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The Character of International Arbitration under the Swiss Rules, June 2012 Edition

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Commentary

The Character of International Arbitration under the Swiss Rules, June 2012 Edition

By
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Introduction

With dispute resolution clauses in international contracts, the typical three-stage cascade of decision-making is i) arbitration or no arbitration, ii) if arbitration will it be institutional or *ad hoc*, and iii) if institutional which institution.

Parties from two different countries usually agree pretty swiftly on arbitration, providing there is no overwhelming power imbalance permitting one party to impose its home court advantage. Parties also generally have a decided preference for the safety and convenience of institutional arbitration, although there may arise countervailing concerns about buying into a package the contents of which they are not closely familiar with, and with which they cannot become familiar in the limited time available for them to do the deal.

The real choice therefore comes down to a choice between arbitration institutions.

It is true that arbitration under the major institutions around the world presents, on the whole, a fair degree of homogeneity. Yet each set of the leading institutional arbitration rules features certain distinct, individual qualities.

The Swiss Rules of Arbitration, in particular in their edition in force as of 1 June 2012 (the “**Swiss Rules**”),

while aligned with best modern practice, disclose certain pronounced features conferring upon them a character unique among institutional arbitration rules.

To date, the Swiss Rules have not often been used by parties beyond Europe. This should not surprise. Very little marketing has been conducted to familiarise users with the Swiss Rules, especially those outside Europe. Yet, as will be seen, the Swiss Rules have much to recommend them. If, as is usual, a Swiss seat is chosen for an application of the Swiss Rules, they can usually be considered an attractive, neutral option for contracts between companies around the world, notably from the Americas and from Asia.

This article seeks to describe the character of the Swiss Rules. In view of the fact that the Swiss Rules do not seem to be very well known outside Europe, the article will not dwell on the passage from the initial state of the Swiss Rules to their state under the June 2012 revisions. It is at all events this latter version which users will encounter in any arbitration initiated as from 1 June 2012, even if their contract was signed before.¹

Background

International arbitration comes instinctively to Switzerland. Switzerland's political neutrality and its traditional engagement in international relations, peacekeeping and humanitarian efforts, positioned the country early as a host for international arbitration.

Switzerland's modern international arbitration law came into force in 1989 and it has proved an effective and stable environment for the settlement of disputes by arbitration right up to the present day. A prominent

feature of Swiss international arbitration law is the high degree of finality of arbitration awards.² It is exceedingly rare for a Swiss international arbitration award to be set aside by the Swiss courts.³

Institutional arbitration has been run through the major Swiss chambers of commerce for over a hundred years. In 2004, six Swiss chambers of commerce, from Basle, Berne, Geneva, Lausanne, Lugano and Zurich, adopted a common set of arbitration rules, the Swiss Rules. In 2008, a seventh, that of Neuchâtel, joined.

On 1 June 2012, a revision of the Swiss Rules enters into force.

Best modern practice, familiarity and legitimacy

The Swiss Rules follow the 2010 UNCITRAL Arbitration Rules closely. The UNCITRAL Rules are the fruit of a vast consultation involving governments and private actors of notable experience. As an instrument of a UN agency they enjoy legitimacy around the world. In their 1976 edition they earned wide acceptance globally, and the 2010 edition is expected to build on this success.

Inasmuch as the Swiss Rules map the UNCITRAL Rules, they too offer best arbitration practice, familiarity and legitimacy to users around the world. Most points of divergence ensue from the institutional character of Swiss Rules arbitration, whereas the UNCITRAL Rules are framed to operate without the support of an arbitration institution.

Efficiency

General

The foremost characteristic of Swiss Rules arbitration is efficiency.

Efficiency has become a watchword in international arbitration since about a decade ago criticism began to swell about the excessive cost and duration of arbitration.

Maintaining a proportion between minimising cost and time and the vindication of procedural rights

Efficiency in arbitration denotes chiefly a concern to minimise cost and time. Efficiency must, however, be responsive to the parties' rights to be heard. Efficiency is

therefore largely the quality of maintaining a proportion between, on the one hand cost and duration, and, on the other, complexity and significance of the dispute.

Article 15(7) of the Swiss Rules requires "all participants in the arbitral proceeding [to] act in good faith and to make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary expense and delays." Article 12 foresees that an arbitrator may be removed if he or she "fails to perform his or her functions despite a written warning from the other arbitrators or from the Court".

