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International Arbitration

Switzerland
Trends and Developments
Niederer Kraft Frey

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Trends and Developments

Contributed by Niederer Kraft Frey

Niederer Kraft Frey's dispute resolution group regularly serve as chairpersons, single arbitrators, party-appointed arbitrators and counsels in national and international arbitration proceedings. Its track record is particularly strong in high-stakes arbitration proceedings. The team has extensive experience with arbitral proceedings both as arbitrators and

party representatives, in-depth knowledge of the different rules governing the proceedings, and strong ties with leading law firms all over the world allow us to effectively represent client's interests in national and international arbitral proceedings.

Author



András Gurovits is a listed arbitrator with the Court of Arbitration for Sport (CAS/TAS) in Lausanne Switzerland, where he regularly acts as Sole Arbitrator, member of the Panel or Chairman in contentious matters brought before the CAS. He has

been a partner with Niederer Kraft Frey since 2001 specialising in dispute resolution, sports, TMT and corporate law.

Switzerland – an Important Venue for International Arbitration

Switzerland is one of the most important centres for international arbitration. A recent empirical study of the European Parliament on arbitration in the EU and Switzerland came to the conclusion that Switzerland is among the most recommended places for arbitration and thus without doubt one of the leading arbitration venues worldwide. A similar picture emerges from recent statistics of the International Chamber of Commerce in Paris (ICC), where Geneva was the most chosen seat of arbitration after Paris and London. In addition, Swiss nationals were the third most frequently appointed arbitrators in these ICC arbitration proceedings. Switzerland is also often chosen as the place for commercial arbitration according to the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution, and it hosts the Court of Arbitration for Sport (TAC/CAS) in Lausanne, which is the highest instance in sports-related disputes worldwide, as well as the WIPO Arbitration and Mediation Center.

In the course of the preparatory work for the revision of the Swiss Private International Law Act (PILA), which is discussed in more detail below, the Swiss Federal Office of Justice interviewed various stakeholders of international arbitration in Switzerland. With regard to Switzerland's success in this area, the discussion partners cited the excellent legal framework as the most important factor for success in arbitration (in particular the 12th chapter of the PILA),

and at the same time the high quality and consistency of the Swiss Federal Court's case-law in the field of international arbitration. The size and dynamics of a constantly renewing pool of highly qualified and multilingual Swiss arbitrators were also mentioned as factors contributing to the success of Switzerland as an internationally recognised location for arbitration. According to the interviewees, all this is complemented by the traditional quality factors of Switzerland as a place for business, such as political neutrality and stability, the quality of the infrastructure and the accessibility of legal sources in the three official languages (German, French and Italian), with a number of these sources also being available in English translations.

Switzerland's tradition of arbitration ties in with the tradition of good offices in foreign policy. Within this framework, Switzerland has played a role as facilitator, and continues to do so, supporting parties in the search for negotiated solutions without taking sides itself. While the first arbitration proceedings took place as early as the Middle Ages, the Alabama Arbitration Procedure of 1872 is commonly mentioned as the birth of modern public arbitration. At that time, the Governments of the United States of America and the United Kingdom submitted claims for damages arising during the American Civil War. Later, private international commercial arbitration reached its current significance with the upturn in cross-border trade in the twentieth century when all Swiss cantons regulated arbitration. The PILA came into force in 1989 and its 12th chapter regulates international

arbitration in Switzerland. In terms of domestic arbitration, the Federal Constitution of 18 April 1999 cleared the way for a federal regulation, which came into force on 1 January 2011 as the third part of the Swiss Code of Civil Procedure (CPC) and replaced the regulations on a Cantonal level. However, the creation of a uniform arbitration law in the sense of a *code unique* (covering both international and domestic arbitration) was deliberately waived at that time.

Revision of the Legislative Framework for International Arbitration in Switzerland

Almost 30 years after its adoption, the 12th chapter of the PILA continues to apply internationally as an innovative arbitration law of great quality. It is appreciated as a clear and concise law that gives the parties great autonomy and flexibility in procedural design, while at the same time providing a transparent framework secured by the state courts. Thanks to these characteristics, the 12th chapter of the PILA is a suitable legal framework for different types of arbitration, such as ad hoc proceedings, institutional arbitration, sports arbitration and investment arbitration.

