INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Working Session "State Court Participation in Arbitration – Help or Hindrance?"

Commission(s) in charge of the Session/Workshop:

International Arbitration Commission and Litigation Commission

London, 2015 Annual Congress

National Report of Switzerland

Matthias Gstoehl, MSc in Finance
Nater Dallafior
Hottingerstrasse 21
8032 Zurich
Switzerland
+41 44 250 45 45
gstoehl@naterdallafior.ch

/

Lukas Rusch, LL.M.
Pestalozzi
Loewenstrasse 1
8001 Zurich
Switzerland
+44 217 91 11
lukas.rusch@pestalozzilaw.com

General Reporters:

Silvia Pavlica Dahlberg, VINGE, Gothenburg, Sweden
Arnoldo Lacayo, Astigarraga Davis, Miami, USA
Gunnar Pickl, Dorda Brügger Jordis, Vienna, Austria

16 March 2015

Questionnaire

Introductory remarks on sources of Swiss arbitration law:

Swiss arbitration law is based on a dual system, providing separate statutes for domestic and international arbitration.

For domestic arbitration, part 3 of the Swiss Code of Civil Procedure (CPC) is applicable. By contrast, international arbitration is governed by chapter 12 of the Swiss Private International Law Act (PILA).

As a general rule, arbitration proceedings qualify as domestic whenever (i) the tribunal has its seat in Switzerland and (ii) at the time of the conclusion of the arbitration agreement, the (litigant)[1] parties had their domicile or habitual residence in Switzerland (Art. 353.(1) CPC and Art. 176(1) PILA). If at that point in time at least one party had its domicile or its habitual residence outside of Switzerland, the proceedings are deemed international and, hence, subject to chapter 12 of PILA.[2]

For the purposes of this National Report, the term arbitration shall indiscriminately refer to domestic and international arbitration, unless the context otherwise requires. If not provided differently, references to CPC shall apply to domestic arbitration and references to PILA to international arbitration.

1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?

The short answer is *yes*. Different (but essentially comparable) rules apply, however, depending on whether the arbitration is domestic or international and on whether the arbitration is seated in Switzerland or abroad.

If the disputed arbitration agreement provides for a *seat abroad*, Swiss courts who are confronted with an arbitration defence (*exceptio arbitri*) must apply the New York Convention (NYC).[3] According to Art. II (3) NYC, a state court shall, at the request of one of the parties, refer the parties to arbitration, unless the court finds that the *"[arbitration] agreement is null and void, inoperative or incapable of being performed"*.

Art. 61 CPC is applicable if the disputed arbitration agreement provides for *domestic arbitration in Switzerland*. For *international arbitrations with seat in Switzerland*, Art 7 PILA

---

1 Berger, Bernhard/Kellerhals, Franz, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, para. 101.

2 For further details and explanation on the differences, see Berger/Kellerhals, para. 78; and § 2.

3 Berger/Kellerhals, para. 323; Schnyder, Anton K./Liatowitsch, Manuel, *Internationales Privat- und Zivilverfahrensrecht*, 3rd ed., Zurich 2011, para. 510.

is applicable. Art. 61 CPC and Art. 7 PILA both provide that a state court must deny its jurisdiction if the parties have concluded an arbitration agreement, unless (i) the defendant has made an appearance without reservation, (ii) the arbitration agreement is invalid, (ineffective) or unenforceable, or (iii) the arbitral tribunal cannot be constituted for reasons that are manifestly attributable to the respondent in the arbitration proceedings.

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

Ordinary court proceedings are initiated by filing the statement of claim (Art. 220 CPC). If the respondent wants to object to the jurisdiction of the state court based on an arbitration defence, it should raise such defence in its first (oral or written) submission to the court, such as the statement of defence (Art. 222 CPC), in ordinary proceedings.[4] If the respondent fails to raise the arbitration defence, the court might find that the respondent has made an appearance (Art. 61 (a) CPC; Art. 7 (a) PILA).

As a general rule, a Swiss court will decide on a plea of jurisdiction emerging from an arbitration defence as a preliminary question early in the proceedings.[5]

If the court *accepts* its jurisdiction it will render an interim decision (so-called *Zwischenentscheid*, Art. 237 (1) CPC).[6] If a party wants to challenge an interim decision, it has to do so immediately, in a separate appeal, and not later together with the final decision (Art. 237 (2) CPC).

If the court *declines* its jurisdiction it will render a final decision deciding not to consider the merits of the case (so-called *Nichteintretensentscheid*, Art. 236 (1) CPC). The final decision can be appealed to the next instance. Note that in its final decision, the state court only decides that it is not competent to hear the case. The final decision does not include a (positive) ruling on the jurisdiction of an arbitral tribunal, i.e. if an arbitration proceeding is initiated after the court's final decision, the arbitral tribunal still has to decide on its own jurisdiction.[7]

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

Art. II (3) NYC provides that courts need to refer the parties to arbitration only "*at the request of one of the parties*". If the arbitration agreement provides for a foreign seat

---

4 Hurni, Christoph, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 61, para. 15.

5 Berger/Kellerhals, para. 718.

6 Hurni, Art. 61, para. 26; Berger/Kellerhals, para. 718.

7 Hurni, Art. 61, para. 25.

of arbitration, thus, a state court cannot refer the parties to arbitration on its own motion.[8]

In contrast, Art. 7 PILA and Art. 61 CPC, which apply to international and domestic arbitrations with seat in Switzerland (*cf.* question 1.1), do not expressly provide whether the respondent has to object to the state court's jurisdiction or whether the court should determine the validity of an arbitration agreement *ex officio*. The prevailing view in legal doctrine is that if the respondent makes a submission to the court but fails to raise an arbitration defence, the court should apply the same approach as under Art. II (3) NYC and should not on its own motion refer the parties to arbitration.[9] Only if the respondent is in default, i.e. if it fails to make a submission and/or to appear before the court altogether, state courts may *ex officio* enforce an otherwise valid arbitration agreement.[10]

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

In most cases, a declaratory action regarding the (in)validity of an arbitration agreement would lack the necessary legally protected interest (*Rechtsschutzinteresse*) as the same result can also be reached by virtue of an action for performance (*cf.* question 1.5).[11] The party asserting that a valid arbitration agreement exists can file a claim before an arbitral tribunal. If the counter-party objects to the jurisdiction, the arbitral tribunal might render a (challengeable) preliminary award on jurisdiction (principle of competence-competence; Art. 359 CPC; Art. 186 PILA).[12] In contrast, the party claiming that no valid arbitration agreement exists can bring an action before a state court, leaving it up to the counter-party to raise an arbitration defence.[13]

According to some authors, a declaratory action might be possible in very exceptional cases, such as where a "pseudo arbitral tribunal" usurps jurisdiction

---

8 Schramm, Dorothee/Geisinger, Elliott/Pinsolle, Philippe, in: Kronke, Herbert et al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards, A Global Commentary on the New York convention*, Kluwer 2010, Art. II, p. 102; Berger/Kellerhals, para. 710.

