SWITZERLAND

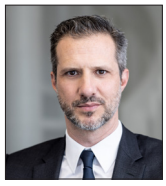
Law and Practice

Contributed by:
Simon Gabriel, Axel Buhr, Andreas Schregenberger and Roxane Schmidgall
GABRIEL Arbitration

Contents

GABRIEL Arbitration is an independent dispute resolution boutique law firm specialised in international arbitration with its office in Zurich, Switzerland. The team presently consists of Simon Gabriel, founder and partner; Axel Buhr, partner; Andreas Schregenberger, counsel; Roxane Schmidgall, senior associate; Daniela Frenkel, senior associate; and Audrey Duffner, associate. Clients benefit from first-class dispute resolution services, fewer conflicts of interest and competitive pricing. The firm's lawyers are particularly experienced in disputes concerning joint ventures and consortia, energy-related issues, international sales contracts, licensing contracts, post-M&A issues, as well as venture capital and shareholder-related issues. In terms of industries, the team is experienced in disputes on commodity trading, pharmaceutical products, construction projects, production of hi-tech equipment, and oil and gas.

Authors



Simon Gabriel is the founding partner at GABRIEL Arbitration. He has represented clients and served as president, sole arbitrator and co-arbitrator in over 120 ICC, Swiss Rules, VIAC, DIS, SCC and ad hoc arbitration proceedings. He is experienced in disputes concerning construction joint ventures, energy-related issues, international sales contracts, licensing contracts, and post-M&A issues. Simon is President of the Swiss ICC Arbitration Commission, 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. He has published widely in the field of international arbitration and holds a PhD on liability of mediators and an LLM in common law advocacy.

Axel Buhr is a partner at GABRIEL Arbitration, and has participated in dozens of arbitration proceedings as arbitrator and counsel, under Swiss, ICC, VIAC and ad hoc arbitration rules. Axel is a member of the Swiss Arbitration Association (ASA), the German Arbitration Institute (DIS), and the Swiss Society for International Law (SVIR). He 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 arbitration law. Axel holds a PhD on procedural issues in cross-border litigation from the University of Lucerne.

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GABRIEL Arbitration

Andreas Schregenberger is a counsel at GABRIEL Arbitration, representing clients in a range of arbitration and litigation disputes, including in the field of banking, construction, corporate law, energy, engineering, hospitality, infrastructure, and venture capital. He has acted as arbitrator, counsel and secretary in over 35 arbitration proceedings, involving disputed amounts of more than EUR800 million. Andreas has acted as a mentor in prestigious mentoring programmes and is a member of the Swiss Arbitration Association (ASA), the Viennese Attorney's Society UNION, and the Europe Sub-Committee of the Campaign for Greener Arbitrations. He studied law at the University of Zurich (MLaw UZH) and holds an LLM degree from Georgetown University Law Center (Fulbright Fellow).

Roxane Schmidgall is a senior associate at GABRIEL Arbitration. She acts as party representative, sole arbitrator, and secretary to arbitral tribunals and has taken part in a number of arbitration proceedings, including under Swiss, ICC and ad hoc arbitration rules. She has particular expertise in the international sale of goods. Since 2020, Roxane has been teaching a course on international arbitration and the international sale of goods at the University of Lucerne.

GABRIEL Arbitration

Rämistrasse 6
CH-8001 Zurich
Switzerland

Tel: +41 44 206 20 80
Fax: +41 44 206 20 81
Email: s.gabriel@gabriel-arbitration.ch
Web: www.gabriel-arbitration.ch

GABRIEL ARBITRATION DISPUTE RESOLUTION

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 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 Türkiye. Swiss substantive law is, therefore, in many cases both neutral and familiar to both parties in a dispute – this being an advantage that 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 additionally chosen by parties for larger disputes when time is of the essence.

Moreover, 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**).

