

N

Monthly
Newsletter
July 2021

International
Arbitration

Schellenberg
Wittmer



Swiss Rules of International Arbitration (Swiss Rules) 2021

Janine Häslér

Key Take-aways

- 1.** The institution is rebranded the "Swiss Arbitration Centre" – arbitration agreements referring to SCAI or the chambers of commerce remain valid and binding.
- 2.** The revised Rules entered into force on 1 June 2021 and apply to all arbitration proceedings which are initiated on or after that date, unless the parties have agreed otherwise.
- 3.** The new provisions regarding complex arbitrations foster legal certainty, while at the same time preserving the necessary flexibility of the parties and the arbitral tribunal.

1 Introduction

In the course of the restructuring of the arbitration institution of the Swiss chambers of commerce into the "**Swiss Arbitration Centre**", the Swiss Rules of International Arbitration ("Swiss Rules") have also been revised.

The Swiss Rules first came into existence in 2004 and were last amended in 2012. They have now undergone a moderate overhaul with the primary purpose of reflecting the most recent developments and trends in International Arbitration.

The revised Swiss Rules **came into force on 1 June 2021** and apply to all arbitration proceedings initiated on or after that date, unless the parties have agreed otherwise.

2 New Swiss Arbitration Centre

At the end of May 2021, the Swiss Chambers' Arbitration Institution ("**SCAI**") was converted into a Swiss stock company and rebranded the "Swiss Arbitration Centre". The Swiss Arbitration Centre has assumed the tasks previously handled by SCAI.

All existing arbitration agreements referring to SCAI remain valid and binding. The same applies to arbitration agreements referring to the rules of a chamber of commerce or other organization, which adhere to the Swiss Rules or subject their proceedings to the Swiss Rules. Arbitration proceedings under such agreements may be initiated before the Swiss Arbitration Centre. Arbitration proceedings initiated before 1 June 2021 will be administered by the Swiss Arbitration Centre under the previously applicable Swiss Rules.

3 Main Amendments

The revised Swiss Rules continue to place paramount importance on **party autonomy, flexibility of the proceedings** and the **discretion of the arbitral tribunal**. The revision process primarily resulted in structural changes and focused amendments, rather than a complete overhaul of the pre-existing rules.

3.1 Digitalisation

The Swiss Rules keep abreast with the digital era and abandon the requirement for hardcopy submissions of the Notice of Arbitration and Answer to the Notice of Arbitration. Instead, an **electronic submission** to the secretariat of the arbitration court of the Swiss Arbitration Centre ("**Secretariat**") is sufficient, unless the Secretariat or a party requests otherwise (Articles 3 and 4).

The 2012 Swiss Rules already allowed for remote hearings, albeit implicitly. Nevertheless, under the previous rules there were at times discussions as to whether the parties had deviated from this principle for instance if they agreed on a venue for the hearing at the outset and the circumstances changed later in the proceedings. The Swiss Rules 2021 now expressly empower the arbitral tribunal to hold hearings remotely by **videoconference or other appropriate means**, as decided by the arbitral tribunal after consulting with the parties (Article 27 (2)). Parties who wish to exclude remote hearings

altogether may consider including an express provision in their arbitration agreement.

3.2 Complex Arbitration Proceedings

Arbitration proceedings can be complex in particular if they involve **more than two parties** or concerns **several agreements**.

Revised Swiss Rules address the most recent developments and trends.

3.2.1 Proceedings based on several arbitration agreements

The revised Swiss Rules extend the arbitration court of the Swiss Arbitration Centre's ("**Court**") *prima facie* review in terms of administration of claims, providing that the Court shall not let the arbitration proceed with all claims where claims are made under more than one arbitration agreement and the arbitration agreements are **manifestly incompatible** (Article 5(1)(b)).

If the Court denies the administration of a claim following its *prima facie* review, the claimant is not barred from initiating separate proceedings concerning the claim in question.

A decision of the Court under Article 5 to continue with the proceedings is without prejudice to the arbitral tribunal and does not constrain the assessment of its jurisdiction (Article 5 paragraph 2).

3.2.2 Cross-Claim, Joinder and Intervention

The **Joinder** of and **Intervention** by third parties in a pending arbitration was already permissible under the previous Swiss Rules (Article 4 Swiss Rules 2012). The prior provision was concise and allowed utmost flexibility to address the circumstances of each individual case.

The revised Article 6 preserves this **flexibility** and incorporates established practice on the issue. At the same time, the provision is more detailed and fosters **legal certainty**.

Article 6(1) provides that a party asserting a claim against another party other than a claim in the Notice of Arbitration or a counterclaim in the Answer to the Notice of Arbitration (cross-claim), or a party asserting a claim against an additional party (joinder), or an additional party asserting a claim against an existing party (intervention), must file a **notice of claim**. The revised provision does not only allow for the Joinder of and Intervention by third parties, but also so-called **cross-claims**, for example a claim by one respondent against another.

Prior to the **constitution** of the **arbitral tribunal**, the Secretariat notifies the notice of claim to the addressee of the claim, to the other parties and to any confirmed arbitrator(s) (Article 6(2)). The parties can object to the application of the Swiss Rules to the claim or raise any other jurisdictional objection within 15 days from the date of the receipt of the notice of claim. Such jurisdictional objections may be assessed by the

Court on a prima facie basis and can lead to the discontinuation of the proceedings in relation to that claim pursuant to Article 5.

After the **constitution** of the **arbitral tribunal**, any cross-claim, request for joinder or request for intervention is decided by the arbitral tribunal. Before rendering a decision, it will consult the parties and take all relevant circumstances of the case into account (Article 6(3)).

