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ARBITRATION

Arbitration procedures and practice in Switzerland: overview

Harold Frey, Xavier Favre-Bulle and Martin Aebi
Lenz & Staehelin

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USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration and current trends

Switzerland is among the world's most-preferred places for international commercial arbitration. It was highly rated as a place of arbitration in the recently published report on Legal Instruments and Practices of Arbitration in the EU (based on a study prepared for the Committee on Legal Affairs (JURI) of the European Parliament). In this largest empirical study of arbitration practitioners ever undertaken, Switzerland is recommended by more respondents than any other state included in the study. Major commercial players from all over the world regularly choose to have their disputes resolved by arbitral tribunals sitting in Switzerland. Switzerland is the second-most popular seat for arbitrations under the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) with 66 arbitrations commenced in 2015. In addition, the Swiss Rules of International Arbitration (Swiss Rules), as revised with effect on 1 June 2012, remain highly popular, with 100 new cases administered by the Swiss Chambers' Arbitration Institution in 2015. 74% of the parties involved in these Swiss Rules cases have their registered office or domicile outside Switzerland.

The nature of the disputes referred to arbitration in Switzerland is highly diverse, but particularly includes disputes in various industry sectors relating to:

- Construction and engineering.
- Purchase and sale of goods.
- Service contracts.
- Share purchase agreements.
- Distribution and agency.
- Intellectual property and licence agreements.

Current trends

One ongoing trend in arbitrations seated in Switzerland is the significant number of cases administered by the Swiss Chambers' Arbitration Institution conducted under the expedited procedure (*Article 42, Swiss Rules*), now corresponding to 43% of the cases submitted in 2015. The expedited procedure provides, among other things, that an award must as a rule be made within six months after the file is sent to the arbitral tribunal. The provisions of the expedited procedure apply to proceedings with an amount in dispute not exceeding CHF1 million or if the parties so agree. This feature of the Swiss Rules is gaining more and more recognition by international users.

The presence in Switzerland of two major international arbitration institutions, WIPO (through its Arbitration Center) and the Court of Arbitration for Sport (CAS) also contributes to a substantial number of high-stake intellectual property-related arbitrations and sports arbitrations, respectively, held in Switzerland rather than in other countries.

Advantages/disadvantages

The general advantages of arbitration in Switzerland compared to court litigation are the following:

- Tailor-made procedural rules reflecting the parties' needs and the specific nature of the dispute at issue.
- Possibility to constitute a tribunal with specific expertise in the field of the dispute as well as regarding the parties' cultural and legal background.
- Possibility to conduct the proceedings in English (or any other language the parties may choose).
- No restrictions for attorneys registered in foreign jurisdictions to act as party representative in international arbitrations seated in Switzerland.
- Privacy of the proceedings (or even strict confidentiality, depending on the parties' agreement or the applicable institutional rules).
- Shorter overall time until final adjudication of the dispute as there is only one layer of appeal based on very limited grounds (with an average duration of setting-aside proceedings of six months).
- Effective enforcement of a Swiss arbitral award outside Switzerland under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).

LEGISLATIVE FRAMEWORK

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

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

The Swiss law of international arbitration is set out in Chapter 12 of the Federal Private International Law Act (PILA), which entered into force on 1 January 1989. The provisions of the PILA apply to any arbitration if both:

- The seat of the tribunal is in Switzerland.

- At least one of the parties had neither its domicile nor its habitual residence in Switzerland at the time the arbitration agreement was concluded.

There are no fundamental differences between Chapter 12 of the PILA and the UNCITRAL Model Law, although Chapter 12 is much shorter. Chapter 12 gives paramount importance to party autonomy and, in the absence of an agreement between the parties, to arbitral discretion.

Since 1 January 2011, Swiss domestic arbitration proceedings are governed by Articles 353 and following of the new Swiss Code of Civil Procedure.

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

As previously indicated, Chapter 12 of the Federal Private International Law Act (PILA) is designed to allow for maximum flexibility in the conduct of international arbitrations. The only mandatory procedural requirements are that the arbitral tribunal must ensure (*Article 182(3), PILA*):

- Equal treatment of the parties.
- The right of both parties to be heard in adversarial proceedings.

