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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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Judicial Review of Arbitrators’ Fees
A Swiss law perspective
GIULIO PALERMO*, MALCOLM ROBACH**

I. Introduction

_Nemo iudex in causa sua_ is a Latin brocard pursuant to which no one should be judge of his own cause. It is a principle of natural justice that no person may judge a case in which she or he has an interest. This principle is challenged when an arbitrator is brought to issue a decision on his own fees,¹ in Swiss domestic or international arbitration proceedings.

Due to the historical importance of Switzerland as a seat of arbitration,² the above-mentioned issue is relevant to arbitration practitioners at large, serving as arbitrators or acting as counsel in arbitration proceedings seated in Switzerland.

The first section of the present article studies the extent to which such rulings are possible in Swiss domestic arbitration proceedings, with a particular focus on the degree of judicial review over these decisions. With the same focus, a second section of this article focuses on decisions on costs in Swiss international arbitration proceedings.

II. The arbitrators’ authority to decide their own fees in domestic arbitration proceedings

In domestic arbitration proceedings, the arbitrators’ authority to decide their own fees varies subject to whether the parties have (B) or have not (A), through their agreement, granted that power to a neutral third party.

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¹ In addition to their own fees, arbitral tribunals are also brought to rule on their expenses. The two are referred to as “costs” for the purposes of the present article.
A. Fees fixed by arbitral tribunals in domestic arbitration proceedings

Domestic arbitration proceedings in Switzerland are governed by the new Swiss Code de Procédure Civile dated 1 May 2013 (hereinafter “CPC”). Article 393(f) of the CPC impliedly grants arbitral tribunals the power to fix their own fees. This will occur most frequently in ad hoc arbitration proceedings, where no third party has been designated to fix arbitrators’ fees.

Article 393(f) of the CPC provides that an arbitral award may be challenged on the grounds that the costs and compensation fixed by the arbitral tribunal are obviously excessive (namely, “manifestement excessifs”). This provision is one of six exhaustive grounds of appeal under which a domestic Swiss award can be set aside.

However, the survival of an otherwise seemingly blameless arbitral award should not be jeopardised by obviously excessive fees fixed by the arbitrator. Article 395 CPC provides for this eventuality. This provision specifies that, if the award is contested “on the grounds that the compensation and costs are obviously excessive, the appellate court may itself decide on them”. This alternative to annulment of the entire award is confirmed by caselaw (ruling on the similarly worded provisions of the Concordat) and by doctrine (commenting, also, on the Concordat). It follows that Article 393(f) only provides a ground for partial annulment.

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3 F. Bohnet et al., Code de procédure civile commenté (Helbing Lichtenhahn 2011), 1499 [Bohnet]. See also F. Knoepfler and P. Schweizer, RSDIE 2003 591, 598, commenting on 4P.263/2002. Although the CPC was amended in 2013, Article 393(f) was not subject to any amendment, therefore the reference to antecedent case law and doctrine shall be considered still applicable.


5 Bohnet, 1499.

6 CPC, Art. 395(4) (emphasis added).

7 Tribunal cantonal valaisan, decision of 3 February 1995, ASA Bull. 4/1996, p. 687 (“Le montant des honoraires fixés par les arbitres peut être revu par l’autorité judiciaire, sur la base de l’art. 36 let. i CIA, lorsqu’il est manifestement excessif. Si tel est le cas, c’est l’autorité judiciaire de recours qui, après avoir annulé ce point du dispositif de la sentence, fixe par un prononcé établit le montant des honoraires dus solidairement par les parties aux arbitres, en application de l’art. 40 al. 3 CIA”).

8 P. Jolidon, Commentaire du Concordat Suisse sur l’arbitrage (Stämpfli 1984), 523 [Jolidon] (“[C]e n’est que si ce montant est “manifestement” excessif […] que le motif de recours est donné. Dans l’affirmative, c’est l’autorité judiciaire de recours qui, après avoir annulé ce point du dispositif de la sentence, fixe par un prononcé établit le montant des honoraires dus solidairement par les parties aux arbitres”).

