Recent Developments in the Practice of the SCAI Arbitration Court

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I. Introduction

The internal practice of the SCAI (Swiss Chambers’ Arbitration Institution) Arbitration Court has already been the topic of a short presentation, made by the first author of the present paper in the framework of the 8th annual Conference on New Developments in International Commercial Arbitration, which took place on 14 November 2014 in Neuchâtel.

The present contribution is a follow-up of that presentation and focuses on the practice of the Court in the last six years (2012 to date).

The first part basically describes the functioning of the Court and the allocation of competences within the Court. The second part is dedicated to the decisions issued by the Court, in particular regarding, consolidation, seat, challenge of arbitrators, administration of cases under the Swiss Rules and costs.

II. Arbitration Court

A. In general

The Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich, which have been offering arbitration services for about 150 years, founded the Swiss Chambers’ Arbitration Institution (SCAI) as an independent non-profit Institution “that offers means of dispute resolution based on the Swiss Rules of International Arbitration (the "Swiss Rules") and the Swiss Rules of Commercial Mediation” in 2004.

In order to administer the arbitrations under the Swiss Rules, the SCAI established an Arbitration Court (hereinafter: the “Court”) as an autonomous body. The Court replaces the former “Arbitration Committee” un-
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der the Swiss Rules 2004\textsuperscript{6} and carries out its functions in complete independence. The Members are experienced international arbitration practitioners from Switzerland and abroad\textsuperscript{7}.

The Court is assisted in its work by the Secretariat of the Court (the “Secretariat”), which is responsible for the administrative tasks relating to arbitration proceedings pending under the Swiss Rules. The Secretariat manages all arbitration cases through its 3 administering offices in Zurich (which reunites also Bern and Basel), Geneva (which reunites also Neuchâtel and Lausanne) and Lugano. The request for arbitration can nevertheless still be submitted as usual to any one of the seven Swiss Chambers of Commerce (see art. 3(1) and Appendix A of the Swiss Rules).

B. The Internal Rules

For the purpose of organizing the work of the Court and the Secretariat, the SCAI has adopted the “Internal Rules of the Arbitration Court of the Swiss Chambers’ Arbitration Institution” (hereinafter: "Internal Rules" or "IR")\textsuperscript{8}. The adoption of these Internal Rules allows for a clear allocation of tasks among the members of the Court\textsuperscript{9}.

Pursuant to art. 1 of the Internal Rules, the Court consists of a President, two Vice-Presidents and ordinary members (collectively designated as “Members”). All are appointed by the Board of Directors of the Swiss Chambers’ Arbitration Institution.

The Court renders its decisions as provided for under the Swiss Rules, e.g. pursuant to art. 4(1), 11(3) and 16(3) Swiss Rules. The Court may delegate to one or more members or committees the power to make certain decision pursuant to the Internal Rules\textsuperscript{10}.

\textit{Swiss Rules of international Arbitration, Commentary, 2\textsuperscript{nd} ed. 2013, Introduction N 16, p. 5 (hereinafter: SR-Commentary, Author).}

\textit{SR-Commentary, Besson/Thommesen, Introduction N 16, p. 5.}

\textit{For the current overview of the Members of the Court, see https://www.swissarbitration.org/About-us.}

\textit{The last version of the Internal Rules entered into force on 14 September 2016 (art. 11 IR). The Internal Rules are available online directly on the Swiss Chambers’ Arbitration Institution website (https://www.swissarbitration.org/files/9/INTERNAL%20RULES%20OF%20THE%20ARBITRATION%20COURT%202016%20-%20Published%2020170818.pdf).}

\textit{SR-Commentary, Besson/Thommesen, Introduction N 45, p. 11.}

\textit{Swiss Rules, Introduction lit. b and art. 2 IR.}
The plenary sessions of the Court are held in regular intervals – normally 4 times per year. The main aim of the plenary sessions is to define a common practice in order to ensure a consistent and efficient administration of all arbitration proceedings. In this regard, the Members (assisted by the Secretariat) have to report to the Court if they have encountered an issue of interpretation of any provision of the Swiss Rules or have rendered a decision inducing a change of practice in the administration of arbitration proceedings pending under the Swiss Rules11.

Beside the plenary sessions, which ensure a unitary implementation of the Swiss Rules, the Court acts through the followings different bodies that are explored more in detail below:

- Case Administration Committees
- Court Special Committee
- President and Vice-Presidents.

