Award of 11 November 2008 in Swiss Chambers' Arbitration Case No. xxxxxx–2006 between Claimants (certain individuals and companies domiciled in various jurisdictions) and Respondents (two German companies), before the Arbitral Tribunal composed of David A. Lawson, Martin Wiebecke, and Franz Kellerhals (Chairman).

I. Background

1. Claimants initiated the present arbitration proceedings by a Notice of Arbitration received by the Chamber of Commerce and Industry of Geneva ("CCIG") on 16 November 2006. On the merits, Claimants are seeking, inter alia, an award for damages allegedly suffered from the termination of the Agreement of 14 July 2004 in the amount of some USD 160 million.

2. The Arbitral Tribunal is composed of David A. Lawson as arbitrator upon nomination by Claimants, Martin Wiebecke as arbitrator upon nomination by Respondents, and Franz Kellerhals acting as Chairman upon joint nomination by the party-appointed arbitrators. All arbitrators have been duly confirmed by the Arbitration Committee of the CCIG pursuant to Article 5 of the Swiss Rules of International Arbitration ("the Swiss Rules").

3. In the course of the proceedings, a dispute arose between the parties on the issue of certain deposits which the Tribunal asked the parties to make as an advance for the costs of the arbitration.

4. By letter of 31 May 2007, the Arbitral Tribunal requested each party to deposit CHF 20,000 as a first and provisional advance on costs pursuant to Article 41 para. 1 of the Swiss Rules. Claimants paid their share of CHF 20,000 on 12 June 2007. Respondents paid their share of CHF 20,000 on 29 September 2007.

5. Following a preliminary meeting in Geneva on 17 July 2007, the Tribunal issued Procedural Order No. 1 on 25 July 2007, ordering each party to deposit a further amount of CHF 155,000 as an additional advance on costs, subject to later readjustment.

6. By letter dated 11 September 2007, Respondents informed the Tribunal that they would pay their share of the further advance but only on condition that Claimants first provide them with security in the form of a bank guarantee for the same amount.

7. Claimants paid the additional CHF 155,000 on 19 September 2007, while Respondents did not pay their share.

8. In Procedural Order No. 2 dated 26 September 2007, the Tribunal dismissed the parties' requests relating to a bank guarantee on the basis that "the Swiss Rules do not contain any provision entitling a party to have its deposit for costs guaranteed by the other party." Instead, it fixed a new deadline for Respondents to pay their share of the advance, indicating that if Respondents failed to pay, it would so inform Claimants in order that they could substitute payment of the advance on behalf of Respondents as provided for in Art. 41 para. 4 of the Swiss Rules.

9. By letter dated 16 October 2007, Respondents informed the Tribunal that, since Claimants were not prepared to provide the bank guarantee which they had made a condition of payment of their share, they would not pay the additional advance of CHF 155,000.

10. By letter dated 21 October 2007, Claimants requested the Tribunal to order Respondents to pay their unpaid share of the advance or for Claimants to be granted a period of at least 6 months to be in a position to substitute payment of Respondents' share of the additional advance.

11. By Procedural Order No. 3 dated 5 November 2007, the Tribunal ordered Claimants to pay Respondents' share of the advance by 20 December 2007, failing which it would reserve the right to order the suspension or termination of the arbitral proceedings.

12. Claimants paid Respondents' share of the additional advance in the amount of CHF 155,000 on 11 December 2007.

13. By Procedural Order No. 7 dated 30 May 2008, the Tribunal decided to increase the total amount of deposits to be made from CHF 350,000 so far to CHF 1,000,000. Con-

sidering that Claimants had advanced CHF 330,000 and Respondents only CHF 20,000 so far, it ordered Claimants to pay an additional advance of CHF 170,000 and Respondents an additional advance of CHF 480,000. In case of Respondents' continued failure to comply with this order, Claimants were invited to substitute also the amount of CHF 480,000 on behalf of Respondents.

14. By letter dated 30 May 2008, Respondents indicated once again that they were prepared to pay their share of the increased advance on condition that Claimants first provide a bank guarantee, payable against presentation of a decision on arbitration costs from the Tribunal in their favor.

15. By letter of 5 June 2008, Claimants noted that Respondents had failed to pay their share of the advance and requested the Tribunal to issue a partial award ordering Respondents to pay their fair share of the additional advance according to Procedural Order No. 7 and to reimburse Claimants the advance already paid on their behalf amounting to CHF 155,000.

16. By letter dated 6 June 2008, the Tribunal confirmed its ruling in Procedural Order No. 2 and expressly found that Respondents' answer in their letter of 30 May 2008 was not in compliance with Procedural Order No. 7.