Recently, however, the Swiss Federal Council has proposed a revision of the PILA and presented a preliminary draft of the amended law that aims to strengthen further the current strengths and increase legal certainty and clarity. In particular, the preliminary draft enshrines the case-law of the Federal Tribunal, removes ambiguities and makes the law more user-friendly. It also takes into account the developments in international trade and other arbitration laws worldwide, and incorporates a number of innovations aimed at further optimising the Swiss law on international arbitration.

The main goals of the proposed amendment are outlined below.

Keeping track of court practice and clarification of open questions

In the almost 30 years since the PILA came into force, the Federal Tribunal has clarified various questions and supplemented the law in important points. In the interest of transparency and user-friendliness, the Federal Council deems it necessary to update or, where appropriate, supplement the jurisprudence in the law. At the same time, open issues should be clarified by law where appropriate.

These revision points include the following:

- According to the preliminary draft, the legal remedies for corrections, explanation, amendment and revision of arbitral awards shall now be expressly regulated in the law. While today's PILA contains no provisions in this respect, the Federal Tribunal has recognised that decisions of arbitration tribunals in international arbitration can also be rectified, explained or amended, and are also accessible

for revision. By implementing the preliminary draft, the framework of legal remedies will be comprehensively dealt with in the text of the law. Consequently, the 12th chapter of the PILA will satisfy the claim of the historical legislator to regulate international arbitration comprehensively and conclusively in the PILA.

- According to Article 176, the PILA shall apply to arbitration tribunals domiciled in Switzerland, "provided that at least one party has its domicile or habitual residence when concluding the arbitration agreement in Switzerland." In a decision on the question of the scope of applicability of the PILA, the Federal Tribunal examined the circumstances of the later parties to the arbitration (and not of the parties to the arbitration agreement). This decision was unanimously criticised by academic writers. According to that decision, the applicable arbitration law (CPC or PILA, depending on the domicile, seat or habitual residence of the parties) cannot be established until an arbitration procedure has been initiated. This creates legal uncertainty, particularly in contracts with several parties, because it is often impossible to predict which parties to the contract will be involved in a subsequent legal dispute. This legal uncertainty is a major weakness of the current system. Therefore, the revised PILA shall now explicitly refer to the parties to the arbitration agreement.
- The current law does not clarify the applicable procedure for proceedings before the state court if it is acting as *juge d'appui*. The preliminary draft therefore expressly provides that the summary procedure according to the CPC shall apply in such cases in both domestic and international arbitration.

Strengthening party autonomy

The 12th chapter of the PILA grants the parties great freedom in the design of procedural matters. The aim of the proposed amendment of the PILA is to strengthen this characteristic by implementing the following:

- Under the current law, an arbitration agreement shall be concluded in writing or in any other form of transmission "*which allows proof of the agreement by text.*" Today, the form must always be respected by all parties to the arbitration agreement. Compared with foreign legal systems, the current regulation in the PILA is very strict. Legal systems of neighbouring states, such as Germany and Austria, have already introduced a simplification of the formal requirements, or even completely dispensed with them, such as the French law. Also, the UNCITRAL Model Law provides two options – ie, a modernised written form and the complete waiver of formal requirements. Against this background, the regulation under the PILA no longer fully meets the customs and expectations in international business transactions. For this reason, the formal requirement should be moderately simplified by allowing that only one party to the arbitration agreement shall have to fulfil the form.

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- The preliminary draft now also expressly provides that, in addition to the usual bilateral or multilateral arbitration agreement, jurisdiction may also be conferred to an arbitral tribunal based on an arbitration clause contained in a unilateral legal transaction, such as a last will, a foundation, a trust and others, if such clause was effectively established in accordance with the substantive law applicable thereto.

Strengthening user-friendliness

The PILA competes with foreign legal systems, so user-friendliness is therefore extremely important. The proposal for an amendment to the PILA intends to further address parties' needs by implementing the following measures:

