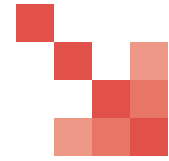


Switzerland



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GENERAL

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

Commercial arbitration enjoys a longstanding tradition in Switzerland, a key centre for arbitration. In 2006, Swiss arbitrators were the most frequently nominated arbitrators according to the yearly statistics of the International Chamber of Commerce (ICC), the leading institutional arbitration organisation worldwide.

Further, Swiss law was the most frequent choice of law in ICC arbitration proceedings and Switzerland was the second most frequent place of arbitration, after France. The World Intellectual Property Organisation (WIPO) and the Court of Arbitration for Sport (CAS) (see box, *the Main arbitration organisations*) also contributed to the arbitration-friendly environment in Switzerland. They both base their arbitration centres in Switzerland (Geneva and Lausanne, respectively). Arbitration proceedings held in Switzerland are conducted in a professional environment, supported by a concise legal framework (see *Question 3*) and have limited intervention by state courts (see *Question 16*).

The fact that there is only one level of appeal possible against an award in Switzerland, (directly to the Swiss Federal Supreme Court (see *Question 22*)) supports one of the key arguments for arbitration: finality. A further advantage of arbitration over court litigation is the choice of languages. Depending on the area the court is located, all court filings must be done in the official language only (which is either German, French or Italian but never English) and all exhibits must be translated into the formal language as well. Foreign language witnesses are interrogated by translators. None of these restrictions apply to arbitral tribunals.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

ICC is the most commonly used arbitration organisation in Switzerland, followed by the Swiss Chambers of Commerce (see box, *the Main arbitration organisations*). Ad hoc arbitration proceedings are held in Switzerland as well, although there are few statistics available on those. Experience shows that most of the ad hoc arbitrations are held under the UNCITRAL Arbitration Rules.

The Swiss Rules of International Arbitration (Swiss Rules) were adopted by the Swiss Chambers of Commerce on 1 January 2004 to combine the former various rules of a number of chambers of commerce in Switzerland into one set of rules. The Swiss Rules are based on the UNCITRAL Arbitration Rules, with various amendments, including:

- Consolidation (*Article 4, Swiss Rules*).
- The formal requirement to issue a procedural timetable (*Article 15(3), Swiss Rules*).
- Jurisdiction over set-off defences (*Article 21(5), Swiss Rules*).
- The expedited procedure (*Article 42, Swiss Rules*).

These amendments are set out on the website of the Swiss Chambers' Court of Arbitration and Mediation (Chambers) (www.sccam.org; *Rules*). The Swiss Rules can be applied to arbitration proceedings anywhere in the world (*Article 1(2), Swiss Rules*).

Due to the increase in sport related arbitrations, the CAS's caseload increased from 76 cases in 2000 to 252 cases in 2007, out of which 230 were appeal proceedings. The leading decisions of the CAS are published on its website (www.tas-cas.org). Decisions of the CAS are deemed to be decisions of an arbitral tribunal having its seat in Switzerland, so are subject to an appeal to the Swiss Federal Supreme Court (in Lausanne). In 2007 the Swiss Federal Supreme Court annulled a decision of the CAS for the first time on the grounds that one party's right to be heard was violated.

3. What legislation applies to arbitration in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

Arbitration proceedings held in Switzerland are governed by Chapter 12 of the Private International Law Act (PILA), which entered into force on 1 January 1989. The 19 articles (*Articles 176 – 194, PILA*) provide a flexible framework for arbitration in Switzerland, giving parties autonomy in the relevant areas. This framework is not based on the UNCITRAL Model Law.

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

The PILA gives the parties a great degree of freedom to organise the arbitration proceedings but does contain a few mandatory provisions to ensure that constitutional principles are followed. For example:

- Arbitrators must be independent. If an arbitrator is not independent, the parties to the arbitration can challenge him (*Article 180(1)(c), PILA*).
- The tribunal must ensure that parties are treated equally and are both heard in adversarial proceedings (*Article 182(3), PILA*).
- The award is final and can only be annulled under limited circumstances (by filing an action for annulment at the Swiss Federal Supreme Court) (*Article 190, PILA*). If none of the parties to the arbitral proceedings are based in Switzerland, such action for annulment may be waived by the parties to the arbitration.

