

An Arbitrator’s Perspective: A Few Reflections about the Case Administration under the Swiss Rules

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This paper stems from a panel discussion during the ASA Conference of 31 January 2014. The panel was asked the following question: “Is the model of an ‘institution light’ with a decentralized administration of arbitral proceedings a suitable one, for instance as regards accessibility, securing procedural efficiency and cost control?” The panel was further asked to give some thoughts as to the way forward for the Swiss Chambers’ Arbitration Institution (also the “Institution”).

This paper intends to reflect the author’s contribution during the conference and to continue the discussion. It first examines whether the Swiss Rules arbitrations are correctly labeled as a “light touch” approach to administered arbitrations and, if so, what the consequences are in terms of efficiency and accessibility (1). Then, it analyzes whether the decentralization is indeed an issue (2) and discusses four possible improvements (3).

1. NATURE OF THE CASE ADMINISTRATION UNDER THE SWISS RULES

1.1. The Swiss Rules Represent a “Light Touch” Approach to Administered Arbitrations

Swiss Rules¹ arbitrations can be categorized as “light touch” administration, whether with respect to the organization in place or to the Institution’s interference with the arbitration process.

The Institution is composed of the Court of Arbitration (the “Court”) and the Secretariat of the Court (the “Secretariat”). The character of the Swiss Chambers’ Arbitration Institution, in particular the absence of any scrutiny of the award apart from the decision on

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¹ Swiss Chambers’ Arbitration Institution, Swiss Rules of International Arbitration (June 2012) (*hereinafter* Swiss Rules).

costs, results in very reasonable needs in terms of staff.² In effect, although the Secretariat is composed of staff of the seven chambers of commerce which enacted the Swiss Rules, the overall number of these members is very limited.

1.2. Consequences of “Light Touch” Administration in Terms of Efficiency

In theory, a “light touch” administration could entail the risk of an underequipped institution not able to cope with the requirements of an efficient arbitration process. The efficiency of an arbitration institution is often measured by the reasonableness of its costs and its responsiveness. The question is how well the Swiss Chambers’ Arbitration Institution performs in terms other those measurements.

1.2.1. Efficiency: cost-wise

One requirement of accessibility is that the administrative fees do not exceed what is reasonable. An arbitral institution cannot seriously pretend that the arbitration services offered are accessible if the range of its fees actually limits such services to a minority of powerful groups of companies or well-off individuals.

Statistics show, however, that the costs of the Swiss Rules arbitrations are reasonable. The administrative costs are reported to represent two percent of the total arbitration costs and, for disputes under two million Swiss francs, there are no costs. As to the arbitrators’ fees, the same statistics report that they represent eighteen percent of the total arbitration costs.³

1.2.2. Efficiency: response-wise

As a premise, one should admit that no arbitral institution holds the key to efficiency in arbitral proceedings in any specific case. The key lies much more in the hands of the arbitrators and, even more so, in those of the parties’ counsel. However, it is true that an institution cannot pretend to contribute to this efficiency if each of its interventions results in the derailment of the procedural timetable.

² Art. 40 (4) Swiss Rules. The absence of a requirement of terms of reference which would have to be scrutinized by the Institution is another factor reducing the staffing needs.

³ See, Joya Raha’s contribution, *Institutional Involvement and Costs*, section 6, in this volume.

This is certainly not an issue with the Swiss Chambers' Arbitration Institution, which is reported to be very responsive. In the author's experience, the Swiss Chambers' Arbitration Institution responds in a matter of days. For instance, the Court's determination on the arbitral tribunal's draft decision on costs is issued within two to four working days from the communication of the draft award to the Secretariat. The same applies to the arbitrator's appointment, be it further to, or in the absence of, a nomination by the parties. Equally rapid are the decisions within the purview of the Court's Special Committee.⁴ For instance, in 2013, it only took two working days for the Special Committee to deal with and decide on a challenge of an arbitrator.⁵ The Special Committee's decisions on the seat of the arbitration are equally or even more rapid.

The responsiveness of the Institution can be attributed to two main factors. First, the Secretariat is very quick to respond. In this respect, the staff members of the Chambers of Commerce who compose the Secretariat must be praised for their eagerness to assist. Secondly, the Court members always make sure to react promptly to the Secretariat's queries.

