

Volume 29, No. 4, 2011

ISSN 1010-9153

ASA Bulletin



Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central
and South America by *Aspen*
Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries
by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1010-9153

© 2011, Association Suisse de l'Arbitrage
(in co-operation with Kluwer Law International, The Netherlands)

This journal should be cited as ASA Bull. 4/2011

The ASA Bulletin is published four times per year.
Subscription prices for 2012 [Volume 30, Numbers 1 through 4] including postage
and handling: Print subscription prices: EUR 263/USD 351/GBP 193
Online subscription prices: EUR 244/USD 325/GBP 179
(covers two concurrent users)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.

For further information please contact our sales department
at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For advertisement rates please contact our marketing department
at +31 (0) 172 641525 (Marina Dordic) or at marketing@kluwerlaw.com.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval
system, or transmitted in any form or by any means, mechanical, photocopying,
recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner.
Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th
floor, New York, NY 10011, United States of America.
E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com.

Printed on acid-free paper

**Association Suisse de l'Arbitrage
Schweizerische Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association**

Comité de l'ASA

ASA Committee

Président

Chairman

Michael E. Schneider, Avocat (Genève)

Vice-Présidents

Vice Presidents

Elliott Geisinger, Avocat (Genève), Daniel Wehrli, Avocat (Zurich)

ASA Secrétariat

ASA Secretariat

Secrétaire général

General Secretary

Dr. Rainer Füeg (Bâle)

Membres

Members

Bernhard Berger, Avocat (Bern), Rocco Bonzanigo, Avocat (Lugano),
François Dessemontet, Professeur (Lausanne), Dieter Gränicher,
Avocat (Bâle), Claudia Kälin-Nauer, Avocate (Zurich), Bernhard F. Meyer,
Avocat (Zurich), Paolo Michele Patocchi, Avocat (Genève), Wolfgang Peter,
Avocat (Genève), Daniel Petitpierre (Bâle), Thomas Pletscher (Zurich),
Klaus Michael Sachs, Avocat (Munich), Pierre Tercier, Professeur (Fribourg),
Pierre-Yves Tschanz, Avocat (Genève)

Présidents d'honneur

Honorary Presidents

Pierre Lalive, Professeur et Avocat (Genève), Marc Blessing, Avocat (Zurich),
Pierre A. Karrer, Avocat (Zurich), Gabrielle Kaufmann-Kohler,
Professeur et Avocate (Genève), Markus Wirth, Avocat (Zurich)

Vice-Présidents d'honneur

Honorary Vice-Presidents

Claude Reymond †, Professeur et Avocat (Lausanne),
Jean-François Poudret, Professeur (Lausanne),
François Knoepfler, Professeur et Avocat (Neuchâtel)

www.arbitration-ch.org

REDACTION DU BULLETIN

Fondateur du Bulletin ASA

Founder of the ASA Bulletin

Prof. Pierre Lalive

Conseil de direction

Advisory Board

Prof. Pierre Lalive

Prof. Piero Bernardini – Me Matthieu de Boissésou – Prof. Franz Kellerhals –
Prof. François Knoepfler – Prof. François Perret – Dr. Philippe Schweizer –
Prof. Pierre Tercier – V.V. Veeder QC. – Dr. Werner Wenger

Comité de rédaction

Editorial Board

Rédacteur/Editor

Matthias Scherer

Domitille Baizeau (Geneva) – Dr. Philipp Habegger (Zurich)
Dr. Cesare Jermini (Lugano) – Dr. Bernhard Berger (Bern)

Secrétaire de rédaction

Editorial Secretary

Angelika Kolb-Fichtler

Correspondance

Merci d'adresser toute correspondance concernant la rédaction du Bulletin, non pas au secrétariat de l'ASA à Bâle, mais à l'adresse suivante:

Correspondence

Please send all correspondence regarding the Bulletin to the following address rather than to the Secretariat of ASA in Basel:

Bulletin ASA

Prof. Pierre Lalive, Me Matthias Scherer
Rue de la Mairie 35, CP 6569, CH-1211 Genève 6
Tel: +41 22 319 87 00 – Fax: +41 22 319 87 60
Emails: plalive@lalive.ch & mscherer@lalive.ch
(For address changes please contact
info@arbitration-ch.org/tel +41 61 270 6015)

Dealing With “Challenged Documents”

SIMON GABRIEL*

I. The Problem

A frequent problem in international arbitration is the handling of documents of which the authenticity or the content is in dispute (so-called “challenged documents”¹).² Different arbitral tribunals handle the issue in different ways. The following examples show the wide range of approaches to the subject:³

- In a Swiss Rules arbitration in Zurich, a crucial agreement was challenged to have been counterfeited. When the party relying on the document was unable to produce the original, the arbitral tribunal completely disregarded the (photocopied) document which finally decided the case.
- In a DIS arbitration in Berlin, crucial confirmation letters were challenged to have been counterfeited. The arbitral tribunal ordered inspection measures to confirm or disprove the authenticity of the document.
- In an ICC arbitration in Geneva, an agreement was alleged to have been backdated and no original was produced by the other party. The arbitral tribunal did not further pursue the challenge, stating (*inter alia*) that there was no generally accepted rule in international arbitration pursuant to which original documents had to be produced in response to a challenge.

