The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Switzerland: International Arbitration (4th edition)

This country-specific Q&A provides an overview of the legal framework and key issues surrounding international arbitration law in Switzerland.

This Q&A is part of the global guide to International Arbitration.

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1. What legislation applies to arbitration in your country? Are there any mandatory laws?

In Switzerland, international arbitration is governed by chapter 12 of the Swiss Private International Law Act (PILA) which entered into force on 1 January 1989. An arbitration is deemed international, if at least one party to the arbitration agreement had its domicile or

habitual residence outside Switzerland at the time of the conclusion of the arbitration agreement. Since 1 January 2011, Domestic arbitration is governed by the 3rd title of the Swiss Civil Procedure Code (CPC). However, parties to an international arbitration dispute may declare the provisions on domestic arbitration of the CPC to apply in lieu of the provisions of the PILA (art. 167 para 2 PILA). Equally, the parties to a domestic arbitration are granted the possibility to agree on the provisions of the PILA to apply instead of the CPC (art. 353 para 2 CPC).

While great emphasis is placed on party autonomy in adapting the arbitral proceedings to their needs, Swiss arbitration law contains several mandatory requirements, namely the provisions on arbitrability (art. 177 PILA and art. 353 CPC), the provisions stipulating the lack of independence or impartiality as grounds to challenge an arbitrator (art. 180 para 1 (c) PILA and art. 367 para 1 (c) CPC), the provisions requiring the arbitral tribunal to ensure equal treatment of the parties and compliance with their right to be heard (art. 182 para 3 PILA and art. 373 para 4 CPC), as well as the provisions providing for assistance by the state courts at the seat of the arbitral tribunal (art. 185 PILA and art. 356 CPC) are among the mandatory rules.

2. **Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?**

Switzerland ratified the New York Convention in 1965 without making any reservations to the general obligations of the convention. With the PILA having entered into force on 1 January 1989 the reciprocity reservation of Switzerland was withdrawn and the New York Convention applies erga omnes.

3. **What other arbitration-related treaties and conventions is your country a party to?**

Switzerland is a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention), as well as to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Neither the PILA nor the CPC are based on the UNCITRAL Model Law. There are, however, no substantial differences between them.

5. Are there any impending plans to reform the arbitration laws in your country?

Almost thirty years after its entering into force, on 24 October 2018, the Swiss Federal Council published and submitted a draft partial revision of chapter 12 of the PILA to the Swiss parliament for discussion and approval. If approved by the Swiss parliament, the partially revised chapter 12 of the PILA is expected to enter into force after January 2021.

As the chapter 12 of the PILA is still considered to be a modern legislation by the Swiss Federal Council, legal scholars and practitioners, the draft provisions of chapter 12 of the PILA do not aim at fundamentally reforming the rules on international arbitration in Switzerland. In particular, the draft does not constitute a complete revision of the existing legislation. The declared overall objective of the partial revision is for Switzerland to maintain its attractiveness for international arbitration.

Against this background, the revision is directed at (i) implementing and converting into law the developments in international arbitration of the last roughly 25 years driven by the case law of the Swiss Federal Tribunal, (ii) strengthening the party autonomy (iii) and making the provisions of chapter 12 of the PILA more user-friendly. The revised draft chapter 12 of the PILA includes, inter alia, new codified provisions on the revision, rectification, explanation and correction of awards, and the possibility to make submissions to the Swiss Federal Tribunal in English.

The partially revised chapter 12 of the PILA will, if approved by the parliament in the form of the current draft, apply to all arbitration proceedings initiated after its coming into force, i.e. also to arbitration agreements concluded before the entry into force of the partial revision.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

The Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel, and Zurich established the Swiss Chambers' Arbitration Institution offering arbitration services governed by the Swiss Rules of International Arbitration ("Swiss Rules") which were last amended in June 2012.

In addition, Switzerland hosts many dispute resolution institutions, including the Dispute Settlement Bodies of the World Trade Organization (the Understanding on Rules and Procedures Governing the Settlement of Disputes entered into force on 1 January 1995), and the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center (WIPO Arbitration Rules, as well as WIPO Expedited Arbitration Rules last amended in June 2014). The Court of Arbitration for Sports (CAS) is also located in Switzerland (Lausanne).

Apart from the Code of Sports-related Arbitration issued by the CAS which was amended as per 1 January 2019, none of the rules of the aforementioned institutions have been amended in 2019.

7. What are the validity requirements for an arbitration agreement under the laws of your country?

A valid arbitration agreement in international arbitration must meet minimum requirements of form and substance. In terms of formal requirements, the arbitration agreement must be made in writing, by telegram, telex, facsimile or any other means of communication allowing it to be evidenced by text. Strictly speaking, signature or exchange of the arbitration agreement is not required as long as the parties' agreement can otherwise be evidenced based on written documents. The revised chapter 12 of the PILA is expected to provide for a relaxation of these formal requirements, allowing for an arbitration agreement to be validly concluded even if only one party fulfils the aforementioned formal requirements.
As regards content requirements, such arbitration agreement must stipulate the parties' intent to resolve a determined or determinable dispute by way of arbitration, thereby excluding the jurisdiction of the state courts.

The same conditions apply to arbitration agreements in domestic arbitration pursuant to art.

357 and 358 CPC.

