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***Arbitral Proceedings under the revised  
Swiss Rules (2012) and the Vienna Rules  
(2006): A comparative analysis***

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## **Abstract**

**A.1.** Switzerland has been, for many decades now, one of the most preferred venues in the world for hosting international arbitrations either conducted under the leading arbitration institutions or even ad hoc arbitration proceedings. It's not random but rather predictable since Switzerland is a politically neutral country and this neutrality, combined with many other factors, attracts to its territory a great number of arbitrations making this country arbitration - friendly.

**2.** For the first time in 2004, all the arbitration rules used by the Cantonal Chambers of Commerce and Industry in Switzerland were unified by the adoption of the "Swiss Rules of International Arbitration" ("Swiss Rules"). Since then, the Swiss Rules have been widely accepted with great success, since they administer a very large number of cases. These Rules were revised in the course of 2011 in order to take into consideration the revised 2010 UNCITRAL Rules, the recent developments in arbitral practice and the experiences gained under the previous rules. The changes do not constitute an overhaul of the first Rules 2004, however they strengthen significantly the Rules. These new rules entered into force in 1<sup>st</sup> June 2012.

**B.1.** On the other hand, Austria came into the picture in the early seventies as the venue for East-West commercial arbitrations as a neutral country along with Switzerland and Sweden. For this reason, the Austrian Federal Economic Chamber, which is the umbrella organization of the nine Regional Economic Chambers, established the VIAC in 1975 particularly for the settlement of East-West commercial disputes.

**2.** On 3<sup>rd</sup> May 2006 with effect from 1 July 2006, the Extended Board of the Austrian Federal Economic Chamber adopted a new set – the fifth since 1975 - of Rules of Arbitration and Conciliation, the Vienna Rules.

**C.** In this thesis, there will be a presentation of Switzerland and Austria, as two countries which due to their neutrality, attract every year a great number of arbitration proceedings, conducting in their territories and involving parties from all over the world. The entry into force of the relevant set of arbitration rules of each country (the revised Swiss Rules and the Vienna Rules), their evolution over the years and their contribution to the arbitration world will also be mentioned. The core part will be consisted by a comparison between the arbitral procedures provided under the revised Swiss Rules (2012) [*general provisions (article 15), seat of arbitration (art. 16), language (article 17), statement of claim (article 18), statement of defence (article 19),*

*amendments to the claim or defence (article 20), objections to the jurisdiction of the arbitral tribunal (article 21), further written statements (article 22), periods of time (article 23), evidence and hearings (article 24 -25), tribunal appointed experts (article 27), default (article 28), closure of proceedings (article 29) and waiver of rules (article 30)] and the relevant articles of the Vienna Rules [the statement of claims (article 9), the memorandum in Reply (article 10), counter claim, amendment and set -off (article 11), transmission of the file to the arbitrators (article 12), jurisdiction of arbitral tribunal (article 19), conduct of the proceedings (article 20) and termination of proceedings (article 25)].*

## **I. General introduction**

In the early 20<sup>th</sup> century, business people in international trade began to use quite often arbitration as a dispute resolution mechanism in order to protect their rights. The reasons for choosing and using arbitration, instead of litigation, in those days were more or less the same as they are today: neutrality, expertise, flexibility, speed and cost<sup>1</sup>. Furthermore, confidentiality of the arbitral procedure is one of the most important elements that attract businesses to international arbitration.

It has been supported for quite some time that the international commercial arbitration process enjoys substantial autonomy, without being obliged to apply national laws and being subject to court control. This autonomy and flexibility at the same time have been proved major advantages to the widespread use of arbitration all over the world as an alternative mechanism of disputes resolution. However, there is not an autonomous set of international procedural rules or a consistent international arbitration practice being applied worldwide yet. Despite the fact that many efforts are being made to a general harmonisation of national laws, that there are general principles and practices commonly used, still there are many differences in practice and procedures adopted by each jurisdiction<sup>2</sup>.

## **II. Arbitration in Switzerland**

### **1. History**

Switzerland is one of the world's, leading centers for international commercial arbitration. It is remarkable that since 2000 Swiss cities have invariably been ranked first or second among the chosen venues for ICC arbitration proceedings worldwide. The reasons for that are too many: **a)** Switzerland is neutral from the political point of view; **b)** hosts a great number of international organisations or dispute settlement institutions such as the United Nations (UN), the World Trade Organisation (WTO), the World Intellectual Property Organisation (WIPO) etc; **c)** it has a very well – developed, clearly defined, liberal, predictable and in general stable legal system tested in thousands cases of contracts including in international litigation and arbitration proceedings; **d)** its location is very convenient; **e)** it is the home of many international arbitration experts and a regular meeting point for the world's leading

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<sup>1</sup> Ali Yesilirmak in Loukas A. Mistelis and Julian D.M. Lew (eds), *'Pervasive Problems in International Arbitration'*, 2006 Kluwer Law International, p. 185 et seq.

<sup>2</sup> Henri Alvarez in Loukas A. Mistelis and Julian D.M. Lew (eds), *'Pervasive Problems in International Arbitration'*, 2006 Kluwer Law International, p. 119 et seq.

arbitration practitioners; **f**) it has the most open mind of all, in the arbitration, community. All these characteristics facilitate people from all over the world, with different values, cultures and perceptions to come in Switzerland and settle their disputes.

The legal framework (*lex arbitri*) of Swiss international arbitration proceedings is the Swiss Federal Act on Private International Law (PILA). In the 18 articles of its chapter 12, which has inspired many jurisdictions, it foresees the basic, mostly non mandatory, rules of arbitration for international arbitration proceedings conducted in Switzerland. As far as the national arbitration proceedings are concerned, the *lex arbitri* is set forth in the Swiss Federal Law on Civil Procedure since January 1<sup>st</sup>, 2011.

In Switzerland there are two types of arbitration: *ad hoc* and institutional, which is by far the most important type of arbitration. Since many arbitrations are *ad hoc* i.e. not governed by a specific set of arbitration rules, the parties are free to choose specific arbitration rules of a specialized institution. The most often used arbitration rules are: **i.** The Rules of the ICC International Court of Arbitration (ICC Rules) ([www.iccwbo.org](http://www.iccwbo.org)) and **ii.** The Swiss Rules of International Arbitration (Swiss Rules) ([www.swissarbitration.ch](http://www.swissarbitration.ch)).

## **2. The 2004 Swiss Rules**

In the past, six Swiss Chambers of Commerce and Industry namely, Basel, Bern, Geneva, Ticino, Vaud and Zurich were providing their own different arbitration services in Switzerland. In order to promote international arbitration in Switzerland and harmonise the six different set of arbitration rules, these six chambers adopted formally the Swiss Rules of International Arbitration (hereinafter the “Swiss Rules”) on 30 September 2003. The Swiss Rules, which for the first time entered into force on 1 January 2004, replaced the Chamber’s former rules of international arbitration and apply to both domestic and international arbitrations<sup>3</sup>. The Swiss Rules were drafted from the beginning in English. However, one can find translation of the Swiss Rules into many other languages on [www.swissarbitration.org/sa/en/rules.php](http://www.swissarbitration.org/sa/en/rules.php).

The Swiss Rules 2004 are based on the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules), which were submitted to changes and additions in order: a) to adapt them to institutional

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<sup>3</sup> Ben Horn and Roger Hopkins, “Arbitration Law, Handbook” (2007) (informa), p.750.

arbitration, since UNCITRAL Rules were applied to ad hoc arbitral proceedings and b) to reflect the modern practice of international arbitration.<sup>4</sup>

The fact that the Swiss Rules provide for fast, flexible, neutral, professional, confidential and enforceable proceedings has led to their great success.

Since their entry into force and until 2011, 577 Swiss Rules arbitrations took place which led to 204 awards.

More specifically:

- 36% of all arbitrations were in expedited proceedings.
- 51% were before sole arbitrators.
- 69% of the arbitrators were Swiss, 21% from other European countries.
- In 71% of the cases Swiss law applied.
- 22% of the parties were Swiss, 58% from other European countries, 10% from Asia and the Middle East.
- In 97% of the cases, the seat of the arbitration was Switzerland (49% Zurich, 36% Geneva, 9% Lugano, 3% other Swiss cities).

In 2007, 70% of the arbitrations took place in English, 14% in German, 14% in French and 2% in Italian.

In 2011, 87 cases were pending<sup>5</sup>.

### **3. The revised Swiss Rules 2012**

The Swiss Rules 2004 underwent a ‘light’ revision in the course of 2011. According to article 1.3., the new Rules came into force on 1 June 2012 and unless the parties have otherwise agreed apply to all arbitral proceedings in which the notice of Arbitration is submitted on or after that day. Basically this means that parties that have entered into a Swiss Rules arbitration agreement prior to 1 June 2012 and they have not excluded expressly the application of the revised Swiss Rules, are deemed to have accepted their application.

The main reason for this revision was not because major changes needed to be done but because there was the need to ensure the compatibility of the Swiss Rules with the new Code of Civil Procedure, which entered into force in 1 January 2011 and

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<sup>4</sup> Blaise Stucki and Elliott Geisinger in ‘International Arbitration in Switzerland – A handbook for Practitioners’, ed. By Gabriell Kaufmann – Kohler & Blaise Stucki (Schulthess 2004)

<sup>5</sup> Karrer in ‘Institutional Arbitration: A commentary’ (2013), ed. by Rolf A. Schutze, p. 366



which, inter alia, governs Swiss domestic arbitration<sup>6</sup>. Furthermore, the aim of this “light” revision was to take into consideration the recent developments in the field of arbitration (e.g. the new IBA Rules on the Taking of Evidence in International Arbitration and the revised UNCITRAL Rules of 2010) and of course the experiences gained under the previous rules. For once again, the efficiency of the arbitral proceedings mainly in terms of time and cost, the flexibility of the proceedings and finally the autonomy both of the parties and the arbitral tribunal to the largest extent possible, were the most important goals to be achieved<sup>7</sup>.

The new Rules introduce some important innovations, such as the possibility of consolidation and joinder and the mandatory expedited procedure for cases with amounts in dispute of less than one million Swiss francs (Article 42(2)). Furthermore, some of the most substantive changes of this “light” revision are the following: the introduction of provisions on “emergency relief”; the possibility for the arbitral tribunal to render ex parte interim measures in exceptional circumstances; the prima facie examination of jurisdiction by the Swiss Chamber’s Court in certain circumstances.

Another novelty of the new Swiss Rules is the constitution of two new administrative organs: the “*Swiss Chamber’s Arbitration Institution*” (hereinafter “Institution”) and the “*Arbitration Court*”.

The Institution is a separate legal entity and completely independent of the Chambers association, incorporated under the law of Switzerland<sup>8</sup>. Until the time the Swiss Rules 2012 were adopted the arbitration cases were administered by the various Chambers. After the new Swiss Rules came into force, the Institution undertook the administration of the cases on behalf of each Chamber<sup>9</sup>.

Additionally, the Institution established the “Arbitration Court” which replaced the “Arbitration Committee” (a Committee appointed by the Chambers) to oversee the handling of the cases under the Swiss Rules. The Court acquired more competencies, than the Committee used to have and it is assisted in its work by the Secretariat of the Court. According to the new article 1(4) of the Swiss Rules, *by submission of one*

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<sup>6</sup> Manuel Arroyo /Guy – Philippe Rubeli, “The new Swiss Rules of International Arbitration”, in <http://www.mll-legal.com/index.php?id=382>

<sup>7</sup> Dr. Christopher Boog, “2012 Swiss Rules of International Arbitration Revealed” in <http://blogs.law.nyu.edu/transnational/2012/04/2012-swiss-rules-of-international-arbitration-revealed/>

<sup>8</sup> See <http://www.swissarbitration.org/sa/en>

<sup>9</sup> Matthias Scherer, Lalive, “Revised Rules of International Arbitration enter into force” (31.5.2012), in <http://kluwarbitrationblog.com/blog/author/matthiasscherer/>

*dispute to arbitration under the new Swiss 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 in the Swiss Rules*<sup>10</sup>. The Court has also extended powers regarding the due and prompt constitution of the arbitral tribunal.

With the Swiss Rules 2012 a big step forward has been made since all the Chambers have united under a single set of arbitration Rules administered by central structures<sup>11</sup>. Thanks to the recent “light” revision, the Swiss Rules 2012 have managed to keep up with the current modern arbitration practice. The proceedings under the new Swiss Rules have become more efficient from the aspect of time and costs whilst at the same time the Swiss Rules Arbitration maintained the basic characteristics to which it owes its success the past eight years as a means of dispute resolution. Compared to other institutional arbitration the Swiss Rules continue to offer a leaner and more flexible but effective administration proceedings.

### **III. Arbitration in Austria**

#### **1. History**

The nine Regional Economic Chambers in Austria were, originally, competent to set up arbitral institutions. In 1949 each of these nine Chambers established its own institution which was using its own standard set of arbitration rules. From the middle of the sixties onwards, international arbitration and Austria as a seat of arbitration started, at the same time, to become very important. It is true that the federal structure of the Austrian Economic Chamber was unknown outside of Austria, so there were often problems regarding the designation of the institution. Additionally, there was no need for all nine Chambers to provide for international arbitral proceedings, mostly, for economic reasons<sup>12</sup>.

In 1974, the Federal Economic Chamber was empowered with the “*establishment of a permanent arbitration court for settling disputes in which at least*

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<sup>10</sup> Article 4(1) of the Swiss Rules 2012

<sup>11</sup> See <http://www.swissarbitration.org/sa/en>

<sup>12</sup> Liebscher in “Institutional Arbitration: A commentary” (2013), ed. by Rolf A. Schutze, p. 306

*one party has its place of business outside the Austrian Republic.*<sup>13</sup>” The Vienna International Arbitration Centre (hereinafter “VIAC”), which is the leading arbitration institution in Austria, came into operation on 1 January 1975, after the adoption of the Rules of Arbitration and Conciliation. VIAC is legally part of the Austrian Federal Economic Chamber, meaning that it is a public law entity, without a separate legal personality. The Arbitration Rules are issued by the Austrian Federal Economic Chamber. The management of VIAC belongs to the Secretary General of the Austrian Federal Economic Chamber. Furthermore, the organs of the VIAC, namely the Secretary General and the Board which is appointed for a period of office of five years, are completely independent to execute their duties without being subject to any instructions of any other organ. VIAC acts, very often, as an appointing authority.

## **2. The Vienna Rules 2006**

On 3 May 2006 the Extended Board of the Austrian Federal Economic Chamber revised for the fifth time the Rules of Arbitration and Conciliation of Vienna, with effect from 1 July 2006. This new version applies to all proceedings in which the claim was filed after 30 June 2006, except the parties have otherwise agreed. The specific revision replaced the Vienna Rules of 2001 and took place because of the fact that a new arbitration law, based upon the UNCITRAL Model Law, entered into force on 1 July 2006 and it was necessary the Vienna Rules to be adapted on it<sup>14</sup>.

The Vienna rules are mainly designed for international proceedings (i.e. when at least one party is non-Austrian or all parties are Austrian but the dispute has an international character). The Rules have been revised in 2006 in order to incorporate the recent developments of international arbitration in general and the practical experience of the Vienna Centre since the previous reform of 2001<sup>15</sup>.

Austria, as well as Switzerland, is considered a neutral territory, in the centre of Europe with a steadily increasing caseload from Europe, Asia and America.

The Vienna Rules 2006 are comparatively to other Arbitration Rules short. The fact that the mandatory procedural rules are copied from the new arbitration law based

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<sup>13</sup> sec. 19(3) WKG

<sup>14</sup> Werner Melis, “New Vienna Rules”, in Albert Jan van den Berg (ed), *Yarbook commercial Arbitration 2006*-Volume XXXI (Kluwer Law International) p.p.341 et seq.

<sup>15</sup> Frank-Bernd Weigand, “Practitioner’s Handbook on International Commercial Arbitration”, 2009, Oxford University Press

upon the UNCITRAL Model Law which entered into force the 1 July 2006 made the Vienna Rules 2006 user – friendly<sup>16</sup>.

Statistically, in 2011, 75 requests were submitted for arbitration, one third of which were settled.

The most important advantage of the Vienna Rules is their flexibility. This means that the Rules are easily adjustable to any kind of needs of the parties and any kind of particularities each case may have. Additionally, the arbitral proceedings under the Vienna Rules do not create any uncertainty to the parties regarding the height of cost and fees of the procedure until the publishing of the award. The fees of the arbitrators and the administrative costs are predicted in a schedule so that the parties know from the very beginning what the whole arbitral procedure is going to cost them.

#### **IV. Arbitral Proceedings under the Swiss Rules 2012 and Vienna Rules 2006**

##### **1. General**

The stage of the arbitral proceedings is the core part of the whole arbitration procedure. It determines the way that the whole procedure has to be conducted. Who controls the procedure who decides about the technical matters regarding the organisation and conduct of the proceedings and in what way (evidentiary procedure, language, place of the proceedings) are some of the most important issues that the articles of arbitral proceedings of Swiss Rules 2012 and Vienna Rules 2006 provide for. During this stage, which is the most crucial, each party is trying to establish the relevant facts only to the extent the facts serve their own interests in supporting their claims or defences, since what matters for each party is to win the case.

