THE SWISS RULES OF INTERNATIONAL ARBITRATION – FIVE YEARS OF EXPERIENCE

DR. BERNHARD F. MEYER, LL.M, FCIARB[1]

Summary

Switzerland has a long and impressive arbitration tradition. The enactment of the unified Swiss Rules five years ago marked another historical step forward. But, challenges are ahead of us. Other successful arbitration places have been developed and Switzerland seems to lose market shares. At the same time, the world-wide arbitration culture is changing. Arbitration is more and more resembling large scale litigation and some business leaders are turning away from it to other forms of ADR which are deemed to be cheaper and more efficient. The amalgamation of civil and common law principles in arbitration sometimes complicates the proceedings. Therefore, efficiency and pragmatism – two genuine Swiss qualities – are needed to carry out arbitrations today. Beyond that, the market calls for "full service providers", i.e. arbitration institutions offering not only up to date arbitration rules but also logistical services, a convenient infrastructure (an arbitration center), educational offerings and good marketing services. In this respect, Switzerland has yet to learn from its successful competitors. Will it accept the challenge?

I. ARBITRATION IN SWITZERLAND

A. 1911: Zurich Chamber of Commerce Establishes Its First Arbitration Court

Switzerland's arbitration history is old. As early as 1911, the Zurich Chamber of Commerce (ZCC) established its first commercial arbitration court, designed to resolve disputes between Chamber members in a private and business-like atmosphere. This was more than a decade before the now predominant International Chamber of Commerce (ICC) International Arbitration Court was established in Paris in 1923. Over the years, the Zurich Chamber of Commerce Arbitration Court gained recognition beyond the Chamber's constituency and

[1] The author is grateful to R. Clifford Potter, Seattle, www.pottergroup.com, for his review of the manuscript. The views expressed are the author's own.

non-members from all over the world were allowed to use the Zurich Chamber's arbitration services.

The ZCC Arbitration Court still exists today for purely Swiss arbitrations. By contrast, the new Swiss Chambers' International Arbitration Court (see: I.F), established as a follow-up organization of – amongst others – the Zurich Chamber of Commerce's international arbitration practice, has handled international arbitrations since 2004.

B. Geneva Chamber of Commerce and Industry Arbitration Court

The Geneva Chamber of Commerce and Industry (CCIG) Arbitration Court is also very old. It is well-recognized in conducting arbitrations for French-oriented participants. International arbitrations, including many ICC arbitrations, are often located in Geneva.

The CCIG Arbitration Court still exists today for purely Swiss arbitrations. By contrast, the new Swiss Chambers' International Arbitration Court (see: I.F), established as a follow-up organization of – amongst others – the Geneva Chamber of Commerce and Industry's international arbitration practice, has handled international arbitrations since 2004.

C. Geneva Convention on Execution of Foreign Arbitral Awards of 1927

The first catalyst for international commercial arbitration was the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. It set international standards for arbitration proceedings and provided for the execution of arbitral awards in member states. Switzerland was one of the first countries to ratify the Convention.

D. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958

The next and even more important step towards a world-wide arbitration system was the well-known New York Convention of 1958. It is the backbone of every international arbitration proceeding today and boosted arbitration in Switzerland and elsewhere in the world.

E. Post World War II Developments: Foreign Countries Discover Swiss Arbitration

Both before and substantially more after World War II, many foreign states and private parties discovered Switzerland as a convenient and reliable place for settling disputes by arbitration. The proceedings were private and confidential. Switzerland was centrally located and neutral. This political element was important as many of the early cases concerned business dealings between Eastern countries and the Western hemisphere.

1. Cantonal Arbitration Providers

In addition to the ICC, the two major arbitration providers at the time in Switzerland were the Zurich Chamber of Commerce Arbitration Court (ZCC) and the Arbitration Court of the Chamber of Commerce and Industry in Geneva (CCIG). In later years, the Basel Chamber of Commerce, the Ticino Chamber of Commerce and Industry, the Chamber of Commerce and Industry of Bern and other cantonal chambers of commerce began to provide their own arbitration services to the public.

In these days, every canton had its own arbitration law, its own arbitration rules and its own internal procedures. The result was a great diversity of small local arbitration providers who competed with each other rather than against the rest of the world.

2. International Concordat on Arbitration 1969

A first step towards unification of the Swiss arbitration systems was the Swiss Intercantonal Arbitration Convention (the so-called "Concordat") of March 27, 1969. It unified the arbitration laws of participating cantons, although the arbitration rules of the different cantonal institutions remained in place.

