

Workshop on the Swiss Rules 2012

The Arbitral Proceedings under the Swiss Rules 2012

Prague, 5 October 2012
Czech Bar Association

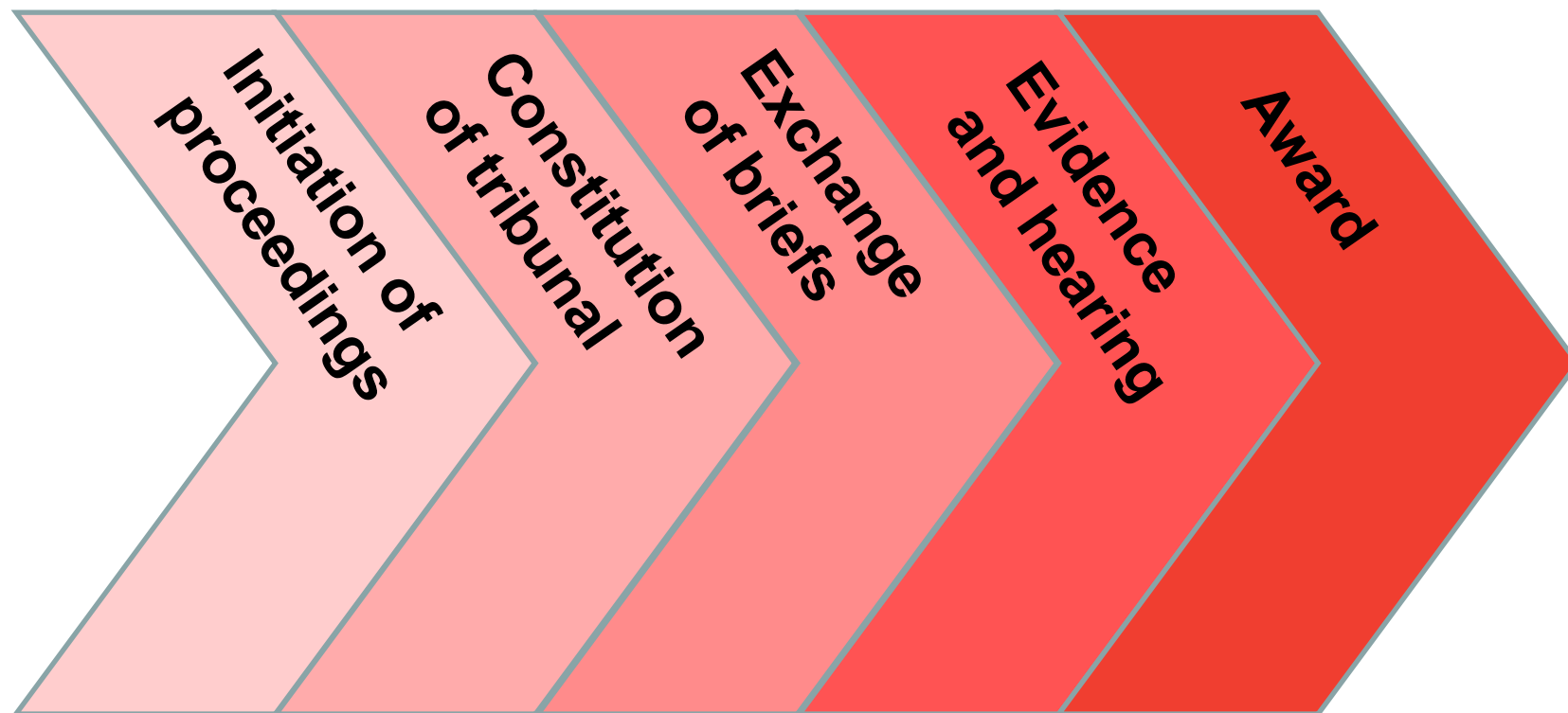
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The phases of arbitral proceedings under the Swiss Rules 2012



Other features of the Swiss Rules 2012

- Interim measures.
- Emergency relief.
- Consolidation.
- Joinder.
- Expedited procedure.

