



NEW RULES OF INTERNATIONAL ARBITRATION IN SWITZERLAND

MATTHIAS SCHERER¹

Switzerland is well established as an important centre for international arbitration proceedings and indeed dispute settlement in general. For instance, 111 out of 457 arbitrations submitted to the International Chamber of Commerce ("ICC") in 2002 were located in Switzerland.²

Arbitration clauses referring disputes to arbitration in Switzerland are often coupled with a choice of law in favour of Swiss substantive law.³ Many international commercial contracts contain a choice of law provision submitting the contract to Swiss law, even where neither of the parties nor the contract has any link to Switzerland. Swiss law seems to be perceived by the business community as a "neutral" law, the lowest common denominator on which the parties can agree in contract negotiations.

Arbitration is also promoted by the many international organisations that have their seat in Switzerland. Particularly noteworthy are the Arbitration and Mediation Rules of the World Intellectual Property Organisation ("WIPO") and its widely-used rules for the settlement of internet domain names,⁴ and the increasingly popular Court of Arbitration for Sport ("CAS/TAS") in Lausanne with its rules tailored for sport-related disputes.⁵ The oldest arbitration service-providers, however, are the Chambers of Commerce of Geneva and Zurich ("CCIG", "ZHK").

Indeed, so close are the ties to arbitration that it comes as a surprise to many, in Switzerland and abroad, that there are no "Swiss" arbitration institutions that offer a set of rules to parties to international contracts. While the Geneva and the Zurich Chambers were each thriving, their case load increasing by the year, local parochialism stood in the way of a harmonisation of the quite distinct rules of the various Chambers of Commerce.

It took decades but finally, in 2003, the Chambers of Commerce of Basel, Bern, Geneva, Ticino, Vaud and Zurich agreed to adopt a common set of rules. These rules, the Swiss Rules of International Arbitration ("Swiss Rules"), entered into force on January 1, 2004 and replace the arbitration rules of the six Chambers of Commerce.⁶ Rather than giving preference to the existing Rules of one of the Chambers, the drafters decided to rely on the 1976 UNCITRAL Arbitration Rules. Without doubt the most popular of all *ad hoc* arbitration rules, the UNCITRAL Rules have been tested by many national courts and arbitral tribunals, including the Iran-US

1. Partner, Lalive & Partners, Geneva (mscherer@lalive.ch / www.lalive.ch). The author is a member of the Arbitration Committee of the Chambers of Commerce that have issued the Swiss Rules since January 1, 2004. He has not been involved in the making of the Rules. The opinions expressed in this paper and any errors it might contain are the author's alone.

2. ICC Bulletin, Spring 2003, p.13.

3. According to the ICC statistics for 2002, Swiss law was with English and French law, the most commonly chosen law (ICC Bulletin, Spring 2003, p.14).

4. <http://arbitrator.wipo.int/center/>.

5. www.tas-cas.org/. In 2003, 107 new requests for arbitration have been submitted to the CAS. For a description of the CAS see the leading case of the Federal Tribunal of May 27, 2003, in ASA Bull. 2003, p.601. All arbitrations have their legal venue in Lausanne/Switzerland even if the actual proceedings may take place elsewhere (see, for

instance, the decision of the Supreme Court of New South Wales, in *Raguz v Sullivan*, ASA Bull. 2001, p.335). During the Olympic Games *ad hoc* tribunals are set up to decide in matters of hours disputes arising during the Games. While the proceedings of the *ad hoc* tribunal will physically be held at the location of the Games, they remain Swiss.

6. The Rules are posted at the Chambers web page: www.swissarbitration.ch/. The website also contains a marked-up version of the UNCITRAL Rules reflecting changes made by the Swiss Rules. See also Laurent Levy, "Swiss Rules of International Arbitration" [2004] Int.A.L.R. 2, N-25 and the hand-outs at the ASA Conference of January 23, 2004 (published in ASA Special Series No.22): Wolfgang Peter, "Some Observations on the New Swiss Rules of International Arbitration"; Marc Blessing, "Comparison of the Swiss Rules with the UNCITRAL Rules and Others"; Elliott Geisinger, "The Expedited Procedure under the Swiss Rules of International Arbitration"; Daniel Wehrli, Gino Koenig & C. Triebold, "Management of the Proceedings and Quality Control under the Swiss Rules"; Markus Wirth, "Financial Aspects of the Swiss Rules"; V.V. Veeder, "The New Swiss Rules for International Arbitration—a View from Abroad: London".

