for what type of contracts?

*Yes. I would not limit it to certain types of contracts.*
14. Could you imagine inserting a multi-tier arbitration clause into a contract using the model as set out in question 7 and/or 8 as stage one, before moving to a regular commercial arbitration procedure, i.e., ICC or classical ad hoc procedure as stage two if necessary?

15. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (question 14) and if yes for what type of contracts?
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Kind regards, Sridar Paramalingam

1. What is your name?
Name known to the author.

2. What is your experience in arbitration?
I have been involved in approximately 200 arbitration proceedings, mostly as an arbitrator

3. What is your experience in sports arbitration?
Most of my arbitration matter have to do with sports, both in the narrow sense and in commercial matters involving sport.

4. Could you imagine being “on call” as an arbitrator 24/7?
I have been on call like this during services for the Court of Arbitration for Sport during the Olympic Games on four occasions.
5. Would you be willing to resolve a commercial dispute and issue an award without reasons within 24 hours?

Typical lawyer’s answer: this depends on the complexity of the dispute. More complex cases are impossible to be resolved within 24 hours unless the arbitrator can decide ex aequo et bono.

6. Could you imagine resolving such dispute ex aequo et bono (based on the principles of fairness and good faith instead of a codified law)?

Yes

7. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 24 hours (sole arbitrator, documents only, one round of submissions max. 40 pages each, award without reasons, ex aequo et bono or CISG or Swiss law applicable)?

Between 5.000 to 10.000 €

8. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 48 hours (documents only, one round of submissions max. 40 pages each, award with brief reasons, ex aequo et bono or CISG or Swiss law applicable)?

25.000 €

9. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 7 and 8) and if yes for what type of contracts (i.e., industry sector, amount in dispute, etc.)?

Given my experience with ex aequo et bono the answer is yes. In principle, the system could be used for any kind of conflict.

10. Could you imagine being appointed as a sole arbitrator already during the contract negotiation phase and being on call for the duration of the contract and resolve an emerging dispute within 24/48 hours (parties provide you with the contract and update you about changes from the beginning of their contractual relationship, parties pay you an annual non-refundable fee for being on call, similar to an insurance policy)?

Yes

11. Would you have a time limit for such a commitment and if yes, what would be your maximum threshold (i.e., 6 months, 2 years, 10 years)?

One year subject to remuneration for stand-by.

12. How much would you charge (monthly/annual fee) to render this service for a contract based on the CISG/Swiss law worth USD 50 million (documents only, one round of
submissions max. 40 pages each, **award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable**?)

€ 3.000,00/month

13. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 10 and 12) and if yes for what type of contracts?

Yes, as a matter of principle for any kind of contract.

14. Could you imagine inserting a multi-tier arbitration clause into a contract using the model as set out in question 7 and/or 8 as stage one, before moving to a regular commercial arbitration procedure, i.e., ICC or classical *ad hoc* procedure as stage two if necessary?

Probably not

15. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (question 14) and if yes for what type of contracts?

Probably not
The Super Expedited Procedure
A Concept for Extra-Fast Commercial Arbitration Procedures Inspired by Sports Arbitration

Master thesis by Sridar Paramalingam

Questionnaire to Arbitrators regarding the Super Expedited Procedure being developed by Sridar Paramalingam in his master thesis.

The aim of my thesis is to find elements from expedited commercial procedures and sports arbitration procedures and develop a new expedited procedure for commercial arbitration with elements, which are typical in sports arbitration, such as decisions *ex aequo et bono*, awards without reasons or arbitrators who are on call, like during the Olympic Games.

Please write your opinions and answers directly into the document underneath the questions using red letters. Please note that your answers might get quoted in my master thesis. If there are questions which you do not want to answer just leave them blank. Please return the form to my e-mail address sridarpemalingam@gmail.com latest by 12.07.2018. Thank you very much for your participation. If you are interested in my finished thesis, please let me know and I will happily send you a copy.

Kind regards, Sridar Paramalingam

1. What is your name?
Name known to the author.

2. What is your experience in arbitration?
Around 30-40 arbitrations, as counsel, arbitrator, and secretary. Mostly commercial.

3. What is your experience in sports arbitration?
Very little, participated in 2 proceedings.

4. Could you imagine being “on call” as an arbitrator 24/7?
For a limited time, e.g. a specific week, yes.

5. Would you be willing to resolve a commercial dispute and issue an award without reasons within 24 hours?
Yes, if certain procedural rules are agreed, e.g. the parties’ submissions shall not exceed 50 pages or so and that the exhibits are limited to 30 pieces of evidence or so, and that the parties agree that the legal issues may not be fully researched, in particular when an applicable law is involved I am not familiar with.

6. Could you imagine resolving such dispute *ex aequo et bono* (based on the principles of fairness and good faith instead of a codified law)?
   
   If the parties so agree, yes.

7. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within **24** hours (sole arbitrator, documents only, one round of submissions max. 40 pages each, *award without reasons, ex aequo et bono* or CISG or Swiss law applicable)?
   