9 Hurni, Art. 61, paras. 8 et seq.; Berti, Stephen V./Droese, Lorenz, in: Honsell, Heinrich et al. (eds.), *Basler Kommentar zum Internationalen Privatrecht*, 3rd ed., Basle 2013, Art. 7, para. 6; Volken, Paul, in: Girsberger, Daniel et al. (eds.), *Zürcher Kommentar zum IPRG*, 2nd ed., Zurich 2004, Art. 7, para. 53.

10 Berger/Kellerhals, para. 710; Hurni, Art. 61, para. 9; Berti/Droese, Art. 7, para. 6.

11 Berger/Kellerhals, para. 675; Hurni, Art. 61, para. 27; Schott, Markus/Courvoisier, Maurice, in: Honsell, Heinrich et al. (eds.), *Basler Kommentar zum Internationalen Privatrecht*, 3rd ed., Basle 2013, Art. 186, para. 6.

12 Schott/Courvoisier, Art. 186, para. 7.

13 Schott/Courvoisier, Art. 186, para. 7.

despite the fact that *prima facie* no arbitration agreement exists or that the arbitration agreement is obviously invalid.[14]

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

A claimant filing an action for a declaratory judgment must show that it has a *legally protected interest in the case* (Art. 88 CPC; Art. 59 (2)(a) CPC). If the claimant fails to show its legally protected interest, the court will not consider the case.

A legally protected interest exists if a legal position of the claimant is uncertain or in danger and if no other action is available to protect such legal position.[15] A declaratory action is usually subsidiary to an action for performance, i.e. if the same result can be reached by raising an action for performance, the claimant generally lacks the necessary legally protected interest to raise a declaratory action (*cf.* question 1.4).[16]

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

There are *no* specific procedural time-limits to raise an arbitration defence. A respondent is, however, well advised to raise such defence at the earliest opportunity. If respondent fails to raise the arbitration defence at the beginning of the proceedings, it might later be deemed to have implicitly accepted the court's jurisdiction by making an appearance without reservation (Art. 61 (a) CPC; Art. 7 (a) PILA).

In *ordinary proceedings*, the arbitration defence should be raised in the statement of defence (Art. 222 CPC).[17] The deadline to submit the statement of defense is set by the court (Art. 222 CPC). In *simplified proceedings*, the respondent should raise its arbitration defence either in its written response or at the hearing, whichever occurs first (Art. 245 CPC).[18] If the court proceedings are preceded by an attempt for conciliation before a conciliation authority, it is advisable that the respondent raises its arbitration defence already during the conciliation proceedings. According to legal doctrine, however, only in cases where the conciliation authority is exceptionally

---

14 Schott/Courvoisier, Art. 186, para. 8; Heini, Anton, in: Girsberger, Daniel et al. (eds.), *Zürcher Kommentar zum IPRG*, 2nd ed., Zurich 2004, Art. 186, para. 3; *dissenting opinion* Berger/Kellerhals, para. 676.

15 Staehelin, Adrian/Staehelin, Daniel/Grolimund, Pascal, *Zivilprozessrecht*, 2nd ed., Zurich 201, p. 221.

16 Staehelin/Staehelin/Grolimund, p. 221.

17 Hurni, Art. 61, para. 15.

18 Hurni, Art. 61, para. 15.

competent to decide on the merits of the dispute,[19] respondent might forfeit its arbitration defence in future court proceedings.[20]

Similary, a party should file its action for a declaratory judgment, if at all possible (*cf.* question 1.4), as soon as it becomes aware of any circumstances that give rise to such action; a court might otherwise find that the declaratory action lacks the necessary legally protected interest.

In case a state court is seized after the same dispute is already pending between the same parties at another court or before an arbitral tribunal, the court seized second should stay the proceedings and wait for the other court's or the arbitral tribunal's, respectively, decision on jurisdiction (Art. 372 (2) CPC; Art. 9 PILA; Art. 27 Lugano Convention).[21] Moreoever, if an arbitration proceeding is already established, a respondent would usually lack the necessary legally protected interest to file a declaratory action at a state court (regarding the exception for "pseudo arbitral tribunal", *cf.* question 1.4).

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the doctrine of assertion or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

In state court proceedings, facts that are relevant to both the jurisdiction of the court as well the merits of the dispute will only be fully reviewed when deciding the merits (so-called theorie of facts of double relevance, *Theorie der doppelrelevanten Tatsachen*).[22] Thus, when a state court has to determine its own jurisdiction, it is sufficient for a claimant to conclusively assert facts of double relevance and no full proof is necessary with regard to such facts.[23] When deciding on their own jurisdiction, state courts will generally assume that the asserted facts are true unless the respondent can immediately and unambiguously rebut these facts.[24]

If an arbitral tribunal has to decide on its jurisdiction, however, the doctrine of fact of double relevance is not applicable and the standard of proof with regard to such

---

19 The conciliation authority is competent to decide on the merits if the amount in dispute is lower than CHF 2'000 (Art. 212(1) CPC).

20 Hurni, Art. 61, para. 16.

21 Berger/Kellerhals, paras. 717, 1036-1039.

22 Zingg, Simon, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 60, para. 40.

23 Zingg, Art. 60, para. 40.

24 Decision of the Swiss Federal Tribunal dated 22 November 2010, BGE 137 III 32, cons. 2.3; Zingg, Art. 60, para. 40.

facts is not lowered.[25] Arbitral tribunals have to determine whether the parties are bound by an arbitration agreement as a preliminary question and with unfettered power of review.[26]

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

Whether an arbitral tribunal is competent to hear claims based on different legal grounds largely depends on the wording of the arbitration agreement in question, the parties' real intent, and the specific circumstances of the case.