While many Swiss cantons joined the Concordat soon after it was adopted, the canton of Zurich joined much later, only in 1985. The Concordat was originally applicable to both domestic and international arbitrations, however in 1989 its scope of application was reduced to domestic arbitrations for which it is still applicable. Domestic arbitrations are arbitrations seated in Switzerland where all parties have their domicile or habitual residence in Switzerland at the date when the arbitration agreement is concluded.

3. *The 12th Chapter: Federal Act of International Private Law of 1989*

A next cornerstone towards unification of the Swiss arbitration system was the entry into force of the Federal Act of International Private Law of 1989 (FAIPL). This Federal Act codified the hitherto controlling conflict of law rules developed in Swiss Federal Supreme Court's decisions over many years. The lawmakers also took the chance to unify Switzerland's international arbitration regime by enacting the well-known 12th Chapter on arbitration.

This first unified Swiss arbitration law was guided by the principles of the UNCITRAL Model Law on Arbitration (see below II.B). However, it did not copy the UNCITRAL Model Law but established its own independent arbitration system in only 17 articles. These 17 articles in the 12th Chapter, until today, contain a proven and lean law for international arbitration cases. The 12th Chapter is applicable to all arbitrations seated in Switzerland 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.

The 1989 law revision introduced a dual system for arbitrations in Switzerland: The pre-existing cantonal arbitration laws (mostly Concordat) survived and still apply to arbitrations involving Swiss parties only. In international cases, on the other hand, the modern, unified and simple arbitration regime of the 12th Chapter is applicable.

The Swiss Federal Supreme court is a reliable guard over the independence of arbitration carried out in Switzerland. Article 190 of the 12th Chapter limits challenges against Swiss awards in international cases to only five grounds: The most fundamental guarantees for a fair proceeding. Moreover, all challenges must go directly to the Swiss Federal Supreme Court and experience shows that this highest Swiss judicial authority favors a pronounced policy of non-interference. Only about 5% of the actions for annulment to the Swiss Federal Supreme Court are partially or totally successful. In addition, if both arbitration parties are non-Swiss, they may exclude any challenge of the award by entering into a written exclusion agreement (Art. 192 FAIPL). In such a case no action for annulment is possible against a Swiss award, at least in Switzerland.

4. *International Arbitration – a Booming Business*

As a result of various factors, among them the success of the New York Convention, the globalization of the economy, the enactment of the 12th Chapter

and Switzerland's long-standing reputation as a neutral, stable and reliable place for resolving international disputes, arbitration flourished after World-War II. Today, estimates suggest that approximately 200 to 300 major arbitration cases are carried out in our country every year. Most of these cases are truly international in character.

However, in spite of great tradition and success, the growth rate of arbitration in Switzerland seems to have fallen behind the estimated growth rate of the world arbitration market. If some competitive arbitration institutions' case numbers published on the internet are correct, the growth of Swiss arbitrations has decreased by comparison. Of course, given the private nature of arbitration proceedings, reliable statistics are not available but the concern is well-founded.

I will come back to this topic but will first address another cornerstone of Swiss arbitration.

F. The Great Leap Forward: Swiss Rules of International Arbitration 2004

In 2004, the different arbitration rules which were heretofore used by the various cantonal Chambers of Commerce were unified. To administer the new Swiss Rules of International Arbitrations, the Swiss Chambers' International Arbitration Court[2] was established by (initially) six cantonal Chambers of Commerce. To understand the magnitude of this development, Swiss politics must be explained.

Switzerland is a federal republic consisting of 26 widely independent cantons. Berne is the seat of the federal authorities, while the country's economic centers are Geneva, Basel and Zürich. The country's formal name is the Swiss Confederation, underlining the federal structure.

When looking at Swiss federalism, one must understand that the Swiss cantons are not merely administrative bodies, executing decisions of the Federal Government on a local level. They have their own cantonal constitutions, their own cantonal governments and – to a great extent – their own legal systems. They have a cantonal judiciary and great fiscal sovereignty.

