



Arbitration Newsletter Switzerland

The Swiss Rules of Arbitration of January 1, 2004: A First Practical Analysis

The Swiss Rules of Arbitration ("the Swiss Rules") entered in to force on January 1, 2004 and replaced the, up to that date, individual International Arbitration Rules of the Chambers of Commerce of Basle, Berne, Geneva, Lugano, Vaud and Zurich. The Swiss Rules are based on the Uncitral Arbitration Rules of 1976 but were amended resp. modified in two areas, namely

(i) changes and additions required to adapt the Uncitral Arbitration Rules to institutional arbitration;

(ii) changes and additions reflecting modern practice and comparative law in the field of international arbitration.

(cf. Introduction (b) of the Swiss Rules)

Until now almost 70 cases have been filed under the new Swiss Rules, the vast majority in Zurich and Geneva, the two centres of arbitration in Switzerland and the following first conclusions can be drawn:

Transitory Provisions

Article 1 (3) of the Swiss Rules states:

"These Rules shall come into force on January 1st, 2004 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."

The above wording is clear and though most of the arbitration agreements which formed the basis for the more than sixty cases filed so far were signed prior to January 1, 2004, and, thus, were still referring to one of the individual Chambers rules the immediate application of the Swiss Rules has not led to any discussions. Apparently only in one case a party requested the individual Chambers rules to be applied

but there was no consensus with the other party entered into subsequent to January 1, 2004 and, hence, there was no opting out available to this party for the old rules.

Place of Arbitration

In July 2004, Article 1 (2) of the Swiss Rules, originally restricted in its application to the territory of Switzerland, has been amended by stating that

"The parties are free to designate the seat of the arbitration anywhere in Switzerland or elsewhere."

(emphasis added)

This amendment allows for the Swiss Rules to become applicable for any arbitration proceedings in the world, irrespective of the seat of the arbitral tribunal.

According to Article 3 (1) of the Swiss Rules, a party initiating arbitration proceedings can submit its notice of arbitration to any of the six Chambers, regardless of the actual place of arbitration. It is then an internal matter of the six Chambers to decide where the notice of arbitration is actually registered.

Pathological Arbitration Agreements

According to Article 3 (6) of the Swiss Rules, the Chambers forward any notice of arbitration to the respondent

"... unless the Chambers decide, after consultation with the Special Committee, that there is manifestly no agreement to arbitrate referring to these Rules."

Some of the notices of arbitration filed so far under the Swiss Rules had to be looked at more closely, in order to find out whether the parties had actually



agreed for institutional arbitration under the Swiss Rules.

In the following, a few of those cases are cited:

"... Further more, both parties agree to that all disputes, controversies or differences that cannot be settled by negotiations between them, shall upon written request by either party, be settled by arbitration in and under the laws of Switzerland. The result of such arbitration shall be final and binding on both parties."

This arbitration agreement does not contain any reference to institutional arbitration in Switzerland. It simply states that disputes between the parties are to be settled *"by arbitration in and under the laws of Switzerland"*. The Special Committee therefore declined registration of this case.

"The dispute will be referred for resolution before the International arbitrage at the International commercial chamber of Geneva."

The Special Committee decided that this case was to be registered since it contained a reference to the Commercial Chamber of Geneva, which, however, is not the "International Chamber of Commerce". One could therefore have also argued that this case is to be held under the ICC Rules in Geneva.

"... with Uncitral rules by arbitration of the Chamber of Commerce and Industry of Geneva."

This was a fairly clear-cut case for registration because the reference to the Chamber of Commerce and Industry of Geneva is accurate and the specific application of the Uncitral Rules provided for in this arbitration agreement can not be interpreted in a way that the Swiss Rules should not apply since they are actually based on the Uncitral Rules.

"Any misunderstanding consequent upon this Contract or arising in connection with it, both of the parties will solve in the first place by bilateral agreement. In case of impossibility of reach an agreement, contentious matters will be arbitrated by Arbitration of Exchange due to the Chamber of Commerce of Switzerland by the law and the Legal Order of Switzerland."

Here, the Special Committee agreed that there was at least a *prima facie* indication that the parties wanted to have institutional arbitration to be held in Switzerland by making reference to the Chamber of Commerce of Switzerland, though there is actually no such Chamber of Commerce.

A few other cases had clear references to the ICC Rules by using terms such as *"...court of jurisdiction would be that of the International Chamber of Commerce of Zurich"* or *"...of the International Chamber of Commerce..."* (without naming a seat within Switzerland) or *"...shall be finally settled in Zurich...with the rules of conciliation and arbitration of the International Chamber of Commerce."*

Therefore, the Special Committee declined to register those cases under the Swiss Rules.

Preliminary Conclusions

It seems that the Swiss Rules had a smooth start, the only minor "hick-ups" occurred in the field of the arbitration agreement itself. There the old rule should be remembered, namely *"do not change the model arbitration clause, unless there are very specific reasons to do so"* (which is usually not the case).

Consequently, if the Swiss Rules are to be applied, the following model arbitration clause should be used:

"Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules."

The number of arbitrators shall be (one or three);

The seat of the arbitration shall be (city in Switzerland or anywhere else in the world);

The arbitral proceedings shall be conducted in (insert desired language)."

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