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Switzerland – Law & Practice

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GABRIEL Arbitration

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SWITZERLAND

LAW AND PRACTICE:

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Law and Practice

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SWITZERLAND LAW AND PRACTICE

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GABRIEL Arbitration is an independent dispute resolution boutique law firm specialising in international arbitration with office in Zürich, Switzerland. Clients benefit from first class-dispute resolution services, fewer conflicts of interest and competitive pricing. The lawyers of the firm are particularly experienced in disputes concerning joint ventures and consortia, distribution contracts, international

sales contracts, licensing contracts and post-M&A issues. In terms of industries, the team is experienced in disputes on commodity trading, pharmaceutical products, construction projects, production of high-tech equipment and semiconductor development. For more information, visit www.gabriel-arbitration.ch

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1. General

1.1 Prevalence of Arbitration

Switzerland is one of the leading places of arbitration worldwide. The local hubs are Geneva (in the French-speaking part of Switzerland) and Zürich (in the German-speaking part). There is also some international arbitration activity in Lausanne (the seat of the Court of Arbitration for Sport; CAS), Lugano (in the Italian-speaking part) and Basel (a pharmaceutical hub in the German-speaking part).

The importance of Switzerland as a place of arbitration stems from Switzerland's traditional neutrality, its cultural diversity as reflected by the four different official languages of the country and, most importantly, the quality and integrity of the legal profession.

Finally, as a small country, Switzerland also has a tradition of efficiently administering small and mid-size disputes, with the Swiss Rules of International Arbitration stipulating that disputes up to a value of one million Swiss Francs are dealt with in expedited proceedings within six months. The expedited proceedings are increasingly also chosen by parties in larger disputes when time is of the essence.

1.2 Trends

There has been an increase in third-party funding in international arbitration of late. Based on a decision with respect to security for costs in the so-called Saint Lucia case, the increase in third-party funding has entailed an increase in requests for securities for costs (ICSID Case No ARB/12/10 and the assenting opinion of Gavan Griffith QC in particular).

There appears to be saturation with respect to any kind of guidelines, best practice guides and similar soft law products by institutions or arbitration bodies. Many Swiss clients and practitioners wish to return to the original values of international arbitration: efficient proceedings under the down-to-earth guidance of reasonable and experienced arbitrators who take the time to provide high-quality services.

In this respect, it may be worthwhile to consider how institutions could minimise formal burdens in arbitration proceedings and, at the same time, maximise the reasonability and confirmability of the outcome on the merits. New dynamic institutions have recognised this wish of arbitration users and have discovered innovative products. A European institution to be watched in this respect is the Court of Innovative Arbitration (COIA), which offers *ex aequo et bono* arbitration proceedings with a seat in Switzerland.

1.3 Key Industries

There has been no exceptional increase of arbitration proceedings in any particular industry in Switzerland.

1.4 Arbitral Institutions

The leading arbitration institutions are the International Chamber of Commerce (ICC Rules) and the Swiss Chambers' Arbitration Institution (Swiss Rules).

2. Governing Law

2.1 Governing Law

International arbitration proceedings in Switzerland are governed by the 12th Chapter of the Swiss Private International Law Act ("PILA"), which comprises 19 articles (Article 176 to Article 194 PILA: the so-called "lex arbitri").

The Swiss PILA is not directly based on the UNCITRAL Model Law, although it is evident that the drafters of the PILA were aware of the ideas and concepts of the Model Law, and some Swiss scholars even state that the spirit of the Model Law can be recognised in many provisions of the PILA.

2.2 Changes to National Law

The Swiss legislator currently envisages a minor revision of the Swiss international arbitration law, (ie the 12th Chapter of the PILA). A first draft of an expert committee ("Consultation Draft") was circulated to interested bodies for consultation in January 2017. The amendments aim (inter alia) to reflect already existing continuous practice of the Swiss Federal Tribunal for the sake of transparency, and make the legal framework even more arbitration-friendly. For example, the current draft provides for the possibility to file submissions in setting-aside proceedings before the Swiss Federal Tribunal in the English language. At the same time, no major

changes in the current legal situation are expected. If the response to the Consultation Draft is positive and subject to further amendments in the legislative process the revised law may enter into force in 2018 or 2019.

In the following, the most important amendments of the Swiss *lex arbitri* (status: Consultation Draft) will be noted in the relevant sections.