It is obvious that the list of articles of the Swiss Rules 2012 regarding the arbitral proceedings is longer and far more elaborated than the relevant of the Vienna Rules 2006.

However, flexibility, cost and time efficiency are the main aims to be achieved regarding the arbitral proceedings under both set of Rules.

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<sup>16</sup> Werner Melis, “New Vienna Rules”, in Albert Jan van den Berg (ed), Yearbook commercial Arbitration 2006-Volume XXXI (Kluwer Law International) p.p.341 et seq.

The arbitration procedure is a structured procedure. It is consisted of several stages which have to be followed by all the participants in order to lead to the resolution of the dispute.

## **2. General principles of the arbitral proceedings**

According to most institutional rules, the tribunal itself decides the procedure that will be followed, since once the dispute arise the parties are difficult to agree even on procedural issues. Although, this procedure has, more or less, the same basic characteristics, it is always adjusted to the specific features of each case. However, the tribunal in executing this duty is supposed to apply some generally accepted in international arbitration principles, such as the principle of “*equal treatment of the parties*”, “*the right to be heard*” and “*the right to present one’s case*” .

### **2.1. Equal treatment of the parties and the right to be heard**

The tribunal must be fair and reasonable in fixing the procedure<sup>17</sup>. A fair hearing by an impartial and independent tribunal is a fundamental *due process* right<sup>18</sup>. Such an example is reflected in both Swiss and Vienna Rules. In particular, article 15(1) of the Swiss Rules 2012 provides that:

“(…) ***the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard. (...)***”.

On the other hand, article 20 of the Vienna Rules 2006, provides that:

“(…) ***the sole arbitrator (arbitral tribunal) may conduct the arbitration proceedings at his (its) absolute discretion; the principle of equal treatment of the parties shall apply, the right to be heard being ensured at every stage of the proceedings. (...)***”

The “*right to equal treatment*” means that the tribunal has to apply the same procedural rules and requirements for all parties regarding for example the exchange of written submissions, the filing of documentary evidence, the questioning of witnesses etc<sup>19</sup>. In this right again there are some exceptions. More specifically, the

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<sup>17</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll, “Comparative International Commercial Arbitration”, (2003), Kluwer Law International, p. 524.

<sup>18</sup> Matti S. Kurkela, Hannes Snellmann, “Due Process in International Commercial Arbitration” (Oceana Publications Inc), (2005), p. 186.

<sup>19</sup> Ibid page 58

tribunal may treat differently one party if justified by the different situation of this party<sup>20</sup>.

The “*right of a party to be heard*” includes its right, *inter alia*, to be represented by a legal counsel, to take part into the evidentiary proceedings, to rebut the factual allegations of the opposing party, to challenge evidentiary material furnished by the opposing party and also furnish evidentiary material of its own<sup>21</sup>. Of course this right is subject to limitations controlled by the tribunal (e.g. there is no violation of this right if the tribunal refuses a party to furnish evidence irrelevant to the issue in dispute<sup>22</sup>).

## **2.2. The right to present one’s case (“*Audi Alteram Partem*”)**

**2.2.1.** The right to present one’s case is another fundamental rule of the *due process* and *ordre public*<sup>23</sup>. The parties need not exercise the right. What matters in order to say that this principle is respected is to provide the opportunity to the party to exercise the right. This right is met in scattered provisions both under the Swiss and the Vienna Rules. In particular this right is provided to the parties, when:

- They have full access to all documents, reports submitted by any of the participants in the proceedings (witnesses, experts, parties) (e.g. to statements of claims and supporting documents on which the claims are based (e.g. art. 9(2) of the 2006 Vienna Rules, art. 15(4), 27(1) of the Swiss Rules);
- They have the right to submit claims (or counter - claims) and argue in support of them; to raise material and procedural defences and objections, to bring new claims and raise new defences<sup>24</sup>, to amend or supplement these claims or defences and to raise a set-off defence (e.g. art. 9(1), 10(1), 11(1)(2)(3) of the Vienna Rules, art. 20(1) 18(1)(3), 19(1)(2), 21(3), 22 of the Swiss Rules);
- They are given the right, after an adequate advance notice to prepare, to be present physically in any meetings of the arbitral tribunal or to be present in hearings which take place via internet, by means of videoconference (e.g.

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<sup>20</sup> Ibid page 58

<sup>21</sup> D.P. Roney / A.K. Muller – The Arbitral Procedure, in “International Arbitration in Switzerland – A Handbook for Practitioners”, ed. by Gabrielle Kaufmann-Kohler & Blaise Stucki, Schulthess, 2004, p. 57 with further references.

<sup>22</sup> Ibid page 57

<sup>23</sup> Matti S. Kurkela, Hannes Snellmann, “Due Process in International Commercial Arbitration” (Oceana Publications Inc), (2005), p. 182.

<sup>24</sup> Matti S. Kurkela, Hannes Snellmann, “Due Process in International Commercial Arbitration” (Oceana Publications Inc), (2005), p. 184.

videoconference) (e.g. for the inspection of goods or documents, the oral hearings etc. (art. 16(3), 25(1)(4) of the Swiss Rules).

- They are given the right to examine witnesses, experts (in an oral hearing or in the form of written statements), documents (art. 25(3), 27(3)(4) of the Swiss Rules).

- They are given the right to produce documents, exhibits or other evidence (art. 24(3), 27(2) of the Swiss Rules).

- They are given the opportunity to take note of, and comment on, the motions and pleadings of other parties and the result of the evidentiary proceedings (e.g. art. 20(3) of the Vienna Rules, art. 27(3) of the Swiss Rules)

- The right to bring supplement evidence (witnesses to be heard or submissions to be made) (e.g. art. 20(8) of the Vienna Rules),

- They are given a prior written notice regarding the termination of the proceedings (e.g. art. 25(c.cc) of the Vienna Rules, art. 29(1) of the Swiss Rules).

Of course, the right to present one's case is not exercised by the parties with no limits. It is subject on the one hand to the autonomy and freedom of the arbitral tribunal to administer the proceedings and on the other to the test of relevance regarding the admissibility of evidence and its production<sup>25</sup>. As in article 24(2) of the Swiss Rules is provided, only the arbitral tribunal is competent to determine whether the submission of whatever by a party in the proceedings is necessary and it may simply reject it or not allow it to be submitted, due to admissibility, relevance and expediency.

**2.2.2.** Under article 15 (general provisions) of the Swiss Rules another three (3) principles exist (two of them for the first time) that are not met in the Vienna Rules. According to this article, all participants in the arbitral proceedings shall:

- Act in good faith
- Make every effort: **a)** to contribute to the efficient conduct of the proceedings and **b)** to avoid unnecessary costs and delays.

Additionally, with the agreement of each of the parties:

- The arbitral tribunal may take steps to facilitate the settlement of the dispute before it.

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<sup>25</sup> Matti S. Kurkela, Hannes Snellmann, "Due Process in International Commercial Arbitration" (Oceana Publications Inc), (2005), p. 185

**2.2.2.1.** The duty to **act in good faith (bona fides)** is a universally recognised principle of law, applicable also in the course of arbitral proceedings and is part of both substantive and procedural public policy<sup>26</sup>. According to this principle, not all procedural weapons are permitted in arbitration<sup>27</sup>. The prohibition of misuse of rights, and of contradictory behaviours consist manifestations of this principle, which has to be respected both by the parties and the arbitral tribunal<sup>28</sup>. The duty of the arbitral tribunal to act in good faith is closely linked to its duty to ensure equal treatment of the parties and to guarantee their right to be heard<sup>29</sup>. Article 30 of the Swiss Rules and article 20 (7) contain a relevant provision of acting in good faith concerning the parties. According to these articles, if a party finds out that a violation of a provision or of a procedural rule takes place, the party has to raise immediately an objection, otherwise it shall be deemed to have waived its right to raise an objection.

Article 15(7) of the Swiss Rules clarifies that contributions to efficient proceedings and avoidance of unnecessary delays and costs are manifestations of the principle of good faith<sup>30</sup>.

In a wider sense the Swiss Rules, as far as the section III (Arbitral Proceedings) is concerned, has implemented this principle in Art. 15(3), 15(8), 18(3), 19(2), 29(1) and 30<sup>31</sup>.

**2.2.2.2.** Although for a long period of time it was not clear if it is appropriate for a tribunal to raise the possibility of settlement, article 15(8) of the Swiss Rules provides now, with the agreement of the parties, expressly this possibility, which is one the most expeditious tools for the resolution of the dispute if the tribunal handles it correctly<sup>32</sup>. This possibility is not foreseen in the Vienna Rules.

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<sup>26</sup> Tina Wustemann/Cesare Jermini in “Swiss Rules of International Arbitration (Commentary)”, ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.149.

<sup>27</sup> Karrer in “Institutional Arbitration: A commentary” (2013), ed. by Rolf A. Schutze, p. 385

<sup>28</sup> Article 15(7) of the 2012 Swiss Rules is referred to: “*All participants in the arbitral proceedings (...)*”.

<sup>29</sup> Tina Wustemann/Cesare Jermini in “Swiss Rules of International Arbitration (Commentary)”, ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.149.

<sup>30</sup> Philipp A. Habegger, The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes, ASA Bulletin, (Kluwer Law International 2012, Volume 30 Issue 2) p. 283

<sup>31</sup> Karrer in “Institutional Arbitration: A commentary” (2013), ed. by Rolf A. Schutze, p. 385

<sup>32</sup> Philipp A. Habegger, The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes, ASA Bulletin, (Kluwer Law International 2012, Volume 30 Issue 2) p. 284



### 3. Language of the proceedings

Arbitration proceedings have to be conducted in any language convenient for the parties and the tribunal<sup>33</sup>. As we all know the court proceedings are conducted in the official language of the place that the court is situated; however, the same does not happen in the arbitral proceedings<sup>34</sup>. The language used is not, necessarily, the one of the seat of arbitration.

Both Swiss Rules in article 17 and Vienna Rules in article 20(2) include a provision for the language that is going to be used in the proceedings. Both these provisions (art. 17 of the Swiss Rules and art. 20(2) of the Vienna Rules) agree that first comes the agreement of the parties.

Article 17 of the Swiss Rules, recognises, expressly, the right of the parties to choose the language they wish to use in the arbitral proceedings (“*Subject to an agreement of the parties (...)*”). Many times the parties choose the language their contract is drafted. It is true that at the time of drafting the contract, the choice of language in the arbitration clause may not seem such an important issue for the parties. However, when the arbitral proceedings are about to commence, the language becomes a crucial subject since there will be involved many people coming from different countries. This is why it is not suffice the parties to select a language that they feel comfortable to deal with but also select arbitrators who will be capable of conducting the proceedings in the selected language<sup>35</sup>.

The model arbitration clause of the Swiss Rules suggests that the parties should agree on the language in which the proceedings will be conducted (“*(...) The arbitral proceedings shall be conducted in ... (insert desired language)*”). Having agreed on the language from the beginning, the parties save precious time but even cost, since, for instance, they will choose from the beginning a counsel or arbitrator who speaks the chosen language and will not be burdened afterwards with translating costs.

Both articles 17 and 20(2) of the Swiss and Vienna Rules, respectively, give the parties the possibility to choose more than one language for the arbitration. However, the use, at the same time, of more than one language could be proved not such a good choice for the parties. First of all, it would increase the costs of the arbitration

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<sup>33</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll, “Comparative International Commercial Arbitration” (2003), Kluwer Law International, p. 540

<sup>34</sup> Tina Wustemann/Cesare Jermini in “Swiss Rules of International Arbitration (Commentary)”, ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.160.

<sup>35</sup> Ibid, page 160.

(translators, interpreters). Furthermore, it would not be easy to find and choose arbitrators speaking the same well all the chosen languages. Finally, the risk of inconsistency between the various documents of the proceedings is very likely. At least, in the case the parties insist on choosing more than one language, one of them could be selected as the principal language and the other as the optional language<sup>36</sup>.

If there is not an agreement of the parties on the language, article 17(1) of the Swiss Rules provides that the arbitral tribunal will be competent, immediately after its appointment, to determine the language or languages to be used in the proceedings. The choice of language(s), in this case, belongs to the discretion of the tribunal. But the article does not say what the tribunal should take into consideration in order to choose the language(s). Some of the opinions that in theory have been expressed are: a) the language of the contract, b) the language of the parties' correspondence, c) the language of the arbitrators and of the parties' counsels, d) the language of the relevant documents e) the language of the law governing the substantive issues<sup>37</sup> and last but not least f) the official language of the seat of arbitration.

On the other hand, article 20(2) of the Vienna Rules provides that if there is an agreement of the parties in their contract regarding the language, the tribunal is bound by this agreement. Otherwise, the tribunal is going to take into consideration all the other, previously mentioned circumstances. Apparently, it is not an easy thing for the tribunal to decide, especially when it has to take into consideration, simultaneously, the principle of equal treatment of the parties. However, the language of the contract might be the most important factor on which the tribunal could base its determination since this is the language that the parties from the beginning accepted to govern their relationship.

According to the article 17(1), the chosen language will apply to the statements of claim and defence, to any further written statements and to any oral hearings. From this wording it seems that all the other documents could be filed in another language. As far as the oral hearings are concerned, a witness should be heard in his native language unless he gives his consent to testify in another language. While in the former case an interpreter might be necessary, so as the tribunal and parties be able to follow, understand and ask questions, in the latter case the risk of misunderstanding is

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<sup>36</sup> Tina Wustemann/Cesare Jermini in "Swiss Rules of International Arbitration (Commentary)", ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.161.

<sup>37</sup> Ibid page 161

increased and the failure to establish the real facts and finally the truth is highly likely<sup>38</sup>.

Finally, it is provided both in article 17(2) of the Swiss Rules and article 20(2) of the Vienna Rules that the tribunal may order that any documents submitted in the course of the proceedings in another language, they will have to be translated into the language of the arbitration. But what happens in cases where the parties have to submit voluminous exhibits, in order to support their interests, which are written in another language. They will have to be translated and this means undue costs and delays. The fact that the order of translating the documents is subject to the discretionary power of the tribunal, permits the parties, in order to avoid spending more money and losing valuable time, to agree from the beginning of the proceedings that the documents will be filed in their original language (if this language is English, French, German or Italian, otherwise they will have to be translated in the language of the arbitration). The parties can also agree the language in which their witnesses / experts will be examined in order to save money on interpreters<sup>39</sup>.

#### **4. Statements of Claim**

The Statement of Claim is the document upon which the arbitration is based.

And whilst under article 9(1) of the Vienna Rules, arbitral proceedings are commenced when a Statement of Claims is filed with the Secretariat, under article 3(2) of the Swiss Rules, the commencement of the proceedings takes place and the pendency of the arbitral proceedings is established<sup>40</sup> on the date on which a Notice of Arbitration is received by the Secretariat.<sup>41</sup> Obviously, the Statement of Claim (under Vienna Rules) and the Notice of Arbitration (under the Swiss Rules) is first addressed to the Secretariat of the VIAC and the Secretariat of the Arbitration Court, respectively, in order to afford them the opportunity to examine the claim's compliance with the minimum standards as set out by the relevant articles<sup>42</sup>.

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<sup>38</sup> Matti S. Kurkela, Hannes Snellman "Due Process in International Commercial Arbitration" (Oceana Publications Inc), (2005), p. 141.

<sup>39</sup> Tina Wustemann/Cesare Jermini in "Swiss Rules of International Arbitration (Commentary)", ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.163.

<sup>40</sup> Bernhard Berger in "Swiss Rules of International Arbitration (Commentary)", ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.168

<sup>41</sup> A Notice of Arbitration as a preliminary document does not exist under the Vienna Rules.

<sup>42</sup> Franz T. Schwarz and Christian W. Konrad "The New Vienna Rules", in *Arbitration International*, Volume 23, Issue 4 (2007), p. 622

According to article 18(1) of the Swiss Rules, the Statement of Claim may be submitted by two different ways; the first one is to be put together with the Notice of Arbitration and the second one is to be communicated by the Claimant, in writing, to the Respondent as well as to each of the arbitrators, after the delivery of the Notice of Arbitration and within the period of time the arbitral tribunal will determine and which should not exceed 45 days according to the article 23(1), unless the tribunal determines otherwise due to a justified reason. These two documents, the Notice of Arbitration and the Statement of Claim are two totally separate documents. The Notice of Arbitration is the first step the Claimant is taking in order to make known his intention to initiate arbitral proceedings against the Respondent. The Claimant may include his Statement of Claim in the Notice of Arbitration or not. If he does and the Statement complies with all the requirements of the articles 18(2) and 17 then the tribunal may proceed and ask the Respondent to communicate his Statement of Defence. If he does not, and the Claimant fails to communicate the Statement of Claim in the time limits set by the tribunal without a sufficient cause for this failure, the tribunal may, under article 28(1) of the Swiss Rules, declare the termination of the proceedings.

But what happens if the Statement of Claim is filed in due time but it is incomplete. The Rules do not cover this issue. However, the tribunal could inform the Claimant about what the missing elements are and set a short deadline in order to add them.<sup>43</sup> In practice, what the tribunal does is only to tell the Claimant that the Statement is incomplete. In this way, the Claimant is not entitled to raise an objection about violation of his “right to be heard” (when the seat of arbitration is in Switzerland) and the risk of an award being set aside for such a violation is minimised<sup>44</sup>.