As a general rule, according to the Swiss Federal Tribunal, an extensive interpretation applies regarding the scope of an arbitration agreement.[27] Swiss courts presume that parties usually wish a broad application of the arbitration agreement in order to avoid arguing their claims before different fora and to avoid conflicting decisions.[28]

It is generally accepted in legal doctrine that an arbitration clause reading "*any disputes arising out of this contract*" (or "*concerning*", or "*in connection with*") extends to extra-contractual claims such as tort, unjust enrichment or *negotiorum gestio*.[29] Arbitration agreements reading "*in connection with this contract*", however, usually do not extend to extra-contractual claims.[30]

According to legal doctrine, an arbitration agreement contained in the main contract, in case of doubt, also extends to claims arising out of other agreements between the same parties if such agreements are connected to the main contract.[31]

1.9 Does your jurisdiction allow for anti-arbitration injunctions or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

The short answer is *no*. *Anti-suit* or *anti-arbitration injunctions* are, according to the prevailing legal doctrine, not admissible in Switzerland.[32] Arbitration agreements do

---

25 Decision of the Swiss Federal Tribunal dated 20 December 1995, BGE 121 III 495, cons. 6d; Berger/Kellerhals, para. 358.

26 Berger/Kellerhals, para. 359.

27 Decision of the Swiss Federal Tribunal dated 19 May 2003, 4C.40/2003, cons. 5.3.

28 Decision of the Swiss Federal Tribunal dated 19 May 2003, 4C.40/2003, cons. 5.3; Berger/Kellerhals, para. 512; Gränicher, Dieter, in: Honsell, Heinrich et al. (eds.), *Basler Kommentar zum Internationalen Privatrecht*, 3rd ed., Basle 2013, Art. 178, para. 35.

29 Berger/Kellerhals, para. 512; Gränicher, Art. 178, para. 35; Pfisterer, Stefanie, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 357, para. 46.

30 Berger/Kellerhals, para. 512.

31 Berger/Kellerhals, para. 515; Pfisterer, Art. 357, para. 46.

32 Gränicher, Art. 178, para. 81; Pfisterer, Art. 357, para. 66; Berger/Kellerhals, para. 677. For the incompatibility of anti-suit injunctions with the Swiss legal system see also the decision of the Canton of Geneva, Tribunal de première instance, ordonnance du 2 mai 2005, réf. C/1043/2005–15SP, ASA Bulletin 2005, pp. 728 et seqq., and

not constitute an enforceable legal obligation to go to arbitration and a party, thus, remains free to initiate legal proceedings before a state court, although risking that the other party successfully brings forward an arbitration defence (*cf.* Art. II (3) NYC; Art. 61 CPC; Art. 7 PILA; question 1.1).[33]

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

Cf. question 1.9.

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

Cf. question 1.9.

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

We are not aware of any cases where an anti-arbitration injunction or similar measure has been successfully argued before Swiss courts; *cf.* question 1.9.

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

The short answer is *yes*. If the parties or the appointing authority failed to appoint the arbitrators, Art. 179 (2) PILA and Art. 362 CPC provide that the court at the seat of arbitration may be seized with the appointment.

With regard to *international arbitrations with seat in Switzerland*, Art. 179 (2) PILA provides that "*in the absence of such agreement [of the parties regarding the appointment, removal or replacement of the arbitrators], the judge where the arbitral tribunal has its seat may be seized*" with appointing the arbitral tribunal. According to legal doctrine, the term "*absence of such agreement*" is to be understood broadly and includes, for example, situations where one party fails to appoint a co-arbitrator, the co-arbitrators fail to agree on a presiding arbitrator, or the agreed-upon appointment authority fails to make the appointment or does no longer exist.[34] Within the ambit of the PILA, the procedural rules of the CPC regarding the appointment, removal or replacement of arbitrators shall be applied by analogy (Art. 179 (2) PILA).

---

the annotation by Stacher, Marco, *You Don't Want to Go There – Antisuit Injunctions in International Commercial Arbitration*, ASA Bulletin 2005, pp. 640 et seqq.

33 Pfisterer, Art. 357, para. 66; Berger/Kellerhals, para. 311.

34 Girsberger, Daniel/Voser, Nathalie, *International Arbitration in Switzerland*, 2nd ed., Zurich 2012, para. 523; Wolfang, Peter/Legler, Thomas, in: Honsell, Heinrich et al. (eds.), *Basler Kommentar zum Internationalen Privatrecht*, 3rd ed., Basle 2013, Art. 179, paras. 19 et seqq.

With regards to *domestic arbitrations*, Art. 362 (1) CPC provides that the competent cantonal court at the seat of the arbitration shall proceed with the appointment at the request of one of the parties (i) if the parties cannot agree on the appointment of the single arbitrator or the chairperson, (ii) if a party fails to designate its arbitrator within 30 days from being requested to do so, or (iii) if the appointed arbitrators cannot agree on the appointment of the chairperson within 30 days from their appointment. This list of grounds is not exhaustive.[35] Note that the court will only appoint an arbitrator if "*the arbitration agreement provides no other body for the appointment, or if such body does not appoint the members within a reasonable time*" (Art. 362 (1) CPC).

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

The court will appoint an arbitrator if (i) an arbitration agreement exists between the parties (*cf.* questions 2.3), (ii) one or all parties file a request to the competent court (the courts at the seat of the arbitration), (iii) the parties, the co-arbitrators, or the appointing authority failed to nominate the (presiding) arbitrator, and (iv) the arbitration agreement provides for no other (alternative) body for the appointment (*cf.* Art. 179 PILA; Art. 362 CPC).

Regarding time-limits, *cf.* question 2.4.

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

According to Art. 362 (3) CPC and Art. 179 (3) PILA, the court must proceed with the appointment of an arbitrator unless a *summary examination* shows that no arbitration agreement exists between the parties.

It is undisputed in jurisprudence and in legal doctrine that in light of the arbitral tribunal's competence to decide on its own jurisdiction (competence-competence), the court's power to review whether a (valid) arbitration agreement exists should be very limited. The exact meaning of the term *summary examination* is, however, a matter of interpretation. According to one decision of the Swiss Federal Tribunal, both the *formal existence* and the *objective scope* – i.e. whether the alleged claims fall within the scope of the arbitration agreement – shall be subject to summary examination by the court.[36] This decision has been criticized by legal doctrine. According to the prevailing legal doctrine, courts should be limited to examine without prejudice whether a *prima facie* formally valid arbitration agreement exists.[37]

---

35 Boog, Christoph/Stark-Traber, Sonja, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 362, paras. 27 et seq. A court, e.g., may also appoint an arbitrator if the arbitrator which has been mentioned by name in the arbitration agreement does not accept the mandate and the parties fail to agree on the further course of action.

36 Decision of the Swiss Federal Tribunal dated 27 February 1992, BGE 118 Ia 20, cons. 5b.

37 Berger/Kellerhals, para. 830; Peter/Legler, Art. 179, paras. 40/41; Boog/Stark-Traber, Art. 362, para. 49.

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

For both domestic and international arbitrations with seat in Switzerland, the procedure by which a request for the appointment of arbitrators shall be conducted is determined by the CPC (Art. 179 (2) PILA refers to the rules of CPC, *cf.* question 2.1).

