

Arbitration

in 55 jurisdictions worldwide

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Contributing editor: Gerhard Wegen and Stephan Wilske Gleiss Lutz

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Editor-in-chief

Callum Campbell

Publisher

Richard Davey

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The Swiss Chambers of Commerce

Matthias Scherer and Domitille Baizeau

Lalive

Geneva and Zurich have historically hosted legions of institutional and ad hoc arbitrations and continue to do so. The Swiss Chambers of Commerce and Industry (the Chambers) have themselves been administering international arbitration proceedings since the early 20th century, until recently each under their own arbitration rules.

In 2002, six chambers (Basel, Berne, Geneva, Vaud (Lausanne), Ticino (Lugano) and Zurich) decided to harmonise their arbitration rules and work towards a common set of international arbitration rules with the assistance of several renowned international arbitration practitioners. They adopted uniform rules for international arbitration proceedings, the Swiss Rules of International Arbitration (the Swiss Rules), in 2004 and were joined by a seventh chamber, the Chamber of Neuchâtel, in 2008. The Swiss Rules can be found on the website of the Swiss Chambers' Court of Arbitration and Mediation, www.sccam.org, in 12 languages: Arabic, Chinese, Croatian, Czech, English (original version), French, German, Italian, Portuguese, Russian, Spanish and Turkish (model arbitration clauses are available in nine of those languages).

The Swiss Rules are based on the well-tested UNCITRAL Arbitration Rules in their 1976 version, which are the most widely used ad hoc arbitration rules worldwide, and which have been adapted and modernised for use in an institutional framework and to take into account new issues and developments in international arbitration practice. They therefore provide for certain novel features, namely, expedited procedure, joinder and consolidation of proceedings, a broader scope for set-off defences and extensive confidentiality obligations (as detailed below).

In 2007, the Swiss Chambers also adopted the Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry (the Swiss Mediation Rules), thereby offering a complete and uniform set of rules for the resolution of commercial disputes. These rules exist in English (original version), French, German and Italian, together with various model mediation clauses, including a model two-tier dispute resolution clause providing for both mediation and international arbitration.

The role of the Swiss Chambers: a balance between local administration and centralised supervision

Under the Swiss Rules, and in line with the Swiss tradition of decentralised regimes based on linguistic, economic and geographical groups, each arbitration is administered locally by the Secretariat of one of the seven chambers, depending on the seat of the arbitration. While the parties are free to agree on the language of the proceedings, English, French and German are the most frequently used (English representing two third of the cases filed since 2004). Each Chamber is assisted by a local arbitration committee composed of experienced international arbitration practitioners based locally.

Coordination is guaranteed through the Swiss Chambers' Court of Arbitration and Mediation (composed of a member of the executive board of each chamber and a president) and its National

Arbitration Committee, comprised of 35 representatives of the chambers and local arbitration committees.

The special committee of the National Arbitration Committee ensures uniformity and consistency in the decisions taken by each local Arbitration Committee:

- the Special Committee alone decides on three issues – the seat of the arbitration absent a clear agreement of the parties, the challenge of an arbitrator (thus far none of the challenges brought have succeeded) and the revocation of an arbitrator;
- the Special Committee must be consulted by local committees before they decide on whether there is 'manifestly an agreement to arbitrate referring to [the Swiss Rules]' (article 3.6 of the Swiss Rules) and whether to consolidate arbitral proceedings (article 4.1); and
- the Special Committee provides advice on other issues upon consultation by the local committees, for example, whether an expedited procedure should be adopted in unclear cases.

In all cases, the Special Committee has distinguished itself by its particularly fast decision-making – an average of five days.

The Chambers continue to administer Swiss domestic arbitrations under their own arbitration rules where both parties are domiciled or have their usual place of residence in Switzerland. Such arbitrations are subject to Swiss domestic arbitration law, as set out in the Inter-cantonal Concordat of 1969 until 31 December 2010, and since 1 January 2011 in part III of the new Federal Code on Civil Procedure – which unifies the former 26 cantonal procedural codes.

General scope of the Swiss Rules of international arbitration

The Swiss Rules can apply to any international arbitration whether the seat is in Switzerland or not, although Swiss arbitration law, as set out in chapter 12 of the Federal Statute of Swiss Private International Law of 1989 (PIL Act), will only apply if the place of arbitration is Switzerland (the PIL Act is available in several languages other than Switzerland's official languages, including English and Spanish, on the Swiss Chambers' website). A few cases have indeed been filed with the Chambers where the seat was outside Switzerland, including in Asia and the United States.

