Switzerland

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Switzerland is a contracting party to the New York Convention. It entered into force on 30 August 1965. Switzerland originally made a reciprocity reservation pursuant to article I(3) of the New York Convention, but withdrew it in 1993.

Switzerland is also a contracting party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. However, according to article VII(2) of the New York Convention, these treaties cease to have effect between contracting states to the New York Convention. As a consequence, the Geneva Convention has had no effect since 2007. Today, the Geneva Protocol applies only in relation to Iraq.

Finally, Switzerland is also a contracting party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Switzerland has signed over 120 bilateral investment treaties (for further details see www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz/overview-of-bits.html).

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Swiss law distinguishes between international and domestic arbitration. Chapter 12 of the Federal Statute on Private International Law applies to international arbitration (ie, where at least one of the parties has its domicile or regular place of residence outside of Switzerland at the time it enters into the arbitration agreement). Part 3 of the Civil Procedure Code (articles 353 et seq) applies to domestic arbitration (ie, where none of the parties has its domicile or regular place of residence outside Switzerland at the time the arbitration agreement is concluded).

The parties to a domestic arbitration are free to agree (in writing or any other form evidenced by text) that the provisions of Chapter 12 of the Federal Statute on Private International Law shall apply to their arbitral proceedings (article 353(2) Civil Procedure Code).

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Swiss arbitration law is not based on the UNCITRAL Model Law.

Chapter 12 of the Federal Statute on Private International Law, which was drafted around the same time as the UNCITRAL Model Law, does not substantially differ from the latter. It is, however, with only 19 provisions, significantly shorter in comparison to the UNCITRAL Model Law.

Part 3 of the Civil Procedure Code is more detailed and goes back largely to the Inter-Cantonal Concordat on Arbitration of 1969.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Insofar as Chapter 12 of the Federal Statute on Private International Law is concerned, the following provisions are considered to be mandatory:

- objective arbitrability (article 177(1));
- subjective arbitrability of a state, or an enterprise held by or an organisation controlled by a state (article 177(2));
- the written form of the arbitration agreement (article 178(1));
- the independence of arbitrators (article 180(1)(c));
- the possibility for a party to challenge the appointment of an arbitrator it has nominated based on grounds that come to its attention after such appointment (article 180(2));
- the principle of lis pendens (article 181);
- the equal treatment requirement and the right to be heard in an adversarial procedure (article 182(3)); and
- judicial assistance (article 185).

In addition, the action for the annulment of arbitral awards (article 190(2) of the Federal Statute on Private International Law) is considered mandatory in international arbitration if one of the parties is Swiss. If none of the parties to the arbitration agreement has its domicile, its habitual residence or a business establishment in Switzerland, the parties can waive the right to appeal the decision according to article 192 of the Federal Statute on Private International Law.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties are free to choose the rules of law applicable to their conflict. According to article 187(1) of the Federal Statute on Private International Law, a dispute is decided according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

The parties can also authorise the tribunal to decide ex aequo et bono (article 187(2) of the Federal Statute on Private International Law).

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The most prominent arbitration institutions situated in Switzerland are the following:

- Swiss Chambers' Arbitration Institution (SCAI) (www.swissarbitration.org; 4, Boulevard du Théâtre, P.O. Box 5039, CH-1211 Geneva 11, Switzerland, with offices in Geneva, Zurich and Lugano);
- Court of Arbitration for Sport (CAS) (www.tas-cas.org; Château de Béthusy Avenue de Beaumont 2, CH-1012 Lausanne, Switzerland); and
- Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) (www.wipo.int/amc/en/center/; 34, chemin des Colombettes, 1211 Geneva 20, Switzerland).

SCAI administers arbitration proceedings under the Swiss Rules of International Arbitration. The revised Swiss Rules took effect on 1 June 2012 and are a flexible set of rules under which the parties are free to designate their arbitrator(s) and to select the applicable law, the seat of the arbitration and the language of the proceedings.

CAS arbitrations are governed by the Code of Sports-related Arbitration. CAS operates with a system of a closed list of arbitrators (for further details see www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html).

