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Switzerland

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Introduction

Located in the heart of Europe, Switzerland is a civil law country with a long tradition as one of the major global venues for international commercial arbitration and commercial litigation. Switzerland has a reliable court system and its judges are known for their impartiality and independence. Civil proceedings in Switzerland are comparably fast and not overly complicated or costly. Broad pre-trial discovery proceedings, jury trials and long hearings are foreign to Switzerland.

Arbitration

The Swiss cities of Geneva and Zurich are among the world's leading venues for international commercial arbitration, with approximately 300 arbitrations commenced in these cities annually. In addition, Switzerland is home to several specialised arbitration centres, such as the Tribunal Arbitral du Sport / Court of Arbitration for Sport, with its steadily increasing number of new arbitration requests each year (599 in 2016[1]). Traditionally, cities in Switzerland have been among the top venues for arbitration proceedings conducted under the ICC arbitration rules worldwide. In a survey conducted on behalf of the European Parliament, arbitration practitioners were asked to recommend the five most favoured States as the seat of an international arbitration. Of the participating practitioners, 85.62% recommended Switzerland, more than any other State included in the study, and 13.6% more than the next most recommended State.[2]

One of the factors that has contributed to Switzerland becoming one of the world's leading international arbitration jurisdictions is its arbitration-friendly legislation. Other factors include an excellent arbitration infrastructure, high professional standards in the legal profession, as well as Switzerland's reputation for neutrality and political stability. In principle, international arbitrations seated in Switzerland are governed by Chapter 12 of the Swiss Private International Law Act (the **PILA**[3]), which is currently being revised to reflect the latest developments in international commercial arbitration. The PILA's rules on international arbitration provide for a short and concise legal framework that affords the parties maximum flexibility and recognises the principle of party autonomy to the fullest extent possible. The parties are free to agree on all aspects of the arbitral procedure, and to tailor the arbitration to the specific needs of their case, subject only to the principle of due process (the parties' right to be heard and to equal treatment).

The PILA only provides for a very limited number of grounds to challenge the award. Unless the award violates public policy, there is no review on the merits of the award. Challenges to an award are heard exclusively by the Swiss Federal Supreme Court (the highest court in Switzerland) and are generally adjudicated within a time period of four

to six months from the date of the challenge. The Swiss courts have a well-established, arbitration-friendly practice, and both legal and commercial infrastructure are well suited to serve the needs of international arbitration proceedings. Switzerland has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**[4]), and foreign arbitral awards are enforced in Switzerland as a matter of course.

State court proceedings

State court proceedings in civil matters are primarily governed by the Swiss Civil Procedure Code of 1 January 2011 (the **CPC**[5]). The CPC has been in force for about eight years. In March 2018, the Swiss Federal Council started the consultation phase regarding a partial revision of the CPC. Some of the main objectives of this revision are addressed below.

The CPC, as well as Switzerland's substantive civil law, is federal law, whereas the organisation of the judicial system on a cantonal level remains the responsibility of the cantons. Federal law, however, provides for certain guidelines as to the organisation of the judiciary. In particular, the CPC as a general rule requires the cantons to establish a court system with two cantonal instances: a court of first instance, and an appellate court as a second instance for first (and usually full) appellate review.

In international cases, State court proceedings are also regulated by the rules of private international law of Switzerland set forth in the PILA and other bilateral and multilateral instruments. Switzerland has ratified a large number of international treaties that are relevant in an international context, including but not limited to the following:

- the Hague Convention of 1 March 1954 on Civil Procedure;[6]
- the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;[7]
- the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the **Hague Service Convention**);[8]
- the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;[9]
- the European Convention of 16 May 1972 on the Calculation of Time-Limits;[10]
- the European Agreement of 27 January 1977 on the Transmission of Applications for Legal Aid;[11]
- the Hague Convention of 25 October 1980 on International Access to Justice;[12] and
- the revised Lugano Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the **Lugano Convention**).[13]

As a general rule, civil proceedings before State courts must be preceded by an attempt at conciliation before a conciliation authority, although the CPC also contains certain exceptions to this requirement. One such exception applies where the respondent is domiciled abroad, in which case the claimant may waive conciliation proceedings. Conciliation proceedings are initiated by an application for conciliation containing, among other things, the prayers for relief and usually a brief description of the matter in dispute. Upon filing the conciliation application, the case becomes pending (*lis pendens*) and the statute of limitations is interrupted. Conciliation proceedings are confidential and

rather informal. Within two months of receipt of the application, an oral hearing takes place at which the conciliation authority attempts to reconcile the parties in an informal manner. If no agreement is reached, the conciliation authority issues the authorisation to proceed, allowing the claimant to file the claim before the competent court of first instance within three months after issuance of the authorisation to proceed.

