

THE NEW SWISS UNIFORM ARBITRATION ACT AND INTERNATIONAL COMMERCIAL ARBITRATION

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I. INTRODUCTION

The resort to arbitration for the settlement of commercial disputes, in preference to litigation in the ordinary courts of law, is increasingly important, both at the national level and in international business. Arbitration has gained wide acceptance in many countries. It is now a generally accepted method of settlement of commercial disputes in international contracts, and it has gained wide recognition among countries as different in other aspects of their legal systems as industrialized countries, developing countries and those of Eastern Europe. It would be outside the scope of this contribution even to summarize the various aspects and methods of arbitration. A recent publication under the editorship of Professor Clive M. Schmitthoff gives a general view of the existing international conventions and rules and regulations in this field.¹ Several major international conventions governing the field of international arbitration require mention: the two Geneva conventions, the Protocol on Arbitration Clauses of 1923² and the Convention on the Execution of Foreign Arbitral Awards of 1927;³ the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;⁴ and the 1961 European Convention on International Commercial Arbitration.⁵

II. LAW RELATING TO ARBITRATION IN SWITZERLAND

Like the United States, Switzerland is a federal state. Unlike in

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¹ INTERNATIONAL COMMERCIAL ARBITRATION (2 vols.) (C. Schmitthoff & J. Nowak compilers and eds.; C. Schmitthoff series ed. 1976).

² Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158.

³ Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for United States Dec. 29, 1970) [hereinafter cited as New York Convention].

⁵ European Convention on International Commercial Arbitration, done April 21, 1961, 484 U.N.T.S. 364.

the United States, substantive law is mainly federal law in Switzerland, notably in the field of business transactions. The law of contracts and torts, corporation law, and the law of commercial instruments are all regulated by a Federal statute known as the Swiss Code of Obligations.⁶ But adjective law, and in particular the law of procedure in civil and commercial matters, is within the province of the member States, as in the United States. The same applies to the organization of the courts, with the notable difference that there are no Federal courts in Switzerland even for matters regulated by Federal statutes, with the only and basic exception of the Federal Supreme Court, to whom appeals are raised against decisions of the State courts in matters involving Federal statutes.

It is the prevailing view in Switzerland that the law of arbitration is a part of the law of procedure. That principle applies not only to arbitration procedure as such, including the right to appeal against arbitral awards, but also to the form, essential validity, and the effects of arbitration clauses and arbitration agreements, even though contained in contracts governed in other respects by Federal statute or by a foreign system of law.⁷ The law of arbitration being a part of the law of procedure, subject to regulation by the States, there were recently as many laws of arbitration as there are States in Switzerland, *i.e.* 25.

This situation obviously led to quite a few difficulties. Whereas some State laws of procedure have been recently and ably adapted to the requirements of a modern business community, others were antiquated or insufficient or both. This was of course felt to be a major obstacle in Swiss arbitrations, both internal and interstate. It was also considered a major difficulty in international arbitrations taking place in Switzerland, which is all the more unfortunate since Switzerland can be described as a popular place of arbitration for international commercial disputes.

Such popularity can be attributed to a number of factors. Due to its policy of neutrality Switzerland appears as a neutral forum. Introduction to other legal systems is part of the training and the daily work of the Swiss lawyer, who is usually not confined to his own system of law. The same applies to foreign languages, which are a must for any Swiss lawyer. Disputes involving parties of larger

⁶ Schweizerisches Obligationenrecht; Code des obligations; Codice delle obbligazione.