As a consequence of such structure, the true power in Switzerland, in many instances, is to be found at the cantonal level. Even in matters of national inter-

[2] www.swissarbitration.ch

est, the cantonal delegates – in the Federal parliament – vigorously defend their local positions. Most Swiss citizens are happy with this stabilizing and preserving element of Swiss democracy. The down-side of such a system is that changes may not be achieved easily. Cantonal authorities, including local Chambers of Commerce, jealously watch over any curtailment of their local powers. They tend to compete with each other rather than marching together and competing against the rest of the world.

Thus, when some seasoned arbitration practitioners in the early 2000s started to lobby at various cantonal Chambers of Commerce to focus on international arbitrations rather than local competition, the difficulties and the impact cannot be overestimated. Each canton had a relatively smoothly running arbitration system in place and a number of cantons were at first unwilling to give up their own domains.

Yet, little strokes fell big oaks. After a good bit of lobbying and the clever idea to draft the Swiss International Arbitration Rules along the lines of the well-known and widely accepted UNCITRAL Arbitration Rules, the various Chambers agreed to unify their local arbitration rules. Today, the Swiss Rules of International Arbitration are a most modern form of UNCITRAL Arbitration Rules, adapted to institutional arbitration and with a number of unique additions reflecting modern arbitration trends and practices.

The changes as compared to the UNCITRAL Arbitration Rules have deliberately been kept to a minimum. A comparative version of the Swiss Rules and the UNCITRAL Arbitration Rules, with italicized changes, may be found on the webpages of the Swiss Chambers under *www.swissarbitration.ch.*

The drafters of the Swiss Rules of International Arbitration should be congratulated for their use of the UNCITRAL Rules as their basis. This had the desired effect. Upon enactment of the new Swiss Rules in 2004, a whole body of case law and publications was immediately available to draw from. Thus, even though the Swiss Rules were brand new when they were adopted in 2004, they have been known to and used by the interested arbitration community for a long time.

The success of the Swiss Rules may be evidenced by the impact they have had on other arbitration rules in the past years. For instance, the Administered Arbitration Rules of the Hong Kong International Arbitration Center, which were enacted in September 2008, have drawn heavily from the Swiss Rules. For instance, Section V of the Swiss Rules dealing with Expedited Procedures was

directly copied into the Hong Kong Rules as an almost verbatim clone. The grandfathering went so far that members of the Swiss arbitration community and of ASA, the Swiss Arbitration Association, have been thanked for their contributions to the HKIAC in a public acknowledgement attached to the Hong Kong Rules.

It is also expected that the UNCITRAL Rules, which are presently revised by the United Nations, will borrow from the Swiss Rules. Another article will deal with this matter in more details, so I will refrain from making further comments.

G. A Distinct Success Story (With Ongoing Needs)

This leads to the conclusion that the enactment of the Swiss Rules five years ago has been a great success.

The Rules combine a wealth of experiences from the UNCITRAL Rules (established in 1976) with the great administration skills acquired by the Swiss Chambers over a period of time of almost 100 years. Thus, everyone may be happy and proud of the achievements which we are celebrating today.

Indeed, I would like to thank and congratulate the many individuals and representatives of the Swiss arbitration community and of the participating Chambers who have contributed to this great success. The Swiss Rules are alive, they have lived up to their expectations, and they are a model for others.

What more can we wish for at this stage?

Well, on this very special day, some additional thoughts shall be considered. While the Swiss Rules of International Arbitration have marked a big step forward, they are not enough to guarantee the continued success of Switzerland as a place for arbitration. More needs to be done to keep up with the international development. The challenge on all of us, particularly on every arbitration practitioner and the Swiss Chambers, is to review today's international arbitration business and consider ways in which our arbitration system can be improved.

II. THE GLOBAL ARBITRATION BUSINESS

A. A Niche Business is Globalized

I am using the term "arbitration business" on purpose. Some prominent, mostly elderly arbitration practitioners take the view that arbitration is not a business but an "art". The commercial aspect is said to be negligible.

While this may be true for some arbitrators, it is certainly not true for the many commercial arbitration institutions that exist today, nor is it true for many law firms that have been or are entering the arbitration market.

Some 50 years ago, only a handful of highly specialized lawyers in each country, most of them with high academic credentials, were knowledgeable of this niche business at the time. Today, however, arbitration is no longer a niche activity. Small and large law firms throughout the world have become specialized in arbitration. Universities teach this specialty very prominently all over the world. As we all know, almost every university with an up-to-date law faculty today sends a team of students to the Willem C. Vis moot court competitions in Vienna and Hong Kong, year after year.

