Definitive global law guides offering comparative analysis from top-ranked lawyers

International Arbitration

Switzerland: Law & Practice
Simon Gabriel, Axel Buhr, Johannes Landbrecht and Andreas Schregenberger
GABRIEL Arbitration

chambers.com
2020
# Contents

1. General
   - 1.1 Prevalence of Arbitration
   - 1.2 Trends
   - 1.3 Key Industries
   - 1.4 Arbitral Institutions

2. Governing Legislation
   - 2.1 Governing Law
   - 2.2 Changes to National Law

3. The Arbitration Agreement
   - 3.1 Enforceability
   - 3.2 Arbitrability
   - 3.3 National Courts’ Approach
   - 3.4 Validity

4. The Arbitral Tribunal
   - 4.1 Limits on Selection
   - 4.2 Default Procedures
   - 4.3 Court Intervention
   - 4.4 Challenge and Removal of Arbitrators
   - 4.5 Arbitrator Requirements

5. Jurisdiction
   - 5.1 Matters Excluded from Jurisdiction
   - 5.2 Challenges to Jurisdiction
   - 5.3 Circumstances for Court Intervention
   - 5.4 Timing of Challenge
   - 5.5 Standard of Judicial Review for Jurisdiction/Admissibility
   - 5.6 Breach of Arbitration Agreement
   - 5.7 Third Parties

6. Preliminary and Interim Relief
   - 6.1 Types of Relief
   - 6.2 Role of Courts
   - 6.3 Security for Costs

7. Procedure
   - 7.1 Governing Rules
   - 7.2 Procedural Steps
   - 7.3 Powers and Duties of Arbitrators
   - 7.4 Legal Representatives

8. Evidence
   - 8.1 Collection and Submission of Evidence
   - 8.2 Rules of Evidence
   - 8.3 Powers of Compulsion

9. Confidentiality
   - 9.1 Extent of Confidentiality

10. The Award
    - 10.1 Legal Requirements
    - 10.2 Types of Remedies
    - 10.3 Recovering Interest and Legal Costs

11. Review of an Award
    - 11.1 Grounds for Appeal
    - 11.2 Excluding/Expanding the Scope of Appeal
    - 11.3 Standard of Judicial Review

12. Enforcement of an Award
    - 12.1 New York Convention
    - 12.2 Enforcement Procedure
    - 12.3 Approach of the Courts

13. Miscellaneous
    - 13.1 Class-Action or Group Arbitration
    - 13.2 Ethical Codes
    - 13.3 Third-Party Funding
    - 13.4 Consolidation
    - 13.5 Third Parties
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 Zurich (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 of Switzerland).

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.

Switzerland as a place of arbitration is often chosen together with Swiss substantive law because the latter has influenced the making of the laws of some countries in South Eastern Europe and beyond, the most prominent among them being Turkey. Swiss substantive law is, therefore, in many cases both neutral and familiar to both parties in a dispute – this being an advantage that only few substantive laws have. Other advantages of Swiss substantive law are its flexibility and the high priority of parties’ agreements.

Furthermore, 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 CHF1 million 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.

Finally, Switzerland promotes efficient international arbitration because an arbitral award that was rendered by a tribunal with its seat in Switzerland can only be set aside for very limited reasons, and only the Swiss Federal Tribunal (the highest Swiss judicial authority) is competent to hear such a case. There is even the possibility to exclude any challenge proceedings (see 11.2 Excluding/Expanding the Scope of Appeal).

1.2 Trends
To begin with, it goes without saying that the current COV-ID-19 pandemic has had a considerable impact on arbitration proceedings in Switzerland both on the procedural and on the substantive side:

In-person meetings have been impossible for several months and many hearings have had to be postponed to the second half of 2020, or even 2021. Against this background, the increased use of technical tools to conduct hearings has generally gained more attention from the parties. In this respect, tribunals often require the parties to liaise with each other for the agreement on a cyber protocol for virtual examinations. However, in bigger cases with more than ten participants, there is often still a certain reluctance to depart from the traditional in-person hearing format.

From a substantive perspective, the COVID-19 pandemic is likely to generate an unprecedented case load based on force majeure clauses and/or questions as to whether a party was excused from performing its obligations which were otherwise due under the contract. In many cases, this will lead to new and delicate issues.

Another big topic is the recently completed revision of the Swiss lex arbitri: the amendments aim (inter alia) to reflect already existing continuous practice of the Swiss Federal Tribunal for the sake of transparency, and to make the legal framework even more arbitration-friendly. The most visible improvement will probably be the possibility to file arbitration-related submissions in proceedings before the Swiss Federal Tribunal in English. This is a key development of making the Swiss Federal Tribunal as accessible to international parties as its counterparts in the English-speaking world. The revised law also contains many other improvements, but the legislator has deliberately refrained from extensive amendments (see 2.2 Changes to National Law).