Claims Tribunal.⁷ A modernisation of certain provisions of the Rules was, however, inevitable since they are rooted in an era, when arbitration was not yet as well established as it is now, in the beginning of the 21st century. Moreover, the UNCITRAL Rules were the fruit of a compromise among national delegates not all of whom shared the arbitration friendly approach that is prevalent today. Adaptations were necessary also since the UNCITRAL Rules are *ad hoc* Rules and had to be re-written for use by the Chambers as institutional Rules.

The scope of application of the Swiss Rules

The Swiss Rules do not contain a definition of the validity requirements of an arbitration agreement. In order to be a valid under the Swiss Rules, the agreement must comply with the requirements of the Swiss PIL Act. Article 177.1 PIL Act provides that an arbitration agreement "must be made in writing, by telegram, telex, fax or any other means of communication which permits it to be evidenced by a text". In addition, it must refer to the Swiss Rules, or any of the previous Rules of the Chambers that the Swiss Rules have replaced.

Initially the Swiss Rules could only be selected in conjunction with arbitrations that have their legal seat (as opposed to venue of the proceedings) in Switzerland. In other words, an arbitration agreement that simply states "arbitration under the Swiss Rules" will have to be interpreted as referring to a place of arbitration in Switzerland. If the parties do not agree on a town in Switzerland, the Special Committee of the Chambers will determine the seat.⁸

It must be noted, however, that if the seat of the arbitration is not in Switzerland, the arbitration will be governed by the *lex arbitri* of the country of the seat, not by the Swiss arbitration law (PIL Act). The parties would lose the advantage of having their arbitration covered by the framework of Switzerland's international arbitration law.

Responding to demands of users, the Chambers decided in July 2004 to allow the use of the Swiss Rules also for arbitration proceedings having their seat *outside* Switzerland, as it was possible under the old Rules. At the time this paper is completed (July 15) it is planned to modify

the terms of Art.1.2 as follows: "The parties are free to designate the seat of the arbitration in Switzerland or elsewhere." Likewise, the model arbitration clause will be changed as follows: "The seat of the arbitration shall be ... (name of the city in Switzerland, unless the parties agree on a city abroad)."

According to Art.1.1, the Swiss Rules "govern international arbitrations". Unlike the PIL Act, the Swiss Rules do not define what constitutes an international arbitration. Pursuant to Art.176 PIL Act all arbitrations in Switzerland are international if "at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland". All other arbitrations are domestic, and governed by a treaty among the Swiss cantons (the Concordat). In order to distinguish between domestic and international arbitration, Swiss law, contrary to other legal systems (French for instance), relies entirely on the domicile of the parties to the arbitration. Neither the nature of the dispute nor the event that all parties and the subject-matter of the dispute are located in the same country are relevant.⁹

If at least one of the parties to the arbitration was domiciled outside Switzerland at the time the contract was entered into, the Swiss international arbitration provisions (PIL Act) apply. If not, the dispute is considered a domestic arbitration. In a recent decision the Federal Tribunal held that the domicile of contract parties which are not parties to the subsequent arbitration is irrelevant for the qualification of the arbitration as domestic or international.¹⁰

Transitional rules

Any arbitration commenced after January 1, 2004 is governed by the new Swiss Rules. Article 1.3 provides that "unless the parties have agreed otherwise [the Swiss Rules], shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date."

From the above provision it appears that an arbitration agreement entered into before January 1, 2004 will be subject to the old rules, if both parties agree. If they do not agree, the decision on the applicable rules will be a matter of interpretation of the agreement. In other words, one has to examine whether the arbitration agreement can be construed as excluding arbitration under revised rules. In light of case law of the Swiss Supreme Court (the Federal Tribunal), an opting out of

7. Lucy Reed and Stephanie Hill Rosenkranz, "The UNCITRAL Rules as Applied in the Iran-US Claims Tribunal", hand-out at the ASA Conference of January 23, 2004 (to be published in ASA Special Series). See also George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunals* (Clarendon Press, Oxford, 1996); Charles N. Brower, *The Iran-United States Claims Tribunal* (M. Nijhoff, The Hague, 1998); J.J. Van Hof, *Commentary on the UNCITRAL Arbitration Rules* (Kluwer, The Hague, 1991).