With regard to the criteria on substance, an international arbitration agreement is deemed valid if it displays the legal requirements for a mutual party intent concerning the essential aspects either based on (i) the law chosen by the parties to specifically govern the arbitration agreement, or (ii) the law governing the subject matter of the dispute (i.e. in general the underlying contract), or (iii) Swiss law.

8. Are arbitration clauses considered separable from the main contract?

The concept of severability of the arbitration clause is explicitly stipulated in art. 178 para 3 PILA and art. 357 para 2 CPC. Both provisions provide for the arbitration agreement not to be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not yet arisen.

9. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

In domestic arbitration, art. 376 para 2 CPC expressly provides the possibility for claims between the same parties to be joined in the same arbitration proceeding, provided that these claims are factually connected and the subject of corresponding arbitration agreements between the respective parties. In contrast, the legislation on international arbitration is silent in this regard. As regards the appointment of arbitrators in multi-party disputes, art. 362 para 2 CPC stipulates that the state court at the place of arbitration ("juge d'appui"), may nominate the entire arbitral tribunal, if seized by the parties after their failure to designate the arbitrators. The revised PILA is expected to also include such solution for international multi-party arbitration proceedings.

Apart from the above, Swiss law does not provide specific provisions on multi-contract arbitration. However, if an arbitration is for instance conducted under the Swiss Rules, separate arbitral proceedings may be consolidated pursuant to art. 4 para 1 of the Swiss Rules. The decision on the consolidation of separate proceedings is made by the arbitral tribunal after consulting with both, the parties and any confirmed arbitrator in all proceedings, taking into account the relevant circumstances of the arbitral proceedings in question. Consolidation is

equally possible if the parties to the separate arbitral proceedings are not identical.

10. In what instances can third parties or non-signatories be bound by an arbitration agreement?

Whether in international arbitration an arbitration agreement can be extended onto a non-signatory third party must always be assessed on a case-by-case basis. Pursuant to the Swiss Federal Tribunal's case law, an extension of the arbitration agreement onto non-signatory third parties may in the following scenarios be possible:

- A non-signatory third-party may become subject to an arbitration agreement based on an implied intent, typically expressed by such party's conduct. Under certain circumstances, an interference by a third party in the negotiations or performance of a contract containing an arbitration clause may lead to the applicability of such arbitration clause to the interfering third party.
- Unless express language in the arbitration clause determines otherwise, third party beneficiaries of agreements with arbitration clauses may generally invoke such arbitration clauses when raising claims under the pertinent agreements, even though these third party beneficiaries have not signed the agreement in question.
- In case of assignment of contracts containing an arbitration clause, the arbitration clause is generally also deemed to have been assigned onto the assignee.
- Under the alter ego doctrine, also referred to as the piercing of the corporate veil doctrine, a non-signatory party can be bound by an arbitration agreement, if such non-signatory party can be regarded as an alter ego of a party formally bound by the arbitration agreement. Such assumption requires that a party exerts complete and exhaustive control over another party and has misused such control to such extent that it may be appropriate to disregard the separate legal forms of the two parties and treat them as one entity. However, in Switzerland the separate corporate forms of companies will only under exceptional circumstances be disregarded, such as in case of fraud or blatant abuse of rights.
- It is a matter of debate in Switzerland whether the group of companies doctrine applies in Switzerland. In any event, it is submitted that in many instances where one would apply such doctrine to extend the scope of an arbitration agreement onto a third party, there is a similar likelihood to successfully achieve an extension invoking the doctrine of implied intent of the third party onto whom the agreement is to be extended (see above).

11. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

According to art. 187 para 1 PILA the law applicable to the substance in international arbitration is primarily determined by the parties' explicit or implicit choice of law. In the absence of such choice, the arbitral tribunal applies the rules of law with which the underlying agreement has its closest connection.

In domestic arbitration, art. 381 CPC provides for the arbitral tribunal to decide either according to the rules of law chosen by the parties or based on equity if authorised by the parties. In a subsidiary manner, the arbitral tribunal "shall decide according to the law that an ordinary court would apply".

12. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

In international arbitration, art. 177 para 1 PILA and the case law of the Swiss Federal Tribunal provide for a broad definition of disputes deemed arbitrable as any dispute of financial interest, i.e. any claim that ultimately pursues an economic purpose, may be subject of an arbitration procedure. Thus, also monetary claims in family and inheritance law, monetary claims relating to intellectual property and competition as well as antitrust law are deemed arbitrable in Switzerland. Thus, solely matters concerning the legal status (e.g. marriage, separation, divorce, matrimony, paternity, adoption etc.) and some matters relating to insolvency law (opening of bankruptcy proceeding, arrest etc.) are deemed non-arbitrable in international arbitration.

In contrast thereto, the definition of arbitrability in Swiss domestic arbitration is more restrictive than its understanding in Swiss international arbitration. Pursuant to art. 354 CPC, a dispute may only be submitted to an arbitral tribunal if the parties are free to dispose over the rights and duties in question. In particular and contrary to the situation in international arbitration, labor law disputes in a domestic context are solely arbitrable if the respective arbitration agreement was concluded a minimum of one month after the end of the employment relationship (art. 341 para 1 Swiss Code of Obligations). In addition, labor law rights confirmed by the Swiss Code of Obligations as non-waivable will also not be deemed arbitrable in a domestic context.

The notion of arbitrability in Switzerland did not undergo any major changes throughout the last few years. The interpretation of arbitrability continues to be broad, particularly in international arbitration. Also the partial revision of the PILA will not change this situation.

