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Practical cross-border insights into international arbitration work

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Preface

Gary Born, Chair, International Arbitration Practice Group & Charlie Caher, Partner
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Expert Analysis Chapters

1 Climate Change Arbitration: An Update
Charlie Caher & Marleen Krueger, Wilmer Cutler Pickering Hale and Dorr LLP

9 Arbitrable or Arbitrary? The Impact of Sanctions on International Arbitration
Alexander Scard, Kennedys

14 Pre-award Interest, and the Difference Between Interest and Investment Returns
Gervase MacGregor, BDO LLP

Asia Pacific

18 Overview
Dr. Colin Ong Legal Services: Dr. Colin Ong QC

35 Australia
HFW: Nick Longley & Chris Cho

46 Brunei
Dr. Colin Ong Legal Services: Dr. Colin Ong QC

55 China
SGLA Law Firm: Dr. Xu Guojian

68 Hong Kong
Stevenson, Wong & Co.: Milly Yuk Kwan Hung & Michael Ka Hei Lau

76 India
Kachwaha and Partners: Sumeet Kachwaha & Tara Shahani

88 Indonesia
ABNR Counsellors at Law: Theodoor Bakker, Sahat A.M. Siahaan & Ulyarta Naibaho

98 Japan
Mori Hamada & Matsumoto: Yuko Kanamaru & Yoshinori Tatsuno

107 Korea
Bae, Kim & Lee LLC: Tony Dongwook Kang & Hongjoong Kim

115 Macau
BN Lawyers: Bruno Nunes

124 New Zealand
Bankside Chambers: Paul Heath QC, Dr Anna Kirk, Lauren Lindsay & Ben Prewett

136 Singapore
HFW: Adam Richardson & Suzanne Meiklejohn

Central and Eastern Europe and CIS

146 Austria
Weber & Co.: Katharina Kitzberger & Stefan Weber

155 Croatia
Vukić and Partners: Zoran Vukić, Iva Sunko & Ema Vukić

164 Hungary
Nógrádi Law Office: Dr. Péter Nógrádi, Dr. Milán Pock & Dr. Poppea Putnoki

172 Romania
Consortium Legal: Adrian Iordache
Outer Temple Chambers: Lucian Ilie

182 Turkey
ECC: Ceren Çakır

Western Europe

191 Overview
European Court of Arbitration: Mauro Rubino-Sammartano

199 Cyprus
Patrikios Pavlou & Associates LLC: Stavros Pavlou, Eleana Christofi & Yvoni Lambrianou

210 England & Wales
King & Spalding LLP: Tom Sprange QC & Shouvik Bhattacharya

223 Finland
Attorneys at law Ratiolex Ltd: Timo Ylikantola & Tiina Ruohonen

231 **France**
Cartier Meyniel Schneller: Marie-Laure Cartier, Alexandre Meyniel & Yann Schneller

242 **Germany**
King & Spalding LLP: Jan K. Schäfer & Rüdiger Morbach

251 **Greece**
Gregoriou Law Firm: Stelios H. Gregoriou

260 **Ireland**
Maples Group: Brian Clarke & Kyle Nolan

270 **Italy**
Legance – Avvocati Associati: Stefano Parlatore, Daniele Geronzi, Daria Pastore & Bianca Berardicurti

281 **Liechtenstein**
Walser Attorneys at Law Ltd.: Dr. *iur.* Manuel Walser, Lisa Sartor & Carmen Kranz

290 **Netherlands**
Van Doorne N.V.: Rogier Schellaars, Bas van Zelst & Bas Keizers

299 **Switzerland**
Bär & Karrer Ltd.: Pierre-Yves Gunter & Nadia Smahi

Latin America

308 **International Commercial Arbitration in Latin America**
GST LLP: Diego Brian Gosis, Ignacio L. Torterola, Quinn Smith & Domenico Di Pietro

314 **Brazil**
Costa Tavares Paes Advogados: Vamilson José Costa & Antonio Tavares Paes Jr.

