INTERNATIONAL ARBITRATION BRIEFING

REVISED SWISS RULES OF INTERNATIONAL ARBITRATION

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Introduction

The Swiss Rules of International Arbitration ("Swiss Rules") were adopted in 2004 with an aim to replacing the existing arbitration rules of the different Swiss Chambers of Commerce (Basel, Berne, Geneva, Neuchâtel, Ticino, Vaud and Zurich) by one set of rules based on the UNCITRAL Arbitration Rules. The objective was to promote institutional arbitration in Switzerland on the basis of a well improved set of rules. Seven years on after the advent of the Swiss Rules and taking into account some important changes in the arbitration environment (including the adoption of a unified Code of Civil Procedure in Switzerland applicable to domestic arbitration, and the revision of the UNCITRAL and the ICC Rules internationally), in 2010, a working group was set up by the Swiss Chambers of Commerce in order to consider a possible revision to the Swiss Rules. In the light of their past success, the working group understood that a **"light" revision to the Swiss Rules** would be sufficient and consequently proceeded with the following goals in mind:

1. to strengthen the independence of the arbitration institution and to extend its powers;
2. to enhance the efficiency of the arbitral process in terms of time and costs; and
3. to preserve the flexibility of the proceedings and the autonomy of the parties and of the arbitral tribunal.

The revised Swiss Rules came into force on **1 June 2012** and they apply to arbitration proceedings initiated on or after that date (unless otherwise agreed to by the parties).

Independence and Powers of the Arbitration Institution

Instead of the rather decentralised administration of the past, which was carried out to a large extent by the various Chambers of Commerce, the new Swiss Rules now introduce the new **"Swiss Chambers' Arbitration Institution"**, which is a separate legal entity (an association under Swiss law). Further, the new Arbitration Court

(the "Court") replaces the former Arbitration Committee for the purposes of administering the arbitration proceedings under the Swiss Rules. The Court can delegate the power to take certain decisions pursuant to its internal rules to one or more of its members or committees, allowing for a degree of flexibility in the organisation, which was not provided for by the former Swiss Rules. A new Secretariat of the Court (the "Secretariat") assists the Court in its work and is responsible for the administrative tasks relating to the arbitration proceedings. Therefore, the Swiss Chambers' Arbitration Institution acts as one organisation but with seven offices (one in each of the seven Chambers of Commerce concerned), enabling the Secretariat to continue to work in a decentralised manner.

The **power of the institution** has been enhanced in many ways. Notably, there is the new Article 1(4), which provides that by submitting their dispute to arbitration under the Swiss Rules, the parties confer on the Court, to the fullest extent permitted under the law applicable to the arbitration, all of the powers required for the purposes of supervising the arbitral proceedings, including the power to extend any terms of office of the arbitral tribunal and to decide on challenges of arbitrators based on grounds not provided for in the Swiss Rules. This amendment strengthens the autonomy of the arbitration with the intent of limiting state-court intervention. Other provisions allow the Court to extend or shorten time-limits (Article 2(3)), to ensure the proper constitution of the arbitral tribunal (Article 5(3)), or to approve or adjust the decisions on costs (Article 40(4)). Still, the administration remains "lighter" than with other arbitration rules. There is for example no requirement of Terms of Reference and no review of the award by the Court (save in relation to costs).

Efficiency of the Arbitral Process

An essential provision in the revised Swiss Rules is Article 15(7) which provides that all participants in the arbitral proceedings shall act in good faith and shall make every effort to **contribute to the efficient conduct of the proceedings** and to avoid unnecessary costs and delays. A violation of this provision could possibly trigger consequences in the allocation of costs (Article 40(1 and 2)).

One of the most efficient tools of the Swiss Rules continues to be the **expedited procedure** (Article 42), which already existed under the former Swiss Rules, and which applies to arbitrations involving amounts in dispute of less than CHF 1 million (or higher amounts in dispute if the parties so agree). In such cases, the award is issued within six months of the date on which the Secretariat transmitted the file to the arbitral tribunal. The experience under the former Swiss Rules has been very positive, illustrating first that the expedited procedure was very popular, and secondly, that the six-month time-limit was respected in the large majority of the cases. A provisional deposit of CHF 5,000 has been introduced in the revised Swiss Rules in order to cover the arbitral tribunal's initial efforts (Appendix B, Article 1(4)).

