party telephoned. He asked me whether I would care to be another client's appointee in an arbitration to take place in Berne. When he said it would be in English, I agreed. The other Party appointed a distinguished Law Professor from Budapest. He and I tried but couldn't agree upon a Chairman so the ICC appointed a renowned Law Professor from Basle.

As a mere technician, I found daunting the thought of working with such lions of the Law. In the few weeks available to me after reading the materials sent by the two Parties, I obtained a copy of the Payot *Code Civil* and *Code des Obligations*. I read it as best I could, with the aid of my *Robert*;[3] like most Englishman of my generation I have a poor French vocabulary and little facility for reading the language. Nevertheless, Swiss Law was my first serious introduction to Law – a fact that has coloured my approach ever since.

One of the complications about being an Engineer in arbitration is that one may understand what witnesses and Parties are talking about. In this Swiss arbitration another Engineer appeared as an expert witness. One issue concerned the corrosion of steel by salt and whether certain parts of a machine should be in plain or stainless steel. The witness had expatiated upon the scientific mechanism of pitting corrosion of steels. Unfortunately – or fortunately – I once was apprenticed as a ship's Engineer and later studied corrosion for a guided weapon project. I knew that the witness had made a mistake and neither Counsel had appreciated it.

I didn't know what to do, so I wrote an aide-memoire overnight. I gave copies to the Chairman and my co-arbitrator and then asked the Chairman if he would care to give it to Counsel for the parties. At the hearing, he did that. I offered to answer any questions either Counsel, or the other arbitrators, wished to ask. There were no questions, but nothing further was said of the witness on that topic.

Swiss Law had been my introduction to Law and a strong influence when I learned English Law. It stayed with me when an Engineer friend, the distinguished Civil Engineer Ian Menzies, alas no longer with us, asked me to help with mechanical issues on behalf of a Party in an arbitration in Switzerland. We were to be led by Michael E. Schneider and the case was to last in brief hearings over, as it turned out, a number of years. The case concerned the manufacture and construction of high performance boilers for a power station.

It was a pleasure and a privilege to work with Michael even if it became necessary to have one's wits about one at four in the morning – eight bells of the morning watch, the dawning of a new day!

3. *Collins Complete and Unabridged – Collins Robert French Dictionary* [now Ninth edition] (ISBN: 9780007331550).

I was an Expert Witness for the Party represented by Michael; I wrote my report and gave oral evidence in the usual way. I thought nothing of it when Michael asked me to put questions to technical witnesses of the other side – there were issues about working practices on site, as I recall. One was the technique of mirror welding: nothing to do with the boudoir but the welding of inaccessible boiler tube by reference to a close-up reflection of the working area.

Michael took me by surprise, however when the hearing drew to a close. He told me that he would introduce the closing address and I would then argue some technological points; then he would finish. I had never thought to be an advocate before. I hope I made it clear to the three arbitrators that I understood the difference between advocacy and evidence. One of the opposing lawyers, commenting on the short morning coat I always wore for formal occasions in those days, said he had thought I looked like an English lawyer. I didn't know if that was intended as a compliment.

Michael Schneider was making use – good use – of the inherent flexibility of arbitration. That flexibility of arbitration is the subject of this chapter. It has become usual for practitioners to discuss arbitration as if it were a creature of law but I argue that it is nothing of the kind. I'll argue that it's plain common-sense.

It's plain common-sense for two people, when they can't agree, to turn to a third person for an answer. That person may be a friend, a colleague, or they may be a priest or a community leader someone they admire; they may be an expert in the field, or they may be a lawyer or a judge if it's a matter of law.

That is all that is implied by the classic English definition of arbitration: "The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision." There's nothing about a binding decision in that definition. The conflicting parties may decide to agree to be bound by that decision. Indeed, they often do; that is why we think of arbitration as binding. In days gone by lawyers spoke of an Arbitration Bond,[4] which is what we have come to know as an Arbitration Agreement. Such a bond was what was called, in French, a *compromis d'arbitrage*.

4. 1768 W. Blackstone *Comm. Laws Eng.* iii. i, Arbitration-bond: A bond entered into by two or more parties to abide by the decision of an arbitrator.

The word "equitable" is a legal term of art but it also has an ordinary meaning of "fair". Indeed, the English Arbitration Act[5] uses that ordinary word "fair" and nothing more pretentious, to describe the purpose of arbitration.

The essence of arbitration laws world-wide is to be found in that one word. Fairness is what legislators have sought to achieve, not a mere weak simulacrum of processes of the court, in private hands. It is at once less than that and more than that. Less than that in that arbitrators have none of the coercive authority of a court; more than that because the arbitrator's decision is untrammelled by national boundaries. I'll return to that last assertion later. For now this part of my thesis has to do with the implications of fairness.

When those two people agree to ask another to decide for them, common-sense suggests that he or she should not have a private interest in their own decision. There are said to be two essential rules of Natural Justice, of which the first is usually expressed as *nemo judex in causa sua* – nobody should be judge in their own cause. It's an obvious rule in the context of criminal or administrative law where there is no equality between an individual and the state – or for that matter an employer or organisation. It is a rule that may perhaps be set aside when the disputed issue is between equals.

There will be circumstances in which a third person is connected with one of the parties or with the very subject of the dispute such that no reasonable person would believe that their decision would be unaffected by the connection. One would hope that in such circumstances no-one would accept an invitation to act.

There will be other circumstances where the connection is so tenuous that no reasonable person would doubt the arbitrator's independence for a moment. Between the two sets of possibilities there is a whole spectrum of degrees of connection and it becomes impractical to draw a hard and fast line between what is acceptable and what not.[6]

At the end of the day, an arbitration is the creature of the parties. If they agree to accept the decision of an interested party, that may be a matter

5. *Arbitration Act* 1996 c. 23 Part I Section 1 General principles.
The provisions of this Part are founded on the following principles, and shall be construed accordingly –
(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; …

6. Although a gallant attempt has been made by the International Bar Association (IBA) in their *IBA Guidelines on Conflicts of Interest in International Arbitration* (May 2004). These Guidelines distinguish between red, orange, and green categories, with a non-exclusive list for each. The implication is that appointments should not be accepted where the Red List applies but should give no concern where the relationship is on the Green List. The subjectivity of the topic is demonstrated by the extensive Orange List and more particularly by the existence of waivable and non-waivable Red Lists.

for them but a National Court cannot be guaranteed to lend its coercive authority to their pact. For many years, indeed since the colonial days of the British Raj, it was usual for the Indian Government to provide for the Government's own Chief Engineer to be sole Arbitrator of supplier's contracts. The trust that the suppliers of those days had in the integrity of the colonial civil service led them to accept the arrangement without question.

There is a circumstance which may cast doubt on an arbitrator even though the connection is not one that normally would result in suspicion. It arises when some link exists but it has not been disclosed to both parties. If that link is discovered later a question may be asked as to why it was not disclosed. Non-disclosure may seem deceitful. Deceit is an attribute that a bystander would think unbecoming an arbitrator.

The second Rule of Natural Justice is one which, when I was younger, I took for granted, so obvious did it seem. It is summed up in the pithy Latin instruction, perhaps commandment would be a better word, *audi alterem partem*, hear the other party.

Isn't that obvious? There's a dispute between two people. Why would one not hear what each had to say? But in one celebrated English case[7] a distinguished barrister, who was also a surveyor, decided a case after seeing the evidence (a building project) for himself and without letting the parties know what he had seen. Flexibility can't stretch that far; he was removed by the Court and his Award overturned.

Arbitration is flexible where the Court cannot be. The Arbitration Laws in most jurisdictions are based upon that premise although they may, of course, impose additional requirements. This freedom has its own burden – freedoms always do. Long before he or she goes into Court, the lawyer knows how to prepare, how the opponent will behave and what to expect of the Judge or Judges. With that knowledge, the lawyer can advise the Client. The flexibility of Arbitration denies the lawyer that certainty.

Even when the arbitral hearing is subject to the rules of Institutions, such as the ICC (the International Chamber of Commerce's International Court of Arbitration), there remains a high degree of choice in the hands of the arbitrator or arbitrators. There is also a high degree of freedom in the hands of the Parties but, to exercise their choice, the Parties have to agree between them. That agreement is not often available once the Parties have fallen out so the choices usually are left to the arbitrator or arbitrators.

That is why every arbitration begins with a conundrum that must be resolved before anyone involved can even think about what to do. Each person

7. *Annie Fox and Others v P.G. Wellfair Ltd (In Liquidation)* [1981] 2 Lloyd's Rep 514, CA.

'5.3 Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance.'[3]

The Golden Rule reflects one of the essential differences between arbitration and mediation. Arbitration is a private court procedure. Like any other formal procedure before domestic courts or international tribunals, it is subject to mandatory due process rules. These due process rules ensure the legitimacy of the procedure. Mediation, on the other hand, is an assisted negotiation process. It is purely contractual. Due process rights do not apply because this contractual process lacks the quality of a formal procedure. Caucus sessions between the mediator and one party in the absence of the other, therefore, belong to the accepted arsenal of mediation techniques.

§2.02 Origins and Scope of the Golden Rule

The Golden Rule is based on a blend of legal considerations related to the role of the arbitrator as a private judge, the impact of the parties' due process rights on the communication between them and the arbitrators, and common sense. However, that Golden Rule, like most other rules, is subject to a number of reservations.

The first reservation relates to the scope *ratione temporis*. The 2013 IBA Guidelines on Party Representation in International Arbitration[4] defines "x parte communications" as any oral or written communications between a party representative and an arbitrator or a prospective arbitrator without the presence or knowledge of the opposing party or parties. It is noteworthy that this definition also includes communications with a '*prospective arbitrator.*' However, unilateral contacts between a party and a nominee (during the search for a party-appointed arbitrators) or between a party and the party-appointed arbitrator (during the search for the president of the tribunal) are unavoidable. In fact, they have become common practice in international arbitration. The Green List of the IBA Guidelines on Conflicts of Interest of 2004 takes account of the practice of communicating with prospective arbitrators. Formulated from the perspective of the arbitrator, it provides that such *ex parte* contacts

for Eric Bergsten, pp. 291 et seq. (Wolters Kluwer 2011); Daniele Favalli (ed.), *Sense and Non-sense of Guidelines, Rules, and Other Para-regulatory Texts in International Arbitration* (ASA Special Series No 37, 2014).

