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Switzerland

INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Switzerland.

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SWITZERLAND

INTERNATIONAL ARBITRATION



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

In Switzerland, there are different sets of rules for domestic and international arbitration. International arbitration is governed by chapter 12 of the Swiss Private International Law Act ("PILA"). The PILA applies if, at the time of the conclusion of the arbitration agreement, the seat of the arbitral tribunal is in Switzerland and at least one of the parties had its domicile or habitual residence outside Switzerland.

Domestic arbitration is governed by Part 3 of the Swiss Civil Procedure Code ("CPC"). Part 3 of the CPC applies to arbitrations seated in Switzerland if, at the time when the arbitration agreement was concluded, all the parties had their domicile or habitual residence in Switzerland.

The parties to a domestic arbitration are free to opt out of the CPC and apply the PILA instead, and vice versa (Art. 353 para. 2 CPC; Art. 176 para. 2 PILA).

Party autonomy plays a very important role in Swiss arbitration law, but there are some mandatory rules. These rules include (but are not limited to) the provisions on arbitrability (Art. 177 PILA / Art. 353 CPC), the right to challenge an arbitrator for lack of independence or impartiality (Art. 180 para. 1(c) PILA / Art. 367 para. 1(c) CPC), the provisions on *lis pendens* (Art. 181 PILA / Art. 372 CPC), the provisions ensuring equal treatment of the parties and their right to be heard (Art. 182 para. 3 PILA / Art. 373 para. 4 CPC), and the provisions on judicial assistance by state courts (Art. 185 PILA / Art. 375 para. 2 CPC).

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

Switzerland has signed and ratified the New York Convention. The Swiss "reservation of reciprocity" was

withdrawn in 1993, making the New York Convention applicable *erga omnes*.

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

Switzerland is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention). Switzerland also ratified the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Switzerland is also a contracting party to the Energy Charter Treaty, which entered into force in 1998. It has not ratified the European Convention on International Commercial Arbitration of 1961.

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

The PILA is not based on UNCITRAL Model Law, but various provisions indicate that the drafters of the PILA were influenced by the Model Law.

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

On 19 June 2020, the Swiss parliament approved a revision of chapter 12 of the PILA which regulates international arbitrations (see question 1).

The revision, which entered into force on 1 January 2021, was not aimed at bringing major changes to Swiss international arbitration but at modernizing and clarifying certain issues. For example, under the revised law, it is possible for parties to file submissions in arbitration-related proceedings before the Swiss Federal Tribunal in the English language. Another important element of the revision was the codification of the Swiss Federal Tribunal's practice of allowing parties to request

a revision of an arbitral award.

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

The leading Swiss arbitration institution is the Swiss Arbitration Centre.

It was created in June 2021, when the Swiss Chambers' Arbitration Institution ("SCAI") was officially converted into a Swiss limited company and rebranded as the "Swiss Arbitration Centre".

The Centre's majority shareholder is the Swiss Arbitration Association ("ASA"), one of the leading associations of arbitration practitioners and academics.

The Swiss Arbitration Centre administers proceedings under the Swiss Rules of International Arbitration ("Swiss Rules"). The latest version of the Swiss Rules entered into force on 1 June 2021, replacing the previous version of 2012. The Swiss Rules 2021 apply to arbitration proceedings in which the Notice of Arbitration was submitted on or before 1 June 2021, unless the parties have agreed otherwise.

The Swiss Society of Engineers and Architects ("SIA"), which issues the most widely used domestic standard form construction contract, has issued a modern set of arbitration rules - the SIA Standard 150:2018 (the "SIA 150") - which entered into force on 1 January 2018.

7. Is there a specialist arbitration court in your country?

The Court of Arbitration for Sport ("CAS"), based in Lausanne, Switzerland, is an institution independent of any sports organization which provides services to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.

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

Under Swiss law, an arbitration agreement must meet minimum requirements of form and substance.

In terms of form, an arbitration agreement must be made in writing or by any other means of communication which permits it to be evidenced by text

(Art. 178 para. 1 PILA). An arbitration agreement can thus be validly concluded by email or telefax. Signatures are not required. According to the Swiss Federal Tribunal, the form requirements of Art. 178 para. 1 PILA correspond to those of Art. II para. 2 of the New York Convention (see the Swiss Federal Tribunal's decision no. 145 III 199 of 17 April 2019).

The form requirement of Art. 178 para. 1 PILA does not prevent the extension of the arbitration agreement to third parties (see question 12). As long as the *original* parties complied with the form requirement, the Swiss Federal Tribunal argues, the agreement can be extended to third parties without that extension being evidenced by text.