Of course, one could argue that this effectiveness would probably be affected if the Court had to scrutinize draft awards in their entirety and not only the costs section. Such scrutiny would require a substantial preparatory work of the Secretariat in order to enable the Court to decide within an acceptable time frame. As a consequence, not only would the response time of the Institution be longer but the staffing needs would also increase. It is enough to consider, *mutatis mutandis*, the resources that the ICC needs in order to ensure a comprehensive and high quality scrutiny.

Whether the Swiss Rules should be amended so as to provide for a full scrutiny of awards is an issue which exceeds the scope of this paper. We will thus restrict ourselves to one comment. On the one hand, the ICC Rules provide for such scrutiny,⁶ and it is commonly accepted that this scrutiny and its quality are one of—if not, the—landmark(s) of ICC arbitration. On the other hand, the Swiss Rules arbitrations are among the arbitrations administered with a light touch. Statistics show that they are also fast.⁷ However, the speed of Swiss

⁴ For a list of the areas reserved to the Special Committee; see, Art. 4 Internal Rules of the Arbitration Court of the Swiss Arbitration Institution.

⁵ Art. 11 (2) Swiss Rules.

⁶ Art. 33 International Chamber of Commerce, International Court of Arbitration, Arbitration Rules (2012), [*hereinafter* ICC Rules].

⁷ Statistics report that in 2013 the average duration of an arbitration proceeding under the ordinary procedure was eleven months and seven months for those under the

Rules arbitrations is not the result of the absence of scrutiny. Practitioners know that the length of proceedings depends almost entirely on the arbitral tribunal, the parties and their counsel, and only marginally on the institutional arbitration rules, at least with respect to the rules of reputable arbitration institutions. Nevertheless, it is not disputable that the scrutiny of draft awards by the Institution would have repercussions on the Institution in terms of its staffing and on the length of the proceedings. Therefore, our preliminary conclusion would be not to duplicate an essential feature of another arbitration institution, all the more so if that feature might in turn change the nature of the Swiss Rules arbitrations in terms of its light touch administration.

2. DECENTRALIZATION V. CENTRALIZATION IS NOT AN ISSUE

The Secretariat takes care of the day-to-day administrative management of the cases. Since the Secretariat is composed of staff members of the Chambers of Commerce of the seven cantons which adopted the Swiss Rules,⁸ the Swiss Rules arbitrations may appear decentralized in this respect. The risk of such an organization is that, in theory, the respective practice of the chambers may differ. However, this is of no practical concern.

This organization could be an issue if there were room for materially differing local practices, but this is not the case. The practice can only differ where interpretation of the rules is required. All of the issues where interpretation could be of concern are handled by the Court: e.g. confirmation of arbitrators or, if required, determination of the place of arbitration.⁹ It follows that the Secretariat exclusively deals with administrative issues.

The (unique) Court guarantees the unity of practice. It is composed of twenty-seven practitioners, who meet regularly *in persona*, as with the court of other institutions such as the International Chamber of Commerce (ICC) or London Court of International Arbitration (LCIA). The purpose of the plenary sessions is to ensure “consistent and efficient administration of arbitration proceedings.”¹⁰

expedited procedure.

⁸ Swiss Chambers of Commerce in Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich.

⁹ Arts. 5 and 16(1) Swiss Rules.

¹⁰ Art. 5 of the Internal Rules of the arbitration court of the Swiss Chambers' Arbitration Institution (*hereinafter* Internal Rules). According to this same provision: “The Chairperson, the Vice-Chairpersons and the committees must report to the Court if they

Moreover, decisions which are subject to some discretion are entrusted to the Court's Special Committee of seven members, which further guarantees a uniform practice. These decisions relate to the correction of a failure in the constitution of the arbitral tribunal,¹¹ the appointment of a replacement arbitrator,¹² the challenge of an arbitrator,¹³ the removal of an arbitrator,¹⁴ the revocation of an arbitrator,¹⁵ the non-replacement of an arbitrator after the closure of the proceeding,¹⁶ the determination of the seat of the arbitration and the consolidation of proceedings.¹⁷

The decisions that do not fall within the ambit of the Court's Special Committee are taken by the administration committee in charge of the case (the "Case Administration Committee").¹⁸ Each proceeding is assigned to a specific Case Administration Committee, which remains the same throughout the arbitration. Therefore, the same Court members will follow the case from start to finish. Such permanence is certainly a source of comfort for the parties and arbitrators, especially in relation to the Court's power to review the arbitral tribunal's decision on costs.