324 **Mexico**
Baker McKenzie: Alfonso Cortez Fernández & Francisco Franco

331 **Peru**
Montezuma Abogados: Alberto José Montezuma Chirinos & Mario Juan Carlos Vásquez Rueda

Middle East / Africa

341 **Middle East and North Africa Overview**
Diana Hamade Attorneys at Law: Diana Hamadé, Nada Al Ghurair & Khulud Jarrar

350 **Kenya**
TripleOKLaw Advocates, LLP: John M. Ohaga & Isaac Kiche

360 **United Arab Emirates**
Charles Russell Speechlys LLP: Mazin Al Mardhi & Thanos Karvelis

369 **Zambia**
Dentons Eric Silwamba, Jalasi and Linyama Legal Practitioners: Joseph Alexander Jalasi, Jr. & Mwape Chileshe

379 **Zimbabwe**
Kanokanga & Partners: Davison Kanokanga & Prince Kanokanga

North America

389 **Overview**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning & Carter Greenbaum

402 **Bermuda**
Kennedys: Mark Chudleigh & Erik Penz

412 **Turks and Caicos Islands**
GrahamThompson: Stephen Wilson QC

420 **USA**
Williams & Connolly LLP: John J. Buckley, Jr. & Jonathan M. Landy

Switzerland


Pierre-Yves Gunter


Nadia Smahi

Bär & Karrer Ltd.

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

In Switzerland, international arbitration is governed by Chapter 12 of the 1987 Private International Law Act ("PILA"), in force since 1989. The PILA underwent a light revision in 2020, which entered into force on 1 January 2021.

According to Article 178(1) PILA, an arbitration agreement is valid if it is made in writing or by any other means of communication allowing it to be evidenced by text. As to its substance, the principle "*in favor validitatis*" applies: namely, the arbitration agreement is valid if it complies either with the requirements of the law chosen by the parties, or with the law governing the subject matter of the dispute and in particular the law applicable to the main contract, or with Swiss law (Article 178(2) PILA).

The validity of an arbitration agreement may not be challenged on the grounds that the main contract is invalid or that the arbitration agreement concerns a dispute that has not yet arisen (Article 178(3) PILA).

The 2021 revision also expressly provides that the provisions of Chapter 12, including the above principles, also apply to an arbitration contained in a unilateral deed or in articles of association (Article 178(4) PILA).

1.2 What other elements ought to be incorporated in an arbitration agreement?

It is recommended (although not mandatory) to also specify the seat of the arbitration, the language of the proceedings, as well the number and the procedure for the appointment of arbitrators. Parties may also include a waiver (in the form specified in Article 178(1) PILA, see above question 1.1) of their right to challenge the final award, as permitted by Article 192 PILA; provided, however, that none of them has their domicile, habitual residence or seat in Switzerland. Parties may not waive their rights to request the revision of the award pursuant to Article 190a(1)(b) PILA (see below question 10.4).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Switzerland is known to be an arbitration-friendly jurisdiction, where valid arbitration agreements are duly enforced by the courts.

In particular, pursuant to Article 7 PILA, if the parties have entered into an arbitration agreement in respect of an arbitrable dispute, the Swiss court seized shall decline jurisdiction unless: (a) the respondent has proceeded on the merits without making a reservation; (b) the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or (c) the arbitral tribunal cannot be constituted for reasons clearly attributable to the respondent to the arbitration.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In accordance with Article 194 PILA, the recognition and enforcement of foreign arbitral awards is governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "NYC").

Arbitral awards rendered as a result of arbitration proceedings seated in Switzerland are enforceable in Switzerland in the same manner as Swiss court judgments, i.e., according to the provisions of Articles 335 *ff.* of the Swiss Civil Procedure Code ("CPC") and, for monetary awards, the provisions of the Federal Act on Debt Collection and Bankruptcy.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

No, Switzerland has a dual system: international arbitration proceedings are governed by the PILA (see above question 1.1), while domestic arbitration proceedings are governed by Articles 353 *ff.* CPC.

Pursuant to Article 176(1) PILA, the provisions of Chapter 12 PILA apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties to the arbitration agreement was not domiciled, habitually resident or seated in Switzerland at the time of its conclusion. Article 176(2) PILA provides that the parties may exclude the application of Chapter 12 PILA and instead agree to the application of Articles 353 *ff.* CPC governing domestic arbitration proceedings. Such declaration must satisfy the formal requirements of Article 178(1) PILA (see question 1.1 above).

