PRIVATE CLIENT & OFFSHORE SERVICES - SWITZERLAND

Revised PILA: setting the ground for trust arbitration in Switzerland?

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Background

While trusts have not been incorporated into the Swiss legal system, Switzerland ratified the Hague Trust Convention with effect from 1 July 2007 and adapted its conflict of laws provisions – in particular, Articles 149(a) to 149(e) of the Private International Law Act (PILA). As a result, foreign trusts are fully recognised and implemented under Swiss law. Although discussed controversially, legislative initiatives to introduce trusts into the Swiss legal system are ongoing.

More recently, several litigation cases involving high-value, complex trust structures have been brought before the Swiss civil courts in public proceedings.**(1)** This trend can be explained by the fact that settlors, beneficiaries and trustees from non-trust jurisdictions are less willing to rely on the courts located in trust jurisdictions and foreign procedural rules. Considering the general advantages of arbitration, there is also significant potential for and interest in arbitration proceedings relating to trust matters in Switzerland.

Contrary to litigation proceedings before state courts, parties to arbitration proceedings can agree on the level of confidentiality that all involved parties are to maintain. More specifically, settlors may also state in the arbitration clause contained in the trust instrument that any dispute in connection with a trust arbitration must be confidential. Another advantage of the enhanced flexibility of arbitration is that parties may choose specialised arbitrators and adapt the proceedings according to their needs. Further, the New York Convention**(2)** assists in ensuring that arbitral awards are recognised and enforced in 159 jurisdictions in a relatively straightforward manner.

Although Switzerland's longstanding tradition in international arbitration and its importance as a centre for trust services would make it a perfect venue for trust arbitration, there are still some legal hurdles to overcome. One of these hurdles has now been addressed – at least on its face – in the draft bill for the revised Chapter 12 of the PILA, the *lex arbitri* for international arbitration proceedings in Switzerland, published on 24 October 2018 together with its supplementary report.**(3)** On its face, the proposed revision of Chapter 12 of PILA, which has yet to be debated and voted on in Parliament and is not expected to enter into force before 2021,**(4)** appears to lay the foundations for trust arbitration in Switzerland. However, the draft bill leaves certain key questions unanswered.

Key amendments

The envisaged revision of Chapter 12 of PILA seeks to modernise Swiss arbitration law in order to further strengthen the attractiveness and competitiveness of Switzerland as an internationally recognised arbitration venue. The key amendments of the PILA relevant to trust disputes may be summarised as follows.

The formal requirements for arbitration agreements, set out in Article 178 of PILA, will be modernised. Similar to the form requirements for domestic arbitration,**(5)** the draft bill provides that the arbitration agreement must be made in writing or in any other form which allows it to be evidenced by text (eg, email or any other form of modern communication).

The draft proposal appears to open up the possibility of validly including an arbitration agreement in unilateral legal transactions, such as wills, bylaws and trust deeds. This is achieved by means of a newly proposed Article 178(4) of PILA, which specifically provides that Chapter 12 of PILA will apply *mutatis mutandis* to an arbitration clause contained in a unilateral legal transaction or in

articles of incorporation.

New opportunities

The introduction of the newly proposed Article 178(4) of PILA is of particular interest from a trust arbitration perspective. This provision could lay the foundation for the settlement of trust disputes in Switzerland by allowing such disputes to be submitted to a Swiss arbitral tribunal by means of a unilateral arbitration clause included in the trust deed.

Notwithstanding the prospective permissibility of unilateral arbitration clauses under Swiss arbitration law, attention should be drawn to a few not-yet-entirely-resolved issues in the context of trust arbitration.

The proposed revision clarifies the requirements only as to the formal validity of an arbitration clause. The newly proposed Article 178(4) of PILA provides that Chapter 12 of PILA will apply "by analogy with regard to an arbitration clause contained in unilateral legal transactions".**(6)** Accordingly, the formal validity of the arbitration clause in writing which is contained in a unilateral act (eg, a trust deed) is confirmed under the revised Swiss *lex arbitri* (ie, the law of the place in which the arbitration is to take place). Further conditions, such as the signature of all parties to the future arbitration proceedings, are not required.