The Arbitration and Mediation Center of the WIPO administers arbitrations under the WIPO Arbitration Rules. The latter are, due to their provisions on confidentiality and technical and experimental evidence, of special interest to parties to intellectual property disputes.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

According to article 177(1) of the Federal Statute on Private International Law, any dispute of financial interest may be the subject of arbitration. This includes monetary claims relating to labour matters, marital property matters, disputes between heirs and intellectual property matters, as well as antitrust and competition law matters.

By contrast, claims that first and foremost affect a party's personal rights – such as marriage, paternity, child adoption, divorce or separation – are not arbitrable. Likewise, claims in bankruptcy law that are strictly part of the debt collection procedure, such as claims belonging to the bankruptcy estate, are considered to be non-arbitrable.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

Swiss law distinguishes between formal and substantive validity.

With regard to formal validity, Swiss law requires the arbitration agreement to be in writing. Signature by the parties is not required. The written form requirement is considered to be met if the arbitration agreement is concluded in writing or by telegram, telex, telecopier or any other means of communication that permits it to be evidenced in text (article 178(1) of the Federal Statute on Private International Law). This requirement is also generally met by any modern means of electronic communication, such as email. Accordingly, the form requirements can also be fulfilled for arbitration agreements in general terms and conditions (please note that the substantive validity will have to be assessed on a case-by-case basis).

It is not settled whether both parties must adhere to the formal requirement of article 178(1) of the Federal Statute on Private International Law, or whether it is enough that a written offer to arbitrate by one party is accepted orally or tacitly by the other.

With regard to substantive validity, article 178(2) of the Federal Statute on Private International Law provides that an arbitration agreement is valid if it conforms to the law chosen by the parties, the law governing the subject matter of the dispute or Swiss law. It is sufficient if the arbitration agreement is valid under the substantive law of any of these three laws.

If substantive validity is examined under Swiss law, the parties must have the capacity to validly enter into an arbitration agreement (subjective arbitrability) and the subject matter of the dispute must be arbitrable (objective arbitrability).

In addition, the parties' consent with regard to the essential elements of the arbitration agreement is required. This requires that the parties express their intention to submit their dispute to arbitration and that the arbitration agreement specifies the object or the legal relationship subject to arbitration.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is valid and enforceable if it conforms either to the law chosen by the parties, the law governing the subject matter of the dispute, in particular the main contract, or Swiss law (article 178(2) of the Federal Statute on International Private Law).

Since the doctrine of separability applies in Swiss law (article 178(3) of the Federal Statute on Private International Law), the avoidance, rescission or termination of a contract will generally not affect the validity of an arbitration agreement contained therein. However, there may be instances in which the main contract as well as the arbitration agreement are subject to the same grounds for invalidity.

While the death of a party will usually not cause the arbitration agreement to become inoperative, legal incapacity to enter into an arbitration agreement may be a ground for the arbitration agreement to be invalid. In this context it is noted that, under Swiss law, a state or state-owned entity cannot invoke its own law in order to contest its capacity to arbitrate (article 177(2) of the Federal Statute of Private International Law).

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The principle of the separability of the arbitration agreement is set out in article 178(3) of the Federal Statute on Private International Law. The validity of an arbitration agreement cannot be challenged on the grounds that the main contract between the parties is invalid.

However, this does not preclude the grounds for nullity of the main contract from also affecting the arbitration agreement.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

In general, an arbitration agreement is binding only on the parties to the original agreement. Deviating from that general rule, a third (non-signatory) party may nevertheless become bound by the arbitration agreement based on several legal extension theories under Swiss law, such as the principle of confidence (*Vertrauensprinzip*), assignment, agency or the piercing of the corporate veil. In particular, the extension of arbitration agreements to non-signatories may be justified under Swiss law where the third party explicitly or implicitly expressed its intention to be bound by the arbitration agreement (eg, by interfering in the performance of the relevant contract).

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The international arbitration law of Switzerland (ie, Chapter 12 of the Federal Statute on Private International Law) does not contain any provisions regarding third-party participation in arbitration.

By contrast, the domestic arbitration law provides that the intervention and the joinder of a third party require an arbitration agreement between the third party and the parties to the dispute, and that they are subject to the consent of the arbitral tribunal (article 376 of the Civil Procedure Code).

Under the Swiss Rules of International Arbitration, the arbitral tribunal shall decide on a request to join one or more third persons after consulting with all the parties, including the third person(s), taking into account all relevant circumstances of the case (article 4(2) of the Swiss Rules of International Arbitration).

