

Arbitration in Germany – some aspects and comparison of law

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I. Introduction: Some general remarks

(1) The concept „Intellectual Property“ includes, in one way or the other, the topic „competition“¹. As I understand the task which I am having to perform today, competition is exactly the point which we have to focus on, i.e. the competition between the court procedure and the arbitration procedure. This competition exists, I believe, in all countries more or less intensely.

Later this morning, we shall hear comments on German jurisdiction with regard to arbitration. My own impression is that the German courts perform their task with a very thorough and refined method, backed by a longlasting experience². The German jurisdiction may be characterised as being arbitration friendly minded. What now is going to be addressed, within the next 20 minutes, will be „ADR“³, in other words the alternative dispute resolution. This conception, in my mind, comprises arbitration as well as conciliation (the latter often called „mediation“⁴). The focus will be on arbitration. Conciliation will only shortly be mentioned. When doing so we shall leave aside all the different ways as to how to practise conciliation⁵. Thus, we now shall embark on the topic arbitration in Germany. With your allowance, I will, here and there, add some aspects of comparison of law.

Arbitration, in particular commercial arbitration, is practised in Germany since the beginning of the 19th century. Already the Code of Civil Procedure (ZPO) of the 31st January 1877 contained detailed rules on arbitration. In international trade and shipping centres like Hamburg, commercial arbitration has played, since long, an important role, even before the coming into force of the ZPO of 1877⁶. More than hundred years later, in 1998, new arbitration rules were included in the Code of Civil Procedure , essentially following the Uncitral Model Law on International Commercial

1 Cf. the general introduction by S. Rojahn, Der Streit um gewerbliche Schutzrechte, in: DIS-Materialien/ DIS-MAT XIII (2006), p.1 seq. - WIPO, What is intellectual property ? <http://www.wipo.int/about-ip/en/> : „Inventions, literary and artistic works, and symbols, names, images, and designs used in commerce“.

2 R. Kreindler reports in F.A.Z. 1 August 2012 that in the IP practice, foreign firms like to sue each other before German courts: „Technologiekonzerne klagen gern in Deutschland gegeneinander: (...) Dies gilt vor allem im Vergleich zu anderen Rechtssystemen wie etwa dem der Vereinigten Staaten, das durch eine andere Kostenstruktur, eine andere Art der Beweisführung und damit durch ein höheres Prozessrisiko gekennzeichnet ist“.

3 Cf. the study by Eidenmüller (ed.), Alternative Streitbeilegung, Munich 2011.

4 Some practitioners do see a difference between conciliation and mediation. See, e.g., Sessler, Aussergerichtliche Streitbeilegung, in: Eidenmüller (ed.), Alternative Streitbeilegung, Munich 2011, p. 9 seq. and p. 20. Otherwise the DIS-Mediation/Conciliation Rules 02, <http://www.dis-arb.de>. The German Maritime Arbitration Association has established „Conciliation Rules“, in German: „Schlichtungsordnung“. Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd edition Cologne 2008, nos. 47 seq.: According to him, there is no difference, the question is said to be „irrelevant“. The Regulation (Richtlinie) 2008/52EG in its Art. 3 defines „Mediation“ as a particular procedure „regardless as to how it is named“.

5 Adjudication, Dispute Board, Schiedsgutachten, described by Sessler, Aussergerichtliche Streitbeilegung, in: Eidenmüller (ed.), Alternative Streitbeilegung, Munich 2011, p. 9 seq. As an example for a Schiedsgutachten cf. the GMAA Adjudication Rules <http://www.gmaa.de> , and Kasolowski/Schnabl, Schiedsgutachten als Alternative zu Schiedsverfahren, SchiedsVZ 2012,84.

6 J. Trappe, Schiedsgerichtsbarkeit, in: J. Albers (ed.), Recht und Juristen in Hamburg, Köln 1994, p.141 seq.

Arbitration⁷

Practitioners see a difference between ad-hoc arbitration, (i.e. a procedure designed by the parties themselves and/or by the arbitrators, apart from the existing legal provisions) and institutionalised arbitration (i.e. a private institution providing special arbitration rules and costs tariffs). Actually, both systems are adopted, without meeting practical differences as far as the procedure itself is concerned. There are countries, where ad-hoc arbitration is not en vogue or even not allowed, among them Mainland China⁸. We certainly will hear some comments later today. As far as institutionalised arbitration in Germany is concerned, we have, first of all, the German Institution for Arbitration (DIS)⁹, as well as some Chambers of Commerce, like the one of Hamburg¹⁰, the German Maritime Arbitration Association in Hamburg¹¹, and other specialised arbitration bodies, for instance in the grain trade.