On the contrary, article 9(5) of the Vienna Rules provides that: “(...) *the Secretary General shall request the Claimant to remedy the defect or to submit the necessary documents or enclosures. The Claimant is to be informed that until the defects have been remedied, the claim shall not be processed.*” The Vienna Rules seem to be more cooperative to that point than the Swiss Rules by undertaking to

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<sup>43</sup> Karrer in “Institutional Arbitration: A commentary” (2013), ed. by Rolf A. Schutze, p. 386

<sup>44</sup> Bernhard Berger in “Swiss Rules of International Arbitration (Commentary)”, ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.170

inform the Claimant about the deficiencies of his Statement in order to avoid the austere consequences of the termination of the proceedings.

The content of the Statement of Claim according the two set of Rules are more or less the same. What differentiates the Vienna from the Swiss Rules, is that the Statement of Claim under the Vienna Rules contain information about the arbitrators whilst under the Swiss Rules whatever has to do with arbitrators is settled in the Notice of Arbitration [art. 3(3g-h)].

According to the article 18(1) and (3) of the Swiss Rules and to the article 9(3b) (4) of the Vienna Rules, the Statement of Claim has to be accompanied by the contract or the arbitration agreement - if it is not contained in the contract - as well as by all documents and other evidence on which the Claim relies. The provisions under the two set of Rules are similar. In fact, as far as the “documentation” that is annexed to the Statement of Claim is concerned, it seems to be compulsory according to the wording of the two provisions: “*must include*” according to the Vienna Rules, “*shall annex*” according to the Swiss Rules – although the provision begins: “*As a rule (..)*” which provides flexibility where it is needed<sup>45</sup>.

A claimant who is very confident about his case and wants to avoid any undue delays should submit all documents, facts and other elements from the very beginning of the proceedings. Whenever, he fails to act promptly he just gives the respondent more opportunities to delay the proceedings.<sup>46</sup>

As we have already mentioned, arbitration under the Swiss Rules aims, inter alia, at time efficiency. From this perspective, it is very important that the Respondent and the arbitral tribunal will receive the documentary evidence on which the Claims rely as soon and as early as possible<sup>47</sup>.

## **5. Statements of Defence**

The “*Statement of Defence*” under article 19 of the Swiss Rules or “*Memorandum in Reply*” under article 10 of the Vienna Rules is the response to the *Statement of Claim*. The Secretary General, under the Vienna Rules, is responsible both for the Statement of Claim and the Memorandum in Reply. He is the one who

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<sup>45</sup> Bernhard Berger in “Swiss Rules of International Arbitration (Commentary)”, ed. By Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Schulthess 2005), p.171

<sup>46</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll “Comparative International Commercial Arbitration”, (2003), Kluwer Law International, p. 538

<sup>47</sup> Philipp A. Habegger, “The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes”, ASA Bulletin, (Kluwer Law International 2012 Volume 30 Issue 2) p. 285.

checks that they comply with the Rules and decides the continuation of the proceedings. Under the Swiss Rules the tribunal is “running” the respective procedure.

Since the stage of Notice of Arbitration exists under the Swiss Rules, the Respondent has the choice to include his Statement of Defence in the Answer to this Notice. This possibility does not exist under the Vienna Rules.

Whilst under article 10 of the Vienna Rules, the Respondent has to submit the Memorandum in Reply “*within a period of thirty (30) days*”, the Swiss Rules provide in article 19(1) that the Statement of Defence has to be communicated to the Claimant and to each of the arbitrators “*within a period of time to be determined by the arbitral tribunal*”. The periods of time under article 13 of the Vienna Rules can be prolonged by the Secretary on sufficient grounds. On the contrary, under article 23 of the Swiss Rules, this prolongation can not exceed forty – five (45) days.

Article 19 of the Swiss Rules provides that the Statement of Defence shall also contain the factual and legal basis of any objections he may raise regarding the proper constitution or jurisdiction of the tribunal. The same provision exists under article 19 of the Vienna Rules, according to which the Respondent is expressly obliged to assert the lack of the tribunal’s jurisdiction not later than then the Memorandum in Reply.

Under article 19 of the Swiss Rules, the Respondent (as the Claimant), as a rule, shall annex to its Statement of Defence all documents and other evidence on which it relies. On the contrary, the Vienna Rules under article 10 do not impose such an obligation to the Respondent (as they do to the Claimant). Obviously, the reason for this is that the Claimant and not the Respondent, is obliged to furnish the proof<sup>48</sup>.

## **6. Counterclaims and Set off**

According to article 11 of the Vienna Rules, counterclaims raised by the Respondent against the Claimant are admissible in a single proceeding even if they do not fall within the same arbitration agreement, provided that the Vienna Rules apply<sup>49</sup>.

On the contrary, under article 20(1) of the Swiss Rules a claim or defence may not be amended or supplemented during the course of the arbitral proceedings in such a manner that the amended claim will fall outside the scope of the arbitration clause or separate arbitration agreement. On the other hand article 21(5) provides for set-off

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<sup>48</sup> Christoph Liebscher, in “Arbitration Law of Austria: Practice and Procedure”, by Stefan Riegler, Alexander Petsche, Alice Fremuth –Wolf, Martin Platte and Christoph Liebscher, 2007.

<sup>49</sup> Franz T. Schwarz and Christian W. Konrad, “The New Vienna Rules” in LCIA, Arbitration International, Vol. 23, No.1, 2007, p. 627.

defences, saying that they can be submitted, even if they arise from a relationship which is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum - selection clause.

Article 11(1) of the Vienna Rules provides that counterclaims can be raised up to the time of the ‘*closure of the evidentiary proceedings*’ whilst article 3(10) of the Swiss Rules permit counterclaims and set off defences to be raised with the Answer to the Notice of Arbitration, namely at a very early stage comparatively to the Vienna provision, for time efficiency reasons. However, the wording of the provision does not seem to preclude the respondent from raising a counterclaim or a set off defence at a later stage<sup>50</sup>.

Further conditions that are provided under article 11 of the Vienna Rules are the following:

- a. The parties have to be identical.
- b. The submission of the counterclaims must not lead to a substantial delay in the main proceedings.

Even if one of the conditions is not met, the arbitrator must “return” the claim to the Secretariat in order new arbitral proceedings to begin. Otherwise, the counter-respondent has to be given the opportunity to submit a Memorandum in Reply in writing.

Despite the extensive discussion of this point<sup>51</sup>, the VIAC plainly chose not to address the admissibility of set-off in the new rules<sup>52</sup>.

On the contrary, article 19(3) of the Swiss Rules provide for counterclaims and claims for set off as well. Both need to include the same particulars as the main claim according article 3(10). The Vienna Rules, on the other hand, do not make any references to what particulars a counterclaim should include.

## **7. Jurisdiction of the Arbitral Tribunal**

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<sup>50</sup> Georg von Segesser and Aileen Truttmann, “Appendix 5: Comparison of Major Arbitration Rules” Georg von Segesser and Aileen Truttmann in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners*, Second edition (Kluwer Law International 2013) pp. 377 – 428.

<sup>51</sup> C. Liebscher in “Arbitration Law of Austria: Practice and Procedure”, S. Riegler, A.Petsche, A. Fremuth – Wolf, M. Platte, C. Liebscher (eds), Huntington, Juris Publishing, (2007), p. 628 with further references.

<sup>52</sup> Franz T. Schwarz and Christian W. Konrad , “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International 2009), p.260, 11-044.

An arbitral tribunal with no jurisdiction has no authority and no power to render an award which in this case would not be legitimate. The danger a court to set aside such an award or to refuse its recognition and enforcement is enormous. This is why the issue of jurisdiction has to be resolved from the very beginning of the proceedings<sup>53</sup>.

According to article 19 of the Vienna Rules a party may raise a plea against the tribunal either for lack of jurisdiction or for excess of authority. More specifically, if a party claims that the tribunal has no jurisdiction is under the obligation to raise it at the first pleading in the matter, which will typically be (but not necessarily) be the Memorandum in Reply. Furthermore, in order to avoid an impasse in the constitution of the arbitral tribunal<sup>54</sup>, the same article provides that a party is not precluded from raising such a plea by the fact that he has appointed or participated on the appointment of an arbitrator. The party may also raise a plea during the arbitral proceedings if it finds out that the tribunal is exceeding the scope of its authority. Unless the party raises the plea when it has to, it is deprived of the specific right at a later stage. An exception to this rule is provided, when the party can justify the delay.

According to article 19(2) of the Vienna Rules the decision on the pleas for the jurisdiction of the tribunal can be made either together with the ruling on the case or by a separate arbitral award. This provision aims at encouraging the tribunal to decide on its own jurisdiction at an early stage of the proceedings<sup>55</sup>.

Article 21 of the Swiss Rules is written in a more detailed way. The tribunal, according the paragraphs (1) and (2), has the power to rule on any kind of objection to its jurisdiction, including the existence or validity of the arbitration agreement of the parties in whichever way this was made (clause in the contract or separate agreement), even the main contract of the parties itself. As we can see, the Swiss rule is wider than the Vienna rule. Likewise the Vienna provision, article 21(3) of the Swiss Rules requires that any objection to the jurisdiction of the tribunal will be raised at the earliest stage possible, namely to the answer to the Notice or Arbitration and *in no event* later than in the Statement of Defence or the reply to a (likely) counterclaim. Exactly as the Vienna Rule, article 21(4) of the Swiss Rules provides that the tribunal

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<sup>53</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll “Comparative International Commercial Arbitration”, (2003), Kluwer Law International, p. 329

<sup>54</sup> Franz T. Schwarz and Christian W. Konrad “The New Vienna Rules”, in LCIA, Arbitration International, Vol. 23, No.1, 2007, p. 625

<sup>55</sup> Ibid page 625



should rule on any objection to its jurisdiction as a preliminary order or in the award on the merits.

### **8. Seat of the Arbitration (*loci arbitri*)**

A very important issue that has to be decided by the parties when they choose “*arbitration*” to resolve their dispute is the “*seat or place of the arbitration*”.<sup>56</sup> The seat of arbitration may determine which law will govern the arbitration and which courts will be the ones that will exercise any supervisory or supporting powers to the procedure; furthermore, the seat of arbitration will determine the nationality of the award and consequently the enforcement of the award<sup>57</sup>.

The choice of the “*seat or place of the arbitration*” may be included in the arbitration clause in the parties’ contract or in a separate agreement after the dispute has arisen. The *lex loci arbitri* is considered, in theory, to be *a vital territorial link* connecting international arbitration proceedings to a certain legal order and this is why it establishes the “*formal legal domicile*” of the arbitration<sup>58</sup>.

But what happens in the case of absence of any agreement of the parties regarding the “*seat of arbitration*”? In this case the Vienna Rules under article 2 provide that the place of arbitration shall be Vienna. The Swiss Rules under article 16 (1) provide that the Court will determine the seat of the arbitration or shall request the arbitral tribunal to determine it, after having considered all the relevant circumstances. These circumstances could be for example: the object of the dispute, political and economic factors, the business residence of the arbitrators and of the parties, the evidence likely to be gathered<sup>59</sup>. For example, article 16(3) of the Swiss Rules provide that the tribunal may meet at any place it deems appropriate for the inspection of goods, other property, or documents. When there is a need of such an inspection, this place can be determined as the place of arbitration in order to facilitate the whole procedure.

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<sup>56</sup> It needs to be clear that although the Swiss Rules use the term “*seat of the arbitration*” and the Vienna Rules the term “*place of the arbitration*” the meaning is the same.

<sup>57</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll “Comparative International Commercial Arbitration”, (2003), Kluwer Law International, p. 172.

<sup>58</sup> Franz T. Schwarz and Christian W. Konrad, “The New Vienna Rules”, in LCIA, Arbitration International, Vol. 23, No.1, 2007, p. 628.

<sup>59</sup> Tina Wustemann – Cesare Jermini in “Swiss Rules of International Arbitration (Commentary)” by Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Eds), Schulthess, 2005, p. 154.

However, both the Vienna Rules and the Swiss Rules provide that irrelatively to which the place of arbitration will be, procedural acts, such as hearing of witnesses, can be held in any other convenient place. Again here under article 16 (2) of the Swiss Rules the tribunal has to take into account practical considerations of the arbitration such as, for example, the travelling expenses.

Article 2(2) of the Vienna Rules and article 16(2) provide that the tribunal (and not the parties) may decide the place where they will meet for consultation.

Finally, both the Vienna Rules [article 27(2)] and the Swiss Rules [article 16(4)] provide that the award is deemed to be made at the seat of the arbitration.

## **9. Evidentiary proceedings**

### **9.1. General**

Taking and presentation of evidence to the tribunal is one of the key issues of international commercial arbitration<sup>60</sup>. Evidentiary proceedings may be conducted orally or/and in writing. The opportunity of the parties to present their arguments orally is a fundamental element of the proceedings in both the common and civil law litigation systems as well as in commercial arbitration<sup>61</sup>.

The two parties have to spend a lot of time to plan their strategy according to what kind of evidence they will use in order to present their arguments. This is a very crucial stage since the facts will be established and the tribunal will try to find out the truth and finally reach a decision based on the evidence the parties will present.

Article 24(1) of the Swiss Rules provides that each party shall have the burden of proving the facts relied on to support its claim or defence. This is a widely accepted principle applied also under the Vienna Rules.

Under article 24(2) of the Swiss Rules the tribunal shall determine the admissibility, relevance, materiality and weigh of the evidence. The absolute power of the tribunal to manage the evidentiary proceedings is more than obvious in this provision.

### **9.2. A cut-off date of submission of evidentiary material**

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<sup>60</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll, "Comparative International Commercial Arbitration", 2003, Kluwer Law International, p. 554.

<sup>61</sup> Ibid page 535

As far as the time of submission of evidence is concerned, article 20(1) of the Vienna Rules provides that subject to advance notice, the tribunal is entitled to declare that pleadings and the presentation of documentary evidence shall be admissible only up to a certain stage of proceedings. This means that the tribunal sets a cut-off date which the parties have to know in advance in order to prepare the presentation of their case. After that cut-off date, the parties usually are not entitled to offer additional evidence or bring up any new facts<sup>62</sup>.

On the other hand, under article 24(3) of the Swiss Rules, the tribunal *at any time during the arbitral proceedings*, may require the parties to produce documents, exhibits or other evidence *within a period of time* determined by the tribunal.

### **9.3. A preliminary hearing**

A preliminary hearing usually takes place in order the tribunal and the parties meet each other and discuss procedural expectations, identify agreements as well as differences in opinions and establish the procedural timetable, which is updated from time to time<sup>63</sup>. Especially, the Swiss Rules under article 15(3) foresee expressly the preparation of a provisional timetable at an early stage of the arbitral proceedings. During this preliminary hearing, practical issues that are not addressed at all by the Vienna and the Swiss Rules such as the form and content of written submissions, the document production, the witness testimony and other forms of taking the evidence is very important to be discussed<sup>64</sup>.

### **9.4. Proceedings: oral or in writing**

Article 20(1) of the Vienna Rules and article 25(2) of the Swiss Rules provide that the arbitral proceedings may be oral or only in writing or there can be a mixture of oral and written proceedings<sup>65</sup>.

According to article 25(2), the Swiss Rules leave it to the arbitrators to decide whether to hold hearings for the presentation of evidence or for oral argument even where one of the parties has expressly asked for such a hearing<sup>66</sup>.

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<sup>62</sup> Franz T. Schwarz and Christian W. Konrad, "The Vienna Rules: A Commentary on International Arbitration in Austria", (Kluwer Law International 2009), 443.

<sup>63</sup> Ibid page 456

<sup>64</sup> Ibid page 457.

<sup>65</sup> Article 20(3)

<sup>66</sup> Tina Wustemann / Cesare Jermini in "Swiss Rules of International Arbitration" (Commentary), by Tobias Zuberbuhler, Christoph Muller and Philipp Habegger (eds), p.147.

Under article 20(3) of the Vienna Rules oral hearings shall take place at the request of a party or if the tribunal considers it necessary in the context of its discretionary power. If it decides to do so, the tribunal is in charge of the organisation of the hearing and its contents<sup>67</sup>. If a party does not ask for an oral hearing the tribunal may decide that the procedure will be based exclusively on written documentation. According to the article 20(1) of the Vienna Rules and in the absence of any agreement of the parties, it's up to the tribunal to decide whether it will hear a person who has submitted a written witness statement in an oral hearing or not<sup>68</sup>.

The oral hearings are not mandatory. Furthermore, oral hearings cause too many expenses (travel costs etc). This is why there are arbitrations conducted on a “*document only*” basis or through the exchange of written submissions. Article 15(2) of the Swiss Rules expressly provides for this possibility which can be agreed between the tribunal and the parties. These written submissions are further clarifications of the parties to the initial statement of claims and the memorandum in reply<sup>69</sup>. By these written submissions each party tries to present its case namely to describe in detail the factual allegations elaborate on the substantial law etc and to respond to the other party<sup>70</sup>. In order to gain time, the parties are required some times to attach to their written submissions all evidence on which they rely their allegations (such as documents, written witness testimonies, experts reports etc) as well as all legal material (e.g. statutory provisions, expert opinions etc) which they believe that would help the tribunal with the case<sup>71</sup>.