Groups of companies

14 | Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

To date, the Swiss Federal Court has neither expressly rejected nor endorsed the group of companies doctrine. Whether or not the doctrine is recognised under Swiss law is thus a matter of scholarly debate. However, given that Swiss law is based on the concept that different legal entities form independent legal subjects, the mere existence of a group of companies is insufficient to extend the arbitration agreement to other companies within the same group. Rather, such extension would only be allowed in specific and exceptional circumstances.

In any event, when trying to apply the group of companies doctrine to extend the scope of an arbitration agreement to non-signatory third parties, it is worth noting that there might be an overlap with the doctrine of implied intent to be bound by the arbitration agreement. This holds true, in particular, with respect to cases concerning the involvement of a non-signatory in the performance of a contract (see question 12).

Multiparty arbitration agreements

15 | What are the requirements for a valid multiparty arbitration agreement?

Swiss law recognises multi-party arbitration agreements. However, no specific provisions of the Federal Statute on Private International Law deal with such situations, particularly the appointment of the arbitrators. The draft proposal for a revision of Chapter 12 of the Federal Statute on Private International Law provides that in case of a multi-party arbitration and in the absence of an agreement by the parties, the court at the seat of the arbitration may appoint all members of the arbitral tribunal, as is already the case for domestic arbitration proceedings (article 362(2) Civil Procedure Code).

Consolidation

16 | Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Chapter 12 of the Federal Statute on Private International Law contains no rules on the consolidation of arbitration proceedings by an arbitration tribunal. By contrast, article 4(1) of the Swiss Rules of International Arbitration provides that where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 | Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Arbitrators must be impartial and independent of the parties (article 180(1)(c) of the Federal Statute on Private International Law). Beyond this, Chapter 12 of the Federal Statute on Private International Law imposes no additional requirements or restrictions on arbitrators. However, the parties are free to agree on any qualifications that the arbitrators must have (eg, regarding their legal qualification, experience of the subject matter or language skills) (article 179(1) of the Federal Statute on Private International Law). The parties are also free to choose the number of arbitrators.

While diversity is actively promoted in the Swiss arbitration community, the parties' autonomy to designate the arbitral tribunal is not limited by any non-discrimination laws.

Background of arbitrators

18 | Who regularly sit as arbitrators in your jurisdiction?

In Switzerland, parties most frequently designate practising attorneys and sometimes law professors.

Moreover, there is a tendency to provide for more (gender) diversity in institutional appointments. In 2016, the Swiss Chambers' Arbitration Institution signed the Equal Representation in Arbitration Pledge committed to improving the representation of women in arbitration. In 2018, 58 per cent of the arbitrators appointed by the Court of

the Swiss Chambers' Arbitration Institution were male and 42 per cent were female.

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In the absence of an agreement on the constitution of the tribunal, the parties may turn to the court of the place where the tribunal has its seat. According to article 179(2) of the Federal Statute on Private International Law, the court will then apply, by analogy, the provision of the Civil Procedure Code on the appointment, removal or replacement of arbitrators.

According to article 360(1) of the Civil Procedure Code, unless the parties have agreed otherwise, the tribunal will consist of three members. The Civil Procedure Code includes no provisions on the characteristics that an arbitrator must have.

Under the Swiss Rules of International Arbitration, if the parties have not agreed on the number of arbitrators, the Court of the Swiss Chambers' Arbitration Institution decides whether the case shall be referred to a sole arbitrator or to a three-member tribunal (article 6(1) of the Swiss Rules of International Arbitration). Moreover, if a party fails to designate an arbitrator, the Court of the Swiss Chambers' Arbitration Institution will appoint the respective arbitrator.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may be challenged if he or she does not have the qualifications agreed on by the parties (article 180(1)(a) of the Federal Statute on Private International Law), or if the rules of arbitration agreed on by the parties provide for another reason to challenge the appointment of the arbitrator (article 180(1)(b) of the Federal Statute on Private International Law). In addition, the appointment of an arbitrator may be challenged if there are justifiable doubts as to his or her independence or impartiality (article 180(1)(c) of the Federal Statute on Private International Law).