C. Case Administration Committees

Upon receipt of a Notice of Arbitration, the Secretariat designates among the Members of the Court one to four member(s) of the Court, who together will constitute the Case Administration Committee for the arbitration proceeding at hand (art. 3 IR)12.

The Case Administration Committees “shall be empowered to make – after consultation with the Secretariat – all decisions within the powers of the Court relating to the case concerned, which are not expressly delegated to the Court Special Committee” pursuant to Article 4 IR or to the President or any Vice-President pursuant to Article 6 IR (see art. 3 IR).

While there is no express indication in the Internal Rules as to the specific tasks the Case administration Committees have to fulfil, they result from the general delegation clause. In general terms, the Case Administration Committees have to follow and monitor the proceedings assigned to them and, in particular, to accomplish the following main tasks:

- Extension or shortening of any time-limit it has fixed or has the authority to fix or amend (Art. 2(3) Swiss Rules);

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11 Art. 5(2) IR.
12 See SR-Commentary, BESSON/THOMMESEN, Introduction N 40, p. 11.
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- *Prima facie* decision as to the existence of an agreement to arbitrate referring to the Swiss Rules (Art. 3(12) Swiss Rules);
- Confirmation and appointment of arbitrators (Art. 5 through 8 Swiss Rules);
- Approval or adjustment of costs (Art. 40(4) Swiss Rules);
- Extension of the 6 months deadline to issue the award under the Expedited Procedure rules (Art. 42(1) Swiss Rules);
- Exceptions to the application of the rules on Expedited Procedure for values that do not reach the threshold of CHF 1 mio. (Art. 42(2) Swiss Rules).

D. Court Special Committee

Pursuant to Art. 4 IR, the Court Special Committee comprises seven Members of the Court, together with the President and the Vice-Presidents of the Court. As a whole, the Court Special Committee is thus composed of ten Members of the Court.

The Court Special Committee has the power to render the following decisions (art. 4 IR):

- Appointment of an arbitrator in the circumstances contemplated by Article 5(3) and 13(2)(a) Swiss Rules;
- Challenge of an arbitrator (Article 11 Swiss Rules);
- Removal of an arbitrator (Article 12 Swiss Rules);
- Revocation of an arbitrator (Article 5(3) Swiss Rules);
- Non-replacement of an arbitrator (Article 13(2)(b) Swiss Rules);
- Determination of the seat of the arbitration (Article 16 Swiss Rules);
- Those decisions which may be necessary relating to consolidation of proceedings (Article 4(1) Swiss Rules);

The decisions rendered by the Court Special Committee are valid provided that at least five of its Members have participated in the decision making process and are taken by simple majority.
E. President and Vice-Presidents

When seized with an application for emergency relief proceedings, the Secretariat assigns to the President or one of the Vice-Presidents the emergency relief proceedings for the purpose of deciding upon (art. 6 Swiss Rules):

- Appointment of the emergency arbitrator (Article 43(2) Swiss Rules);
- Challenge of an emergency arbitrator (Article 43(4) Swiss Rules);
- Removal of an emergency arbitrator (Article 43(4) Swiss Rules);
- Determination of the seat of the emergency relief proceedings (Article 43(5) Swiss Rules).

All other administrative decisions relating to the emergency relief proceedings, such as extensions of time to render the decision on the application, approval or adjustment of fees of the emergency arbitrator etc., are rendered by the Case Administration Committee designated to this purpose.

III. Selected Case Law of the SCAI Arbitration Court

This review covers the internal decisions of the Court (including the Case Administration Committees, the Special Committee, the President and the Vice-Presidents) concerning the administration of the arbitration cases from 2012 (date of entry into force of the revised Swiss Rules) to date (the "period under review").

For every type of decision considered, statistical data are provided. The various cases are grouped in categories, whereas representative cases are briefly summarized.
A. **Consolidation of Proceedings (art. 4(1) Swiss Rules)**

1. **Statistics**

In the period under review the Court Special Committee was requested to make a decision on consolidation in 21 cases. In 15 cases (≡ ca. 70%) the request for consolidation was granted, in 6 (≡ ca. 30%) cases it was denied.13

2. **Grounds for Consolidation**

According to art. 4(1) Swiss Rules, the Court has to take into consideration the following criteria when deciding on the consolidation of the proceedings:

- The parties requesting consolidation must be already involved in other arbitral proceedings pending under the Swiss Rules. It is, however, not necessary that the parties are the same in all proceedings.
- The opinion of all the parties and any confirmed arbitrator in all proceedings.
- All relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings.

a) **Consolidation granted**

In 7 cases, where the parties were identical and all agreed to the consolidation, the Court decided to consolidate the proceedings.