Court proceedings are initiated by filing a fully substantiated statement of claim. The statement of claim must contain, among other things, the prayers for relief, a statement regarding the value in dispute, all relevant allegations of facts, and a specific notice of the evidence offered for each allegation of fact. Along with the statement of claim, the claimant has to submit the original copy of the authorisation to proceed as well as the available physical records (documents) to be offered in evidence.

Upon receipt of the statement of claim, the court usually orders the claimant to pay an advance on costs. At the request of the respondent, the claimant must also provide security for party costs where the claimant is not domiciled in Switzerland, appears to be insolvent, owes costs from prior proceedings, or where there otherwise appears to be a considerable risk that the respondent's party costs, if awarded, would not be paid.

Thereafter, the court serves the respondent with a copy of the statement of claim and sets a deadline for the respondent to submit a statement of defence. If the respondent is domiciled abroad, service is effected in accordance with the applicable bilateral or multilateral conventions, namely the Hague Service Convention. The court may order a second exchange of written submissions if the circumstances so require, or directly summon the parties to the main hearing. State court proceedings are generally structured in three stages. In a first stage, the factual assertions are pleaded and the evidence is offered. The second stage is the actual evidentiary phase during which the evidence is taken by the court (*e.g.* witness testimony, filing of expert reports, production of documents, etc.). The last phase of the proceedings is the post-hearing stage where the parties may comment on the result of the evidence-taking and, thereafter, the judgment is rendered.

In principle, civil proceedings before Swiss courts follow an adversarial model. Accordingly, it is up to the parties to present the court with the relevant facts in support of their case and to submit the respective evidence, unless the law provides that the court has to establish the facts and to take the evidence *ex officio*.[14] Conversely, pursuant to the principle *iura novit curia*, the courts always apply the law *ex officio*.

As an exception to the principle of double instance, the cantons are granted the option of establishing a specialised commercial court for commercial and corporate disputes. These courts serve as the first and sole cantonal instance. Where a dispute is heard by a commercial court, the claimant has to file his statement of claim directly with the court, without the need to first participate in conciliation proceedings. Challenges to judgments rendered by a commercial court are handled directly and exclusively by the Swiss Federal Supreme Court. Four cantons in the German-speaking part of Switzerland (Zurich, Aargau, Bern and St Gallen) have established such a specialised commercial court. The commercial courts, in particular the commercial court of the canton of Zurich, are frequently chosen as a legal venue by international contracting parties. An important feature of the procedure before the commercial court of the canton of Zurich is the built-in conciliation/settlement hearing, during which a majority of cases are settled. The purpose of such a hearing is to assist the parties in settling their dispute amicably. To this end, a delegation of the commercial court usually presents its preliminary and non-binding

analysis of the case to the parties and comments on the strengths and weaknesses of their respective allegations. Settlement hearings take place at an early stage of the proceedings (usually after the first exchange of written briefs) and prior to the taking of evidence. On average, about 65% of all cases are settled by the parties in the course of such a hearing.

Proceedings before Switzerland's State courts are conducted in one of Switzerland's official languages (German, French or Italian, depending on the canton). However, some judges at the commercial court of Zurich are sometimes willing to conduct the settlement hearing in English if a foreign party is involved and provided no party objects.

Decisions of the cantonal appellate courts (or the commercial courts) may then be appealed to the Swiss Federal Supreme Court in Lausanne, provided that the amount in dispute is least CHF 30,000.[15] Proceedings before the Federal Supreme Court are governed by the Federal Act on the Federal Supreme Court. The grounds for appeal are limited to violations of federal law, international public law or constitutional law (including violations of a cantonal constitution). As a general rule, the Federal Supreme Court is bound by the facts established by the lower cantonal court, unless they were established in a manifestly erroneous manner, and new facts and evidence may not be submitted.

In 2017, the Swiss Federal Supreme Court heard 8,029 new cases (7,743 in 2016) and concluded 7,782 cases (7,811 in 2016). Out of these 7,782 cases, 1,805 cases concerned civil/commercial matters including cases relating to the Federal Debt Enforcement and Bankruptcy Act (the **DEBA**). Out of these 1,805 cases, 46 cases were appeals against an international arbitral award. In 2017, the average duration of proceedings in civil matters before the Swiss Federal Supreme Court was 132 days.

2018 partial revision of the Swiss Civil Procedure Code

In March 2018, the Swiss Federal Council launched the process of a partial revision of the CPC. Among other things, the revision aims at: (i) facilitating the process of asserting mass damages; (ii) reducing cost barriers which in the past prevented claimants from commencing State court proceedings; (iii) introducing a legal privilege for in-house counsel in civil proceedings; (iv) strengthening the conciliation proceedings which over the past eight years have effectively reduced the case load of the courts; and (v) improving the procedural tools for the coordination of parallel cases (third-party intervention, joinder of actions, joinder parties).