In addition, the following provisions are considered to be mandatory (*Chapter 12, PILA*):

- Article 177(1): objective arbitrability.
- Article 177(2): subjective capacity to arbitrate of states and state-controlled enterprises.
- Article 178(1): form of the arbitration agreement.
- Article 178(2): conflict of laws rule for the determination of the law governing the substantive validity of the arbitration agreement.
- Article 180(1)(c): right to challenge an arbitrator on the grounds of justifiable doubts as to his independence.
- Article 180(2): restriction of challenges of an arbitrator by the appointing party to grounds which came to that party's attention only after the appointment.
- Article 181: *lis pendens.*
- Article 185: judicial assistance by state courts.
- Article 190(2): grounds for setting aside an award (subject to a waiver within the limits of Article 192 of the PILA).

4. Does the law prohibit any types of disputes from being resolved via arbitration?

Article 177(1) of the Federal Private International Law Act (PILA) takes a broad and liberal approach to objective arbitrability and provides that any "dispute of an economic interest may be the subject of an arbitration". On that basis, the Swiss Federal Supreme Court ruled that objective arbitrability can be denied only in case of disputes exclusively entrusted to state courts according to provisions that are deemed mandatory as a matter of public policy. Examples of such disputes include: criminal, bankruptcy or attachment proceedings. Moreover, family law status issues such as marriage, paternity, adoption, divorce or separation are not arbitrable pursuant to Article 177(1) of PILA. However, economic consequences resulting from these fields (such as pensions for divorce) can be referred to arbitration (this is rare in practice).

Limitation

5. Does the law of limitation apply to arbitration proceedings?

Under Swiss law, the statute of limitations is a matter of substantive law. Therefore, the Swiss limitation law only applies to the arbitration proceedings if Swiss law is the applicable substantive law governing the dispute before the arbitral tribunal. If Swiss substantive law applies, the general rules on limitation, which equally apply before state courts and arbitral tribunals, are:

- **Contractual claims.** The general limitation period is ten years, subject to deviating provisions of federal law (*Article 127, Swiss Code of Obligations (CO)*):
  - for periodical obligations (such as periodic rental fees or running royalties) and certain special obligations (including doctor's bills and attorney's fees), the limitation period is five years;
  - a special regime applies to warranty claims under purchase contracts (two years as a general rule, subject to a deviating agreement of the parties);
  - claims under an insurance contract are time-barred after two years.
- **Tort or unjust enrichment.** The limitation period is one year from the date when the aggrieved party had knowledge of the claims, but in any event ten years from the date when the damaging event took place or the claim arose, respectively (*Articles 60 and 67, CO*).

A limitation period is interrupted (that is, start running anew) by (*Article 135, CO*):

- An express or implied acknowledgment of the debt by the debtor.
- The initiation of debt enforcement proceedings.
- Filing of a claim with a court or arbitral tribunal.

In international arbitrations seated in Switzerland, a claim is deemed pending (causing interruption of the limitation period) from the time when one of the parties either (*Article 181, Federal Private International Law Act (PILA)*):

- Files a prayer for relief before the arbitrator(s) designated in the arbitration agreement.
- Initiates the procedure for the appointment of the arbitral tribunal (in the absence of the above designation in the arbitration agreement).

To establish *lis pendens*, the claimant must present its prayer for relief in sufficient detail to allow a proper identification of the subject matter of the dispute.

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

The main arbitration organisations are the:

- ICC International Court of Arbitration.
- Swiss Chambers' Arbitration Institution.
- WIPO Arbitration and Mediation Center.
- Court of Arbitration for Sport (CAS).

See box, *Main arbitration organisations*.

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The principle of kompetenz-kompetenz (that is, it is for the arbitral tribunal (in the first instance) to decide on its jurisdiction) is expressly provided in Article 186(1) of the Federal Private International Law Act (PILA). The arbitral tribunal must, as a rule, decide this by way of a preliminary award. An award on jurisdiction is then subject to setting aside proceedings before the Swiss Federal Supreme Court (*Article 190(2)(b), PILA*).

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

Form. In international arbitrations, an arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication permitting it to be evidenced by text (*Article 178(1), Federal Private International Law Act (PILA)*). However, there is no requirement for signatures or an exchange of documents by the parties. Arbitration agreements can be contained in a company's bye-laws or in general terms and conditions.

Substantive validity. In relation to substantive validity (that is, whether the parties have reached consent on the essential elements (*essentialia negotii*) of the arbitration agreement), Article 178(2) of the PILA provides for a choice of law rule following the *in favorem validitatis* principle. Under this provision, an arbitration agreement is valid if it conforms to either:

- The law chosen by the parties.
- The law governing the subject matter of the dispute (in particular the main contract).
- Swiss law.

