Arbitration in Switzerland

The Practitioner's Guide

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Section V: Other Provisions

Article 42: Expedited Procedure

1. If the parties so agree, or if Article 42(2) is applicable, the arbitral proceedings shall be conducted in accordance with an Expedited Procedure based upon the foregoing provisions of these Rules, subject to the following changes:

(a) The file shall be transmitted to the arbitral tribunal only upon payment of the Provisional Deposit as required by Section 1.4 of Appendix B (Schedule of Costs);

(b) After the submission of the Answer to the Notice of Arbitration, the parties shall, as a rule, be entitled to submit only a Statement of Claim, a Statement of Defence (and counterclaim) and, where applicable, a Statement of Defence in reply to the counterclaim;

(c) Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the arbitral tribunal shall hold a single hearing for the examination of the witnesses and expert witnesses, as well as for oral argument;

(d) The award shall be made within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal. In exceptional circumstances, the Court may extend this time-limit;

(e) The arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

2. The following provisions shall apply to all cases in which the amount in dispute, representing the aggregate of the claim and the counterclaim (or any set-off defence), does not exceed CHF 1'000'000 (one million Swiss francs), unless the Court decides otherwise, taking into account all relevant circumstances:

(a) The arbitral proceedings shall be conducted in accordance with the Expedited Procedure set forth in Article 42(1);

(b) The case shall be referred to a sole arbitrator, unless the arbitration agreement provides for more than one arbitrator;

(c) If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, the Secretariat shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree to refer the case to a sole arbitrator, the fees of the arbitrators shall be determined in accordance with Appendix B (Schedule of Costs), but shall in no event be less than the fees resulting from the hourly rate set out in Section 2.8 of Appendix B.

I. Purpose of the Provision

1 Fast-track procedures are one of a number of ways in which the Swiss Rules seek to present a flexible framework for fast decisions that respect the right to be heard.[1] Art. 42 tries to accommodate the growing criticism that arbitration has become too expensive and, in particular, too time consuming, by speeding up the proceedings.[2] The purpose of the provision is to provide parties with more time-efficient

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1 Scherer, *SchiedsVZ 2005*, p. 230.

2 Lörcher, *Experience*, pp. 72 – 73.

and less costly procedures.[3] The number of cases administered under expedited procedures show that a large percentage of claims are conducted under expedited procedures.[4]

A possibility to speed up the resolution of smaller claims without special agreement as contained in paragraph 2 is to assist the parties further in cost control,[5] as parties can hardly foresee the amount in controversy in advance and rarely agree on specific procedures after a dispute has arisen. **2**

The provision seeks to maintain the maximum flexibility in party autonomy while safeguarding the arbitrators' interest in adequate payment.[6] **3**

Expedited procedures for the resolution of disputes are not a recent development. Short procedures were, for instance, already utilized in Venice between the 12th and 16th centuries, where decisions were rendered within very short time-limits.[7] **4**

The 2004 version is comparable to the provisions existing in the previous Rules of Basel, Lugano and Geneva.[8] The Geneva Rules (CCIG) provided for an opt-in mechanism.[9] This provision was inserted in order to accommodate the need for a fast track procedure as contained in other institutional Rules.[10] The WIPO Rules, the CIETAC Rules, the AAA Rules and the SCC Rules contain expedited procedures with varying parameters.[11] Expedited procedures are one of four main changes in comparison to the UNCITRAL Rules.[12] **5**

This provision has basically remained unchanged, save minor changes that became necessary due to amendments to other provisions in the 2012 Rules: Art. 42(1)(a) Rules 2004 was deleted ("the Chambers may shorten the time-limits for the appointment of arbitrators") and a new Art. 42(1)(a) was inserted. Additionally the term "three member arbitral tribunal" in Art. 42(2) has been substituted by the term "more than one arbitrator". Furthermore, the term "Chambers" has been substituted with the term "Swiss Chambers' Court" due to the transfer of the respective competences to the latter institution (see *Introduction, (b)*).[13] **6**

II. Derogation from the Provision

The provision is a combination of an opt-in and an opt-out provision. Parties wishing for an Expedited Procedure must state so explicitly, unless they fall under paragraph 2, in which case the parties would have to opt-out of the expedited provisions expressly. Even though there is contractual relationship between the parties, the institution and arbitrators based on consent, the Rules impose certain limitations on what the parties can derogate from.[14] **7**

Article 42(1) is a voluntary opt-in provision. Opting out of Art. 42(2) is permissible.[15] It must be done expressly. Paragraph 2 contains a second opt-out provision, which prescribes a sole arbitrator unless otherwise agreed (Art. 42(2)(b)).[16] **8**

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3 Müller, *J.Int.Arb. 1998*, p. 7.

