
Switzerland

Arbitration Guide

IBA Arbitration Committee

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Switzerland is one of the major venues for international arbitration. Many factors account for this reputation, in particular neutrality, a secure and predictable legal framework, access to qualified arbitrators and counsel (Swiss and foreign) as well as a developed infrastructure. Switzerland has a modern and liberal international arbitration law in Chapter 12 of the Swiss Private International Law Act (SPILA), in force since 1 January 1989, which grants the parties to arbitration wide party autonomy. Chapter 12 of the SPILA provides a streamlined set of essential provisions which assure proper constitution and functioning of the arbitral tribunal and give the parties (and the arbitrators) all the necessary flexibility to conduct the arbitral proceedings in accordance with their own fair and reasonable expectations. Users of international arbitration services in Switzerland generally do not perceive disadvantages since the alternative in most cases would be litigation in the home country of their adversary.

Swiss parties rarely resort to domestic arbitration for their domestic disputes. Litigation remains the preferred dispute resolution. This might change in the future since Switzerland unified its civil procedural laws and adopted a modern arbitration law governing domestic arbitration (The Swiss Federal Code of Civil Procedure (CCP), in force since 1 January 2011).

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

It is difficult to assess the respective importance of institutional and *ad hoc* arbitration, given that there is no statistical information available in relation to the latter. In any case, international arbitration by far outnumbers domestic arbitration in Switzerland. The most common institutional rules are the Rules of Arbitration of the International Chamber of Commerce. Swiss seats (mainly Geneva and Zurich) are the most frequently chosen places for ICC arbitrations, ahead of Paris and London. The Swiss Rules of International Arbitration of the Swiss Chambers of Commerce (Swiss Rules) and the Court of Arbitration for Sport in Lausanne are also widely used.

(iii) What types of disputes are typically arbitrated?

Article 177 SPILA offers a wide definition of arbitrable disputes that covers all disputes with an economic interest. A wide range of commercial disputes are thus arbitrated in Switzerland. In 2010, disputes related to the international sale of goods represented 30 per cent of all disputes submitted to the Swiss Chambers of Commerce. Other disputes typically referred to arbitration include those

concerning construction projects, commodity trading, energy supply and license agreements.

(iv) How long do arbitral proceedings usually last in your country?

Many proceedings last between 18 and 24 months. However, the length of arbitral proceedings varies depending on the complexity of the particular case and whether the arbitration is conducted under institutional or ad hoc rules.

With respect to post-arbitration court proceedings, Switzerland has an edge over many other arbitration venues: there is only one remedy available against international arbitration awards: an application directly to the Swiss Federal Supreme Court. Proceedings before the Court last six to eight months on average.

Since the adoption in 2004 of the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce (Swiss Rules), the parties may agree to an expedited procedure in cases where the amount in dispute exceeds CHF 1 million (Article 42 Swiss Rules). In such cases, an award must be rendered (subject to limited exceptions) within six months from the date when the Chambers transmitted the file to the arbitral tribunal (Article 42(1)(d) Swiss Rules). In cases involving amounts in dispute of less than CHF 1 million, the arbitration will in any event be expedited.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are no restrictions.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

In Switzerland, different sets of rules apply to domestic and international arbitration. Chapter 12 of the Swiss Private International Law Act (SPILA) applies to international arbitral proceedings seated in Switzerland where, at the time of the conclusion of the arbitration agreement, at least one of the parties did not have its domicile or habitual residence in the country. Although the SPILA is not based on the UNCITRAL Model Law, there are no major differences between them.

Domestic arbitration is governed by Part 3 of the federal Swiss Code of Civil Procedure (CCP), in force since 1 January 2011, which harmonised the previously applicable 26 different cantonal codes on civil procedure and replaced the Swiss

Cantonal Concordat on Arbitration of 1969. Part 3 of the CCP (Article 353) applies to arbitrations having their seat in Switzerland where, at the time of the conclusion of the arbitration agreement, all parties had their domicile or habitual residence in Switzerland. However, the parties in a domestic arbitration may choose to apply Chapter 12 of the SPILA but they must express this choice in writing or in another form that provides text based proof of such agreement (Articles 353(2) and 358 CCP).