The essential elements of an arbitration agreement are the agreement of the parties to submit their dispute to an arbitral tribunal, and the description of the dispute or the legal relationship that will be covered by the arbitration agreement.

In addition, a valid arbitration agreement requires that the parties to the arbitration agreement have the (legal) capacity to be a party to as well as to conduct arbitration proceedings (subjective arbitrability), and that the dispute or legal relationship referred to in the arbitration agreement is capable of settlement by arbitration (objective arbitrability).

Separate arbitration agreement

There is no need for a separate arbitration agreement under the Swiss *lex arbitri*. An arbitration clause contained in a main contract is sufficient to submit a dispute to arbitration. Despite this, a separate arbitration agreement with regard to a main contract may be concluded at any time.

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

Under the Swiss *lex arbitri*, it is possible to agree on an arbitration agreement that is only for the benefit of one party, which may also initiate proceedings before competent state courts.

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

Chapter 12 of the Federal Private International Law Act (PILA) does not contain a provision on the joinder of third parties to an arbitration. However, the parties to an arbitration agreement are free to agree on such a mechanism. They typically do so by choosing institutional rules providing the procedural framework for such a joinder, for example Article 7 of the ICC Rules or Article 4(2) of the Swiss Rules. Nevertheless, it is the predominant view that even under those institutional rules the arbitral tribunal must have jurisdiction over all the parties to the arbitration. In the case of a joinder request, an arbitral tribunal must therefore in any event examine whether the third person to be joined is a party to the arbitration clause(s) forming the jurisdictional basis of the proceedings.

This issue becomes relevant if the third party to be joined is not a signatory to the original arbitration agreement binding on the existing parties to the arbitration. This question is one of the subjective scope of the arbitration agreement. Therefore, an arbitral tribunal seated in Switzerland must determine this issue under the substantive laws applicable under Article 178(2), PILA (*see Question 8*). If Swiss law applies, an extension of the arbitration agreement to a non-signatory may be accepted in limited circumstances, in particular where the third party significantly intervened in the conclusion or performance of the main contract. The intervention must have been such that the party seeking the extension had a legitimate interest worthy of protection in assuming that the third party intended to become a party to the main contract (including the arbitration clause contained in it) under the general principle of good faith.

In addition, arbitration agreements may, as a matter of principle, be transferred to legal successors such as heirs, merged companies, assignees and transferees.

Third party beneficiaries enforcing their claims are equally bound by arbitration agreements entered into between the parties. Finally, trustees in bankruptcy or the executors of a will are bound by arbitration agreements concluded by the debtor or deceased, respectively.

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

When the Swiss Rules of International Arbitration apply, Article 4(2) contemplates both a joinder of a third party requested by a party to the existing proceedings and the joinder of a third party on its own request. Whether a third party that did not sign the agreement incorporating the arbitration clause can be compelled or entitled (as the case may be) to participate in the pending proceedings is a matter of jurisdiction that the arbitral tribunal will have to decide under the applicable *lex arbitri* (see above for the situation under Swiss law).

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

The principle of separability of the arbitration agreement is expressly provided in Article 178(3) of the Federal Private International Law Act.

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

A Swiss court must decline its jurisdiction if the parties have concluded an arbitration agreement with respect to an arbitrable dispute, unless either the (*Article 7, Federal Private International Law Act (PILA)*):

- Respondent argued on the merits of the case without objecting to jurisdiction.
- Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.
- Arbitral tribunal cannot be constituted for reasons for which the respondent is manifestly responsible.

The court makes its determination on the validity of the arbitration agreement with unfettered powers of review under the New York Convention (*see Question 34*) if the seat of the arbitration is abroad. However, if the seat is in Switzerland, the court limits itself to a summary examination (that is, it would accept its jurisdiction only in the case of a manifestly invalid arbitration agreement).

Arbitration in breach of a valid jurisdiction clause

If a party initiates arbitration proceedings in breach of a valid jurisdiction clause, arbitral tribunals seated in Switzerland will themselves decide on their jurisdiction (*kompetenz-kompetenz, Article 186, PILA*) (*see Question 7*).

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

There is no known instance of a Swiss state court issuing an anti-suit injunction, as they are generally deemed incompatible with the concept of *kompetenz-kompetenz* (*see Question 7*).

ARBITRATORS

Number and qualifications/characteristics

15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in, your jurisdiction in order to serve as an arbitrator there?

The appointment of arbitrators must be made in accordance with the parties' agreement (*Article 179(1), Federal Private International Law Act (PILA)*). Under this provision, anyone may be an arbitrator, subject to the legal requirements of independence and impartiality. The parties are also free to agree on the number of arbitrators.

