Arbitration procedures and practice in Switzerland: overview

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Country Q&A | Law stated as at 01-Feb-2020 | Switzerland

A Q&A guide to arbitration law and practice in Switzerland.

The country-specific Q&A guide provides a structured overview of the key practical issues concerning arbitration in this jurisdiction, including any mandatory provisions and default rules applicable under local law, confidentiality, local courts' willingness to assist arbitration, enforcement of awards and the available remedies, both final and interim.

To compare answers across multiple jurisdictions visit the Arbitration procedures and practice *Country Q&A tool*.

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Use of arbitration and recent trends

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

Use of commercial arbitration and recent trends

Arbitration is widely used to resolve commercial disputes in both domestic and international matters. From an international perspective, Switzerland is among the most preferred seats for arbitration, as was revealed in the 2018 arbitration survey by Queen Mary University and White & Case (2018 survey) (*http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF*). According to the International Chamber of Commerce (ICC) Dispute Resolution Statistics 2018, 10% of ICC arbitral proceedings are seated in Switzerland, which makes Switzerland the third most chosen seat for ICC arbitration. The Swiss Chambers' Arbitration Institution (SCAI) received 83 new cases in 2018, of which the great majority were international cases. In addition, there are ad hoc arbitral proceedings, including investment arbitrations (for which statistics are difficult to find) and a high number of sports arbitrations.

To maintain its attractiveness for international arbitration, the Swiss federal government dispatched on 24 October 2018 to the Swiss Parliament a proposal for a reform of the 12th chapter of the Swiss Private International Law Act

(PILA) containing Switzerland's legislative framework for international arbitration. The proposal aims at putting into law core aspects of the Federal Supreme Court's jurisprudence, making clarifications as well as enhancing usability, for example, by introducing the possibility to have appeals against arbitral awards filed in the English language.

Advantages/disadvantages

Although Switzerland has strong democratic structures and a well-equipped, reliable state court system to handle large and complex commercial cases in a reasonable time at reasonable costs, along with a reliable practice in recognising judgments handed down by foreign state courts, parties regularly chose arbitration for various reasons. According to the 2018 survey, users mention the enforceability of arbitral awards and the avoidance of specific legal systems/national courts as the most valuable characteristics of arbitration, followed by flexibility and the ability of the parties to select arbitrators.

As regards flexibility, there are no restrictions for attorneys not registered in Switzerland to act as party representatives in arbitral proceedings as opposed to state court proceedings. Also, the entire proceedings (excluding appeals) can be held in English or any other foreign language. Appeals to the Federal Supreme Court (which on average take about six months) can be fully or partially waived in express agreements by foreign parties.

Legislative framework

Applicable legislation

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

The principal legislation applicable to international arbitration is the 12th chapter of the federal Private International Law Act (PILA). By election, the parties to an international dispute can also chose the third part of the Swiss Code on Civil Procedure (CCP) governing domestic arbitration to apply. In this article, we will limit our comments to the PILA, unless specific reference to the CCP is necessary for the full understanding of the Swiss provisions.

The 12th chapter of the PILA is not based on the UNCITRAL Model Law, however, there are no fundamental differences in substance between the two laws. The main difference between the PILA and the UNCITRAL Model Law is the degree of regulation. While the UNCITRAL Model Law contains a comprehensive set of provisions, the PILA only contains a few fundamental rules and instead largely leaves the set-up of the proceedings in the hands of the parties and the arbitral tribunal.

Mandatory legislative provisions

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

If the parties to an international arbitration seated in Switzerland do not chose to exclude the application of the PILA in favour of the CCP, the following provisions in the PILA must be observed:

- Articles 177(1) and (2): arbitrability/restrictions on state entities to invoke national law to contest arbitrability or capacity to be subject to arbitration.
- Articles 178(1) and (2): form and validity of the arbitration agreement.
- Articles 180(1)(c) and 180(2): challenge of arbitrators on grounds of justifiable grounds on independence and restrictions on challenges of arbitrators by the nominating/appointing party.
- Article 181: lis pendens.
- Article 182(2): mandatory procedural rules (equal treatment to the parties and their right to be heard).
- Article 185: further assistance by the state court.
- Article 186(1): *kompetenz-kompetenz* to the extent that the parties cannot exclude it, however, they may enhance it, for example, by excluding appeals (to the extent permitted).
- Article 190(2): grounds for setting aside an arbitral award, to the extent that the grounds for setting aside are exhaustive, although qualifying parties can waive an appeal on all or one or more of these grounds.