9 Jolidon, 539.
This ground for review, namely the notion of “manifestement excessif”, has been specified by caselaw. In a decision of 1995,\(^{10}\) the *Tribunal cantonal valaisan* had to assess whether fees set by the arbitral tribunal in a domestic arbitration (related to an expropriation) were or not “totally disproportionate to the size of the case and the task of the arbitrators”. The state court noted, with reference to Article 36(i) of the Concordat, that fees should correspond to “usual remuneration at the place of the seat; instead of practice, we speak of appropriate remuneration [...]”. The state court subsequently held that the “decisive criteria” were the amount of work to be performed, the complexity of the case, its importance to the parties, their financial situation, the responsibility assumed by the arbitrators and, if quantified, the amount in dispute.\(^{11}\)

Remuneration should in any case “remain in proportion to the amount of work performed”. The state court also accepted to consider elements relating to the arbitrator, including his hourly rate. This was later confirmed by another decision of the *Tribunal cantonal valaisan* in 1998. The state court there reminded the parties that fees set by the arbitral tribunal could be subject to review if obviously excessive, “i.e. arbitrary”.\(^{12}\) This time, however, it was added that arbitral tribunals, when ruling on fees, enjoyed “wide discretion”.\(^{13}\)

This power could however be limited by an agreement of the parties, be it on the method of setting the fees, or on the method of organising their allocation. Such agreement frequently takes place through reference to institutional rules.

**B. Fees fixed by third parties in domestic arbitration proceedings**

Article 393(f) of the CPC does not make an express reference to arbitral institutions.

Commenting on the equivalent provision of the Concordat, some scholars submit that this provision nevertheless extends also to fees fixed by

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\(^{11}\) See also Bohnet, 1499; P. Lalive, J-F. Poudret, C. Reymond, *Le droit de l’arbitrage interne et international en Suisse* (Payot Lausanne 1989), 218 ([Lalive Poudret Reymond] suggesting, in addition, that courts may inspire themselves of fee schedules adopted by arbitral institutions).


institutions, as parties would otherwise be deprived of any form of recourse against the decision.\textsuperscript{14} Other scholars observe that the wording of the provision excludes third parties and that, as a consequence, fees fixed by an arbitral institution are not subject to review by the courts.\textsuperscript{15}

This is not a moot point of disagreement. The rules of several institutions (including the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce) provide that the decision on arbitrator costs belongs to the institution, and not to the arbitrators themselves. Whether these decisions are encompassed within the \textit{rationae personae} scope of Article 393(f) of the CPC remains unclear.

The position is however different under the regime of the Rules of the Swiss Chambers’ Arbitration Institution (the Swiss Rules).\textsuperscript{16} The formal decision on arbitrators’ costs under Article 38(a) of the Swiss Rules belongs to the \textit{arbitrators themselves}: the arbitral tribunal is empowered to determine its own fees unilaterally.\textsuperscript{17} This determination is then subject to approval, and eventually to adjustment, by the Court and such approval or adjustment is binding only upon the arbitral tribunal.\textsuperscript{18} It seems therefore difficult to conclude that such decisions would be outside the \textit{ratione personae} scope of Article 393(f) of the CPC.

In light of the above, depending on the applicable institutional rules, the decision might or might not be subject to challenge. The authors believe that, at domestic level, it is difficult to advocate that the decision of an institution to fix the arbitrators’ costs would cause the inapplicability of Article 393(f) of the CPC.

Firstly, as noted already by Lalive, Poudret, and Reymond, excluding fees fixed by institutions from the scope of Article 393(f) of the CPC would deprive the parties of recourse against the decision on fees, entailing a potential denial of justice.