13. In your country, are there any restrictions in the appointment of arbitrators?

In general, there are no restrictions on the appointment of arbitrators, apart from the requirements of independence and impartiality. As an exception to the foregoing, in domestic arbitration only the conciliation authority may be appointed as arbitral tribunal in matters relating to the lease and usufructuary lease of residential premises (art. 361 para 4 CPC).

Although the IBA Guidelines on Conflict of Interest in International Arbitration have no statutory value, the Swiss Federal Tribunal indicated that the IBA Guidelines on Conflict of Interest in International Arbitration may serve as valuable instrument when verifying the independence and impartiality of arbitrators. Furthermore, the Swiss Federal Tribunal has ruled that the co-arbitrators and the chairperson are subject to the same degree of independence.

14. Are there any default requirements as to the selection of a tribunal?

Art. 179 para 2 PILA states that the state court at the place of arbitration ("juge d'appui") may be seized by the parties (or one of the parties) to appoint the arbitrators of an arbitration proceeding if the parties have failed to designate the arbitrators – whether in their arbitration agreement (e.g. directly or by reference to institutional rules of arbitration or by providing for an alternative mechanism or authority to appoint the arbitrators) or thereafter.

15. Can the local courts intervene in the selection of arbitrators? If so, how?

In both the international and the domestic arbitration, the court at the seat of the arbitral tribunal may intervene and appoint, challenge, remove or replace an arbitrator upon request of

a party to the arbitration proceeding (art. 179 et seq. PILA and art. 367 et seq. CPC). When seized, the court ("juge d'appui") must accept and act on the request to appoint an arbitrator unless a summary examination reveals that no arbitration agreement exists between the parties.

16. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

The appointment of an arbitrator may be challenged based on three grounds (art. 180 para 1 PILA and art. 367 CPC), namely, (i) if the appointed arbitrator does not have the qualification agreed upon by the parties, (ii) if the rules of arbitration agreed upon by the parties provide a ground for challenging the arbitrator, and (iii) if circumstances giving rise to reasonable doubts as to the arbitrator's independence exist.

A party that wishes to challenge an arbitrator it itself nominated, or in whose appointment it participated, may only do so on grounds that have come to its attention after the appointment. The grounds for challenge must be notified to the arbitral tribunal and the other party without delay.

In case the parties have not agreed on a procedure for challenging an arbitrator (including by means of referring to institutional rules of arbitration), the competent court at the seat of the arbitral tribunal shall take a final decision (art. 180 para 3 PILA).

17. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The authority of a truncated tribunal is not expressly stipulated by Swiss law. However, in both domestic and international arbitration, an arbitral award rendered by an arbitral tribunal that was not properly constituted may be challenged before the Swiss Federal Tribunal (art. 190 para 2(a) PILA and art. 393(a) CPC).

The Swiss Federal Tribunal particularly held that in a case where the arbitrator resigned without cause the remaining arbitrators may only proceed with the consent of the parties or after a new

arbitrator was appointed. Should the remaining arbitrators nevertheless proceed, the arbitral tribunal may be deemed no longer regularly constituted amounting to a violation of article 30 para 1 of the Swiss Federal Constitution and article 6 of the European Convention on Human Rights. In a later decision, the Swiss Federal Tribunal clarified that the aforementioned circumstances should be distinguished from a situation where a party-appointed arbitrator, without formally tendering his or her resignation, is refusing to collaborate or obstructing the proceeding. The Swiss Federal Tribunal held that in such situation the arbitral tribunal is still considered to be regularly constituted and may continue if a majority of the members of the tribunal decide so.

The majority of the legal scholars consider that the resigning arbitrator must be replaced unless the parties agree otherwise or the applicable arbitration rules provide differently.

In its arts. 13 and 14 the Swiss Rules provide for a specific procedure in case an arbitrator has to be replaced. According to art. 13 of the Swiss Rules, the Arbitration Court established by the Swiss Chambers' Arbitration Institution and comprising experienced international arbitration practitioners set a time-limit for the parties to appoint a new arbitrator pursuant to the regular procedure stipulated in arts. 7 and 8 of the Swiss Rules. The Arbitration Court may only in exceptional circumstances and after consulting with the parties and the remaining arbitrators either directly appoint the replacement arbitrator or, after the closure of the proceedings (pursuant to art. 13 para 2 of the Swiss Rules), authorise the remaining arbitrator(s) to proceed with the arbitration and render any decision or award. Finally, art. 14 of the Swiss Rules stipulates that as a rule the proceeding shall resume at the stage reached when the replaced arbitrator ceased to perform his or her function, unless the arbitral tribunal decides otherwise.

18. Are arbitrators immune from liability?

The legal relationship between the arbitrator and the parties (receptum arbitri) is to be qualified according to the law at the seat of arbitral tribunal (lex arbitri). According to Swiss case law and the legal doctrine, the arbitrator is obliged to personally fulfill all his/her duties with all due care. Throughout the proceedings, arbitrators are committed to independence and impartiality.

The liability of arbitrators is considered to be limited to the event of unlawful intent or gross negligence. However, in case of breach of duties by the arbitrator, parties are likely to in the first instance challenge the arbitration award and only subsequently attempt to hold the arbitrator liable for damages. In addition, an arbitrator may be liable if he/her accepts an appointment without disclosing a reason for refusal that finally leads to refusal or revocation of

the arbitration award in appeal proceedings.