1.3 Key Industries
There has been no exceptional increase of arbitration proceedings in any particular industry in Switzerland. As previously mentioned, this may change, however, in the wake of the COV-ID-19 pandemic.

Key industries that usually appreciate arbitration as a dispute resolution method are the pharmaceutical industry, the construction industry, and commodity traders, as well as exporters of technical equipment.

The financial industry in Switzerland is not yet a frequent user of arbitration and it will be interesting to follow the developments in this regard.

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

In 2018, The Swiss Association of Engineers and Architects (SIA) published, as SIA standard 150:2018, new arbitration rules specifically designed for construction disputes. These rules are
not publicly available and, for the time being, there are no statistics on their use.

2. Governing Legislation

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

The PILA is not directly based on the UNCITRAL Model Law on International Commercial Arbitration (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
On 19 June 2020, the Swiss legislator approved a minor revision of the Swiss international arbitration law (ie, the 12th Chapter of the PILA) (see 1.2 Trends). For example, the revised law provides for the possibility to file submissions in arbitration-related proceedings before the Swiss Federal Tribunal in the English language (see 11.1 Grounds for Appeal). At the same time, no major legal changes to the Swiss international arbitration law will take place. Subject to an optional referendum (which would need to be taken by 8 October 2020), the revised law can be expected to enter into force in early 2021. It will apply to arbitration proceedings initiated thereafter, whereas arbitration agreements as such will be subject to the revised law irrespective of when they have been concluded.

In the following, the most important amendments of the revised Swiss lex arbitri will be noted in the relevant sections.

3. The 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 of the PILA); therefore, arbitration agreements in emails or telefax communications are formally valid in Switzerland.

In a recent landmark decision (decision of the Swiss Federal Tribunal No 145 III 199), the Swiss Federal Tribunal confirmed that the text form requirements are congruent with those of Article II.2 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (New York Convention). It further held that, in line with Article II.2 of the New York Convention, an arbitration agreement can bind non-signatories – eg, in a scenario where a non-signatory is involved in the performance of an agreement and implicitly declares, by its conduct, that it intends to be party to the arbitration agreement. Similarly, the Swiss Federal Tribunal confirmed that an arbitration agreement can be implicitly extended and bind a non-signatory without the extension being evidenced by text.

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 or Swiss law (Article 178.2 of the PILA; principle of favor validitatis).

Revised Swiss Lex Arbitri
The revised law clarifies that the rules of the Swiss lex arbitri also apply by analogy to arbitration agreements in unilateral legal instruments (such as last wills) or in articles of association (Article 178.4 of the revised PILA).

3.2 Arbitrability
Article 177.1 of the PILA provides that every claim “of financial interest” (“vermögensrechtlich”) may be referred to international arbitration. Claims that concern family status issues (eg, separation, divorce or children-related claims) are thus not arbitrable in Switzerland, and neither are insolvency matters arbitrable which have the aim of dissolving a company for lack of assets. At the same time, a company in insolvency proceedings is still bound by its arbitration agreements (unless the insolvency negatively affects 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 of the 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 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 a 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 there is an objection, 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 of the 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 of the PILA expressly provides that an arbitration agreement may be considered valid even if the remainder 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 is valid, since the arbitral tribunal is competent to rule on its own competence (Article 186.1 of the 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 Jurisdiction of Arbitral Tribunals, ASA Bull. 2/2009, p 236 et seq for further information on this issue).

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to nominate and replace any arbitrator in line with the arbitration agreement (Article 179.1 of the 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 (see 4.4 Challenge and Removal of Arbitrators).

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 (“juge d'appui”) and request that she or he designate an arbitral tribunal (Article 179.2 of the PILA). Depending on the specific circumstances, the state court judge will currently 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 (CPC) and designate the missing members of the arbitral tribunal (Article 362 of the CPC).

