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Luca Beffa,[1] Joachim Frick,[2] Anne-Catherine Hahn[3] and Urs Zenhäusern[4]

A. Legislation and rules

A.1 Legislation

Switzerland is planning to revise its *lex arbitri* that governs international arbitral proceedings seated in Switzerland. On 24 October 2018, the Swiss Federal Council published the Draft Bill on the Revision of Switzerland's International Arbitration Act (i.e. chapter 12 of the Swiss Private International Law Act). The bill takes into account the comments made by the affected public during the consultation process, in particular, those made by the Swiss Arbitration Association ASA, the Swiss Chambers' Arbitration Institution SCAI and ICC Switzerland. The main purpose of the revision is to selectively adjust and modernize Switzerland's arbitration law by (i) codifying established case law of the Swiss Federal Supreme Court; (ii) adapting the statutory rules to recent developments to maintain the position of Chapter 12 of the Swiss Private International Law Act as one of the most internationally regarded arbitration laws, and (iii) introducing certain minor linguistic and technical amendments and reducing the references to other laws. The most controversial proposal is the possibility to file legal submissions in setting aside proceedings before the Swiss Federal Supreme Court, in English. While this would further strengthen the attractiveness of conducting international arbitrations in Switzerland, the court itself is not enthusiastic. Whether parliament will accept the Swiss Federal Council's proposal remains to be seen.

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[1] Luca Beffa is a partner in Baker McKenzie's Geneva office.
[2] Joachim Frick is a partner in Baker McKenzie's Zurich office.
[3] Anne-Catherine Hahn is a partner in Baker McKenzie's Zurich office.
[4] Urs Zenhäusern is a partner in Baker McKenzie's Zurich office.

A.2 Institutions, rules and infrastructure

The Swiss Chambers' Arbitration Institution SCAI is about to revise the Swiss Rules of Commercial Mediation. The goal is to introduce a reasonably priced solution for parties to opt for the Simplified Procedure and to offer a faster and more cost-efficient alternative for projects and disputes where the amount at stake is relatively small. The revised version is expected to be launched in 2019.

B. Cases

B.1 Immunity of states in attachment proceedings

A decision of 7 September 2018[5] addressed whether or not the New York Convention prevents the taking into account of the admissibility requirement of Swiss law of a "sufficient domestic connection" when an attachment against a foreign state is requested in Switzerland based on a foreign arbitral award.

The Swiss court answered in the negative and, accordingly, the real estate property of the Republic of Uzbekistan could not be attached. The court concluded that when a state acted as the holder of private rights (i.e. *jure gestionis* as opposed to *jure imperii*) the requirement of Swiss law for there to be a sufficient connection between the dispute and Switzerland applies. Such connection would be fulfilled, in particular, when the contract was concluded in Switzerland, is to be fulfilled in Switzerland, or the foreign state at least acted in Switzerland, but not if only assets of a foreign state are located in Switzerland or an arbitral tribunal is seated in Switzerland. The New York Convention indeed foresees that a foreign arbitral award can be denied recognition and enforcement only under certain specific conditions that do not include the mentioned connectivity requirement. However, the examination of such conditions under the New York Convention first requires that the proceedings in which such examination takes place are procedurally permitted under the laws of the concerned state. Accordingly, if the required connection to

[5] 5A_ 942/2017.

Switzerland is not given, the respective Swiss judge who is asked for an attachment order will, based on Swiss laws, refuse to accept jurisdiction.

The Supreme Court expressly left open whether its conclusion would be the same if it had to judge with full cognition an appeal against a final decision on the recognition and enforcement of a foreign arbitral award against a foreign state (contrary to a request for the attachment of assets in summary proceedings).

B.2 Start of the thirty-day deadline for filing an annulment action

In a decision of 26 September 2018,[6] the Supreme Court held that under the ICC Rules, the receipt of a courtesy copy of the arbitral award by email from the ICC Secretariat does not yet trigger the start of the thirty-day period to file a request to annul the award, but only the receipt of an original by mail or courier. The Court stressed, however, that the beginning of the relevant deadline depends on the applicable rules of arbitration.

B.3 Pathological arbitration clause

In a judgment of 22 January 2018,[7] the Supreme Court examined an "arbitration clause" providing for the competence of the Buenos Aires commercial courts subject to certain proceedings before national and international bodies. The dispute was initially brought by a former agent of a football player against a football player for payment of a commission to the agent; the Court of Arbitration for Sports (CAS) had accepted jurisdiction. The Supreme Court rightfully came to the conclusion that the mentioned "arbitration clause" was not sufficiently clear to conclude that the parties indeed had agreed on an arbitral tribunal and set aside the arbitral award.

[6] 4A_40/2018.
[7] 4A_432/2017.