The reason for all this interest is the fact that arbitration is a booming area of law, expected to grow even further with the progressing globalization of the world economy.

The "art of arbitration", if it ever existed, has become a "down-to-earth business" today. An arbitrator must cope with very different expectations of the users, and very often with a complex set of facts. An element of art cannot be denied, but it is normally not the academic act of writing the award which is the greatest challenge in an arbitration but the management of the process day by day.

An arbitrator has to reconcile the many different expectations upon him to give all participants a fair chance to present their case. And he/she shall not get lost in the intricacies of the proceedings. This is hard and time consuming work. Settling the case or writing a conclusive award is "the icing on the pie", often equally challenging and time-consuming as the case management, but often less controversial.

Arbitration institutions and arbitrators today provide a service. And, like in any other business, this service is measured against the service provided by

peers. Thus, I will have a short look at some of the Swiss Chambers' more successful arbitration competitors (see below C). But before doing so, I would like to mention another important development in arbitration that occurred in 1985.

B. UNCITRAL Model Law on International Commercial Arbitration of 1985

On a world-wide level, one element which helped to turn arbitration into a global business (besides the NY Convention) is certainly the UNCITRAL Model Law on International Commercial Arbitration, published by the United Nations in 1985 (with amendments adopted in 2006). This Model Law was successfully designed to assist states in reforming and modernizing their laws on arbitral procedures so as to take into account the particular features and experiences of international commercial arbitration. The UNCITRAL Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention, up to the recognition and enforcement of arbitral awards. The Model Law reflects worldwide consensus on key aspects of international arbitration practice, having been accepted by states of all regions and different legal and economic cultures.

The UNCITRAL Model Law, since its publication by the UN, has been widely accepted all over the world. It has been transformed into national law in many jurisdictions or has at least influenced the national arbitration laws of countries which have adopted their own solutions, such as in Switzerland (see above I.E.3). Due to the UNCITRAL Model Law and its effects, the arbitration laws of the majority of countries that have such a law today are very similar. This, of course, favors arbitration as a preferred dispute resolution method. It has made proceedings more predictable and the risk of negative surprises has become less likely.

C. Successful Arbitration Providers Are Mushrooming

As a result of the phenomenal growth and acceptation of arbitration on a world-wide scale, new arbitration providers have appeared on the scene. Many of them offer full-scale arbitration services with: (1) tailor-made arbitration rules, (2) convenient arbitration facilities (an arbitration center), (3) conferences, work-shops and other educational offerings, and they are (4) managed and marketed by (5) professional full-time staff.

Successful examples of this type of relatively new "full service" providers are, for instance:

- The **London Court of International Arbitration (LCIA)** which emerged in 1981 from a series of local London predecessor institutions (the first one was founded in 1883). When the LCIA was repositioned and founded as a global arbitration provider in 1981, it immediately teamed up with the International Bar Association (IBA), also headquartered in London. The two organizations since then organize at least two annual back-to-back conferences all over the world. A professional registrar with pronounced management and marketing skills was hired who forthwith promoted the services of the LCIA in a very professional manner. The LCIA administered more than 213 new cases in 2008 (Swiss Chambers: 68 in the same year). The LCIA is very visible in the arbitration community due to its conference activity, its marketing and the joint venture with the IBA.
- The **Hong Kong International Arbitration Center (HKIAC)** was established in 1985 with the great support of the Hong Kong business community and the Hong Kong government. From 9 cases in its initial year, the annual case load rose dramatically to 54 cases in 1990, 184 cases in 1995, 298 cases in 2000, and 448 in 2007. Although special factors fueled such dramatic growth – among them the importance of the China business – one very important factor is the efficient Arbitration Center run by the HKIAC. In addition, the professionalism of the Center's management and marketing skills is remarkable. Today, the HKIAC is totally self-contained. By renting out its convenient arbitration facilities in the middle of the town to any potential users (not only to users of the HKIAC), it earns enough money to cover all wages and other staff expenses and to make a healthy profit on top of it.
- The **Singapore International Arbitration Center (SIAC**) was established in 1991 to meet the increasing demands of the international business community for a neutral, efficient and reliable dispute resolution center in Asia. The SIAC maintains a multinational and multi-cultural professional staff which managed in 2000, nine years after its establishment, no less than 58 cases (Swiss Chambers: 68 in the same year). Since then, the case load has almost doubled to 99 cases in 2008. The SIAC, through its staff, organizes conferences, workshops and other marketing events regularly in the region and internationally. It is also very visible in the arbitration world. A major resource for Singapore arbitrations are Indian companies which use the SIAC regularly for international business dealings.