Finally, the enacted "revision light" of the Swiss lex arbitri contained in the 12th Chapter of the Private International Law Act (PILA), which entered into force on 1 January 2021, confirmed the distinctively liberal and arbitration-friendly tradition of Switzerland. On the institutional side, the conversion of the former Swiss Chambers' Arbitration Institution (SCAI) into the Swiss Arbitration Centre and the revision of the Swiss Rules of International Arbitration (the "Swiss Rules"), which entered into force on 1 June 2021, helped to maintain and strengthen Switzerland's standing as a major arbitration venue (see **1.3 Arbitral Institutions**).

1.2 Key Industries

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 and importers of technical equipment.

In all these industries, the caseload is steady, in particular as a result of the ongoing disruption of supply chains caused by the termination of trade relationships by the war in Ukraine and the Red Sea shipping crisis.

The broad use of sanctions as a geopolitical tool affects a growing number of contractual relationships, and the number of related cases is likely to further increase. The legal consequences of

sanctions remain a contentious issue, frequently debated in many arbitrations, both on a procedural level and as a matter of substantive law. The fundamental right of access to justice raises new and delicate issues for arbitration as a dispute resolution mechanism, which are yet to be fully resolved.

The financial industry in Switzerland has traditionally not been a frequent user of arbitration. However, a rise in fintech cases involving companies from Switzerland's crypto valley, a world-leading blockchain hub, can be observed since the early 2020s.

1.3 Arbitration Institutions

The leading arbitration institutions are the International Chamber of Commerce (the issuer of the "ICC Rules") and the Swiss Arbitration Centre (the issuer of the "Swiss Rules").

In May 2021, the Swiss Arbitration Centre was established by the Swiss Arbitration Association (ASA) and the cantonal chambers of commerce that formerly constituted SCAI. As a one-stop shop, the Swiss Arbitration Centre aims to make Swiss arbitration more accessible for international users, who sometimes found the previous dualism confusing.

In June 2021, the revised Swiss Rules entered into force (replacing the version of 2012). Being based on the UNCITRAL Arbitration Rules, the Swiss Rules provide for an arbitration procedure that combines international best practices with useful innovations and a comparatively light institutional framework. Only a few substantial amendments were made and the key features of the Swiss Rules remained the same ("light touch administration", multiparty proceedings, expedited proceedings and emergency arbitration).

Moreover, users benefit from a single internet portal providing services, information and links. The platform includes information from the Swiss Arbitration Academy and the Swiss Arbitration Hub. These four organisations have joined under a new brand, "Swiss Arbitration", to emphasise their close co-operation for the benefit of arbitration users worldwide. The Swiss Arbitration Academy provides training for arbitration practitioners and the Swiss Arbitration Hub provides services and information for the organisation of hearings in Switzerland.

1.4 National Courts

The Swiss Federal Tribunal is the only state court in Switzerland competent to hear challenges of international arbitral awards rendered in Switzerland (see **11. Review of an Award**). On the cantonal level, state courts may intervene in the composition of the arbitral tribunal under limited circumstances (see **4.3 Court Intervention**) and grant interim relief upon request (see **6.2 Role of Courts**), both in supportive function to international arbitration proceedings.

That said, there are no commercial courts (neither on a federal nor on a cantonal level) specifically designated to exclusively deal with international commercial disputes (or arbitrations) in Switzerland. In this context, however, the Swiss legislature has during the past few years implemented a minor revision of the Swiss Civil Procedure Code (CPC). Pursuant to the revised law, the Swiss cantons will be entitled to designate their commercial courts as competent to specifically decide international commercial disputes provided certain conditions are met, including obtaining the necessary consent from the parties. In March 2023, the Swiss Parliament approved the respective amendments, and the revised CPC will come into force on 1 January 2025. Upon its enactment, it will have to be seen

in practice whether the same types of disputes that are currently resolved by means of international arbitration will increasingly be heard before Swiss cantonal commercial courts.

2. Governing Legislation

2.1 Governing Law

International arbitration proceedings in Switzerland are governed by the 12th Chapter of the PILA, which, since the revision, comprises 24 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 (the "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.

At the same time, the parties are free to exclude the application of the 12th Chapter of the PILA and instead agree that the provisions of the third part of the CPC is applicable (Article 176.2 of the PILA).