3. Text reproduced at *www.trans-lex.org/701100 (accessed 1 Dec. 2013)*.
4. Text available at *ww.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#partyrep (accessed 1 Dec. 2013)*.

need not be disclosed by the arbitrator once appointed, so long as the contact is limited and does not address the merits or procedural aspects of the dispute:

'4.5. Contacts between the arbitrator and one of the parties

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.'[5]

Article 8 of the 2013 IBA Guidelines on Party Representation in International Arbitration, even though more elaborate, contains essentially the same principle, albeit formulated from the perspective of counsel.[6] At Article 8(d) of the same, counsel is warned that, while a general description of the dispute may be permissible, counsel should not seek out the views of the prospective party-nominated arbitrator or presiding arbitrator on the substance of the Dispute.

'8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:

(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.

(c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the Dispute.'

5. Text available at *www.trans-lex.org/701000 (accessed 1 Dec. 2013)*.
6. Art. 5.3 IBA Rules of Ethics for International Arbitrators (*supra* n. 3) puts the duty on arbitrators to avoid the communications, rather than placing the duty on counsel to avoid initiating conversation.

Subsection (d) reveals the thin line between admissible and non-admissible conversations in scenarios where *ex parte* communications are allowed.

The second reservation relates to the scope and limits of the Golden Rule. Not all communications between counsel or party-representatives and the party-appointed arbitrators during the arbitration are forbidden. It is for that reason that Section 5.3 of the 1987 IBA Rules of Ethics for International Arbitrators[7] provides that an arbitrator 'should' and not 'shall' or 'must' avoid any unilateral communications regarding the case with any party, or its representatives. The relevant test is whether the other party's due process rights are in danger of being violated if a party communicates *ex parte* with the arbitrator.

§2.03 A Personal Account

This test was met in an ICC case many years ago in which I was acting as party-appointed arbitrator. When I entered the hearing room in the morning of the first day of the hearing, I noticed that I was the first member of the arbitral tribunal in the room. I also realized that the only other person present in the room was the in-house counsel of the party that had appointed me. I felt very uncomfortable with that situation. I also wondered what my fellow arbitrators or counsel from the other side might say (or think) if they saw me in that kind of situation. Thus, I kindly asked the in-house counsel to leave and to wait in the break-out room that had been reserved for his party until the beginning of the hearing. He refused. It was only when the chairman arrived and repeated the request on behalf of the arbitral tribunal that he finally left the hearing room and went to his party's break-out room.

That incident, however, did not come as a surprise to me. It had a history. Months before the hearing, that same in-house counsel had called me in my office. He made it very clear to me that he intended to discuss certain aspects of the merits of the case with me over the phone. I pre-empted him and said that I refused to enter into any kind of discussion with him or even to listen to what he had to say. I told him that it is a rule in international arbitration that *ex parte* communications with counsel or the representative of a party are not permissible. I also made it clear that if he had something to say on the case he should send a message or brief to the other party as well as to all three members of the arbitral tribunal. I also told him that, immediately upon termination of our conversation, I would send a note to my fellow arbitrators informing them about the subject and content of the phone conversation with him.

7. See *supra* n. 3.

In hindsight, this was very new territory for me. The Golden Rule had become so engrained in the lectures I was delivering at University and, indeed, in my own ideas of arbitral practice that I presumed that everyone was operating under the same assumptions. Thus, perhaps naively, I also asked him why he thought that he could call me to discuss legal and factual details of the case with me. He had a surprisingly straightforward answer:

'I pay you, so I can call you!'

I was struck and puzzled by the simplicity of his argument. It is true that an arbitrator should understand his or her role as a (paid) service-provider for the parties. However, I had never even thought about the question of whether this service-oriented nature of the arbitrators' judicial task might serve to override mandatory due process rights of the parties. Fortunately, however, I immediately realized that it made no sense to continue the discussion with him. I terminated the phone call and sent a note about the call to my fellow arbitrators and the other party. I thought I had done the 'right' thing, but weeks later, the Tribunal received a brief from counsel. We had the strong feeling that large parts of that brief were not written by the external counsel but dictated by the in-house counsel who wanted to vent his anger about this – in his view – 'unacceptable' conduct of the arbitral tribunal. Apparently, he thought that his due process rights were being jeopardized by the fact that I would not speak with him about the case. It was as if I had bitten the hand that fed me!

A few weeks later, I happened to run into the in-house counsel at a conference. Actually, I should rather say that he ambushed me in the lobby of the conference hotel when I arrived late in the evening. When I entered the hotel lobby, he immediately approached me and started talking about the case. I, once again, made him aware that this was unacceptable and reminded him of what I had told him before on the phone some weeks ago. He ignored my remark and continued to address me on the merits of the case while I was escaping through the hotel lobby to the elevator. I still remember very vividly that I was standing in the elevator while he shouted through the lobby that he and his company 'would do anything to attack the award should they lose this case.' I was captive and forced to listen to him while the elevator doors were slowly closing, until he finally disappeared behind the closed elevator doors. On my way up to my hotel room I wondered why such a truly talented attorney, who obviously had a considerable number of years of experience as in-house counsel, would behave in such a way. He certainly did not help his party's case with such a conduct.

§2.04 Applying the Golden Rule

As indicated above, the test for whether an *ex parte* communication was improper is whether the other party's due process rights become in danger of being violated. This test was easily met in the incident reported above.

It is certainly not met and *ex parte* communications are therefore permissible in cases of communications involving social topics or purely peripheral matters:

> 'Petitioners also contend that [the arbitrator] engaged in misconduct by having an *ex parte* communication with [one party]. This conversation, of which petitioners caught the tail-end, took place during a break in the hearings with a stenographer present and concerned a computer problem that [the arbitrator] had once had. In order to vacate an award based on an *ex parte* conversation, a party must show that this conversation deprived him of a fair hearing and influenced the outcome of the arbitration … Generally, the subject matter of the conversation must have gone to the heart of the dispute's merits, and an award will therefore not be vacated if the conversation concerned a merely peripheral matter.'[8]

A qualification of the Golden Rule is also reflected in Rule 3.820 (b) (1) of the 2013 California Rules of Court which provides:

> 'Rule 3.820. Communication with the arbitrator
>
> (b) Ex parte communication prohibited
>
> An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the arbitrator outside the presence of all of the parties concerning a pending arbitration, except as follows:
>
> (1) An arbitrator may communicate with a party in the absence of other parties about administrative matters, such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings, as long as the arbitrator reasonably believes that the communication will not result in a procedural or tactical advantage for any party. When such a discussion occurs, the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity to respond before making any final determination concerning the matter discussed.'[9]

8. *Spector v. Torenberg*, 825 F. Supp. 201, 209 et seq. (S.D.N.Y. 1994); see also *M&A Elec. Power Coop. v. Local Union No. 702, International Brotherhood of Electrical Workers, AFL-CIO*, 977 F.2d 1235, 1237-38 (8th Cir. 1992); *Metropolitan Property & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 893 (D.Conn. 1991); *Maaso v. Signer, 203 Cal. App.4th 362 (2012)*.

One may, of course, ask the question whether early knowledge of the time and place of a hearing provides, in and of itself, a tactical advantage for the party having the knowledge. In international arbitrations, such issues are therefore always discussed in the presence of all parties, typically during the case management meeting.

The last part of the California Rule points to the intra-tribunal aspect of this issue. What happens when an arbitrator engages in inappropriate contact with a party? It does happen. An experienced practitioner once told me the story about a party-appointed arbitrator who clearly misunderstood the role of an arbitrator. At the closing of the session, the Chairman had asked for further observations from counsel and received none. He was just about to declare the session closed, when the respondent-nominated arbitrator leaned forward and reminded counsel for the respondent that counsel was supposed to notify the tribunal and claimant of the respondent's desire to make a counter-claim! What can or should the arbitrators do to restore the integrity of the arbitral process in such a situation? Again, the 1987 IBA Rules of Ethics for International Arbitrators provide a best practice rule for such situations:

> '5.4 If an arbitrator becomes aware that a fellow arbitrator has been in improper communication with a party, he may inform the remaining arbitrators and they should together determine what action should be taken.
>
> Normally, the appropriate initial course of action is for the offending arbitrator to be requested to refrain from making any further improper communications with the party. Where the offending arbitrator fails or refuses to refrain from improper communications, the remaining arbitrators may inform the innocent party in order that he may consider what action he should take. An arbitrator may act unilaterally to inform a party of the conduct of another arbitrator in order to allow the said party to consider a challenge of the offending arbitrator only in extreme circumstances, and after communicating his intention to his fellow arbitrators in writing.'

The IBA Rules of Ethics make it clear that unilateral contacts with one party by any member of the arbitral tribunal is an issue that needs to be resolved first and foremost by the tribunal itself, without involving the innocent party. That

9. Text available at *www.courts.ca.gov/cms/rules/index.cfm?title=three&linkid=rule3_820 (accessed 1 Dec. 2013)*.

step, as well as unilateral contact with the innocent party by one member of the tribunal, must remain the *ultima ratio*, given that such a move may serve to eliminate the last bit of cooperative work atmosphere within the tribunal. Very often, a discussion within the arbitral tribunal will resolve the matter. In most cases, the offending arbitrators will realize that if he or she continues that conduct, he or she runs the risk that the other members of the tribunal – deliberately or not – could form an alliance against him or her.

§2.05 Conclusion

Michael Schneider has repeatedly criticized the avalanche of 'para-regulatory texts' in international arbitration. He regards them as an unwelcome and detrimental substitute for independent legal thinking by arbitrators and counsel. At the same time, he fears that these texts constitute an invitation for endless arguments and motions concerning the meaning and relevance of these texts.[10] While this may be true, some soft law instruments may serve as a written baseline for acceptable practices in international arbitrations and as such, may assist to resolve tricky situations like the one described above. In that case, reference to such a text might at least have helped the in-house counsel to better understand my reaction to his attempts to talk to me in the absence of the opposing party and the other members of the arbitral tribunal (if he was inexperienced in international arbitration) or to remind him of the best practice standard in this area (if he was experienced, but had 'forgotten' the intrinsic justification for the Golden Rule). Such texts may also assist inexperienced arbitrators in finding the right way to respond to attempts of counsel or other party representatives to communicate unilaterally with him or her. This reveals the dilemma of these soft law instruments: even though they are the result of the work of a private working group without law-making power, the 'para-regulatory' text looks like a binding law and may have a beneficial impact on the conduct of an arbitration for the very reason that it looks like a binding code.[11] However, for the very same reason, it can be just as detrimental to the process.

