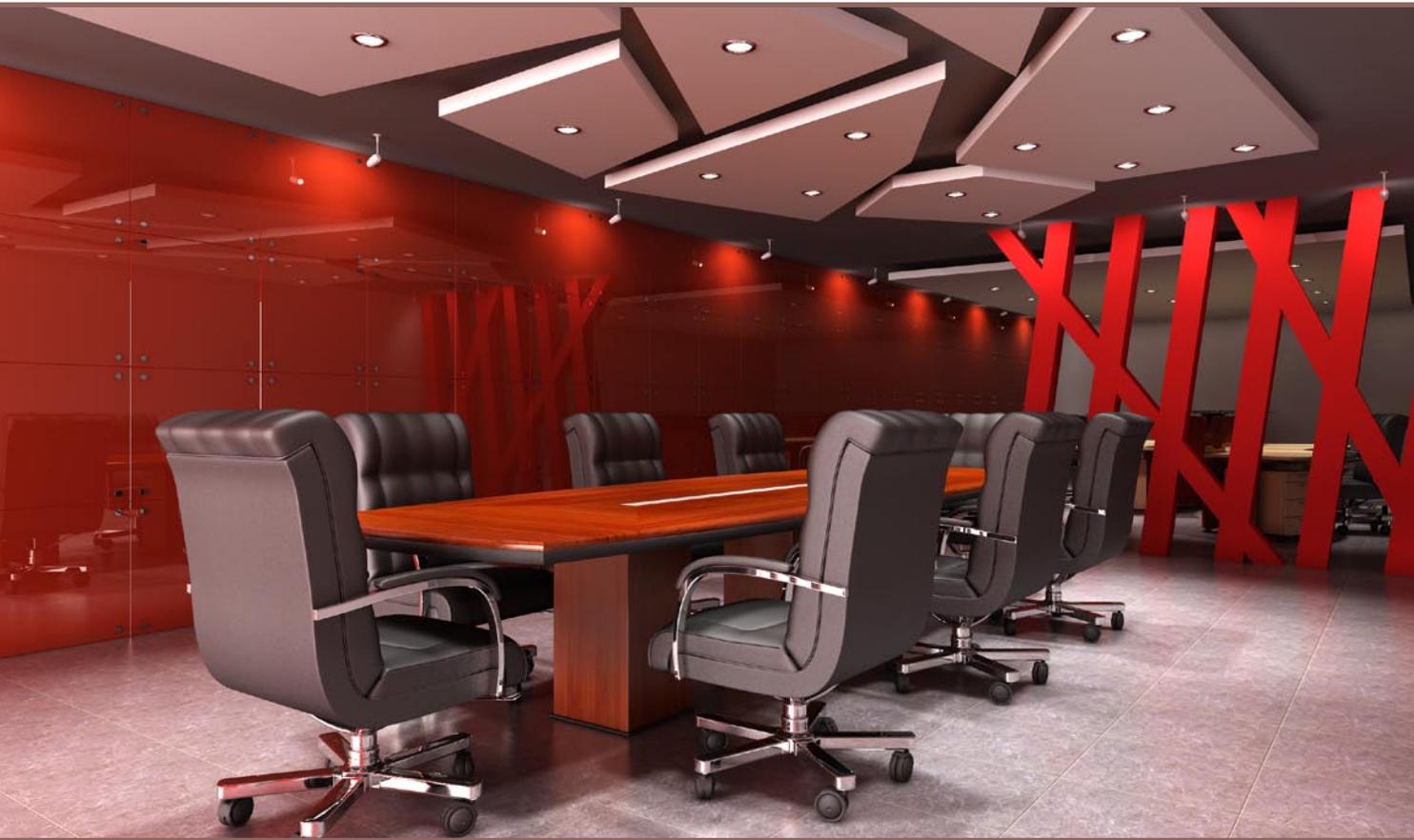


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The Swiss Rules of International Arbitration and of Commercial Mediation: Modern Tools for the Settlement of International Disputes

BY MATTHIAS SCHERER AND DOMITILLE BAIZEAU | LALIVE

The Swiss Chambers of Commerce (the “Chambers”) have been administering international arbitration proceedings since 1911. Historically, Geneva and Zurich have hosted legions of institutional and *ad hoc* arbitrations and continue to do so. Switzerland also has a long standing experience in the settlement of disputes through other ADR means, including mediation.

Key Features of the Swiss Rules of International Arbitration

In 2004, six Swiss Chambers of Commerce (Basel, Berne, Geneva, Lausanne, Lugano, and Zurich, joined more recently by Neuchâtel) harmonised their procedural rules and adopted uniform rules for international arbitration proceedings, the Swiss Rules of International Arbitration (the “Swiss Rules”).