In terms of substance, an arbitration agreement must have the following minimum content (*essentialia negotii*): the agreement of the parties to submit their dispute to an arbitral tribunal instead of a state court, (ii) the designation of a defined or at least determinable arbitral tribunal and (ii) a description of the dispute or the legal relationship to be covered by the arbitration agreement.

Furthermore, an arbitration is considered valid if it conforms either to the law chosen by the parties, or to the law governing the merits of the dispute, in particular the main contract, or to Swiss law (Art. 178 para. 2 PILA) (see question 10).

Art. 178 PILA also applies to arbitration agreements in unilateral legal acts and in company by-laws (Art. 178 para. 4 PILA), thus confirming that disputes regarding wills, foundations and trusts etc. may be resolved by arbitration.

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

Yes. Under Swiss arbitration law, an arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not yet arisen (Art. 178 para. 3 PILA).

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

An arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the merits of the dispute, in particular the main contract, or to Swiss law (Art. 178 para. 2 PILA).

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

Chapter 12 of the PILA does not contain specific provisions on multi-party or multi-contract arbitrations.

There is a provision in the PILA stating that, in case of multi-party arbitrations, the *juge d'appui* may nominate the entire arbitral tribunal (Art. 179 para. 5 PILA). A provision to that effect already exists for domestic arbitrations (Art. 362 para. 2 of the Swiss Civil Procedure Code).

The Swiss Rules of International Arbitration, in force as from 1 January 2021 ("Swiss Rules"), provide for the consolidation of pending arbitrations (Art. 7 Swiss Rules) and regulate cross-claims, joinder and intervention (Art. 6 Swiss Rules). They also contain a specific regime for the constitution of the arbitral tribunal in multi-party settings (Art. 11 Swiss Rules).

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

According to the Swiss Federal Tribunal's case law, an arbitration agreement can bind a third party in the following instances:

- assignment of a claim, assumption of a debt or transfer of a contract containing an arbitration clause;
- a third party who interferes in the performance of a contract, knowing that it contains an arbitration agreement, and thereby demonstrates its willingness to be bound by said agreement; or
- a third party who is the beneficiary of a contract which was concluded by other parties and which contains an arbitration agreement.

The Swiss Federal Tribunal has so far declined to bind a third party to an arbitration agreement based purely on the existence of a group of companies.

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

In international arbitration, every dispute which is "of financial interest" ("*vermögensrechtlich*") is arbitrable (Art. 177 para 1 PILA).

Thus, there are only few areas which are deemed non-arbitrable. These include claims concerning legal status (e.g. divorce, separation, adoption etc.) and some matters relating to insolvency law (actions aimed exclusively at enforcing debts, such as the opening of bankruptcy proceedings, freezing of assets etc.).

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

In the Swiss Federal Tribunal's decision no. 142 III 239 of 18 February 2016, the Swiss Federal Tribunal held that there is no hierarchy between the three laws designated by Art. 178 para. 2 PILA (cf. question 10). Absent a choice of law applicable to an arbitration agreement, validity can thus be examined alternatively under Swiss law or the *lex causae* (in the same vein: the Swiss Federal Tribunal's decision no. 141 III 495 of 6 October 2015).

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

In Switzerland, the law applicable to the merits is determined by the rules of law chosen by the parties or, in the absence of such choice, by the rules of law which have the closest connection to the case (Art. 187 para. 1 PILA). The parties can authorize the arbitral tribunal to decide *ex aequo et bono* (Art. 187 para. 2 PILA).

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

Under Art. 187 para. 1 PILA, an arbitral tribunal is entitled to apply transnational rules of law such as the UNIDROIT Principles of International Commercial Contracts as the substantive law.

Whether state courts are entitled to apply transnational law is less clear. The only available case law relates to Art. 116 PILA, which is a general conflict of law provision stating that a contract is governed by the law chosen by the parties. In connection with Art. 116 PILA, the Swiss Federal Tribunal has held that rules issued by private organizations like the FIFA are not qualified as “law” and may not be chosen as the substantive law. It has not yet been decided whether this strict approach would also exclude rules issued by intergovernmental organizations such as the UNIDROIT.

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

The PILA does not impose restrictions on the appointment of arbitrators, but provides that arbitrators who are not sufficiently independent or impartial may be challenged by the other party (Art. 180 para. 1(c) PILA).

The Swiss Federal Tribunal has held that arbitrators are essentially subject to the same degree of independence as state court judges. The IBA Guidelines on Conflict of Interest in International Arbitration, while not binding, have been termed a “useful instrument” to determine the independence and impartiality of arbitrators by the Swiss Federal Tribunal.