4. Does the law prohibit any types of dispute from being resolved through arbitration?

Any dispute of financial interest can be subject to arbitration (*Article 177(1), PILA*). The broad scope of arbitrability is limited only by substantive provisions considered mandatory as a matter of public policy which reserve jurisdiction exclusively to state courts (for example, certain claims under the Debt Enforcement and Bankruptcy Act (attachment proceedings) and family law status matters (in particular marriage, paternity, adoption, divorce, separation), although the financial consequences are arbitrable).

Limitation

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

Under Swiss law, the statute of limitations is a matter of substantive law. Accordingly, if the law applicable to the matter in dispute is Swiss substantive law, the relevant limitation periods apply.

The Swiss Code of Obligations (as of 1 January 2020) provides for the following limitation periods:

- A general statutory limitation period of ten years for all claims (unless federal law prescribes a different limitation period).
- Five years for claims which by their nature require quick settlement, such as claims:
    - for rent, interest or other periodic payments;
    - by tradesmen, craftsmen and for medical treatment;
    - relating to the sale of foodstuffs and payments for board and lodging;
    - relating to the work of tradesmen and craftsmen but also legal counsel and notaries;
    - of employees.
- Tort claims will become time-barred after three years from the day on which the injured party has knowledge of the damage and the injuring party. A tort claim will become unenforceable owing to the statute of limitations after ten years from the date of injury. Where a criminal action coincides with the wrongful death and bodily injuries, the latest time of assertion will be 20 years after the injury. Where a tort claim is derived from an offence for which the criminal law envisages a longer limitation period, the longer period is also applicable to tort claims.
- Claims based on unjust enrichment also become time-barred three years after the date on which the injured party becomes aware of its claim, but in any event, ten years after the claim first arose.

Arbitration institutions

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

The main arbitration institutions used in Switzerland are the:

- ICC International Court of Arbitration.
- Swiss Chambers' Arbitration Institution.
- WIPO Arbitration and Mediation Center.
- Court of Arbitration for Sport (600 cases in 2016).

Jurisdictional issues

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

The arbitral tribunal must rule on its own jurisdiction (*see Question 3*), which it either does in the form of an interim award on jurisdiction or in the final award. Decisions by the arbitral tribunal on its jurisdiction are subject to an appeal to the Federal Supreme Court, provided that eligible parties did not waive such an appeal (*see Question 1, Question 3 and Question 28*). An interim award on jurisdiction must be separately appealed and an appeal together with the final award would be untimely. The concept of kompetenz-kompetenz is governed by PILA**.**

Arbitration agreements

Validity requirements

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

Substantive/formal requirements

An arbitration agreement is valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication which permits it to be evidenced by a text (*Article 178(1), PILA*). PILA does not require the arbitration agreement to be signed by all the parties. For example, the Federal Supreme Court upheld an arbitration

clause that was never signed by the parties but remained unchanged throughout the exchange of several drafts of a framework contract.

Also, arbitration agreements by reference, such as in the bye-laws of a corporate body or in general terms and conditions, are generally valid. However, in relation to sport arbitration, the Federal Supreme Court drew a line and considered arbitration agreements by reference invalid if the content and scope thereof need not be reasonably expected under the given circumstances.

With respect to the substance, the arbitration agreement is valid if it conforms to the law chosen by the parties, the law governing the subject matter of the contract or Swiss law (*Article 178(2), PILA*).

Generally, to be valid on substance, the exclusion of state jurisdiction (and therefore the consensus to arbitrate) must be crystal clear under the law governing the conclusion and construction of contracts (strict approach by the Federal Supreme Court). Once this exclusion is clear, the construction of the content and scope of the arbitration clause follows a less restrictive approach.

