

The Changing Landscape of Arbitration in Switzerland: Advent of the Swiss Arbitration Centre and the 2021 Swiss Rules Revision

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On May 19, 2021, the leading arbitral institution in Switzerland, the Swiss Chambers' Arbitration Institution, ceased to exist in its previous form and was replaced by the Swiss Arbitration Centre Ltd., an entity formed by the Swiss Arbitration Association and the seven Swiss cantonal chambers of commerce whose prior affiliation established the Swiss Chambers' Arbitration Institution in 2008.

On June 1, 2021, the revised Swiss Rules of International Arbitration also entered into force. The revision process included an in-depth consultation of both practitioners and users while it resulted in comparatively modest changes, including with the goal of modernizing and codifying existing practice. In parallel with these notable developments, "Swiss Arbitration" – a new portal for Swiss arbitration and ADR – was formally launched with the goal of providing comprehensive access to information related to arbitration in Switzerland. These developments follow on the heels of the entering into force of the revised Swiss International Arbitration Act in early 2021 and continue to pursue the aim of maintaining Switzerland's position as a leading venue for international arbitration. In so doing, Switzerland has taken concrete steps which not only serve to maintain its competitiveness with other venues, but likely also to motivate still other locales and institutions to consider modernizing and optimizing their rules, legislation and general arbitration offerings.

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1. The Swiss Arbitration Centre

On May 19, 2021, the Swiss Chambers' Arbitration Institution ("SCAI") – the leading Swiss arbitration and mediation institution founded in 2008 by seven Swiss cantonal chambers of commerce – and the Swiss Arbitration Association ("ASA") – the predominant Swiss arbitration organization – formed the Swiss Arbitration Centre Ltd. ("Swiss Arbitration Centre") as the successor to SCAI, which ceased operations. In the new entity, the ASA is the majority shareholder while the seven Swiss chambers of commerce retain minority ownership. The intention is for the ASA to contribute with its know-how and by providing administrative support to the Swiss Arbitration Centre, while the individual cantonal chambers of commerce formerly associated under SCAI will continue to sustain the Swiss Arbitration Centre with their network and infrastructure.

Arbitrations under the Swiss Rules of International Arbitration are now administered by the Arbitration Court of the Swiss Arbitration Centre (the "Court"). The Court is in turn assisted in its work by the Secretariat of the Court (the "Secretariat").

Arbitration agreements referring to administration by SCAI or to the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud, Zurich, Neuchâtel and Central Switzerland remain valid and binding. Going forward, they will be recognized and applied by the Swiss Arbitration Centre.¹

In short, the creation of the Swiss Arbitration Centre is not likely to cause any major change in or disruption of the administration of SCAI Rules proceedings, and is likely to promise greater integration and coordination with the ASA.

2. The Revised Swiss Rules of International Arbitration

On June 1, 2021, a revised version of the Swiss Rules of International Arbitration (the "Swiss Rules" or "Rules") entered into force (the prior version of the Rules entered into force in 2012).² Notably, the 2021 revision to the Rules takes place in the context of the recent revisions to the Swiss International Arbitration Act, which entered into force six months earlier on January 1, 2021 and which remains embedded in the Swiss Private International Law Act.³

Based broadly on the UNCITRAL Arbitration Rules, the Swiss Rules provide for arbitration procedure that combines international best practices with a comparatively light institutional framework. The drafters of the 2021 Swiss Rules revision opted for modest revisions, aimed at striking a balance between preserving the flexibility of the Rules while at the same time strengthening the role of the supervising institution.

The revised Swiss Rules are applicable to all arbitration proceedings, *inter alia*, where the underlying arbitration agreement references the Rules or designates administration by SCAI or the Swiss Arbitration Centre, and in which the Notice of Arbitration is submitted on or after June 1, 2021.⁴

Set out below is an overview of the most noteworthy revisions introduced in the 2021 Swiss Rules:

2.1. Paperless Notice of Arbitration and Answer

The provision of a hard copy of the Notice of Arbitration is no longer required under the revised Rules. Claimants may now submit their Notices solely in electronic form, unless the Secretariat requests otherwise or the claimant itself requests that the Secretariat notify a hard copy to the opposing party.⁵

¹ Introduction(c) and Article 1(1), Swiss Rules (2021).

² The English, German, French and Italian versions of the [2021 Swiss Rules](#) are available on the new Swiss Arbitration online portal.

³ See "[The Revised Swiss International Arbitration Act – Key Changes and Developments](#)," Cleary Gottlieb Alert Memo, January 14, 2021.

⁴ Art. 1(2), Swiss Rules (2021).

⁵ Art. 3(1), Swiss Rules (2021).