The Swiss Federal Council proposes to introduce a reparatory group action for the collective assertion of monetary claims. This new tool is designed to facilitate the assertion of mass damages claims, e.g. in product liability cases, improper trade cases or cases of antitrust violations involving a large number of claimants. The draft bill proposes that the individual claims of the represented group members are raised by a non-profit organisation which, according to its bylaws, aims at safeguarding the interests of the affected group of persons. The Federal Council proposed an opt-in system, meaning that an affected person is not bound by a judgment unless he or she authorised the organisation to raise claims on his or her behalf. Another noteworthy proposal in the revision draft is the proposed introduction of collective settlement proceedings. According to the related provisions, an organisation that is authorised to initiate a group action may also enter into a collective settlement agreement with the other party. Such a settlement can be approved by the court and declared binding upon all affected parties. In such a case, all affected parties are bound by the collective settlement agreement, unless they declare their withdrawal from the agreement within a time-period of at least three months.

Privilege and disclosure

Document production

Broad (pre-trial) discovery proceedings, as known in common law jurisdictions, do not exist in Switzerland. The scope of document production under the CPC is rather limited. Generally, the court will order a litigant or a third party to produce documents requested by a party where a material allegation of fact is disputed; the requested documents are suitable to prove the alleged and disputed facts; the documents are sufficiently described; and the documents are in the custody of the requested party (or arguably, where the documents are not in the custody of the requested party, the requested party is entitled to retrieve them from a third party). Such production orders are issued at an advanced stage of the proceedings when the court takes evidence.

Additionally, the CPC provides for 'precautionary evidence-taking' (pre-trial production of documents or witness questioning) that may be initiated before an ordinary proceeding is pending. This procedure is available where a specific statutory right so provides, or where the requesting party credibly demonstrates either that the evidence it seeks is at risk or that it has a legitimate interest worthy of protection. Notably, the need to assess the prospects of potential litigation does not itself constitute such a legitimate interest and without more, will not justify precautionary evidence-taking. Rather, in order to justify a legitimate interest, the requesting party must credibly demonstrate that certain particular facts, if proven, would give rise to a claim against the opposing party, and that the evidence it is seeking through precautionary evidence-taking would enable it to prove such facts. If these facts are pleaded in a sufficiently substantiated manner, a party may be able to obtain the relevant evidence in order to assess the prospects of litigation. However, where the party is seeking the production of documents, it should be recalled that the particular prerequisites for document production mentioned above also apply in the case of precautionary evidence-taking.

Court orders for document production against the opposing party are not enforceable. Rather, where the opposing party refuses without valid reason to comply with a production order, the court will take this into account when appraising the evidence. On the other hand, court orders ordering the production of documents by third parties may be enforced under the threat of criminal sanctions.

Given the limited possibilities of obtaining documents in civil proceedings, parties often attempt to collect information through criminal proceedings, or based on the right to access arising out of data protection law. Regarding the latter, the Swiss Supreme Court has held that requesting access to one's personal data from a bank with a view to potential litigation against that bank does not constitute an abuse of a person's (data protection) rights, among other things. This broad interpretation of the right to access personal information, together with the broad definition of personal data contained in the Data Protection Act – encompassing all information relating to identified or identifiable individuals and legal entities – renders the right to access arising out of data protection law a potentially powerful tool for the gathering of evidence with a view to potential litigation.

Privilege

Registered lawyers (excluding in-house counsel) are subject to a duty of professional secrecy. This duty of professional secrecy covers all confidential information connected with a particular lawyer-client relationship, provided that the mandate does not relate to mere ancillary activities such as asset management or board member activities. A lawyer's duty of professional secrecy is reflected in the relevant Swiss procedural codes, which provide

that lawyers, clients and third parties may invoke legal privilege to refuse the disclosure of privileged documents. These procedural provisions thus complement the lawyers' duty of professional secrecy by providing comprehensive legal privilege encompassing lawyers' documents. In recent decisions, however, the Swiss Federal Supreme Court held that certain reports prepared by attorneys in the course of internal investigations may not always be covered by attorney-client privilege, namely if the investigation relates to compliance with anti-money laundering regulation and the performance of a bank's related obligations which the bank outsourced to external counsel. The decisions are heavily criticised in legal writing.

In contrast, in-house counsel are not covered by a duty of professional secrecy under Swiss law. As a result, in-house counsel cannot withhold information from the courts and authorities, and their documents are not protected by a legal privilege.

Costs and funding

Costs

Procedural costs include court costs (judgment fee, the costs of evidence-taking, etc.) and party costs (the costs of legal representation and expenses). Generally, the losing party must bear the procedural costs. If neither party is deemed to have entirely prevailed on the merits of the dispute, the procedural costs are allocated in accordance with the outcome of the case. In case of a settlement, the costs are usually charged to the parties according to the terms of the settlement agreement. Both the court costs and the party costs are determined and allocated *ex officio* according to the tariffs for the procedural costs. Each canton has its own rate scale that is normally based on the amount in dispute. Procedural costs, therefore, differ from canton to canton.