Initiation of the arbitral proceedings (1)

- Notice of Arbitration:
 - Submission to the Secretariat of the Arbitration Court.
 - Content: Cornerstones of the arbitration (Art. 3(3)).
 - *A proposal as to the number of arbitrators (i.e. one or three), the language and the seat of the arbitration, if the parties have not previously agreed thereon (Art. 3(3)(g)).*
 - *Claimant's designation of one or more arbitrators, if the parties agreement so requires (Art. 3(3)(h)).*
 - Optional: Proposal for the appointment of a sole arbitrator, if applicable.
 - Optional: Statement of Claim.

Initiation of the arbitral proceedings (2)

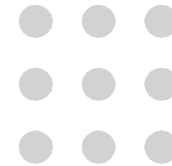
- Answer to the Notice of Arbitration (1):
 - Submission to the Secretariat of the Arbitration Court.
 - Content: Comments to the Notice of Arbitration.
 - Any plea that an arbitral tribunal constituted under the Swiss Rules lacks jurisdiction (Art. 3(7)(b)).
 - A proposal as to the number of arbitrators (i.e. one or three), *the language and the seat of the arbitration if proposed by Claimant under Art. 3(3)(g) (Art. 3(7)(e))*.
 - *Claimant's designation of one or more arbitrators, if the parties agreement so requires (Art. 3(7)(f))*.

Initiation of the arbitral proceedings (3)

- Answer to the Notice of Arbitration (2):
 - Optional: Proposal for the appointment of a sole arbitrator, if applicable.
 - Optional: Statement of Defence.
 - In principle: any counterclaim or set-off defence (Art. 3(10)).

Initiation of the arbitral proceedings (4)

- «*Gatekeeper*» function of the Arbitration Court (Art. 3(12)): *Prima facie jurisdiction test if:*
 - Respondent has not filed an Answer to the Notice of Arbitration;
 - Respondent object to the proceedings being administered under the Swiss Rules.
- *Explicit competence of the Arbitration Court to terminate the arbitral proceedings if they become unnecessary or impossible (Art. 5(4)).*



Constitution of the arbitral tribunal (1)

- All arbitrators have to be confirmed by the Arbitration Court (Art. 5(1)).
- In case of non-confirmation new appointment by the parties/arbitrators or, in exceptional cases, by the Arbitration Court (Art. 5(2)).
- *Residual power of the Arbitration Court to effect the constitution of the arbitral tribunal in case of a failure (Art. 5(3)).*
- *Transmission of the file to the arbitral tribunal without delay once the registration fee and any provisional deposit was paid and all arbitrators were confirmed (Art. 5(5)).*

Constitution of the arbitral tribunal (2)

- Number of arbitrators (Art. 6):
 - Sole arbitrator or three-member arbitral tribunal.
 - Determination by the Arbitration Court.
 - As a rule sole arbitrator, unless the complexity of the subject matter and/or the amount in dispute justify a three-member arbitral tribunal.
 - Application of Expedited Procedure (Art. 42(2)) where the amount in dispute does not exceed CHF 1'000'000.

Constitution of the arbitral tribunal (3)

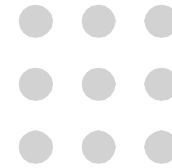
- Appointment of a sole arbitrator (Art. 7)
 - Joint designation by the parties within 30 days from the Notice of Arbitration or the Arbitration Court's decision appoint a sole arbitrator.
 - Subsidiary competence of the Arbitration Court.
- Appointment of a three-member arbitral tribunal (Art. 8)
 - Each party designates one arbitrator.
 - The two arbitrators designated by the parties designate the presiding arbitrator («chairman»).
 - Subsidiary competence of the Arbitration Court.

Constitution of the arbitral tribunal (4)

- Appointment of the arbitral tribunal in multi-party proceedings:
 - According to the agreement of the parties.
 - Joint designation by the group of claimants/respondents.
 - Subsidiary competence of the Arbitration Court to appoint all of the arbitrators.
- All arbitrators must be and remain impartial and independent (Art. 9(1)).

