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International Arbitration

Switzerland: Trends & Developments

Dr András Gurovits and Anja Vogt
Niederer Kraft Frey

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Trends and Developments

Contributed by:
Dr András Gurovits and Anja Vogt
Niederer Kraft Frey see p.6

A Popular International Hub

Switzerland is one of the most important and sought-after hubs for international arbitration. According to the latest survey on international arbitration conducted by the School of International Arbitration at Queen Mary University of London in 2018, Switzerland is one of the leading arbitration venues worldwide, with 38% of the respondents including at least one Swiss city or Switzerland itself as their preferred seats. Geneva ranked among the top five most preferred seats after London, Paris, Singapore and Hong Kong, and is the third most preferred seat in Europe and Africa after London and Paris. Furthermore, 33% of respondents were of the opinion that Switzerland will benefit most from the impact of Brexit.

Switzerland's status as one of the primary hubs for international arbitration was further confirmed by the recently published statistics on dispute resolution by the International Chamber of Commerce (ICC) for the year 2019. In ICC arbitration proceedings, Switzerland was the third most chosen country for arbitral seats after the UK and France, Swiss nationals were the second most frequently appointed arbitrators, and Swiss law was the second most chosen law. In addition, Switzerland 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 Center for Arbitration and Mediation.

Switzerland's tradition of arbitration ties in with the tradition of good offices in foreign policy. Within this framework, Switzerland has played and continues to play a role as facilitator and supports parties in the search for negotiated solutions without taking sides itself. While historic literature mentions the first arbitration proceedings in the Middle Ages, the Alabama Arbitration Procedure of 1872 is commonly understood to have marked the birth of modern public arbitration. At that time, the governments of the USA and the UK 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 20th century when all Swiss cantons regulated arbitration. The Swiss Private International Law Act (PILA) came into force in 1989 and its 12th Chapter governs international arbitration in Switzerland. For the area 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. The creation of a uniform arbitration law in the sense of a "code unique" (covering both international and domestic arbitration) was, however, deliberately waived at that time.

Switzerland's popularity in international arbitration is perhaps primarily due to its modern and arbitration-friendly legislation, namely the 12th Chapter of the PILA governing international arbitration proceedings seated in Switzerland. With the objective of further increasing Switzerland's attractiveness for international arbitration proceedings, the 12th Chapter of the PILA was subject to legislative revisions, which will be discussed in more detail below.

In the course of the preparatory work for the revision of the PILA, the Swiss Federal Office of Justice interviewed various stakeholders of international arbitration in Switzerland. The discussion partners named Switzerland's excellent legal framework, and the high quality and consistency of the Swiss Federal Tribunal's case law in the field of international arbitration as main factors for Switzerland's popularity in 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 venue for arbitration.

All this is complemented, according to the respondents, by the traditional appeal of Switzerland as a place for business, factors 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 being also available in English.

Revision of the Swiss Legislative Framework

Almost 30 years after its enactment in 1989, 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, which gives 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 and sports arbitration.

Triggered by a motion of the Swiss Parliament, the 12th Chapter of the PILA was revised in order to further strengthen its cur-

rent strengths as well as to increase legal certainty and clarity. On 19 June 2020, the Swiss Parliament approved the final draft bill of the revised 12th Chapter of the PILA, which is expected to enter into force in early 2021.

The revised legislation enshrines the case law of the Swiss Federal Tribunal, removes ambiguities and makes the law more user-friendly. In addition, developments in international trade and other arbitration laws worldwide have been taken into account and a number of innovations aimed at further optimising the Swiss legislation on international arbitration were incorporated.

The key changes to Chapter 12 of the PILA are outlined below.

Submissions to the Swiss Federal Tribunal in English

English is the predominant language in international arbitration. In appeal proceedings, the Swiss Federal Tribunal already accepts submission of exhibits in English with the consent of the other parties. The revised 12th Chapter of the PILA makes a further step in this context and stipulates the possibility of filing submissions to the Swiss Federal Tribunal in English.

In view of the strict conditions for appeals against an arbitral award (see below), it is not expected that the number of appeal proceedings brought before the Swiss Federal Tribunal will increase because of this change. However, the admission of submissions 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.