10. Michael E. Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other Methods intended to help International Arbitration Practitioners to avoid the need for Independent Thinking and to promote the Transformation of Errors into "Best Practices"*, in Laurent Lévy (ed.), *Liber Amicorum en l'honneur de Serge Lazareff*, pp. 563 et seq. (Pedone 2011); Michael E. Schneider, *President's Message: Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation*, 31 ASA Bulletin 497 et seq. (2013).

11. See for these effects, e.g., Nils *Jansen*, *The Making of Legal Authority*, pp. 43 et seq. (Oxford University Press 2010), concluding that 'non-legislative reference texts may gain similar or even greater authority than legislative codifications'; see also Stewart Macaulay, *Private Government*, in: Leon Lipson & Stanton Wheeler (eds.), *Law and the Social Sciences*, pp. 445 et seq. (Russell Sage Foundation 1986).

We will never know whether the *ex parte* communications or the hotel ambush affected the further course of proceedings in the ICC arbitration years ago. The dispute was ultimately settled at the end of that hearing. The in-house counsel played a very important and productive role in these negotiations. I am not sure whether the dispute would have been settled without his input and brilliant negotiation skills. He also added a human element to the very difficult business talks leading up to the conclusion of the settlement contract. When, late at night, he had the feeling that things could have gone a bit quicker, he said: 'May I ask you to hurry up please, I need to go home and take care of my dog!' It's just a pity that he was able to find a dog sitter that night he ambushed me at the hotel!

Before we start, it is important to clarify what is meant by "non-verbal communication". Of course, "non-verbal communication" includes things such as the direction in which a witness's eyes swivel when trying to remember a fact as opposed to making up a story (left or right?) or the velocity of lip-licking before speaking (an innocent sign of understandable nervousness or a harbinger of a shameless lie?). Although this alleged form of involuntary 'communication' has been the subject of many serious publications, recent studies have shown that the conclusions to be drawn from such observations are closer to haruspicy than to scientific observation.[2]

Wikipedia defines non-verbal communication in the following terms:

> Nonverbal communication is the process of communication through sending and receiving wordless (mostly visual) cues between people. It is sometimes mistakenly referred to as body language (kinesics), but nonverbal communication encompasses much more, such as use of voice (paralanguage), touch (haptics), distance (proxemics), and physical environments/appearance. Typically overlooked in nonverbal communication are proxemics, or the informal space around the body and chronemics: the use of time. Not only considered eye contact, oculesics comprises the actions of looking while talking and listening, frequency of glances, patterns of fixation, pupil dilation, and blink rate.
>
> Even speech contains nonverbal elements known as paralanguage, including voice quality, rate, pitch, volume, and speaking style, as well as prosodic features such as rhythm, intonation, and stress. ... However, much of the study of nonverbal communication has focused on interaction between individuals, where it can be classified into three principal areas: environmental conditions where communication takes place, physical characteristics of the communicators, and behaviors of communicators during interaction.

Other definitions can be found on the web, such as this one:[3]

> Non-verbal communications include facial expressions, the tone and pitch of the voice, gestures displayed through body language (kinesics) and the physical distance between the communicators (proxemics). These non-verbal signals can give clues and additional information and meaning over and above spoken (verbal) communication.

These definitions are very helpful because they show that non-verbal communication is not just body language or eye contact. The tone of voice and the factors that relate to speech are just as important: therefore *how* something is said can be just as important as *what* is said. Similarly, the use of time (whether voluntary or not) can be very telling – a long pause can speak volumes, as we will see. The physical appearance of a person also matters. Finally, and although the definitions quoted above do not cite this factor, this contribution will include under the term 'non-verbal communication' messages that flow from what someone does *not* say.

§7.02 It's Not What You Say, It's *How* You Say It: Overall Demeanor

Many years ago, I was chairman of an arbitral tribunal that had to deal with the failure of a cooperation agreement in the services sector.[4] One of the features of the case was that all three members of the arbitral tribunal were puzzled by the fact that the dispute had arisen in the first place (the contract was on its face a typical win-win affair) and had become highly acrimonious instead of settling. Thus, all three of us were looking forward to the evidentiary hearing for enlightenment. On the last afternoon of the hearing, we got more than we had bargained for.

That last afternoon was devoted entirely to the examination of the former CEO of one of the parties, who had retired after the dispute had arisen but who was in charge at the time of the relevant facts. He was a very senior person in an industry where seniority matters.[5] He was extremely formal and very reserved.[6] Most of all, he was the type of person who had long since lost the habit of being contradicted – and who very visibly had no appetite for contradiction, or for that matter any sign of anything other than complete submission, from anyone dealing with him.

2. The rate of success that this type of observation achieves in sorting *bona fide* recollections from outright fabrications is about 50%. See for example Köhnken, G., Kraus, U. & Schemm, K., *Fünfzig Jahre und kein bisschen Weise? Gibt es wirklich «Lügensignale» im nonverbalen Verhalten?* in: C. Lorei (Ed.), Kongressband der Tagung Polizei & Psychologie am 3. und 4. April 2006 in Frankfurt am Main. Frankfurt: Verlag für Polizeiwissenschaft, 2007; Volbert, R. & Steller, M. (Ed.), *Handbuch der Rechtspsychologie* (Reihe: Handbuch der Psychologie), Göttingen: Hogrefe. 2008.
3. Taken from http://www.skillsyouneed.com/ips/nonverbal-communication.html.
4. I shall not cite the industry concerned, since otherwise the parties (and the witness whose testimony is described here) might recognize the case.
5. The arbitral tribunal surmised that the witness had probably been a high-ranking officer in the Swiss army. This question being of no relevance to the merits of the case, it was not elucidated.
6. Not that this is a character flaw (on the contrary).

This resulted in unmistakable non-verbal communication in the course of his examination. Whenever anyone, be it counsel or a member of the arbitral tribunal, suggested even obliquely that certain portions of his testimony were difficult to reconcile with contemporaneous documentary evidence, his response was invariably one of icy irritation: his head would tilt back, he would glare long and hard *under* his spectacles; a sigh of weariness in the face of such unfathomable ignorance and/or impudence would issue and, this ritual completed, the witness would launch into a condescending lecture. Whenever he had anything to say on the other party's performance, he would liken it to the actions of malevolent cretins, frequently closing his eyes and shaking his head as head spoke (softly, ever so softly). Whenever asked to comment on his own actions at the time of the fact, he would again subject the interrogator to the under-the-eyeglasses glare before answering the question using the tone of voice one would normally reserve for addressing a mildly idiotic four-year-old. This lasted for about three and a half hours, after which the witness's examination was finished and the tribunal was given a frigid farewell.

Remarkably, the actual content of nearly all of this witness's answers (except when assessing the competence of the other side) was rather balanced and plausible. However, what all three arbitrators "took away" from this examination was the witness's overall demeanor. And we all felt that we knew why the cooperation between the parties foundered, why the dispute had arisen and why all attempts to settle failed.

§7.03 It's Not *What* You Say, It's *How* You Say It: An Explosion of Truth

In another matter, our firm was representing an HVAC subcontractor whose subcontract had been terminated by the main contractor on a number of grounds, including alleged delays. At the hearing, one of the representatives of the main contractor was heaping abuse on our client, complaining that this subcontractor was never able to meet a single intermediate milestone and wondering how our clients could possibly make so many promises and then not keep them. At this point, one of the main representatives of our client – the witnesses were being "conferenced" by a seasoned chairman who is also a well-known advocate of this method – completely "blew his stack" (to use an American colloquialism). He leapt from his chair and, standing with his arm extended and his index finger pointing towards the other side of the table, started to shout: "Why did we accept all these intermediate milestones? Because *you* told us that the civil works would be completed on time, and they weren't! Because *you* told us that the glass façades would be installed in time, and they weren't! Because *you* told us that the building would be ready for the air handling units, and it wasn't!" This outburst continued for quite a while,

on the same overall theme. I recall the startled (and mildly worried) look on the face of one of the arbitrators, but more than anything the intense look of the chairman who, asked by the startled arbitrator to calm the witness down, replied "No, I want to hear this".[7] And I recall feeling that, at last, someone was speaking *avec les tripes*.

Did this convince the arbitral tribunal? Only the three arbitrators (one of whom was Michael Schneider) can know. The fact remains that the tribunal found in our client's favor.

§7.04 The Pregnant Pause

In one of my earlier cases as counsel, I had the unfortunate experience of having one my "my" witnesses seriously damage my client's case in a few seconds. This normally happens when a witness blurts something out or more simply just talks too much. In this particular case, it was a pause of a few seconds that did the harm – just as surely.

The case related to a services agreement in the hotel industry. My client was providing the off-site management services, and an employee of my client was the on-site manager. The opposite party had terminated the off-site management agreement on the ground, *inter alia*, that my client was not providing any added value and that the on-site management employed by my client was doing all of the real work. Obviously, my client disagreed and arranged for me to interview the on-site manager, who confirmed that he was receiving valuable and irreplaceable services from the off-site company. One might add that the on-site manager was a seasoned professional who had an impressive resume in the industry and that in addition to being a hard-working, highly intelligent and articulate person he possessed considerable charisma and charm. He was therefore an obvious candidate for the position of "star witness".

The preparation of the witness statement was simple. The on-site manager was able to recite from the top of his head many examples of concrete and valuable assistance that he was receiving from my client, with many details that could simply not have been made up. In the hearing preparation, all went well, and he had in the meantime even recalled further evidence supporting my client's case. On the stand, the on-site manager was testifying very effectively on a variety of other issues. But then, when the topic of the added value from the off-site company came up, something went terribly wrong.

7. Given the overall noise volume prevailing in the hearing at that point, anyone sitting within three meters of the arbitrators (which was the case for me) could easily hear anything exchanged between them.

The question, from the sole arbitrator, was simple enough: "Mr X, in sections 5 to 15 of your witness statement, you cite a number of things that you consider to constitute concrete assistance from [my client]. Could you elaborate?" The response was… a pause (the witness's mouth slightly open) of at least five seconds.