II. Arbitration in Germany

(2) It is often alleged that arbitration

- is more specialised than an ordinary court procedure,
- costs less than a court procedure, and
- lasts less long than a court procedure.

We shall see whether these allegations are well founded. However, more important, and thus finally decisive, appear to be the quality, the flexibility and the conduct of the arbitration procedure.

(1) Characteristics of German arbitration

(3) Let us begin with the characteristics of the German arbitration procedure.

While a court is in existence before a legal dispute arises, the parties to that dispute have to accept an already existing procedure as well as judges already being in their place. Admittedly, there are specialised courts for special disputes. However, in arbitration, from the very beginning, a party itself may appoint an arbitrator who comes from that particular trade which has brought about that kind of dispute which is the kernel of the party's own dispute. That is why often a „commercial man“¹² is appointed arbitrator. Such an arbitrator may suggest to the parties his own procedural rules being in line with his own commercial experience, and which are apt for solving the dispute, or to apply the rules of one of the specialised arbitration institutions.

(4) Often, arbitrators invite the parties to a preliminary meeting where a detailed time table is discussed and agreed upon. In that meeting, arbitrators occasionally suggest how many written pleadings may be submitted by the parties (for instance: at first claimant, then respondent , and

7 In detail cf. K.P. Berger, *The New German Arbitration Law*, RWS-Dokumentation 21, Köln 1998.

8 Cf. L. Kniprath, *Die Schiedsgerichtsbarkeit der Chinese International Economic and Trade Arbitration Commission (CIETAC)*, Cologne 2004, p. 74. Yu Jianlong/A. Neelmeier, *CIETAC Arbitration Rules 2012 – Another Move Forward*, *SchiedsVZ* 2012, p.134. A Taiwanese Court recently considered the situation under Taiwanese law; *Asian Dispute Review* 2012, 59.

9 <http://www.dis-arb.de> .

10 <http://www.hk24.de> .

11 <http://www.gmaa.de> .

12 Divergencies of views may exist about who is considered a „commercial man“, as in the English case *Pando v. Fimo*, [1975] 1 Lloyd's Rep. 561: A London barrister and fulltime arbitrator was held to be a commercial man. Section 2.2 DIS Arbitration Rules suggests that a third or a sole arbitrator should be a lawyer. As for the nationality of an arbitrator, Art. 20b WIPO Rules provides (except if the parties agree otherwise) that a sole and a presiding arbitrator „shall be a national of a country other than the countries of the parties“. However, it rather appears to be advisable that in any case the presiding arbitrator should be a national of that country whose substantive law applies, since he is supposed to be conversant with his „home“ law.

then claimant again commenting on the arguments raised by respondent). I personally am not in favour of that kind of procedure since, in a way, it limits the freedom of the parties and one may not forget – as will be seen later - that the arbitrator, leading the proceedings, has authority to suggest to the parties to extend or to shorten their submissions.

(5) Terms of Reference, favourite instrument of the ICC, are not common – I believe rightly since, at least under German procedural law – and not necessary. I remember a Paris arbitration where it took us one year before the parties finally agreed on their Terms of Reference. It also is uncommon that parties' lawyers, once arbitrators have been appointed, before the proceedings proper really begin, undertake long lasting searches for collecting evidence, for instance for interviewing witnesses. In this country, this is being done well before the decision was made to start proceedings. Future witnesses are not interviewed. I have heard of countries where, occasionally, one spoke of „having instructed our witnesses“.

(6) Another problem is discovery¹³. In Germany, neither judges nor arbitrators are used to order that beforehand all papers are submitted which might be of interest. It rather is a matter for the parties to present the documents they are relying on. In case a party fails to do so, the arbitrator may order that party to do so. Of course, the tribunal may draw its own conclusions once a party fails to submit certain documents.

It is by no means a task for arbitrators to sort out the documents a party is relying on. I remember a case in Paris where a party wished to hand over to the tribunal two suitcases full of documents which were said to give reasons for its claim. We refused to accept these suitcases. As usual, the claimant had to submit himself the documents he wished to rely on.

