

# Swiss Rules of International Arbitration Practice Note

October 2024

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# I. Introduction to the Swiss Arbitration Centre and Swiss Rules – Model Arbitration Clause

## A. INTRODUCTION

1. This Practice Note serves the purpose of providing guidance regarding the practice of the Swiss Arbitration Centre (“**Centre**”) when administering arbitration proceedings under the Swiss Rules of International Arbitration (“**Swiss Rules**”), with a particular focus on the changes that were brought about by the latest revision of the Swiss Rules in 2021. This Practice Note is limited to selected issues where additional explanations on the application of the Swiss Rules may be useful to the users, parties, counsel, and arbitrators alike.

2. The Swiss Rules were first enacted on 1 January 2004. They were originally inspired by the UNCITRAL Arbitration Rules of 1976. A first revision of the Swiss Rules came into effect on 1 June 2012. Following a second light revision in 2021, the current Swiss Rules have been in force since 1 June 2021.

3. The 2021 version of the Swiss Rules (including provisions such as the emergency procedure) shall apply to all arbitration proceedings in which the Notice of Arbitration was submitted on or after 1 June 2021, unless the parties have agreed otherwise (Article 1(2)).

4. The 2021 Swiss Rules came into effect following the reorganisation of the Swiss Chambers’ Arbitration Institution (“**SCAI**”). At the end of May 2021, SCAI was converted into a Swiss limited company and renamed Swiss Arbitration Centre Ltd. The Swiss Arbitration Association (“**ASA**”) is the majority shareholder. The Swiss Chambers of Commerce and Industry of Basel, Bern, Central Switzerland, Geneva, Neuchâtel, Ticino and Zurich (“**Chambers of Commerce**”, as defined in the Introduction to the Swiss Rules, letter (a)) continue to support the Centre as shareholders and through their extensive networks. The reorganisation has ensured that users continue to be served at the highest standard.

*5. The conversion of SCAI into the Swiss Arbitration Centre does not affect the validity of existing arbitration or mediation agreements referring to SCAI or any cantonal Chamber of Commerce.*

6. The Swiss Rules have been drafted to be efficient, flexible, and cost effective for the resolution of international and domestic disputes. The parties are free to designate the arbitrator(s), to select the applicable law, the language of the proceedings, the seat of the arbitration, and legal counsel, in Switzerland or elsewhere. The parties may consider agreeing on the seat of the arbitration in Switzerland if they want to benefit from certain characteristics of the Swiss law on arbitration.

## B. ORGANISATION OF THE SWISS ARBITRATION CENTRE

7. The Board of Directors (“**Board**”) of the Centre is composed of a majority of members nominated by ASA and other members nominated by the Chambers of Commerce (currently seven members in total). The Board is in charge of supervising the operation of the Centre and ensuring its compliance with applicable laws. It has no role in the management of cases administered by the Centre but appoints the Members of the Arbitration Court (“**Court**”) taking into account various criteria, including legal background, as well as geographical, cultural, and gender diversity.

8. The Court is an independent body responsible for the administration of arbitration proceedings under the Swiss Rules and the final authority for the proper application of the Swiss Rules. The Court is composed of leading arbitration practitioners of Swiss and other nationalities. The Board appoints the President, two Vice Presidents and the Secretary of the Court (who together compose the Executive Committee), as well as the ordinary Members of the Court. The Court renders decisions as provided for under the Swiss Rules. It may delegate to one or more Members of the Court or committees of the Court the power to make certain decisions pursuant to the Internal Rules of the Arbitration Court (“**Internal Rules**”, currently of September 2024).

9. By submitting their dispute to arbitration under the Swiss Rules, the parties accept that the Court is vested with all powers required for supervising the arbitration proceedings, as far as permitted by the law applicable to the arbitration (Article 1(4)). This may include powers otherwise vested in any competent judicial authority, such as to extend the

term of office of the arbitral tribunal and to decide on the challenge of an arbitrator on grounds not provided for in the Swiss Rules. When the circumstances so justify, the Court may extend or shorten any time limit set out in the Swiss Rules (Article 2(3)).

10. The Court Special Committee comprises at least seven Members of the Court, including the President, the Vice Presidents and the Secretary of the Court. The Court Special Committee renders the following decisions under Swiss Rules (Internal Rules, Article 4(3)):

- Appointment of an arbitrator in the circumstances contemplated by Articles 8(3) and 15(2)(a);
- Challenge of an arbitrator (Article 13);
- Removal of an arbitrator (Article 14);
- Revocation of an arbitrator (Article 8(3));
- Non-replacement of an arbitrator (Article 15(2)(b));
- Determination of the seat of the arbitration (Article 17);
- Those decisions which may be necessary relating to consolidation of proceedings (Article 7).

11. The President or, if the President is unavailable, any other member of the Executive Committee decides, among others, matters regarding the emergency relief proceedings pursuant to Article 43 (most notably the appointment of emergency arbitrators; Internal Rules, Article 6).

12. For each case, a Case Administration Committee is constituted by the Secretariat among the Members of the Court. It consists of a Rapporteur and in principle two Members (Internal Rules, Article 3(1)). The Case Administration Committee supports the Secretariat in its tasks and is empowered to make, in 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 or to the President or any other member of the Executive Committee.

13. Further details regarding the bodies of the Court and their powers are set forth in the Internal Rules.

14. The Secretariat assists the Court in administering arbitration proceedings. The Secretariat is headed by the Executive Director.

15. Arbitrators handling arbitrations under the Swiss Rules are assisted by the Guidelines for Arbitrators.

16. A separate set of rules applies when the Centre acts as appointing authority or case administrator (Rules as Appointing Authority and Case Administrator in UNCITRAL, *ad hoc* and Other Proceedings, currently of June 2021).

17. Supplemental rules apply to certain disputes based on statutory arbitration clauses (the Supplemental Swiss Rules for Corporate Law Disputes). Further details regarding the application of these supplemental rules can be found in the Supplemental Swiss Rules for Corporate Law Disputes and the explanatory note thereto.

18. All Rules and Guidelines, including this Practice Note, are available online ([www.swissarbitration.org](http://www.swissarbitration.org)).

19. To ensure compliance with sanctions regimes, the Centre has issued a Note to Parties, Arbitrators, and Mediators on Sanctions providing information on the administrative measures taken by the Centre during proceedings administered under the Swiss Rules.

### **C. MODEL ARBITRATION CLAUSE**

20. Parties wishing to include an arbitration clause in their contract may refer to the Model Arbitration Clause set forth at the outset of the Swiss Rules.

21. In the Model Arbitration Clause, the seat of arbitration is left open, and the parties need to fill in the city they want to designate as the seat. The parties may also determine the number of arbitrators (“one”, “three” or “one or three”) and the language of the proceedings.

## II. Commencement of the Proceedings

### A. NOTICE OF ARBITRATION

#### 1. Filing of the Notice of Arbitration

22. The Notice of Arbitration (“**Notice**”) is the first step to commence arbitration proceedings under the Swiss Rules. The Claimant must submit a Notice to the Secretariat at any of the office addresses or at the e-mail address listed in Appendix A. The Swiss Rules provide the choice of paper or non-paper filing of the Notice (Article 3(1)):

- **Electronic filing:** the Notice and its exhibits in PDF format may be submitted electronically to the Secretariat’s e-mail address: [centre@swissarbitration.org](mailto:centre@swissarbitration.org). The Claimant can also upload the Notice and its exhibits on a safe cloud and send the link via e-mail for the Secretariat to download the files.
- **Paper filing:** the Notice may be submitted by post or courier service to the Secretariat at one of its offices in Geneva, Zurich, or Lugano (Appendix A). The Claimant must provide the Secretariat with a sufficient number of copies of the Notice and its exhibits for each Respondent, each arbitrator and the Secretariat. If the number of copies is not sufficient, the Secretariat will ask the Claimant to provide additional copies.

23. In case of electronic filing, there is no requirement for submitting a hard copy, unless:

- The Claimant specifically requests the Secretariat to notify a hard copy to the Respondent, instead of, or in addition to, the electronic copy. In that case, the Claimant must provide the Secretariat with a sufficient number of hard copies for each Respondent, each arbitrator and the Secretariat. If the Claimant fails to submit a sufficient number of hard copies, the Secretariat will invite the Claimant to supply the missing hard copies and will notify the Notice and its exhibits to all addressees upon receipt of the additional hard copies.
- The Secretariat specifically requests a hard copy. This will be the case only exceptionally. In such case, the Secretariat will communicate the required number of copies.

24. None of the above options is preferred over the other.

25. The arbitration proceedings are deemed to commence on the date on which the Notice is received by the Secretariat in compliance with the requirements set forth in Article 3 (Article 3(2)). The date indicated by the Claimant on the Notice, or the moment when the Notice was sent is not taken into account. Only the date of due receipt by the Secretariat is relevant. The date of receipt of the Notice in case of electronic filing is the date of receipt of the e-mail and, in case of the Claimant uploading the Notice and its exhibits on a safe cloud, the date on which the corresponding link is received by the Secretariat (assuming that the link works properly).

26. If a party files the Notice in both electronic and paper format, the arbitration proceedings are deemed to commence on the date on which the first copy is received, either by e-mail or by post or courier service.

27. Confirmation of receipt of the Notice will be sent by the Secretariat to the Claimant, irrespective of the filing option chosen.

#### 2. Content of the Notice of Arbitration

28. The Swiss Rules offer the Claimant wide discretion as regards the content of the Notice, which may be short or not. The Claimant may draft the Notice in the manner and format it deems appropriate, provided that the Notice contains certain necessary elements (Article 3(3)), so as to enable the Respondent to understand the nature of the dispute, as well as to enable the Court to make the necessary decisions at the initial stages of the arbitration (such as determining the advance on costs and making decisions regarding the constitution of the arbitral tribunal).

29. The Notice must include at least the following information (Article 3(3)):

##### (a) Demand for submission of the dispute to arbitration

The Notice must be precise and specific in the demand for the dispute to be referred to arbitration under the Swiss Rules. Any vague language in that respect may result in the Notice being incomplete.

(b) Contact details of the parties and their representatives

The Notice must contain the contact details, i.e. name, address, telephone number, and e-mail address of each Claimant and each Respondent, as well as their representatives where applicable. Providing the contact details of the Respondent enables the Secretariat to notify the Notice to the Respondent (Article 3(6)).

(c) Identification of the Arbitration Agreement

The Arbitration Agreement is a key element. It enables the Court to determine the modalities of the arbitration, such as the seat, the applicable law, the language, the procedure for the constitution of the arbitral tribunal, etc. The Notice must provide exact reference to the Arbitration Agreement invoked by the Claimant. It may be a specific agreement to arbitrate an existing or future dispute, or an arbitration clause contained in a contract. "Arbitration Agreement" includes the reference to an arbitration agreement between two or more parties and an arbitration clause contained in a unilateral legal act (will, trust deed) or articles of association, etc. It may be advisable to not only make explicit reference to a specific document containing the Arbitration Agreement, but to reproduce the Arbitration Agreement in the Notice itself.

(d) Identification of the contract/legal instrument

The contract(s) or other legal instrument(s) (such as statutes, by-laws, regulations, wills, etc.) from which the dispute between the parties arises must be clearly identified in the Notice in order for the Respondent to understand the source and context of the dispute when preparing its Answer to the Notice ("**Answer**") according to Article 4.

(e) General nature and amount of the claim

The description of the nature of the claim must be specific enough to allow the Respondent to understand the elements of the dispute and prepare the Answer (Article 4). Furthermore, the Claimant must, whenever possible, give an indication of the amount involved, i.e. the amount it claims from the Respondent or, in case of a non-monetary claim, the value of its claim. This information is not only relevant for the Respondent, it also enables the Court to decide on the number of arbitrators in case the Arbitration Agreement is silent in this respect, and the Secretariat to calculate the applicable fees and costs. It also serves to determine whether the Expedited Procedure provisions apply to the proceedings.

(f) Relief/remedy sought

The relief, monetary or otherwise, or remedy sought by the Claimant must be clearly stated with sufficient specificity in the Notice in order to enable the Secretariat to calculate the applicable fees and costs, as well as to enable the Respondent to prepare its Answer (Article 4).

(g) Proposal for the number of arbitrators, manner for constituting the arbitral tribunal, language and seat of the arbitration

If the Arbitration Agreement is silent on the number of arbitrators, the procedure for the constitution of the arbitral tribunal, the language or the seat of the arbitration, the Notice must specify the Claimant's proposal(s) on the issues concerned.

The Secretariat invites the Respondent to comment on the Claimant's proposal(s) in the Answer. If there is no agreement on the proposal(s), the default mechanisms set forth in the Swiss Rules will apply, which may entail a decision of the Court as to the number of arbitrators (Article 9) or the seat of the arbitration (Article 17). If the Claimant's proposal(s) is in contradiction with the Arbitration Agreement but the parties agree, the parties' agreement prevails.

(h) Designation of an arbitrator

Where a three-member arbitral tribunal is to be constituted as per the Arbitration Agreement or Article 11(1), the Notice must specify the name and contact details of the arbitrator designated by the Claimant. This enables the Court to commence the process for confirmation of the designated arbitrator.

(i) Payment of the Registration Fee

The Claimant must calculate and make payment of the applicable Registration Fee in accordance with Appendix B, Section 1 (see in more detail para. 221 *et seq.* below). In case of an understatement of the amount in dispute or a subsequent increase of claims, the Secretariat may request an additional portion of the Registration Fee, based on the effective amount in dispute or the aggregate amount of the claims following an increase. Similarly, in case of an unquantified claim, the Registration Fee may be increased when the arbitral tribunal has quantified such claims. An additional portion of the Registration Fee will be requested in such case.

The payment of the Registration Fee must be made in Swiss francs (CHF) and received net of any banking

charges in the bank account listed in Appendix A. For updated details of the bank account, please consult: [www.swissarbitration.org/centre/arbitration/arbitration-logistics](http://www.swissarbitration.org/centre/arbitration/arbitration-logistics).

Payment of the Registration Fee must be made directly from an account held in the name of the Claimant. The Secretariat may reject any payment not directly received from the Claimant without providing reasons for that determination.

The Registration Fee is not refundable.

30. In addition to the necessary information required under Article 3(3) as detailed above, Article 3(4) sets forth certain *optional* information that may be provided by the Claimant in the Notice:

- (a) The Claimant may provide proposals for the appointment of a sole arbitrator pursuant to Article 10. While suggested criteria for the profile of the sole arbitrator may be useful if the Court subsequently appoints the sole arbitrator, providing specific names is usually not advisable: if the other party does not agree to these names, the Court, when appointing the sole arbitrator, is likely to disregard names which have been provided unilaterally.
- (b) The Claimant may include in the Notice the Statement of Claim referred to in Article 20. In that case, the Claimant does not have to wait until the arbitral tribunal determines the time limit for submitting the Statement of Claim under Article 20(1). The Statement of Claim must comply with the requirements set out in Article 20.

31. The Claimant may subsequently amend its claim(s) within the limits provided in Article 22.

### 3. Incomplete Notice and its Consequences

32. If the Notice lacks any of the information required by Article 3(3), the Secretariat will inform the Claimant accordingly and set a time limit for the Claimant to provide the missing information (Article 3(5)). The same applies in case of non-payment of the Registration Fee in order for the Claimant to make the payment due. The Secretariat usually fixes a time limit of 15 days from the date of receipt of the Notice.

33. If the Notice has been submitted in another language than English, German, French or Italian, the Secretariat may request the Claimant to submit a translation of the Notice and any exhibits within an appropriate time limit, usually 15 days.

34. If the Claimant fully complies with the directions of the Secretariat within the time limit set, the Notice will be deemed to have been validly filed on the date on which the initial version of the Notice was received by the Secretariat (Article 3(5)). If the Claimant does not comply with the directions of the Secretariat within the time limit set, the Notice will be deemed to be withdrawn, without prejudice to the Claimant's right to resubmit the Notice at a later stage or file a new Notice in relation to the same claim(s).

### 4. Notification of the Notice to the Respondent

35. When the Notice has been validly submitted by the Claimant in compliance with Article 3 and the Registration Fee has been paid, the Secretariat notifies the Notice, along with any exhibits received, to the Respondent (Article 3(6)). As a rule, if the notification is made by e-mail only, the Notice will be notified within 24-48 hours upon receipt of the payment of the Registration Fee. If hard copies are to be notified to the Respondent, the time it will take for notification to become effective will vary depending on the country where the notification is to be made. The notification is made by courier/post, without being subject to requirements for service of state court documents.

