# Arbitration in Switzerland

## The Practitioner's Guide

Dr. Manuel Arroyo, Attorney-at-Law, LL.M.

Wolters Kluwer
Law & Business

*Published by:*
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

*Sold and distributed in North, Central and South America by:*
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

*Sold and distributed in all other countries by:*
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

*Printed on acid-free paper.*

ISBN 978-90-411-3377-9

© 2013 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, Seventh Floor, New York, NY 10011-5201, United States of America. E-mail: permissions@kluwerlaw.com.

Printed and bound by CPI Group (UK) Ltd., Croydon, CR0 4YY

# Part II – Commentary on the Swiss Rules

## Section I: Introductory Rules

### Article 1: Scope of Application

**(1) These Rules shall govern arbitrations where an agreement to arbitrate refers to these Rules or to the arbitration rules of the Chambers of Commerce and Industry of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud, Zurich, or any further Chamber of Commerce and Industry that may adhere to these Rules.**

**(2) The seat of arbitration designated by the parties may be in Switzerland or in any other country.**

**(3) This version of the Rules shall come into force on 1 June 2012 and, unless the parties have agreed otherwise, shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date.**

**(4) By submitting their dispute to arbitration under these Rules, the parties confer on the Court, to the fullest extent permitted under the law applicable to the arbitration, all of the powers required for the purpose of supervising the arbitral proceedings otherwise vested in the competent judicial authority, including the power to extend the term of office of the arbitral tribunal and to decide on the challenge of an arbitrator on grounds not provided for in these Rules.**

**(5) These Rules shall govern the arbitration, except if one of them is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, in which case that provision shall prevail.**

---

#### I. Purpose of the Provision

**1** The provision is intended to define temporal, local, subject matter, and reference parameters for arbitrations under the rules.

**2** The Swiss Rules are based on the UNCITRAL Rules, adjusted to institutional arbitration. Initially, the seat of the arbitration was to be in Switzerland.[1] The provision was revised effective July 1, 2004, permitting the parties to freely designate their seat within or outside Switzerland.[2] The 2012 Rules deleted the reference to international arbitration, thus broadening the scope of the rules even further. In spite of the dualistic nature of arbitration in Switzerland and a few other jurisdictions,[3] it is permissible to refer purely domestic disputes to the 2012 Rules.

#### II. Derogation from the Provision

**3** It is not permissible to give preference to individual chambers' rules in international cases. Derogation from the provisions is explicitly provided for in the 2012 Rules when the rules conflict with mandatory law. Otherwise the Swiss Rules prevail.

---

1 Kaufmann-Kohler/Rigozzi, para. 113.

2 Poudret/Besson, para. 524; Karrer, para. 1 at Art. 1.

3 Gilliéron/Pittet, para. 7 at Art. 1; Blessing, *ASA Special Series no. 22*, p. 27.

## III. Content of the Provision

### A. Paragraph 1

#### 1. Internationality

Paragraph 1 of the 2004 Rules defines the applicability of the rules when reference is made thereto. It limits the subject matter of arbitrations under these rules to "international" arbitrations. This distinction is due to the dualistic nature of arbitration in Switzerland and other countries, making a difference between domestic and international arbitration.[4] **4**

The definition of "international" used for these rules was presumably, but without specific reference, the one applied under Art. 176(1) PILS.[5] According to Art. 176(1) PILS, an arbitration is international, if at least one party had neither domicile nor habitual residence in Switzerland. The decisive moment for internationality is the time of conclusion of the arbitration agreement.[6] The existence of a branch of a company in Switzerland will not negate internationality.[7] **5**

It is irrelevant if the dispute itself is related to a cross-border transaction or occurrence.[8] By the same token, whether a dispute is commercial in nature plays no part,[9] unlike requirements found in Art. 1(1) UNCITRAL Model Law. **6**

Under the 2012 Rules, no internationality is required. **7**

#### 2. Reference to the Rules

Paragraph 1 further clarifies that, not only a reference directly to the Swiss Rules but also a reference to the rules of any of the member chambers, suffices to make the Swiss Rules applicable. This clarification was necessary, as each chamber continues to administer arbitrations.[10] It creates a presumption of how contracts with specific references are to be interpreted. **8**

While this may be helpful to careless drafters,[11] it may infringe on the autonomy of those parties who deliberately choose specific chamber rules.[12] Viewed in conjunction with paragraph 3, this clarification creates valid references of older agreements to the Swiss Rules. **9**

The reference to the rules will not supersede party agreements that derogate from the Swiss Rules.[13] It will not supersede mandatory laws of the seat country,[14] e.g., the prohibition in Italy against provisional measures found in Art. 26 of the Swiss Rules.[15] **10**

The 2012 Rules added the Chamber of Neuchâtel and made a slight grammatical alteration, changing an "and" for an "or", to facilitate the addition of any other Chambers in the future. **11**