(7) It often happens that parties present too many means of evidence, even such which, later on for the decision of the tribunal, did not play a role at all. Once, in a London arbitration, each of the arbitrators received from claimant 56 letter-files. During the hearing, they stood in bookshelves behind us; and when during the hearing reference was made to a particular document, we got up to take that document out from the relevant file. In the end, quite a number of these files, and parts of them, were even not referred to by the parties and were not used at all by the tribunal for deciding the case and, in fact, definitely had not been needed for doing so. In Germany¹⁴, in case of court proceedings as well as in arbitration, the parties are used to mention in their written submissions the evidence they are relying on: Documents, witnesses, expert witnesses, visual observation. The tribunal will then, in due course, issue a written order (Beweisbeschluss) which of these means are, in its opinion, relevant for deciding the case and, consequently, have to be submitted by the respective party. The parties, of course, are free to comment. Apart, a tribunal is entitled to ask for the presentation of certain documents, or itself may appoint an expert witness.

(8) The reason for this uneasy aspect lies deeper and brings us to the point whether it is the arbitrator who leads the arbitration, or the parties. Differently from what is done in some countries, in our practice it is the arbitrator who actively leads the proceedings, by directing the course of the debate, by asking questions, by referring the parties to particular factual aspects or to particular legal aspects (for instance even to such which a party might have overlooked, but which, in the arbitrator's opinion, could be relevant for deciding the dispute). In other words, we follow the inquisitorial system while other countries prefer the adversarial system. Thus, it can not happen that a tribunal abstains from dealing with a legal issue just because a party had not pleaded it, as recently illustrated in an English case¹⁵. An arbitrator has to take care that all essential facts and

13 Cf. J. Trappe, Discovery under German Law and Arbitration Proceedings, *Arbitration*, vol. 52, 1986, p. 116; and Timár/Kraayvanger, U.S. Discovery in Aid of Foreign Arbitration, *SchiedsVZ* 2012, p.66. Cf. Art. 23 ICC Rules of Arbitration (2012).

14 Böckstiegel (ed.), *Beweiserhebung in internationalen Schiedsverfahren*, Cologne 2001.

15 In „The Amplify“ [2012] 1 *Lloyds Rep.* 206 arbitrators had not taken into consideration „The Happy Day“ [2002] 2 *Lloyds Rep.* 487 (though knowing that case) because (remarkably) one party had not pleaded it (a remnant of

all legal issues brought forward by the parties are being discussed, or, if so, at least mentioned as being irrelevant for deciding the case. In any case, by all means, an award may not base the decision on a legal or factual argument which, beforehand, had not been mentioned at all during the proceedings. That is what usually is referred to as „Überraschungseffekt“. That means: A party may not be taken by surprise in being confronted, in the award, with an issue which had not been discussed before.

(9) Further on and even more important is this:

We follow the maxime: „Iura novit curia“: the court does know the law. A German arbitrator (like, by the way, a judge), already during the course of the proceedings, does form his own views on the case. That means that he comes, in his mind, step by step to the conclusion as to which the relevant facts are, and which the legal reasons are on which he is about to base his decision, and which are not. As already mentioned, the tribunal decides which means of evidence are relevant. It , thus, applies – as we in German say – the „Relationstechnik“¹⁶, a certain technic how to structure the case, which a lawyer has learned in his University times, or during his further legal education. In other words: He considers which legal rule (either contractual provision or statutory provision) might justify the claim (or not) and which are the facts presupposed by that rule. In Latin, the first question the arbitrator has to put to himself is: „Qualis sit actio ?“. Of course, the parties themselves ought to have put that question to themselves, when preparing their pleadings. Practically speaking, the arbitrator neglects certain facts and arguments as not being decisive, since they are not relevant according to the basic legal provision the award will be founded on. That is what „commercial men“ learn by doing.