The PILA provides for a broad approach with regard to arbitrability. Any dispute relating to financial interests can be subject to arbitration (*Article 177, PILA*). As such, monetary interests resulting from contractual, commercial, civil, administrative or public law matters can be subject to arbitration.

5. Are there any requirements relating to independence or impartiality?

An arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his independence (*Article 180(1)(c), PILA*). Arbitrators must remain impartial and independent of the parties (*Article 9, Swiss Rules*).

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.

The law of limitation applies to arbitration proceedings only if the dispute is to be decided according to Swiss law.

The usual limitation period for monetary claims is ten years and can be interrupted by making arbitration proceedings pending (*Article 135(2), Swiss Code of Obligations*). Arbitration proceedings are considered to be pending from the time one party to the arbitration agreement either (*Article 181 PILA*):

- Appeals to the arbitrators designated in the arbitration agreement.
- Initiates the procedure for the appointment of the arbitral tribunal.

Therefore, in arbitration proceedings to be conducted under the Swiss Rules, limitation periods can be interrupted by submitting the Notice of Arbitration (*Article 3, Swiss Rules*).

ARBITRATION AGREEMENTS

7. For an arbitration agreement to be enforceable:

- What substantive and/or formal requirements must be satisfied?
 - Is a separate arbitration agreement required or is a clause in the main contract sufficient?
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The arbitration agreement is formally valid when it is made in writing, by telegram, telex, telecopier or any other means of communication which enables it to be evidenced by writing (*Article 178(1), PILA*). The signatures of the parties to the arbitration agreement are not required.

An arbitration agreement is valid in substance if it complies with either (*Article 178(2), PILA*):

- The law chosen by the parties to govern the arbitration agreement.
- The law governing the substantive issues in the dispute, in particular the law governing the main contract.
- Swiss law.

If the substantive validity of the arbitration agreement is determined under Swiss law, the agreement to arbitrate must contain the express or tacit consent of the parties to submit any dispute arising out of a particular legal relationship to arbitration.

An agreement to arbitrate can be entered into by way of a separate arbitration agreement, in particular after the dispute has arisen, or by including an arbitration clause into the main agreement. The reference to an arbitration agreement contained in another document need not be explicit.

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/ characteristics or selection of arbitrators?

There are no restrictions on the arbitral tribunal's composition. The parties are free to agree on the number of arbitrators and the way they are appointed. The arbitrators do not need to have specific qualifications or characteristics, such as a certain education, profession or nationality.

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

Non-signatories can be bound to an arbitration agreement in circumstances other than the standard situation (where non-signatories are bound to an arbitration agreement as legal successors (as heirs, by merger, assignment or transfer, or other legal transactions)). The extension of an arbitration agreement to non-signatories is assumed if the third party created the impression that it feels bound to the agreement as well as to the arbitration agreement contained within it. Two recent decisions of the Swiss Federal Supreme Court have

confirmed this kind of extension to non-signatories. However, this scenario does not necessarily include third parties by application of the corporate veil or the group of companies' doctrines.

PROCEDURE

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

Ad hoc arbitration

In ad hoc arbitration, where there is no agreement on the appointment, removal or replacement of arbitrators, the parties can apply to the court at the seat of the arbitration to act as appointing or removing authority (*Article 179(2), PILA*). The court must apply, by analogy, the cantonal law (the provisions of the Swiss Intercantonal Concordat). A sole arbitrator must be appointed by both parties. If the parties cannot agree, the court appoints the arbitrator. If the tribunal consists of three arbitrators, each party designates one arbitrator and these two arbitrators then appoint a third arbitrator as chairperson. Where a party fails to appoint its arbitrator or where the party-appointed arbitrators fail to agree, the court must appoint the chairperson. Further, the court at the seat of the arbitration can also be addressed for the removal of an arbitrator for valid reasons.