However, the draft proposal does not alter the existing requirements concerning the substantive validity of an arbitration clause which must also apply to an arbitration clause contained in a unilateral legal transaction. Under existing Swiss arbitration law, the substantive validity of an arbitration clause will be determined under the more favourable of the following laws:

- the law applicable to the arbitration agreement chosen by the parties (if any);
- the applicable substantive law (in particular, the law applicable to the principal contract); or
- Swiss law (see Article 178(2) of PILA).

If the applicable law were to prohibit unilateral arbitration agreements or provide that arbitration clauses in a trust deed are invalid, then it may still be that – in application of the in *favorem validitatis* principle described above – the arbitration clause would still be considered valid as a matter of Swiss law. This question (namely, whether and under what circumstances a unilateral arbitration clause contained in a trust deed can bind other actors, such as beneficiaries) remains unanswered under Swiss law and requires further analysis and clarification.

This is confirmed by the draft explanatory note in a 24 October 2018 report, which states that the jurisdiction of an arbitral tribunal can be provided for in a formally valid arbitration clause contained in a unilateral legal transaction, such as a will or trust deed, if this unilateral legal transaction is made in accordance with the applicable law.

The Federal Tribunal allows the extension of arbitration agreements to non-signatories under particular circumstances. More specifically, this may be the case where a non-signatory party is involved in the performance of a contract and shows, by its conduct, that it intends to be a party to the agreement and the arbitration clause, as well as in the case of mergers and assignments. In such cases, a form of consent on the part of the non-signatory is implied.

A further question that arises is the extent to which an arbitral award issued based on a unilateral arbitration agreement, if such an arbitration agreement were to be considered valid, would be enforceable under the New York Convention. Article II(2) of the convention provides that "agreement in writing" includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

In a recent decision, the Federal Tribunal found that the formal requirements of Article II(2) were not a barrier to an extension of the agreement and the arbitration clause contained therein, similar to the decisions rendered under PILA.**(7)** The affect of this case law in the context of trust arbitration remains to be seen. A particularly interesting question for trust arbitration will be whether third parties that did not sign the trust deed, such as the beneficiaries (even if unborn), could also be deemed to have agreed to a unilateral arbitration clause implemented by the settlor by accepting distributions or invoking any right under the trust deed.

Outlook

The draft bill for the revision of the Swiss arbitration law, in particular the acceptance of the formal validity of an arbitration clause contained in a (foreign) trust deed, is welcomed. Settlors who are increasingly concerned about prospects of court proceedings in remote trust jurisdictions will have an additional option in the future and would be able to settle their disputes with trustees or beneficiaries in confidential arbitration proceedings based in Switzerland.

Should the draft enter into force in its current version, it should be further clarified whether trust law as such must provide for the possibility of arbitration in the event that the arbitration clause is contained in a trust deed and the parties to the arbitration have not signed the arbitration clause. In any event, trust practitioners who want to arbitrate in Switzerland must carefully draft their arbitration clauses. They can already rely on a few model clauses, such as the arbitration clause for trust disputes suggested by the International Chamber of Commerce,**(8)** although such clauses do not overcome the requirements of formal and substantive validity under the *lex arbitri*.

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Endnotes

(1) A list of various decisions rendered by the Swiss federal and cantonal courts – including unpublished ones – can be found here.

(2) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

(3) See here.

(4) The draft bill is currently under detailed consideration by the National Council Legal Affairs Committee.

(5) See Article 358 of the Swiss Civil Procedure Code.

(6) Article 178(4) of the draft PILA.

(7) Decision 4A_646/2018 (17 April 2019).

(8) See here.