8. Art.16, Swiss Rules.

9. Federal Tribunal, Decision of October 16, 2003, 4P.115/2003 (dispute among Lebanese parties about a construction project in Lebanon).

10. Decision of June 24, 2002, published in ASA Bulletin 2003, p.131, Comments by F. Knoepfler, p.137.

the Swiss Rules in favour of the old Rules requires a specific agreement.¹¹

Under certain circumstances it might still be possible for a party to argue that arbitration initiated after January 1, 2004 under an arbitration agreement concluded before January 1, 2004 should follow the old Rules, even if there is no specific agreement. In *Komplex v Voest-Alpine Stahl*,¹² the Federal Tribunal admitted that an ICC arbitration was governed by the revised ICC Rules and not by the Rules in force when the arbitration agreement was concluded. The tribunal applied the following threshold test: the relevant provision of the old version takes precedence over the new one if the changes in the new one were structurally and fundamentally different and if the solution in the new Rules were untenable or surprising. The tribunal found that in the case at hand, the new provision was not untenable or surprising.

In general, revisiting the old rules should be avoided unless the new rules contain a provision that is entirely unexpected and unjustified. Even in this case, it would be inappropriate to fall back on the old rules in their entirety. It would appear to be more appropriate in such instance to adapt the new rules, or to apply only the relevant provision of the old rules. The rules of arbitration service-providers, are—just like legislation—subject to periodical amendments to reflect developing practice and expectations of users. The principle that the rules governing the proceedings are those in force at the time the arbitration is initiated has also been applied by English courts. An arbitration clause providing for appeals on questions of law under the 1979 Arbitration Act was interpreted as referring to the 1996 Act. Similarly, a Commercial Court considered that when parties agreed on the London Maritime Arbitrators' Association Small Claims Procedure of 1989 they must have intended that "the procedure current at the relevant date would be the procedure used."¹³

The arbitral tribunal

The Chambers do not impose a list of arbitrators. The parties are free to select the arbitrators of their choice.

11. By analogy one can refer to the case law in connection with the 1989 PIL Act. Under Art.176.2 PIL Act, the parties can opt out if they exclude in writing the Act's application and agree to the exclusive application of the old rules (the "Concordat", a treaty among the Swiss cantons). It is standing case law of the Federal Tribunal that the parties need to exclude the PIL Act specifically and mention that they wish to be bound by the old Concordat. It would not be sufficient merely to state that a dispute is subject to the Concordat (Federal Tribunal, Decision of January 8, 2001, *Imuna v Octapharma*, ASA Bulletin 2001, p.516).

12. Federal Tribunal, Decision of June 14, 1990, *Komplex v Voest-Alpine Stahl* in ASA Bull. 1994, p.226, Commentary by Sébastien Besson, p.230.

13. *Taylor Woodrow Civil Engineering v Hutchison IDH Development Ltd* [1998] C.I.L.L. 1434; *Ranko Group v Antarctic Maritime SA*, June 12, 1998, Comm. Ct, Toulson J., unreported, both quoted after Stewart Shackleton, "Global Warming: Milder Still in England (Pt I)" [1999] Int.A.L.R. 60.

There is no nationality requirement or prerequisites as to bar affiliation. In fact, non-Swiss arbitrators have regularly been appointed by the Chambers in the past, a tendency that can be expected to continue in the future.

All arbitrators are subject to confirmation by the Chambers (Art.5.1) even if they are proposed by the parties jointly or, in case of the chairman, by the other arbitrators.

If a party fails to designate its arbitrator, the latter will be appointed by the Chambers. If the late party designates the arbitrator before the arbitrator appointed by the Chambers takes up his work, the Chambers should confirm the arbitrator nominated by the party, irrespective of the delay of the party designating him.¹⁴

The chairman is designated by the two party arbitrators, unless the parties provide otherwise (Art.8.2). They may do so in the agreement to arbitrate or in a subsequent agreement. In order to benefit fully from one of the key advantages of arbitration, *i.e.* the parties' right to participate in the constitution of the tribunal, it is recommended to agree that the chairman is appointed by the arbitrators designated by the parties in consultation with them.

All arbitrators, including arbitrators designated by a party, must be and remain impartial and independent (Art.9.1). There is ample case law of the Federal Tribunal about the standards to be applied in this respect.¹⁵ The litmus test is not the subjective impression a party may have but whether any neutral bystander may objectively have "justifiable doubts" (Art.9.2) as to the independence and impartiality of the arbitrator.

