

Briefing March 2021

Arbitration and COVID-related Challenges

One year into the COVID-19 pandemic, the justice system is still adapting to the challenges. In Switzerland, this applies not only to litigation proceedings, which often still take place on paper and in person rather than electronically and virtually, although revision efforts are underway, but also to arbitration proceedings, although these have historically profited from more flexibility. The new age of electronic notifications, virtual hearings and electronic signatures requires a modern arbitral tribunal that is skilled in the use of the necessary technical equipment.

Many arbitration institutions have already reacted to the COVID-19 pandemic. In particular, in its revised rules that came into force on 1 January 2021 (the "**2021 ICC Rules**"), the International Chamber of Commerce introduced changes that are conducive to paperless proceedings and virtual hearings. Similarly, the revised LCIA Rules that came into force on 1 October 2020 (the "**2020 LCIA Rules**") include a refinement and expansion of the provisions accommodating the use of virtual hearings and reaffirm the primacy of electronic communication. The current Swiss Rules of International Arbitration ("**2012 Swiss Rules**"), although they date from 2012, according to prevailing opinion already allow electronic communications and provide that the tribunal may hear witnesses and expert witnesses by videoconference.

Swiss arbitration law is supportive of such developments and thus continues to offer an arbitration-friendly legal environment in the era of the "new normal".

Means of notification

The 2021 ICC Rules include provisions that encourage electronic submissions and notifications. The new Art. 3(1) merely requires that notifications or communications be "sent", and no longer presumes that this occurs with the use of physical copies, paving the way for paperless, electronic arbitration files as the new rule. Under the old regime, the parties had to

supply pleadings and other written communications in a number of hard copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat (Art. 3(1) 2017 ICC Rules). Further, the claimant's Request for Arbitration and the respondent's Answer will be submitted in paper against receipt of delivery only where this is requested by the claimant and the respondent, respectively (Art. 4(4)(b), Art. 5(3) 2021 ICC Rules). The rules

therefore give priority to electronic notifications and communications. This is in contrast to the former 2017 ICC Rules, according to which the Request for Arbitration was to be submitted in paper form by default (Art. 4(4)(a)).

Similarly, the revised LCIA Rules also give priority to electronic submissions and communications. The claimant and the respondent shall submit the Request and the Response thereto in electronic form, either by e-mail or other electronic means including via any electronic filing system operated by the LCIA (Art. 4.1). By default, any written communication shall be delivered by e-mail or by any other electronic means of communication that allows a record of its transmission (Art. 4.2). The references to "registered mail" or "courier service" included in the 2014 LCIA Rules have been deleted. Even the commencement date of arbitration proceedings is now explicitly linked to the electronic receipt of the Request (including all accompanying documents) by the Registrar (Art. 1.4). Under the 2014 LCIA Rules, the parties had the option to submit the Request (Art. 1.2) or the Response (Art. 2.2) to the Registrar in electronic form.

The 2012 Swiss Rules do not provide a list of means of communication that are permissible; the method chosen should allow proof of both sending and receipt. Electronic communications are thus admissible. In the context of the COVID-19 pandemic, the Swiss Chambers' Arbitration Institution invited its users to file applications for emergency relief, notices of arbitration and answers to such notices by post/courier as usual and, in addition, by e-mail, as appropriate.

Swiss arbitration law does not exclude the electronic submission of memorials and other communications. There are no rules that preclude using e-mail or other means of telecommunication that provides a record of sending to commence an international arbitration or to serve other notifications or communications during an arbitration proceeding. There are also no rules that may preclude using e-mail or other telecommunica-

tion to notify an arbitral award or other arbitral decision, such as a decision on interim measures, although whether or not an arbitral award is dispatched in advance electronically may be relevant for the calculation of the deadline for filing an appeal against the arbitral award. According to the case law of the Swiss Federal Supreme Court, a notification of an arbitral award by telefax or e-mail can trigger the 30-day time limit for challenging the award, provided the applicable institutional rules or the means of communication chosen by the parties do not require the original, i.e. duly signed copy of the award to be sent to the parties.¹

