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DREIFUSS

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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: In the wake of the coronavirus (COVID-19) pandemic, we have seen technological advances and the ease of access to digital communication take hold in arbitrations. While some issues still need to be resolved, maintaining confidentiality and security remains key. In our experience, these technicalities are best addressed in a procedural order, with a virtual hearing protocol, including technical requirements, test runs and details regarding the examination of witnesses, for example. Against this background, the new Swiss Rules of International Arbitration, which came into effect in June 2021, further advance digitalisation, with paperless filings becoming the norm. In this vein, the new rules provide that the arbitral tribunal shall, as soon as practicable after receiving the file from the secretariat, hold an initial conference with the parties to organise the arbitration proceedings and address issues of data protection and cyber security. At the beginning of 2023 a new provision

of the Swiss Code of Obligations came into force which provides that the articles of association of Swiss companies may require “corporate law disputes” to be settled by an arbitral tribunal seated in Switzerland. The statutory arbitration clause in the articles of association will bind the company, the company’s governing bodies, the members of such governing bodies and the shareholders, unless the articles of association provide otherwise. Companies have two years to adapt their corporate documents. Depending on its uptake, we expect this to lead to an increase in arbitration proceedings.

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

A: In its decision of 19 June 2021, the Federal Tribunal confirmed its view on the question regarding the exhaustion of legal remedies in arbitral matters. In the matter at hand, a biathlete had been sanctioned by a single arbitrator under the auspices of the Anti-Doping Division of the Court of Arbitration for Sport (CAS).

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According to the decision, the arbitrator's finding was challengeable to the Appeals Chamber at the CAS. However, the athlete also appealed the decision directly at the Federal Tribunal. The Federal Tribunal dismissed the appeal explaining that only arbitral awards could validly be brought before it by means of an appeal in civil matters. It held the first instance decision could constitute an internal administrative act by the federation which could still be brought before the Appeals Chamber of the CAS as a true independent arbitral tribunal. If viewed as such, it was not a final arbitral award. Though not expressly provided for under Swiss law for international arbitrations, in contrast to domestic arbitration, the Federal Tribunal held that the general rules governing access to the Federal Tribunal, intended to ensure that it should deal with an issue only once, should apply by analogy to international arbitration. The decision goes to show that the Federal Tribunal is cautious in its approach and has resisted interfering too early or at all in private arbitration proceedings.

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

A: Switzerland has a proud tradition as an arbitration-friendly jurisdiction, which is evidenced by its constant top ranking, both for seats of arbitrations where it led the list for International Chamber of Commerce (ICC) arbitrations in 2020 with 104 registered cases, and number of Swiss arbitrators, third in the ICC rankings for 2020 with 8.9 percent. The high regard for party autonomy, stable and liberal Swiss private law, well established arbitration scene and cosmopolitan, politically neutral backdrop all foster a good climate for dispute resolution by arbitration. With the new provisions in local law allowing appeals to the Federal Tribunal to be drafted in English, this trend will no doubt increase.

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?



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A: Claims with small to moderate dispute values are, as a rule and when made against Swiss debtors, preferably enforced in local courts. Four of the major Swiss cantons have specialised commercial courts which dispense efficient and technically sound decisions in international cases where resorting to arbitration would appear disproportionate from a cost perspective. If confidentiality considerations do prevail, parties can avail themselves of so-called ‘fast track arbitration’ proceedings, for claims of less than CHF1m under Swiss Rules or claims up to \$2m under ICC Rules. Opting to do so has a positive impact on the expected costs and streamlines proceedings from a time perspective.

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 has a strong tradition of protecting parties’ enforcement efforts, based on arbitral awards. As a signatory state of the New York Convention, international awards are enforced as if they were granted by Swiss courts.



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Depending on the nature of the award, be it a monetary award or non-monetary relief, different statutes are applicable, but enforcement is usually governed by summary proceedings, and is efficient and cost effective, up to court level.

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


A: Several factors must be considered in making this decision, such as the complexity of the matter, language preferences and confidentiality issues. These aspects may make arbitration preferable. One of the advantages of arbitration is the possibility of having the case judged by experts, in part chosen by the litigants. Another advantage is the flexibility of proceedings, as well as the neutrality of the arbitral tribunal. Where there are parties from differing states, state court proceedings invariably lead to proceedings before the state courts of one of the parties, possibly conferring a 'home advantage' to such a party, even if only psychologically. Another important upside of arbitral proceedings is the enforceability

of international arbitral awards based on the New York Convention. On the other hand, arbitral proceedings are often costlier than state court proceedings. Frequently, the shorter duration of the arbitration proceedings, including limited appealability, are thwarted by a document production phase that can prove extensive, cumbersome and time consuming. Swiss state court proceedings, on the other hand, apply very limited evidence production mechanisms. In summary, arbitral proceedings have both positives and negatives. Parties should carefully consider these before agreeing on an arbitration clause in their contractual arrangements. When doing so, they should ensure that the necessary requirements of a valid arbitration clause are met. Typically, the exact number of the arbitrators, the seat of the arbitration and the language of the proceedings must be included. 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?



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A: Considering the advantages of litigating in Switzerland, and in view of the ever-increasing complexity of international commercial relations, compounded by new and uncontrollable factors, such as pandemics, acts of war and multilateral sanctions and political trade barriers, all of which have direct or indirect economic consequences on international contracts, we expect arbitration figures to remain constant or to increase in the coming months and years. 

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