In the canton of Zurich, for example, the following rates apply in ordinary civil proceedings:

- if the value in dispute amounts to CHF 100,000, the party costs are about CHF 11,000 and the court costs CHF 9,000;
- with a value in dispute of CHF 1m, both court costs and party costs amount to approx. CHF 31,000 each;
- where the value in dispute is CHF 10m, party costs amount to approx. CHF 106,000 and court costs to CHF 120,000.

Court costs may be increased (by one third or, in exceptional cases, up to a maximum of 200%) or decreased, depending on the complexity of the case and the time spent by the court on the matter. If a case is settled in court, the parties are usually granted substantial reductions in their court costs. Similarly, party compensation may be increased or decreased by one third, depending on the complexity of the case, the responsibility of the lawyer, and the time and efforts spent by the lawyer on the matter. In practice, however, the compensation paid by the losing party rarely covers the actual legal costs incurred by the prevailing party.

Reduced rates for court costs and party costs apply in summary proceedings, in proceedings concerning real estate leases and tenancy disputes, and non-pecuniary disputes. Employment law proceedings with a value in dispute of up to CHF 30,000 are free of charge. The procedural costs of appellate proceedings before cantonal courts and the Federal Supreme Court are determined pursuant to similar rules.

As explained, courts may order the claimant to make an advance payment up to the amount of the expected court costs. In practice, it is standard procedure for courts to request advance

payments, although certain exceptions apply. The court costs, which are generally fixed in the final decision, are set off against the advance paid by the claimant and the balance is collected. If the claimant prevails, it will be granted the right to recover the costs from the respondent. As a result, the claimant bears the risk of the respondent becoming insolvent. With respect to the taking of evidence, each party has to advance the costs for taking the evidence it has requested.

Further, at the request of the respondent, the claimant may be required to provide security for potential party compensation where the claimant has no residence or registered office in Switzerland, appears to be insolvent, owes costs from prior proceedings, or where there otherwise appears to be a considerable risk that such compensation, if ordered, will not be paid.

If the claimant does not provide the ordered advance or security, the court will declare the action inadmissible. Claimants, and in particular foreign claimants, therefore face significant financial hurdles in initiating civil litigation before the Swiss courts.

Litigation funding

Court proceedings in Switzerland are usually funded by the parties themselves. However, a party may seek legal aid if it lacks the financial resources to fund the proceedings and if the case does not seem devoid of any chance of success. Legal aid can comprise an exemption from the obligation to pay an advance on costs and to provide security; an exemption from court costs; or the appointment of a legal representative (attorney) by the court, if necessary, to protect the rights of the party. In theory, legal aid is also available to companies, provided, among other things, that the object in dispute is the company's only remaining asset.

According to the Federal Supreme Court's practice, third-party litigation funding is in principle protected by the fundamental right of economic freedom. Litigation funding by an independent third party is thus permitted in Switzerland, provided that the (funded) party's lawyer acts independently from – and free from any instructions of – the third-party funder. The attorney representing the party in court is, however, prohibited from participating in the funding. This is due to the fact that attorneys in Switzerland are generally not allowed to make arrangements with their clients pursuant to which their fees are determined exclusively by reference to the proceeds in the case of a success (*pactum de quota litis*). These principles have been confirmed by the Federal Supreme Court (decision 2C_814/2014 of 22 January 2015).

Despite its permissibility, litigation funding is still not very common in Switzerland. The conditions for obtaining third-party litigation funding are usually rather strict. It may therefore be difficult, but not impossible, to obtain litigation funding in Switzerland. The funding party usually requires a success fee. While the fees vary from case to case, a fee of about 30% of the outcome of the litigation is not unusual.

Interim relief

In general, interim measures may be ordered if the applying party can credibly establish that: (i) a right to which it is entitled has been violated or that a violation is anticipated; (ii) the applying party holds the entitlement which the requested interim measure is intended to protect (*prima facie* case); and (iii) the violation threatens to cause harm to the applicant that cannot be easily remedied (*see* Article 261 CPC). In cases of special urgency, Swiss courts may also order interim measures on an *ex parte* basis, *i.e.* without hearing the opposing party. This is the case where there is a risk that the enforcement of the measure will be frustrated if the opposing party is informed of the requested relief before it is ordered. Once

an *ex parte* measure is ordered, the court will either summon the parties to a hearing, which must take place immediately, or set a deadline for the opposing party to comment on the measures in writing. Thereafter, the court must again decide on the request immediately.

According to the CPC, the court may order whatever is necessary and suitable to prevent imminent harm to the applicant. By way of example, the court may render an injunction prohibiting the opposing party from continuing with a certain unlawful conduct, or it may order such party to remedy an unlawful situation.