The CPC does not specify which type of procedure should be applied to the appointment of an arbitrator. According to legal doctrine, the court should apply the rules of the *summary proceedings* when being seized with a request for appointing an arbitrator.[38] A summary proceeding is initiated by a written – or in urgent cases oral – request by the applicant (Art. 252 CPC). If the request is not obviously inadmissible or unfounded, the court will give the opposing party the opportunity to comment orally or in writing on the request (Art. 253 CPC).

The request for appointment of an arbitrator does not have to be made within a specific time-limit.[39] An application could, however, be considered premature if such request was made before an agreed deadline to appoint an arbitrator has expired, if a deadline contained in the applicable rules has not yet expired or if a deadline set by one party, according to the principle of good faith, is unreasonably short. Moreover, Art. 362 (1)(b)/(c) CPC provide that a court shall upon request appoint the arbitrator if a party fails to designate the arbitrator *within 30 days* from being requested to do so or if the co-arbitrators cannot agree on the appointment of the chairperson *within 30 days* from their appointment.

If a party waits too long with a request for appointment of an arbitrator, according to the principle of good faith, it might have to grant the other party, the co-arbitrators or the appointing authority an additional deadline to make the necessary appointment.[40]

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

Neither the CPC nor the PILA contain specific principles that a court has to consider when it selects an arbitrator.[41] The court should, as a general rule, take into consideration all relevant circumstances, such as the parties' reasonable expectations, the nature of the dispute, the place of arbitration, or the applicable law on the merits.[42] The court has to hear the parties before it makes the appointment.[43]

To our knowledge, there is no official list of arbitrators available to the court.

---

38 Berger/Kellerhals, para. 823; Boog/Stark-Traber, Art. 362, para. 30.

39 Boog/Stark-Traber, Art. 362, para. 15.

40 Boog/Stark-Traber, Art. 362, para. 15.

41 Berger/Kellerhals, para. 824.

42 Berger/Kellerhals, para. 824; Peter/Legler, Art. 179, paras. 26a; Boog/Stark-Traber, Art. 362, para. 32.

43 Boog/Stark-Traber, Art. 362, para. 32.

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

If an arbitration is administered by an institution, the appointment of arbitrators will generally be made in accordance with the applicable arbitration rules. Many arbitration rules provide that appointment of an arbitrator will be made by a designated body if the parties or the co-arbitrator failed to make such appointment (e.g. Art. 7 (3) and 8 (2) Swiss Rules; Art. 12 (3)/(4) ICC Rules). The proceeding for the appointment of an arbitrator set forth in the arbitration rules has, as a result of the parties' autonomy, *priority* over the appointment by a court.[44]

However, if the appointing institution no longer exists or if the appointing institution refused or failed to designate the arbitrator within reasonable time, a court will make the appointment instead *in accordance with the above principles.*[45] In this context, note that Art. 362 CPC and Art. 179 CPC are mandatory and cannot be derogated from by the parties.[46]

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

The short answer is *yes*. Both the CPC and the PILA contain provisions regarding the removal (*Absetzung*) or replacement (*Ersetzung*) of arbitrators by a competent state court (Art. 370 CPC; Art. 371 CPC; Art. 179 PILA; *cf.* question 2.8).

2.8 If so, please describe the procedure therefore briefly.

If an arbitrator is unable to fulfil his or her duties within due time or with due diligence, according to Art. 370 (2) CPC, he or she may be *removed* at a party's request by the body designated by the parties or, if no such body has been designated, by the *ordinary court at the seat of arbitration.*

Although Art. 179 PILA fails to expressly mention the removal of an arbitrator, it is widely accepted in legal doctrine that the concept of "revocation" also includes removal of an arbitrator.[47] In absence of a designated authority, thus, the court at the seat of arbitration is competent to decide on a request for removal of an arbitrator. In absence of agreed grounds for removal, the court, according to legal doctrine, shall apply similar requirements as provided in Art. 370 (2) CPC, i.e. a request shall only be granted for good cause.[48]

Art. 371 (1) CPC provides that an arbitrator who has retired must be *replaced* by "*the same procedure as for appointment [...] unless the parties agree or have agreed otherwise*". If it is impossible to follow the original procedure, the new arbitrator shall be nominated by

---

44 Peter/Legler, Art. 179, paras. 7 et seq.

45 Boog/Stark-Traber, Art. 362, para. 6; Peter/Legler, Art. 179, para. 21.

46 Boog/Stark-Traber, Art. 362, para. 4; Philipp Habegger in: Spühler, Karl/Tenchio, Luca/Infanger, Dominik (eds.), *Basler Kommentar zur Schweizerischen Zivilprozessordnung*, 2nd ed, Basle 2013, Art. 362, para. 5

47 Berger/Kellerhals, para. 926.

48 Berger/Kellerhals, para. 926.

the competent court at the seat of the arbitration (Art. 371 (2) CPC). Similarly, under the PILA, an arbitrator shall be replaced in accordance with the same procedure that governed his or her appointment (Art. 179 (1) PILA). In absence of an agreement, the parties can apply to the competent court at the seat of arbitration (Art. 179 (2) PILA).

If an arbitrator is removed/replaced, the newly constituted arbitral tribunal shall decide on the extent to which procedural acts must repeated, unless agreed otherwise by the parties (*cf.* Art. 371 (3) CPC). According to legal doctrine, this general rule applies to both domestic and international arbitrations with seat in Switzerland.[49]

According to legal doctrine, state courts shall generally apply the rules of the *summary proceedings* when deciding about a party's request on the removal/replacement of an arbitrator (regarding the rules of the summary proceeding, *cf.* question 2.4).[50]

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

The short answer is *yes*. Pursuant to both Art. 183 (1) PILA and Art. 374 (1) CPC, the arbitral tribunal may grant interim relief or provisional measures, provided the parties have not agreed otherwise.[51] The parties are thus free to exclude or restrict the tribunal's power to grant such measures, either explicitly or by reference to a set of rules of arbitration or procedural law that foresees exclusive jurisdiction of the state courts in relation to provisional measures.

Provisional measures pursuant to Art. 183 (1) PILA and Art. 374 (1) CPC are measures aiming at preserving the legal positions of the parties for the duration of the proceedings, or defining the parties' relationship on a provisional basis during such proceedings.[52] Types of measures typically include, in accordance with Swiss legal tradition, (i) conservatory measures, (ii) regulatory measures and (iii) performance measures.[53] In addition to these categories, authors consider that an arbitral tribunal acting under the Swiss *lex arbitri* is authorized to grant certain provisional measures that are not available before Swiss courts, or which are

---

49 Berger/Kellerhals, paras. 956/957.

50 Gabriel, Simon/Buhr, Axel, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 370, para. 33, and Art. 371, para. 27.