Further possible reasons for an arbitration agreement to be invalid are:

- Lack of legal capacity.
- Lack of capacity to act.
- Agency without authority.
- A plea of defect in consent.

Separate arbitration agreement

Under Swiss law, a separate arbitration agreement is not necessary and it suffices that the arbitration clause is contained in the main contract. As stated above, arbitration agreements by reference are generally considered valid, save for very limited exceptions.

Unilateral or optional clauses

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

Yes, such clauses are enforceable.

Third parties

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

Unlike in the CCP governing domestic arbitration, there is no statutory rule in the PILA for joining third parties to arbitration proceedings. However, the parties to an arbitration agreement are free to agree on such rules which they typically do when choosing institutional arbitration (for example, ICC or SCAI arbitration). The arbitration rules of many arbitral institutions contain rules on joining third parties, for example, Article 7 of the ICC Arbitration Rules or Article 4(2) of the Swiss Rules of International Arbitration.

Contractual obligations generally only bind the contracting parties. It is, however, recognised that an arbitration agreement can, under certain circumstances, also bind third parties, for example where:

- Claims were assigned.
- A third party assumed a contractual obligation.
- A contract was transferred to a third party.
- The parties entered into a contract in favour of a third party.

In some cases, the arbitration agreement can be extended to third parties. This may be the case, for example, if a third party intervened in the conclusion of or performs work under a contract in a manner creating legitimate grounds to assume that the third party intends to be bound by the contract and the arbitration agreement.

Whether an arbitration clause also extends to a third party is a matter of substance and must be determined in accordance with Article 178(2) of the PILA.

Also, in some cases, the corporate veil can be pierced and the separate legal status of a company disregarded in favour of the underlying economic realities, for example, under an *alter ego* theory where the court finds a corporation lacks a separate identity from an individual or corporate shareholder.

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

There is no statutory rule in the PILA providing that a third party can compel a party to an arbitration agreement to arbitrate a dispute under that arbitration agreement. Whether a third party can have such a right is a matter to be determined by the arbitral tribunal or the competent courts.

Separability

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

Yes. Article 178(3) of the PILA expressly provides that the validity of an arbitration agreement cannot be contested on the grounds that the principal contract is invalid.

Breach of an arbitration agreement

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

Court proceedings in breach of an arbitration agreement

A Swiss court must decline jurisdiction, unless the:

- Defendant proceeded to the merits or the matter without objecting to the state court's jurisdictions.
- State court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.
- Arbitral tribunal cannot be constituted for reasons for which the defendant is manifestly responsible.

(*Article 7, PILA*.)

Conversely, if arbitration is initiated in breach of a valid jurisdiction clause, the arbitral tribunal, deciding on its own jurisdiction (Article 186(1), PILA) (*see Question 7*) and must decline jurisdiction.

Arbitration in breach of a valid jurisdiction clause

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

No, Swiss courts would deny motions for an anti-suit injunction. Moreover, anti-suit injunctions would be contrary to the concept of kompetenz-kompetenz, which Swiss law recognises (*see Question 7*).

Arbitrators

Number and qualifications/characteristics

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

There is no rule in the PILA about the number, qualifications or characteristics of arbitrators apart from the requirements that the arbitral tribunal must be appointed in accordance with the arbitration agreement (*Article 179(1), PILA*) and the independence and impartiality of each arbitrator. Subject to this, any person with full legal capacity whom a party considers suitable to resolve a dispute can be appointed as arbitrator. Arbitrators need not be licensed to practice as attorneys in Switzerland (or elsewhere).

The Federal Supreme Court considers the IBA Guidelines on Conflict of Interest (although without any statutory value) a valuable instrument capable of harmonising and unifying international arbitration standards to dispose of conflict of interests that should not fail to influence the practice of arbitral institutions and tribunals (*Supreme Court Decision No. 4A_506/2007, consid. 3.3.2.2*).

Independence/impartiality

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

Yes, see *Question 15*.

Appointment/removal

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

If there is no agreement by the parties on the appointment of arbitrators, the matter can be brought before the court at the seat of the arbitral tribunal. That court must apply by analogy the provisions in the CCP (*Article 179(2), PILA*) and in accordance with Article 360(1) of the CCP appoint a three-member arbitral tribunal. However, neither the PILA nor the CCP contain provisions for the basis of this appointment.

