

Background of the 2012 Revision: What Were the Main Objectives?

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1. INTRODUCTION

What were the main objectives of this first revision, only a few years after the entry into force of the Swiss Rules of International Arbitration (*hereinafter* Rules)?

1. Strengthen the supervisory powers conferred upon the arbitral institution;
2. Accelerate the proceedings;
3. Achieve even more flexibility for the arbitral tribunal;
4. Facilitate the consolidation of several proceedings;
5. Improve the control of the costs by the arbitral institution;
6. Grant an emergency relief by emergency arbitrators;
7. Extend the scope of application to domestic arbitration.

Despite these main objectives, the 2012 revision was only a partial and not a general one. The aim was to add improvements based on the several years of experience under the 2004 Rules. The Working Group did not have a more ambitious target simply because the 2004 Rules have by and large worked well. This is also why the starting point of the revision was the former text of the Swiss Rules and not the amended UNCITRAL Arbitration Rules (as revised in 2010).

2. STRENGTHEN THE SUPERVISORY POWERS OF THE ARBITRAL INSTITUTION

The 2004 Rules were based on the 1976 UNCITRAL Arbitration Rules, which were designed for *ad hoc* proceedings. The 2004 version thus already contained several new elements adapting the UNCITRAL *ad hoc* model to institutional arbitration. This endeavour has been further developed by the following measures in the 2012 revision.

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First, the Chambers of Commerce founded a new and independent institution, the “Swiss Chambers” Arbitration Institution”. This institution then established the Arbitration Court. The Court replaced the former “Arbitration Committee” and the “Special Committee”. The new structure is designed to be more centralized. It will insure better coordination of the practice of each Chamber. The Court is assisted by the Secretariat, which continues to work in a decentralized manner and in separate offices.¹

As a second measure to strengthen the institution, Art. 1(4) extends the supervisory powers of the Arbitration Court. These powers expressly include the competence “to extend the term of office of the arbitral tribunal and to decide on the challenge of an arbitrator on grounds not provided for in the[se] Rules”. These are two areas which before potentially fell under the jurisdiction of judicial authorities. They are now clearly within the scope of the Arbitration Court’s authority. Art. 1(4) thus gives the broadest possible powers to the arbitral institution. It allows the parties to avoid having to resort to national courts to administer their arbitration.

Under Art. 5(3), the Court now also has “all powers to address” any failure in the constitution of the arbitral tribunal. It can “revoke an appointment made, appoint or reappoint any of the arbitrators”. This new provision ensures an appropriate constitution of the arbitral tribunal under all circumstances.

The institutional aspect has been strengthened in yet another way. Art. 3(12) amends the arbitral institution’s power to refuse to administer an arbitration when there is “manifestly no agreement to arbitrate referring to these Rules”. Under the revised Rules, the Court examines this issue only after – and not before – the notification of the Notice of Arbitration to the Respondent. This allows the Respondent to accept the jurisdiction of the arbitral tribunal or at least the principle of an arbitration under the Swiss Rules.

Finally, the arbitral institution also exercises its expanded supervisory powers through a better control of the costs (see below, section 6).

The organizers of the ASA Conference of January 2014 have conducted a survey among arbitration practitioners regarding their perception of the Swiss Rules. With respect to the degree of involvement of the Swiss Chamber’s Arbitration Institution in the arbitration proceedings, 85% of the participants considered that it was “just right”.²

¹ Swiss Chambers’ Arbitration Institution, Swiss Rules of International Arbitration (June 2012), Appendix A.

² See Annex Swiss Rules Survey.

3. ACCELERATE THE PROCEEDINGS

Art. 41(4) reduces the time limit for the payment of the deposits of costs from 30 to 15 days.

Art. 11(1) introduces a new time limit of 15 days for the challenge of an arbitrator. In comparison: Art. 14(2) ICC Rules provides for a time limit of 30 days. The new Art. 11(2) also provides that if, within another 15 days, the parties do not agree to the challenge or the arbitrator does not withdraw, the Court shall decide on the challenge. These provisions thus bring more clarity and predictability to the challenge proceedings, not only with respect to time.

4. MORE FLEXIBILITY FOR THE ARBITRAL TRIBUNAL

Art. 15(7) introduces a general duty to “act in good faith”. This duty applies to “[a]ll participants in the arbitral proceedings”. According to this provision it means in particular that the participants are obliged to make “every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays”. For arbitrators, this new provision could provide a basis for procedural directions to improve the efficiency of the proceedings. It could also justify decisions on costs adverse to the party causing unnecessary costs and delays.

Art. 15(8) allows the arbitral tribunal to “take steps to facilitate the settlement of the dispute”, with the agreement of the parties. This provision clarifies the existing situation with respect to facilitation of amicable settlement by the arbitral tribunal.³

According to the new Art. 26(1), the arbitral tribunal may modify, suspend or terminate any interim measures granted. In exceptional circumstances and with prior notice to the parties, it can do so also on its own initiative.

Subsection 3 of Art. 26 expressly allows—as a novelty—for *ex parte* measures by way of a preliminary order.⁴

5. FACILITATE THE CONSOLIDATION OF SEVERAL PROCEEDINGS

Two novelties in the long provision of Art. 4(1) achieve this objective:

³ See, Markus Wirth’s contribution, *Settlement Facilitation*, in this volume.

⁴ See, in this volume Christopher Boog’s contribution, *Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances*, section 2.

First, in case of consolidation, “the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator”. Under the 2004 Rules, only “the parties to the new case” lost this right.

Second, the Court may revoke the appointment and confirmation of arbitrators and confirm (or not) new arbitrators.