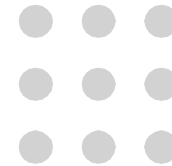
Challenge, Removal and Replacement (1)

- Ground for challenge: circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence (Art. 10(1)).
- *Notice of challenge to be sent to the Secretariat of the Arbitration court within 15 days after the relevant circumstances became known to the challenging party (Art. 11(1)).*
- *Decision of the Arbitration Court (no reasoning) if the parties do not agree or the arbitrators does not withdraw within 15 days from the notice of challenge (Art. 11(2)).*



Challenge, Removal and Replacement (2)

- Ground for removal: arbitrator fails to perform his or her functions despite a written warning from the other arbitrators or from the Arbitration Court (Art. 12(1)).
- Final decision of the Arbitration Court after having heard the affected arbitrator (Art. 12(2)).
- *Replacement procedure (Art. 13):*
 - *In accordance with the usual procedure (Art. 7 and 8).*
 - *Exceptionally (a) direct appointment by the Arbitration court or (b) after the closure of the proceedings, authorisation of the remaining arbitrator(s) to proceed.*



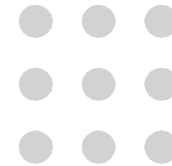
General provisions

- Procedural cornerstones: equal treatment of the parties and their right to be heard (Art. 15(1)).
- Explicit competence of the arbitral tribunal to appoint a secretary (Art. 15(5)).
- *Extended duty to act in good faith (Art. 15(7)).*
- *Settlement facilitation by the arbitral tribunal (Art. 15(8)).*
- Waiver of rules: duty to promptly state any objection of non-compliance with the Swiss Rules *or any other applicable procedural rule* (Art. 30).



Exchange of written submissions

- Statement of Claim, with all documents *and other evidence on which Claimant relies* (Art. 18).
- Statement of Defence, with all documents *and other evidence on which Respondent relies* (Art. 19).
- During the arbitral proceedings, amendments or supplements of the claims or defences are allowed, unless they fall outside the scope of the arbitration agreement (Art. 20).
- Arbitral tribunal decides upon further written statements (Art. 22).



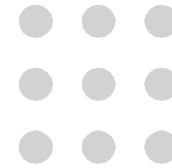
Objections to jurisdiction

- The arbitral tribunal has Kompetenz-Kompetenz (Art. 21(1)).
- Separability of the arbitration agreement (Art. 21(2)).
- Any objection as to jurisdiction must be raised in the Answer to the Notice of Arbitration or, at the latest, in the statement of defence (to the counterclaim; Art. 21(3)).
- Explicit jurisdiction of the arbitral tribunal to hear a set-off defence even if the relationship out of which the defence arises is not covered by the arbitration agreement or is covered by another arbitration agreement or forum-selection clause (Art. 21(5)).



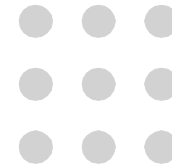
Administration of evidence

- *The arbitral tribunal determines the admissibility, relevance, materiality, and weight of the evidence (Art. 24(2)).*
- The arbitral tribunal may require the production of documents (Art. 24(3)).
- Any person may be a witness or an expert witness in the arbitration (Art. 25(2)).
- Interviewing witnesses is not improper (Art. 25(2)).
- Written witness statements are allowed (Art. 25(3)).
- The arbitral tribunal may appoint independent experts (Art. 27).