Article 20(3) of the Vienna Rules provides that *the parties must be given the opportunity to take note of and comment on the motions and pleadings of the other parties and the result of the evidentiary proceedings*. This presupposes that the written submissions, evidence etc of each party must be brought to the attention of the other party. This possibility that is granted to each party constitutes an expression of the “*right to be heard and to present its case*” meaning that in case of a refusal, a violation of this fundamental right would take place<sup>72</sup>.

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<sup>67</sup> C. Liebscher in Rolf A. Schutze (ed), “Institutional Arbitration (2013)”, p. 338.

<sup>68</sup> Ibid. page 339.

<sup>69</sup> Franz T. Schwarz and Christian W. Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International 2009), p. 466.

<sup>70</sup> Ibid page 466.

<sup>71</sup> Ibid page 466.

<sup>72</sup> Ibid page 469.

## **9.5. The taking of evidence by the tribunal**

Article 20(5) of the Vienna Rules grants the tribunal the discretion to establish the facts and collect evidence on its own initiative. As from this article arises, all common types of evidence are admitted, namely documents, visual evidence, testimonial evidence, expert testimony of technical or legal nature etc. The listing of forms of evidence is indicative and not exclusive. The tribunal freely evaluates the evidence submitted by the parties and decides what the evidentiary value of each one of them is<sup>73</sup>.

Likewise, article 24(3) of the Swiss Rules provides that the tribunal may require the parties at any time during the arbitral proceedings to produce documents, exhibits or other evidence within a period of time determined by the tribunal.

Consequently, both set of rules grant the tribunal the power to collect evidence at its own initiative or at a party's request which is subject to the discretion of the tribunal.

It is important to mention that the International Bar Association (IBA) Rules on the taking of evidence are increasingly taken into account by the parties and arbitral tribunals or are referred to by analogy under both Swiss and Vienna Rules<sup>74</sup>.

## **9.6. Evidence of fact witnesses**

### **9.6.1. General**

Witness testimony is a principal form of fact finding<sup>75</sup>. It is a common principle applied to both set of Rules that any person may testify as a fact witness, including an officer, employee or representative of a party<sup>76</sup>. The parties are allowed to call witnesses however this possibility is subject to the tribunal's discretion regarding the necessity of the examination. The tribunal may refuse the examination of a witness if it considers that he is irrelevant and will undermine the cost and time effectiveness of arbitration<sup>77</sup>.

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<sup>73</sup> Ibid page 483.

<sup>74</sup> Karrer in "Institutional Arbitration" (2013) by Rolf A. Schutze (ed.), p. 390.

<sup>75</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll "Comparative International Commercial Arbitration", (2003), Kluwer Law International, p. 570.

<sup>76</sup> Article 25(2) of the Swiss Rules.

<sup>77</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll "Comparative International Commercial Arbitration", (2003), Kluwer Law International, p. 570.

### 9.6.2. Examination and practical issues at oral hearings

According to the article 20(4) of the Vienna Rules, the sole arbitrator or the Chairman of the tribunal is the person who fixes the date of oral hearings. The parties have to be informed of the fixed hearing date as far in advance as possible so that they can prepare for their participation and ensure that witnesses and/or experts will be able to attend the hearing<sup>78</sup>. The same more or less is provided under article 25(1) of the Swiss Rules, which requires an adequate advance notice of the date, time and place of any oral hearing. The best scenario is when all parties and their counsels agree to a specific date for the oral hearing. But in case there cannot be an agreement, arbitrators have the power to fix a hearing date and proceed with this even if there is a defaulting party, provided that this party has been properly informed.

The procedure for the questioning of witnesses at the hearings, under the most common adopted approach, has as follows: a) the witness statements stand in place of direct examination by the party which presents the witness, although there may be some limited scope for the party or its counsel to put some introductory questions, b) the opposing party or its legal counsel questions the witness, c) the party who has presented the witness may ask to re-examine its witness and finally d) the tribunal may address any remaining questions to the witness<sup>79</sup>.

This is how the examination of witnesses, in general, takes place under the Vienna Rules: The witness is first of all examined by the representative of the party who has nominated him. After that a cross-examination is permitted and finally a re-direct examination of the witness by the party who nominated it in order to repair the damage maybe caused by the witness during the cross-examination<sup>80</sup>.

Under both set of Rules, the arbitral tribunal has the control over the conduct of the witness examinations; it's up to the tribunal to limit, exclude any questions to the witness which is for example irrelevant to the issue in dispute<sup>81</sup>.

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<sup>78</sup> Franz T. Schwarz and Christian W. Konrad, "The Vienna Rules: A Commentary on International Arbitration in Austria", (Kluwer Law International 2009), 472.

<sup>79</sup> Elliott Geisinger and Pierre Ducret, Chapter 5: The Arbitral Procedure in Elliott Geisinger and Nathalie Voser (eds) in "International Arbitration in Switzerland: A Handbook for Practitioners", Second edition (Kluwer Law International 2013) p. 95

<sup>80</sup> Franz T. Schwarz and Christian W. Konrad, "The Vienna Rules: A Commentary on International Arbitration in Austria", (Kluwer Law International 2009), 494.

<sup>81</sup> Elliott Geisinger and Pierre Ducret, Chapter 5: The Arbitral Procedure in Elliott Geisinger and Nathalie Voser (eds) in "International Arbitration in Switzerland: A Handbook for Practitioners", Second edition (Kluwer Law International 2013) p. 96

Under the Vienna Rules hearings *shall* be private<sup>82</sup>, meaning that third persons are not allowed to attend any stage of the arbitral proceedings. This is generally accepted in international arbitration, including the arbitration under the Swiss Rules<sup>83</sup>. This *privacy* is something that falls outside the discretion of the arbitrators. However it is subject to the agreement of all parties to decide otherwise.

During the oral hearings a record of *at least* the results of the hearings is kept which at the end is signed by the tribunal. Although article 20(4) of the Vienna Rules does not provide for the possibility to object to the correctness and completeness of the minutes, however in practice the parties are often granted this opportunity<sup>84</sup>.

### **9.6.3. Written witness statements**

A written witness statement, instead of an oral hearing, is under both Swiss and Vienna rules, an accepted form of witness testimony which helps to expedite hearings and proceedings<sup>85</sup>. These statements may have the form of a sworn affidavit made under oath but usually are simply signed declarations<sup>86</sup>. The decision if the adverse party will question the witness depends on the content of its statement.

However the choice between the two forms of witness statements (oral or written) belongs to the tribunal and depends on the circumstances of each case, it is suggested though to be agreed from the outset of the arbitral proceedings.

## **9.7. Documents**

Arbitration is a procedure based mostly on documents, which seems to be the most important form of evidence. Under both the Vienna and the Swiss Rules it begins with the parties' statements of claim and defence (or memorandum in reply) to which all documentary evidence in support of their case is attached. But what do we mean when we refer to '*documents*' especially nowadays given all that technology progress?

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<sup>82</sup> Article 20(4).

<sup>83</sup> Elliott Geisinger and Pierre Ducret, Chapter 5: The Arbitral Procedure in Elliott Geisinger and Nathalie Voser (eds) in "International Arbitration in Switzerland: A Handbook for Practitioners", Second edition (Kluwer Law International 2013) p. 101

<sup>84</sup> C. Liebscher in "Arbitration Law in Austria: Practice and Procedure", by S. Riegler, A. Petsche, A. Fremuth – Wolf, M. Platte and C. Liebscher, (eds) (Huntington, Juris Publishing, 2007), p. 643.

<sup>85</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll, "Comparative International Commercial Arbitration", (2003), Kluwer Law International, p. 571

<sup>86</sup> D.P. Roney / A.K. Muller – The Arbitral Procedure, in "International Arbitration in Switzerland – A Handbook for Practitioners", ed. by Gabrielle Kaufmann-Kohler & Blaise Stucki, Schulthess, 2004, p. 62 with further references.

“*Documents*” include any written or printed material capable of being made evidence; furthermore, e-mail, fax, television, film, photographs, computer records and tape recording<sup>87</sup>.

The exact procedure under which the parties must produce their documentary evidence (e.g. when and how) is agreed either by agreement between the parties either, most often, by the procedural rules and timetable which the parties establish at the outset of the proceedings by the tribunal in consultation with the parties<sup>88</sup>.

Both under the Swiss [articles 18(3) and 19(2)] and the Vienna [article 9(3)] Rules, the parties are requested to submit the supporting documents together with their first written submissions, which are the request for arbitration and the answer to this request. In exceptional cases the arbitral tribunal may permit a party to submit further documents at a later stage.

According to the article 3(12) of IBA Rules that apply in practice, all documents produced are protected by confidentiality. Parties are not obliged to produce copies of confidential documents if they are requested by the opposing party<sup>89</sup>. However, this can be ordered by the tribunal only for documents which are directly relevant to the issues in the arbitration<sup>90</sup>.

The parties may submit to the tribunal either original documents or authorised copies.

Additionally, in case a document is written in a language not familiar to the tribunal, it is submitted translated into the language of the arbitration<sup>91</sup>. Under Swiss Rules, also, the parties may agree that any kind of documents will be filed in their original language if this language is a common one (such as English, French, Italian or German) otherwise they shall be accompanied by a translation in the language agreed by the parties.

Article 15(4) of the Swiss Rules provides that all documents or information provided to the tribunal by one party shall be communicated at the same time to the other party.

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<sup>87</sup> Franz T. Schwarz and Christian W. Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International 2009), p. 500.

<sup>88</sup> Elliott Geisinger and Pierre Ducret, Chapter 5: The Arbitral Procedure in Elliott Geisinger and Nathalie Voser (eds) in “International Arbitration in Switzerland: A Handbook for Practitioners”, Second edition (Kluwer Law International 2013) p. 91

<sup>89</sup> Julian D M Lew, Loukas A. Mistelis, Stefan M. Kroll Comparative International Commercial Arbitration”, (2003), Kluwer Law International, p. 567

<sup>90</sup> Ibid. p. 567

<sup>91</sup> Ibid p. 569



## 9.8. Expert evidence

An “expert” is appointed to elucidate issues of a technical, legal, medical, biological or other discipline of some sophistication in order to be better understood<sup>92</sup>.

Under article 20(5) of the Vienna Rules and articles 15(2), 25(3) and 27 of the Swiss Rules, experts may be appointed either by the tribunal<sup>93</sup> or (most often) by the parties and may be appointed individuals, companies or institutions.

If parties agreed to an explicit exclusion of tribunal-appointed experts, the tribunal is bound by this agreement<sup>94</sup>.

Under the Swiss Rules [(article 27(1)], the tribunal has to consult with the parties before it appoints an expert. This consultation includes the announcement to the parties of the intention of the tribunal to appoint an expert, which person is to be appointed and on which issue the expert will report; the parties have the opportunity to express their opinion on each one of these issues<sup>95</sup>. After the expert’s appointment, according to the article 27(1) of the Swiss Rules, the tribunal, usually with the cooperation of the parties, is drafting the expert’s terms of reference which contains the tasks assigned to the expert and the issues on which the expert shall report<sup>96</sup>.

An expert may require of the parties to give him any information or produce any documents that will be helpful for his report, which has to be filed in writing<sup>97</sup>. The report is communicated to the parties for comments and if necessary the expert may be interrogated by a party which has asked for it, in an oral hearing.

Experts are expected to be objective, neutral and independent of the parties<sup>98</sup>. However, under both the Vienna Rules and the Swiss Rules the standards of impartiality and independence that apply to arbitrators are requested to be followed only by the tribunal appointed experts and not by the parties appointed experts for whom this is an issue of evidentiary value and credibility<sup>99</sup>.

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<sup>92</sup> Matti s. Kurkela, Hannes Snellman, “Due Process in International Commercial Arbitration”, (Oceana Publications, Inc) (2005), p. 146.

<sup>93</sup> Article 20(5): “If the sole arbitrator (arbitral tribunal) considers it necessary, he (it) may on his own initiative collect evidence (...) and may call in experts”

<sup>94</sup> Christian Oetiker, in “Swiss Rules of International Arbitration (Commentary)”, by Tobias Zuberbuhler, Christoph Muller and Philipp Habegger (eds), p.243

<sup>95</sup> Ibid page 244.

<sup>96</sup> Ibid page 246.

<sup>97</sup> Article 27(2) of the Swiss Rules

<sup>98</sup> Franz T. Schwarz and Christian W. Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International 2009), p. 527

<sup>99</sup> Ibid page 531.

Although expert evidence can be very beneficial and contribute to the efficiency and effectiveness of arbitration there are some points that parties have to deal with from the beginning on a case-by-case basis such as: the independence and the qualifications of the expert, the disclosure of documents and information considered by the expert etc<sup>100</sup>. An expert may be heard in person before the arbitral tribunal or submit a written report signed by him. The parties, except otherwise agreed, have the right to cross - examine the expert appointed by the tribunal by calling him to show up at a hearing, in order to verify the accuracy of his report<sup>101</sup>.

Under the Vienna Rules, the arbitrators have to ensure in consultation with the Secretary General that the deposit covers the expected costs of the expert before making the appointment<sup>102</sup>.

Article 21 of the Vienna Rules is referred only to experts appointed by the tribunal, not by the parties and provides that article 16 for the challenge of arbitrators also applies to these experts. Under this provision experts can be challenged under the same circumstances, *mutatis mutandis*, as arbitrators. In case a reason of challenging of an expert, appointed by the party, arises, the credibility of the party who appointed him is undermined<sup>103</sup>.

In the same way, article 27(5) of the Swiss Rules is also referred only to the tribunal – appointed experts and provides that articles 9 to 11 which deal with the impartiality, independence and challenge of the arbitrators apply, also, by analogy to them.

### **9.9. Default proceedings**

Article 20(6) of the Vienna Rules and article 28(2) of the Swiss Rules provide for the case one party, the claimant or the respondent, even though it has received a proper notice to participate, does not take part in the proceedings.

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<sup>100</sup> Henri Alvarez in Loukas A. Mistelis and Julian D.M. Lew (eds), *'Pervasive Problems in International Arbitration'*, 2006 Kluwer Law International, p. 138 et seq.

<sup>101</sup> Franz T. Schwarz and Christian W. Konrad, "The Vienna Rules: A Commentary on International Arbitration in Austria", (Kluwer Law International 2009), p. 529

<sup>102</sup> Franz T. Schwarz and Christian W. Konrad, "The Vienna Rules: A Commentary on International Arbitration in Austria", (Kluwer Law International 2009), p. 528

<sup>103</sup> Franz T. Schwarz and Christian W. Konrad, "The Vienna Rules: A Commentary on International Arbitration in Austria", (Kluwer Law International 2009), p. 631

In this case, although only one party has taken part in the proceedings and so its factual submissions would be assumed to be true as long as they are not disproved, however the tribunal does not proceed to an automatic default award.

Although the Vienna rule says “*the case must be heard with the other party alone*”, the Swiss rule says “*the tribunal may*”. This difference shows the discretionary power of the tribunal under the Swiss Rules to continue to the proceedings only if the three requirements that are mentioned in this article are fulfilled. If not the tribunal may reschedule the hearing cause otherwise a violation of the right to be heard can be raised by the defaulting party (e.g. in case of a sufficient cause of the non appearance)<sup>104</sup>.

Both articles reflect the modern international arbitration<sup>105</sup>, since the tribunal will “*hear*” the case with the other party alone, namely the facts will have to be established by the tribunal even when a party does not participate<sup>106</sup>.

The tribunal is obliged to notify the defaulting party of all procedural steps and continue inviting it to take part in all procedural stages otherwise the defaulting party could claim that a violation of its right to be heard took place<sup>107</sup>.

The Swiss Rules under article 28(3) provide also for the case that a party although was duly invited to produce documentary or other evidence has failed to do so without sufficient cause for such failure. Documentary evidence includes any documents supporting the allegations and arguments of a party which had to be attached to the statements at the time of their submission and any documents asked from the parties to be produced by the other party or an expert<sup>108</sup>. In this party’s failure the tribunal proceeds to an award relying on the evidence brought before it.

The Vienna Rules are silent on this matter.

### **9.10. Objections against violation of procedural rules**

Article 20(7) of the Vienna Rules provides for the possibility of each party to object to any violation of the rules applying to the proceedings *immediately* when it

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<sup>104</sup> Christian Oetiker, in “Swiss Rules of International Arbitration (Commentary)”, by Tobias Zuberbuhler, Christoph Muller and Philipp Habegger (eds), p.262

<sup>105</sup> Franz T. Schwarz and Christian W. Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International 2009), 514 (20-260)

<sup>106</sup> C. Liebscher in Rolf A. Schutze (ed), “Institutional Arbitration (2013)”, p. 339.

<sup>107</sup> Franz T. Schwarz and Christian W. Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International 2009), 517 (20-270)

<sup>108</sup> Christian Oetiker, in “Swiss Rules of International Arbitration (Commentary)”, by Tobias Zuberbuhler, Christoph Muller and Philipp Habegger (eds), p.263

comes to its notice<sup>109</sup>. Normally, an objection must be raised within the following day at the latest<sup>110</sup> and has to be addressed invariably to the tribunal. If it fails to do so, the party is deprived of the right to bring up this violation at any later stage. Obviously, according to the wording of this provision the party “*is aware*” of the violation. What is very important to mention is that the obligation of the party to raise an immediate objection applies only to procedural rules on which the parties have agreed or provisions that they can deviate from but does not apply to provisions of mandatory law<sup>111</sup>.