Swiss Rules

The Chambers must appoint the sole arbitrator if the parties to the arbitration fail to jointly designate the arbitrator (*Article 7(3) Swiss Rules*). Where the dispute is referred to a three-member arbitral tribunal, each party designates one arbitrator, who then designates the chairperson. Failing such designation, the Chambers appoints the party arbitrators or the chairperson, respectively (*Article 8(2) Swiss Rules*). In multi-party arbitrations, the Chambers must first invite the group of claimants to designate an arbitrator and then invite the group of respondents to designate one. These two arbitrators must designate a third arbitrator as chairperson. If one group or both groups of parties fail(s) to designate an arbitrator, the Chambers can appoint all three arbitrators and specify the chairperson (*Article 8(3) - (5) Swiss Rules*). There are no default rules regarding the removal of the arbitrators, nor are there default rules regarding the start of arbitration proceedings.

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

In the absence of a specific reference to institutional rules or a procedural law and within the realm of the mandatory provisions of PILA, the arbitrators and the parties enjoy full autonomy in agreeing on procedural rules which meet the particular needs of the case. There are no default rules governing procedure.

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

Arbitrators in Switzerland do not have coercive power but the state judge at the seat of the arbitral tribunal is obliged to assist,

in particular, in taking evidence. The arbitrators can order disclosure of documents and attendance of witnesses (factual or expert). The state judge's assistance is only given where the parties or the witnesses summoned fail to co-operate (which is rare).

EVIDENCE

13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

The PILA does not provide for rules on disclosure of documents. The parties can agree on when and how documentary evidence is produced either by an agreement or by adopting procedural rules. A Swiss arbitral tribunal usually adopts rules similar or identical to those stated in Article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration for document disclosure by the opposing party.

Based on the civil law tradition, courts are considerably more restrictive in ordering disclosure. Usually the parties have to deal with the documents they have in their own possession.

CONFIDENTIALITY

14. Is arbitration confidential?

The PILA does not provide for confidentiality of arbitration proceedings. However, the arbitrator has an obligation of confidentiality based on the contract that appoints him. The parties can agree in the arbitration agreement or in a separate agreement on confidentiality issues. Further, the arbitration rules chosen by the parties may contain rules on confidentiality.

Under the Swiss Rules, unless the parties agree otherwise, the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers, together with the parties, undertake to keep confidential all awards, orders and all materials submitted by a party (subject to the exceptions in Article 43(1), Swiss Rules).

The arbitral tribunal's deliberations are confidential (*Article 43(2), Swiss Rules*). The award can be published as an anonymous version if a request for publication is made to the Chambers and no party objects to the publication (*Article 43(3), Swiss Rules*).

COURTS AND ARBITRATION

15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

Swiss courts have a limited ability to intervene in international arbitration. However, a Swiss arbitral tribunal does not have coercive power, so the Swiss courts' assistance is occasionally required.

If a party does not voluntarily comply with the provisional or conservatory measures ordered by the arbitral tribunal, the arbitral tribunal can request the assistance of the Swiss court (*Article 183(2), PILA*).

The arbitral tribunal, or a party with the consent of the arbitral tribunal, can request the Swiss courts' assistance in taking evidence (*Article 184(2), PILA*).

The court at the seat of arbitration has jurisdiction for any further judicial assistance (*Article 185, PILA*).

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

There is no such risk. A Swiss court cannot interfere in arbitral proceedings on its own motion. A court at the seat of the arbitration can only be asked to assist the arbitral proceedings (see *Question 15*). Procedural orders of the arbitral tribunal cannot be challenged before the Swiss courts. Therefore, the parties to the arbitration cannot delay proceedings by court applications.

17. What remedies are available where proceedings are started in the local court in breach of an arbitration agreement?

A party sued for breach of the arbitration agreement before a Swiss court can challenge the court's jurisdiction. The court must refuse jurisdiction where a party commences proceedings (in breach of the parties' arbitration agreement), unless either the (*Article 7, PILA*):

- Defendant proceeded to the merits of the dispute without having contested the court's jurisdiction.
- Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.
- Arbitral tribunal cannot be constituted for reasons for which the defendant in the arbitration proceeding is manifestly responsible.

If the tribunal has its seat in Switzerland, the proceedings can still be initiated. *Article 186 1bis, PILA* explicitly confers this authority to the tribunal, despite an action on the same matter between the same parties already being pending before a court or another tribunal. If there are, however, serious reasons the tribunal may stay proceedings.

18. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

Anti-suit injunctions (restraining the defendant from commencing or continuing proceedings in another jurisdiction) are not available. However, a judgment made by a foreign court in breach of an arbitration agreement will not be recognised and enforced in Switzerland on the grounds that the foreign court did not have jurisdiction.

19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction accept the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

A party denying the jurisdiction of the tribunal can request a partial award as to this jurisdictional issue. If the party is not satisfied with the result in this partial award it can then file an appeal to the Swiss Federal Supreme Court (see *Question 22*).

The concept of separability of the arbitration clause is a substantive rule. The arbitration agreement's validity cannot be challenged on the grounds that the main agreement is not valid (*Article 178(3), PILA*). *Article 21(2)* of the Swiss Rules also provides for the concept of separability of the arbitration clause.

The concept of kompetenz-kompetenz is well established in Switzerland. The arbitral tribunal has the power to decide on its own jurisdiction (*Article 186(1), PILA*). The arbitral tribunal has this power irrespective of whether the same claim between the same parties is already pending at a state court or at another arbitral tribunal, except if notable reasons would justify a stay of proceedings (*Article 186(1bis), PILA*). The Swiss Rules embody the concept of kompetenz-kompetenz in *Article 21(1)*.

Article 186(1) PILA is considered a mandatory provision. Accordingly, the parties to the arbitration agreement cannot waive the concept of kompetenz-kompetenz. However, the arbitral tribunal's decision on jurisdiction can be challenged before, and be set aside by, the Swiss Federal Supreme Court (*Article 190(2)(b), PILA*) unless the parties have waived the right of annulment according to *Article 192 PILA*. In addition, the arbitral tribunal's decision on jurisdiction can be reviewed by the Swiss courts in the enforcement stage (*Article V(1)(c), NYC*).

REMEDIES

20. What interim remedies are available from the tribunal? Can the tribunal award:

- Security for costs?
 - Security or other interim measures?
-

An arbitral tribunal can order conservatory measures or grant interim relief, unless the parties have agreed that the arbitral tribunal cannot do so. The tribunal can make such orders subject to the provision of appropriate security. Consequently, an arbitral tribunal can also award security for costs, but specific circumstances have to be established by the requesting parties. Generally, security for costs is to be provided by the claimant only if its potential inability to meet a costs award is shown by bankruptcy, Chapter 11 proceedings or other objective standards of financial distress. Further, an assignment of the claim to a collapsible entity, such as an offshore company, can justify issuance of an award for security for costs.

The arbitral tribunal can issue any kind of interim measures.

The request for interim measures to be issued by a state court is deemed not to be incompatible with the agreement to arbitrate or a waiver of that agreement (*Article 26(3), Swiss Rules*) (see *Question 15*).

The issuance of interim measures *ex parte* was recently addressed by the amendment of Article 17 of the UNCITRAL Arbitration Rules. Though this amendment has not yet been directly implemented into the PILA, there seems to be an understanding that an arbitral tribunal in Switzerland can also issue interim measures *ex parte* and, in doing so, will give consideration to the amended UNCITRAL Arbitration Rules as to that issue.

21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

An arbitral tribunal can impose the final remedies that the law agreed on between the parties provides. There are no restrictions imposed by Swiss law as to final remedies and an arbitral tribunal can award damages, injunctions, declarations, costs and interest. An arbitral tribunal can also award punitive damages, provided they are available under the law to be applied by the arbitral tribunal. If specifically authorised by the parties, the arbitral tribunal can also decide according to what it considers to be fair and equitable in the circumstances, leaving aside legal considerations (*ex aequo et bono*).

APPEALS

22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal?

An arbitral tribunal's procedural orders cannot be challenged in the local court. Awards can be challenged before the Swiss Federal Supreme Court or, if the parties agreed so, before the court at the seat of the arbitration (*Article 191, PILA*).

The grounds for challenge are limited and mainly concern violation of fundamental procedural rights. Interim, partial and final awards can be set aside on the grounds that the:

- Arbitral tribunal was not properly constituted.
- Arbitral tribunal wrongly accepted or declined jurisdiction.