Therefore, while it is a fact that the Secretariat has staff in multiple locations, i.e. different cantons, delocalization is not an issue since it does not affect the coherence of the practice. This coherence is ensured by the Court's plenary sessions with respect to the overall proceedings under the Swiss Rules and, for each particular proceeding, by the permanent composition of the Special Administration Committee in charge.

have encountered an issue of interpretation of any provision of the Swiss Rules or have rendered a decision inducing a change of practice in the administration of arbitration proceedings pending under the Swiss Rules. The Court may at such time define a common practice in order to ensure consistent and efficient administration of arbitration proceedings."

¹¹ See, Art. 5(3) Swiss Rules.

¹² See, Art. 13(2)(a) Swiss Rules.

¹³ See, Art. 11 Swiss Rules.

¹⁴ See, Art. 12 Swiss Rules.

¹⁵ See, Art. 5(3) Swiss Rules.

¹⁶ See, Art. 13(2)(b) Swiss Rules.

¹⁷ Art. 4 Internal Rules and *see also*, Art. 4(1) Swiss Rules.

¹⁸ A reservation should be made for the decisions which, in the context of the emergency proceedings, are entrusted to the Chairperson of the Court or one of the Vice-Chairpersons, i.e. the appointment of the emergency arbitrator (Swiss Rules, Art. 43[2]), the challenge of an emergency arbitrator (Swiss Rules, Art. 43[4]), the removal of an emergency arbitrator (Swiss Rules, Art. 43[4]) and determination of the seat of the emergency relief proceedings (Swiss Rules, Art. 43[5]).

3. IS THERE ROOM FOR IMPROVEMENT?

Whether as counsel for a party, arbitrator or Court member, the author of the present paper has never been frustrated by an event which could be attributed to a malfunctioning of the Institution or an outdated practice. A different assessment would be alarming for a ten-year-old arbitration institution when its rules have just been reviewed and revised. Although it may seem premature to devote time and energy to trying to improve something that is working well, the author would like to suggest four points for reflection.

3.1. One Focused Entity with a Fulltime Staff

The present paper has endeavored to report the author's experience that the administration by the Institution, be it the Secretariat or the Court, is responsive and quick. There was no different experience expressed by the other panelists of the ASA conference of 31 January 2014. Thus, there seems to be consensus in this respect.

Would the assessment remain the same if the number of proceedings were to increase dramatically and to reach, for instance, the numbers of proceedings which are administered by the ICC? There is no need for detailed projections to anticipate that the Institution, in its current structure and organization, would be overwhelmed by such an increase.

The question is whether the Swiss Chambers' Arbitration Institution should anticipate such an increase. In particular, should the staff of the Secretariat be increased?

Launching a program now to increase the number of employees with an eye to a possible increase in cases in the future sounds rather premature. However, after ten years of existence, it may be a good time for the Institution to reflect on whether it has the most rationalized organization. To outline what such an organization should be obviously exceeds the scope of the present paper. However, a few submissions might be put forward here.

There is no reason why the Swiss Chambers' Arbitration Institution would contradict the quite natural principle according to which synergies are generated by gathering in one location people who simultaneously do the same work in different places. Suffice it to say how much easier it would be to coordinate work, exchange information or collect statistics. Moreover, gathering the Secretariat staff members in one location would generate additional working

capacity, which would then give the Institution the flexibility to cope with an increase in the number of cases, at least up to a certain level.

This additional working capacity would also allow staff members to dedicate more time to tasks that they may find difficult to include in their current workload. Areas where efforts would be welcome are numerous. For instance, as with any product, the Swiss Rules need more promotion and marketing. There is no need for in-depth studies to conclude that promotion and marketing would be much more powerful if they were carried out by a professional or even a team of professionals, working full time for the Swiss Chambers' Arbitration Institution. No need for in-depth studies either, to acknowledge that the visibility of the Swiss Rules, and thus their market share, would be greater if this team of professionals were under the leadership of one person, who could be a full-time executive director or secretary.

