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Revision of Swiss Lex Arbitri: From very good to excellent

Switzerland gears up in view of defending its top position in the field of international arbitration. The reform project published earlier this year is set to pave the way towards faster and more efficient arbitration proceedings with an increased international outlook.

1. The Origin and Current State of the Revision

1.1 The need for reform

It is widely acknowledged that Switzerland is well established as a historical arbitration stronghold on the international stage. If the reasons for its success are in reality manifold, the general opinion often tends to consider the four following characteristics to be at the roots of Switzerland's strong position in that field: political and financial stability, neutrality, professionalism and efficiency. Switzerland – as a place of arbitration – is indeed offering efficient solutions for dispute resolution which ultimately base on a liberal approach towards arbitration contained in the Swiss lex arbitri. Further, the development of case law on international arbitration is both transparent and consistent, hence foreseeable. Finally, the stability of the legal framework, state-institutions and politics makes Switzerland a safe-haven for international dispute resolution.

In light of the above, it would be tempting to ask why change anything?

The answer to this question cannot be found looking at Switzerland's strengths as a place of arbitration but is rather influenced by the growing importance of international arbitration also in regions of the world which up until a decade ago were not present in the arbitration world. Further, the ever-evolving patterns and trends in international finance and globalized trade are challenging all players on the international arbitration stage, including individual states – in particular, the increasingly clear establishment of English as the «lingua franca» of international arbitration, the constant call for faster dispute resolution as well as the evolution of formal requirements applying to arbitration clauses.

In the midst of all this, Switzerland is seeking to maintain its position and capture further ground as an international arbitration stronghold. One cornerstone of this effort is the revision of its lex arbitri which entered into force on 1 January 1989 and remained widely unchanged since then.

1.2 The accomplished efforts and the path ahead

The first parliamentary thrust to reform the 12th chapter of the Private International Law Act (PILA), that is to say the Swiss lex arbitri, emerged in February 2012. The Federal Office of Justice, subsequently closely worked with a task-force of arbitrators and regularly touched base with the main institutional actors, such as the Swiss Chambers' Arbitration Institution (SCAI), the International Chamber of Commerce (ICC), the Court of Arbitration for Sport (CAS) and the Federal Supreme Court. The result of this groundwork resulted in concrete amendment proposals with regard to PILA and a detailed report that covered the main points of the contemplated reform. The proposed amendments – together with the report – were made available to the public on 11 January 2017 as part of the consultation process launched by the Federal Office of Justice, prior to submitting a finite reform package to the Parliament.

The authors actively took part in the consultation process as representatives of Bratschi Wiederkehr & Buob Ltd in a group of bespoke law firms which cooperated in view of drafting and filing a position paper with the Federal Office of Justice.

The consultation process was closed on 31 May 2017. The Federal Office of Justice will now consider making changes to its proposed amendments on the basis of the position papers filed and should foreseeably submit the reform package to the Parliament before the end of 2018.

2. The Main Highlights

2.1 Submissions in the English language

This is probably the most symbolic - and thus politically sensitive - part of the reform: the possibility to file an appeal in the English language with the Swiss Federal Supreme Court, the sole and final appellate instance in the field of international arbitration. In substance, this will simply extend to the appeal itself the existing friendly practice of the Federal Supreme Court towards the English language which already allows appendixes and other enclosures to be submitted in Shakespeare's language. Regardless, even though it does not amount to a substantial change of paradigm, this proposed amendment will nevertheless no doubt be highly appreciated by Switzerland's international clientele in the field of international arbitration, enabling litigators, counsels and parties to use English from the beginning to the end of the arbitral procedure, thereby considerably reducing the translation efforts into French, German or Italian.

This may come as a hard pill to swallow for the unconditional admirers of the Swiss national languages among lawyers (there are thankfully a few) and politicians. Nonetheless, with regard to Switzerland as an arbitration stronghold, it must be welcomed as an overall positive step in the right direction. It is an unmistakable statement, if one was ever needed, that Switzerland shows great openness towards a globalized business world.