A party may not challenge an arbitrator whom it nominated itself, unless the challenge is based on grounds which came to its attention after the appointment (article 180(2) of the Federal Statute on Private International Law).

The parties to the arbitration agreement can establish their own rules regarding the procedure for challenging the appointment of an arbitrator. Unless the parties have agreed otherwise (eg, by reference to institutional arbitration rules), the court of the place where the tribunal has its seat shall make the final decision (article 180(3) of the Federal Statute on Private International Law). The court will then apply the provisions of the Civil Procedure Code on the removal or replacement of arbitrators by analogy. According to article 369(2) of the Civil Procedure Code, the challenge must be submitted within 30 days of the challenging party becoming aware of the grounds for challenge.

In addition, a party can request the removal of an arbitrator if the arbitrator in question cannot perform his or her tasks within reasonable time and with the necessary care according to article 370 of the Civil Procedure Code, applicable by analogy based on article 179(2) of the Federal Statute on Private International Law.

The replacement of an arbitrator might become necessary if a challenge to the appointment of the arbitrator succeeds. In addition, a replacement might become necessary if an arbitrator is dismissed as a result of the corresponding declarations of the parties to the arbitration proceedings, or if an arbitrator resigns or is removed on the request of one of the parties.

According to article 179(1) of the Federal Statute on Private International Law, an arbitrator shall be replaced in accordance with the agreement of the parties. In the absence of such agreement, the court of the place where the tribunal has its seat may be seized with the question (article 179(2) of the Federal Statute on Private International Law).

Arbitrators in Switzerland have a tendency to seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration in order to avoid a challenge or replacement.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Under Swiss law, the parties and the arbitral tribunal are bound by an arbitral contract. By virtue of this contract, the arbitrators have to adjudicate the parties' dispute in person, with due care, independently and impartially. In turn, the arbitrators are entitled to compensation.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Under Swiss law, an arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to his or her independence (article 180(1)(c) of the Federal Statute on International Private Law). The same standard of independence and impartiality applies to all members of the arbitral tribunal, including party-appointed (co-)arbitrators. Therefore, an arbitrator must disclose any circumstances which might raise reasonable doubts regarding his or her independence and partiality. This duty applies throughout the entire arbitral proceedings.

Although the IBA Guidelines on Conflict of Interest in International Arbitration have no statutory value, the Swiss Supreme Court held that they may serve as a valuable instrument to determine the independence and impartiality of arbitrators.

The Swiss Rules of International Arbitration also state that any arbitrator conducting an arbitration under said rules shall remain impartial and independent of the parties at all times, and that arbitrators shall disclose any circumstances which are likely to give rise to justifiable doubts as to their impartiality or independence throughout the proceedings (article 9 of the Swiss Rules of International Arbitration).

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The prevailing view is that the relationship between the parties to the arbitration proceedings and the arbitrators is contractual in nature. As a consequence, the question of an arbitrator's liability towards the parties will most likely be governed by Swiss law. Under Swiss law, a party is liable for a violation of its contractual duties. Thus, an arbitrator could become liable for a violation of his or her obligations. However, except for wilful intent and gross negligence, liability may be excluded or limited under Swiss law (see article 45 of the Swiss Rules of International Arbitration).

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The state courts will decline jurisdiction whenever there is a valid arbitration agreement between the parties, unless the parties proceed on the merits without reservation (article 7 of the Federal Statute on Private International Law; article II(3) of the New York Convention). A plea of lack of jurisdiction must be raised prior to any defence on the merits.

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Pursuant to article 186 (1) of the Federal Statute on Private International Law the arbitral tribunal is competent to decide on its own jurisdiction (competence-competence principle). This applies even if an action on the same matter between the same parties is pending before a state court or another tribunal, unless there are serious reasons to stay the proceedings (article 186(1 bis) of the Federal Statute on Private International Law). A plea of lack of jurisdiction must be raised prior to any defence on the merits (article 186 (2) of the Federal Statute on Private International Law). The tribunal shall, as a rule, decide on its jurisdiction by preliminary award (article 186(3) of the Federal Statute on Private International Law).

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Unless the parties have agreed otherwise, the seat will be determined by the arbitral institution designated by them or, in the absence of such designation, by the arbitrators (article 176(3) of the Federal Statute on Private International Law). The language will be chosen by the tribunal if the parties failed to make a choice in this regard (article 182(2) of the Federal Statute on Private International Law).