- An arbitration is international in accordance with the 12th chapter of the PILA if at least one party to the arbitration is from abroad. Such party might not be familiar with the Swiss legal system, so, for foreign parties, it is a decisive advantage if the *lex arbitri* is comprehensively settled in one specific decree. In the interest of user-friendliness, references to the CPC in the PILA shall, therefore, be replaced by direct regulations in the PILA itself, so that the PILA solely and comprehensively regulates international arbitration. In that sense, the PILA shall now regulate the appointment, the refusal and the dismissal of a member of an arbitral tribunal in cases where these proceedings require the assistance of state courts – ie, where the parties have not themselves stipulated the relevant provisions in their arbitration agreement.
- English is the predominant language in international arbitration. In appeal proceedings, the Federal Tribunal already accepts submission of exhibits in English with the consent of the other parties. The preliminary draft proposes to make a further step in this context and foresees that it shall now also be possible to submit the legal briefs in English to the Federal Tribunal in cases where it acts as the competent appeal body in arbitration matters. In view of the strict conditions for appeals against an arbitral award (cf. below), it is not expected that the number of appeal proceedings brought before the Federal Tribunal will increase because of this change. However, the admission of legal documents in English will lead to a reduction in the translation workload for the parties, thus further enhancing Switzerland's attractiveness as a venue for international arbitration.

The draft for a revision of the PILA is to be submitted to discussion by the parliament, and it is not yet clear when the revised law will come into force.

Jurisprudence of the Swiss Federal Tribunal

The Swiss Federal Tribunal in Lausanne is the last instance in arbitration matters.

According to Article 190 of the PILA, an arbitral award in international arbitration shall, in principle, be final when

communicated. The PILA, however, permits the challenging of an arbitral award before the Federal Tribunal on the following limited grounds:

- if a sole arbitrator was irregularly designated or the arbitral tribunal was irregularly constituted;
- if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims submitted;
- if the parties were not treated equally or their right to be heard in an adversarial proceeding was not respected; or
- if the award is incompatible with Swiss public order (*ordre public*).

In order to strengthen the power of arbitral tribunals in Switzerland, Article 192 of the PILA even allows appeals against an arbitral award to be excluded if neither party has a domicile, place of habitual residence or place of business in Switzerland, provided the parties expressly agree so in the arbitration agreement or a subsequent written agreement.

Success rates of appeals against arbitral awards with the Federal Tribunal are low, with just three challenges being successful in 2016 and 2017.

In the author's view, the following decisions of the Federal Tribunal in arbitration matters during the past twelve months are worthy of note here.

Suspensive effect of the appeal against an arbitral award

The Federal Tribunal has decided that an appeal with the Swiss Federal Tribunal against an arbitral award shall have suspensive effect if the defendant, to whom the arbitral tribunal has awarded a sum of money, is domiciled in a country with which Switzerland has no treaty on the recognition and enforcement of decisions in civil matters (*in casu* : USA).

Waiver of appeal

The parties to domestic arbitration cannot waive the challenge of the arbitral award with the Federal Tribunal in advance. The appeal, however, may be waived after the award has been issued.

By contrast, the parties to an arbitration agreement for international arbitration may waive the right to challenge the award in advance. The Federal Tribunal held that a clause providing that "there shall be no appeal to any court from awards rendered hereunder" entered into by foreign parties constitutes a valid waiver of the right to file an appeal against the arbitral award within the meaning of Art. 192 para. 1 PILA.

Equal treatment

According to the Federal Tribunal, an arbitral tribunal does not violate the principle of equal treatment of the parties if it grants an extension to a plaintiff who missed the time limit for filing the statement of claim by one day.

The right to be heard

The Federal Tribunal followed an appellant's complaint that the arbitral tribunal had violated his right to be heard as it had neither explicitly nor implicitly examined a relevant argument of the appellant.

Legal aid

The Federal Court confirmed its jurisprudence that there is no legal aid in the field of arbitration, but it grants it for appeal proceedings before the Federal Court on the grounds that such is a state court procedure (if the relevant conditions are fulfilled).

Arbitrability

Whether or not an arbitration is international or domestic is relevant in the case of employment-related disputes. According to Swiss law, such disputes can be subject to international arbitration, but mandatory provisions under the Swiss Code of Obligations on employment agreements cannot be brought to arbitration in domestic arbitration (unless the parties agree on arbitration one month or more after the termination/expiration of the employment agreement). The Federal Tribunal confirmed this practice and held that an arbitration clause contained in an employment agreement between a football club and its coach cannot be held against the coach who claims compensation for an (alleged) early termination of the agreement by the club with no justified grounds, and who files his claims with the state courts.

Niederer Kraft Frey

Bahnhofstrasse 53
CH-8001 Zurich

Tel: +41 58 800 8000
Fax: +41 58 800 8080
Email: nkf@nkf.ch
Web: www.nkf.ch