⁷ See *Jugomineral v. Grillo Werke AG*, Mar. 17, 1975, Tribunal Fédéral Suisse, 101 Arrêts du Tribunal fédéral suisse, Recueil officiel[ATF] II, 168, [1975] *Journal des Tribunaux*[J.T.] I 629.

countries are often referred to arbitration in smaller nations, such as Switzerland, the Netherlands, Belgium, and Scandinavian countries. Even the convenience in location of Switzerland is often considered a practical advantage. With or without Swiss arbitrators, international arbitrations are therefore very often located in Switzerland, with the legal consequence that they are governed in certain matters by Swiss procedural regulations of which parties and many foreign arbitrators are unaware. Some of these regulations might have catastrophic and unexpected effects on the award.⁸

The solution to this problem was to propose a Uniform Arbitration Act, which was drafted at the initiative of a distinguished Swiss judge, M. André Panchaud, former Chief Justice of Switzerland. This act has been adopted in the manner usual in Switzerland, that of an inter-State treaty, classically described as a *concordat*. As for an American uniform act, such as the Uniform Commercial Code (or indeed the Uniform Arbitration Act), the new law is enacted by the State legislatures; but unlike the United States, it can only be enacted as a whole, without any change, by a procedure similar to the ratification of a treaty. The "Concordat suisse sur l'arbitrage" (translated as Uniform Arbitration Act) was signed in 1961. Since then it has been adhered to and enacted as part of their law of procedure by 16 Swiss States (out of 25), including the major States of Berne, Basle, Vaud and Geneva,⁹ but with the one important exception of Zurich, which is not likely to join in the foreseeable future.¹⁰

III. THE SYSTEM OF THE UNIFORM ARBITRATION ACT¹¹

It would be outside the scope and space limitations of this article

⁸ A classic example is that of the award in *Société Européenne d'Études et d'Entreprises v. République Socialiste Fédérative de Yougoslavie*, 1958 J.T. III 107, the filing of which was rejected by a Swiss State court. The award gave rise to decisions in many countries, notably France and the Netherlands. See 1974 *REVUE DE L'ARBITRAGE* 311; 1975 *REVUE DE L'ARBITRAGE* 328.

⁹ As of September 30, 1976, the following States have adhered to the Act (capital city indicated parenthetically if not identical to the name of the State): Berne, Schwyz, Unterwald-Obwalden (Sarnen), Unterwald-Nidwalden (Stans), Fribourg, Solothurn, Basle City, Baselland (Liestal), Schaffhausen, St. Gallen, Ticino (Bellinzona), Vaud (Lausanne), Valais (Sion), Neuchâtel, Geneva, Graubünden (Chur).

¹⁰ One of the major reasons is that the law of Zurich grants extensive rights of appeal against awards and against interlocutory decisions of the arbitrators.

¹¹ The Act exists formally in three languages: French, German and Italian. The text is published in the Federal Acts and Statutory Instruments, [1969] *Recueil officiel des lois et ordonnances de la Confédération suisse* 1117. For a four language annotated edition, includ-

to give a full explanation of the Uniform Arbitration Act (hereinafter referred to as the Act), although the Act itself is sure to appear as very short to an American reader, with its 46 sections covering 16 pages of pocket-book size, following the drafting technique in use in continental Europe. Attention shall be drawn here to the features of the Act that are likely to appear as most characteristic to an American reader.

A basic, although often ignored, problem in international arbitrations is that of the *proper law of the arbitration*: which law governs the arbitration, the formation of the arbitral tribunal, its procedure and possible appeals against its award. Following the method of the New York Convention,¹² the Act puts emphasis on the *seat of the arbitration*, which it technically qualifies as the *seat of the Arbitral Tribunal* (articles 2 and 3). The seat of the arbitration is not automatically the place where arbitration proceedings are physically taking place. It is the connection of the arbitration with the legal order of a particular State, whose law on arbitration (*i.e.*, the Act) is thus governing. In the system of the Act, parties are free in the *choice of the seat*. If they have not designated it, the body which appoints the arbitrators or the arbitrators themselves can make this choice (article 2). Although such choice, when made in favour of a State which has enacted the Uniform Arbitration Act, subjects the arbitration to the Act, it is not conditional upon the substantive law of the case being Swiss law, nor does it make Swiss substantive law applicable thereto.¹³

There is a kind of feedback effect of the Act, when applicable to the arbitration by the choice of the seat of the Arbitral Tribunal, on the validity of the *arbitration agreement*, be it in the form of an arbitration clause (article 4(3)), or of a proper arbitration agreement submitting an existing dispute to arbitration (article 4(2)), or by way of reference to the regulations of a body or institution. The Act

ing an English translation, see SWISS ARBITRATION ASSOCIATION, *CONCORDAT SUISSE SUR L'ARBITRAGE* (Editions Payot 1974). For an annotated English translation, see 2 INTERNATIONAL COMMERCIAL ARBITRATION 309 (J. Nowak compiler and ed.; C. Schmitthoff series ed. 1976).