3. Arbitration Agreement

3.1 Enforceability

From a formal point of view, the arbitration agreement is required to be evidenced by text (so-called "text form"; Article 178.1 PILA); therefore, arbitration agreements in e-mails or telefax communications are formally valid in Switzerland.

From a substantive point of view, the minimal requirements for an arbitration agreement are as follows:

- it provides for an agreed exclusion of the state court jurisdiction in favour of arbitral jurisdiction;
- it relates to a defined dispute (eg "all disputes arising out of or in connection with" a certain contract); and
- it details a definable arbitral tribunal.

Finally, it should be noted from a substantive point of view that an arbitration agreement is also considered valid in Switzerland if it meets the substantive legal requirements of either the law chosen by the parties or the law that applies to the merits of the case (Article 178.2 PILA; principle of "favor validitatis").

Swiss *lex arbitri* Revision: the Consultation Draft clarifies that the formal requirements are fulfilled if only one party meets the text form (eg in a confirmation letter). Furthermore, the draft clarifies that the rules of *lex arbitri* also apply to arbitration agreements in unilateral legal instruments (such as last wills).

3.2 Arbitrability

Article 177.1 PILA provides that every "economically relevant" ("*vermögensrechtlich*") claim may be referred to international arbitration. Claims that concern matrimonial status issues (eg separation, divorce or children-related claims) are thus not arbitrable in Switzerland, and neither are insolvency proceedings in the sense of the proceedings that lead to the dissolution of a company for lack of assets. At the same time, a company in insolvency proceedings is still bound by arbitration agreements (unless the insolvency concerns the general legal capacity of an entity according to the decisions of the Swiss Federal Tribunal Nos 4A_118/2014, 138 III 714 and 4A_428/2008 – the so-called "Vivendi" decision).

One important point for proceedings with state involvement is that Article 177.2 PILA provides that a state or state-owned entity is not entitled to rely on its own law in order to argue that certain issues in dispute are not arbitrable or that it is not capable of being a party in arbitration proceedings. This provision of the Swiss PILA can be very useful for any party that contracts with state-owned entities.

3.3 National Courts' Approach

The Swiss Federal Tribunal considers that (at least) the core of the arbitration agreement (ie the exclusion of the state courts in favour of arbitration) is of procedural nature.

If a party starts legal proceedings before state courts in a dispute that is subject to an arbitration agreement, the state court will – first of all – wait and see whether the counterparty objects to state court jurisdiction based on the arbitration agreement. If so, it will decline its jurisdiction and the claimant will need to start arbitration proceedings. However, the state court will consider the absence of any objection as tacit agreement to proceed before state courts (Article 7 PILA).

Against this background, the (procedural) Swiss approach is slightly different from the (substantive) US approach, where courts positively order parties to attend arbitration proceedings, but the result remains the same: if a valid arbitration agreement exists and one of the parties insists on arbitration, Swiss courts will respect the arbitration agreement by declining their jurisdiction and the parties must proceed with arbitration in order to obtain a decision on the merits.

This approach is in line with Article II.3 of the New York Convention, of which Switzerland is a contracting state.

3.4 Validity

Article 178.3 PILA expressly provides that an arbitration agreement may be considered valid even if the rest of the contract is invalid (so-called “doctrine of separability”).

At the same time, there may be situations in which a defect of the main contract also affects the arbitration agreement. This can be the case, for example, if an unauthorised person signed a contract that includes an arbitration agreement. However, in such a situation it would be for the arbitral tribunal (and not a state court) to assess whether the arbitration agreement was valid, since the arbitral tribunal is competent to rule on its own competence (Article 186.1 PILA).

In exceptional cases, an arbitration agreement in a draft contract can even be valid and binding before the main contract is signed. This is the case if an intention to be bound by the arbitration agreement can be established independently of the conclusion of the main contract (see Gabriel/Wicki, *Vorvertragliche Schiedszuständigkeit* (Pre-contractual Jurisdic-

tion of Arbitral Tribunals), *ASA Bull.* 2/2009, p. 236 et seqq. for further information on this issue).

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to nominate any arbitrator in line with the arbitration agreement (Article 179.1 PILA).

However, if an arbitrator nominated by a party is not sufficiently independent and/or impartial, she or he may be challenged by the other party, and may be subject to removal and replacement.

It is important to note that such a challenge must be brought forward immediately after a party gains knowledge of the reasons for such a challenge. While the Swiss PILA does not provide for a fixed time limit, it is advisable to submit a challenge at the latest within ten days of learning of the respective reasons unless the arbitration agreement – including referenced institutional arbitration rules – provides for a different time limit for challenges.