(10) Customarily, three arbitrators act in a case. Some institutionalised arbitration rules so provide expressly¹⁷. There is, as far as I can see, one exception: The GMAA Rules¹⁸. They provide for two arbitrators to decide the case, with (what should not be forgotten to mention in the applicable rules) the expressly provided possibility for them to appoint a third arbitrator once the two of them are unable to find a common decision, either procedural order or award. One reason for this exception (not to forget the cost savings) might be that the shipping circles accepting these Rules in most cases do know each other quite well, among them in particular the arbitrators, so that consequently no risk exists of partial opinions being expressed. In my view, practice confirms this attitude since. I guess, in about 90% of the cases a joint award is reached (leaving aside settlements). It may be added that often also non-shipping parties agree on the GMAA-Rules. Of course, in many international cases it sometimes appears to be preferable to have three arbitrators, because, possibly, inter alia, the three arbitrators had not met before, thus not knowing each other. One never is sure of a surprise. An unfortunate experience of mine is this: In an international case, parties, lawyers, and arbitrators coming from different countries, a witness was interviewed by the tribunal. When he started to report what he had experienced, he was interrupted by one of the arbitrators (stemming from the same country as the party which had presented that witness) by saying: „I thought you wanted to tell us quite another factual story“. Needless to tell which uproar followed.

(11) When speaking on the number of arbitrators, one has to mention multiparty cases particularly in IP cases. Many procedural rules provide that in such cases the multiple claimants as well as the multiple respondents both have to appoint one arbitrator only¹⁹.

Roman law ?). This topic was dealt with by F. Strube on the occasion of ICMA XVIII (Vancouver 2012) in his paper „Are Arbitrators the Sorcerer's Apprentices ? Core Distinctions between 'Commercial' and 'Civil Law' Arbitrations“, International Congress of Maritime Arbitrators: Proceedings, p. 74.

16 Cf. also S.H. Elsing, Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds, SchiedsVZ 2011, p. 114, 117.

17 Par example : Section 3 DIS-Arbitration Rules 98: <http://www.dis-arb.de> .

18 German Maritime Arbitration Association Rules 2012: Sections 3 and 4. <http://www.gmaa.de> .

19 WIPO Rules Art. 18; DIS Rules Section 13; GMAA Rules Section 4a . - The rules of the Swiss Chambers' Arbitration Institution deal with the consolidation of cases and joinder in Art. 4.

In this connection, one also should mention cases where a chain of contracts exists, under each of them the same legal issue is disputed. To give an example: A shipowner sued his time charterer for damages suffered by his ship during the performance of the contract; the time charterer took recourse against his sub-charterer and this one took recourse against the stevedore which in fact had caused that damage, all this happening in the same, one, process. In the arbitration which took place in New York, all parties had appointed arbitrators except the sub-Charterer which, with the stevedore, had not agreed upon arbitration. The sub-charterer, therefore, available in the States, opened court proceedings against the stevedore who finally was held to join the arbitration proceedings²⁰. In one strike the liability under four contracts was dealt with.

Another kind of a chain of cases concerns what in German is called „Streitverkündung“, i.e. a third party notice²¹. A party to a state court case which considers to take, in case it fails, recourse against a third party may invite this third party to join the court proceedings. The third party, regardless whether or not it joins the proceedings, will be bound by the findings of the court in the later following recourse action. Once, in a GMAA case, the issue was as to whether this rule of the ZPO applied when the recourse action took place in an arbitration. The arbitrators did confirm this view²².

(12) An award is final. As known, under English law, an appeal against an award is possible for „serious irregularity“ and for „error in law“²³. The reason for these rules might be that the commercial law and other fields of law are mainly not codified so that a certain control of the reasoning of an arbitration tribunal is, by the courts, considered advisable with a view to the development of law.

What about enforcing an award ?²⁴ First of all, the award must be effective, in other words, no recourse against the award had been lodged and, if so, the award had not been set aside²⁵. Recourse against an award may be made only in case of extreme offences of procedural rules, mainly such offences being in conflict with public policy (ordre public). Subsequently, enforcement of an inland award can take place if it has been declared enforceable (in Germany) by the local Court of Appeal²⁶. Recognition and enforcement of (foreign) arbitral awards are granted in accordance with the New York Convention²⁷. My impression is that, in general, as already mentioned, German Courts decide „award-friendly“.

(13) A judge is obliged, as the ZPO expressly provides²⁸, to see to it whether the dispute can be solved amicably. The same rule is followed in arbitration proceedings²⁹. The DIS Arbitration Rules, for instance, literally following the ZPO suggestion, provide³⁰:

20 The writer remembers this case in which he had represented the shipowner before a tribunal of the New York Maritime Arbitration Association, <http://www.smany.org> . It may be mentioned that that case was heard within one afternoon.

21 § 72 Code of Civil Procedure (ZPO).