The Chambers will administer any case where the arbitration clause either refers to the Swiss Rules 'or to the arbitration rules of [one of the chambers]' (article 1.1), which means that no international arbitration may now be governed by such 'local' arbitration rules. In addition, the Chambers will administer any case unless 'there is manifestly no agreement to arbitrate referring to' the Swiss Rules (article 3.6). Hence, clauses referring to arbitration 'of the International Chamber of Commerce of [Swiss city]' or 'to the appropriate arbitration board in the Canton of [X]' or to 'the rules and legislation of the International Court in [Swiss city]' have been accepted by the Chambers. In some cases, the Chambers may also accept cases where the arbitration clause refers to the Chamber of Commerce of Switzerland without reference to a particular city.

Conducting arbitration under the Swiss Rules: flexibility and efficiency

Like the UNCITRAL Rules, the Swiss Rules, although administered (unlike the UNCITRAL Rules) vest broad powers in the arbitral tribunal, in particular in the conduct of the arbitral proceedings (article 15). They are in that sense not much different from other institutional rules. They are however characterised by a 'light' administration, which – as has been widely recognised – ensures a high degree of flexibility and efficiency. The following three features are particularly noteworthy.

Rapid appointment of the arbitral tribunal

The decision-making process followed by the local and national arbitration committees is very fast, including with respect to the appointment of the chairperson or indeed the full arbitral tribunal when the parties cannot agree or one party refuses to cooperate (as noted above, the average time is five days).

No terms of reference

The Swiss Rules do not require that terms of reference be drawn up and signed by the parties (or otherwise approved by the Chambers). Such a step exists under other institutional rules and can easily be used as a delaying tactic by one party. In practice, it is increasingly common for arbitral tribunals to draw up 'constitution orders' or the like for discussion with the parties at the outset of the proceedings, together with a procedural timetable. Indeed, the Swiss Rules require that the arbitral tribunal 'at an early stage of the arbitral proceedings and in consultation with the parties' prepare a procedural timetable, which ought to be sent to the Chambers (article 15.3).

Costs administered by the arbitral tribunal

The costs of the arbitration are administered by the arbitral tribunal, rather than the Chambers, but the arbitral tribunal's powers in that regard are set out in detail in the rules.

The administrative expenses and the arbitrators' fees are fixed *ad valorem*, namely, depending on the amount in dispute, with a maximum and a minimum being fixed in a schedule of costs set out in appendices B and C of the Swiss Rules. No administrative expenses are payable for disputes below 2 million Swiss francs. An online calculator is available on the website of the Swiss Chambers (by way of illustration, at present, where the amount in dispute is US\$5 million, the total fees for a three-member arbitral tribunal should range approximately between US\$120,000 and US\$440,000. It goes up to between US\$180,000 and US\$640,000 for a US\$10 million dispute. This is in line with other institutions that have adopted the same system).

However, unlike most other institutional rules, the Swiss Rules provide that the arbitral tribunal, rather than the Chambers, will manage the costs of the arbitration, including the fixing and collection of advances on costs (articles 38 to 41). The arbitral tribunal must follow the Schedules and the maximum amount can only be exceeded in exceptional circumstances and with the prior approval of the Chambers (article 2.3 of appendix B).

In addition, while not all communications between the arbitral tribunal and the parties must be copied to the Chambers, the latter must be informed about all decisions and communications pertaining to costs (article 41). Finally, the costs assessment as set out in the draft award must be submitted to the Chambers for scrutiny (article 40.4) and the Chambers will step in if the costs fixed by the arbitral tribunal are considered unreasonable. The rest of the award is not scrutinised by the Chambers.

Expedited procedure

One of the most significant innovations of the Swiss Rules, as compared to other institutional rules, is the mandatory expedited six-month procedure for small claims (amounts of less than 1 million Swiss francs in dispute) provided in article 42. The expedited pro-

ceedings are particularly important in international sale of goods and specifically in maritime cases and in commodity trading where disputes are frequent (and Geneva, like London, is a key hub in this sector). In 2010, sale of goods disputes represented 30 per cent of all disputes submitted to the Chambers.