In Swiss Rules arbitration, art. 45 Swiss Rules declares the exclusion of liability of, inter alia, the arbitrators for any act or omission in connection with arbitration conducted under the Swiss Rules, except if such act or omission is shown to constitute intentional wrongdoing or gross negligence.

19. Is the principle of competence-competence recognised in your country?

The principle of competence-competence applies to arbitral tribunals based on art. 178 para 1 PILA.

Swiss court practice has established principles favouring arbitration over state court litigation, at least where the parties have agreed on arbitration seated in Switzerland. When a state court's jurisdiction is contested based on the existence of an arbitration agreement, Swiss court practice directs any state court seized to refer the matter for review to the arbitral tribunal stipulated in the arbitration agreement in question, if the arbitration agreement on its face appears to be valid and capable of being performed by the parties. This is referred to as the negative effect of competence-competence, which applies in Switzerland with regard to arbitral tribunals seated in Switzerland. Thus, if an arbitration agreement provides for arbitration seated in Switzerland, a state court (wrongly) seized by a party must even in case of doubt refrain from reviewing the arbitration agreement (i.e. its validity and scope) and refer the matter to arbitration.

20. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

At least with regard to arbitral tribunals seated in Switzerland, Swiss court practice has established principles favouring arbitration over state court litigation. As per the "negative effect" of "Kompetenz-Kompetenz", if the jurisdiction of the state court seized is contested based on the existence of an arbitration agreement, the state court ought to refer the matter for review to the arbitral tribunal stipulated in the arbitration agreement in question, unless the

arbitration agreement on its face appears to be invalid and incapable of being performed by the parties (art. 7 PILA). Thus, if an arbitration agreement provides for an arbitral tribunal seated in Switzerland, a state court seized by a party will only summarily examine whether the alleged arbitration agreement is invalid and/or not covering the dispute.

21. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

In accordance with art. 181 PILA and art. 372 CPC arbitral proceedings are deemed commenced from the moment one of the parties seizes the arbitral tribunal designated in the arbitration agreement or, in the absence of such designation in the arbitration agreement, when one of the parties initiates the procedure for the constitution of the arbitral tribunal or requests to conduct conciliation proceedings agreed upon by the parties to precede the commencement of arbitral proceedings.

There are no procedural provisions relating to limitation periods under the Swiss arbitration laws. Swiss law does not qualify limitation periods as procedural but rather as a matter of substance and limitation periods are therefore subject to the lex causae. Hence, the law applicable to the substance of the contract in dispute determines the duration of a limitation period as well as the procedural actions that will toll limitation periods.

22. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

In the first place, it is noted that there are very little statutory rules in Switzerland concerning state immunity. Also the question whether a state or state entity may invoke its immunity in connection with the commencement of arbitration proceedings is not expressly regulated.

As one of the very few rules, in terms of international arbitration art. 177 para 2 PILA stipulates that a state, an enterprise held by a state, or an organization controlled by a state may not invoke its own law to contest its capacity to be party to an arbitration agreement or use its own

laws as a defence against the arbitrability of the dispute. The legal doctrine, for the most part, agrees that it can be derived from the ratio legis of the aforementioned provision that it is not permissible for a state or a state entity to plead immunity from jurisdiction before an international arbitral tribunal seated in Switzerland.

The legislation on domestic arbitration does not contain a provision comparable to art. 177 para 2 PILA. Thus, it remains uncertain whether immunity is a permissible defence in domestic arbitrations.

23. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

Except where a party fails to appoint an arbitrator when establishing the arbitral tribunal (in which case the state court will step in in lieu of the defaulting party), Swiss law does not entrust the state courts at the seat of the arbitral tribunal with authority to compel parties to arbitrate.

After an arbitral tribunal has been established, it is up to the arbitral tribunal to deal with a defaulting party. As Swiss law requires the arbitral tribunal to treat parties equally and to ensure the parties' right to be heard, the arbitral tribunal must ensure that the parties – including non-participating parties to a proceeding – are properly served and informed. If these conditions are met, a default award is generally considered valid and enforceable.

In Swiss Rules arbitration, art. 28 Swiss Rules stipulates the procedure for the arbitral tribunal in case a party fails to take procedural acts. Provided that the parties are duly notified, the arbitral tribunal may proceed with the arbitration in case one of the parties fails to appear at a hearing without showing sufficient cause for its failure. On the same basis, the arbitral tribunal may render an award based on the evidence available to it if a party fails to produce evidence.

24. Can local courts order third parties to participate in arbitration proceedings in your country?

In Switzerland, state courts cannot order parties or third parties to arbitrate. However, if the taking of evidence or other procedural acts require the assistance of the state courts (e.g. due to the fact that arbitral tribunals do not have coercive powers), such participation may be

requested from the state court at the seat of the arbitral tribunal either by the arbitral tribunal itself or by a party to the arbitration with the consent of the arbitral tribunal (art. 184 para 2 PILA and art. 375 para 2 CPC). In particular, state courts have the power to order third parties to give evidence in the course of an arbitration proceeding (cf. also below question 26).

25. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Disputing parties in Swiss arbitration proceedings can, just as in ordinary state court litigation, benefit from the entire array of interim relief available under Swiss domestic law.