¹² Note 4 *supra*.

¹³ Nor does such a choice make Swiss rules of conflicts automatically applicable to the matter in dispute, in the absence of a choice of law by the parties. See P. Lalive, *Les Règles de Conflict de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REVUE DE L'ARBITRAGE 155, and in L'ARBITRAGE INTERNATIONAL PRIVÉ ET LA SUISSE; MÉMOIRES PUBLIÉS PAR LA FACULTÉ DE DROIT DE GENÈVE. See also Rules of Conciliation and Arbitration of the International Chamber of Commerce, art. 13(3) (1975 revision)[1976] Y.B.: COMMERCIAL ARBITRATION 157 (International Council for Commercial Arbitration).

requires such agreement to be in writing.¹⁴ There is, however, no provision in the Act as to the law governing the essential validity of the arbitration agreement. This very important question remains governed by the substantive provisions of the law of the seat of the arbitration, or, for certain aspects, such as the authority of the signatories of the arbitration agreement, by the legal system designated by the conflict rules of that State.¹⁵

It is worth pointing out here that in Swiss law the existence of an arbitration clause is a bar to an action in the ordinary courts of law,¹⁶ a distinctive feature when compared to the traditional American view prevailing before the appearance in the United States of the Uniform Arbitration Act and before recent interpretations by the United States Supreme Court of the Federal Arbitration Act.¹⁷

The Act further provides a practical *machinery for the appointment of arbitrators*. The Supreme Court of the State of the seat of the Arbitral Tribunal has jurisdiction under the Act to appoint (and remove in certain specified instances) the arbitrator(s) if the parties do not agree on their choice or if the appointing body designated by the parties fails to appoint the arbitrators. This jurisdiction is not exclusive, since the Act recognizes the validity of arbitration clauses by which the parties give authority to a person, a court or another body designated by them for appointing the arbitrators. The idea is to safeguard the widespread arbitration clause of the International Chamber of Commerce, whose Court of Arbitration sits as an appointing body, and similar clauses of other local, national or international organizations. With regard to the number of arbitrators, the Act follows a general practice in providing, in the absence of an agreement to the contrary, for a *panel of arbitrators*, the Arbitral Tribunal, with each party designating an equal number of arbitrators (usually one), who then elect an umpire (article 11). The umpire acts as chairman of the panel and *not* as sole arbitrator in case

¹⁴ Cf. New York Convention, *supra* note 4, art. II, para. 2.

¹⁵ There is in Switzerland a vast body of Federal case law on arbitration developed in connection with the recognition of Swiss and foreign awards. For a discussion of such case law and international commercial arbitration, see F. E. Klein, *La jurisprudence du Tribunal fédéral suisse en matière d'arbitrage commercial international* in RECUEIL OFFERT AU TRIBUNAL FÉDÉRAL PAR LES FACULTÉS DE DROIT SUISSES 487 (1975) [hereinafter cited as Klein]. Regarding the conflicts rule on the authority of the signatories of an arbitration agreement, see Spuhler A.-G. v. East Asiatic Co. Ltd., Nov. 22, 1950, Tribunal Fédéral Suisse, 76 ATF I 338, [1951] J.T. I 239.

¹⁶ Cf. New York Convention, *supra* note 4, art. II, para. 3.

¹⁷ 9 U.S.C. §§ 1-14 (1970). See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

the two others fail to agree, as in English arbitrations.