A party may submit a request for interim relief either before or after the main proceedings have become pending. If interim measures are ordered before the main proceedings have become pending, the court must set a deadline (usually of about 30 days) for the applicant to file the principal action. If no principal action is filed within this deadline, the interim measures become automatically ineffective.

The court decides on a request for interim relief in summary proceedings. Consequently, the primary means of evidence to obtain interim relief are documents. An important feature that has been newly introduced in the CPC is the precautionary taking of evidence, which is also governed by the rules on interim measures (*see* above).

If the opposing party provides appropriate security, the court may refrain from ordering interim measures. In addition, any person having reasons to believe that an *ex parte* interim measure or an attachment will be requested against him or her can file a protective brief. The purpose of the protective brief is to allow such person to set out in advance of any request its position in response to the other party's anticipated arguments. The opposing party will only be served with the protective brief if it initiates the anticipated *ex parte* proceedings for interim relief. If no application for interim relief is filed within six months, the protective brief becomes ineffective.

Enforcement of judgments

Main sources of law

The main sources of law governing the enforcement of State court judgments and arbitral awards are – on a national level – the CPC and the DEBA, and – in international cases – the Lugano Convention, the PILA and the New York Convention.

Enforcement of domestic judgments

The enforcement of Swiss judgments is governed by the CPC (Articles 335 *et seq*.) and – to the extent the judgment relates to the payment of money – by the provisions of the DEBA. A judgment rendered by a Swiss court is enforceable if: (i) it is final and binding and the court has not suspended its enforcement; or (ii) it is not yet legally binding (e.g. because an appeal can be filed against it), but its provisional enforcement has been authorised by the court. The court making the judgment on the merits is competent to directly order the necessary enforcement measures.

The party seeking the enforcement of the judgment has to file a request for enforcement with the enforcement court. The enforcement court decides in summary proceedings. The opposing party can comment on the request; however, if necessary, the enforcement court may order interim measures on an *ex parte* basis. If the judgment relates to the payment of money, the party seeking the enforcement can request the local debt collection office to issue a payment order against the other party. If the other party objects to the payment order, any enforceable judgment or arbitral award constitutes a valid title to set aside the objection.

Enforcement of foreign judgments and awards

a) *Judgments rendered in a signatory State of the Lugano Convention*

If the foreign judgment was rendered in a State which is a party to the Lugano Convention, the judgment will be recognised in Switzerland in accordance with the rules of that convention. There are only limited grounds for non-recognition. In particular, a judgment will not be recognised in Switzerland if recognition would be manifestly contrary to Swiss public policy or, if the judgment was rendered in default of appearance, the respondent was not served with the document which instituted the proceedings, or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence. Importantly, the Lugano Convention does not require the party seeking recognition to provide evidence that the document that instituted the proceedings was properly served on the respondent, *i.e.* that it was served in accordance with the provisions of the Hague Convention of 15 November 1965 on the Service Abroad. Under the Lugano Convention, service is deemed to be sufficient if it enabled the respondent to arrange for its defence.

Upon application of the party seeking enforcement, the foreign judgment will immediately be recognised and declared enforceable upon completion of the formalities provided for in the Lugano Convention. These formalities include submission of an original or authenticated copy of the judgment to be enforced, and of the certificate referred to in Article 54 of the Lugano Convention (*i.e.* the standard form in Annex V to be issued by the court or another competent authority of the State in which the judgment was rendered). The party against whom recognition is sought is not entitled to make any submission on the application. The respondent is heard on appeal only.

b) *Other foreign judgments and foreign arbitral awards*

Outside the scope of the Lugano Convention, the recognition and enforcement of a foreign State-court judgment is subject to the principles set forth in the PILA.

Under the PILA, a foreign judgment may be recognised in Switzerland if:

- the foreign court having rendered the judgment had jurisdiction according to PILA;
- no ordinary appeal can be filed against it or if it is final; and
- no grounds for refusal exist. In particular, recognition of a foreign judgment will be refused where doing so would be obviously irreconcilable with Swiss public order, or where the respondent can prove that: (i) it was not properly served; (ii) the judgment was reached in a procedure that violated basic principles of Swiss procedural law, in particular the right to be heard; or (iii) a dispute between the parties was first pending in Switzerland.

Whether the foreign court that rendered the judgment had jurisdiction must be determined on the basis of the criteria set forth in the PILA. The PILA sets forth the specific situations in which the jurisdiction of the foreign court will be recognised. These include: where a provision of the PILA provides for such jurisdiction; where the respondent was domiciled in the State in which the judgment was rendered; or, in matters of a financial nature, where the parties subjected themselves to the jurisdiction of the foreign court by means of an agreement that is valid under the rules of the PILA.

Foreign arbitral awards are enforced in accordance with the New York Convention. According to the Federal Supreme Court's practice, the formal requirements of Article IV New York Convention should not be applied too strictly (decision 5A_752/2011

of 9 February 2012). In particular, a Swiss court may enforce an English award even though no German translation was submitted by the applying party.

