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SWISS CHAMBERS'
ARBITRATION INSTITUTION



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Paving a Path Through the Jungle: SCAI's Approach to Conflicts of Interest

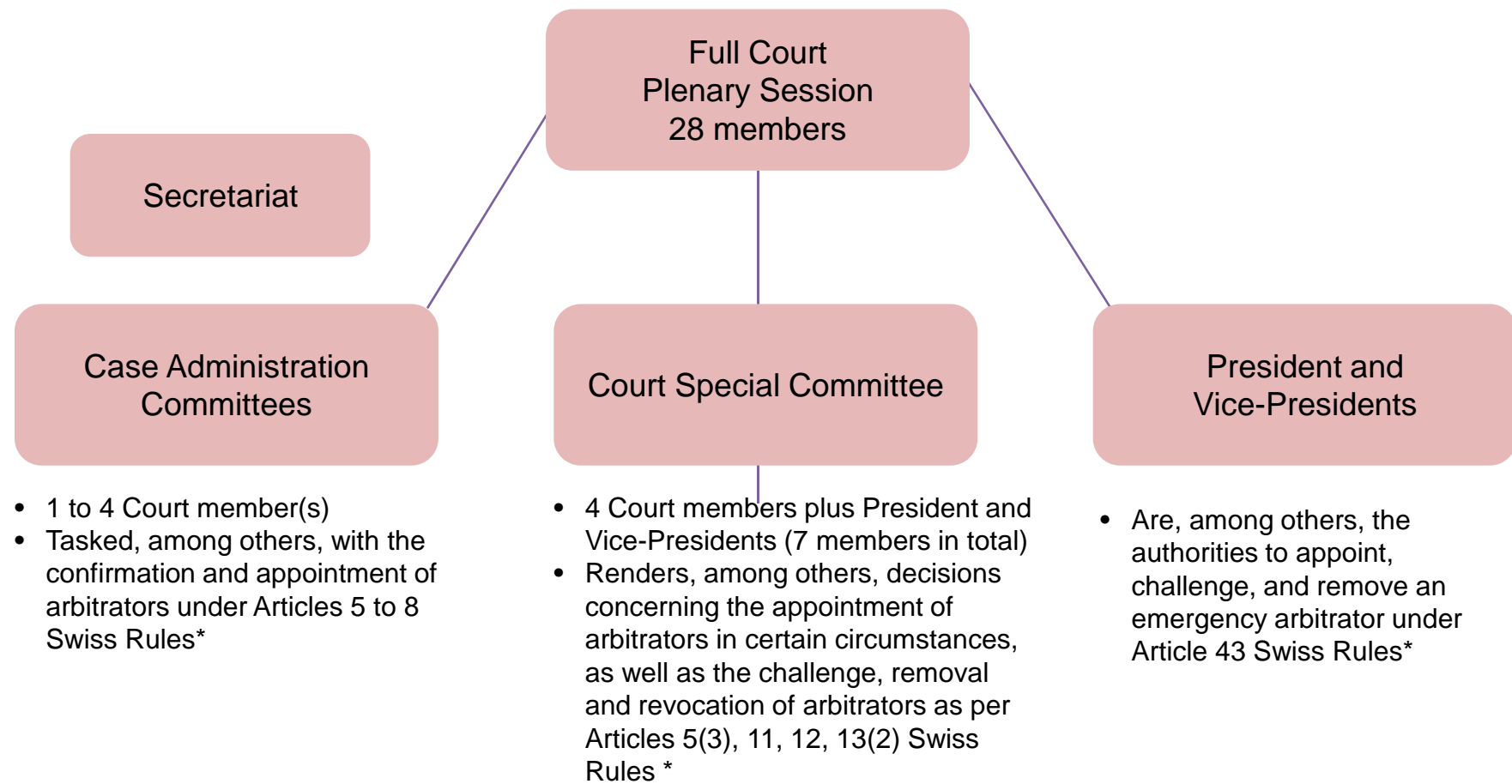
Gabrielle Nater-Bass, President of the SCAI Arbitration Court; Partner at Homburger, Zurich
7 February 2020, ASA Conference



Agenda

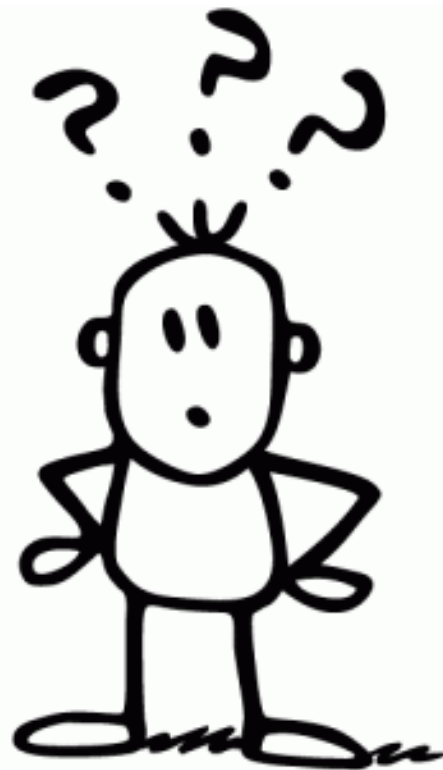
- Organisation of the SCAI Arbitration Court
- SCAI's Approach to Disclosure Obligations
- SCAI's Approach to Appointment | Confirmation of Arbitrators
- SCAI's Approach to Challenge of Arbitrators