Particular attention has been given by Swiss courts, at the stage of recognition and enforcement of awards, to the independence of the arbitrators, particularly in the case of appointment by professional organizations in which one of the parties may have greater weight than the other. There is a large body of case law in this field, embodied in the provisions of the Act, that enables the parties to object to an arbitrator (articles 18 and 19).¹⁸

Once appointed under any of the methods acceptable under the Act, the arbitrators enjoy wide authority and considerable freedom of action. The arbitrators are empowered to determine their own *jurisdiction*, specifically including jurisdiction as to the issue of validity or invalidity of the arbitration agreement itself (article 8). As to the substance of the claim brought before them, the arbitrators are of course limited to the claims submitted to them under the arbitration clause, or by the agreement of the parties (article 36(c)).

As to the *procedure* to be followed, the arbitrators enjoy a large degree of freedom. In the absence of a choice of law of procedure by the parties (which is most unusual) or by applicable arbitration regulations (*e.g.*, by the operation of the standard ICC arbitration clause), the procedure to be followed in the arbitration is determined by the arbitrators themselves. They are free therefore to organize the arbitration in the manner most convenient in view of the issues before them. This flexibility has the further advantage of enabling the arbitrators to take into consideration the requirements of the parties, whose lawyers, often coming from different legal systems, may have opposite views concerning the type of procedure to be followed—*e.g.*, on the method of examination of witnesses, or on the method of obtaining expert evidence.¹⁹ There are, however, a few basic procedural requirements which are mandatory for the arbitrators, and which correspond to fair trial requirements: both parties are entitled to be heard by the arbitrators; both have access to the evidence on the file, take part in any hearing and are entitled to be represented before the Tribunal (article 25).

There are also some formal requirements as to the *contents of the*

¹⁸ For a summary of such case law, see Klein, *supra* note 15.

¹⁹ See generally the papers submitted to the interim meeting of the International Committee for Commercial Arbitration, London, February 14-16, 1974, analyzing the difference in the manner of presenting evidence in arbitrations held under civil and common law systems, reprinted in 1974 REVUE DE L'ARBITRAGE 119, and 41 ARBITRATION, THE JOURNAL OF THE INSTITUTE OF ARBITRATORS (London 1974).

award, which is to be reached by a majority vote (articles 31 and 33). It is a standard practice in continental Europe that the award should indicate the factual and legal reasons for the decision, a requirement incorporated in the Act (article 33(1)(e)). However, the parties may waive the requirement, enabling the arbitrators to follow the English practice of not giving, or at least not including in the award their reasons for the decision. The Act specifically requires the arbitrators to issue their award in accordance with the proper law governing the dispute before them. In some European countries, however, it is common practice to give the arbitrators authority to issue their award according to natural justice, an authority usually described by the French expression of *amiable composition*. The Act does not give this authority to the arbitrators, but the parties can grant it by a provision of the arbitration agreement (article 31(3)).

Once the award is issued, the machinery provided by the law of the seat of the Arbitral Tribunal is once more available in two important respects. The first is the organization of a system of *filing* "Deposit of the Award," (article 35) with the Record Office of the Supreme Court of the State where the Arbitral Tribunal has its seat. The Record Office has authority to cause service of the award to be made to the parties, and to declare it enforceable in the same manner as a judgment of the State courts of law, once the period for appeal has elapsed (article 44). This is of course of major importance to recognition of the award.²⁰ These provisions, however, are not mandatory; the parties may in particular dispense the arbitrators from filing their award.

The second aspect regarding State action is that the Supreme Court of the State of the Arbitral Tribunal's seat has a limited *appeal jurisdiction* on the award ("action for annulment," article 36). The rule is that the award is final and binding. But there are exceptions to the rule that can be classified into two categories. The first category comprises appeal grounds based on the violation of fundamental requirements of an adjective nature. Those grounds are as follows: the tribunal was not properly constituted; there was a breach of one of the few mandatory procedural rules mentioned before; the tribunal exceeded its jurisdiction; it failed to make a determination of one of the items of the claim; or it allowed to the winning party something more, or other than claimed.

²⁰ Cf. New York Convention, *supra* note 4, art. IV.