According to standing case law of the Federal Tribunal a party must challenge an arbitrator as soon as it learns, or could reasonably have been expected to learn of the fact that gives rise to the challenge. It must also be noted that for the Federal Tribunal any party is under a general duty to investigate the background of an arbitrator appointed by the other party or the arbitral institution as soon as practicable.¹⁶

14. Cantonal Court of Aargau/Switzerland, May 4, 1998, ASA Bull. 2000, p.779; See also the French case of *Sonapra v Adeossi*, June 8, 1999, Cour de Cassation (2000) Rev.arb. 116.

15. See Pierre-Yves Tschanz, "L'indépendance des arbitres en droit Suisse" (2000) Rev.arb. 523; Teresa Giovannini, "Arbitrators and Arbitration Institutions: Conflicts of Interest" in RDAI/IBLJ No.6/2002, p.629.

16. One of the leading cases concerned a dispute between a Panama company and a Cuban State-owned corporation subject to ICC arbitration in Geneva. The Panama company requested the Federal Tribunal to set the arbitral award aside based on the result of research that had been performed after the award had been rendered and which brought to light that the arbitrator appointed by the Cuban party had led various trade missions and assignments for the Cuban State. The Swiss Federal Tribunal rejected the challenge because all these assignments were in the past, and because the Panama company could have reasonably expected to vet the arbitrator appointed by its opponent as soon as it learnt of the appointment, and not only after having received the award (Federal Tribunal, Decision of October 15, 2001, ASA Bull. 2001, p.321).

In multi-party proceedings the arbitral tribunal will be constituted in accordance with the parties' agreement. Failing an agreement, the Chambers invite first the claimant(s) and then the respondent(s) to designate an arbitrator. Where a group of parties fails to designate its arbitrator, Art.8.5 provides that "the Chamber may appoint all three arbitrators and shall specify who among them shall be the presiding arbitrator." The Chambers have discretion to appoint any of the arbitrators or none of them.

Salient features and pitfalls of the provisions on the arbitral procedure

A party wishing to initiate arbitration can send a *Notice of Arbitration* to the Swiss Chambers at any of their six addresses.¹⁷ The arbitration is deemed to commence on the date the Chambers receive the Notice (Art.3.2).

The date of inception of the arbitration can be important for the calculation of time bars and in the event of parallel court proceedings in order to determine whether the arbitral tribunal has to defer to the foreign court or vice versa according to the *lis alibi pendens* rule. An arbitral tribunal sitting in Switzerland will, in certain circumstances, indeed have to *stay the arbitration* and defer to a foreign court who has been seized earlier by the same parties.

In a recent landmark decision the Swiss Federal Tribunal set aside an arbitral award because the arbitrators did not wait for the outcome of pending court proceedings in Panama between the same parties that had been initiated before the arbitration and where the alleged waiver of the claimant's right to arbitrate was an issue to be decided.¹⁸

In order to warrant a stay, Swiss law also requires that the foreign decision would be rendered in a reasonable time and be enforceable in Switzerland. This latter requirement was found to be lacking in a case brought before the Federal Tribunal, opposing a Peruvian to a French mining company in a dispute about gold-mining rights. The Federal Tribunal confirmed an arbitral award rendered in Zurich-Switzerland in spite of pending court

proceedings in Peru. The Federal judges found that the Peruvian decision was in contradiction with the New York Convention, according to which courts of signatory states, such as Peru and Switzerland, must refer the parties to arbitration if there is a valid arbitration agreement. In the opinion of the Swiss judges, the Peruvian courts should have referred certain parties before them to arbitration, since they were bound by the arbitration agreement providing for arbitration in Switzerland. Since they failed to do so, the judgment could in no event be enforced in Switzerland and a stay of the arbitration was not possible.¹⁹

The Notice shall contain the basic information about the dispute listed in Art.3.3 and the payment of the registration fee. The Notice can be very succinct. It needs only to describe the nature of the dispute, at least in general terms. Of course, the claimant may also submit a full statement of claim. In that event, however, the claimant may be barred from submitting another full brief later on. In fact, Art.18.1 provides: "Unless the Statement of Claim was contained in the Notice of Arbitration ... the Claimant shall communicate its Statement of Claim ..." A like provision applies to the Statement of Defence (Art.19.1). Any party should, therefore, reserve in its initial pleadings the right to submit additional pleadings under Art.18 or 19.