Gathering the staff in one location under one leader in order to act in a coordinated manner seems to depict the mission of a centralized entity. Why not? This entity would have under its one roof a team of professionals who would be fully dedicated to one goal from sunrise to sunset: the Swiss Rules, only the Swiss Rules and their market share. Is it a mere dream? First, what is wrong with dreaming? Dreams are often our best counselor. Secondly and more importantly, it is not quite a dream but, in the author's understanding, the subject-matter of a motion that is currently being considered by the Chambers of Commerce and that should be fully supported.

3.2. Option for the Arbitral Tribunal's Fees Computed on a Time-Spent Basis

The present paper reflects the consensus that arbitration fees and administrative costs represent the smallest part of arbitration costs. The Swiss Rules system based on an *ad valorem* schedule is no exception.¹⁹ Yet, these costs, more particularly the arbitrators' fees, may generate some frustration on the parties' part when these costs are perceived as too high or, on the arbitrators' part, when they are perceived as too low. An example of a rather high risk for such frustrations is when the parties reach a settlement. On the one hand, the parties have dedicated a lot of time, effort and financial resources to the settlement. A kind of exhaustion may then add to their feeling of release and achievement which a settlement normally generates. Such exhaustion might sometimes turn into incomprehension, not to say exasperation, when the arbitration costs, especially the arbitrators'

¹⁹ Swiss Rules, Appendix B.

fees, are disclosed and it is discovered that they are almost the same as they would have been had the proceedings not been settled. Conversely, arbitrators might feel the same way when the settlement arises quite late in the process, for instance shortly before the hearing or when the drafting of the award is well advanced, and the fees as confirmed by the arbitral institution, in their opinion, do not appropriately reflect the work done. Whether justified or not, these possible frustrations should be anticipated to the extent possible.

Certain parties and arbitrators may feel more comfortable if the arbitrators' fees are computed on an hourly basis.²⁰ Without seeking to be exhaustive, the pros and cons of such computations are worth discussing briefly.

Once the hourly rate is established, there should be little room for objection or frustration, but would this really be the case? Parties may not be convinced by the necessity or efficiency of all the hours that the arbitrators have dedicated to the case and the questioning of those hours would also generate frustration. One could think of two remedies. First, preemptively, such issues may be avoided, or at least the risk of such doubts arising may be considerably reduced, by a careful screening of the candidate arbitrators. Secondly, a posteriori, an overcharging arbitrator would not go unnoticed for long and is likely to be sanctioned by the market.

Now the question would be whether fees calculated on an hourly rate basis would remunerate more adequately the work accomplished than an *ad valorem* computation. Legitimate doubts remain. In particular, would such computation not be a premium to inefficiency? Why should the time spent prevail over other circumstances which may be even more relevant? These circumstances should also include the efficiency of the arbitrators, as some may be more efficient in a specific industry or type of dispute than others.²¹

These legitimate doubts as to the adequacy of a fee computed on an hourly rate basis confirm that such system should not be imposed upon the parties but they should be given this option if they so wish.

²⁰ As for instance the arbitrations under the LCIA Arbitration Rules, effective 1 January 2014, (*hereinafter* LCIA Rules), Appendix Schedule of costs.

²¹ In this respect, Art. 39 Swiss Rules provides that the arbitral tribunal's fees must be "reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter of the arbitration, the time spent and any other relevant circumstances of the case, including the discontinuation of the arbitration proceedings in case of settlement."; *see also*, Marco Stacher, *Art. 39*, in *SWISS RULES OF INTERNATIONAL ARBITRATION, COMMENTARY*, Art. 39 N. 3 (Zuberbühler, Müller, Habegger eds, 2nd ed, 2013).

The Swiss Rules could be amended and refer expressly to this option.²² In order to avoid the discomfort that could arise should a party want to decline a time-spent-basis fee, which presumably would come from an arbitral tribunal, the Swiss Rules could provide that an agreement on such an option must be made before the constitution of the arbitral tribunal.