Revised Swiss Lex Arbitri

The revised law provides further guidelines on the procedure so that a recourse to the CPC will no longer be necessary:

• if the parties have not agreed otherwise, the tribunal shall consist of three members, whereby the parties each nominate one member and these members nominated by the parties unanimously nominate the president of the tribunal (Article 179.1 of the revised PILA);
• if the parties have not determined the seat, or determined that the seat should be in Switzerland (without any further specification), the state court that was first seized by a party shall have jurisdiction (Article 179.2 of the revised PILA);
• further, if a state court is entrusted with the appointment or replacement of a member of the tribunal, it must grant that request, unless a summary examination shows that there exists no arbitration agreement between the parties (Article 179.3 of the revised PILA);
• moreover, the state court takes the required measures for the constitution of the tribunal at the request of a party if the parties or the (party-nominated) members of the tribunal do not comply with their duties within 30 days (Article 179.4 of the revised PILA);
• the juge d’appui may nominate the entire arbitral tribunal in multi-party situations (Article 179.5 of the revised PILA); and
• finally, a prospective arbitrator must disclose any grounds which may raise doubts as to her or his independence and impartiality (Article 179.6 of the revised PILA).
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 of the PILA governs the challenge and potential removal 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.

Generally, it is important to note that a challenge must be brought forward immediately after a party gains knowledge of the reasons for such a challenge. While the current 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.

Revised Swiss Lex Arbitri
The revision introduces a new set of rules as to the procedure for arbitrator challenges:

- if the parties have not agreed otherwise and the proceedings are still pending, a time limit of 30 days for the submission of the challenge applies, running from the point in time when a party has or could have learned about the respective reasons (Article 180a.1 of the revised PILA);
- once the challenge has been submitted to the arbitrator(s), another time limit of 30 days for the challenge before the state court applies, which decides finally (Article 180a.2 of the revised PILA);
- the tribunal may proceed without excluding the challenged arbitrator until there is a decision in the challenge proceedings, unless the parties have agreed otherwise (Article 180a.3 of the revised PILA); and
- finally, the revised law provides additional rules for the removal of arbitrators upon joint agreement of the parties or, unilaterally – ie, by one of the parties, in the case of incapability of the arbitrator (Article 180b of the revised PILA).

4.5 Arbitrator Requirements
According to Article 180 of the PILA and pertinent jurisprudence 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, paragraph 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 her or his participation risks being set aside.

5. Jurisdiction
5.1 Matters Excluded from Arbitration
Any disputes of financial interest (ie, monetary value) may be referred to arbitration pursuant to the Swiss lex arbitri (for the Swiss lex arbitri, see 2.1 Governing Law and for arbitrable disputes, see 3.2 Arbitrability), 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 of the 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 of the 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 (whether positive or negative) in potential challenge proceedings, if a respective objection is brought forward by a party (Article 191 of the PILA). If not challenged, a negative ruling on jurisdiction by the arbitral tribunal becomes final, with the effect that the same matter cannot validly be submitted (again) to arbitration.

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 challenge 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 Einnahme*; 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 of the 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 2018, only 11.3% of all jurisdictional challenges have been successful since the PILA was introduced in 1989 (see Dasser/Wojtowicz, Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017, ASA Bull. 2/2018, p 276), 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 then also needs to respect an arbitration agreement (unless otherwise stated in that arbitration agreement).

A summary of this legislation can be found in the decision of the Swiss Federal Tribunal No 4A_627/2011, paragraph 3.2 (with further references; see also 3.1 Enforceability).

6. Preliminary and Interim Relief

6.1 Types of Relief
Article 183 of the 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 PILA would be measures of a temporary nature which aim to maintain the status quo between the parties while 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 of the PILA).

Increasingly, there are also emergency arbitration proceedings in Switzerland (mostly under the ICC Rules or the Swiss Rules). In this respect it should be noted that under the Swiss Rules ex parte applications are also 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 request of the arbitral tribunal (Article 183.2 of the PILA).

Revised Swiss Lex Arbitri
The revised law clarifies that the state courts may assist in the enforcement of the order also upon the request of a party (Article 183.2 of the revised PILA). It is further provided that the state courts will also support arbitral tribunals of and parties to arbitration proceedings with a place of arbitration outside Switzerland (i) to implement preliminary or securing measures (Article 185a.1 of the revised PILA), or (ii) in the taking of evidence (in the case of a party, only upon approval by the tribunal) (Article 185a.2 of the revised PILA).
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 provide security for 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 requires 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 (e.g., 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 of the PILA provide a few general rules on arbitral procedure.

As a matter of mandatory procedural law, Article 182.3 of the 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.

Revised Swiss Lex Arbitri
The revised law expressly stipulates that a party who continues the proceedings without objecting to an infringement against the procedural rules, immediately after it took or could have taken notice thereof, will later be precluded from invoking that infringement (Article 182.4 of the revised PILA).

7.2 Procedural Steps
As long as the parties are treated equally and their right to be heard in contradictory proceedings is safeguarded, Swiss law does not prescribe any particular procedural steps.

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 previously mentioned, 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 of the PILA).