2.2 Changes to National Law

On 1 January 2021, a minor revision of the Swiss international arbitration law (ie, the 12th Chapter of the PILA) (see **1.1 Prevalence of Arbitration**) came into force.

Since then, no legal changes were made to the Swiss international arbitration law.

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, instant messaging apps, or telefax communications are formally valid in Switzerland.

In a 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 (the "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.

Furthermore, 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).

Finally, Article 178.4 of the PILA 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.

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 that have the aim of dissolving a company for lack of assets. At the same time, a company in insolvency proceedings is still bound by pre-existing 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).

In respect of the law applicable to the arbitration agreement, the state court will apply the principle of favor validitatis in international arbitration proceedings seated in Switzerland (see **3.1 Enforceability**).

On the other hand, the state court is obliged to apply Article II.3 of the New York Convention, of which Switzerland is a contracting state, if the arbitration agreement at issue would (hypothetically) lead to the formation of an arbitral tribunal seated outside Switzerland. In this regard, the prevailing view suggests that the state court should apply the conflict of laws rule of Article V.1.a of the New York Convention by analogy. Accordingly, the law applicable to the substantive validity of an arbitration agreement is primarily the law chosen by the parties to govern their agreement (lex causae), or subsidiarily, the law of the foreign seat of the arbitral tribunal (foreign lex arbitri).

In a recent decision, the Swiss Federal Tribunal found in this regard that an arbitration clause,

providing for a (Russian) arbitration institution that no longer existed, was to be interpreted exclusively on the basis of the applicable foreign law, in this case Russian law (decision of the Swiss Federal Tribunal No 4A_19/2023, paragraph 2.3; see Schregenberger/Carè, Pathological Arbitration Clauses: Role of the Law Applicable to the Substantive Validity of the Arbitration Agreement under Article II.3 NYC, ASA Bull. 1/2024, p 23 et seqq for further information on this case).

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.

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 (the 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 a recent decision (decision of the Swiss Federal Tribunal No 4A_148/2023), the Swiss Federal Tribunal confirmed that the arbitral tribunal has to individually check whether a defect exclusively affects the validity of the arbitration agreement, the main contract or both of them. In this regard, the Swiss Federal Tribunal emphasised that if this question is examined under Swiss law, the capacity to act is a relative concept that must be assessed individually in relation to a specific act at a specific point in time (see Frenkel, Autonomy of Arbitration Agreements and Capacity of Judgment, ASA Bull. 1/2024, p 45 et seqq for further information on this case).

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. If the parties have not agreed otherwise, the tribunal shall consist of three members, whereby each party nominates one member and these members nominated by the parties unanimously nominate the president of the tribunal (Article 179.1 of the PILA).

However, if an arbitrator nominated by a party is not sufficiently independent and/or impartial, they may be challenged by the other party, and

may be subject to removal (see **4.4 Challenge and Removal of Arbitrators**).

Against this background, a prospective arbitrator must disclose any grounds that may raise doubts as to their independence and impartiality, and this for the course of the entire proceedings (Article 179.6 of the PILA). In this regard, an arbitrator whose law firm maintains a client relationship with one of the parties may have a duty to disclose such relationship irrespective of whether such other mandate(s) bears any direct relevance to the case in question (decision of the Swiss Federal Tribunal No 4A_462/2021, paragraph 4.2).

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 it designates an arbitral tribunal. 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 PILA).

In this context, Article 179.3 of the PILA specifies that 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. The state court must thereby take 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 PILA). Also, the *juge d'appui* may nominate the entire arbitral tribunal in multiparty cases (Article 179.5 of the 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, the state court does not have the authority to name the new arbitrator. Instead, the arbitration agreement's provisions will dictate the selection of the replacement.

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.

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 in exercising due diligence, learned about the respective reasons (Article 180a.1 of the PILA). Once the challenge has been submitted to the arbitrator(s), there is a further 30-day period for bringing the challenge to the state court, which will render the final decision (Article 180a.2 of the 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 PILA). Also, Article 180b of the PILA provides additional rules for the removal of arbitrators upon joint agreement of the parties or unilaterally – that is, by a single party – specifically in cases where an arbitrator is deemed unfit for duty.

