Note on SCAI 2020 Revised Guidelines for Arbitrators

The Swiss Chambers’ Arbitration Institution (SCAI) is pleased to announce that it has recently revised its Guidelines for Arbitrators. The goal of the revision was to provide further guidance on selected points, among them the use of secretaries, the efficient conduct of the proceedings, the procedure for requesting deposits, and the requirements for advance payments of fees. The revised Guidelines remain short and to the point, while at the same time offering the necessary guidance to arbitrators handling arbitrations under the Swiss Rules of International Arbitration (Swiss Rules).

The task force for the revision of the Guidelines was composed of SCAI Court members Bernhard Berger, Homayoon Arfazadeh, Philippe Baertsch, Christoph Müller and Andrea Meier. The revised Guidelines are available in English, French, German and Italian on the website of SCAI:


This note provides an overview of the changes made to the Guidelines for Arbitrators.

1. Secretaries

The previous Guidelines contained but a few provisions regarding the use of a secretary by the arbitral tribunal. They addressed fundamental points, namely that an arbitral tribunal may appoint a secretary only after consulting with the parties, and shall ensure that any secretary meets the same requirements of independence and impartiality as the arbitrators. They also made clear that the appointment of a secretary may not lead to an increase in the overall fees payable by the parties.

The existing provisions on the secretary appointment have been incorporated into the revised Guidelines (see A.1, A.11 and A.12). However, it was felt that more guidance on the use of secretaries would be appropriate, in particular since different approaches exist in different legal cultures as to the role of the secretary. Therefore, a number of further provisions were included with the goal to create more transparency regarding the appointment process, and to assure the Parties that no appointment can be made and no role can be ascribed to a secretary without their knowledge and against their will.
The new set of provisions requires an arbitral tribunal that intends to appoint a secretary to address this with the parties as early as possible. Furthermore, prior to any appointment, the arbitral tribunal shall submit to the parties the proposed secretary’s curriculum vitae and a declaration of independence and impartiality, including a disclosure, if applicable (see A.2).

In a new key provision, the revised Guidelines make clear that the appointment of a secretary cannot take place against the will of the Parties, and that this must also be communicated to the Parties. The same applies to the tasks to be carried out by the secretary. Therefore, the new provision requires the arbitral tribunal to make clear to the parties that they may object to its proposal for appointment of a secretary. The arbitral tribunal shall also clarify that a secretary shall not be appointed if a party has raised an objection (see A.3).

A similar procedure applies regarding the tasks to be carried out by the secretary. When proposing the appointment of a secretary, the arbitral tribunal shall also inform the parties of the proposed tasks to be carried out by the secretary, and make clear to the Parties that they may object to the proposed tasks, and that the secretary may not carry out such tasks if a party has raised an objection (see A.4, A.5).

Further provisions were included to clearly describe the limits to the role of the secretary. It is now expressly stated that the secretary acts upon the arbitral tribunal’s instructions and under its supervision, and that the arbitral tribunal is responsible for the conduct of the secretary (see A.6). Furthermore, the revised Guidelines are built on the understanding that any decision-making is reserved to the arbitral tribunal. Therefore, the arbitral tribunal’s delegation power finds its clear limits, with the arbitral tribunal being prohibited from delegating any decision-making functions to the secretary, or from relying on a secretary to perform any essential duties of the arbitral tribunal (see A.7). In other words, any decisions and their reasoning, whether they be of a procedural or substantive nature, must stem from the tribunal, not the secretary.

The revised Guidelines also make clear that the arbitral tribunal may remove the secretary at its discretion (A.8) and expressly state that the provisions on challenges for arbitrators also apply to secretaries (A.9). Should a secretary be removed by the arbitral tribunal, either on its own motion or because of a challenge, the appointment process for a substitute secretary, if any, follows the same rules as the initial appointment (A.10).

2. Efficient conduct of the proceedings

Undoubtedly, one of the key duties of an arbitrator in a Swiss Rules arbitration is making every effort to conduct the proceedings in an efficient manner. A newly added provision in the revised Guidelines reminds the arbitral tribunal of this duty, and that it shall avoid unnecessary costs and delays. It sets a clear
expectation as to the time limit within which the tribunal has to render the final award absent any exceptional circumstances, and sets forth the process by which the Court monitors compliance with this time limit.

As regards the time limit for the final award, absent exceptional circumstances, SCAI expects the arbitral tribunal to render its final award within 3 months after the filing of the last submission on the merits in the proceedings (A.\textsuperscript{bis}1). In order to allow the Court to monitor this time limit, the arbitral tribunal, within 10 days of the last submission on the merits, shall inform the Secretariat of the date by which it expects to render its final award. The arbitral tribunal shall promptly inform the Secretariat of any exceptional circumstances that would warrant a longer period of time for the rendering of the final award, and indicate the expected date of completion (A.\textsuperscript{bis}2). Any undue delay in the rendering of the final award may be taken into account by the Court when fixing the costs of the arbitration (A.\textsuperscript{bis}3). In other words, an undue delay may cause the Court to reduce the arbitrators’ fees.

3. The arbitral tribunal’s request for deposits

Under the Swiss Rules, it is for the arbitral tribunal to request the deposits of costs. This is a difference to arbitrations under other institutions, and the responsibility of the arbitral tribunal, which is also stated in Article 41 Swiss Rules, is thus reiterated in the Guidelines in a newly amended provision (see B.1).

Since the arbitral tribunal must ensure that its own fees and the administrative costs of SCAI are covered, the newly amended provision reminds the arbitral tribunal that the first request for deposits shall be made promptly after the transmission of the file to the arbitral tribunal, and the arbitral tribunal may wish to inform the parties that it will not proceed with the arbitration until payment of the first deposits has been made (see B.2).

Furthermore, the newly amended provision expressly states that any additional requests for deposits must be made as soon as the arbitral tribunal becomes aware of circumstances that so justify. This serves to ensure that the arbitral tribunal does not wait until late in the proceedings, e.g. after the evidentiary hearing, to request additional deposits although the circumstances prompting additional deposits have been known for a while (see B.3).

Lastly, the revised Guidelines make clear that before the Court's review of the determination of costs pursuant to Article 40(4) Swiss Rules, the Secretariat may also invite the arbitral tribunal to request additional deposits from the parties should it turn out that the deposits made by the parties so far do not cover the costs of the arbitration, including the SCAI administrative costs (see B.5).
4. Advance payments of fees

Finally, the Guidelines were amended regarding the provisions on advance payments of fees. The previous Guidelines stated the principle that advance payments of arbitrators’ fees (Article 38(a) Swiss Rules) were only approved by the Court once significant steps in the arbitration had been achieved. The new wording allows for a more flexible approach as the Court may now also consider other relevant circumstances justifying the release of parts of the deposits, including but not limited to the time passed since the constitution of the arbitral tribunal (see E.2).

For example, the Court may now grant a request of the tribunal for an advance payment of fees if the parties have requested a stay of the proceedings for a significant period of time, which in turn would significantly postpone the rendering of the final award and thus the payment of the arbitrators’ fees. As under the previous Guidelines, however, such payments, as a rule, shall not exceed 50% of the deposits paid by the parties absent particular circumstances.

* * * * *

April 2020; Reported by Andrea Meier and Bernhard Berger.