## **10. Termination of proceedings**

All arbitrations do not terminate with an award. There are some cases that arbitration can come to an end at an earlier stage. Both 2012 Swiss Rules and 2006 Vienna Rules provide for these cases.

In article 25 of the Vienna Rules, the proceedings are terminated by three (3) different ways (which are enumerated exhaustively and not indicatively<sup>112</sup>):

a) By an award rendered by the tribunal.

This is the most common termination of arbitration procedure. Under all institutional arbitration rules, included Swiss Rules even though there is not an express reference within an article, arbitration is terminated with an award. Such an award, according to Sec. 608 ZPO, can only be final awards such an award on the merits or an award which has denied the jurisdiction of the arbitral tribunal<sup>113</sup>.

b) By a settlement concluded between the parties.

In such a case the parties have two options, according to article 28: Either to ask the tribunal for a record to be drawn up on the concluded settlement or for an award to be rendered. The Swiss Rules provide for the conclusion of a settlement in two different stages of arbitration: first, under article 5(4) before the arbitral tribunal is constituted and secondly, under article 34(1) before the award is made. In the first case, the Secretariat will give advance notice to the parties that the Arbitration Court may terminate the proceedings and in the second case the arbitral tribunal may issue

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<sup>109</sup> See the famous case *Cook Indus. Inc. v. Iran*, where a party requested a retranslation of documents one and a half years after their first filing, which was denied.

<sup>110</sup> C. Liebscher in Rolf A. Schutze (ed), “Institutional Arbitration (2013)”, p. 340.

<sup>111</sup> Franz T. Schwarz and Christian W. Konrad, “The New Vienna Rules”, in *Arbitration International*, Volume 23, Issue 4 (2007), p. 631

<sup>112</sup> Liebscher, in “Institutional Arbitration: A commentary” (2013), ed. by Rolf A. Schutze, p. 344

<sup>113</sup> *Ibid* page 344.

an order or, if requested by the parties and accepted by it, an award on the agreed terms of the settlement.

c) By an order of the tribunal which declares the termination of the proceedings in case that:

i. The claimant withdraws his claim unless the respondent objects thereto and the tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute.

In this case, it is at the tribunal's discretion under which circumstances the respondent has a legitimate interest to consent to the definite settlement of the dispute. A legitimate interest exists if the statement of claim is withdrawn without a waiver of the claim. If there is a waiver, the respondent is likely to have an interest to obtain an award with respect to the waiver. In any case the tribunal will take into consideration how far the proceedings have progressed in order to determine if there is a legitimate interest<sup>114</sup>.

The corresponding provision of the 2012 Swiss Rules is article 28, under which if the claimant fails to communicate its claim to the respondent without any justified reasons within the period of time set by the arbitral tribunal, which in fact is as if the claimant has withdrawn his claim against the respondent, the tribunal shall issue an order for the termination of the arbitral proceedings.

ii. The parties agree on the termination of the proceedings and communicate their intention to the tribunal.

This is an express manifestation of the freedom of the parties to settle their dispute as they wish.

iii. The tribunal finds that it is impossible the proceedings to continue.

An example of this case is when despite a written notification from the tribunal, both parties refrain from continuing the arbitral proceedings. This behaviour is an implied waiver of the claimant's claims or even it conceals a settlement that has been concluded between the parties and they have no interest anymore to continue the proceedings. This example of settlement is one of the cases that according to the article 34(1) of the Swiss Rules the continuation of arbitration becomes unnecessary or impossible. Article 34(2), just like article 25(cc), is drafted quite widely in order to include any other reasons for which the continuation of the arbitration becomes

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<sup>114</sup>Liebscher, in "Institutional Arbitration: A commentary" (2013), ed. by Rolf A. Schutze, p. 345.

unnecessary or impossible and therefore an order for the termination of the proceedings is necessary to be issued. Additionally, article 5(4) of the Swiss Rules provides that an order by the Arbitration Court for the termination of proceedings is issued when before the constitution of the tribunal the continuation of the arbitral proceedings becomes unnecessary or impossible for any reasons.

The early termination of the arbitral proceedings affects the final costs of arbitration. Article 36(1) of the Vienna Rules provides that the Secretary General may reduce the fees at his / her discretion if the proceedings terminate earlier.

Finally, the “termination” of the proceedings, as analysed above, has to be distinguished from the “closure” of the proceedings which is provided by article 29 of the Swiss Rules and article 20(8) of the Vienna Rules.

When we talk about “closure” of proceedings we mean that the arbitral proceedings have totally been concluded, all the parties were offered the possibility to present their cases according to the rules and the agreements that were made in the course of the proceedings between the parties and the arbitral tribunal and they have nothing else to offer to the case (e.g. any further evidence etc.). This express declaration of the tribunal regarding the “closure” of the proceedings is intended to inform the parties that the tribunal is now ready to proceed to issue an award<sup>115</sup>. Besides, the declaration of the “closure” of the proceedings is a “weapon” in the hands of the tribunal to restrict the parties from adding evidence the last minute<sup>116</sup>. However, article 29(1) of the Swiss Rules says that the tribunal “*may*” declare the proceedings closed, meaning that it does not impose a duty to the tribunal to do so and the closure of the proceedings is not a prerequisite for rendering the final award.<sup>117</sup> On the contrary, article 20(8) of the Vienna Rules says that the tribunal “*must*” declare the proceedings closed, rendering this stage compulsory.

Furthermore, the same article says that “*the tribunal must ask the parties whether they have any further proof to offer, witnesses to be heard or submissions to make*”. Although the article is referred explicitly only to witnesses and submissions,

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<sup>115</sup> Franz T. Schwarz and Christian W. Konrad, “The New Vienna Rules”, in *Arbitration International*, Volume 23, Issue 4 (2007), p. 632.

<sup>116</sup> Franz T. Schwarz and Christian W. Konrad in “The Vienna Rules: A Commentary on International Arbitration in Austria”, (Kluwer Law International, 2009)

<sup>117</sup> Christian Oetiker in “Swiss Rules of International Arbitration (Commentary)” by Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Eds), Schulthess (2005), p. 267

the fact that it is referred “*any further proof*”, undoubtedly includes any kind of proof (e.g. experts hearings).<sup>118</sup>

Finally, article 29(2) gives the tribunal the possibility to reopen the arbitral proceedings on matters with regard to which the proceedings were closed, on its own initiative or when a party applies for it and only if the tribunal considers it necessary due to exceptional circumstances. Although the German version of article 20(8) of the Vienna Rules also provides for the reopening of the arbitral proceedings at any time<sup>119</sup>, the English version of the Rules makes no reference to it at all. According to the article 29(2) of the Swiss Rules, the possibility of reopening of the proceedings is at the tribunal’s discretion but only if there are “exceptional circumstances” which does not specify. However, as “*exceptional circumstances*” have been accepted, for instance, if during the deliberation of the tribunal: a) it finds out that certain issues need to be further clarified and b) an issue comes up which was not dealt with in the proceedings<sup>120</sup>.

## 11. Conclusion

From the presentation and comparative analysis of the Swiss Rules 2012 and the Vienna Rules 2006 regarding the arbitral proceedings obviously one can ascertain too many similarities. This is not surprising since on the one hand arbitral proceedings in the practice of international arbitration are more or less the same with not too many differentiations and on the other hand both sets have adopted many provisions from the UNCITRAL Rules and the IBA Rules on the Taking of Evidence in International Arbitration.

However, the Swiss Rules are far more detailed than the Vienna Rules which in many cases are more generally drafted so the practice followed in international arbitration comes to fill in the gaps, give answers and make any clarifications necessary.

Undoubtedly, both sets of Vienna and Swiss Rules are part of an ongoing international trend to modernise arbitration rules having the same main goal: the speedy and cost effective resolution of disputes.

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<sup>118</sup> C. Liebscher in “Arbitration Law in Austria: Practice and Procedure”, by S. Riegler, A. Petsche, A. Fremuth – Wolf, M. Platte and C. Liebscher, (eds) (Huntington, Juris Publishing, 2007), p. 643.

<sup>119</sup> See Article 20(8) of the German version of the Vienna Rules: “(...) Der Schiedsrichter (Schiedsrichtersenat) kann das Verfahren jederzeit wieder eröffnen”.

<sup>120</sup> Christian Oetiker in “Swiss Rules of International Arbitration (Commentary)” by Tobias Zuberbuhler, Christoph Muller, Philipp Habegger (Eds), Schulthess (2005), p. 268

## APPENDIX I

### VIAC Arbitration Rules 2006 English

#### General Provisions

##### Article 1

###### The Institution

1 The International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the Vienna International Arbitral Centre - “the Centre”) shall make arrangements for the settlement by arbitration of disputes in which not all contracting parties that concluded the arbitration agreement had their place of business or their normal residence in Austria at the time of conclusion of that agreement.

The jurisdiction of the Centre can also be agreed by parties whose place of business or normal residence is in Austria for the settlement of disputes of an international character.

2 If the parties have agreed to the jurisdiction of the Centre, these arbitration rules (“Vienna Rules”) shall thereby apply in the version valid at the time of commencement of the proceedings.

3 If parties which had their place of business or normal residence in Austria at the time of conclusion of the arbitration agreement have agreed that their disputes should be finally settled by a sole arbitrator or an arbitral tribunal to be appointed according to the Vienna Rules, and if the dispute is not international in character, the Permanent Arbitral Tribunal of the Vienna Economic Chamber, or, if another venue in Austria has been agreed, of the regional economic chamber in whose territorial jurisdiction the agreed venue is situated, shall be competent to make arrangements for settlement by arbitration. The latter tribunal shall conduct the proceedings in accordance with the rules of arbitration for the Permanent Arbitral Tribunals of the regional economic chambers.

##### Article 2

Unless the parties have agreed otherwise

- (a) the place of arbitration shall be Vienna
- (b) the sole arbitrator (arbitral tribunal) may conduct procedural acts at any place where he deems appropriate.

The arbitral tribunal may in any case meet at any place to consult in any way.

#### Organization

##### Article 3



## The Board

1 The Board of the Centre shall have at least five members. They shall be appointed for a period of office of five years by the Extended Board of the Austrian Federal Economic Chamber by recommendation of the President of the Centre and can be reappointed. If there is no new appointment by the time of the expiration of a period of office, the members of the Board shall remain in office until a new Board is appointed. If a member of the Board is permanently incapacitated during his period of office (for instance, by resignation or death), a substitute member can be appointed for the remainder of the period of office of the serving Board.

2 The members of the Board shall elect one of their number to act as President for the duration of their term of office. Where the President is prevented, the member who is oldest by age shall take over his tasks.

3 The meetings of the Board are convened by the President, and presided over by the President or in his absence, by the most senior member by age present who is eligible to vote. The Board can validly take decisions if more than half of its members are present. It shall take decisions by a simple majority of the members present who are eligible to vote (see paragraph 4). In the event of a tie in voting, the Chairman shall have a casting vote.

4 Members of the Board who are parties to particular arbitration proceedings in any capacity whatsoever shall be excluded from decisions pertaining to those proceedings, however they are to be counted for the presence quorum.

5 Decisions may be made by correspondence. In this case the President shall submit a written proposal to the members and shall set a time limit for voting by correspondence. Paragraph 3, sub-sections 3. and 4. shall apply accordingly. Each member has the right to request a meeting regarding the written proposal.

6 The members of the Board must perform their duties to the best of their ability; they are independent and are not subject to any directives in that respect. They are bound to secrecy on all matters coming to their notice in the course of their duties.

## Article 4

### International Advisory Board

The International Advisory Board consists of international arbitration experts who may be invited by the respective Board of the Centre for the duration of its period of office. Its purpose is to discuss factual issues of immediate interest.

## Article 5

### The Secretary General

1 The Secretary General of the Centre shall be appointed by the Extended Board of the Austrian Federal Economic Chamber for a period of office of five years by

recommendation of the Board of the Arbitral Centre; he can be reappointed. The third sentence of Article 3 paragraph 1, shall apply by analogy

2 The Secretary General shall direct the activities of the Secretariat and shall perform the administrative tasks of the Centre insofar as they are not reserved to the Board of the Centre.

3 The Secretary General must perform his duties to the best of his ability and is not subject to any directives in that respect. He is bound to secrecy on all matters coming to his notice in the course of his duties.

4 If the Secretary General is unable to perform his duties or if he is permanently incapacitated, a member of the Board of the Centre, appointed by that Board, shall perform the relevant functions until a Secretary General is appointed.

## Article 6

### Languages of correspondence

Correspondence by the Parties with the Board and the Secretary General shall be conducted in German or English.

## Article 7

### Arbitrators

1 The parties shall be free to appoint the arbitrators. Any person having legal capacity - irrespective of nationality - may be an arbitrator, provided the parties have not agreed upon any special additional qualification requirements.

2 The requirements for the appointment as arbitrator are:

- a) A written statement as to his impartiality and independence in accordance with paragraph 5. The Secretary General shall transmit to the parties a copy of the form in which the sole arbitrator (all members of the arbitral tribunal) has (have) confirmed his (its) impartiality and independence.
- b) A written statement to submit to these Rules of Arbitration including to the provisions on the costs of the proceedings.

3 A member of the Board may act only as Chairman of an arbitral tribunal or sole arbitrator.

4 The arbitrators must perform their duties in complete independence and impartiality, to the best of their ability, and are not subject to any directives in that respect. They are bound to secrecy in respect of all matters coming to their notice in the course of their duties.

5 When a person is approached in connection with his possible appointment as arbitrator, he shall disclose any circumstances likely to give rise to doubts as to his

impartiality or independence or that are in conflict with the agreement of the parties. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

## Article 8

### Liability

Liability of the arbitrators, the Secretary General, the Board and its members and the Austrian Federal Economic Chamber and its employees for any act or omission in relation to arbitration proceedings, insofar as such liability may be admissible by law, shall be excluded.

## Arbitral Proceedings

## Article 9

### Commencement of the Proceedings

1 Arbitral proceedings are commenced when a statement of claims is filed with the Secretariat. The proceedings become pending on receipt of the statement of claims by the Secretariat.

2 One copy of the statement of claims together with enclosures must be submitted for each Respondent, each arbitrator and the Secretariat.

3 The statement of claims must include:

- a) The designation of the parties and their addresses;
- b) A specific statement of claims and the particulars and supporting documents on which the claims are based;
- c) The amount in dispute at the time of submission of the statement of claims, unless the claims are not related exclusively to a specific sum of money;
- d) Particulars regarding the number of arbitrators in accordance with Article 14;
- e) If a decision by three arbitrators is requested, the nomination of an arbitrator and the address of that person.

4 A copy of the agreement specifying the jurisdiction of the Arbitral Centre must be attached to the statement of claims.

5 If the statement of claims does not comply with the provisions of paragraph 3 of the present Article or if copies of documents or enclosures are missing, the Secretary General shall request the Claimant to remedy the defect or to submit the necessary documents or enclosures. The Claimant is to be informed that until the defects have been remedied, the claim shall not be processed.

6 The Board can refuse to carry out proceedings if the parties have designated the International Arbitral Centre of the Austrian Federal Economic Chamber in the arbitration agreement but have made agreements that deviate from the Vienna Rules.

## Article 10

### Memorandum in Reply

1 If the claim is not to be dealt with under Article 9 paragraphs 5 and 6, the Secretary General shall make service to the Respondent of the statement of claims and one copy each of the rules of arbitration and shall invite the Respondent to submit a memorandum in reply within a period of thirty days, in the number of copies required under Article 9 paragraph 2.

2 The memorandum in reply must include:

- a) A reply to the pleadings in the statement of claims;
- b) Particulars regarding the number of arbitrators in accordance with Article 14;
- c) Indication of the name and address of an arbitrator, if a decision by an arbitral tribunal is requested or if a decision by three arbitrators has been agreed upon in the arbitration agreement.

## Article 11

### Counter-claims

1 Claims by the Respondent against the Claimant that are based on an arbitration agreement which constitutes the jurisdiction of the International Arbitral Centre of the Austrian Federal Economic Chamber can be raised as counter-claims up to the time of closure of the evidentiary proceedings.

2 Counter-claims must be submitted to the Secretariat of the Centre and must be forwarded by the latter to the sole arbitrator (arbitral tribunal) for further action after the deposit against costs has been paid.

3 If the claim designated as a counter-claim is not based on an arbitration agreement which constitutes the jurisdiction of the International Arbitral Centre of the Austrian Federal Economic Chamber, if the parties are not identical, or if the submission of a counter-claim after transmission of the files to the sole arbitrator (arbitral tribunal) would lead to a substantial delay in the main proceedings, the sole arbitrator (arbitral tribunal) must return the claim to the Secretariat to be dealt with in separate proceedings.

4 The sole arbitrator (arbitral tribunal) must give the Counter-Respondent to an admissible counter-claim the opportunity to submit a memorandum in reply in writing and must set a time-limit for that purpose.