The above three examples illustrate that there is no generally accepted approach as to how challenged documents should be dealt with in international arbitration. Against this background the present contribution provides general recommendations on how arbitral tribunals may wish to address the issue.⁴

* Dr. Simon Gabriel, attorney at law, CMS von Erlach Henrici Ltd., Zurich.

¹ Also referred to as “questioned documents”; see KOPPENHAVER, Attorneys Guide to Document Examination, Westport 2002 for the following definition: “A questioned document is a document whose origin or content is in dispute.” In this article referred to as “challenged documents” for documents of which the authenticity or content is challenged in arbitral proceedings.

² The author of the present contribution acted and currently acts as counsel for parties challenging certain documents and also for parties relying on documents challenged by the counterparty.

³ For reasons of confidentiality the author is not in a position to elaborate further on these cases.

⁴ Potential implications of criminal law are not considered in the present contribution. For further information with respect to fraud in court proceedings, see Published Decision of the Swiss Federal

II. Legal Framework

A. Minimal Standards pursuant to Swiss *lex arbitri*

1. Right to Be Heard in a Contradictory Procedure

It is assumed that the relevant arbitration agreements provide for a seat in Switzerland and thus Swiss *lex arbitri* applies.⁵ Swiss *lex arbitri* in international arbitrations is contained in art. 176 et seqq. of the Swiss Private International Law Act (“PILA”). The issue of challenged documents forms part of the larger subject of the conduct of arbitral proceedings. In this respect art. 182 PILA states:

*“Irrespective of the rules chosen, the arbitral tribunal in all cases has to safeguard equal treatment of the parties as well as their right to be heard in a contradictory⁶ procedure”.*⁷

Equal treatment of the parties and the right to be heard are firm principles in Swiss international arbitration and any infringement may lead to annulment of the arbitral award.⁸ Furthermore, the said principles are widely accepted in international arbitration and implemented in most arbitration laws by virtue of the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**NY Convention**”).⁹ In the context of the present article, the right to be heard is of particular relevance.

Under Swiss *lex arbitri* the Swiss Federal Tribunal¹⁰ has found with respect to the right to be heard:

“It [the right to be heard] is violated if, by inadvertence or misunderstanding, the arbitral tribunal fails to consider allegations,

Tribunal (“**DFT**”) 122 IV 197. With respect to a revision of an arbitral award due to fraudulent behaviour, see decision of the Swiss Federal Tribunal BGer 4A_596/2008 (summary and comment by MRAZ, *ius.focus* 2009/02, section international private law, LugÜ, arbitration).

⁵ See BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd ed., London 2010, sec. 689.

⁶ In German “*kontradiktorisch*” which is sometimes also translated to “adversarial”.

⁷ See art. 182 para. 3 PILA (informal translation, emphasis added).

⁸ See art. 190 para. 2 lit. d PILA; BERTI/SCHNYDER in: Honsell et al. (ed.), *Basle Commentary on International Private Law*, 2nd ed., Basle 2007, sec. 59 et seqq. to Art. 190 PILA (with further reference).

⁹ See art. 18 Model Law; Art. V lit. b NY Convention which allows refusal of an arbitral award if a party was “unable to present its case”.

¹⁰ The highest court in Switzerland, in German: “*Bundesgericht*”.

arguments, evidence and offers of proof presented by a party which are important for the decision to be made [...]"¹¹

The principle of contradictory procedure, which is also stipulated in art. 182 PILA, has been defined by the Swiss Federal Tribunal as follows:

"By contradictory procedure every party shall be enabled to review, comment and attempt to disprove the submissions of the counterparty by way of proper submissions and evidence".¹²

Hence, from a mandatory Swiss *lex arbitri* perspective, the limits for the conduct of proceedings on the taking of evidence are: (i) equal treatment of the parties, (ii) the right to be heard and (iii) the form of the contradictory procedure.¹³

2. Onus of Substantiation and Burden of Proof

Closely connected with the right to be heard is the parties' onus of substantiation. The onus of substantiation requires each party to submit facts in sufficient detail to allow the application of substantive law.¹⁴ In particular, the Swiss Federal Tribunal has held:

*"As the applicant (respondent in the arbitral proceedings) in spite of repeated invitation failed to meet its procedural onus of substantiation, the arbitral tribunal did not infringe the right to be heard when it relied upon the calculation of damages pursuant to the submissions of the claimant in the arbitral proceedings."*¹⁵

The findings of the Swiss Federal Tribunal imply *e contrario* that if (i) the respondent had met the onus of substantiation and (ii) the arbitral tribunal had only relied upon the submissions of claimant, it might have infringed respondent's right to be heard. This could in turn have led to the annulment of the award.¹⁶

Consequently, an arbitral tribunal has to apply the substantive law and render a decision on the authenticity of relevant documents, if (i) a party alleges a duly substantiated set of facts and (ii) the counterparty disputes

¹¹ See DFT 133 III 235, sec. 5.2 (translation by BERGER/KELLERHALS, (FN 5), sec. 1586a).