Contrary to the UNCITRAL Rules, the respondent has an opportunity to file an *Answer to the Notice* within 30 days from receipt of the Notice of Arbitration.²⁰ The respondent is at liberty to file a full defence even if the claimant initiated the arbitration with a short Notice. In principle, the respondent should raise any set-off defence or counterclaim at this stage. If no counterclaim or set-off defence is raised the Chambers will rely exclusively on the claim in order to determine the amount in dispute. If the latter is below CHF 1 million,²¹ the arbitration will be subject to the expedited procedure of Art.42.2, notwithstanding any subsequent increase of the claimed amount or introduction of a counterclaim/set-off defence. A respondent who wishes to have "normal" proceedings is well advised to specify any counterclaim or set-off from the outset.

Objections to the jurisdiction of the arbitral tribunal must be made at the latest in the Statement of Defence or reply to the counterclaim (Art.21.3). Other *subsequent amendments* to the claim or defence are possible provided that they are covered by the arbitration agreement "unless the arbitral tribunal considers it inappropriate ... having regard to the delay in making it or prejudice to the other party or any other circumstances" (Art.20.1).

A party may be "represented or assisted" by any person of its choice (Art.3.13). The drafters wanted to give entire freedom to the parties in the way they participate in the

17. A notice filed with a Chamber other than the Chamber mentioned in the arbitration clause is valid (Art.3.1) and will be forwarded to the proper Chamber.

18. Decision of May 14, 2001, ASA Bulletin 2001 p.544 (French original) and p.555 (English translation). See also Elliott Geisinger and Laurent Levy, "*Lis Alibi Pendens* in International Commercial Arbitration" in ICC Bulletin, Special Supp. 2003, p.53; Laurent Levy and Anne Véronique Schlaepfer, "*La suspension d'instance dans l'arbitrage international*" in *Gazette du Palais*, Les cahiers de l'arbitrage, No.2001/2—1ère partie, p.25; Manuel Liatowitsch, "*Die Anwendung der Litizpendenzregeln von Art.9 IPRG durch schweizerische Schiedsgerichte: ein Paradox*", ASA Bulletin 2001, pp.422—443; Jean-Marie Vuillemin, "*Litispandance et compétence internationale indirecte du juge étranger*", ASA Bulletin 2001, pp.439 *et seq.*; Matthias Scherer, "*When Should an Arbitral Tribunal Sitting in Switzerland Confronted with Parallel Litigation Abroad Stay the Arbitration?*", *ibid.*, p.451.

19. Decision of December 19, 1997, *Compañía de Minas Buenaventura SA v Bureau de Recherches Géologiques et Minières Pérou S.A.S*, ATF 123 III 83, published in ASA Bull. 1998, p.365.

20. Peter, *op. cit.*, n.6 above, p.4.

21. CHF 1 million is the equivalent of US\$ 787,588 (exchange rates as per Oanda Currency Converter, March 22, 2004; www.oanda.com).

proceedings not only with legal counsel but also with other advisors. In recent years, it has become increasingly common in complex arbitrations that the team comprises accountants, claims consultants, other advisors in addition to counsel. On the other hand, a party may choose to defend itself without legal counsel or by its in-house counsel. Frequently, however, a party in arbitration in Switzerland is represented by its outside counsel, alone or in co-operation with a Swiss firm. It is not necessary for a party representative to be admitted to a bar, foreign or Swiss, although this will normally be the case.

Under Art.21.5 the arbitral tribunal has jurisdiction to hear a *set-off defence* even when the relationship out of which this defence is alleged to arise is not within the scope of the arbitration clause or is the object of another arbitration or forum selection clause. This novel feature increases the effectiveness of arbitration but is likely to give rise to discussions about the respective scope of application of distinct dispute resolution mechanisms.

According to Art.4.1 of the Swiss Rules, the Chambers may decide after consultation with the parties and of the Chambers' Special Committee to *consolidate* two arbitrations among the same parties and to refer the second dispute to the arbitral tribunal constituted in the first dispute. The same provision also allows for proceedings to be consolidated that are not between the same parties and, as it appears from the wording of the provision, not even under the same contract.²² The second arbitration must also be based on an arbitration agreement providing for arbitration under the Swiss Rules or their predecessors. The Chambers have wide discretion in deciding to consolidate: "The Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings."