The rules also allow for voluntary expedited proceedings even if the amount in dispute exceeds 1 million Swiss francs.

The amount is calculated by the Chambers upon receipt of the answer to the initial notice of arbitration taking into account the claim, counterclaim and any set-off defences, but irrespective of any subsequent increase or counterclaim, for instance in the statement of defence. The amount of 1 million Swiss francs is much higher than under the few other international rules with a similar provision. However, the mechanism will not apply if 'the Chambers decide otherwise, taking into account all relevant circumstances' (article 42.2). Such circumstances will usually include the complexity of the case (factual, legal and procedural) and the nature of the relief (eg, declaratory relief).

The expedited procedure set out in the Swiss Rules provides for a good compromise: it ensures speed and cost-efficiency, but also makes a clear allowance for the parties' right to be heard and for some flexibility.

First, with respect to the conduct of the proceedings, the rules provide for one round of pleadings 'in principle', which means that further briefs may be submitted in appropriate circumstances, and no time limit is set in advance for the submission of these pleadings. In addition, a single hearing – for the examination of witnesses and for oral argument – has to take place, unless both parties agree that the tribunal should decide on the basis of the documentary evidence alone.

Secondly, insofar as the arbitral tribunal is concerned, the case must be heard by a sole arbitrator unless the parties initially agreed otherwise and, despite the suggestion from the Chambers, continue to insist on a three-member tribunal.

Thirdly, as to the award, the arbitral tribunal must state the reasons upon which it relies on the award, but in summary form only, unless the parties have agreed that no reasons need to be given. In addition, the six-month time limit to render the award may only be extended in exceptional circumstances. This may be required where excessive speed would conflict with due process and the parties' right to be heard. This will typically be the case 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, or if a key witness is unexpectedly but for good reasons unavailable for the hearing initially scheduled. However, contrary to other institutions, the Chambers apply strict control over time limits, and almost all accelerated proceedings are completed within the original six-month period.

Consolidation of proceedings and joinder (participation) of third parties

Another key novel feature of the Swiss Rules is set out in article 4, which allows for far-reaching consolidation of proceedings and joinder or participation of third parties. These provisions are aimed at finding a solution to the increasingly common problems raised by multiparty and multi-contracts disputes. It is absent from all the other popular international arbitration rules in such a comprehensive form.

First, article 4(1) allows for the consolidation by the Chambers of a new arbitration with an already existing and related arbitration. While not expressly stated, the Chambers will consult with all the parties in both cases and with the arbitral tribunal in the pending proceedings. However, the Chambers can order consolidation even absent the agreement of all the relevant parties and even where the two arbitrations are between different parties.

The decision is taken by the Chambers, taking into account 'all circumstances, including the links between the two cases and the

progress already made in the existing proceedings'. Typically, the Chambers will consider the link between the two cases; the progress made in the pending proceedings; and the identity of the arbitration clauses, obviously not only as to the arbitration rules chosen, but also as to the seat of the arbitration, the language of the arbitration, and any agreement on a specific procedure to be followed in each case. If the arbitral tribunal in the existing arbitration has already been constituted, the parties in the new proceedings are 'deemed to have waived their right to designate an Arbitrator' (article 4.1) by accepting the Swiss Rules in the first instance.

Over the past five years, article 4.1 has been increasingly invoked and the Chambers have been inclined to grant consolidation. However, to date, the application of this provision has not been tested by the Swiss Federal Supreme Court, which is the sole court entitled to hear challenges to an arbitral award rendered in Switzerland upon the restricted grounds of article 190.2 PIL Act, including where the arbitral tribunal has not been properly constituted (article 190.2(a)).

Regarding the joinder of third parties, the decision may be made by the arbitral tribunal, upon a request either of such third party or of a party to the existing arbitration (article 4.2). Again, the arbitral tribunal must take into account 'all circumstances it deems relevant and applicable' and consult the parties, as well as – although not expressly stated – the Chambers. Pursuant to Swiss Rules, however, in theory at least, the consent of the third party or the other parties is not required; nor is there a requirement that all the parties to the proceedings be in fact bound by an identical arbitration clause. Yet, in practice, where a party objects, one expects that the arbitral tribunal will rarely proceed with the joinder.