Consolidation was further ordered in 7 cases, where the parties to the second arbitration were not completely identical to those involved in the arbitration case that had been initiated first. In all of those cases, the parties either formally agreed, or did not object (in one case because Respondent did not take part in the proceedings) to the consolidation of the proceedings.

13 The previous review encompassing the case law of the years 2004-2014 showed very similar percentage.
In 1 case, the Court decided that the proceedings should be consolidated despite the objection of one of the parties. The parties were the same in both cases (Claimant in Case no. 1 was Respondent in Case no. 2). The underlying contract was the same. The Claimant in the first case objected to the consolidation on the basis that the proceedings were well advanced (the parties had already exchanged written statements and the evidentiary hearing was upcoming) in the first case and that consolidation would not be procedurally efficient.

b) Consolidation denied

Consolidation was denied in 6 cases: in all cases one of the parties objected to the consolidation request and not all of the parties were identical in the pending arbitrations.

In a case of 2012, the underlying facts were similar and Respondent was the same in both arbitrations. However, Claimants were different, the already pending case was well advanced (only the post hearing briefs were outstanding) and Respondent and the sole arbitrator were opposed to the consolidation request.

In another case of 2012, Claimant filed one single request for arbitration, “blending” three separate contracts that involved 4 Parties (grouped differently under each contract), provided for the application of Swiss and Italian law and set out three different arbitration clauses (with different seats: Lugano and Bologna). The Court rejected the request for consolidation as it found that a request for consolidation requires at least two separate proceedings to be consolidated, one of which shall be already pending.

In 1 case of 2013 two Claimants had filed one single request for arbitration directed against the same Respondent. Only one case was thus pending before the Arbitral Tribunal. Contrary to the case of 2012 mentioned above, the Court found the request to be inadmissible, as it reasoned that it is up to the Arbitral Tribunal to decide whether or not it can address the claims of both Claimants in one single arbitration (issue of jurisdiction rather than of consolidation).
B. Challenge of Arbitrators (art. 11 Swiss Rules)

1. Statistics

The Special Committee was requested to decide on 8 challenges of arbitrators in the period under review. In 1 case (≡ ca. 12%) the challenge was upheld, in 7 cases (≡ ca. 88%) it was denied.

The only decision that was upheld in the period under review dates back to 2013. The trend seems to go towards less challenges: between 2013 and 2014, 7 notices of challenge were filed (and only 1 upheld), whereas from 2015 onwards only one notice of challenge was filed (and rejected by the Court).¹⁴

It be reminded that the Court is not involved at the beginning of the challenge procedure. The notice of challenge must be sent to the Secretariat, which will communicate it to the arbitrator and to the other parties involved. Within fifteen days, the arbitrator may decide to withdraw or the other parties may agree to the challenge.¹⁵ In these circumstances, the procedure ends, without a decision of the Court. The Court will then be called upon to replace the arbitrator according to art. 13 Swiss Rules.

2. Grounds for Challenge

Pursuant to Art. 9(1) of the Swiss Rules, “Any arbitrator conducting an arbitration under these Rules shall be and shall remain at all times impartial and independent of the parties”. This is a basic requirement for each arbitrator. Therefore, “any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence”.¹⁶

It is worth mentioning that art. 1(4) Swiss Rules explicitly states that by submitting their dispute under the Swiss Rules, “the parties confer on the Court, to the fullest extent permitted under the law applicable to the arbitration, all of the powers required for the purpose of supervising the arbit-

¹⁴ The previous review encompassing the case law of the years 2004-2014 showed a similar picture.
¹⁵ Art. 11 (2) Swiss Rules reads as follows: “If, within 15 days from the date of the notice of challenge, all of the parties do not agree to the challenge, or the challenged arbitrator does not withdraw, the Court shall decide on the challenge”.
¹⁶ Art. 10(1) Swiss Rules.
tral proceedings (...) including the power (...) to decide on the challenge of an arbitrator on grounds not provided for in these Rules”. Thus, apart from the grounds explicitly set out in art. 9-10 Swiss Rules, the parties may agree on specific qualifications for arbitrators which might lead to a challenge, if not respected17.