Organisation SCAI Arbitration Court



* For more detailed information, see "Internal Rules of the Arbitration Court of the Swiss Chambers' Arbitration Institution" (www.swissarbitration.org)

Approach to Disclosure Obligations



To disclose or not to disclose, that is the question??

Approach to Disclosure Obligations

Threshold:

- Article 9 (1) Swiss Rules: *"Any arbitrator conducting an arbitration under these Rules shall be and shall remain at all times impartial and independent of the parties."*
- Article 9 (2) Swiss Rules: *"Prospective Arbitrators shall disclose to those who approach them in connection with a possible appointment any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. An arbitrator, once designated or appointed, shall disclose such circumstances to the parties, unless they have already been so informed."*

Approach to Disclosure Obligations

The Court's Practice to Solicit Disclosures:

Consent to Appointment and Statement of Impartiality and Independence
Case No [REDACTED] 2

IMPARTIALITY AND INDEPENDENCE

Nothing to disclose: I declare that I am, and shall remain, impartial and independent. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence.

Acceptance with disclosure: I declare that I am, and shall remain, impartial and independent. However, in accordance with Article 9(2) of the Swiss Rules, I wish to disclose to the Swiss Chambers' Arbitration Institution, to the other members of the Arbitral Tribunal and to the Parties, the matters **on the attached separate sheet**. To the best of my belief, these circumstances do not impair my impartiality or independence.

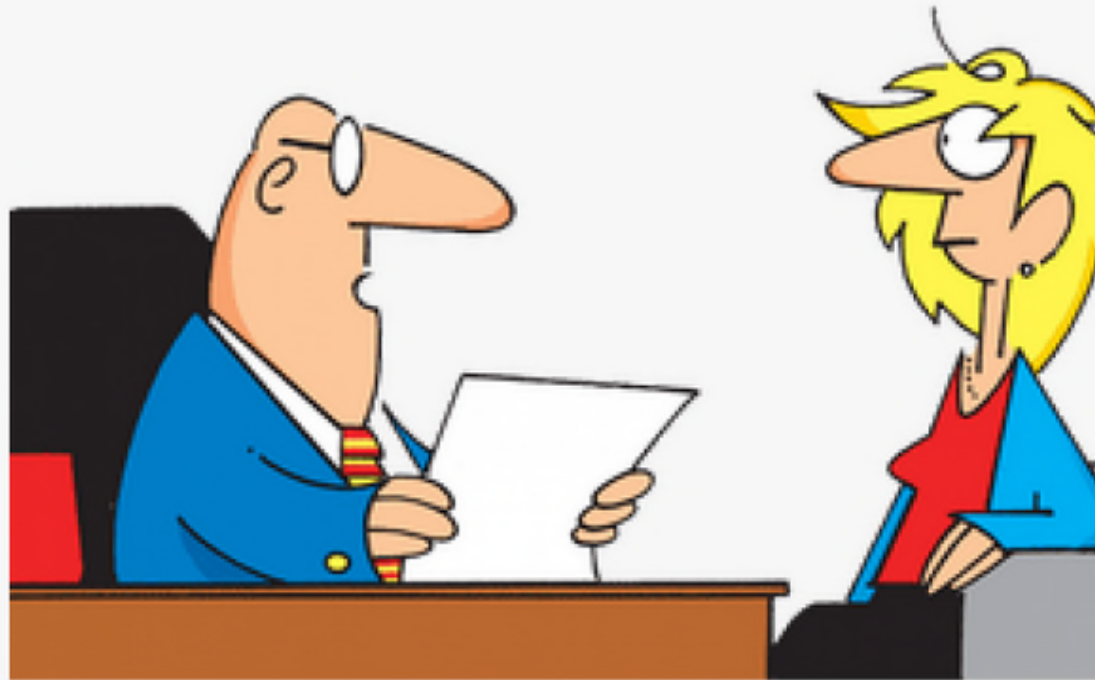
I will declare forthwith to the Court, the other members of the Arbitral Tribunal and the Parties, any future fact that could give rise to justifiable doubts as to my impartiality or independence.

Approach to Disclosure Obligations

The Court's Practice to Solicit Disclosures:

- In case Secretariat | Court is privy to information which could justify disclosure, arbitrator is encouraged to make disclosure.
- Objections by parties in reaction to disclosure are made available to arbitrator; arbitrator and all parties are set a short time-limit to comment.
- In case of extraordinary disclosures, Case Administration Committee consults with Court members and may ask additional questions to concerned arbitrator.