4 Lörcher, *Experience*, p. 75. In 2009, it was 30% expedited procedure and a total of 35% since the inception. See <https://www.sccam.org/sa/download/statistics_2009.pdf>; Karrer, para. 3 at Art. 42.

5 Geisinger, *ASA Special Series no. 22*, p. 78; La Spada, para. 21 at Art. 42.

6 La Spada, para. 21 at Art. 42.

7 Philippe, p. 255.

8 Karrer, para. 1 at Art. 42.

9 Müller, *J.Int.Arb. 1998*, p. 10.

10 Geisinger, *ASA Special Series no. 22*, p. 67.

11 Müller, *J.Int.Arb. 1998*, pp. 8 – 9.

12 Peter, *SchiedsVZ 2004*, p. 58.

13 For this reason the term "Swiss Chambers' Court" will be used when referring to the 2012 Rules.

14 Fouchard/Gaillard/Savage, para. 1110.

15 La Spada, para. 5 at Art. 42; Geisinger, *ASA Special Series no. 22*, p. 71; Scherer, *SchiedsVZ 2005*, p. 232.

16 Scherer, *SchiedsVZ 2005*, p. 232.

9 The provision referring to the number of rounds of submissions may also be adapted by the parties.[17] While the provision on cost may not be derogated from in order to maintain some cost efficiency and level of protection for the arbitrators.

III. Content of the Provision

10 The Swiss Supreme Court has so far only dealt with few challenges against awards issued in proceedings under the expedited Rules.[18] The expedited proceeding results in an arbitral award that is treated like any other arbitral award, including the level of review.[19]

A. Scope of the Provision

11 As already stated, the provision is a combination of an opt-in and an opt-out provision. Ordinarily, institutional Rules decide on one of the two schemes.[20] The DIS Fast Track Rules are an opt-in only provision.[21] Parties wishing for an Expedited Procedure must state so explicitly, unless they fall under paragraph 2, in which case the parties would have to opt-out of the expedited provisions.

B. Paragraph 1

12 No restrictions for the timing of an agreement to opt-in exist. However, once the arbitral tribunal is constituted and following regular procedure, Art. 15 will limit the parties' ability to impose an expedited procedure on a tribunal.[22] Should a tribunal agree, there is no reason why the procedure could not be conducted in the same manner as an expedited procedure, without being classified as such formally.

13 Paragraph 1 clarifies that expedited procedures follow the regular procedure under the Swiss Rules in principle, subject to the changes set out in Art. 42.[23] The alterations specified in Art. 42 are designed to streamline the process by setting shorter time-limits and limiting oral hearing and exchanges of pleadings.

14 Due to the wording of Art. 42(1), the rules on confidentiality (Art. 44) and exclusion of liability (Art. 45) would not be included in the Rules applicable to the expedited proceedings. There appears to be no reason for the exclusion of these two provisions for expedited procedures. It appears to be a drafting error. These two provisions have no impact on the speed of the proceedings. La Spada rightly concludes that these provisions should be applied to expedited procedures as well.[24]

1. Subparagraph a Rules 2004

15 The first subparagraph in paragraph 1 of the 2004 Rules allows Chambers to shorten time-limits for the appointment of arbitrators. This is not an obligation but a permission as the appointment procedure does not form part of the 6-month time-limit of the entire proceeding.

16 It is not clear under which circumstances such abbreviated appointment will be ordered.

17 The competence to shorten time-limits has now been extended to any time-limit the Swiss Chambers' Court has fixed or has the authority to fix or amend (Art. 2(3)). For this reason, Art. 42(1)(a) 2004 Rules could be deleted.

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17 Lörcher, *Experience*, p. 73.
18 See, e.g., BGer. 4P.88/2006 of 10 July 2006; BGer. 4A_294/2008 of 28 October 2008.
19 Meyer-Hauser/Vock, para. 63.
20 Müller, *J.Int.Arb. 1998*, p. 9.
21 Berger, *J.Int.Arb. 2008*, p. 598.
22 La Spada, para. 3 at Art. 42.
23 Geisinger, *ASA Special Series no. 22,* p. 71; La Spada, para. 6 at Art. 42.
24 La Spada, para. 6 at Art. 42.