### 5. Multi-party Arbitration

36. The Swiss Rules allow for arbitration proceedings involving multiple parties. A joint Notice can be filed by more than one Claimant if it satisfies the requirements set forth in Articles 3(3) to 3(5). The Claimant(s) can also submit claims against more than one Respondent. If such claims are made under more than one Arbitration Agreement, the Court may have to take a decision pursuant to Article 5(1)(b) as to whether the arbitration can proceed in respect of all parties or all claims (see para. 48 *et seq.* below).

## B. ANSWER TO THE NOTICE OF ARBITRATION

### 1. Filing of the Answer

37. The time limit for the Respondent to submit an Answer to the Secretariat is 30 days from the date of receipt of the Notice (Article 4(1)). The Claimant may ask the Secretariat to provide proof of receipt of the Notice by the Respondent in order for the Claimant to know when to expect the Answer.

38. If so requested by the Respondent, the Secretariat may grant the Respondent a time extension to file the Answer. The Secretariat usually grants a 30-day extension without seeking the Claimant's agreement. If a longer or additional extension is requested, the Secretariat in principle invites the Claimant to comment. Depending on the Claimant's comments, the Secretariat asks the Court to decide on the extension sought. When a time extension is requested, the Respondent may, but need not, designate an arbitrator before the filing of the Answer.

39. The Swiss Rules provide the Respondent with the same option available to the Claimant of paper filing or non-paper filing, regardless of which option the Claimant chose for the Notice. Article 3(1) setting out the requirements applicable to the Notice applies *mutatis mutandis* to the Answer. The Answer can be filed with the Secretariat at any of the addresses listed in Appendix A, by post or courier service, or by electronic means (see para. 22 above).

### 2. Content of the Answer

40. Consistent with what applies to the Claimant (see para. 28 above), the Swiss Rules do not restrict the Respondent's freedom to draft the Answer in the manner and format it deems appropriate, with the exception of certain *necessary* elements that the Answer must contain in accordance with Article 4(1). This information is required to enable the Court to make decisions at the initial stages of the arbitration (such as determining fees and costs and making decisions regarding the constitution of the arbitral tribunal). This information also enables the Claimant to understand the nature and content of the Answer.

41. The Answer must include the following information (Article 4(1)):

(a) Contact details of the Respondent and its representatives

The Answer must contain the contact details, i.e. name, address, telephone number, and e-mail address of the Respondent and its representative.

(b) Plea of lack of jurisdiction

Where the Respondent raises a plea of lack of jurisdiction, the Answer must clearly and unambiguously specify such plea and its reasons. The Court will first decide whether the case can proceed, applying the *prima facie* test set forth in Article 5 (see para. 48 *et seq.* below). If the Court decides that the case can proceed, the jurisdictional objection will then be heard and decided by the arbitral tribunal when constituted (Article 23).

(c) Comments on the general nature and amount of the claim

The Answer must appropriately address, and reply to, the general nature and amount of the claim(s) as stated in the Notice (Article 3(3)(e); see para. 29(e) above).

(d) Answer to the relief/remedy sought in the Notice

The Answer must appropriately address, and reply to, the relief or remedy sought by the Claimant in the Notice (Article 3(3)(f); see para. 29(f) above).

(e) The Respondent's proposal as to the number of arbitrators, manner for constituting the arbitral tribunal, language and seat of the arbitration

As is the case for the Notice (Article 3(3)(g); see para. 29(g) above), if the parties have not previously agreed on the number of arbitrators, the procedure for the constitution of the arbitral tribunal, the language or the seat of the arbitration, the Answer must specify the Respondent's proposal(s) on the issues concerned.

If the Respondent's proposal(s) is aligned with the Claimant's proposal(s) with either the number of arbitrators, the procedure for the constitution of the arbitral tribunal, the language or the seat of the arbitration, then the parties' agreement will be followed, even if the Arbitration Agreement provided otherwise. If there is no agreement on the proposal(s), the default mechanisms set forth in the Swiss Rules will apply, which may entail a decision of the Court as to the number of arbitrators (Article 9) or the seat of the arbitration (Article 17).

(f) Designation of an arbitrator



In the event a three-member tribunal is to be constituted as per the Arbitration Agreement or Article 11(1), the Answer must specify the name and contact details of the arbitrator designated by the Respondent. This enables the Court to commence the process for confirmation of the designated arbitrator.

42. In addition to the necessary information required under Article 4(1) as detailed above, Article 4(2) refers to certain *optional* information that may be provided by the Respondent in the Answer:

- (a) The Respondent may make proposals for the appointment of a sole arbitrator as referred to in Article 10. The same applies as set out above regarding proposals of the Claimant (see para. 30 above), namely that – unless the parties can agree on a sole arbitrator – the Court will likely not appoint an arbitrator proposed unilaterally by one party, and the Respondent is therefore generally better advised to propose criteria rather than names.
- (b) If the Claimant has included its Statement of Claim in the Notice, the Respondent may, but need not, provide the Statement of Defence referred to in Article 21 together with the Answer. In that case, the Respondent does not have to wait until the arbitral tribunal determines the time limit for submitting the Statement of Defence under Article 21(1). The Statement of Defence shall comply with the requirements of Article 21.

43. In case of an incomplete Answer or need for a translation of the Answer and any exhibits, Article 4(3) provides that Articles 3(5) and (6) on the Notice apply *mutatis mutandis* to the Answer (see para. 32 *et seq.* above).

### 3. Counterclaims and Set-off

44. Any counterclaim or set-off defence by the Respondent is, as a rule, to be raised in the Answer (Article 4(4); for cross-claims and joinder see para. 54 *et seq.* below). The admissibility of any counterclaim or set-off defence asserted at a later stage will be decided by the arbitral tribunal when constituted (Article 22). Article 3(3) on the content of the Notice applies *mutatis mutandis* to any counterclaim or set-off defence (see para. 29 above).

45. The Respondent may subsequently amend its counterclaim(s) and/or set-off defence within the limits provided in Article 22.

46. In case of any counterclaim, the Respondent must pay a corresponding Registration Fee according to Appendix B, Section 1, and the requirements set out above (see para. 29(i) above) for the Claimant apply in the same manner. In case of any subsequent increase in the amount claimed or a failure to pay the Registration Fee, the consequences regarding the claims made in the Notice apply *mutatis mutandis* (see paras 29(i) and 31 *et seq.* above). A set-off defence does not trigger payment of a separate Registration Fee, but it may be taken into account when determining the amount in dispute under the conditions set forth in Appendix B, Section 2.1.

47. The Swiss Rules do not provide for a specific reply submission by the Claimant to any counterclaim or set-off defence raised by the Respondent together with its Answer. This will be dealt with after the arbitral tribunal has been constituted, as part of the main submissions in the arbitration.

## C. ADMINISTRATION OF CLAIMS

48. When the Answer (together with any counterclaim and/or set-off defence as the case may be) has been submitted, the arbitration in principle proceeds with all the claims made by the parties at that stage.

49. The Court need not conduct a *prima facie* test to determine whether a case can proceed when the parties have so agreed expressly or impliedly because no objection is raised. The Court will decide that the arbitration or some of the claims cannot proceed only if (i) the Respondent does not file an Answer or raises a jurisdictional objection, including that claims made under more than one Arbitration Agreement may not be determined together, and (ii) upon *prima facie* assessment there is no Arbitration Agreement manifestly referring to the Swiss Rules, or claims made under more than one Arbitration Agreement are manifestly incompatible (Article 5(1)).

50. Reference to the Swiss Rules in the Arbitration Agreement may be express (regardless of whether the arbitration institution mentioned is the Swiss Arbitration Centre or the former SCAI) or by a reference to the (former) arbitration rules of the Chambers of Commerce (Basel, Bern, Central Switzerland, Geneva, Neuchâtel, Ticino, Vaud, Zurich),

or of any further Chamber of Commerce or other entity that may adhere to or refer its cases to the Swiss Rules (Article 1(1)).

51. Article 5(1) has a gatekeeping function. It allows the Court to prevent arbitrations from proceeding in the clear absence of a Swiss Rules arbitration agreement or in case of so-called pathological clauses the interpretation of which would clearly exclude an agreed submission of the dispute to arbitration under the Swiss Rules.

52. Article 5(1) also covers the situation where the Claimant commences a single arbitration in relying on more than one contract (multi-contract situation). The *prima facie* test enables the Court to examine whether the various Arbitration Agreements (not the contracts themselves) are compatible, for example, with regard to the designated institution, the seat of the arbitration or the number of arbitrators. If the Court determines that the Arbitration Agreements are manifestly incompatible, the Court may decide under which agreement(s) the proceedings shall proceed.

53. Article 5(2) makes clear that the Court's decision is only *prima facie* and without prejudice to the arbitral tribunal's power – as reserved in Article 23 – to rule on any jurisdictional objections, including the existence, validity, or scope of the Arbitration Agreement, or whether claims under more than one Arbitration Agreement can be determined together. The Court's assessment is of an administrative nature to allow a case to proceed; if the Court decides that the case is to proceed, the arbitral tribunal will be constituted. When the arbitral tribunal is in place, a party needs to submit any jurisdictional objections to the arbitral tribunal, which will make all decisions required.

### **III. Cross-Claim, Joinder, Intervention**

#### **A. DEFINITION OF CROSS-CLAIM, JOINDER AND INTERVENTION**

54. Article 6 governs claims other than claims made by the Claimant against the Respondent in the Notice or counterclaims made by the Respondent against the Claimant together with the Answer.

55. A cross-claim is a claim by a party against another party already involved in the arbitration, which does not qualify as a claim made in the Notice or a counterclaim made in the Answer. A cross-claim may include (i) a claim of one or more Respondents against one or more other Respondents, (ii) a claim of one or more Respondents against one or more Claimants who did not assert a claim against these Respondents, or (iii) a claim of one or more Claimants against one or more other Claimants.

56. By contrast, joinder and intervention both involve adding a party to an existing arbitration. They however differ inasmuch as they are initiated by different parties. Joinder refers to a situation where a party asserts a claim against an additional party. Intervention, by contrast, refers to a situation where an additional party asserts a claim against an original party.

#### **B. ASSERTION OF A CROSS-CLAIM, JOINDER OR INTERVENTION**

57. A party asserting a cross-claim or seeking joinder, or an additional party seeking to intervene in a pending case must do so by submitting a Notice of Claim (Article 6(1)). Such Notice of Claim may be contained in a submission having another main purpose (typically the Answer of a Respondent) or be submitted as a separate document. The rules governing the submission of a Notice in Article 3 apply *mutatis mutandis* as to the content and filing of a Notice of Claim.

58. Prior to the constitution of the arbitral tribunal, the Notice of Claim must be submitted to the Secretariat (Article 6(2)). The Secretariat notifies it to all other parties and any confirmed arbitrator. In case of a joinder request, the Secretariat will also notify the Notice of Arbitration and the Answer, together with their exhibits, to the additional party.

59. Any objection to the application of the Swiss Rules to the claim or any other jurisdictional objection, including that claims made under more than one Arbitration Agreement may not be determined together, must be raised by the

addressee of the claim or any other party within 15 days from the date of receipt of the Notice of Claim (Article 6(2)). When notifying the Notice of Claim to the parties, the Secretariat reminds them of the 15-day time limit to raise objections.

60. Article 5 applies *mutatis mutandis*, i.e. the arbitration will proceed with all claims unless the Court determines that there is manifestly no Arbitration Agreement referring to the Swiss Rules or, where claims are made under more than one Arbitration Agreement, the Arbitration Agreements are manifestly incompatible (Article 5(1); see para. 48 *et seq.* above). The Court's *prima facie* determination is without prejudice to any subsequent decision of the arbitral tribunal regarding its jurisdiction pursuant to Article 23, including as to any issue of consent in case the Arbitration Agreement is sought to be extended to a non-signatory party.

61. In case of a joinder request, if the Court decides that the arbitration can proceed with respect to the additional party, or if no objection to the joinder has been raised by the addressee of the claim or any other party, the Secretariat will set a 30-day time limit for the additional party to file an Answer to the Notice of Claim and set a time limit of usually 15 days for the additional party to state whether it agrees with the designation of the arbitrators made by the Claimant and the Respondent, respectively.

62. If the additional party does not agree with the designation of any of the arbitrators made by the Claimant or the Respondent, the Secretariat will invite the parties to agree upon a procedure for the constitution of the arbitral tribunal (Article 11(3)). The process is described in more detail below, including how the Court proceeds if the parties fail to agree (see paras 92-93 below).

63. After the constitution of the arbitral tribunal, any cross-claim, request for joinder or request for intervention must be addressed to, and is decided by, the arbitral tribunal, after consulting with all parties and the additional party (Article 6(3)). The party making the claim/request must copy the Secretariat. In taking its decision, the arbitral tribunal must consider all relevant circumstances, such as whether it has *prima facie* jurisdiction over the additional party in view of the Arbitration Agreement(s) invoked, the timing of the request, potential conflicts of interests, the modalities of the participation of the additional party in case of joinder or intervention, and the impact on the efficient conduct of the arbitration. Since joinder or intervention before an arbitral tribunal already constituted by the original parties may prove to be more difficult, in particular at an advanced stage of the proceedings, any party contemplating making such a request for joinder or intervention should consider whether making its request at an earlier stage, to the Secretariat before the arbitral tribunal is constituted, may be preferable. Any procedural ruling on the admissibility of a cross-claim, request for joinder or request for intervention is without prejudice to the separate decision to be made by the arbitral tribunal as to its jurisdiction, if disputed, under Article 23.

### **C. CONSTITUTION OF THE ARBITRAL TRIBUNAL IN CASES OF JOINDER OR INTERVENTION**

64. Joinder or intervention results in multi-party proceedings. Articles 11(3)-(5) govern the appointment of arbitrators in such multi-party proceedings.

65. As a rule, in multi-party proceedings the arbitral tribunal is constituted in accordance with the parties' agreement (Article 11(3)). In the absence of an agreement, the Court sets a time limit for the Claimant and the Respondent (or group of parties) to each designate an arbitrator (Article 11(4)) (see para. 92 below).

66. In case of a joinder or intervention, the additional party sought to be joined or seeking to intervene is usually involved at a point in time where the Claimant and often also the Respondent have already designated an arbitrator. Unless the additional party accepts the designation of the arbitrator(s) of the original parties, the Secretariat invites the parties to comment on whether any parties should be considered forming a group of parties for the purpose of setting time limits in accordance with Article 11(4).

67. Where the Court has to set time limits under Article 11(4), it will usually first set a time limit to the Claimant (or the Claimant's group of parties), and only thereafter set a time limit to the Respondent (or the Respondent's group of parties) (see para. 93 below). However, in case of joinder or intervention, the circumstances may warrant that the Court sets a concurrent time limit to all parties to designate the arbitrator(s) required, in particular if it is unclear whether and with which party the additional party forms a group of parties.

68. Where a party (original or additional) or group of parties fails to designate an arbitrator, or where a joint designation cannot be agreed within a group of parties or because the parties and the additional party do not form a group of parties, the Court may – depending on the circumstances of the specific case – decide to appoint some or all of the arbitrators and designate the presiding arbitrator (Article 11(5)). If so, any previous confirmation or appointment of arbitrator(s) is revoked.

#### **D. PARTICIPANTS OTHER THAN PARTIES PROPER**

69. A third person may request or be requested by a party to participate in pending arbitration proceedings in a capacity other than a party (Article 6(4)). Article 6(4) refers to situations where the third person does not itself raise or defend a claim.

70. The third person can either join of its own motion as what is sometimes referred to as a side intervener or ancillary party, or pursuant to a third-person notice by one of the original parties. As a side party, the third person does not become a party proper but rather assists one of the parties in order to promote an outcome which is favourable to it. Many legal cultures are familiar with this form of participation used in state court proceedings (e.g. *Nebenintervention*; *intervention accessoire*; *intervento adesivo*).

71. Other forms of a third person participating in the arbitration proceedings in a capacity other than a party may be so-called third-party practices, vouching ins, or *amicus curiae* briefs, i.e. a legal brief of someone who is not a party to an arbitration but assists the arbitral tribunal by offering information, expertise, or insight that has a bearing on the matters at issue in the arbitration. Considering the strict confidentiality requirements under the Swiss Rules (Article 44), allowing third person participation (such as by an *amicus curiae*) is to be carefully considered and does not mean that the arbitration proceedings may become public (see paras 74-75 below).