The parties regularly agree on these issues by incorporating institutional rules in their arbitration agreement. However, in the absence of such an agreement, the court where the tribunal has its seat may be seized with that question. In this case, the court must apply the relevant provisions of the Swiss Code of Civil Procedure (CCP) by analogy (*Article 179(2), PILA*).

In the absence of an agreement by the parties, the arbitral tribunal must consist of three members (*Article 360(1), CCP*). In addition, if the parties have agreed on an even number of arbitrators, it is presumed that an additional arbitrator must be appointed as the chairperson (*Article 360(2), CCP*). A person asked to take the office of an arbitrator must disclose any circumstances that may raise reasonable doubts as to his independence or impartiality (*Article 363, CCP*).

There are no further default rules regarding arbitrators' qualifications or characteristics under the CCP.

Independence/impartiality

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

An arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his independence (*Article 180(1)(c), Federal Private International Law Act (PILA)*). It is generally acknowledged that this concept of independence referred to in the PILA also includes the arbitrator's impartiality. Equally, the Swiss Code of Civil Procedure (CCP) provides that a member of the arbitral tribunal can be challenged if there is reasonable doubt as to his independence or impartiality. The CCP applies as a default rule in the absence of a party agreement as to the removal procedure (*Article 179(2), PILA*). The concept of reasonable doubt as to independence or impartiality has its roots in Article 10(2) of the UNCITRAL Arbitration Rules 1976 and Article 12(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985. It arguably constitutes today's internationally accepted standard.

Appointment/removal

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

The parties are free to agree on the procedure for the appointment of the arbitrator(s) (*Article 179(1), Federal Private International Law Act (PILA)*) and they often do so by referring to certain institutional arbitration rules or a procedural law. The only limit to the parties' freedom of contract is the principle that no party can be given a predominant influence on the constitution of the arbitral tribunal (that is, there is a non-waivable right to parity).

In the absence of a party agreement (or in the case of failure to constitute the tribunal in accordance with an agreement), the parties can refer the question to the state court at the place of arbitration. In that case, the court must apply the relevant provisions of the Swiss Code of Civil Procedure (CCP) by analogy (*Article 179(2), PILA*).

Removal of arbitrators

The procedure for the removal of arbitrators is primarily subject to the parties' agreement (*Article 179(1), PILA*). In the absence of a party agreement, the parties can refer the question to the court at the place of arbitration. The court must apply the relevant provisions of the CCP by analogy.

Both Article 180(1) of the PILA and Article 367(1) of the CCP provide, in essence, for the same grounds for challenge:

- The arbitrator does not meet the qualifications agreed on by the parties.

- A ground for challenge exists under the rules of arbitration agreed on by the parties.
- Circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality. It is generally recognised that this ground constitutes a mandatory ground for challenge.

PROCEDURE

Commencement of arbitral proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

Chapter 12 of the Federal Private International Law Act (PILA) does not contain any default rules regarding the commencement of arbitration proceedings. Article 181 of the PILA solely relates to the issue of *lis pendens* (*see Question 5*).

Applicable rules and powers

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

Chapter 12 of the Federal Private International Law Act (PILA) is based on the concept that the parties themselves determine the arbitral procedure and they can do so by referring their dispute either to (*Article 182(1), PILA*):

- A set of institutional arbitration rules.
- Tailor-made rules or those codified in the UNCITRAL Rules, in the case of ad hoc arbitrations.

If the parties have not determined the procedure (and the relevant arbitration rules are silent regarding certain issues), the arbitral tribunal must determine the procedure to the extent necessary (*Article 182(2), PILA*). Either way, the arbitral tribunal must ensure equal treatment of the parties and their right to be heard (*Article 182(3), PILA*).

Default rules

Apart from the requirements of equal treatment of the parties and their right to be heard (*Article 182(3), PILA*), Chapter 12 of the PILA does not provide for any rules governing the arbitral procedure *per se*.

Evidence and disclosure

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitral tribunal must itself conduct the taking of evidence (*Article 184(1), Federal Private International Law Act* (*PILA*)). However, the procedure for the taking of evidence, including orders for document production, forms part of the arbitral procedure to be determined by the parties or, in the absence of an agreement by the parties, the arbitral tribunal (*see Question 19*).

