Arbitration

in 57 jurisdictions worldwide

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The Swiss Chambers of Commerce

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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 fairly 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 (the 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. They have been adapted and modernised for use in an institutional framework and to take into account developments in international arbitration practice. The Swiss Rules therefore provide for certain novel features, namely, expedited procedure, joinder and consolidation of proceedings, a broad scope for set-off defences and extensive confidentiality obligations (as detailed below). A new, slightly revised, version of the Rules will into force around mid-2012. The main anticipated changes are set out in broad terms in the last section of this chapter.

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-thirds of the cases filed between 2004 and 2010). 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, comprising 35 representatives of the chambers and of their local arbitration committees. The organisation of the bodies administering the Swiss Rules has been clarified in the 2012 version (with the Arbitration Committee being renamed the ‘Arbitration Court’, assisted by a ‘Secretariat’, comprising seven offices) although the administration of the Rules will be largely identical from the users’ perspective (arbitrators and parties).

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 has succeeded, although in 2011 a sole arbitrator was removed upon request of both parties for failure to fulfil his or her functions) 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. However, the Swiss Rules in their 2012 version will govern both international and domestic arbitration. Domestic arbitrations will remain subject to Swiss domestic arbitration law, as set out 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 (the 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 interna-
tional 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 Interna-
tional Chamber of Commerce of [Swiss city]’ or ‘to the appropriate
arbitration board in the Canton of [X]’ or to ‘the rules and legisla-
tion 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 tri-
bunal, in particular in the conduct of the arbitral proceedings (article
15). They are in that sense not much different from other institu-
tional rules. They are however characterised by a ‘light’ administra-
tion, 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 arbi-
tration committees is very fast, including with respect to the appoint-
ment 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 maxi-
mum 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 collec-
tion 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. Under the 2012 Rules,
the Court will actually have to approve or adjust any determination
on costs. The rest of the award is not scrutinized by the Chambers,
and this will not change.

Expedited procedure
One of the most significant innovations of the Swiss Rules, as com-
pared 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 provi-
sion. 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 rea-
sons 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
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 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, including in their 2010 revised version, set-off rights are limited to those rights arising out of the same contract as those giving rise to the main claim.

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 appoint- ment. 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 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 eight 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, in 80 per cent of the new cases both parties were from outside Switzerland.

In 2011, a group of Swiss experts proposed a ‘light’ revision of certain provisions of the Swiss Rules in light of the practice that had developed since 2004. The 2012 version of the Rules will come into force in mid-2012. As mentioned, the bodies administering the Rules have been renamed, with an ‘Arbitration Court’ assisted by a ‘Secretariat’ with offices attached to each of the seven Chambers. The Court’s powers have been increased only with respect to the control over the costs of the arbitration as determined by the arbitral tribunal, which now have to be approved by the institution. The Rules also now set out the procedure and time limits for the challenge and replacement of arbitrators and contain slightly more detailed provisions regarding the granting of interim measures (including preliminary orders) and the taking of evidence. The main change, however, consists in the introduction of a specific procedure for emergency relief to be granted by an emergency arbitrator within 15 days of an application being made and the required fee being paid.