Conversely, in accordance with Article 353(2) CPC, parties to domestic arbitration proceedings can opt out of Articles 353 *ff.* CPC and apply instead the provisions of Chapter 12 PILA.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Chapter 12 PILA is unique to Switzerland and is not based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law. There are, however, no major differences or inconsistencies between the two.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Although parties enjoy wide autonomy under Chapter 12 PILA and can modify most rules by agreement, certain provisions are mandatory, such as, e.g., the provisions on the arbitrability of the dispute (Article 177(1) PILA), the form of the arbitration agreement (Article 178(1) PILA), the challenge of arbitrators (Article 180 PILA), the rule on *lis pendens* (Article 181 PILA) and the principle of equality of the parties and their right to be heard in adversarial proceedings (Article 182(3) PILA).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

According to Article 177(1) PILA, any claim involving an economic interest may be submitted to arbitration. The notion of "economic interest" is interpreted broadly. For example, unfair competition, antitrust claims or employment claims are arbitrable. Family law issues such as adoption or divorce are not arbitrable as they primarily concern personal rights. Debt enforcement proceedings such as declarations of bankruptcy or attachment orders are reserved to state courts and are thus not arbitrable. It should finally be noted that, pursuant to Article 177(2) PILA, a state cannot invoke its own law to contest its capacity to arbitrate or the arbitrability of the dispute.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes. According to Article 186(1) PILA, the arbitral tribunal shall decide on its own jurisdiction. This principle of *compétence-compétence* also applies when proceedings between the same parties and with the same subject matter are already pending before a state court or another arbitral tribunal, unless there are substantial grounds for a stay of proceedings (Article 186(1*bis*) PILA).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The national court shall decline jurisdiction unless (a) the respondent has proceeded on the merits without reservation, (b) the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, or (c) the arbitral tribunal cannot be appointed for reasons that are clearly attributable to the respondent in the arbitration (Article 7 PILA). The review by the court will be made *prima facie* if the seat of the arbitration is in Switzerland, but with a complete power of review if the seat is abroad.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

See question 3.3 above. Moreover, an arbitral tribunal's decision on jurisdiction can be reviewed by the Swiss Federal Supreme Court in challenge proceedings with full power of review. The Supreme Court will, however, not review the facts established by the arbitral tribunal that are relevant for the question of jurisdiction, such as, e.g., the actual intent of the parties, unless those facts have been established in violation of the fundamental procedural guarantees. The jurisdiction of a foreign arbitral tribunal may also be reviewed in the context of enforcement proceedings under the New York Convention.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

This question is not expressly addressed in Chapter 12 PILA. According to case law, an arbitration agreement can bind a non-signatory in exceptional circumstances when the relevant applicable law (see question 1.1 above) allows it. Under Swiss law, this can be the case, e.g., when the non-signatory intervened in the conclusion and performance of the main contract in a way that the other party had legitimate reasons to believe that the non-signatory intended to be bound by the arbitration agreement. The mere existence of a group of companies is, however, not sufficient to extend an arbitration agreement to an affiliated company. Arbitration agreements are also generally transferred to a party's legal successor or in case of assumption of debt.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Under Swiss law, provisions regarding time limitations are deemed substantive rules. Therefore, the relevant time limitation will be determined by the applicable substantive law. Under Swiss law, the following limitation periods are provided by the Swiss Code of Obligations (as of 1 January 2022):

- a general limitation of 10 years for all claims unless otherwise provided by federal civil law;
- five years for rent, interest and all period payments, for claims related to delivery of foodstuffs, board and lodging or hotel expenses, and for claims related to work carried out by craftsmen, purchase of retail goods, medical treatment, professional services provided by advocates, solicitors, legal representatives and notaries and work performed by employees for their employers;
- three years for tort claims from the day a party has knowledge of the damage and of the perpetrator, and in any event 10 years after the damage. If the damage results from an offence for which criminal law provides a longer limitation period, the longer period is also applicable to the tort claim; and

- three years for claims based on unjust enrichment from the date on which the person suffering the damage learned of his or her claim, and in any event 10 years after the date on which the claim first arose.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

According to case law, the effect of pending insolvency proceedings on a party must be assessed pursuant to the general conflict of law rules under the PILA. If an insolvent foreign entity retains its legal capacity under the foreign applicable law, it has capacity to be a party in Swiss arbitration proceedings. That is also the case if the foreign law contains restrictions that are only specifically related to arbitration proceedings, but the foreign law maintains the general legal capacity of that party. For Swiss entities, courts have also confirmed that the bankrupt party remains bound by the arbitration agreement concluded prior to bankruptcy.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The substantive applicable law is determined according to the rules of law chosen by the parties or, absent such choice, according to the rules of law with which the case has the closest connection (Article 187(1) PILA). The arbitral tribunal may also decide *ex aequo et bono* if so authorised by the parties (Article 187(2) PILA).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