2. Subparagraph a Rules 2012

According to Art. 1.4 Appendix B, the Swiss Chambers' Court shall request the Claimant to pay a Provisional Deposit of CHF 5'000 upon receipt of the Notice of Arbitration. If this Provisional Deposit is not paid the Swiss Chambers' Court shall not proceed with the arbitration (Art. 1.5 Appendix B). **18**

For that reason it is coherent that Art. 42(1)(a) states that the file will only be transmitted to the arbitral tribunal after payment of this Provisional Deposit. **19**

3. Subparagraph b

Procedural restrictions are the key to fast track arbitrations.[25] A common restriction is a limitation on written pleadings.[26] Subparagraph 2 seeks to limit the number of exchanges between the parties. Other Rules limit the length or the number of issues. **20**

In addition to the Notice of Arbitration, the Statement of Claim and the Defense, in principle no other submissions are allowed, with the exception of the option to answer a counterclaim.[27] Submissions of evidence should be included in these pleadings.[28] Nothing in the Rules points to separate submissions. Tactical considerations might lead the parties not to submit their evidence with the pleading. In expedited procedures, tactical considerations playing on time should be limited. In principle, it is therefore not permissible to consider evidence submitted outside the pleadings or the hearing. **21**

Parties and arbitrators are not permitted to limit the number of submissions further, as the wording of the provision attests. Additional submissions are neither expressly prohibited nor permitted. In light of the time-restraints imposed by Art. 42(1)(d), the arbitrator(s) must be aware of the difficulty of balancing the interests involved. The arbitrator must also keep in mind that the implications of the right to be heard require that parties are permitted to comment on an additional submission.[29] **22**

4. Subparagraph c

Most fast track Rules contain limitations of hearings, some as the AAA going so far as to limit a single hearing to a single day.[30] **23**

Subparagraph c enables the parties to choose to have an award based on documents alone, an option which exists in the regular procedure Art. 15(2) as well. If the parties do not agree on a documentary procedure, the arbitrator must conduct a single hearing, as the Rules contain the wording "shall". **24**

The duration of this hearing is not specified. A continuous hearing over several days is permissible.[31] However, while recesses and breaks are permitted, interruptions of one or more days or even additional hearings are not.[32] The wording of the Rules is forceful and in light of time restraints as well as the spirit of the expedited procedure, which seeks to limit the proceeding to the necessary minimum. One predecessor of the Swiss Rules similarly provided for one hearing without restricting the duration thereof.[33] **25**

Pre-hearing or other conferences during the proceeding are not prohibited, as they often serve to speed up and streamline the proceedings in their turn.[34] Art. 25 applies to the hearing. **26**

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25 Müller, *J.Int.Arb. 1998*, p. 8.
26 Müller, *J.Int.Arb. 1998*, p. 13.
27 Scherer/Baizeau, p. 147.
28 Tschanz, *J.Int.Arb. 1993,* p. 53, commenting on the virtually identical rule of the Geneva Chamber of Commerce.
29 La Spada, para. 9 at Art. 42.
30 Müller, *J.Int.Arb. 1998*, p. 14.
31 La Spada, para. 10 at Art. 42.
32 Differing opinion: La Spada, para. 10 at Art. 42.
33 Müller, *J.Int.Arb. 1998*, p. 14.
34 La Spada, para. 10 at Art. 42.

5. Subparagraph d

27 Article 42(1)(d) states that the award shall be made within six months from the date when the Swiss Chambers' Court transmitted the file to the arbitral tribunal. The time-limit is calculated from the transmission, not the receipt, of the file from the Swiss Chambers' Court to the arbitrator(s), thus not including the constitution phase.[35] The signature of the award signifies its being "made" (Art. 32(4)). If a three member tribunal is concerned, the significant factor is the signature of the last arbitrator.[36]

28 The second sentence of subparagraph d permits the Swiss Chambers' Court to extend this time-limit in *exceptional circumstances*. Therefore the authority to extend this specific time-limit is more restrictive than the general competence laid down in Art. 2(3).

29 It remains unclear what these exceptional circumstances are. The Rules provide no guidelines.[37] In any case, these circumstances must be more severe than ordinary circumstances. The appointment of experts for example is rather unexceptional and should not entitle parties to an extension.[38] Some authors suggest that an extension should be granted only when required to ensure the parties right to equal treatment or the right to be heard.[39] In our opinion, these exceptional circumstances cannot be such events that are contained in the Rules themselves, because they are by definition foreseeable and thus not exceptional. The replacement of an arbitrator, e.g., is not such an occurrence, as Art. 14 clarifies that no repetitions are necessary and the time lost is minimal. Geisinger suggests that the extension should be very limited and not granted as a rule, so that parties and arbitrators do not consider it a guideline, but a true deadline.[40] However, where both parties jointly request a timeline exceeding the 6-month period, Chambers previously granted the extension under the 2004 Rules.[41]

30 Certain events may disrupt or delay the arbitration, which requires additional time. An example for exceptional delay would be a stay of arbitral proceedings for reasons of *lis pendens*. Whether this should result in simply extending the total time of the arbitration or whether the duration of the interruption should be deducted from the time which has passed is not clear. In our opinion, the classification is of theoretical importance alone. In the end, the date of making the award will be pushed to a later date. The date should be calculated by adding the number of days required for the interruption to the originally calculated date in accordance with Art. 2(2).