22 In due course the Hamburg Court of Appeal has declared that award enforceable: 17.1.2002, Betriebs-Berater 2002, p. 1170. The issue is very much disputed. Pro: A. Bartels, Bedeutung der Streitverkündung vor dem staatlichen Gericht, Betriebs-Berater 25.10.2001, Beilage 7, p. 20. Contra: For instance S.H. Elsing, Streitverkündung und Schiedsverfahren, SchiedsVZ 2004, p.88.

23 Section 68 and Section 69 Arbitration Act.

24 Wagner/Schlösser, Die Vollstreckung von Schiedssprüchen, German Institution of Arbitration, Cologne 2007.

25 § 1095 ZPO.

26 §§ 1060 and 1062 ZPO .

27 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and §§ 1061,1062 ZPO.

28 § 278 (1) : „Das Gericht soll in jeder Lage des Verfahrens auf eine gütliche Beilegung des Rechtsstreits oder einzelner Streitpunkte bedacht sein“.

29 Cf. i.a. Wilske, Schiedsvergleich, in: Vorwerk (ed.), Das Prozessformularbuch, 9th edition, Cologne 2010, p. 2045.

30 DIS-Arbitration Rules 98 Section 32 (1) ; <http://www.dis-arb.de> .

„At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute“.

In practice, „seek to encourage“ means more than just hinting to the possibility to settle; it comprises the way how to settle.

In other jurisdictions, one can notice a certain reserve towards discussing a settlement during arbitration proceedings, under the eyes and with the help of the arbitrator. Contrary to that, the Chinese Arbitration Law expressly allows that the arbitration tribunal carries out conciliation prior to giving an arbitration award³¹, So does the recently published new version of the CIETAC Rules³². This topic was discussed during the recent International Congress of Maritime Arbitrators where was noted a „tendency within the Anglo-American legal systems to promote negotiations during pending proceedings“, referring in particular to the 1999 Woolf reform³³.

(14) In Germany, following a Regulation of the European Union, the Government has set in force a Law on Mediation (by the way, without expressly defining that term vis-à-vis the term conciliation)³⁴. In long lasting discussions on the Bill, the Government had pretended it being necessary to also modify the ZPO with regard to its provision on the judge's obligation to help in settling a dispute in an amicable way. Unfortunately, after discussing the pros and cons, a compromise was reached to the effect that in any case, once the parties have decided to start mediation, the court orders its proceedings to be interrupted³⁵. In other words, the judge who so far handled the case , though being fully in the picture and conversant with the case, cannot do more than emphasizing to the parties to settle the case; thereafter it is up to another judge (called „Güterichter“) to handle the conciliation³⁶. In my mind, the old rule and the wise DIS-solution are much preferable since being in the spirit of the liberal arbitration philosophy, and saving time and money. One may ask as to whose lobby was successful.

(15) Another problem is, as to whether a judge or an arbitrator, in the same case, may act as conciliator/mediator³⁷. Different opinions have been published. The new law strictly provides that the mediator, if the mediation fails, cannot act as an arbitrator. DIS, however fortunately, leaves it up to the parties to a conciliation/mediation procedure to agree that once the conciliation has failed the conciliator may go on as arbitrator³⁸. Again, in my mind, the wise DIS-solution is much preferable since being in the spirit of the liberal arbitration philosophy.

(16) Finally, a short hint for our American friends with regard to the material law: No punitive damages can be claimed under our law, apparently otherwise than in the States, there e.g. under

31 Chinese Arbitration Law Art. 57.

32 CIETAC Arbitration Rules (2012), in force as from 1 May 2012, contain, as the predecessor, in Art. 45 detailed provisions for the combination of arbitration with conciliation.

33 See Chr. Hasche, Arbitrators Proposing an Amicable Settlement – No Way or Useful Obligation ? In: Proceedings of ICMA XVIII (2012 in Vancouver), p. 714, 715 seq.

34 <http://mediation.de/mediation/mediationsgesetz> .

35 § 278a(2) ZPO (now in force). In other words, the judge is not anymore involved in the conciliation process, see the new version of § 278(5) ZPO.

36 Cf. J. Trappe, Richter / Schiedsrichter als Schlichter ?, SchiedsVZ 2012, p. 79. This article was published before the new Law on Mediation came into force.