Final and partial awards can also be challenged on the grounds that the:

- Arbitral tribunal's decision went beyond the claims submitted to it or failed to decide on items of the claim.
- Principle of equal treatment or the right of the parties to be heard was violated.
- Award is incompatible with public policy.

MAIN ARBITRATION ORGANISATIONS

Swiss Chambers of Commerce (Swiss Rules) (Zurich Chamber of Commerce/Chamber of Commerce and Industry of Geneva)

Main activities. International arbitration, including the Swiss Rules of International Arbitration (based on the UNCITRAL Arbitration Rules).

W www.swissarbitration.ch

World Intellectual Property Organisation (WIPO)

Main activities. Promoting the effective use and protection of IP worldwide, by (among other things) offering arbitration and mediation to resolve international commercial disputes between private parties.

W www.wipo.int

Court of Arbitration for Sport (CAS)

Main activities. Settling sport related disputes through arbitration or mediation by procedural rules adapted to the specific needs of the sporting industry.

W www.tas-cas.org

The appeal to the Swiss Federal Supreme Court must be filed within 30 days from the notification of the award. The application must contain the reasoned grounds for the challenge of the award. In most cases the proceedings to set aside the arbitral awards are entirely in writing and comprise only one exchange of briefs.

If none of the parties have their domicile, place of residence or business in Switzerland, the parties can agree to waive the right to challenge the arbitral award (*Article 192, PILA*).

COSTS

23. What legal fee structures can be used? For example, hourly rates and task based billing? Are fees fixed by law?

The parties and their counsel can agree on their fee structure. Fees are not fixed by law. Generally, counsel is paid according to an hourly rate and the parties are usually asked, at the end of the proceedings, to file all their costs and expenses incurred in the arbitral proceedings.

24. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider when awarding costs?

Arbitral tribunals generally follow the principle of loser pays, that is, the unsuccessful party bears the costs of the arbitration and compensates the successful party for all of its costs and expenses incurred

in the arbitral proceedings. An arbitral tribunal can, to the extent it deems appropriate in the circumstances of the case, deviate from this principle and apportion the costs between the parties. This might be justified in particular if a claimant has prevailed on the merits of the case (for example, it has established that there was a breach of contract) but could not be awarded the amount it requested.

ENFORCEMENT

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

Domestic arbitration awards are enforceable in all cantons in the same way that a Swiss court judgment is enforceable. An award that orders the payment of a sum of money or the posting of security must be enforced according to the Swiss Debt Enforcement and Bankruptcy Law. The creditor must apply to the debt collection office at the seat of the debtor and request that a payment order be issued. If the debtor objects to the payment order, the creditor can apply for recognition or enforcement of the arbitral award by the court in summary proceedings.

The enforcement of a non-monetary award must be requested from the competent cantonal court according to the applicable cantonal law.

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Switzerland is party to the New York Convention and to various other bilateral treaties on recognition and enforcement of arbitral awards. Arbitral awards made in Switzerland are enforceable in other jurisdictions according to these treaties.

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

The recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention irrespective of whether the award was made in a member state of the New York Convention (*Article 194, PILA*). Switzerland is also a party to various bilateral treaties regulating the recognition and enforcement of foreign arbitral awards. Therefore, a party to a foreign award made in a member state of a bilateral treaty can choose whether it wants to rely on the New York Convention or on the respective bilateral treaty.

A foreign award that orders the payment of a sum of money or the posting of security must be enforced according to the Swiss Debt Enforcement and Bankruptcy Law. If the debtor objects to the payment order to be issued by the debt collection office, the creditor can apply for recognition or enforcement of the arbitral award by the court in summary proceedings. The judge will have to examine whether the conditions for enforcement (as set out in the New York Convention) are fulfilled.

The enforcement of a non-monetary award must be requested from the competent cantonal court according to the applicable cantonal law.

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

Enforcement proceedings are held as summary proceedings and are generally decided in one hearing. In exceptional cases they are followed by an additional exchange of briefs. A decision should be available within three to six months after the filing. From that point appeals can be filed, first on cantonal level and then at the Swiss Federal Supreme Court. At both levels the duration is less predictable.

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