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

A default procedure is set out in Art. 179 PILA:

Unless the parties have agreed otherwise, the arbitral tribunal will consist of three members (with the party-appointing arbitrators unanimously designating the president). If the parties have not specified the seat of the arbitration, the state court first seized is deemed competent to appoint or replace an arbitrator. Upon request by one of the parties, the state court must take the necessary steps to constitute the arbitral tribunal, if the parties or the existing arbitrators fail to comply with their duties within 30 days of being requested to do so. In multi-party settings, the *judge d'appui* may nominate the entire arbitral tribunal. Lastly, a person who has been requested to act as arbitrator must disclose any grounds which may give rise to justifiable doubts regarding his or her independence or impartiality.

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

The local court may only intervene if (i) the parties have

not agreed on a method for appointing arbitrators or if the appointment failed for other reasons, and (ii) one of the parties requests the court’s assistance (Art. 179 para. 2 PILA; see question 17). The court must grant such request, unless a summary examination reveals that no arbitration agreement between the parties exists (Art. 179 para. 3 PILA).

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

According to Art. 180 PILA, an arbitrator may be challenged if:

- he or she does not meet the qualifications agreed upon by the parties;
- a ground for challenge exists under the applicable rules of arbitration;
- circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality.

Many institutional rules provide for time limits to raise a challenge (for example Art. 13 para. 2 of the Swiss Rules of International Arbitration: 15 days after the grounds for challenge became known). The PILA provides the following procedure for challenging arbitrators (Art. 180a PILA):

- Unless the parties have agreed otherwise, a challenge shall be submitted in writing to all members of the tribunal within 30 days, starting from the point in time when the grounds for challenge became known or could have become known to the challenging party.
- After submitting a challenge, the respective party has another time limit of 30 days in which to approach the state court. The court’s decision on the challenge is final.
- The arbitral tribunal may continue the proceedings, without excluding the challenged arbitrator, until a decision on the challenge has been reached, unless the parties have agreed otherwise.

Art. 180b PILA states that arbitrators can be removed upon joint agreement by the parties, and also that an arbitrator may be challenged on the grounds of incapability.

21. Have there been any recent

developments concerning the duty of independence and impartiality of the arbitrators

See questions 16 and 19.

22. Have there been any recent decisions in your country concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in *Halliburton v Chubb*?

The Swiss Federal Tribunal has held that the IBA Guidelines on Conflicts of Interest in International Arbitration are a useful instrument, capable of harmonizing the standards applied in the field of international arbitration to prevent conflicts of interest (cf. decision no. 136 III 605 of 29 October 2010; decision no. 4A_506/2007 of 20 March 2008).

However, the parties cannot simply rely on the duties of disclosure set out in the IBA Guidelines on Conflicts of Interest in International Arbitration, Part I, section (3). Instead, as the Swiss Federal Tribunal held in its decision no. 147 III 65 of 22 December 2020, the parties have a duty to conduct research, notably in the internet, in order to identify elements that might cast doubt on an arbitrator's impartiality. The Swiss Federal Tribunal acknowledged that it was difficult to define the scope of this duty, which depends on the circumstances of the specific case. It left open the question whether a party may be required, depending on the circumstances, to verify the existence of possible grounds for challenge by examining, at least within certain limits, various social networks.

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

The PILA does not specifically address the case of a truncated tribunal. The Swiss Civil Procedure Code ("CPC"), which governs domestic arbitrations, provides that if an arbitrator refuses to participate in a deliberation or decision, the others may proceed without him or her, unless the parties have agreed otherwise (Art. 382 para. 2 CPC).

Truncation raises the question as to whether the tribunal is still regularly constituted. An arbitral award rendered by an improperly constituted tribunal is subject to annulment by the Swiss Federal Tribunal (Art. 190 para. 2(a) PILA).

According to the Swiss Federal Tribunal's case law, a

distinction must be made between an arbitrator who formally resigns without good cause, and an arbitrator who, without formally resigning, refuses to collaborate or obstructs the proceedings. In the former case, the Swiss Federal Tribunal found that the resigned arbitrator must be replaced, unless the arbitration agreement or the applicable arbitration rules contain a provision allowing the arbitration to continue with the remaining members. In the latter case, the Swiss Federal Tribunal held that the tribunal remains regularly constituted and may decide to continue the proceedings if the majority of its members so decides.

Various sets of arbitration rules include a procedure for the replacement of arbitrators (e.g. Art. 14 and 15 of the Swiss Rules of International Arbitration).

24. Are arbitrators immune from liability?

There is no provision in the PILA (or in the Swiss Civil Procedure Code for domestic arbitration) which provides immunity to arbitrators. However, most authors agree that the arbitrators' liability should, in the interest of arbitration, be limited to the extent possible by law. Many modern arbitration rules contain provisions for the exclusion of liability, such as Art. 45 para. 1 of the Swiss Rules of International Arbitration, which sets forth that the arbitrators shall not be liable for any act or omission in connection with an arbitration conducted under the Swiss Rules of International Arbitration, except if the act or omission is shown to constitute intentional wrongdoing or gross negligence.