72. Since the Swiss Rules allow for a wide variety of participation of third persons in a capacity other than an additional party, it is for the arbitral tribunal to decide whether to allow the participation in question. The Court is not involved in this decision. As there are different forms of third person participation, and different motivations for requesting such participation, the Swiss Rules do not prescribe the content of the request for third person participation. In order to allow the arbitral tribunal to decide on the request, the request is expected to set out the details of the third person, the justification for the requested participation, and the requested role of the third person, i.e. whether it wishes to participate or is requested to participate in support of one of the parties and if so, which one, or in another capacity.

73. Before deciding on whether to permit the third person's participation and its modalities, the arbitral tribunal must consult with all parties and the third person. When making its decision, the arbitral tribunal must consider all relevant circumstances. If the arbitral tribunal allows for the participation of the third party, it also has to decide on its modalities. That typically includes directions as to the right of the third person to make its own submissions and the role it may take at any hearing(s).

#### **E. CONFIDENTIALITY IN CASE OF ADDITIONAL PARTICIPANTS**

74. In order to maintain confidentiality, Article 44 and the rules contained therein also apply to any additional party joining the arbitration proceedings (joinder or intervention), in the same manner as they apply to the original parties.

75. To the extent a third person, acting in a capacity other than an additional party, has access to the file within the meaning of Article 44, i.e. any awards or orders or any material submitted by the parties in the framework of the arbitration proceedings, the third person is considered a party for the purpose of confidentiality of the arbitration, with the effect that, as a rule, the duties under Article 44 apply to the third person in the same manner as they apply to the parties proper.

## **IV. Consolidation**

76. Consolidation refers to the merging of two or more arbitrations commenced separately into one proceeding adjudicated by one arbitral tribunal.

77. A party wishing to consolidate two or more arbitration proceedings initiated before the Centre shall file a request for consolidation (Article 7(1)). This can be done either by means of a separate application sent to the Secretariat, or by including a request for consolidation in the Notice in any one of the arbitrations to be consolidated. Consolidation can be requested both where one or more arbitrations are already pending and a new arbitration is initiated, which will be consolidated with the pending arbitration(s), or where several arbitrations are initiated at the same time. The request for consolidation should include the reasons in support of consolidation.

78. Upon receipt of a request for consolidation, the Secretariat seeks written comments on the request from all parties in all arbitrations concerned by the request, as well as from any arbitrator already confirmed in any of those arbitrations. The Secretariat will usually set a time limit of 15 days for any comments on the request for consolidation.

79. Upon receipt of all comments on the request for consolidation, the Secretariat provides these comments to the Court for decision.

80. When rendering its decision, the Court (through its Special Committee) takes into account all relevant circumstances, including the links between the claims and the progress already made in the respective proceedings (Article 7(2)). The relevant circumstances considered by the Court will depend on each individual case.

81. The Court must also consider the views expressed by all parties and any arbitrator having provided comments. If all parties agree to the consolidation, consolidation will in principle be ordered. The Court may also order consolidation absent the agreement of a party if it considers that the circumstances so warrant.

82. Where the Court decides to consolidate proceedings in which one or more arbitrators have already been confirmed by the Court, and absent an agreement of all parties in all proceedings on the constitution of the arbitral tribunal in the consolidated proceedings, the Court may revoke the confirmation or appointment of arbitrator(s) and apply the provisions on the composition of the arbitral tribunal in Section II of the Swiss Rules, so that arbitrators are designated/appointed afresh. The Court will make use of this possibility where the circumstances so warrant. This may be the case, for example, where the parties in the different proceedings to be consolidated are not the same and the law governing the arbitration does not consider the waiver contained in Article 7(3) to be valid. Article 7(3) provides that, by agreeing to arbitrate under the Swiss Rules, the parties to all proceedings are deemed to have waived their right to designate an arbitrator in case of consolidation.

83. Unless all parties agree or the Court decides otherwise, the proceedings will be consolidated into the arbitration commenced first (Article 7(3)).

## **V. Arbitral Tribunal**

### **A. CONSTITUTION OF THE ARBITRAL TRIBUNAL**

#### **1. Confirmation of Arbitrators**

84. The arbitral tribunal is constituted in accordance with the parties' agreement under the supervision of the Court. Absent a specific agreement on the designation process, the Swiss Rules provide as follows: in case of a three-member arbitral tribunal, each side may designate an arbitrator in the Notice and Answer (i.e. within 30 days), respectively (Articles 11(1), 3(3)(h), 4(1)(f)). The presiding arbitrator shall be designated by the two party-designated arbitrators (possibly, and often in practice, in consultation with the parties) within 30 days from the confirmation of the second arbitrator (Article 11(2)). In case of a sole arbitrator, the sole arbitrator may be jointly designated by the parties

within 30 days from the date on which the Notice was received by the Respondent (Article 10(1)). Each designated arbitrator must be confirmed by the Court (Article 8(1)).

85. The Court's powers set out in Articles 8(1)-(3) are to ensure that the arbitral tribunal is impartial and independent from the parties and can effectively carry out its mission. When assessing whether an arbitrator designated by a party should be confirmed, the Court examines any objection raised by another party and any disclosure made by the designated arbitrator. The Court can also refuse to confirm an arbitrator for other reasons, such as the lack of the required skills in the language of the arbitration.

86. If an arbitrator is not confirmed, the Secretariat will set a time limit of usually 15 days for the relevant party or parties, or, as the case may be, the arbitrators, to make a new designation. Only in exceptional circumstances does the Court appoint an arbitrator directly. Due to its mission to address any failure in the constitution of the arbitral tribunal, the Court is vested with the power, if necessary, to revoke any appointment made, appoint or reappoint any of the arbitrators and designate one of them as the presiding arbitrator (Article 8(3)).

87. The file is transmitted by the Secretariat to the arbitral tribunal when the last arbitrator has been confirmed and generally when the Registration Fee and Provisional Deposit (Appendix B, Section 1; see paras 221 and 279 below) have been duly paid (Article 8(5)). If emergency relief was sought under Article 43, the Secretariat will also transmit to the arbitral tribunal the parties' submissions in the emergency arbitration and the emergency arbitrator's decision. The Provisional Deposit is considered as a partial payment of a deposit (Article 41(1)).

## 2. Number of Arbitrators

88. Where the parties have not agreed upon the number of arbitrators, the Swiss Rules favour the appointment of a sole arbitrator, absent any circumstances indicating a particular complexity of the dispute or any interests at stake justifying the appointment of three arbitrators (Articles 9(1) and (2)). Without prejudice to other relevant circumstances, the Court usually decides, as a general guideline, in favour of three arbitrators where the amount in dispute is above CHF 4,000,000, unless the dispute appears to be of no complexity.

89. For reasons of cost-efficiency, if the Arbitration Agreement provides for more than one arbitrator, the Court will invite the parties to agree to refer the case to a sole arbitrator if the amount in dispute is below an amount determined by the Court (currently around CHF 2,000,000), without prejudice to other relevant circumstances that may lead to the constitution of an arbitral tribunal composed of more than one arbitrator (Article 9(3)).

## 3. Appointment of a Sole Arbitrator or Presiding Arbitrator

90. If the Court is to appoint a sole arbitrator or the presiding arbitrator pursuant to Articles 10(3) or 11(2), respectively, this arbitrator will in principle be of a nationality other than those of the parties, unless particular circumstances justify otherwise. Where all parties are of the same nationality, the Court may appoint a sole arbitrator or presiding arbitrator having the same nationality of the parties. If relevant circumstances such as the law applicable to the merits and/or the seat of the arbitration may justify the appointment of a sole arbitrator or presiding arbitrator of a common nationality with a party, the parties will be consulted. A sole arbitrator or presiding arbitrator of the same nationality as one of the parties shall only be appointed upon acceptance of all parties.

## 4. Appointment of Arbitrators

91. The party designating an arbitrator pursuant to Article 11(1) must indicate the contact details of that arbitrator, so that the Secretariat may contact the designated arbitrator. If the Secretariat is unable to contact the designated arbitrator, the Court will not be in a position to confirm that arbitrator.

92. In multi-party proceedings, in the absence of an agreement on a procedure for the constitution of the arbitral tribunal, the Court will, as a rule, first set a time limit (usually 15 days) for the Claimant (or group of Claimants) to designate an arbitrator and, after such a designation, set a subsequent similar time limit for the Respondent (or group of Respondents) for its own designation. When the circumstances so justify, the Court may set a common time limit for the Claimant and the Respondent (or group of parties) to each designate an arbitrator (Article 11(4)).

93. In the absence of a joint nomination by a group of parties (see para. 68 above), the Court may appoint an arbitrator on behalf of that group of parties. However, the Court will assess whether the aim of ensuring that all parties are treated equally in the process for the constitution of the arbitral tribunal requires to rather appoint all arbitrators and to designate the presiding arbitrator (Article 11(5)). This may particularly be the case where a group of parties does not appear to have aligned interests or does not belong to the same group of companies. If the Court decides to appoint all arbitrators and to designate the presiding arbitrator, any existing confirmation or appointment of arbitrator(s) is revoked.

## **B. IMPARTIALITY AND INDEPENDENCE, DUTY OF DISCLOSURE AND CHALLENGE OF ARBITRATORS**

### **1. Impartiality and Independence Obligation of Arbitrators**

94. Any arbitrator appointed under the Swiss Rules must be and remain impartial and independent throughout the proceedings (Article 12(1)). The Swiss Rules apply the same standard of impartiality and independence (and disclosure) to party-designated arbitrators, sole arbitrators and presiding arbitrators.

### **2. Duty of Disclosure of Arbitrators**

95. The obligation to be independent and impartial is concretised by a duty of disclosure of the arbitrator in Article 12(2). Any arbitrator is required to disclose to the Secretariat all circumstances which are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. The test is not defined in the Swiss Rules; it depends on the applicable law and arbitration practice, which usually refer to how the circumstances are perceived in the eyes of the parties. Such disclosure must be made before accepting to act as arbitrator.

96. If the Centre becomes privy to information which might justify disclosure, the Secretariat will encourage the arbitrator concerned to make a disclosure. An example might be where the same Claimant initiated two separate arbitrations proceedings against different Respondents under related contracts and appointed the same arbitrator in each case, and the arbitrator appointed by the Claimant in both proceedings does not make a disclosure.

97. The Secretariat provides any disclosure to all parties and sets a time limit (usually 7 days) for the parties to comment on the disclosure (Article 12(2)). If a party wishes to object to the confirmation of an arbitrator on the basis of the disclosure made, it must raise the objection in its comments.

98. The Secretariat informs the arbitrator who has made a disclosure of the parties' comments and the arbitrator is given the opportunity to comment.

99. The Court decides whether confirming the arbitrator or not, based on the information available to it. As a rule, the reasons for such a confirmation decision are not provided.

100. Article 12(3) clarifies that the duty of disclosure is a continuing duty throughout the arbitration proceedings and does not end after the appointment or confirmation of the arbitrator. After the appointment or confirmation, all arbitrators remain bound to disclose promptly to the parties and the Secretariat any circumstances likely to give rise to justifiable doubts regarding their impartiality or independence.

101. In case third-party funding is resorted to by any party, that party is expected to disclose the existence and identity of the third-party funder, so as to enable each arbitrator to run a conflict check to ensure that the involvement of the third-party funder does not affect the arbitrator's independence or impartiality.

### **3. Challenge of Arbitrators**

102. The Swiss Rules provide mechanisms to guarantee the impartiality and independence of the arbitrators (Articles 13 and 1(4)). Any arbitrator appointed or confirmed by the Court can be challenged in particular if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (Article 13(1)). An arbitrator cannot be challenged for grounds that were already known and considered at the time of the confirmation by the Court (in light of the arbitrator's disclosure or a party's objection to the confirmation).

103. The existence of justifiable doubts is examined by the Court on a case-by-case basis. The Court has, for example, considered the challenge of an arbitrator who had dealt with the same factual and legal issues in a previous case and the challenge of an arbitrator having expressed views in an academic article about advances on costs. The Court's decisions do not constitute binding precedents or even an established practice, as each decision will depend on the specific circumstances of the case.

104. A notice of challenge must be sent to the Secretariat, copying the arbitral tribunal and the other parties, within 15 days after the circumstances giving rise to the challenge became known to the challenging party. If that 15-day time limit is not complied with, the Court will in principle dismiss the challenge as belated. A non-refundable application fee is due when a notice of challenge is filed (Appendix B, Section 2.10(a)).

105. The Court is not called upon to render a decision on the challenge of an arbitrator in all circumstances. First, the parties can agree within 15 days from the date of the notice of challenge that an arbitrator shall not continue to act, in which case the arbitrator will be removed. Second, within the same time limit, the challenged arbitrator may withdraw (Article 13(3)).

106. If the application fee is not paid by the challenging party and the Court is requested to render a decision on the challenge, the Court shall render a decision to dismiss the application without dealing with the merits of the challenge.

107. Under the 2021 Swiss Rules, a decision by the Court on a challenge application may, but need not, be reasoned. The Court may first notify the operative part of its decision to all parties and arbitrators, followed by summary reasons.

### **C. REMOVAL OF ARBITRATORS**

108. Of its own motion or upon request by a party (in which case a fee is charged in accordance with Appendix B, Section 2.10(a)) or the other arbitrators, the Court may revoke the appointment of an arbitrator who fails to perform his or her functions (Article 14). The arbitrator concerned is heard before a decision is made. Although the Court enjoys discretion when revoking an arbitrator, the circumstances are expected to be serious enough to justify such decision. A party may not apply for revocation of an arbitrator merely because it is not satisfied with a decision made by that arbitrator. Failure to perform the arbitrator's functions requires that serious mismanagement of the proceedings or other severe inability to act as arbitrator is properly established. Consistent with the principle of proportionality and that an arbitrator's removal should in principle be an ultima ratio, the Court usually proceeds by way of warning the arbitrator concerned, the process towards the arbitrator's removal being then escalated failing sufficient improvement.

### **D. REPLACEMENT OF ARBITRATORS**

109. When an arbitrator has been challenged or revoked, or has resigned (provided that such resignation has been accepted by the Court) or otherwise needs to be replaced (e.g. in case of death), Article 15 sets out the applicable regime for such replacement. The party/parties concerned may designate a new arbitrator, failing which the arbitrator will be appointed by the Court, pursuant to Articles 10-11.

110. In exceptional circumstances, and after consulting with the parties and any remaining arbitrators, the Court may directly appoint the replacement arbitrator, or if after the closure of the proceedings (Article 31), it may authorise the remaining arbitrator(s) to proceed with the arbitration and make any decision or award (Article 15(2)).

111. When an arbitrator has been replaced, the proceedings shall resume at the stage reached when the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise (Article 15(3)).



## VI. Organisation and Conduct of the Proceedings

### A. GENERAL PRINCIPLES AND MEASURES FOR INCREASED EFFICIENCY

112. Consistent with the autonomy granted to the arbitral tribunal under the Swiss Rules, the arbitration may be conducted in such manner as the arbitral tribunal considers appropriate (Article 19(1)).

113. Express reference is made to the power of the arbitral tribunal to adopt measures for ensuring efficiency, provided that fundamental principles such as equal treatment of the parties and their right to be heard (Article 19(1)), as well as any other mandatory rules which may apply, are complied with. Such measures depend first and foremost on the circumstances of the case.

114. Guidance on measures regarding the organisation and conduct of the arbitration proceedings in general, and in particular to promote efficiency, can be found in the Arbitration Toolbox by ASA, accessible at [toolbox.swissarbitration.org/toolbox/home](http://toolbox.swissarbitration.org/toolbox/home).

115. Once constituted, the arbitral tribunal must hold an initial organisational conference with the parties, as soon as practicable after receiving the file from the Secretariat (Article 19(2)). The Secretariat monitors that the time taken for organising such conference is suitable in view of the circumstances of the case. The purpose of the conference is proper case management, to discuss with the parties how to organise the different phases of the proceedings (including possible bifurcation in case certain issues require to be decided in a preliminary manner before the merits are heard), as well as the procedural rules to be applied (usually prepared by the arbitral tribunal in the form of a set of specific rules, often incorporated in a procedural order). The arbitral tribunal should consider holding further organisational conferences whenever it is appropriate for efficient case management (Article 19(4)).

116. Terms of reference or appointment (signed by the parties) need not be established. While this is not a requirement under the Swiss Rules, some arbitral tribunals issue a constitution order after consulting with the parties, for the purpose of setting forth the expected tasks of the arbitrators in the case at hand.

