# Kluwer Mediation Blog

## The 2012 Swiss Rules of International Arbitration: what's new in connection to ADR?

Christophe Imhoos (Esprit d'entente) · Thursday, June 7th, 2012

On June 1, 2012, the revised version of the Swiss Rules on International Arbitration entered into force (see the recent following posts on the Kluwer Arbitration Blog: http://wolterskluwerblogs.com/blog/2012/05/31/revised-swiss-rules-of-international-arbitration-enter-into-force/ and http://wolterskluwerblogs.com/blog/2012/06/01/entry-into-force-of-the-revised-swiss-rules-of-international-arbitration-%E2%80%93-1-june-2012/).

These new Rules (see text of the Swiss Rules at https://www.swissarbitration.org/sa/en/rules.php), based on the UNCITRAL Arbitration Rules, were initially enacted in 2004 in order to harmonize the arbitration rules of six of Swiss Chambers of Commerce (Basel, Bern, Geneva, Lugano, Lausanne, Neuchâtel and Zurich) for use in an institutional framework. Whilst maintaining flexibility, the New Rules contain some new features such as, *inter alia*, the administration of the arbitration proceedings, now by the "Arbitration Court", with some new – but light – administrative powers or the possibility for the parties to seek emergency relief through the "emergency arbitrator".

As a part of the principle of flexibility mentioned above, the Swiss Rules set out that participants in the arbitral proceedings shall act in good faith and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays; the parties undertake to comply with any award or order made by the arbitral tribunal or emergency arbitrator without delay (Art. 15 para. 7), this with a view of achieving efficiency and saving unnecessary costs.

Of more importance in the context of ADR, it is worth noting the following provisions (Art. 15 para. 8 of the Swiss Rules):

*With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps.*

As compared to the previous Rules, this is a significant step towards alternative dispute resolution as the 2004 Swiss Rules did not contain any similar provision.

Article 15 para. 8 of the 2012 Swiss Rules dealing with the Arbitral Proceedings enables therefore

an Arbitral Tribunal to discuss "settlement" with the parties provided the latter so agree. By settlement, it must be understood "amicable settlement", *i.e.* without a binding decision that settles the parties' difference(s). However, the 2012 Swiss Rules do not provide any explanation as to which settlement techniques may be used by the arbitrators for this purpose. One would naturally think about mediation. By contrast, the ADR Rules of the International Chamber of Commerce (ICC) do provide for various settlement techniques apart from mediation, such as neutral evaluation, mini-trial, etc. (see 7 March 2012 post: ADR Rules of the International Chamber of Commerce (ICC): a flexible way in the use of ADR settlement techniques: http://kluwermediationblog.com/2012/03/07/adr-rules-of-the-international-chamber-of-commerce-icc-a-flexible-way-in-the-use-of-adr-settlement-techniques/).

Besides the Swiss Arbitration Rules, the Swiss Chambers of Commerce enacted in 2007 the "Swiss Rules of Commercial Mediation" (available at https://www.swissarbitration.org/sm/en/rules.php ). Chapter VI thereof contain provisions dealing with Arbitration and Mediation. Article 24 of said Rules provides that "*In all arbitral proceedings pending before the Chambers where mediation appears to be worth trying, whether in whole or in part, the Chambers or the arbitrator(s) may suggest to the parties to amicably resolve their dispute, or a certain part of it, by having recourse to a mediator*".

Thus, Article 15 para. 8 of the 2012 Swiss Arbitration Rules, read in connection with Article 24 para. 1 of the Swiss Rules of Commercial Mediation, also enables an Arbitral Tribunal to suggest to the parties in dispute to engage into a mediation process according to the Swiss Rules of Commercial Mediation. This may reveal to be particularly appropriate when the Arbitral Tribunal realises that it does not handle mediation, as a settlement technique, sufficiently well or when its position, as neutral settling the dispute, is hardly compatible with the of the mediator.

On this latter issue, the New Arbitration Rules have anticipated it when providing that as soon as steps are taken, with the agreement of the parties, for the Arbitral Tribunal to facilitate an amicable settlement, the parties waive their right to challenge the arbitrator(s)' impartiality based on the latter's participation in such a process and the knowledge acquired therein. This addresses the obvious concern of any arbitrator involved in a settlement process to run the risk of being challenged later on when rendering an award, after the failure of such a process. This may be so in circumstances where the arbitrator(s) has acquired sensitive information during the settlement process that would not have come out in the arbitration proceedings, endangering thereby his/their impartiality in the eyes of any of the parties.

The authors of the revised edition of the Swiss Arbitration Rules may have found out some inspiration in the CEDR (Center for Effective Dispute Resolution) Rules for the Facilitation of Settlement in International Arbitration (available at http://www.cedr.com). The CEDR Settlement Rules are a useful tool in international arbitration. They manage to strike a good balance between the arbitrators' powers to take proactive steps to assist the parties in achieving a negotiated settlement of part or all of their dispute and their duty to remain impartial. As far as the latter is concerned, the Rules stipulate that the parties agree that the tribunal's facilitation of the settlement shall not be asserted by any party as ground for disqualifying the arbitral tribunal or for challenging any award rendered by the tribunal (see: Kluwer Arbitration Blog, Post of 7 January 2010: The new CEDR Rules for the Facilitation of Settlement in International Arbitration – A very useful and welcome tool at http://wolterskluwerblogs.com/blog/2010/01/07/the-new-cedr-rules-for-the-facilitation-of-settlement-in-international-arbitration-%E2%80%93-a-very-useful-and-welcome-tool-2/.

To sum up, this new tool in the hands of the arbitrators, as embodied now in general terms in Article 15 para. 8 of the New Swiss Arbitration Rules, no doubt constitutes a new step towards ADR, in particular as regards mediation even though one would have expected a more audacious approach in precise and specific terms.

---



This entry was posted on Thursday, June 7th, 2012 at 7:01 am and is filed under ADR, Arbitration, Commercial Mediation, International Mediation, Mediation Institutions and Rules
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.