Moreover, if the parties so agree, arbitral proceedings – whether domestic or international – can be governed by any set of rules issued by private arbitration institutions, such as the Rules of Arbitration of the ICC, or the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce (Swiss Rules), issued by the Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

(ii) Is there is a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

There are no major differences between Chapter 12 of the SPILA and Part 3 of the CCP, which both provide for wide party autonomy. The most notable difference is the discreet remedies available to challenge a domestic or an international arbitral award.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Switzerland is a party to the New York Convention, which entered into force in Switzerland on 30 August 1965. Switzerland is also a party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, although their relevance have been superseded by Article VII(2) of the New York Convention. Finally, Switzerland is also a party to the Washington Convention for the Settlement of Investment Disputes Between States and Nationals of Other States of 1965.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

International arbitration: Article 187(1) SPILA is based on the principle of party autonomy and provides that the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties. If the parties have not agreed upon the applicable law, the arbitral tribunal shall decide according to the rules of law with which the case has the closest connection. The phrase ‘rules of law’ should be understood broadly to include transnational rules of law, general principles of law, public international law, *lex mercatoria*, UNIDROIT principles, etc. Under Article

187(2) SPILA, the parties may also authorise the arbitral tribunal to decide the dispute *ex aequo et bono*.

Domestic arbitration: According to Art. 381 CCP, parties are free to determine the applicable rules of law. In the absence of a choice of law, the arbitral tribunal will apply the law 'which a court would apply'.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

In international arbitration proceedings, Article 178(1) SPILA provides that the arbitration agreement must be in writing. Article 178(2) SPILA further provides that the arbitration agreement is valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law. Under Articles 357 and 358 CCP, the same basic principles are applicable to domestic arbitration.

Neither Chapter 12 of the SPILA (Article 178) nor Part 3 of the CCP (Article 358) explicitly deals with the content of a valid arbitration agreement under Swiss law. However, the minimum requirements of a valid arbitration agreement under Swiss law correspond to those specified in Article II(1) of the New York Convention (in force and binding on Switzerland since 1965).

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an award will not be enforced?**

An arbitration agreement may be deemed completely or partially invalid under Swiss law for various reasons. Under Swiss law, the parties are free to agree on whatever they wish in their arbitration agreement, as long as it does not violate mandatory law, public policy, morality or the right of legal personality (Article 19 of the Swiss Code of Obligations, applied by analogy). An arbitration agreement must abide by the mandatory provisions of Chapter 12 SPILA, such as: Article 177 (subject-matter arbitrability); Article 178 (form of the arbitration agreement); Article 180(1)(c) (independence of arbitrators); and Article 182(3) (equal treatment requirement and right to be heard in an adversarial procedure).

The enforcement of awards is governed by the New York Convention. Enforcement can be refused in the circumstances described in Article V of the Convention.

- (iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier arbitral clauses are relatively common. The Swiss Federal Supreme Court has ruled that their enforceability depends upon the specific drafting language of the multi-tier arbitral clause in question (for example, whether or not it is unambiguous and contains a time-limit) and normal principles of contract interpretation.

The Swiss Federal Supreme Court has not expressly determined the consequences of non-compliance with an enforceable multi-tiered arbitral clause, and the matter remains controversial.

- (iv) What are the requirements for a valid multi-party arbitration agreement?**

Chapter 12 of the SPILA does not specifically address multiparty arbitration agreements. On the other hand, Article 8 Swiss Rules provides for a specific regime regarding the constitution of the arbitral tribunal in multiparty proceedings.

- (v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

In accordance with the principle of wide party autonomy, it is undisputed under Swiss law that an arbitration agreement which provides for a unilateral right of one of the parties to arbitrate is enforceable.

- (vi) May arbitration agreements bind non-signatories? If so, under what circumstances?**

Swiss law is based on the well-established principle of privity of contract by which the arbitration clause binds only the parties that have originally agreed to it. However, certain exceptions to this rule have nevertheless been accepted in Swiss case law. In particular, the Swiss Federal Supreme Court has held that the extension of an arbitration agreement to a non-signatory party is admissible if that party participated in the performance of the contract, thus demonstrating that it was willing to be bound by the arbitration agreement. The Swiss Federal Supreme Court has also held that the mere existence of a group of companies does not generally result in the obligation of the parties of this group to arbitrate.