The case law in the period under review highlights three main case studies that are discussed hereunder.

a) Professional Relationships of the Arbitrator

In a case of 2013 pending before an Arbitral Tribunal between a Claimant with seat in India and a Respondent with seat in Germany, Respondent challenged the arbitrator nominated by Claimant due to concerns about his potential partiality “for lack of independence, impartiality and his incorrect statement of independence”. More specifically Respondent pointed out that the webpage of the law firm of the challenged co-arbitrator mentioned Claimant's group, respectively the family owning that group, among the high profile clients of the law firm. This was the only case in which the challenge was upheld.

In other cases, the alleged “professional relationship” put forward by the challenging party was not considered sufficient or sufficiently proved to grant the challenge:

In another case of 2013, the parties could not reach an agreement on the designation of a sole arbitrator. The Case Administration Committee in charge appointed an arbitrator, who was challenged by Respondent for an alleged “conflict of interests”. The previous involvement of the sole arbitrator was as counsel of a third party in a totally unrelated dispute not against the Respondent, but rather against a company in which the Respondent had a substantial (minority) shareholding. This previous case was concluded more than the three years before the acceptance of the appointment (see Orange List of the IBA Guidelines, Section 3.1.2.) and was totally unrelated to the previous one.

b) Personal Relationship of the Arbitrator

In a case of 2014 the Respondent (an Iranian individual) challenged the sole arbitrator (a resident of Lugano; mother tongue Italian) appointed by

17 SR-Commentary, Spoorenberg/Fellrath, Art. 1 N 19, p. 21.
the Court on the ground that he had the same nationality, spoke the same language and came from the same town as Claimant (who was represented by a Counsel based in Lugano). In reality, Claimant was a company incorporated in Cyprus, with an operative branch in Lugano. The Court found no sufficient reason for a challenge.

In a subsequent case of the same year, the challenge was grounded on a "serious dispute" that had allegedly arisen between the co-arbitrator designated by Claimant and Respondent's counsel, who had been on opposing sides in a previous arbitration that did not have any relationship with the arbitration at hand. The Court found that such personal animosity between the co-arbitrator and one of the counsel was based on subjective sensations of the applicant and did thus not warrant a challenge. 18

c) Perceived Bias due to Orders/Actions of the Arbitrator(s)

In a case of 2014, Claimant filed a notice of challenge based on the written statement that the Chairman of the Arbitral Tribunal had previously filed to object to its own removal. In Claimant’s view in that letter the arbitrator had manifested a personal opinion on the arbitration at hand. Moreover, the arbitrator had stopped all the work as soon as the request for removal had been filed.

The Court found the challenge to be time barred. Art. 11 Swiss Rules provides that the applicant shall file the challenge within 15 days after the circumstances giving rise to the challenge became known to it. According to the Court, the deadline for a challenge started to run when the challenging party got knowledge of the arbitrator’s written statement in the framework of the removal proceedings and not only when the decision rejecting the request for removal was notified to it. Generally speaking, even if a decision on the request for removal is still outstanding, the notice period for a possible challenge will not be extended.

The Court followed the Decision of the Federal Supreme Court ATF 139 III 433, which found that, if an unrelated case is fought with particular animosity between Counsel, it is not excluded that this may lead to a situation where that “conflict” may have a negative effect on the requirement of impartiality. The applicant has in this regard to substantiate the conflict and why, on the basis of objective reasons, the arbitrator appears to be partial. Merely subjective sensations of the applicant are in this regard not sufficient.
Further, the Court Special Committee noted that the Swiss Rules do not provide any guidance with respect to the impact of a challenge on the arbitral proceedings. The arbitrator “may” proceed with the arbitration but is not obliged to do so.

As quite obvious, a further decision issued in 2014 held that the mere disagreement with some decisions of the Arbitral Tribunal does per se not constitute a valid ground for challenge.

C. Removal of an Arbitrator (art. 12 Swiss Rules)

1. Statistics

The Special Committee had to decide in two cases only about the removal of an arbitrator. Both cases date back to 2014. In one case the request was accepted, in the other one denied.