31 The Rules do not state who is entitled to request the extension. In theory the parties may seek an extension with the Swiss Chambers' Court.[42] It may even be at the instigation of the arbitrator that parties sent a request to the Swiss Chambers' Court. Once granted however, it is still the arbitrator who conducts the proceeding and who must decide whether to make use of the extension to render an award. It is the arbitrator who must make the award and so if he requires more time for his proceedings, it should be his responsibility to request it. Parties requesting extensions will do so in order to gain time for submissions, so their requests should be directed at the arbitrator. If the arbitrator denies the request, maybe for lack of time, the party may still seek relief by having the award annulled for violation of the right to be heard. As the parties have opted in (paragraph 1) or failed to opt-out (paragraph 2) to an expedited procedure, success with this request will be likely limited.

32 Support of the parties when the arbitrator(s) are requesting an extension may however be required, as deviation from the procedure agreed by the parties may lead to an annulment of the award. In the current practice of Chambers under the 2004 Rules, time-limits are extended upon application by the arbitrators, if they have received a request from the parties.

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35 La Spada, para. 12 at Art. 42.
36 Scherer, *SchiedsVZ 2005*, p. 233.
37 La Spada, para. 13 at Art. 42; Brunner, *SchiedsVZ 2010*, p. 249.
38 Scherer, *SchiedsVZ 2005*, p. 234.
39 La Spada, para. 13 at Art. 42; Scherer/Baizeau, p. 147.
40 Geisinger, *ASA Special Series no. 22*, p. 72.
41 La Spada, para. 14 at Art. 42.
42 Advocating the right for parties and arbitrator Geisinger, *ASA Special Series no. 22,* p. 72.

Similarly, nothing in the Rules prevent the Swiss Chambers' Court to extend time-limits on their own initiative.[43] Institutions have a responsibility to maintain the efficiency of expedited proceedings.[44] A practical application here is likely to be a delay of a few days on the part of the arbitrator, e.g., when the drafting requires additional time. The Swiss Chambers' Court must however be conscious, that the award may potentially be overturned in court because the chosen procedure of the parties was not followed. The longer the extension without party consent, the more likely an annulment. **33**

An award issued after the time-limit has expired may be overturned as well, not only for a violation of the chosen procedure. In certain jurisdictions, the duration of the arbitrators mandate is linked to these time restraints.[45] The mandate lapses with the expiration thereof. The ground for challenge would then be a lack of jurisdiction.[46] This ground is not recognized in Switzerland.[47] The Swiss Chambers' Court can avoid a potential lack of jurisdiction by unilaterally extending the deadline. This serves also as a justification for the position that a reference to the Swiss Rules or the expedited procedure does not express the intention of the parties that the agreement would lapse at the end of the 6 month period.[48] **34**

There are no sanctions mentioned within the Rules for exceeding the 6 month period.[49] Indeed the average expedited proceeding does not finish within 6 months.[50] **35**

6. Subparagraph e

Subsection e is directed at the arbitrator, who is permitted to limit his reasons in the award to a summary form. This is intended to speed up the drafting process. Parties are free to opt-out of reasons for the award altogether, as Art. 32(3), which remains unchanged. This is permissible according to Swiss law.[51] This does neither limit the applicable review nor the effect of the award. **36**

C. Paragraph 2

Any claims not exceeding an aggregate amount of 1'000'000 CHF fall under paragraph 2, unless the parties opt-out. The aggregate sum includes claims, counterclaims, any other set-off-defenses[52] and interim measures. Interest claims should not be included in the calculation.[53] Appendix B applies to the calculation. The calculation must be based on the information known at the time of the constitution of the tribunal,[54] or once both initial pleadings are received.[55] Later increases in the amount should not be considered.[56] Once an arbitral procedure is selected, too many complications are connected with changing procedures.[57] An agreement between all concerned, i.e. parties and arbitrator(s) is possible.[58] **37**