The parties are free to choose the rules of law applicable to their conflict. According to article 187(1) of the Federal Statute on Private International Law, a dispute is decided according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection. The parties can also authorise the tribunal to decide ex aequo et bono (article 187(2) of the Federal Statute on Private International Law).

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under Swiss arbitration law, arbitration proceedings are considered to be pending as soon as one of the parties seizes the arbitrator(s) designated in the arbitration agreement with a claim. If no arbitrators are designated in the arbitration agreement, the proceedings are considered to be pending from the moment that one of the parties initiates the procedure for the appointment of the tribunal (article 181 of the Federal Statute on Private International Law).

Under the Swiss Rules of International Arbitration, arbitration proceedings are commenced by filing a notice of arbitration with the Secretariat of the Swiss Chambers' Arbitration Institution. article 3(3) of the Swiss Rules of International Arbitration sets out the minimum content of a notice of arbitration.

Hearing

28 | Is a hearing required and what rules apply?

Absent parties' agreement, there is no such requirement under Swiss arbitration law. The Swiss Rules of International Arbitration regulate hearings in their article 25.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The procedure to be followed for taking evidence is a matter to be determined by the parties or, in the absence of any agreement, by the tribunal (article 182 of the Federal Statute on Private International Law). Under Chapter 12 of the Federal Statute on Private International Law, a tribunal is not obliged to follow the rules of state courts regarding the taking of evidence.

Chapter 12 of the Federal Statute on Private International Law contains no provisions on the kinds of evidence that are acceptable. However, a tribunal acting under Chapter 12 of the Federal Statute on Private International Law will usually stick to the commonly known evidentiary means, such as documents, fact and expert witnesses, and site or subject-matter inspections.

Pursuant to article 184(1) of the Federal Statute on Private International Law, the tribunal shall conduct the taking of evidence (ie, the parties and the arbitrators cannot delegate the taking of evidence to a third party, such as a state authority).

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

A tribunal acting under Chapter 12 of the Federal Statute on Private International Law has no coercive powers. Thus, article 184(2) of the Federal Statute on Private International Law provides that if the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the state court judge at the seat of the arbitral tribunal; the judge shall apply his or her own law.

Further, in case of non-compliance with any interim measures ordered, the tribunal lacks the power to enforce its interim decision. Thus, if a party does not voluntarily comply with any interim measures ordered against it, the tribunal may request the assistance of the state court judge (article 183(2) of the Federal Statute on Private International Law).

Lastly, article 185 of the Federal Statute on Private International Law provides that the court at the place of the seat of the tribunal has jurisdiction for any further judicial assistance. Such interventions of a Swiss court hardly ever occur in practice.

Confidentiality

31 | Is confidentiality ensured?

Chapter 12 of the Federal Statute on Private International Law contains no rules on confidentiality. By contrast, article 44(1) of the Swiss Rules of International Arbitration provides that unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts and the secretary of the tribunal (article 44(1) of the Swiss Rules of International Arbitration). According to article 44(2) of the Swiss Rules of International Arbitration, the deliberations of the tribunal are confidential.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

An arbitration agreement does not preclude a Swiss state court from granting any interim relief before or after the commencement of arbitration proceedings.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Swiss arbitration law does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. By contrast, the Swiss Rules of International Arbitration have adopted the possibility to seek emergency relief from an emergency arbitrator. A party requiring urgent interim measures before the arbitral tribunal is constituted may, unless otherwise agreed by the parties, submit to the Secretariat of the Swiss Chambers' Arbitration Institution an application for emergency relief proceedings (article 43 of the Swiss Rules of International Arbitration).

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Article 183(1) of the Federal Statute on Private International Law does not define the permitted content or types of interim measures. However, it is commonly accepted that, in principle, a tribunal can grant any interim measures it considers necessary to protect a party's right effectively during the arbitration proceedings. In other words, a tribunal to which Chapter 12 of the Federal Statute on Private International Law applies is not restricted to interim measures recognised under Swiss law. Thus, an arbitral tribunal also has the authority to grant security for costs, but this is not done frequently.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The issue of guerrilla tactics is not explicitly dealt with in Swiss arbitration law nor in the Swiss Rules. An arbitral tribunal may, however, sanction bad faith conduct of the parties when allocating costs (cf. article 40 (1) and (2) of the Swiss Rules).