\textsuperscript{14} Lalive Poudret Reymond, 539.
\textsuperscript{15} Jolidon, 522.
\textsuperscript{16} The Swiss Rules may be referred to in relation to both international and domestic arbitrations (notwithstanding the name “Swiss Rules of International Arbitration”). It was the case also under the 2004 Swiss Rules. See T. Zuberbühler, C. Müller, P. Habegger (eds), \textit{Swiss Rules of International Arbitration – Commentary} (2nd edn, Schulthess 2013), 17 [Zuberbühler Müller Habegger].
\textsuperscript{17} Zuberbühler Müller Habegger, 399; M. Arroyo (ed), \textit{Arbitration in Switzerland: the practitioner’s guide} (Kluwer 2013), 603 [Arroyo].
\textsuperscript{18} Zuberbühler Müller Habegger, 421; Arroyo, 615.
Secondly, excluding institutionally fixed fees from the scope of Article 393(f) of the CPC would create the possibility in practice for parties to waive their right to have the fees reviewed by Swiss courts on the basis of this provision, by agreeing contractually on institutionally fixed fees. However, Swiss domestic arbitration law does not allow parties to waive any of the grounds for annulment.19

Therefore, it is possible that in light of such limitation, a Swiss court faced with a challenge pursuant to Article 393(f) of the CPC against a domestic award issued from an administered arbitration would analogically extend the application of such provision to decisions taken by arbitral institutions.20 It follows that this provision applies to domestic arbitrations regardless of whether the fees have been set by the arbitral tribunal or by a third party.

This ground of challenge is however not available to parties in international arbitration proceedings in Switzerland, to which the Swiss Private International Law Act applies.

III. The arbitrators’ authority to decide their own fees in international arbitration proceedings

Setting the CPC aside, the issue becomes more tangled under the Swiss Private International Law Act of 1987 (hereinafter “PILA”), which applies to international arbitration proceedings with a seat in Switzerland.21 The issue is positioned differently subject to whether the fees are fixed by the arbitral tribunal (A) or by a neutral third party (B).

A. Fees fixed by arbitral tribunals in international arbitration proceedings

The PILA contains no provision founding the arbitrators’ power to set their own fees. This initially gave rise to some debate. Some authors considered that the tribunal simply wasn’t qualified to determine its own

19 Bohnet, 1164, 1172. Swiss arbitration law only allows for waiver of annulment, in specific circumstances, for international arbitrations seated in Switzerland. See PILA, Art. 192.
20 Bohnet, 1499.
21 The provisions of the PILA apply to arbitrations seated in Switzerland where, at the time of the conclusion of the arbitration agreement, at least one of the parties has neither its domicile nor its habitual residence in Switzerland, see PILA, Art. 176(1)).
fees. Others considered that the arbitrators’ power to issue a binding determination of their fees arose out of their general power to determine the arbitral procedure as defined in article 182(2) PILA.\textsuperscript{23}

This debate was settled in a landmark decision dated 10 November 2010. The issue before the Supreme Court related to the setting aside of an “interim award” issued in an arbitration administered by the Zurich Chamber of Commerce and governed by the Swiss Rules. This award enjoined the parties to pay outstanding tribunal fees. The Supreme Court had to determine whether this interim award qualified as an arbitral award which could be enforced under the provisions of the PILA.

The Supreme Court first focused on whether the considered “interim award” met the requirements of an award under PILA. It then moved on to studying whether arbitral tribunals seated in Switzerland had the authority to issue rulings of this nature. On the latter point, it observed that:

“[A]ccording to the largely prevailing doctrine the arbitral tribunal is deemed not to have the authority to issue an enforceable decision as to the fees to which it may be entitled under the arbitration contract (receptum arbitrii) […]. This is so, first, because claims arising out of the relationship between the arbitral tribunal and the parties do not fall within the scope of the arbitration clause; second, because this would be an unacceptable decision in one’s own case.”\textsuperscript{24}