17. By submission of 19 June 2008, Claimants requested an extension of time for the payment of Respondents' share of the additional advance until 23 July 2008. On 23 June 2008, Claimants paid their own share of the additional advance on costs amounting to CHF 170,000.

18. By Procedural Order No. 9 dated 26 June 2008, the Tribunal postponed the witness hearings (then scheduled from 30 June to 4 July 2008) and suspended the arbitration proceeding until Claimants had paid the additional CHF 480,000 on behalf of Respondents, which payment was to be made no later than 23 July 2008 as requested by Claimants.

19. Claimants paid Respondents' share of the additional advance amounting to CHF480,000 by 23 July 2008.

20. By submission of 25 July 2008, Claimants filed a motion for reimbursement of the advance paid by them on behalf of Respondents. More specifically, Claimants asked the Tribunal to

"order the Respondents to reimburse Claimants for the costs that they have advanced on behalf of the Respondents to date, in the full amount of CHF 635,000.00, with said order to take the form necessary to render it fully recognizable and enforceable by a state court".

21. In support of their motion, Claimants referred to the reasoning provided to the Tribunal in their correspondence of 5 June 2008. In the said submission, Claimants maintained that Respondents are bound by an arbitration agreement referring to the Swiss Rules and, therefore, are obligated to advance the costs of the present arbitration in equal measure. Since Respondents have refused to fulfil this obligation, Claimants are entitled to claim that such default under the arbitration agreement be remedied, in particular given that Claimants have substituted for most of Respondents' share of the advance. By citing legal doctrine and arbitral case law, Claimants supported the view that the decision of the Tribunal on its motion should take the form of a partial award.

22. By letter dated 15 September 2008, Respondents sent their response in opposition to Claimants' motion for reimbursement. Respondents referred to their letters of 11 September, 16 October 2007 and 30 May, 9 June and 24 June 2008. Furthermore, they added that they were seeking "to protect themselves against a possible insolvency of Claimants, in the event the costs of arbitration are awarded against Claimants." In addition, Respondents argued that a decision on reimbursement of costs prior to the final award on the merits of the case could only take the form of an order for interim measures and noted that the conditions for such interim measures (namely irreparable harm and emergency) have not been demonstrated by Claimants.

II. Discussion

23. After having carefully reviewed the parties' various submissions, the legal doctrine and arbitral case law, and after having deliberated the present matter at the occasion of a conference call on 29 October 2008, the Arbitral Tribunal, by majority, concludes that the following facts are proved and legal arguments are relevant.

1. Amount in Dispute

24. In its motion of 25 July 2008, Claimants are requesting for reimbursement of a total amount of CHF 635,000. However, the quantum of this motion does not find any support in the record. Indeed, Claimants have advanced CHF 980,000 and Respondents CHF 20,000 so far, i.e. Claimants substituted a total amount of CHF 480,000 on behalf of Respondents, given that the Tribunal, at all times, applied Article 41 para. 1 of the Swiss Rules, according to which each party shall "deposit an equal amount". Hence, the amount to be reimbursed to Claimants by Respondents, if any, is CHF 480,000.

2. Authority of the Tribunal

25. The authority of the Arbitral Tribunal to hear and decide on Claimants' motion for reimbursement has not been challenged by Respondents. In fact, looking at the legal doctrine and case law, there is no reason to doubt that an arbitral tribunal sitting in Switzerland and constituted under the Swiss Rules has jurisdiction to decide matters in relation to advances not paid by a party which have been substituted by the other party.[1]

3. Legal Basis of the Motion for Reimbursement

26. In legal writing, the basis or source of a motion for reimbursement of an advance paid on behalf of another party is normally seen in the arbitration agreement. The arbitrators on the panel of this Arbitral Tribunal share this opinion.[2]

27. In the present case, the arbitration clause contained in the Agreement of 14 July 2004 reads as follows:

"Any dispute arising with respect to or in connection with this Agreement shall be finally decided by one or more arbitrators in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva. The language of the proceedings shall be English. The seat of the arbitration shall be Geneva."

[1] See e.g. *Marco Stacher*, in: Commentary on the Swiss Rules of International Arbitration, ed. by Zuberbühler, Müller, and Habegger, Zurich 2005, Article 41 N 19 et seq.

[2] See e.g. *Marco Stacher*, in: Commentary on the Swiss Rules of International Arbitration, ed. by Zuberbühler, Müller, and Habegger, Zurich 2005, Article 41 N 20.