The question of whether an arbitral tribunal may sanction counsel is not a hotly debated issue in Switzerland.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The parties are free to establish their own rules on how the tribunal should reach its decision (article 189(1) of the Federal Statute on Private International Law). If they fail to do so, the default rule of article 189(2) of the Federal Statute on Private International Law provides that the arbitral award shall be made by a majority or, in the absence of a majority, by the presiding arbitrator alone.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Chapter 12 of the Federal Statute on Private International Law does not address whether dissenting opinions are permitted. However, according to the Swiss Federal Supreme Court, a dissenting opinion may be expressed if the parties agreed to allow dissenting opinions or the majority of the tribunal decides to allow a dissenting opinion.

Form and content requirements

38 | What form and content requirements exist for an award?

Any award rendered by an international arbitral tribunal in Switzerland is final from its notification (article 190(1) of the Federal Statute on Private International Law). The term 'final' means both that the award is enforceable and that it has binding effect by operation of law. Thus, no additional state court scrutiny is needed for an award rendered by an international tribunal with seat in Switzerland to be enforceable and have binding effect.

According to article 189(1) of the Federal Statute on Private International Law, the arbitral award shall be rendered in conformity with the procedure and in the form agreed upon by the parties.

In the absence of such agreement, the arbitral award shall be made by a majority or, in the absence of a majority, by the chairman. The award shall further be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient (article 189(2) of the Federal Statute on Private International Law).

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Swiss law imposes no time limit on the arbitrators within which they must render their award.

The Swiss Rules of International Arbitration do not impose a time limit on the arbitrators to render the final award either, except for arbitral proceedings conducted under the Expedited Procedure provisions (ie, if the total amount in dispute does not exceed 1 million Swiss francs and the Court does not decide otherwise; article 42(2) of the Swiss Rules of International Arbitration). In case of an Expedited Procedure, the award must be rendered within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal, save for exceptional circumstances (article 42(d) of the Swiss Rules of International Arbitration).

Date of award

40 For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

To set aside a final award in Switzerland, the date of notification of the respective award (as opposed to the date of the award itself) is decisive (article 100(1) of the Federal Statute on the Swiss Federal Supreme Court). The same applies with regard to preliminary awards (article 190(3) of the Federal Statute on Private International Law). The mode of notification is determined by the parties' explicit agreement or their choice of institutional rules. Absent such agreement or choice, the electronic receipt of the award may constitute sufficient notification.

As regards the interpretation or correction of an award, or the request of an additional award, the Swiss Rules of International Arbitration consider the date of receipt of the award as decisive (article 35 et seq of the Swiss Rules of International Arbitration).

Types of awards

41 What types of awards are possible and what types of relief may the arbitral tribunal grant?

Besides a final award, arbitral tribunals may render preliminary awards and, unless agreed otherwise by the parties, partial awards (article 190(3) and article 188 of the Federal Statute on Private International Law).

The Federal Statute on Private International Law is silent on the issue of how arbitral tribunals should proceed in case the parties settle their dispute amicably. Subject to the parties' agreement or choice of institutional rules, arbitral tribunals may either issue a consent award or a termination order (both explicitly provided for in article 34(1) of the Swiss Rules of International Arbitration).

Unless agreed otherwise by the parties, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures (article 183(1) of the Federal Statute on Private International Law).

Termination of proceedings

42 By what other means than an award can proceedings be terminated?

Under the Swiss Rules of International Arbitration, arbitral proceedings can also be terminated by means of a consent award or a termination order (as opposed to a final award), for example if the parties reach a settlement agreement or a party withdraws its claim(s) without prejudice.

If a consent award is requested by the parties and accepted by the arbitral tribunal, the arbitral tribunal shall record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award (article 34(1) of the Swiss Rules of International Arbitration).

If the continuation of the arbitral proceedings becomes unnecessary or impossible for reasons other than a settlement, the arbitral tribunal shall give advance notice to the parties that it may issue an order for the termination of the proceedings. Unless a party raises justifiable grounds for objection, the arbitral tribunal then has the power to issue such an order (article 34(2) of the Swiss Rules of International Arbitration).