Unlike state courts, arbitral tribunals do not have the power to impose sanctions (for example, on parties refusing to disclose a document or witnesses refusing to appear at a hearing). For these cases, if the assistance of state courts is necessary for the taking of evidence, the arbitral tribunal (or a party with the consent of the arbitral tribunal) can request the assistance of the state court at the seat of the arbitration (*Article 184(2), PILA*). The state court must then apply the relevant local law.

In any event, an arbitral tribunal may draw a negative inference from a party's refusal to comply with an order for the production of documents.

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

As a part of the applicable procedural rules, it is primarily up to the parties to determine the scope of disclosure (*Article 182(1) , Federal Private International Law Act* (*PILA*)). Procedural rules agreed on by the parties or suggested by arbitral tribunals often provide that the tribunal can seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration in relation to a party's document production request. In any event, arbitrators will primarily focus on:

- Whether the requested documents (or a narrow and specific category of documents) are described in sufficient detail.
- How the requested documents are relevant and material to the outcome of the case.
- Why the requesting party assumes that the requested documents are in the possession of the other party.

Arbitrators with a legal background in Switzerland or any other continental European jurisdiction tend to have a rather restrictive approach to document production, and broad production requests are frowned-upon. However, the scope of disclosure in arbitration is considerably broader than in litigation, as Swiss courts typically take a more restrictive view, particularly with regard to the specificity of document requests.

Validity of parties' agreement as to rules of disclosure

Under the Swiss *lex arbitri*, the parties are free to choose the procedural rules guiding their dispute and can therefore agree on the rules of disclosure.

CONFIDENTIALITY

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Chapter 12 of the Federal Private International Law Act (PILA) is silent on confidentiality and the extent to which arbitration proceedings are confidential remains unsettled (both regarding the scope of confidentiality and regarding who is bound by a confidentiality undertaking). The arbitration agreement or any other agreement between the parties, as well as the arbitration rules chosen by the parties, may contain provisions in that regard.

Unlike the Rules of Arbitration of the International Chambers of Commerce (ICC Rules), among others, Article 44 of the Swiss Rules of International Arbitration (Swiss Rules) provides for a rather broad confidentiality undertaking that applies unless the parties expressly agree in writing to the contrary.

COURTS AND ARBITRATION

23. Will the local courts intervene to assist arbitration proceedings seated in its jurisdiction?

The parties can apply for judicial assistance from local courts for the purpose of facilitating the proper conduct of an arbitration,

including (*Chapter 12, Federal Private International Law Act (PILA)*):

- Appointment, removal and replacement of arbitrators (*Article 179, PILA*) (absent arbitration rules which would provide for another appointing authority).
- Challenge of an arbitrator (*Article 180, PILA*) (absent arbitration rules which would provide for another competent body).
- Ordering or enforcing provisional and conservatory measures (*Article 183, PILA*).
- Support regarding the taking of evidence (*Article 184, PILA*).
- Deposit and certification of the arbitral award (*Article 193, PILA*).

In addition, Article 185 of the PILA contains a general clause that the judge at the seat of the arbitral tribunal has jurisdiction for "any further judicial assistance". Although precedents are scarce, the following situations may be covered by that provision:

- Requests for an extension of the agreed term within which the arbitral tribunal must render its award.
- Complaints for significant delays.
- Requests for an order to repeat procedural steps following the replacement of an arbitrator.

24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

Switzerland is traditionally arbitration friendly and there is no known case in which a Swiss court intervened of its own motion to frustrate arbitration proceedings.

Delaying proceedings

Chapter 12 of the Federal Private International Law Act (PILA) only provides limited grounds for seeking a state court's assistance. Swiss courts would not allow a party to abuse these grounds for the purpose of delaying arbitration proceedings.

Insolvency

25. What is the effect on the arbitration of pending insolvency of one of more of the parties to the arbitration?

In international arbitrations seated in Switzerland, bankruptcy of one or more parties domiciled in another state does not affect the arbitration proceedings if the relevant entity retains legal capacity under its own laws. A Swiss arbitral tribunal will disregard any foreign law restrictions concerning a bankrupt party, unless those restrictions result in a loss of legal capacity. However, if bankruptcy results in a loss of legal capacity under those laws, a bankrupt entity no longer has capacity to be a party to the arbitration and the arbitration will have to be discontinued in relation to that party. If a party with its domicile in Switzerland goes bankrupt, this does not affect its legal capacity (nor does it result in any legal succession).

