



## Newsletter – 2/2012

### Swiss Rules revised and updated

Based on more than seven years of experience in administering close to six hundred cases, the Swiss Rules of International Arbitration have been revised and updated and thereby rendered even more useful for parties seeking to settle a dispute. The revised Swiss Rules take effect on 1 June 2012.

Since their creation in 2004 seven Swiss Chambers of Commerce and Industry joined together to provide arbitration services under the Swiss Rules of International Arbitration, which have met with huge success. The "light administration", the fast rendering of decisions by the arbitral tribunals, and the quality of awards have been the main reasons. These advantages have been reinforced by the current revision and several new features have been introduced.

The revised Swiss Rules can be downloaded in English from the website of the Swiss Chambers' Arbitration Institution:

[www.swissarbitration.org/sa/en/rules.php](http://www.swissarbitration.org/sa/en/rules.php)

Further languages will follow.

### Organisation

With the revised Swiss Rules, the arbitration institution and the body administering arbitrations changed their names (cf. Newsletter 1-2012). The arbitration institution of the Chambers was renamed the "Swiss Chambers' Arbitration Institution", which is incorporated as an association under Swiss law. The former Arbitration Committee was renamed the "Arbitration Court". The roles and functions of the Court and the Secretariat have been defined in the Swiss Rules, and also in the Internal Rules of the Court.

### Additional institutional powers

According to Art. 1.4, the Court is empowered to supervise the arbitral proceedings in place of an otherwise competent judicial authority to the fullest extent permitted under the applicable law. Since the Swiss Rules do not expressly address all instances in which the Court may be validly declared competent for the purpose of rendering administrative decisions under the law applicable to the arbitration, this new provision preserves the autonomy of the arbitration to the fullest extent possible. For instance, it ensures that challenges of arbitrators on grounds not provided for in the Swiss Rules, but available under the *lex arbitri*, may be decided by the Court.

Moreover, according to Art. 2.3, the Court may extend or shorten time limits it has fixed or has the authority to fix or amend. This expanded power aims at ensuring the smooth and efficient conduct of proceedings.

The Court's "gatekeeper" function is set forth in Art. 3.12. The Court's prima facie control of jurisdiction is now limited to cases where the Respondent has not filed an Answer to the Notice of Arbitration or objects to the proceedings being administered under the Swiss Rules. Respondent may thus agree to arbitration under the Swiss Rules, even if the contract did not refer to them.

The revised Art. 5.3 provides the Court with new discretionary powers to appoint arbitrators, to revoke their appointment, and to appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator. Inspired by Art. 10.3 of the revised UNCITRAL Rules, the provision accommodates the wide variety of situations in which the constitution of the arbitral tri-

bunal risks to fail. Since the constitution in multi-party scenarios is already addressed in the existing Articles 8.3 to 8.5 Swiss Rules, the new provision guarantees, for example, the successful constitution of arbitral tribunals in circumstances where the parties have agreed to a number of arbitrators other than one or three. Moreover, the concept has now also been included in the revised provision on consolidation.

### **Accelerating procedures**

Under the new Art. 15.7, all participants are under obligation to make every effort to contribute to the efficiency of the proceedings and avoid unnecessary costs and delays. Any action that hinders such efficiency may have an influence on the allocation of costs (Arts. 40.1 and 40.2).

The process for initiating arbitration was also amended. When required to designate an arbitrator as per an agreement, the parties must now designate their arbitrator in the Notice of Arbitration or the Answer thereto respectively (Arts. 3.3(h) and 3.7(f)).

Challenges to arbitrators must now be raised within 15 days after the party became aware of the grounds giving rise to the challenge (Art. 11.1). Furthermore, the Court may, in certain circumstances, directly appoint arbitrators or – after the arbitral tribunal has closed the proceedings with regard to matters to be decided in an award (Art. 29) – opt not to have an arbitrator replaced at all, and instead authorize the proceedings to continue with the remaining arbitrators (Art. 13.2(b)).

Under the revised Rules, the proceedings will be more “front loaded” in that all documents and other evidence on which parties rely should be attached to the Statement of Claim or the Statement of Defence, respectively (Arts. 18.3 and 19.2). In this way, the revision sets a higher standard on the completeness required of the first full submissions filed by the parties. At the same time, the wording “*as a rule*” allows for flexibility where needed. Experience shows that to be efficient parties and arbitral tribunals need to maintain the possibility of defining the procedure according to the specific circumstances of the case.