Finally, the application of the law by the arbitral tribunal must not be surprising. However, a surprise has been acknowledged by the Swiss Federal Tribunal only in very exceptional cases, where an arbitral tribunal applied a legal act to which no party had made reference in the arbitral proceedings and the application of which could not have been foreseen by the parties (decision of the Swiss Federal Tribunal No 4A_424/2018, paragraph 5.2.3).

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 challenge 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 consid-
ere to be admissible (typically in the format of a 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 experienced 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 of the PILA (merely) provides that it is for the arbitral tribunal to administer the taking of evidence, and Article 184.2 of the PILA provides that (i) the arbitral tribunal may seek the assistance of the state courts with respect to the taking of evidence and (ii) the state courts apply their own (domestic) law.

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.

Revised Swiss Lex Arbitri

The revised law clarifies that the state courts may assist with the taking of evidence also upon the request of a party (upon approval by the tribunal) (Article 184.2 of the revised PILA). State courts may apply or consider different procedural rules as their own on request, which may in particular be helpful for the examination of witnesses (Article 184.3 of the revised PILA).

8.3 Powers of Compulsion

As previously mentioned, the arbitral tribunal may seek the assistance of the state courts with respect to the taking of 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 assistance from 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 “adverse inference” if the evidence is not produced, rather than seeking the assistance of the state courts.

Revised Swiss Lex Arbitri

Under the revised law, the Swiss state courts will also assist arbitral tribunals of and parties (upon approval by the tribunal) to arbitration proceedings with a place of arbitration outside Switzerland with the taking of evidence (Article 185a of the revised PILA).

9. Confidentiality

9.1 Extent of 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, paragraph 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, for example, provide for a general confidentiality provision in Article 44, whereas the ICC Rules do not.

10. The Award

10.1 Legal Requirements

Article 189.1 of the 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 of the 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, paragraph 5.c.cc).

Second, as previously mentioned (see 3.2 Arbitrability), only claims “of financial interest” are arbitrable in Switzerland, so an arbitral tribunal must not award remedies for 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 50/50.

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 of the 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 application 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 challenge 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 the 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. The respective jurisprudence of the Swiss Federal Tribunal has served as a basis for the formal inclusion of the revision in the Swiss lex arbitri (see section on the revised Swiss lex arbitri below).

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

Revised Swiss Lex Arbitri

The revised law provides that the briefs in appeal or revision proceedings can be submitted in the English language (Article 77.2bis of the revised Federal Tribunal Act) (see 1.2 Trends).

Further, the revised law now expressly provides for limited grounds for a revision in international arbitration, namely, (i)
discovery of new material facts, (ii) criminal behaviour which affected the award, and (iii) discovery of new circumstances which give rise to doubts as to an arbitrator's independence or impartiality (Article 190a.1 of the revised PILA). Furthermore, the revision provides for the right of a party to request from the arbitral tribunal the correction of typos, the explanation of unclear or ambiguous considerations and the rendering of an additional award on any claims not dealt with (Article 189a.1 of the revised PILA). Finally, the revision clarifies that a revision has in any event to be submitted within ten years of the award coming into legal force, with the exception of criminal behaviour which affected the award (Article 190a.2 of the revised PILA).

11.2 Excluding/Expanding the Scope of Appeal
If no party is domiciled in Switzerland, the parties may exclude any challenge proceedings (Article 192 of the 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 of the PILA.

Revised Swiss Lex Arbitri
The revised law provides that the parties may not exclude a revision on the ground of criminal behaviour which affected the award (Article 192.1 of the revised PILA) (see 11.1 Grounds for Appeal).

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 (i) arbitral jurisdiction or (ii) substantive public policy.

12. Enforcement of an Award

12.1 New York Convention
Switzerland has signed and ratified the New York Convention (without reservations; see also 3.1 Enforceability).

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 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 Articles 335 et seq CPC and the Swiss Debt Enforcement and Insolvency Act.

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.

13. Miscellaneous

13.1 Class-Action or Group Arbitration
Collective arbitration procedures do not exist and requests for representative relief cannot be submitted to arbitration in Switzerland.

Subject to a very limited number of exceptions, claimants are not entitled to submit any claims but their own to arbitration. Likewise, Swiss awards strictly entitle and bind the parties to the arbitration only.

13.2 Ethical Codes
All qualified Swiss lawyers who are registered to represent parties in state courts must comply with Switzerland’s professional rules, including its ethical provisions. The entirety of their contentious and non-contentious legal work (whether in or out of court) must comply with these professional rules. This includes, as a general rule, any work as arbitrator or counsel in arbitration proceedings, including cases with a place of arbitration outside Switzerland.