Five seconds may not sound like much, but these five seconds were devastating, and the effect was compounded by the rather longish "umhh" and the "well …" that followed (before the witness recovered his composure). Needless to say, in closing oral argument my opponents pounced on that pause, which also found its way into the final award.

We did not win the case. There were many reasons for this and it would be grossly unfair to blame the witness for the outcome. To this day, I still sincerely believe that the witness had been entirely truthful in his interview with me, his witness statement and in the lead-up to the hearing. But none of that matters: what *does* matter is the damage that a pause of five-seconds can do.

§7.05 Damning Silence

If a long pause can be devastating, complete silence can be lethal. This is something that I experienced (happily, to my client's benefit) in a recent hearing in which I was counsel.

Again, it is not possible to disclose much detail. Suffice it to state that, in this matter, my client's opponent had purported to rely on a contract clause to terminate the agreement. This clause provided for a remedy that was subject to prior notice under that very same clause. If the opposite party had openly relied on this clause at a given point in time, this would have limited its options; in particular it would have triggered a compulsory 30-day contract renegotiation period at the end of which either party could terminate. Apparently in order to keep its options open, what the opposite party did was to lift parts of the clause and copy them into correspondence, without referring to the contract clause in question and, above all, without referring to the type of remedy for which this clause provided. The opposite party thereby avoided triggering the compulsory (and short) re-negotiation period while leaving the door open to a later argument that notice had been given under the contract and that such notice entitled the opposite party to terminate. This is precisely what happened: when purporting to terminate the contract after many months of desultory business negotiations, the opposite party argued that it had been relying on the contract clause in question from the outset. This was far from indifferent: depending on whether the arbitral tribunal found that the opposite party's initial letters constituted a notice under the clause, this could potentially have reduced our client's claim by an eight-digit figure in Euros.

At the hearing, I was cross-examining the author of one the letters in which one found bits and pieces of the contract clause but no open reference to the clause or to the remedy to which that clause pertained. I took him through his letters, and asked whether he was writing these letters with the contract in front of him (the answer was yes) and whether his letters were intended to serve as a notice under the clause in question (again the answer was yes). I then took him through the letters once more and asked whether he could point the arbitral tribunal to what, in his view, was a reference to the clause or the remedy; he was unable to point to anything explicit and merely said that, because of the language partially lifted from the clause, he thought that the reference was clear enough.

Lawyers are usually taught to avoid putting open questions in cross-examination, and in particular never to ask "why?" However, at this point, there was the elephant in the room, namely the question: "Why did you not simply make an explicit reference to clause or to the remedy you were availing yourself of instead of lifting portions of the contract language and copying it into your letters?" I put that question a bit differently and still was unable to get a clear explanation. A that juncture, the chairman of the tribunal stepped in and put the question more bluntly:

Can you explain why you did not mention [the remedy in question] or not make your reference to the [remedy] clause in the contract?

The witness's response was to turn his palms heavenwards, shaking his head and smiling somewhat helplessly at the chairman. After what seemed like an eternity, he said, in an apologetic tone, that he was simply unable to explain. This triggered a few moments of evidently perplexed silence from the arbitrators, accompanied by uncomfortable shuffling, throat-clearing and shoe-staring on the part of the representatives of the opposite party (also a perfect example of non-verbal communication).

We won that case. There were several reasons for this, and it would be a gross oversimplification to portray that this moment decided the matter. However, our whole team walked out of that day of hearings feeling very confident that what this witness did *not* say would necessarily weigh heavily in the minds of the arbitrators.

§7.06 The Complete Cocktail

In my very first case as arbitrator – I was appointed sole arbitrator in an ICC case having a five-digit amount in dispute – I was fortunate enough to be treated to a full display of practically all of the ingredients of non-verbal communication cited in the definitions above.

The matter related to the payment of groundwater exploration services in a developing country. One of the issues under dispute was an increase in hourly rates that were said to have been granted to the claimant by way of a several letters signed by the managing director of the respondent. The respondent disputed the increase in rates, arguing *inter alia* that they had been inserted into the letters unbeknownst to its managing director by one of the respondent's employees (of which it was implied that he was in cahoots with the claimant), and that the respondent's managing director had signed the letters without reading them. The argument was of dubious legal relevance. From a factual point of view, it was rather weak on the face of the written record. Nevertheless, it was an obvious issue for the hearing, during which the behavior of the respondent's managing director (to whom I shall refer as "Mr X") dispelled any possible doubts.

First of all, Mr X was clearly someone who ran a tight ship and who liked to be in charge. This was manifested quite remarkably at the very first coffee break, during which Mr X approached me for small talk. The term "approached me" is something of an understatement, since Mr X positioned himself approximately fifteen centimeters away from me, full frontal. Given that Mr X is about four or five centimeters taller than I am, this particular form of body language ("proxemics" to be precise) was impossible to misunderstand. The term "small talk" is also a misnomer, since our chat was devoted to his asking me my age and then proceeding to tell me about his own children, of which I was duly informed that they were all older than me.

I took no umbrage at this behavior. However, I do recall returning to the hearing room mildly perplexed: how could such a commanding personality be tricked into signing several letters (one of which was five pages long) granting non-negligible increases in compensation? My perplexity was rapidly dispelled in the further course of the hearing. The following excerpt of the final award neatly summarizes Mr X's involuntary non-verbal communication:

> During the hearing … Mr X showed a very clear and comprehensive grasp of the record and was at all times in full control of his team. Mr X made part of the opening statement for [his company], participated in the examination and cross-examination of witnesses and also made a significant contribution to [his company's] closing argument. His sense of control and attention to detail was illustrated, *inter alia*, by the fact that he intervened to make corrections during [his] counsel's closing oral argument.

The reader will not be surprised to learn that, two paragraphs further, the final award the following:

> These circumstances are difficult to reconcile with the statement that [respondent's employee] allegedly hoodwinked Mr X on three separate occasions, each relating to potentially sensitive matters.

§7.07 Closing Remarks

Lawyers are notorious "control freaks". We are trained to identify risk and to do all we can to eliminate, or at least minimize it; and putting a witness on the witness stand is one of the biggest risks a lawyer can take. It is precisely for this reason that, before we enter into the hearing room, we engage in the painstaking preparation described in the introduction to this article: we want control.

However, things are not that simple. We can sift through the evidence till the end of time in order to fine-tune our questions; we can make sure that our witnesses go through the materials until they achieve Thirty-Nine-Steps-like levels of memory; we can explain the process to a witness until we (or the witness) turn blue in the face: But we will never, ever be able to escape the fact that witnesses are human beings and, as such, are not controllable. This is what makes a lawyer's job so stressful. However, I do not view this as a cause for regret; on the contrary, this is one of the many things that make our job such fun. And I doubt very much that Michael Schneider, whose talents for non-verbal communication are unrivalled,[8] would disagree.

8. Witness his magical use of pause, pace and rhythm when fingering his prayer beads.

hearings on procedural issues or issues regarding strategy. However, I would not be involved in either the clarification of the facts, or in the preparation of the witness statements. A younger partner of our law firm focusing on dispute resolution took over all these responsibilities as my co-counsel.

Independently from me, my younger partner investigated the facts of the case and prepared detailed written witness statements. Unfortunately, at a certain point he had to involve me as a witness, because a relevant contract interpretation of the matter could not be established without recourse to witness testimony. An interesting aspect of this (war-)story was that Michael E. Schneider's Turkish co-counsel on the opposite side had also acted as legal representative for the Turkish side during the joint venture negotiations and he was placed in the same position as I, serving as co-counsel and being called as a witness.

§26.02 The Actual Matter

As legal counsel to the German group, I had negotiated a two-level joint venture with the Turkish group. On the first level, the joint venture covered the participation of this German group in a Turkish joint stock company which was quoted on the Istanbul Stock Exchange. On a second level, it covered the preparation of a joint venture between the two parties in form of a Turkish private limited company. The relationship between the parties became litigious as a consequence of an unjustified use of a financial guarantee, including also interim measures before the courts in Turkey and a breach of the joint venture agreements. The joint venture agreements were subject to Swiss law and contained an arbitration clause. According to this clause, issues were to be settled before an ICC arbitration panel with its seat in Zurich.

§26.03 Legal Counsel as Legal Representatives

In international arbitration the parties have the fundamental right "to select counsel of their own choice irrespective of where the dispute is heard".[2]

The arbitration agreement usually contains a provision regarding the seat of arbitration. This has far reaching consequences, including, e.g. determining the applicable procedural law. In this matter, the arbitral tribunal's seat was Zurich. First, this means that the award will be Swiss and it can only be set aside in Switzerland. Second, the Swiss procedural rules (*lex arbitri*) are

2. For this statement *see* W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (3d.ed., Oceania Publications 2000), p. 303; in this sense *see* also Gary B. Born, *International Commercial Arbitration* vol. II, 2290 (Kluwer Law International 2009).

applicable to the arbitration. Last but not least, it also means that the Swiss mandatory rules are applicable.[3] Also, the applicable procedural law may govern legal representation and witness evidence.

In order to understand these issues, it is necessary to analyze it from the point of view of the applicable national rules (such as Swiss Law) but also from the point of view of the most relevant rules of arbitration (ICC, DIS, LCIA, Swiss Rules, UNCITRAL Rules, etc.) as well as other relevant rules of "soft law".

1. Right to be Represented by a Legal Counsel under German Law

German arbitration law (the 10th book of the Code of Civil Procedure (ZPO))[4] applies to all arbitration proceedings with the seat of arbitration in Germany. In German law there is no distinction between domestic and international arbitration as in Swiss law.

There is also no express reference to the freedom of the parties to choose their authorized representatives and the representation of parties by legal counsel is not obligatory.[5] However, the parties may agree that they must be represented by a legal counsel. But according to the mandatory provision of Section 1042(2) ZPO, the parties may not agree that counsel will be excluded from acting as authorized representatives.