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

In relation to international arbitral proceedings, Article 177(1) SPILA provides that any dispute involving an economic interest may be submitted to arbitration. The arbitrability of domestic disputes is regulated by Article 354 CCP which provides that any cause of action of which the parties are free to dispose may be the subject of arbitration. Excluded are primarily the following matters:

- legal status matters in family law, such as matrimony, paternity suits, adoption, paternalism, divorce, etc;
- insolvency law matters, such as the commencement of bankruptcy proceedings, arrest in personam or in rem, dismissal of objection in prosecution proceedings, etc; and
- issuance and constitutive registration of patents, designs and trademarks.

In principle, the arbitral tribunal decides whether the dispute submitted to it is capable of being submitted to arbitration. The question of arbitrability is a requirement for the validity of the arbitration agreement and is thus considered a condition for the jurisdiction of the arbitral tribunal. However, the subject of arbitrability may also become relevant at a later stage of the proceedings. For example, a Swiss state court might be seized with an action to set aside the award where the arbitral tribunal has wrongly accepted or denied jurisdiction, due to lack of arbitrability (Article 190(2)(b) SPILA; Article 393(b) CCP)).

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

If a party initiates court proceedings before a state court in breach of an arbitration agreement, the court will decide upon its jurisdiction.

A party that proceeds on the merits will lose its right to rely on an arbitration agreement.

Under Article 186(1)bis SPILA, the arbitral tribunal shall decide on its own jurisdiction irrespective of whether an action having the same subject-matter is already pending between the same parties before a state court unless significant grounds exist that require a stay in arbitration proceedings. Under Article 186(2)

SPILA, jurisdictional objections should be raised prior to any statement on the merits.

- (iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

Under Article 186(1) SPILA, the arbitral tribunal shall rule on its own jurisdiction (*competence-competence*). As a rule, the arbitral tribunal will have to issue an interim award on its jurisdiction, if it is challenged, unless the facts relevant for jurisdiction are intertwined with those that are decisive for the merits. In international arbitration proceedings, the arbitral tribunal's decision on its jurisdiction can generally be appealed before the Swiss Federal Supreme Court. On the basis of Article 190(3) SPILA, an appeal against an interim award on the arbitral tribunal's jurisdiction should be filed immediately. In proceedings governed by the Swiss Rules, a plea that the arbitral tribunal does not have jurisdiction shall be raised in the answer to the notice of arbitration, but in no event later than in the statement of defence, or, with respect to a counterclaim, in the reply to the counterclaim.

V. Selection of Arbitrators

- (i) How are arbitrators selected? Do courts play a role?**

The parties enjoy freedom in the selection of arbitrators. Article 179 SPILA accordingly provides that the arbitrators shall be appointed, removed, or replaced pursuant to the agreement of the parties. In the absence of such agreement, the judge at the place of arbitration shall apply (by analogy) the provisions of the CCP on appointment, removal or replacement of arbitrators (Article 179(2) SPILA read in conjunction with Articles 360-371 CCP). If the parties fail to agree on the person to be appointed as a sole or presiding arbitrator, the competent court at the place of arbitration will appoint the arbitrators upon a party's request.

If the Swiss Rules are applicable, the Chambers shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal if the parties have not agreed upon the number of arbitrators (Article 6(1) Swiss Rules). Moreover, if the parties fail to designate the sole arbitrator within the applicable time limit, the Chambers shall proceed with the appointment (Article 7(3) Swiss Rules).

- (ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

Chapter 12 of the SPILA is silent on the specific requirements for disclosure of conflicts in the case of international arbitration proceedings. Article 180(1) SPILA

provides that an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence. Under Article 180(2) SPILA, a party may challenge an arbitrator whom it nominated or in whose appointment it participated only based on information discovered after the appointment. The arbitral tribunal and the other party must be informed immediately of the grounds for the challenge. Under Article 180(3) SPILA, in the event of dispute and if the parties have not agreed upon the procedures for challenge, the judge at the place of arbitration shall make the final decision.

