SCAI INNOVATION CONFERENCE 2020 (6 February 2020, Zurich)

“Fast and Furious”:
Urgent and Expedited Relief
Lessons Learnt – Challenges Lying Ahead –
Need for Innovative Solutions?

Welcome address and Introduction

Ms Gabrielle NATER-BASS (Partner, HOMBURGER, Zurich), President of the SCAI Arbitration Court, welcomed the attendees to the 4th SCAI Innovation Conference and announced this year’s conference topic. She started off with submitting that the topic – emergency and expedited relief – as such might not seem most innovative. However, and that would make this conference outstanding among others, the innovative frame of the SCAI Innovation Conference would allow fresh views on this topic and, hopefully, new ideas. She closed her welcome speech with expressing her gratitude to the speakers, moderators, and conference organisers.

On behalf of the Organising Committee, including also Ms Sandra DE VITO BIERI (Partner, BRATSci, Zurich), Dr Simon GABRIEL (Partner, GABRIEL ARBITRATION, Zurich), Dr Christian OETIKER (Partner, VISCHER, Basel), Ms Alexandra C. JOHNSON (Partner, BÄR & KARRER, Geneva), and Ms Caroline MING (SCAI Executive Director & General Counsel, Geneva), Dr Diana AKIKOL (Partner, ABR AVOCATS, Geneva) and Ms Ulrike GANTENBERG (Partner, HEUKING KÜHN LÜER WOJTEK, Düsseldorf) welcomed the attendees of the conference and introduced the three panel topics:

Dr Akikol emphasized the interactive nature of the conference and its purpose to provide a forum where practitioners could draw on their collective experience with existing rules and practices, with a view to identifying potential room for improvement and exploring possible new solutions. She mentioned that the first panel topic was relatively new to arbitration, as many arbitral institutions had only introduced rules on emergency arbitration within the last decade, and it was time to evaluate the practical experience gathered with this new tool to see whether it worked well in practice. As to the second panel topic, she pointed out that the underlying key tension was a potential divergence between quality and speed.

Ms Gantenberg foreshadowed the discussions in particular of the last panel by mentioning that the purpose of this conference was also to evaluate whether arbitration had a future, last but not least against the background of emerging calls for international commercial courts. She emphasized that it would hence be essential to see on the occasion of the conference what arbitration could learn from litigation. Ms. Gantenberg concluded that in the end, the very idea of arbitration was to deal with new ideas.
The first panel, moderated by Ms Nadja Jaisli Kull (Partner, Bär & Karrer, Zurich), discussed practical experiences with emergency and interim relief and proposed new approaches of making the granting of emergency and interim relief more effective. The speakers analysed in particular (i) benefits of the Swiss Rules and the ICC Rules on selected issues; (ii) advantages of concurrent jurisdiction of state courts and arbitral tribunals; (iii) essential criteria for granting security for costs in arbitration; and (iv) enforcement problems with decisions by emergency arbitrators.

Dr Cecilia Carrara (Partner, Legance Avvocati Associati, Rome) focused her presentation “Exploring practical experiences: unsettled issues and room for improvement” on a comparison between emergency arbitrations conducted under the Swiss Rules and the ICC Rules. She started off sharing selected statistical data from the ICC Commission Report on Emergency Arbitration Proceedings of 2019, covering the first 80 cases thereunder. Dr Carrara submitted that in comparison with the ICC Rules, the Swiss Rules might even be more attractive for emergency arbitrations in a specific case due to: (i) the option of ex parte decisions; (ii) broader discretion of the arbitrator due to absence of institutional scrutiny; and (iii) the option to appoint the arbitrator in the subsequent main proceedings, subject to the parties’ agreement. Dr Carrara concluded with the observation that appointed emergency arbitrators were often in their mid-careers, with the experience, the willingness and the ability to contribute sufficient time and efforts for an effective conduct of the emergency proceedings.

Mr Christopher Harris QC (Barrister, 3 Verulam Buildings, London) explored in his presentation “Emergency and Interim Relief: Parallel Recourse to the Courts” potential benefits of a concurrent jurisdiction of state courts and arbitral tribunals for emergency relief. He explained that under the English Arbitration Act 1996, courts would only have to exercise their powers in support of arbitral proceedings if no agreed arbitral tribunal or institution had the power to act or to act effectively. Recent case law would show that this rule was interpreted very narrowly (cf. Gerald v Timis [2016] EWHC 2327). Mr Harris pointed out that the background to this overly strict application was the arbitration-friendly stance of the English courts, which however with respect to emergency relief might lead to practical disadvantages. He advocated that the English courts should be more open to accept concurrent jurisdiction with arbitral tribunals, as they would often be better suited to act quickly and efficiently. Such situation would also be in line with the LCIA Rules and the Swiss Rules.