25. Is the principle of competence-competence recognized in your country?

Yes. Pursuant to Art. 186 para. 1 PILA, an arbitral tribunal is competent to decide on its own jurisdiction. It shall do so even if an action on the same matter between the same parties is already pending before a state court or another tribunal, unless there are serious reasons for staying the proceedings (Art. 186 para. 1bis PILA).

The principle of competence-competence does not mean that the arbitral tribunal's decision on jurisdiction is beyond review: An arbitral award can be submitted to the Swiss Federal Tribunal for annulment on the grounds that the tribunal wrongly accepted or declined jurisdiction (Art. 190 para. 2(b) PILA).

26. What is the approach of local courts towards a party commencing litigation in

apparent breach of an arbitration agreement?

If a Swiss state court is seized with an action raised in apparent breach of an arbitration agreement, it will not invariably decline its jurisdiction. First, the court will wait and see whether the respondent raises a plea of lack of jurisdiction. If the respondent does so, the court will decline its jurisdiction. It is then up to the claimant to commence arbitration. If no jurisdictional objection is raised, the court will continue proceedings (Art. 7(a) PILA).

The court will also continue proceedings if the arbitration agreement is found to be null and void, inoperative or incapable of being performed (Art. 7(b) PILA). The same applies if the arbitral tribunal cannot be constituted for reasons for which the respondent party in the arbitration is manifestly responsible (Art. 7(c) PILA).

Art. 7 PILA applies to disputes with an international dimension which provide for an arbitration seated in Switzerland. If the seat of the arbitration is abroad, the state court will apply Art. II(3) of the New York Convention.

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

Arbitral proceedings are deemed commenced from the point in time when one of the parties seizes with a claim the arbitrator(s) designated in the arbitration agreement or, failing such designation, from the point in time when one of the parties initiates the procedure for constituting the tribunal (Art. 181 PILA).

Swiss arbitration laws do not contain provisions on limitation periods or time bars. Swiss law qualifies limitation periods as a matter of substantive rather than procedural law. For claims governed by Swiss substantive law, Art. 135 para. 2 of the Swiss Code of Obligations provides that a statutory period of limitation can be interrupted by filing a claim before an arbitral tribunal.

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

The question whether, and to what extent, a state may

invoke its immunity in connection with the commencement of an arbitration is not expressly regulated.

The PILA merely stipulates that a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of the dispute covered by the arbitration agreement (Art. 177 para. 2 PILA). The same applies to enterprises held by, and organizations controlled by a state.

Many authors argue that the same provision, by reference to the *ratio legis*, should not permit a state, an enterprise held by, or an organization controlled by a state to plead immunity from jurisdiction before an arbitral tribunal.

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

Swiss arbitration law provides that local courts can intervene if a party fails to participate in the constitution of the tribunal (see questions 17 and 18). Otherwise, local courts are not empowered to compel the parties to arbitrate.

The PILA does not provide guidance on how to deal with defaulting parties. These issues are thus governed by the arbitral procedure to be determined by the parties or the tribunal (Art. 182 PILA). Any provisions on default, which are applied to the parties of an arbitration, must be consistent with the parties' right to be heard and to be treated equally.

Default is addressed, for example, in Art. 30 of the Swiss Rules of International Arbitration, which states that a tribunal may proceed with the arbitration if a party fails to appear at a hearing despite due notification and without showing sufficient cause. The same provision allows the tribunal to render an award based on the evidence on record if one of the parties fails to produce evidence within the time limit set by the tribunal.

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

For domestic arbitration, there is a provision stating that a third party may request to participate in, or a litigant

may request that a third party be joined to the arbitration (Art. 376 para. 3 of the Swiss Civil Procedure Code ("CPC")). Both cases require an arbitration agreement between the parties and are subject to the consent of the arbitral tribunal (Art. 376 para. 3 CPC).

There is no comparable provision for international arbitration and it is controversial whether international arbitral tribunals seated in Switzerland should take guidance from Art. 376 para. 3 CPC.

Often, the rules of arbitration will contain provisions on joinder. For example, Art. 6 para. 3 of the Swiss Rules of International Arbitration provides that requests for joinder that are submitted after the constitution of the tribunal shall be decided by the tribunal, after consulting with all the parties, taking into account all circumstances. Prior to the constitution of the tribunal, claims directed at an additional party shall be made by submitting a notice of claim to the Secretariat of the Court of the Swiss Arbitration Centre (Art. 6 para. 2 Swiss Rules).