Other arbitration rules confine themselves to placing a duty upon *the arbitral tribunal* to seek efficiency. But it is widely acknowledged that inefficiencies may originate as much with a party or the parties as with the arbitral tribunal. For example a respondent may want to make it costly for the claimant to assert its rights and therefore to settle on terms favourable to the respondent. Parties seeking to avoid displeasing the arbitral tribunal, and seeking to avoid costs consequences, will be anxious to comply with their efficiency obligations under the Swiss Rules.

Stipulating efficiency as a goal for arbitrators is not idle verbiage. In practice, since arbitrators generally enjoy wide discretion in their procedural decisions, they do invoke such stipulations in their procedural decisions, and in the justifications they provide to the parties for them. To take the most common example, an arbitral tribunal may deny as inefficient a party request for a time extension, or for further submissions. Without the efficiency criterion it is more difficult to say no.

The Swiss Rules do not expressly identify the level of opportunity which parties must be given to present their case. This is in contrast for example to both the ICC Rules and the LCIA Rules, which specify that that opportunity is limited to a "reasonable" one.⁴ Nonetheless, where Swiss arbitration law is applicable, and under most other arbitration laws, that level is a flexible one, which can be made to vary in accordance with the demands of efficiency.

It will be observed below that the Swiss Rules limit procedural flexibility more than do most of the other leading institutional arbitration rules. Nonetheless, the Swiss Rules do grant the tribunal extensive procedural discretion. The general rule governing this discretion is

enunciated in Article 15(1) of the Swiss Rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard." The limitations on the tribunal's procedural flexibility under the Swiss Rules are not so extensive as to have a negative incidence on its ability to craft efficient procedure appropriate to complexity and amount in dispute.

Expedited Procedure

In Article 42(1), the Swiss Rules provide for an expedited procedure of specific features, which applies upon the parties' express election, or which, in default of party agreement, the arbitral tribunal may adopt.

It may be debated whether the stipulation of an expedited procedural program in a set of arbitration rules encourages parties to adopt it. Certainly though, it affords convenient reference in an arbitration clause. By contrast, it is rare to stipulate individual procedural features aimed at saving time and costs in an arbitration clause.

The Swiss Rules are uniquely robust in their pursuit of efficiency where the amount in dispute does not exceed CHF1,000,000. Such cases are *automatically* subject to the expedited procedures under the Swiss Rules, with discretion with the Swiss Chambers' Arbitration Court (the "**Arbitration Court**") to disapply.

The expedited procedure for cases where less than CHF1,000,000 is at stake requires that there be a sole arbitrator. If the parties' agreement foresees a three-person arbitral tribunal the Arbitration Court will invite the parties to agree to a sole arbitrator. If the parties do not agree, the costs of the three-person tribunal are set at a level which will generally be higher than the costs of a three-person tribunal otherwise. So the Swiss Rules provide for a reinforced financial incentive for the parties to agree to having a sole arbitrator. The expedited procedure also limits the number of rounds of submissions, and it permits no more than one oral hearing.⁵ The award must be rendered within six months of the tribunal receiving the file, with discretion for the Arbitration Court to extend this.

This special-track procedure for low-value cases proceeds upon a vision that it will only be in very rare circumstances that a low-value case will justify fuller,

more costly and time-consuming procedures. There are indeed usually significant savings in costs in the procedural limitations imposed in the expedited procedure, especially in having a sole arbitrator.

Since the Swiss Rules began in 2004, about 36% of cases have followed the expedited procedure (either because of the amount in dispute was below the threshold or because the parties specifically elected its application).⁶

Light-touch administration

A third element of efficiency is that the administration of Swiss Rules arbitrations is kept to a minimum. Other than the award itself, the only specific procedural document that the tribunal must prepare is a provisional timetable (Article 15(3)). The only documents which need to be sent to the Arbitration Court are the provisional timetable (for the Arbitration Court's information and not for approval), those relating to the deposits (Article 41, paras. 1 and 3), and the draft award (Article 40(3)). No provision is made for the Arbitration Court to review and approve the arbitration award, except for the part on costs of the arbitration (see Article 40(4) of the Swiss Rules).