REMEDIES

26. What interim remedies are available from the tribunal?

Interim remedies

Unless the parties have agreed otherwise, an arbitral tribunal seated in Switzerland has broad discretion regarding provisional measures (*Article 183(1), Federal Private International Law Act (PILA)*). Categories of possible provisional measures include:

- **Conservatory measures.** Under these, a party is ordered to preserve assets out of which a subsequent award may be satisfied.
- **Regulatory measures.** Under these, a party is ordered to restore or maintain the status quo pending the outcome of the dispute.
- **Performance measures.** These are aimed at ensuring the temporary enforcement of a claim pending the outcome of the dispute

Ex parte

Under Article 183(1) of PILA, an arbitral tribunal seated in Switzerland is empowered to grant interim relief on an ex parte basis. It may do so if the applicant shows that the specific urgency justifies a deferral of the other party's right to be heard, and particularly if prior disclosure of the application to the other party could frustrate the purpose of the requested measure. In any case, the other party must receive an opportunity to present its position as soon as possible after issuance of the related order, and the tribunal will decide on any objections against the interim relief without delay. The tribunal may then, as the case may be, confirm, modify or revoke the order issued ex parte.

Security

An arbitral tribunal seated in Switzerland can grant an order for security for costs of the arbitration (*cautio judicatum solvi*). However, it is broadly accepted that tribunals should use these powers with great restraint. In particular, such an order is justified only in cases in which either:

- There has been a serious deterioration of a party's financial situation since the arbitration agreement was concluded (or that party is manifestly insolvent).
- The relevant party appears to have engaged in bad faith actions intended to frustrate the other party's future costs claim.

27. What final remedies are available from the tribunal?

The remedies available in a dispute before an arbitral tribunal seated in Switzerland are not limited by procedural law, but are a matter of the law applicable to the merits of that dispute. Assuming Swiss law applies, the following three main categories of remedies (or relief) exist:

- Performance (or damages, if specific performance is no longer possible).
- Creation, modification or termination of a legal relationship.
- Declaratory relief.

Among these categories, performance (including damages) is by far the most important remedy in practice and comprises several sub-categories, such as orders for:

- Specific performance.
- Abstaining from or tolerating certain acts or a situation.
- Issuing a declaration of will.

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

There is only one layer of judicial review of international arbitral awards. A party can file a motion to set aside the award with the Swiss Federal Supreme Court based on the limited grounds set out in Article 190(2) of the Federal Private International Law Act (PILA) (*Article 191, PILA*) (*see below*).

Grounds and procedure

The only grounds available to challenge an international arbitral award are listed in Article 190(2) of the PILA:

- Improper constitution of the arbitral tribunal (or improper appointment of sole arbitrator).
- The arbitral tribunal wrongly accepted or declined jurisdiction.
- The arbitral tribunal's decision was *infra* or *ultra petita* (that is, it failed to decide one of the items of the claim or went beyond the claims submitted to it).
- Violation of the principle of equal treatment of the parties or of the parties' right to be heard.
- The award is incompatible with public policy.

A motion to set aside must be filed with the Swiss Federal Supreme Court within 30 days of notification of the award to the parties.

The Federal Supreme Court's practice in setting aside proceedings is characterised by judicial restraint (when reviewing the arbitral tribunal's decision) and swift adjudication. In recent years, less than 7% of the challenges were successful and it took the Supreme Court six months on average to render its final decision.

Waiving rights of appeal

The parties may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive setting aside proceedings (or limit such proceedings to one or several of the grounds listed in Article 190(2) of the PILA (*Article 192(1), PILA*)). This option is available only if none of the parties have their domicile, habitual residence or a business establishment in Switzerland.

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award rendered?

A motion to set aside an award rendered by an international arbitral tribunal seated in Switzerland must be filed with the Swiss Federal Supreme Court within 30 days of the notification of the award to the parties.

30. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

There are no particular limitation periods under Swiss law for enforcement actions regarding foreign international arbitral awards (provided that the underlying claim has not become time-barred under the substantive law applicable to the dispute).

COSTS

31. What legal fee structures can be used? Are fees fixed by law?

Swiss law is silent on legal fees in international arbitration. The amount and structure of fees are basically a matter of negotiation between attorneys and clients. However, attorneys admitted to the bar or registered in Switzerland are bound by the Free Movement of Lawyers Act (FMLA) and the rules of professional conduct of the Swiss Bar Association, which prohibit contingency fees (*pactum de quota litis*) (*Article 12(e), FMLA*). However, these rules allow arrangements with mark-up success fees (*pactum de palmario*), provided that the attorney's basic rate covers at least his own costs plus a minimal profit.

32. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

There is no default rule regarding cost allocation in international arbitration. The parties can agree on this matter either directly or by reference to institutional rules. In the absence of a party agreement, arbitral tribunals seated in Switzerland tend to apply the general rule that costs follow the event (that is, the successful party is entitled to seek an order that the unsuccessful party pay his reasonable costs). This may not apply if the parties' conduct in the course of the proceedings or other circumstances dictate otherwise.

Cost calculation

Typically, arbitral tribunals base their calculation of costs on the parties' respective cost submissions.

Factors considered

When assessing whether and to what extent compensation for costs of a party is justified, arbitral tribunals regularly apply a reasonableness test. In doing so, they consider factors such as:

- The amount in dispute.
- The complexity of the matter.
- A comparison with the other party's costs.

Arbitral tribunals increasingly take further circumstances into account when allocating costs, such as obstructive behaviour, dilatory tactics or disregard of the tribunal's orders.

ENFORCEMENT OF AN AWARD

Domestic awards

33. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

International arbitral awards rendered by tribunals seated in Switzerland are enforceable on their notification as a matter of law under the same rules as a decision rendered by a Swiss state court. There is no need for a separate *exequatur* (that is, obtaining a declaration of enforceability).

Foreign awards

34. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Switzerland is a party to the New York Convention. Awards rendered by arbitral tribunals seated in Switzerland can be enforced in other member states under the terms of the New York Convention.

35. To what extent is a foreign arbitration award enforceable?

According to Article 194 of the Federal Private International Law Act (PILA), the recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention, irrespective of whether the award was rendered in a member state of the New York Convention or not. Recognition and enforcement of foreign awards under the rules of the New York Convention are determined directly in the enforcement proceedings, and there is no need for a prior and separate procedure for obtaining a declaration of enforceability (*exequatur*).

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

Depending on the complexity of the matter, enforcement proceedings before Swiss courts take about six months.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

In September 2012, the Swiss Parliament gave the assignment to the Federal Government to prepare a revision of Chapter 12 of the Federal Private International Law Act (PILA). The revision is aimed at preserving and enhancing the well-recognised attractive features of Chapter 12. It is intended to provide for a limited and focused update. Possible improvements could include:

- The reinforcement of the "negative effect" of kompetenz-kompetenz.
- Procedures for the correction or interpretation of awards by arbitral tribunals.
- Specific rules for the revision of awards.
- The use of English as an official language in setting aside proceedings before the Federal Supreme Court.

MAIN ARBITRATION ORGANISATIONS

Swiss Chambers' Arbitration Institution

Main activities. The Swiss Chambers' Arbitration Institution, established by the Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich, offers dispute resolution services based on the Swiss Rules of International Arbitration. It has become a main institution for commercial arbitrations seated in Switzerland, with 100 new cases administered under the Swiss Rules in 2015.

W www.swissarbitration.org

Court of Arbitration for Sport (CAS)

Main activities. The CAS, in Lausanne, is the world's most important institution for the administration of international sports-related arbitrations and mediations. It is an independent institution.

W www.tas-cas.org

WIPO Arbitration and Mediation Center

Main activities. The WIPO Arbitration and Mediation Center, based in Geneva, offers dispute resolution services with a particular focus on disputes involving intellectual property and internet domain name disputes. It administrates commercial arbitrations under the WIPO Arbitration Rules.

W www.wipo.int/amc

Swiss Arbitration Association (ASA)

Main activities. ASA is a non-profit association with over 1,200 members, a third of which are from outside Switzerland. Its members are practitioners and academics engaged or interested in domestic and international arbitration.

W www.arbitration-ch.org

ONLINE RESOURCES

Swiss Federal Government

W www.admin.ch/bundesrecht

Description. Website of the Swiss Federal Government with the official classified compilation of Swiss statutory law, including the Swiss Private International Law Act (PILA), the Swiss Code of Civil Procedure (CCP) and the Swiss Code of Obligations (CO) (in the original languages French, German and Italian).

Swiss Federal Government – English translations

W www.admin.ch/opc/en/classified-compilation/2.html

Description. Website of the Swiss Federal Government with unofficial English translations of Swiss statutory law, including the Swiss Code of Civil Procedure (CCP) and the Swiss Code of Obligations (CO).

Swiss Arbitration Association

W www.arbitration-ch.org/pages/en/arbitration-in-switzerland/index.html

Description. Website of the Swiss Arbitration Association with non-official translations of Chapter 12 of the Swiss Private International Law Act (PILA) in English, Russian and Spanish.