Swiss *lex arbitri* Revision: for arbitrator challenges, a time limit of 30 days after learning of the respective reasons is suggested in the Consultation Draft.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, they may approach the state court judge at the place of arbitration (so-called “*juge d'appui*”) and request that he or she designate an arbitral tribunal (Article 179.2 PILA). Depending on the specific circumstances, the state court judge will either apply the arbitration agreement to the extent possible or, in the absence of any viable agreement, apply the rules of the Swiss Code of Civil Procedure (“CCP”) and designate the missing members of the arbitral tribunal (Article 362 CCP).

Swiss *lex arbitri* Revision: the Consultation Draft clarifies that the *juge d'appui* may nominate the entire arbitral tribunal in multi-party situations.

4.3 Court Intervention

A state court cannot intervene in the selection of arbitrators unless an arbitrator is rightly challenged and thus removed for lack of independence and/or impartiality. Even in this case, it is not for the state court to designate the replacement of the arbitrator, but rather the replacement will (again) take place according to the relevant provisions in the arbitration agreement.

4.4 Challenge and Removal of Arbitrators

Article 180 PILA governs the challenge and potential removal and replacement of arbitrators. Reasons for challenging an arbitrator include:

- reasonable doubts with respect to impartiality and/or independence;
- a failure to meet characteristics provided for in the arbitration agreement; and
- any further reasons provided for in the arbitration agreement.

4.5 Arbitrator Requirements

According to Article 180 PILA and pertinent jurisdiction of the Swiss Federal Tribunal, arbitrators must be independent and impartial comparable to state court judges (see, for example, the decision of the Swiss Federal Tribunal No 4A_620/2012, para 3.1). The Swiss Federal Tribunal takes note of the IBA Guidelines on Conflict of Interest in International Arbitration on a case-by-case basis, but does not consider itself to be bound by any standards noted therein.

If an arbitrator does not meet the required (high) standard of independence and impartiality, any award that was rendered with his or her participation risks being set aside.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Any subject matters that are arbitrable may be referred to arbitration pursuant to the Swiss *lex arbitri* (see **2.1 Governing Law**), as long as they are covered by a valid arbitration agreement.

5.2 Challenges to Jurisdiction

The arbitral tribunal can assess whether it is competent to make a decision on the merits of a dispute (Article 186.1 PILA: so-called “competence-competence”). When making use of its competence-competence, the arbitral tribunal may render a decision on its jurisdiction even in *lis pendens* situations (ie where the same matter is already pending before a state court or a different arbitral tribunal). In such *lis pendens* situations, the arbitral tribunal is not required to stay its proceedings, unless justified by notable circumstances (Article 186.1bis PILA).

5.3 Circumstances for Court Intervention

The Swiss Federal Tribunal is the only judicial instance that has the power to review any decision on jurisdiction in potential setting-aside proceedings, if a respective objection is brought forward by a party.

The Swiss Federal Tribunal freely assesses the accurate application of the law in this respect. At the same time, it is not in

a position to review the findings of an arbitral tribunal with respect to the facts underlying the award on jurisdiction.

5.4 Timing of Challenge

Only arbitral awards are subject to setting-aside proceedings and thus also to challenges with respect to the jurisdiction of an arbitral tribunal. At the same time, the parties are required to object to arbitral jurisdiction in their first submission on the merits. Otherwise, the jurisdictional challenge will be barred due to an assumed tacit agreement to arbitral jurisdiction (“*materielle Einlassung*”; see also **3.3 National Courts’ Approach** for the same requirement before state courts).

If arbitral jurisdiction is disputed in arbitral proceedings, the tribunal is generally required to decide on its jurisdiction in a preliminary award, in order to enable an early challenge in this respect (Article 186.3 PILA).

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The Swiss Federal Tribunal has the power to review fully issues of jurisdiction with respect to the correct application of the law. At the same time, it has no power to review the arbitral tribunal’s findings on the facts of the case (see also **5.3 Circumstances for Court Intervention**).

According to recent statistics in 2016, only 10.7% of all jurisdictional challenges have been successful since the PILA was introduced in 1989 (see Dasser/Wojtowicz, *Challenges of Swiss Arbitral Awards*, ASA Bull. 2/2016, p. 286), so it appears fair to conclude that the Swiss Federal Tribunal has remained deferent to reasonable jurisdictional decisions of arbitral tribunals.