2. Grounds for Removal

Art. 12(1) Swiss Rules provides that “if an arbitrator fails to perform his or her functions despite a written warning from the other arbitrators or from the Court, the Court may revoke the appointment of that arbitrator”. This provision addresses the removal of an arbitrator by decision of the Court and not the case of removal by common agreement of the parties.\(^{19}\)

According to the doctrine, “it is up to the Court to further develop the concept of ‘failure to perform the functions’ in practice on a case-by-case basis”\(^{20}\). Such notion may comprise obstructive behaviour of the arbitrator; failure to use reasonable dispatch in conducting the proceedings or making the award; lack of impartiality or independence of the arbitrator (in case the parties have not challenged the arbitrator in due time)\(^{21}\).

In a case decided on 2014 the procedure had followed the slow path, with several warnings from the Court to the President of the Arbitral Tribunal. Even after these warnings, the President of the Arbitral Tribunal took a considerable time to proceed. Additionally, when the parties could not

\(^{19}\) See SR-Commentary, FREI/AEBI, Art. 12 N 3, p. 163.
\(^{20}\) SR-Commentary, FREI/AEBI, Art. 12 N 6, p. 164.
\(^{21}\) See SR-Commentary, FREI/AEBI, Art. 12 N 6, p. 164.
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find an agreement about the date of the hearing, the Arbitral Tribunal simply decided to postpone the issue. The request for removal came ca. 5 years after the beginning of the proceedings. The Court criticized the excessive duration of the proceedings. However, it also considered that the Chairman had promptly reactivated the procedure each time a warning was received, that the numerous objections raised by the same party requesting the removal had slowed down the procedure and that the Arbitral Tribunal had not remained completely idle after postponing the decision about the hearing. In conclusion, the Court decided to dismiss the request for removal. Nevertheless, it promptly requested the Arbitral Tribunal to issue an amended provisional timetable covering all remaining steps, including the rendering of the final award.

In another case of 2014, the sole arbitrator did not react to a submission filed by Claimant on 22 January 2014. On 25 March 2014, the sole arbitrator's daughter informed the parties that her father was not able to deal with the case anymore due to a serious illness. Given that the sole arbitrator was not able to respond and could not even be contacted anymore at his address, the Court – upon Claimant's request – decided to remove the arbitrator.

D. Determination of the Seat of the Arbitration (art. 16 Swiss Rules)

1. Statistics

During the period under review, the Special Committee had to take a decision in 27 cases. In 22 cases (≡ ca. 80%) the Court fixed the seat itself (9 in Geneva and 13 in Zurich). In the remaining 5 cases (≡ ca. 20%) the Court decided to let the Arbitral Tribunal determine the seat of the arbitration.

2. Criteria for the Determination of the Seat of the Arbitration

If the parties have not determined the seat of the arbitration, or if the designation of the seat is unclear or incomplete, it is up to the Court Special Committee to determine the seat of the arbitration (art. 16(1) of the Swiss Rules).
In determining the seat of the arbitration, the Court Special Committee has to take into account “all relevant circumstances” (art. 16(1) Swiss Rules). The Court Special Committee has considered a.o. the following circumstances in its decisions during the period under review.

**a) Reference to the Pre-existing Arbitration Rules of a Swiss Chambers of Commerce**

If an arbitration agreement refers to the previous arbitration rules of the Zurich, Geneva and Lugano Chamber of Commerce (in particular), the Court will designate the respective cities as the seat of the arbitration.

All of those pre-existing arbitration rules do indeed provide for a default seat in the respective cities of Zurich, Geneva and Lugano. This was e.g. decided in a case of 2014, where the arbitration clause provided: “the case shall be submitted to the court of arbitration of the Zurich Chamber of Commerce for a final Decision pursuant to the said Conciliation and Arbitration Rules” and in 8 further cases with similar wording.

**b) Reference to the Chamber of Commerce of a Specific City in Switzerland**

When the arbitration agreement refers to “the International Chamber of Commerce of” a specific city in Switzerland, then this city generally becomes the seat of the arbitration.

This was the case in a decision of 2012, where the arbitration clause referred to the “International Chamber of Commerce of Geneva”, as well as in other 7 similar cases.

**c) Arbitral Tribunal to Determine the Seat**

Failing any other indication as to the seat, in case of particular ambiguity of the arbitration clause or when the decision on the seat needs further input from the parties, the decision can be left to the Arbitral Tribunal. The Court decided to do so in 5 cases.