51 Berger/Kellerhals, para. 1242; Mabillard, Ramon, in: Honsell, Heinrich et al. (eds.), *Basler Kommentar zum Internationalen Privatrecht,* 3rd ed, Basle 2013, Art. 183, para. 3 (although most arbitration rules do empower the tribunal to grant provisional measures, see Schramm, Dorothee, in: Furrer, Andreas/Girsberger Daniel (eds): *Handkommentar zum Schweizer Privatrecht*, Art. 182-186 IPRG, para. 12).

52 Wyss, Lukas, in SchiedsVZ 2011: *Vorsorgliche Maßnahmen und Beweisaufnahme – die Rolle des Staatlichen Richters bei Internationalen Schiedsverfahren aus Schweizer Sicht*, p. 196.

53 Berger/Kellerhals, para. 1256; Habegger Art. 374, para. 11; Mabillard, Art. 183, paras. 3, 6a; Wyss, p. 197.

unknown to Swiss law, *e.g.*, an order to provide a bank guarantee as a security for the disputed claim, or a freezing order in the form of an English *Mareva* injunction.[54]

Whereas an arbitral tribunal has jurisdiction to grant interim relief, it however lacks the coercive power to enforce its own measures and decisions[55], such as sanctions based on criminal law for non-compliance with an order (Art. 292 of the Swiss Criminal Code).[56] An arbitral court must therefore primarily rely on the good faith of the party affected by the measure and on voluntary compliance, unless the measure is self-executing.[57] If, however, a party does not voluntarily comply with the tribunal's provisional measure, the assistance of the state court (the *juge d'appui* or the court where the measure needs to be enforced) may be requested.[58]

The state court will enforce a provisional measure (i) at the request of the arbitral tribunal (or one of the parties)[59], (ii) provided that the arbitration agreement is valid *prima facie* and that the tribunal is validly constituted, and (iii) provided that the interim injunction is not clearly inadmissible pursuant to the *lex fori* (*cf.* question 3.3).[60] Technically, the state court will act as the enforcement court, *i.e.* it will *convert* the provisional measures issued by an arbitral tribunal into an enforceable title, applying its own law (Art. 183 (2) PILA; Art. 374 (2) CPC *i.e.* Swiss procedural law (Art. 335 et seqq. CPC).[61]

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

The prevailing view among legal scholars is that a provisional measure issued by an arbitral tribunal with its seat abroad cannot directly be recognized and enforced as such. It does not count as "foreign arbitral award" for the purposes of Art. 194 PILA and the NYC.[62]

---

54 Berger/Kellerhals, para. 1258. However, most scholars deny the arbitral tribunal's power to issue an attachment order (*Arrest* pursuant to Art. 272 et seqq. of the Swiss Debt Collection and Bankruptcy Act), *cf.* Berger/Kellerhals, para. 1248, with further references; Walter, Gerhard/Bosch, Wolfgang/Brönnimann, Jürgen, *Internationale Schiedsgerichtsbarkeit in der Schweiz*, Bern 1991, p. 130-131; for the opposing view see Göksu, Tarkan, *Schiedsgerichtsbarkeit*, Zürich/St. Gallen 2013, para. 1902; Mabillard, Art. 183, para. 7a.

55 Berger/Kellerhals, para. 1262; debated, according to Schramm, Art. 182-186, para. 18; Mabillard, Art. 183, para. 1.

56 It is debated whether a tribunal may impose a so-called *astreinte*, which is a private non-compliance sanction on a per day penalty basis (see Berger/Kellerhals, para. 1263; Wyss, p. 199).

57 Berger/Kellerhals, para. 1261; Mabillard, Art. 183, para. 9, 16; Schramm, Art. 182-186, para. 11.

58 Mabillard, Art. 183, para. 17; similar view with regard to CPC: Habegger, Art. 374, para. 36.

59 Contrary to Art. 183 (2) PILA, Art. 374 (2) CPC provides that this request may not only be brought by the tribunal but also by one of the parties. It is therefore disputed among scholars whether or not in *international arbitration* the assistance of state courts may also be requested by the parties. In favor: Mabillard, Art. 183, para. 16; Habegger, Art. 374, para. 42. Against: Schramm, Art. 182 – 186, para. 20; Walter/Bösch/Brönnimann, p. 150.

60 Berger/Kellerhals, paras. 1267 et seqq., in particular para. 1270; Mabillard, Art. 186, para. 18; Schramm, Art. 182-186, para. 20.

61 Berger/Kellerhals, para. 1271; Göksu, para. 1943; Mabillard, Art. 186, para. 18.

62 Berger/Kellerhals, para. 1300; Göksu, para. 1948.

It is disputed in legal doctrine whether Art. 183 (2) PILA allows an arbitral tribunal with its seat abroad to address a direct request to a Swiss court for judicial assistance, in particular when a provisional measure issued by that foreign tribunal shall take effect in Switzerland.[63] The prevailing view seems to be that, in the absence of a clear provision in the current legislation, a foreign arbitral tribunal is left with no other option than to submit a letter of request (letter rogatory) to the Swiss authorities through diplomatic channels. In practice, considering the delay of this procedure, it may be a better solution to directly seize the Swiss court with a request for the measure itself.[64] Pursuant to Art. 10 PILA and Art. 31 Lugano Convention[65], applications seeking interim relief may be brought before the Swiss courts at the place where the measure shall take effect, even if the courts of another state or an arbitral tribunal have jurisdiction to decide on the substance of the matter.

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

There is no case law and clear opinion in the doctrine on this. Assuming a direct request to a Swiss state court is permissible (*cf.* question 3.2), we would argue that the state court requested to enforce such interim measure would rule no differently than if faced with a request originating from an arbitral tribunal with seat in Switzerland.[66] In this hypothesis, the state court will amend or modify the measure to such an extent required to render the injunction permissible under Swiss law, yet seeking to correspond as closely as possible to the contents and purposes of the relief granted by the arbitral tribunal.[67] This rule finds its limits, of course, if a foreign measure is clearly incompatible with Swiss *ordre public* and no transformation would allow the measure to be effective.[68] Accordingly, while certain measures are generally enforceable[69], other measures, such as anti-suit or anti-arbitration injunctions (*cf.* question 1.9), are not (*cf.* question 3.1; Art. 186 (1bis) PILA).