The second category comprises appeal grounds of a substantive nature. The first such ground concerns the issue of jurisdiction. As mentioned above, the arbitrators have the power to decide on their own jurisdiction. Their award on that point is subject to review (article 36(b)). As to the substance of the award, the State's Supreme Court is *not* a court of review. Its jurisdiction is limited to two specific grounds worded as follows by article 35(f) of the Act: "that the award is arbitrary in that it was based on findings that were manifestly contrary to the facts appearing on the file, or that it constitutes a clear violation of law or equity." Emphasis should be placed on the words "arbitrary," "manifestly" and "clear violation." This provision is to be construed in the light of the vast body of case law of the Supreme Court of Switzerland which, in its constitutional jurisdiction, has given to these words definitions that are part of Swiss law. A wrong decision is not by itself arbitrary. It becomes so when it lacks any reasonable justification.²¹ The particular instance of "violation of equity" has nothing to do with Equity as distinct from Common Law. This historical distinction is unknown in Swiss law. The mention of equity refers to instances when the arbitrators have been granted authority to act as "amiables compositeurs."²² Their award must nevertheless be justifiable according to what can be roughly described as natural justice.²³

If the appeal is allowed, the award is quashed (article 40). However, the State's Supreme Court has authority to remit the award to the arbitrators for the amendment or supplementation thereof (article 39). The purpose of this provision is to enable the arbitrators to correct formal defects of their award, without exposing the parties to the inconvenience of the annulment of an award that could be redressed.

If no "action for annulment" has been filed within 30 days from service of the award, or if the action has been dismissed, the award becomes final and may be declared enforceable in the manner de-

²¹ The legal concept of *arbitrary decision* has been developed by the Supreme Court of Switzerland (Tribunal Fédéral Suisse) on the basis of the constitutional principle of equality before the law. A basic notion of Swiss public and administrative law with wide application in many fields, the concept provides a standard under which the decisions of State courts are subject to review. See J.-F. AUBERT, *TRAITÉ DE DROIT CONSTITUTIONNEL SUISSE* 176 (1967). On the construction of art. 36(f) of the Act, see Grumbach v. Moser, April 25, 1972, Tribunal Cantonal (Chambre des recours), Vaud [1973] J.T. III 32.

²² See p. 91 *supra*.

²³ See Fressineau v. Ruch, Mar. 21, 1972, Tribunal Cantonal (Chambre des recours) Vaud, [1973] J.T. III 31.

scribed earlier. Its enforceability in Switzerland is governed by the Act in the Swiss States that have adhered thereto. In the other Swiss States, it is to be recognized under the general provisions of Swiss law, as developed by the case law of the Supreme Court of Switzerland.²⁴ As for the enforcement in other countries, it is of course governed by their municipal law, subject to international conventions. In this connection, the new Swiss Uniform Arbitration Act can be described as a valuable contribution to international commercial arbitration and to the recognition of awards issued in arbitrations taking place in Switzerland.²⁵

²⁴ See references cited note 15 *supra*.

²⁵ See generally Panchaud, *Le Projet de Concordat des Cantons Suisses*, 1969 *REVUE DE L'ARBITRAGE* 116; Hinderling, *Die private Schiedsgerichtsbarkeit nach Basler ZPO und Konkordat*, [1972] *BASLER JURISTISCHE MITTEILUNGEN*; Bratschi & Briner, *Bemerkungen zum Konkordat über die Schiedsgerichtsbarkeit*, 72 *REVUE SUISSE DE JURISPRUDENCE (SCHWEIZERISCHE JURISTEN-ZEITUNG)* 101 (1976); Caprez, *Le Concordat sur l'Arbitrage (Notes de jurisprudence)*, *id.* at 233; Wenger, *Die Rechtsmittel gegen Schiedsrichterliche Entscheidungen in L'ARBITRAGE INTERNATIONAL PRIVÉ ET LA SUISSE* (not yet published) in the series *MÉMOIRES PUBLIÉS PAR LA FACULTÉ DE DROIT DE GENÈVE*.