¹² See DFT 116 II 639, sec. 4.c (informal translation); also SCHNEIDER in: Honsell et al. (ed.), *Basle Commentary on International Private Law*, 2nd ed., Basle 2007, sec. 59 et seqq. to Art. 182 PILA (with further reference).

¹³ See SCHNEIDER, (FN 12), sec. 2 to Art. 184 PILA.

¹⁴ See SCHNEIDER, (FN 12), sec. 9 to Art. 184 PILA (with further reference). It is the author's view that reference to evidence on file in sufficient detail also forms part of the parties' onus of substantiation.

¹⁵ See decision of the Swiss Federal Tribunal dated 17 August 1994 in: *ASA Bulletin* 2/1995, p. 198 (informal translation, emphasis in the original).

¹⁶ See art. 190 para. 2 lit. d PILA.

these facts in a duly substantiated manner. If neither party establishes proof for its allegations, the burden of proof rule applies.¹⁷

B. Relevant Provisions in Common Arbitration Rules

The most common institutional arbitration rules in Continental Europe do not specifically address the issue of challenged documents. Usually, the principles of the right to be heard¹⁸ and equal treatment¹⁹ are provided for as well as the arbitral tribunal's general discretion to adequately take the evidence within these limits²⁰. Some arbitration rules expressly stipulate a provision regarding burden of proof.²¹

C. Relevant Provisions in the IBA Rules

General standards such as the IBA Rules for the Taking of Evidence in International Arbitration (2010 edition; "**IBA Rules**") are regularly applied as guidelines by way of reference in the "terms of reference" or in the procedural rules ordered by an arbitral tribunal.

The IBA Rules provide that "*copies of documents shall conform to the originals and, at the request of the arbitral tribunal, any original shall be presented for inspection*".²²

Pursuant to the Commentary on art. 3.12 of the IBA Rules, "*the arbitral tribunal may request the production of an original document at any time, so if a party believes that a copy does not fully conform to the original document, it*

¹⁷ The burden of proof rule forms part of Swiss substantive law and is governed by art. 8 Swiss Civil Code ("**CC**"; see SCHNEIDER, (FN 12), sec. 11 to Art. 184 PILA). Other legal systems consider the burden of proof rule or certain aspects thereof as part of procedural law. The general rule, pursuant to which the party relying on a fact must prove the existence thereof is, however, not only valid under Swiss law, but rather generally accepted in international arbitration (see art. 27 para. 1 UNCITRAL Arbitration Rules (2010); BLACKABY/PARTASIDES, Redfern and Hunter on International Arbitration, 5th ed, New York 2009, sec. 6-92; REDFERN/HUNTER et al., Law and Practice of International Commercial Arbitration, 4th ed., London 2004, sec. 6-67; SCHNEIDER, (FN 12), sec. 12 to Art. 184 PILA). Some authors even consider the burden of proof rule to be part of international public policy (see SCHNEIDER, (FN 12), sec. 12 to Art. 184 PILA with an overview over the different opinions). If this view prevailed an infringement of the burden of proof rule could even lead to the potential annulment of an award (see art. 190 para. 2 lit. e PILA).

¹⁸ See art. 15.1 Swiss Rules; art. 15.2 ICC Rules; art. 19.2 SCC Rules; § 26.1 DIS Rules; art. 17.1 UNCITRAL Model Arbitration Rules (2010; "**Model Rules**").

¹⁹ See art. 15.1 Swiss Rules; art. 15.2 and 20.1 ICC Rules; art. 19.2 SCC Rules; § 26.1 DIS Rules; art. 17.1 Model Rules.

²⁰ See art. 15.1 Swiss Rules; art. 15.1 ICC Rules; art. 19.1 and 26.1 SCC Rules; § 24.1 und 27.1 DIS Rules; art. 17.1 Model Rules.

²¹ See art. 24.1 Swiss Rules; art. 27.1 Model Rules.

²² Art. 3.12.a IBA Rules.

may ask the arbitral tribunal to require the production of that original”.²³ This includes cases where a party believes that no authentic document exists at all as this would qualify as comprehensive non-conformity.

Hence, under the IBA Rules an arbitral tribunal has the right but not a duty to request production of an original for inspection by the tribunal.²⁴

D. Relevant Issues Referred to in Arbitration Cases and Legal Doctrine

Available decisions of arbitration cases and relevant legal doctrine in international arbitration do not establish a comprehensive concept, rule or practice as to how an arbitral tribunal should in general deal with situations of challenged documents.²⁵ Nevertheless, reference to particular issues is helpful in expanding the present analysis:

Competence: It is maintained by leading commentators and confirmed in arbitral awards that arbitral tribunals are competent to decide upon authenticity issues.²⁶ Arbitral tribunals are usually not under an obligation to refer the parties to penal courts.²⁷

Burden of proof and substantiation: In line with the considerations on Swiss *lex arbitri*²⁸, leading commentators in international arbitration confirm that the authenticity of documents must be proven by the party relying on the documents²⁹ (e.g. by submission of the original), if there are sufficient reasons to doubt such authenticity.³⁰

²³ See Commentary on IBA Rules of Evidence (2010 edition), p. 9 (http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx; visited: 26 May 2011)

²⁴ See also VON SEGESSER, The IBA Rules for the Taking of Evidence in International Arbitration, ASA Bulletin 4/2010, p. 746 et seq.