The Arbitration Court reacts quickly in coming to decisions assigned to it, such as consolidation (Article 4(1) of the Swiss Rules), challenges to arbitrators (Article 11(2) of the Swiss Rules), and determining the seat of the arbitration (Article 16(1) of the Swiss Rules). These decisions are in practice made in a matter of days, on average five.⁷

One-stop dispute resolution

Fourthly, efficiency also entails that, to the furthest extent possible, there be one-stop shopping in the resolution of a dispute. Potentially huge inefficiencies may be suffered where only a part of a dispute between the same parties can be resolved in a particular forum. It is also usually more efficient to resolve disputes between multiple parties on the same set of facts in one and the same dispute resolution proceeding.

The Swiss Rules confer upon arbitrators the broadest powers to grant interim relief. Article 26(1) of the Swiss Rules states that "the arbitral tribunal may grant any interim measures it deems necessary or appropriate." They may even determine to do so without notice to the other side (Article 26(3)). There is provision for

immediate relief by an emergency arbitrator (Article 43), while the arbitral tribunal is being constituted. Such emergency relief may not be determined without notice to the other side (Article 43(6)). While it is impossible to eliminate entirely the potential need to apply to court for interim relief in relation to a matter subject to arbitration, the Swiss Rules go as far as any institutional rules to minimise such a potential need.

Unique among the major institutional arbitration rules⁸, the Swiss Rules make express provision for the inclusion of set off claims within an arbitrator's jurisdiction. They also do so on a remarkably broad basis:

The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum-selection agreement. (Article 21(5) of the Swiss Rules)

The wording in Article 21(5) concerning a Swiss Rules arbitral tribunal's jurisdiction over a set off defence "even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause" is, however, somewhat misleading. It does not in fact revolutionise the basis of arbitral jurisdiction.

As an almost inviolate principle, arbitral jurisdiction can only arise from the consent of the parties, however broadly one might conceive consent.⁹ For the most part, the arbitration clause will represent the extent of the parties' consent to arbitral jurisdiction. The choice of the Swiss Rules, and with it its set-off jurisdiction provision, is generally made as part of the arbitration clause, and therefore *ipso iure* extends jurisdiction under that clause accordingly. If the Swiss Rules are chosen after the arbitration clause is agreed, then this choice operates to modify the arbitration clause, in particular as relates to jurisdiction over set-off defences. Either way, the parties have consented to this expanded jurisdiction through the integration of the Swiss Rules into their arbitration clause.

Additionally, the Swiss Rules provide the arbitral tribunal with the broadest powers (under Article 4(2)) of all major institutional arbitration rules to decide on the "participation of third persons". Such "third persons" include not just *amici curiae*, but also third parties, such as co-defendants or co-claimants. The tribunal may order

the joinder of a third party even in the absence of consent from the existing parties or the third party to be joined. Although the Swiss Rules do not make this explicit, it must be assumed that any third party to be joined has consented to arbitration under the Swiss Rules.

Again, despite the suggestion in the unconfined wording of the Swiss Rules, they do not depart from the settled basis of jurisdiction in arbitration, which is consent. Rather the Swiss Rules push the frontiers of consent to an unprecedented, pro-efficiency breadth.

Furthermore, Article 4(1) of the Swiss Rules confers power on the Arbitration Court to consolidate arbitrations even where the parties are different, and features of the arbitration are different, for example the seat. The parties' acceptance of the Swiss Rules operates as their consent to arbitrate with parties who are not privy to their own arbitration agreement. This is providing, first, that the Arbitration Court exercises its consolidation discretion appropriately and secondly the party in question is treated as having validly waived any right it may have under applicable law to designate an arbitrator. Article 4(1) casts this discretion in the extremely broad terms: "[...] the [Arbitration] Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings."

There is no express requirement for the Arbitration Court to give reasons for its consolidation decisions, but elsewhere in the Swiss Rules there is an express exclusion of any obligation to give reasons for other types of decision. Given the importance of the rights potentially at stake in connection with consolidation matters, and the *expressio unius exclusio alterius* interpretive principle, it would seem that, upon request, the Arbitration Court will prove amenable to providing reasons for its consolidation decisions, with an eye to avoiding potential challenges. In this regard it is worth noting that the reasoning of the US Supreme Court in *Stolt-Nielsen v. Animal Feeds International Corp.*¹⁰ that agreement to class action arbitration cannot be assumed, since it greatly complicates the arbitration procedure, applies, albeit with lesser force, to consolidation.

Predictability and procedural paternalism

The Swiss Rules generally leave sufficient procedural flexibility for the parties and the arbitral tribunal such that concerns of inefficiency will not generally arise.