---

4 Gilliéron/Pittet, para. 2 at Art. 1.
5 The definition of what is an international arbitration varies in different countries.
6 Gilliéron/Pittet, para. 6 at Art. 1.
7 Lalive/Poudret/Reymond, para. 3 Art. 176; Poudret/Besson, para. 35.
8 Karrer, para. 6 at Art. 1.
9 Berger/Kellerhals, para. 37.
10 Girsberger/Voser, paras. 197-198.
11 Reference is made here to drafters who do not verify the existence of the rules they are choosing in advance and may thus produce pathological arbitration clauses, ensuring that courts and arbitrators would interpret the clause as properly referencing a set of rules.
12 Gilliéron/Pittet, para. 15 at Art. 1.
13 Berger/Kellerhals, para. 11.
14 Berger/Kellerhals, para. 12.
15 Karrer, para. 2 at Art. 1.

*3. Writing Requirement*

**12** It is notable that no writing requirement is contained in the Swiss Rules, which Blessing considers to be an innovation suitable to the (electronic) times.[16] It has been argued that with the wording "agreement to arbitrate" rather than a writing requirement, modern theories, such as the group of companies doctrine, can be accommodated.[17] It may well be that the reason for the lack of a requirement for written agreement in the scope of application was the need to be able to make room for the extension of an agreement to third parties. It does facilitate the inclusion of third parties as previewed in Art. 4(2), who no longer need to be included in a written contract. However, in how far third parties can be validly included in an arbitration agreement they were not party to is not addressed by Rule 1, but rather by Rule 4(2).

**13** Arbitrations under the Swiss Rules having their seat in Switzerland must comply with the writing requirement contained in Art. 178(1) and (2) PILS. This provision requires at minimum a written offer of arbitration, which makes proving the text thereof possible.[18] This offer does not need to be signed. Consent thereto need not be in writing.[19] Nevertheless, some written evidence, even unsigned, needs to have been exchanged.[20] Countries, which adopted the UNCITRAL Model Law, would have even stricter requirements.[21] Violation of these requirements would invalidate the arbitration clause.

**14** In Swiss courts, the requirement of some writing and an agreement[22] may, in special circumstances, be substituted by behaviour of the parties, which would amount to a waiver of the right to object,[23] or indicates consent, e.g., by delivery of the goods without reservation.[24]

**15** It is questionable, however, whether all agreements to arbitrate permitted by this broad rule would withstand scrutiny of enforcement under Art. II(2) NYC, which does not refer to modern methods or even to oral agreement.[25]

**16** A further obstacle for agreements without writing, i.e., oral agreements would be the issue of proof and submission to Chambers for *prima facie* evaluation as well as likely disputes concerning the scope of the arbitration agreement.

**17** The scope of the necessary agreement is not defined in the Swiss Rules and must be determined by the law applicable to the interpretation of the contract. Such laws may vary as to the required content. In Switzerland, the law does not define the necessary elements.[26] At a minimum, necessary elements of agreement must include those the lack of which would render the clause binding. These necessary elements would generally include the agreement to have a dispute bindingly settled by arbitration excluding the courts, the (initial two) parties to the agreement, the scope of the disputes to be solved,[27] and an agreement that the Swiss Rules are to apply.[28]

**18** No restrictions are imposed in the rules with regard to arbitrability, which will be governed by the law applicable to the arbitration agreement.[29]

**19** For more information see the commentary on PILS.

---

16 Blessing, *ASA Special Series no. 22*, pp. 25-26.
17 Gilliéron/Pittet, para. 8 at Art. 1.
18 Karrer, para. 7 at Art. 1.
19 Karrer, para. 8 at Art. 1.
20 Poudret/Besson, para. 189.
21 Art. 7 UNCITRAL Model Law on International Arbitration.
22 Yearbook of Commercial Arbitration 1996, p. 685, Switzerland 26, Basel Court of Appeal 1995.
23 BGE 121 III 38 para. 3.
24 Karrer, para. 8 at Art. 1.
25 Poudret/Besson, para. 188, consider an agreement in writing a requirement of validity under the NYC.
26 Kaufmann-Kohler/Rigozzi, para. 166.
27 Kaufmann-Kohler/Rigozzi, para. 166, adding also the reference to a legal order generally.
28 Gilliéron/Pittet, para. 10 at Art. 1.
29 Gilliéron/Pittet, para. 12 at Art. 1; Kaufmann-Kohler/Rigozzi, para. 98.