The Supreme Court consequently dismissed such authority on the basis of (i) the scope of the arbitration agreement, (ii) the legal nature of the arbitral tribunal’s determination on costs in the award and (iii) significant public policy considerations. Indeed, the Supreme Court observed that:

(i.) The arbitrators’ adjudicatory power derives solely from the arbitration clause contained in the contract between the parties. Arbitrators only have the authority to finally determine those issues that arise out of that contract. The costs of the arbitration, in contrast, arise out of the arbitrator contract, or receptum

\textsuperscript{22} J-F. Poudret, S. Besson, Droit comparé de l’arbitrage international (Schulthess 2002), para 443 [Poudret Besson].

\textsuperscript{23} M. Wirth, “Art. 189 PILA”, para 63, in H. Honsell et al. (eds), Basler Kommentar IPRG (2\textsuperscript{nd} edn, Helbing and Lichtenhahn 2007). This position was subsequently revised in a newer edition, taking account of recent caselaw on the subject. See M. Wirth, “Art. 189 PILA”, para 63, in H. Honsell et al. (eds), Basler Kommentar IPRG (3\textsuperscript{rd} edn, Helbing and Lichtenhahn 2013).

\textsuperscript{24} Swiss Federal Supreme Court, Decision 4A_399/2010 of 10 November 2010, ASA Bull. 1/2011, p. 110, para 19 (citations omitted).
arbitri. Indeed, the dominant view in Swiss legal doctrine is that “the legal relationship between arbitrators and parties rests on a contractual basis”. The arbitrators do not have adjudicatory powers over disputes arising out of or in connection with the receptum arbitrii.

(ii.) The cost decision in the operative part of an award is thus “nothing else but an invoice [Rechnungsstellung] that does not bind the parties”. Any dispute in relation to this invoice must be resolved by ordinary courts. For the same reasons, arbitrators also lack authority to order the payment of the advance on costs in a so-called ‘interim award’, which is in reality nothing more than an interim statement of account. In a nutshell, the arbitrators’ decision on their own costs cannot have res judicata effect.

(iii.) Granting arbitrators the power to adjudicate their own fees would make them judges of their own cause (nemo iudex in causa sua), which would be contrary to public policy. The indication of the amount of costs has an adjudicatory effect only to the extent that it finally allocates the costs between the parties.

In a recent decision of 19 November 2013, consistently with the November 2010 decision, the Supreme Court made a persuasive confirmation of its case law providing further legal certainty for arbitration in Switzerland:

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25 Berger Kellerhals, para 889. See also Lalive Poudret Reymond, 332; Jolidon, 229.
(i.) The decision on the arbitrators' fees stated in an arbitral award can be considered as a non-authoritative invoice, that is, a descriptive notice of the arbitrator’s claim based on the contract between the arbitrator and the parties (receptum arbitrii).

(ii.) A dispute regarding the arbitrators' fees requires an assessment of the law and facts of the case in an adversarial procedure between the arbitrator and the objecting party. As the appeal procedure is focused on the application of the law, the Supreme Court confirmed that the decision on the fees of the arbitrators does not constitute an appealable decision before the Supreme Court.

B. Fees fixed by third parties in international arbitration proceedings

It has been observed that the above-mentioned landmark decision should have no impact in international administered arbitral proceedings like those of the ICC, SCC or LCIA, where the institutions fix the arbitrators fees. Indeed, given that such institutions are contractually empowered by the parties to authoritatively fix the arbitrators’ fees, the arbitrators are clearly not acting against the principle of nemo iudex in causa sua, since a third party, and not the arbitrators’ themselves, is the judge of the arbitrators’ case.

This statement might be correct under institutional rules where the institution fixes the arbitrators’ costs, but not under institutional rules where the institution is limited to a monitoring role. Indeed, under the latter rules the formal decision is not binding upon the parties, and therefore to a certain extent the arbitrators might still be considered iudex in causa sua. As the above-mentioned landmark decision dated 10 November 2010 indicates, under these rules the receptum arbitrii may be contested in ordinary court proceedings.