The PILA does not contain a rule on the removal of arbitrators, apart from Article 180(1) which sets out grounds on which an arbitrator can be challenged. Such rules typically emerge from the parties' arbitration agreement (for example, as a matter of reference to institutional rules, such as Article 12 of the Swiss Rules of International Arbitration or Article 15 of the ICC Arbitration Rules).

An arbitrator can be challenged:

- If he/she does not possess the qualification agreed upon by the parties.
- On the grounds for challenge in the rules of arbitration adopted by the parties.
- If the circumstances permit legitimate doubt about his/her independence.

(*Article 180(1), PILA*.)

Where there is no agreed procedure by the parties on the removal of arbitrators, the court at the seat of the arbitral tribunal must rule on the removal. The court will apply Article 180(1) of the PILA and its procedural law.

Procedure

Commencement of arbitral proceedings

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

No, such rules typically emerge from the parties' agreement to apply certain arbitration rules. The PILA only defines when lis pendens occurs, that is, at the moment one of the parties files a claim before the sole arbitrator of the

arbitrators designated in the arbitration agreement or, in the absence of such designation, if one of the parties institutes the procedure for the appointment of the arbitral tribunal (*Article 181, PILA*).

Applicable rules and powers

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

Applicable procedural rules

Chapter 12 of the PILA is premised on the principle of party autonomy. The parties can, in the arbitration agreement or by reference to a set of institutional arbitration rules, determine the arbitral procedure applicable to their dispute (*Article 182(1), PILA*). They can also submit the arbitral procedure to a procedural law of their choice.

Only if the parties have failed do so, the arbitral tribunal has to determine it to the extent necessary, either directly or by reference to a law or to arbitration rules (*Article 182(2), PILA*).

In Switzerland, regardless of the procedural rules chosen, the arbitral tribunal must ensure the equal treatment of the parties and the right of the parties to be heard in adversarial proceedings (*Article 182(3), PILA*) (*see also Question 3*).

Evidence and disclosure

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

The rules on the taking of evidence form part of the arbitral procedure, which is normally determined by the parties. In the absence of an agreement between the parties on issues of evidence, the arbitral tribunal must determine the procedure to the extent necessary (*Article 182(2), PILA*).

In any event, the arbitral tribunal has the duty to conduct the taking of evidence (*Article 184(1), PILA*). If the arbitral tribunal orders measures of evidence which are not complied with by the burdened party, the question of enforcement arises. Unlike state courts, arbitral tribunals themselves have no sovereign powers and cannot order coercive measures against parties not complying with evidentiary orders. Thus, in instances where a party refuses to cooperate with the tribunal, the assistance of Swiss state judicial authorities can be sought. Assistance can be requested from the state court at the seat of the arbitral tribunal. The Swiss court then applies its own domestic (Swiss) procedural law, that is, the CCP (*Article 184(2), PILA*).

The practical significance of state judicial assistance in the taking of evidence is limited, since where a party refuses to comply with an arbitral order, the tribunal can draw negative inferences from such behaviour.

Evidence

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

Scope of disclosure

The procedure on the taking of evidence such as disclosure of documents forms part of the arbitral procedure, which is determined by the parties or, in the absence of an agreement, by the arbitral tribunal (*Article 182(2), PILA*). The admissibility of evidence is therefore assessed in accordance with the applicable procedural law. If agreed by the parties, arbitrators in Switzerland frequently seek guidance from the IBA Rules on the Taking of Evidence.

When compared to common law discovery proceedings, Swiss arbitrators frequently opt for more limited disclosure. Communication that can be considered legally privileged (trade secrets, correspondence with attorneys) will be exempt from production.

Despite this, requests for other documents that are deemed relevant for the determination of the dispute will normally be admitted by the tribunal. Arbitrators frequently manage document production by means of a "Redfern Schedule" (a collaborative document prepared by the parties and the tribunal containing the requests for disclosure, the arguments for the requests and the tribunal's decisions on each).