²⁵ See HANOTIAU, Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings, in: van den Berg (ed.), International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series, London 2002, pp. 261 – 287, p. 261 stating that very little has been written on the topic.

²⁶ See Preliminary Award in ICC arbitration dated 9 October 2008, ASA Bulletin 4/2011, sec. 87 et seqq.; ICSID Award in Case No. ARB(AF)/07/2 dated 13 August 2009, sec. 149; BERGER/KELLERHALS, (FN 5), sec. 1218; BORN, International Commercial Arbitration, New York 2009, p. 1828; POUURET/BESSON, Comparative Law of International Arbitration, 2nd ed., London 2007, sec. 655 (with further reference); SCHNEIDER, (FN 12), sec. 16 to Art. 184 PILA (with reference to art. 1467 of the French Nouveau Code de Procedure Civil).

²⁷ See BERGER/KELLERHALS, (FN 5), sec. 1218; POUURET/BESSON, Comparative Law of International Arbitration, 2nd ed., London 2007, sec. 655 (with further reference), where Belgium is noted as an exception.

²⁸ See herein above, sec. II.A.2 and 3.

²⁹ See LEBEDEV in: SANDERS (ed.) Comparative Arbitration Practice and Public Policy in Arbitration The Hague 1987, p. 80; PIETROWSKI, Evidence in International Arbitration, 22 Arb Intl 3, 2006, p. 379 and 393.

³⁰ See BLACKABY/PARTASIDES, (FN 17), sec. 6.99.

Means of Evidence: Irrespective of a reference to the IBA Rules in a procedural order, it is maintained by legal scholars that arbitral tribunals are entitled to request presentation of original documents for inspection by the arbitral tribunal.³¹

Standard of proof for fraud: The relevant standard of proof with respect to alleged fraud (e.g. forgery of an original document) was addressed by a sole arbitrator in Geneva in a preliminary award in ICC arbitration dated 9 October 2008. The sole arbitrator found that a high standard of proof must be applied for allegations of forgery.³²

Legal Consequence: Some authors argue that in cases of unproven authenticity the challenged document should not be relied upon.³³

E. Preliminary Conclusion

Considering the requirements of (i) the right to be heard, (ii) the onus of substantiation, (iii) contradictory proceedings under Swiss *lex arbitri* and the referred literature and arbitration cases, a *two-step-approach* can be recommended in cases of challenged documents. The following factual background is hereby assumed: “Claimant” pleads a set of facts and submits the photocopy of a document as evidence. “Respondent” does not only dispute the pleaded facts, but furthermore in a substantiated way challenges the fact that an original document exists which (i) is similar to the submitted photocopy and/or (ii) originates from the alleged signatories.

Step one: The arbitral tribunal determines whether (i) the challenged document is relevant for the outcome of the case and (ii) the challenge of the document is sufficiently substantiated. If both requirements are met, the arbitral tribunal must proceed to step two (i.e. take evidence on the authenticity of the disputed document and make a decision).³⁴ If either of said requirements is not met, the arbitral tribunal does not have to (but still may) investigate further into the authenticity issue.

³¹ See BERGER/KELLERHALS, (FN 5), sec. 1218; BLACKABY/PARTASIDES, (FN 17), sec. 6.134; SCHNEIDER, (FN 12), sec. 16 to Art. 184 PILA; PIETROWSKI, (FN 29), sec. 394.

³² “There are no international rules on the burden of proof, but it is commonly accepted by ICC arbitral tribunals that allegations of fraud call for a high standard of evidence [Further reference]”; see Preliminary Award in ICC arbitration dated 9 October 2008, ASA Bulletin 4/2011, sec. 94 et seqq. with further reference particularly to English law.

³³ See BLACKABY/PARTASIDES, (FN 17), sec. 6.134.

³⁴ Otherwise, there is a serious risk of an infringement of Respondent's right to be heard, since the “arbitral tribunal fails to consider allegations, arguments, evidence and offers of proof presented by a party which are important for the decision to be made” by not considering the duly substantiated authenticity challenge of Respondent (cf. herein above FN 11 and 15).

Step two: If the arbitral tribunal decides on further investigation, it has to consider appropriate means of evidence and make a decision. This will usually entail inspection of the original document and testimony of witnesses regarding the authenticity of the document. Presentation of the original document usually establishes sufficient proof (“*voller Beweis*”) for the authenticity of that document. If Respondent upholds its authenticity challenge irrespective of the production of the original, Respondent bears the burden of proof for a forgery which would disqualify the proof established by the presentation of the original document (“*Gegenbeweis*”).

