

Kluwer Arbitration Blog

Revised Swiss Rules of International Arbitration Enter Into Force

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Thursday, May 31st, 2012

On 1 June 2012, the new revised version of the Swiss Rules of International Arbitration (“Swiss Rules”) will come into force. According to Article 1.3, the new Rules will apply to all Swiss Rules proceedings in which the Request for Arbitration is submitted after 1 June 2012, unless the Parties agree otherwise.

The Swiss Rules 2012 build on the initial version of the Swiss Rules, which were created in 2004 in order to harmonize the arbitration rules of six Swiss Chambers of Commerce (those of Basel, Berne, Geneva, Ticino (Lugano), Vaud (Lausanne), and Zurich, joined later by Neuchâtel). The 2004 Rules were based on the UNCITRAL Arbitration Rules, although they were adapted by the Chambers for use in an institutional framework. They therefore already contained some novel features, including the possibility of consolidation and joinder, as well as mandatory expedited arbitration in certain circumstances.

The Swiss Rules 2012 do not constitute a complete overhaul of the original version of the Rules, which worked well in practice, and they maintain the traditional flexibility of the Swiss Rules. They do, however, incorporate a number of important changes (for a thorough analysis of the Swiss Rules 2012 see P. Habegger, “The Revised Swiss Rules of International Arbitration – An Overview of the Major Changes”, in ASA Bull. 2/2012 (forthcoming)).

The “Swiss Chambers’ Arbitration Institution” and “Arbitration Court”

Until now, arbitration cases under the Swiss Rules were administered directly by the various Chambers. With the entry into force of the 2012 revision, arbitration services will be provided on behalf of the Chambers by the new “Swiss Chambers’ Arbitration Institution” (see <https://www.swissarbitration.org/sa/en/>), an association incorporated under the laws of Switzerland as a separate legal entity, and which is independent of the Chambers. In addition, the old “Arbitration Committee”, appointed by the Chambers to oversee the handling of cases under the Swiss Rules, will be replaced by the “Arbitration Court” of the Swiss Chambers’ Arbitration Institution.

Although these changes might seem to be merely administrative in nature, they represent a significant step forward for the Swiss Rules. It took a decade for the Swiss

Chambers to unite behind a single set of arbitration rules. It is therefore no small feat, in federalist Switzerland, that the leading Chambers from all across the country have now agreed on a joint administrative structure. The step strengthens the role of the Rules, as the structure within which they are administered now reflects their uniform nature. It also brings the Rules in line with all other arbitration rules in frequent use in Europe (ICC, LCIA, SCC, Vienna, etc.), which are administered by central structures.

The Swiss Chambers administer disputes unless “there is manifestly no agreement to arbitrate referring to” the Swiss Rules (Article 3.12, which corresponds to Article 3.6 of the Swiss Rules 2004). Clauses referring to arbitration “of the International Chamber of Commerce of (Swiss city)” and “to the appropriate board in the Canton of X” have been accepted by the Chambers as referring to the Swiss Rules.

Expedited Procedure

One of the important innovations of the 2004 version of the Swiss Rules was the mandatory Expedited Procedure for cases with amounts in dispute of less than one million Swiss Francs (Article 42(2)). Contrary to other institutions, the Swiss Chambers enforce time limits strictly, and almost all expedited proceedings are completed within the prescribed six month period from the time of transmission of the file to the arbitrator (Article 42(1)(d)). Such expedited proceedings play an important role in various sectors, including in resolving the very frequent disputes arising in the field of commodities trading, for which Geneva is one of the most important centers.

Unlike the 2004 Rules, the revised 2012 Rules now explicitly provide that the arbitrator only has to begin his or her work once the parties have made a provisional cost deposit. Indeed, pursuant to Article 42(1)(a), the Secretariat of the Arbitration Court will transmit the file to the arbitrator only after “payment of the Provisional Deposit as required by Section 1.4 of Appendix B (Schedule of Costs)”.