Under Article 363 CCP, an arbitrator in a domestic arbitration must reveal without delay the existence of facts, which could raise legitimate doubts about his or her independence or impartiality. This obligation of disclosure subsists until the close of the arbitral proceedings. Absent an agreement between the parties, Article 369 CCP further provides that a written and reasoned demand should be addressed to the challenged arbitrator within 30 days of a party learning of the ground(s) for the challenge. If the challenged arbitrator disputes the grounds, the challenging party may, again within 30 days, seek a decision on the challenge from the designated authority agreed upon by the parties or, in the absence thereof, from the competent state court at the place of arbitration. If the aggrieved party fails to communicate its request for challenge in a timely manner, the right to challenge will be treated as having been irrevocably waived. Any decision on the challenge of an arbitrator delivered by a designated judicial authority or state court at the place of arbitration is final and without appeal.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Anyone may serve as an arbitrator in Switzerland. Article 180(1)(c) SPILA requires only that an arbitrator in an international arbitration must be independent and impartial. There is no explicit duty of disclosure under Chapter 12 of the SPILA. However, Article 9 Swiss Rules provides that in an arbitration conducted under Swiss Rules, an arbitrator shall at all times remain impartial and independent of the parties and must disclose all relevant facts which might give rise to justifiable doubts about his or her independence and impartiality. Apart from the requirements of independence and impartiality imposed by law, the parties are free to agree on additional qualifications for the mandate of an arbitrator.

Article 367(1)(c) CCP provides that an arbitrator in a domestic arbitration must also be independent and impartial. Moreover, Article 363(1) CCP provides that any person who has been nominated as arbitrator must disclose without delay any circumstances that may give rise to justifiable doubts as to his or her independence or impartiality. There are no specific restrictions regarding the qualification or nationality of the arbitrators. Court judges may act as arbitrators as well. However, cantonal law may require a judge to give notice of such appointment or ask for permission to accept such appointment.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

In a decision from 2008, the Swiss Federal Supreme Court has stated that the IBA Guidelines on Conflicts of Interest in International Arbitration may not have the same value as statutory law, but they nevertheless constitute a valuable tool that is likely to influence the practice of both institutions and state courts in Switzerland.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

The arbitral tribunal's competence to order interim measures is recognised in Article 183(1) SPILA and Article 374(1) CCP. Unless otherwise agreed upon by the parties, the arbitral tribunal may, at the request of either party, order interim measures and it has wide discretion as to the content of interim measures. For example, if applicable, Article 26(1) Swiss Rules provides in general terms that the arbitral tribunal may at the request of either party order any interim measures it deems necessary or appropriate. However, the power of the arbitral tribunal to order interim measures is not unlimited. It follows from Article 183(2) SPILA and Article 374(2) CCP that the arbitral tribunal does not have coercive power: it lacks the power to enforce its own orders on interim measures. The arbitral tribunal may thus request the assistance of the competent state court if the party so ordered does not comply voluntarily with the order for interim measures. If the Swiss Rules are applicable, Article 26(1) Swiss Rules provides that interim measures may be established in the form of an interim award.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?**

The prevailing view in Switzerland is that, unless otherwise agreed upon by the parties, the jurisdiction of the arbitral tribunal in an international arbitration to order interim measures provided for in Article 183(1) SPILA is not exclusive but is concurrent with that of state courts. Article 26(3) Swiss Rules also embodies this principle. Domestic arbitrations are based on the same principle and Article 374(1) CCP gives effect to this in explicit terms. In other words, in Switzerland, the party requesting interim relief may – even after the arbitral tribunal is constituted – freely choose whether to apply for such measures before state courts or the arbitral tribunal.

- (iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Article 184(2) SPILA and Article 375(2) CCP both provide that if judicial assistance is necessary for the taking of evidence, the arbitral tribunal may apply for such assistance to the state court at the place of arbitration. The same provisions further state that the arbitral tribunal's consent is a condition of admissibility in any such proceedings before the state court.

VII. Disclosure/Discovery

- (i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

Article 184(1) SPILA provides that the arbitral tribunal itself conducts the taking of evidence, within the overall scope of the arbitral procedure agreed upon by the parties. The arbitral tribunal is accordingly competent to determine the applicable rules for the taking of evidence. Neither the SPILA nor the CCP provides specific rules on disclosure and discovery. In any case, the evidentiary proceedings are subject to the overriding principles of the right to equal treatment and the right to be heard.

Arbitral tribunals seated in Switzerland will often rely on Articles 3(3) and 9(2) of the IBA Rules on the Taking of Evidence in International Arbitration.

- (ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**

Arbitral tribunals seated in Switzerland will often be guided by Articles 3(3) and 9(2) of the IBA Rules on the Taking of Evidence in International Arbitration.

- (iii) Are there special rules for handling electronically stored information?**

In dealing with electronically stored information, arbitral tribunals seated in Switzerland will often be guided by Articles 3(3)(a)(ii) and 3(12)(b) of the IBA Rules on the Taking of Evidence in International Arbitration.