Section 79(2), first sentence, ZPO clearly provides for the fundamental right of a party to be legally represented by a legal counsel in German litigation. This right is also found in Section 3(3) of German Federal Lawyer's Act[6] which states that: 'Within the framework of the law everyone has the right to be given legal advice and to be represented by a legal counsel of his or her choice in the courts, before arbitral tribunals or before the authorities'. The arbitral tribunal can seek guidance from these provisions in particular cases.[7]

3. For this kind of conclusion, *see* Patricia Nacimiento, *Konfliktlösung nach allgemeinen Schiedsordnungen, insbesondere ICC (International Chamber of Commerce), AAA (American Arbitration Association) und DIS (Deutsche Institution für Schiedsgerichtsbarkeit)*, Zeitschrift für Urheber- und Medienrecht (ZUM), 788 (2004).
4. *See* Stephan Wilske & Claudia Krapfl, *Germany*, in Gerhard Wegen and Stephan Wilske (eds.), Arbitration in 49 Jurisdictions worldwide, 189 (Law Business Research 2014).
5. In this sense, *see* Klaus Sachs and Torsten Lörcher, in Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento (eds.), Arbitration in Germany – The Model Law in Practice, *section 1042 ZPO, para. 21* (Kluwer Law International 2007).
6. *See* the German Federal Lawyer's Act (Bundesrechtsanwaltsordnung – BRAO) of 1st August 1959 (BGBl. I 565).
7. On this statement, *see* Ulrich Theune, in Rolf A. Schütze (ed.), *Institutionelle Schiedsgerichtsbarkeit*, § 26 DIS-Schiedsgerichtsordnung, Footnote 293 (2nd edition, Carl Heymanns Verlag 2011).

2. *Right to be Represented by a Legal Counsel under Swiss Law*

In Switzerland, international arbitration is governed by Chapter 12 of the Swiss Private International Law Act (SPILA), which according to Article 176 applies "to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland". Pursuant to Article 172(2) SPILA, the Parties also have the possibility to exclude the application of the provisions of the SPILA by a written declaration in the arbitration agreement or by an agreement at a later date and agree on the application of the third part of the Swiss Federal Code of Civil Procedure (CCP)[8] – Article 353-399 CCP – which governs domestic arbitration in Switzerland.[9]

Unlike SPILA, which contains no express reference to the representation of parties by a legal counsel, Article 373(5) of CCP provides under General Rules of Procedure in domestic arbitration that: "Each Party may act through a representative".

Furthermore, Article 68(1) of CCP states also that "[a]ny person who has capacity to take legal action may choose to be represented in proceedings". As in German law, an analogous application of the general provisions of CCP on the taking of evidence in arbitration proceedings would be arbitrary. In particular cases the arbitral tribunal can seek guidance from these general provisions.

3. *Right to be Represented by Legal Counsel under Important Institutional Rules of Arbitration*

In all major institutional rules of international arbitration the parties to the arbitration agreement have the right to be legally represented.[10]

Thus, Article 26(4) ICC Rules[11] stipulates that: "The Parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers".[12]

8. *See* the unified Swiss Federal Code on Civil Procedure (CCP), which came into force on the 1st January 2011.
9. For the distinction between international and domestic arbitration in Switzerland, *see* Bernhard Berger, *The Swiss domestic Arbitration Law: potential Effects on International Arbitration in Switzerland*, Zeitschrift für Schiedsverfahren (SchiedsVZ), 303 (2011).
10. For this statement, see Born *supra* n. 1, at 2293 ('These rules reflect the overwhelming practice in international arbitration, which is to leave the parties almost entirely free – for better and worse – to select their own representatives and advisers').
11. *See* the revised ICC Rules, which entered into force on 1st January 2012.
12. On this issue, *see* Lena Rudkowski, *Einführung in das Schiedsverfahrensrecht*, Juristische Schulung (JuS), 398, 402 (2013).

As in the present case, the parties of an ICC arbitration proceeding, more often than not, have co-counsel for the following reason: "One law firm represents the party on a regular basis and is familiar with its activities and personnel and may be located in the same country as the party. The other law firm may be more familiar with the rules of law governing the arbitration of ICC arbitration in general".[13] Another aspect may be the familiarity with the substantive law applicable to the matter at hand.

In this regard, section 26(1), fourth sentence, of the Arbitration Rules of the German Arbitration Institution (DIS)[14] stipulates that the parties are entitled in arbitration proceedings to be legally represented.

The parties to the arbitration agreement may also agree on the application of the 2012 Swiss Rules of International Arbitration[15] which state in Article 15(6) that: "The parties may be represented or assisted by persons of their choice".

The LCIA Rules[16] provide in Article 18(1) that: "Any party may be represented by legal practitioners or any other representatives". In other words, in arbitral proceedings, parties may be represented by a legal counsel or even by an in-house counsel.

Article 5 of the UNCITRAL Rules[17] states that: "each party may be represented or assisted by persons chosen by it. (...) Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine."

13. *See* Michael W. Bühler & Thomas H. Webster, *Handbook of ICC Arbitration – Commentary, Precedents, Materials*, 280 (1st edition, Sweet & Maxwell 2005).
14. *See* the Arbitration Rules of the German Arbitration Institution (DIS), which came into force on 1st July 1998.
15. *See* the revised Swiss Rules of International Arbitration, which were drafted by the Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich and entered into force on 1st June 2012; on this issue *see* Philipp Habegger, *The Revised Rules of International Arbitration – An Overview of the Major Changes*, 2 ASA Bulletin 269-311(2012); Thomas Rohner & Nadja Kubat Erk, *Switzerland*, in Gerhard Wegen & Stephan Wilske (eds.), Arbitration in 49 Jurisdictions worldwide, 398 (Law Business Research 2014); Bernd Ehle & Werner Jahnel, *Revision der Swiss Rules – erhöhte Effizienz und Flexibilität*, SchiedsVZ, 169-177 (2012); Karl Pörnbacher & Philipp Duncker, *Streitbeilegung nach Schweitzer Art: Reform der 'Swiss Rules'*, Betriebs-Berater (BB), 2453-2455 (2012).
16. *See* the London Court of International Arbitration (LCIA) Rules, which entered into force on 1st January 1998; *See* also the Revised Draft of the LCIA Rules, dated 18 February 2014; Marc Blessing, *Die LCIA Rules – aus der Sicht des Praktikers*, Zeitschrift für Schiedsverfahren (SchiedsVZ), 198, 202 et seq. (2003).
17. *See* the UNCITRAL Rules (as revised in 2010).

A similar provision in Rule 18 of the ICSID Arbitration Rules[18] provides that: '(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party (…) (2) For the purposes of these rules, the expression "party' includes, where the context so admits, an agent, counsel or advocate authorized to represent that party".

4. *Right to be Represented by a Legal Counsel under "Soft Law"*

According to the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration,[19] the "party representative" or the "representative" is defined as "any person, including a party's employee, who appears in an arbitration on behalf of a party and makes submissions, arguments or representations to the arbitral tribunal on behalf of such party, other than in the capacity as a witness or expert, and whether or not legally qualified or admitted to a Domestic Bar".

These guidelines are not mandatory rules and only become legally binding when the parties to the arbitration adopt them fully or partially in an arbitration agreement.

5. *May the Counsel who Conducted the Negotiations also be the Legal Representative in International Arbitration Proceedings Relating Thereto?*

The question we have to ask ourselves is whether there is a potential conflict of interest for the legal counsel at the expense of his client within the meaning of Section 43a(4) German Federal Lawyer's Act (under German law) or Article 398(2) CO[20] (under Swiss law). We are talking about a conflict of interest because of legal counsel's personal responsibilities.

On the one hand, a counsel who negotiated one or more agreements for his client, knows all the details of the negotiations and the corporate structure, and does not need much time for the preparation of an arbitration proceeding in comparison to a lawyer who takes over this mandate for the first time.

On the other hand, it is possible that the counsel made some errors, misjudgments or even professional mistakes during the negotiations. Particularly in these situations, the legal counsel as legal representative of the party in the arbitration proceedings may not have an objective opinion. The credibility

18. *See* the International Centre for Settlement of Investment Disputes (ICSID) – Arbitration Rules (as revised on 10 April 2006).
19. *See* the IBA Guidelines on Party Representation in International Arbitration, which were adopted by a resolution of the International Bar Association Council on 25 May 2013.
20. *See* the Swiss Code of Obligations (CO) of 30 March 1911.

of the legal counsel might be reduced or even destroyed when these circumstances become known. We refer here to the counsel's credibility in the eyes of the arbitrators as well as his client. Therefore, a potential conflict of interest arises between the client's interests and the legal counsel's personal interests.

The next question is which national ethical rules are applicable to such a conflict of interest in an international arbitration which "dwells in an ethical no-man's land".[21] Is it German law (German lawyer) or Swiss law (Swiss procedural rules as *lex arbitri*) that governs the lawyer's professional conduct? Or are the rules established by the respective arbitral tribunal applicable? In principle it must be assumed that the German professional rules (The Federal's Lawyer's Act, Rules of Professional Practice) apply to German lawyers because "traditionally, attorneys are subject to ethical rules that are created and enforced by national and sub-national regulatory authorities".[22] The disadvantage of this approach is that different national rules apply to different lawyers acting as legal counsel in the same international arbitration proceeding. In this case, the Swiss Rules of Lawyer's Professional Conduct[23] are not a better solution because they "are intended to deal with local lawyers practicing domestically and may not be particularly appropriate for international dispute resolution".[24] German and Swiss rules are silent on the issue of whether a legal counsel who has conducted the contract negotiations may represent his client in the arbitration proceedings. A possible solution is also that "the dispute should be left to the arbitration panel's discretion, based on internationally accepted principles".[25] The "supra-national"[26] Code of Conduct for European Lawyers[27] adopted by the Council of Bars and Law Societies of Europe (CCBE), also offers no answer to our issue and "deals with arbitral proceedings in a fairly limited fashion".[28] Pursuant to Article 4.1 CCBE, "a lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal". But

21. For this remark *see* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341, 342 (2002).
22. *See* Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Legal Studies Research Paper no. 18-2010, 1.
23. *See* the Swiss Rules of Lawyer's Professional Conduct (Schweizerische Standesregeln) of 10 June 2005 (last amendment on 22 June 2012).
24. On this conclusion *see* Margaret L. Moses, *Ethics in International Arbitration: Traps for the Unwary*, 10 Loy. U. Chi. Int'L. Rev. 73 (2012).
25. See John L. Jacobus, Thomas Rohner & Andrew J. Hefty, *Conflicts of Interest Affecting Counsel in International Arbitrations*, MEALEY'S International Arbitration Report, vol. 20, 7 (2005).
26. *See* Silvano Domenico Orsi, *Ethics in International Arbitration: New Considerations for Arbitrator and Counsel*, The Arbitration Brief, no. 1, 92, 108 (2013).
27. *See* the Code of Conduct for European Lawyers, dated on 28 October 1988 (last amendment on 19 May 2006).
28. *See supra* n. 21, at 79.

