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Swiss International Commercial Courts – Necessity or Luxury?

Switzerland – Open, cosmopolitan and competent
Switzerland prides itself as a multicultural, open and cosmopolitan country, a fact appreciated by leisure and business visitors alike. This attractiveness is reflected in the number of international arbitrations held in Switzerland. According to the recent International Chamber of Commerce (ICC) Dispute Resolution Statistics 2018/2019, 10% of ICC arbitral proceedings worldwide are seated in Switzerland, which makes the country the third most chosen seat for ICC arbitrations. The Swiss Chambers' Arbitration Institution (SCAI) received 95 new cases in 2018/2019, of which the great majority were international cases. In addition, there are significant numbers of ad hoc arbitral proceedings, including investment arbitrations and a high number of sports arbitrations with the International Court for Arbitration in Sport seated in Lausanne.

Pending Revision of the CPC and international commercial courts
In this vein, the pending revision of the Civil Procedure Code (CPC) includes new provisions enabling the cantons to establish so-called international commercial courts, a trend that has taken on globally in the past years.

In its explanatory report, the federal government noted that several countries had recently established national courts focusing on adjudging international commercial disputes; i.e. Singapore International Commercial Court, the Chamber for International Commercial Disputes at the Landgericht Frankfurt; the Netherlands Commercial Court; International Chamber of the Paris Commercial Court; Brussels International Business Court; other specialized courts in various trade zones, i.e. DIFC courts in Dubai.

Dispute resolution "Swiss made"
In view of its recognition for a neutral and commercially sound approach to disputes paired with well-organized and smooth-functioning courts, the federal government has proposed amendments to the CPC which will authorize cantons with commercial courts (presently Aargau, Berne, St. Gallen and Zurich) to establish specialized sections within these state courts dealing exclusively with international commercial disputes. Given that the departure of Britain from the EU and thus from the Brussels Convention with its consequent uncertainty as a centre for international disputes, the new features in Switzerland seem to be timely.

Conditions
The new provisions will facilitate the holding of international commercial disputes without significant conditions. The revised CPC will only require (i) that the case concerns the commercial activity of at least one of the parties and (ii) that the litigious amount is in minimum CHF100,000 (currently approx. USD110,000 / EUR90,000). Furthermore, (iii) one party needs to have its domicile, registered office

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or habitual residence in Switzerland and (iv) the parties need to agree on the jurisdiction of the commercial court (note though that entering an appearance may suffice).

As the commercial courts act as sole instance at the cantonal level – an exception to the requirement of the double instance system under the CPC – an appeal is only possible to the Swiss Federal Tribunal.

Proceedings in English
Already now in Zurich, the commercial courts are accommodating with regards to evidence exhibited in English. Most of the commercial court judges feel at ease with documentary evidence submitted in English. The revised CPC will include provisions that will allow for the entire proceedings at the international section of the commercial courts to be conducted in English. Already today, the Swiss Federal Tribunal, acting as highest appeals court in the country, accepts appeals in English in international arbitration matters, although the judicial decision will be issued in one of the official languages of the country (German, French, Italian, Rhaeto-Romanic).

Costs
According to recent reviews, (i) the costs, (ii) the lack of effective sanctions during the arbitral process and (iii) the lack of power in relation to third parties are perceived as the three most relevant downsides in arbitration. These aspects can be addressed by the international commercial courts.

On the costs side, it seems that a new state court dealing with international disputes could offer a substantial advantage in the future. In ordinary ICC proceedings with a dispute value of USD1 million, a losing party has to pay USD140,000 (or 14% of the dispute value) in arbitrator fees and administrative expenses alone. This amount climbs to USD400,000 where the dispute value attains USD10 million. The state tariffs may appeal to international business entities. Presently, the Zurich Commercial Court will invoice a losing party with a "mere" CHF30,000 (in an ordinary case without increasing factors), where the case amounts to CHF1 million. The costs increase to CHF120,000 (or 1.2% of the dispute value) where the amount in dispute reaches CHF10 million. It cannot be excluded that tariffs applied by an international section of the commercial court could be higher compared to the current court tariffs (additional judges etc.). However, the project of an international commercial court in Zurich seems to have a substantial backing in parliament and at the Zurich High Court.

For small and medium-sized enterprises engaging in international business, including a clause subjecting disputes to Swiss international commercial courts may prove to be a viable middle ground between expensive international arbitration and the perceived risk of going to court in unknown territories. Moreover, the international commercial court offers cost advantages and the option of taking a decision on appeal to the Federal Tribunal for a full legal review.

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Speed
Based on its German tradition of court-assisted settlements, Swiss courts evaluate settlement options throughout the proceedings. This is especially true for the commercial courts which render higher settlement rates than other first instance courts. The Commercial Court of Zurich for instance dealt with 536 suits in 2019 of which 301 were concluded in the same year, 182 (or approx. 60%) by means of settlement, recognition or withdrawal. On average, over the last few years, roughly two thirds of the cases were concluded, usually by settlement, within a period of 6-8 months.

The hope would be that the same expeditiousness would prevail at the new international section of the court and potentially at comparable statutory tariffs.

Outlook
Currently, the cantons of Geneva and Zurich are preparing for the establishment of international commercial courts. This is more complicated in Geneva as this canton does not have a commercial court yet. However, in Zurich, it is very likely that the new international commercial court could become a section of the well-established Commercial Court in Zurich, which has heard cases for the past 150 years.

For Swiss companies engaged in international trade and business the option of an international commercial court is providing further possibilities, also including mediation steps to de-escalate a dispute. Where a high degree of flexibility on the applicable rules, the avoidance of a specific national legal system and the worldwide enforceability are the focus, arbitration may still be the preferred choice. If case speed and cost-efficiency are more relevant, the option to agree on an international commercial court in Switzerland is likely to soon be available.

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