Ms Marieke van Hooijdonk (Partner, Allen & Overy, Amsterdam) focused in her presentation “Security for costs” on the three criteria set out in the CIArb Guidelines on Applications for Security for Costs (November 2016): (i) prospect of success on the merits; (ii) ability to satisfy an adverse cost award; and (iii) fairness. On the success requirement, Ms van Hooijdonk pointed out that the pre-assessment of the merits might be difficult to conduct in an early stage of the proceedings. On the financial requirement, she submitted that consistent rejections of the claimant to provide information about its financial status may be used very effectively as evidence in the application for security on costs. On the fairness requirement, she mentioned the situation where the claimant submitted that it might be forced to withdraw its claim completely, if ordered to pay the requested security. Ms van Hooijdonk concluded that the freezing of assets (pre-judgment attachment) might be an effective alternative to security for costs, in particular when the opposing party had assets in a creditor-friendly country (e.g. in the Netherlands).
Mr Philippe Cavalieros (Partner, Simmons & Simmons, Paris) addressed in his presentation “The (perceived) enforcement problem: old and new solutions” selected aspects of the enforcement of orders by emergency arbitrators. He pointed out that according to the 2015 White & Case / Queen Mary International Arbitration Survey, 79% of the users were concerned about anticipated enforcement issues of decisions by emergency arbitrators. In contrast, statistical data concerning the ICC showed that only 13% of the parties were non-compliant with orders given by tribunals. He emphasized that nevertheless it might be a serious issue if orders by emergency arbitrators could not be enforced in jurisdictions which were less enforcement-friendly. For instance, such orders were as a rule not enforceable in France as the French Cour de Cassation required a final decision for that purpose. Mr Cavalieros submitted that tribunals faced with parties who were not compliant in the preceding emergency arbitration should sanction them in turn for reimbursement.

Second panel: Expedited Procedure & Efficiency Tools

Discussion: The faster the better or is it time to shift the focus back on the quality of the award?

The second panel shifted the focus to general means to expedite the proceedings. Dr Christian Oetiker (Partner, Vischer, Basel) moderated the panel whose speakers discussed in particular (i) the effective use of case management techniques; (ii) the limitation of the material scope of the arbitration; (iii) particularly helpful tools to achieve more efficiency and effectivity; and (iv) new legal tech solutions which may increase efficiency.

Dr Nils Schmidt-Ahrendts (Partner, Hanefeld Rechtsanwälte, Hamburg) addressed in his presentation “The desire for efficient dispute resolution and what we may still be missing”. He submitted that we should shift our focus away from tools which mainly seek to reduce time, and thereby costs, to tools which focus on an effective and efficient resolution of the parties’ core business dispute. He noted that the tools which mainly seek to expedite proceedings were, in his experience and according to the statistics provided by the arbitral institutions, used relatively rarely. This was true for formal rules on expedited procedures, but also for various more informal techniques. For instance, it was rare to see tribunals decide on a document-only basis or parties to agree to limit their briefs. Therefore, he suggested to shift the focus away from these techniques to tools which promote effectiveness and efficiency rather than solely speed. His key proposition to achieve this was that tribunals and parties should as early as possible enter into a dialogue, in which (i) the parties should focus on making the tribunal aware of the true factual core of their dispute and (ii) the tribunals should be ready to identify the key legal rules, legal basis, burden of proof, standards of substantiation, etc. they intend to apply.

Ms Gisela Knuts (Partner, Roschier, Helsinki) submitted in her presentation “Additional efficiency mechanisms: added value or superfluous gadgets?” that tribunals should focus more on the question whether the material scope of the proceedings could be limited for sake of efficiency. Thereby the tribunal could help the parties to "re-focus" on how they should effectively be pleading their case. Ms Knuts mentioned certain features which might be of support: (i) the ICC Note 2019 provisions on the dismissal of manifestly unmeritorious claims; (ii) the Danish Rules which provided for a preparatory meeting as early as possible; and (iii) the general power of tribunals to give instructions and directions to the parties. She highlighted that in light of looming due process concerns, tribunals might want to ask for respective waivers by the parties when sharing their views on a pre-assessment of the case. Ms Knuts concluded that if
tribunals were more courageous to limit the material scope of the arbitration, much efficiency could be reached.