VIII. Confidentiality

- (i) Are arbitrations confidential? What are the rules regarding confidentiality?**

Neither Chapter 12 of the SPILA nor Part 3 of the CCP addresses the confidentiality of the arbitration. Exceptions to this principle of confidentiality apply if disclosure is required by a legal duty, to protect or pursue a legal right or

to enforce or challenge an award in legal proceedings before a judicial authority. According to Article 43 Swiss Rules, the parties undertake as a general principle to keep confidential all awards as well as all materials submitted by another party in the framework of the arbitral proceedings and not otherwise in the public domain.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

Trade secrets and confidential information have traditionally enjoyed protection in Switzerland, principally by virtue of provisions of criminal law and the law against unfair competition. Nowadays, this type of information is also protected by Article 39 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which is directly applicable in Switzerland. In those cases where the parties have agreed upon the application of the IBA Rules on the Taking of Evidence in International Arbitration, the arbitral tribunal may, on the basis of Article 9(2)(e), exclude from the evidence or refuse to order production of any document, statement, oral testimony or inspection that it determines to be commercially or technically confidential.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The arbitral tribunal must first of all have due regard to possible arrangements made by the parties themselves (in application of Article 182(1) SPILA or Article 373(1) CCP). If the parties have not determined questions related to privilege, the arbitral tribunal shall determine it to the extent necessary (Article 182(2) SPILA or 373(2) CCP). In such circumstances, Articles 9(2)(b), (e) and (g) of the IBA Rules on the Taking of Evidence in International Arbitration will often provide the arbitral tribunal with helpful guidance.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Under Article 182 SPILA, the parties may directly or by reference to rules of arbitration regulate the arbitral procedure; they may also subject the procedure to the procedural law of their choice. The IBA Rules on the Taking of Evidence in International Arbitration are often used as guidance in arbitrations seated in Switzerland. If the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Under Articles 182(3) SPILA, irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Article 25(4) Swiss Rules provides that the arbitral tribunal is free to determine the manner in which witnesses are examined. This rule applies also under the SPILA, subject only to the arbitral tribunal's duty to treat the parties equally. It is common practice for arbitral tribunals seated in Switzerland to seek guidance from Article 4 of the IBA Rules on the Taking of Evidence in International Arbitration and thus require parties to submit a written witness statement for each of their fact witnesses. These witness statements may take the form of a sworn affidavit made under oath, but simply signed declarations are more commonly used. Oral examinations are the rule (examination in chief; cross-examination). The arbitral tribunal may ask questions to a fact witness or expert witness at any time of the proceedings (as is also the case under Article 8(3)(g) of the IBA Rules on the Taking of Evidence in International Arbitration).

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

It is a matter for the applicable arbitral procedure (Article 182 SPILA or Article 373 CCP) to determine who, when, where, in what form and by whom a witness may be heard and examined. Under the SPILA any person may be a witness or expert witness. There are no mandatory rules on oath or affirmation, but the arbitral tribunal may seek guidance from Article 8(4) of the IBA Rules on Evidence in International Arbitration. In any case, providing false testimony to an arbitral tribunal seated in Switzerland may entail criminal sanctions in the same way as when made before state courts in accordance with Article 309 of the Swiss Penal Code.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

In principle, there is no distinction between the testimony of a witness specially connected with one of the parties and the testimony of an unrelated witness. In essence, the arbitral tribunal is free to weigh the evidence which has been provided by the parties. Witnesses with no interest in the outcome of the proceedings might carry more weight.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

According to the case law of the Swiss Supreme Court, tribunal-appointed experts must be independent and impartial. Party-appointed experts are not expected to be impartial.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

While it is increasingly common for each of the parties to appoint their own experts, arbitral tribunals seated in Switzerland retain their discretion to appoint their own experts. There is no requirement that experts be selected from a particular list. There is no such corresponding provision for party-appointed experts. It is for the arbitral tribunal to assess the probative value of both forms of evidence.

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Arbitral tribunals seated in Switzerland occasionally use witness conferencing.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

The use of arbitral secretaries is common, especially in complex cases. Article 365 CCP provides that the arbitral tribunal in a domestic arbitration may appoint a secretary to the tribunal. The same principle applies (though not expressed explicitly) to international arbitrations governed by Chapter 12 of the SPILA. The main rule concerning the use of an arbitral secretary is the requirement that he or she is independent and impartial in the same way as the arbitrators themselves (see Article 365(2) CCP and Article 15(5) Swiss Rules).