If the Chambers decide to consolidate these proceedings and to refer the new case to the existing arbitral tribunal "the parties to the new case shall be deemed to have waived their right to designate an arbitrator."

Pursuant to Art.4.2 of the Swiss Rules, a third party may request participation in a pending arbitration, or a party in such arbitration may request the participation of a third party. However, contrary to the consolidation of proceedings, which can be ordered by the Chambers, upon request or on their own motion, a *joinder* can only be admitted by the arbitral tribunal, and only upon request.

The expedited procedure

One of the important innovations of the Swiss Rules compared to other institutional rules, is a mandatory

expedited procedure for small claims.²³ While many disputes submitted to arbitration involve several million US\$ others can be quite small. In disputes arising out of simple cross-border sales, commodity-trading, freight contracts or bank guarantees, all of which are frequently subject to arbitration, often less than US\$ 1 million are at stake. Experience shows that full-fledged arbitration is seldom the most effective way to resolve these disputes.

In order to increase the effectiveness of arbitration as a dispute settlement mechanism in this kind of disputes, the Swiss Rules allow for expedited proceedings. According to Art.42.2 of the Swiss Rules, disputes in which the aggregate amount in dispute (claim, counterclaim, set-off defences added) does not exceed CHF 1 million will be subject to expedited procedure of Art.42.1. The amount is calculated by the Chambers upon receipt of the Answer to the Notice of Arbitration (Art.3.10), irrespective of any subsequent increase or counterclaim, for instance in the Statement of Defence.

Article 42.1 also allows for voluntary expedited proceedings. The parties are free to agree to subject their disputes to expedited proceedings even if the amount in dispute exceeds CHF 1 million

The distinctive features of expedited procedures under Art.42.1 are the following:

- Shortened time limits: The Chambers may shorten the time limits for the appointment of arbitrators. The award shall be made within six months of transmission of the file to the arbitrators (Art.3.12). In exceptional circumstances the Chambers may extend this time limit.
- Limited submissions and hearings: Unless the parties agree that the award shall be rendered on the basis of written submissions and documentary evidence, the tribunal shall hold a single hearing for all expert and fact witnesses. Of course the general principles of due process and right to be heard also apply in the expedited procedure. Awards rendered in expedited procedure that were inconsistent with these rights can be challenged under Art.190 PIL Act like an award made in ordinary proceedings.
- Summary award: The arbitral tribunal shall state the reasons upon which it relies in a summary form, unless the parties have agreed that no reasons need to be given.²⁴ However, the award still needs to decide all claims made, failing which the award can be set aside under Art.190 PIL Act (*infra* and *ultra petita*).

22. Arguably, the Chambers should also consult with the Arbitral Tribunal in cases involving parties other than the ones to the original proceedings, who have participated in its constitution, and with regard to whom the arbitrators have performed a conflict check.

23. For a comprehensive discussion, see Geisinger, *op. cit.*, n.6 above.

24. This is unproblematic in Swiss international arbitration law. According to standing case law of the Federal Tribunal, an international arbitral award does not need to give reasons (Decision of September 10, 2001, ASA Bull 2002, p.473).

- Single arbitrator: where the amount in dispute is below CHF1 million, the case shall be referred to a sole arbitrator.²⁵ If the arbitration agreement provides for three arbitrators, the Chambers invite the parties to agree on a sole arbitrator. As an incentive for the parties to agree, the Rules provide that failing an agreement, the fees of the arbitrators will not be less than the fees resulting from an hourly rate of (currently) CHF350.

Arbitral decisions

Under the Swiss Rules, the decisions of the arbitral tribunal can take three forms: interim measures, awards and a hybrid: Art.26.3 allows the arbitral tribunal to establish interim measures in the form of an **interim award**. This is particularly useful in cases where it is urgent that a party is provisionally awarded certain amounts. In construction projects, for instance, the lack of funds can bring an entire project to a halt. The arbitrators can order the respondent to pay the claimant forthwith an amount claimed, if the claim at first sight appears justified and if the claimant provides appropriate security.

In principle, the Chambers do not scrutinise the awards made by the arbitral tribunal. In order to ensure a proper application by the arbitral tribunals of the Chambers' fee schedule, the Chambers request that the draft award is submitted to them "for consultation on the decision as to the assessment and apportionment of the costs" (Art.40.4).