3.3. An Internationally Composed Arbitration Court for International Arbitrations?

This paper has emphasized that the Court is a single instance and thus a centralized body. Looking at its current composition, one should also say that the Court's members are almost all Swiss and all Swiss-based.

Should this composition not be reviewed, first for the benefit of practitioners and users and, second, for the benefit of the Court itself?

From the practitioners' perspective, there is little doubt that the Swiss-based counsel and arbitrators have no real concern about the Court's "Swiss-based" composition. It may actually be quite a comfort for these practitioners to know that any Court's interference in their arbitrations will be led by colleagues who have the same legal and cultural background. Admittedly, however, practitioners from other parts of the world may feel more comfortable if there were some compatriots on the panel.

From the Court's perspective, it is quite obvious that the Court would gain in wisdom if all the topics that the Court has to deal with were discussed with a multinational and multicultural input. To put it simply, since the vast majority of the proceedings conducted under the Swiss Rules are international arbitrations, it would not be incongruous that this international nature be reflected in the Court's composition. Of course, one could argue that part of the efficiency and responsiveness of the Court might be explained by the simple fact that all its members live close-by and it is true that proximity helps (suffice it to mention the absence of a time difference). Although proximity may contribute to efficiency, it is certainly not a necessary prerequisite. Besides, other reputable arbitration institutions have shown the way.²³

²² See e.g., Hong Kong International Arbitration Centre, HKIAC Administered Arbitration Rules (2013 Edition) (*hereinafter* HKIAC Rules), Art. 10 provide for such an option.

²³ For instance, the LCIA went as far as to provide for a cap for the UK-based practitioners in the composition of the LCIA Court (up to six UK-based members Constitution of the LCIA Arbitration Court, adopted 1990, amended 1998, 2002, 2008,

Reversing the Rule of Art. 42(e) Swiss Rules?

Statistics show that the expedited procedure as in Art. 42 Swiss Rules has been very popular among users.²⁴ Those who have experienced those procedures, especially as arbitrators, may have had the feeling that the concept actually results in maintaining almost all the steps of standard arbitration proceedings but cuts short the time periods between each step, thus putting pressure on parties and arbitrators.

A significant part of this pressure may arise out of the time that is required for the drafting of the award and that reduces accordingly the time available for the parties' pleadings. The expedited procedure thus expressly authorizes the arbitrators to state the reasons on which the award is based in a summary form.²⁵ However, it is difficult to assess how much this latitude actually eases the burden on arbitrators. More often than not, in practice, the awards issued in expedited procedure are so complete and detailed that it is actually hard to tell how they could have been different if the case had been conducted under the ordinary procedure.

A possible way to ease the arbitrators' burden and thereby to release time for the parties' pleadings may be to reverse the rules of Art. 42(e) Swiss Rules so as to provide that the award will not set out the reasons for the decision unless the parties have agreed otherwise. This may, however, open the way to frustration for the parties and raise concern at the enforcement stage, depending on where enforcement is sought.

4. CONCLUSION

A few remarks by way of conclusion: The assessment that the Swiss Rules arbitrations fall under the category of "light touch" administered arbitrations is certainly true. Considering the achievements in terms of responsiveness, noting for instance how fast the tribunals are constituted or, more generally, how fast the Court reaches its decisions, one could reasonably and rightly believe that the Swiss Rules should stay that way.

2009, 2010 and 2011, Art. A.1). Similarly, the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC") must include both Swedish and non-Swedish nationals; however, there is no cap for Swedish nationals (Art. 3 of Appendix I to the Arbitration Rules of the SCC).

²⁴ See, annex Swiss Rules Survey, Cases under the expedited procedure represented 38% of the cases since 2004 throughout 2013.

²⁵ Art. 42(e) Swiss Rules.

However, this *satisfecit* should not mean that there is no room for improvement. On the contrary, intense competition and the globalization will very soon—if they have not done so already—make the current organization outdated. It may have been sufficient when it was about picking up some cases in our neighboring countries. Now the whole world is the hunting ground for arbitration institutions. The structure must be adapted accordingly, which in the author's view means a centralized entity run by one leader whose only focus would be the development of Swiss Rules arbitration.