The Swiss Rules can apply to any international arbitration whether the seat is in Switzerland or not (although Swiss arbitration law only applies if the place of arbitration is Switzerland). In addition, the Chambers will administer disputes unless “there is manifestly no agreement to arbitrate referring to” the Swiss Rules. Clauses referring to arbitration “of the International Chamber of Commerce of [Swiss city]”, to “the appropriate arbitration board in the Canton of [X]” and to “any arbitration council of Switzerland” have been accepted by the Chambers.

The Swiss Rules are based on the UNCITRAL Arbitration Rules 1976, which are the most popular *ad hoc* arbitration rules worldwide. They have been adapted and modernised for use in an institutional framework and provide some novel features, namely expedited procedure, joinder and consolidation of proceedings and broad inclusion of set-off defences.

One of the most significant innovations of the Swiss Rules as compared to other institutional rules is indeed the mandatory expedited procedure for small claims (amount of less than CHF 1 million in dispute) provided in Article 42. The expedited proceedings are particularly important in commodity trading where disputes are frequent, and Geneva, like London, is a key hub in this sector. The rules also allow for voluntary expedited proceedings even if the amount in dispute exceeds CHF 1 million.

The mechanism set out in the Swiss Rules ensures speed and cost-efficiency, but also make a clear allowance for the parties’ right to be heard and for some flexibility. First, the rules provide for one round of pleadings “in principle”, with no time limit set in advance, which means that further briefs may be submitted in appropriate circumstances. Secondly, a single hearing – for the examination of witnesses and for oral argument – has to take place, unless both parties agree that the arbitral tribunal should decide on the basis of the documentary evidence

alone. Thirdly, the expedited procedure applies automatically to all cases where the amount in dispute is below CHF 1 million, but “unless the Chambers decide otherwise, taking into account all relevant circumstances”, which circumstances will include the complexity of the case (factual, legal and procedural) and the nature of the relief (e.g., declaratory relief). Fourthly, the case must be heard by a sole arbitrator unless the parties initially agreed and continue to insist on a three member tribunal. Fifthly, there is a six month time limit to render the award which may be extended in exceptional circumstances only, in particular be required where excessive speed would conflict with due process and the parties’ right to be heard, typically if a party submits a lengthy expert opinion, or a substantial amount of documentary evidence, which call for more time for the other party to respond. However, contrary to other institutions, the Chambers apply strict control over time limits, and almost all accelerated proceedings are completed within the original six months period. Finally, the arbitral tribunal shall state the reasons upon which it relies in summary form, unless the parties have agreed that no reasons need to be given.

Another key set of features of the Swiss Rules is set out in Article 4 which allows for far reaching consolidation and joinder. First, new cases may be consolidated by the Chambers with an already pending and related arbitration even absent the parties’ agreement and even amongst different parties, taking into “all circumstances, including the links between the two cases and the progress already made in the existing proceedings”. Secondly, the Swiss Rules allow for the joinder of third parties upon request either of such third party or of a party to the arbitration. The arbitral tribunal decides on the application, again taking into account “all circumstances it deems relevant and applicable” and “after consulting with all parties” (and although not expressly stated, the Chambers) but the parties’ consent is not required. In practice, these provisions have been applied and have not yet given rise to insuperable procedural obstacles.

The third significant feature of the Swiss Rules relates to set off defences. As in the UNCITRAL Arbitration Rules, the arbitral tribunal has jurisdiction to hear set-off defences. However, and this is new, this is so “even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause”. Nonetheless, where a counter-claim is brought independently rather than as a set-off, it must be covered by the arbitration agreement on which the main claim is based.

Key Features of the Swiss Rules of Commercial Mediation

In 2007, the Swiss Chambers adopted the Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry (“Mediation Rules”), thereby offering a complete and uniform set of rules for the resolution of commercial disputes.

Parties can resort to the Mediation Rules in the event that a dispute has already arisen and for future disputes. The seat of the mediation can be in Switzerland or abroad, but the Mediation Rules apply only to “commercial” mediation, and not family mediation or the like.

Like arbitration, mediation requires the consent of all the parties concerned. However, unlike for arbitration, the Chambers may be seized even in the absence of a mediation agreement or any agreement at all. Once the Chambers notify a request for mediation, the other party will have an opportunity to accept to proceed with the mediation, or not, and hence either not reply to the Chamber’s notification or, preferably, refuse mediation explicitly.

The parties are free to designate any mediator they choose and there is no closed list. Unless the parties agree

otherwise, a single mediator is appointed. It may sometimes be useful to have two mediators, especially if the parties come from different cultural backgrounds or if the mediator requires a number of skills that cannot be found in a single individual.

Where the parties do not jointly designate a mediator, the Chambers will submit a list of at least three names to the parties, selected after considering the nature of the dispute and the required qualifications. It is advisable for a party who seizes the Chamber with a unilateral request for mediation to identify all the qualifications that may be required (e.g., industry experience, language, nationality). However, it is not advisable that the party name a possible mediator, as, if refused by the other party, s/he will be automatically excluded by the Chambers.