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Chapter 12 of the Federal Statute on Private International Law contains no rules on the costs of arbitration proceedings, including their estimation and allocation.

By contrast, the Swiss Rules of International Arbitration contain detailed provisions on costs (article 38 et seq of the Swiss Rules of International Arbitration). They provide, in particular, that the following costs are recoverable:

- fees of the arbitral tribunal;
- expenses incurred by the tribunal and secretary, if any;
- costs of expert advice;
- expenses incurred by witnesses to the extent approved by the tribunal;
- reasonable costs for legal representation;
- registration fee and administrative costs; and
- fees and expenses incurred in emergency arbitration proceedings.

The costs of the arbitration shall in principle be borne by the unsuccessful party (article 40(1) of the Swiss Rules of International Arbitration). However, with respect to the costs for legal representation and assistance, the arbitral tribunal is free to determine which party shall bear such costs or may apportion such costs among the parties (article 40(2) of the Swiss Rules of International Arbitration).

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

The answer to this question depends on the applicable substantive law. Swiss substantive law allows for the award of interest. Under the Swiss Code of Obligations, where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5 per cent per annum (article 73(1) of the Swiss Code of Obligations).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Chapter 12 of the Federal Statute on Private International Law, unlike the Swiss Rules of International Arbitration (cf. article 35 et seq), does not address the issue of correction or interpretation of an award. According to the case law of the Swiss Supreme Court such a correction or interpretation is, however, permissible.

The rules for domestic arbitration (ie, Part 3 of the Civil Procedure Code) also provide for the possibility of a correction or interpretation of

an award. The application must be made to the arbitral tribunal within 30 days from the discovery of the error or the parts of the award that need to be explained or amended, but no later than one year from receiving notice of the award (article 388 (2) of the Civil Procedure Code).

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

The rules on international arbitration allow the parties to challenge an arbitral award by way of annulment proceedings on the basis of one of the grounds exhaustively listed in article 190(2) of the Federal Statute on Private International Law as follows:

- the tribunal was irregularly constituted or the sole arbitrator was improperly appointed (article 190(2)(a) of the Federal Statute on Private International Law);
- the tribunal wrongly accepted or declined jurisdiction (article 190(2)(b) of the Federal Statute on Private International Law);
- the tribunal's decision went beyond the claims submitted to it or failed to address one of the items of the claim (article 190(2)(c) of the Federal Statute on Private International Law);
- the principle of equal treatment of the parties or the right of the parties to be heard was violated (article 190(2) (d) of the Federal Statute on Private International Law); or
- the award is incompatible with public policy (article 190(2)(e) of the Federal Statute on Private International Law).

According to article 190(3) of the Federal Statute on Private International Law, interim (or preliminary) awards (as opposed to final awards) may be challenged only on the basis of a violation of article 190(2)(a) of the Federal Statute on Private International Law (irregular constitution of the tribunal) or article 190(2)(b) of the Federal Statute on Private International Law (incorrect ruling on jurisdiction).

If the Swiss Federal Supreme Court decides that one of the grounds listed in article 190(2) of the Federal Statute on Private International Law is fulfilled, it will set aside the award. If the Swiss Federal Supreme Court affirms the challenge of the award based on the grounds that the tribunal erroneously denied or affirmed jurisdiction (article 190(2) (b) of the Federal Statute on Private International Law), it may issue a new decision replacing the award. In all other cases, however, the Swiss Federal Supreme Court will not issue its own decision on the merits, but will refer the matter back to the same tribunal for reconsideration.

As case law shows, the Swiss Federal Supreme Court is reluctant to set aside arbitral awards and the success rate of appeals brought before the Swiss Federal Supreme Court is very low.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under Swiss law, an arbitral award may be challenged only before the Swiss Federal Supreme Court (article 191 of the Federal Statute on Private International Law). The proceedings are governed by article 77 of the Federal Statue on the Swiss Federal Supreme Court of 17 June 2005. Appeals against arbitral awards may be brought before the Swiss Federal Supreme Court with the uniform appeal in civil matters (article 77(1) of the Federal Statue on the Swiss Federal Supreme Court). Set-aside proceedings before the Swiss Federal Supreme Court last approximately six to nine months on average.

