

Swiss Law And Swiss Arbitration For International License Agreements: More Than The Myth Of Neutrality?



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International license agreements should include a choice of law provision and either a jurisdiction clause or an arbitration clause. But why do e.g. a British licensor and a Japanese licensee agree on Swiss law and Swiss arbitration in their license agreement? Probably, because neither party wanted to be subject to the law and jurisdiction of the other party. Looking for a “neutral” legal system and seat of arbitration, Switzerland came to their mind when thinking of a neutral forum.

But is there more to Swiss law and Swiss arbitration than just the myth of neutrality? The answer is yes: Switzerland has a long tradition of serving as a favorite location for international arbitration. According to a statistic of the International Chamber of Commerce (ICC), for the year 2000 Switzerland was the most frequently chosen country as the place of arbitration under the auspices of the ICC. Additionally, Switzerland is one of the leading nations as to the nationality of arbitrators appointed in ICC arbitration cases; as a consequence, Swiss arbitration practitioners have developed a considerable expertise in acting as arbitrators and in representing parties in international arbitration cases. Besides its long-standing historical tradition of neutrality, there are numerous further reasons why Switzerland is a popular venue for arbitration: its central geographical location; its well-developed and pragmatic legal system; its multicultural and multilingual society; the reliability and high standards of public services and infrastructure; and the enactment of one of the most modern and liberal laws on international arbitration.

This article briefly explores the

main principles of Swiss arbitration law and of Swiss licensing law.

Swiss Arbitration Law

In light of the increasing importance of international arbitration, Switzerland enacted in Chapter 12 of the Swiss Private International Law Act (“PILA”) a modern set of rules governing international arbitration. This set of rules applies to all international arbitrations conducted in Switzerland, provided that the seat of the arbitral tribunal is in Switzerland.

Chapter 12 PILA provides the fundamental framework to ensure a proper constitution and functioning of arbitral tribunals. At the same time, it leaves open a very large degree of flexibility so as to accommodate the various legal and procedural cultures of the parties involved. Disputes arising out of license agreements are arbitrable in Switzerland just like any other dispute involving pecuniary interests (Article 177 PILA).

Chapter 12 PILA applies both to institutional arbitration (i.e. arbitration conducted under the auspices of an institution, such as the various chambers of commerce, ICC and LCIA) as well as to ad hoc arbitration (i.e. arbitration not administered by an arbitral institution).

The arbitration clause

With respect to the formal requirements, Swiss law requires only that the arbitration clause be made in writing, by telegram, telex, telefax, or any other means of communication allowing the agreement to be evidenced by a text. Neither a signature nor an exchange of documents is required. Furthermore, an arbitration clause is deemed valid

if it conforms to the law chosen by the parties, or the law governing the subject matter of the dispute, or to Swiss law. This provision reflects the principle of *in favorem validitatis*, i.e. the policy of favoring the validity of an agreement to arbitrate. The validity of an arbitration clause may not be contested on the ground that the main contract, of which the arbitration clause is a part, may not be valid.

Appointment of arbitrators

The arbitral tribunal is appointed pursuant to the parties’ arbitration clause. Where such clause refers to particular institutional arbitration rules, these rules will apply. If a party does not cooperate in appointing the arbitrators, the other party may request the assistance of the state court located at the seat of the tribunal. The same court may be called upon in the case of a dispute regarding the challenge of an arbitrator. Therefore, it is important to specify in the arbitration clause the city in which the arbitral tribunal will have its seat.

Procedure

An arbitral tribunal has the authority to decide on its own jurisdiction. On the merits, the arbitral tribunal must decide the dispute according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the case has the closest connection.

Preliminary or interim injunctions are often crucial in licensing

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