After the taking of the evidence there are three potential outcomes: (i) No party, including the Claimant, has discharged its burden of proof. It follows that the challenged document must not be relied upon. (ii) Claimant has established full proof of authenticity (e.g. by presentation of the original document). Hence, the document may be relied upon. (iii) Respondent has been successful in establishing proof of forgery. Consequently, the document must not be relied upon.³⁵

III. Particular Procedural Problems

A. Substantiated Challenge of Documents

1. Specific Circumstances Giving Rise to Reasonable Doubts in General

The two-step-approach for arbitral tribunals as recommended in the preliminary conclusion herein above, is very similar to the rule of the recent Swiss Civil Procedure Act (“CPA”) which provides in art. 178 relating to State court proceedings:

“The party relying upon a document must prove its authenticity, if the authenticity is challenged by the counterparty; the challenge must be sufficiently substantiated.” (Informal translation)

Even though procedural rules designed for state court proceedings are not necessarily suitable for arbitration proceedings, the similarity of the concepts found under Swiss *lex arbitri* and in the CPA justify reference to the considerations behind art. 178 CPA. Specifically, these considerations may be helpful to establish guidelines for the degree of sufficient substantiation when challenging a document.

³⁵ The question of whether an existing forgery “pollutes” the entire case of a party will be addressed separately in section III.C herein below.

The Considerations of the Swiss Federal Council (“*Botschaft des Bundesrats*”) to art. 178 CPA provide:

“*However, the counterparty may not confine itself to merely disputing authenticity in general. Rather, it must submit specific circumstances which give rise to reasonable doubts of the court with respect to the authenticity of the document*”.³⁶

Hence, if “*specific circumstances which give rise to reasonable doubts*” are pleaded with respect to an authenticity issue, the challenge is to be considered sufficiently substantiated. The next step is thus to analyse those circumstances which are generally held sufficient to raise reasonable doubts.

2. Specific Circumstances Considered in Arbitration Cases

For the purpose of establishing categories of circumstances which usually qualify as giving rise to reasonable doubts on the authenticity of a document, two publicly available arbitration cases addressing the issue provide some guidance.

In the investment arbitration case *Europe Cement Investment & Trade SA v. Republic of Turkey*³⁷ claimant alleged a transfer of shares which was evidenced by copies of a share transfer agreement and copies of bearer shares.³⁸ Respondent challenged the authenticity of said documentation.³⁹ When addressing the issue the arbitral tribunal considered the following circumstances in particular as potential indications for lack of authenticity:

- Claimant was not in a position to produce the originals of the challenged documents.⁴⁰
- Even though the language of the agreement provided that it was executed in a Turkish and a Polish version, only one of the versions was available.⁴¹
- No “paper trail” could be demonstrated with respect to the relevant transaction.⁴²
- There was no mention of the transaction in the financial statements of claimant.⁴³

³⁶ See *Botschaft zur Schweizerischen Zivilprozessordnung* vom 28. Juli 2006, BBl 06.062, p. 174 (informal translation, emphasis added).

³⁷ See ICSID Case No. ARB(AF)/07/02).

³⁸ See ICSID Case No. ARB(AF)/07/02), Award dated 13 August 2009 (date of dispatch to the parties), sec. 141.

³⁹ See ICSID Case No. ARB(AF)/07/02), (FN 38), sec. 146.

⁴⁰ See ICSID Case No. ARB(AF)/07/02), (FN 38), sec. 152.

⁴¹ See ICSID Case No. ARB(AF)/07/02), (FN 38), sec. 153.

⁴² See ICSID Case No. ARB(AF)/07/02), (FN 38), sec. 154.

- The alleged transaction was considered to be “economic nonsense”.⁴⁴
- Claimant failed to provide a serious rebuttal to respondent’s arguments.⁴⁵

Based on these findings the arbitral tribunal concluded:

“[...] *the circumstances of this case as outlined above give rise to a strong inference that there was no transfer of shares [...]. This carries with it the clear implication that the claim to share ownership was based on inauthentic documents and that the claim was fraudulent.*”⁴⁶

The arbitral tribunal dismissed the claim on the basis that it had no jurisdiction.⁴⁷

In an ICC arbitration in Geneva, claimant challenged the authenticity of an amendment agreement produced by respondent. The amendment agreement contained amongst others an arbitration agreement that differed from the one in the original agreement on which claimant relied.⁴⁸ Even though respondent was able to produce the original, claimant further pursued its challenge and endeavoured to prove forgery.⁴⁹ Claimant submitted that a person in respondent’s organisation had stolen pre-signed and stamped sheets of claimant’s corporate stationary during a visit in claimant’s premises. When considering whether a forgery had been established the sole arbitrator took into account various circumstances, including:

- The claimant’s main witness, an alleged signatory of the amendment agreement, failed to appear at the witness hearing.⁵⁰
- A forensic expert report confirmed that the document in question was probably composed of authentic elements.⁵¹
- The application of an allegedly out-dated corporate seal on the document.⁵²

⁴³ See ICSID Case No. ARB(AF)/07/02, (FN 38), sec. 157.

⁴⁴ See ICSID Case No. ARB(AF)/07/02, (FN 38), sec. 161.