"this rule is largely meaningless in the field of international arbitration because there are no "rules of conduct" applied generally to lawyers before an international arbitration tribunal".[29]

In the absence of a 'supranational bar association',[30] it was proposed that 'a lawyer should follow the rules of both his home jurisdiction and that of the foreign one; if they conflict, the arbitrator should remove himself or make an effort to inform the tribunal that a conflict exists without trying to sacrifice either set of rules'.[31]

Another proposal refers to the developing of an international uniform code of conduct for the legal counsel[32] because "the legal representatives of parties do not usually share the same national legal culture or practice subject to the rules of the same professional body. (...) This does not mean that international practitioners are pirates sailing under no national flag; it means only that on the high seas, navigators need more than a coastal chart".[33]

However, the legal counsel is "an independent adviser and representative in all legal matters"[34] who must avoid any conflict of interest[35] in order to protect the free exercise and the integrity of the profession[36] and the fairness of arbitral proceedings. As seen above, there are no rules (national or international) which expressly prohibit legal representation in the arbitration proceedings by the same counsel who had conducted the negotiations.

In my opinion, this conflicting situation may not be prevented but at least alleviated in a larger law firm by having a team of the Mergers & Acquisitions Department conducting the contract negotiations and a team of

29. *See* V.V. Veeder, *The 2001 Goff Lecture – The Lawyer's Duty to Arbitrate in Good faith*, 18 Arbitration International, no. 4, 431, 433 (2002).
30. See Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 Stan. J. Int'l L. 1.
31. *See supra* n. 26, at 107.
32. As Margaret L. Moses stated: "An international code would help provide transparency and certainty for proper attorney conduct, help level the playing field, contribute to the fairness of the procedure, and improve the confidence of the participants and the public in the arbitration process" (*see supra* n. 22, at 80).
33. *See supra* n. 29, at 438.
34. *See* Section 1(3), first sentence, of the German Rules of Professional Practice (Berufsordnung für Rechtsanwälte-BORA), dated on 22 March 1999 (last amendment on 15 April 2013) and Section 3(1) in conjunction with Section 43a (1) of German Federal's Lawyer's Act. For a similar view *see* Section 2, first sentence, and Section 10 of the Swiss Rules of Lawyer's Professional Conduct.
35. *See* Section 43a(4) of German Federal's Lawyer's Act, Section 11 of the Swiss Rules of Lawyer's Professional Conduct.
36. *See* also the IBA International Principles on Conduct for the Legal Profession, which were adopted on 28 May 2011. It states that: 'A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact'.

the Litigation Department representing the client in the arbitration proceedings, as it occurred in our case. However, it still is preferable to have a third law firm actually run the arbitration proceedings.

§26.04 Legal Counsel as Witness in International Arbitration

> "Lawyers may know facts because they have been involved in the planning of a deal or arrangement or the negotiation of a contract".[37]

As a general rule, the arbitral tribunal can hear any person who has something relevant to say in a dispute including legal counsel linked to the case.

In arbitration proceedings any person can testify[38] 'without the arbitrators making any differentiation among the various qualities or capacities in which a person may appear: representative of a party, employee or former employee of a party, consultant or expert remunerated by a party or appointed by the Tribunal, spouses and other related persons'.[39]

Most national rules are silent with respect to this issue.

1. *Under German Law*

Under German arbitration law, witness testimony is admitted as evidence. As a general principle, there is no restriction of the above mentioned persons, or in other words, no exclusion of the representatives of a party. In German litigation a legal representative may act as a witness.[40] The arbitral tribunal can be guided by this general provision and accept the testimony of a legal representative.

2. *Under Swiss Law*

There is no express provision in the Swiss Private International Law Act which states that legal representative may act as witness. In contrast to SPILA, Article 169 CCP clearly provides that: "any person who is not a party may testify on matters that he or she had directly witnessed". This leads us to the

37. For this statement *see* Judith A. McMorrow, *The Advocate as Witness: Undertaking Context, Culture and Client*", 70 Fordham Law Review 945, 946 (2001).
38. See Mian Sami ud-Din, *International Commercial Arbitration: Developments in the Practice of Taking Evidence*, 79 International Arbitration 1, 23 (2013); *see also* Pierre Bienvenu & Martin J. Walasek, *Witness Statements and Expert Reports*, in Doak Bishop and Edward G. Kehoe (eds.), The Art of Advocacy in International Arbitration, 248 (2nd edition, 2010).
39. On the concept of witness *see* Paul-A. Gélinas, *Evidence through Witnesses* in Laurent Lévy and V.V. Veeder (eds.), Arbitration and Oral Evidence – Dossiers ICC Institute of World Business Law, 31 et seq. (ICC 2004).
40. *See* Baumbach/Lauterbach/Albers/Hartmann, Zivilprozessordnung, *Übersicht § 373 ZPO*, para. 4 (71th edition, C.H. Beck 2013).

conclusion that under Swiss law – as under German law – a legal representative may testify in arbitral proceedings.

3. *Important Rules of Arbitration*

Generally speaking, most relevant rules of arbitration contain similar provisions on the issue of whether a legal representative may act as a witness.

For example, Article 25(3) of the ICC Rules of Arbitration states that: "The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned".

Furthermore, according to Article 20(7) of the LCIA Rules "any individual intending to testify to the Arbitral Tribunal on any issue of fact or expertise shall be treated as a witness under these Rules notwithstanding that the individual is a party to the arbitration or was or is an officer, employee or shareholder of any party".

Article 25(2), first sentence, of the Swiss Rules of International Arbitration merely provides that: "Any person may be a witness or an expert witness in the arbitration".

Last but not least, Article 27(2) of the UNCITRAL Rules[41] stipulates that: "Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party".

In contrast to the above presented arbitration rules, the DIS Rules and the ICSID Arbitration Rules are silent in respect of this issue and leave the question of whether a legal representative may act as witness unanswered.

4. *Other Sources of Soft Law*

The Charter of Core Principles of the European Legal Profession,[42] the Code of Conduct for European Lawyers as well as the IBA International Principles on Conduct for the Legal Profession contain no provision on whether a legal representative may testify or not as a witness.

41. *See* the UNCITRAL Rules (as revised in 2010).
42. *See* the Charter of Core Principles of the European Legal Profession, which was adopted on 24 November 2006.

5. *Preliminary Conclusion*

The controversial issue of this article is whether the transaction counsel may play a dual role by testifying as a witness and by representing his client before an arbitral tribunal.

Unfortunately, in all of the jurisdictions and rules of procedure we found no real answer to the question on whether a legal representative may act as witness.

A positive answer can be found in an arbitration before the International Centre for Settlement of Investment Disputes (ICSID) PAC RIM CAYMAN LLC v. the Republic of El Salvador,[43] where the legal counsel representing the respondent was accepted as fact witness and ordered to submit a sworn statement. The Tribunal "required him to be available for cross-examination at the Hearing".

In contrast to the relevant arbitration rules, the American Model Code of Professional Responsibility states in EC 5-9 the advocate-witness rule, as follows:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

There are three exceptions to the above mentioned rule, namely:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would cause substantial hardship on the client.

Nevertheless as discussed before, a legal representative should carefully consider several aspects in such a situation.

In the light of the above mentioned provisions the following conclusion can be drawn: a legal representative can be called to testify as a witness in order to fill evidentiary gaps or to explain factual key issues, but it is advisable

43. *See* ICSID Case No.ARB/09/12, decision on the respondent's jurisdictional objections dated 1 June 2012, part 6, p. 21.

that he does not take on at the same time the dual role of legal representative and witness.

Legal counsel should avoid this dual role because a conflict of interest could arise between his duties as legal counsel and his statement as a witness and there is also a considerable risk that "clients might become angry because the lawyer was not a stronger or clearer witness".[44] On one hand, the legal counsel should execute his duties independently. On the other hand, he is in an awkward situation when acting as a witness before the arbitration tribunal, in light of both his commitments to his client and his previous performance as legal counsel pertaining to the litigious case.

In general, the testimony by the legal representative would be admissible, but its relevance would be lower than in case of fact witnesses who have no interest in the outcome of the dispute.

§26.05 Legal Privilege/Confidentiality

Under German law, a legal counsel has the duty "(…) to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt in professional practice".[45] The client may waive the legal counsel's duty to maintain confidentiality. In German litigation, the legal counsel has the right to refuse to testify.[46]

Pursuant Article 398 of the Swiss CO, legal counsel is liable to his client "for the diligent and faithful performance of the business entrusted to him". The client may waive – as under German law – the duty of counsel to maintain confidentiality. This does not mean that legal counsel is obliged to give evidence.[47]

According to the IBA International Principles on Conduct for the Legal Profession, legal counsel has the fundamental duty "to maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rule of professional conduct".

This principle is also stated in the Code of Conduct of European Union Lawyers in International Arbitration.[48]

44. *See supra* n. 12, at 962.
45. *See* Section 43a(2) of the German Federal Lawyer's Act.
46. *See* Section 383(1) Nr. 6 ZPO.
47. On this issue, *see* Article 13(1), second sentence, of the Swiss Federal Act on the Freedom of Movement for Lawyers (Lawyer's Act) of 23 June 2000 which provides that: 'Release from professional secrecy does not obligate the lawyer to divulge confidential information'.
48. *See* Article 2.3 of the Code of Conduct of European Union Lawyers in International Arbitration; on this issue see also Ramón Mullerat, *The Code of Conduct of European Union Lawyers in International Arbitration*, The ICC International Court of Arbitration Bulletin Vol. 8/No. 1, 43 et seq. (1997).

This problem can especially occur when legal counsel acts as witness in front of the arbitral tribunal who uses "privilege as a sword, as well as a shield, insofar as a witness reveals partially the facts of a situation to support one party's case, but refuses to answer questions which would probe the veracity of that recollection".[49] In such a case, the arbitral tribunal may order that the witness "fully cooperates" if there is no fundamental duty to maintain confidentiality.

Article 9(2)(b) of IBA Rules on the Taking of Evidence in International Arbitration[50] provides that:

> "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (…) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."