117. When establishing rules of procedure, the arbitral tribunal must have due regard to the parties' agreement, as well as to provisions of the Swiss Rules which may assist with respect to issues such as where the seat of the arbitration is (Article 17), in what language the arbitration will be conducted (Article 18), or as regards the taking of evidence (Articles 26-28; for the hearing(s), see para. 136 *et seq.* below), as well as whether and how proceedings may be conducted by default (Article 30).

118. In addition to the rules of procedure, the procedural framework may also be supplemented by reference to suitable soft law provisions, such as the IBA Rules on the Taking of Evidence in International Arbitration.

119. The arbitral tribunal is required to prepare a procedural timetable setting out the main steps to be undertaken in the proceedings, as well as the applicable time limits for the filing of written submissions and supporting evidence, and the dates of any hearing(s) (Article 19(3)). The parties must be consulted about the timetable, a draft of which can be discussed at the organisational conference (see para. 115 above) or submitted for comments prior to or promptly thereafter. The arbitral tribunal must also provide time estimates for rendering its main decisions, in particular any award.

120. The parties are encouraged to contribute to the efficient conduct of the proceedings and the avoidance of unnecessary costs and delays (Article 16(1)). The arbitral tribunal may take into account the parties' conduct in this respect in its allocation of costs (Article 40), in particular when a party has resorted to tactics which delayed the proceedings, thereby causing an increase of costs.

121. Where a party considers that the Swiss Rules or any other procedural rules have not been complied with and intends to make a complaint to that effect, that party must do so promptly after becoming aware of the non-compliance in making such complaint to the arbitral tribunal, failing which its right to object is deemed waived (Article 32).

122. The parties are free to settle their dispute amicably prior to or at any time during the arbitration proceedings (for the consequences on the proceedings, see para. 179 *et seq.* below). With the agreement of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute (Article 19(5)). In view of the requirements for independence and impartiality of each arbitrator, acting as settlement facilitator requires careful attention, in particular when confidential information is shared by a party with the arbitral tribunal, considering that the same arbitral tribunal might have to decide the dispute on the merits failing a settlement. In order to guarantee efficiency and protect the integrity of the process, the involvement of the arbitral tribunal in the settlement process implies that the parties concerned are deemed to have waived their right to challenge an arbitrator for lack of impartiality because of the arbitrator's participation or knowledge acquired in taking the agreed steps.

123. At any time during the arbitration proceedings, the parties may also agree to refer their dispute, fully or partly, to mediation (such as under the Swiss Rules of Mediation) or any other forms of alternative dispute resolution (Article 19(6)). Upon consultation with the parties, the arbitral tribunal will decide on the modalities of stay or termination of the arbitration proceedings while the parties seek to settle their dispute through mediation or otherwise.

## **B. DATA PROTECTION AND CYBERSECURITY**

124. The Centre recognises the importance of appropriate data protection and cybersecurity measures. Given that the measures to be taken depend on the specifics of the case concerned, including the seat/domicile of the parties and the arbitrators, no specific measures are as such provided in the Swiss Rules. The arbitral tribunal is expected to discuss issues of data protection and cybersecurity at the initial organisational conference to ensure an appropriate level of compliance and security (Article 19(2)).

125. Beyond drawing the parties' attention to the issues of data protection and cybersecurity which may affect the arbitral process in general, whether specific measures (such as protocols) shall be adopted depends on each individual case, given that arbitration proceedings under the Swiss Rules may involve participants from various jurisdictions and the applicable requirements may vary, in particular for cross-border data processing. Cybersecurity measures may include the undertaking of the parties to make the transfer of exhibits on a sharing platform or on a portable hard drive subject to password protection.

126. Insofar as data protection and cybersecurity are matters to be discussed and agreed upon between the parties and the arbitral tribunal in the case at hand, the Centre is not responsible for taking measures in a particular case, unless it has been advised that specific measures regarding data protection and/or cybersecurity are required at the Centre itself and such measures can be reasonably followed.

## **C. EARLY DETERMINATION AND SUMMARY DISMISSAL**

127. Early determination and summary dismissal are accepted as tools that may have a beneficial effect on the efficiency of proceedings in very specific cases. The Swiss Rules do not explicitly address these tools in order to allow for the greatest flexibility possible. These tools, and in particular summary dismissal of manifestly unmeritorious claims or defences, are mechanisms that are available when required under the Swiss Rules. As an arbitral tribunal acting under the Swiss Rules has discretion to conduct the arbitration in such manner as it considers appropriate, including by adopting measures for the efficiency of the proceedings (Article 19(1)), the arbitral tribunal may also entertain an application for early determination of claims or defences, in particular if alleged to be manifestly unmeritorious. When doing so, the arbitral tribunal must have due regard for possible applicable mandatory laws, equal treatment of the parties and their right to be heard.

## **D. CONTENT AND TIME LIMIT OF WRITTEN SUBMISSIONS; COPY OF SUBMISSIONS TO THE SECRETARIAT**

128. The Swiss Rules contain provisions on the content and the time limits of the written submissions to be filed by the parties, i.e. Statement of Claim, Statement of Defence and further written submissions as applicable (Articles 20-25). These constitute default rules that the parties and the arbitral tribunal may depart from depending

on the circumstances of the case. The arbitral tribunal usually provides for further rules as to communications by the parties in the arbitration in its procedural rules.

129. Any communication by a party to the arbitral tribunal must at the same time be sent to all other parties. Any communications by a party to the arbitral tribunal must also be copied electronically to the Secretariat (Article 16(2)) at [centre@swissarbitration.org](mailto:centre@swissarbitration.org); the Centre will not keep or archive unsolicited hard copies of communications.

## **E. APPOINTMENT AND ROLE OF A SECRETARY**

130. The Swiss Rules adhere to the standard that the appointment of an administrative secretary to the arbitral tribunal may be warranted in certain cases but should not be made without the parties' agreement. It is therefore expressly provided that the arbitral tribunal may, with the consent of the parties, appoint a secretary (Article 16(3)). A secretary is subject to the same independence and impartiality requirements as an arbitrator. Article 12, as well as Article 13 on the challenge of an arbitrator, apply to the secretary *mutatis mutandis*. A declaration of independence and impartiality of the secretary, including disclosures where applicable, must be provided to the parties, together with a *curriculum vitae*, prior to the secretary's appointment. The secretary's duty of disclosure applies for the duration of the arbitration. A secretary is also subject to the same confidentiality requirements as an arbitrator (Article 44).

131. If the arbitral tribunal intends to appoint a secretary, it should address such appointment with the parties as early as possible in the proceedings. A party may object to the arbitral tribunal's proposal for appointment of a secretary. A secretary may not be appointed if a party raises an objection.

132. When proposing the appointment of a secretary, the arbitral tribunal must also inform the parties of the proposed tasks (administrative in nature) to be carried out by the secretary. The parties may object to the proposed tasks, in which case the secretary may not carry out such tasks. Transparency and explanations about the purpose and tasks of the contemplated secretary, aimed at providing administrative assistance to the arbitral tribunal, usually enable to secure the parties' agreement.

133. No fees can be charged for the secretary's tasks. The work of the secretary is remunerated through the arbitrators' fees (see para. 244 below). When effectively incurred (such as for travelling to a hearing), reasonable expenses of the secretary can be charged.

134. Further guidance on the appointment and role of a secretary, and the applicable requirements, may be found in the Guidelines for Arbitrators (Article 1) available at [www.swissarbitration.org/centre/arbitration/arbitration-rules](http://www.swissarbitration.org/centre/arbitration/arbitration-rules).

## **F. PARTY REPRESENTATION**

135. Although it may be recommended that a party instructs experienced legal counsel, there is no requirement for a party to be represented in arbitration proceedings under the Swiss Rules. Any party enjoys full discretion as to how it will be represented or assisted (Article 16(4)), provided that proof of authority of a representative is made available upon request (usually by the Secretariat at the outset and/or subsequently by the arbitral tribunal). The only exception to ensure the integrity of the arbitral process and avoid disruption is that any new representative appointed in the course of the proceedings may be refused by the arbitral tribunal in case the appointment of such new representative could affect the independence or impartiality of any arbitrator (Article 16(4), second sentence; consistent with the IBA Guidelines on Party Representation in International Arbitration, Guidelines 4-6).

## **VII. Hearings**

136. Hearings are an essential part of many arbitration proceedings but are not required in all cases. When appropriate, the arbitral tribunal may decide on the disputed issues without holding a hearing, in particular when the documentary evidence is sufficient and hearing witnesses/experts, or oral argument, would not be decisive.

137. When a hearing is held, the Swiss Rules determine some key aspects of the hearing while giving wide discretion to the arbitral tribunal as to the conduct of the hearing, including its format. The arbitral tribunal may hold a hearing at any stage of the proceedings (Article 27(1)). Hearings shall be held *in camera* to preserve confidentiality, unless the parties agree otherwise (Article 27(7)).

138. Any hearings may be held in-person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties (Article 27(2)). There is no right or obligation to follow a certain hearing format under the Swiss Rules. When deciding on whether to hold a hearing by remote means of communication rather than by physical attendance, the arbitral tribunal must consider all relevant circumstances. In addition to following what the parties may have agreed to, this may include the nature of the hearing, its expected duration, the size and complexity of the case, the possibility of all involved persons to appear at such hearing, and whether rescheduling the hearing would entail delays.

139. Even if the arbitral tribunal decides to hold a hearing in person, the arbitral tribunal may direct that witnesses/experts be examined through means that do not require their physical presence at the hearing, including by videoconference (Article 27(5)).

140. The modalities of the hearings should, if possible, be preliminarily addressed by the arbitral tribunal at the initial organisational conference (see para. 115 above) and be further determined at another organisational conference prior to the hearing.

141. When holding an in-person hearing, the arbitral tribunal must consult with the parties and determine the logistics for that hearing, such as the venue (offering adequate hearing and breakout rooms) and equipment required.

142. The logistics for a remote hearing include a determination on the appropriate videoconferencing platform and/or document sharing platform to use. The arbitral tribunal must also implement any measures required (such as by way of protocols) to adhere to any applicable data protection and cybersecurity regulations, and to ensure the reliability and integrity of the process of taking the evidence, in particular to avoid any improper influence of witnesses when they testify remotely.

143. Unless the parties have agreed otherwise, the measures set for both in-person and remote hearings must ensure the privacy of the hearing (Article 27(7)) and the confidentiality of communications (to the extent required, see Article 44).

144. For both in-person and remote hearings, the following items may need to be discussed and agreed upon:

- a time schedule including start and finish times of the hearing and breaks;
- time allocation for each party;
- opening and closing statements (if any);
- the procedure and sequence for the examination of the witnesses and experts;
- the form and availability of a possible transcript or record of the hearing;
- the use of interpreters where applicable, with simultaneous or consecutive interpretation;
- the use of documentary evidence and demonstrative documents at the hearing.

145. The Swiss Arbitration Hub provides useful guidance and options with regard to the hearing logistics, such as information on hearing venues, accommodation, interpreters, court reporters, as well as other services. The Swiss Arbitration Hub can be accessed at [hub.swissarbitration.org/services](https://hub.swissarbitration.org/services).

## **VIII. Interim Measures**

### **A. PRIOR TO THE CONSTITUTION OF THE ARBITRAL TRIBUNAL**

146. Prior to the constitution of the arbitral tribunal, a party requiring urgent interim measures under Article 29 can seek emergency relief from an emergency arbitrator pursuant to Article 43 (see para. 190 *et seq.* below).

## **B. AFTER THE ARBITRAL TRIBUNAL HAS BEEN CONSTITUTED**

147. After the file has been transmitted to the arbitral tribunal (Article 8(5)), a request for interim measures under Article 29 may be addressed directly to the arbitral tribunal, copying the other parties and the Secretariat (Article 16(2)), unless the requesting party is seeking a preliminary order from the arbitral tribunal before the request is communicated to the other parties (Article 29(3)).

148. The Centre does not accept so-called “preventive letters” (*Schutzschrift; mémoire préventif; memoria difensiva*).

149. The Swiss Rules do not prescribe any specific form or content of a request for interim measures, however the party seeking interim measures will usually make such a request in writing and will include a statement of the interim measures sought and the reasons therefor. If the requesting party requires a preliminary order from the arbitral tribunal before the request is communicated to the other parties (Article 29(3)), such a request should be set out, including the reasons therefor, in the request for interim measures. The requesting party may also consider addressing the form in which it wishes the arbitral tribunal's decision to be rendered (see para. 153 below).

150. No separate Registration Fee or deposit must be paid in case of a request for interim measures under Article 29. Such a request can be a factor that increases the complexity of the matter and may justify an increase of the arbitral tribunal's fees (Article 39(1)).

151. The Swiss Rules do not specify the conditions for granting interim measures. The arbitral tribunal has discretion in this regard and will be guided by the parties' agreement, the law applicable at the seat of the arbitration, any pertinent provisions of the law applicable to the merits, and best arbitral practice.

152. The arbitral tribunal equally has discretion to conduct the interim measures procedure in the manner it deems appropriate, taking into account the circumstances, including the nature of the relief sought.

153. Interim measures may be granted in the form of an order or interim award (Article 29(2)). In the latter case, the arbitral tribunal must comply with the formal requirements of Article 34.

154. When ordering interim measures, the arbitral tribunal may order the provision of appropriate security (Article 29(2)). Although the Swiss Rules do not stipulate whether the ordering of security requires a request by a party or whether the arbitral tribunal can do so of its own motion, a party seeking the imposition of a security will usually so request expressly. The arbitral tribunal has jurisdiction to rule on claims for compensation by a party against the party which requested interim relief for any damage caused by an unjustified interim measure or preliminary order (Article 29(4)).

155. The arbitral tribunal may take a decision on costs in its decision on a request for interim measures or defer any decision on costs until a later award on the merits.

## **C. INTERIM MEASURES BY A JUDICIAL AUTHORITY**

156. By submitting their dispute to arbitration under the Swiss Rules, the parties do not waive any right that they may have under the applicable law(s) to submit a request for interim measures to a judicial authority. Likewise, a request for interim measures addressed by any party to a judicial authority is not deemed to be incompatible with the Arbitration Agreement and does not constitute a waiver of that agreement (Article 29(5)).

## **IX. Award and Termination of the Proceedings**

### **A. FORM AND EFFECT OF THE AWARD**

157. Making an award requires that deliberations have been properly conducted so that decisions are validly made in accordance with Article 33. The arbitral tribunal is expected to declare the proceedings closed with regard to matters to be decided in the award when it is satisfied that the parties have had a reasonable opportunity to present their respective cases (Article 31(1)).

158. In addition to the final award, the arbitral tribunal may make interim or partial awards where certain issues require to be decided at an earlier stage of the proceedings (Article 34(1)). An interim award is a final decision on a preliminary legal issue of substance or a procedural issue, such as the statute of limitations or the admissibility of a prayer for relief. In contrast, a partial award adjudicates part of the claims or counterclaims in dispute in a final manner.

159. Although an award on jurisdiction falls within the scope of those decisions (in a wide sense), it is more specifically addressed in Article 23. In particular, that provision governs how and until when a jurisdictional objection may be validly raised, and when and how the arbitral tribunal must decide on such objection, as well as the extent to which a set-off defence may be heard when not falling within the scope of the Arbitration Agreement.

160. Parties have a justified expectation that they receive an award in due course. The Guidelines for Arbitrators (available at [www.swissarbitration.org/centre/arbitration/arbitration-rules](http://www.swissarbitration.org/centre/arbitration/arbitration-rules)) provide in Article 2 that the arbitral tribunal must make every effort to contribute to the efficient conduct of the arbitration proceedings and that, absent any exceptional circumstances, the award must be rendered within three months after the filing of the last submission on the merits in the proceedings (e.g. post-hearing briefs or closing arguments, excluding submissions on costs, or otherwise the hearing itself, whichever is the latter). The Secretariat monitors this time limit and will contact the arbitral tribunal if it does not timely receive a draft award for approval or adjustment by the Court of the determination on costs. Any undue delay in rendering the award may be taken into account by the Court in accordance with Article 39(1) when reviewing the determination on costs (Article 39(5)).

161. Arbitral awards must be rendered in writing and contain the signature(s) of the arbitrator(s) in handwriting (Articles 34(2) and (4)), as some national courts may reject enforcement if the award was submitted solely via digital means. If any arbitrator fails to sign within the arbitral tribunal, the award must state the reason for the lack of signature (Article 34(4)). Although an award is expected to be reasoned, that requirement is left to party's autonomy, as the parties may agree that no reasons or only summary reasons are to be given (Article 34(3)).