A party who disagrees with a default appointment made by the Chambers has a 5-day time limit to object to the appointment in writing, stating the reasons, which is rather strict. The rules have not been much tested yet, but it is expected that the Chambers will be lenient when considering objections.

All mediators must undertake to comply with the European Code of Conduct for Mediators, which is an attachment to the rules.

Once the mediator is appointed, the Chambers invite he or she to promptly convene the parties to a joint face to face preliminary session, but this is not mandatory. Generally, the parties are free to agree on the manner in which the mediation shall be conducted and will do so in a mediation agreement entered into also with the mediator.

The mediation can be terminated by either party at any time by notification in writing even if no preliminary meeting has been held, i.e., if in effect the mediation has not been properly started.

Finally, a settlement agreement will only put an end to the mediation if it is signed by all the relevant parties. The parties may opt out of this formality.

Two-tier Proceedings: Combining Mediation with Arbitration

The Mediation Rules can be combined with arbitration. They expressly refer to the possibility for the parties to agree in writing at any stage during the course of the mediation to submit all or part of their dispute to arbitration under the Swiss Arbitration Rules. This is simply a reminder to the parties that if mediation fails, arbitration, as opposed to litigation, may be an appropriate alternative. However, this provision does not intend to put in place arbitral tribunals that simply rubberstamp a settlement reached in the mediation. There must be a “dispute” and the submission of a Notice of Arbitration as provided for by the Swiss Arbitration Rules. On the other hand, the parties have the possibility to obtain an award on agreed terms under the Swiss Rules if they settle their dispute during the arbitration.

Somewhat surprisingly, the Mediation Rules (rather than the Swiss Arbitration Rules) also provide that, in case of an arbitration pending under the Swiss Arbitration Rules, not only the arbitrators, but also the Chambers may suggest that the parties mediate the dispute. However, unless the parties agree otherwise, the mediator cannot act as arbitrator, judge, expert, or as representative or advisor of one party in any subsequent proceedings initiated against one of the parties to the mediation. The problem is obviously that the mediator is likely to have obtained confidential *ex parte* information during the mediation.

The Swiss Mediation Rules, like most mediation rules, do not restrict the parties’ freedom to initiate litigation or arbitration during the mediation. In fact, in jurisdictions where mediation does not interrupt time limits or where no clear authority to the contrary exists, a party may have to start formal proceedings to preserve its rights.

A restriction may however result from the rules governing the arbitration or litigation itself. For instance, a

court or arbitral tribunal might decide that, unless and until the mediation is initiated, conducted in good faith and fails, arbitration is premature because the right to arbitrate has not yet arisen. This would be an issue as to the validity of the arbitration agreement (*ratione temporis*). This assumes that the complaining party objects to arbitration from the outset and does not proceed on the merits, and that it participated in good faith in the mediation; any objection would otherwise be considered abuse of right.

Whether the agreement to mediate can be enforced and a failure to mediate in good faith or at all give rise to a damages claim is a highly controversial issue. As a rule, it can be said that the clearer the mediation undertaking, the more likely it will be enforced and its (clear) breach sanctioned.

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The Unified Swiss Code of Civil Procedure: A Major Development in Swiss Litigation

BY SANDRINE GIROUD | LALIVE

The unified Swiss Code of Civil Procedure (“SCCP”) will enter into force on 1 January 2011. It will mark one of the most important developments in the Swiss legal order since the unification of the substantive law in civil, commercial, and criminal matters at the beginning of the twentieth century.

Currently, each of the twenty-six cantons has its own code of civil procedure. These codes can differ substantially from each other given the varying influence of the Germanic and French legal traditions prevailing in Switzerland. In addition, the Federal Constitution and several federal statutes also contain procedural rules. Finally, the Swiss Federal Supreme Court has developed unwritten civil procedural law on several basic issues. This multiplicity of rules makes it both onerous and complex to take legal action in Switzerland and has been a source of legal uncertainty. The SCCP aims to eliminate these obstacles by way of a uniform civil procedural law. It is a relatively concise code of 408 articles regulating civil procedure and domestic arbitration. It largely draws on the existing cantonal codes, in particular those of the Swiss-German cantons. Its key features are as follows.

Residual Cantonal Competence: Judicial Organisation

While the regulation of civil procedure is now a federal competence, the judicial organisation remains in the hands of the cantons which are each autonomous in the administration of justice. Cantonal law will thus continue to determine the composition and the jurisdiction of the civil courts, as well as the cost of proceedings. Under the SCCP, cantons are also allowed to create specialised courts, e.g., commercial courts, courts in employment matters, or courts for landlord/tenant disputes. As a result of this cantonal judicial autonomy, it is likely that the existing cantonal practices, e.g., the use of laypersons as judges, will impact the further development of the SCCP.