Main hearing and closure of proceedings

- *Examination of witnesses (Art. 25(4)).*
- Pleadings/post hearing briefs.
- *Closure of proceedings when the arbitral tribunal is satisfied that the parties have had a reasonable opportunity to present their respective cases, also with regard to certain matters (Art. 29(1)).*
- Reopening in exceptional circumstances on arbitral tribunal's own motion or upon request from a party, *also only with regard to certain matters (Art. 29(2)).*



Interim measures (1)

- Explicit competence of the arbitral tribunal:
 - to grant interim measures which it deems necessary or appropriate (Art. 26(1));
 - *to modify, suspend or terminate any interim measures granted, upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative (Art. 26(1));*
 - *to rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party in exceptional circumstances (Art. 26(3));*
 - *to rule on claims for compensation for any damage caused by an unjustified interim measure or preliminary order (Art. 26(4)).*



Interim measures (2)

- Interim measures may be granted in the form of an interim award or, usually, as an order (Art. 26(2)).
- The arbitral tribunal is entitled to order the provision of appropriate security (Art. 26(2)).
- No waiver:
 - *By submitting to the Swiss Rules, the parties do not waive any right to submit a request for interim measures to a judicial authority (Art. 26(5)).*
 - A request for interim measures to a judicial authority is not incompatible with the agreement to arbitrate and does not constitute a waiver of that agreement (Art. 26(5)).



Preliminary Orders (Art. 26(3))

- *Ruling before the request was communicated to any other party (and such party was heard).*
- *Only in exceptional cases.*
- *Only in the form of a preliminary order (no interim awards).*
- *Request must be communicated at the latest together with the preliminary order.*
- *The other parties (to the proceedings) are immediately granted an opportunity to be heard.*

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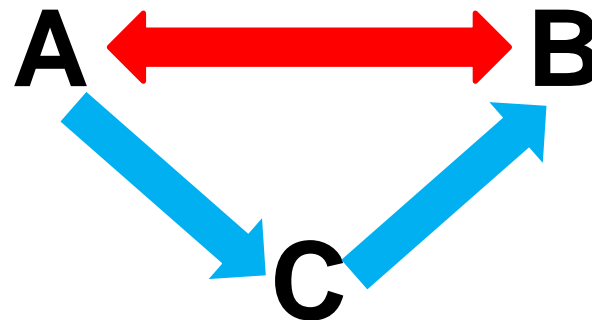
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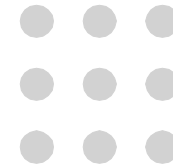


Consolidation



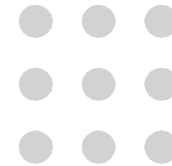
Joinder





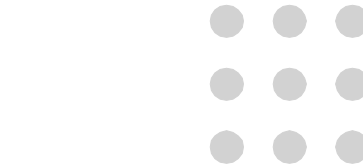
Consolidation (Art. 4(1)) (1)

- Arbitration between A and B pending under the Swiss Rules.
- A notice of arbitration is submitted:
 - between the same parties;
 - between parties not identical to the parties in the pending arbitration.
- Decision of the Arbitration Court after consulting with the parties and *any confirmed arbitrator*.



Consolidation (Art. 4(1)) (2)

- Taking into account all relevant circumstances, including the link between the cases and the status of the *pending* arbitral proceedings.
- New case is consolidated with the pending arbitral proceedings.
- *The parties to all proceedings are deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators and apply the provisions of on the composition of the arbitral tribunal.*

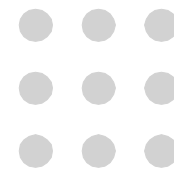
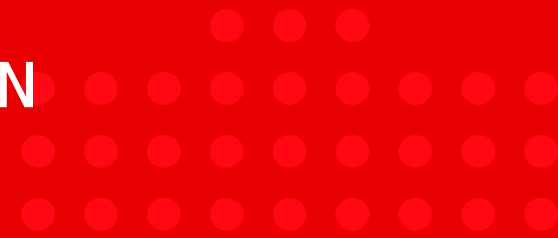


Joinder (Art. 4(2))

- Arbitration between A and B pending under the Swiss Rules.
- Request that one or more third persons participate in the arbitration:
 - by *one or more third persons*;
 - by a party to the pending arbitral proceedings.
- Decision by the arbitral tribunal after consulting with all of the parties, *including the person or persons to be joined*, taking into account all relevant circumstances.

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Thank you!

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