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Swiss Contract Law in International Commercial Arbitration

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At first glance, one may be inclined to assume that 'Swiss Contract Law in International Commercial Arbitration' is just one more treatise on Swiss arbitration. However, Professor Christoph Müller's new book is unlike any other existing texts on arbitration in Switzerland because it is really not a book about arbitration at all. Rather, Professor Müller has created an English language guide to substantive Swiss contract law, specifically with a view to rendering Swiss substantive law accessible to international arbitration practitioners far beyond Switzerland's borders.

This is significant because of the outside role Swiss law plays in international commercial transactions. In fact, Swiss law constantly ranks near the top of the list of substantive laws most frequently chosen to govern international commercial contracts. (1) Despite its popularity and prevalence, there is a noticeable scarcity of commentary and literature available to English-speaking international lawyers seeking to acquaint themselves with Swiss substantive law. Especially where most arbitration proceedings involving contracts governed by Swiss law do not actually involve Swiss parties, (2) and are largely conducted in English, (3) the lack of English-language resources on Swiss substantive law can be a real challenge for the significant number of non-Swiss and/or non-German/French/Italian-speaking parties, counsel, and arbitrators faced with arbitration proceedings involving issues of Swiss contract law. ●

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Recognizing this gap in the market, Professor Christoph Müller has compiled a comprehensive English-language treatise on Swiss contract law with a specific emphasis on its application in international commercial arbitration. To anyone familiar with Professor Müller this will come as no surprise. In fact it is hard to imagine anyone better placed to write this book than Professor Müller, who has both extensive experience in international and domestic arbitration and specific Swiss contract law expertise. Among many other professional accolades, Professor Müller is a professor of private law at the Law Faculty of the University of Neuchâtel, where he inter alia teaches contract law; he also serves as the Vice-president of the Swiss Arbitration Association (ASA) and has acted as presiding, sole, or co-arbitrator, and as a legal expert, in well over 200 arbitrations subject to ad hoc or various institutional rules (including the ICC, Swiss, LCIA, SCC, UNCITRAL, CAS and WIPO Rules).

The reviewers would be remiss not to mention that Professor Müller specifically acknowledges the assistance of Sabrina Pearson-Wenger in the writing of *Swiss Contract Law in International Commercial Arbitration*. Her being a lawyer with a common law background, Professor Müller credits Sabrina Pearson-Wenger with ensuring that the book's commentary contains all the necessary background and explanation to ensure that lawyers from common law jurisdictions would be able to fully grasp Swiss contract law. Considering the final product, the reviewers are convinced that this collaboration proved very fruitful to ensure the book would speak the language of a key part of its prospective readership.

The book's core text spans nearly 700 pages, divided into four main sections, each further divided into multiple subsections. Rather than addressing each section in detail, the reviewers will provide an overview over what readers can expect to find in *Swiss Contract Law in International Commercial Arbitration*.

Part I is intended as an introduction to Swiss contract law and includes subsections on the importance of Swiss law in international arbitration, an introduction to the Swiss legal system in general, and chapters on general principles of Swiss contract law applicable to all contracts governed by Swiss law. In addressing the importance of Swiss contract law in international arbitration, Professor Müller only provides further justification for the relevance of this book. He rightly highlights both practical and legal reasons for the popularity of Swiss law, including that Swiss law is concise and easy to understand: the Swiss Code of Obligations is accessible online in multiple languages, including in English, and the Swiss Supreme Court's case law is accessible on the Court's website (for all decisions since 1 January 2000). From a legal perspective, Swiss contract law is attractive because it allows for great party autonomy. As Professor Müller points out, there are very few mandatory provisions under Swiss law, allowing parties to freely agree on their contractual rights and obligations. ●

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Turning next to a key feature of Swiss contract law, Professor Müller introduces the reader to Article 2(1) of the Swiss Civil Code, which provides that a party must act in good faith in the exercise of its rights and in the performance of its obligations. Relatedly, Professor Müller discusses the prohibition of an abuse of right enshrined in Article 2(2) of the Swiss Civil Code.

To round out Part I, Professor Müller sets out helpful background on the obligation (as the effect of the contract), the formation, interpretation, and validity of contracts, as well as other key elements of Swiss contract law, including inter alia agency, general terms and conditions, breach of contract and assignment of a claim. Considering what type of issues arise frequently in arbitration, the chapters discussing the approach to contract interpretation under Swiss law, breach of contract, and assignment will no doubt prove particularly valuable for arbitration practitioners faced with issues of substantive Swiss law.