D. A Victim of Its Success: The Changing Arbitration Culture

Approximately 30 to 40 years ago arbitration was conceived to be a fast and efficient way to resolve business disputes. In Switzerland this was often true because, at that time, an estimated 3 out of 4 cases were settled at relatively early stages of the proceedings, often with the substantive involvement of the arbitrators. Today, in my own experience, far fewer cases are settled and very often parties do not wish the arbitrators to get actively involved in settlement talks. The result of this: more elaborate and more costly proceedings.

As mentioned, arbitration is (still) the preferred method of dispute resolution in the international business world. However, complaints are becoming louder and louder that the costs and time needs associated with arbitration have reached a magnitude which many international companies are no longer willing to tolerate.

What has happened that such a situation occurred?

1. The Amalgamating Worlds of Litigation

While many individual factors may have contributed to this development, one major factor certainly is the amalgamation of civil and common law principles in arbitration although the wording of the applicable arbitration rules themselves has rarely changed. The following is what has happened:

- 30 to 40 years ago – at least in Switzerland and in other continental European countries – arbitrations were basically run by the arbitrators alone. The arbitrators were setting the time table, they fixed the number of submissions of each side, they interrogated the witnesses at the hearing, they decided on whether or not to admit an expert, and if an expert was needed, the arbitrators would normally appoint and instruct him (court expert). Depositions, document productions, written witness statements and similar discovery and hearing aids were unknown in arbitration. In short, the arbitration procedure, in the old days, followed a distinct civil law pattern and the results were not too bad.
- Over the past 25 years, concurrently with the appearance of large American and English law firms in the Swiss and international arbitration arena, elements of common law proceedings have quietly but distinctively found their way into arbitration.
- Today, in major international arbitrations, it is not uncommon that counsel of the two parties agree on pre-trial discovery (depositions, written inter-

rogatories and the like), on production of documents, on witness statements, on party experts, on examination and cross-examination of witnesses through counsel and other typical common law litigation features.

– As a result of this changing arbitration world, the IBA promulgated in 1999 its well-known IBA Rules on the Taking of Evidence in International Commercial Arbitration. Since then, the usefulness of the amalgamation of the civil and common law features in arbitration has rarely been questioned.
– At least if parties from civil and common law jurisdictions are involved, the principles of the IBA Rules may have their justification. But the impact of the IBA Rules goes beyond what I would like to call a "dual culture" arbitration (with civil and common law parties involved). I have seen arbitration cases exclusively between *civil law* parties where the two counsels in question proposed and agreed to pre-trial discovery (taking depositions to prepare their cases) and desired to conduct the hearing by examining and cross-examining the witnesses themselves. The civil law arbitrators in one of these cases went along with such an "Americanized" proceeding although the dispute was between a Swiss and a German company. In my view, this is strange.
– While I am not at all against paying due regard to cultural differences, including differences in litigation cultures, some developments such as the one just described go too far. Unfortunately, it happens more and more often that – deliberately or unconsciously – "civil law" and "common law" methods are combined by the parties in such a manner that the resulting proceeding is tremendously blown up.

2. The "worst-of-two-worlds" Phenomenon

As an example, I would like to mention the following "worst of two worlds" scenario that has not really happened (yet) but elements of which I have taken from real cases:

– After comprehensive initial briefs (an element of civil law), the parties are allowed to engage in pre-trial discovery (common law style).
– Then, written interrogatories are exchanged (common law). One party refuses to answer certain questions on grounds of privilege and lack of relevancy. The arbitrators must now decide the discovery dispute (common law).
– Next, counsels take depositions all over the world without the arbitrators being present, in order to find relevant facts (common law). Discovery disputes arise as to the admissibility of certain witnesses which the arbitrators must decide (common law).