Compared to disclosure obligations under Swiss domestic proceedings, the latter are more limited, with more stringent rules on identification and demonstrating necessity of production.

Validity of parties' agreement as to rules of disclosure

As noted, the parties can enter into special agreements concerning the taking of evidence such as production of documents.

Confidentiality

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

In principle, the parties are free to agree that the fact of their dispute, the resorting to arbitration and the proceedings and outcome will remain confidential. There are no statutory rules in Swiss law that provide for confidentiality, though the Supreme Court has confirmed that Swiss arbitral proceedings are, as a rule, not open to the public, thus giving an indication that it considers such proceedings to be of a confidential nature.

However, confidentiality can only be deemed applicable for the actual arbitration proceedings themselves and not in any related state proceedings regarding injunctive relief sought by the parties (*Article 54(1), CCP*). Equally, appeal proceedings to the Supreme Court are generally open to the public (*Article 59(1), Supreme Court Act*).

However, scholarly opinions diverge on the issue of whether the parties themselves are bound by confidentiality in the absence of an express obligation to that effect.

Courts and arbitration

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

As noted in *Question 20*, Swiss state courts may be involved in arbitration proceedings to the extent that sovereign power is needed to compel parties in matters of evidence or with regard to interim measures not complied with by parties.

Swiss law is also supportive of arbitration proceedings to the extent that Article 179(2) of the PILA provides that where an arbitration agreement is mute on the nomination and election of arbitrators, a party can approach the local state court judge at the agreed seat of the arbitration requesting the appointment of arbitrators (*see Question 17*). The Swiss court is required to refer to the CCP on the appointment of arbitrators in domestic arbitration proceedings when doing so (*Article 361 et seq, CCP*).

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

Risk of court intervention

In principle, a Swiss court will not intervene or frustrate validly commenced arbitration proceedings located in Switzerland from itself, as long as the dispute matter can validly be subjected to arbitration. Even then, a party will need to invoke the existence of an arbitration agreement.

Delaying proceedings

As noted in *Question 20*, parties to arbitration proceedings seated in Switzerland have recourse to state courts for interim measures not complied with or for other coercive orders.

Further, a party may try to delay the outcome of the arbitration by challenging the appointment of arbitrators or the jurisdiction of the tribunal itself.

The final arbitral award itself can be brought before the state Supreme Court in limited cases with an appeal. Invoking such measures may have a delaying effect on proceedings.

Insolvency

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

According to Swiss jurisprudence, the commencement of bankruptcy proceedings does not automatically lead to a transfer of rights and obligations of the debtor to the bankruptcy estate. However, previously concluded arbitration agreements remain binding on the bankruptcy estate, whether the estate is a claimant or a defending party.

Remedies

26. What interim remedies are available from the tribunal?

Interim remedies

Unless the parties have agreed otherwise, the arbitral tribunal **can**, on application by a party, order interim measures (*Article 183(1), PILA*). Generally, three types of interim measures are commonly encountered, though this list is not exhaustive:

- Safeguarding measures: aiming to secure the subsequent enforcement of the disputed claim, maintaining or restoring the status quo for the duration of the proceedings.
- Regulatory measures: serving to regulate and/or stabilise provisionally the relationship between the parties.
- Executory measures: characterised by the fact that they include a temporary enforcement of the alleged claim.

Ex parte/without notice applications

The arbitral tribunal has, in accordance with the prevailing opinion, the power to grant interim remedies without notice to the other party provided that both:

- There is a particular urgency or that a hearing of the opposing party would impair the effectiveness of the measure.
- The arbitral tribunal reviews its decision promptly after issuing the measure and after hearing both parties.

Security

Chapter 12 of the PILA contains no rules on the posting of security. As far as the applicable arbitration rules allow such a provision, Swiss arbitrators will regularly make such an order. The Swiss Rules on International Arbitration authorise arbitrators to require such a payment.

Swiss domestic arbitration rules also have provision on the awarding of security if the claimant appears to be insolvent (*Article 379, CCP*). In addition, the defendant must establish that its future costs claim, if any, would be frustrated or significantly jeopardised by the appearance of the claimant's insolvency if not immediately secured.