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

In Switzerland, the local courts do not have the power to compel third parties to arbitrate. However, if the assistance of the state courts is necessary for the taking of evidence, such assistance may be requested by the arbitral tribunal or by a party (Art. 184 para. 2 PILA). State courts have the power to impose sanctions on a third party who refuses to give evidence in an arbitration proceeding.

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

Before the tribunal is constituted, a party can request the state courts to issue interim measures, unless the parties have agreed otherwise. Some rules of arbitration provide that, before the tribunal is constituted, interim relief may be sought from an emergency arbitrator appointed by the institution (e.g. Art. 43 of the Swiss Rules of International Arbitration).

According to the PILA, the arbitral tribunal is authorized – unless the parties have agreed otherwise – to order provisional or conservatory measures upon the request of a party (Art. 183 para. 1 PILA). Such measures include conservatory measures, aimed at preserving assets, regulatory measures, aimed at preserving the status quo

between the parties, or performance measures, aimed at temporary enforcement of a claim pending determination of the dispute.

If necessary, the tribunal or a party may request the assistance of the local court to enforce those measures (Art. 183 para. 2 PILA). Assistance will also be given if the place of arbitration is outside Switzerland (Art. 185a PILA).

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Anti-suit and anti-arbitration injunctions are not expressly excluded by Swiss law. However, these measures are not traditionally applied in Switzerland's civil law system. Therefore, tribunals seated in Switzerland will be reluctant to grant anti-suit injunctions.

Regarding applications for anti-arbitration injunctions from state courts, it is doubtful whether such injunctions are compatible with the principle of competence-competence, which entitles a tribunal to rule on its own jurisdiction, irrespective of pending parallel court or arbitration proceedings between the same parties (see question 23).

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

The PILA merely states that the arbitral tribunal shall itself conduct the taking of evidence (Art. 184 para. 1 PILA). The procedure for taking evidence is part of the arbitral procedure which is determined by the parties or, in the absence thereof, by the tribunal (Art. 182 PILA).

If necessary, the arbitral tribunal or a party (with the tribunal's consent) may request the assistance of the state court at the seat of the tribunal (Art. 184 para. 2 PILA). The state court will apply its own law; it may also, upon request, apply or consider other procedural norms (Art. 184 para. 3 PILA). As mentioned, state courts have the power to impose sanctions on a third party who refuses to give evidence in an arbitration proceeding.

Assistance may also be requested if the seat of the arbitration is outside Switzerland (Art. 185a PILA).

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

If the counsel or arbitrator is a licensed Swiss lawyer who is registered to represent parties before state courts, he or she must adhere to the professional rules set forth in the Swiss Federal Act on the Freedom of Movement for Lawyers (Swiss Federal Lawyers' Act). In addition, the Swiss Bar Association has issued a set of professional rules which must be observed by its members.

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

Swiss statutory law does not address the confidentiality of the arbitration proceedings. However, it is generally accepted that arbitrators assume a duty of confidentiality with the acceptance of their mandate, based on their agreement with the parties (*receptum arbitri*).

Whether the parties themselves are also under a duty of confidentiality depends on whether there is a corresponding confidentiality agreement between them. Sometimes, specific confidentiality provisions may be found in the arbitration agreement itself or in the agreed rules of arbitration. Art. 44 of the Swiss Rules of International Arbitration imposes a general duty on the parties, unless agreed otherwise in writing, to keep confidential all awards and orders as well as all material submitted by another party in the framework of the proceeding.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

According to the Swiss Federal Tribunal, evidence that was obtained illegally is *not per se* inadmissible; this applies both to state court and arbitral proceedings (cf. decision no. 4A_448/2013 of 27 March 2014; decision no. 4A_362/2013 of 27 March 2014). Instead, a balancing of interests must be made between the interest in finding the truth and those interests that have been violated by the illegal acquisition of evidence.

In two cases, the CAS (see question 7) held that an

illegally recorded phone call and an illegal video recording which proved that a player was involved in the manipulation of games could be used because the interest in fair games was considered predominant (decision no. 4A_448/2013 of 27 March 2014; decision no. 4A_362/2013 of 27 March 2014).

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

The PILA does not contain provisions on how to estimate and allocate the costs of the arbitration.

Failing an agreement by the parties, guidance may be provided by the applicable rules of arbitration or by the procedural law governing the arbitration. Otherwise, the determination and allocation of costs is in the discretion of the arbitral tribunal. Swiss arbitrators will generally apply the "costs follow the event"-principle, meaning that the costs will be allocated between the parties in proportion to the success and failure of their respective claims and defenses.