## Article 12

## Transmitting of the file to the sole arbitrator (arbitral tribunal)

The Secretary General shall transmit the files to the sole arbitrator (arbitral tribunal) as soon as a statement of claims (counter-claim) has been received in due form, the sole arbitrator (all members of the arbitral tribunal) has (have) confirmed acceptance of the mandate and his (its) objectivity, using a form issued by the Centre (Article 7 paragraph 2), and the deposit for costs has been paid (Article 34). The proceedings before the sole arbitrator (arbitral tribunal) shall thereby commence.

## Article 13

### Time-limits, Service and Communications

1 A time-limit shall be deemed to have been observed if the document is dispatched as provided under paragraph 2 of the present Article on the last day of the period set. Time-limits can be prolonged by the Secretary General on sufficient grounds; after the transmission of the files to the sole arbitrator (arbitral tribunal), the sole arbitrator (arbitral tribunal) shall be competent to prolong time-limits (except in the cases covered by Article 34 paragraphs 5 and 6).

2 Communications shall be considered as having been validly served if they are forwarded by registered letter, courier service, telefax or by other means of communication that guarantee evidence of transmission to the address most recently notified in writing to the sole arbitrator (arbitral tribunal) by the addressee as the address for service, or if the document to be served has been demonstrably transmitted.

3 As soon as a party has appointed a representative, service to the most recently indicated address of that representative shall be considered as having been made to the party represented.

## Article 14

### Nomination and Appointment of Arbitrators

1 The parties can agree that their dispute is to be decided either by a sole arbitrator or by an arbitral tribunal that shall consist of three arbitrators.

2 When no such agreement has been made and the parties do not agree on the number of arbitrators, the Board shall determine whether the dispute is to be decided by a sole arbitrator or by an arbitral tribunal. In that context, the Board shall take into consideration in particular the difficulty of the case, the magnitude of the amount in dispute and the interest of the parties in a rapid and cost-effective decision.

3 The parties shall be notified of the decision of the Board pursuant to paragraph 2 of the present Article; in the event that proceedings before a sole arbitrator are decided upon, the parties shall be requested to agree on a sole arbitrator and to indicate that person's name and address within thirty days after service of the request. If no such indication is made within that period, the sole arbitrator shall be appointed by the Board.

4 If the dispute is to be decided by an arbitral tribunal, the party that has not yet nominated an arbitrator shall be requested to indicate the name and address of an arbitrator within thirty days after service of the request. If the party has not appointed an arbitrator within that time-limit, the arbitrator shall be appointed by the Board.

5 If the dispute is to be decided by an arbitral tribunal, the arbitrators nominated by the parties or appointed by the Board shall be requested to agree on a Chairman and to indicate his name and address within thirty days after service of the request. If no such indication is made within that period, the Chairman shall be appointed by the Board.

6 The parties are bound by their nomination of arbitrators as soon as the identity of the arbitrator nominated has been made known to the other party.

## Article 15

### Multiparty Proceedings

1 A claim against two or more Respondents shall be admissible only if the Centre has jurisdiction for all of the Respondents, and, in the case of proceedings before an arbitral tribunal, if all Claimants have nominated the same arbitrator, and:

- a) If the applicable law positively provides that the claim is to be directed against several persons; or
- b) If all Respondents are by the applicable law in legal accord or are bound by the same facts or are joint and severally bound; or
- c) If the admissibility of multiparty proceedings has been agreed upon; or
- d) If all Respondents submit to multiparty proceedings and, in the case of proceedings before an arbitral tribunal, all Respondents nominate the same arbitrator; or
- e) If one or more of the Respondents on whom the claim was served fails or fail to provide the particulars mentioned in Article 10 paragraph 2, b) and c) within the thirty-day time-limit (Article 10 paragraph 1).

2 Where a claim against a number of Respondents cannot be served on all Respondents, the arbitral proceedings shall, upon application of the Claimant (the Claimants), be continued against those Respondents on whom the claim was served. The claim against those Respondents to which the claim could not be served shall be subject to separate proceedings.

3 If multiparty proceedings are admissible, the Respondents must agree among themselves whether they wish to have the dispute decided by one arbitrator or by three arbitrators, and, if a decision by three arbitrators is desired, must jointly nominate an arbitrator.

4 In the case covered by paragraph 3 of the present Article, if there is no agreement among the Respondents concerning the number of arbitrators, the Respondents shall be requested by the Secretary General to provide evidence of such agreement within thirty days after service of the request.

5 If no evidence of agreement on the number of arbitrators is presented within the period mentioned in paragraph 4 of the present article, the Board shall determine whether the dispute is to be decided by one arbitrator or by an arbitral tribunal.

6 If the Respondents have agreed that the dispute is to be decided by an arbitral tribunal, but without nominating an arbitrator, they shall be requested by the Secretary General to indicate the name and address of an arbitrator within thirty days after service of the request.

7 If no arbitrator is jointly nominated within the period mentioned in paragraph 6 of the present Article and if the dispute is to be decided by an arbitral tribunal, the Board shall appoint the arbitrator for the defaulting Respondents.

8 In cases other than those mentioned in paragraph 1 of the present Article, the consolidation of two or more disputes shall be admissible only if the same arbitrators have been appointed in all the disputes that are to be consolidated and if all parties and the sole arbitrator (arbitral tribunal) agree.

9 The decision whether multiparty proceedings, as per paragraph 1 of this Article, are admissible, shall be taken by the sole arbitrator (the arbitral tribunal) upon application of one of the Respondents. If the admissibility of multiparty proceedings is denied, the arbitral proceedings return to the stage they were in for the Respondents before the sole arbitrator (the arbitral tribunal) was appointed.

## Article 16

### Challenge of Arbitrators

1 An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or that are in conflict with the agreement of the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he participated, only for reasons of which he becomes aware after the participation in the appointment or after the appointment has been made.

2 If a party challenges an arbitrator, it must without delay inform the Secretary General thereof, stating the grounds for the challenge.

3 Should the challenged arbitrator not withdraw from his office, the Board shall decide upon the challenge on the basis of the particulars in the challenging motion and the evidence attached thereto. Before the Board makes its decision, the Secretary General must obtain the comments of the arbitrator challenged and of the other parties. The Board can also request comments from other persons.

4 An arbitrator challenged may continue the proceedings, notwithstanding the challenging motion. However, an award may not be rendered until after the final and binding decision of the Board.

## Article 17

### Early Termination of the Mandate of Arbitrators

1 The mandate of an arbitrator terminates when

- (a) the parties agree on the termination,
- (b) the arbitrator withdraws from office,
- (c) a challenging motion is granted,
- (d) the arbitrator is removed from his office by the Board.

2 Any party may request the termination of the mandate of an arbitrator if the latter's incapacitation is not merely temporary, if he otherwise fails to perform his duties or unduly delays the proceedings. The request must be submitted to the Secretariat. The Board shall decide upon the request after hearing the arbitrator in question. If it is clear that incapacitation is not merely temporary, the Board may terminate the arbitrator's mandate even without a request from a party.

## Article 18

### Consequences of Challenge or Early Termination of Mandate

1 If the challenge of an arbitrator has been allowed, if his mandate has been terminated, if he has resigned his mandate or has died, then,

- a) If that arbitrator is a sole arbitrator, the parties - or,
- b) If that arbitrator is the Chairman, the remaining arbitrators - or
- c) If that arbitrator has been nominated by a party or has been appointed for a party, the party that nominated him or for which he was appointed

shall be requested to nominate a new arbitrator within thirty days - by mutual consent in the cases covered by subparagraphs a) and b) of the present paragraph - and to indicate his name and address. If no such indication is received within that period, the new arbitrator shall be appointed by the Board. If a new arbitrator nominated has also been successfully challenged, the right to nominate a new arbitrator shall lapse and the new arbitrator shall be appointed by the Board.

2 If the challenge of an arbitrator has been allowed, if his mandate has been terminated, if he has resigned his mandate or has died, the new sole arbitrator (newly constituted arbitral tribunal) shall determine, after obtaining the comments of the parties, whether and, if so, to what extent, previous procedural stages are to be repeated.

## Article 19

### Jurisdiction of the Arbitral Tribunal

1 A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the first pleading in the matter. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the



arbitral proceedings. In both cases a later plea shall not be permitted; if the arbitral tribunal however considers the delay justified, the plea can be admitted.

2 The sole arbitrator (arbitral tribunal) shall rule on its own jurisdiction. The ruling can be made together with the ruling on the case or by separate arbitral award.

## Article 20

### Conduct of the Proceedings

1 In the context of the Vienna Rules and the agreements between the parties, the sole arbitrator (arbitral tribunal) may conduct the arbitration proceedings at his (its) absolute discretion; the principle of equal treatment of the parties shall apply, the right to be heard being ensured at every stage of the proceedings. However, subject to advance notice, the sole arbitrator (arbitral tribunal) is entitled to declare that pleadings and the presentation of documentary evidence shall be admissible only up to a certain stage of the proceedings.

2 Immediately after transmission of the files to the sole arbitrator (arbitral tribunal), the latter shall determine the language or languages of the proceedings, taking into consideration all circumstances, in particular, the language of the contract. In such matters, he (it) is bound by any agreement between the parties. The sole arbitrator (arbitral tribunal) can order that a translation be submitted of all documents that are not drafted in that language (those languages).

3 The proceedings may be oral or only in writing. Oral hearings shall take place at the request of one party or if the sole arbitrator (arbitral tribunal) to whom (which) the case has been referred considers it necessary. In any case, the parties must be given the opportunity to take note of, and comment on, the motions and pleadings of the other parties and the result of the evidentiary proceedings.

4 The date of oral hearings shall be fixed by the sole arbitrator or the Chairman of the arbitral tribunal. Hearings shall be private. A record of at least the results of the hearings shall be made, which the sole arbitrator or the Chairman of the arbitral tribunal shall sign.

5 If the sole arbitrator (arbitral tribunal) considers it necessary, he (it) may on his (its) own initiative collect evidence, and in particular may question parties or witnesses, may request the parties to submit documents and visual evidence and may call in experts. If costs are incurred through the evidentiary proceedings and in particular through the appointment of experts, the procedure under Article 35 shall be followed.

6 If one party does not take part in the proceedings, the case must be heard with the other party alone.

7 If a violation by the sole arbitrator (arbitral tribunal) of a provision of these arbitration rules or of other provisions applicable to the proceedings comes to the notice of a party, that party must immediately enter an objection otherwise the party will be barred from entering an objection against that defect.

8 The sole arbitrator (arbitral tribunal) must ask the parties whether they have any further proof to offer, witnesses to be heard or submissions to make. As soon as the sole arbitrator (arbitral tribunal) is convinced that the parties have had an adequate opportunity for such purposes, the sole arbitrator (arbitral tribunal) must declare the proceedings closed.

## Article 21

### Challenge of Experts

Article 16 shall apply accordingly to the challenging of experts appointed by the sole arbitrator (arbitral tribunal). However, the sole arbitrator (arbitral tribunal) shall decide on the challenge.

## Article 22

### Interim Measures of Protection

1 Unless otherwise agreed by the parties, the sole arbitrator (arbitral tribunal) may, at the request of a party order any party, after hearing such party, to take such interim measure of protection as the sole arbitrator (arbitral tribunal) may consider necessary in respect of the subject matter of the dispute, as otherwise the enforcement of the claim would be frustrated or considerably impeded or there is a danger of irreparable harm. The sole arbitrator (arbitral tribunal) may require any party to provide appropriate security in connection with such measure. The parties are obliged to comply with such orders, whether or not they are enforceable by State courts.

2 Measures referred to in paragraph (1) are to be ordered in writing and a signed copy is to be served on each party. In arbitral proceedings with more than one arbitrator the signature of the presiding arbitrator or, if he is prevented, the signature of another arbitrator shall suffice, provided that the presiding arbitrator or another arbitrator records on the order the reason preventing the signature.

3 Unless the parties have agreed otherwise, the measures are to be substantiated. The measure must include the date on when it was ordered and the place of arbitration. The measure shall be deemed to have been ordered on that date and at that place.

4 The measures and the records on the serving are joint documents of the parties and the sole arbitrator (arbitral tribunal). The sole arbitrator (arbitral tribunal) shall discuss with the parties the possibility of depositing the measure and the records on the serving.

5 The sole arbitrator (the presiding arbitrator) or, if he is prevented, another arbitrator, shall upon the motion of a party, confirm the unappealability and enforceability of the measure on a copy of the measure.

6 This provision does not prevent the parties from applying to any competent State organ for interim measures of protection. Such an application to a State organ for ordering such measures or for the enforcement of measures ordered by the sole arbitrator (arbitral tribunal) shall not constitute an infringement or waiver of the

arbitration agreement and shall not affect the powers of the sole arbitrator (arbitral tribunal). The Secretariat and the sole arbitrator (arbitral tribunal) must be immediately informed of any such application as well as of all measures ordered by the State organ.

#### Article 23

##### Authorized Agents

The parties shall have the right to be represented or advised by persons of their choice in the proceedings before the sole arbitrator (arbitral tribunal).

#### Article 24

##### Applicable Law, Equity

1 The sole arbitrator (arbitral tribunal) shall decide the dispute in accordance with such legislation or rules of law as are chosen by the parties as applicable. Any choice of law or legal system of a given state shall be construed, unless otherwise expressed by the parties, as directly referring to the substantive law of that state and not to its conflict-of-law rules.

2 Failing any designation by the parties, the sole arbitrator (arbitral tribunal) shall apply the rules of law considered by him (it) as appropriate.

3 The sole arbitrator (arbitral tribunal) may decide on equity only if the parties have expressly authorized him (it) to do so.

#### Article 25

##### Termination

The proceedings are terminated by

- a) the rendering of an award,
- b) the conclusion of a settlement,
- c) an order of the sole arbitrator (arbitral tribunal) where
  - aa) the claimant withdraws his claim, unless the respondent objects thereto and the sole arbitrator (arbitral tribunal) recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
  - bb) the parties agree on the termination of the proceedings and communicate this to the sole arbitrator (arbitral tribunal);
  - cc) the sole arbitrator (arbitral tribunal) finds that the continuation of the proceedings has become impossible, in particular when the parties to the proceedings do not continue the arbitral proceedings despite written notification from the sole arbitrator (arbitral tribunal), in which it refers to the possibility of terminating the proceedings.

## Article 26

### Decision Making of the Arbitral Tribunal

- 1 Any award or any other decision of the arbitral tribunal shall be made by a majority of all its members. If no majority of votes is obtained, the presiding arbitrator shall decide alone.
- 2 Questions of procedure may be decided by the presiding arbitrator alone if so authorized by the arbitral tribunal, with reservation to possible amendments by the arbitral tribunal.

## Article 27

### The Award

- 1 Awards shall be drawn up in writing. The grounds upon which the award is based must be stated, unless all parties, either in the arbitration agreement or in the oral proceedings, have agreed that no grounds are to be stated.
- 2 The award shall state the date on which it was made and the place of arbitration (Article 2).
- 3 All copies of awards must be signed by the arbitrators. The signatures of the majority of the arbitrators shall suffice if the award contains a statement that one arbitrator refuses to sign or that his signature is prevented by an obstacle which cannot be overcome within a reasonable period of time. If the award is made by a majority decision, mention thereof shall be made in the award at the request of the arbitrator who is in a minority.
- 4 Awards are confirmed on all copies as awards of the Centre by the signature of the Secretary General and the stamp of the Centre. By this it is confirmed that the award is an award of the International Arbitral Centre of the Austrian Federal Economic Chamber and that it was made and signed by (an) arbitrator(s) chosen or appointed in accordance with these Rules of Arbitration.
- 5 The award shall be served on the parties by the Secretary General. Awards become effective as against the parties on service of the copies. One copy of the award and the records on the serving shall be deposited with the Secretariat of the Centre.
- 6 The sole arbitrator (Chairman of the arbitral tribunal, or, if he is prevented, another arbitrator) shall confirm on all copies at the request of a party the finality and enforceability of the award.
- 7 Partial and interim awards may be issued.
- 8 By their agreement to the Vienna Rules, the parties undertake to implement the award.

## Article 28

## Settlement

The Parties can request that a record is drawn up on a settlement they have concluded or that an award (*on agreed terms*) be made thereof.

### Article 29

#### Correction and Interpretation of Award; Additional Award

1 Each party may within 30 days of receipt of the award file with the Secretariat the following applications to the sole arbitrator (arbitral tribunal):

- a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
- b) if so agreed by the parties, to interpret certain parts of the award;
- c) to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2 The decision on such an application is made by the sole arbitrator (arbitral tribunal). Prior to making a decision upon such an application, the other party is to be heard. The sole arbitrator (arbitral tribunal) shall determine a time period for that purpose, which should not exceed 30 days.

3 The sole arbitrator (arbitral tribunal) may correct any error of the type referred to in paragraph (1) a) of this Article on its own initiative within 30 days of the date of the award.

4 The provisions of Article 27 paragraphs 1 to 6 shall apply to the correction, interpretation or making of an additional award. The interpretation or correction shall be part of the arbitral award.

### Article 30

#### Publishing of Awards

The Board is entitled to publish an award in legal journals or in its own publications in anonymous form, unless publication is objected to by at least one party within thirty days after service of the copy of the award on it.

### Article 31

#### Determination of Costs

When the arbitral proceedings are terminated, the sole arbitrator (arbitral tribunal) shall, upon application of a party, state in the award on the merits or by separate award: the costs of arbitration fixed by the Secretary General in accordance with Article 34 paragraph 1; shall determine the amount of costs of the parties; and shall state who should bear the costs of the proceedings or the proportion in which the costs of the proceedings are to be shared.

