

New Supplemental Swiss Rules for Trust, Estate and Foundation Disputes

The Growing Significance of Arbitration in Switzerland

Since their adoption by the Swiss Arbitration Centre in 2004, the Swiss Rules of International Arbitration (periodically updated to reflect evolving best practices) have played a pivotal role in establishing Switzerland as a popular location for both domestic and international arbitration. The efficiency, flexibility, relative cost-effectiveness and confidentiality, makes arbitration in Switzerland an increasingly preferred method for resolving complex and sensitive disputes, particularly those involving private wealth.

This development is enhanced by Swiss procedural law which recognizes the validity of arbitration clauses in unilateral legal instruments - such as wills, trust deeds, and foundation statutes - under both the Swiss Code of Civil Procedure (CPC) and Chapter 12 of the Private International Law Act (PILA), provided that they stipulate a seat of arbitration in Switzerland. However, trust, estate, and foundation (TEF) disputes present unique characteristics that are not sufficiently addressed by the general Swiss Rules.

The TEF Rules: A Tailored Framework for Private Wealth Disputes

To address the unique characteristics of TEF disputes, the Swiss Arbitration Centre has developed bespoke procedural rules (the TEF Rules), which will enter into force on 1 July 2025. These new rules supplement the existing Swiss Rules and are designed to tailor arbitration proceedings to the complexities of private wealth disputes.

The TEF Rules are accompanied by model arbitration clauses designed for inclusion in wills, inheritance contracts, trust deeds and foundation statutes. These specific rules will apply automatically when a Unilateral Arbitration Clause refers to arbitration under the Swiss Rules.

These rules are particularly relevant in cross-border estates where the presence of numerous parties and assets located in various jurisdictions could otherwise lead to prolonged and costly litigation before state courts.

For example, a testator may include an arbitration clause in a will or inheritance agreement to address

potential disputes concerning the validity of the will, the division of assets, or matters relating to matrimonial property regimes. Similarly, a trust deed may include an arbitration clause to anticipate disputes among trustees, protectors, and beneficiaries. Foundations are not immune to internal disagreements either, and arbitration offers an attractive forum for resolving disputes between beneficiaries and foundation boards, providing confidentiality and procedural flexibility.

Key Features of the TEF Rules

The TEF Rules introduce certain innovations that address the unique challenges of TEF disputes:

- 1. Involvement of Entitled Persons:** The rules require that all entities and persons whose rights might be affected by the dispute - referred to as "Entitled Persons" - must be informed and given the opportunity to have their interests represented. Their involvement enhances the enforceability of resulting awards against them, thereby reducing the risk of future disputes.
- 2. Confidentiality:** Enhanced confidentiality provisions apply to all parties involved, including Entitled Persons (and their representatives), even if they do not ultimately become parties to the arbitration. This is particularly important in disputes involving significant wealth, reputational concerns or politically exposed persons.
- 3. Appointment of the Arbitral Tribunal:** The TEF Rules ensure that Entitled Persons are heard on matters relating to the appointment of the arbitral tribunal, even if they choose not to file a Notice of Claim or otherwise participate in the proceedings. They may have to be invited to comment on various aspects, including the number of arbitrators, the appointment procedure and the qualifications of the arbitrators. Furthermore, where not all Entitled Persons are legally represented or where it appears appropriate in the circumstances, the arbitration court is empowered to appoint arbitrators directly. This addresses practical issues that arise in TEF disputes, where not all affected parties may be capable or willing to participate actively.

4. Applicable Law in Estate Matters: Article 35 of the Swiss Rules provides that the arbitral tribunal shall decide the case by applying the rules of law agreed upon by the parties or, failing such agreement, the rules of law with which the dispute has the closest connection. This principle of party autonomy is problematic in estate law matters, where mandatory legal provisions and policy considerations play a role. Under Swiss conflict-of-law rules, testators may only choose between Swiss law and the law of their foreign nationality, if applicable. There is legal uncertainty as to how these estate-specific restrictions interact with Swiss arbitration law, which allows an unrestricted choice of applicable law. To address this issue, the TEF Rules explicitly exclude the application of

Article 35 of the Swiss Rules in estate matters. However, trust and foundation matters are unaffected and remain subject to Article 35.

Certain uncertainties remain regarding the limits of arbitral jurisdiction and the enforceability of awards in TEF disputes, particularly in cases involving heirs who are entitled to a forced heirship share. Such heirs are generally considered bound by a unilateral arbitration clause only if they expressly consent to its application. Ambiguity also arises in situations where the courts of the state in which real estate assets are located have exclusive jurisdiction.

Should you require any further information on this subject, please do not hesitate to contact the authors or your usual contact person at Borel & Barbey. Our specialists will be pleased to assist you.



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