27. What final remedies are available from the tribunal?

The type of final remedy issued by a Swiss based tribunal will be determined by the material law applicable to the dispute and available to the parties under that governing law. As a rule, for arbitrations taking place in Switzerland a final award can order a party to:

- Pay damages.
- Perform specific actions or desist from certain actions.

Awards that would be considered to be contrary to the Swiss understanding of *ordre public* (such as awarding high punitive damages) will face the risk of unenforceability in Switzerland and a party can appeal such an award to the Supreme Court for transgression of public policy (*Article 190(2)(e), PILA*). Further, as noted in *Question 3*, *Question*

4 and *Question 24*), areas of law that are considered out of the scope of arbitration cannot be enforced in Switzerland (certain family law matters) as they are not considered to subject to arbitration.

Appeals

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

Rights of appeal/challenge

In matters of international arbitration, an appeal can only be brought to the Swiss Supreme Court (*Article 191, PILA*).

Grounds and procedure

There are very limited grounds for appeal which are if the:

- Sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted.
- Arbitral tribunal wrongly accepted or declined jurisdiction.
- Arbitral tribunal's decision went beyond the claims submitted to it or failed to decide one of the items of the claim.
- Principle of equal treatment of the parties or the right of the parties to be heard was violated.
- Award is incompatible with public policy.

(*Article 190(2), PILA*.)

A party considering bringing an appeal against a Swiss arbitration award must lodge its appeal within 30 days from receipt of the award and must invoke one of the setting aside reasons of Article 190(2) of the PILA.

Though not technically an appeal, it has been standing practice by the Supreme Court to admit applications for the revision of an international arbitration award. Such applications have been accepted where it becomes apparent after the rendering of the award that such decision was made as a consequence of criminal activity influencing its outcome or where significant facts or decisive evidence become available only at a later stage and which were not accessible to the party bringing the revision during the actual arbitration phase (*Supreme Court Decision No. 4A 662/2018*).

The currently debated revision of Chapter 12 of the PILA includes a specific statutory provision that would codify this jurisprudence.

Waiving rights of appeal

If none of the parties has their domicile, habitual residence or a business establishment in Switzerland, they can, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully their entitlement to bring an appeal against the award (*Article 192, PILA*). At the same time, they are also free to bilaterally limit the reasons for an appeal to one or several of the grounds listed in Article 190(2).

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

As mentioned in *Question 28*, setting aside proceedings before the Swiss Supreme Court must be brought within the appeal period of 30 days since the proceedings are governed by Article 77 of the Supreme Court Act, which provides that (all) appeals to the highest Swiss court are subject to a 30-day deadline (*Article 100(1),* Supreme Court Act). The limitation period begins with the notification of the award to the parties and is not extendable.

Costs

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

Attorneys' fees can be freely arranged between lawyers and their clients and hourly rates depending on the experience level are the norm. Contingency fees are not permitted. However, conditional fee arrangements providing for a bonus in the case of successful litigation are permitted if the base fee for the attorney provides a reasonable income. Moreover, such an agreement needs to be made at the start of the matter or after the matter is concluded. Party costs and court fees are calculated according to cantonal statutory rules and depend on the value in dispute.

Parties usually finance litigation privately. If successful, a party can recover costs from its opponent. Cost calculations are based on cantonal statutory tariffs and may not fully cover actual expenses.

There are a few third-party funding providers in Switzerland and their services are becoming increasingly popular. Their services usually involve handing over a share of the claimed amount in successful proceedings. Such services are permitted as long as the attorney remains independent and free from influence in the execution of his/her mandate. Further, the lawyer is not allowed to participate in the funding. The Supreme Court has found that informing a client about the options of third-party funding can form part of the diligent performance of their mandate.

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

Cost allocation

Since the parties are free to choose a set of arbitration rules to govern the resolution of their conflict, typically the arbitration rules will contain rules on the allocation of costs. The Swiss Rules for instance provide that the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal can apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case (Article 40(1), Swiss Rules).