Pursuant to art. 262 CPC any interim measure suitable to prevent the imminent harm may be ordered. In particular, an injunction, an order to remedy an unlawful situation, an order to a register authority or to a third party, performance in kind, and the payment of a sum of money in the cases provided by law may be applied for by arbitrating parties.

In contrast to interim relief from state courts, in case of interim relief requested from the arbitral tribunal, even interim relief not known under Swiss law may theoretically be granted.

Swiss law allows for an arbitral tribunal to grant interim relief unless the parties to an arbitration agreement agreed otherwise (art. 183 para 1 PILA and art. 374 para 1 CPC). State courts' assistance in connection with interim relief is, however, of critical importance based on the following grounds:

• If not complied with voluntarily by the relevant party, interim relief issued by an arbitral tribunal requires the involvement of the state courts to be enforced.

• The arbitral tribunal has no competence and thus no basis to issue binding and enforceable orders against third parties, e.g. banks in case of freezing orders, since the latter will normally not be part of the arbitration agreement.

• As interim relief is generally connected with matters of urgency it will often need to be given ex parte, without hearing the counterparty. In contrast to state courts and unless the specific applicable institutional rules of the arbitration expressly provides otherwise (as the Swiss Rules do – in contrast to e.g. the ICC Rules), arbitral tribunals are likely not grant interim relief ex parte, but only once the counterparty is heard.

In order for an arbitral tribunal to be able to grant interim relief, it must be established and in a position to deal with the motion for interim relief. Various institutional arbitration rules (including the Swiss Rules and the ICC Rules) provide for the possibility to call on a so called emergency arbitrator to grant interim relief even before the arbitral tribunal has been formally established in accordance with the applicable institutional rules.
State courts can be called on to grant interim relief before constitution of the arbitral tribunal. If the requested relief is granted, the party submitting the motion will be required to commence arbitral proceedings within 10 days following receipt of the court's order for interim relief.

26. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Art. 184 PILA and art. 375 CPC stipulate rules for taking of evidence and the participation of the state courts. In principle, the arbitral tribunal takes the evidence itself. If, however, taking of evidence or other procedural acts require the assistance of the state courts, e.g. due to the fact that arbitral tribunals do not have coercive powers, such participation may be requested from the state court at the seat of the arbitral tribunal by the arbitral tribunal itself or by a party to the arbitral tribunal with the consent of the arbitral tribunal.

In such event, the state courts will either request a third party to produce the evidence requested in front of the arbitral tribunal or will itself hold an evidentiary hearing to collect the evidence. In the latter case, both the members of the arbitral tribunal, as well as the parties to the arbitration, may attend such evidentiary hearing and request the minutes of such a hearing. If a third party refuses to cooperate without justification, the court may, inter alia, impose a disciplinary fine, order the use of compulsory measures or impose the costs caused by such refusal on such third party.

27. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

In general, representatives and arbitrators in arbitral tribunals do not need to be lawyers or

admitted to the bar. Parties may, however, only be represented by attorneys authorised by Swiss Law or a treaty in appeal proceedings before the Swiss Federal Tribunal.

According to Swiss law, lawyers are required to observe various professional rules such as duty of diligence, independence, avoidance of conflict of interest, and the attorney-client-privilege. Violation of these rules may result in disciplinary action by the cantonal supervisory authorities. In addition, the Swiss Bar Association stipulated various professional standards which should be observed by its members.

28. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Both the Private International Law Act and the Swiss Code of Civil Procedure are silent on the question of confidentiality. However, it is generally acknowledged that under the arbitrators' agreement with the parties (receptum arbitri), the members of the arbitral tribunal are under a duty of confidentiality with regard to the arbitration proceeding, deriving from the general duty of care under an agency agreement as stipulated in art. 398 para 2 of the Swiss Code of Obligations.

The parties to an arbitration agreement may agree upon confidentiality obligations in the arbitration agreement or choose arbitration rules that contain specific provisions on confidentiality. In the absence of clear provisions, it is unclear whether the arbitration agreement contains an implied duty of confidentiality of the parties or whether such duty could be derived from the duty of good faith pursuant to art. 2 para 1 of the Swiss Civil Code; legal commentators are divided on the issue, and the view favouring such implied duty has not been corroborated by case law thus far.

As regards the Swiss Rules on International Arbitration, art. 44 provides for a duty of confidentiality that applies unless the parties expressly agree otherwise in writing. The arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Arbitration Court and the Secretariat and the staff of the individual chambers are all bound by this duty of confidentiality. Furthermore, according to art. 44 para 2 of the Swiss Rules, the deliberations of the arbitral tribunal are confidential.

29. How are the costs of arbitration proceedings estimated and allocated?

Swiss law does not stipulate how the costs of arbitration proceedings are estimated and allocated. In general, one can expect the arbitral tribunal to follow the costs follows the event-rules, because said rule is also followed by the state courts in Switzerland.

In Swiss Rules institutional arbitration, according to art. 38 Swiss Rules the arbitral tribunal shall determine the costs of the arbitration proceeding, as well as its apportionment in its award. In principle, also in Swiss Rules arbitration the costs are borne by the unsuccessful party. However, the arbitral tribunal may apportion the costs taking into account the circumstances of the case.

30. Can pre- and post-award interest be included on the principal claim and costs incurred?

The payment of interest on principal claims and costs is governed by the applicable substantive law to the matter in dispute (art. 187 para 1 PILA). If Swiss law is the applicable substantive law to the matter, pre- and post-award interest can be included on both, the principal claim and the costs incurred.

31. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

As a principle, according to art. 190 para 1 PILA, an award rendered by an arbitral tribunal with its seat in Switzerland is final and thus enforceable from its notification.

As regards the validity requirements of arbitral awards rendered by an arbitral tribunal with its seat in Switzerland, art. 189 para 1 PILA stipulates that the awards shall be rendered in conformity with the rules of procedures or the form agreed upon by the parties. Subsidiarily, in case of absence of such agreement para 2 of art. 189 PILA provides for the arbitral tribunal to

render the award by a majority or, in the absence of a majority, by the chairman alone. The award must be in writing, supported by reasons, i.e. substantiated and motivated, dated and signed. The chairman's signature suffices.

The recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention (art. 194 PILA). Foreign awards are recognized and enforced in Switzerland on the basis of the New York Convention, regardless of reciprocity.

Moreover, it is important to note that Switzerland does generally not foresee a separate procedure for the mere recognition of an award. Rather, the court seized will examine within the enforcement procedure or as a preliminary question whether the foreign award can be recognized. In fact, an independent request for recognition may only be granted under exceptional circumstances, if a party is able to demonstrate that it has a legitimate interest in having this issue determined.

32. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Both, domestic and foreign awards are recognised and enforced in adversarial proceedings, i.e. following the filing of a motion for recognition and enforcement by the applicant, the defendant is invited to submit an answer to such motion.

Since recognition and enforcement proceedings are summary and the ground for objection as well as the evidence available to the defendant are limited, the estimated timeframe for the recognition and enforcement of an award is rather short, i.e. between a few days and some weeks.

33. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

A domestic award rendered by an arbitral tribunal with its seat in Switzerland is final and thus enforceable from its notification, equally to a decision rendered by a Swiss state court (art. 190

para 1 PILA and art. 387 CPC).

Foreign arbitral awards are recognised and enforced in Switzerland as per the New York Convention (art. 194 PILA). In accordance with art. IV para 1 (a) and (b) of the New York Convention, a party requesting the recognition of a foreign award must thus submit (i) a duly authenticated original award or a duly certified copy thereof, and (ii) the original of the arbitration agreement or a duly certified copy thereof. In practice, however, the authentication of the award will only be required if the party resisting enforcement disputes its authenticity.

In addition, as per art. IV para 2 of the New York Convention, the filing of a certified translation of the aforementioned documents is required if said award or arbitration agreement was not issued in an official language of the country in which the recognition of the award is requested. Thus, in Switzerland the translation of the award and the arbitration agreement into one of the official languages of Switzerland (German, French and Italian) is necessary. However, according to the Swiss Federal Tribunal, such language does not need to be the administrative language of the canton in which recognition of the award is sought – it is, however, advisable.

In general, according to the Swiss Federal Tribunal, and against the backdrop of the principle of favorability (favor recognitionis), the state courts are required to adopt a pragmatic, flexible and not formalistic approach when determining if a foreign award is recognizable and enforceable in accordance with the New York Convention. In general, arbitral awards will only be denied enforcement if one or more of the defences stipulated in art. V of the New York Convention is established.

It is important to note that in general, there is no need for a separate exequatur for the mere recognition of an award in Switzerland. In fact, an independent request for recognition may only be granted under exceptional circumstances, provided that a party is able to demonstrate that it has a legitimate interest in having this issue determined, without at the same time seeking the enforcement of the award.

34. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts?

In principle, Swiss procedural law does not impose any limits on the final remedies available to an arbitral tribunal with its seat in Switzerland. The available remedies are depending on the law applicable to the substance of the dispute. If the dispute is governed by Swiss law, the

following main categories of final remedies exist:

- Performance
- Specific performance;
- damages, if specific performance is no longer possible (no punitive damages are available);
- abstaining from or tolerating certain acts or a situation; and
- issuing a declaration of will
- Creation, modification, or termination of a legal relationship; and
- Declaratory Relief

In accordance with art. V para 2(b) of the New York Convention, Swiss courts are not enforcing remedies that are considered to be contrary to Swiss public policy. In this regard, in particular treble and punitive damages are critical. According to the Swiss Federal Tribunal, such damages might infringe Swiss public policy, depending on the particular circumstances of the case.

35. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

In Switzerland an arbitral award is, in principle, deemed final, which is why appeals against arbitral awards do – as a rule – not have suspensive effect. In practice, however, when an appeal is filed, the parties are nevertheless asked not to commence enforcement proceedings. Both in international and domestic arbitration an arbitral award, whether final or partial, may only be appealed to the Swiss Federal Tribunal (art. 191 PILA and art. 389 para 1 CPC), i.e. the principle of one instance of appeals applies, such instance being the highest court in the country. In domestic arbitration, pursuant to art. 390 para 1 CPC, the parties are given the option to agree that the arbitral award shall first be appealed to the cantonal high court at the seat of arbitration.

Swiss Law provides for only a very restricted number of grounds on which arbitral awards may be appealed. In international arbitration the grounds for appeal provided by art. 190 para 2 PILA are: (i) the irregular composition of the arbitral tribunal, (ii) an incorrect decision on jurisdiction, (iii) the fact that the arbitral tribunal rendered a decision beyond the claims made by the parties or did not answer all claims raised, (iv) the violation of equal treatment of the parties or their right to be heard, and (v) a violation of the (procedural or substantive) principles of public

policy.

