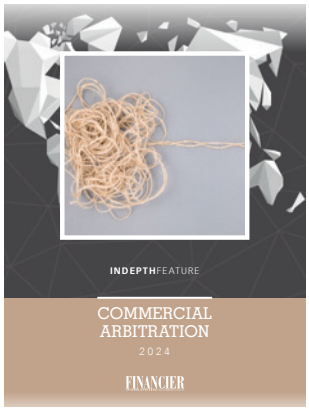

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COMMERCIAL ARBITRATION

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

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Q. Could you provide an overview of arbitration activity in Switzerland over the last year or so? How would you describe case numbers and common themes causing disputes?

A. We have seen consistent figures regarding arbitrations in Switzerland. The increasing complexity of international commercial relations, compounded by factors beyond the control of parties, such as the fallout of the coronavirus (COVID-19) pandemic, wars and the effects of multilateral sanctions and political trade barriers, have all directly or indirectly had economic consequences for international contracts, leading to an increase in the number of arbitrations. Also, the consequences of sanctions are making themselves felt in the practical aspects of conducting arbitration proceedings.

Q. What factors often influence parties in their choice of arbitration over litigation? Could you outline some of the key benefits of the arbitration process for those involved?

A. In commercial disputes, which inevitably arise in most international trade relations, parties may consider arbitration over normal state court litigation for a variety of reasons. Frequently, parties opt for arbitration owing to the complexity of the matter, which might require an arbitrator with a particular industry background or language capacity or for confidentiality. The flexibility of proceedings, the higher degree of influence by the parties on the process, as well as the neutrality of the arbitral tribunal may also be determining factors. In multijurisdictional disputes with parties from differing states, where normal state court proceedings would lead to a dispute being heard by the local court of one of the parties, providing potential 'home advantage', choosing a neutral arbitration venue and composition of arbitrators may be appropriate and effective. Another important advantage of arbitral proceedings is the global recognition afforded to international awards, based on the New York Convention with its 172 contracting states.

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Being able to choose one's arbitrator may give litigants comfort that their matter will be adjudged by a person competent in the relevant industry.

Q. How would you describe arbitration facilities and processes in Switzerland? How do they compare internationally?

A. Switzerland has a longstanding tradition as an arbitration-friendly jurisdiction. The high regard for party autonomy by the state, stable and liberal Swiss private law, the well-established arbitration scene and the country's cosmopolitan, politically neutral outlook all foster a good climate for dispute resolution by arbitration. Many Swiss-based practitioners have global renown and with Swiss law frequently the chosen law for international contracts, Swiss attorneys are often the best choice for party representation. Given the recently enacted option for parties to bring appeals to the Federal Tribunal in English, the attractiveness of Switzerland and its arbitration facilities will no doubt persist when compared internationally. While Switzerland does not boast a specialised hearing facility, there are numerous well-suited and experienced arbitration venues available. An intuitive, user-friendly platform on the Swiss Arbitration website can help parties find hearing facilities and

service providers for other aspects of the process.

Q. Have you seen any recent changes to arbitration rules in Switzerland? If so, how are they likely to affect the arbitration process?

A. State legislators have become aware of the potential economic benefits that go hand in hand with having reliable dispute resolution institutions capable of managing large international disputes, with spin off advantages to the legal industry and related sectors. Switzerland has followed the lead taken by other jurisdictions, such as Singapore, Dubai, Amsterdam and Paris, and amended its national civil procedure law to enable the cantons to establish international sections of the commercial courts. These would then be competent to hear commercial cases of an international nature above a value threshold of CHF100,000 where parties agree to its jurisdiction with proceedings held in English with an English judgment rendered. The jury is still out on whether these new international commercial courts would cannibalise the arbitration market or offer a complementary service to market participants who would venture into international trade relations but not opt for arbitration.

Q. With more parties involved in remote or hybrid arbitrations, what steps should they take to prepare for the process, such as addressing technology and administrative issues?

A. The revised Swiss Rules of International Arbitration further promote digitalisation, with paperless filings becoming the norm. This is underpinned by the general provision in the Swiss Rules that the arbitral tribunal may conduct an arbitration by adopting measures to improve the efficiency of proceedings, to the extent due process is upheld. In this vein, the new rules provide that the arbitral tribunal, as soon as practicable after receiving the file from the secretariat, holds an initial conference with the parties to organise the arbitration proceedings and address data protection and cyber security issues. As set out in its March 2023 Practice Note, the modalities of the hearings should, if possible, be preliminarily addressed by the arbitral tribunal at the initial organisational

conference and be specified at another organisational conference in advance of the hearing. Against that backdrop, it is certainly helpful if the parties address this topic at the initial organisational conference.

Q. When it comes to enforcing arbitral awards, to what extent are you seeing a rise in tactical challenges? Are courts in Switzerland generally unreceptive to such efforts?

A. We have noted a trend that parties try to reverse unfavourable arbitration outcomes in substance by challenging procedural aspects, in particular arbitrator objectivity, after the award. The Swiss Federal Tribunal, though only competent to hear appeals against Swiss international arbitration awards in a very limited number of cases, has dealt with a few challenges where a party has submitted that an arbitral tribunal was incorrectly constituted owing to the inclusion of a biased arbitrator. However, in cases before the Federal Tribunal, the challenge was made only after the award had been rendered. In one instance, the court admitted the challenge because the reasons that gave rise to the bias only appeared after the arbitral award, while in a newer case, the Federal Tribunal dismissed the challenge because due diligence in background checking the opposing party's arbitrator would have revealed the bias. Another more recent challenge is the rise of complexity due to sanctions and designated parties involved in arbitral proceedings.

Q. Do you believe more companies should include arbitration provisions in their contract clauses at the outset of a commercial venture? What are some of the key considerations when drafting such clauses?

A. Given that Swiss courts are highly competent, prompt, objective and reasonable, there are no compelling institutional reasons to opt for arbitration. Four cantons have specialised commercial courts with specialist industry sector judges, a high settlement ratio and quick resolution times. However, other reasons such as the technical exigencies of a matter, the native language of the parties, confidentiality issues such as trade secrets or other exposure risks, may

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make arbitration advantageous. Being able to choose one's arbitrator may give litigants comfort that their matter will be adjudged by a person competent in the relevant industry. Whenever parties do opt for arbitration, they should ensure that the validity requirements of the clause are met. There needs to be clarity on whether arbitration is compulsory and exclusive. Typically, the exact number of arbitrators, the seat and the language of the proceedings need to be included in the clause. ❑

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PRAGER DREIFUSS is one of the leading Swiss law firms for commercial law. The firm seeks holistic, innovative solutions adapted to legal and economic conditions for all of its clients. The firm's focus is on legal issues as well as the control of business risks. With many years of experience in asserting civil claims and in complex international commercial disputes, the firm understands the needs of its clients and provides its services accordingly. Prager Dreifuss is ideally positioned to advise and support international and domestic clients in a wide range of legal matters.

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