5.6 Breach of Arbitration Agreement

Swiss courts will deny state court jurisdiction and the party that commenced state court proceedings in breach of an arbitration agreement will have to restart the proceedings before an arbitral tribunal (see also **3.3 National Courts’ Approach**).

5.7 Third Parties

The Swiss Federal Tribunal has accepted extensions of arbitration agreements to non-signatories in the following situations:

- if an assignment of a claim, an assumption of a debt or a transfer of a contract takes place;
- if a third party intentionally interferes with the performance of a contract in full knowledge of the fact that this contract contains an arbitration agreement; or
- if a contract for the benefit of a third party is concluded, the third party needs to respect an arbitration agreement as well (unless otherwise stated in said arbitration agreement).

A summary of this legislation can be found in the decision of the Swiss Federal Tribunal No 4A_627/2011, para 3.2 (with further references).

6. Preliminary and Interim Relief

6.1 Types of Relief

Article 183 PILA expressly authorises arbitral tribunals to order interim measures, unless the parties agreed otherwise in the arbitration agreement.

Interim measures in the sense of the Swiss PILA would be measures of a temporary nature which aim to maintain the status quo between the parties whilst a dispute is pending, safeguard the arbitral process (eg by preserving evidence), or preserve assets in order to satisfy a subsequent award (eg security for costs).

Even though it is not expressly excluded according to the terms of the PILA, Swiss arbitral tribunals would be very reluctant to order anti-suit injunctions as there is no legal tradition of applying this measure in Switzerland.

The arbitral tribunal may require a security from the party requesting interim measures in order to secure potential damages from the party against which the order is directed (Article 183.3 PILA).

Increasingly, there are also emergency arbitrator proceedings in Switzerland (mostly under the ICC Rules or the Swiss Rules). In this respect it should be noted that under the Swiss Rules also “ex parte” applications are admissible before emergency arbitrators.

6.2 Role of Courts

If a party does not voluntarily comply with an interim measures order from an arbitral tribunal, the state courts may assist in the enforcement of the order upon the request of the arbitral tribunal (Article 183.2 PILA).

Swiss *lex arbitri* Revision: the Consultation Draft clarifies that the state courts may assist in the enforcement of the order also upon the request of a party.

6.3 Security for Costs

According to a large majority of legal commentators, arbitral tribunals are in a position to order security for costs in the sense that (typically) the impecunious claimant would have to secure the potential procedural costs of the respondent.

The specific requirements are – at the same time – controversially discussed by legal scholars. The majority of legal commentators still require that the financial situation of the party against which the request is directed (typically the

claimant) has deteriorated since the conclusion of the arbitration agreement. This means that any party that chooses to contract with an impecunious counterparty (eg a shell company or special-purpose vehicle) risks that eventually no security for costs will be granted.

7. Procedure

7.1 Governing Rules

Articles 182 to 185 PILA provide a few general rules on arbitral procedure.

For example, it is provided that arbitral tribunals are competent to order specific procedural steps to the extent that the parties did not agree on the applicable procedure. Moreover, and as a matter of mandatory procedural law, Article 182.3 PILA provides that, in any event, arbitral tribunals need to safeguard the parties’ equal treatment as well as their right to be heard in contradictory proceedings.

7.2 Procedural Steps

As long as the parties are treated equally and their right to be heard in contradictory proceedings is safeguarded, there are no particular procedural steps required.

At the same time, it should be noted that the right to be heard in contradictory proceedings guarantees the following minimum standard of participation in arbitration proceedings:

- the opportunity to submit arguments on the merits of the case in accordance with the procedural rules;
- participation in oral hearings, if any;
- access to records; and
- the opportunity to comment on the arguments of the other party.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal has the power to order the individual procedural steps in the event that the parties have not reached any agreements regarding the procedure. In this respect, and as already mentioned above, the arbitral tribunal is required to treat the parties equally and grant them the right to be heard in contradictory proceedings (see also 7.1 **Governing Rules** and 7.2 **Procedural Steps**).

At the same time, the arbitrators have a duty to conduct a reasonably expedited procedure and issue the necessary orders in good time. They also have a duty to deliberate on the merits of the case and make an award on the basis of the applicable substantive law (which is applied *ex officio* in Swiss arbitration proceedings pursuant to the principle of “*iura novit arbiter*”). An exception applies if the parties agreed that

the arbitral tribunal shall decide *ex aequo et bono* (Article 187.2 PILA).