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 their 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 Einlassung* see also **3.3 National Courts' Approach** for the same requirement before state courts).

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

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The Swiss Federal Tribunal has the authority to conduct a comprehensive examination of jurisdictional matters, specifically concerning the correct application of the law. However, it has no

authority to review the arbitral tribunal's findings on the facts of the case (see also **5.3 Circumstances for Court Intervention**).

According to statistics in 2021, only 12.3% of all jurisdictional challenges have been successful since the PILA was introduced in 1989 (see Dasser/Wojtowicz, Swiss International Arbitral Awards Before the Federal Supreme Court – Statistical Data 1989-2019, ASA Bull. 1/2021, p 19), 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 Jurisdiction Over Third Parties

In general, 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 jurisprudence 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**).

Moreover, the Swiss Federal Tribunal has in the past also accepted an extension of an arbitration agreement to non-signatories based on the group of companies doctrine. In the decision of the Swiss Federal Tribunal No 4A_450/2013, para. 3.2 and 3.5.5.1.1, the court found that the companies of a group had created an appearance of adhering to the contracts by not making it clear that they did not want to be bound by such contracts and by behaving as if they were. On such basis, the parent company had created the appearance that it was a party to the contracts and thus the arbitration agreement.

In the context of situations with intentional interference by a third party, the Swiss Federal Tribunal has (partly) quashed an award in which an arbitral tribunal had extended the arbitration agreement of a main contractor to a subcontractor (decision of the Swiss Federal Tribunal No 4A_124/2020, paragraph 3.3.2). The key holding of the decision is that a party's officially communicated position as a subcontractor outweighs actions by that party that might otherwise be deemed sufficient to extend the arbitration agreement. This clarification is welcome and likely to be relevant in practice regarding projects or supply chains with main contractors and subcontractors.

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 that 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).

Emergency arbitration proceedings in Switzerland are mostly conducted 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 or a party (Article 183.2 of the PILA). The state courts 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 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 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.

While the specific requirements remain a topic of debate among legal scholars, the majority of them contend that for security for costs to be ordered, there must have been a deterioration in the financial position of the party against whom the request is directed (usually the claimant) since the time the arbitration agreement was executed. This means that any party that chooses to contract with an impecunious counterparty (eg, a shell company or special-purpose vehicle) risks that eventually no security for costs will be granted.

7. Procedure

7.1 Governing Rules

Articles 182 to 185a 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.

In this context, Article 182.4 of the PILA expressly stipulates that a party that 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.

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 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).

On the other hand, the right to be heard does not, pursuant to consistent jurisprudence by the Swiss Federal Tribunal, entitle the parties to a reasoning of the award. In this regard, the Swiss Federal Tribunal specified in a recent decision (decision of the Swiss Federal Tribunal No 4A_41/2023) that a scrutiny of the award by the Swiss Federal Tribunal was "inaccessible" where the release of an unreasoned award was in line with the procedural rules agreed by the parties (see Buhr, No setting aside without reasoning, in: dRSK, published on 10 July 2023).

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 Arbitration (the "IBA Rules"; 2020 version) 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 to the outcome of the case are generally considered 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 the arbitral tribunal or a party (upon approval by the tribunal) may seek the assistance of the state courts with respect to the taking of evidence. The state courts apply their own (domestic) law or, since the revision, 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 PILA).

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

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. Since the revision (see **2.2 Changes to National Law**), the Swiss state courts will also assist arbitral tribunals 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 PILA).

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.

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 Swiss lex arbitri 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 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 that 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 that 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 an 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 for 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 (Article 190.4 of the PILA), and must specifically demonstrate that at least one of the above reasons for challenge applies to the award at issue. Since the revision, the briefs in appeal proceedings can be submitted in the English language (Article 77.2bis of the Federal Tribunal Act) (see **2.2 Changes to National Law**). 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.