Ms Jennifer Kirby (Principal, Kirby, Paris) focused in her presentation “The ways arbitral institutions push tribunals for speed: How helpful are they?” on three tools which might substantially make arbitration proceedings more efficient. First, she submitted that sole arbitrators might be preferable to three-member-tribunals. Sole arbitrators would generally be in a position to conduct the proceedings more efficiently. Further, she mentioned the Paulsson-van den Berg observation (that party-appointed arbitrators may hurt more than help the arbitral process) to question the common perception that having three arbitrators is generally better than having one. Second, Ms Kirby submitted that it may be helpful for arbitral rules to give the tribunal discretion as to whether or not to hold a hearing, as the Swiss Rules do (Article 15). In her experience, it was extremely rare that something would come out at the hearing which substantially changed the outcome of the proceedings. Third, she considered that the financial incentives implemented by the institutions to render the award timely can new legal tech solutions increase efficiency. This was against the background that a lot of delay can creep in between the closure of the proceedings and the rendering of the award.

Dr Michael Cartier (Partner, Walder Wyss, Zurich) gave in his presentation “How can new legal tech solutions increase efficiency“ an overview of technical solutions which might help to obtain results more quickly. He confessed that technical tools, however, might not help to achieve better results in all cases. First, Dr Cartier mentioned that arbitral institutions started to implement online case management systems with the following incentives for its users: (i) quicker processing (e.g. uploading vs. sending by postal mail); (ii) more security (e.g. data protection); and (iii) more accessibility of the file (i.e. globally). Second, he pointed out that there were more and more software solutions offering document automation, for instance to generate arbitration clauses, submissions, and awards. He emphasized the usefulness of the arbitration clause generator on the SCAI website, with which the parties might tailor an arbitration clause to their particular needs and at the same time avoid the danger of creating a pathological clause. Dr Cartier concluded with the mention of crowdsourced arbitration procedures, which might become more relevant in the future.

**Third panel: The Comparative Test (and What to Learn from Judges)**

The final panel, moderated by Mr Elliott Geisinger (Partner, Schellenberg Wittmer, Geneva), discussed the general question whether arbitrators could learn from judges. The panel was comprised of seasoned (former) judges and arbitrators.

Dr Christoph Hurni (High Court Judge, High Court of the Canton of Berne, Berne) gave in his presentation “The Comparative Test” an overview of selected issues in Swiss state court litigation: (i) the right to present evidence; (ii) due process requirements; and (iii) requirements on drafting decisions. On the right to present evidence, he emphasized that the right to present evidence was not unlimited. In particular, the evidence had to be legally relevant, i.e. connected to a fact that might be material for the outcome for the dispute, and judges were entitled to anticipatory assessment of evidence. Further, Dr Hurni explained that due process was being understood as a very broad right of the parties which would, at least theoretically, allow for an “eternal right to reply”. However, the state court might cut-off the right to reply after the last word of the losing party on basis of good faith considerations. Dr Hurni concluded his presentation by pointing out the minimal requirements for drafting state court decisions, which would allow confining the reasoning to essential aspects.
Dame Elisabeth GLOSTER (Arbitrator, ONE ESSEX COURT, London), who was appointed to the English Commercial Court as the first woman ever, started off with the general question whether arbitration was able to learn from state court litigation against the many idiosyncrasies of the two systems. She shared however a number of observations where tribunals could be more strict in the shaping and the enforcement of the procedural frame of the proceedings. First, tribunals should be less reluctant to sanction the non-compliance with time limits. Commercial courts in England for instance would be very strict with time limits, also because the well-behaving party would deserve that. Second, Ms Gloster mentioned that the Redfern Schedule procedure would often be inefficient and overly costly. Accordingly, there should be given more room to narrow down the disclosure procedure. Third, Ms. Gloster concluded that regarding potential fraud cases, arbitrators might often be too “sensitive” about this topic. Instead, arbitrators should take the challenge and accept the different nature of dealing with such kind of cases.

Dr Philipp HABEGGER (Partner, HABEGGER ARBITRATION, Zurich) focused his presentation on the question whether arbitral tribunals should be more open to procedural tools used in state court litigation. He started off with the key question whether it would be really necessary to always have two rounds of written submissions. In Swiss state court procedure, it is only after the submission of the statement of defense that the judges would decide whether there had to be a second round of submissions. The Swiss Rules and the UNCITRAL Rules would leave room for such an approach also in arbitration proceedings. At least in smaller disputes, it would hence be a viable option not to fix all procedural steps from the beginning. Dr Habegger submitted that after the first round of submissions, the tribunal could – like in Swiss litigation proceedings – share its preliminary views with the parties. In anticipation of due process concerns, he emphasized that the risk of a successful challenge for a prima facie assessment were nil if properly done. Moreover, Dr Habegger suggested that tribunals should take more advantage of their evidentiary powers, in particular in anticipatory weighing of evidence. Further, he submitted that tribunals should be stricter regarding document production: by requesting parties to point on the relevance and materiality of a fact specifically in their briefs; strict limits of the number of the allowed requests and the pages to be used per request; and the narrow description of categories. Dr Habegger concluded by advocating for using more often oral closing statements instead of post-hearing briefs and for less emphasis on the procedural history when drafting the award, as the parties would have had to object anyway immediately in case their procedural rights would have been infringed.