Attachment proceedings

A request for attachment will be granted if the creditor credibly establishes that: (i) it has an unsecured and matured claim against the debtor; (ii) assets belonging to the debtor are located in Switzerland; and (iii) a ground for attachment pursuant to Article 271 of the DEBA exists. By far the most relevant grounds for attachment in practice are the following two:

- the debtor does not live in Switzerland, and no other ground for attachment exists, provided that the claim has a sufficient connection with Switzerland or is based on a written recognition of debt pursuant to Article 82 (1) of the DEBA; and
- the creditor holds an enforceable title permitting the definitive setting-aside of an objection by the debtor in debt enforcement proceedings ("*definitiver Rechtsöffnungstitel*").

Examples of valid titles are enforceable domestic State court judgments or awards, court-approved settlements, or enforceable public deeds. The term "enforceable title" also relates to foreign arbitral awards and to foreign State court judgments (decision of the Federal Supreme Court 5A_355/2012 of 21 December 2012). As a result, any enforceable judgment or (foreign) arbitral award in the hands of a creditor entitles the creditor to attach assets of his debtor in Switzerland, provided that the creditor can credibly show that the foreign judgment or award can be recognised and declared enforceable in Switzerland.

The competent Swiss court – *i.e.* the court located either in the area in which the debtor has assets or in the area which the debt enforcement proceedings are officially based – can issue a Swiss-wide attachment order; it is therefore no longer necessary to initiate attachment proceedings in each district in which attachable assets are located.

If the requirements for an attachment order in Switzerland are not met, creditors may try to obtain a freezing order in another State that is a party to the Lugano Convention (in particular, a worldwide Mareva injunction of an English court), and then seek recognition of such order as well as a declaration of enforceability in Switzerland. As a rule, freezing orders are deemed to be judgments within the meaning of the Lugano Convention (and can thus be recognised in Switzerland), provided that the defendant was granted the right to be heard before the foreign court prior to the application for recognition and enforcement in Switzerland. By contrast, a foreign *ex parte* order (*i.e.* an order issued without the respondent being heard) cannot be recognised in Switzerland.

In a remarkable decision of November 27, 2017 (DFT 143 III 693), the Swiss Federal Supreme Court held that (i) a so-called "conservatory attachment" issued by a State court in Athens can be recognised and declared enforceable in Switzerland under the Lugano Convention; and (ii) the appropriate measure to actually enforce the foreign judgment in Switzerland is an attachment order pursuant to Article 271 of the DEBA, given that the Greek "conservatory attachment" operates *in rem* (rather than *ad personam*). In passing, the Federal Supreme Court also found that an English freezing order would have to be enforced in Switzerland as a preliminary measure pursuant to Article 340 of the CPC, and thus not in the form of an attachment pursuant to the DEBA.

International arbitration

Switzerland continues to be one of the most frequently chosen venues for international commercial arbitration. Over the last decades, Swiss arbitrators have been among the most

frequently chosen arbitrators; cities in Switzerland are among the most frequently chosen venues; and Swiss law among the most frequently chosen applicable laws. In addition to ICC proceedings, a number of other international arbitration proceedings are conducted in Switzerland, including *ad hoc* proceedings; proceedings under the Swiss Rules; and proceedings under the rules of one of the specialised arbitration centres such as the Tribunal Arbitral du Sport / Court of Arbitration for Sport.

International arbitration proceedings – defined as proceedings in which at least one party had its domicile in Switzerland at the time the arbitration agreement was executed – are generally governed by the rules of the PILA. However, the parties are free to opt out of the PILA and choose the rules of the CPC, which in principle govern domestic arbitrations. The rules of the CPC are much more detailed than those of the PILA and differ in certain relevant points.

Currently, Chapter 12 of the PILA is undergoing a review process. Since the existing provisions of the PILA remain a widely accepted standard for modern arbitration legislation, the review aims at brushing-up the arbitration framework by adopting certain best practices as well as some of the most important decisions of the Swiss Federal Supreme Court. Among other things, the released draft bill contains provisions relating to the possibility of pleading in the English language in appellate proceedings before the Swiss Federal Supreme Court.