Grounds for Revision

Since the revision (see **2.2 Changes to National Law**), the Swiss lex arbitri formally includes the exceptional legal remedy of the so-called revision against binding awards based on earlier jurisprudence of the Swiss Federal Tribunal (see decisions of the Swiss Federal Tribunal Nos 122 III 492 and 134 III 286), which is generally only available on limited grounds that are discovered after an award was rendered. Such limited grounds include (i) discovery of new material facts, (ii) criminal behaviour that affected the award, and (iii) discovery of new circumstances that give rise to doubts as to an arbitrator's inde-

pendence or impartiality (Article 190a.1 of the PILA).

A request for revision must be submitted within 90 days of the discovery of such new facts, whereby such request has, in any event, to be submitted within ten years of the award coming into legal force, with the exception of criminal behaviour that affected the award (Article 190a.2 of the PILA). As with appeal proceedings, the briefs can be submitted in the English language (Article 77.2bis of the Swiss Federal Tribunal Act).

In its first decision on a request for revision pursuant to Article 190a of the PILA, the Swiss Federal Tribunal rejected the respective application as manifestly inadmissible. Specifically, the Swiss Federal Tribunal named the following five individual conditions that must be fulfilled under the pertinent ground for revision (decision of the Swiss Federal Tribunal No 4A_422/2021, paragraph 4.4.1).

- Allegation of one or more facts.
- The alleged facts must be material to the outcome of the case. This is the case if they modify the factual basis of the award in the sense that the correct application of the law on the (modified) facts leads to a different legal solution and thus to a different award.
- The relevant facts already existed at the time when the award was rendered.
- The relevant facts were only discovered at a later point in time.
- The applicant was not in a position – in spite of all its diligence – to rely on these facts during the arbitration proceedings.

In several recent decisions, the Swiss Federal Tribunal applied Article 190a PILA to requests for the revision of arbitral awards which were released before 1 January 2021, when the revised law entered into force (see decisions of the Swiss Federal Tribunal No 4A_184/2022, paragraph 2.2; 148 III 436, paragraph 3; and 4A_100/2022, paragraph 2.3).

In conclusion, the revision is not merely a theoretical concept; it is a legal remedy with very specific requirements, offering a mechanism to review awards alongside the ordinary setting aside application under Article 190.2 of the PILA.

Correction of Awards

Finally, Article 189a.1 of the PILA 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.

In the respective proceedings (ie, after the award was issued), the arbitral tribunal is bound by the fundamental procedural guarantees, and in particular the parties' right to be heard, like it is in the main proceedings (see **7.1 Governing Rules**). Accordingly, the arbitral tribunal must as a rule notify the other party of the correction request before the correction of the award. In a recent decision, the Swiss Federal Tribunal set aside an interpretation of an award because the arbitral tribunal had omitted to notify the other party of the respective request before it issued its interpretation (decision of the Swiss Federal Tribunal No 4A_603/2023, paragraph 4.4).

11.2 Excluding/Expanding the Scope of Appeal

If no party is domiciled in Switzerland, the parties may exclude (fully or partially) any challenge or revision proceedings (Article 192 of the PILA). As is the case with the arbitration agreement, such exclusion must be evidenced by text (so-

called text form, Article 178.1 of the PILA) (see **3.1 Enforceability**). However, the parties may not exclude a revision on the ground of criminal behaviour that affected the award (Article 192.1 of the PILA) (see the decision of the Swiss Federal Tribunal 148 III 436, paragraph 4.3.3, and 11.1 Grounds for Appeal).

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.

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 of the 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.

In particular, neither the mere possibility to challenge a foreign award nor the mere filing of an appeal at the foreign seat constitutes a ground for refusal under Article V.1.e of the New York Convention (see decision of the Swiss Federal Tribunal No 135 III 136, paragraph 2.2). Rather, it is, in line with Article IV of the New York Convention, up to the discretion of the competent state court to decide whether the enforcement proceedings should be stayed until ongoing set-aside proceedings at the foreign seat are resolved.

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 an arbitrator or counsel in arbi-

tration 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 in International Arbitration) 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 Arbitrator 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 highlighted by the Swiss Federal Tribunal in the past (decision of the Swiss Federal Tribunal No 4A_125/2018):

- the fees that 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 that are not performance-related; and
- 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 7 of the Swiss Rules).

13.5 Binding of 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.