Following the structure of the Swiss Code of Obligations itself, the remaining three parts address the main types of contracts under Swiss law relevant from the perspective of an international arbitration practitioner. In Part II, Professor Müller presents a systematic overview over Contracts of Sale. This section also includes a specific chapter addressing sales of real property and the international sale of goods, focusing in particular on the United Nations Convention on the International Sale of Goods (CISG). Considering that – unless it is explicitly excluded – a reference to Swiss law in a choice of law clause in a contract for the sale of goods would include the CISG, this is a welcome addition to the book.

In Part III Professor Müller sets out key features of service contracts under Swiss law, including the contract for work and services, the simple mandate contract, as well as the commercial agency contract (as a specific type of mandate contract). Helpfully, Professor Müller addresses in detail the termination of simple mandate contracts pursuant to Article 404 of the Swiss Code of Obligations. This provision, which has been deemed mandatory by the Swiss Supreme Court, stipulates that the simple mandate contract may be terminated at any time and without reason. International parties (and counsel) are often caught by surprise by the meaning and application of Article 404 of the Swiss Code of Obligations and Professor Müller's book provides helpful clarity for international users of Swiss law.

Finally, Part IV covers innominate contracts more generally, before delving into the specifics of licence agreements, exclusive distribution agreements, as well as settlement agreements. Professor Müller's selection of these three innominate contracts is not coincidental – all three have a high likelihood of being the subject of an international commercial arbitration and this in depth look at these contracts under Swiss law will no doubt prove useful to practitioners in many arbitration proceedings.

P 254 The book is comprehensive but remains user-friendly through its clear structure and language. It provides concise explanations of fundamental principles of ● Swiss contract law and the most important types of contracts under Swiss law, which are likely to come up frequently in international arbitration. It at all times keeps its key target audience in mind, written to be accessible for international lawyers from different legal traditions.

In addition to being sure to become an indispensable resource for international parties and counsel faced with issues of Swiss contract law, the book will without a doubt also be very helpful to Swiss practitioners seeking to explain key aspects of Swiss contract law to international clients and colleagues or having to draft arguments or awards analysing Swiss law in English. For drafting assistance, the Table of Terms which contains key legal terms of Swiss contract law in English, German, French, and Italian will certainly prove to be particularly useful.

While no book can replace the assistance of qualified counsel and particularly thorny issues of Swiss contract law will likely still require in depth analysis of (non-English language) legal commentary and case law, *Swiss Contract Law in International Commercial Arbitration* will no doubt prove itself to be an excellent starting point for all things Swiss contract law.

By making Swiss contract law more accessible to a broader audience of international practitioners, the reviewers are convinced, that the book will only further the popularity of Swiss substantive law to govern international commercial transactions. The reviewers, therefore, have no doubt that this book is a highly relevant and useful tool which fills an important void in the market, and congratulate Professor Christoph Müller and Sabrina Pearson-Wenger, on this impressive treatise.

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References

- 1) See *ICC Dispute Resolution 2020 Statistics*, at 17 (third place); *ICC Dispute Resolution 2019 Statistics*, at 15 (second place); *ICC Dispute Resolution 2018 Statistics*, at 13 (third place) all quoted in the book, at 3.
- 2) See *ICC Dispute Resolution 2020 Statistics*, at 10–11, 24 (49 Swiss parties, making up only 1.91% of the total number of parties in all filings); *ICC Dispute Resolution 2019 Statistics*, 9–10, at 21 (only 68 Swiss parties, making up only 2.68% of the total number of parties in all filings) all quoted in the book, at 6.

- 3) According to recent ICC and SCAI (now Swiss Centre) Dispute Resolution Statistics, arbitral awards were drafted in English in four-fifths of all cases. See ICC Dispute Resolution 2020 Statistics, at 19 (80% of Awards drafted in English); ICC Dispute Resolution 2019 Statistics, at 16 (79% of Awards drafted in English); SCAI Arbitration Statistics 2019, at 3 (English was language of arbitration in 70% of cases between 2004–2019), all quoted in the book, at 6.

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