

A Swiss “(R)Evolution”: SCAI Becomes the Swiss Arbitration Centre and Enacts New Arbitration Rules

Kluwer Arbitration Blog

June 15, 2021

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Please refer to this post as: Sebastiano Nesi, ‘A Swiss “(R)Evolution”: SCAI Becomes the Swiss Arbitration Centre and Enacts New Arbitration Rules’, Kluwer Arbitration Blog, June 15 2021, <http://arbitrationblog.kluwerarbitration.com/2021/06/15/a-swiss-revolution-scai-becomes-the-swiss-arbitration-centre-and-enacts-new-arbitration-rules/>

Undoubtedly, the date of 1 June 2021 will remain a milestone for the Swiss (and international) arbitration community. This is the date when (i) the Swiss Chambers’ Arbitration Institution (SCAI) became the Swiss Arbitration Centre (the Centre), and (ii) the revised Swiss Arbitration Rules entered into force (the 2021 Swiss Rules).

The 2021 Swiss Rules, on which this post will mainly focus, constitute a welcome refinement of the existing provisions, with limited substantial amendments. Key changes include more detailed provisions on multi-party and multi-contract proceedings and several other light-touch amendments to streamline and modernise the proceedings, while reinforcing the role of the institution. A number of changes were also made to improve the Swiss Rules’ terminology and structure with a view to facilitating their use in practice.

Institutional Change: Exit SCAI, Welcome Swiss Arbitration Centre

In 2012, the Chambers of Commerce and Industry of Basel, Bern, Geneva,

Lausanne, Lucerne, Lugano, Neuchâtel and Zurich established SCAI as a not-for-profit organisation to administer arbitrations under the Swiss Rules. As of 1 June 2021 however, SCAI has become the Swiss Arbitration Centre. The Centre is a Swiss company whose shareholders are the Swiss Arbitration Association (ASA) and the Swiss Chambers of Commerce participating in SCAI. The Board of Directors of the Centre is composed of four members nominated by ASA as well as three members nominated by the Chambers of Commerce. SCAI's website (now: <https://www.swissarbitration.org/>) has been updated accordingly with a new visual and integration of the ASA website.

Despite this institutional change, arbitration clauses referring to SCAI remain valid and binding and will be recognised by the Swiss Arbitration Centre. That being said, all users are now advised to refer in any contract concluded from 1 June 2021 to the "*Swiss Rules of International Arbitration of the Swiss Arbitration Centre*".

The 2021 Swiss Rules

After their adoption in 2004, the Swiss Rules were revised a first time in 2012 to introduce an emergency arbitrator procedure and, more generally, to reinforce the efficiency of arbitration proceedings.

In 2021, the creation of the Centre prompted a detailed review of the Swiss Rules in light of past practical experience and recent developments in international arbitration. This process, led by a drafting committee composed of eminent arbitration specialists, included a broad consultation of both practitioners and users. This process led to the 2021 Swiss Rules, which entered into force on 1 June 2021.

As is immediately apparent, the approach adopted by the drafting committee was to give the Swiss Rules a welcome refresh. As the adage goes, "*if it is not broken, don't fix it*". With that in mind, the underlying idea of the revision was not to revolutionise but to upgrade the Swiss Rules and streamline arbitration proceedings under these new rules.

Modernisation, Digitalisation and Cyber-Security

The 2021 Swiss Rules contain new provisions facilitating the online management of arbitration proceedings. For instance:

- Articles 3(1) and 4(1) 2021 Swiss Rules provide that paperless filings are the new standard, while hard copies are only required under specific circumstances;
- Article 27(2) 2021 Swiss Rules also clarifies that any hearing may be held “*remotely by videoconference or other appropriate means*”. On this point, it should be noted that unlike other arbitration rules, Article 25(4) of the 2012 Swiss Rules already referred to videoconference in the context of witness examination. As such, according to commentators, the language of that provision already granted tribunals with sufficient flexibility to order remote hearings;
- Article 19(2) 2021 Swiss Rules now provides that the parties and the tribunal shall discuss issues related to cybersecurity at an early stage of the proceedings. Since the start of the pandemic and the rise of remote hearings, this provision was a much-needed clarification.

Amongst the other amendments to modernise the arbitration proceedings, one can also think of the enhanced requirements for independence and impartiality of arbitrators and related disclosures (Article 12 2021 Swiss Rules), the appointment of a tribunal’s secretary (Article 16(3) 2021 Swiss Rules), the possibility for a tribunal to “*oppose the appointment of a new representative where this would risk jeopardising the impartiality or independence of the arbitral tribunal*” (Article 16(4) 2021 Swiss Rules), and the newly-introduced obligation for the tribunal to hold a case management conference “*as soon as practicable after receiving the file from the Secretariat*” (Article 19(2) 2021 Swiss Rules).

The Reinforcement of the Role of the Institution

Under the 2021 Swiss Rules, the Centre will play a more prominent role. For instance, it is now for the Secretariat (and not the tribunal as was the case under the 2012 Swiss Rules) to hold the deposit to be paid by the parties (Appendix B, Section 4.1). Also, the Secretariat shall now receive electronic copies of all communications (Article 16(2) 2021 Swiss Rules), and it is the Secretariat (and not the tribunal as this was the case under the 2012 Swiss Rules) who will notify the

originals of the arbitral award to the parties (Article 34(5) 2021 Swiss Rules).