§26.06 Concluding Remarks

As seen above, the issues analyzed in this article have received hardly any attention in international arbitral jurisprudence so far and in European literature and are not dealt with in the most relevant arbitration rules. Several aspects need to be carefully weighed when legal counsel is confronted with such situations, but for the moment I believe it is safe to say that there are many questions and only few answers.

The practitioners "are placed in unnecessarily difficult positions, by the lack of clear professional standards to guide their conduct".[51]

Being questioned by Michael E. Schneider in the abovementioned case was, for the reasons developed above, a rather awkward and embarrassing situation I would have rather not been in. The situation outlined also found my esteemed opposing co-counsel from Turkey just as embarrassed as myself. The questioning on our side was actually done by my younger partner,

49. On this statement, *see* Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, 112 (Informa 2012).
50. *See* the IBA Rules on the Taking of Evidence in International arbitration, which were adopted by a resolution of the IBA Council on 29 May 2010; on this issue *see* George Burn & Zara Skelton, *The Problem with Legal Privilege in International Arbitration*, 72 Arbitration 2, 128 (2006); on these rules *see* also Amy Cohen Kläsener & Alexander Dolgorukow, *Die Überarbeitung der IBA-Regeln zur Beweisaufnahme in der internationalen Schiedsgerichtsbarkeit*, Zeitschrift für Schiedsverfahren (SchiedsVZ), 302-309 (2010).
51. *See supra* n. 8, at 2325.

§27.06 Zunehmende Komplexität

Die den Schiedsgerichten im 21. Jahrhundert zum Entscheid vorgelegten Streitigkeiten sind tendenziell erheblich komplexer geworden als die Sachverhalte, welche früher zur Diskussion standen, als sich die Prinzipien der Schiedsverfahrensgestaltung entwickelt hatten. Wenn es in den ersten Jahrzehnten der Tätigkeit der Hamburger Freundschaftlichen Arbitrage und des Schiedsgerichts der Zürcher Handelskammer – der beiden Schiedsgerichtsinstitutionen, die 2004 resp. 2011 ihr hundertjähriges Jubiläum gefeiert haben – zu entscheiden galt, ob die Getreide-Lieferung des Beklagten hinsichtlich Qualitätskategorie und Vollständigkeit der Bestellung des Klägers entsprach, war das Risiko, dass der mit den Usanzen des Getreide-Handels bestens vertraute Schiedsrichter den Sachverhalt oder die Argumente der einen oder andern Partei missverstehen könnte, äusserst gering. Heutzutage hingegen haben sich Juristen als Schiedsrichter mit Sachverhalten vertraut zu machen, die häufig fern von ihrer beruflichen Ausbildung und Erfahrung liegen; das Risiko, dass ein Schiedsrichter in Zusammenhängen, die beispielsweise durch die neuesten Entwicklungen im ICT-Bereich, in Anlageprodukten der Finanzindustrie, in der Arzneimittelentwicklung und dergleichen geprägt sind, Missverständnissen erliegt, ist grösser geworden.

§27.07 Inhalt der Kommentierung durch die Parteien

Die Kommentierung des Schiedsentscheids-Entwurfs durch die Parteien darf keinesfalls als weiterer Schriftenwechsel missverstanden werden. Neue Sachverhaltsvorbringen, neue Beweisanträge und neue rechtliche Argumente sind grundsätzlich unzulässig. Die Parteien haben sich in ihrer Kommentierung darauf zu beschränken, das Schiedsgericht zu ersuchen,

- angeblich nicht verständliche Teile des Schiedsentscheids (Begründung oder Dispositiv) zu erläutern;
- allfällige Rechen-, Schreib-, Druck- oder ähnliche Fehler im Schiedsentscheid zu berichtigen;
- den Schiedsentscheid bezüglich geltend gemachter, aber versehentlich nicht behandelter Ansprüche zu ergänzen, oder umgekehrt Entscheide über dem Schiedsgericht nicht unterbreitete Streitpunkte wegzulassen;
- nachträglich die Stellungnahme zu Rechtsnormen entgegenzunehmen, welche das Schiedsgericht zur (angeblichen) Überraschung der Partei und damit in (angeblicher) Verletzung des Anspruchs auf rechtliches Gehör anwendet;

- nachträglich die Stellungnahme der Partei A zu einem von der Partei B erstmals im *Post Hearing Brief* vorgebrachten Argument entgegenzunehmen, welches das Schiedsgericht als erheblich behandelt hat, ohne der Partei A Gelegenheit zur Stellungnahme zu gewähren.

Die Parteien können somit in diesem Stadium nicht mehr vorbringen, als was sie nach förmlichem Erlass des Schiedsentscheids beim Schiedsgericht mit einem Erläuterungsbegehren, mit einem Berichtigungsbegehren oder mit einem Antrag auf Ergänzung[8] oder beim staatlichen Gericht mit einer Beschwerde gemäss Art. 393 lit. c und d ZPO resp. Art. 190 lit. c und d IPRG geltend machen könnten. Nicht geeignet zur Behandlung in diesem Stadium des Verfahrens sind hingegen Rügen betreffend angeblicher inhaltlicher Willkür resp. Ordre public-Widrigkeit des Schiedsentscheids: Ist es einer Partei im Laufe des Verfahrens mit (in der Regel) doppeltem Schriftenwechsel, Beweisverhandlung und abschliessender Kommentierung des Beweisergebnisses nicht gelungen, das Schiedsgericht von der Begründetheit ihres Standpunktes zu überzeugen, so wird ihr dies – angesichts der Unzulässigkeit neuer Vorbringen – auch im Rahmen der Kommentierung des Schiedsentscheids-Entwurfs nicht gelingen.

§27.08 Verhältnis zum Verfahrensschluss

Bekanntlich hat das Schiedsgericht nach den meisten Verfahrensordnungen zu gegebener Zeit – nämlich wenn es der Ansicht ist, die Parteien hätten ausreichend Gelegenheit gehabt, zu den zu entscheidenden Angelegenheiten vorzutragen[9] – das Verfahren als geschlossen zu erklären mit der Wirkung, dass ab diesem Zeitpunkt *„keine weiteren Schriftsätze eingereicht, Erklärungen abgegeben oder Beweise erbracht werden [können], es sei denn, das Schiedsgericht genehmigt oder ordnet dies an."*[10] Die vorbehaltene Wiedereröffnung des Verfahrens kommt nur ausnahmsweise in Betracht, nämlich wenn das Schiedsgericht *„dies wegen ausserordentlicher Umstände für notwendig hält."*[11] Die hier propagierte Unterbreitung des Schiedsentscheids-Entwurf zur Kommentierung durch die Parteien hat nach der Verfahrensschliessung zu erfolgen und eine anschliessende Wiedereröffnung des Verfahrens – nach Entgegennahme der Kommentare der Parteien – soll weiterhin nur ausnahmsweise stattfinden, nämlich wenn das Schiedsgericht von der einen oder anderen Partei auf einen materiellen Punkt hingewiesen wird, dessen Behandlung nicht nur zu einer Verdeutlichung der Entscheidbegründung oder des Entscheiddispositivs, sondern zu einer Ergänzung oder gar zu einer Wiedererwägung des

8. Art. 388 ZPO; Art. 35-37 Swiss Rules.
9. Art. 29 Abs. 1 Swiss Rules.
10. Art. 27 Abs. 3 ICC-Schiedsgerichtsordnung.
11. Art. 29 Abs.2 Swiss Rules.

Entscheids führen könnte und deshalb möglicherweise und ausnahmsweise die Notwendigkeit schafft, die andere Partei hierzu anzuhören.

§27.09 Beschränkt unpräjudizieller Charakter des Schiedsspruchs-Entwurfs

Das Schiedsgericht hat den Parteien den Entwurf seines Entscheids als finales Ergebnis seines Entscheidfindungsprozesses zu unterbreiten. Lediglich im Hinblick auf die soeben als Möglichkeiten erwähnte Ergänzung oder Wiederwägung seines Entscheids erfolgt die Unterbreitung des Entwurfs ohne Präjudiz für den endgültigen Entscheid des Schiedsgerichts.

§27.10 Verhältnis zur Prüfung des Schiedsentscheids durch die Schiedsinstitution

Die Unterbreitung eines Schiedsentscheids-Entwurfs zur Kommentierung durch die Parteien hat der allfällig vorgesehenen Vorlage des Entscheids-Entwurfs bei der Schiedsgerichtsinstitution klarerweise vorauszugehen. Möglicherweise ist Schiedsgerichten, auf deren Verfahren die ICC-Schiedsgerichtsordnung anwendbar ist, zu empfehlen, anlässlich der vorgängigen Unterbreitung des Entscheids-Entwurfs den Parteien gegenüber nicht nur den vorstehend erwähnten Vorbehalt der beschränkten Unpräjudizialität ihres Entwurfs anzubringen, sondern ausdrücklich auch eine Wiedererwägung ihres Entscheids für den Fall vorzubehalten, dass der ICC-Schiedsgerichtshof im Rahmen der Überprüfung des Entwurfs auf Punkte hinweisen sollte, „*die den sachlichen Inhalt des Schiedsspruchs betreffen*".[12]

§27.11 Beratungsgeheimnis

Es mag je nach anwendbaren Verfahrensregeln zulässig sein, dass den Parteien gleichzeitig mit der Eröffnung des Schiedsentscheids mittels einer *Dissenting Opinion* bekanntgegeben wird, dass der Schiedsentscheid nicht einstimmig zustande gekommen ist, sondern eine Minderheit eine andere Lösung bevorzugt hätte, wie diese Lösung gelautet hätte und welches Mitglied des Schiedsgerichts diese Lösung favorisiert hat.[13] Vor der förmlichen Eröffnung des Schiedsentscheids kommt eine solche Transparenz nicht in Betracht, denn sie würde krass das Beratungsgeheimnis verletzen, welches ein überaus wertvolles Element der Sicherung der Unabhängigkeit der schiedsrichterlichen Meinungsbildung darstellt.

12. Art. 33 ICC-Schiedsgerichtsordnung („*... points of substance*").
13. Zur Thematik der „*Dissenting Opinion*" vgl. insbesondere Bernhard Berger/Franz Kellerhals, International and Domestic Arbitration in Switzerland, 2. Aufl., 2010, Rz. 1367-1375.