Finally, the application of the law by the arbitral tribunal must not be surprising. A surprise is usually acknowledged by the Swiss Federal Tribunal when an arbitral tribunal had applied a legal act to which no party had made reference in the arbitral proceedings (decision of the Swiss Federal Tribunal No 4A_374/2011, para 2.4).

7.4 Legal Representatives

There are no legal requirements for legal representatives in arbitration proceedings in Switzerland, but it is highly recommended to choose a legal representative who is not only educated in Swiss law but also experienced in international arbitration. Candidates should specifically be asked about their experience in international arbitration before being instructed in an arbitration case.

For legal representation of parties before any Swiss state courts (also in setting-aside proceedings against an arbitral award before the Swiss Federal Tribunal), a Swiss bar exam or an international accreditation as a lawyer in Switzerland is required.

8. Evidence

8.1 Collection and Submission of Evidence

Typically, Swiss arbitrators use the IBA Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules”) as a source of inspiration for the taking of evidence. This means:

- there are usually no US-style discovery proceedings, but requests for the production of specific documents that may be relevant for the outcome of the case are generally considered to be admissible (typically in the format of the so-called “Redfern Schedule”);
- correspondence between clients and legal counsel is usually considered to be legally privileged and is thus excluded from any production orders;
- documentary evidence is to be submitted together with the written submissions;
- written witness statements are fairly common in Swiss international arbitration proceedings;
- in the oral witness hearings, there is typically a brief direct examination (to “warm up” the witness) and then cross-examination on all relevant issues. In many cases, Swiss arbitral tribunals admit re-direct examination limited to issues covered in cross-examination and re-cross-examination limited to issues covered in re-direct examination; and
- the tribunal often takes the prerogative to ask questions of witnesses at any time during the examinations, but experi-

enced arbitrators will rarely interfere with the examinations of versed counsel, unless there are specific reasons to do so.

8.2 Rules of Evidence

Article 184.1 PILA (merely) provides that it is for the arbitral tribunal to administer the taking of evidence, and Article 184.2 PILA provides that the arbitral tribunal may seek the assistance of the state courts with respect to the taking of evidence.

Against the background of the right to be heard, the tribunal is required to consider evidence which was offered in accordance with the procedural rules.

8.3 Powers of Compulsion

As mentioned above, the arbitral tribunal may seek the assistance of the state courts with respect to the taking of the evidence (see **8.2 Rules of Evidence**). If relevant evidence is not under the control of either party, there may be no other option than to seek the assistance of a state court, even though it is rarely seen in practice.

However, if relevant evidence is under the control of a party, tribunals may anticipate a so-called “negative inference” if the evidence is not produced, rather than seeking assistance of the state courts.

9. Confidentiality

Swiss arbitration proceedings are confidential in the sense that they are not open to the public (expressly confirmed by the Swiss Federal Tribunal in connection with the “*Causa Pechstein*” in decision No 4A_612/2009, para 4.1).

Furthermore, it is widely acknowledged that, based on the arbitrators’ agreement with the parties (*receptum arbitri*), arbitrators have a duty to keep any information from the arbitral proceedings confidential.

At the same time, legal scholars have controversially discussed whether and to what extent the parties themselves have any confidentiality duties arising out of the arbitration agreement. If the arbitration agreement (including arbitration rules potentially referred to) does not address the issue of confidentiality, it is difficult to find a legal basis for a respective duty between the parties, as the PILA is silent on this issue. Nevertheless, some Swiss commentators suggest that any arbitration agreement should be interpreted to the effect that the mere existence of arbitration proceedings is not confidential, while any materials submitted in the proceedings as well as the award should be considered as confidential.

The Swiss Rules of Arbitration, for example, provide for a confidentiality provision in Article 44, whereas the ICC Rules do not.

10. The Award

10.1 Legal Requirements

Article 189.1 PILA provides that the arbitral award shall be made in the form and according to the procedure agreed upon by the parties.

Article 189.2 PILA provides that, in the absence of any agreement between the parties, the following requirements apply:

- the award shall be made by majority vote or, in the absence of any majority, by the president of the tribunal;
- the award shall be in written form (the signature of the president is sufficient) and show the date on which it is rendered; and
- the award shall be reasoned (at least with respect to the most relevant arguments of the parties).

