ZURICH
Brandschenkestrasse 24
CH-8027 Zurich

GENEVA
Route de Chêne 30
CH-1211 Geneva 6

LAUSANNE
Avenue de Rhodanie 40C
CH-1007 Lausanne

International Arbitration in Switzerland: revised Swiss Rules of International Arbitration

As of 1 June 2021 the Swiss Chambers' Arbitration Institution (SCAI) becomes the Swiss Arbitration Centre, administering proceedings under revised Swiss Rules of International Arbitration. Our newsflash provides a concise overview of the most important features of this revision aimed at consolidating Switzerland as a preferred place of arbitration.

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AUTHORS	Xavier Favre-Bulle	Partner, Head of Arbitration
	H. Wehland	
	Harold Frey	Partner, Head of Litigation and Arbitration
	Martin Aebi	Counsel
EXPERTISE	Litigation and Arbitration	

1. Introduction

After their adoption in 2004, the Swiss Rules of International Arbitration ("Swiss Rules") were revised in 2012 to introduce an emergency arbi-trator procedure and reinforce the efficiency of arbitration proceedings. In 2021, upon the ini-tiative of the Swiss Arbitration Association (ASA) and the main Swiss Chambers of Commerce, a Swiss Arbitration Centre has been set up, as successor of the Swiss Chambers' Arbitration Institution ("SCAI"). This reorgan-isation has also prompted a detailed review of the Swiss Rules in light of past practical experience and recent international develop-ments. The revision process included an in-depth consultation of both practitioners and users. The date of entry into force of the revised Swiss Rules is 1 June 2021, coinciding with the Swiss Arbitration Centre's start of operation.

Among other things, the amendments to the Swiss Rules reflect the corporate changes associated with the transformation of SCAI into a Swiss company, as well as the strengthened role of the

institution in supervising the proceedings. Key changes include refined provisions on multi-party and multi-contract proceedings and several amendments to streamline the proceedings, allowing for paperless filings and supporting remote hearings when needed. A number of changes were also made to improve the Rules' terminology, structure and consistency with a view to facilitating their use and making them even more predictable. The salient features of the 2021 Swiss Rules are described below.

2. Name of the institution and corporate changes

At the institutional level, SCAI becomes the Swiss Arbitration Centre. From a corporate perspective, the Centre is a Swiss company whose current shareholders are ASA, on the one hand, and the Swiss Chambers of Commerce partici-pating in SCAI, on the other hand. Full continu-ity is ensured: arbitration clauses referring to SCAI remain valid and binding and will be re-cognised and applied by the Swiss Arbitration Centre, with Notices of Arbitration to be filed at the addresses of the Secretariat in Geneva, Zu-rich or Lugano. The model arbitration clause is adapted accordingly. All users and their counsel are advised to refer in any contract made from 1 June 2021 to the "Swiss Rules of International Arbitration of the Swiss Arbitration Centre".

3. Strengthened role of the institution and new processes

The revised Rules strengthen the role of the institution and the involvement of the Court and Secretariat.

The gate-keeping function of the institution when deciding whether a case may proceed is clarified with a refined test in multi-contract situ-ations. In addition to the standard *prima facie* review whether there is manifestly no arbitration agreement referring to the Swiss Rules, the new Article 5 ("Administration of Claims") provides that the Court shall also determine whether the arbitration agreements are "manifestly incompat-ible" if more than one contract is invoked. When the Court decides to administer the case, the arbi-tral tribunal or sole arbitrator, as the case may be, retains the power to rule on any jurisdictional issue, including an objection that claims brought under different arbitration agreements should not be determined together (Article 23(1)).

The Secretariat shall receive electronic copies of all communications (Article 16(2)). It will notify awards to the Parties (Article 34(5), the arbitral tribunal was in charge of that task under the previous Rules). Cost deposits will be held by the Secretariat rather than by the arbitral tribunal (Appendix B, Section 4.1). In order to reflect the increased workload of the Secretariat, the revised Schedule of Costs in Appendix B provides for slightly higher administrative costs (only charged for amounts in dispute above CHF 300,000 and capped at CHF 75,000 for disputes above CHF 250 million), counterbalanced by a scale providing for slightly reduced fees for arbitrators. Overall, and despite other novelties regarding costs in Appendix B, the costs of an arbitration under the 2021 Swiss Rules are likely to be lower than under the previous Rules, which will be welcome news for users.

4. Multi-party and multi-contract arbitrations

In addition to Article 5 dealing with multi-contract disputes as described above, a significant feature of the 2021 revision is the inclusion of detailed provisions addressing multi-party

situations. A very innovative provision, Article 4(2), was already part of the original Swiss Rules of 2004 and has proven successful over the years due to its flexibility. However, it focused on the arbitral tribunal's powers and deserved to be supplemented as regards the role of the institution. Art. 4(2) is now replaced by a new Article 6 on "Cross-Claim, Joinder, Intervention", which tackles those scenarios where, for instance, a respondent raises claims against another co-respondent (cross-claim) or an additional party (joinder), or where an additional party seeks to participate in the proceedings by bringing claims against an existing party (intervention).