---

63 Berger/Kellerhals, para. 1301; Göksu, para. 1948.

64 Berger/Kellerhals, para. 1301; Göksu, para. 1948.

65 Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339/3, 21.12.2007 (Lugano Convention, LugC).

66 An arbitral tribunal with seat in Switzerland is allowed to issue interim measures that are not foreseen under Swiss law, *cf.* question 3.1.

67 Berger/Kellerhals, para. 1271.

68 Mabillard, Art. 183, para. 18; Schramm, Art. 182-186, para. 20.

69 Berger/Kellerhals, para. 1258; Göksu, para. 1907.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

Both Art. 183 (1) PILA and Art. 374 (1) CCP provide for a *concurrent jurisdiction* of state courts and the arbitral tribunal.[70] Unless the parties have excluded the jurisdiction of the arbitral tribunal or the state courts[71] (*cf.* question 3.1), a party may therefore apply either to the arbitral tribunal or to the ordinary courts for obtaining provisional measures, provided, however, that the arbitral tribunal has already been constituted.[72]

It follows from the concurrent jurisdiction of state courts and the arbitral tribunal that, under the Swiss *lex arbitri*, state courts do have jurisdiction to grant interim relief irrespective of whether or not arbitration proceedings have already been initiated. As long as the arbitral tribunal is not (yet) constituted and no other private instance (e.g. an emergency arbitrator, *cf.* Art. 43 Swiss Rules or Art. 29 ICC Rules) can be seized, the state courts are *exclusively* competent to issue interim measures; and the parties have no other option available but to apply to the state court with a request for interim relief.

If the measure is granted by the state court *prior* to commencement of arbitration proceedings, the state court will set a deadline (usually 30 days) within which the applicant must file their "main" claim, subject to the ordered measure becoming automatically ineffective in the event of default (Art. 263 CPC).

3.5 May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?

The short answer is *yes*. The principle of concurrent jurisdiction implies that a party may – even after the arbitral tribunal is constituted – freely choose whether to apply to the arbitral tribunal or to a state court or with a request for obtaining provisional measures.[73] For an effective protection, the latter course of action is even recommended, given the difficulties in enforcing provisional measures (*cf.* question 3.1). A different question is whether a state court can be seized with a request for provisional measures *after* the same request has (unsuccessfully) been rejected by the arbitral tribunal (or vice versa). The prevailing view is that the principle of *res iudicata*

---

70 Although the text of Art. 183 para. 1 PILA is less explicit in this respect, it is broadly accepted that under Chapter 12 PILA too there is concurrent jurisdiction between the arbitral tribunal and the courts in respect of provisional measures, *cf.* Berger/Kellerhals, para. 1274; Mabillard, Art. 183, para. 5.

71 Although it is contentious whether or not the parties are allowed to exclude the state courts' jurisdiction to issue interim measures, *cf.* Göksu, para. 1920, with references.

72 Göksu, para. 1910.

73 Berger/Kellerhals, para. 1277, with references to dissenting opinions.

applies *mutatis mutandis* in such a case, preventing the applicant from bringing the identical request again.[74] Furthermore, the new request may be rejected by the authority second seized on the basis that the applicant lacks a legitimate interest (*cf.* question 1.4) in the proceedings. A new request for interim relief is, however, admissible if the circumstances materially changed since the first request was rejected or if the conditions for granting provisional measures are not the same before the state court and the arbitral tribunal.[75]

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

The short answer is *yes*. Pursuant to Art. 105 CPC in connection with 106 (1) CPC, procedural costs (consisting of *court costs* and *party costs*, which include legal fees) shall be borne by the losing party. The applicable tariff for the procedural costs is set by cantonal law (Art. 96 CPC).

With regard to interim measures ordered by state courts, Art. 104 (3) CPC provides that the decision on the procedural costs *may* be deferred until the final decision on the merits. However, where the arbitral tribunal is not constituted yet, the court will have to decide on the costs already in the proceedings for interim relief.[76] When an arbitral tribunal is already constituted, the prevailing view seems to be that these costs need to be determined by the state court as well.[77]

Furthermore, for *domestic arbitration*, Art. 374 (4) CPC provides that the applicant is liable for the harm caused by unjustified interim measures. However, if the applicant proves that the application was made in good faith, the arbitral tribunal or the ordinary court may reduce the damages or relieve the applicant entirely from liability. Although legal authors do not explicitly mention the indemnification for *party costs* as reimbursable damages (as opposed to *court costs*)[78], it is submitted that any kind of damage that materially qualifies so under substantive law is reimbursable under Art. 374 (4) CPC. Pursuant to a recent decision of the Swiss Federal Tribunal (BGE 139 III 24, cons. 3.1), party costs are considered reimbursable damage.

---

74 Berger/Kellerhals, para. 1279; Mabillard, Art. 186, para. 5a.

75 Berger/Kellerhals, para. 1279.

76 Rüegg, Viktor, in: Spühler, Karl/Tenchio, Luca/Infanger, Dominik (eds.), *Basler Kommentar zur Schweizerischen Zivilprozessordnung*, 2nd ed, Basle 2013, Art. 104, para. 6; Sterchi, Martin, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 104, para. 11.

77 Lazopoulos, Michael, in: Hausheer, Heinz/Walter, Hans Peter (eds.), *Berner Kommentar ZPO*, Zurich 2014, Art. 384, para. 56.

78 Sprecher, Thomas, in: Spühler, Karl/Tenchio, Luca/Infanger, Domini (eds.), *Basler Kommentar zur Schweizerischen Zivilprozessordnung*, 2nd ed, Basle 2013, Art. 264, para. 9; Huber, Lucius, in: Suter-Somm, Thomas/Hasenböhler, Franz/Leuenberger, Christoph (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 2nd ed., Zurich 2013, Art. 264, para. 26.

Chapter 12 of PILA contains no similar provision. Hence, according to legal doctrine, Art. 374 (4) is to be applied *mutatis mutandis* on cases where an interim measure ordered by an arbitral tribunal is found to be unjustified.[79]

If the interim measure was rendered by a state court, Art 264 CPC provides, quite similarly to Art. 374 (4) CPC, that *"the applicant is liable for any loss or damage caused by unjustified interim measures. If the applicant proves, however, that he or she applied for the measures in good faith, the court may reduce the damages or entirely release the applicant from liability"*. In ordinary civil proceedings, the legal doctrine considers that such damages need to be claimed by a separate action.