The purpose of these two novelties is to guarantee equal rights to the Parties to appoint arbitrators and thus to favour consolidation.⁵

6. IMPROVE THE CONTROL OF THE COSTS BY THE ARBITRAL INSTITUTION

Under Art. 40(4), any determination of the costs, including the determination by the arbitrators of their own fees, is subject to the “approval or adjustment” by the Court. The provision specifies that any such approval or adjustment shall be binding upon the arbitral tribunal. Under the 2004 Rules, the institutional scrutiny was limited to a “consultation”. The revision aims at giving the arbitral institution the “last word” on the issue of costs. The arbitrators remain, however, exclusively competent to determine the allocation of costs among the parties.

Under Art. 41(1), the arbitral tribunal will also determine the deposit of costs “after consulting with the Court”. Such consultation was not required under the 2004 Rules. In practice, the arbitrators are not required to consult the Court as long as the requested deposits are below the average total costs of the arbitration.

The “Administration of Deposits” is also subject to more detailed rules (see Appendix B Sect. 4.1). The deposits must be held in a separate bank account. This account is to be held by the Secretariat or by the arbitral tribunal, “if so requested by the Secretariat”. In practice, the Secretariat systematically requests the arbitrators to establish such a separate bank account. Under the 2004 Rules, the sole arbitrator, or the presiding arbitrator, was exclusively in charge of administering the deposits. The release of part of the deposits to the arbitrators as an advance on costs needs the approval of the Court (see Appendix B Sect. 4.2).

With the entry into force of the 2012 revision, the Court also issued general guidelines for arbitrators on the accounting of expenses (see Appendix B Sect. 3).⁶ The Chambers have never used this competence, even though the 2004 Rules had already provided for it.

⁵ See, in this volume Ruth Stackpool-Moore’s contribution, *Joinder and Consolidation – Examining Best Practice in the Swiss, HKIAC and ICC Rules*, section 3.2 and 3.3.

⁶ These Guidelines are available on https://www.swissarbitration.org/sa/download/guidelines_for_arbitrators_2012.pdf.

The revised Rules also better protect the arbitrators for the time spent on the case before any deposit of costs has been made by the parties. The purpose was to avoid any delay in the conduct of the proceedings due to the arbitrators' legitimate concerns regarding their remuneration.

In order to address this concern, the time limit for the payment of the deposits has been reduced from 30 to 15 days, as mentioned before (see Art. 41(4)). Furthermore, the payment of a provisional deposit has been introduced for expedited procedures (Art. 42(1)(a) and Appendix B Sect. 1.4). Finally, the new Rules provide for a specific deposit in relation to applications for emergency relief by the emergency arbitrator (Art. 43(1)(c) and Appendix B Sect. 1.6).

7. EMERGENCY RELIEF

The 2012 revision also introduced a means for emergency relief by emergency arbitrators in Art. 43. By doing so, the Swiss Chambers' Arbitration Institution followed a general trend of other arbitral institutions.

To this day (24 April 2014), the Secretariat has received only one application for emergency relief proceedings. The President of the Court appointed the emergency arbitrator one day after the Secretariat received the application. One day later, the emergency arbitrator received the case file. 14 days after the transmission of the file, the emergency arbitrator rendered his order of 31 pages. During the emergency proceedings, the parties and the emergency arbitrator held a conference call and a hearing at the place of arbitration. The Parties exchanged two set of written briefs (i.e. the request for emergency relief, the answer to the request for emergency relief, the statement of reply and the statement of rejoinder) and submitted their statements of costs. The case is currently pending before a three-member arbitral tribunal under the Swiss Rules.

Art. 43 applies "unless the parties have agreed otherwise". There is therefore no need for a specific agreement to initiate this new procedure. It is, however, not mandatory and can be "opted out".

The decision of the emergency arbitrator shall have the same effects as a decision of "interim measures of protection" made pursuant to Art. 26 (Art. 43(8)).⁷

⁷ See, in this volume Christopher Boog's contribution, *Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances*, section 3.

8. DOMESTIC ARBITRATION

Last but not least, the application of the Swiss Rules to domestic arbitration was a main objective of the 2012 revision. Therefore, since 1 June 2012, the Swiss Rules automatically apply not only to international arbitration, but also to domestic arbitration (Introduction Sect. c). They thus replace the former rules of the Chambers governing domestic arbitration. By contrast, the 2004 Rules were not applicable *per se* to domestic arbitration. However, the Chambers decided to administer such arbitrations if the parties so specifically agreed.

Despite this important change in the scope of application, the name “Swiss Rules of *International* Arbitration” was maintained following a heated debate among the members of the Working Group.

9. CONCLUSION

As with every set of arbitration rules, the choices made by the drafters of the 2012 revision are of course open to criticism. According to the survey conducted in the framework of this Conference,⁸ further features should be considered for inclusion in a future revision of the Swiss Rules. The survey mentions items such as case management conference, scrutiny process or a more active involvement of the institution in general. Obviously, such features could also have been included in the present revision.

However, from a general standpoint, the 2012 revision has achieved its main objectives. It has improved the Swiss Rules in several respects, in particular by enhancing cost control and by introducing a mechanism for emergency relief.

The new Swiss Rules are a good product meeting the needs of modern institutional arbitration. One can safely advise reference to them in a contract when arbitration as such is appropriate. This is also the result of the survey conducted in the framework of this Conference, as 80% of the participants would recommend the inclusion of the Swiss Rules in an arbitration clause in any situation.⁹

⁸ See annex, Swiss Rules Survey.

⁹ See annex, Swiss Rules Survey.