

Litigation, Arbitration & Dispute Resolution

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Any defence pertaining to due process (Article V.1(b) & (d)) requires a serious breach, which was raised during the arbitral proceedings.

With respect to the defence of Article V.1(e) – award not yet binding, set aside or suspended – the Swiss courts adopt a predictable and sensible approach, in line with leading NY Convention commentaries. First, the award will be considered as binding even if still open to challenge proceedings in the country of the seat; or if it is not enforceable in that country. Secondly, the award can be enforced if subject to challenge proceedings (although a stay of enforcement may be granted under Article VI NY Convention), but it will not be enforced if it has already been set aside in the country of the seat (unlike in some other countries like France). Finally, the award will not be considered as “suspended” if suspended only by operation of procedural law rather than by a specific court decision.

The concept of arbitrability is very broad under Swiss law, so that the defence of Article V.2(a) (lack of arbitrability) is limited in scope. The defence of breach of public policy (Article V.2(b)) is equally limited, since a very serious breach is required. This defence has only been upheld in one case where the sole arbitrator had been identified in the arbitration agreement and could not be removed (if he was the agreement provided for a penalty of CHF 1 million); yet, he had acted as counsel for both parties on the underlying transaction. Enforcement was denied.

Finally, the Swiss courts tend to avoid excessive formalism when applying Article IV of NY Convention which sets out the documents required for enforcement, namely the authenticated original or certified copy of the award and of the arbitration agreement, together with a certified translation. This is particularly so when the party resisting enforcement does not actually dispute the existence of the arbitration agreement or of the award or the accuracy of a translation. However, caution is required as the approach may vary from one Canton to the next. Whilst an incomplete request can be completed at a later stage (including on appeal), the best approach is to provide, at the outset, all the relevant documents and certified translations, together with evidence that the award is enforceable and not suspended through copies of the relevant foreign legal provisions and even an affidavit of counsel explaining the legal position.

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Switzerland: A Leading Venue for International Arbitration

BY NORADÈLE RADJAI | LALIVE

Switzerland, a neutral country in the heart of Europe, has always been a popular venue for international commercial arbitration. Geneva and Zurich are amongst the four most frequently selected places for ICC Arbitrations worldwide whilst most ICC arbitrators come from Switzerland (ICC Bulletin Vol. 20/No. 1 (Spring 2009), 2008 Statistical Report). The reasons for this are clear from a review of the key features of international arbitration in Switzerland.

Concise Legal Framework Focused on Party Autonomy

Switzerland has adopted an arbitration-friendly law, embodied in Chapter 12 of the Swiss Private International Law Act (the PIL Act). This governs all international arbitrations with a seat in Switzerland, when at least one party does not have its usual place for business or domicile in the country. It is a concise and flexible piece of legislation that accommodates party autonomy, i.e., the parties' own terms in the arbitration agreement, including regarding the qualifications of the arbitrators; the arbitral procedure; the choice (or absence thereof) of specific arbitration rules and other matters.

Arbitrability of Disputes

Any dispute involving "an economic interest" may be the subject of an international arbitration in Switzerland. The Swiss courts interpret "economic interest" broadly and include matters such as competition law issues and expropriation disputes. There is a wide range of disputes referred to arbitration, although disputes most commonly involve construction projects, commodity trading, energy supply and licence agreements.

No Restrictive Requirements for the Arbitration Agreement

In international arbitration proceedings, the arbitration agreement must be made in writing, but this can be by fax or any other means of communication that permits it to be evidenced in writing (Article 178(1) PIL Act). An arbitration agreement is valid if it conforms to any of the following three laws: that chosen by the parties in the arbitration agreement; that applicable to the merits of the dispute; or Swiss law.

Under Swiss law, the main requirement is that the parties intended to submit their dispute to arbitration, which could include the mention of the word "arbitration". This requirement is construed rather widely. The clause must provide an indication of the dispute to be decided by way of arbitration. It is also strongly recommended that a specific Swiss city be designated as the seat of the arbitration and that the language of the arbitration be agreed.

Importantly, as in most arbitration-friendly countries, in Switzerland, the validity of the arbitration agreement itself cannot be challenged on the basis of an alleged invalidity of the underlying contract. Furthermore, the assignment of rights under a contract from the original party to another party usually entails the transfer of the arbitration agreement to the other party, unless the underlying contract itself specifically prohibits assignment.

Support of Swiss State Courts

The Swiss courts' intervention in arbitration is limited to lending support to the arbitrators and the parties. They do not otherwise interfere with the arbitration process. Their role consists essentially in the following:

- Recognition of arbitration agreements by denying the State courts' jurisdiction where there is a valid arbitration agreement (including refusal of jurisdiction if seized of a matter where there is a valid arbitration agreement in place);
- Appointment of arbitrators in the event that a party fails to do so;
- Enforcement of procedural orders issued by arbitral tribunals, including on the taking of evidence;
- Granting interim relief or conservatory measures where such cannot be granted by arbitral tribunals;
- Restricted review of the awards on specific grounds; and
- Enforcement of arbitral awards, whether or not rendered in Switzerland.