In *domestic arbitration*, the aggrieved party may assert their claim in the pending arbitration (Art. 374 (4) CPC), regardless if the measures were ordered by a state court. According to legal doctrine, this should apply *mutatis mutandis* for international arbitration, allowing the claiming of damages for an unjustified measure issued by a state court directly before the arbitral tribunal.[80]

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

The short answer is *yes*. Although the arbitral tribunal administers the evidence by itself (Art. 184 (1) PILA and Art. 375 CPC), it lacks effective coercive powers to impose sanctions (based on criminal law) in case of non-compliance with its order. Hence, the smooth administration of evidence will essentially depend on the good will of the parties, including third parties, such as banks, expert witnesses, etc. If these (third) parties fail to comply with the orders voluntarily, recourse to state courts may become necessary.

However, the practical importance of state courts in the gathering of evidence for use in arbitration is limited. Parties typically have an incentive to cooperate (and procure their witnesses and other third parties to cooperate), as their refusal could be subject to negative inference in the arbitration proceedings.[81]

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

The way the assistance may be requested will very much depend on where the tribunal has its seat.

For an arbitral tribunal with its seat *in* Switzerland, the assistance/intervention of the state court may be requested directly by the arbitral tribunal or by a party with the

---

79 Göksu, para. 1960.

80 Göksu, para. 1968.

81 Göksu, para. 1557; Habegger, Art. 375, para. 65; Schneider, Michael E./Scherer, Matthias, in: Honsell, Heinrich et al. (eds.), *Basler Kommentar zum Internationalen Privatrecht*, 3rd ed, Basle 2013, Art. 184, paras. 56 et seq.

consent of the tribunal (Art. 184 (2) PILA and Art. 375 (2) CPC). The arbitral tribunal's consent is a condition of admissibility in the proceedings before the state court.[82] Some authors consider that in case the tribunal denies its consent without cause, the state court may still accept the request.[83]

For an arbitral tribunal with its seat *outside* of Switzerland, although some authors consider that Art. 3 PILA[84] could serve as a basis to grant assistance, the prevailing view is that the tribunal has to seek assistance through letters rogatory.[85]

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

Pursuant to Art. 184 (2) PILA, the state court assisting the arbitral tribunal in the taking of evidence applies its own law. Although Art. 375 (2) CPC is silent on this point, according to legal doctrine, the same applies for court proceedings in support of domestic arbitration.[86] Hence, in Switzerland, the evidence-taking is governed by the CPC.

This particularly means that the evidence gathered and the applicable procedural rules in gathering the evidence must conform to the rules set forth in the CPC. However, within the limits of Art. 11a (2) and (3) PILA, *i.e.* if it appears necessary to enforce a claim abroad within the framework of international legal assistance, other forms of evidence unknown to the Swiss court may be taken into consideration.[87]

If the state court asked by the arbitral tribunal to assist in the taking of evidence needs the assistance of a foreign authority, the bi- and multilateral treaties ratified by Switzerland apply. Of particular relevance for the international judicial assistance are the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.[88]

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

The state court's assistance may only be requested by the arbitral tribunal or a party (with the consent of the arbitral tribunal) if the taking of evidence *requires* the assistance of the official authorities (Art. 184 (2) PILA, Art. 375 (2) CPC). This means that the state court will only assist the arbitral tribunal if the evidence concerned is considered relevant by the arbitral tribunal for the outcome of the

---

82 Berger/Kellerhals, para. 1361; contra: Göksu, para. 1553.

83 Schneider/Scherer, Art. 184, para. 58.

84 According to Art. 3 PILA, the state courts at the place with which the case has a sufficient connection have jurisdiction if the PILA does not provide for a jurisdiction in Switzerland and proceedings abroad are impossible or the claimant cannot reasonably be expected to conduct such proceedings.

85 Schneider/Scherer, Art. 184, para. 63; Berger / Kellerhals, para. 1370.

86 Berger/Kellerhals, para. 1366.

87 Berger/Kellerhals, para. 1366; Schneider/Scherer, Art. 184, para. 61.

88 Habegger, Art. 375, para. 80; Berger/Kellerhals, para. 1368.

arbitration and provided that there are no other options available to the arbitral tribunal to take the evidence itself.[89] In order to prove to the court that these requirements are met, the arbitral tribunal (or the party with the consent of the tribunal) shall include in the request for assistance the reasons for the application, elaborating, for instance, on the previous (unsuccessful) efforts made by the arbitral tribunal in obtaining the evidence concerned.[90]

Some authors contend that the arbitral tribunal under Art. 184 (2) PILA has an obligation (and not only the right) to request the assistance of state courts. The case law of the Swiss Federal Tribunal, however, suggests the contrary (Decision of 15 March 1993, 4P.217/1992, unpublished cons. 7b).[91]

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?

The state court assisting the arbitral tribunal in the taking of evidence applies its own law (*cf.* question 4.3).

Pursuant to Art. 168 CPC, the following evidence is admissible in Swiss civil proceedings: testimony, physical records, inspection, expert opinion, written statements and questioning and statements of the parties.

However, the Swiss court may also consider foreign forms of procedure or evidence if that appears necessary in an international context.[92] Both Art. 11a (2) and (3) PILA shall likewise be applied by the state courts when the request for judicial assistance is submitted by an arbitral tribunal.[93]

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

Cf. question 4.3.

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

The short answer is *yes*. The major difference to be taken into account regarding judicial assistance sought in Switzerland relates to the seat of the arbitral tribunal:

---

89 Netzle, Stephan, in: Sutter-Somm, Thomas/Hasenböhler, Franz/Leuenberger, Christoph (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 2nd ed, Zurich 2013, Art. 375, para. 19.

90 Brunner, Alexander, in: Brunner, Alexander/Gasser, Dominik/Schwander, Ivo (eds.), *DIKE-Kommentar zur Schweizerischen Zivilprozessordnung*, Zurich/St. Gallen 2011, Art. 375, para. 7.

91 In favor, deriving the obligation from the right to be heard: Göksu, paras. 1553, 1577, 1585, 1662; contra: Berger/Kellerhals, para. 1362; Habegger, Art. 375, para. 70.

92 Art. 11a (2) PILA provides that *"upon petition of the requesting authority, foreign legal procedures may also be observed or taken into account, if it is necessary for the enforcement of a claim abroad, unless there are important reasons […]"*; Art. 11a (3) PILA, provides that *"Swiss authorities may issue documents or take an affidavit from an applicant in accordance with a form provided by foreign law if the Swiss form is not recognized abroad and if a claim worth to be protected could not be enforced abroad."*

93 Berger/Kellerhals, para. 1367.

Whereas an arbitral tribunal seated in Switzerland (irrespective of whether an international or a domestic arbitration is concerned) may directly approach the Swiss courts for assistance in the taking of evidence, a tribunal with its seat outside Switzerland has to seek assistance through letter rogatory via diplomatic channels (*cf.* question 4.2).

