ARBITRATION IN SWITZERLAND: MUCH ADO ABOUT NOTHING?

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INTRODUCTION

Switzerland is famous for a number of things: chocolate, cheese, watches, the Matterhorn and certainly Roger Federer. In the corporate world, Switzerland is also known for headquartering major global players such as Roche and Novartis, UBS and Credit Suisse, Zurich Insurance and Swiss Re, Glencore and Nestlé. And in the legal world, Switzerland is known as one of the premier places for arbitration. For good reason?

PREFERRED FEATURES FOR A PLACE OF ARBITRATION

The place of arbitration (also referred to as the seat of the arbitral tribunal) is generally understood as "a definable place that commits the parties (i) to the arbitral procedure, the arbitral tribunal and a particular arbitration law (lex arbitri), (ii) to a forum for judicial assistance in support of the arbitration, and (iii) to state courts of a particular country for recourse against the award."[1][2]

In essence, the parties' choice of a place of arbitration is a choice of the legal framework that shall govern their arbitral procedure, regardless of whether or not the parties opt for institutional or ad-hoc arbitration. Clearly, parties will expect their place of arbitration to exert neutrality. But experienced parties will be looking for more when considering their preferred place for arbitration. One of the elements most often mentioned in this regard is the efficiency of proceedings.

In today's business world, time is money and speed is key. And this applies similarly to arbitration, where parties usually have an interest to resolve a dispute as quickly as possible. And in terms of speed, Switzerland has quite a few features on offer geared towards ensuring the efficiency of its arbitral proceedings.

AVOIDING DILATORY TACTICS

In recent years, efficiency of arbitration (or the lack thereof) has increasingly been raised by corporate counsel as a criticism against arbitration. The major arbitration institutions have reacted in various ways, such as the International Chamber of Commerce promulgating new rules on transparency[3], or by introducing the possibility of expedited arbitral proceedings[4]. However, these measures will have little effect on the efficiency of arbitral proceedings if parties – generally the defendants – can torpedo proceedings by engaging in dilatory tactics with ease. And this is where the place of arbitration (and its lex arbitri[5]) can have a meaningful impact.

AVOIDING OUTSIDE INTERFERENCE BY SWISS STATE COURTS

To delay or avoid arbitration, one of the most popular delaying tactics used is the involvement of local state courts. To deter parties from doing so, arbitral tribunals seated in Switzerland are granted priority over ordinary Swiss state courts when the latter are seized by a party bound by an arbitration agreement in relation to matters falling within the arbitration agreement's ambit. This priority is given based on the principle of the negative effect of Kompetenz-Kompetenz.

Pursuant to the principle of Kompetenz-Kompetenz, a reviewing instance is given authority to itself determine its competence to hear a particular case. Kompetenz-Kompetenz is generally granted to state courts, but in many countries – amongst which Switzerland – also to arbitral tribunals.

Not only does the Kompetenz-Kompetenz granted to arbitral tribunals save time, and thus increase efficiency, in that there is no need to first seize a state court to compel arbitration. It also addresses the uncertainty inherent in any state court's review created by the need to file a motion to compel arbitration. Such uncertainty can in practice be observed particularly given an at times quite apparent lack of expertise of state courts when it comes to arbitration.

The Kompetenz-Kompetenz granted to arbitral tribunals, and the efficiency benefits deriving therefrom need

protection. This is in particular the case where parties seize state courts in contradiction to an arbitration agreement, e.g. hoping that the court's review will at a minimum delay proceedings and at best result in the court altogether affirming its jurisdiction in lieu of arbitration.

Switzerland as one of few countries protects the Kompetenz-Kompetenz of arbitral tribunals seated in Switzerland by means of the so-called negative effect of Kompetenz-Kompetenz[6]. Such principle confirms that when a Swiss state court is ceased in relation to a matter that prima facie falls within the ambit of an arbitration agreement, the matter must be referred to arbitration for determination and the court's own Kompetenz-Kompetenz to determine its competence is overridden.