Approach to Appointment | Confirmation of Arbitrators



**You know Claimant's counsel's husband's sister's aunt's third cousin?
Sorry, we cannot appoint you.**

Approach to Appointment | Confirmation of Arbitrators

Threshold:

- Article 5 (1) Swiss Rules: *"All designations of an arbitrator made by the parties or the arbitrators are subject to confirmation of the Court, upon which the appointments shall become effective. The Court has no obligation to give reasons when it does not confirm an arbitrator."*

Approach to Appointment | Confirmation of Arbitrators

The Court's Practice in Case of Disclosures:

- IBA Guidelines on Conflicts of Interest are often used as a non-binding reference when making decisions on appointments | confirmations of arbitrators.
- Threshold is usually higher in case of institutional appointments and non-participating respondents where Court is likely to take a more cautious approach by not appointing an arbitrator.
- Threshold is usually highest when it comes to institutional appointment of a sole arbitrator.
- If parties support confirmation despite disclosures, Court usually confirms arbitrator unless disclosed facts fall in the non-waivable red list of the IBA Guidelines.
- In case of non-confirmation of an arbitrator, Court – in line with Article 5 (1) Swiss Rules – in general does not communicate reasons for its decision.

Approach to Challenge of Arbitrators

Gary Varvel
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Challenged!

Approach to Challenge of Arbitrators

Threshold:

- Article 10 (1) Swiss Rules: *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."*
- Article 10 (2) Swiss Rules: *"A party may challenge the arbitrator designated by it only for reasons of which it becomes aware after the appointment has been made."*

Approach to Challenge of Arbitrators

The Procedure:

- Article 11 (1) Swiss Rules: *"A party intending to challenge an arbitrator shall send a notice of challenge to the Secretariat within 15 days after the circumstances giving rise to the challenge became known to that party."*
- Article 11 (2) Swiss Rules: *"If, within 15 days from the date of the notice of challenge, all of the parties do not agree to the challenge, or the challenged arbitrator does not withdraw, the Court shall decide on the challenge."*
- Article 11 (3) Swiss Rules: *"The decision of the Court is final and the Court has no obligation to give reasons."*

Approach to Challenge of Arbitrators

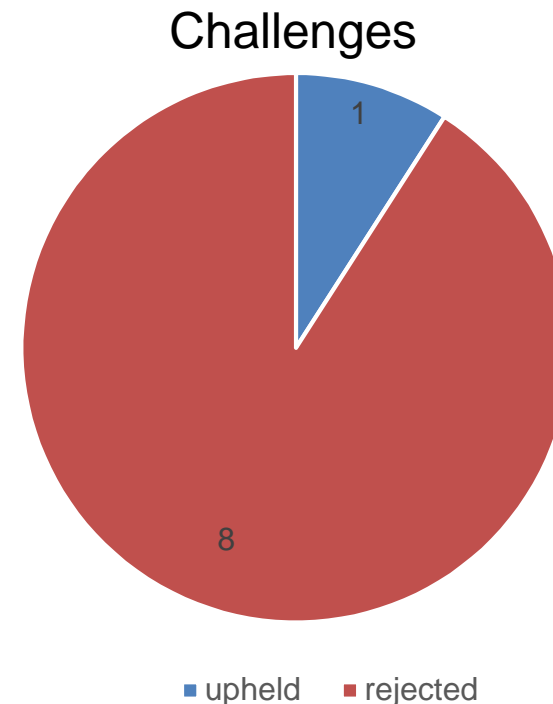
The Court's Practice:

- Challenged arbitrator, all parties and all other arbitrators are set a time-limit to comment on a challenge.
- Comments of parties and the other arbitrator(s) shall be made available to the challenged arbitrator.
- Threshold to accept a challenge is the same as for the appointment or confirmation of an arbitrator.
- Court often uses IBA Guidelines as a non-binding reference.
- As a general rule and in line with Article 11 (3) Swiss Rules, Court does not give reasons for its decision, unless Court Special Committee decides otherwise in exceptional cases.

Approach to Challenge of Arbitrators

Statistics on Court Decisions (June 2012 – 2019)*

- 1 challenge upheld (approx. 11%)
- 8 challenges rejected (approx. 89%)



* Includes only challenges where the Court had to decide because "all of the parties [did] not agree to the challenge or the challenged arbitrator [did] not withdraw" (Article 11(2) Swiss Rules); challenges where the Court was seized under Article 11(2) Swiss Rules but the arbitrator resigned before the Court could reach a decision are also not included.

Approach to Challenge of Arbitrators

Categories Identified:

- Professional relationship of arbitrator
- Personal relationship of arbitrator
- Perceived bias due to orders | actions of arbitrator(s)

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Thank you for your attention!

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