**Joint Recording of Conclusions**

In their concluding remarks, Ms Sandra DE VITO BIERI (Partner, BRATSCHI, Zurich) and Dr Simon GABRIEL (Partner, GABRIEL ARBITRATION, Zurich) summarised the panels’ conclusions.

Ms De Vito Bieri mentioned that one of the key points which were discussed throughout the conference was that there should be more dialogue between the parties and the tribunal. In this context, she raised the general questions whether this was in fact copying the approach already taken by mediation, and whether the point of arbitration was not rather that the parties would like to have their day in court.

Dr Gabriel put the question to the audience as to whether there should be increased financial incentives for arbitrators to settle cases. A slight majority found that a “bonus for arbitrators, if a settlement were reached” would be a good innovation.
Ms De Vito Bieri mentioned that another innovation could be to incentivize interim awards, for instance on the question of liability. This might in turn help to shorten the proceedings.

Dr Gabriel put the question to the audience whether one should have generally more hearing and less legal briefs. A comfortable majority of the audience deemed this to be a good innovation.

They closed on a lighter note by awarding the Innovation Medal of the conference to Dr Oetiker for the most innovative introductions of speakers: The audience had to choose which of three fun facts about the speakers was true – and Dr Oetiker showed an exceptional innovative talent when inventing the wrong ones...

### Closing Remarks

**Ms Caroline Ming (SCAI Executive Director & General Counsel)** started her closing remarks by highlighting that 2019 had been the fourth best year for SCAI with 96 new arbitration and 6 mediation files opened. She added that not only the numbers for 2019 were positive, but also the view to the future: the Willem C. Vis Moot Problem 2021 would be governed by the Swiss Rules!

In reference to the conference topic, Ms Ming pointed out that out of the eleven emergency arbitrations registered with SCAI to date, only three contained requests for ex parte proceedings. Regarding the calls for stricter compliance with time limits voiced throughout the conference, Ms. Ming stressed that SCAI had just issued new guidelines for arbitrators which would, amongst other things, address these concerns.

Ms Ming announced that the Swiss Rules brochure would now contain the 2019 revised Swiss Rules of Mediation (which were already available in five languages). On this topic, she mentioned that out of eleven mediation cases registered with SCAI in 2018, five turned in 2019 into Swiss Rules arbitration proceedings. This would prove that mediation was both a beneficial tool to sort things out at an early stage for some cases, but also still allowed the cases in real need to be brought to arbitration. Ideally, the mediation would have at least helped to resolve misunderstandings, determine which are the disputed facts and focus the debate on the real and substantive issues.

Answering Ms Gantenberg’s opening remark, Ms Ming stated that she was confident that arbitration had a future, and this mainly thanks to all the support provided not only by the SCAI team, the Court Members and the Chambers of Commerce, but also by the very many other arbitration practitioners who helped by working on dedicated projects.

On translations and upcoming projects, Ms Ming mentioned that the SCAI website was now also available in Portuguese, thanks to Ernandes Ramos. She highlighted that the Swiss Rules were recently translated into Ukrainian (with thanks, notably, to Anastasija Dulska, Schellenberg Wittmer, and to Elena Neidhart, Lenz & Staehelein, Geneva), Latvian (with thanks, notably, to Eva Kalnina, Lévy Kaufmann-Kohler, Geneva) and Romanian (with thanks, notably, to Adrian Hodis, to Rodica Turtoi, Peter & Kim, and to Andreas Schregenberger, Gabriel Arbitration, Zurich). There were corresponding events planned this year in Riga and Bucharest, and an event on arbitration in finance disputes in Geneva after the success of a similar event last year in Zurich (with thanks to Niklaus Zaugg, CMS, and to Dr Stefanie Pfisterer, Homburger, Zurich).

Ms Ming concluded the event by expressing her gratitude to everyone making the SCAI Innovation Conference 2020 possible, in particular its 116 participants.

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Reported by Andreas SCHREGENBERGER, Senior Associate, Gabriel Arbitration, Zurich