The gate-keeping function of the institution when deciding whether a case may proceed is also now clarified. Under Article 3 of the 2012 Swiss Rules, if the Respondent did not submit an Answer to the Notice of Arbitration, or if the Respondent raised an objection to the arbitration being administered under the rules, the Arbitration Court of the Centre (the Court) had to administer the case, unless there was manifestly no agreement to arbitrate referring to the rules. Under Article 5 of the 2021 Swiss Rules, in addition to the standard *prima facie* review whether there is manifestly no arbitration agreement referring to the Swiss Rules, this new article provides that the Court shall also determine whether the arbitration agreements are “*manifestly incompatible*” if more than one contract is invoked. However, and this is a crucial point, when the Court decides to administer the case, the tribunal retains the full power to rule on any jurisdictional issue, including an objection that claims brought under different arbitration agreements should not be determined together (Article 23(1) 2021 Swiss Rules).

Multi-party and Multi-contract Arbitrations

Provisions on multi-party and multi-contract arbitrations were amongst the most discussed issues by the drafting committee.

Regarding the issue of joinder, Article 4(2) of the 2012 Swiss Rules, which was already a very innovative feature at the time it was adopted, focused almost exclusively on the tribunal and its power to decide on a request of joinder made by one or more third persons. This provision has now been replaced by Article 6 of the 2021 Swiss Rules, which addresses the situations where, for example, a respondent raises claims against another co-respondent (cross-claim) or an additional party (joinder), or where an additional party seeks to participate in the proceedings by bringing claims against an existing party (intervention).

Article 6(1) 2021 Swiss Rules further requires the submission of a separate notice of claim against the targeted party. Before the constitution of the tribunal such notice of claim shall be submitted to the Secretariat (Article 6(2) 2021 Swiss Rules), which will then proceed to a *prima facie* review if the party sought to be joined raises an objection (within 15 days). The tribunal remains however in charge of deciding on the admissibility of a request submitted after its constitution (Article

6(3) 2021 Swiss Rules). For its part, Article 6(4) 2021 Swiss Rules contemplates the possibility for a third person to participate in the proceedings *“in a capacity other than an additional party”*, allowing tribunals to *“decide on whether to permit such participation and on its modalities”*.

This new regime is intended to ease the organisation of the proceedings and the constitution of the tribunal at the outset of the case, but it does not entail any consequences for jurisdiction, which remains a matter for the tribunal to decide.

Regarding the issue of consolidation, Article 7 of the 2021 Swiss Rules replaces Article 4(1) of the 2012 Swiss Rules, without any substantive changes. Decisions on the consolidation of proceedings are still exclusively taken by the Court.

Settlement Facilitation / Mediation

While, like the 2012 Swiss Rules, the 2021 Swiss Rules provide for the tribunal’s potential role as settlement facilitator (Article 19(5) 2021 Swiss Rules), the revised Swiss Rules now expressly provide that, at any time during the arbitration proceedings, the parties may agree to resolve their dispute, or any portion of it, by mediation, including under the Swiss Rules of Mediation, or any other forms of alternative dispute resolution. To facilitate this process, and unless the parties agree otherwise, the arbitration proceedings will be stayed during that period (Article 19(6) 2021 Swiss Rules).

Costs of Arbitration

In order to reflect the increased workload of the Secretariat under the 2021 Swiss Rules, the revised Schedule of Costs in Appendix B provides for slightly higher administrative costs only charged for amounts in dispute above CHF 300,000 and capped at CHF 75,000 for disputes above CHF 250 million. This increase in administrative costs is however counterbalanced by a scale providing for slightly reduced fees for arbitrators.

What You Will NOT Find in the 2021 Swiss Rules

Rightly or wrongly, and this is a matter for the arbitration community to discuss, several other ideas were considered by the drafting committee but were eventually not introduced into the 2021 Swiss Rules. For instance, the 2021 Swiss rules:

- do not dispense with the requirement of notifying original copies of the award.
- do not provide for an early dismissal / early determination of claims' mechanism.
- have not increased the CHF 1 million threshold for expedited proceedings.

Conclusion

The creation of the Swiss Arbitration Centre is a welcome improvement. Although SCAI and ASA have long been complementary forces, the division between SCAI, on the one hand, and ASA, on the other, was not always very well understood by the arbitration community. The future cooperation between these two institutions under the umbrella of the Centre offers very promising perspectives for the development of Switzerland as a global arbitration hub. It is therefore unsurprising that the creation of the Centre made it to the GAR Awards 2021 nomination list for "Best innovation".

While they have not undergone any major revolution, the 2021 Swiss Rules have been refreshed and modernised but have also retained their essential character. The 2021 Swiss Rules will undoubtedly enhance the efficiency of any arbitration proceedings while maintaining party autonomy, flexibility and cost-effectiveness. In that regard, the 2021 Swiss Rules convey a message of continuity of an alternative dispute resolution system that has proven very satisfactory in many years of practice.