In domestic arbitration arbitral awards may be appealed on two additional grounds pursuant to art. 393 CPC, namely (i) if the arbitral award is arbitrary in its result due to it being based on findings that are obviously contrary to the facts as stated in the case file or because it constitutes an obvious violation of law or equity, and (ii) if the costs and compensation fixed by the arbitral tribunal are obviously excessive.

Appeals to the Swiss Federal Tribunal are governed by the Federal Tribunal Act (the CPC governs the procedure for appeals to the cantonal court if so chosen by the parties in domestic arbitration). In both proceedings the appeal must be filed in writing within 30 days of notification of the award.

Chances of success with appeals against arbitral awards are remote. Based on available statistics, the chances of success to appeal an arbitral award on all available grounds other than jurisdiction range around 7%, while appeals on grounds of lack of jurisdiction have a statistical chance of success of about 10%. In addition, appeals proceedings are conducted rather swiftly. A decision of the Swiss Federal Tribunal can generally be expected to be rendered within 6 to 8 months following the lodging of the appeal.

36. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

The parties may waive any possibility at all to appeal an arbitral award if all parties to the dispute have their domicile or place of business outside Switzerland. Such waiver can either be outlined in the arbitration agreement or be made subsequently by written declaration of the parties. Such waiver must, given its implications, be made expressly be the parties. Reference to institutional rules providing for the finality of arbitral awards do not suffice for such purposes.

In a recent much-noticed decision, the Swiss Federal Tribunal demonstrated the far-reaching consequences of a waiver of the right to appeal against an arbitral award rendered in an international context. Particularly, the Swiss Federal Tribunal found that (i) in the absence of any explicit limitation thereto, a valid waiver of the right to appeal against an arbitral award applies to all grounds for appeal stipulated in art. 190 para 2 PILA, namely also the arbitrators' alleged lack of independence and impartiality and (ii) that a waiver of the right to appeal

against an arbitral award will, at least in certain circumstances, also exclude a party from requesting a review of such arbitral award by means of the extraordinary remedy of revision.

37. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

No specific Swiss law has been adopted on the matter of sovereign immunity. Established case law in Switzerland, however, is based on the concept of limited immunity of states, according to which immunity from enforcement action is accorded for a state's public acts (acta iure imperii), as opposed to a state's private acts (acta iure gestionis), i.e. acts that concern an activity that a private party could have similarly engaged in. With regard to the latter, immunity may not apply.

In addition, assets dedicated to sovereign tasks are immune from enforcement unless the state or state entity in question has expressly waived such immunity.

Immunity may not apply if the counterparty can successfully demonstrate a sufficient nexus (e.g. Switzerland being the place of origin or place of performance of the obligation in question) between the state's commercial (as opposed to public) act and Switzerland. The possibility of confiscation of a state's assets acting under private law can therefore not be excluded provided that no treaty between the respective state and Switzerland determines the assets in question to be immune from enforcement.

In a recent landmark decision, the Swiss Federal Tribunal held that the prerequisites established by case law for the enforceability of a claim against a foreign state, in particular the aforementioned establishment of a sufficient nexus to the territory of Switzerland, also apply in Swiss enforcement proceedings governed by the New York Convention.

38. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

Only in exceptional cases can a third party or non-signatory be bound by an award rendered by

an arbitral tribunal. Such cases include third parties being legal successors or guarantors of one of the parties to the arbitration or the awards modifying legal relationships inter-omnes (e.g. annulment of a decision by the shareholders' assembly).

As a general rule, a separate challenge of the recognition of an award is generally – for the parties bound by an arbitration award – not available under Swiss law, as there is no special separate procedure for the recognition of an award. Only the decision of the Swiss court that decides on the recognition within the enforcement procedure may be challenged.

As a rule, the effects of an award on the merits only extends to the parties involved in the arbitral proceedings and the award does generally not have any effect vis-à-vis third parties. Therefore and outside the aforementioned exceptional cases, a third party will in ordinary circumstances lack the necessary legitimate interest to challenge the recognition of an award.

39. Have courts in your jurisdiction considered third party funding in connection with arbitration proceedings recently?

Despite the recent increase of third party funding, the issue remains unregulated under Swiss law. There are no rules or restrictions on third-party funders in Switzerland. While, the Swiss Federal Tribunal has expressly confirmed that third party funding is, as a rule, admissible, certain limitations on influencing the client-attorney relationship will need to be respected by third party funders. In particular, in order to avoid any conflict of interest, the third party funder should not unduly interfere with the client-attorney relationship.

40. Is emergency arbitrator relief available in your country? Is this frequently used?

The possibility of emergency arbitrator relief is not stipulated in the PILA or the CPC. However, a state court can at all times (i.e. even before constitution of an arbitral tribunal) be seized to obtain interim relief.

The revised Swiss Rules in effect as from 1 July 2012 introduced the possibility to apply for emergency arbitrator relief. Pursuant to art. 43 Swiss Rules a party requiring urgent interim measures before the constitution of the arbitral tribunal may submit an application for

emergency relief to the secretariat of the arbitration court. Based on the statistics of the Swiss Chambers' Arbitration Institution, emergency arbitrator relief is not very actively used with only3% of all cases submitted in the year 2015 representing emergency relief procedures.

41. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

There are no mandatory or default provisions under Swiss statutory law providing for an expedited or simplified procedure. In line with the principle of party autonomy, it is up to the parties to design the arbitration proceeding to fit their needs, irrespective of the amount in dispute (art. 182 para 1 PILA and art. 373 para 1 CPC).

For cases administered by the Swiss Chambers' Arbitration institution, art. 42 Swiss Rules provides for an expedited procedure. The provisions on the expedited procedure apply to every proceeding with an amount in dispute not exceeding CHF 1 million or if the parties so agree. In such expedited proceeding, there is, as a rule, only one exchange of submissions and only one hearing. Furthermore, subject to certain exceptions, the arbitral tribunal must render the award within six months from the date when the case file was first transmitted to the arbitral tribunal. According to 2015 statistics 43 % of all disputes submitted to the Swiss Chambers' Arbitration Institution were conducted under the expedited procedure.

Also WIPO and CAS provide for expedited procedures.

42. Have measures been taken by arbitral institutions in your country to promote transparency in arbitration?

There are currently no broad initiatives to strengthen transparency in arbitration. On the contrary, Art. 44 Swiss Rules explicitly stipulates that all awards, orders, and materials submitted by a party in the course of an arbitral proceeding are to be kept confidential, unless agreed otherwise by the parties.

43. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Gender- and other diversity in international arbitration is actively promoted by the Swiss Chambers' Arbitration Institution. In particular, gender diversity is a debated topic. According to the statistics for the year 2015 issued by the Swiss Chambers' Arbitration Institution, 47% of the arbitrators appointed by the court were women. However, the percentage of women appointed by the parties or the co-arbitrators amounted to only 5%.

In 2016 the Swiss Chambers' Arbitration Institution has signed the "Equal Representation in Arbitration Pledge" committed to improving the representation of women in arbitration.

44. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

To our knowledge, the Swiss Federal Tribunal has not yet decided on the question of whether an award that has been set aside in another jurisdiction may nevertheless be enforced or vice versa. As regards enforcement proceedings in Switzerland governed by the New York Convention, art. V para 1(e) stipulates that a party can object to the enforcement of an award, inter alia, if the award has been set aside by a competent authority in the country of its origin. In addition, the Swiss Federal Tribunal has held in recent cases that the recognition and enforcement of an award does not aim at attributing to the award any other effects than those already pertaining to the award in its state of origin.

45. Is corruption an issue that is regularly raised in your jurisdiction? What standard do local courts apply for proving of corruption?

Switzerland has a strong and effective legal framework to combat corruption. On a scale from 0 (highly corrupt) to 100 (very clean), Transparency International's Corruption Perceptions Index 2017, a recognized source for comparing worldwide corruption, ranks Switzerland 3rd with a score of 85 (the average score in Western Europe is 66). In particular, the provisions of the Swiss Criminal Code are pivotal elements of the fight against corruption. Arts. 322ter to

322novies of the Swiss Criminal Code prohibit active and passive bribery of public officials, including arbitrators, as well as active and passive bribery of private individuals which are prosecuted ex officio. In a recent order issued by the Office of the Attorney General of Switzerland, a company was ordered to pay a sum of CHF 94 Mio. for not having timely implemented sufficient organizational measures (such as sufficient training, internal rules, internal audits, etc.) to avoid that certain employees and consultants paid bribes to foreign state officials.

As regards the standard of proof, the determination of the facts of the case must be based on all available and admissible evidence and must be justifiable as well as objectively comprehensible. A defendant may only be convicted if the criminal court is convinced, beyond any reasonable doubt, that all conditions for criminal liability are met.

46. Have there been any recent court decisions in your country considering the definition and application of “public policy” in the context of enforcing or setting aside an arbitral award?

In accordance with art. V para 2(b) of the New York Convention, the Swiss courts will not enforce remedies that are considered to be contrary to Swiss public policy. In this regard and potentially of some practical relevance, according to the Swiss Federal Tribunal, treble and punitive damages might infringe Swiss public policy, depending on the particular circumstances of the case. Whilst this and also a limited selection of other matters have been noted by the Swiss Federal Tribunal as theoretically conceivable to violate Swiss public policy, it should be noted that the application of the public policy exception in Switzerland is extremely narrow. Since the coming into force of the PILA almost 30 years ago arbitral awards have only in two instances been set aside on grounds of a violation of public policy. Accordingly, objecting the enforcement of foreign awards in Switzerland on such grounds has only a remote chance of success.

47. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with

respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

Switzerland as a non-member of the European Union is not bound by the judgments of the Court of Justice of the European Union. While the decisions of the supreme court of the European Union are reviewed in Switzerland, the judgment in Slovak Republic v Achmea BV (Case C-284/16) has, thus far, not found its way into Swiss jurisprudence, and there have been no recent court decisions in Switzerland which have expressly or otherwise considered the aforementioned judgment.

However, against the backdrop of ongoing negotiations between Switzerland and the European Union in relation to the draft of a new framework agreement, the judgment rendered by the Court of Justice of the European Union has been a topic of discussion amongst Swiss legal scholars, and gave rise to the question of whether the Court of Justice of the European Union would opt for a similar approach in relation to an agreement between the European Union and a third party as it has with respect to inter-European Union bilateral investment treaties.

48. ## Have there are been any recent decisions in your country considering the General Court of the European Union’s decision Micula & ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

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