⁴⁵ See ICSID Case No. ARB(AF)/07/02, (FN 38), sec. 166.

⁴⁶ See ICSID Case No. ARB(AF)/07/02, (FN 38), sec. 163.

⁴⁷ Claimant particularly failed to establish a qualified investment under the applicable investment treaty.

⁴⁸ See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 99 et seqq.

⁴⁹ See herein above, II.E. last paragraph.

⁵⁰ The absence of the witness was found to be conspicuous but not sufficient to establish a forgery by way of negative inference; see Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 109 et seqq.

⁵¹ See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 118 et seqq.; the fact that the toner of the text was probably added after the signature of one of the signatories was not found to be conclusive.

⁵² See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 130 et seqq.

- The circumstances of the relevant signatures: the name of one signatory contained a typographical error and the other signatory was no longer employed by the party in question when the amendment agreement was allegedly executed.⁵³
- The allegedly unusual format of the amendment agreement (e.g. unusual use of claimant’s letterhead for an agreement).⁵⁴

The sole arbitrator considered these elements as sufficient to investigate into the issue of the authenticity of the amendment agreement and make a decision. After detailed consideration of each indication submitted by claimant, the sole arbitrator concluded:

“However, it is not for me to speculate, but rather for the Claimant to prove its case of alleged fraud. [...]”

In conclusion, it cannot be excluded in light of the record that the events the Claimant alleges may have occurred. However, there is insufficient evidence that they actually did occur.”⁵⁵

Consequently, for lack of evidence that an original document was a forgery, the sole arbitrator decided to rely upon the document.

3. Categories of Specific Circumstances that give Rise to Reasonable Doubts

Based upon the considerations in the above summarized cases and further experience from arbitration cases which are not publicly available, it can be concluded that the following categories of circumstances in particular may raise reasonable doubts on a document’s authenticity: (i) unusual format of a document;⁵⁶ (ii) no “paper trail”;⁵⁷ (iii) absence of witnesses having knowledge of the existence of a document;⁵⁸ (iv) anachronisms: information

⁵³ See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 151 et seqq.

⁵⁴ See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 160 et seqq.

⁵⁵ See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 178 and 181.

⁵⁶ E.g. unusual use of a letterhead as referred to in Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 160 et seqq.; unusual translation practice (e.g. document only in one language, if there is a practice of preparing documents in two languages, e.g. in the form of two columns); unusual use of a company stamp or seal as referred to in Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 130 et seqq.; unusual typography; etc.

⁵⁷ If a document to which no other document makes any reference is submitted, this may give rise to doubts on authenticity especially, if the document was relevant to the relationship of the parties. At the same time special circumstances, such as a confidentiality undertaking, may explain the absence of a paper trail.

⁵⁸ See e.g. Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 109 et seqq. However, particularly if an old document is at issue, there may be valid reasons why the signatories or other witnesses may not be available any more.

in the document was not available at the time when it was allegedly created;⁵⁹ (v) lack of a reasonable economic background;⁶⁰ (vi) discrepancy from an established pattern;⁶¹ (vii) any forensic traces of forgery.⁶²

It goes without saying that whether or not a challenge is sufficiently substantiated strongly depends on the circumstances of each individual case. At the same time it is recommended that a cautious arbitral tribunal may want to apply the following rule of thumb: if at least two of the above mentioned factors are pleaded and indeed apply to a challenged document, this should be sufficient to raise reasonable doubts and the authenticity issue should thus be considered by the tribunal.⁶³ The mere fact that the issue of authenticity is established should, however, in no way prejudice the subsequent substantive analysis of the said issue.

B. Inspection of Originals

If an arbitral tribunal finds that a challenge is sufficiently substantiated, in the sense that it has given rise to reasonable doubts on the authenticity of a document, it will usually order production of the original document for inspection.⁶⁴

As already mentioned above, the IBA Rules provide that “copies of documents shall conform to the originals and, at the request of the arbitral

⁵⁹ In an ICC arbitration case which is not publicly available, a document provided the address of the counterparty to which it, however, only moved some years after the alleged date of the document. Another example would be reference to a specific (legal) issue which only came up during the proceedings: It is the author’s view that overly convenient contents of documents which are unusual with respect to all relevant circumstances may be indications for lack of authenticity in the sense of backdating.

⁶⁰ See e.g. ICSID Case No. ARB(AF)/07/02, (FN 38), sec. 161. At the same time it must be noted that economic reasonability is neither a requirement for a valid contract, nor for an authentic document. Hence, the mere lack of economic reasonability would not, in the author’s view, be sufficient to raise reasonable doubts about the authenticity of a document.

⁶¹ E.g. if the parties always use a certain means of correspondence (e.g. mail) and one single document is allegedly sent by a different means of correspondence (e.g. telefax), this may add to doubts on the authenticity of the document.

⁶² See KOPENHAVER, (FN 1) for an introduction.