The revised Swiss Rules allow third parties to be joined or intervene in arbitration proceedings in a capacity other than an additional party (Article 6(4)). This includes, for example, **third-party interventions** (*Nebenintervention/intervention accessoire*) and **third-party notices** (*Streitverkündung/dénonciation d'instance*). The arbitral tribunal is competent to rule upon the permission of such a participation as well as its terms and conditions. It must consult all parties as well as the third party and take all relevant circumstances of the case into account.

An (additional) party, who submits a notice of claim pursuant to Article 6(1), shall pay a non-refundable **Registration Fee** computed on the basis of the aggregate amount of all of its claims. In addition, an increase of the Administrative Costs by 10 percent for each additional party up to a maximum increase of 30 percent applies (Appendix B, Section 2.9).

Alternative Dispute Resolution is encouraged.

3.3 More Prominent Role of the Swiss Arbitration Centre

The revised Swiss Rules vests the Swiss Arbitration Centre with a more prominent role in the administration of the arbitration proceedings than the previous SCAI.

In the future, the **Secretariat** of the Swiss Arbitration Centre holds the **deposits** to be paid by the parties (e.g. advance payments of fees) in ordinary proceedings and the arbitral tribunal is deprived from doing so (Appendix B, Section 4.1).

Under the revised Swiss Rules, any communication between the parties and the arbitral tribunal has to be copied to the Secretariat (Article 16(2)). The award is **notified** to the parties **by the Secretariat**, rather than by the arbitral tribunal (Article 34(5)). However, also under the revised Swiss Rules, the award will not be scrutinized by the Swiss Arbitration Centre.

The Court does continue to **review the determination on costs** made by the arbitral tribunal and can either approve or adjust such determination (Article 39(5)).

3.4 Initial Conference

In view of an **efficient conduct of the proceedings**, the revised Swiss Rules require the arbitral tribunal to hold an **initial conference** with the parties as soon as practicable after receiving the file from the Secretariat (Article 19(2)). Although it was standard practice, an initial conference was not mandatory under the previous Rules.

The main purpose of the initial conference is to discuss the **organisation of the arbitration proceedings** with the parties and to prepare a procedural timetable setting forth the steps to be undertaken in the course of the proceedings (Article 19(2) and (3)). In particular, issues such as **data protection** and **cybersecurity** should be discussed to the extent necessary to ensure an appropriate level of compliance and security.

Party autonomy is safeguarded.

3.5 Reinforced Impartiality and Independence of the Arbitral Tribunal

In order to reinforce the impartiality and independence of the arbitral tribunal, the revised Swiss Rules provide that the secretary of the tribunal must adhere to the same obligations and standards as the arbitrators (Article 16(3)). Furthermore, the arbitral tribunal may oppose the appointment of a new representative where this would risk jeopardising the impartiality or independence of the tribunal (Article 16(4)).

3.6 Mediation and Other Forms of Alternative Dispute Resolution

Switzerland has a long-standing tradition of alternative dispute resolution in various forms. Accordingly, the Swiss Rules expressly empower the Tribunal, with the agreement of each of the parties, to take steps to facilitate the settlement of the dispute before it (Article 19(5)). Moreover, at any time during the arbitration proceedings, the parties are free to resort to **mediation**, including under the Swiss Rules of Mediation, or **any other forms of alternative dispute resolution** to resolve their dispute, or any portion of it. Unless the parties agree otherwise, the arbitration proceedings will be stayed during that period (Article 19(6)).

3.7 Adjusted Schedule of Costs

The Schedule of Costs was also adjusted as part of the revision process. When a party initiates arbitration under the Swiss Rules, it must pay a non-refundable Registration Fee (Appendix B, Section 1.1). Under the revised Swiss Rules, the Registration Fee also applies in case of Cross-Claims, Joinder and Intervention of third parties pursuant to Article 6.

As soon as the number of arbitrators is determined and the total amount in dispute is known on a preliminary basis, the Secretariat shall request the claimant who has initiated the arbitration proceedings to pay a Provisional Deposit (Appendix B, Section 1.4). Such a Provisional Deposit is considered as a partial payment of the claimant's deposit (Article 41(1)).

The Administrative Costs as well as the fees of the arbitrators were slightly amended (Appendix B, Section 6). In particular, the revision introduced a fixed application fee for a notice of challenge of an arbitrator as well as an annual fee for the stay of arbitration proceedings (Appendix B, Section 2.10).

4 Conclusion

Since 1 June 2021 the **Swiss Arbitration Centre** administers all arbitrations under the Swiss Rules of International Arbitration (Swiss Rules). The Swiss Rules have experienced a moderate overhaul. The revised Swiss Rules reflect the most recent developments in international arbitration, whilst, at the same time, continuing to promote **party autonomy** and **flexibility of the proceedings**.



Dr. Christopher Boog
Partner Zurich
christopher.boog@swlegal.ch



Anya George
Partner Zurich
anya.george@swlegal.ch



Philippe Bärtsch
Partner Geneva
philippe.baertsch@swlegal.ch



Elliott Geisinger
Partner Geneva
elliott.geisinger@swlegal.ch

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or one of the persons mentioned above.

Schellenberg Wittmer Ltd is your leading Swiss business law firm with more than 150 lawyers in Zurich and Geneva, and an office in Singapore. We take care of all your legal needs – transactions, advisory, disputes.



Schellenberg Wittmer Ltd
Attorneys at Law

Zurich
Löwenstrasse 19
P.O. Box 2201
8021 Zurich / Switzerland
T +41 44 215 5252
www.swlegal.ch

Geneva
15bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
www.swlegal.ch

Singapore
Schellenberg Wittmer Pte Ltd
6 Battery Road, #37-02
Singapore 049909
T +65 6580 2240
www.swlegal.sg