### *B. Paragraph 2*

Paragraph 2 defines the seat of the arbitration to be permitted in any location within and outside of Switzerland, thus making clear that the rules are not limited to arbitrations with their seats in Switzerland. **20**

If the parties do not define their seat, the Special Committee, a section of the Court comprising seven members (Art. 4 Internal Rules of the Court), makes a determination according to Art. 16(1) Swiss Rules. The finding of the Special Committee is administrative in nature and cannot be challenged in front of the courts directly.[30] Upon agreement between the parties, the seat may be relocated.[31] **21**

It is these authors' view, that the decision of the Special Committee can be challenged in front of the arbitral tribunal, once it is established.[32] Whether such relocation is possible is in dispute.[33] **22**

A change of seat *sua sponte* is not possible, as a lack of objection could be construed as waiver.[34] As a consequence, the parties should make their objections with their first pleading following the determination of the seat. **23**

The arbitral tribunal will have more facts at its disposal, is the master of the arbitral proceeding and can guarantee the right to be heard in an adversarial proceeding, while the Special Committee can decide without participation of the parties. Many authors suggest that the Special Committee should consult with the parties,[35] which in the authors' view is insufficient. The authors submit that in an important decision, such as the choice of a seat,[36] the parties must be heard or a violation of a fundamental procedural right occurs. **24**

### *C. Paragraph 3*

Paragraph 3 defines the temporal scope of application. Disputes submitted after 1 January 2004 are to be administered according to the Swiss Rules absent special agreement to the contrary.[37] **25**

The provision addresses the issue of inter-temporal application by automatically making all references to the previous individual Chambers rules and to Swiss Rules, unless specified otherwise. This section should be viewed in conjunction with paragraph 1. Assuming an agreement was signed in 2000 with reference to the Zurich Rules, and a case was filed in 2010, the reference to the Zurich rules is to be interpreted as to the Swiss Rules, which apply to arbitrations after 1 January 2004. Without the existence of paragraph 1, the exception in paragraph 3 may have been interpreted to mean that the parties specifically chose not to apply other Rules than the Zurich Rules. **26**

Paragraph 3 creates the presumption of a dynamic reference by focusing on the date of submission, rather than by creating a static reference to the date of signature. This method poses certain problems considering the fact that parties' consent to arbitrate is the foundation for arbitration. This may subject them to procedural provisions they are not yet aware of or to provisions that curtail important procedural rights that existed before. **27**

Some refer to this approach as impractical[38] or not feasible for arbitrators.[39] The absence in the revised UNCITRAL Rules of a dynamic reference to arbitration agreements predating their entry into force may be an indicator that not all changes can be shrugged off as justified by practicality. The principles **28**

---

30 Karrer, para. 13 at Art. 1.

31 Kaufmann-Kohler/Rigozzi, para. 118; Berger/Kellerhals, para. 715.

32 In agreement Berger/Kellerhals, para. 707.

33 In favour: Lalive/Poudret/Reymond, para. 13 at Art. 176; Berger/Kellerhals, para. 716.

34 Berger/Kellerhals, para. 698.

35 Instead of many Berger/Kellerhals, para. 709.

36 For the relevance of the seat see Berger/Kellerhals, paras. 689-693.

37 Scherer, *SchiedsVZ 2005*, p. 231.

38 Greenberg/Mange, *J.Int.Arb. 2010*, p. 199.

39 *Cremer v. Granaria*, [1981] 2 Lloyd's Rep. 583.

of party autonomy, *pacta sunt servanda,* and the contractual nature of arbitration need to be taken into account.[40]

**29** The predominant view, however, approves of dynamic references contained in institutional arbitration as conforming to the standard of applying procedural rules valid at the time of submission.[41] It conforms to most institutional provisions and is contained in the revised UNCITRAL Rules 2010, with modifications, and in litigation.[42]

**30** While it cannot be said that it is impossible or in every case a severe violation of party autonomy to have dynamic references, the revisions applied need to be foreseeable in order not to limit parties' access to the courts of law.[43] Arbitration is in most cases a voluntary waiver of the right to access to the courts as constitutional guarantee. As such, parties must have protection concerning the procedures followed. Whether such dynamic reference can thus be considered valid may depend on specific circumstances of individual rules. In cases of changes that amount to a surprise to the parties, a presumption of a dynamic reference may fail.[44]

**31** When old and new versions of the rules conflict, the *Komplex*[45] test should apply, which prescribes precedence of the old rules only when changes result in a structural and fundamental difference.[46]

**32** The debate is still on going.[47] In Switzerland, the test of which rules are to apply is one of contract interpretation: if the parties, aware of the revision, would have concluded the clause in the same fashion, the dynamic reference stands.[48] In a case analogous to the set up of the Swiss Rules, which explicitly are the successor rules for the Chamber rules (para. 1), the FETAC Rules were succeeded by the CIETAC Rules. An English court held, that if a particular institution's rules are chosen, the agreement *prima facie* refers to the rules applicable at the time of submission of the dispute.[49]

**33** As the Rules stand, the presumption of applicability of the rules in force at the time of submission would only be overcome by, e.g., making specific reference to the Zurich rules in force on a specific date.

