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The Baker McKenzie **International Arbitration Yearbook**

Switzerland

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A. Legislation and rules

A.1 Legislation

International arbitration proceedings where the arbitral tribunal has its seat in Switzerland are governed by the arbitration provisions of Article 176-194 of the Swiss Act on Private International Law (PILA). In the last 10 years, there was one change to these provisions: as of 1 March 2007, arbitral tribunals sitting in Switzerland can decide on jurisdictional challenges and render a decision on the merits of the case, irrespective of whether proceedings regarding the same subject between the same parties are already pending before a state court or another arbitration tribunal. A stay may only be ordered if serious reasons require it.

On 1 January 2011, the new Swiss Federal Code of Civil Procedure entered into force. It includes a full set of new rules concerning domestic arbitration. The practice under the new domestic arbitration rules will likely have an effect on the practice of international arbitration.

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A.2 Institutions, rules and infrastructure

In 2004, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud and Zurich established the Swiss Chambers' Court of Arbitration and adopted the Swiss Rules of International Arbitration. In 2007, the Swiss Chambers of Arbitration and the Swiss Chambers of Mediation combined their organizations. In 2012, the Swiss Chambers' Court of Arbitration and Mediation became the Swiss Chambers Arbitration Institution with its own legal personality.

In 2013, a new online platform (www.swissarbitration-hub.com) was created under the auspices of the Swiss Arbitration Association (ASA) that offers a convenient one-stop service for the organization of arbitration hearings in Switzerland.

The Swiss Rules of International Arbitration issued by the Swiss Chambers of Commerce entered into force on 1 January 2004. They were originally designed for use in international arbitration only. However, over time, the Swiss Chambers' Court of Arbitration received more requests to use the Swiss Rules for domestic cases as well. As from 2007, domestic cases are also accepted under the Swiss Rules, provided that both parties agree.

On 1 June 2012, the Swiss Rules were revised. The main goals of the revision were to enhance efficiency in terms of time and cost and to give certain additional powers to the bodies administrating the proceedings. The Arbitration Court of the Swiss Chambers' Arbitration Institution now has the power to shorten (or extend) a number of time limits. The designation of party-appointed arbitrators must occur in the notice of arbitration and the answer. An arbitrator must be challenged within 15 days of the relevant circumstances becoming known. The statement of claim and the statement of defense must include all documents and/or evidence on which the parties want to rely. The revised Rules now also expressly state that arbitral tribunals and state courts both have jurisdiction to grant interim measures. The arbitral tribunal has jurisdiction to award compensation for any damage caused by an interim measure that later proves to be

unjustified. Most importantly, the revised Rules introduced a procedure for emergency relief prior to the constitution of the arbitral tribunal.

B. Cases

The following is a quick overview of the most interesting cases rendered by the Swiss Supreme Court in the last 10 years.

B.1 Irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA)

In a decision dated 10 June 2010,[5] the Swiss Supreme Court held that an arbitrator who has already been involved in a case and participated in earlier decisions can give the appearance of bias only if he has already taken a stand on certain issues so as to be influenced in his future decisions.

In a decision dated 29 October 2010,[6] the Swiss Supreme Court decided not to sanction an arbitrator's relationship with WADA, relying on the specificities of Court of Arbitration for Sport (CAS) arbitration that render it more likely that CAS arbitrators will have contacts with sport organizations and may be asked to carry out activities for them. No bias exists where such activities are punctual, have been carried out a few years before the initiation of the proceedings, and concern issues of general interest.

Finally, in a decision dated 9 October 2012,[7] the Swiss Supreme Court dismissed the challenge brought by a Belgian mountain biker, Roel Paulissen, against an arbitrator who had been appointed by the Union Cycliste Internationale (UCI) in seven cases dealing with the same legal issue in less than 2 years. The court found that Mr. Paulissen's

[5] Decision 4A_458/2009.
[6] Decision 4A_234/2010; published in the official record of decisions of the Swiss Supreme Court as decision 136 III 605.
[7] Decision 4A_110/2012.

counsel should have expressly asked the arbitrator at the hearing how many times he had been appointed by the UCI in similar cases.