It is generally accepted that Swiss arbitral tribunals must apply the mandatory norms of the *lex causae*. In certain circumstances, Swiss arbitral tribunals may have to apply mandatory norms of another jurisdiction based on criteria to be assessed on a case-by-case basis. In general, arbitral tribunals are afforded a certain flexibility in considering whether to apply mandatory norms that do not belong to the *lex causae*.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Pursuant to the principle of *favor validitatis*, an arbitration agreement is valid if it meets the requirements of the law chosen by the parties, or the law governing the subject matter of the dispute and, in particular, the law applicable to the main contract or Swiss law (Article 178(2) PILA (see question 1.1 above).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Article 179(1) PILA provides the parties with broad autonomy to select, appoint or replace arbitrators in accordance with their agreement. Their autonomy is, in principle, not limited except by the requirements of independence and impartiality (Article 180 PILA). The parties are further free to agree on specific qualifications to be met by the arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In such case, the state court where the arbitral tribunal has its seat can be seized to appoint the arbitrator(s) (Article 179(2) PILA). Following its recent revision, the PILA now further provides that if the parties have not agreed on a seat or have only agreed that the seat of the arbitral tribunal be in Switzerland, the first state court seized has jurisdiction (Article 179(2) *in fine* PILA).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

As mentioned under question 5.2, the court at the seat of the arbitral tribunal can assist in the constitution of the arbitral tribunal at the request of one party. In the case of a multiparty dispute, the state court may appoint all the members of the arbitral tribunal (Article 179(5) PILA).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

A prospective arbitrator must disclose without delay – and throughout the proceedings – the existence of circumstances that could give rise to legitimate doubts as to his or her independence and impartiality (Article 179(6) PILA). Similarly, an arbitrator may be challenged if circumstances exist that give rise to legitimate doubts as to his or her independence and impartiality. The "legitimate doubts" must be assessed objectively. The Swiss Federal Supreme Court has recognised that the International Bar Association ("IBA") Guidelines on Conflicts of Interest constitute a useful tool in this respect.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The parties are free to determine the arbitral procedure, either directly or by reference to arbitration rules or a procedural law of their choice (Article 182(1) PILA). Absent such agreement, the arbitral tribunal shall determine the procedure (Article 182(2) PILA), provided that it guarantees the parties' equal treatment and their right to be heard in adversarial proceedings (Article 182(3) PILA).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The parties – and the arbitral tribunal – have broad autonomy to determine the procedural steps, subject to the fundamental procedural guarantees of Article 183(2) PILA (see question 6.1 above). In case of a breach of the rules of procedure, a party must object immediately and will not be entitled to invoke such breach later on (Article 182(4) PILA).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

All Swiss lawyers must comply with the provisions of the Federal Act on the Free Movement of Lawyers, the relevant cantonal laws on the legal profession, as well as the professional rules of the Swiss Bar Association and the Code of Conduct for European lawyers, not only before national courts but also in arbitration proceedings in Switzerland and abroad. These rules are, however, not necessarily applicable to counsel from other jurisdictions, who will be bound by the professional and ethical rules of their jurisdiction.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators have the power to determine the arbitral procedure, issue procedural orders, including provisional measures and other interim relief, and issue awards. They have a duty to remain independent and impartial from the parties, safeguard their right to be heard and treat them equally.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

The Federal Act on the Free Movement of Lawyers sets out the requirements for foreign lawyers to appear before Swiss courts. As a rule, lawyers who are nationals of an EU or an EFTA country and who have registered with an EU or EFTA register can appear before Swiss courts based on the freedom to provide services, in some cases together with a registered Swiss attorney. However, this act is not applicable to international arbitration proceedings in Switzerland and the parties are thus free to appoint foreign lawyers as counsel or arbitrators.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Under Swiss law, there are no provisions granting arbitrators immunity. On the contrary, arbitrators may be held liable for breach of their contractual obligations under the *receptum arbitri*, in particular if they do not render any award in accordance with the applicable rules and law and/or if they do not personally fulfil their mandate; however, the assistance of arbitral secretaries is generally admitted.