B.4 Success fees of lawyers and public policy

In a decision of 26 July 2018,[8] the Swiss Supreme Court confirmed its practice that an arrangement between a lawyer representing a law firm and a client about the payment of a success fee does not contradict Swiss public policy, i.e. the Swiss *ordre public*). This finding hold true even if the success fee amounts to thirty percent of the sum in dispute (notwithstanding the fact that in Switzerland a *pactum de quota litis* is, in principle, not permitted), or if there is a disproportionate difference between the amount of the success fee and the fixed fee, or even if the clause is formulated in a manner to create a lack of concurring interests between lawyer and client.

B.5 Agreement on the encouragement and mutual protection of investments of 1998 between Russia and Ukraine

In a decision of 23 November 2017,[9] the Supreme Court concluded that the above-mentioned investment treaty applies even though the territory where the investments by a Ukrainian party were made was part of Ukraine at the time of the investment and only later became a de facto controlled territory of Russia. According to the Supreme Court, the respective arbitral tribunal had rightfully explained that the notion "territory" in the treaty would not be limited to the territory which, on the principles of international law, belongs to a state, but include also territories which are de facto controlled by a state. Accordingly, the treaty protects also investments which, as a consequence of a de facto change of borders, are located on the territory of another state.

B.6 Power of an arbitral tribunal to judge retention claims

In a decision of 1 May 2018,[10] the Supreme Court held that an arbitral tribunal is entitled to judge not only claims raised based on a contract that includes an arbitration clause, but also the responding party's

[8] 4A_125/2018.
[9] 4A_396/2017.
[10] 4A_583/2017.

defense that it could exercise retention rights against the claim, provided that such retention rights are connected with the respective claims under the applicable Swiss substantive law. Only if there is no connection, as required under the substantive law, then the arbitral tribunal may lack jurisdiction to judge the retention rights. The dispute concerned mandate agreements between a lawyer and his (deceased) client, respectively the client's heirs.

B.7 Right to be heard

In a decision of 19 November 2018,[11] a claimant alleged a breach of his right to be heard, since the arbitral tribunal allegedly by surprise had applied legal reasoning to which no party had referred, namely a reduction of damages claims due to fault on the part of the party claiming damages.

The dispute concerned a Greek company which had entered into a consultancy agreement with an individual to assist the company with respect to a project to win and perform a contract for the construction of a power plant. The company first won the tender in the amount of over USD 400 million. but the project was then not realized. The Supreme Court concluded, based on a review of the arguments raised by each party before the arbitral tribunal, that it was not surprising for the claimant that the arbitral tribunal reduced the claim for damages based on own fault, even though the opposing party had not specifically asked for such reduction.

B.8 Deviation from agreed procedural rules

In a decision of 23 November 2018,[12] the Supreme Court held that an arbitral tribunal had not breached the right of the parties to be heard, even if the tribunal had deviated from a procedural rule (on the deadline for submission of new evidence or arguments) agreed between the parties to be binding on the arbitral tribunal. The judges based their decision on the finding that agreed procedural rules in

[11] 4A_301/2018.
[12] 4A_308/2018.

arbitration proceedings are not mandatory procedural rules (concerning the equal treatment of the parties and their right to be heard) in the sense of article 190, section 2 lit. d of the Swiss Private International Law Act. Also, the wrong or even arbitrary application of such agreed procedural rules would not constitute a breach of procedural public policy.

In the case at hand, one of the parties submitted in its final pleadings, contrary to the agreed procedural rules, a list newly annotated by hand of allegedly missing equipment and materials. The other party had timely objected, in a timely manner, to the submission of the annotated list, but the tribunal nevertheless considered the list without rejecting it as a late submission.

B.9 Recognition of the independence of the CAS vis-à-vis FIFA

In a decision dated 20 February 2018,[13] the Swiss Supreme Court upheld an arbitral award rendered by the CAS, confirming that the latter presents a sufficient level of independence, regardless of the contributions paid to it by the various sports federations in general, and FIFA in particular.

In 2015, the FIFA Disciplinary Committee sanctioned a Belgian football club for having failed to comply with article 18bis of the FIFA Regulations on the Status and Transfer of the Players (RSTP) which prevents so-called "third-party ownership" agreements, under which clubs can transfer a player's economic rights to a third party in exchange for a financial contribution.

The club appealed, but the decision was upheld by the FIFA Appeal Committee in 2016 and by the CAS in 2017. The football club then requested the Swiss Supreme Court to annul the award of the CAS, arguing, *inter alia*, that the CAS is not a genuine arbitral tribunal ("un véritable tribunal arbitral"). The club argued namely that the CAS

[13] 4A_260/2017.

could not be considered to be sufficiently independent of the various international sports federations in general, and in particular from FIFA, in view of the fact that FIFA was both one of the most important financial contributors of the CAS and its most important "client" due to the fact that the vast majority of cases brought before CAS were football- and FIFA-related.

