Arbitrating in Switzerland: *ad hoc* notes

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Arbitration is one of the true winners of globalisation. Everyone makes business with everyone in the world but it is only natural that no one wants to submit to the jurisdiction of the other party. Arbitrating in a venue neutral to the parties is then the logical choice and it comes, therefore, as no surprise that all relevant statistics reveal an increasing number of arbitration proceedings.

Arbitration is a private dispute resolution mechanism, usually administrated by institutions, which provide for the organisational back-up, and less often on an *ad hoc* basis. Frequently the venues chosen for arbitration are Moscow with the ICAC Rules, Paris with the ICC Rules, London with the LCIA Rules or Stockholm with the SCC Rules. It should immediately be clarified that the institutional rules and the seat of the institution mentioned allow for their application in any place of the world. The venue stipulated in the arbitration clause of a contract is often chosen for logistical reasons (easy access to the venue, direct flights, convenient accommodation, etc.) or simply for personal preferences for a particular venue. But such approach misses a very important point decisive on the venue of arbitration, namely, the legal framework of the mandatory rules embracing arbitral proceedings, deciding, in particular, the legal remedies available to challenge the award in case of a negative outcome for the losing party. Such legal framework is commonly referred to as *lex arbitri*. The *lex arbitri* is literally the law governing the procedure of international arbitration; it is also described sometimes as the mandatory procedural law.

The role of *lex arbitri* cannot be underestimated and should be singled out from other relevant laws, i.e., the law governing the merits of the dispute (*lex causae*); the law applicable to the arbitration agreement; and the law applicable to the parties capacity to enter into the arbitration agreement.

In this respect Switzerland is definitely on the map as venue for arbitral proceedings for a variety of reasons. Chapter 12 of the Swiss Private International Law Act ("PILA" of 1 January 1989) covers the mandatory provisions to be borne in mind for international arbitration held in Switzerland. It is very informative, yet, comprised of only 19 articles (translation available here: www.swissarbitration.ch).

Once an award has been rendered in Switzerland it can be challenged only and directly at the Swiss Federal Supreme Court whereby such challenge must be lodged and motivated

within 30 days after the date of communicating of the arbitral award. The grounds for such a challenge are effectively – and conveniently - mirroring the grounds enumerated in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which Russia is a party) as listed under Art. V (1) and (2). Art. 190 (2).

PILA lists the following grounds for annulment: (a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted; (b) if the arbitral tribunal wrongly accepted or declined jurisdiction; (c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim; (d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated; (e) if the award is incompatible with the public policy.

The Swiss Federal Supreme Court has a very arbitration friendly approach. Whenever possible it protects the jurisdiction of an arbitral tribunal (*in favorem arbitri*). In one of its most recent decision it had to deal with a jurisdictional clause, which referred under the heading "ARBITRATION" to the "empowered jurisdiction of Geneva, Switzerland". A claim was filed at the Geneva Chamber of Commerce and Industry and a sole arbitrator, acting under the Swiss Rules, confirmed shortly thereafter as having jurisdiction. His partial award on jurisdiction was then challenged at the Swiss Federal Supreme Court but the challenge was rejected. In the view of the Swiss Federal Supreme Court the use of the word "ARBITRATION" was sufficient to accord such procedure to the parties, irrespective of the fact that the term "empowered jurisdiction of Geneva, Switzerland" was less than clear.

As to the violation of public policy as ground for a challenge it should be noted that the Federal Supreme Court uses a demanding yardstick in this respect, by considering only a violation of the **international public policy** as relevant. In its words, such a violation can be assumed only if the award challenged disregarded *"some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognised values, which according to dominant opinions in Switzerland, should be the basis of any legal order."*

In other words, **violation of a national law does not qualify as violation of public policy** pursuant to Art. 190 (2) (e) PILA. The interpretation by the Swiss Federal Supreme Court takes an extremely narrow view in this respect. Consequently, it should come as no surprise that in 25 years of PILA's existence only two arbitral award challenges successfully evoked violation of public policy as grounds of annulment. Both challenged awards were the decisions of the Court of Arbitration in Sports (CAS) in Lausanne. The first award successfully challenged in 2010 violated the *res judicata* principle, and the second one, challenged in 2012, violated the constitutional guarantee of the right to personal freedom, in that particular case the right to work as a football player. The Swiss author of this article was able to establish at the Federal Supreme Court that a lifelong ban of FIFA imposed upon a player for not having paid money under a joint and several liability with his former club for a transfer does violate the players right to work or as the Swiss Federal Supreme Court stated in this award: *"The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA*

Disciplinary Code constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) of the Swiss Civil Code. Should payment fail to take place, the award under appeal would lead not only to the Appellant being subjected to his previous employer's arbitrariness but also to an encroachment in his economic freedom of such gravity that the foundations of his economic existence are jeopardised without any possible justification by some prevailing interest of the world football federation or its members."

An analysis of the decisions of the Swiss Federal Supreme Court rendered so far under the provisions of PILA has revealed that the overall chances of success for a challenge of an arbitral award amount to approx. 7,5% only. The highest rate of success is achieved by challenges on jurisdictional issues which is 9,4% and the lowest rate is obviously achieved under the sole provision which allows for a review of the case on its merits, which is, as just established, restricted to violations of provisions of international public policy only resulting in a marginal success rate of 1,3%.

Generally, under Swiss law, there is only one exchange of briefs at the Federal Supreme Court and there is anyway no hearing. In considering the challenge of an arbitral award in Switzerland the Federal Supreme Court is bound to the presentation of facts as already established in the challenged award. In other words, the losing party stands no chance to reargue factual issues, except if it could establish that such facts were established in a manifestly inaccurate way. Also, the challenge has no suspensive effect by law. Such effect must be requested in the challenge and is granted under specific circumstances only.

Therefore, an award rendered in Switzerland can be enforced even if a challenge is still pending. Given the restricted procedure the decision of the Federal Supreme Court is, on average, rendered within 180 days after the challenge has been filed – probably the most efficient challenge procedure in the world. By contrast, in some other jurisdictions challenges of international arbitral awards are dealt with on two or even three levels of court hearings, which may take many years to get a final decision.