Arbitrator's liability is often excluded or limited by the applicable arbitration rules, if any. Such exclusion or limitation of liability clauses are usually valid under Swiss law, except in cases of gross negligence or wilful misconduct.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Subject to the assistance that may be required in relation to interim measures and/or the taking of evidence (see questions 7.1 and 8.3 below), the national court will not deal with procedural issues that may arise during an arbitration. Procedural issues may be reviewed in the context of a challenge against the arbitral award for violation of fundamental procedural guarantees (i.e., the right to be heard or the principle of equal treatment) or for violation of procedural public policy (Article 190(2) PILA).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes. In accordance with Article 183(1) PILA, unless otherwise agreed by the parties, the arbitral tribunal may order interim or conservatory measures at the request of a party. In practice, arbitral tribunals order (i) conservatory measures (i.e., measures that preserve the *status quo*), (ii) regulatory measures (to regulate the parties' relationship during the resolution of the dispute), and (iii) anticipatory performance measures (ordering the provisional performance of an obligation before a decision is rendered on the merits of the claim). The arbitral tribunal does not need to seek the assistance of a court to order such measures. However, if a party does not comply voluntarily with its order, the arbitral tribunal or the other party may request the assistance of the court, which will then apply its own law (Article 183(2) PILA). The arbitral tribunal may ask the party requesting the preliminary relief for security for costs if appropriate (Article 183(3) PILA).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

While Article 183 PILA empowers arbitral tribunals to order preliminary relief, it does not exclude the jurisdiction of the courts in this regard (even after the arbitral tribunal has been constituted). Accordingly, a party may file a request for interim relief before Swiss courts, as there is concurrent jurisdiction between courts and arbitral tribunals with respect to interim relief.

A party's request to a court for preliminary or interim relief has no effect on the jurisdiction of the arbitral tribunal and shall not be considered a waiver of the arbitration agreement.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

If the arbitral tribunal is already constituted, courts may be reluctant to issue preliminary measures. When a request for interim relief is already pending or has been decided by the arbitral tribunal, a party should be precluded from filing the same request before a national court (and *vice versa*). Aside from those cases, courts will treat a request for preliminary relief by parties to arbitration agreements in the same way as any other such request.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions are not expressly excluded by Swiss law, and the question of their admissibility has been left open by

the Swiss Federal Supreme Court to this day (see in this regard Swiss Federal Supreme Court Decision 138 III 204, para. 5.3). That said, given that Switzerland is a Member State of the Lugano Convention on the Recognition and the Enforcement of Judgments in Civil and Commercial Matters, Swiss courts will in principle not issue anti-suit injunctions to prevent a party to an arbitration agreement from initiating or continuing a court action, at least if the action is presented before a court of another Member State.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Yes. Ordering security for costs is a long-standing tradition in Swiss courts. Arbitral tribunals are also allowed to do so; ordering security for costs is considered to be one type of preliminary or interim measures permitted under Article 183(1) PILA. Such measures are thus authorised unless the parties have agreed otherwise.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Pursuant to Article 183(2) PILA, if a party does not voluntarily comply with a preliminary or interim measure, the arbitral tribunal or a party may request the assistance of the courts, which will apply its own law. Practical difficulties may arise if the parties are located abroad.

Under the newly introduced Article 185a(1) PILA, foreign arbitral tribunals and parties to foreign arbitration proceedings may seek assistance from the Swiss national court where preliminary or interim relief is to be enforced. Such assistance may also be requested from the court where evidence is to be taken (Article 185a(2) PILA).

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

According to Article 184(1) PILA, the arbitral tribunal administers evidence directly. The arbitral tribunal – or a party with the consent of the arbitral tribunal – may require assistance from the court at the seat of the arbitral tribunal in this regard (Article 184(2) PILA).

It is common for parties to agree that the arbitral tribunal may take guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

It is generally admitted that arbitral tribunals seated in Switzerland have the authority to order disclosure of documents, unless otherwise agreed by the parties. Swiss arbitrators rarely order wide-ranging disclosure or discovery. Adverse inferences may be drawn if a party refuses to comply with such order.