However, on the basis of its established case law, the Swiss Supreme Court dismissed these arguments, considering that FIFA's financial contribution to the CAS, which amounted to less than 10% of the CAS annual budget, was not a factor which could undermine CAS independence. Furthermore, out of the 65% football-related cases pending before the CAS, only 5% concerned FIFA directly as a party to the arbitration. This decision of the Swiss Supreme Court is particularly noteworthy as it confirms, once again, that the CAS is considered to be a proper arbitral tribunal in Switzerland. Both the German Supreme Court (Bundesgerichtshof) in 2016,[14] and the European Court of Human Rights on 2 October 2018[15] reached the same conclusion in relation to the Pechstein saga.

B.10 Lack of *res judicata* for prior foreign judgments which are unenforceable in Switzerland

In a decision dated 18 April 2018,[16] the Swiss Supreme Court confirmed that a prior foreign judgment which is not enforceable in Switzerland does not bind an arbitral tribunal.

In 2010, a BVI company ("A") entered into two loan agreements with two BVI companies ("C" and "D") for the purpose of purchasing two vessels. The guarantor of A was a Russian individual domiciled in Moscow ("B"). The loan agreements provided for the application of Swiss law and included an ICC arbitration clause.

[14] See BGE KZR 6/15.
[15] See ECHR, Case *Mutu and Pechstein v. Switzerland*, Requests nos. 40575/10 and 67474/10.
[16] 4A_247/2017.

In 2015, A and B initiated ICC arbitration proceedings, after C and D had brought actions before the ordinary state courts of the BVI and Russia. The arbitral tribunal first accepted jurisdiction, and then rendered its final award in 2017, dismissing most of the claims raised by A and B, but ordering C and D to pay for 40% of A's and B's costs and expenses.

C and D challenged the award before the Swiss Supreme Court, claiming, in particular, that the arbitral tribunal had violated procedural public policy insofar as it had ignored the *res judicata* effect of a judgment rendered in Moscow in 2015. However, the Swiss Supreme Court dismissed this argument, noting that the Russian judgment was not enforceable in Switzerland as the Moscow court had disregarded the arbitration clause contained in the relevant loan agreement. As a result, the Russian judgment could not have a binding effect on the arbitral tribunal.

C. Diversity in arbitration

Switzerland is composed of several linguistically and culturally diverse regions, with Swiss German speakers representing approximately 63% of the population, while French and Italian speakers make up for approximately 23% and 8% respectively.[17] Additionally, more than 30% of Switzerland's current population have at least one parent who was born outside Switzerland, particularly in countries such as Italy, Spain, Portugal, Croatia or Kosovo.[18] This large degree of cultural and linguistic diversity is also reflected amongst lawyers, many of whom are fluent in at least one other language in addition to their mother tongue and English. Along with the perception of neutrality, the absence of a colonial past and

[17] About 0.5% speak Rumantsch as first language. Statistics from 2016 (Source: BFS-SE): „Ständige Wohnbevölkerung nach Hauptsprachen in der Schweiz," https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/sprachen-religionen/sprachen.assetdetail.4542305.html>).

[18] Statistics from 2017 (Source: BFS): „Schweizerische Arbeitskräfteerhebung (SAKE)," https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/migration-integration/nach-migrationsstatuts.html.

Switzerland's good infrastructure, this tradition of cultural diversity has certainly contributed to the country's development into an established place of arbitration for international proceedings.

The picture regarding gender diversity is less clear and less consistent. Over 60% of law school graduates in Switzerland are female,[19] and there is clearly a large number of young female practitioners looking to work in arbitration, typically by joining large firms. Additionally, the Swiss Chambers' Arbitration Institution as well as ASA, the Swiss Arbitration Association, have been making notable efforts to promote gender diversity by supporting the Pledge, by ensuring that female practitioners are included as speakers in major conferences, and by considering female candidates to arbitrator nominations. Thus, in 2015, 47% of the arbitrators appointed by the Court of the Swiss Chambers' Arbitration Institution were women. However, the representation of women on tribunals appointed by the parties or by the co-arbitrators is much smaller; in fact, in 2015, 95% of such appointments went to men.[20]

While there is an increasing awareness also among counsel that female candidates should be taken into account for arbitrator appointments, women continue being underrepresented in partnership positions in law firms in Switzerland. In practice, this means that relationships with important clients and high-stakes disputes continue being managed primarily by men. Nevertheless, compared to other areas of law, arbitration is a field where women have risen to senior positions in Switzerland, both in law firm roles and as arbitrators, enjoying considerable visibility and international recognition. Law firms also increasingly face a clear expectation from clients to put together diverse teams to work on cases, which helps to create

[19] Statistics from 2017 (Source: BFS/SHIS): "Studierende und Abschlüsse der schweizerischen Hochschulen," https://www.swissuniversities.ch/fileadmin/swissuniversities/Dokumente/Forschung/Chancengleichheit/CGHS_Indikatorenbericht_22-06-17.pdf.
[20] The SCAI only provides for Statistics until 2015.

awareness for diversity as a business need, although there clearly still is considerable room for improvement.