2.2 Enhanced rules regarding the «juge d'appuis»

As of today, an arbitration clause that does not refer to a concrete place where the arbitral tribunal shall have its seat (such as Zurich or Geneva) but rather merely states that Switzerland shall be the place of arbitration – without naming the arbitrators nor mentioning a particular arbitration institution – so-called «bare» arbitration clause – will not be enforced for want of certainty. The reform is directed at changing this in favorem validitatis and explicitly stipulates that in such a case, the first state court called upon by one of the parties to the arbitration clause may rule upon the appropriate place of arbitration and thus heal the original uncertainty to which the arbitration clause was subject.

Further, the reform clearly states which kind of civil procedure applies when a state court is acting as a «juge d'apppuis» to the arbitral tribunal. In an effort to speed-up proceedings, the project foresees that in such a case and similarly to the rules prevailing in domestic arbitration, the fast-track summary procedure will apply.

These two changes are to be welcomed as well. In view of recent development on the international arbitration stage, in particular the recent decision from the Singapore High Court in favor of the enforcement of such bare arbitration clauses[1], the first above-mentioned amendment in this regard is an important signal that Switzerland has the ambition to remain arbitration-friendly.

Finally, it must be noted that the Federal Office of Justice chose not to suggest the establishment of a central authority that would fulfill the role of the local courts as «juge d'appuis». Nevertheless, in connection with the consultation procedure, a strong majority of the law firms teaming with Bratschi Wiederkehr & Buob, including the latter, expressed the need for the implementation of such central authority with regard to the case administration, in particular the appointment and dismissal of arbitrators when parties cannot agree thereupon. The interim measures shall, however, remain in the hands of the competent local courts, which are often geographically closer to the subject matter of the interim measure in question. We now await the publication of the amended reform project in order to see if the Federal Office of Justice at least partly changed its mind in this regard.

2.3 Looser formal requirements as to the arbitration agreement

The amendment project aims to implement a loosening of the formal requirements currently prevailing with regard to the arbitration agreement. At present, an arbitration agreement is considered formally valid under Swiss law if documented in any kind of written form (written contract, e-mail, facsimile etc.). The new, looser requirement stipulates that it is sufficient for the enforcement of the arbitration agreement that only one of the parties expresses content in a written form. In other words, an arbitration agreement will be considered valid in case one of the parties orally consents to a written proposal of the other (e.g. during a conference call).

[1] K.V.C. Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd [2017] SGHC 32.

This arbitration-friendly amendment is in line with recent developments on the international stage and shall as such be welcomed. A vast majority of the law firms teaming with Bratschi Wiederkehr & Buob in connection with the consultation procedure, including the latter, were explicitly in favor of widely unified formal requirements regarding parties' consent throughout the entire lex arbitri, which is currently generally the case but some exceptions remain. Whether the Federal Office of Justice responds favorably to this call and submits a correspondingly amended project to the Parliament will be something to look for.

3. Takeaways

If the reform passes, Switzerland will step up from a great place of arbitration to an excellent one with ever-broader international outlook. The new Swiss lex arbitri is not only in line with the most sophisticated developments on the international arbitration scene; it also increases transparence and enhances an already truly efficient system. In a nutshell, the main highlights of the reform are summed up below:

- Switzerland will allow parties to the arbitration to file appeals in English against an award, thereby extending the number of languages in which the arbitration and subsequent appellation procedure may be conducted to four;
- A Swiss court will be able to enforce so-called bare clauses and every time a local tribunal will be called upon as a «juge d'appuis», the ensuing litigation will explicitly take place as fast-track summary procedure; and
- Once the reform enters into force, the formal requirements applicable to arbitral agreements will be drastically loosened, thereby reflecting the current trend on the international stage and taking into account the digitalization of the economy.

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