162. While not expressly stated in the Swiss Rules, it is accepted that an award may be signed in counterparts, meaning that each member of the arbitral tribunal may sign a separate copy of the award and the award will have the same force and effect as if the original award had been signed by all members of the arbitral tribunal together.

163. In order to allow the notification of the award to the parties by the Secretariat (Article 34(5)), the arbitral tribunal must provide the Secretariat with the required number of signed originals (in principle one for each party and one for the Secretariat, as well as one for each arbitrator in case the arbitrators request to be notified by the Secretariat), together with a PDF of the signed original by e-mail.

164. The Secretariat notifies the originals of the award to the parties, provided that the costs set forth in Articles 38(a), (b), (c), (f) and (g) have been paid by the parties in full by way of advances (Article 34(5)), i.e. all costs due to the Centre and to the arbitrators. In addition to notifying the originals of the award, the Secretariat may send a courtesy copy of the award to the parties by e-mail upon request, together with the clarification that receipt of such courtesy copy by e-mail does not trigger any time limits for requests for interpretation or correction of the award, or for an additional award, or for initiating any court proceedings to seek to have the award set aside.

165. Upon request and against a fee, the Secretariat may issue certified copies of awards (Appendix B, Section 2.10(e)).

166. The Swiss Rules do not address dissenting opinions, as their admissibility and effect are considered matters to be governed by the law applicable to the arbitration, including the question whether and how a dissenting opinion may be communicated to the parties (e.g. annexed to the award or delivered separately). A dissenting opinion does not make part of the award.

## **B. INTERPRETATION OR CORRECTION OF THE AWARD, ADDITIONAL AWARD**

167. If a party considers that the award it has received (whether partial, interim, or final) needs to be interpreted or corrected, or that relief remaining undecided requires an additional award, it can seek corresponding remedies as detailed below. These remedies aim at having specific flaws of the award fixed by the arbitral tribunal itself. They are to be distinguished from any other remedy (typically setting aside or revision) that a party may seek from a competent court of law. A request for interpretation, for correction or for an additional award shall not be used by a party to argue its case afresh in an attempt to achieve that substantive decisions in the award are revisited by the arbitral tribunal.

### **1. Request for Interpretation**

168. A party may request the arbitral tribunal to interpret the award if any part of it is ambiguous or otherwise requires clarification (Article 37(1)(a)). The requesting party is expected to explain to the arbitral tribunal its interest in having the award interpreted.

### **2. Request for Correction**

169. The arbitral tribunal may, upon request of a party or *sua sponte*, correct any clerical and/or typographical error or any error of similar nature in the award (Articles 37(1)(b) and (4)). If the award does not reflect what the arbitral tribunal wanted to decide, the arbitral tribunal may correct it. Errors that may be corrected are truly clerical errors (such as misspellings, mistakes in numbers, names, etc.), computational errors (miscalculations) and other similar errors (e.g. claimant used in lieu of respondent), to the exclusion of errors of substantive nature affecting the reasons of the award. A request for correction is not aimed at reviewing the merits of the case and how a disputed issue has been decided by the arbitral tribunal.

### **3. Request for an Additional Award**

170. A party may request the arbitral tribunal to make an additional award in relation to the claims made in the proceedings which have not been adjudicated upon in the final award (Article 37(1)(c)). Such additional award aims at preventing setting aside proceedings on the ground of *infra petita* by providing the arbitral tribunal with the possibility to decide on a claim that had been submitted but not decided, thereby preserving the finality of the award rendered under the Swiss Rules.

171. A request for an additional award is admissible only if it concerns an omission in the operative part of the award with regard to a claim made in a timely manner, i.e. a situation where a proper prayer for relief is not addressed in the dispositive section containing the decisions of the arbitral tribunal. The arbitral tribunal may dismiss a request for an additional award if it has indicated in the award that it has left a claim or counterclaim undecided on purpose. While including a final catch-all sentence such as “all other claims are dismissed” in the operative part of the award is recommended, that may not suffice and may not dispense of an additional award when the circumstances show that a proper claim has mistakenly remained undecided while it ought to have been expressly addressed in the dispositive section. The arbitral tribunal may reject the request if it deems itself unable to rectify the omission for lack of evidence or otherwise.

### **4. Time Limits, Procedure and Decisions**

172. A request for interpretation, for correction or for an additional award must be addressed to the arbitral tribunal, with a copy to the Secretariat and to the other parties, within 30 days from the receipt of the award by the requesting party (Article 37(1)(a)).

173. When seized of a request for interpretation, for correction or for an additional award, the arbitral tribunal may set a time limit, in principle not exceeding 30 days, for any opposing party to comment (Article 37(2)).

174. The arbitral tribunal may first decide whether it will proceed with the merits of the request or dismiss it at the outset (admissibility test, e.g. when the request is time-barred).

175. The time limit for the arbitral tribunal to render its decision is different depending on the decision. A decision of interpretation of the award or containing any correction of the award must be made within 45 days from the receipt of the request (Article 37(3)). An additional award must be made within 60 days from the receipt of the request (Article 37(3)). If the arbitral tribunal intends to make any correction on its own initiative, it must do so within 30 days after the award has been notified (Article 37(4)). The Court may extend these time limits upon request from the arbitral tribunal or of its own motion.

176. If the arbitral tribunal decides to interpret or correct the award, its decision will become an integral part of the award, in the form of an addendum. The original award is not replaced but simply amended or supplemented. In case of an additional award, that supplemental award is independent from the original award and does not make part of it. Articles 34(2) to (5) apply *mutatis mutandis* to any interpretation, correction or an additional award and require that the decision of the arbitral tribunal be made in writing, reasoned, and signed by the arbitrators (also specifying the seat of the arbitration and date of the decision).

177. A request for interpretation, correction or an additional award does not suspend the time limit to challenge the award before a competent court of law, unless the applicable law provides otherwise.

178. As a rule, in particular if the arbitral tribunal intends to grant the request, no additional costs will be charged (Article 39(3); see also paras 250 and 256 below). Only if justified by the circumstances (for example when a party submits a lengthy request *prima facie* aimed at challenging the merits of the award) may additional costs be charged. If so, a supplementary deposit for arbitrators' fees and/or any expenses, as well as for Administrative Costs where applicable (see para. 238 below), may be requested, provided that the Court has approved the amount(s) (Article 39(3); Appendix B, Section 1.6; see also para. 298 below).

### **C. SETTLEMENT AND OTHER GROUNDS FOR TERMINATION OF THE PROCEEDINGS**

179. If a settlement has been reached, by agreement of the parties without the involvement of the arbitral tribunal or with the arbitrators acting as settlement facilitators (see para. 122 above), the arbitral tribunal will terminate the proceedings by issuing, as requested by the parties, either an order for termination or an arbitral award on agreed terms (also referred in practice to as an award by consent) (Article 36(1)).

180. If the parties do not see a need that the terms of the settlement be recorded in the award, they may request the arbitral tribunal to issue an order for termination instead of an award by consent.

181. An award on agreed terms records the settlement in the manner communicated by the parties to ensure its enforcement and needs not contain reasons. It must identify the dispute submitted to the arbitral tribunal and set forth the parties' respective prayers for relief. The arbitral tribunal is expected to review, and be agreeable, to the agreed terms that the parties may request to have in the award by consent, so as to make sure that the settlement corresponds to a genuine dispute known to the arbitral tribunal (prevention of money laundering).

182. An award on agreed terms or order for termination can only be rendered after the constitution of the arbitral tribunal. Prior to the constitution of the arbitral tribunal, the proceedings are terminated by a communication from the Court (transmitted by the Secretariat). In such a case, the Secretariat must give advance notice to the parties that the Court may terminate the proceedings and any party may request that the Court proceed with the constitution of the arbitral tribunal in order that the arbitral tribunal determine and apportion the costs not agreed upon by the parties (Article 8(4)).

183. The arbitral tribunal may also terminate the proceedings before an award is made if the continuation of the proceedings becomes unnecessary or impossible for any reason other than a settlement. This may be the case if the Claimant has failed to submit a Statement of Claim, if the parties failed to make the requested deposit of costs or if the subject matter of the proceedings has become moot. If the arbitral tribunal intends to terminate the proceedings,



it must give advance notice of such termination to the parties, so that they have an opportunity to comment (Article 36(2)). The arbitral tribunal should not terminate the proceedings where a party has objected based on justifiable grounds (Article 36(2)).

184. Any decision terminating the proceedings, whether in the form of an award on agreed terms or an order for termination, must be signed by the arbitrator(s). An order for termination is communicated by the arbitral tribunal to the parties and the Secretariat (Article 36(3)). An award on agreed terms is notified by the Secretariat (Articles 34(2), (4) and (5) apply *mutatis mutandis*). Where applicable, the decision terminating the proceedings must determine the costs of the arbitration and the allocation of such costs (Article 38). After the arbitral tribunal has recorded the termination of the proceedings, the Secretariat will remove the case from the docket.

## **X. Expedited Procedure**

185. The Expedited Procedure provisions apply to all cases in which the parties so agree or the amount in dispute (aggregate of all claims or any set-off defence) does not exceed CHF 1,000,000, unless the Court decides otherwise, taking into account all relevant circumstances (Article 42(1)). Such a decision of the Court will be the exception; conceivable cases where the Expedited Procedure may not be warranted are highly complex cases not exceeding an amount in dispute of CHF 1,000,000, e.g. because of the existence of multi-party claims, joinder or intervention pursuant to Article 6.

186. The Expedited Procedure provides that the case is referred to a sole arbitrator, unless the Arbitration Agreement provides for an arbitral tribunal composed of more than one arbitrator (Article 42(2)(a)). Even in such situation, the case is not automatically referred to a three-member tribunal. The Secretariat will first invite the parties to agree to refer the case to a sole arbitrator. Only if the parties do not agree to this proposal will the case be referred to a three-member tribunal. The fees of the arbitrators are determined in accordance with Appendix B, but will in no event be less than the fees resulting from the hourly rate set out in Section 2.7 of Appendix B, i.e. CHF 350 (Article 42(2)(b)). Guaranteeing each of the three arbitrators a minimum hourly rate in this situation may also serve as an incentive for the parties to consider whether agreeing on a sole arbitrator is more appropriate in a case where the amount in dispute does not exceed CHF 1,000,000.

187. The final award must be made within six months from the date on which the sole arbitrator (or arbitral tribunal where applicable) received the file from the Secretariat. This requires that the Secretariat is provided within that time limit with the originals of the award signed by the arbitrator(s) which the Secretariat will notify to the parties (Article 34(5)). Although the arbitrator(s) is expected to organise the proceedings in a manner allowing the six-month time limit to be complied with, the Court may extend this time limit in exceptional circumstances (Article 42(2)(e)). Such exceptional circumstances may be the arising of new circumstances which no longer make it possible for the parties and the arbitrator(s) to adhere to the six-month time limit prescribed in the Swiss Rules. When establishing the procedural timetable, the parties and the arbitrator(s) should take into account that the cost section of the award has to be approved by the Court before the award can be signed by the arbitrator(s) and notified by the Secretariat. As a rule, the draft final award is expected to be submitted to the Court at least two weeks before the issuance of the award.

188. In order for the award to be made in six months, the arbitrator(s) must organise the proceedings by following the specific rules set out in Article 42 and adopting any other measures required by the case at hand: apart from the Notice and Answer, in principle only one exchange of substantive submissions must take place (Statement of Claim, Statement of Defence with counterclaim where applicable, reply to counterclaim where applicable) (Article 42(c)); one single hearing must be held to take witness/expert evidence and/or for oral argument, unless the dispute may be decided based on documentary evidence only (Article 42(d)); the award must be reasoned, but, as opposed to an award made in ordinary procedure, the reasons in an award made in the Expedited Procedure may be in summary form (Article 42(f)).

189. At any time during the arbitration proceedings, the parties may agree that the provisions set out in Article 42(2) no longer apply. This opt-out mechanism has been newly introduced with the 2021 Swiss Rules. Opting-out does not

require the approval of the Court. A reduction in the amount of a claim being not taken into account if the reduction is made after the transmission of the file to the arbitral tribunal (Appendix B, Section 2.1), this will not result in the application of the Expedited Procedure even if the reduction leads to an amount in dispute not exceeding CHF 1,000,000. This also applies *mutatis mutandis* in case of an increase in the amount of a claim, the Expedited Procedure remaining applicable if the amount in dispute did initially not exceed CHF 1,000,000, except if the Court decides to release the parties from the Expedited Procedure and administer the proceedings as an ordinary procedure.

## **XI. Emergency Relief**

### **A. APPLICATION FOR EMERGENCY RELIEF**

190. A party requiring urgent interim measures under Article 29 before the arbitral tribunal is constituted may apply for emergency relief pursuant to Article 43.

191. The application for emergency relief ("**Application**") must be filed with the Secretariat and contain the information stipulated in Article 43(1), including a statement of the interim measures sought and the reasons therefor, in particular the reason for the purported urgency. If the requesting party requires a preliminary order from the emergency arbitrator before the request is communicated to the other party (Article 29(3)), such a request should be set out in the Application, including the reasons therefor.

192. To allow the Secretariat to take the necessary preparatory steps and ensure utmost efficiency in handling emergency relief Applications, parties intending to apply for emergency relief may wish to notify the Secretariat before submitting the Application that such Application is forthcoming.

193. The Application may be filed before, together with or after a Notice pursuant to Article 3. If the Application is submitted before the Notice, the applicant must submit a Notice within 10 days of the Application, failing which the Court will terminate the emergency relief proceedings. In exceptional circumstances, the Court may extend this time limit (Article 43(3)). For example, this occurred in a case where the Claimant had to meet different time limits set by the emergency arbitrator.

194. The party applying for emergency relief must pay a non-refundable Registration Fee of CHF 5,000 and a deposit of CHF 20,000 as an advance on costs of the emergency relief proceedings (Appendix B, Section 1.5). Confirmation of payment of the Registration Fee and of the deposit for emergency relief proceedings must be appended to the Application (Article 41(1)(c)). In case an Application is made without (full) payment of the Registration Fee and/or the deposit, the Secretariat will set a short time limit of usually no more than a few days for the applicant to make the outstanding payment, failing which the emergency relief proceedings will not proceed (Appendix B, Article 1.5). As a rule, the Application is only notified to the other party when proof of full payment of both the Registration Fee and the deposit has been provided.

195. As soon as possible after the receipt of the Application, the Registration Fee and the deposit for the emergency relief proceedings, the Court proceeds to appoint an emergency arbitrator and transmits the file to that arbitrator, unless it finds that (a) there is manifestly no Arbitration Agreement referring to the Swiss Rules, or (b) it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the Application to it (Article 43(2)). These powers of the Court are delegated under the Internal Rules to the President of the Court, or one of the Vice Presidents, or, if the President is unavailable, any other member of the Executive Committee, or, in case all are unavailable, to another Member of the Court Special Committee or of the Court when required (Internal Rules, Article 6).

196. The emergency arbitrator is usually appointed within 24 hours. The emergency arbitrator must comply with the same independence and impartiality requirements and is subject to the same challenge and removal process, as any arbitrator (Article 43(4) referring to Articles 12 to 14). Any request for challenge or removal of the emergency arbitrator is also decided by the President, or one of the Vice Presidents, or another Court Member in case of conflict (Internal Rules, Article 6). The emergency arbitrator may not serve as arbitrator in any arbitration relating to the dispute in respect of which the emergency arbitrator has acted, unless otherwise agreed by the parties (Article 43(11)).

197. In case the Respondent or any other party also requests emergency relief, it shall, in principle, file a (separate) Application with the Secretariat. Such party must also pay a non-refundable Registration Fee of CHF 5,000 and a deposit of CHF 20,000 as an advance on costs of the emergency relief proceedings (Appendix B, Section 1.5). The Court may, in its discretion, decide that the Applications shall be dealt with in the same proceedings.

198. In exceptional circumstances, the emergency arbitrator may issue a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard (Article 29(3)). The President of the Court or the allowed deputy Court Member (Internal Rules, Article 6) making the emergency arbitrator appointment will assess whether a request for a preliminary order is being made and, if so, will instruct the Secretariat that no copy of the Application is to be sent to the responding party and that the cover letter under which the file is transmitted to the emergency arbitrator indicates that (i) it appears that a preliminary order is being requested and that (ii) it is in the discretion of the emergency arbitrator to decide whether the emergency arbitrator wishes to immediately notify the Application to the responding party or whether the emergency arbitrator will do so together with the preliminary order, if any.