⁶³ The following reasons led to the above-mentioned rule of thumb: (i) On the one hand no party should, without valid reasons, be in a position to trigger costly and time-consuming examinations of numerous documents. In particular, disruptive procedural tactics such as authenticity challenges of all documents on file and the like should be prevented. (ii) On the other hand the threshold for an authenticity examination should not be too high in cases where a party has real concerns regarding specific documents. In such cases the existence of more than one typical circumstance giving rise to authenticity doubts should be sufficient to not just decide on the basis of a photocopy submitted by one of the parties.

⁶⁴ See herein above, sec. II.C.

tribunal, any original shall be presented for inspection”.⁶⁵ Neither the IBA Rules, the Commentary of the Working Group, nor the pertinent legal doctrine specifies to whom the original should be presented.⁶⁶

On this point different interests are at stake: first, the party producing the original has a valid interest that the document is not delivered to the counterparty, since the document could be damaged, lost, exchanged or maltreated. Second, the challenging party has a valid interest in conducting a forensic examination of the document including as the case may be through an independent expert. These valid interests can be reconciled if the arbitral tribunal appoints an independent forensic expert who performs the examination, if requested, in the presence of party representatives.

C. Consequences of a Failure to Meet the Burden of Proof

The next question relates to the legal consequences if a party fails to provide sufficient proof of the authenticity of the challenged document or the counterparty proves forgery.

Regarding the legal consequence of unproven authenticity, it is rightly maintained by certain leading authors that the challenged document should not be relied upon in the proceedings.⁶⁷ However, the alleged fact, for which the inauthentic document was submitted as evidence, may still be true and proven by other means of evidence.⁶⁸

Furthermore, the question may arise as to whether the mere disregard of a challenged document is an adequate consequence, if a forgery is established or a document is withdrawn after a well-reasoned challenge. In the International Court of Justice case “Maritime Delimitation and Territorial Questions between Qatar and Bahrain” the court was confronted with a challenge of 82 documents submitted by Qatar and different expert opinions in this respect.⁶⁹ Later in the proceedings, following allegations and evidence of potential forgery by Bahrain, Qatar withdrew the entire documentation.

⁶⁵ Art. 3.12.a IBA Rules

⁶⁶ See BERGER/KELLERHALS, (FN 5), sec. 1218; BLACKABY/PARTASIDES, (FN 17), sec. 6.134; SCHNEIDER, (FN 12), sec. 16 to Art. 184 PILA and herein above, sec. II.C.

⁶⁷ See BLACKABY/PARTASIDES, (FN 17), sec. 6.134 and herein above, sec. II.D.

⁶⁸ *Example*: A side-agreement providing for 10% higher purchase price than stipulated in a contract is alleged and document D is submitted as evidence. If the authenticity of document D is duly challenged and can not be proven, the side-agreement can still be true: If, e.g., all witnesses, against all expectation, testify that there was such a side-agreement (but not codified in document D), the fact of the 10 % higher purchase price is established albeit without reliance upon document D.

⁶⁹ See Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment of 16 March 2001, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=61&case=87&code=qb&p3=4> (visited on 22 July 2011).

The court thereupon decided the case without considering the withdrawn documents.

This way of proceeding was criticized in a separate opinion rendered by Yves Fortier⁷⁰, for whom a disregard of the withdrawn documents was not sufficient as a consequence vis-à-vis Qatar.⁷¹

Without expressing an opinion on this particular case, it can certainly be argued that an adverse inference from a withdrawn or inauthentic document on the validity of the entire case of a party should only be applied in very exceptional circumstances, as the alleged facts may, nevertheless, be true.⁷²

Finally, it is widely acknowledged in Swiss international arbitration that an arbitral tribunal enjoys considerable discretion when assessing the evidence and particularly also when assessing the credibility of witnesses.⁷³ In connection with a withdrawal of challenged documents or even proof of a forgery an arbitral tribunal may find it adequate to consider these circumstances when weighing the credibility of the responsible person (e.g. as witness). Such a way of proceeding appears to be within the discretion of an arbitral tribunal.⁷⁴

D. Challenged Arbitration Agreements

An additional complication occurs if the arbitration agreement forms part of a challenged document. The question arises whether an arbitral tribunal can have jurisdiction based on an allegedly unauthentic arbitration agreement:

Pursuant to art. 178 para. 3 PILA, the validity of an arbitration agreement may not be contested on the grounds that the main contract is

⁷⁰ See Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment of 16 March 2001, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=61&case=87&code=qb&p3=4> (visited on 22 July 2011), separate opinion of judge Fortier, sec. 1 and 2.

⁷¹ “I believe that the Court should not simply disregard and fail to take into consideration this unprecedented incident. In my opinion, these documents have ‘polluted’ and ‘infected’ the whole of Qatar’s case [...]”; see separate opinion of judge Fortier, (FN 70), sec. 4.

⁷² See herein above, FN 68, for an example how a fact can be true, irrespective of an inauthentic document.

⁷³ See BERGER/KELLERHALS, (FN 5), sec. 1238 (with further reference), where the principle of *free assessment of evidence* is referred to as a cornerstone of modern procedural law which applies as far as the parties have not otherwise agreed.