Article 6(1) requires the submission of a separate notice of claim against the targeted party, with Article 3 on the submission of a Notice of Arbitration applying *mutatis mutandis*. Before the constitution of the arbitral tribunal such notice of claim is to be submitted to the Secre-tariat (Article 6(2)), which will then proceed to a *prima facie* review in accordance with Article 5 (as described above) if the party sought to be joined raises an objection (within 15 days). The arbitral tribunal remains in charge of deciding on the admissibility of a request submitted after its constitution (Article 6(3)). Article 6(4) further contemplates the possibility for a third person to participate in the proceedings "in a capacity other than an additional party", allowing tri-bunals to "decide on whether to permit such participation and on its modalities". The pro-vision is meant to provide for additional flexi-bility, in particular where a third person seeks to intervene in favour of one of the parties (*Neben-intervention, intervention accessoire*) or one of the parties seeks to extend the effects of an arbitral award to a third person (*Streitverkündung, dénonciation d'instance*).

This regime in Article 6 is intended to ease the organisation of the proceedings and the constitution of the arbitral tribunal at the outset of the case. It does not entail any consequences for jurisdiction, which remains a matter for the arbitral tribunal to decide.

The new Article 7 on consolidation replaces the former Article 4(1) of the 2012 version, without any substantive changes. Decisions on the consolidation of proceedings are still exclusively taken by the Court.

5. Suitable responses to technological and other current developments

A number of amendments reflect technological developments and modern trends. In particular, the filing of hard copies is no longer required if a claimant is content for the respondent to be notified by e-mail (Article 3(1)), and this oppor-tunity for paperless filing is also available to the respondent *mutatis mutandis* (Article 4(1)). Article 27(2) allows for hearings to be held "remotely by videoconference or other appro-priate means" as decided by the arbitral tribunal after consulting with the parties. This should offer full flexibility to choose what is most appropriate between an in-person hearing and a remote hearing (when a hearing is required) in the circumstances of each case. Issues of data protection and cybersecurity must be addressed when discussing the rules of procedure, "to the extent needed to ensure an appropriate level of compliance and security" (Article 19(2)).

Several other amendments take on board lessons about matters that have received increased attention over the last decade, such as enhanced requirements for independence/impartiality of arbitrators and related disclosures (Article 12), the appointment of a tribunal's secretary (only with the consent of the parties, Article 16(3)), the possibility for an arbitral tribunal to oppose the appointment of a new party's counsel in the course of the proceedings in situations which could give rise to an arbitrator's challenge (Article 16(4)), or considering in the allocation of costs of the arbitration whether a party contributed to the efficient conduct of the proceedings and the avoidance of unnecessary costs and delays (now specifically envisaged by Article 40).

In addition to the already existing possibility for the arbitral tribunal to take steps to facilitate the settlement of the dispute (Article 19(5)), a new provision expressly emphasises that, at any time during the proceedings, the parties may agree to resolve the dispute by mediation, such as under the Swiss Rules of Mediation, or any other forms of alternative dispute resolution (Article 19(6)).

6. Tailoring the time limits to meet the needs of users

The Swiss Rules have also been fine-tuned to ensure time-efficiency of certain procedural steps, but also to further increase flexibility to meet the parties' needs on a case-by-case basis. For instance, in multi-party proceedings, when the parties have not agreed on a procedure for the constitution of the arbitral tribunal, the claimant(s) and respondent(s) will no longer have 30 days for each group of parties (totalling 60 days) to designate an arbitrator. Rather, the Court will set a time limit in its discretion, taking into account the parties' needs under the circumstances (Article 11(4)).

When the arbitral tribunal has been constituted, the steps to be taken have been updated as follows. As soon as practicable after receiving the file from the Secretariat, the arbitral tribunal shall hold an initial conference with the parties to discuss the organisation of the arbitration proceedings (Article 19(2)). At that conference or promptly thereafter, the arbitral tribunal shall prepare a procedural timetable setting forth the steps to be undertaken in the course of the proceedings (Article 19(3)).

Arbitral tribunals are also granted more discre-tion with respect to time limits for written submissions (Article 25(1)) and payment of cost deposits (Article 41(4)).

7. Outlook

The 2021 revision of the Swiss Rules constitutes a refinement of the existing provisions with limited substantial amendments, thus conveying a message of continuity of a system that has proven highly satisfactory in many years of practice. This will allow the new Swiss Arbitra-tion Centre to capitalise on SCAI's experience and efficient work process, while benefitting from improvements in particular with respect to the supervisory function of the institution.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

CONTACTS	Xavier Favre-Bulle	Partner, Head of Arbitration, Geneva xavier.favre-bulle@lenzstaehelin.com Tel: +41 58 450 70 00
	H. Wehland	, Geneva Tel: +41 58 450 70 00
	Harold Frey	Partner, Head of Litigation and Arbitration, Zurich harold.frey@lenzstaehelin.com Tel: +41 58 450 80 00
	Martin Aebi	Counsel, Zurich martin.aebi@lenzstaehelin.com Tel: +41 58 450 80 00