Modernisation of form requirements

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 ought to be concluded in writing, by telegram, telex, tele-copier or in any other form of transmission "which allows proof of the agreement by text". In order to modernise the wording of the aforementioned provision on formal requirements for arbitration agreements, and in line with the already applicable formal requirements for domestic arbitration, the revised bill now includes any written communication, which permits the arbitration agreement to be evidenced by text (including emails and, presumably, even text messages provided that the sender can be reliably identified).

In addition, the revised PILA 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 – for example, a will or the articles of incorporation of a foundation, a trust or association.

Strengthening user-friendliness

The PILA competes with foreign legal systems. User-friendliness is therefore extremely important and, to further this, the revised 12th Chapter of the PILA implements the following new measure: 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 may not be familiar with the Swiss legal system. For foreign parties it is, therefore, 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 are, therefore, replaced by direct regulations in the PILA itself, so that the PILA solely and comprehensively regulates international arbitration. In addition, the PILA now also governs the appointment, the refusal and the dismissal of a member of an arbitral tribunal.

Clarification of the scope of application

According to its current Article 176, the PILA applies if "at least one party has its domicile or habitual residence in Switzerland when concluding the arbitration agreement". In its practice, the Swiss Federal Tribunal examined the circumstances of the parties to the arbitration proceedings, and not of the parties that concluded the arbitration agreement when it assesses whether an arbitration was international or domestic.

As a result of this practice of the highest court in Switzerland, the question as to whether the CPC (domestic arbitration) or the PILA (international arbitration) was to apply could not be determined at the time of the conclusion of the arbitration agreement, but only when either of the parties initiated arbitration proceedings.

This practice was criticised in the legal doctrine for creating legal uncertainty, particularly with regard to contracts with several parties, as it is often impossible to predict which parties to the contract will be involved in a subsequent legal dispute. The revised PILA specifies that its provisions shall apply to an arbitration if, at the time of conclusion of the arbitration agreement, at least one of the parties to the agreement had its domicile, habitual residence, seat or place of business outside Switzerland.

Appointment of arbitrators by the juge d'appui

As per the current Article 179 of the PILA, the state court at the seat of the arbitration (the juge d'appui) has jurisdiction to appoint or replace arbitrators if the parties have not agreed on a procedure or rules in this regard. However, in the event that the arbitration agreement did not specify the seat of the arbitration or merely referred to a seat "in Switzerland", the parties were prevented from having the arbitrator(s) appointed or replaced as provided for in Article 179 of the PILA.

In order to close such gap, the revised PILA provides for the jurisdiction of the court first seized to appoint the arbitrator(s) in the event that the parties have not agreed on a seat. Thereafter, it is up to the arbitral tribunal thus constituted to choose a seat within Switzerland or anywhere in the world, in the event that the parties have not agreed on a specific country.

Furthermore, the revised PILA provides for the state court to appoint all members of the arbitral tribunal in multiparty arbitrations, in the event that the parties fail to appoint the arbitrators.

Assistance of state courts in foreign arbitration proceedings
As arbitral tribunals are not vested with sovereign power, in the event that parties do not voluntarily comply with interim and provisional measures or the production of evidence ordered by a tribunal, the enforcement of such measures and orders requires the assistance of state courts. In order to facilitate and expedite such procedure, the revised PILA grants arbitral tribunals and parties to arbitration proceedings outside Switzerland direct access to the Swiss state courts at the place where enforcement is sought.

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 is, in principle, final when communicated. According to the PILA, however, an arbitral award can be challenged before the Swiss Federal Tribunal for some limited grounds – namely, 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;
- the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims submitted;
- the parties were not treated equally or their right to be heard in an adversarial proceeding was not respected; or
- 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 for the exclusion of the right to appeal against an arbitral award if the parties expressly agree so in the arbitration agreement or subsequent written agreement and provided that neither party has a domicile, place of habitual residence or place of business in Switzerland.

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

In our view, the following decisions of the Swiss Federal Tribunal in arbitration matters during the past 12 months are particularly worthy of note.

Extension of arbitration agreement to non-signatory under the New York Convention
In a landmark decision, the Swiss Federal Tribunal upheld a decision by a lower court, in which an arbitration agreement was extended to a non-signatory as such third party had intervened in the performance of the main contract.

