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New Swiss Rules of International Commercial Arbitration

On 1 January 2004, the new uniform Swiss Rules of International Arbitration (the "Swiss Rules") replaced the arbitration rules of the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud and Zurich (the "Chambers"). The Swiss Rules are modelled on the UNCITRAL Arbitration Rules, but assimilate modern arbitral practice and thus provide an excellent procedural framework for the resolution of international commercial disputes.

Why Arbitration?

Although business has become "global", the courts adjudicating international business disputes remain "national". It is difficult for a foreign party to avoid the pitfalls of local court procedures and the foreign litigant may, for a number of reasons, feel that the dispute is not being decided on a level playing field. Even if the action is decided in a court in one's own jurisdiction, if the judgement debtor has no assets in that jurisdiction, the judgement will require enforcement abroad; and the recognition and enforcement of foreign judgements often proves to be difficult or impossible.

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Arbitration overcomes these and other weaknesses of litigation by allowing the parties to decide for themselves *who* will decide the dispute and *how* it will be decided. The parties' agreement to arbitrate empowers a private body, the arbitral tribunal, to decide the dispute. The parties can choose the arbitrators according to their experience in international business matters, technical knowledge and language skills. The tribunal is not bound to apply rules of procedure of a national law, rather it can – in accordance with the parties' agreement – tailor the procedure to fit the specific characteristics of the dispute and its cross-border context. Arbitral awards which comply with the minimum standards set forth in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards qualify for recognition and enforcement in the convention's more than 130 signatory states. Finally, remedies against a final arbitral award are generally very limited. These features have made arbitration the preferred method for the resolution of international commercial disputes.

Switzerland – a Centre of International Arbitration

Switzerland's neutrality and political stability, as well as the respect its legal system enjoys, have long made it a desirable venue for international arbitrations. In addition, parties to an international contract regularly not only provide for Switzerland as the place of arbitration, but also often choose Swiss substantive law to be the "neutral substantive law" governing their relationship. The Swiss International Arbitration Act (Chapter XII of the Swiss Private International Law) of 1987 reinforced Switzerland's reputation as an arbitration-friendly jurisdiction. An important feature of this act is that it permits only narrow grounds for vacating an award and allows only the Swiss Federal Supreme Court to hear an appeal against the award, thus supporting the finality of arbitral awards. In a dispute between two foreign parties, the parties may even exclude any challenge to the award by adding an explicit exclusion clause to their arbitration agreement.

It is estimated that about 400 international arbitrations are held in Switzerland each year. In 2002, parties chose Switzerland as the place of arbitration in nearly 20% of all arbitrations filed with the International Chamber of Commerce ("ICC"). As a leading centre of international arbitration, Switzerland has a substantial pool of arbitrators and lawyers with wide experience in arbitration. Indeed, in ICC arbitrations, the parties chose arbitrators from Switzerland more often than from any other country.

The Swiss Rules: New but Tested

The drafters of the Swiss Rules wisely chose to base the Swiss Rules on the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). This has two significant advantages. First, the UNCITRAL Rules harmonise the

civil and common law approaches and they are well-known worldwide and therefore especially appropriate for parties who wish to arbitrate on neutral ground. Second, since their adoption in 1976, the UNCITRAL Rules have been tested in thousands of arbitrations and have proven to be robust and fundamentally sound. The many decisions under the UNCITRAL Rules and the numerous commentaries written on them are thus a valuable resource for the parties and their lawyers when arbitrating under the Swiss Rules.

Nevertheless, arbitral practice over the years revealed weaknesses in the UNCITRAL Rules. The drafters of the Swiss Rules strove to make the improvements needed to incorporate the most modern arbitration practices and to meet the needs of today's global business. Further changes and additions were required to adapt the UNCITRAL Rules to arbitral proceedings administered by permanent arbitral institutions, i.e. the Chambers. Indeed, the Chambers' common Arbitration Committee helps ensure that the arbitration is run as smoothly as possible, playing a particularly important role during the initiation of the proceedings and the arbitral tribunal's constitution. The Swiss Rules also provide the framework for the financial aspects of the proceedings, including the arbitrators' fees, which are determined in accordance with the Chambers' fee schedule. The fee schedule, which is based on the amount in dispute, avoids the awkward situation of the parties negotiating with the arbitrators about their remuneration.

Special Features of the Swiss Rules

Articles 15 to 30 of the Swiss Rules provide clearer procedural guidelines than other arbitration rules which is particularly helpful to parties relatively less experienced in arbitration. For instance, the Swiss Rules make clear that, upon constitution of the tribunal and prior to the hearings, each party may file at least one written pleading and that the parties are required to submit all documents on which they rely with such written pleading. The Swiss Rules order the tribunal to prepare a provisional timetable in consultation with the parties at an early stage. This promotes the practice of conducting an organisational meeting at the outset of the proceedings in which the format and schedule for the proceedings can be discussed and determined.

Article 21.5 gives the tribunal jurisdiction to hear a set-off defence, notwithstanding that the circumstances giving rise to it are not covered by the arbitration clause or are the subject of a contract with a different arbitration agreement or jurisdiction clause. This clarification avoids the debate on the availability of such defence which arises regularly under arbitration rules which are silent on this point.

Article 42 lets the parties agree to a form of "fast-track arbitration" and cases with a total amount in dispute of CHF 1 million or less are, in principle, to be conducted under the expedited procedure by a sole arbitrator. Emphasis is placed on an accelerated and cost-efficient adjudication of small claims.

Finally, unlike the UNCITRAL Rules, Article 43.1 includes an express provision on confidentiality in the arbitral proceedings.

Selecting the Swiss Rules

Parties to an international transaction who want the benefits of arbitration under the Swiss Rules can do so by simply including in the relevant agreement the standard arbitration clause suggested by the Chambers. It is available – together with the Swiss Rules – at www.swissarbitration.ch.

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