199. The Swiss Rules do not specify the conditions for granting emergency relief. The emergency arbitrator has discretion in this regard and will be guided by the parties' agreement, the law at the seat of the emergency arbitration proceedings, any pertinent provisions of the law applicable to the merits, and best arbitral practice.

200. The emergency arbitrator also has discretion with regard to the manner in which the emergency arbitration proceedings are conducted, albeit always taking into account the urgency inherent in such proceedings and ensuring that each party has a reasonable opportunity to be heard on the Application (Article 43(6)).

201. In exceptional circumstances, the emergency arbitrator may have to appoint an expert or may require other assistance. In such case, the parties, or one of them, must pay a supplementary deposit fixed by the emergency arbitrator sufficient to cover the expected costs (Appendix B, Article 3.2).

## **B. THE EMERGENCY ARBITRATOR'S DECISION**

202. The emergency arbitrator's decision may take the form of an order or interim award (Article 29(2)) and must be notified directly by the emergency arbitrator to the parties within 15 days from the date on which the emergency arbitrator received the file from the Secretariat. Article 2(2) does not apply to the calculation of the time limit and the 15 days' time limit is thus not extended to the next business day if the time limit lapses on an official holiday or non-business day. The time limit may be extended by agreement of the parties or, in appropriate circumstances, by the Court (Article 43(7)). Although the Court expects the emergency arbitrator to comply strictly with the time limit fixed, a short extension may for instance be granted in light of an increased scope of the Application and the need for further input from the parties.

203. The decision on the Application must include a determination of costs as referred to in Article 38(g). Before rendering the decision on the Application, the emergency arbitrator must submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination of costs. The fees of the emergency arbitrator range from CHF 2,000 to CHF 20,000. They may exceed CHF 20,000 only in exceptional circumstances and with the approval of the Court (Appendix B, Article 2.8). The costs are paid out of the deposit paid by the applicant. The determination of costs pursuant to Articles 38(d) and (e) and the apportionment of all costs among the parties are not to be decided by the emergency arbitrator but rather by the arbitral tribunal. If no arbitral tribunal is constituted, the determination of costs pursuant to Articles 38(d) and (e) and the apportionment of all costs are decided by the emergency arbitrator in a separate award (Article 43(9)).

204. A decision of the emergency arbitrator is expressly stipulated to have the same effects as a decision on interim measures under Article 29 (Article 43(8)), which may assist parties in need of enforcement of such a decision.

205. Any interim measure granted by the emergency arbitrator may be modified, suspended, or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal (Article 43(8)).

## **XII. Costs**

### **A. INTRODUCTION**

206. Article 38 provides for an exhaustive list of items which qualify as costs of the arbitration under the Swiss Rules. No other cost items may be taken into consideration by the arbitral tribunal or the Court when rendering cost-related decisions. These cost items are:

- (a) the fees of the members of the arbitral tribunal and, if applicable, for any secretary;
- (b) the travel and other expenses incurred by the members of the arbitral tribunal and, if applicable, by any secretary;
- (c) the costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) the costs of witnesses and experts, to the extent such costs are approved by the arbitral tribunal;
- (e) the legal and other costs (the nature and scope of which being determined by the arbitral tribunal where required) incurred in connection with the arbitration, if such costs were claimed during the arbitration proceedings and the arbitral tribunal determines the amount of such costs to be reasonable;
- (f) the Registration Fee and the Administrative Costs;
- (g) the Registration Fee, the fees and expenses of any emergency arbitrator, and the costs of expert advice and of other assistance required by such emergency arbitrator.

207. The amounts of cost items (a) and (f) depend on the total amount in dispute (see B. below for the computation of the amount in dispute). The various cost items are addressed in sub-section C. below.

208. The arbitral tribunal has the authority and duty to determine and allocate the costs of the arbitration (see sub-section D. below). Save for cost items (d) and (e), it must do so even if no party claims reimbursement of costs.

209. The advances for the costs (deposits) payable by the parties (see sub-section E. below) are intended to cover cost items (a), (b), (c), (f, second part), as well as item (g) in case of emergency relief proceedings. The deposits do not cover the arbitration-related costs incurred by the parties (items (d) and (e)) nor the Registration Fee (item (f), first part).

210. Unless stated otherwise, the principles described in this chapter equally apply to the Expedited Procedure (Article 42(2), first sentence), whereas a separate regime is applicable to emergency relief proceedings (Article 43).

211. Any payment such as payment of a Registration Fee, a Provisional Deposit or a deposit must be made directly from an account held in the name of a party to the case (including in case of a group of companies). The Secretariat may reject any payment not directly received from the parties to the case without providing reasons for that determination.

### **B. COMPUTATION OF THE AMOUNT IN DISPUTE**

212. The claims of all parties (as well as additional parties, if any) are added for the determination of the total amount in dispute of the case (Appendix B, Section 2.1). The Secretariat preliminarily determines the amount in dispute after the filing of the Notice of Arbitration and the Answer, without prejudice to the determination of the amount in dispute by the arbitral tribunal at a later stage, and the ultimate review of the determination on costs by the Court pursuant to Article 39(5).

213. For the purpose of computing the Registration Fee payable by a party (Appendix B, Section 1.1), the aggregate amount of all of that party's claims, whenever submitted (see para. 225 below), is taken into account, without considering the other party's defences or counterclaim.

214. If a set-off defence is subsequently raised, its amount may be added to the total amount in dispute, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defence will not require significant additional work (Appendix B, Section 2.1). Significant additional work is for instance required if the alleged set-off

claim is contested, so that this claim must be examined in addition to the main claim, in particular if the claim and set-off defence are not rooted in the same factual circumstances. Minor additional efforts, in contrast, shall be taken into account when fixing the deposits and the fees within the range set forth in the scale in Appendix B, Section 6. A set-off defence is not considered a claim for the purpose of establishing the aggregate amount of a party's claims for the determination of the Registration Fee payable by that party (see para. 224 below).

215. The amount in dispute for an individual claim is the difference between the financial value of a claim (Articles 3(3) (e) and (f)) and the amount acknowledged by the Respondent to that claim (Articles 4(1)(c) and (d)). An estimate of the financial interest at stake will be made if the amount/value of a claim in dispute is not exactly quantifiable. As a rule, if only declaratory relief or other unquantified relief is sought, the amount in dispute will be deemed to correspond to the actual value of the right that forms the subject matter of the arbitration. The same applies if a party has manifestly undervalued its claim (e.g. partial claim asserted while the determinations required from the arbitral tribunal concern the full claim, unless particular circumstances justify a partial claim), or has not indicated the value of it (Appendix B, Section 2.4).

216. For the purposes of calculating the amount in dispute, claims and set-off defences in foreign currencies are converted into Swiss francs (CHF) at the rate of exchange on the date when the Notice of Arbitration or Answer, or, in the event of joinder, cross-claim or intervention, a Notice of Claim under Article 6 is received by the Secretariat (Appendix B, Section 2.3). If a party submits new or amended prayers for relief, including a set-off defence, in the course of the arbitration, the rate of exchange on the date when this submission is received by the arbitral tribunal is applicable.

217. Interest claims (even if quantified) are not included in the determination of the amount in dispute. If, however, the demanded interest exceeds the amounts claimed in principal, the interest claims alone are taken into account (Appendix B, Section 2.2).

218. A prayer for relief submitted in the alternative is only adjudicated if a party's main prayers are not upheld. It is not taken into consideration in the assessment of the amount in dispute unless it is higher than the party's main prayers for relief.

219. A reduction in the amount of a claim or set-off defence will not be taken into account if the reduction was made after the transmission of the file (Article 8(5)) to the arbitral tribunal (Appendix B, Section 2.1). In respect of the determination of arbitrators' fees at the end of the proceedings, the reduction may be taken into account if the complexity of the subject matter decreases as a consequence of the reduction of the amount in dispute (Article 39(1); see para. 247 below).

220. The above principles also apply when determining whether the amount in dispute exceeds CHF 1,000,000. If this threshold is not exceeded, the provisions on the Expedited Procedure apply, unless the Court decides otherwise or the parties opt-out of the Expedited Procedure (Articles 42(1)(b) and 42(3); see para. 185 *et seq.* above).

## **C. COST ITEMS**

### **1. Registration Fee**

221. Each party asserting a claim (principal claim (Article 3(3)(i)), counterclaim (Articles 4(4), 21(3)), cross-claim, claim asserted against an additional party by virtue of a request for joinder, claim brought by an additional party by virtue of a request for intervention (Article 6) must pay a Registration Fee (Article 38(f); Appendix B, Section 1.1).

222. The Registration Fee is due in addition to the Administrative Costs. It is not a payment on their account (Appendix B, Section 2.9).

223. The Registration Fee is payable into a bank account of the Secretariat of the Court (Appendix A). Updated information on the bank account details may be found at [www.swissarbitration.org/centre/arbitration/arbitration-logistics](http://www.swissarbitration.org/centre/arbitration/arbitration-logistics).

224. The amount of the Registration Fee payable by a party depends on the aggregate amount of the claims brought by that party whenever submitted (Appendix B, Section 1.1). The amount is of

- CHF 4,500 where the aggregate amount does not exceed CHF 2,000,000;
- CHF 6,000 where the aggregate amount is between CHF 2,000,001 and CHF 10,000,000;
- CHF 8,000 where the aggregate amount exceeds CHF 10,000,000.

Any set-off defence is not taken into consideration for that purpose.

225. Any subsequent increase in the amount of that party's claims is taken into consideration for fixing the Registration Fee (Appendix B, Section 1.1). The Registration Fee is computed on the basis of the aggregate amount of the claims following the increase. If the increase of the aggregate amount of the claims results in a higher Registration Fee than that previously paid, the party concerned must pay the difference (Appendix B, Section 1.1).

226. If the aggregate amount of the claims of a party or additional party is not quantified, the Registration Fee is CHF 6,000 (Appendix B, Section 1.2). If it emerges during the course of the proceedings that (i) the value/interest of the unquantified parts together with the quantified parts exceeds CHF 10,000,000, or (ii) the unquantified claim is understated and the true value/interest exceeds CHF 10,000,000 (Appendix B, Section 2.4), the party concerned will be requested by the Secretariat to pay an additional amount of CHF 2,000 to supplement the Registration Fee (the Registration Fee being CHF 8,000).

227. The Registration Fee is not refundable in full or in part if a claim is withdrawn or reduced, or if the arbitration proceedings are terminated for any (other) reason at any point in time (Appendix B, Section 1.1).

228. If the claiming party fails to pay the Registration Fee, or only pays the Registration Fee in part, the Court will request it to remedy the defect (Article 3(5)). If this request is not complied with, the Notice of Arbitration, the Notice of Claim under Article 6(1) or the counterclaim will be deemed to be withdrawn without prejudice, and the arbitration shall not proceed as to the corresponding claim/counterclaim (Articles 3(5), 4(3) and Appendix B, Section 1.3).

229. Appendix B, Section 1.5 sets forth a standard Registration Fee of CHF 5,000 in emergency relief proceedings which applies regardless of the amount in dispute. If the Registration Fee is not paid, the Application will not be transmitted to the emergency arbitrator (Article 43(2)). If the party requesting emergency relief fails to pay the Registration Fee and does not comply with a time limit set by the Court to remedy the defect, the Application will be deemed to be withdrawn.

## 2. Administrative Costs

230. Administrative Costs (Article 38(f)) are a contribution to the general overhead of the Centre, in addition to the Registration Fee, and are intended to cover all administrative services rendered by the Centre, such as in connection with the commencement of the arbitration (e.g. notification of the Notice of Arbitration to the Respondent (Article 3(6)), constitution of the arbitral tribunal, approval or adjustment by the Court of the arbitral tribunal's determination on costs pursuant to Article 39(5) (Appendix B, Section 2.9 and footnote 3).

231. Administrative Costs computed on the basis of the scale in Appendix B, Section 6 are payable if the amount in dispute exceeds CHF 300,000 (Appendix B, Sections 2.9 and 6). In case the amount in dispute is not quantified, it will be determined considering all relevant circumstances (Appendix B, Section 2.4).

232. If more than two parties are involved in an arbitration, the amount of Administrative Costs so computed is increased by 10 percent for each additional party up to a maximum increase of 30 percent (Appendix B, Section 2.9, second sentence) to account for the increased complexity in administering the case.

233. Because most administrative services do not depend on whether the proceedings progress to a final award or are discontinued (by a decision terminating the proceedings at whatever stage), Administrative Costs computed on the basis of the scale in Appendix B, Section 6 are in principle due regardless of a discontinuation of the proceedings (Articles 36 and 41(4)). Nevertheless, the Court may reconsider them in exceptional circumstances, taking all relevant factors into account (Appendix B, Section 2.9 and footnote 3). In case of an early termination of the proceedings, the

Court will usually consider the stage of the proceedings (before the constitution of the arbitral tribunal, shortly after the constitution of the arbitral tribunal, after the issuance of the first procedural order, before the issuance of a partial award, etc.) and apply reduced Administrative Costs if justified by the circumstances and the stage reached.

234. Independent of the amount in dispute and in addition to Administrative Costs computed on the basis of the scale in Appendix B, Section 6, the items listed at Appendix B, Section 2.10 form part of the Administrative Costs in order to cover additional services not occurring in the ordinary course of a standard arbitration. These include:

- A non-refundable application fee of CHF 4,500 payable by the requesting party or, as the case may be, in equal shares by the requesting parties, for a notice of challenge of an arbitrator (Article 13(2)), or a request for removal of an arbitrator (Article 14(1)) (Appendix B, Section 2.10(a)).  
If the requesting party fails to pay the application fee within the time limit fixed, the Court will not be able to consider the merit of the application.
- An annual fee of CHF 2,000 payable by the parties (or group of parties) in equal shares in the event of an agreed stay of proceedings or, as the case may be, by the party which requested the stay of proceedings, if an arbitration is in abeyance for more than three months (Appendix B, Section 2.10(b)).
- Extraordinary work or expenses of the Secretariat or members of the Court in connection with the arbitration (including in connection with a request for interpretation or correction of the award, or for an additional award, made pursuant to Article 37, or where an award is remitted to the arbitral tribunal following the decision of a judicial authority) (Appendix B, Section 2.10(c)).
- Charges as a condition for the provision of additional support services by the Secretariat such as arranging hearing facilities, interpreters, transcribers, secretarial or logistical assistance, or facilitating entry visas (Appendix B, Section 2.10(d)).
- A fee of CHF 300 for each copy, payable by the requesting party, as a condition for the issuing of additional copies of awards or decisions terminating the proceedings certified by the Secretariat (Appendix B, Section 2.10(e)).

235. The Administrative Costs are first assessed by the Secretariat in reliance on a preliminary basis of the total amount in dispute when requesting the Claimant to pay the Provisional Deposit (Appendix B, Section 1.4; see para. 279 below).

236. The Secretariat continuously monitors the development of the total amount in dispute as the arbitration progresses. Upon transfer of the file (Article 8(5)), it advises the arbitral tribunal of the Administrative Costs to be taken into account by the arbitral tribunal when requesting the payment of advances on costs (deposits) from the parties (Article 41(1); see para. 279 below) and that the Administrative Costs may increase during the proceedings as a result of, *inter alia*, an increase in the amount of claims (including the value of declaratory relief), the filing of a counterclaim or a set-off defence, or if additional parties join the proceedings. In such cases, the Secretariat requests the arbitral tribunal to proceed only after having received confirmation by the Secretariat of the payment of the related supplemental deposit to cover, *inter alia*, the increase in Administrative Costs (and any additional Registration Fee) (Articles 41(3) and 41(4); Guidelines for Arbitrators, Article 3(4)).

237. The Administrative Costs are fixed by the Court in a final manner and form part of the costs which the arbitral tribunal must allocate and account for in the final award or the decision terminating the proceedings (Articles 40 and 41(5); see paras 267-268 below). Exceptionally, when the service is rendered after the termination of the proceedings (Appendix B, Section 2.10(e)), the Secretariat fixes the fees in question.

238. In case of a request for interpretation or correction of the award, or for an additional award, made pursuant to Article 37, or where an award is remitted to the arbitral tribunal following the decision of a judicial authority, a supplemental deposit may be requested by the arbitral tribunal to cover Administrative Costs or expenses of the Secretariat only when particular circumstances so justify, provided that such supplemental deposit has been approved by the Court (Appendix B, Sections 1.6 and 2.10(c); see para. 178 above).