If a witness whose appearance at a hearing has been requested refuses to comply, arbitral tribunals may request assistance from the court at the seat of the arbitration (see question 8.3 below).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As per Article 184(2) PILA, the arbitral tribunal and/or a party with the consent of the arbitral tribunal may request assistance from the court at the seat of the arbitration for the taking of evidence. The court may, for instance, summon a witness to appear before the arbitral tribunal or directly take the testimony of the recalcitrant witness. Such requests are rare in practice.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The PILA does not contain any specific provision regarding the production of written and/or oral witness testimony. Accordingly, the applicable procedure is decided by the parties or the arbitral tribunal, in compliance with the parties' right to be heard and to be treated equally.

Witnesses need not be formally sworn in, but they are usually made aware of their duty to tell the truth and reminded of the existence of criminal sanctions in case of perjury.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Lawyers who are admitted to the Swiss Bar and act as attorneys have an obligation of professional secrecy (or privilege) as per the applicable law and professional rules (see question 6.3 above). Whether arbitrators have professional secrecy or privilege of their own is debated. As for in-house counsel, it is considered that legal privilege does not apply to them.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

Pursuant to Article 189(2) PILA, the award must be written, reasoned, dated and signed. Article 189(1) PILA provides that the arbitral award shall be rendered "in the form agreed upon by the parties". Accordingly, parties are free to waive their right to obtain a written award, even though this could lead to difficulties at the enforcement stage. There is no requirement for arbitrators to sign each page of the arbitral award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

In accordance with Article 189a(1) PILA, unless otherwise agreed, any party may request that the arbitral tribunal within 30 days of the communication of the award correct any errors in computation or drafting in the award, to interpret certain passages of the award or to make an additional award on claims presented in the arbitral proceedings but omitted from the award. As per the same provision, the arbitral tribunal may, on its own initiative and within the same period of time, correct or interpret the award or make an additional award.

It must be noted that, pursuant to Article 189a(2) PILA, such request does not suspend the 30-day time limit to challenge the initial award (see question 10.4 below). However, a new time limit to appeal will begin to run for the part of the award that has been rectified or interpreted and for the additional award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Pursuant to Article 190(1) PILA, arbitral awards are final as soon as they are communicated. The grounds that can be relied upon in setting-aside proceedings are exhaustively listed under Article 190(2) PILA, which provides that an arbitral award may be challenged only where: (a) the sole arbitrator has been improperly appointed or the arbitral tribunal improperly constituted; (b) the arbitral tribunal has wrongly assumed or denied its jurisdiction; (c) the arbitral tribunal has ruled beyond the scope of the claims before it or has failed to rule on any of the claims; (d) the equality of the parties or their right to be heard in adversarial proceedings has not been respected; or (e) the award is incompatible with public policy.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

In accordance with Article 192 PILA, the parties may waive their right to appeal in advance, provided that neither of them has their seat, domicile, residence or place of business in Switzerland and that they do so explicitly and in writing, whether in the arbitration agreement or through a subsequent written agreement. Said agreement must meet the formal requirements of Article 178(1) PILA. As previously stated (see question 1.2 above), and in accordance with Article 192(1) PILA, parties may not waive their rights to request the revision of the award pursuant to Article 190a(1)(b) PILA.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, the grounds to challenge an arbitral award before the Swiss Federal Supreme Court are exclusively those provided under Article 190(2) PILA. The parties can, however, restrict the scope of appeal by waiving their right to appeal the award with regard to certain grounds under the conditions of Article 192(1) PILA.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Article 190(4) PILA provides that the award must be challenged within a (non-extendable) time limit of 30 days as from the date of its communication. In accordance with Article 191 PILA, the sole review body is the Swiss Federal Supreme Court, and the procedure is governed by Article 77 of the Federal Supreme Court Act ("FSCA"). In general, challenge proceedings are rather short and usually last around five to six months: this is notably due to the fact that the Swiss Federal Supreme Court does not, in principle, hold oral hearings, and does not administer new evidence.

