

I.1.2 Request for Arbitration

(Succinct Document)

Place of arbitration: Geneva

Arbitration rules: ICC 2012

Nationality of parties: Italian and Swiss

Nationality of counsel: Swiss

Applicable law: Swiss

Subject matters: - non-renewal of distribution contract for luxury goods;
- payments owed;
- language to be decided by the arbitrators.

This Form is a request for arbitration submitted before the ICC International Court Arbitration (ICC) in a dispute between Swiss and Italian parties. The case relates to the non-renewal of a distribution contract and its consequences.

The dispute was to be heard by a three-member arbitral tribunal.

The request is drafted by Swiss lawyers.

The request for arbitration refers back to Article 4 of the 2012 ICC Rules of Arbitration which contain specific information to be mentioned. Apart from these provisions, a party enjoys a complete freedom on how to present the request.

The present Form is succinct and clear. Claimant reserves the right to be allowed to submit supplemental or additional claims, evidence and arguments as it may deem appropriate to respond to respondent's coming answer.

Form I.1.2

REQUEST FOR ARBITRATION

of ____ (date)

for

COMPANY A.,

A corporation organised and existing under the laws of Switzerland, with its principal place of business at ____, Switzerland.

represented by

Dr ____, cabinet ____, address,

Email : _____ ; telephone : _____

Claimant,

versus

COMPANY B,

A corporation organised and existing under the laws of Italy, with its principal place of business at ____, Italy.

Respondent.

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I. **STATEMENT OF FACTS**

1. Claimant is a Swiss manufacturer and designer of luxury goods and other time pieces, together with all components, spare parts and accessories, which are sold under the registered trademark "C" under licence from C, the parent company and owner of the trademark.
2. Respondent is a Milan based distributor.
3. The parties' business relationship started in ____, with the concluding of a distribution agreement, which was followed by a second one effective as of ____, which expired ____.
4. During the year ____, negotiations took place between the parties in order to adapt the Distribution Agreement expiring on ____.
5. As a result, the parties entered into a third distribution agreement, effective ____ (hereafter, "the Agreement"), which replaced the one of ____ (**Exhibit No __**).
6. Pursuant to Article ____ of the Agreement, Claimant appointed Respondent as its sole and exclusive distributor for the purpose of distributing various goods listed in Schedule A to the Agreement to retail dealers in ____.
7. Article ____ clearly specified that Respondent was an independent contractor, as opposed to an agent of Claimant.
8. Article ____ provided that the Agreement would be effective for an initial period of 4 years from the date of its conclusion and would automatically be renewed for successive periods of one year following the initial term, save in the event of written notice of non-renewal by one party to the other at least 180 days before the scheduled date of renewal, or in the event of termination in accordance with Article _____. According to Article ____ therefore, failing renewal, the Agreement would expire on _____.
9. In ____, the parties started negotiating the adaptation of the Agreement expiring on _____. The negotiation continued throughout the year. As a consequence, Claimant did not manage to terminate the Agreement in ____, having missed the contractual notice period of 180 days. The Agreement was thus tacitly renewed for one year, until _____.
10. Early ____, it turned out that Respondent did not agree to the adaptation proposed by Claimant and the negotiations for a continued relationship between the parties were unsuccessful.
11. In view of the foregoing, on _____, i.e. within the 180 day time-limit of Article ____, Claimant gave notice to Respondent of the fact that it would not renew the Agreement after _____:

"*... nous vous informons que nous ne renouvelons pas le contrat à son échéance du _____.*" (**Exhibit No __**)

12. At the expiry of the Agreement, on _____, Respondent still had in its possession certain items delivered to it by Claimant, but which had not yet been paid for.
13. Hence, in a letter dated _____, Claimant requested the payment by Respondent of the amount of CHF _____, which can be broken down as follows:

Outstanding invoices:	CHF _____
Minus amounts due by Claimant under the Agreement:	CHF _____
Total	CHF _____

14. As a sign of goodwill, Claimant offered to accept a payment by Respondent of CHF _____ in full settlement, together with the restitution to Claimant of various items listed in a facsimile of _____. (Exhibits No ____)

The offer was declined.

II. APPLICABLE LAW

Article ____ of the Agreement provides:

“Governing Law. This Agreement and all acts and transactions hereunder shall in all aspects be governed by and construed in accordance with the laws of Switzerland.”

III. LEGAL BASIS FOR THE CLAIM

The Agreement is a distribution agreement. This stems from Article ____, pursuant to which

“The Distributor is an independent contractor, is not an agent of the Manufacturer (...). Nothing herein shall be construed so as to create an employer-employee, agency, partnership or joint-venture relationship between the parties hereto. The distributor shall not hold himself out to any person as being an agent (...).”