Under the Swiss Rules, the costs for a party's legal counsel will be reimbursed in the final award to the extent such costs were claimed during the arbitral proceedings, and to the degree the arbitral tribunal deems the amount to be reasonable

Cost calculation and factors considered

Tribunals will frequently take into account the claim amount, the complexity of the matter and the duration and stages of the proceedings (submissions, hearings, evidence procedure) when determining costs.

Enforcement of an award

Domestic awards

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

Arbitral awards rendered by tribunals seated in Switzerland are enforced in the same way as judgments of Swiss state courts, meaning that they are automatically enforced and no additional exequatur (recognition procedure) is necessary.

Foreign awards

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

Foreign arbitral awards rendered by arbitral tribunals not seated in Switzerland will be recognised pursuant to the rules of the New York Convention (*Article 194, PILA*) or by another applicable treaty if that treaty is more favourable than the New York Convention (*favor recognitionis*). One such treaty is the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

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

In principle, all foreign arbitration awards are enforceable in Switzerland as long as their content is not contrary to public policy and the other safeguarding provisions of the New York Convention (*Article V, New York Convention*) have been adhered to.

The enforcement procedure is governed by the CCP and summary in nature, adjudged by the court at the place of residence or incorporation of the defendant, the place where the award shall be enforced or where it was issued, which would not be applicable in instances of foreign awards.

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

How long a party can wait with lodging its enforcement application in Switzerland is primarily an issue of the substantive law applicable to the dispute and the validity that such law gives to an arbitral award. Under Swiss law, an arbitration award is considered equivalent to a state court judgment. As such, Swiss law provides that obligations cast in a court judgment maintain their validity for ten years from their rendering.

Length of enforcement proceedings

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

As noted, enforcement proceedings are reasonably quick and uniform. Once seized with an application request for enforcement, the court will notify the counterparty about the pending request and set the respondent a short deadline to lodge a submission on the admissibility.

The arguments that the counterparty can bring against the enforcement are limited to reasons that can halt the enforcement such as payment, an agreed deferment of enforcement, lapsing of the obligation owing the statute of limitations or forfeiture of the right to due performance. Deferment and statute of limitation arguments must be supported by documentary evidence.

Reform

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

Draft proposals for the additions to Chapter 12 of the PILA (*see Question 2*) primarily aim to codify existing Swiss jurisprudence in international arbitration and to make the regime even more arbitration-friendly while maintaining the main rules and leaving most of the content to the parties discretion.

The proposal includes the following features:

- The option for parties to approach the state court directly for the granting of interim measures, without needing to approach the tribunal first.
- Permitting appeals to be formulated in English.
- An obligation by the arbitrators to make transparent any reasons that might question their objectivity and independence.
- A formal requirement on parties to invoke breaches of the arbitration rules immediately on becoming aware of such transgressions (and not saving them for later). The deadline for an appeal will be included in an express provision, thus avoiding the need for foreign parties to consult other domestic sources of law for this information.
- The inclusion of an instrument of revision of an arbitral award. The additions will also include the right of a party to request a revision if it comes across circumstances at a later stage that give rise to valid reasons to decline an arbitrator that acted in the arbitration.
- More detailed provisions on the procedure applicable to the challenges and removals of arbitrators.

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Professional qualifications. PhD, University of Zurich, 1998; admission Switzerland, 1999; admission England and Wales, 2002

Areas of practice. Litigation and arbitration; corporate and commercial; financing and capital markets; private clients; real estate and construction.

Recent transactions

- Assisting Swiss bank as civil complainant in complex fraud investigation.
- Assisting Swiss bank in internal regulatory compliance reviews.
- Representing a foreign client in large-scale commercial litigation regarding infrastructure project.
- Issuing expert reports on issues of Swiss law for English High Court proceedings.
- Bankruptcy litigation on behalf of creditors in Lehman bankruptcy.
- Assisting sovereign fund in claims against Swiss bank.
- Representing a company in UNCITRAL arbitration proceedings.
- Asset freezing and asset recovery litigation on behalf of private parties as well as on behalf of foreign states in connection with mutual legal assistance proceedings.