239. In emergency relief proceedings (Article 43), no Administrative Costs computed on the basis of any scale or on the amount in dispute are payable. However, the items listed in Appendix B, Section 2.10 will be due if applicable.

### 3. Fees of Arbitrators and any Secretary

240. By choosing to arbitrate under the Swiss Rules, the parties vest the arbitral tribunal with the power to fix its own fees, subject to the requirements set out in Article 39. The scrutiny of the arbitral tribunal's determination of its fees by the Court (Article 39(5)), as well as the arbitral tribunal's obligation to consult with, or where required seek the approval of, the Court before requesting the parties to pay deposits and supplementary deposits (Articles 41(1) and (3); Appendix B, Section 4.2) ensure that the fees ultimately payable comply with the standards of Article 39.

241. Fee arrangements agreed between the parties and the arbitral tribunal remain subject to the binding approval or adjustment by the Court under Article 39(5) (see para. 245 below). Separate fee arrangements between the parties and the arbitral tribunal resulting in payment of fees above those approved or adjusted by the Court are incompatible with the Swiss Rules (Guidelines for Arbitrators, Article 5(3)).

242. Article 39(1) provides that the fees 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 diligence and efficiency of the arbitral tribunal. Article 39(2) further provides that the fees of the arbitral tribunal shall be determined in accordance with Appendix B (Schedule of Costs).

243. Appendix B, Section 2.5 clarifies that the fees cover the activities of the arbitral tribunal and any secretary from the moment the file is transmitted to the arbitral tribunal (Article 8(5)) until the final award or decision terminating the proceedings is rendered. Hence, the members of the arbitral tribunal and any secretary are not remunerated for any activity prior to the transfer of the file, such as contacts with the party appointing them (as far as permissible), reading of any initial documentation, completing the statement of independence and acceptance, making any disclosures (Article 12(2), and/or designating a presiding arbitrator (Article 11(2)), etc.

244. The fees of any secretary to the arbitral tribunal (Article 16(3)) form part of the fees of the arbitral tribunal (Article 38(a)). The secretary's tasks would be performed by the arbitrators if no secretary were appointed. This entails that such appointment may not increase the aggregate amount payable under Article 38(a) in conjunction with Appendix B, Section 6. The secretary's fees are part of the costs listed in Article 38(a), not Article 38(b) or (c). Thus, an arbitral tribunal must ensure that the appointment of a secretary does not increase the overall fees payable by the parties (Guidelines for Arbitrators, Article 1(11)).

245. The fees of the arbitral tribunal and any secretary must be computed on the basis of the scale in Appendix B, Section 6, taking into account the criteria in Article 39(1) (Appendix B, Section 2.6). The scale in Section 6 is based on the total amount in dispute and provides for a minimum and maximum amount of fees. Absent exceptional circumstances, the fees must be determined within these minimum and maximum amounts and, as a matter of practice, the average amount between the minimum and the maximum is generally taken as a starting point for the determination of its fees by the arbitral tribunal and the approval/adjustment of these fees by the Court in accordance with Article 39(5).

246. In order to allow an assessment of the time spent, each member of the arbitral tribunal is under a duty to record the time spent by that member from the moment the file is transmitted (Appendix B, Section 2.5) and to report such time when the arbitral tribunal is either (i) consulting with the Court with regard to a request for (supplementary) deposits (Articles 41(1) and (3)), (ii) requesting an advance payment of fees (Appendix B, Section 4.4), or (iii) submitting a draft pursuant to Articles 39(5)/43(9) for the purpose of approval or adjustment by the Court of the determination on costs (Guidelines for Arbitrators, Article 5(2)). Apart from the time effectively spent on the matter, the members of the arbitral tribunal are also encouraged to provide the Court (e.g. in the cost section of the draft award or in a separate communication) with any relevant information as to how the fees were determined in view of the circumstances and complexity of the case, so as to allow the Court to assess the reasonableness of those fees pursuant to Article 39(1).

247. Circumstances justifying a determination by the arbitral tribunal and approval/adjustment of the fees by the Court below the average under the scale or, in exceptional circumstances, even at a figure lower than the minimum limits in the scale (to avoid that the fees of the arbitral tribunal are unreasonably high) may include, for instance:

- the complexity of the subject matter of the arbitration is low (and, accordingly, comparatively little time and



effort had to be spent by the arbitral tribunal);

- the arbitration proceedings were discontinued at an early stage of the proceedings (and, accordingly, comparatively little time and effort had to be spent by the arbitral tribunal) (Article 39(1));
- the arbitral tribunal neglects its duty to conduct the proceedings efficiently (Articles 16(1) and 19(4)), in particular by not rendering its final award within three months after the filing of the last submission on the merits in the proceedings (Guidelines for Arbitrators, Articles 2(1) and (3)), or, when the Expedited Procedure applies, within six months since the transmission of the file to it or within the time extended by the Court (Article 42(2)(e)).

248. Circumstances justifying a determination by the arbitral tribunal and approval/adjustment of the fees by the Court above the average under the scale or, in exceptional circumstances, even at a figure higher than the maximum limits in the scale (to avoid that the fees of the arbitral tribunal are unreasonably low) may include, for instance:

- the complexity of the subject matter of the arbitration is high (and, accordingly, comparatively much more time and effort had to be spent by the arbitral tribunal);
- a substantial number of extensive submissions (Article 24) or an extensively long hearing (Article 27) required comparatively much more time and effort to be spent by the arbitral tribunal;
- the replacement of an arbitrator leads to a duplication of efforts by the replaced and the replacement arbitrators, and/or some steps of the proceedings have to be repeated (Article 15(3)).

249. Where the parties do not agree to refer the case to a sole arbitrator as provided for in Article 42(1)(b) (Expedited Procedure) or upon an invitation by the Court pursuant to Article 9(3), the fees of the arbitrators shall be determined in accordance with the scale in Appendix B, Section 6, but shall not be less than the fees resulting from the application of an hourly rate for the arbitrators of CHF 350 (Appendix B, Section 2.7) (see para. 186 above).

250. As a rule, and unless justified by the circumstances, no additional costs may be charged by the arbitral tribunal in case of interpretation or correction of the award, or for an additional award (Article 37), or for a new award after annulment of an award following the decision of a court (Article 39(3)) (see para. 178 above).

251. The fees pursuant to the Schedule in Appendix B, Section 6 do not include any value added tax (VAT). If an arbitrator's or secretary's remuneration is subject to VAT, the parties must pay VAT in addition to these fees (Appendix B, Section 5) according to the modalities defined by the arbitral tribunal taking into account the applicable requirements to such tax. Since Article 41(1) entitles each arbitrator to have his or her estimated remuneration secured, the arbitral tribunal may consider VAT when fixing the deposits (see para. 287 below).

252. In emergency relief proceedings (Article 43), the fees of the emergency arbitrator range from CHF 2,000 to CHF 20,000, unless, in exceptional circumstances, the Court approves otherwise (Appendix B, Section 2.8; see para. 313 below).

#### 4. Expenses of Arbitrators and any Secretary; Costs of other Assistance Required by the Arbitral Tribunal

253. The arbitrators may recover from the parties such expenses as are reasonably incurred in connection with the arbitration (Article 39(1); Appendix B, Section 3.1). The Guidelines for Arbitrators, Article 4.2 provide that arbitrators' expenses are deemed reasonable if they comply with the guidelines. The fees of any secretary are not an expense of the arbitral tribunal (see para. 244 above). However, the Guidelines for Arbitrators also apply to the expenses incurred by any secretary (Guidelines for Arbitrators, Article 1(12)).

254. Costs of "other assistance" required by the arbitral tribunal are governed by Article 38(c). This includes for example court reporters, interpreters, and tribunal-appointed experts.

255. Article 4(3) of the Guidelines for Arbitrators applies regarding the cost items listed in Articles 38(b) and (c). Different categories of costs are distinguished, and the Guidelines for Arbitrators provide whether they are reimbursable in principle and, if so, which requirements must be met (Appendix B, Section 3.1).

256. As a rule, and unless justified by the circumstances, no reimbursement of expenses of the arbitral tribunal may be requested in case of interpretation or correction of the award, or for an additional award (Article 37), or for a new award after annulment of an award following the decision of a court (Article 39(3)) (see para. 178 above).

257. In emergency relief proceedings (Article 43), the cost items are the same (compare Article 38(g) to Articles 38(b) and (c)) and the same principles as those governing regular arbitrations apply. However, an emergency arbitrator may request the parties or one of them to pay a supplementary deposit if the emergency arbitrator requires expert advice or other assistance pursuant to Article 38(c) (Appendix B, Section 3.2), and also request the applicant of the emergency relief proceedings and/or the party/parties requesting the incurring of a substantial expense to directly pay the requested service provider irrespective of whether the expense qualifies as an expense under Article 38(b) or (c) (Guidelines for Arbitrators, Article 4(4)).

258. No approval of expenses or costs of assistance can be made after the rendering of a final award, decision on an Application for emergency relief, termination order, or decision pursuant to Article 37 (Guidelines for Arbitrators, Article 4(5)).

## 5. Legal and Other Costs incurred by a Party; Costs of Witnesses and Experts

259. Whether the costs claimed by a party qualify as legal and other costs pursuant to Article 38(e) is to be decided by the arbitral tribunal according to the applicable law and arbitration practice.

260. The legal and other costs incurred by a party only form part of the costs of arbitration to be determined under Article 38 if the parties claim them during the arbitration proceedings (Article 38(e)) and insofar as they are reasonable. There is no reason for the arbitral tribunal to “approve” costs unless they are claimed, and “approv[ing]” implies checking whether the claimed costs are excessive. If they are excessive, the arbitral tribunal will refuse to consider them in part or in whole.

261. The actual costs associated with witnesses and experts (Article 38(d)) must be determined and allocated (Article 40) insofar as they are appropriate and insofar as they are timely claimed.

## D. ALLOCATION OF COSTS AND COST-RELATED DECISIONS

### 1. Allocation of Costs

262. The parties are free under the Swiss Rules to enter into agreements on cost allocation. They may, e.g. in their arbitration agreement or subsequently, agree that each party bears its own costs. In the absence of an agreement on this issue, the arbitral tribunal must decide on cost allocation and must take Article 40 into account for its decision on cost allocation.

263. Article 40, first sentence embodies the principle that costs follow the event, i.e. that costs shall be allocated according to the success of the parties’ respective claims. The wording of Article 40 leaves it in the discretion of the arbitral tribunal how costs shall be allocated if none of the parties is entirely successful, i.e. whether a party that is substantially unsuccessful must bear all costs or whether the costs should be allocated in proportion to the parties’ relative success.

264. The above applies *mutatis mutandis* to multi-party arbitrations, including in case of cross-claims, joinder or intervention (Article 6). The costs are allocated (i) based on the extent to which a party was unsuccessful on the claims in which it was involved and (ii) based on the portion that these claims represent of the total amount in dispute. Similarly, a successful set-off defence reduces the amount awarded to the Claimant.

265. Article 40 expressly indicates that the parties’ contributions to the efficient conduct of the proceedings and the avoidance of unnecessary costs and delays is one of the circumstances that may warrant a deviation from the costs-follow-the-event rule. Costs that were unnecessarily caused or caused by unreasonable, delaying, or obstructive conduct of a party may have to be borne by this party even if it is entirely successful (Article 16(1)). The arbitral tribunal may reduce the costs awarded to the successful party if it considers that such party unnecessarily contributed to increasing the costs of the proceedings, e.g. by making use of delay tactics, by submitting certain arguments without having good reason to do so, or by submitting dilatory procedural applications. The refusal by a party to agree to a sole arbitrator (see Articles 9(3) and 42(2)(b)) may also fall into this category if it appears unjustified in view of the circumstances.

266. The rule that ultimate success is decisive also applies in emergency relief proceedings (Article 43(9)): (i) if an arbitral tribunal is constituted during or after the emergency arbitrator proceedings, it allocates the costs of these ancillary proceedings based on the outcome of the arbitration before it; (ii) if no arbitral tribunal is constituted, the outcome of the emergency arbitrator proceedings reflects the parties' ultimate success in the proceedings envisaged by the Swiss Rules, and the emergency arbitrator allocates costs accordingly. This applies irrespective of whether the emergency arbitrator renders a decision on the applicant's requests, or the emergency relief proceedings are terminated, e.g. because no Notice of Arbitration is filed within the time limit set forth in Article 43(3).

## 2. Cost-related Decisions

267. The arbitral tribunal must determine the costs of the arbitration when it renders its final award or a decision terminating the proceedings (Article 38, first sentence). This also applies to these types of decisions when they are issued in the Expedited Procedure (Article 42(2); see also Article 43(9) for decisions in emergency relief proceedings). In such decision the arbitral tribunal must also include an accounting of the deposits in its final award or decision terminating the proceedings (Article 41(5); see para. 309 below).

268. Article 38, first sentence, also applies to awards on agreed terms (Article 36(1)) with respect to the cost items in Articles 38(a)-(c), (f) and (g). The parties' costs, i.e. cost items in Articles 38(d) and (e), will only have to be determined in case the parties' agreement does not include an agreement on how these cost items are dealt with.

269. The arbitral tribunal must also determine the costs of the arbitration when it renders decisions on requests for interpretation, correction, or additional awards under Article 37. The stipulation in Article 39(5) that the arbitral tribunal must send its draft of a decision on a request under Article 37 to the Court for approval or adjustment of the determination of the cost items listed in Article 39(5) clarifies that the arbitral tribunal has to establish and allocate the costs, if any, of such additional proceedings (subject to Article 39(3), which provides that no additional costs may be charged by the arbitral tribunal for such decisions unless they are justified by the circumstances; see paras 178, 238, 250 and 256 above).

270. Article 38, second sentence, provides that, if appropriate, the arbitral tribunal may make the determination on costs in "another decision", which includes interim or partial awards (Article 34(1)), decisions on requests for interim measures and procedural orders. Determining and potentially allocating certain costs items in such decisions may be appropriate if the subject matter of the decision is separable from the remainder of the arbitration and if the arbitral tribunal, when it renders its decision, considers that it is reasonable in the sense of Article 40 to allocate certain costs separately, i.e. irrespective of the further course of the arbitration, the outcome of the dispute, and other factors that may impact cost allocation in the decision terminating the arbitration.

271. In cases where the Court decides a termination of the arbitration before all arbitrators are confirmed (Article 8(4)), any party may request that the arbitral tribunal be constituted and "determine and apportion the costs not agreed upon by the parties". For this decision, the same standards as for any other decision on cost allocation apply.

272. If an arbitrator is replaced or if Article 15(2)(b) applies, the newly constituted arbitral tribunal is to determine the fees and expenses of the replaced arbitrator in a future award or decision terminating the proceedings in which it determines its own fees and expenses in accordance with Articles 38(a-c), 39, and Appendix B. The replaced or former arbitrator has no entitlement to payment of fees and expenses or an advance on costs pursuant to Appendix B, Section 4.4 prior to any remaining or replacement arbitrator (Guidelines for Arbitrators, Article 7). This ensures that the allocation of the fees amongst the members of the arbitral tribunal is made at a point when the relative time and efforts spent by each arbitrator (whether replaced, remaining, or new) are known (Article 39(4)).

273. No approval of fees can be made after a final award, decision on an Application for emergency relief proceedings, termination order, or decision pursuant to Article 37 has been rendered (Guidelines for Arbitrators, Article 4(5)).

274. The fees of the arbitral tribunal must be stated separately for each arbitrator and any secretary (Article 38(a)). Article 39(4) states that the presiding arbitrator shall in principle receive between 40% and 50% and each of the other arbitrators between 25% and 30% of the total fees, in view of the time and efforts spent by each arbitrator. The arbitral tribunal decides on the allocation of fees among its members and that decision should be reflected in

the separately stated fees for each arbitrator and any secretary in the draft award submitted to the Court pursuant to Article 39(5). If the members of the arbitral tribunal cannot agree, the Court may itself decide on the allocation based on its power to adjust the fees of (any member of) the arbitral tribunal and on the basis of the information before it (such as the time reports; see para. 246 *et seq.* above).

275. Unless the law applicable to the arbitration provides otherwise, the various cost items (including the fees of the arbitral tribunal; Article 38(a)) and their allocation need not be stated in the dispositive section of the cost related decision, but in the body of the decision only. In contrast, if, as a consequence of its allocation of costs, the arbitral tribunal orders payment by one party to another party, that order is in any event to be made in the dispositive section of an award.