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22 Art. 6(1) of the International Arbitration Rules of the Zurich Chamber of Commerce; Art. 3 of the Arbitration Rules of the Chambre de Commerce et d’Industrie de Genève; Art. 4 of the Lugano Arbitration and Conciliation Rules.
Also in such cases, however, the Court can take the decision itself, if it deems so fit. In a case of 2014 for instance, the arbitration agreement contained only a reference to the Swiss Rules. The parties were from Luxembourg and Spain and had different opinions concerning the seat of the arbitration (Madrid, respectively Luxembourg-city). The Court noted that there is no obligation to have the seat of the arbitration in Switzerland, and that the seat is not determinative for the place of the hearings\textsuperscript{23}. The Court took in consideration Zurich and Geneva as seats granting the best access in Switzerland from both countries, Spain and Luxembourg. Ultimately, Geneva was chosen as the seat of the arbitration.

E. Administration of the Case when Respondent does not Submit an Answer, or Raises an Objection to the Arbitration Being Administered under the Swiss Rules (art. 3(12) Swiss Rules)

According to art. 3(12) Swiss Rules, “if the Respondent does not submit an Answer to the Notice of Arbitration, or if the Respondent raises an objection to the arbitration being administered under the Swiss Rules, the Court shall administer the case, unless there is manifestly no agreement to arbitrate referring to these Rules”.

1. Statistics

In the period under review the Case Administration Committees were confronted with 12 cases falling under art. 3(12) Swiss Rules. In 4 cases (≡ ca. 34\%) it was decided that there was manifestly no agreement to arbitrate referring to the Swiss Rules.

2. Agreement to arbitrate referring to the Swiss Rules affirmed

a) Reference to an Arbitral Body in a Specific City in Switzerland

In 1 case (≡ ca. 8\%) the arbitration clause provided that the dispute should be submitted to arbitration before the “empowered jurisdiction of Geneva, Switzerland”. The Court found that there was a plausible case for

\textsuperscript{23} Art. 16(2) Swiss Rules.
the existence of an agreement to arbitrate referring to the Swiss Rules, although no specific reference to the Swiss Rules was made.

b) Reference to the “International” Chamber of Commerce of a City in Switzerland

In 4 cases (≡ ca. 34%) the arbitration clause referred to “the Geneva Courts of International Arbitration”, “arbitration by the International Rules of the Geneva Courts of International arbitration, to be held in accordance with the rules and legislation of international Court in Geneva, Switzerland”. The Court found that, despite the misleading wording used by the parties, the reference to the Geneva Chamber of Commerce (as opposed to the International Chamber of Commerce in Paris) and its Rules was sufficiently clear to administer the cases.

c) Objections Related to the Existence, Validity and Scope of the Arbitration Clause in Presence of a Clear Reference to the Swiss Rules

In 2 cases (≡ ca. 17%) Respondent objected to the jurisdiction of the Arbitral Tribunal, although the reference to the Swiss Rules was clear and undisputed. The Court found that objections concerning the jurisdiction of the Arbitral tribunal do not fall within the competence of the Court. Rather, it is for the Arbitral Tribunal to rule on those objections during the proceedings.

d) Plain Reference to the Swiss Rules

In 1 case (≡ ca. 8%) the arbitration clause provided that the arbitration shall be settled “by a competent Swiss arbitration service in accordance with the Swiss rules of arbitration”. The Court considered the wording sufficient to be referred to an Arbitral Tribunal under the Swiss Rules.

3. Manifestly no Agreement to Arbitrate Referring to the Swiss Rules

In three cases (≡ ca. 25%) of 2014 and 2015, the arbitration clause provided for arbitration in Geneva, but there was no reference to the Swiss Rules, e.g.: “under the rules of the International Chamber of Commerce” and “arbitration administered by the European Arbitration Association, under its Commercial Arbitration Rules and Judgment”.
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In another case (≈ ca. 8%) of 2014 the clause referred to Geneva, but the dispute should be conducted “before such a board, organization, institution or otherwise to be mutually agreed upon”.

Missing a reference to the Swiss Rules (and to arbitration altogether, in the latter case), the Court decided not to administer the cases.

F. Approval and Adjustment of the Determination on Costs (art. 40(4) Swiss Rules)

The Court, by way of the relevant Case Administration Committees, approves or adjusts the determination on costs made by the Arbitral Tribunal. The Court checks in particular

- the fees and expenses of the arbitrators;
- the costs of expert advice;
- the Registration Fee paid to SCAI; and
- The Administrative Costs due to SCAI.