Practical Law **Contributor profiles**

Harold Frey, Partner

Lenz & Staehelin
T +41 58 450 80 00
F +41 58 450 80 01
E harold.frey@lenzstaehelin.com
W www.lenzstaehelin.com

Professional qualifications. Zurich, 1999; New York, 2002

Areas of practice. International commercial arbitration and litigation; corporate and M&A; internal investigations.

Recent transactions

- Representing a buyer in a large-scale post-M&A dispute relating to the acquisition of a bank.
- Representing a European shipbuilding company in a complex multi-party arbitration (involving a state) in the context of a major international shipbuilding project.
- Representing a state in an arbitration regarding high-stake monetary claims as well as claims for the re-issuance of concessions brought by foreign investors.
- Representing (as Co-counsel) a leading European energy company in a dispute regarding gas price adjustments/review.
- Representing a group of sellers in a post-M&A dispute in the publishing industry.

Languages. German, English

Professional associations/memberships. Swiss Arbitration Association (ASA); The London Court of International Arbitration (LCIA); German Institution of Arbitration (DIS); Zurich Bar Association (ZAV); New York Bar Association.

Publications

- *Frey, H./Aebi, M., Commentary to Art. 12 - 14 of the Swiss Rules of International Arbitration in: Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration: Commentary, 2nd ed., 2013.*
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Xavier Favre-Bulle, Partner

Lenz & Staehelin
T +41 58 450 70 00
F +41 58 450 70 01
E xavier.favre-bulle@lenzstaehelin.com
W www.lenzstaehelin.com

Professional qualifications. Geneva, 1997; England and Wales, 2000

Areas of practice. International commercial arbitration and litigation; contract and commercial; sports law.

Recent transactions

- Representing the largest electricity producer in Romania in an UNCITRAL arbitration involving the supply of electricity.
- Representing a well-known luxury group in a dispute with a distributor.
- Representing a Chinese company of a UK group in a dispute regarding the construction of a mill in Asia.

Languages. French, English

Professional associations/memberships. Swiss Arbitration Association (ASA); London Court of International Arbitration (LCIA); International Council for Commercial Arbitration (ICCA); International Arbitration Institute (IAI); *Comité français de l'arbitrage*; International Bar Association (IBA); Union Internationale des Avocats (UIA); The Law Society of England and Wales; Geneva Bar Association (OdA); Swiss Bar Association (SAV); *Société suisse des Juristes*; Geneva Association of Business Lawyers (AGDA); *Société Genevoise de Droit et de Législation* (SGDL); among others.

Publications

- *Favre-Bulle, X., Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice?, in: Müller C./Besson S./Rigozzi A. (ed.), New Developments in International Commercial Arbitration 2015, Zurich, 2015, p. 315-355*
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- *Favre-Bulle, X., Durante, D., CAS Arbitration Proceedings: Is Sports Arbitration so Different?, in: Journal of International Trade and Arbitration Law (JITAL), Vol. 4, Issue 2, 2015, 123-163.*
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- *Favre-Bulle, X., Le Règlement Suisse d'Arbitrage International ("Swiss Rules"): de 2004 à la révision (légère) de 2012, in: Revue de Droit des Affaires Internationales (RDAI) 2013, 21-39.*

Martin Aebi, Counsel

Lenz & Staehelin
T +41 58 450 80 00
F +41 58 450 80 01
E martin.aebi@lenzstaehelin.com
W www.lenzstaehelin.com

Professional qualifications. Zurich, 2002

Areas of practice. International commercial arbitration; litigation; intellectual property; unfair competition.

Recent transactions

- Representing a state in an arbitration regarding high-stake monetary claims as well as claims for the re-issuance of concessions brought by foreign investors.
- Representing a buyer in a large-scale post-M&A dispute relating to the acquisition of a bank.
- Representing a beverage system manufacturer in a dispute arising out of a major territorial cooperation and distribution agreement.

Languages. German, English

Professional associations/memberships. Swiss Arbitration Association (ASA); International Council for Commercial Arbitration (ICCA); IBA Arbitration Committee, IBA Committee on Intellectual Property and Entertainment Law; International Trademark Association (INTA); Swiss Bar Association (SAV); Zurich Bar Association (ZAV).

Publications

- *Frey, H./Aebi, M., Commentary to Art. 12 - 14 of the Swiss Rules of International Arbitration, in: Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration: Commentary, 2nd ed., 2013.*
- *Calame, T./Aebi, M., Enforceability, in: Halket (ed.), Arbitration of International Intellectual Property Disputes, 2012.*
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