**34** With the passage of time, the concerns regarding party autonomy mentioned above diminish, as parties have not been permitted to conclude institutional arbitration agreements referring to the individual chamber's rules since the entry into force of the Swiss Rules.[50]

### *D. Paragraph 4*

**35** Article 1(4) is an innovation of the 2012 Swiss Rules. The Swiss Chambers' Court is intended to be the only supervisory power for the arbitral proceedings to the exclusion of any Court, insofar as such exclusion is permitted by the law applicable to the proceedings. In Switzerland, exclusion of court supervision is possible to a wide extent, while other countries do not permit exclusion of court supervision. The intent behind the provision is to maintain the integrity of the arbitral proceedings and expedite the proceedings by eliminating delays caused by court proceedings. To what extent this provision will prove effective remains to be seen.

---

40 U.N.Docs. A/CN.9/WG.II/WP-145, paras. 1-2, and A/CN.9/619, paras. 33-35.

41 Greenberg/Mange, *J.Int.Arb. 2010*, pp. 199 and 201; Craig/Park/Paulsson, p. 142; Besson, *ASA Bull. 1994*, pp. 230-243.

42 Greenberg/Mange, *J.Int.Arb. 2010,* p. 201; differing opinion: Court of Appeal Paris, Jan 22, 2009.

43 Scherer, *SchiedsVZ 2005,* p. 231.

44 Scherer, *SchiedsVZ 2005,* p. 231. In ICC Case No. 5622 (1992; *ICC Arb. Bull. 1997/1*, pp. 52-53), the arbitrator made reference to "surprising" provisions, stating that such provisions might result in failing of the reference.

45 BGer. of 14 June 1990 para. 4c/aa, *Komplex v. Voest-Alpine Stahl*, *ASA Bull. 1994,* p. 227.

46 Scherer, *SchiedsVZ 2005,* p. 231.

47 Greenberg/Mange, *J.Int.Arb. 2010*, p. 212.

48 BGer. of 14 June 1990 para. 4c, *Komplex v. Voest-Alpine Stahl*, *ASA Bull. 1994*, pp. 227-228.

49 *China Agribusiness Development Corp. v. Balli Trading*, [1998] 2 Lloyds Rep. 76.

50 Gilliéron/Pittet, para. 15 at Art. 1; see also Art. 16 Swiss Rules.

However, this provision is limited to supervising the proceedings and enumerates two such instances; the power to extend any terms of office of the arbitral tribunal and the power to decide on challenges of arbitrators not provided for in these rules. It does not address supervision of the award itself and the potential to commence setting aside or annulment proceedings. **36**

### *E. Paragraph 5*

Paragraph 5 mirrors common clauses found in many contracts and arbitration rules. A similar provision relating to the prevailing of mandatory law can be found in the UNCITRAL Arbitration Rules Art. 1(2), the CPR International Arbitration Rules 1.2, Art. 3(a) WIPO Arbitration Rules. **37**

## IV. Comparison to Other Arbitration Rules

The UNCITRAL Rules, upon which the Swiss Rules are based,[51] contain in Art. 1 a provision dealing with the scope of application. The UNCITRAL Rules specify a writing requirement for the arbitration agreement. (1(1)), which the pre-released UNCITRAL Rules no longer contain. Wehrli suggests that this was a result of the influence of the Swiss Rules.[52] As the UNCITRAL Rules are *ad hoc* rules, no limiting specification as to the seat is made. No provision exists about restrictions concerning international applicability either. The reference is narrower than the one contained in the Swiss Rules, creating a presumption of applicability of the revised rules only for such arbitration agreements *concluded* after August 15, 2010, when the revised rules were available for parties to study. **38**

The LCIA Rules contain in their preamble a writing requirement for the arbitration agreement. The preamble also specifies a dynamic reference. Art. 16(1) provides for a free choice of arbitral seat, with a default of London. No limitation to international disputes is contained in the LCIA Rules. **39**

The CAS Rules are not limited in national or international scope (R27). The arbitration agreement must be in writing or the arbitration itself must result from an appeal from a sport-oriented organization, the statutes of which provide for CAS arbitration (R27). The seat of the arbitration is in Lausanne, Switzerland (R28).[53] **40**

The WIPO Rules also provide for a dynamic reference in Art. 2. It does not specify a written agreement; however, Art. 9 (iii), similar to the ICC Rules, requires the submission of an arbitration agreement as a "copy". No limitations as to the seat are imposed; however, the parties may only suggest the seat, rather than choose it (Art. 39(a)). **41**

---

51 Wehrli, p. 79.

52 Wehrli, p. 85.

53 For a commentary on R27 and R28 of the CAS Code, see Chapter 5 below.

## Article 2: Notice, Calculation of Periods of Time

**(1) For the purposes of these Rules, any notice, including a notification, communication, or proposal, is deemed to have been received if it is delivered to the addressee, or to its habitual residence, place of business, postal or electronic address, or, if none of these can be identified after making a reasonable inquiry, to the addressee's last-known residence or place of business. A notice shall be deemed to have been received on the day it is delivered.**