It must, however be noted that the Swiss Rules provide a good deal more prescription in relation to procedural matters than do almost all other institutional arbitration rules.¹¹ The Swiss Rules notably lay down a rule regarding the burden of proof, in Article 24(1), and express powers for the arbitrators to take the initiative to obtain any evidence, in Article 24(3). Article 25 contains provisions relating to the conduct of the hearing, a rarity among institutional arbitration rules. Article 27 lays out how arbitrator-appointed experts are to proceed.

This may be viewed in a positive light, in that arbitration generally creates a procedural void to be filled in by party agreement and in default of that by decision of the arbitral tribunal. Very often in practice, however, the arbitral tribunal will make its decisions on an *ad hoc* basis, without enunciating a rule in advance. Thus under the Swiss Rules, there is a laudable level of procedural predictability flowing from the extensive stipulations in the Swiss Rules themselves.

If the parties are opposed to the content of these procedural stipulations in the Swiss Rules, there is no doubt that they can derogate from them by agreement, although, realistically, once a dispute has arisen parties are less open to revising any previous procedural agreement. It is less certain that the arbitral tribunal may do so itself, but under most arbitration laws, and certainly in Switzerland, it is unlikely that there would be any legal consequence of the tribunal's having done so.

The same holds true for the expedited procedure for cases not exceeding CHF1,000,000, except for the financial penalty of the parties or a party insisting on the giving effect to the requirement of a three-person tribunal in the arbitration clause. The Arbitration Court controls this aspect, and it can generally be expected to enforce it, no matter what a party or the tribunal says.

Conclusions

The Swiss Rules, in particular when coupled with a Swiss seat of arbitration, would appear to be ideally suited for contractual parties from two different parts of the world, notably where one is from the Americas and the other from Asia, seeking reliable dispute resolution in a neutral context.

As seen in the foregoing, the Swiss Rules represent best modern arbitral practice for most matters, familiar to arbitration users. They are, in addition, particularly apt to ensure the efficiency of arbitrations conducted under them.

The Swiss Rules particularly recommend themselves for application to international commercial contracts such as the international sale of goods, IP licensing, distribution, franchising, and agency, in respect of which there is an especially pressing need for efficient dispute resolution.

The Swiss Rules are, however, highly prescriptive as regards procedure, a feature which will appeal to many parties, notably those seeking predictability, but not to all.

Endnotes

1. Article 1(3) of the Swiss Rules, from which the parties may derogate by express language.
2. Ph. Landolt, "Annulment of Swiss International Arbitration Awards for Incompatibility with Substantive Public Policy: First Annulment in over Twenty Years" in 27(4) *Mealey's International Arbitration Report*, L. Schaeffer, ed., LexisNexis, April 2012.
3. For statistics portraying the slender chances of succeeding in a challenge to an international arbitration in Switzerland see F. Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis" in (2007) 25(3) *ASA Bull.* 444 and F. Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis" in (2010) 28(1) *ASA Bull.* 82.
4. Article 22(4) of the ICC Rules; Article 14(1)(i) of the LCIA Rules.
5. There is an apparent anomaly in that by Article 42(1)(c) of the Swiss Rules, in an expedited procedure the parties are entitled to a hearing, whereas for the ordinary procedure, in exercise of its powers under Article 15(2) of the Swiss Rules, the tribunal may decide not to have an oral hearing, despite the protest of a party.
6. Swiss Chambers' Arbitration Statistics 2011 (https://www.swissarbitration.org/sa/download/statistics_2011.pdf).

7. See F. Kellerhals, "Highlights from the Arbitration Committee" in *The Swiss Rules of International Arbitration – Five Years of Experience*, Papers from the ASA Conference on 19 June 2009, R. Füeg, ed., at page 8.
8. Even the 2010 UNCITRAL Rules no longer contain any stipulation about jurisdiction over set off defences. Article 19(3) of the 1976 UNCITRAL Rules contained a set-off jurisdiction rule, of significantly more limited scope than that in the Swiss Rules.
9. Ph. Landolt, "Switzerland: Guarantor can be held to arbitration by "operation of law" in 6(3) 2008 *Global Arbitration Review*."
10. 559 U.S. ____ (USSC, 2010).
11. In these matters the Swiss Rules largely follow the 2010 UNCITRAL Rules. It may be apprehended that there may be, on the whole, a more pressing need for extensive up-front procedural stipulation for *ad hoc* arbitration. ■

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