In a decision dated February 2010,[8] the Swiss Supreme Court dismissed the challenge brought by the famous German speed skater Claudia Pechstein, confirming that the CAS must be regarded as a legitimate arbitral tribunal that is sufficiently independent from the IOC.

B.2 Incorrect decision on jurisdiction (Article 190(2)(b) PILA)

In a decision dated 5 December 2008,[9] the Swiss Supreme Court upheld a clause providing for the "competence of the Arbitrator Court of the International Chamber of Commerce of Zurich in Lugano," considering that the clause expressed the clear intent of the parties to submit their dispute to institutional arbitration in Lugano.

Then, in a decision dated 7 November 2012,[10] the Swiss Supreme Court upheld the validity of a clause which read as follows: "The competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent."

In a decision dated 3 June 2015,[11] however, the Swiss Supreme Court refused to uphold a clause providing that "this agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zurich, Switzerland and subsidiary by the laws of Germany," considering that such a clause should be interpreted as a choice of law clause rather than a jurisdiction or arbitration clause.

[8] Decision 4A_612/2009.
[9] Decision 4A_376/2008.
[10] Decision 4A_246/2011; published in the official record of decisions of the Swiss Supreme Court as decision 138 III 29.
[11] Decision 4A_676/2014.

Finally, in a decision dated 7 October 2015,[12] the Swiss Supreme Court upheld the validity of the following clause: "ARBITRATION - Any disputes and disagreements that may arise out of or in connection with this Contract have to be settled between the Parties by negotiations. If no Contract can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Geneva, Switzerland." The Swiss Supreme Court considered decisive the title of the jurisdictional clause ("ARBITRATION"), notwithstanding the fact that the preamble of the contract provided that headings should have no effect on its interpretation.

B.3 Decision beyond the claim submitted or failing to decide an item of the claim (Article 190(2)(c) PILA)

In a decision dated 7 January 2011,[13] the Swiss Supreme Court confirmed for the first time that an arbitral tribunal's decision not to render an (additional) award can be challenged.

B.4 Equal treatment of the parties and their right to be heard (Article 190(2)(d) PILA)

In a decision dated 22 March 2007,[14] the professional tennis player Guillermo Cañas had argued that the CAS had violated his right to be heard because it failed to deal with a twelve-page detailed analysis of Delaware law that he had submitted to the CAS. The Swiss Supreme Court accepted the argument.

In a decision dated 9 February 2009,[15] the Swiss Supreme Court set aside an award of the CAS on the ground that the arbitral tribunal had violated the right of the parties to be heard by rejecting a claim on the basis of a statutory provision that neither of the parties had relied upon.

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[12] Decision 4A_136/2015.
[13] Decision 4A_440/2010; published in the official record of decisions of the Swiss Supreme Court as decision 137 III 85.
[14] Decision 4P.172/2006.
[15] Decision 4A_400/2008.

In a decision dated 10 February 2010,[16] the Swiss Supreme Court rejected a challenge brought by the German speed skater Claudia Pechstein against a CAS award. The Swiss Supreme Court held that there is neither a right to a public hearing before the Swiss Supreme Court (except in specific circumstances provided for in the law), nor a right to a second written exchange of briefs before the CAS, nor a right to cross-examine an expert mandated by the counterparty who was not called by that counterparty for the hearing. In a second decision,[17] it further held that the examination of new evidence must be extremely rigorous and the petitioner must prove that they could not produce the evidence in time by applying reasonable care.

B.5 Breach of public policy (Article 190(2)(e) PILA)

In a decision dated 13 April 2010,[18] the Swiss Supreme Court declared an arbitral award null and void for violation of procedural public policy. Sport Lisboa E Benfica - Futebol SAD. had claimed compensation from the International Federation of Football Associations (FIFA) for education and promotion of a football player employed by the Portuguese club for a short period of time. Atlético de Madrid SAD. challenged the decision of the FIFA Special Committee in front of the Commercial Court of the Canton of Zurich, which declared the decision null and void, since it held that the FIFA Transfer Regulations of 1997 violated European and Swiss competition laws. When it was re-approached, a special committee of FIFA rejected the claim. The Portuguese club appealed to the CAS. The Swiss Supreme Court annulled the award for breach of procedural public policy. It held that the arbitral tribunal could not newly examine the question of whether the FIFA Transfer Regulations 1997 were null and void.