**(2) A period of time under these Rules shall begin to run on the day following the day when a notice, notification, communication, or proposal is received. If the last day of such a period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days are included in the calculation of a period of time.**

**(3) If the circumstances so justify, the Court may extend or shorten any time-limit it has fixed or has the authority to fix or amend.**

---

### I. Purpose of the Provision

**1** The 2004 and 2012 Rules are based on the UNCITRAL Rules, tailored to institutional arbitration. The previous UNCITRAL Rules Art. 2 only contained minor adaptations from Art. 2(1) and (2) of the 2004 Rules.[1]

**2** This provision is intended to define notices and the calculation of time periods. It is particularly relevant concerning the submission of pleadings, such as the statement of claims, the defense or motions. The calculation of deadlines must be known to the parties to satisfy the demands of procedural justice, or else a party may inadvertently waive its rights.

**3** Article 2(1) and (3) have been amended. In Paragraph 1, the rule concerning places where a notice deems to have been received has been changed, i.e., broadened. On the one hand the reference to physical delivery has been deleted and on the other hand it was inserted that a notice is also deemed to have been received when delivered to an electronic address. Paragraph 3 conveys the authority to deal with time-limits to the newly founded Swiss Chambers' Court (see *Introduction, (b)*). Additionally it may not only extend but also shorten any time-limits in the 2012 Rules.

### II. Derogation from the Provision

**4** The method of notice described in Art. 2 Rules 2004 and 2012 will most likely only be relevant to the initial notice by the Swiss Chambers[2] Court to Respondent and potentially for correspondence between the Swiss Chambers' Court and the parties or the Swiss Chambers' Court and the arbitrators.[3] The parties are free to agree on methods of notification less stringent than the ones detailed in Art. 2 Rules 2004 and 2012.[4]

**5** In many instances, the first procedural order or terms of reference will provide for the appropriate method and address for service of transmissions. Often an agent for service will be designated, such as a law-firm, which is permitted to receive communications in this matter.

---

1 Gilliéron/Pittet, para. 1 at Art. 2; Karrer, para.1 at Art. 2; Blessing, *ASA Special Series no. 22*, p. 27.

2 For the purpose of this Article, the Chambers will forthwith be referred to as the "Swiss Chambers' Court" (see *Introduction, (b)*, Swiss Rules 2012).

3 Reference is made here to the potential of, e.g., challenges or the transmission of the file, which require a certain formality.

4 Van Haersolte/van Hof, p. 173.

## III. Content of the Provision

### *A. Scope*

The provision applies to the transmission of all information, such as notifications, communications and proposals throughout the Rules. The enumeration in the rules is not exclusive, but rather exemplary. Any transmissions from or to the parties, the Swiss Chambers' Court or arbitrators are included in the scope of the provision. **6**

### *B. Paragraph 1*

Paragraph 1 of the 2004 Rules establishes the presumption that physical presence of the notice in the "sphere of influence" of the recipient constitutes sufficient notice. Actual notice of the content or of the documents is not required. This theory is called the "objective-receipt theory".[5] The last sentence of paragraph 1 creates a presumption of receipt on the date of delivery, rather than the day thereafter, while the period begins to run only the day thereafter.[6] **7**

Paragraph 1 of the 2012 Rules no longer requires the physical presence of the notice in the recipient's sphere of influence, i.e., there is no need to deliver a "hard-copy". It is sufficient that the notice is delivered to the recipient's electronic address. In that case the e-mail is deemed to be delivered when the recipient can retrieve it from its e-mail system. **8**

#### *1. Potential Methods of Notification*

Delivery can be affected by several methods. The first alternative mentioned is personal service. The second alternative refers to delivery to the habitual residence, place of business or mailing address or – according to the 2012 Rules – electronic address. If none of these can be found after making reasonable inquiry, the notice can be delivered at the addressee's last known residence or place of business. **9**

##### *a. Personal Service*

Physical delivery to the addressee, i.e., personal service, is the preferred method of service in the United States, but is also contained in Art. 138(2), second sentence, ZPO as an option. This method is not frequently used in the continental setting. It requires the actual handing over of the information to be transmitted to the addressee. **10**

Even though Art. 2(1) no longer mentions the physical delivery but rather delivery in general, personal service through physical delivery to the addressee is still possible. **11**

The question of valid delivery to a representative has been raised regarding other international arbitration institutions.[7] In case of the US-Iran Claims Tribunal, a designated representative was considered sufficient for notices, while a mere assistant was not.[8] **12**