Under the PILA there is only one instance of appeal in international commercial arbitration. All appeals must be brought before the Federal Supreme Court. The grounds for appeal under the PILA are very narrow: the award may only be set aside if the arbitral tribunal was constituted irregularly; wrongly accepted or declined jurisdiction; ruled *ultra* or *infra petita*; violated the parties' right to equal treatment or to be heard; or if the award itself violates public policy. In practice, only very few awards are set aside, and these have primarily been based on the grounds of lack of jurisdiction or violation of the right to be heard. Only one arbitral award has been successfully challenged on the ground that it breached *substantive* public policy (decision 4A_558/2012 of 27 March 2012, relating to a dispute between the Brazilian football player *Francelino da Silva Matuzalem vs. the Fédération Internationale de Football Association*, FIFA). An appeal to the Federal Supreme Court is normally adjudicated within four to six months.[16]

The CPC, on the other hand, permits the parties to choose to have a cantonal court hear the appeal, rather than the Federal Supreme Court. As to the grounds for appeal, in addition to the grounds set forth in the PILA, the CPC also permits arbitral awards to be set aside where they are arbitrary or based on an obviously incorrect application of the law or determination of the facts, or on a violation of equity. The grounds for appeal under the CPC are thus substantially broader than under the PILA.

Another feature of international arbitration proceedings under the PILA is that the parties – provided that no party is domiciled in Switzerland – may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive their right to appeal the arbitral award. The parties do not have this right under the CPC. Such a waiver is sometimes made in order to further expedite the resolution of the dispute and to ensure an increased level of confidentiality. While initially the Federal Supreme Court was very reluctant to enforce such advance waivers, requiring that the waiver of the appeal be express and clear, the court appears to have become more liberal in this respect. In its early decisions, the Federal Supreme Court refused to enforce general statements, providing that the award "shall be final and binding", or general waivers of challenges to the award. In a decision of 21 March 2011 (decision 4A_486/2010), however, the Federal Supreme Court concluded that the following statement, contained in the parties' arbitration agreement,

constituted a valid waiver of the parties' right to appeal:

"*The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law.*"

Similarly, in a decision of 3 April 2014 (4A_577/2013), the Federal Supreme Court confirmed that a statement pursuant to which "neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision" could only be understood in good faith as an expression of the parties' intent to waive their right to appeal the arbitral award, despite the rather unusual wording of the clause. Conversely, the Federal Supreme Court has maintained its position that a mere statement to the effect that the award shall be "final" still does not qualify as a valid waiver of the right to appeal (decision 4A_460/2013). According to the Supreme Court's practice, the parties' declaration to waive their right of appeal must reflect their unmistakable will to avail themselves of that opportunity and to opt out of the right to appeal an arbitral award to the Federal Supreme Court. Whether this is the case must be determined by interpretation of the arbitration agreement at hand.

In its decisions 4A_444/2016 and 4A_446/2016 of 17 February 2017, the Federal Supreme Court explained that the deadline for the filing of an appeal only begins to run upon receipt of the fully reasoned award, as opposed to the operative part of the award only.

In a decision of 27 February 2014 (4A_438/2013), the Federal Supreme Court reiterated its practice regarding the severability of the arbitration clause. The dispute related to a licence agreement which stated that after the expiry or termination of the licence, all rights and obligations of the parties would terminate but for some provisions. The arbitral tribunal accepted jurisdiction despite the termination of the agreement. On appeal, the Federal Supreme Court, by referring to the principle of autonomy of the arbitration clause, confirmed that it must generally be assumed that the arbitration clause contained in a contract is not affected by the expiry or termination of the contract, thereby underscoring the principle of severability of the arbitration clause as a cornerstone of arbitration.

On 7 July 2014 (decision 4A_124/2014), the Federal Supreme Court issued a judgment as to whether the pre-arbitration dispute resolution tier in the FIDIC General Conditions is mandatory and, if so, what the legal consequences of a failure to comply with this procedural requirement are. According to that ruling, arbitration proceedings may not be commenced without first completing the DAB procedure if the contract so provides. However, if the *ad hoc* DAB has not been constituted 18 months after it was requested, the responding party in the arbitration may no longer rely on the mandatory nature of the DAB procedure. In a further decision of 16 March 2016 (decision 4A_628/2015), the Federal Supreme Court held that in the case of a party's failure to comply with a contractual pre-arbitration dispute-resolution provision, the arbitral tribunal should stay the proceedings until the pre-arbitration dispute-resolution mechanism has been implemented, while the modalities of the stay (notably the time limit of the suspension) are to be determined by the arbitral tribunal. The Federal Supreme Court expressly rejected other options discussed in legal writing, namely the possibility of an award of damages and the option to reject the claim and terminate the proceedings, finding that a stay of the proceedings was the only reasonable solution which properly balanced the parties' interests. In a decision of 27 February 2014 (4A_438/2013), the Tribunal had ordered a stay of one month in order to allow the parties to follow the mandatory mediation proceeding. See also the Federal Supreme Court's decision 4A_492/2016 of 7 February 2017, according to which a former FIFA employee would have been required to apply to the FIFA dispute resolution chamber before commencing arbitration proceedings.