The wide scope of set-off defences

The third significant new feature of the Swiss Rules relates to set-off defences, and is also aimed at avoiding multiple proceedings. As in the UNCITRAL Rules, the arbitral tribunal has jurisdiction to hear set-off defences. However, under the UNCITRAL Rules, set-off rights are limited to those rights arising out of the same contract as those giving rise to the main claim (article 19.3).

The scope of article 21.5 of the Swiss Rules is wider. The defence may be relied upon '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 defence, it must be covered by the arbitration agreement on which the main claim is based.

Confidentiality

While this is not a unique feature of the Swiss Rules, one final change from the UNCITRAL Rules that is worth noting is the clear and broad confidentiality obligation set out in article 43. The obligation encompasses 'awards and orders' as well as 'materials submitted' by the parties during the proceedings and applies to the parties, the arbitral tribunal, any tribunal-appointed expert, any administrative secretary of the arbitral tribunal and the Chambers.

Combining mediation and arbitration: the Swiss Rules of Commercial Mediation

The Swiss Mediation Rules, which only apply to commercial mediations (whether seated in Switzerland or not) are also administered by the Swiss Chambers. Unlike for arbitration, however, the Chambers may be seized even in the absence of a mediation agreement or any agreement at all (article 5). Once the Chambers notify a request for mediation, the other party will have an opportunity to accept to proceed with the mediation.

The parties are free to designate any mediator they choose and absent any agreement, the Chambers will proceed to the appointment. All mediators are subject to the European Code of Conduct for Mediators (available on the website of the Swiss Chambers).

Mediation can be combined with arbitration in several respects.

First, the Swiss Mediation Rules expressly refer to the possibility for the parties to agree in writing, at any stage during the course of a mediation, to submit all or part of their dispute to arbitration under the Swiss Arbitration Rules (article 23.1). This is in fact simply a reminder to the parties that if mediation fails, arbitration, as opposed to litigation, may be an appropriate alternative. This provision does not intend to put in place arbitral tribunals that simply rubberstamp a settlement reached in the mediation. There must be (obviously) an agreement to arbitrate, as well as a 'dispute' between the parties and the submission of a notice of arbitration as provided for by the Swiss Rules (article 3). 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.

Second, and somewhat surprisingly, the Swiss Mediation Rules (rather than the Swiss Rules of international arbitration) also provide that, in the case of an arbitration pending under the Swiss Rules, not only the arbitrators, but also the Chambers, may suggest that the parties mediate the dispute (article 24.1). However, unless the parties agree otherwise, the mediator cannot act as arbitrator, judge, expert or as representative or adviser of one party in any subsequent proceedings initiated against one of the parties to the mediation (article 22.1). The problem is obviously that the mediator is likely

LALIVE

Geneva Doha Zurich

Matthias Scherer
Domitille Baizeau

mscherer@lalive.ch
dbaizeau@lalive.ch

35 rue de la Mairie
1207 Geneva
Switzerland
Tel: +41 22 319 87 00
Fax: +41 22 319 87 60
www.lalive.ch

Löwenstrasse 2
8001 Zurich
Switzerland
Tel: +41 44 319 8000
Tel: +41 44 319 8019

to have obtained confidential ex parte information during the mediation. Where the parties do agree that the mediator may so act, for example as an arbitrator, then the mediator is entitled to take into account the information received during the mediation. In 2009 seven new mediation cases were submitted to the Chambers and in 2010 eight cases; the parties involved had their domicile mainly in Switzerland.

Like other institutions the Swiss Chambers have been facing increased competition and an ever-increasing demand for cost-efficiency and for other forms of ADR, such as mediation, from end-users. So far they have risen to the challenge. They have now been administering

a uniform set of international arbitration rules for seven years and the critics are unanimous as to their success in combining nearly 100 years of experience in the administration of international arbitral proceedings with already well-tested but also well-adapted arbitration rules. During this short time frame, the Swiss Rules have even been a source of inspiration for other institutions such as the Hong Kong International Arbitration Centre. In 2010, a total of 89 new arbitration cases were submitted to Swiss Chambers, which was slightly less than in 2009 (after an increase of more than 50 per cent from 2008 to 2009). In those cases, only 20 per cent of the parties were from Switzerland.

In view of the revised UNCITRAL Arbitration Rules (adopted in May 2010), a group of experts is currently considering whether a revision of certain provisions of the Swiss Rules are called for.

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