- Extensive document production requests are filed (an element of common law). Because not all documents are produced voluntarily, the arbitral tribunal must decide several motions to compel discovery (common law).
- The parties claim privileges and confidentiality as to some of the documents requested. The arbitrators must thus examine and decide by way of a protective order (common law) to what extent documents are to be handed over.
- Following the production of documents, the initial submissions of the parties are updated by another round of comprehensive briefs, including the new documents obtained (civil law). Opposing counsels request an opportunity to address new arguments in another brief (civil law).
- The parties file witness statements (common law), including party expert reports (common law).
- A second round of rebuttal witness statements, including rebuttal expert reports, becomes necessary (common law).
- The hearing is conducted in the Anglo-Saxon way which means that counsels examine and cross-examine the witnesses and party experts (common law).
- But, the (civil law) arbitrators also engage in an elaborate process of witness interrogations in order to clarify what they consider to be relevant (civil law).
- At the hearing, the experts take opposite views on essential points. This confuses the arbitral tribunal enough to appoint its own court expert (civil law).
- To find and instruct the court expert is a tedious task, creating substantial additional costs (civil law).
- The court expert prepares his report which is submitted to the parties prior to the court expert hearing (civil law).
- The parties challenge the court expert's conclusions and one party requests the appointment of a senior court expert to check on the first court expert's conclusions (civil law).
- After denial of this request, the arbitral tribunal invites both parties to submit comprehensive post-hearing briefs summarizing their position on the evidence (civil law).
- In accordance with its local custom, the common law party insists on a final oral hearing to present its conclusions on the case (common law).
- Then, the arbitrators have to write an award, one of them dissenting.
- Preparation of the final award, including the dissent, takes another half-year.
- The proceeding – without any bifurcation – in such a way lasts 2 to 3 years whereby the everyone involved is kept very busy.

It is self-evident that such a procedure dissatisfies everyone (except perhaps the lawyers who are paid for every additional submission). Such proceedings turn parties away from arbitration.

III. TODAY'S ARBITRATION MARKET AND NEEDS

A. Size of the Market

The size of the arbitration market is of course not known, but independent research such as the PWC Queen Mary University Study on Corporate Attitudes and Practices[3] indicates that the world-wide arbitration market is huge. 86% of corporate counsel participating in the study said they stand behind arbitration and it seems that the majority of cases are successfully resolved. Yet, as outlined above, important criticism has been raised in recent times. Arbitration is deemed to resemble more and more large scale litigation. Other forms of alternative dispute resolution are promoted to be cheaper and more efficient, such as, for instance, mediation, negotiated settlements and the like. Arbitration institutions and arbitrators should be aware that users have a choice. If arbitration no longer constitutes an efficient, cost effective dispute resolution tool, users will turn away from it and will use other mechanisms to settle their disputes.

A new report from ICC's Commission on Arbitration suggests ways of improving efficiency in arbitration through time and cost savings. Entitled Techniques for Controlling Time and Costs in Arbitration, the report draws the attention of arbitrators, parties and their counsel to choices open to them at all stages of the proceedings, which are likely to lead to greater efficiency.

The many suggestions made in the report include, for instance, the utility and timing of a case-management conference allowing the arbitral tribunal and the parties to identify the issues raised by the case and the procedural steps necessary to resolve them; the importance of avoiding repetition when presenting arguments; and the need to focus and minimize witness statements. In addition to providing guidance on the arbitration procedure itself, the report also offers useful tips on drafting arbitration agreements and initiating the proceedings[4].

The market is strong but it needs to be preserved.

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[3] Downloadable at: http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html

[4] Downloadable at: http://www.iccwbo.org/court/arbitration/id16320/index.html

B. More "Swissness" Needed

The Swiss are known for their efficiency and pragmatism. These are qualities that should be preserved to bring arbitrations to a successful end. Today's arbitration proceedings have become too elaborate and too costly.

"Back to the roots" is what should be aspired.

Of course, it is permissible, even desirable, to shape an arbitration between a civil and a common law party in a way that the cultural expectations of both sides are met. This does not mean, however, that the arbitrators should adopt the "worst-of-two-worlds" scenario outlined above. It does not make sense, for instance, to order two rounds of comprehensive briefs and, in addition, pre-trial discovery. If pre-trial discovery is a desired method, then the initial brief should be short, much in the same way as in US litigation. Only one comprehensive pre-hearing brief should then be allowed upon conclusion of the discovery process.

A reasonable compromise is contained in the IBA Rules of Evidence even though these Rules tend to inflate pure civil law proceedings considerably. In my opinion, if there is no nexus to a common law party, arbitration proceedings should be carried out in the "old way" meaning that no pre-trial discovery elements should be used, very limited document edition should be ordered and the hearing should be structured and conducted by the arbitrators rather than by counsel.