10.2 Types of Remedies

As a general rule, the arbitral tribunal may and shall award what is owed pursuant to the applicable substantive law. At the same time, there are some limits which must be considered. First, any arbitral award rendered in Switzerland must remain within the boundaries of Swiss public policy (the so-called “*ordre public*”). Any legal consequences which are not in line with Swiss public policy must not be awarded, and such an award would be at risk of being set aside by the Swiss Federal Tribunal. There are indications that punitive damages might be considered as infringement of Swiss public policy by the Swiss Federal Tribunal (see, for example, the decision of the Swiss Federal Tribunal No 122 III 463, para 5.c.c).

Second, as mentioned above (see 3.2 Arbitrability), only economically relevant claims are arbitrable in Switzerland, so an arbitral tribunal must not award remedies for any claims that fall outside the definition of arbitrability.

10.3 Recovering Interest and Legal Costs

The issue of the recovery of legal costs is a matter of procedural law and is thus governed by the arbitration agreement (including reference to any institutional rules). If the arbitration agreement is silent on the allocation of legal costs but both parties request to be compensated for their legal costs, it appears reasonable to accept an implied agreement that legal costs should be allocated. If the parties do not request compensation of legal costs, the issue of the allocation becomes moot, as the tribunal must not award any position that was not requested by either of the parties.

Generally, Swiss tribunals allocate legal costs in proportion to the success of the parties on the merits of the case. Further circumstances (such as the procedural behaviour of the parties) are sometimes considered as well.

The so-called “American Rule”, where each party bears its own costs, is only applied if agreed upon by the parties or if the proportion of the success on the merits is close to fifty-fifty.

11. Review of an Award

11.1 Grounds for Appeal

In Switzerland, an arbitral award may be challenged before the Swiss Federal Tribunal. The available grounds are expressly noted in Article 190.2 PILA and can be summarised as follows:

- incorrect designation and/or composition of the arbitral tribunal;
- inaccurate decision on arbitral jurisdiction;
- the decision either does not cover all of the parties’ requests for relief (*infra petita*) or goes beyond the requests for relief of the parties (*ultra petita* or *extra petita*);
- infringement of the principles of the right to be heard and/or equal treatment; and
- infringement of Swiss public policy.

The challenge must be submitted to the Swiss Federal Tribunal within 30 days of the date of receipt of the award, and must specifically demonstrate that at least one of the above reasons for setting aside applies to the award at issue. The Swiss Federal Tribunal invites the counterparty and the arbitral tribunal to submit comments (unless a challenge is considered as evidently inadmissible or unfounded by the Swiss Federal Tribunal), and typically decides within a timeframe of four to six months in total.

Moreover, the Swiss Federal Tribunal has admitted requests for the exceptional legal remedy of so-called “revision” against binding awards (decisions of the Swiss Federal Tribunal Nos 122 III 492 and 134 III 286), which is only available if sufficient reasons are discovered after an award was rendered. Sufficient reasons for a revision include fundamental procedural defects, violation of the European Convention on Human Rights and other grounds, such as discovery of new material facts or criminal behaviour which affected the award.

A request for revision on the grounds of newly discovered facts must be submitted within 90 days of the discovery of such new facts.

Swiss lex arbitri Revision: the Consultation Draft expressly provides for limited grounds for a revision in international arbitration, namely, (i) discovery of new material facts or (ii) criminal behaviour which affected the award.

11.2 Excluding/Expanding the Scope of Appeal

If no party is domiciled in Switzerland, the parties may exclude any challenge proceedings (Article 192 PILA).

If the parties wish to expand the scope of review of a higher instance, they have the possibility to agree on an appeal mechanism before a second arbitral tribunal, but the Swiss Federal Tribunal will review challenges only as defined in Article 190.2 PILA.

11.3 Standard of Judicial Review

The Swiss Federal Tribunal does not review the merits of the case, unless it is indispensable in order to review issues of arbitral jurisdiction.

12. Enforcement of an Award

12.1 New York Convention

Switzerland has signed and ratified the New York Convention (without reservations).

12.2 Enforcement Procedure

Enforcement of an arbitral award does not require a separate recognition procedure in Switzerland. Rather, the competent court will examine as a preliminary question within the specific enforcement procedure whether or not the requirements of the New York Convention are fulfilled.

The applicable state court jurisdiction and the details of the enforcement procedure are provided for in the Swiss Code of Civil Procedure (Articles 335 et seqq. CCP).

12.3 Approach of the Courts

Swiss courts are rightly considered to be arbitration-friendly and there are rarely any public policy concerns that would impede enforcement of an arbitral award.

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