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

The claim for default interest is governed by the law applicable to the merits of the dispute (see question 14 above). Under Swiss law, statutory interest for late payment can be claimed on both the principle claim and on the costs incurred in connection with the arbitration.

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

According to the PILA, party autonomy also applies to the form of the arbitral award. Unless the parties have agreed otherwise, the award shall be drawn up in writing, supported by reasons, dated and signed (Art. 189 para. 2 PILA). The absence of reasons (against the parties' wishes) does not make the award subject to annulment.

In principle, an international award rendered by a tribunal seated *in Switzerland* is final and thus enforceable from its notification, i.e. from the date of its communication to the parties (Art. 190 para. 1 PILA). The enforceability of the award is not affected by a subsequent action for annulment.

Awards rendered by tribunals seated *outside Switzerland* are recognized and enforced in Switzerland according to the New York Convention (Art. 194 PILA). The formal requirements for enforcement are set forth in Art. IV New York Convention.

It is important to note that, under Swiss law, the winning party may initiate enforcement proceedings directly: there is no need for prior and separate proceedings to obtain a declaration of enforceability (*exequatur*).

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

Arbitral Awards, both foreign and domestic, are enforced in adversarial proceedings, i.e. the party opposing the enforcement will be heard.

The enforcement of arbitral awards is dealt with in summary proceedings and the defenses available to the opposing party are limited, as are the means of evidence. These measures serve to accelerate the proceedings, but the overall timeframe for enforcement remains difficult to predict.

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

In principle, arbitral awards rendered in Switzerland are enforceable under the same rules as those applicable to state court judgements (Art. 336 et seqq. of the Swiss Civil Procedure Code). The party opposing the enforcement has a limited range of defenses at its disposal, depending on whether the award concerns a monetary or a non-monetary claim. For example, the debtor of a monetary claim can resist enforcement by furnishing documentary proof that the debt has been settled. If – and only if – the award presented for enforcement was subject to a waiver of annulment, the party opposing enforcement can invoke the grounds for refusal set forth in the New York Convention (Art. 192 para. 1 PILA).

Foreign arbitral awards, i.e. arbitral award rendered by a tribunal seated outside Switzerland, are enforced according to the New York Convention. The competent court will examine as a preliminary question whether the requirements set forth in the New York Convention are

met.

As mentioned (see question 37), enforcement may be initiated directly: there is no need for prior and separate proceedings to obtain a declaration of enforceability (*exequatur*).

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

In line with Art. V para. 2(b) of the New York Convention, Swiss state courts will not enforce remedies which violate Swiss public policy. Problems may arise, for example, if the remedy provides for punitive damages. In addition, arbitral tribunals may only award remedies for claims which are covered by definition of arbitrability, i.e. claims of “financial interest” (Art. 177 para. 1 PILA).

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

International awards rendered in Switzerland can be annulled by the Swiss Federal Tribunal. The action for annulment must be submitted within 30 days of the receipt of the award, and must specifically set forth that at least one of the possible grounds for annulment is applicable. The grounds for annulment are set forth in Art. 190 para. 2 of the PILA:

- a. improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal
- b. incorrect decision on jurisdiction by the arbitral tribunal
- c. the decision goes beyond the claims submitted to it (*ultra petita*) or fails to address one of the items of the claim (*infra petita*)
- d. violation of the principle of equal treatment or of the parties’ right to be heard
- e. incompatibility with public policy.

Before rendering its decision, the Swiss Federal Tribunal will invite the counterparty and the arbitral tribunal to comment on the annulment. The Federal Tribunal is bound by the factual findings of the arbitral tribunal. The chances of succeeding with an action for annulment are very slim, below 10%, based on past statistics.

In addition to annulment proceedings, the PILA provides for the revision of arbitral awards.

The grounds for revision are limited, namely the discovery of new material facts, the discovery that the award was influenced by criminal offenses, and

circumstances giving rise to doubts as to an arbitrator's independence or impartiality (Art. 190a para. 1 PILA).

A revision is possible if the ground for revision was discovered after the award was rendered. A request for revision must be submitted to the Swiss Federal Tribunal within 90 days from the discovery. Once 10 years have elapsed since the award has entered into force, a revision can only be requested in case of influence by criminal offenses (Art. 190a para. 2 PILA).

The PILA also expressly stipulates the parties' right to request the correction of spelling mistakes, to request an explanation of unclear considerations and the issuance of an additional award on any claims which the tribunal failed to address (Art. 189a PILA).

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

If none of the parties have their domicile or their place of business in Switzerland, the parties may waive any or all grounds for an appeal (Art. 192 para. 1 PILA). Such waiver may be agreed upon in the arbitration agreement or by subsequent written consent. Given the consequences, the parties must agree on the waiver by express statement. A reference to arbitration rules which state that the award shall be "final" is not sufficient.