X. Awards

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Article 189(1) SPILA provides that the arbitral award shall be rendered according to the procedure and in the form agreed upon by the parties. In the absence of such agreement, Article 189(2) SPILA provides that the award shall be rendered by a majority or, in the absence of such majority, by the chairman alone. The

award must be in writing, set forth the reasons on which it is based, and be dated and signed. The arbitral tribunal may grant damages, relief for specific performance as well as interim and declaratory relief.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

The question of damages and interest is generally governed by substantive law (Article 187 SPILA; Article 33(1) Swiss Rules).

(iii) Are interim or partial awards enforceable?

Article 190(3) SPILA provides that interim or partial awards are enforceable and may be challenged only if the arbitral tribunal was irregularly constituted or if the arbitral tribunal wrongly decided on its own jurisdiction.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Neither Chapter 12 of the SPILA nor Part 3 of the CCP contains provisions on the admissibility of dissenting opinions. The Swiss Federal Supreme Court has ruled that, where the parties have not agreed to the contrary, the majority of the arbitral tribunal may decide upon whether and how to communicate a dissenting opinion to the parties (Swiss Federal Supreme Court decision 4P.23/1991, consideration 2b, confirmed in 4P.196/2003, consideration 1.2). A dissenting opinion does not form part of the award itself, but it may be annexed to the award or delivered to the parties separately.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

The SPILA does not exclude awards by consent. An arbitral tribunal may also issue a simple procedural order for the termination of the proceedings, the form, content and notification of which are governed by the applicable arbitral procedure (Article 182 SPILA and Article 373 CCP).

Under Article 34(1) Swiss Rules, if so requested by all parties to a settlement agreement, the arbitral tribunal shall issue a consent award on agreed terms. Under Article 34(2) Swiss Rules, if, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible the arbitral tribunal shall inform the parties of its intention to issue a procedural order for the termination of the proceedings. The arbitral tribunal has the power to issue such an order unless a party raises justifiable grounds for objection.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The question of the powers of the arbitrators to correct or interpret an arbitral award is primarily determined by the agreement of the parties (Article 182(1) SPILA). Many arbitration rules provide for the possibility of correction and interpretation of awards (for example, UNCITRAL, ICC, Swiss Rules).

In the absence of any agreement between the parties, the Swiss Federal Supreme Court has held that an arbitral tribunal seated in Switzerland has the power to correct or interpret its award on its own motion (DFT 126 III 524).

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Both Chapter 12 of the SPILA and Part 3 of the CCP are silent on this matter. It is thus primarily for the parties to determine issues related to the cost of an arbitration. In the absence of an agreement, the arbitral tribunal has broad discretion. The rule that unsuccessful parties bear the costs is widely applied.

(ii) What are the elements of costs that are typically awarded?

Article 38 Swiss Rules is a good illustration of recoverable costs. These costs include fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators, costs for expert advice or of other assistance, travel and other expenses of witnesses, costs for legal representation and assistance of the successful party (if such costs were claimed during the arbitral proceedings) and the costs for the administration of the arbitration payable to the Chambers.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

In administrated arbitration, the rules of the institution will provide guidance. In ad hoc arbitration, the arbitral tribunal will determine the costs of arbitration in its award. However, as recently decided by the Swiss Supreme Court, arbitrators have no power to order the parties to remunerate the members of the arbitral tribunal. Consequently, arbitral tribunals must ensure that their fees are covered by appropriate advances prior to issuing the award.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

The arbitral tribunal has discretion, unless the parties' agreement imposes apportioning rules, be it directly or by reference to rules of an arbitration institution.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

The award on costs rendered by an international arbitral tribunal may be challenged on the grounds listed in Article 190(2) SPILA. The main grounds would be alleged lack of jurisdiction to decide on costs (Article 190(2)(b) SPILA) or an alleged decision beyond the claims submitted, for example, if an ad hoc arbitral tribunal awards costs without any corresponding request by the parties (Article 190(2)(c) SPILA).

The award on costs rendered by a domestic arbitral tribunal may be challenged on the grounds listed in Article 393 CCP. In contrast to an international arbitral award, a domestic arbitral award may be challenged on the grounds that the fees and expenses of the tribunal are manifestly excessive (Article 393(f) CCP).