28. The Chamber of Commerce and Industry of Geneva and the Chambers of Commerce of Basel, Bern, Ticino, Vaud and Zurich adopted the Swiss Rules which entered into force on 1 January 2004. The Swiss Rules, inter alia, govern all international arbitrations in which – as in the instant case – the agreement to arbitrate refers to the Rules of one of the Chamber mentioned above (Article 1 para. 1) and the Notice of Arbitration is submitted after 1 January 2004 (Article 1 para. 3). The Swiss Rules therefore have replaced the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva referred to in the agreement to arbitrate contained in the Agreement of 14 July 2004.

29. According to Article 41 para. 1 of the Swiss Rules, the arbitral tribunal "shall request each party to deposit an equal amount as an advance" for the costs of the arbitration. Where appropriate in the circumstances, the arbitral tribunal may in its discretion also order the deposit of separate, i.e. unequal advances (see Article 41 para. 2 of the Swiss Rules). In the present case, the Tribunal has decided at all times that the parties have to bear the advances in equal shares.

30. If a party fails to pay its share of the advance in full, the arbitral tribunal shall so inform the parties in order that the other party may make the required payment, failing which the tribunal may order the suspension or termination of the proceedings (see Article 41 para. 4 of the Swiss Rules). In the case at hand, Respondents failed to pay CHF 480,000 of their total share of CHF 500,000 and Claimants, after having been invited by the Tribunal, decided to substitute the amount of CHF 480,000 on behalf of Respondents.

31. On the basis of the foregoing, if a party refuses to pay its share of the advance despite a decision of the tribunal ordering the parties to bear the advances in equal shares, such party must be deemed to have not complied with its obligations arising out of the arbitration agreement, i.e. deemed to be in default vis-à-vis the other party. Such default is capable of being remedied by an application of the other party to the arbitral tribunal for a decision ordering the defaulting party to comply with, and properly execute, its obligations arising out of the arbitration agreement.

4. Respondents' Request for a Bank Guarantee

32. Respondents' failure to comply with the Tribunal's orders for making deposits in equal shares can only be deemed to be a breach of contract if Respondents have defaulted on their obligations without showing sufficient cause for such failure. In the course of the proceedings, Respondents brought forward a number of reasons for which they cannot be considered to be in default as to the payment of their share of the deposits.

33. The principal defence raised by Respondents is that they were always prepared to pay their share of the deposits, provided however, that Claimants would secure their payment by a bank guarantee from a reputable Swiss bank.

34. Respondents maintain that they are entitled to imposing this unilateral condition in order to safeguard their financial interests "in light of the exorbitant amount of the Claimants' lost profit claim, […] which is responsible for the amount of the deposit". In addition, Respondents state that by asking for the bank guarantee they would "seek to protect themselves against a possible insolvency of the Claimants in the event that the costs of the arbitration are awarded against the Claimants and the Claimants are ordered to reimburse them to the Respondents" (...).

35. The Tribunal cannot share Respondents' opinion. As already mentioned in Procedural Order No. 2 dated 26 September 2007, the Swiss Rules do not contain any provision entitling a party to have its deposits guaranteed or otherwise protected by the other party. Therefore, failing a specific agreement between the parties to the contrary, there is, in principle, no room for Respondents to claim that they only have to contribute to the financing of the proceedings conditioned upon security for their deposits from Claimants.

36. Moreover, it is undisputed fact that the claimant party is free to determine the amount to be claimed and that this amount, in an "ad valorem system" as under the Swiss Rules, is relevant for the determination of the costs of the arbitration. Whether or not this amount is deemed to be exorbitant by the other party is irrelevant and has, in particular, no impact on the fact that, according to Article 41 para. 1 of the Swiss Rules, the arbitral tribunal shall request each party, i.e. claimant and defendant, to deposit an equal amount.

37. Furthermore, the risk of a possible insolvency of a party is no reason for making the payment of a deposit dependent on the provision of a security. The only way by which a party can obtain protection for its costs incurred for the arbitration is to address the arbitral tribunal with a request for security for costs (cautio judicatum solvi). Respondents never submitted such a request to the Tribunal, and the arbitrators think rightly so, because mere financial difficulties would not be sufficient to grant such a request.[3] Apart from that, there is no evidence on record in the instant case that Claimants would be in financial difficulties. Respondents' reference to a "possible insolvency" (see their letter of 15 September 2008) remained unsubstantiated. The fact that Claimants did not substitute the additional CHF 480,000 on behalf of Respondents within the relatively short deadlines set in June 2008 but asked for an extension of the time-limit is neither a sufficient sign for financial difficulties nor a possible insolvency.