As far as ICC arbitrations are concerned, the Swiss Federal Supreme Court held that only the serving of the original copy of the award triggers the 30-day deadline for challenging the award; the mere receipt of a courtesy copy by advance e-mail sent by the ICC Secretariat does not cause said time limit to start running.² However, this case law explicitly referred to the 2017 ICC Rules and the "Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration" (the "**ICC Note**") then in force. While the wording of Art. 35(1) has remained unchanged under the revised 2021 ICC Rules, the new ICC Note, which has come into force as of 1 January 2021, explicitly provides that the parties may agree that any award may be signed by the members of the arbitral tribunal in counterparts, and that such counterparts may be assembled in a single electronic file and notified to the parties by the Secretariat by e-mail or any other means of telecommunication.³ In such cases, the notification of an award by e-mail may already trigger the 30-day deadline for challenging the award – it remains to be seen whether the Swiss Federal Supreme Court will deviate from its former jurisprudence in such cases.

Virtual hearings

In international arbitration, the pandemic has increased the use of virtual or remote hearings.

¹ DSC of 20 February 2015, 4A_609/2014, cons. 2.3.1.

² DSC of 26 September 2018, 4A_40/2018, cons. 2.2.

³ Notes to the Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration as in force as of 1 January 2021, paras. 198 et seq.

The 2017 ICC Rules did not regulate whether and under which circumstances an oral hearing could be conducted virtually instead of in person. The English version of the 2017 ICC Rules outlined in Art. 25(2) that the arbitral tribunal shall hear the parties together "in person" if any of them so requests, or upon its own motion, which prompted some parties to argue that virtual hearings against a party's will was inappropriate under the rules. With the advent of the pandemic, the ICC clarified in its ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic of April 2020 that this can be interpreted as merely aiming to ensure live, adversarial hearings, and not to require the physical preference of the participants of the hearing in the same room.⁴

Such ambiguities were eradicated in the 2021 ICC Rules, which includes a provision granting the arbitral tribunal discretion in this regard. Pursuant to Art. 26(1) 2021 ICC Rules, the arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or by other appropriate means of communication.

Similar flexibility is given to the arbitral tribunal under the 2020 LCIA Rules. In general, the arbitral tribunal has the power to employ technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing) (Art. 14.6(iii) 2020 LCIA Rules). The hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form) (Art. 19.2 2020 LCIA Rules).

The 2012 Swiss Rules provide that witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal, in particular through means that do not require their physical presence at the hearing, including by videoconference (Art. 25(4)).

Under Swiss arbitration law, the parties may agree to hold a hearing virtually. It is unclear whether Swiss arbitration law allows virtual hearings to be held against the objection of a party. In a recent decision arising out of state court litigation, the Swiss Federal Supreme Court ruled that the COVID-19 pandemic does not serve as a sufficient justification to impose virtual hearings in state court proceedings against a party's will.⁵ However, it does not appear that the reasoning of the Swiss Federal Supreme Court can be applied to the context of international arbitration, as the Court also justified its ruling with the necessity of guaranteeing the publicity of the hearing, which is not required in arbitration proceedings.

There are no mandatory provisions in Swiss arbitration law that allow for the challenge or preclude recognition and enforcement of an international arbitration award if videoconference or other remote means of communication are used to administer a witness oath or affirmation, to take witness testimony without the physical presence of an arbitrator or to hold an evidentiary hearing. Whether a hearing held virtually against a party's will will be seen as a violation of the right to be heard in a particular case will remain to be seen.

Electronic signatures

The revised 2021 ICC Note invites the parties and the arbitral tribunal to consider whether documents can be manually signed in counterparts, scanned and assembled into a file for communication to the Secretariat and then notified by e-mail. This applies for terms of reference, awards and other decisions.⁶

Under the 2020 LCIA Rules, an award may be signed electronically and/or in counterparts and assembled into a single instrument unless the parties agree otherwise or the arbitral tribunal or LCIA Court directs otherwise (Art. 26.2).

⁴ ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic of 9 April 2020, para. 23.

⁵ DSC 146 III 194.

⁶ Notes to the Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration as in force as of 1 January 2021, paras. 196 and 198 et seq.

The 2012 Swiss Rules do not comment on the electronic signing of awards. Art. 32(6), provides, however, that the "originals" of the award shall be signed by the arbitrators.

Swiss law allows the practice of electronic signatures. There are also no rules under mandatory Swiss law

that may preclude the recognition and enforcement of an arbitral award in an international arbitration, if signed manually in counterparts and then scanned and assembled into one electronic file or signed by other electronic means, for example by using digital signature.

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