XII. Challenges to Awards

- (i) **How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

International arbitral awards, whether final, partial or interim, may be set aside pursuant to Article 190 SPILA. The limited grounds upon which an award may be set aside are contained in Article 190(2) SPILA. Grounds for a challenge are an irregular constitution of the arbitral tribunal, a wrong decision on jurisdiction, where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide on the claims, where there is a violation of the right to be heard or of the principle of equal treatment of the parties, or where the award is incompatible with public policy. Interim awards can be challenged only on the grounds of the irregular constitution of the arbitral tribunal and a wrong decision on jurisdiction (Article 190(2)(a) and (b) SPILA).

In accordance with Article 100(1) of the Swiss Federal Tribunal Act, a full application to challenge the award (drafted in a Swiss national language) must be filed within 30 days from the notification of the award. The time limit cannot be extended. The Swiss Federal Supreme Court will normally render its decision on annulment within six to eight months. A second exchange of submissions or oral argument is allowed only very exceptionally.

An award rendered in international arbitration proceedings is enforceable as of the date of notification to the parties (Article 190(1) SPILA). As a rule, filing a motion to set aside the award has no effect on its finality or enforceability (Article 103(1) Swiss Federal Tribunal Act). However, the Swiss Federal Supreme Court may, and in exceptional cases indeed does, grant a stay the enforcement. From

precedents it appears that the Court requires the party requesting the stay to demonstrate that:

- the immediate enforcement of the award exposes it to serious and irreparable harm in its legitimate legal interests; and that
- the challenge itself has a very strong *prima facie* chance of success.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

Pursuant to Article 192 SPILA, if neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, they may, by an express declaration in the arbitration agreement or in a subsequent written agreement, waive (in whole or in part) the remedies against the award of the arbitral tribunal.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

Switzerland provides only one level of challenge in international arbitration matters, namely, a request to set aside to be filed with the Swiss Federal Supreme Court (Article 191 SPILA). This remedy is not an appeal. The Court does not review the factual findings of the arbitral tribunal.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

If the Swiss Federal Supreme Court sets aside an international arbitral award, it may only annul the challenged award and remand the case to the same arbitral tribunal for the rendering of a new award (so-called 'cassatory' nature of the action for annulment; Article 77 Swiss Federal Tribunal Act). The Federal Supreme Court does not issue its own decision on the merits.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

An international arbitral award rendered under Chapter 12 of the SPILA has the same effect as a final decision by a State court which is automatically enforceable. Similarly, a domestic arbitral award rendered under Part 3 of the CCP is automatically enforceable in the same way as a judicial decision by a Swiss state court (Article 387 CCP). Hence, a final and binding award rendered by an international arbitral tribunal seated in Switzerland can also be automatically

enforced throughout Switzerland, in application (by analogy) of the rules contained in Articles 335-346 CCP.

In Switzerland, different rules apply to the enforcement of monetary and non-monetary claims. The former is governed by the Swiss Debt Enforcement and Bankruptcy Act of 1889 (DEBA; see Article 335(2) CCP) while the latter is governed by Articles 335-346 CCP. The recognition and enforcement of foreign arbitral awards is governed by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (Article 194 SPILA). The grounds for opposing the enforcement of foreign arbitral awards are those listed in Article V of the New York Convention. Foreign monetary arbitral awards are enforced in accordance with the provisions of the DEBA. The enforcement of foreign arbitral awards awarding non-monetary relief are governed by the CCP.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

According to both Article 193(2) SPILA and Article 386(3) CCP, a party may request the competent state court to certify the enforceability of the arbitral award. Such a certificate is not binding on a Swiss state court, but may serve as *prima facie* evidence that the arbitral award has *res judicata* effect and is enforceable under the law of the seat of the arbitral tribunal in enforcement proceedings before competent Swiss state courts.

(iii) Are conservatory measures available pending enforcement of the award?

Pending enforcement of an arbitral award rendered in Switzerland, the Swiss state court where enforcement is sought may order provisional and conservatory measures, if necessary also *ex parte*, for both monetary and non-monetary claims (see Article 271(1)(6) Swiss Debt Enforcement and Bankruptcy Act and Article 340 CCP).

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Switzerland is known to be arbitration-friendly.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

The duration of proceedings depends on a number of factors, including the complexity of the matter, but generally, enforcement proceedings take about six months.