5. Respondents' Reference to Article 41 para. 2 of the Swiss Rules

38. Apparently for the first time in their final submission on point dated 15 September 2008, Respondents referred to Article 41 para. 2 of the Swiss Rules which allows the arbitral tribunal to establish separate deposits where "a Respondent submits a counterclaim, or where it otherwise appears appropriate in the circumstances". Without filing a formal request, Respondents suggest that this Tribunal, upon "a prima facie evaluation of the Claimants' lost profits claim, […] may and should find that a reimbursement of the advance paid by the Claimants would overly burden the Respondents' financial risk in the arbitration".

39. As Respondents correctly point out, Article 41 para. 2 of the Swiss Rules was introduced by the drafters, inter alia, to make allowance for cases of exorbitant or excessive claims. However, this Tribunal disagrees with Respondents' position in that they seem to suggest that an arbitral tribunal should apply Article 41 para. 2 upon its own motion (ex officio). As already mentioned above, the rule is that each party shall make an equal deposit. The possibility to establish separate deposits is the exception. Therefore, an arbitral tribunal can and should only establish separate deposits upon a duly

[3] See e.g. *Bernhard Berger* and *Franz Kellerhals*, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern/Vienna 2006, N 1468 et seq.

motivated request from the party who is interested in obtaining a ruling on the basis of the exception.

40. In the instant case, Respondents did not bring forward such motivated request. They limited themselves to purport that Claimants' lost profit claim would be "exorbitant" and "out of proportion" without further substantiating, however, why and in what respect Claimants' claim, in their opinion, is excessive. As mentioned above, this Tribunal is convinced that it is not its own duty to make a "prima facie" assessment of the reasonableness of the amount claimed by Claimants for the purposes of Article 41 para. 2 of the Swiss Rules.

41. On the basis of the foregoing, the Tribunal concludes that Respondents' mere reference to Article 41 para. 2 of the Swiss Rules contained in its letter of 15 September 2008 is insufficient reason and, therefore, no valid defence for not having complied with their obligation arising from the arbitration agreement to fund the costs of the arbitration in equal measure.

6. Form of the Decision

42. Legal doctrine and case law are divided as to the form of a decision on a motion for reimbursement of advances made by a party on behalf of a defaulting opponent. Some authors argue that such a decision should take the form of an enforceable award.[4] Others maintain that any decision on costs of the arbitration prior to the final awarding of costs is only provisional and, therefore, are in favor of an order for interim measures.[5]

43. This Arbitral Tribunal has decided, by majority of its members, that the proper view to address the issue of a motion for reimbursement of advances under the Swiss Rules is to render an arbitral award. For the majority, to seek reimbursement for a substituted

[4] See e.g. *Marco Stacher*, in: Commentary on the Swiss Rules of International Arbitration, ed. by Zuberbühler, Müller, and Habegger, Zurich 2005, Article 41 N 20 with further reference, in particular *Fouchard*, *Gaillard*, and *Goldman*, Traité de l'arbitrage commercial international, Paris 1996, N 1254 and *Craig*, *Park*, and *Paulson*, ICC Arbitration, 3rd ed., New York 2000, p. 267.

[5] See e.g. *Xavier Favre-Bulle*, Les conséquences du non-paiement de la provision pour frais de l'arbitrage par une partie – Un tribunal arbitral peut-il condamner un défendeur au paiement de sa part de l'avance de frais?, ASA Bull. 2001, 227–245; see also *Bernhard Berger* and *Franz Kellerhals*, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern/Vienna 2006, N 1458.

payment is effectively to seek recovery of damages for breach of that obligation, irrespective of whether or not the reimbursement claim, once made formally, is couched in damages terms or breach of contract terms.

44. One of the arbitrators supported the view that the decision is only provisional and, thus, should take the form of an order for interim measures rather than an award. This arbitrator further concluded that the conditions for ordering interim measures, in particular the grounds for interim measures *(Verfügungsgrund)*, are not met in the instant case since Claimants have not demonstrated, let alone alleged, that they are confronted with an emergency situation and would suffer irreparable harm if the Tribunal would not grant their motion. For these reasons, this arbitrator was in favor of dismissing Claimants' request for reimbursement.

III. Award

45. For these reasons, and by applying the Swiss Rules of International Arbitration, the agreed rules of procedure and Chapter 12 of the Swiss Private International Law Statute, and by majority,

the Arbitral Tribunal:

1. Orders Respondents to pay to Claimants CHF 480,000. In the amount exceeding CHF 480,000, Claimants' motion for reimbursement is dismissed.

2. Decides to defer the determination of the costs of this decision and their allocation among the parties to a subsequent award.

3. Decides to communicate this Award to the parties' Counsel by registered mail.

Place of arbitration: Geneva, Switzerland

Date: 11 November 2008

The Arbitral Tribunal

sig. David. A. Lawson sig. Franz Kellerhals sig. Martin Wiebecke