Last but not least, Art. 15.8 enables the arbitral tribunal, with the agreement of the parties, to take steps to facilitate the settlement of the dispute. While this is not excluded under the existing Swiss Rules, the revised Rules make it clear that by agreeing to those steps, the parties automatically waive their right to challenge an arbitrator's impartiality based on his or her participation in facilitating settlement. Recently, settlement facilitation in international arbitration has won greater international acceptance not least because of the cost and time-saving effects it may generate.

The time-limits for paying deposits at the beginning of the procedure have been shortened from 30 to 15 days (Art. 41.1 and 41.4). In Expedited Procedures, a provisional deposit of CHF 5'000 (i.e. approx. USD 5'500 or € 4'100) will be requested from the Claimant before the transmission of the file to the arbitral tribunal. This will enable the arbitral tribunal to begin the proceedings on the day on which it is confirmed, without having to wait for receipt of the advance of costs it has to request otherwise (Art. 42.1(a)).

### **Expedited Procedure**

The Expedited Procedure has been a very welcome feature of the Swiss Rules right from the beginning. It has been either agreed on by the parties, or has been used for disputes not exceeding CHF 1 million (i.e. approx. USD 1.1 million or € 0.8 million) in more than 36 % of the cases since 2004. Save for the introduction of the provisional deposit, this very successful instrument has been left unchanged.

### **Consolidation**

The rules for consolidation of proceedings have been modified so that they are fairer for all parties involved (Art. 4.1). In a case of consolidation of proceedings, all parties shall be deemed to have waived their right to designate an arbitrator, including those involved in the first arbitration into which the new case is to be consolidated. Stemming from an extended application of the new Art. 5.3, the provision now reserves the Court's right to revoke the appointment

and confirmation of arbitrators in all proceedings and appoint new arbitrators when deemed appropriate. For example, the Court may apply the mechanisms for multi-party proceedings including, if appropriate, the appointment of all arbitrators by the Court (Arts. 8.4 and 8.5).

### **Cost control**

The registration fees, the schedule of costs for the fees of the arbitrators and the administrative costs of the institution remain unchanged in the revised Swiss Rules (Appendix B - Schedule of Costs).

The role of the Court in cost control has been strengthened by the revision. Under Art. 40.4, the Court will now review the arbitral tribunal's determination of its fees, expenses, and costs of other assistance (Arts. 38(a) to (c)). The Court may either approve of the arbitral tribunal's determination or adjust it with binding effect upon the arbitral tribunal. Prior to the revision, the role of the institution was limited to consultation.

The expenses will be defined more precisely in guidelines for the accounting of expenses, which will be issued by the Court.

Under the revised Swiss Rules the deposits may be administered by the Secretariat (Appendix B Art. 4.1), freeing the arbitral tribunal from this task especially in Expedited Procedures, or by the arbitral tribunal, if so requested by the Secretariat.

### **Interim Measures**

The revised Swiss Rules take into account that efficient interim measures of protection can only be guaranteed if there is – under certain circumstances – the possibility to grant such measures without hearing the other party beforehand. Therefore, under exceptional circumstances, the arbitral tribunal may issue a preliminary order, i.e. rule on a request for interim measures before such request has been communicated to any other party, provided the communication is made at the latest together with the preliminary order and the other

party is immediately afforded an opportunity to be heard (Art. 26.3).

### **Emergency Relief**

One of the few completely new features of the revised Swiss Rules is Emergency Relief (Art. 43). Unless the parties have agreed otherwise, a party may apply for emergency relief proceedings even before the arbitral tribunal is constituted. The Court will appoint and transmit the file to a sole emergency arbitrator, unless there is manifestly no agreement to arbitrate referring to the Swiss Rules, or it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the application to it.

The decision on the application is to be made within 15 days from the date on which the file was transmitted to the emergency arbitrator. It has the same effect as a decision of an arbitral tribunal on interim measures (Art. 26), i.e. it may take the form of an award or may initially be granted by way of a preliminary order. The decision is binding upon the parties until the arbitral tribunal to be constituted modifies it or renders its final award. However, if no Notice of Arbitration is pending or submitted within 10 days from the receipt of the application for emergency relief by the Secretariat, any decision of the emergency arbitrator ceases to be binding.

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