If counsel conduct a hearing the American way, even when both parties are continental European or from other civil law jurisdictions, I doubt that the result is any better than arbitration proceedings organized the "old way".

If the parties come from different cultural backgrounds, it may be appropriate to adopt some Anglo-Saxon elements in the procedure. However, here too, arbitrators should avoid falling into the "worst-of-two-worlds" trap. Every procedure should be organized diligently early in the proceeding and the best way to achieve this is by thoroughly discussing the procedure at a terms of reference or constitutional hearing at a very early stage. An elaborate motion practice should be avoided and if counsel engage in such practice, they should be contained by the arbitral tribunal.

C. How to Grow with the Market

A view to successful arbitration centers shows that a perfect infrastructure combined with strong marketing efforts is the key for success. In this respect, the arbitration market acts like any other market. It is not sufficient to have a long and successful history of arbitration. To stay ahead of the crowd requires the best arbitration platform available on the market at any given time.

In this respect, the 5 years' celebration of the Swiss Rules of International Arbitration marks the right direction. But the visibility of the Swiss Chambers and of the Swiss Rules is too low. This is no criticism to the tremendous and impressive work done by many representatives of the Swiss Chambers, in particular by its President, Rainer Füeg, the Arbitration Committee, chaired by Franz Kellerhals, and other local representatives of the seven participating Chambers. They all have done and still do a wonderful job, resolving the everyday problems of the Swiss Chambers' Arbitration and keeping the engine running smoothly. The Swiss Chambers have printed the rules in a dozen languages with other ones to follow. They publish informative marketing brochures and organize interesting congresses such as the one of today.

However, almost all representatives of the Swiss Chambers engaged in arbitration do their arbitration work on a part-time basis. Switzerland does not have an up-to-date arbitration center and no professional marketing organization exists which is promoting the Chambers' services on a daily and worldwide basis.

This should be changed in the years to come.

IV. OUTLOOK

A. There is a Trend Towards Full Service Providers

As mentioned several times in this presentation, there is a definite trend in the market to "full service providers", i.e. arbitration providers offering not only rules and logistical services to arbitration parties, but also a convenient infrastructure, education and marketing services.

In Switzerland, we have all of this but not under one roof. The Swiss Chambers' rules are up-to-date. The logistical services of the Chambers function well, although our Federal structure does not always facilitate this. We have an excel-

lent hotel infrastructure in Switzerland which is used by the arbitration community extensively. We have educational institutions teaching arbitration on a high level (universities, Swiss Arbitration Academy, ASA, Swiss Chambers). We even have some marketing of Swiss arbitration services through ASA and the Swiss Chambers, although not on a full-time professional level.

We fail to have: A fully professional organization under one roof consisting of (1) an arbitration center with (2) a full-time professional marketing staff and (3) regular educational offerings.

B. Yes We Can

It is always easy to find a way to say no if something is needed to be done. We have many arbitration cases in Switzerland compared to the size of the country. We are constantly ranking no. 1 in ICC arbitrations outside of France. Why should we go through the difficult task of establishing a full service arbitration center in Switzerland if the cases come in without it?

Federalism is another concern. Zurich and Geneva are by far the most important arbitration centers in Switzerland. If a full service arbitration center was to be established, should it be established in Zurich, in Geneva, in both cities, or in between, e.g. Bern? Who should pay for the substantial investments that an arbitration center would trigger?

These and other questions are good excuses not to tackle the problem. Because the Swiss Chambers are an organization composed of members from different cantons, the needs and views within this body are likely to be diverse. Besides that, the individual Chambers of Commerce which are part of the Swiss Chambers have many different tasks unrelated to arbitration. So, the individual managements of the various members of the Swiss Chambers do not have their main focus on arbitration. These are all facts that may not be changed.

Nevertheless, what needs to be done needs to be done. Instead of lamenting how difficult the task is to establish a full service arbitration center in Switzerland, or even two centers (one in Zurich and one in Geneva), we should remember President Obama's famous words "yes, we can".

I suggest that the Swiss Chambers team together with ASA, with arbitration practitioners and other interested organizations from all over Switzerland. If all interested circles are mobilized (Swiss Chambers, ASA, ASA members, other arbitration practitioners, business promotion organizations, local hotel associa-

tions, tourist organizations, city promotion services, private investors, etc.) the dream may become true to set up one or (even better) two full service arbitration centers in Switzerland. Perhaps, we may celebrate the 10th year anniversary in those premises.