The options in Art. 2(1) do not include the possibility of serving a notice etc. to a representative of the addressee. Whether a representative can substitute the addressee depends therefore on the consent of the party concerned or, absent such consent, on the *lex arbitri*. **13**

###### i. Permissibility of Notice to Representatives Absent Consent

If the party concerned is a legal entity such as a company, the question arises to whom the notice has to be delivered in order to satisfy the requirement of personal service through physical delivery. In other words it has to be examined – under the 2004 and 2012 Rules – who can legally represent the company. Since this is a matter of substantive law, the applicable law has to be determined. This is according to **14**

---

5 Gilliéron/Pittet, para. 2 at Art 2.

6 This coincides with the UNCITRAL Rules. See van Haersolte/van Hof, p. 173.

7 Gilliéron/Pittet, paras. 4-5. at Art. 2.

8 Gilliéron/Pittet, para. 4 at Art. 2.

Art. 33(1) of the 2004 and 2012 Rules and Art. 187(1) PILS the rules of law with which the dispute has the closest connection. Generally this will be the law of the country where the company was incorporated (e.g., Art. 154(1) PILS). This question only comes into play if the concerned party does not consent to delivery to a certain person. The following examples should illustrate these thoughts.

**15** Notification by use of a representative absent consent by a party will usually occur at the outset of the proceedings, when the Notice of Arbitration is sent to the Company-Respondent. For example, the Notice is physically delivered to a CEO while dining in a restaurant. In this case, whether personal service has been properly effected in relation to the company depends on the applicable law that determines whether the CEO is the proper representative.

**16** This issue is to be separated from the question of non-personal delivery. Non-personal delivery, such as notice to the place of business, need not be personal. There is no requirement, as exists in, e.g., the US Federal Rules of Civil Procedure, to deliver notice to a specific and authorized person at the place indicated in the Rules.[9] A simple dropping in the mailbox or any other means designed for the receipt of communications will suffice. Actual notice is not required, but merely the entry into the sphere of influence of the addressee.

ii. Permissibility of Notice to Representative after Designation

**17** A party is free to name a representative for the service of notices, etc. This results from the principle of party autonomy. Should a notice addressed to a designated representative not reach that person at the address provided by that party, it is then stopped from claiming a lack of notice.[10]

iii. Practical Consideration

**18** This discussion, however, can be avoided by using the expedient of delivering to any of the other possible options (the last only with the requirements of the fourth option fulfilled), which do not require a personal presence of the addressee at all.

*b. Service to Address*

**19** Delivery to the habitual residence, place of business or mailing address represents the most common method for initial service in international commercial arbitration and is the preferred method of the Swiss Chambers' Court. It is usually accomplished by courier or return receipt mail. This is most common for the practical reason that businesses, which are the most common participants in international commercial arbitration, have established headquarters and places of business to which service can be made. This method offers wide latitude, even permitting service to a mere mailing address, which does not exclude a PO Box. The latter is, however, not advisable, as enforcement of an award may be hampered if, e.g., a default judgment is based on notice to a PO Box.

**20** Article 2(1) also permits the notice to be delivered to an electronic address. It remains to be seen if this method will gain wide spread acceptance. Even though many arbitration rules nowadays allow it and even though it is a time and cost efficient means of communication there are also serious risks attached to it. It is well known that e-mail systems can be unstable and thus it often occurs that without fault of either party transmissions either are substantially delayed or filtered out by a spam filter or they do not reach the intended recipient at all. It is important to know that the sender often does not immediately know that something went wrong with the transmission. Usually e-mail servers are configured to only send messages about the delay after five hours (at the earliest). If for a technical reason the e-mail cannot be delivered to the recipient's server, it can take up to three days until the sender gets a notification about the unsuccessful delivery attempt.

**21** As a result, it is suggested here – as a rule of thumb – that there is a rebuttable presumption that the e-mail has been delivered to the recipient's e-mail system if there is no notification of a delivery failure

---

9 See, e.g., Art. 20(1)(b) PILS.

10 Concurring: Gilliéron/Pittet, para. 5 at Art. 2.

or delay after three days. The burden of proof that the e-mail was not received therefore lies upon the recipient.

It has further to be clarified when a person has the legal obligation to download its e-mails from the server ("empty the inbox").[11] § 312e(1) s. 2 German Civil Code obliges the intended recipient to retrieve the messages "*in normal circumstances*". Hence, if a person involved in arbitration proceedings provided an e-mail address, it is also obliged to regularly retrieve its messages during normal business hours. **22**

*c. Substitute Service*

This provision equals in substance the former UNCITRAL Arbitration Rule Art. 2(1). Most arbitral rules provide for service to the last known address.[12] However recognition and enforcement in Germany could be denied, if no proof of reasonable inquiry of a current address is given.[13] Spain does not require such proof.[14] **23**

Under Swiss law Art. 141 ZPO, as well as under other procedural laws, the substitute method of service is publication. Reasonable inquiry is required prior to permitting this method of service.[15] **24**