⁷⁴ Regarding the question of arbitrators’ duties as “*guardians of public policy*” and further moral considerations, see HANOTIAU, (FN 25), p. 283 et seqq.

invalid (principle of “separability of the arbitration agreement”).⁷⁵ On the other hand, the main contract may suffer from defects which also affect the arbitration agreement (so-called “identity of defects”).⁷⁶ For example: An agent concludes a main contract including an arbitration agreement in the name of a principal without any authority in either respect.⁷⁷ As the agent is neither authorized to conclude the main contract, nor the arbitration agreement the lack of his authorization affects both agreements in question.⁷⁸

The case of an allegedly forged main contract containing an arbitration agreement is very similar to the case of the allegedly unauthorized agent. The forger conceals its lack of authority to represent a third party by pretending that the third party itself was the signatory. As the forger obviously has no authority to sign on behalf of the third party this defect affects the entire document including a potential arbitration agreement. Hence, the question is whether this should affect the arbitral tribunal’s jurisdiction.

Pursuant to art. 186 para. 1 PILA, the arbitral tribunal shall rule on its own jurisdiction (principle of “competence-competence”).⁷⁹ The Swiss Federal Tribunal has held that a state court or an arbitral tribunal which has been concerned with a matter is competent to decide upon its own competence.⁸⁰ This is also true in cases of “identity of defects” and thus also in cases akin to that of the allegedly unauthorized agent or of forgery allegations affecting the arbitration agreement.⁸¹

In international arbitration, there are also practical reasons to accept the arbitral tribunal’s competence-competence even in cases of an alleged forgery of the arbitration agreement: A different approach would open the door for respondents to effectively obstruct arbitration proceedings by *merely alleging* a forgery of the arbitration agreement which then would force claimant to have its agreement verified by state courts. Depending on the jurisdictions involved this might be a time-consuming and costly or even an impossible venture.⁸²

⁷⁵ See WENGER/MÜLLER in: Honsell et al. (ed.), Basle Commentary on International Private Law, 2nd ed., Basle 2007, sec. 90 et seqq. to Art. 178 PILA (with further reference).

⁷⁶ See DFT 121 II 495, sec. 6; BERGER/KELLERHALS, (FN 5), sec. 622; WENGER/MÜLLER, (FN 75), sec. 90 et seqq. to Art. 178 PILA.

⁷⁷ See BERGER/KELLERHALS, (FN 5), sec. 622 for further examples.

⁷⁸ See BERGER/KELLERHALS, (FN 5), sec. 622, second example.

⁷⁹ See WENGER/SCHOTT in: Honsell et al. (ed.), Basle Commentary on International Private Law, 2nd ed., Basle 2007, sec. 2 et seqq. to Art. 186 PILA (with further reference).

⁸⁰ See DFT 121 III 495, sec. 6c and 6d; BERGER/KELLERHALS, (FN 5), sec. 622 and 622a.

⁸¹ See DFT 121 III 495, sec. 6d; BERGER/KELLERHALS, (FN 5), sec. 622a where art. 186 PILA is expressly mentioned in connection with cases of “identity of defects”.

⁸² Depending on the concept of declaratory claims in a particular jurisdiction a declaration regarding the existence of a mere fact (i.e. the authenticity of a document) is, for example, not even admissible.

It follows that if an arbitral tribunal is concerned with the issue of its jurisdiction, it is competent to make a decision in this respect, even if a forgery of the arbitration agreement has been alleged. The above-proposed two-step-test⁸³ may also be applied when the tribunal’s jurisdiction is at issue.⁸⁴

IV. Conclusion

In conclusion, it is recommended that arbitral tribunals, when faced with a challenged document, proceed as follows:

Step one: the arbitral tribunal determines whether (i) the challenged document is relevant to the outcome of the case and (ii) the challenge of the document is sufficiently substantiated to raise doubts as to its authenticity. Relevance is determined based on the facts of each individual case. Sufficient substantiation may be assessed by consideration of the frequent characteristics of inauthentic documents as set out herein above.⁸⁵

Step two: If both requirements of step one are met (relevance of the document and sufficient substantiation of the challenge), the arbitral tribunal takes evidence on the authenticity of the disputed document and – following the applicable burden of proof rule – makes a decision. An inspection of the original document is performed under the control of the arbitral tribunal, e.g. through an independent expert, rather than by production to the counterparty.

After the taking of evidence there are three potential outcomes: (i) If no party has discharged its burden of proof, the challenged document must not be relied upon (when applying the Swiss burden of proof rule). (ii) If the party submitting the challenged document established full proof of authenticity, the document may be relied upon. (iii) If the challenging party is successful in establishing proof of a forgery, the document must not be relied upon.

⁸³ See herein above, sec. II.E.

⁸⁴ In order to safeguard respondent’s legitimate interests for the eventuality that an arbitration agreement were indeed a forgery, an arbitral tribunal may consider ordering a security for respondent’s costs, if circumstances which raise reasonable doubts are pleaded and such security is requested (see BERGER/KELLERHALS, (FN 5), sec. 1460 et seqq.).

⁸⁵ See herein above, sec. III.A.3.

Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and Journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).