In addition, the newly introduced Article 190a(1) PILA codifies the possibility to obtain a revision of the award, which was already admitted by case law. More precisely, this provision allows application for revision of arbitral awards by a party if: (a) it discovers afterwards relevant facts or conclusive evidence that it was unable to rely on in the previous proceedings, despite having exercised due diligence – excluding post-award facts or evidence; (b) criminal proceedings establish that the award was influenced to the detriment of the applicant by a crime or misdemeanour, even if no conviction has been obtained – if criminal proceedings are not possible, evidence may be adduced in another way; and (c) despite the parties having exercised due diligence, a ground for challenge of an arbitrator within the meaning of Article 180(1)(c) PILA is not discovered until after the arbitration proceedings have been concluded and no other legal remedy is available. According to Article 190a(2) PILA, the deadline to file such application is 90 days after the ground justifying the revision is discovered, but no later than 10 years after the arbitral award entered into force, save where grounds under Article 190(a)(b) PILA are at stake.

Where a party simultaneously applies to set aside and revise an award, the setting-aside application takes precedence (see Swiss Federal Supreme Court decision 4A_464/2021 of 31 January 2022, consideration 3).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Pursuant to Article 194 PILA, recognition and enforcement of arbitral awards are governed by the New York Convention, which Switzerland ratified on 1 June 1965. The Convention entered into force on 30 August 1965 (with an initial reciprocity reservation later withdrawn by the Swiss Federal Council on 17 December 1992). No other reservations are currently in place.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, but Switzerland has concluded various bilateral treaties regarding both judgments of state courts and arbitral awards. Those treaties have lost some of their importance since Switzerland adhered to the New York Convention, which usually contains more favourable rules than such treaties. In particular, Switzerland is a signatory to the 1923 Geneva Protocol on Arbitration Clauses ("Geneva Protocol") and of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention"), which also, partially or entirely, ceased to have effect after Switzerland adhered to the New York Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Although not explicitly stated by Chapter 12 PILA, any international arbitral award rendered in Switzerland becomes final and enforceable in the same way as does a court judgment. Such award can be enforced throughout Switzerland through debt collection proceedings for monetary claims and through applications before the competent local courts pursuant to Articles 335 *ff.* CPC for non-monetary claims (see question 2.1 above).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Like Swiss state court judgments, arbitral awards rendered in Switzerland are enforceable and have *res judicata* effect without further judicial review. According to case law, *res judicata* exists when a disputed claim is identical to one that has already been the subject of a judgment which has entered into force; i.e., if in both proceedings, the same parties have submitted the same claim to a court or an arbitral tribunal on the basis of the same facts. In this case, the first arbitral award is binding and the same claim may not be re-litigated in further or other proceedings between the same parties. It is worth noting that the Swiss Federal Supreme Court has consistently held that Swiss arbitral tribunals violate procedural public policy under Article 190(2)(e) PILA if they render an award that disregards the principle of *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The enforcement of an arbitral award may be refused in Switzerland, in accordance with Article V(2)(b) New York Convention, if it is contrary to public policy. It is generally recognised that this ground of refusal is to be examined *ex officio* by the court where enforcement is sought. In the framework of enforcement, only breaches of the most fundamental principles of the Swiss legal system may lead to refusal under Article V(2)(b) New York Convention. Both substantive and procedural public policy can be invoked in this regard.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The PILA does not contain any specific provision as to confidentiality. Accordingly, one has to verify whether the applicable arbitration rules, if any, contain a confidentiality provision. The parties may also agree on such provision through other agreements. In any event, the arbitrators' deliberations are confidential.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Traditionally, arbitration proceedings are considered a private matter between the parties to the arbitration agreement. This being said, unless the parties have agreed (through a choice of arbitration rules or otherwise) that the information disclosed during the arbitration shall remain confidential, nothing prevents them from using the information in subsequent proceedings. The arbitrators, however, are deemed to have agreed to a duty of confidentiality when accepting their mandate.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The remedies (including damages) available in arbitration depend on the law applicable on the merits. The question of whether awarding punitive damages would violate public policy pursuant to Article 190(2)(e) PILA (see question 10.1 above), and thus possibly compromise the finality of the arbitral award, has been left open by the Swiss Federal Supreme Court to this day.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Chapter 12 PILA does not provide for any limit as to the interest that may be granted. The applicable interest rate will thus depend on the applicable law.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