Essentially, this means that a party will not be able to delay or disrupt arbitral proceedings by seizing a state court arguing that the validity or applicability of the arbitration agreement is contested. The validity of such contestation will be determined by the arbitral tribunal and the state court seized will defer to the arbitral tribunal's jurisdiction.

AVOIDING OUTSIDE INTERFERENCE BY FOREIGN STATE COURTS

While the negative effect of Kompetenz-Kompetenz for arbitral tribunals must be deferred to by Swiss state courts, foreign state courts will generally not do so, leaving the arbitral proceedings prone to undue outside interference and, hence, delay.

In its attempt to ensure the efficiency of arbitration in Switzerland – also with respect to action taken outside Switzerland – the Swiss legislature has introduced a provision[7] into the lex arbitri, exempting arbitral tribunals from applying the principle of lis pendens. This provision provides for a complete disconnect between pending foreign state court proceedings and Swiss arbitration proceedings between the same parties on the same subject matter. Therefore and as a rule, a Swiss arbitral tribunal has no obligation to defer to a foreign action that was commenced before the arbitration was initiated in Switzerland. Consequently, dilatory tactics by means of taking legal action abroad are rendered ineffective.

SPEEDY APPEALS PROCEEDINGS

As a further means of ensuring efficient arbitration proceedings in Switzerland, the lex arbitri and case law of the Swiss Federal Tribunal foresee a speedy appeals process for arbitral awards.

This is accomplished by three measures: First, by enacting a narrow catalogue of grounds for appeal[8], which is moreover restrictively interpreted by the appeals instance. Second, by providing for only one appeals instance, which is the Swiss Federal Tribunal[9]. And third, by ensuring a swift review by the appeals instance, whose decision can generally be expected to be rendered within six months from the filing of the appeal.

These measures should support the finality of arbitral awards and deter parties from filing appeals for dilatory purposes only.

SUMMARY

While the recent measures undertaken by various arbitral institutions to increase the efficiency of arbitration are laudable, such measures will have little effect if the lex arbitri of the place of arbitration does not protect the integrity of the proceedings from undue delay caused by dilatory tactics. In this regard, some of the most significant delays are threatened by the undue interference from local or foreign state courts.

Switzerland has taken concrete measures to curb attempts to cause undue outside interference by (i) confirming the applicability of the negative effect of Kompetenz-Kompetenz, which grants arbitral tribunals priority over state courts, and by (ii) exempting Swiss arbitral tribunals from the principle of lis pendens, ensuring a complete disconnect between Swiss arbitral proceedings and any foreign proceedings a party may wish to initiate.

These measures paired with a speedy appeals process for arbitral awards make Switzerland rightfully one of the preferred places for arbitration on a global level.

ABOUT THE AUTHOR

The practice of Tamir Livschitz covers a wide range of civil litigation with special emphasis on ad hoc and institutional commercial arbitration proceedings. He is particularly versed in complex international arbitration disputes, where he regularly advises corporate clients from CIS countries, Europe and Asia. He is admitted to practice in Switzerland, Israel and the State of New York. He has a masters degree in law from the New York University School of Law as well as an Advanced Professional Certificate in Law and Business from the NYU Leonard N. Stern School of Business. Tamir is fluent in seven languages.

1. Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 3rd ed., Berne 2015, para. 740.
2. To be sure, the place of arbitration must not be confused with the venue of the arbitration, i.e. the place where any meetings or hearings of the arbitration take place. The latter can be determined to take place in a city or country other than the place of arbitration.
3. http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/
4. Art. 42(2) of the Swiss Rules of International Arbitration.
5. The Swiss lex arbitri for international arbitration can be found in articles 176 et seq. of the Swiss Private International Law Act (PILA).
6. SFT 4A_119/2012 of 6 August 2012
7. Art. 186 para. 1bis of the Swiss Private International Law Act (PILA).
8. Art. 190 of the Swiss Private International Law Act (PILA).
9. Art. 77 of the Swiss Act on the Federal Tribunal (BGG)