On 2 March 2017 (decision 4A_405/2016), the Federal Supreme Court held that a sole arbitrator's decision to grant a one-day extension for the filing of the statement of claim did not violate the principle of equal treatment. It also confirmed the views of legal scholars that under the Swiss Rules, a belated submission would not necessarily result in an inadmissibility of claims. On the other hand, on 6 March 2017 (decision 4A_490/016), the Federal Supreme Court rejected an alleged breach of due process, confirming an arbitral tribunal's decision not to consider arguments submitted in an incorrect format (by e-mail) and in an untimely manner (*i.e.* not in accordance with the agreed timetable).

Swiss Arbitration Centres (Swiss Chambers; Court of Arbitration for Sport)

The Swiss Chambers' Court of Arbitration and Mediation (www.swissarbitration.org) mostly administers commercial arbitrations, investment arbitrations being the exception. Nearly one third of the arbitrations are expedited proceedings, in which the award should be rendered within six months from the date the file is transmitted to the arbitral tribunal.

The Swiss Rules are widely acknowledged as an alternative to other mainstream rules of arbitration, in particular to the ICC Rules of Arbitration. Under Swiss law and under the Swiss Rules, the parties to an arbitration agreement have the right to request provisional, interim or emergency relief from a State court or from the arbitral tribunal. In the past, parties often had to seek provisional relief from a State court in case of particular urgency – and if the arbitral tribunal was not yet constituted. The revised Swiss Rules address the need to have a choice between the State court and the arbitral process also in these circumstances by clarifying that the arbitral tribunal has the authority to make *ex parte* provisional orders, and by introducing an emergency arbitrator proceeding.

In the case of an *ex parte* order, the order must be communicated to the other party at the latest together with the provisional order, and the other party must then be immediately granted the right to be heard. The effect of such an *ex parte* provisional order in practice remains to be seen, since efficient enforcement may be difficult. However, most parties comply voluntarily with the orders of an arbitral tribunal.

Under the rules on emergency arbitrator proceedings, parties to an arbitration agreement may opt out of the emergency arbitrator proceeding. If they have not done so, and if there is a need for a provisional measure, and the applying and the opposing party have entered into an arbitration clause providing for the application of the Swiss Rules, a party may apply for emergency relief even before the arbitral tribunal is constituted or even before arbitration proceedings are initiated. Upon receipt of the application (and payment of the advance for the emergency relief proceedings), the Swiss Chambers' Court of Arbitration will transfer the application to a sole arbitrator, unless it determines that there is manifestly no arbitration agreement, or it concludes that an arbitral tribunal should be constituted first. The sole arbitrator is expected to render the decision on the provisional measure within 15 days from the day the file was transmitted to the sole arbitrator.

The enforceability of the decision of the emergency arbitrator is unclear – regardless of whether it is called an interim award or an order. Enforcement will hardly be possible under the New York Convention, but it may very well be enforceable under the law of certain jurisdictions, such as Switzerland, where the State court judge will assist in the enforcement (Article 183(2) PILA).

The most important of the specialised arbitration centres is the Tribunal Arbitral du Sport / Court of Arbitration for Sport (TAS/CAS; www.tas-cas.org), which handles a large number of sports-related arbitrations.

Endnotes

1. http://www.tas-cas.org/en/general-information/statistics.html.
2. http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf.
3. Federal Private International Law Act of 18 December 1987, SR 291. An unofficial English translation of Chapter 12 PILA is available at http://www.arbitration-ch.org/asset/92989ed67945478fc27d8b28ce80276e/iprg-english-version.pdf.
4. SR 0.277.12. The English text of the New York Convention is available at http://www.uncitral.org/uncitral/de/uncitral_texts/arbitration/NYConvention.html.
5. Swiss Civil Procedure Code of 19 December 2008, SR 272. An unofficial English translation of the CPC is available at http://www.admin.ch/ch/e/rs/c272.html.
6. SR 0.274.12. The English text of the Convention is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=33.
7. SR 0.172.030.4. The English text of the Convention is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=41.
8. SR 0.274.131. The English text of the Convention is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.
9. SR 0.274.132. The English text of the Convention is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=82.
10. SR 0.221.122.3. The English text of the Convention is available at http://conventions.coe.int/treaty/en/Treaties/Html/076.htm.
11. SR 0.274.137. The English text of the Convention is available at http://conventions.coe.int/treaty/en/Treaties/Html/092.htm.
12. SR 0.274.133. The English text of the Convention is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=91.
13. SR 0.275.12. The English text of the Lugano Convention is available at https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/02-conv-prot-ann-corr09_en.pdf.
14. This is the case only in a limited number of matters, such as employment law disputes with a value in dispute not exceeding CHF 30,000, divorce proceedings or disputes between tenants and landlords.
15. In the case of a dispute relating to employment or tenancy law, the minimum value is CHF 15,000.
16. See the updated statistics for 2013 at http://www.arbitration-ch.org/pages/en/asa/news-&-projects/details/974.challenges-of-swiss-arbitral-awards-–-selected-statistical-data-as-of-2013.html.

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