37 Cf. the preceding footnote. The new law provided for a way out, but only if „an extensive information“ of the parties has taken place (Section 3.4) - whatever this is supposed to mean.

38 DIS Schlichtungsordnung 02 § 14(1); <http://www.dis-arb.de> .

general maritime law³⁹ .

(17) Another aspect, with regard to arbitration rules, is the following. It often happens, that at the beginning of the oral hearing the arbitrators suggest to the parties to discuss and to sign a protocol which contains some additional procedural rules , which so far might not be contained in already existing preformulated provisions . Such are for instance, as the case may be:

„The parties confirm that

- the dispute is covered by the arbitration clause of their contract,
- they are in agreement on the appointment of the arbitrators,
- all claims and counterclaims (if any) are covered by the arbitration clause,
- (a particular town) is the place of the arbitration,
- Court of Appeal (of a particular town) has jurisdiction according to § 1062 ZPO,
- the tribunal has jurisdiction to decide on the costs of the procedure,
- applicable law is the law of (of a particular country),
- the disputed value is assessed in line with the provisions of the ZPO,
- the arbitration fees are calculated in line with (the provisions of institution),
- the parties bear the costs and expenses of any expert appointed by the tribunal,
- the parties as joint debtors are liable for all costs of the procedure,
- the tribunal is entitled to demand from each of the parties as security for costs in the amount of half of the costs likely to arise⁴⁰.....“.

Such agreements may help to avoid future disputes on procedural issues.

(18) Finally, there should be mentioned, as I feel, a rather deplorable fact. German awards, in most cases, are not published. This is a great pity. My reasoning is this: One should not forget that awards may contribute to the development of the material law and of the procedural law – apart from helping parties to reconsider their legal chances before they even introduce legal proceedings⁴¹. Better off are for instance the users of certain French and US arbitrations. The French periodical *Droit Maritime Français* publishes informative reports on all awards rendered by the *Chambre Arbitrale Maritime de Paris*⁴²; the *New York Society of Maritime Arbitrators*⁴³ publishes all its awards verbatim. Of course, all hints to the parties involved and to the names of witnesses/experts should not be published; but the decisive legal reasoning should be.

(2) The costs caused by arbitration

(19) First of all, it should be mentioned that it is steady practice in Germany, that the loser of an arbitration procedure bears the costs of the winner, both the latter's contribution to the arbitration costs as well as its lawyers' fees. If a party delays the procedure, some institutions provide that the delaying party is held to pay a certain contribution to the arising costs⁴⁴ .

As to the costs caused by arbitrators and, in addition, those caused by the arbitration institution

39 US Supreme Court in *Atlantic Sounding Co Inc*, 129 S Ct 2561 L Ed 2d 382 (2009), and US District Court for the Eastern District of Missouri, *Osage Marine Servs*, 2012 US Distr LEXIS 28483 (ED Mo March 5 2012).

40 Regarding financial difficulties of the parties, cf. *German Institution of Arbitration* (ed.), *Financial Capacity of the Parties*, Frankfurt/Main 2004.

41 Böckstiegel (ed.), *Rechtsfortbildung durch internationale Schiedsgerichtsbarkeit*, Cologne 1989.

42 <http://www.arbitrage-maritime.org> .

43 <http://www.smany.org> .

44 Cf. Art. 40.1 Swiss Rules, <http://swissarbitration.org> .

involved (if any): These costs are based upon the value of the claim plus counterclaim (if any)⁴⁵. They usually are discussed by the arbitrators and parties, and finally agreed upon, sometimes on the basis of the legal rules of the law on the lawyers costs, sometimes on an hourly or daily rate. In case of an institutionalised arbitration , the rules of remuneration of the respective institution are applied.

Remains to consider the amount of arbitration costs. The following comparison⁴⁶ shows the fees charged for disputes of a value of Euro 1 million:

GMAA ⁴⁷	3 arbitrators with taking of evidence	€ 74.000,-
GMAA	2 arbitrators with taking evidence	€ 46.500,-
RVG ⁴⁸	lawyers' fees	€ 37.766,-
HK HH ⁴⁹	3 arbitrators with taking evidence	€ 65.000,-
DIS ⁵⁰	3 arbitrators with taking evidence	€ 76.680,-
ICC ⁵¹	3 arbitrators with taking evidence	€ 123.189,-

If a party unnecessarily delays the process it risks being held to bear a part of the costs, even if it is successful in the proceedings⁵².