The court costs of a setting aside proceedings depend on the amount in dispute, scope and difficulty of the case and are limited to a maximum of 200,000 Swiss francs. The petitioner will be required to pay an advance on costs, and if the petitioner does not have a permanent residence in Switzerland it may be obliged, at the request of the other party, to pay a security for party costs. As a rule, the losing party will be obliged to reimburse the winning party for its necessary costs for legal representation.

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Any award rendered by an international arbitral tribunal in Switzerland is final from its notification (article 190(1) of the Federal Statute on Private International Law). The term 'final' means both that the award is enforceable and that it has binding effect by operation of law. Thus, no additional state court scrutiny is needed for an award rendered by an international tribunal with seat in Switzerland to be enforceable and have binding effect.

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention. This also applies to awards rendered in a non-member state of the New York Convention (article 194 of the Federal Statute on Private International Law).

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

Swiss arbitration law does not provide for a limitation period with regard to the enforcement of awards, as from a Swiss law perspective limitation periods are issues of substantive law.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention. According to article V(e) of the New York Convention recognition and enforcement can be refused if the award has been set aside by a competent authority of the country of which, or under the law of which, that award was made.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

According to article 43(8) of the Swiss Rules of International Arbitration, decisions of emergency arbitrators shall have the same effects as interim measures (article 43(8) of the Swiss Rules of International Arbitration). According to article 183(2) of the Federal Statute on Private International Law, an arbitral tribunal may request the assistance of the state court judge if a party does not voluntarily comply with any interim measures ordered against it.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The costs vary within Switzerland from canton to canton, as it is the competence of the cantons to determine the cost tariffs.

OTHER

Influence of legal traditions on arbitrators

53 What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Switzerland being a civil law jurisdiction, the Civil Procedure Code does not provide for a discovery phase. That said, Swiss arbitrators will usually be reluctant to allow US-style discovery, but will rather request the production of specific documents that seem relevant and material to the outcome of the case. Written witness statements, on the other side, are very common among Swiss arbitrators.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Counsel and arbitrators admitted to the bar in Switzerland appearing in an international arbitration are in principle subject to the Swiss rules on professional and ethical conduct. These rules are significantly less detailed than the IBA Guidelines on Party Representation in International Arbitration.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no restrictions on third-party funders.

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Switzerland, being an arbitration-friendly jurisdiction, does not entail any adverse particularities of which one should be aware of.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

On 24 October 2018 the Federal Council published the draft proposal for a revision of Chapter 12 of the Federal Statute on Private International Law, which governs international arbitration proceedings seated in Switzerland. The proposed light amendments aim at selectively adjusting and modernising the statutory rules of Swiss-seated international arbitration proceedings, without, however, diverging from Switzerland's philosophy to afford parties maximal autonomy and procedural flexibility. Some of the proposed changes concern the following:

- the draft proposal contains explicit provisions concerning correction and revision of arbitral awards (both remedies are already in practice, but not explicitly provided for in Chapter 12);
- under the proposed amendment of article 183(2) of the Federal Statute on Private International Law, both the tribunal and a party may request the assistance of the state courts in case a party does not voluntarily comply with provisional or protective measures ordered by the tribunal;
- the proposed new article 178(4) expressly allows the conclusion of arbitration agreements by unilateral acts (eg, last will) or by incorporation of an arbitration clause in articles of association; and
- filings with the Federal Supreme Court in matters of international arbitration (eg, a request for revision or an action for setting aside an arbitral award) can also be made in English (filings with the court must be written in an official language).

The draft proposal is currently in discussion in Parliament. On 18 October 2019, the National Council (ie, one of the two chambers of the Swiss Parliament) published its comments to the draft proposal. While generally in favour of the draft proposal, it proposed some amendments to it. Most notably, the Nation Council added that at the request and expense of one of the parties, the Federal Supreme Court shall produce a certified English translation of the fully executed decision, which it shall enclose with the opening of the decision. The draft proposal will now be discussed in the Council of States (ie, the other chamber of the Swiss Parliament) and, in the event of disagreements between the two Chambers of Parliament, again be deliberated by both chambers of the Parliament.

Recently the following bilateral investment treaties have been terminated:

- Switzerland–Bolivia (ceased to apply on 17 May 2019); and
- Switzerland–Ecuador (ceased to apply on 11 September 2018).

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