International soft law (such as the IBA International Principles on Conduct for the Legal Profession or the IBA Guidelines on Party Representation) is often viewed with scepticism (with the exception of the IBA Guidelines on Conflicts of Interest in International Arbitration which are also used by the Swiss Federal Tribunal as guidelines, as mentioned above; see 4.5 Arbtrator Requirements).

13.3 Third-Party Funding
Third-party funding is not specifically addressed by Swiss statutory laws or Swiss arbitration law. However, the possibility of third-party funding and its limitations have been confirmed and analysed by the Swiss Federal Tribunal numerous times (decisions of the Swiss Federal Tribunal Nos 131 I 223 and 2C_814/2014).

Third-party funding must not prevent Swiss lawyers from acting in line with the professional rules. As in all other cases, Swiss lawyers must act independently, keep client-related information confidential, and avoid conflicts of interest. In addition, Swiss lawyers must comply with the following limitations for success fee arrangements, which have been recently highlighted by the Swiss Federal Tribunal (decision of the Swiss Federal Tribunal No 4A_125/2018):
• the fees which are not performance-related must cover the lawyer's costs and include a reasonable profit margin;
• the performance-related fees must not be higher than the fees which are not performance-related;
• the success fee arrangement must be made either at the beginning or after the completion of the case. During the proceedings, lawyers must not enter into success fee arrangements with their clients.

13.4 Consolidation
Consolidation is not specifically addressed by Swiss arbitration law. Consolidation of compatible proceedings is possible, and usually governed by institutional rules (eg, by Article 4 of the Swiss Rules).

13.5 Third Parties
Arbitration agreements can extend to non-signatories only in the limited number of situations (described in 5.7 Third Parties).

As a general rule, awards cannot be enforced against any party but the award debtor. Piercing of the corporate veil at the enforcement level is only possible in very exceptional cases that must typically include an abuse of corporate structures.
**Authors**

**Simon Gabriel** is the founding partner at the firm. Simon has represented clients and served as president, sole arbitrator and co-arbitrator in over 90 ICC, Swiss Rules, VIAC, DIS, SCC and ad hoc arbitration proceedings. He is particularly experienced in disputes concerning joint ventures and consortia, energy-related issues, international sales contracts, licensing contracts, and post-M&A issues. Simon has been invited to the following panels of arbitrators: the ICC Switzerland, the Vienna International Arbitral Centre, the Russian Arbitration Association and the Asian International Arbitration Centre. He is also a member of the Swiss ICC Arbitration Commission, a Swiss delegate in the ICC Arbitration and ADR Commission in Paris, and a member of the latest Working Group on the Revision of the Vienna Rules. Simon has published widely in the field of international arbitration, including contributions in leading Swiss commentaries on arbitral procedure and challenge of arbitrators, as well as general Swiss conflict of laws rules. Simon holds a PhD on the liability of mediators and an LLM in advocacy.

**Axel Buhr** is a partner at the firm, and has participated in more than 25 arbitration proceedings as arbitrator, counsel and secretary. His track record includes cases under SCAI, ICC, VIAC and ad hoc arbitration rules. Most of his cases concern disputes in the field of construction/engineering, sales/purchases, joint venture/consortia and agency/distribution agreements. Axel is a member of the Swiss Arbitration Association (ASA), the German Arbitration Institute (DIS), and the Swiss Society for International Law (SVIR). Axel is admitted to the Bar in Switzerland and Germany. He has published widely in the field of international and national arbitration, private international law, and international procedural law, including contributions in leading Swiss commentaries on private international law and Swiss law on arbitration. Axel holds a PhD from the University of Lucerne on procedural issues in cross-border litigation and has taught at the University of Lucerne since 2010.

**Andreas Schregenberger** is a senior associate at the firm. Since 2013, Andreas has represented international businesses and organisations in a broad range of disputes, with a focus on infrastructure, construction, energy, agency, pharma, insurance, banking, and human rights. He has acted as counsel and administrative secretary in numerous arbitration proceedings involving up to one hundred million euros of amount in dispute. Andreas has been involved in cases under ICC, LCIA, SCAI, VIAC and ad hoc arbitration rules involving various legal systems and has particular expertise in disputes involving states and state-owned companies. Andreas is a member of ASAb40, YAAP, Young ITA and the Viennese Attorney’s Society UNION. He regularly publishes and speaks on topics in the field of international arbitration. Andreas studied law at the University of Zurich (MLaw UZH) and holds an LLM degree from Georgetown University Law Center (Fulbright Fellow).