## Article 32

### Costs of the Proceedings

The costs of the proceedings consist of the following elements:

- a) The costs of arbitration, that is to say, the outlay of the Centre (administrative costs), arbitrators' fees plus any value added tax and cash outlay (such as travel and subsistence expenses of arbitrators, costs of service of documents, rent, costs of simple minuting); and
- b) The costs of the parties, that is to say, the appropriate expenses of the parties for their representation and other outlay related to the arbitration proceedings, in particular, the costs specified in Article 35 paragraph 1.

## Article 33

### Registration Fee

1 On filing the claim (counter-claim), the Claimant (Counter-claimant) shall pay into the account of the Centre, free of charges, a registration fee in the amount stated. That fee is intended to cover the costs up to the submission of the files to the sole arbitrator (arbitral tribunal). If higher outlay is incurred, an additional sum may be prescribed.

2 If there are more than two parties to the proceedings, the registration fee shall be increased by 10% for each additional party.

3 The registration fee shall not be repayable. The registration fee, as well as any additional amount required in accordance with paragraph 1 of the present Article shall be deducted from the Claimant's (Counter-claimant's) share of the deposit against costs of arbitration.

4 The claim (counter-claim) shall be treated only after the registration fee is fully paid.

## Article 34

### Costs of Arbitration and Deposit

1 The costs of arbitration shall be determined by the Secretary General at the end of the proceedings.

2 The Secretary General shall fix the amount of the deposit against the expected costs of arbitration. That deposit shall be paid in equal shares by the parties before transmission of the files to the sole arbitrator (arbitral tribunal) and within thirty days after service of the payment request.

3 If the share of the Claimant (Counter-claimant) is not received within the time-limit, despite prolongation thereof, the claim (counter-claim) shall not be treated any further. The Secretary General shall inform the parties thereof.

4 If the share of the Respondent (Counter-Respondent) is not received within the time-limit set, the Secretary General shall inform the Claimant (Counter-claimant) thereof and shall request him to pay the outstanding share of the deposit within thirty days of receipt of the payment request. If that amount is not received within the time-limit, the claim (counter-claim) shall not be treated any further. The Secretary General shall inform the parties thereof.

5 If it should be necessary in the course of the proceedings to increase the deposit against costs because of an increase in the amount in dispute, a procedure analogous to that provided for in paragraphs 2 to 4 of the present Article shall be adopted. Until payment of the additional deposit, the amplification of the claim that led to the increase of the amount in dispute shall not be taken into account in the arbitral proceedings.

6 If it should be necessary in the course of the proceedings to increase the deposit against costs because the amount fixed for cash outlay on determining the deposit is not sufficient, a procedure analogous to that provided for in paragraphs 2 to 4 of the present Article shall be adopted.

## Article 35

### Further Costs of Procedure

1 If the sole arbitrator (arbitral tribunal) considers certain action entailing costs, such as the appointment of experts, interpreters or translators, making verbatim records of the proceedings, a visual inspection, or relocation of the proceedings, to be necessary, he (it) must make arrangements to cover the expected costs and inform the Secretary General thereof.

2 The sole arbitrator (arbitral tribunal) may undertake procedural steps in accordance with paragraph 1 of the present Article only if adequate cover for the expected costs exists.

3 The sole arbitrator (arbitral tribunal) shall decide what consequences for the proceedings arise from the failure to pay a prescribed deposit against costs.

4 All commitments related to the procedural steps mentioned in paragraph 1 of the present Article shall be undertaken by the sole arbitrator (arbitral tribunal) in the name and for the account of the parties.

## Article 36

### Calculation of the Costs of Arbitration

1 The administrative costs of the Centre and the arbitrators' fees shall be fixed on the basis of the amount in dispute, according to the schedule of arbitration costs attached to these Rules (Annex 1). Where the proceedings are terminated early, the Secretary General may reduce the arbitrator's fees as it appears just corresponding to the stage reached in the proceedings.

2 If there are more than two parties to proceedings, the rates for the administrative costs of the Centre and the arbitrators' fees contained in the schedules attached to these Rules shall be increased by 10% for each additional party.

3 The arbitration costs for claims that are submitted to offset against the claims (counter-claims) and that are in fact and in law of no connection with the cause of action (principle claims), are to be calculated separately and paid as like counter-claims. Article 34 shall apply accordingly to determine the deposits. Counter-claims are not to be dealt with in the proceedings concerning the principle claims until the additional deposits have been fully paid.

4 In the case of proceedings conducted concerning a number of individual claims or counter-claims, which are both in fact and in law of no connection, the Secretary General may at any stage of the proceedings make a separate calculation of the costs of arbitration according to the amounts in dispute in respect of the individual claims.

5 The Secretary General may deviate from the statements of the parties in fixing the amount in dispute if the parties have made only a partial claim or if a request by the parties whose purpose was not the payment of sums of money was obviously undervalued.

6 The rates quoted in the schedule of arbitrators' fees are the fees for sole arbitrators. In any case they shall be raised to two-and-a-half times the amounts quoted if an arbitral tribunal is appointed and to up to three times the rates stated in the event of the particular difficulty of a case.

7 The tariffs specified in the schedule for arbitrator's fees include any and all partial and interim decisions, such as awards on jurisdiction, partial awards, decisions on the challenge of arbitrators, interim measures of protection, other decisions and orders that manage the proceedings.

8 Reductions of the amount in dispute shall be taken into consideration in calculating the arbitrators' fees and administrative costs only if they were made before transmission of the files to the sole arbitrator (arbitral tribunal).

9 Cash outlays shall be determined according to the actual expenditure.

10 The tariffs specified in the schedule for arbitrator's fees do not include value added tax, to which the arbitrator's fees may be subject. Those arbitrators whose fees are subject to value added tax shall inform the Secretary General of the prospective amount of value added tax upon taking up office.

## Article 37

### Transitional Provision

This version of the Vienna Rules shall apply to all proceedings in which the claim was filed after 30th June, 2006.

## Annex 1 Schedule of Arbitration Costs



**Registration Fee: EUR 2,000**

**Administrative Charges**

Amount in dispute in euros	Rate in euros
From	to
0	100,000 3,000
100,001	200,000 3,000 + 1.5 % of excess over 100,000
200,001	500,000 4,500 + 1 % of excess over 200,000
500,001	1,000,000 7,500 + 0.7 % of excess over 500,000
1,000,001	2,000,000 11,000 + 0.4 % of excess over 1,000,000
2,000,001	5,000,000 15,000 + 0.1 % of excess over 2,000,000
5,000,001	10,000,000 18,000 + 0.05 % of excess over 5,000,000
over 10,000,000	20,500 + 0.01 % of excess over 10,000,000

*Fees for sole arbitrators* <sup>(3)</sup>

Amount in dispute in euros	Rate in euros
from	to
0	100,000 6 % - minimum fee: 1,000
100,001	200,000 6,000 + 3 % of excess over 100,000
200,001	500,000 9,000 + 2.5 % of excess over 200,000
500,001	1,000,000 16,500 + 2 % of excess over 500,000
1,000,001	2,000,000 26,500 + 1 % of excess over 1,000,000
2,000,001	5,000,000 36,500 + 0.6 % of excess over 2,000,000
5,000,001	10,000,000 54,500 + 0.4 % of excess over 5,000,000
10,000,001	20,000,000 74,500 + 0.2 % of excess over 10,000,000
20,000,001	100,000,000 94,500 + 0.1 % of excess over 20,000,000
Over 100,000,000	174,500 + 0.01 % of excess over 100,000,000

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## APPENDIX II

### Swiss Rules of International Arbitration 2012 (Swiss Rules)

#### Model Arbitration Clause

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' Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be ... (“one”, “three”, “one or three”);

The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country);

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

#### Introduction

(a) In order to harmonise their rules of arbitration the Chambers of Commerce and Industry of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich in 2004 replaced their former rules by the Swiss Rules of International Arbitration (hereinafter the “Swiss Rules” or the “Rules”).

(b) For the purpose of providing arbitration services, the Chambers founded the Swiss Chambers' Arbitration Institution. In order to administer arbitrations under the Swiss Rules, the Swiss Chambers' Arbitration Institution has established the Arbitration Court (hereinafter the “Court”), which is comprised of experienced international arbitration practitioners. The Court shall render decisions as provided for under these Rules. It may delegate to one or more members or committees the power to take certain decisions pursuant to its Internal Rules<sup>(1)</sup>. The Court is assisted in its work by the Secretariat of the Court (hereinafter the “Secretariat”).

(c) The Swiss Chambers' Arbitration Institution provides domestic and international arbitration services, as well as other dispute resolution services, under any applicable law, in Switzerland or in any other country.

#### 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.

## 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.

## Article 3

### Notice of Arbitration and Answer to the Notice of Arbitration

1. The party initiating arbitration (hereinafter called the "Claimant" or, where applicable, the "Claimants") shall submit a Notice of Arbitration to the Secretariat at any of the addresses listed in Appendix A.

2. Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Secretariat.
3. The Notice of Arbitration shall be submitted in as many copies as there are other parties (hereinafter called the “Respondent” or, where applicable, the “Respondents”), together with an additional copy for each arbitrator and one copy for the Secretariat, and shall include the following:
  - (a) A demand that the dispute be referred to arbitration;
  - (b) The names, addresses, telephone and fax numbers, and e-mail addresses (if any) of the parties and of their representative(s);
  - (c) A copy of the arbitration clause or the separate arbitration agreement that is invoked;
  - (d) A reference to the contract or other legal instrument(s) out of, or in relation to, which the dispute arises;
  - (e) The general nature of the claim and an indication of the amount involved, if any;
  - (f) The relief or remedy sought;
  - (g) A proposal as to the number of arbitrators (i.e. one or three), the language, and the seat of the arbitration, if the parties have not previously agreed thereon;
  - (h) The Claimant's designation of one or more arbitrators, if the parties' agreement so requires;
  - (i) Confirmation of payment by check or transfer to the relevant account listed in Appendix A of the Registration Fee as required by Appendix B (Schedule of Costs) in force on the date the Notice of Arbitration is submitted.
4. The Notice of Arbitration may also include:
  - (a) The Claimant's proposal for the appointment of a sole arbitrator referred to in Article 7;
  - (b) The Statement of Claim referred to in Article 18.
5. If the Notice of Arbitration is incomplete, if the required number of copies or attachments are not submitted, or if the Registration Fee is not paid, the Secretariat may request the Claimant to remedy the defect within an appropriate period of time. The Secretariat may also request the Claimant to submit a translation of the Notice of Arbitration within the same period of time if it is not submitted in English, German, French, or Italian. If the Claimant complies with such directions within the applicable time-limit, the Notice of Arbitration shall be deemed to have been validly filed on the date on which the initial version was received by the Secretariat.
6. The Secretariat shall provide, without delay, a copy of the Notice of Arbitration together with any exhibits to the Respondent.
7. Within thirty days from the date of receipt of the Notice of Arbitration, the Respondent shall submit to the Secretariat an Answer to the Notice of Arbitration. The Answer to the Notice of Arbitration shall be submitted in as many copies as there

are other parties, together with an page "6" additional copy for each arbitrator and one copy for the Secretariat, and shall, to the extent possible, include the following:

- (a) The name, address, telephone and fax numbers, and e-mail address of the Respondent and of its representative(s);
- (b) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;
- (c) The Respondent's comments on the particulars set forth in the Notice of Arbitration referred to in Article 3(3)(e);
- (d) The Respondent's answer to the relief or remedy sought in the Notice of Arbitration referred to in Article 3(3)(f);
- (e) The Respondent's proposal as to the number of arbitrators (i.e. one or three), the language, and the seat of the arbitration referred to in Article 3(3)(g);
- (f) The Respondent's designation of one or more arbitrators if the parties' agreement so requires.

8. The Answer to the Notice of Arbitration may also include:

- (a) The Respondent's proposal for the appointment of a sole arbitrator referred to in Article 7;
- (b) The Statement of Defence referred to in Article 19.

9. Articles 3(5) and (6) are applicable to the Answer to the Notice of Arbitration.

10. Any counterclaim or set-off defence shall in principle be raised with the Answer to the Notice of Arbitration. Article 3(3) is applicable to the counterclaim or set-off defence.

11. If no counterclaim or set-off defence is raised with the Answer to the Notice of Arbitration, or if there is no indication of the amount of the counterclaim or set-off defence, the Court may rely exclusively on the Notice of Arbitration in order to determine the possible application of Article 42(2) (Expedited Procedure).

12. If the Respondent neither submits an Answer to the Notice of Arbitration nor raises an objection to the arbitration being administered under these Rules, the Court shall administer the case, unless there is manifestly no agreement to arbitrate referring to these Rules.

#### Article 4

##### Consolidation and Joinder

1. Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances,

including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment page "7" and confirmation of arbitrators and apply the provisions of Section II (Composition of the Arbitral Tribunal).

2. Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.

## Section II. Composition of the Arbitral Tribunal

### Article 5

#### Confirmation Of Arbitrators

1. All designations of an arbitrator made by the parties or the arbitrators are subject to confirmation by the Court, upon which the appointments shall become effective. The Court has no obligation to give reasons when it does not confirm an arbitrator.

2. Where a designation is not confirmed, the Court may either:

- (a) invite the party or parties concerned, or, as the case may be, the arbitrators, to make a new designation within a reasonable time-limit; or
- (b) in exceptional circumstances, proceed directly with the appointment.

3. In the event of any failure in the constitution of the arbitral tribunal under these Rules, the Court shall have all powers to address such failure and may, in particular, revoke any appointment made, appoint or reappoint any of the arbitrators and designate one of them as the presiding arbitrator.

4. If, before the arbitral tribunal is constituted, the parties agree on a settlement of the dispute, or the continuation of the arbitral proceedings becomes unnecessary or impossible for other reasons, the Secretariat shall give advance notice to the parties that the Court may terminate the proceedings. Any party may request that the Court proceed with the constitution of the arbitral tribunal in accordance with these Rules in order that the arbitral tribunal determine and apportion the costs not agreed upon by the parties.

5. Once the Registration Fee and any Provisional Deposit have been paid in accordance with Appendix B (Schedule of Costs) and all arbitrators have been confirmed, the Secretariat shall transmit the file to the arbitral tribunal without delay.

### Article 6

## Number of Arbitrators

1. If the parties have not agreed upon the number of arbitrators, the Court shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances.
2. As a rule, the Court shall refer the case to a sole arbitrator, unless the complexity of the subject matter and/or the amount in dispute justify that the case be referred to a three-member arbitral tribunal.
3. If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, and this appears inappropriate in view of the amount in dispute or of other circumstances, the Court shall invite the parties to agree to refer the case to a sole arbitrator.
4. Where the amount in dispute does not exceed CHF 1'000'000 (one million Swiss francs), Article 42(2) (Expedited Procedure) shall apply.

## Article 7

### Appointment of a Sole Arbitrator

1. Where the parties have agreed that the dispute shall be referred to a sole arbitrator, they shall jointly designate the sole arbitrator within thirty days from the date on which the Notice of Arbitration was received by the Respondent(s), unless the parties' agreement provides otherwise.
2. Where the parties have not agreed upon the number of arbitrators, they shall jointly designate the sole arbitrator within thirty days from the date of receipt of the Court's decision that the dispute shall be referred to a sole arbitrator.
3. If the parties fail to designate the sole arbitrator within the applicable time-limit, the Court shall proceed with the appointment.

## Article 8

### Appointment of Arbitrators In Bi-Party or Multi-Party Proceedings

1. Where a dispute between two parties is referred to a three-member arbitral tribunal, each party shall designate one arbitrator, unless the parties have agreed otherwise.
2. If a party fails to designate an arbitrator within the time-limit set by the Court or resulting from the arbitration agreement, the Court shall appoint the arbitrator. Unless the parties' agreement provides otherwise, the two arbitrators so appointed shall designate, within thirty days from the confirmation of the second arbitrator, a third arbitrator who shall act as the presiding arbitrator of the arbitral tribunal. Failing such designation, the Court shall appoint the presiding arbitrator.
3. In multi-party proceedings, the arbitral tribunal shall be constituted in accordance with the parties' agreement.

4. If the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multi-party proceedings, the Court shall set an initial thirty-day time-limit for the Claimant or group of Claimants to designate an arbitrator, and set a subsequent thirty-day time-limit for the Respondent or group of Respondents to designate an arbitrator. If the party or group(s) of parties have each designated an arbitrator, Article 8(2) shall apply to the designation of the presiding arbitrator.

5. Where a party or group of parties fails to designate an arbitrator in multi-party proceedings, the Court may appoint all of the arbitrators, and shall specify the presiding arbitrator.

## Article 9

### Independence and Challenge of Arbitrators

1. Any arbitrator conducting an arbitration under these Rules shall be and shall remain at all times impartial and independent of the parties.
2. Prospective arbitrators shall disclose to those who approach them in connection with a possible appointment any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. An arbitrator, once designated or appointed, shall disclose such circumstances to the parties, unless they have already been so informed.

## Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator designated by it only for reasons of which it becomes aware after the appointment has been made.