The same framework applies equally to the respondent's Answer to the Notice of Arbitration.⁶

This change may be regarded as being consistent with the ever-increasing acceptance and use of paperless communications and submissions in both domestic and especially international arbitrations, a trend which was further accelerated as a result of the lockdowns and delays accompanying the COVID-19 pandemic.⁷

2.2. Limited Prima Facie Review of the Claims by the Court

Under new Article 5 of the 2021 Swiss Rules, if a respondent fails to submit an Answer to the Notice of Arbitration or raises a jurisdictional objection, the Court will perform a *prima facie* review of the claims to determine (i) whether manifestly no arbitration agreement referring to the Swiss Rules exists⁸ and (ii) where claims are made under more than one arbitration agreement, whether such arbitration agreements are manifestly incompatible.⁹

This change would appear to be largely consistent with the increasing emphasis on efficiency and judicial economy in the initiation and handling of international arbitrations by both institutions and, once constituted, arbitral tribunals. It is notable for its apparent empowerment of the Court to carry out such a *prima facie* review of the claims even where the named respondent fails or refuses to submit a responsive pleading at all. It is also noteworthy insofar as many if not most proceedings under the Rules are likely to have a Swiss seat triggering application of the Swiss International Arbitration Act, pursuant to which the arbitral tribunal itself is empowered with broad competence-competence discretion to affirm or deny its own jurisdiction even at a relatively early stage.

⁶ Art. 4(1), Swiss Rules (2021).

⁷ See "[International Arbitration in the Time of COVID-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions](#)," Cleary Gottlieb Alert Memo, July 10, 2020.

⁸ Art. 5(1)(a), Swiss Rules (2021).

⁹ Art. 5(1)(b), Swiss Rules (2021).

2.3. Cross-claims, Joinder, Intervention, Consolidation

New Articles 6 and 7 of the 2021 Swiss Rules set out the framework with respect to cross-claims, joinder, intervention, and consolidation. Pursuant to new Article 6, parties asserting a claim against another party other than a claim in the Notice of Arbitration or a counterclaim (cross-claim), requesting a joinder or an intervention shall submit a notice of claim to that effect. The provisions concerning the Notice of Arbitration apply *mutatis mutandis*.

Prior to the constitution of the tribunal, the notice of claim shall be submitted to the Secretariat, which will perform a *prima facie* review of any objections raised by the addressee(s) of the claim. After the constitution of the tribunal, any cross-claim, request for joinder or request for intervention shall then be decided by the tribunal, after consulting with all parties and taking into account all relevant circumstances.¹⁰ New Article 7 clarifies that the consolidation of claims is possible only upon request by a party.¹¹

New Articles 6 and 7 are largely consistent with recent rules changes made by other leading international arbitration institutions with respect to the inclusion of additional parties and the consolidation of multiple proceedings.¹² They are also noteworthy against the background of evolving and recent case law of the Swiss Federal Tribunal respecting the circumstances under which a non-signatory party may or may not be included as a respondent in an arbitration on the basis of the extension of the effects of the arbitration agreement to that non-signatory.

¹⁰ Arts. 6(1)-(3), Swiss Rules (2021).

¹¹ Arts. 7(1) and (3), Swiss Rules (2021).

¹² See "[The London Court of International Arbitration Releases Updated Arbitration Rules, Emphasizing Efficiency](#)," Cleary Gottlieb Alert Memo, October 26, 2020; "[2021 ICC Rules Of Arbitration Unveiled](#)," Cleary Gottlieb Alert Memo, November 12, 2020.

2.4. Appointment of Arbitrators in Multi-Party Proceedings

The 2021 Swiss Rules no longer provide for a fixed deadline for the parties to designate their arbitrators in multi-party proceedings when no agreement on a procedure for the constitution of the tribunal is in place.

Under new Article 11(4), the Court will set a time limit for each group of parties to designate an arbitrator, taking into account the parties' needs under the circumstances.¹³ Under the 2012 Swiss Rules, the claimant(s) and respondent(s) previously each had 30 days respectively to designate an arbitrator.¹⁴

2.5. Organization and Conduct of the Proceedings

Article 19 of the 2021 Swiss Rules now reflects the general international practice according to which a preliminary consultation is held between the tribunal and the parties as soon as practicable following the constitution of the tribunal to discuss the further organization and scheduling of the arbitration proceedings as well as other relevant issues, including the taking of evidence, data protection and cybersecurity. Further organizational conferences may be held throughout the proceedings in order for the tribunal to consult with the parties and ensure efficient case management.¹⁵

This express change is to be welcomed insofar as it encourages or indeed requires that early and if necessary repeated consultation take place to focus the parties and tribunal on potentially vital issues which might otherwise be neglected. These include, notably, proper formulation of the prayers for relief and the scope of the tribunal's mandate. They also include questions as to the form and sequence of taking of evidence, burden of proof, standard of proof and other

matters related to the parties' respective burdens of presentation of their case.