Under the 2004 and 2012 Rules substitute service based on delivery to the last known residence or place of business may be affected only if all other permissible methods have failed. Determination of failure requires that reasonable inquiries were made but were fruitless. **25**

i. Addressee of the Provision

Neither the 2004 nor the 2012 Rules specify who is to make the reasonable effort at locating the party's habitual residence, place of business, mailing or – under the 2012 Rules – electronic address. Gilliéron and Pittet suggest that it can be the arbitrators or the institution, but that their efforts must be limited to the information provided by the parties.[16] Corresponding assumptions have been made with regard to similar provisions in other institutional rules.[17] **26**

In the view of these authors, the burden to make such an effort does not lie upon either the Swiss Chambers' Court or the arbitrators. While institutions and arbitrators should apply all reasonable care to create an enforceable award, these reasonable measures must be based on procedural and administrative duties. Since it is in the interest of the party concerned (usually Claimant) to make a reasonable effort to create an enforceable award, based on proper notice, it has the duty to provide the Swiss Chambers' Court or the arbitrators with the addressee's correct details. **27**

According to Swiss procedural doctrine in litigation, it is the parties' obligation to make inquiries.[18] Arbitrators and the Swiss Chambers' Court find themselves torn between the duty to render an award based on proper notice and the need to remain impartial. Violations of either, proper notice or independence, can cause an award to be unenforceable. The NYC grants the possibility to refuse enforcement of an award when notice was not properly given (Art. V(1)(b)). The PILS provides for a similar rule in Art. 27(2)(a). Arbitrators may also be accused of a lack of independence, if too much assistance was rendered to a party not providing the proper address. While it would be proper to attempt notice to all addresses provided by the party, independent research will not be appropriate. The Swiss Chambers' Court and arbitrators should thus be careful to conduct investigations on their own. **28**

In addition to the responsibility for making inquiries, it is our opinion that the authority to determine whether the third option for notice is justified should lie with the Swiss Chambers' Court. The Swiss **29**

---

11 See Gauch/Schluep/Emmenegger, para. 202.

12 Jana/Armer/Klein Kranenberg, para. 243 at Art. V(1)(b).

13 Bavarian Superior Regional Court, Germany (decision of 16 March 2000), *YCA 2002*, pp. 445, 448-449.

14 *Es-Tel Estudi S.L. v. X.*, "Auto" (Order) No. 281/2006, reported in ITA Arbitration Report April 2007 (Order of 5 October 2006; Madrid Court of Appeals, Spain).

15 Staehelin, para 2 at Art. 141.

16 Gilliéron/Pittet, para. 3 at Art. 2.

17 Derains, p. 44.

18 Strobel, para. 10 at Art. 141.

Chambers' Court will be required to transmit the file to Respondent and to perform the function of gatekeeper for proper notice. This is in line with the duties of a state court in Switzerland.[19] A determination by the tribunal or in challenge procedures would only increase time and cost and detract from the sufficiency of the proceedings.

**30** According to the information received by Chambers, substitute service has not yet occurred. According to inquiries with the Geneva Chamber of Commerce and Industry, it is the parties who will bear the risk of improper notice and Chambers will not second guess their assessment for that reason. The Zürich Chamber of Commerce takes a different view considering it Chambers responsibility to decide whether inquiries were sufficient. It remains to be seen which position the Swiss Chambers' Court under the 2012 Rules will take.

ii. Sufficiency of the Reasonable Inquiry

**31** As under Art. 141(1)(a) ZPO, which functionally deals with the same situation as Art. 2(1) Swiss Rules, the Swiss Chambers' Court are only allowed to resort to deliver the notice to the addressee's last known residence or place of business if habitual residence, place of business or mailing address of the addressee cannot be established with reasonable inquiry.[20]

**32** The following guidelines apply to the amount of research that needs to be performed by the party seeking notification. It is insufficient to solely rely on the address provided in the agreement. At a minimum, internet research containing the name and previous location is required. The Swiss Supreme Court holds that, for cases in litigation that refer to substitute service, all practicable and appropriate measures under the circumstances should be taken.[21] The authors consider the same principle to be applicable to international commercial arbitration. The application of the principle, though, must be more lenient.

**33** It is our opinion that Claimant has to provide the Swiss Chambers' Court with evidence of sufficient inquiries. This proof should contain a record of the failure of notification by the first two alternatives. Failure to provide sufficient proof should not result in an immediate dismissal of the case, but in a request of the Swiss Chambers' Court to provide either further proof or attempt a different method of notification. Only once this request has been made by the Swiss Chambers' Court and sufficient evidence not been provided should the case be dismissed without prejudice. Should Claimant provide evidence of sufficient inquiries after the request has been made, Chambers should permit substitute service.

iii. Refusal of Service

**34** A question not addressed by the rules, but which has occurred in practice is the refusal to accept service. The practice of Chambers under the 2004 Rules was, that refusal to accept service will be treated as if service had been performed. Even though this is not in the rules, both Swiss internal procedural law (Art. 138(3) ZPO) and other procedural laws, which would govern matters not addressed in the rules permit this fiction. It is also permitted under the New York Convention.[22] It remains to be seen which position the Swiss Chambers' Court under the 2012 Rules will take.