As it will be explained below, reference to ordinary courts for disputes arising out of the receptum arbitrii is not problem-free. It gives rise to concerns related to competent court, applicable law and standard of review.

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IV. Difference between national and international arbitration proceedings

The above shows that arbitrators’ decision on their own fees are subject to a different scope of review depending on whether the arbitrators’ decision on their own costs is embodied in a Swiss domestic or international arbitral award. Indeed, Article 190(2) of the PILA, conversely to Article 393(f) of the CPC, does not provide for a ground of appeal against excessive arbitrators’ fees. The consequence is that the part of a domestic award relating to the arbitrators’ own fees has res judicata effect,34 in contrast to any such Part of an international award. This results in potential legal uncertainty (A) and a public policy concern (B).

A. Issues of legal certainty

The different applicable standards to the setting of fees in domestic and international arbitrations can create potential issues of private international law.

Under the regime of Article 393(f) of the CPC, it is easy to identify the competent court and applicable law to the challenge of an arbitral tribunal’s decision on costs. This clarity is absent in the case of a challenge of a tribunal’s decision on costs in Swiss International arbitration proceedings. Indeed at international level there are several problems related to (1) conflict of laws and (2) conflict of jurisdiction.

Conflict of laws

A necessary first step in identifying the relevant rules of conflict of laws and conflict of jurisdiction in this respect is determining the legal nature of the receptum arbitrii. From a Swiss law perspective, the receptum arbitrii is generally considered contractual in nature, and analysed as an agency agreement (mandate)35 or, more cautiously in view of the many particularities of arbitrator contracts, as a contract sui generis generally assimilated to a mandate.36

34 Bohnet, 1499.
36 G. Kaufmann-Kohler, A. Rigozzi, Arbitrage international: droit et pratique à la lumière de la LDIP (Weblaw 2010) para 413 f [Kaufmann-Kohler Rigozzi]; Poudret Besson, para
As a contract, the *receptum arbitrii* is governed by the law chosen by the parties (i.e., the parties to the arbitration and the arbitrators). In the absence of an explicit choice by the parties, the applicable law is that of the State with which the contract has the closest connection.

It is generally considered in doctrine that the law applicable to disputes arising from the *receptum arbitrii* should be the law of the seat. The seat is however not in all instances the country with which the *receptum arbitrii* has the closest connection. This link is questionable notably in cases where hearings take place in other States, and neither the parties nor the tribunal are nationals of the state where the tribunal is formally seated.

An additional difficulty arises out of the PILA itself. In relation to mandates, the country with which the contract has the closest connection is presumed by Art. 117(2) PILA to be the country in which the party providing the characteristic performance of the contract (i.e. the arbitrator) is established. This presumption may be disregarded if it can be shown that the claiming party has a closer connection to yet another State.

The law applicable to a dispute arising from the *receptum arbitrii* is consequently difficult to identify with certainty. While doctrine generally supports reference to the law of the seat, a rigid application of Swiss rules of conflict of laws might lead to the application of the law of the State where the arbitrators are established. This leads to additional concerns, in particular if several arbitrators are established in several different countries.

**Conflict of jurisdictions**

With respect to conflict of jurisdictions, the 2010 decision discussed above indicates that disputes regarding the part of the award pertaining to fees have to be brought before the competent state court of first instance.

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437; Lalive Poudret Reymond, 332. Significant differences are, notably, that the parties may not provide instructions to the arbitrators, and that the arbitrator may resign.

37 PILA, Art. 116(1). See also Kaufmann-Kohler Rigozzi, para 413; Lalive Poudret Reymond, 332; Poudret Besson, para 439.

38 PILA, Art. 117(1).

39 Arroyo, 375; Kaufmann-Kohler Rigozzi, para 413; Lalive Poudret Reymond, 332; Poudret Besson, para 439.

40 PILA, Art. 117(2); See also B. Dutoit, *Droit International Privé* (4th edn, Schulthess 2010), Art. 117 para 25 [Dutoit].