The revised Swiss Rules include a new feature aiming to improve efficiency – the **emergency relief** (Article 43), the purpose of which is to address a situation in which a party requires urgent interim measures before the arbitral tribunal is constituted. This emergency relief is only available in truly urgent situations, and the party requesting it has to pay a provisional deposit of CHF 20,000 to the Court together with the application for such emergency relief. The emergency arbitrator enjoys a wide discretion to conduct the proceedings, but the decision on the application is to be rendered within 15 days from the date of the transmission of the file to the emergency arbitrator. It is possible to opt-out of the emergency relief proceedings (Article 43(1)). Further, for arbitration clauses signed before the adoption of the revised Swiss Rules, *i.e.*, before 1 June 2012, the emergency relief is in principle available, unless the analysis of the will of the parties leads to a different conclusion.

Another new provision, Article 26(3), provides for the possibility of *ex parte* **interim relief** by the arbitral tribunal, however, only in exceptional circumstances and provided

that the party, against whom the *ex parte* measure is directed, is immediately granted an opportunity to be heard. A related new provision is Article 26(4), which grants the arbitral tribunal the competence to rule on claims for compensation for an unjustified interim measure.

There are other provisions which add to the efficiency of the Swiss Rules, for example, a specific 15 days deadline for challenging an arbitrator (Article 11(1)), a requirement of prompt submission of evidence (Articles 18(3) and 19(2)), or the prompt designation of arbitrators by the parties (Articles 3(3)(h) and 3(7)(f)).

Flexibility of the Proceedings

Another specific and innovative feature of the former Swiss Rules was the possibility of consolidation and joinder.

The revised Article 4(1) augments the possibility of **consolidation** by stating first that the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator and secondly that the Court has the power to revoke the appointment and confirmation of arbitrators and to appoint and confirm the arbitrator if necessary to enable consolidation (e.g., to address a *Dutco* case situation, see also Article 5(3)). This allows the Court to ensure that equal treatment is given to the parties with a greater degree of flexibility. Practice has shown that consolidation will only be ordered in limited and justifiable circumstances.

With respect to **joinder**, Article 4(2) has been amended in a way that allows a third person to participate in the proceedings without necessarily being a party, thus enabling different forms of intervention such as side intervention or *amicus curiae*.

The new provision in Article 15(8) of the Swiss Rules, regarding **settlement facilitation** by the arbitral tribunal, foresees such possibility if agreed upon by the parties. This provision allows the arbitrator to facilitate settlement between the parties, a role that has been traditionally recognised to arbitrators in Switzerland and which allows in many instances for a swift resolution of the dispute. Such agreement of the parties also constitutes a waiver of their right to challenge the arbitrators' impartiality based on the arbitrators' participation and knowledge acquired in taking the agreed steps.

Regarding **costs**, the new Swiss Rules vest the Court with greater powers as it no longer has a mere consultative role, but approves or adjusts the costs determined by the arbitral tribunal, such approval or adjustment being binding for the arbitral tribunal (Article 40(4)).

Conclusion

The revised Swiss Rules, in force as from 1 June 2012, have taken into account the experience acquired through the administration of over 500 cases under the former Swiss Rules, and have encompassed the most innovative instruments of international arbitration in Switzerland and abroad, thus allowing the successful former Swiss Rules to adapt to today's international arbitration environment.

The revised Swiss Rules have strengthened the independence of the arbitration institution, have broadened its powers and increased the efficiency of the arbitration proceedings. This has been achieved by addressing the minor procedural flaws, which surfaced during the 7 years of practice under the former rules, and by adopting new tools, such as the provisions on *ex parte* interim relief and on emergency relief. The delicate balance between the powers of the arbitration institution, the powers of the arbitral tribunal and the autonomy of the parties, has not fundamentally changed with the revised Swiss Rules, and the disadvantages of becoming over-institutionalised have been successfully avoided.

This fine tuning exercise allows the Swiss Rules to remain state of the art in international arbitration, offering a flexible and efficient framework for arbitration proceedings.

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The Firm

Founded in Zurich in 1966, Froriep Renggli is one of the leading law firms in Switzerland, with around 90 lawyers and offices in Zurich, Geneva, Lausanne and Zug as well as an office in both London and Madrid serving clients seeking for Swiss law advice.

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