While the Swiss Federal Tribunal found that an arbitration agreement included in a contract is in principle only binding on the contracting parties, it held that the arbitration agreement may, under certain conditions, also bind persons that have not signed the contract and are not mentioned therein, namely in case of the assignment of the claim, the assumption of a debt or the assumption of a contract. In addition, an arbitration agreement may be extended to a non-signatory if such third party is involved in the performance of a contract and shows by its conduct that it intends to be party to the contract and the arbitration clause.

Arbitrator's unilateral contact with party counsel after appointment
The applicant filed an appeal against an award of an ad hoc arbitral tribunal on the grounds that one member of the tribunal proposed by the other party lacked independence and impartiality.

The applicant argued that such lack of independence and impartiality was evidenced (inter alia) by a 12-minute telephone conversation between said arbitrator and the appointing party's counsel, which took place two days after the appointment of the arbitrator and four days prior to the constitution of the tribunal. The appellant argued that the contact and alleged discussion of material aspects of the case raised considerable doubts as to the independence of the arbitral tribunal, even if the arbitral tribunal justified such unilateral contact as an attempt to appoint a chairperson suitable for both parties.

The Swiss Federal Tribunal found that unilateral contacts between the party or its counsel and an arbitrator are not in any event prohibited. The Swiss Federal Tribunal referred to the IBA Guidelines on Party Representation and its own case law and held that it is broadly accepted that the two co-arbitrators may be in contact with the nominating parties with the purpose of selecting an appropriate chairperson. However, after the

appointment of a chairperson, unilateral contact is no longer permitted.

Appointment decision of an arbitral organisation is not contestable

The Swiss Federal Tribunal analysed whether a decision rendered in an international arbitration proceeding by which an arbitral institution (in this case the Court of Arbitration for Sport) appointed an arbitrator may be challenged before the Swiss Federal Tribunal. The Swiss Federal Tribunal held that its case law on this issue with regard to domestic arbitration was applicable mutatis mutandis to international arbitration, and found that decisions of an arbitral institution concerning the constitution of an arbitral tribunal are not arbitral awards and as such may not be appealed against before the Swiss Federal Tribunal. The appointment may only be reviewed in the context of an appeal against the first contestable decision of the arbitral tribunal.

Prerequisites of opting out of the CPC for more restrictive grounds of appeal as per the PILA

The Swiss Federal Tribunal was required to decide whether parties to domestic arbitration proceedings are permitted to validly exclude (opt-out) applicability of the CPC (which governs domestic arbitration) in favour of the 12th Chapter of the PILA (which governs international arbitration) which would mean that less grounds for a challenge of the arbitral award before the Swiss Federal Tribunal would be available.

The Swiss Federal Tribunal held that such opting-out is permissible if the following conditions are met:

- the parties have expressly excluded the applicability of the CPC;
- the parties have agreed on the exclusive applicability of the 12th Chapter of the PILA; and
- such agreement has been made in writing.

In addition, the Swiss Federal Tribunal clarified that the parties may agree to an opting out at any time until the arbitral award is rendered, and indicated (but did not expressly state) that after the constitution of the arbitral tribunal such opting-out would require the consent of the arbitral tribunal.

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Authors

Dr András Gurovits is a partner with Niederer Kraft Frey and specialises in arbitration, technology, sports, and corporate. He represents Swiss and international clients across industries in complex transactions, with a particular focus on technology, and in arbitration. His practice covers advisory, contentious and non-contentious work. Dr 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. Dr Gurovits is also admitted as a fellow of the Chartered Institute of Arbitrators (FCIArb), and he is a member of the Panel of Arbitrators of the Hong Kong International Arbitration Centre (HKIAC).

Anja Vogt is a senior associate with Niederer Kraft Frey's dispute resolution team and regularly represents clients of various industry sectors in international arbitration proceedings. Anja is a member of the Swiss Arbitration Association and, notably, of the Swiss Arbitration Association's below 40 group (ASA below 40, the Groupe des Jeunes Praticiens de l'Arbitrage). She publishes regularly on matters relating to international dispute resolution and has been recognised as a rising star in the field of arbitration.

Niederer Kraft Frey

Niederer Kraft Frey Ltd
Bahnhofstrasse 53
8001 Zurich

Tel: +41 58 800 80 00
Fax: +41 58 800 80 80
Email: nkf@nkf.ch
Web: www.nkf.ch

NIEDERER KRAFT FREY