   Around **10,000-15,000**

8. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within **48** hours (documents only, one round of submissions max. 40 pages each, *award with brief reasons, ex aequo et bono* or CISG or Swiss law applicable)?
   
   Around **USD 20,000-25,000**.

9. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 7 and 8) and if yes for what type of contracts (i.e., industry sector, amount in dispute, etc.)?
   
   Only for limited cases, e.g. primarily long-term contracts that still continue and where the parties are facing a dispute that needs to be resolved before any progress under the contract can be made. In construction contracts, DABs are used for this purpose.

10. Could you imagine being appointed as a sole arbitrator already during the contract negotiation phase and being on call for the duration of the contract and resolve an emerging dispute within 24/48 hours (parties provide you with the contract and update you about changes from the beginning of their contractual relationship, parties pay you an annual non-refundable fee for being on call, similar to an insurance policy)?
    
    In principle yes, but not with the condition that a dispute is rendered within 24/48 hours, but rather with an advance notice of 5 working days. Furthermore, I would ask for the possibility to be able to terminate the appointment after one or two years.

11. Would you have a time limit for such a commitment and if yes, what would be your maximum threshold (i.e., 6 months, 2 years, 10 years)?
    
    Same as above, one to two years. I would agree to the condition that a termination shall be reasoned.
12. How much would you charge (monthly/annual fee) to render this service for a contract based on the CISG/Swiss law worth USD 50 million (documents only, one round of submissions max. 40 pages each, **award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable**)?

I would probably ask for an annual fee of USD 2,000-3,000 and for additional fees in case an award needs to be rendered.

13. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 10 and 12) and if yes for what type of contracts?

Again only in limited circumstances, primarily for long-term contracts, and probably only when disputes are anticipated where it makes sense to already have a standing tribunal so that no disputes on the appointment of the tribunal can occur.

14. Could you imagine inserting a multi-tier arbitration clause into a contract using the model as set out in question 7 and/or 8 as stage one, before moving to a regular commercial arbitration procedure, i.e., ICC or classical ad hoc procedure as stage two if necessary?

Yes, but only for awards with a reasoning (it makes in my view no sense to have an appeal against an unreasoned award), and only under the condition that the award can be “appealed” against only for certain reasons, e.g. obvious violation of the right to be heard by not taking into account arguments.

15. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (question 14) and if yes for what type of contracts?

Not necessarily. In particular where the goal is to have an extremely fast decision, a secondary stage with regular proceedings may work against the purpose, and a party could abusively make use of that.
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Kind regards, Sridar Paramalingam

1. What is your name?
Name known to the author.

2. What is your experience in arbitration?
20 years of experience as arbitrator and counsel in over 50 international and domestic arbitrations under the ICC Rules, Swiss Rules and DIS Rules.

3. What is your experience in sports arbitration?
One case as sole arbitrator in an ICC arbitration (women's basketball).

4. Could you imagine being “on call” as an arbitrator 24/7?
yes

5. Would you be willing to resolve a commercial dispute and issue an award without reasons within 24 hours?
6. Could you imagine resolving such dispute *ex aequo et bono* (based on the principles of fairness and good faith instead of a codified law)?

yes

7. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 24 hours (sole arbitrator, documents only, one round of submissions max. 40 pages each, *award without reasons, ex aequo et bono or CISG or Swiss law applicable*)?

CHF 5'000-8'000

8. How much would you charge to resolve a contractual dispute based on the CISG/Swiss Law with USD 1 million in dispute including counter claim and set off defences within 48 hours (documents only, one round of submissions max. 40 pages each, *award with brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?

CHF 5'000-12'000

9. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 7 and 8) and if yes for what type of contracts (i.e., industry sector, amount in dispute, etc.)?

yes, for consumer contracts, domain name disputes, contracts with an amount in dispute up to CHF 300'000

10. Could you imagine being appointed as a sole arbitrator already during the contract negotiation phase and being on call for the duration of the contract and resolve an emerging dispute within 24/48 hours (parties provide you with the contract and update you about changes from the beginning of their contractual relationship, parties pay you an annual non-refundable fee for being on call, similar to an insurance policy)?

yes

11. Would you have a time limit for such a commitment and if yes, what would be your maximum threshold (i.e., 6 months, 2 years, 10 years)?

no time limit

12. How much would you charge (monthly/annual fee) to render this service for a contract based on the CISG/Swiss law worth USD 50 million (documents only, one round of submissions max. 40 pages each, *award without/brief reasons, ex aequo et bono or CISG or Swiss law applicable*)?

CHF 10'000-20'000
13. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (questions 10 and 12) and if yes for what type of contracts?
yes, for all types of contracts with an amount in dispute up to CHF 500'000

14. Could you imagine inserting a multi-tier arbitration clause into a contract using the model as set out in question 7 and/or 8 as stage one, before moving to a regular commercial arbitration procedure, i.e., ICC or classical \textit{ad hoc} procedure as stage two if necessary?
yes

15. As counsel, would you recommend your client to make use of such a dispute resolution mechanism (question 14) and if yes for what type of contracts?
yes, for all types of contracts with an amount in dispute up to CHF 500'000