[16] Decision 4A_612/2009.
[17] Decision 4A_144/2010.
[18] Decision 4A_490/2009.

In a landmark decision dated 27 March 2012,[19] the Swiss Supreme Court set aside an arbitral award on the basis of a violation of substantive public policy for the first time in over 20 years. The Brazilian football player Matuzalém Da Silva was ordered to pay, together with a Spanish football club, damages of over EUR 11,000,000 to the Ukrainian football club Schachtar Donezk for terminating his contract with the latter club without notice or just cause. As neither paid the amount to the Ukrainian football club, the Disciplinary Committee of the FIFA ordered the player and the club to pay a fine of CHF 30,000 (approximately EUR 28,000) under penalty of prohibition from any football activity. This decision was confirmed by the CAS. The football player argued that the CAS award violated substantive public policy in so far as it subjected him to an unlimited and worldwide prohibition on working as a football player. The Swiss Supreme Court upheld the challenge. It confirmed that the substantive adjudication of a dispute violates public policy when it disregards fundamental legal principles and consequentially, becomes inconsistent with the important, generally recognized values that, according to the dominant opinion in Switzerland, should be the basis of any legal order. In contrast, the Swiss Supreme Court held in a decision dated 21 March 2013[20] that a ban of 7 years against a Ukrainian goalkeeper does not amount to a breach of public policy.

In two decisions dated 3 January 2011,[21] the Swiss Supreme Court rejected challenges brought by the Spanish cyclist Alejandro Valverde against two decisions rendered by the CAS that the principle of *ne bis in idem* had been violated because he had been punished twice for the same offence — once by the National Anti-Doping Tribunal of the Italian National Olympic Committee (CONI) in proceedings in Italy, and a second time in proceedings initiated by the Union Cyclist International (UCI) and the World Anti-Doping Agency (WADA), leading to an arbitral award of the CAS. The Swiss Supreme Court

[19] Decision 4A_558/2011; published in the official record of decisions of the Swiss Supreme Court as decision 138 III 322.
[20] Decision 4A_522/2012.
[21] Decisions 4A_386/2010 and 4A_420/2010.

held that not only the principle of *res judicata* but also its negative aspect, the principle of *ne bis in idem,* are part of Swiss procedural public policy. It stressed, however, that the principle of *ne bis in idem* requires that the protected interests are identical, which would not apply in the present case.

B.6 Revision of arbitral awards

In addition to obtaining the setting-aside of an arbitral award on the basis of the grounds foreseen in Article 190 PILA, it is possible under Swiss arbitration law to request the revision of an arbitral award that has already entered into legal force if: (i) relevant facts or evidence are discovered after the termination of the first proceedings; or (ii) the arbitration was influenced by criminal acts. While this extraordinary appeal was first introduced by the Swiss Supreme Court in 1992 based on an analogous application of domestic civil procedure rules[22] (since when it has been confirmed in a few other cases[23]), it will likely soon be codified in a new provision (Article 190(a) PILA), pursuant to a government proposal presented in early 2017.

C. Trends and observations

The arbitration friendliness of the Swiss legal system has repeatedly been confirmed by the Swiss Supreme Court. Although the number of appeal proceedings against international arbitral awards has constantly increased in the last few years, the chances of successfully setting aside a Swiss arbitral award remain remarkably small, on average about 7% in commercial cases and less than 10% in sports cases.

The number of sport arbitration proceedings, in particular before the CAS in Lausanne, has grown considerably in the last 10 years. More than 400 cases are now brought before the CAS each year.

[22] *Cf.* decision 118 II 199.
[23] *Cf.* decision 134 III 286; decision 4P. 102/2006; decision 4A_596/2008.

On the international level, Switzerland continues to be ranked first or second in ICC statistical reports as a venue for arbitration, nationality of arbitrators and choice of law.

The Swiss Chambers Arbitration Institution has recently signed the "Equal Representation in Arbitration Pledge," and encourages entities and individuals involved in arbitrations to increase the number of women appointed as arbitrators until they reach equality. In 2015, 47% of the arbitrators appointed by the Arbitration Court were women. However, the number looks less good when it comes to appointments by parties and co-arbitrators: only 5% were women.