41 Dutoit, Art. 117 para 5.

42 Fouchard Gaillard Goldman, para 1011.

43 Swiss Federal Supreme Court, Decision 4A_399/2010 of 10 November 2010, ASA Bull. 1/2011, p. 110, para 19-20. This issue may also be brought before a different arbitral tribunal, if the parties have reached an agreement in this regard.
is however not clear how this competent body should be identified under the regime of the PILA.

Guidance can be found in the Lugano Convention of 30 October 2007, which applies to civil and commercial matters.\(^4^4\) Although the Convention excludes arbitration from its scope \textit{rationae materiae},\(^4^5\) it is submitted that no obvious reason supports the exclusion of the \textit{receptum arbitrii}, clearly distinguished from the arbitration agreement. Applying the Lugano Convention, it follows that, in the absence of an agreement of the parties\(^4^6\) and if the defendant\(^4^7\) is domiciled in a State party to the Lugano Convention (such as Switzerland), the courts of that State should be deemed competent.\(^4^8\) A claim may however also be brought before the courts of the place of performance of the obligation in question.\(^4^9\) Granted that an arbitral tribunal is deemed to perform its obligation at the place of its seat, Swiss Courts may therefore be deemed competent to hear disputes founded on the \textit{receptum arbitrii} between the parties to the arbitration and an arbitral tribunal seated in Switzerland.

Assuming, on the other hand, that the Lugano Convention is deemed not to apply,\(^5^0\) the competent court where the defendant is domiciled\(^5^1\) or the court of the country where the characteristic performance of the contract takes place\(^5^2\) may be competent to adjudicate disputes arising from the \textit{receptum arbitrii}.

**B. Issues of Swiss Public policy**

The 2010 decision of the Swiss Supreme Court discussed above also shows that Swiss law provides for a different ground of review by state.

\(^{4^4}\) Lugano Convention, Art. 1. See A. Bucher (ed), \textit{Commentaire Romand: Loi sur le droit international privé – Convention de Lugano} (Helbing Lichtenhahn 2011), 1791 [Commentaire Romand].

\(^{4^5}\) Lugano Convention, Art. 1(2)(d).

\(^{4^6}\) Lugano Convention, Art. 23.

\(^{4^7}\) In the present case, the “defendant” may be a party to the arbitration seeking to challenge the invoice, or an arbitrator seeking to enforce it against the parties to the arbitral proceedings.

\(^{4^8}\) Lugano Convention, Art. 2.

\(^{4^9}\) Lugano Convention, Art. 5(1)(a).

\(^{5^0}\) As supported by Fouchard Gaillard Goldman, para 1012 (“Neither the Brussels Convention nor the Lugano Convention on Jurisdiction and Enforcement in Civil and Commercial Matters appear to apply to such disputes”).

\(^{5^1}\) PILA, Art. 112(1).

\(^{5^2}\) PILA, Art. 113.
courts on the arbitrators’ decision on their own fees under Swiss Domestic and International arbitration law. Indeed, the wording of Article 393(f) of the CPC clearly establishes that the court where a domestic award is challenged should simply ascertain whether the arbitrators’ decision on their own costs is or not “manifestement excessif”. Conversely, the court where the fees set by an international award is challenged has to assess the facts of the case in an adversarial procedure between the arbitrator and the objecting party in order to identify whether the arbitrators’ decision on their own fees is correct or it is not. In these circumstances, courts will apply broader scrutiny if compared with the “manifestement excessif” standard of Article 393(f) of the CPC.