Furthermore, under Article 19 of the 2021 Rules, at any time during the proceedings the parties may agree to resolve their dispute by mediation and, unless otherwise agreed, the proceedings will be stayed during that period.¹⁶

2.6. Remote Hearings

In a pragmatic change reflecting the realities of arbitration practice during the COVID-19 pandemic, the revised 2021 Swiss Rules now expressly provide that evidentiary hearings may be held at any stage of the proceedings in person or remotely by videoconference or other appropriate means, as decided by the tribunal after consulting with the parties.¹⁷

This revision is welcome insofar as it removes any ambiguity as to whether or not the parties have an inviolable right to the holding of a physical hearing, including where the parties are in agreement as to such need. It is also essentially consistent with the emerging trend just since the inception of the pandemic, as reflected in other rules changes, case law and commentary.¹⁸

2.7. Model Arbitration Clause

The new Model Arbitration Clause has also been revised so as now to refer to the Swiss Arbitration Centre rather than to SCAI:

‘Any dispute, controversy, or claim arising out of, or in relation to, this contract, including regarding the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre in force on the date on which the

¹³ Art. 11(4), Swiss Rules (2021).

¹⁴ Art. 8(4), Swiss Rules (2012).

¹⁵ Arts. 19(2) and (4), Swiss Rules (2021).

¹⁶ Art. 19(6), Swiss Rules (2021).

¹⁷ Arts. 27(1) and (2), Swiss Rules (2021).

¹⁸ See [“2021 ICC Rules Of Arbitration Unveiled,”](#) Cleary Gottlieb Alert Memo, November 12, 2020; [“The London](#)

[Court of International Arbitration Releases Updated Arbitration Rules, Emphasizing Efficiency,”](#) Cleary Gottlieb Alert Memo, October 26, 2020; [“2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration,”](#) Cleary Gottlieb Alert Memo, February 17, 2021.

Notice of Arbitration is submitted in accordance with those Rules.

The number of arbitrators shall be ... (“one”, “three”, “one or three”);

The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country);

The arbitration proceedings shall be conducted in ... (insert desired language).’

It remains to be seen how frequently parties who agree to the 2021 Swiss Rules, including based on the guidance provided by the new Model Arbitration Clause, provide for arbitration outside of Switzerland and/or provide for a choice of law other than Swiss law. Considering the high percentage of non-Swiss parties who historically have seen fit to elect a Swiss seat and Swiss law in their arbitration clauses, query whether these new developments in Switzerland will have any discernible effect on the tendency to localize the law and the seat in Switzerland.

3. Swiss Arbitration – A New Portal for Arbitration and ADR

On June 1, 2021, and in connection with the advent of the new Swiss Arbitration Centre and the 2021 revision to the Swiss Rules, an online platform “Swiss Arbitration”¹⁹ was launched. It is designed to provide comprehensive and centralized access to resources and information relevant to arbitration in Switzerland, including user-friendly details of organizations, services, events and practitioners working in the jurisdiction.

The platform provides, among other things, access to the websites of the ASA²⁰ and the Swiss Arbitration Centre,²¹ the independent Swiss Arbitration Academy,²² and the Swiss Arbitration Hub,²³ which is the ASA’s platform for organizing hearing logistics. Other leading organizations active in Switzerland are also featured and can be accessed through the website.²⁴

¹⁹ www.swissarbitration.org.

²⁰ www.swissarbitration.org/asa/.

²¹ www.swissarbitration.org/centre/.

²² www.swissarbitration.org/academy/.

On June 9, 2021, the ASA announced the launch of its “Arbitration Toolbox,” a new resource which is included in the “Swiss Arbitration” platform.²⁵ The Arbitration Toolbox is an electronic tool designed to provide practical advice and templates addressing the various stages of an arbitration, and which can be customized to individual needs. For the time being, the Arbitration Toolbox is limited to international commercial arbitration. In the future, it will also address the particularities of investor-state arbitration.

The launching of the new portal and the pooling of on-line resources and information in a kind of “one-stop shopping” for Swiss-related arbitration is to be welcomed. It is particularly important for first-time and less experienced users of international or Swiss arbitration. It is also no less helpful for those already possessing expertise in the area but still desiring a single site or portal which bundles all relevant information on-line.

4. Conclusion

SCAI has now been succeeded by the new Swiss Arbitration Centre, bringing together in one place the knowledge, experience and resources of the ASA and SCAI (through its cantonal chambers of commerce).

At the same time, the 2021 revisions to the Swiss Rules are welcome amendments that, while maintaining the essence and key provisions of the instrument intact, modernize the Rules and codify existing practice.

Finally, the creation of the centralized “Swiss Arbitration” online platform is also likely to increase efficiency and accessibility of resources for non-Swiss users and to help maintain Switzerland’s position as a leading seat and venue for international arbitration in an increasingly competitive and crowded market.

In view of the unquestioned importance of Switzerland and Swiss law in relation to international arbitration going back many decades, these latest revisions and

²³ www.swissarbitration.org/hub/.

²⁴ www.swissarbitration.org/swiss-arbitration/other-organizations-and-resources/.

²⁵ www.toolbox.swissarbitration.org/toolbox/home.

refinements are likely to continue to enhance the contributions of Swiss arbitration to the further development of international arbitration overall. It behoves experienced and inexperienced users of arbitration alike to familiarize themselves with these latest developments in order to make timely and informed choices as to when a Swiss seat, Swiss institution and/or Swiss law may be suited to their particular needs.

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