§27.12 Keine Verzögerung in der Erfüllung resp. Vollstreckung des Schiedsentscheids

Die Vorlage des Entscheids-Entwurfs, die Entgegennahme der Kommentare der Parteien und die Behandlung dieser Kommentare durch das Schiedsgericht führen zunächst zu einer Verlängerung des Verfahrens. Andererseits wird damit das Risiko, dass die Parteien Anlass zur Ergreifung einer der Rechtsbehelfe zur Erläuterung, Berichtigung oder Vervollständigung des Schiedsentscheids haben, nahezu vollständig beseitigt.[14] Das Risiko, dass gegen den Entscheid erfolgreich eine Beschwerde betreffend *ultra petita* oder *infra petita* oder wegen Verletzung des rechtlichen Gehörs eingereicht wird, wird zumindest stark gemindert.[15] Wird die Unterbreitung des Schiedsentscheids-Entwurfs – wie hier propagiert – auf komplexe und damit ohnehin lange dauernde Schiedsverfahren beschränkt, so wird die Verlängerung des Schiedsverfahrens durch die Verminderung des Risikos von Verfahren nach Erlass des Schiedsentscheids mehr als aufgewogen. Als weiterer Vorteil kommt in Einzelfällen die Aussicht hinzu, dass sich die Parteien nach Kenntnisnahme des Schiedsentscheids-Entwurfs zur (Wieder-)Aufnahme von Vergleichsgesprächen veranlasst fühlen und diese erfolgreich zum Abschluss bringen.

14. Dieser Vorteil darf nicht unterschätzt werden: Gemäss einer Statistik für die Jahre 2005-2010 wurden in 9 bis 14% aller ICC-Schiedsverfahren Erläuterungs- oder Berichtigungsgesuche eingereicht; vgl. Maria Hauser-Morel/Jan Heiner Nedden, Correction and Interpretation of Arbitral Awards and Additional Awards, ASA Special Series No. 38, 2011, S. 19.
15. Auch dieser Vorteil fällt ins Gewicht, denn die Verletzung des rechtlichen Gehörs ist die am häufigsten vorgebrachte Beschwerdebegründung: vgl. Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis, ASA Bulletin 2010, S. 82 ff., 87.

need not prove the causal link between each specific event and the additional man-hours associated therewith.

The owner, a state-owned company, retaliated with a claim of its own, seeking USD 80 million in damages – liquidated damages, lost profits, and other damages – due to the almost three year delay in completion, for which it alleged the consortium alone was to blame.

The heart of the dispute thus revolved around which party was responsible for the substantial delay to project completion and above all, which party was responsible for the additional work and cost caused by the many changes made to the original design. The parties' submissions were long, detailed and heated: allegations ranging from simple and gross negligence to intentional misconduct, mismanagement and outright incompetence were made by both sides.

When the owner's Statement of Defense and Counterclaim first arrived, a cursory review of the filing yielded nothing out of the ordinary: no new claims had been asserted; the prayers for relief remained unaltered; and no procedural motions had been made. Above all there was nothing to foreshadow the arrival – only days later – of an emergency motion from the consortium, urgently requesting that a certain exhibit and all references thereto be "struck from the record". According to the consortium, the Statement of Defense contained references to an internal document that had been illegally obtained from the consortium and could therefore not validly be used in the arbitration proceedings.

Our interest piqued, we took a deeper look into the Statement of Defense and quickly noted both (1) why the consortium was so eager to eliminate the document from the arbitral tribunal's consideration, and (2) that the consortium's motion – should it be successful – would require more than just the removal of an exhibit and the deletion of a few sentences or footnotes. The relevant exhibit was cited no less than 56 times on twenty-nine separate (and non-consecutive) pages of the submission. In short, it was the cornerstone of the owner's entire brief.

So, what was this document and what did it say? The document was an internal memorandum prepared by one of the consortium partners during the construction project, summarizing the status of the project one month prior to the expected completion date. The memorandum set forth the total man-hours expended at that time and the activities still outstanding, including the estimated man-hours required to complete them. In addition, the memorandum analyzed how the actual figures compared to the original budget with which the consortium had submitted its bid. According to the memorandum, despite the impending completion date, much work still needed to be done and

doing so would require going well beyond what had originally been budgeted. What made the memorandum so potentially damaging, however, was that it was more than a mere objective tally of the hours expended and those required for completion. The author of the memorandum – a senior engineer who had incidentally already been named as a witness by the consortium – identified the reasons for which the consortium had been required to invest many more hours than anticipated in the early stages of the project, including the need to redo a number of tasks along the way. Rather than placing the blame on the owner for the many mishaps, however, the author specifically attributed the excess man-hours required to remedial works made necessary due to the faulty engineering of a subcontractor and – above all – the corner-cutting and cheap work product of its very own consortium partner. In fact, as far as responsibility for the additional costs incurred went, the owner was not mentioned anywhere in the memorandum. In other words (as Respondent unabashedly and repeatedly emphasized), the memorandum – at first glance – appeared not only to undermine Claimant's global claim, but also to assist Respondent in the substantiation of its own counterclaim.

Now you might wonder how this document – a document the existence of which the owner would have had no knowledge of and that was safe from disclosure in a civil law arbitration lacking common law discovery practices – found its way into the owner's possession. Well, this is where the memory stick comes in: the parties had developed an operating procedure whereby the minutes of progress meetings held at the construction site were drafted by a representative of one of the consortium partners. After completing his draft minutes, this individual would provide them to the owner's representative such that amendments and/or comments could more easily be made. This file transfer was undertaken by means of a memory stick that was provided by the consortium partner to the owner's representative; the owner's representative then copied the draft document – together with any other relevant files, such as attachments to the minutes – to his computer and then returned the memory stick to the consortium partner. On this particular occasion, the memory stick contained not only draft minutes, but other documents as well – including the internal memorandum at issue. When the owner's representative copied the minutes and other documents from the memory stick onto his computer – which he may or may not have believed to be attachments to the minutes – he also acquired the internal document, the admissibility of which was in dispute.

The dilemma facing the arbitral tribunal was clear: there was no doubt that the owner was not meant to have access to the document in question. Even if the owner's representative had taken the document in error, believing it to be an attachment to the minutes, he would have recognized his error the moment he opened it and registered its contents. On the other hand, the consortium

had – even if inadvertently – made the document available to the owner. And the document's relevance was undeniable given that it potentially undermined the consortium's position in the arbitral proceedings, at least insofar as the consortium had asserted a global claim and attempted to place the blame for *all* additional work and delay on the owner, something that this memorandum suggested at least one consortium partner did not believe justified.

Prior to this dilemma landing with the arbitral tribunal, both parties had faced conundrums of their own as a result of the memorandum's memory stick travels from the consortium representative's laptop to the owner. While the owner – or better said, the owner's counsel – had to decide whether to use the document in the first place, a judgment call to which we will shortly return, the consortium faced a dilemma of a more strategic nature: how to best react to the owner's use of the memorandum? Simply let it slide and attempt to place the document in context or play down its importance? Or seek to have the document struck with the danger of drawing even greater attention to it and cementing its damaging nature in the event that the motion to strike were unsuccessful? Clearly, in this case, the consortium had chosen the latter option, fighting the admissibility of the memorandum with all possible means. In fact, ultimately, the arbitral tribunal had before it no less than eight legal opinions, various affidavits, and four party submissions to consider.

But let us turn back to the position in which the owner's counsel found itself when its client provided it with this document in the first place. Could counsel in good faith submit and rely on this document in the arbitration proceedings? Or did the manner in which it came into the owner's possession place restrictions on counsel's ability to do so? When balancing the client's interests against other obligations – whether professional, ethical, collegial, or moral – when does the scale tip in one direction or ano-ther?

These were questions that we were forced to ask ourselves when, acting as counsel in another arbitration, we stumbled upon evidence that had taken a wrong turn and landed on our doorstep – or rather, in our files. The culprit this time was not a memory stick but rather another (generally) harmless office tool: the printer.

§28.02 The Printer

At issue in this second case was an arbitration proceeding involving a long-term cargo handling contract. Claimant was a ground handler based at a small regional European airport; Respondent an international airline based outside of Europe. The parties had executed a ten-year contract pursuant to which the airline had agreed to move its European cargo hub from certain major European airports to a smaller airport at which the ground handler operated

and to have its cargo handled there for the duration of the contract period. In exchange, the ground handler would expand and modernize its ground handling facilities. Less than two years into the contract, however, the relationship had deteriorated: the airline was suffering significant losses and decided to abandon its operations at the regional airport in favor of larger European hubs, thereby breaching its obligation to employ the ground handler's services.

After fruitless attempts to get the airline back, the ground handler initiated arbitration proceedings seeking damages in the form of the profits it would have earned over the ten-year contract period. While the airline largely acknowledged the terms of the contract, it argued that the contract was void ab initio or at least voidable, as it had been entered into by the airline's then-CEO acting in a substantial conflict of interest. In particular, the airline argued that the ground handling company had been, and still was, indirectly owned and controlled by the airline's ex-CEO and his family. Notably, the ex-CEO had a reputation in his home country as a businessman with questionable practices and criminal as well as civil charges were pending against him there. The airline thus maintained that the original decision to move the airline's cargo hub to the small regional airport – and to execute the ground handling contract in the first place – had been orchestrated and pushed through by the ex-CEO for the sole purpose of pursuing his financial interests and those of his family, the ultimate owners of the ground handling company, and to the detriment of the airline.

The arbitral proceedings were bifurcated into a liability and a quantum phase. During the evidentiary proceedings and at the hearing on liability, the airline desperately attempted to prove the connections between the ex-CEO and his family on the one hand and the ground handler on the other. But because the ground handler's parent companies were incorporated offshore, and in the absence of access to the relevant information via document production requests, finding evidence of the ultimate ownership and resulting conflict of interest proved impossible. Ultimately, the ground handler prevailed in the liability phase and the arbitral tribunal held that the contract was valid and the airline was in breach. Although the arbitral tribunal's partial award provided alternative grounds – holding that even if the conflict of interest on the part of management would have been established, the contract had been subsequently implicitly ratified by an independent board of directors – we, as the airline's counsel, could not help feeling frustrated that the necessary evidence had eluded us and that, had we discovered it, the outcome might have been different.

Nevertheless, the matter of the conflict of interests was set aside and all efforts were focused on the quantum phase and on minimizing the damages. That is, until the ground handler submitted "Exhibit C-200". This exhibit