*2. Means of Communication*

**35** The objective delivery rule contained in the Rules does not provide for specific means of communication.[23] The phrasing "physically delivered" (Rules 2004) seems to indicate that electronic means of communication are not permitted. However, prevailing opinion is that electronic means of communication should be permissible.[24] This is now clarified by the omission of the word "physically" in the 2012

---

19 Strobel, para. 10 at Art. 141.

20 Strobel, para. 8 at Art. 141.

21 BGE 64 III 40 para. 2.

22 Jana/Armer/Klein Kranenberg, para. 243 at Art. V(1)(b).

23 Gilliéron/Pittet, para. 7 at Art. 2.

24 Gilliéron/Pittet, para. 7 at Art. 2; Blessing, *ASA Special Series no. 22*, p. 27.

Rules. Due to the fact that proof of the delivery must be provided in case of denial, any method leaving a physical trace of the delivery would be advisable.[25]

### *C. Paragraph 2*

Again this provision is parallel to the UNCITRAL Arbitration Rule Art. 2(2). If the end of the delay falls on an official holiday or non-working day, the delay runs to the next business day. It is important to note that business days are determined by the location of the addressee or by the location to which the notification has been sent. This provision, while referring only to two of the various options for delivery of the notification, should be interpreted uniformly for all methods of delivery.[26] **36**

### *D. Paragraph 3*

Similar to the UNCITRAL Rules and the ICC Rules, under the 2004 Rules Chambers may extend time limits mentioned in sections I and II of the Rules, as well as any other time limits set by Chambers. **37**

Under the 2012 Rules the Swiss Chambers' Court may not only extend but also shorten time-limits. Under the 2004 Rules, Chambers were only allowed to shorten the time-limit for the appointment of arbitrators in the context of the Expedited Procedure (Art. 42(1)(a) Rules 2004). 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) Rules 2004 could be deleted. **38**

In contrast to the 2004 Rules, Art. 2(3) now state that the Swiss Chambers' Court may extend or shorten *any* time-limit it has fixed or has the authority to fix or amend. This change became necessary because unlike the 2004 Rules the 2012 Rules contain time-limits that Swiss Chambers' Court can alter not only in Sections I and II but also in Section V (Art. 43(3) and (7) Rules 2012). **39**

Another important change should be noted. Whereas Art. 2(3) Rules 2004 allowed Chambers to extend time-limits provided in Sections I and II of the Rules (apart from the time-limits they have set), Art. 2(3) now only permits the Swiss Chambers' Court to extend (or shorten) time-limits it *has the authority* to fix or amend (apart from the time-limits it has fixed itself). This means that Swiss Chambers' Court under the 2012 Rules can no longer extend (or shorten) the time-limits set forth in Arts. 3(7), 7(2), 8(4) Swiss Rules 2004/2012.[27] This is because these provisions simply state a certain time-limit (e.g., 30 days) without giving the Swiss Chambers' Court the authority to amend them. Under the wording of Art. 2(3) Rules 2004 this was possible. **40**

In summary, Swiss Chambers' Court may extend or shorten the time-limits contained in the following provisions: Arts. 3(5), 8(2), 13(1), 43(3) and (7). **41**

Neither the 2004 nor the 2012 Rules permit the Swiss Chambers' Court to extend time limits set by the arbitrators or by a court. **42**

A precondition for the extension or – under the 2012 Rules – the shortening of time-limits is that "circumstances so justify". This broad wording allows for a flexible handling of any situations, which may arise. **43**

The Swiss Chambers' Court will generally request reasons for extensions or – under the 2012 Rules – the shortening. Experience of Chambers has shown, that extensions are requested by the arbitrators, after parties requested additional time. In such cases, extensions will be granted. **44**

The 2004 Rules, by specifying that any time limits set by chambers can be extended by chambers, include an elegant possibility for multiple extensions, as an extension is a time-limit set by chambers rather than a time limit specified under Sections I or II. The flexible approach of the Rules is, in our opinion, superior to fixing a final date.[28] This argument also hold true under the revised wording of Art. 2(3) Rules 2012. **45**

---

25 Gilliéron/Pittet, para. 8 at Art. 2.

26 Gilliéron/Pittet, para. 10 at Art. 2.

27 This also holds true for the new provisions of Arts. 10(3) and 43(4) Swiss Rules 2012.

28 Karrer, para. 1 at Art. 2.