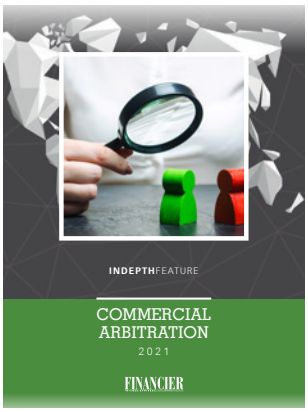

PRAGER DREIFUSS
ATTORNEYS AT LAW

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COMMERCIAL ARBITRATION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in commercial arbitration.

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Q. Reflecting on the past 12-18 months, what key trends and developments do you believe have dominated the commercial arbitration space in Switzerland?

A: With travel restrictions, quarantine requirements and other COVID-19-related measures, it has been very difficult, if not impossible, to carry out physical hearings. Consequently, 2020 was the year of virtual hearings. While parts of arbitration proceedings have previously already been carried out remotely, such as procedural conferences by phone or witnesses examined by videoconference, the pandemic left arbitration users with no option other than to carry out fully-fledged virtual, or at least hybrid, hearings. This, of course, raised a number of issues, starting with the choice of the appropriate virtual hearing platform, considering confidentiality and security concerns, the electronic display of evidence, including possibly retaining service providers to pull up exhibits from the witness examination bundle, simultaneous or consecutive interpretation and real-time transcription. These points should be addressed in a procedural order, containing a virtual hearing protocol, including a hearing timetable, technical requirements, test runs, and details regarding the examination of witnesses, including provisions for who may be present in the same room with a witness, delivery of the witness examination bundle to the witness, and so on. Other developments of interest were the new International Chamber of Commerce (ICC) 2021 Arbitration Rules, updating existing, and providing for new regulations. Further, the revised Chapter 12 of the Swiss International Private Law Act (PILA) on international arbitration came into force on 1 January 2021. In essence, the new provisions of the PILA will strengthen party autonomy and make the application of the law more user-friendly.

Q. Have any recent commercial arbitration cases gained your attention? What can they tell us about arbitration in Switzerland?

A: In several decisions, the Swiss Federal Supreme Court had the opportunity to assess the objective and subjective scope of arbitration agreements. In a decision dated 6 January 2020, two parties signed a given contract, containing an

arbitration clause for 'contract disputes', and also negotiated two other contractual documents, while finally not signing these two documents. In the following, one party started arbitration proceedings on the basis of a claim that did not arise from the signed contract. In a partial award, the arbitral tribunal confirmed its jurisdiction. Upon appeal, the Swiss Federal Supreme Court upheld the arbitral tribunal's award, holding that the arbitration clause in the signed contract governed, in the circumstance of that case, the entire commercial relationship between the parties. This decision emphasises that the existence of an arbitration clause depends on the parties' intentions, but that arbitration clauses should not be interpreted narrowly. It therefore confirms Switzerland's friendliness toward arbitration proceedings. In another decision, dated 13 November 2020, the Swiss Federal Supreme Court vacated an arbitral tribunal's partial award. In that dispute, a supplier entered into various supply agreements with purchasers. The supplier engaged a subcontractor, and the purchasers refused to pay the purchase price as technical problems arose that could not be remediated. The supplier started arbitration proceedings against the purchasers, and the purchasers requested that the subcontractor be included in the proceedings. The arbitral tribunal affirmed its jurisdiction over the subcontractor. The Swiss Federal Supreme Court vacated this award, holding that the subcontractor's role was limited to fulfilling its obligations under the subcontracting agreement. In view of the circumstances of the case, the court held that that the subcontractor had not implicitly consented to the arbitration agreement in the main supply agreements.

Q. What challenges and issues exist for parties undertaking commercial arbitration in Switzerland?

A: As Switzerland is an arbitration-friendly jurisdiction, recognising party autonomy to the largest possible degree, and has a professional arbitration scene, there are no particular challenges and issues. Indeed, Switzerland is one of the most preferred locations for international arbitration proceedings. The revision of the PILA, including the possibility of filing set-aside applications to the Swiss Federal Supreme Court in English, will further

enhance Switzerland's attractiveness for arbitrations.

Q. In your opinion, how might the processes and protocols for conducting commercial arbitration be improved to enhance aspects such as speed, cost and efficiency for the benefit of the parties involved?

A: For smaller claims, arbitration costs can appear disproportionate. In such cases, depending on the applicable arbitration rules, parties may agree on a so-called 'fast track arbitration' proceeding. Depending on the applicable arbitration rules, 'fast track arbitration' may automatically apply. For example, the Swiss Rules foresee an expedited procedure for claims of less than CHF1m. Also, the ICC Rules provide for an expedited procedure which automatically applies to claims up to $2m unless the parties opted out in their arbitration agreement. When agreeing to fast track proceedings, parties should be aware that they will have limited opportunities to submit facts and evidence.

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Q. How robust, would you say, is arbitral enforcement in Switzerland? What can

parties expect when trying to compel an award through local courts?

A: Switzerland is considered an enforcement-friendly jurisdiction. Requirements for the enforcement of international arbitral awards in Switzerland are regulated by the New York Convention. Depending on the nature of the claim, different courts and authorities have jurisdiction over the enforcement of arbitral awards. Awards granting monetary relief are enforced pursuant to the provisions of the Swiss Debt Enforcement and Bankruptcy Act. Conversely, awards granting non-monetary relief are enforced under the provisions of the Swiss Civil Procedure Code.

Q. Would you advise companies to include arbitration provisions in their commercial agreements? What factors should they address when doing so?

A: Depending on the circumstances of the case, considering, among others, factors such as the complexity of the case, the language of the parties and the confidentiality of the issues at hand, it may be advisable to include arbitration clauses in commercial agreements. As a matter of principle, one of the advantages of arbitration as opposed to state courts is the possibility of having the case judged by experts, partly chosen by the parties. Other advantages of arbitral proceedings include the flexibility and confidentiality of the proceedings, as well as the neutrality of the arbitral tribunal. Conversely, where there are parties from differing states, state court proceedings will very often be carried out in the courts of the state of one party, possibly conferring a 'home advantage'. Another important upside of arbitral proceedings is the enforceability of international arbitral awards on the basis of the New York Convention. Conversely, arbitral proceedings often prove to be costlier than state court proceedings. Frequently, the shorter duration of the proceedings, including limited appealability, is mentioned as an upside of arbitral proceedings. Many times, however, arbitral proceedings are carried out more slowly, in part owing to an extensive document production phase, which in Swiss state court proceedings, in contrast, is typically limited. Summarising, there are a number of advantages and disadvantages of arbitral proceedings, and parties should

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carefully consider those before including an arbitration clause in their commercial agreements. When they do so, they will have to ensure that the necessary elements of a valid arbitration clause are included. Typical elements that should be addressed include the number of arbitrators, the seat of the arbitration and the language of the proceedings. Arbitration institutions such as the Swiss Chambers' Arbitration Institution or the ICC provide model arbitration clauses.

Q. How do you expect commercial arbitration to develop in Switzerland over the coming months and years?

A: Disputes, either directly or indirectly related to the economic impact of the pandemic, may increase in the coming months and years. An increase in arbitration proceedings is therefore to be expected. ❑

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