Regarding the possibility of a *revision* (see question 41), the PILA stipulates that the parties may not exclude a revision on the grounds of criminal behavior which influenced the award (Art. 192 of the revised PILA).

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

In Switzerland, there is no specific statute on the immunity of foreign states or state entities.

The Swiss Federal Tribunal has adopted a restrictive approach in this regard. In general, the Swiss Federal Tribunal requires three elements in order to grant enforcement against a foreign state in Switzerland:

First, the claim to be enforced must arise from an *acta jure gestionis*, meaning that the state was acting in a private capacity. If, by contrast, the state was exercising sovereign power (*acta jure imperii*), immunity will apply. Second, enforcement cannot be granted for assets which

are related to the sovereign activities of the state. Thirdly, there must be a sufficient connection between the claim and Switzerland.

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

As a rule, an arbitral award on the merits binds only those persons or legal entities which were parties to the arbitral proceedings. However, there are rare cases in which third parties may be bound. This could be the case for example if the third party is a legal successor or guarantor of one of the litigants, or if the award established or annulled a legal relationship, in which case it will have effects also vis-à-vis third parties (e.g., annulment of a vote taken in a shareholders' meeting).

Regarding the second question, it should be noted that the recognition of an award is usually not decided in a separate procedure but rather as a preliminary question within a specific enforcement procedure. In these cases, there is no separate challenge available against the recognition of the award.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

Third party funding is not expressly regulated in Swiss statutory law. However, the Swiss Federal Tribunal has addressed the issue in several decisions. While third party funding is qualified as legal, certain limitations must be observed. Third party funding may not jeopardize the professional duties of the lawyer acting for the funded party, namely his or her duty to maintain independence, to keep client-related information confidential and to avoid conflicts of interest.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

The PILA does not expressly provide for the possibility of emergency arbitrator relief. However, the parties may apply to state courts for interim measures at any time, even before the tribunal is constituted (see question 31).

The Swiss Rules of International Arbitration ("Swiss Rules") expressly provide that a party seeking urgent interim measures before the arbitral tribunal is

constituted may apply for emergency relief (Art. 43 para. 1 Swiss Rules). In that case, the Arbitration Court of the Swiss Arbitration Centre will appoint a sole emergency arbitrator as soon as possible. According to the Centre's statistics, emergency arbitrator relief is not sought often. In the year 2019, emergency relief only made up 3% of all cases.

The decision of the emergency arbitrator is binding on the parties under the same principles as a decision by an arbitral tribunal on interim measures (see the reference to Article 29 in Article 43(8) of the Swiss Rules). Therefore, it has the binding force of a judicial decision by an arbitrator. Consequently, the emergency arbitrator's decision is, in principle, enforceable in a state court.

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

The PILA does not provide for the possibility of expedited arbitration proceedings.

However, for cases administered by the Swiss Arbitration Centre, the Swiss Rules of International Arbitration ("Swiss Rules") provide an expedited procedure (Art. 42 Swiss Rules). This procedure applies to disputes where the amount in dispute does not exceed one million Swiss francs. Parties are free to agree on the application of the expedited procedure also for larger disputes. As a rule, the award will be rendered within six months from the date on which the arbitral tribunal received the file.

The expedited procedure under the Swiss Rules has proven very popular, making up 43% of all cases submitted to the Swiss Arbitration Centre in 2019.

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

The Swiss Arbitration Centre supports diversity in international arbitration. In 2016, the Centre signed the Equal Representation in Arbitration Pledge, which seeks to increase the number of women appointed as arbitrators on an equal opportunity basis. According to the Centre's gender diversity statistics for 2019, 33% of the arbitrators appointed by the institute were women.

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

For enforcement proceedings in Switzerland which are governed by the New York Convention, Art. V para 1(e) stipulates that a party can oppose the enforcement of an award on the grounds that the award has not yet become binding, or has been set aside or suspended by a competent authority in the country of origin. In the past, the Swiss Federal Tribunal has been requested to deny enforcement on the grounds that a foreign award has not yet become binding. The Swiss Federal Tribunal denied these requests, finding that the appellant failed to submit the necessary proof (decisions no. 108 Ib 85 of 26 February 1982, 110 Ib 191 of 14 March 1984). Regarding awards which have been suspended in the country of origin, the Swiss Federal Tribunal will only consider such suspension if it was ordered by a judicial authority (decision no. 135 III 136 of 9 December 2008).

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

Switzerland regularly achieves top rankings in the corruption indexes published by Transparency International.