Jurisdiction of Arbitral Tribunal

The arbitral tribunal has the jurisdiction to decide whether it has jurisdiction or not (*kompetenz-kompetenz*) and can issue an interim award on its own jurisdiction. The arbitral tribunal's decision on its jurisdiction can generally be appealed before the Swiss Federal Supreme Court, but such an appeal must be filed immediately (Article 190(3) PIL Act).

Arbitral Awards

Arbitral awards must be made in writing, supported by reasons, dated and signed. The arbitral award shall be signed by a majority, or, in the absence of a majority, by the chairman alone (Article 189(2) PIL Act).

Challenges of Arbitral Awards

Switzerland benefits from an expeditious procedure for challenges of arbitral awards.

First, the PIL Act does not allow any appeal on the merits of the award, be it on a question of fact or on a question of law. Second, appeals can be made only on the following limited grounds set out in Article 190 PIL Act:

- The arbitral tribunal was incorrectly appointed or constituted;
- The arbitral tribunal has wrongly decided on its jurisdiction;
- The award has gone beyond the claims submitted to the arbitral tribunal or the arbitral tribunal has failed to decide one of the claims;
- The principle of equal treatment of the parties or their right to be heard in an adversarial procedure has not been observed;
- The award is not compatible with public policy.

A unique feature of Swiss arbitration law is that any setting aside procedures are referred to the highest Court in Switzerland, the Federal Supreme Court, whose decision is final. Applications must be within 30 days of the award being rendered and the decision of the Supreme Court is rendered promptly (within 3 to 6 months on average). This fast-track one-court procedure guarantees the parties a minimal review of the arbitral award. Therefore, the costs of post-award proceedings can be kept to a minimum.

It is possible for non-Swiss parties to expressly exclude, partially or entirely, the challenge of awards (Article 192 PIL Act).

A second means of review of arbitral awards rendered in Switzerland is available under the Swiss Judicial Organisation Act. The procedure (referred to in Switzerland as "revision") is applicable to any court decision and any arbitral award influenced by crime (even in the absence of any conviction), or where a party acquires subsequent knowledge of important facts or key evidence, which existed but could not be discovered before the decision was made or the award rendered.

Flexible Arbitration Procedure

The procedure before the arbitral tribunal may be freely determined. The only statutory requirement is that of due process, in particular the equal treatment of the parties and their opportunity to be heard, which consequently requires that the proceedings be conducted in an adversarial manner. This means that all parties

must be entitled to present their arguments and evidence, although there is no requirement for an oral hearing. The right to be heard does not include a requirement that the award be fully reasoned and address each of the parties' arguments. However, the right to be heard will be violated if the arbitral tribunal fails to draw the parties' attention to issues of law and to facts which it considers highly relevant in order to reach a decision, and which could not be anticipated by the parties, or if the arbitral tribunal fails to hear the parties' arguments on all relevant facts and law before rendering an award on its jurisdiction.

In addition to these minimum requirements, the arbitration proceedings may be subject to institutional rules, such as the Swiss Rules of International Arbitration administered by the Swiss Chambers or the Rules of Arbitration of the International Court of Arbitration of the ICC, if this has been agreed by the parties.

With respect to the venue of the arbitration, arbitral tribunals are free to hold any meeting, hearing or deliberations outside Switzerland, even if the legal seat of the arbitration remains in Switzerland.

The procedure adopted for the gathering of evidence will depend on the legal tradition of the parties and that of the arbitrators, even if the seat of the arbitration is in Switzerland. Generally, as is common practice in international arbitration, all forms of evidence will be admissible including oral testimony by the parties and third party witnesses, expert reports and inspections. Discovery of documents, as is common in US and UK litigation, is not compulsory but is common, even if more limited in scope.

The concept of confidentiality is based on the private character of arbitration proceedings. Whilst the PIL Act does not contain any regulations with regard to confidentiality, some Swiss law commentators suggest that there is an implied obligation to respect the confidentiality of arbitration in Switzerland.

The arbitral tribunal may, at the request of a party, order interim measures (Article 183 PIL Act). However, this power is generally limited to the parties involved in the arbitration and cannot extend to third parties.

Conclusion

Switzerland has for many years been a preferred place for international arbitration. This is no doubt the result of a combination of features unique to Switzerland: political neutrality, a geographically convenient location, a long tradition as the seat of international organisations (e.g., WTO, WIPO, UN, CAS, UNCC), its arbitration-friendly legislation and a well-developed legal system. Switzerland also hosts a high number of experienced Swiss and foreign arbitration practitioners. For all these reasons, Switzerland is often viewed as the best choice of venue when parties include an arbitration clause in an international commercial contract.

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