Arbitral Tribunals are requested to provide the Secretariat with the receipts of all expenses incurred, as well as an indication of the number of hours dedicated to the case and an assessment of the complexity of the case.

While the fees of the Arbitral Tribunal are determined within a scale of fees (Appendix B of the Swiss Rules), when controlling the fees of the arbitrators the Court makes sure that the resulting hourly rate be reasonable24.

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24 Art. 39 Swiss Rules: “The fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter of the arbitration, the time spent and any other relevant circumstances of the case, including the discontinuation of the arbitral proceedings in case of settlement. In the event of a discontinuation of the arbitral proceedings, the fees of the arbitral tribunal may be less than the minimum amount resulting from Appendix B (Schedule of Costs)”.
1. **Statistics**

In a vast majority of cases, the arbitration costs were approved, subject to minor adjustments (e.g. for banking costs, minor typo-graphical mistakes).

In the period under review in 6 cases the Court decided to adjust (i.e. to reduce) the fees of the arbitrators.

2. **Grounds for the Adjustment (Reduction) of the Fees of the Arbitrators**

In the following three cases, given their specificity the Court reduced the fees proposed by the arbitrators:

- Delay in issuing the final award by the sole arbitrator (10 months after the exchange of the post-hearing briefs). The Court made an adjustment of approximately CHF 18’700.

- Settlement of the dispute prior to the constitution of the Arbitral Tribunal (sole arbitrator), which was requested to issue an award on consent. The reduction amounted to approximately CHF 7’000 (hourly rate adjusted from CHF 890 to CHF 700).

- A three-member Arbitral Tribunal was constituted. In the course of the proceedings, the parties requested the co-arbitrators to conduct a mediation in order to try to settle the case. The case was settled and the Arbitral Tribunal issued a termination order. Given that the proceedings were terminated early (and as it was unclear whether the co-arbitrators had received direct payments from the parties for their mediation work) the Court considered the fees suggested by the Arbitral Tribunal to be too high and reduced them accordingly (by CHF 41’000).

In three other cases, the Court decided to adjust the fees because the resulting hourly rates of the arbitrators were considered to be excessive:

- The Arbitral Tribunal requested fees for CHF 900’000, which corresponded to hourly rates of CHF 870 for the presiding arbitrator, respectively of CHF 1’500 and CHF 2’200 for the co-arbitrators. The Court reduced the fees to CHF 720’000 (i.e. -20%).

- The Arbitral Tribunal requested CHF 800’000, which corresponded to hourly rates of CHF 800 for the presiding arbitrator and CHF 600 for
the co-arbitrators. The Court reduced the fees of the Arbitral Tribunal to CHF 720’000 (i.e. -10%).

• The Arbitral Tribunal requested fees in the amount of CHF 142’000, corresponding to hourly rates of around CHF 850 for the presiding arbitrator and CHF 710 for the co-arbitrators. The fees were lowered by 10% (CHF 127’800).

G. Emergency Relief (Art. 43 Swiss Rules)

The emergency relief procedure was introduced with the 2012 Swiss Rules, under art. 43 Swiss Rules.

1. Statistics

In the period under review 8 emergency relief proceedings were administered by the Court: 6 were filed in Geneva and 2 in Zurich. In one of the cases, the Claimant withdrew the Application for emergency relief and proceeded with the arbitration in the merits.

2. Time to Appoint the Emergency Arbitrator

If the conditions are met, the President or Vice-President, upon assignment by the Secretariat, will proceed with the appointment of an emergency arbitrator as soon as possible.

The practice of the Court shows that the appointment of the emergency arbitrators is made very quickly after receipt of the Application, the Registration Fee and the deposit for emergency relief proceedings:

• In 2 cases (≡ ca. 25%), an emergency arbitrator was appointed in less than 24 hours.
• In other 4 cases (≡ ca. 50%), in 1 working day.
• In 1 case (≡ ca. 12.5%), finally, the Court appointed the emergency arbitrator in 2 working days.

25 This corresponds to the expectation of the doctrine: According to Andrea Meier, “one may expect that it will usually take the Court not more than two business days” (SR-Commentary, MEIER, Art. 43 N 22, p. 461).
In no case it took the Court more than 2 working days to designate an emergency arbitrator.
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