Essential provisions to combat corruption are contained in the Swiss Criminal Code and the Federal Unfair Competition Act. For example, Articles 322ter through 322novies of the Swiss Criminal Code prohibit active and passive bribery of public officials, including arbitrators, as well as active and passive bribery of private individuals. With the exception of minor cases, these offences are prosecuted *ex officio*.

As regards the standard of proof, the court is free to interpret the available evidence in accordance with the views that it forms throughout the proceedings. Where there is insurmountable doubt as to whether the factual requirements of an alleged offence have been fulfilled, the court shall proceed on the assumption that the circumstances more favourable to the accused occurred.

54. Have there been any recent court

decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

As Switzerland is not a member of the European Union, it is not bound by the judgements of the European Court of Justice ("ECJ"). However, due to the close economic and political ties between the EU and Switzerland, the ECJ's jurisprudence is closely monitored. The ECJ's judgement in Slovak Republic v Achmea BV (Case C-284/16) has met with considerable interest, in particular regarding the further development of a framework agreement between Switzerland and the EU and the possibility of resolving disputes by way of arbitration. So far, it is unclear which impact ECJ Case C-284/16 will have on agreements between the EU (and/or its member states) and third countries such as Switzerland.

In its decision no. 4A_187/2020 of 23 February 2021, the Swiss Federal Tribunal touched on "Achmea", but indirectly. Specifically, the Swiss Federal Tribunal rejected an application by Spain to set aside a final award rendered under the Energy Charter Treaty (ECT). In the final award, the tribunal had denied Spain's request to revisit a preliminary award on jurisdiction rendered in 2014 after the ECJ issued its ruling in "Achmea". The Swiss Federal Tribunal dismissed Spain's arguments that the arbitral tribunal had violated its right to be heard and procedural public policy when it refused to revisit the preliminary award on jurisdiction.

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

The judgment of the General Court of the European Union Micula & ors (Joined Cases T-624/15, T-694/15 and T-694.15) has, thus far, neither expressly nor otherwise been considered by Swiss courts.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

The COVID-19 pandemic has created an unprecedented incentive to find technical alternatives to in-person meetings. Tribunals often require the parties to discuss the use of such alternatives, in order to continue the proceedings rather than having to postpone examinations and witness hearings. There has also been an increased emphasis on submitting documents in electronic form instead of, or in addition to, by post/courier.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

The Swiss Rules of International Arbitration, in force as from 1 June 2021, provide for an expedited procedure (Article 42). The expedited procedure applies by default (subject to an opt-out by the parties) if the amount in dispute does not exceed 1 million Swiss francs. The Parties are free to agree on the application of the expedited procedure also for larger disputes.

The Swiss Rules 2021 contain a number of new provisions designed to address current technological developments in international arbitration. These new provisions are in line with the current trend in international arbitration (for example the recently revised ICC Rules).

The Swiss Rules 2021 encourage paperless arbitrations: the Secretariat no longer requires hard copies of the Notice of Arbitration and other communications unless special circumstances apply (Article 3 (1), Article 16 (2)). However, the Swiss Rules 2021 do not provide a default rule for electronic filings. It is still up to the arbitral tribunal and the parties to decide whether submissions shall be made electronically.

The previous Swiss Rules, which date back to 2012, already allowed witness examination by videoconference. The Swiss Rules 2021 now clarify that any hearings may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consultation with the parties (Article 27 (2)).

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

According to the case law of the Swiss Federal Tribunal,

the law governing legal capacity (the capacity to have rights and obligations) is determined by the general conflict rules of the PILA. For a foreign legal entity, legal capacity is governed by the law of the place of incorporation. An insolvent company thus remains bound by an arbitration agreement, as long as the insolvency does not restrict that party's legal capacity according to the law at the place of incorporation.

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

Switzerland is a contracting party to the Energy Charter Treaty which entered into force in 1998. Switzerland supports reform concerns such as the application of the transparency rules of the United Nations Commission on International Trade Law to investor-state arbitration proceedings under the Energy Charter Treaty.

60. Have there been any recent developments in your jurisdiction with

regard to disputes on climate change and/or human rights?

In 2020, the Swiss Federal Tribunal seized with an appeal, raised by an association for climate change. The association had accused the Swiss Federal Council of omissions in the area of climate change and requested more stringent measures to meet the targets under the Paris Agreement. Based on, *inter alia*, Articles 2 and 8 of the European Convention on Humans Rights ("ECHR"), the association claimed a right to be protected from an excessive global rise in temperature. The courts found that the association was not sufficiently affected by the alleged omissions and dismissed its claim on formal grounds (Swiss Federal Tribunal decision no. 146 I 145 of 5 May 2020).

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

We could not locate any official statement by the Swiss government on the work of the UNCITRAL Working Group III.

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