Within 30 days from the receipt of the award a party may request an **interpretation** of the award or the **correction** of any errors in computation including clerical errors or errors of a similar nature. Moreover, where a party considers that a claim made by either of the parties, was omitted from the award, it can request that the arbitral tribunal make an **additional award**.

According to Art.190.2 PIL Act, an award can be challenged only to the Federal Tribunal and only on the following grounds: (i) lack of jurisdictional competence of the arbitral tribunal, (ii) defects in the constitution of the arbitral tribunal, (iii) *ultra* or *infra petita*, i.e. an award that went beyond the claim or left a claim undecided, and (iv) violation of rules of substantive or procedural public policy. There is no review of the merits of the award.

25. This does not apply to cases involving amounts in excess of CHF1 million that the parties, under Art.42.1, submit voluntarily to expedited procedures.

Due to the limited grounds for challenge available and their strict application by the Federal Tribunal, chances of success are notoriously slim.²⁶

A request for setting aside an award must be filed to the Federal Tribunal within 30 days from its notification (irrespective of any application for correction or interpretation of the award made to the arbitral tribunal). Contrary to appeals in other jurisdictions, the request under Art.191 PIL Act must be fully reasoned and in a Swiss national language, i.e. French, German or Italian. If it is in another language, e.g. English, the plaintiff can choose whatever national language it prefers. According to an unwritten (and highly welcome) practice of the Federal Tribunal, the award, the exhibits and other material of the arbitration proceedings need not be translated if they are in English.

A party can request security for costs from the plaintiff in the setting-aside proceedings if the plaintiff is domiciled outside Switzerland and if it is not dispensed from providing security under a bi- or multilateral treaty. Since security can only be ordered for costs that have not yet been incurred, the defending party must file its request before starting to draft its defence brief. As the case may be, the defendant should simultaneously apply for an extension to file its brief.

Apart from the statutory remedy for setting aside in Art.190 PIL Act, case law admits a further remedy: a **request for review (revision) of an award** is admissible if a party discovers new and relevant facts or evidence.²⁷

It should be noted that in Switzerland, contrary to other jurisdictions, the mission of the arbitrators does not end with the making of their award. Thus, if an award is annulled by the Federal Tribunal, the case will be referred to the same arbitral tribunal. In a recent decision the Federal judges left open the question whether it could revoke an arbitrator if the award is annulled because of the arbitrator's partiality.²⁸

26. Since the coming into force of the PIL Act in 1989 there are, to the best of the writer's knowledge, only the following few decisions admitting a request for setting aside an international arbitral award: Decision 121 III 331, ASA Bull 1995, p.708 [denial of justice; arbitral award ignored undisputed facts]; Decision 121 III 495, ASA Bull 1996, p.508 [arbitrators cannot decide on their jurisdiction in an interim award unless they establish all the relevant facts, even those that are also relevant to the merits]; Decision of August 17, 1995, *Vekoma v Maran Coal Corporation*, ASA 1996, p.673 [contractual time-bar for bringing arbitration]; Decision 127 III 279, ASA 2001, p.544; Decision of September 30, 2003 [violation of right to be heard—surprising reliance on facts not asserted by the parties]; Decision of October 16, 2001, ASA Bull. 2002, p.97 [Assignment during the arbitration. Arbitrators upheld jurisdiction *vis-à-vis* assignee, overlooking a contractual prohibition to assign the contract]; Decision 118 II 193, ASA Bull. 1992, p.368 [Arbitrators were wrong in deciding that they had no jurisdiction to decide issue under EU competition law]; Decision of May 14, 2001, *Fomento v Colon Containers Terminal*, ASA Bulletin 2001 p.544 (French original) and p.555 (English translation) [Violation of *lis pendens* principle. Arbitrator failed to stay arbitration pending court proceedings abroad].

27. Decisions 118 II 199, 122 III 492.

28. Decision of January 7, 2004, 4P.196/2003.

Conclusions

As of January 1, 2004 the arbitration rules of the Geneva Chamber of Commerce and Industry and of the Zurich Chamber of Commerce, as well as those of four other Swiss Chambers have been replaced by a unified set of arbitration rules, the Swiss Rules. The

new rules are based on the UNCITRAL Rules but have been adapted for use in administrated arbitration and updated to account for developments in international arbitration since the adoption of the UNCITRAL Rules in 1976. It is widely believed that the Swiss Rules will further strengthen the attractiveness of Switzerland as a venue for settling disputes arising from international contracts.