276. In emergency relief proceedings, the emergency arbitrator must make a determination of costs as referred to in Article 38(g) in the decision on the Application. Before rendering the decision on the Application, the emergency arbitrator must submit to the Secretariat a draft thereof for approval or adjustment by the Court (Article 43(9)). In the decision on the Application, the emergency arbitrator must account for the deposit (advance on costs) paid by the applicant (see para. 314 below). In contrast to other proceedings, the determination of costs pursuant to Articles 38(d) and (e) and the apportionment of all costs among the parties is decided by the arbitral tribunal. If, however, no arbitral tribunal is constituted, the emergency arbitrator will be called upon to determine, in a separate award, the costs pursuant to Articles 38(d) and (e) and the apportionment of all costs.

277. Notification of originals of the award to the parties will only be made by the Secretariat if all the costs referred to in Articles 38(a), (b), (c), (f) and (g) have been paid in full (Article 34(5)). Practically speaking, and for final awards in particular, this means that the deposits held by the Secretariat (Article 41 and Appendix B, Section 4.1) must cover the costs approved or adjusted by the Court pursuant to Article 39(5).

278. Pursuant to Appendix B, Section 5 the recovery of VAT or other taxes and charges on an (emergency) arbitrator's fees is a matter solely between each member of the arbitral tribunal, or the emergency arbitrator, on the one hand, and the parties, on the other. It is for each (emergency) arbitrator to issue the required invoice(s) during or after the arbitration. As regards deposits of advances on VAT, see para. 287 below.

## **E. ADVANCES ON COSTS (PROVISIONAL DEPOSIT AND DEPOSITS)**

### **1. Provisional Deposit**

279. In addition to the Registration Fee, as soon as the number of arbitrators is determined and the total amount in dispute is known on a preliminary basis, the Secretariat requests the Claimant to pay a Provisional Deposit. The Provisional Deposit is intended to cover the fees and expenses of the arbitrators and any secretary (Articles 38(a) and (b)) until the issuance of the procedural timetable (Article 19(3), which includes holding an initial organisational conference with the parties for the purpose set out in Article 19(2)) and the full Administrative Costs for those administrative services which invariably are to be rendered in the ordinary course of an arbitration under the Swiss Rules (Appendix B, Section 1.4; see also footnotes 2 and 3).

280. The Provisional Deposit is payable in the amount of (i) CHF 6,000 for a sole arbitrator or for the first arbitrator, respectively, and CHF 4,000 for each additional arbitrator, as well as (ii) the Administrative Costs computed on the basis of the total amount in dispute, unless the amount of 50 percent of the average arbitrators' fees computed solely on the basis of the Claimant's claims is lower, in which case that lower amount applies (Appendix B, Section 1.4; see also footnote 2). The latter provision prevents the Respondent from being able to inflate the amount of the Provisional Deposit by filing unreasonably high counterclaims.

281. The file will only be transmitted to the arbitral tribunal once the Provisional Deposit has been paid in full (Article 8(5)). If the Provisional Deposit is not paid, the Secretariat may set an appropriate additional time limit within which this shortcoming may be remedied. If no payment is made within the time limit fixed, the arbitration will not proceed.

282. Once paid, the Provisional Deposit will be credited to the Claimant's share of the deposit (Article 41(1)).

283. The Provisional Deposit will be administered by the Secretariat in a separate bank account used solely for the arbitration proceedings concerned (Appendix B, Section 4.1). The arbitral tribunal is not allowed to hold deposits (see para. 303 below).

## 2. Deposit of Costs

284. The Swiss Rules vest the arbitral tribunal, and not the institution, with the authority and duty to request the parties to pay deposits and to account for the deposits in its final award or decision terminating the proceedings. The arbitral tribunal must nevertheless consult with, or where required seek the approval of, the Court (see para. 288 below) on the amount of the deposits it intends to request (Articles 41(1) and (3); Appendix B, Section 4.2).

285. The arbitral tribunal, once constituted, and after consulting with the Court, must request each party to deposit an equal amount as an advance for the costs (Article 41(1); Guidelines for Arbitrators, Article 3(1)). The request for deposits must be made promptly after the transmission of the file to the arbitral tribunal, and the arbitral tribunal may inform the parties that it will not proceed with the arbitration (i.e. those activities no longer covered by the Provisional Deposit, see para. 279 above) if payment of the deposits is not made within the time limit set in accordance with Article 41(4) (Guidelines for Arbitrators, Article 3(2)).

286. The starting point for determining the amount of the deposits is an estimate of the fees to which the arbitral tribunal will be entitled if it renders a final award. The standard for calculating this estimate is an arbitration requiring average efforts by the arbitral tribunal. The arbitral tribunal should consider as fee estimate the average of those amounts which the scale in Section 6 of Appendix B indicates as minimal and maximal fees for the amount in dispute (Appendix B, Section 4.2; see also the cost calculator at [www.swissarbitration.org/centre/arbitration/cost-calculator-2021](http://www.swissarbitration.org/centre/arbitration/cost-calculator-2021)).

287. Additionally, in order to calculate the overall deposit, the arbitral tribunal must ensure that such deposit includes allowance for:

- any Administrative Costs referred to in Article 38(f) (Guidelines for Arbitrators, Article 3(4); see also Appendix B, Section 6);
- a reasonable estimate of its expenses (Article 38(b));
- a reasonable estimate of any future costs of expert advice and other assistance (Article 38(c)). Deposits for this type of costs should, however, only be requested if they seem necessary. In making this decision, the arbitral tribunal may take into account that it is entitled to request supplementary deposits if the need for such expert advice or other assistance arises at a later point;
- possible value added taxes (VAT) or other taxes and charges that may be applicable to the fees of a member of the arbitral tribunal (Appendix B, Section 5).

288. If the overall deposit intended to be requested by the arbitral tribunal exceeds the amount computed on the basis of the factors described in paras 286-287 above, the arbitral tribunal must seek the approval of the Court. As a matter of practice, when transferring the file (Article 8(5)), the Secretariat provides the arbitral tribunal with its preliminary assessment of the overall amount in dispute on the basis of which it had fixed the Provisional Deposit and advises of the maximum deposit the arbitral tribunal may request from the parties without further approval from the Court. The amount so communicated usually includes an estimate of reasonable expenses (Article 38(b)) to be incurred by the arbitral tribunal.

289. The arbitral tribunal may then make any adjustments to the determination of the amount in dispute by the Secretariat upon consultation with the parties prior to or at the initial organisational conference (Article 19(2)). Depending on the maximum amount of the deposit, the anticipated complexity of the case, the cash management requirements of the parties or other circumstances, the arbitral tribunal may decide not to request payment of the maximum amount of the deposit or may authorise the payment of deposits, or any party's share thereof, in instalments (Appendix B, Section 4.3).

290. When determining the payments to be made by the parties, any Provisional Deposit paid in accordance with Appendix B, Section 1.4 is considered as a partial payment of the Claimant's deposit.

291. In multi-party arbitrations, including in cases of joinder, intervention or cross-claims (Article 6), the arbitral tribunal may order that the deposits must be paid by both sides (if the parties can be so grouped), rather than by each individual party, in equal amounts. The claims of all parties and additional parties (Article 6) are added for the determination of the amount in dispute (Appendix B, Section 2.1). In a second step, the amount of each individual party's deposit may be fixed by comparing the amount in dispute for this party in proportion to the total amount in dispute. If several parties are jointly claiming or defending with regard to a prayer for relief, they may be jointly liable for the deposit that is due for this claim on their side.

292. Where the Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the arbitral tribunal may in its discretion establish separate deposits (Article 41(2)). It may do so on its own initiative or upon request of a party. The arbitral tribunal may order the separation of the deposits also in case of cross-claims made by the additional party. Before any decision to order separate deposits is made, the arbitral tribunal shall inform the Secretariat. The separate deposits are calculated taking into account the various claims (including counterclaims and/or cross-claims) separately, i.e. as if they had been filed in separate arbitrations. The separate deposits shall also include the Administrative Costs owed for each claim/counterclaim/cross-claim. If all of the parties pay the separate deposits, at the end of the arbitration, the arbitral tribunal may determine its fees on the basis of the amount of the claim, counterclaim and cross-claim considered separately. The Court will exercise the ultimate control over the proposed fees by the arbitral tribunal pursuant to Article 39(5) with a view to avoiding any form of unjustified increase in the arbitration costs. As to the Administrative Costs, the determination shall generally be made taking into account the global amount in dispute by adding up the value of the claim, counterclaim and cross-claim.

293. If one party bears the burden of proof for certain factual issues, the arbitral tribunal may establish "separate deposits" by requesting that party to pay a sole deposit for the costs of "other assistance" (Article 38(c)). Such party may for example be ordered to fully advance the costs of expert advice, together with a notice that the evidentiary proceedings in question will not be conducted in case of default.

294. Pursuant to Appendix B, Section 2.1, a reduction in the amount of a claim shall not be taken into account in the determination of the amount in dispute if the reduction was made after the transmission of the file to the arbitral tribunal.

### 3. Supplementary Deposits

295. The arbitral tribunal may, after consultation with the Court (or, as the case may be, approval of the Court; see para. 288 above), request supplementary deposits (Article 41(3)) if an (updated) estimate suggests that the arbitration costs listed in Article 41(1) are not covered by the initial deposits. This may occur (i) if a party amends its claims, counterclaims or defences (Article 22) or if a new cross-claim, request for joinder or intervention is made (Article 6(3)), thus increasing the amount in dispute, the complexity of the subject matter or the time to be spent by the arbitrators; (ii) if the initial deposits turn out to be insufficient for other reasons. After consulting with the Court, the arbitral tribunal shall ensure that it requests any supplementary deposits as soon as it becomes aware of circumstances that so justify (Guidelines for Arbitrators, Article 3(3)).

296. When the circumstances are prompted by an increase in the overall amount in dispute, in order to calculate the new overall deposit, the arbitral tribunal shall ensure that such supplemental deposit includes any Administrative Costs referred to in Article 38(f) (Guidelines for Arbitrators, Article 3(4)).

297. Any supplementary deposit should if possible be requested well before the final award or an award on any matter is to be rendered. The Secretariat monitors whether the arbitral tribunal is authorised to request the amounts. As a matter of practice, the Secretariat also follows up after the evidentiary hearing to see whether the deposits it holds (see para. 303 *et seq.* below) are sufficient. Finally, before the Court's review of the determination of costs pursuant to Article 39(5), the Secretariat may invite the arbitral tribunal to request additional deposits from the parties if it turns out that the deposits made by the parties so far are insufficient to cover the costs referred to in Articles 38(a) to (c) and/or the Administrative Costs referred to in Article 38(f) (Guidelines for Arbitrators, Article 3(5)).

298. In case of a request for correction, interpretation or for an additional award (Article 37), or where a judicial authority remits an award to the arbitral tribunal, a supplementary deposit may only be requested by the arbitral tribunal when particular circumstances so justify, with prior approval by the Court (Article 39(3); Appendix B, Section 1.6; see para. 178 above).

#### 4. Time Limit and Failure to Pay Deposits

299. The arbitral tribunal sets the time limits for payment of any deposit, separate or supplementary deposit.

300. If the required deposits are not paid in full within 15 days after the receipt of the request, or another time limit set by the arbitral tribunal if appropriate in the circumstances, the arbitral tribunal will notify the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may, but does not have to, order the suspension or termination of the arbitration proceedings in whole or in respect of certain claims or parties (Article 41(4)), in particular in cases where separate deposits have been ordered. If the arbitral tribunal envisions termination, it must inform the parties of its intention (Article 36(2)).

301. Failure to pay the required deposit may also result in the award not being notified to the parties by the Secretariat (Article 34(5); see para. 277 above).

302. If the arbitral tribunal established a separate deposit by requesting a party to pay a sole deposit for the costs of "other assistance" (Article 38(c); see para. 293 above), failure of that party to timely pay the deposit results in the assistance not being retained by the arbitral tribunal including all negative consequences this may entail for the defaulting party.

#### 5. Administration and Accounting of the Deposits

303. The deposits are administered by the Secretariat and are kept in a separate bank account, specifically open for the arbitration proceedings in question and the details of which are communicated to the parties. Under the 2021 Swiss Rules arbitrators are not allowed to hold deposits (arbitrators holding deposits was possible under prior versions of the Swiss Rules and past practice).

304. Pursuant to Appendix B, Section 4.7, the deposits do not *per se* yield interest for the parties or the arbitral tribunal. However, in case interest is granted by the bank on the deposits, such interest will be credited in favor of the parties. Any bank charges and negative interest shall be borne by the parties.

305. With the approval of the Court, part of the deposits may from time to time be released to each member of the arbitral tribunal as an advance payment of fees or compensation for expenses or costs of assistance, as the arbitration progresses (Appendix B, Section 4.4). As a rule, however, no advance payments on fees, costs or expenses are approved in the Expedited Procedure (Article 42) or emergency relief proceedings (Article 43).

306. As regards compensation for expenses prior to the approval/adjustment of expenses by the Court pursuant to Article 39(5), part of the deposit may be released for that purpose if the accrued unpaid expenses and/or costs of an arbitrator exceed CHF 1,000 or the equivalent amount in another currency (Guidelines for Arbitrators, Article 6).

307. In principle, advance payments of fees (Article 38(a)) are only approved by the Court once significant steps in the arbitration have been achieved (e.g. an interim award on jurisdiction or liability has been rendered). However, the Court may 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. As a rule, such advance payments shall in the aggregate not exceed 50 percent of the deposits paid by the parties, unless particular circumstances justify departing from this principle.

308. At any time during the arbitration, the Court may release part of the deposit as payment of the Administrative Costs (Appendix B, Section 4.5) effectively incurred according to the Guidelines for Arbitrators.

309. The arbitral tribunal shall include an accounting of the deposits in the final award or decision terminating the proceedings (Article 41(5); see para. 267 above).

310. If the deposits exceed the costs referred to in Articles 38(a) and (c), (f) and (g), the balance will be returned to the parties in proportion to their contribution to the deposits and irrespective of the outcome of the case, unless the parties have agreed otherwise (Article 41(5)). If the parties have agreed otherwise, the arbitral tribunal will so state in the body of its final award or decision terminating the proceedings. For compliance reasons, the return payment

will, in principle, be made to the person or entity which made the payment (Appendix B, Section 4.6); payment may be made to the party's counsel if duly empowered to receive such funds.

## 6. Advances on Costs in Emergency Relief Proceedings

311. The provisions on the Provisional Deposit and Article 41 on deposits, supplementary and separate deposits do not apply in emergency relief proceedings where no Administrative Costs must be paid (see para. 305 above) and where the applicant must instead advance the possible maximum fees of the emergency arbitrator of CHF 20,000 already together with the Application (Article 43(1)(c); Appendix B, Sections 1.5 and 2.8). No Provisional Deposit is thus requested by the Secretariat and no deposits are requested by the emergency arbitrator.

312. However, when requested by a party to incur substantial expenses (such as for travel and accommodation, retaining or of expert advice or other assistance), i.e. irrespective of whether the related costs fall within Article 38(b) or (c), the emergency arbitrator may ask the requesting party or the applicant to directly pay the service provider (airline, travel agent etc.). Failing such payment, the emergency arbitrator is not under an obligation to incur the requested expenses (Guidelines for Arbitrators, Article 4(4)). This special regime takes account of the urgent nature of emergency relief proceedings, avoids the loss of time resulting from a consultation process or a request for approval of supplementary deposits by the Court and ensures that the CHF 20,000 paid by the applicant remain available in full as payment of the emergency arbitrator's fees.

313. The Court may order the applicant to pay a supplemental deposit in instances where CHF 20,000 are unlikely to cover the cost items under Articles 43(9)/38(g), in particular if in exceptional circumstances the amount of CHF 20,000 would be insufficient to ensure adequate remuneration of the emergency arbitrator (Appendix B, Section 2.8; see para. 252 above).

314. The emergency arbitrator is to account for the deposits in the decision on the Application (Article 43(9)).

315. If the deposit of CHF 20,000 (together with any supplementary deposit) paid by the applicant exceeds the fees and expenses of the emergency arbitrator and any costs for expert advice and other assistance, the balance will be returned to the applicant irrespective of the outcome of the case. For compliance reasons, the return payment will, in principle, be made to the person or entity which made the payment (Appendix B, Section 4.6); payment may be made to the party's counsel if duly empowered to receive such funds. In the alternative, and if the applicant filed a Notice of Arbitration in accordance with Article 43(3), the applicant may request that the balance be considered as a partial payment of the Provisional Deposit or the Claimant's deposit.