While nothing in Chapter 12 PILA specifically addresses this issue, parties are usually entitled to recover the costs they have incurred in the arbitration as per the parties' agreement and/or the applicable arbitration rules, if any. This stems from Article 182(1) PILA, which enshrines the principle of party autonomy in relation to the arbitral procedure. In general, the arbitral tribunal enjoys broad discretion as to the apportionment of arbitration costs; in arbitrations seated in Switzerland, the "costs-follow-the-event" principle usually applies, according to which costs should be allocated among the parties in proportion to the relative success and failure of their claims and defences.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Arbitral awards rendered in Switzerland are not subject to any specific tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Lawyers registered at the Swiss Bar are subject to the Federal Act on the Free Movement of Lawyers, as well as professional codes of conduct. Restrictions apply on this basis. Agreements by which lawyers agree to (i) make their fees depend on the outcome of the case, and/or (ii) waive their fees in the event of an unfavourable outcome (*pactum de quota litis*) are explicitly prohibited by Article 12(e) of the Federal Act on the Free Movement of Lawyers. However, it is possible, under certain conditions, to agree on a premium that will be paid to the lawyer on top of his regular fees (*pactum de palmario*).

Third-party funding is permitted in Switzerland, and an increasing number of third-party funders operate in the country.

14 Investor-State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes. Switzerland signed the Washington Convention on 22 September 1967, and it entered into force on 14 June 1968.

14.2 How many Bilateral Investment Treaties ("BITs") or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Switzerland is a party to more than a hundred BITs and to various investments treaties, including the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No requirements exist as to specific language that must be used in this context, even though most BITs contain similar terms.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

In accordance with Article 177(2) PILA, if a party to the arbitration agreement is a state, a state-dominated enterprise or an organisation controlled by it, that party may not invoke its own law to challenge the arbitrability of a dispute or its capacity to be a party to an arbitration.

The approach differs when matters involving immunity are brought before Swiss courts, given that international treaties and conventions then come into play (e.g., the 1972 European Convention on State Immunity, the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, as well as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations).

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

Switzerland has recently enacted an updated version of Chapter 12 PILA, which came into force on 1 January 2021. With it, new provisions were created in order to further improve the efficiency of the *lex arbitri*. They provide, *inter alia*, clarifications as to the scope of application of Chapter 12 PILA, the introduction of English as a possible language for the drafting of setting-aside proceedings submissions before the Swiss Federal Supreme Court, broader access to state courts for assistance, a codification of the procedure for the appointment and replacement of arbitrators and the possibility to seek and obtain the revision of an award (see above question 10.4).

In addition to commercial disputes, a significant number of sports disputes are submitted to the Court of Arbitration for Sport ("CAS") seated in Lausanne.

The Swiss Rules of International Arbitration have also been revised with effect from 1 June 2021, in the context of the conversion of the Swiss Chambers' Arbitration Institution ("SCAI") into the Swiss Arbitration Centre.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The Swiss Arbitration Centre's enactment of the new Swiss Rules of International Arbitration represents the most significant recent development by an arbitration institution in Switzerland. These revisions have improved certain aspects related to time and costs, such as, for example, the provisions relating to multi-party proceedings or state court assistance (even if the arbitral tribunal is seated abroad). Furthermore, the new Swiss Rules expressly authorise paperless filings and remote hearings, and provide that data protection and cybersecurity issues are to be discussed at the initial conference between the parties and the arbitral tribunal.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

There is, as such, no "right" to an arbitration hearing under Swiss arbitration law (whether in person or remotely), but it is rare for arbitral tribunals to refuse to hold a hearing once they have been requested to do so by the parties.

Whether or not hearings may be held remotely thus depends on the parties' agreement and on the applicable arbitration rules (if any). It was already possible, before the beginning of the COVID-19 pandemic, to hold hearings remotely (for instance, in application of Article 25(4) of the former 2012 Swiss Rules of International Arbitration). In practice, however, virtual hearings have become much more common since then.

Recent developments worth noting include a decision rendered by the Swiss Federal Supreme Court on 6 July 2020 (ATF 146 III 194; 4A_180/2020) in relation to (domestic) state court proceedings conducted under the CPC. It held that the main hearing is meant to be a physical hearing in a courtroom and in the presence of the parties and court members (see consideration 3.2 of the decision). It is unclear at this stage whether this decision will have any impact on the upcoming international arbitration-related case law of the Supreme Court. In another decision rendered on 15 June 2021 (4A_530/2020), the Supreme Court held that an arbitral tribunal had not violated the plaintiff's right to be heard by dismissing their request to postpone an evidentiary hearing allegedly due to COVID-19 difficulties and to an alleged need for the hearing to take place in person, finding that said request was a dilatory tactic.

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