It follows also that the principle nemo iudex in causa sua arguably applies differently under Swiss Domestic and International arbitration law. The fact that the arbitrators’ decision on their own fees is only subject to an extraordinary form of appeal in domestic proceedings, a challenge pursuant to Article 393(f) of the CPC, creates at the very least a presumption of correctness of such decision and certainly a shifting of the burden of proof on the party that challenges such decision. Such decision is also enforceable at law53 unless the challenging party successfully sets the domestic award aside. Conversely, a decision on fees in an international award is subject to no particular presumption. It is an invoice, a statement of the arbitrator’s claim. It has no res judicata effect and therefore can be disputed and subject to adversarial court proceedings.

It consequently appears that the principle of nemo iudex in causa sua is morestringently applied to international arbitration with seat in Switzerland than to Swiss domestic arbitrations proceedings.

V. Conclusion

The present article has sought to clarify positive law related to determination of arbitrators’ fees in Swiss domestic and international arbitration proceedings, with a particular focus on the degree of review by Swiss courts over these decisions.

As it has been shown, the framework varies substantially subject to whether the arbitration is domestic or international, and subject to whether the fees are set by the tribunal directly (most frequently in ad hoc arbitration) or by a neutral third party (most frequently in administered arbitration). In domestic proceedings, “obviously excessive” fees may be challenged under a specific ground of the Swiss Code of Civil Procedure. In international

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53 Bohnet, 1499.
proceedings, fees set by the arbitral tribunal are considered as invoices issued on the basis of the *receptum arbitrii*, and may be challenged before ordinary courts in adversarial proceedings.

As discussed above, domestic and international arbitration laws differ also in their application of the principle of *nemo iudex in causa sua*. Indeed, in domestic arbitration there is a presumption that an arbitrator’s decision on his or her own fees is correct, and therefore enforceable at law. No such presumption exists at international level, where such decision is considered to breach the principle of *nemo iudex in causa sua*, and therefore breach of Swiss public policy. In addition, issues of the competent court and applicable law by which the parties to an arbitration may challenge the arbitrators’ decision on their own costs remain unsettled. It follows that it may prove difficult for an arbitrator to recover his or her legal fees and/or for the parties to challenge the arbitrators’ decision on his or her own costs.

With regard to administered arbitration proceedings, the possibility for an arbitral institution to issues a decision with final and binding effects upon the parties in relation to the arbitrators’ costs does not go against the principle of *nemo iudex in causa sua*. Such decisions are however not immune to challenge. A decision from an institution with final and binding effects upon the parties would limit the access to justice at both domestic and international level. Indeed, such decision would not be motivated and would come from an institution lacking adjudicatory powers (being only an administrative body).\(^54\) In instances where such a decision is fully integrated in the final award,\(^55\) at the very least, a possible challenge of the award itself on grounds of public policy must be possible.\(^56\)

Assuming that institutions like ICC, SCC and LCIA do have the power to issue final and binding decisions on arbitrators’ costs, it would be appropriate to amend Article 38(a) of the Swiss Rules in the same sense in order to make such rules as attractive, in this respect, as the rules of the other leading institutions.


\(^{55}\) Lalive Poudret Reymond, 217.

\(^{56}\) Lalive Poudret Reymond, 425; Poudret Besson, para 443.
Gulio PALERMO, Malcolm ROBACH, *Judicial Review of Arbitrators’ Fees*

**Summary**

The present article explores positive law on establishment of arbitrator fees in domestic and international Swiss arbitration in light of the principle that no one may be judge of his own cause. The article notes that the principle of *nemo iudex in causa sua* appears to be applied more stringently to international proceedings seated in Switzerland than to Swiss domestic arbitration proceedings.

With regard to relevant legal provisions and case law, it compares cases where the arbitrators are brought to fixing their own fees with cases where such fees are fixed by a neutral third party such as an arbitral institution. Subsequently it examines the degree to which state courts exercise control over these decisions looking at potentially competent courts and applicable law.
Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. 1/2 page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World’s leading places for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce (“Swiss Rules”)
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and Journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).

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