The value in dispute for the purposes of determining whether the Expedited Procedure is applicable is calculated upon receipt of the Answer to the Notice of Arbitration (Article 3(11) of the Swiss Rules 2012, which corresponds to Article 3(10) of the Swiss Rules 2004). The determination is not affected by any subsequent increase in the value of claims or counterclaims, for example in the Statement of Defence. Article 42(1) also allows for voluntary expedited proceedings. Indeed, the parties are free to agree to subject their disputes to expedited proceedings even if the amount in dispute exceeds one million Swiss Francs.

Emergency Relief

One of the main innovations of the 2012 revision of the Swiss Rules is the provision regarding Emergency Relief at Article 43. The provision allows parties to seek urgent interim measures prior to the constitution of the tribunal. Article 43 is applicable by default unless the parties opt out of the Emergency Relief regime. As an alternative, the parties are also free to file for interim measures before state courts (Article 43(1) with Article 26).

The applicant may file for urgent interim relief either before or after submitting the

Notice of Arbitration. If the Notice of Arbitration has not been submitted at the moment the applicant applies for interim relief, a Notice of Arbitration has to be submitted “within ten days from the receipt of the Application [for interim relief]” (Article 43(3)). Otherwise, the Court will terminate the proceedings for Emergency Relief.

The emergency arbitrator decides by way of an order or an interim award. Since Article 43(1) refers to Article 26, the emergency arbitrator’s decisions have the same effect as standard decisions on interim measures rendered by the constituted tribunal under Article 26. Emergency relief decisions pursuant to Article 43 are therefore enforceable to the same extent as interim measures decisions rendered by an arbitral tribunal, although whether interim measures ordered by an arbitral tribunal are enforceable in practice ultimately depends on the laws of the country where such measures have to be enforced.

Transitional Rules

According to Article 1.3, the Swiss Rules 2012 “shall come into force on 1 June 2012 and, unless the parties have agreed otherwise, shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date.” In principle, this means that parties that have entered into a Swiss Rules arbitration agreement prior to 1 June 2012, without having expressly excluded the application of the revised Swiss Rules, are deemed to have consented to the application of the revised Rules, including of the Emergency Relief provisions.

A party could however argue that the inclusion of Emergency Relief in the Swiss Rules is a major change which was both unforeseeable and unforeseen at the time of the conclusion of the arbitration agreement. The Swiss Federal Supreme Court has addressed how an arbitration agreement referring to the rules of an arbitration institution should be interpreted if arbitration is initiated after the rules were revised. In *Komplex v. Voest-Alpine Stahl* (ASA Bull. 1994, p. 226, Commentary by Sébastien BESSON, p. 230), the Federal Tribunal held that an arbitration agreement must be construed like any other contract, in accordance with the common intention of the parties. Consequently, a clause that expressly stipulates that arbitration should be subject to the arbitration rules in force at the time of the conclusion of the contract is likely to be enforced by the Arbitration Court of the Swiss Chambers’ Arbitration Institution. If, however, the parties did not specify the applicable version of the rules, the *Komplex* test would apply, according to which the new version of the provision at issue would apply unless the changes made to the old version result in structural and fundamental differences.

In the *Komplex* case, the parties had signed a contract in 1978. At that time, the ICC Rules of 1975 were in force. When, in subsequent arbitration proceedings, an arbitrator resigned, one of the parties claimed that the applicable replacement procedure should be that provided for in the 1988 version of the ICC Rules. The other party argued that the 1975 rules continued to apply. The Federal Supreme Court analysed both sets of Rules and came to the conclusion that the parties would have entered into their contract irrespective of which version of the ICC Rules applied since their principal choice was of arbitration as opposed to litigation. The judges found that

the 1988 revision did not fundamentally alter the ICC system and that the new rule on the replacement of arbitrators was not surprising or untenable. Consequently, the Federal Tribunal confirmed that the new rules were applicable.

Conclusion

The revised version of the Swiss Rules will usher in a new era for Swiss Chambers arbitration. The changes do not constitute an overhaul of the original 2004 Rules, which have proved themselves in practice, however they do significantly strengthen the Rules.


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