The Swiss Chambers' Court has jurisdiction to determine the amount in controversy for the purposes of assessing whether the threshold has been reached.[59] If one party disagrees with the amount, it can give additional information to the Swiss Chambers' Court, before the decision is made. **38**

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43 Differing opinion: Lachmann, para. 4086; La Spada, para. 15 at Art. 42; Scherer, *SchiedsVZ 2005*, p. 233.
44 Müller, *J.Int.Arb. 1998*, p. 5-18.
45 Lörcher, *Experience*, p. 75.
46 Poudret/Besson, pp. 452-454; Tschanz, *J.Int.Arb. 1993*, pp. 54-55.
47 Geisinger, *ASA Special Series no. 22*, p. 84; Basel-City Court of Appeal, 2 January 1984, *ASA Bull. 1985*, pp. 24-25.
48 La Spada, para. 17 at Art. 42.
49 Lörcher, *Experience*, p. 74.
50 Lörcher, *Experience*, p. 75.
51 Heini, paras. 13-14 at Art. 189.
52 La Spada, para. 25 at Art. 42.
53 Scherer, *SchiedsVZ 2005*, p. 232.
54 La Spada, para. 26 at Art. 42. In light of Chamber's goal to have a one-person tribunal the constitution phase may be late for the determination.
55 Scherer, *SchiedsVZ 2005*, p. 232.
56 La Spada, para. 27 at Art. 42; Geisinger, *ASA Special Series no. 22,* p. 81.
57 Scherer, *SchiedsVZ 2005*, p. 232.
58 Scherer, *SchiedsVZ 2005*, p. 232.
59 Scherer, *SchiedsVZ 2005*, p. 232.

39 This opting out provision has experienced some criticism on the basis that the amount in controversy may reveal nothing of the complexity of the matter.[60] Lörcher points out that it may be necessary to obtain evidence, which can be time consuming and that the parties who have failed to opt-out may consider this proceeding "rough justice".[61]

40 The Expedited Procedures need not be selected specifically, but may apply simply by reference to the Swiss Rules.[62] The Swiss Chambers' Court may decide against an expedited procedure in its discretion based on "taking into account all relevant circumstances". No further guidelines are provided for in the Rules. A similar discretionary rule based on minimal funds can be found in the AAA Fast Track procedure.[63]

41 Even when the necessary threshold is theoretically reached, the Swiss Chambers' Court should decide against an expedited procedure, when the issues, as far as they are apparent, are complicated or time consuming, numerous witnesses must be heard, or evidence is unavailable.[64] The same is true when other claims under the same clause or related contracts are likely, in order to avoid potential conflicts for consolidation and joinder.

42 The Swiss Chambers' Court is not formally limited in the timing of decisions on whether a fast track procedure should be applied. As a practical matter, on the one hand, information at the outset of the case is rather scarce and all relevant circumstances cannot easily be identified. On the other hand, once the tribunal has been constituted, making changes in the procedure could be burdensome to all involved.

43 It is our opinion that the formal choice of procedure, expedited or not, should be made at the outset. Any delays caused by difficult issues can be addressed by extending time-limits. The arbitrator can decide to have pre-conferences and exchanges of additional submissions to accommodate the difficulty. The only issue not adjustable would be the number of arbitrators and there is no reason why one arbitrator should not be able to deal with the issues as well as three.

44 Subchapter a sets out the equality of expedited proceedings under paragraph 1 and 2 by making the same Rules applicable to both procedures.

45 Subchapter b provides for an opt-out sole arbitrator. Parties are free to agree on three arbitrators (Rules 2004) or on more than one arbitrator (Rules 2012).

46 Subchapter c is directed at the Swiss Chambers' Court and instructs it to make an effort to have the parties agree on a sole arbitrator, even if they opted out of this provision. It further sets out the consequences of opting out in terms of costs, which may be considerable.[65] Appendix B applies. The three arbitrators (Rules 2004) or the multiple arbitrators (Rules 2012) are not to be recompensed below 350 CHF per hour (Art. 2.8 Appendix B).[66]

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60 Lörcher, *Experience*, p. 74.
61 Lörcher, *Experience*, p. 74.
62 La Spada, para. 19 at Art. 42.
63 Müller, *J.Int.Arb. 1998*, p. 10.
64 Geisinger, *ASA Special Series no. 22*, p. 74; La Spada, para. 24 at Art. 42; Lörcher, *Experience*, p. 74.
65 Lachmann, para. 4083.
66 Peter, *SchiedsVZ 2004*, p. 63.