Under Swiss law, distribution agreements are not regulated by statute. The legal independence of a distributor, especially his acting in his own and for his own account and risk, is the major element distinguishing the distribution agreement from the agency agreement.¹

1. Agency and Distribution Agreement, An International Survey, page ____.

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Article ___ of the Agreement provides as follows:

“In case of expiration in accordance with Section ___, any unsold stock of Products shall remain held by the Distributor which will be entitled to dispose of them in line with current sales policy.”

As a consequence, Respondent continues to owe Claimant the purchase price of the products sold to it and of which it had taken delivery up until the Agreement expired, as reflected in the unpaid invoices such as stated under No 12 above.

The balance outstanding in favour of Claimant for the said products was CHF _____. After deduction of CHF _____ (see above No 12), the total amount due to Claimant is CHF _____.

Although the Agreement expired on _____, the dispute resolution clause it contains applies to the present dispute, which centres on the legal consequences of the non-renewal of the Agreement. The arbitral tribunal shall have jurisdiction not only with regard to Claimant's claim against Respondent, but also concerning any counterclaim Respondent might put forward against Claimant on the basis of alleged pre-contractual or extra-contractual liability for non-renewal of the agreement.

Under Swiss law, in order to construe an arbitration clause and its scope, one must refer to the common methods of interpretation, i.e. to seek and establish the real common intention of the parties (CO Art. 18).² The interpretation must follow the *principe de la confiance* or good faith: declarations of intent should produce the effect that the parties could or should have expected from them in the light of the circumstances surrounding their relationship.³

According to the Federal Tribunal:

in free translation:

“Complementary rules of interpretation result from the particular nature of an arbitration clause (...) One must not accept too easily that an arbitration agreement has been agreed, if this is in dispute. However, if it is established that an arbitration clause exists, there is no reason to interpret that clause restrictively; on the contrary, in this case (...) one must assume that the parties wanted the arbitral tribunal to have extensive jurisdiction if they agreed on an arbitration clause. (...). This also applies when the parties' agreement put an end to the main contract; unless there is a specific provision to the contrary in the said termination agreement, one can generally take it that the parties were willing to submit disputes on the termination of the contract to arbitration”. Hence, any counterclaim that

2. ATF _____.
3. ATF _____.

Respondent might have against Claimant based on alleged pre-contractual or extra-contractual for non-renewal of the Agreement would fall under the scope of the arbitration clause, inasmuch as such counterclaims would arise precisely from the termination of the Agreement.

IV. JURISDICTION OF THE ICC

The jurisdiction of the ICC in these proceedings is based on Article ___ of the Agreement, which provides:

“Resolution of Disputes. All disputes or claims arising in connection with this Agreement, or any breach thereof which cannot be settled by mutual agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said Rules. The arbitration award may take the form of an order to pay a sum of money and/or to perform or refrain from an act. The place of arbitration shall be in Geneva, Switzerland. Each party agrees that the arbitration decision shall be final and binding on both parties and that judgement upon the award rendered by the arbitrators, as afore-said, may be entered in any court of competent jurisdiction. The prevailing party in any such arbitration or proceeding shall be entitled to its reasonable attorney’s fees in addition to its costs and other expenses.

V. APPOINTMENT OF CLAIMANT’S ARBITRATOR

Pursuant to the provisions of Article ___ of the agreement, Claimant appoints as arbitrator:

Dr. x.,
(address)

Tel: _____

Email: _____

Fax: _____

VI. LANGUAGE OF THE PROCEEDINGS

The Agreement does not state the language in which the arbitration proceedings must be conducted. It merely specifies that it has been negotiated and written in English and that the English text shall prevail in the event of any discrepancy with any translation (Article ___).

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Article 20 of the ICC Rules (2012) provides:

“In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.”

In view of the fact that the Agreement is in English, and that correspondence between the parties was either in French or Italian, it is submitted that these proceedings should be conducted in language of the contract which is English.

VII. REQUEST FOR RELIEF

On the basis of the foregoing, the Arbitral Tribunal is respectfully requested to:

1. hold that it has jurisdiction with regard to all the consequence of non-renewal of the Agreement as well as to any counterclaims of Respondent based on alleged pre-contractual or extra-contractual liability of Claimant;
2. award Claimant CHF _____ plus interest at the applicable rate and conditions;
3. hold that Respondent must pay all the costs of the arbitration as defined in Article 37 of the ICC Arbitration Rules (2012);
4. hold that through payment by Respondent to Claimant of the amount of CHF _____ plus interest, the legal relationship between the parties is liquidated and Respondent cannot assert any claims based on alleged pre-contractual or extra-contractual liability of Claimant;
5. authorize Claimant to submit such supplemental or additional claims, evidence and arguments as it may deem appropriate or as may be required or appropriate to respond to any defence or counterclaim advanced by Respondent in these proceedings.

Respectfully submitted for
COMPANY A

by its duly appointed attorney:

Dr _____
_____, cabinet d'avocats