XIV. Sovereign Immunity

- (i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?**

In Switzerland, there is very little statutory legislation on state immunity. The matter is mostly governed by case law, in particular that of the Federal Supreme Court. Under Swiss law, states enjoy immunity in relation to their public acts (*acta jure imperii*), while there is no guarantee of immunity for its private acts (*acta jure gestionis*) such as personal injury, property damage (torts) or all kinds of commercial activities.

- (ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?**

Under Swiss law, where the state acts in a commercial capacity (*acta jure gestionis*), state immunity may be lifted, provided that the matter has a ‘sufficient connection’ with Switzerland (in German: ‘*Binnenbeziehung*’; in French ‘*attachement suffisant*’). Thus, even if the dispute arises from a commercial act of the foreign state, it is necessary to demonstrate that circumstances exist which connect the legal relationship in question so closely to Switzerland that it is justified to summon the foreign state to appear before Swiss state courts. A connection is deemed sufficient where the legal obligation arose or was, or had to be, performed in Switzerland.¹

XV. Investment Treaty Arbitration

- (i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Switzerland has been a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States since 1968. It has also been a party to the Energy Charter Treaty since 1998.

- (ii) Has your country entered into bilateral investment treaties with other countries?**

Switzerland has one of the largest bilateral investment protection treaty (BIT) networks in the world. It has to date signed 125 BITs with other countries of which 109 are currently in force.

¹ See Michael E. Schneider and Joachim Knoll, ‘Enforcement of Foreign Arbitral Awards Against Sovereigns – Switzerland’, in: R. Doak Bishop (ed.), *Arbitral Awards Against Sovereigns* (JurisNet 2009), pp. 311-353.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Practitioners wishing to learn more about arbitration in Switzerland may consult, *inter alia*, the following:

- Berger/Kellerhals, *International and Domestic Arbitration in Switzerland* (Stämpfli Publishers, 2nd ed. 2010)
- Berti/Honsell/Vogt/Schnyder, *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Helbing & Lichtenhahn/Kluwer Law International 2000)
- Girsberger/Voser, *International Arbitration in Switzerland* (Schulthess 2008)
- Kaufmann-Kohler/Rigozzi, *Arbitrage international: droit et pratique à la lumière de la LDIP* (Editions Weblaw 2010)
- Kaufmann-Kohler/Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International 2004)
- Lalive/Reymond/Poudret, *Le droit de l'arbitrage interne et international en Suisse : édition annotée et commentée du Concordat sur l'arbitrage du 27 mars 1969 et des dispositions sur l'arbitrage international de la loi fédérale du 18 décembre 1987 sur le droit international privé* (Payot 1989)
- Patocchi/Scherer (eds.), *Swiss International Arbitration Law Reports* (Juris Publishing)
- Poudret/Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd ed. 2007)
- Scherer (ed.), *ASA Bulletin* (Journal of the Swiss Arbitration Association) (Kluwer Law International)
- Zuberbühler/Müller/Habegger, *Swiss Rules of International Arbitration: Commentary* (Schulthess/Kluwer Law International 2005)

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

As one of the leading venues for arbitration, many arbitration events and conferences take place in Switzerland every year. In particular, the Swiss Arbitration Association (ASA) and the Swiss Chambers of Commerce are very active and regularly organise educational events and conferences on various arbitration topics every year.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Most domestic disputes are referred to the courts, not to arbitral tribunals. On the other hand, international disputes, with or without connection to Switzerland, are referred to arbitration.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Mediation is becoming an increasingly important tool for conflict resolution in Switzerland. However, although mediation is increasingly used in Switzerland, including as a service provided since 2007 by the Swiss Chambers of Commerce under the Swiss Rules of Commercial Mediation, it is still unclear whether mediation will become as important for commercial disputes as it has in the United States, mainly because it is a long-standing tradition of Swiss courts to conduct settlement negotiations themselves. The CCP, which entered into force in January 2011, dedicates a separate section to mediation (Articles 213-218 CCP).

(iii) Are there any noteworthy recent developments in arbitration or ADR?

A recent major development in arbitration is the entry into force on 1 January 2011 of the federal Swiss Code of Civil Procedure (CCP). Part 3 of the CCP provides a unified regulatory regime not only for domestic arbitration, but also for the enforcement of any arbitral award in Switzerland. Following the recent revision to the UNCITRAL rules, a working group has been formed to consider revisions to the Swiss Rules (which are inspired by the UNCITRAL Rules).