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

As a matter of principle, Swiss courts applying Swiss civil procedural rules have jurisdiction over both the *parties* to the proceedings and *third parties*. These persons have a duty to cooperate in the taking of evidence, including depositions, the production of records and the examination of their person or property by an expert (Art. 160 (1) CPC).

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

Yes, but only with respect to *third parties*. Art. 164 CPC provides that where a *party* refuses to cooperate without valid reasons, the court shall take this into account when appraising the evidence. The civil procedure law, however, does not confer the power on the civil court to impose sanctions on a party in case of non-compliance. As regards evidence to be taken from the *parties*, the state court's powers have the same limits as those of the arbitral tribunal, since Art. 164 CPC does not provide for the possibility of imposing sanctions on a party.[94] Hence, state court's assistance will regularly be of little help in relation to a party to the proceedings.[95]

If, however, a *third party* refuses to cooperate without justification, the court may, based on Art. 167 CPC, impose an array of sanctions on the recalcitrant third party. These sanctions range from a disciplinary fine or the threat of criminal sanctions, to the ordering of compulsory measures, which includes police force.[96] Further, the court may charge the third party the costs caused by the refusal.

The court will sanction a third party if it is made aware of the non-compliance with the order, which can either be the result of deliberate refusal to cooperate or of the third party's default in complying with the court's order.[97] A further requirement for sanctioning a recalcitrant third party is that it was informed in the court's order about its duty to cooperate, its right to refuse to cooperate and the consequences of a

---

94 Berger/Kellerhals, para. 1367.

95 Berger/Kellerhals, para. 1367.

96 Göksu, para. 1577; Schramm, Art. 182-186, para. 24.

97 Hasenböhler, Franz, in: Suter-Somm, Thomas/Hasenböhler, Franz/Leuenberger, Christoph (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, 2nd ed., Zurich 2013, Art. 167, para. 9; Schmid, Ernst F., in: Spühler, Karl/Tenchio, Luca/Infanger, Dominik (eds.), *Basler Kommentar zur Schweizerischen Zivilprozessordnung*, 2nd ed, Basle 2013, Art. 167, para. 2; also see Higi, Peter, in: Brunner, Alexander/Gasser, Dominik/Schwander, Ivo (eds.), *DIKE-Kommentar zur Schweizerischen Zivilprozessordnung*, Zurich/St. Gallen 2011, Art. 167, paras. 19 et seq, submitting that unconscious behaviour does not amount to a default in terms of Art. 167 para. 2 CPC.

default.[98] Once these requirements are fulfilled, the court may execute the announced sanctions.

4.10 What can the state court do if the discovery or disclosure target fails to comply?

Cf. question 4.9.

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

Cf. question 4.2. The state court's assistance can be requested by the arbitral tribunal or the party with the consent of the arbitral tribunal.

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

Pursuant to Art. 167 (3) CPC, the third party may challenge the court's order (imposing sanctions) by way of objection (pursuant to Art. 319 et seqq. CPC). According to legal doctrine, this extends to the right to challenge the disclosure order itself.[99]

A party may challenge a disclosure order only with the final decision, although certain authors consider that under certain conditions, the order may be challenged immediately, by way of objection (pursuant to Art. 319 et seqq. CPC).[100]

On the merits, the CPC provides for an exhaustive list of reasons for which both the parties to the dispute and third parties may refuse to cooperate, *i.e.* may refuse to comply with the court's order (*cf.* question 4.13).

4.13 What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

According to Art. 163 (1)(b) and Art. 166 (1)(b) CPC, which apply to both international and domestic arbitration (Art. 184 (2) PILA),[101] the parties and third parties may refuse to cooperate to the extent that the taking of evidence concerns information protected by the attorney-client privilege.

A right to refuse cooperation is further provided to third parties to the extent that disclosing information would expose the person to criminal prosecution or civil liability (Art. 166 (1)(a) CPC). Such right, however, is only conferred to third parties

---

98 Higi, Art. 167, para. 10.

99 Hasenböhler, Art. 167, para. 19; Higi, Art. 167, para. 37; Leu, Christian, in: Brunner, Alexander/Gasser, Dominik/Schwander, Ivo (eds.), *DIKE-Kommentar zur Schweizerischen Zivilprozessordnung*, Zurich/St. Gallen 2011, Art. 154, paras. 167 et seqq.; Schmid, Art. 167, para. 4.

100 Schmid, Art. 160, para. 42.

101 *Cf.* question 4.3.

who are asked to cooperate in the taking of evidence but not to the parties themselves.

With regard to the protection of confidential information, the court is called to take appropriate measures to ensure that the taking of evidence does not infringe the legitimate interests of any parties or third party, such as business secrets (Art. 156 CPC). Accordingly, a party or third party finding itself exposed to a real risk that confidential information might become public, may request the court to take measures such as restrictions relating to the parties' access to the court files, blackening of documents, ordering that proceedings or hearing are to be held *in camera*, etc.[102]

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

In our view *no*. In any event, the arbitral tribunal's consent is a condition of admissibility of the proceedings before the state court (*cf.* question 4.2). Such consent would in our view imply that the arbitral tribunal approves the requested disclosure.

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

In our view *no*. The state courts' powers are limited to the inquiry whether the assistance of the state authority is required in the taking of evidence (*cf.* question 4.4). The state court does not have the power to review the arbitral tribunal's request as to the relevancy, appropriateness or admissibility of the evidence in the arbitration proceedings.[103]

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

The short answer is *yes*. Attorneys' fees and expenses that the *parties* incur in the course of the taking of evidence are considered procedural costs (party costs), which, as a matter of principle, are to be borne by the losing party (Art. 106 CPC; *cf.* question 3.6). The losing party has to reimburse the winning party, in particular, for any reasonable costs incurred to the latter, including lawyers' fees, expenses and costs for expert evidence provided by the party (Art. 95 para. 3 CPC). However, it shall be noted that the reimbursement of attorneys' fees is subject to cantonal tariffs, and the actual lawyers' costs often exceed the compensation awarded by the court.

Third parties who are ordered by the court to cooperate in the taking of evidence are entitled to reasonable compensation (Art. 160 para. 3 CPC). The compensation awarded to third parties is considered part of the court costs, which are determined and allocated by the court *ex officio* (Art. 105 CPC). Here again, the costs are, as a matter of principle, to be borne by the losing party (Art. 106 CPC).

---

102 Leu, Art. 156, para. 13.

103 Netzle, Art. 375, para. 21.