## Article 11

1. A party intending to challenge an arbitrator shall send a notice of challenge to the Secretariat within 15 days after the circumstances giving rise to the challenge became known to that party.
2. If, within 15 days from the date of the notice of challenge, all of the parties do not agree to the challenge, or the challenged arbitrator does not withdraw, the Court shall decide on the challenge.
3. The decision of the Court is final and the Court has no obligation to give reasons.

## Article 12

### Removal of an Arbitrator



1. If an arbitrator fails to perform his or her functions despite a written warning from the other arbitrators or from the Court, the Court may revoke the appointment of that arbitrator.

2. The arbitrator shall first have an opportunity to present his or her position to the Court. The decision of the Court is final and the Court has no obligation to give reasons.

#### Article 13

##### Replacement of an Arbitrator

1. Subject to Article 13(2), in all instances in which an arbitrator has to be replaced, a replacement arbitrator shall be designated or appointed pursuant to the procedure provided for in Articles 7 and 8 within the time-limit set by the Court. Such procedure shall apply even if a party or the arbitrators had failed to make the required designation during the initial appointment process.

2. In exceptional circumstances, the Court may, after consulting with the parties and any remaining arbitrators:

(a) directly appoint the replacement arbitrator; or

(b) after the closure of the proceedings, authorise the remaining arbitrator(s) to proceed with the arbitration and make any decision or award.

#### Article 14

If an arbitrator is replaced, the proceedings shall, as a rule, resume at the stage reached when the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

### Section III. Arbitral Proceedings

#### Article 15

##### General Provisions

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard.

2. At any stage of the proceedings, the arbitral tribunal may hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. After consulting with the parties, the arbitral tribunal may also decide to conduct the proceedings on the basis of documents and other materials.

3. At an early stage of the arbitral proceedings, and in consultation with the parties, the arbitral tribunal shall prepare a provisional timetable for the arbitral proceedings, which shall be provided to the parties and, for information, to the Secretariat.

4. All documents or information provided to the arbitral tribunal by one party shall at the same time be communicated by that party to the other parties.
5. The arbitral tribunal may, after consulting with the parties, appoint a secretary. Articles 9 to 11 shall apply to the secretary.
6. The parties may be represented or assisted by persons of their choice.
7. All participants in the arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays. The parties undertake to comply with any award or order made by the arbitral tribunal or emergency arbitrator without delay.
8. With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps.

#### Article 16

##### Seat of the Arbitration

1. If the parties have not determined the seat of the arbitration, or if the designation of the seat is unclear or incomplete, the Court shall determine the seat of the arbitration, taking into account all relevant circumstances, or shall request the arbitral tribunal to determine it.
2. Without prejudice to the determination of the seat of the arbitration, the arbitral tribunal may decide where the proceedings shall be conducted. In particular, it may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property, or documents. The parties shall be given sufficient notice to enable them to be present at such an inspection.
4. The award shall be deemed to be made at the seat of the arbitration.

#### Article 17

##### Language

1. Subject to an agreement of the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the Statement of Claim, the Statement of Defence, any further written statements, and to any oral hearings.
2. The arbitral tribunal may order that any documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents or exhibits submitted in the course of the proceedings in a language other than the language or

languages agreed upon by the parties or determined by the arbitral tribunal shall be accompanied by a translation into such language or languages.

## Article 18

### Statement of Claim

1. Within a period of time to be determined by the arbitral tribunal, and unless the Statement of Claim was contained in the Notice of Arbitration, the Claimant shall communicate its Statement of Claim in writing to the Respondent and to each of the arbitrators. A copy of the contract, and, if it is not contained in the contract, of the arbitration agreement, shall be annexed to the Statement of Claim.
2. The Statement of Claim shall include the following particulars:
  - (a) The names and addresses of the parties;
  - (b) A statement of the facts supporting the claim;
  - (c) The points at issue;
  - (d) The relief or remedy sought.
3. As a rule, the Claimant shall annex to its Statement of Claim all documents and other evidence on which it relies.

## Article 19

### Statement of Defence

1. Within a period of time to be determined by the arbitral tribunal, and unless the Statement of Defence was contained in the Answer to the Notice of Arbitration, the Respondent shall communicate its Statement of Defence in writing to the Claimant and to each of the arbitrators.
2. The Statement of Defence shall reply to the particulars of the Statement of Claim set out in Articles 18(2)(b) to (d). If the Respondent raises an objection to the jurisdiction or to the proper constitution of the arbitral tribunal, the Statement of Defence shall contain the factual and legal basis of such objection. As a rule, the Respondent shall annex to its Statement of Defence all documents and other evidence on which it relies.
3. Articles 18(2)(b) to (d) shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

## Article 20

### Amendments to the Claim or Defence

1. During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it, the prejudice to the other parties,

or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

2. The arbitral tribunal may adjust the costs of the arbitration if a party amends or supplements its claims, counterclaims, or defences.

## Article 21

### Objections To The Jurisdiction of The Arbitral Tribunal

1. The arbitral tribunal shall have the power to rule on any objections to its jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
3. As a rule, any objection to the jurisdiction of the arbitral tribunal shall be raised in the Answer to the Notice of Arbitration, and in no event later than in the Statement of Defence referred to in Article 19, or, with respect to a counterclaim, in the reply to the counterclaim.
4. In general, the arbitral tribunal should rule on any objection to its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such an objection in an award on the merits.
5. The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum-selection clause.

## Article 22

### Further Written Statements

The arbitral tribunal shall decide which further written statements, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall set the periods of time for communicating such statements.

## Article 23

### Periods of Time

The periods of time set by the arbitral tribunal for the communication of written statements (including the Statement of Claim and Statement of Defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it considers that an extension is justified.

#### Article 24

##### Evidence and Hearings

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.
3. At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence within a period of time determined by the arbitral tribunal.

#### Article 25

1. The arbitral tribunal shall give the parties adequate advance notice of the date, time, and place of any oral hearing.
2. Any person may be a witness or an expert witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses.
3. Prior to a hearing and within a period of time determined by the arbitral tribunal, the evidence of witnesses and expert witnesses may be presented in the form of written statements or reports signed by them.
4. At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal. The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference).
5. Arrangements shall be made for the translation of oral statements made at a hearing and for a record of the hearing to be provided if this is deemed necessary by the arbitral tribunal having regard to the circumstances of the case, or if the parties so agree.
6. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may order witnesses or expert witnesses to retire during the testimony of other witnesses or expert witnesses.

#### Article 26

##### Interim Measures of Protection

1. At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate. Upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative, the arbitral tribunal may also modify, suspend or terminate any interim measures granted.
2. Interim measures may be granted in the form of an interim award. The arbitral tribunal shall be entitled to order the provision of appropriate security.
3. In exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard.
4. The arbitral tribunal may rule on claims for compensation for any damage caused by an unjustified interim measure or preliminary order.
5. By submitting their dispute to arbitration under these Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority. A request for interim measures addressed by any party to a judicial authority shall not be deemed to be incompatible with the agreement to arbitrate, or to constitute a waiver of that agreement.
6. The arbitral tribunal shall have discretion to apportion the costs relating to a request for interim measures in an interim award or in the final award.

## Article 27

### Tribunal-Appointed Experts

1. The arbitral tribunal, after consulting with the parties, may appoint one or more experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for the expert's inspection any relevant documents or goods that the expert may require of them. Any dispute between a party and the expert as to the relevance of the required information, documents or goods shall be referred to the arbitral tribunal.
3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in the report.
4. At the request of any party, the expert, after delivery of the report, may be heard at a hearing during which the parties shall have the opportunity to be present and to examine the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. Article 25 shall be applicable to such proceedings.

5. Articles 9 to 11 shall apply to any expert appointed by the arbitral tribunal.

## Article 28

### Default

1. If, within the period of time set by the arbitral tribunal, the Claimant has failed to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time set by the arbitral tribunal, the Respondent has failed to communicate its Statement of Defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.
2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.
3. If one of the parties, duly invited to produce documentary or other evidence, fails to do so within the period of time determined by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

## Article 29

### Closure of Proceedings

1. When it is satisfied that the parties have had a reasonable opportunity to present their respective cases on matters to be decided in an award, the arbitral tribunal may declare the proceedings closed with regard to such matters.
2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon the application of a party, to reopen the proceedings on the matters with regard to which the proceedings were closed pursuant to Article 29(1) at any time before the award on such matters is made.

## Article 30

### Waiver of Rules

If a party knows that any provision of, or requirement under, these Rules or any other applicable procedural rule has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, it shall be deemed to have waived its right to raise an objection.

## Section IV. The Award

## Article 31

### Decisions

1. If the arbitral tribunal is composed of more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone.
2. If authorized by the arbitral tribunal, the presiding arbitrator may decide on questions of procedure, subject to revision by the arbitral tribunal.

## Article 32

### Form and Effect of The Award

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards. If appropriate, the arbitral tribunal may also award costs in awards that are not final.
2. The award shall be made in writing and shall be final and binding on the parties.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall specify the seat of the arbitration and the date on which the award was made. Where the arbitral tribunal is composed of more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. The publication of the award is governed by Article 44.
6. Originals of the award signed by the arbitrators shall be communicated by the arbitral tribunal to the parties and to the Secretariat. The Secretariat shall retain a copy of the award.

## Article 33

### Applicable Law, Amiable Compositeur

1. The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.
2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the trade usages applicable to the transaction.

## Article 34

### Settlement or Other Grounds for Termination



1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in Article 34(1), the arbitral tribunal shall give advance notice to the parties that it may issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order, unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties and to the Secretariat. Where an arbitral award on agreed terms is made, Articles 32(2) and (4) to (6) shall apply.

#### Article 35

##### Interpretation of The Award

1. Within thirty days after the receipt of the award, a party, with notice to the Secretariat and to the other parties, may request that the arbitral tribunal give an interpretation of the award. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The Court may extend this time limit. The interpretation shall form part of the award and Articles 32(2) to (6) shall apply.

#### Article 36

##### Correction of The Award

1. Within thirty days after the receipt of the award, a party, with notice to the Secretariat and to the other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request.

2. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing, and Articles 32(2) to (6) shall apply.

#### Article 37

##### Additional Award

1. Within thirty days after the receipt of the award, a party, with notice to the Secretariat and the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request.
2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request. The Court may extend this time-limit.
3. Articles 32(2) to (6) shall apply to any additional award.

## Article 38

### Costs

The award shall contain a determination of the costs of the arbitration. The term “costs” includes only:

- (a) The fees of the arbitral tribunal, to be stated separately as to each arbitrator and any secretary, and to be determined by the arbitral tribunal itself in accordance with Articles 39 and 40(3) to (5);
- (b) The travel and other expenses incurred by the arbitral tribunal and any secretary;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses, to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance, if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) The Registration Fee and the Administrative Costs in accordance with Appendix B (Schedule of Costs);
- (g) The Registration Fee, the fees and expenses of any emergency arbitrator, and the costs of expert advice and of other assistance required by such emergency arbitrator, determined in accordance with Article 43(9).

## Article 39

1. The fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter of the arbitration, the time spent and any other relevant circumstances of the case, including the discontinuation of the arbitral proceedings in case of settlement. In the event of a discontinuation of the arbitral proceedings, the fees of the arbitral tribunal may be less than the minimum amount resulting from Appendix B (Schedule of the Costs of Arbitration).
2. The fees and expenses of the arbitral tribunal shall be determined in accordance with Appendix B (Schedule of Costs).

3. The arbitral tribunal shall decide on the allocation of its fees among its members. As a rule, the presiding arbitrator shall receive between 40 % and 50 % and each co-arbitrator between 25 % and 30 % of the total fees, in view of the time and efforts spent by each arbitrator.

#### Article 40

1. Except as provided in Article 40(2), the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in Article 38(e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs among the parties if it determines that an apportionment is reasonable.

3. If the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall determine the costs of the arbitration referred to in Articles 38 and 39 in the order or award.

4. Before rendering an award, termination order, or decision on a request under Articles 35 to 37, the arbitral tribunal shall submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination on costs made pursuant to Articles 38(a) to (c) and (f) and Article 39. Any such approval or adjustment shall be binding upon the arbitral tribunal.

5. No additional costs may be charged by an arbitral tribunal for interpretation, correction, or completion of its award under Articles 35 to 37, unless they are justified by the circumstances.

#### Article 41

##### Deposit of Costs

1. The arbitral tribunal, once constituted, and after consulting with the Court, shall request each party to deposit an equal amount as an advance for the costs referred to in Articles 38(a) to (c) and the Administrative Costs referred to in Art. 38(f). Any Provisional Deposit paid by a party in accordance with Appendix B (Schedule of Costs) shall be considered as a partial payment of its deposit. The arbitral tribunal shall provide a copy of such request to the Secretariat.

2. Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the arbitral tribunal may in its discretion establish separate deposits.

3. During the course of the arbitral proceedings, the arbitral tribunal may, after consulting with the Court, request supplementary deposits from the parties. The arbitral tribunal shall provide a copy of any such request to the Secretariat.

4. If the required deposits are not paid in full within fifteen days after the receipt of the request, the arbitral tribunal shall notify the parties in order that one or more of them may make payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. In its final award, the arbitral tribunal shall issue to the parties a statement of account of the deposits received. Any unused amount shall be returned to the parties.

## 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.

## Article 43

### Emergency Relief

1. Unless the parties have agreed otherwise, a party requiring urgent interim measures pursuant to Article 26 before the arbitral tribunal is constituted may submit to the Secretariat an application for emergency relief proceedings (hereinafter the “Application”). In addition to the particulars set out in Articles 3(3)(b) to (e), the Application shall include:
  - (a) A statement of the interim measure(s) sought and the reasons therefor, in particular the reason for the purported urgency;
  - (b) Comments on the language, the seat of arbitration, and the applicable law;
  - (c) Confirmation of payment by check or transfer to the relevant account listed in Appendix A of the Registration Fee and of the deposit for emergency relief proceedings as required by Section 1.6 of Appendix B (Schedule of Costs).
2. As soon as possible after receipt of the Application, the Registration Fee, and the deposit for emergency relief proceedings, the Court shall appoint and transmit the file to a sole emergency arbitrator, unless
  - (a) there is manifestly no agreement to arbitrate referring to these Rules, or
  - (b) it appears more appropriate to proceed with the constitution of the arbitral tribunal and refer the Application to it.
3. If the Application is submitted before the Notice of Arbitration, the Court shall terminate the emergency relief proceedings if the Notice of Arbitration is not submitted within ten days from the receipt of the Application. In exceptional circumstances, the Court may extend this time-limit.
4. Articles 9 to 12 shall apply to the emergency arbitrator, except that the time-limits set out in Articles 11(1) and (2) are shortened to three days.
5. If the parties have not determined the seat of the arbitration, or if the designation of the seat is unclear or incomplete, the seat of the arbitration for the emergency relief proceedings shall be determined by the Court without prejudice to the determination of the seat of the arbitration pursuant to Article 16(1).
6. The emergency arbitrator may conduct the emergency relief proceedings in such a manner as the emergency arbitrator considers appropriate, taking into account the urgency inherent in such proceedings and ensuring that each party has a reasonable opportunity to be heard on the Application.
7. The decision on the Application shall be made within fifteen days from the date on which the Secretariat transmitted the file to the emergency arbitrator. This period of time may be extended by agreement of the parties or, in appropriate circumstances, by the Court. The decision on the Application may be made even if in the meantime the file has been transmitted to the arbitral tribunal.

8. A decision of the emergency arbitrator shall have the same effects as a decision pursuant to Article 26. Any interim measure granted by the emergency arbitrator may be modified, page "21" suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal.

9. The decision on the Application shall include a determination of costs as referred to in Article 38(g). Before rendering the decision on the Application, the emergency arbitrator shall submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination of costs. The costs shall be payable out of the deposit for emergency relief proceedings. The determination of costs pursuant to Article 38(d) and (e) and the apportionment of all costs among the parties shall be decided by the arbitral tribunal. If no arbitral tribunal is constituted, the determination of costs pursuant to Article 38(d) and (e) and the apportionment of all costs shall be decided by the emergency arbitrator in a separate award.

10. Any measure granted by the emergency arbitrator ceases to be binding on the parties either upon the termination of the emergency relief proceedings pursuant to Article 43(3), upon the termination of the arbitral proceedings, or upon the rendering of a final award, unless the arbitral tribunal expressly decides otherwise in the final award..

11. The emergency arbitrator may not serve as arbitrator in any arbitration relating to the dispute in respect of which the emergency arbitrator has acted, unless otherwise agreed by the parties.

Article 44

#### Confidentiality

1. Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.

2. The deliberations of the arbitral tribunal are confidential.

3. An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

- (a) A request for publication is addressed to the Secretariat;
- (b) All references to the parties' names are deleted; and
- (c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat.

## Article 45

### Exclusion of Liability

1. Neither the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, except if the act or omission is shown to constitute intentional wrongdoing or gross negligence.

2. After the award or termination order has been made and the possibilities of correction, interpretation and additional awards referred to in Articles 35 to 37 have lapsed or have been exhausted, neither the members of the board of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, the individual Chambers or their staff, the arbitrators, the tribunal-appointed experts, nor the secretary of the arbitral tribunal shall be under an obligation to make statements to any person about any matter concerning the arbitration. No party shall seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

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