(3) Time consumed

(20) It appears to be impossible to even guess which time is consumed during an arbitration in comparison with the length of a court procedure. Various reasons can be given: Applications of the parties counsels' to prolong certain time limits, availability of witnesses and experts, necessary discussions among the arbitrators, complexity of the case.

One relative advantage for the arbitration process, of course, is that there is no possibility to appeal against an award⁵³.

It is selfunderstood that arbitrators are obliged to conduct the proceedings expeditiously and to render their award within a reasonable period of time⁵⁴. It should be added that some arbitration rules oblige the arbitrators to render their award within a certain period of time⁵⁵. Some of them mention that the secretariat of the institution involved may prolong the available time. All this might induce a tribunal to speed up proceedings. However, if the arbitrators surpass the time allowed, the

45 The German Federal Court recently reasoned that the determination of the amount in dispute by the arbitration tribunal is not an improper decision in the tribunal's own interest; SchiedsVZ 2012, p. 154, 155.

46 Figures based on detailed calculations made by, and with the allowance of, GMAA.

47 GMAA Rules on the Remuneration of the Arbitral Tribunal of the German Maritime Arbitration Association (issue 2012), <http://www.gmaa.de> .

48 RVG: Law for the Remuneration of Lawyers, dated 5.5.2004, BGBl. I S.718, 788.

49 Rules of the Court of Arbitration of the Hamburg Chamber of Commerce : Art. 25. <http://www.hk24.de/recht-und-steuern/schiedsgerichtemediationschlichtung/> .

50 DIS Rules: Appendix to Section 40 sub. 5 of the Arbitration Rules , <http://www.dis-arb.de/en/16/rules/> .

51 ICC Rules of Arbitration (2012), Appendix XIII: Arbitration Costs and Fees; <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> .

52 Cf. Section 35(2) DIS Rules and Art. 40(1) Swiss Rules.

53 There are few exceptions, just to mention Art. XVII.1 of the rules of the Chambre Arbitrale Maritime de Paris: „When the main claim which is submitted to the Chambre by the claimant exceeds 30.000 € each party to the award, including that which failed in the first instance proceedings, may request a second degree examination of the case, if the award which is delivered has brought the case to an end. The award which is subject to a second degree examination is then considered as a draft which cannot be enforced, even provisionally“.

54 For instance Section 33(1) of the DIS Arbitration Rules.

55 For instance 9 months plus 3 months according to Art. 63 WIPO Arbitration Rules, <http://wipo.int/> ; 6 months as from the date on which the arbitral tribunal is formed according to Art. 42(1) of the CIETAC Rules, <http://www.cietac.org> .

question remains open as to the consequences.

A useful try to speed up the arbitration procedure appears to be the expedited procedures provided for by some arbitration institutions which, at least for less valuable claims, foresee a sole arbitrator only as well as relatively shorter time limits⁵⁶.

As mentioned above, a certain help to motivate parties to act expeditiously might be the risk to be held liable to bear a certain percentage of the arbitration costs, though I cannot remember a case where this materialised.

III. Conclusion

(21) Here are the answers to the questions raised above:

It usually is alleged that arbitration is more specialised than an ordinary court can be. This statement, in general, can be affirmed. L'exception confirme la règle.

It also is alleged that arbitration costs less than a court procedure. This does not appear to be correct. In fact, the fees charged by a court of first instance are much lower than arbitration costs, compared with the fees charged by an arbitration institution (if any) and by the arbitrators. But court charges of course increase considerably once the first instance is followed by a second instance (court of appeal) and by a third instance (Federal Court), not to mention the possibility of a further appeal with the Federal Constitution Court.

Arbitration proceedings may last relatively long in comparison with a first instance court case. However, this conclusion changes once a court of appeal is called upon or even the Federal Court. In other words, it very much depends of the development of a case.

Leaving these three questions aside, in this paper first of all weight was laid on what had been said in the beginning: When comparing the court procedure with the arbitration procedure, all depends on what is aimed at by a party before deciding where to go. To give an example: If an arrest order is wished to be obtained the available court procedure together with its decision most probably is preferable to a corresponding order of an arbitration tribunal; however, an arbitration procedure might be more appropriate for an international intellectual property (material) dispute.

⁵⁶ For instance Art. 42 Swiss Arbitration Rules .