Languages. English, German, French

Professional associations/memberships. Zurich and Swiss Bar Association; International Bar Association; The Law Society (England and Wales); British-Swiss Chamber of Commerce.

Publications

- *Recognition and enforcement of UK judgments in Switzerland post no-deal Brexit, LexisNexis Professional Support Lawyer, October 2019, with Marcel Frey and Michaela Kappeler.*

- *No-deal Brexit and jurisdiction issues – the Swiss position, LexisNexis Professional Support Lawyer, October 2019, with Marcel Frey and Michaela Kappeler.*
- *Right to be heard vs. "surprising" contract interpretation, IFLR, April/May 2019, with Andreas A. Schregenberger.*
- *Class Actions in Switzerland, The Lawyer, September 2018, with Nina Lim.*
- *Litigation and enforcement in Switzerland: overview, Practical Law Country Guide, October 2018, with Marcel Frey and Bernhard C. Lauterburg.*
- *Lexis Nexis Dispute Resolution Law Guide 2018, December 2017, with Marcel Frey and Nina Lim.*
- *Sovereign immunity – Switzerland, IFLR Dispute Resolution Guide 2017, September, with Marcel Frey.*

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Professional qualifications. Admission Switzerland, 2004; LLM, University of Cape Town, 2006

Areas of practice. Litigation and arbitration; private clients.

Recent transactions

- Assisting Swiss bank as civil complainant in complex fraud investigation.
- Representing foreign client in large-scale commercial litigation regarding infrastructure project.
- Issuing expert reports on issues of Swiss law for English High Court of Justice proceedings.
- Assisting sovereign fund in claims against Swiss bank.
- Representing a company in UNCITRAL arbitration proceedings.
- Representing claimants and defendants in high-level D&O claims.

Languages. German, English, French, Afrikaans

Professional associations/memberships. Zurich and Swiss Bar Association; SwissCham Southern Africa.

Publications

- *Recognition and enforcement of UK judgments in Switzerland post no-deal Brexit, LexisNexis Professional Support Lawyer, October 2019, with Urs Feller and Michaela Kappeler.*
- *No-deal Brexit and jurisdiction issues – the Swiss position, LexisNexis Professional Support Lawyer, October 2019, with Urs Feller and Michaela Kappeler.*
- *Litigation and enforcement in Switzerland: overview, Practical Law Country Guide, October 2018, with Dr. Urs Feller and Bernhard C. Lauterburg.*
- *Lexis Nexis Dispute Resolution Law Guide 2018, December 2017, with Urs Feller and Nina Lim.*
- *Sovereign immunity – Switzerland, IFLR Dispute Resolution Guide 2017, September, with Urs Feller.*

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Professional qualifications. Georgetown University Law Centre, LLM, 2006; admission Switzerland, 2010

Areas of practice. Competition and regulatory; corporate and commercial; litigation and arbitration.

Recent transactions

- Representing clients before state courts and arbitral tribunals.
- Advising on competition law (unfair competition, mergers, cartel investigations, abuse of dominance, distribution agreements, and private enforcement of competition law).
- Advising on public procurement law and state aid law.

Languages. German, English, French

Professional associations/memberships. Swiss and Berne Bar Association; Swiss Arbitration Association; *Studienvereinigung Kartellrecht e.V.*; Swiss Chapter of the Ligue *Internationale du Droit de la Concurrence*; International Bar Association.

Publications

- *To what extent should competition law be concerned with differences in prices, terms and conditions and quality to different purchasers? Ligue Internationale du Droit de la*

Concurrence, Paris Conference 2019, National Report for Switzerland (forthcoming with Springer)

- *Public Procurement 2019 – Switzerland, Getting the Deal through, June 2019, with Prof. Dr. Philipp Zurkinden.*
- *Litigation and enforcement in Switzerland: overview, Practical Law Country Guide, October 2018, with Dr. Urs Feller and Marcel Frey.*
- *Verband und Kooperationen, in: Michael Tschudin, Kartellrecht in der Praxis, Helbing Lichtenhahn, Basel, 2018.*
- *Merger control in Switzerland, market intelligence, Volume 4 Issue 1, October 2017, with Prof. Dr. Philipp Zurkinden.*

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