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SWITZERLAND — A FAVORABLE SEAT OF ARBITRATION FOR FOREIGN ANTITRUST CLAIMS

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Introduction

Switzerland (especially Geneva and Zurich) has traditionally been a preferred venue for arbitration, generally ranking among the top three countries as a place for ICC arbitrations. This also applies in disputes involving antitrust issues. For parties or counsel dealing with matters involving or relating to antitrust law or potential antitrust claims, Switzerland is a particularly interesting venue to consider.

Among the factors making Switzerland generally a top choice for arbitration are its arbitration-friendly legislation and courts and its political neutrality. Furthermore, Switzerland is not a member of the EU, and neither the Swiss courts nor arbitral tribunals are part of the EU court system, which means that there is no interference from EU courts. This feature specifically plays out in the context of antitrust or competition-related claims. Statistics show that Switzerland is now among the top venues for antitrust claims to be resolved in arbitration. For example, out of 52 ICC antitrust-related arbitrations conducted during the period from 1964 to 2010, Switzerland was the seat of arbitration in at least 12 of those arbitrations (France had 11 cases, and Belgium had 6 cases).

Antitrust Claims Are Generally Arbitrable in Switzerland

Typically, antitrust claims are raised by the respondent party to invalidate a contract claim. According to case law of the Swiss Supreme Court and leading scholarly writing on Swiss arbitration law, it is well settled that antitrust claims that are raised defensively ("antitrust claims as a shield"), e.g., by a respondent seeking to invalidate contractual provisions, are fully arbitrable under Swiss law. (Supreme Court Decision, BGE/ATF 118 II 193; Supreme Court Decision, BGE/ATF 132 III 389). More rare is a situation where parties put forward antitrust claims in an affirmative fashion, i.e., private claims seeking damages for alleged violations of antitrust statutes ("antitrust claims as a sword"). According to leading Swiss scholarly writing, affirmative antitrust claims are arbitrable provided that they "entail a financial interest". This is the criterion for arbitrability according to the Swiss *lex arbitri*, as set forth in Article 177(1) of the Swiss Private International Law Act (PILA). The Swiss Supreme Court has not yet stated an opinion on the arbitrability of "antitrust claims as a sword", but the Court has by no means suggested that it would take a different position on this issue.

In order for any antitrust claims to be arbitrated, such claims must furthermore of course fall within the scope of the relevant arbitration clause (ratione materiae). Switzerland has long taken a pro-arbitration stance on the interpretation of arbitration clauses, including with respect to their scope. Once it is determined that the parties have consented to arbitration in the first place, the scope of their agreement to arbitrate will then be interpreted extensively, in an all-embracing manner. (Supreme Court Decision 4C.40/2003 of 19 May 2003; Supreme Court Decision 4A_103/2011 of 20 September 2011).

According to Swiss scholarly writing as well as the case law of the Swiss Supreme Court, a broadly drafted arbitration clause, such as one containing words like "arising out of or in connection with", will cover extra-contractual, and thus also antitrust claims. The Swiss Supreme Court has interpreted "in connection with" as implying a "broad and comprehensive arbitration clause covering not only contractual claims but also extra-contractual ones." (Supreme Court Decision 4A_119/2012 of 6 August 2012, reasons, 4.3). Moreover, such language implies that the parties selected arbitration as the exclusive forum for resolving all their claims rather than referring some claims to arbitration and others to a judicial forum. (*Ibid*, reasons, 4.4).

Antitrust Claims Do Not Fall within the Swiss Notion of Public Policy

Where an arbitral tribunal finds that the scope of an arbitration clause is wide, and a party has submitted antitrust claims under that clause, the arbitral tribunal has a duty under Swiss law to take jurisdiction over the antitrust claims. This is emphatically the case because, according to a leading decision of the Swiss Supreme Court, an arbitral award can be set aside under Article 190(2)(b) PILA if the arbitral tribunal has wrongly declined jurisdiction to hear antitrust claims. (Supreme Court Decision, BGE/ATF 118 II 193).

On the other hand, an arbitral award cannot be set aside for the mere misapplication of a foreign antitrust statute by the tribunal. Misapplication of the law would fall within the realm of determining the merits of the case, and the only (highly remote) possibility for an award to be set aside in such a context would be, under Article 190(2)(e), where the award violates Swiss public policy. In a leading decision of the Swiss Supreme Court, the Court

furthermore held that non-application or incorrect application of a foreign antitrust statute – which was, in the particular case, EU competition law – did not constitute a violation of Swiss public policy. (Supreme Court Decision, BGE/ATF 132 III 389). The situation is different in the EU where, according to the case law of the European Court of Justice, EU competition law is regarded as a matter of public policy within the meaning of the New York Convention. (See e.g., *Eco Swiss China Time Ltd vs. Benetton International NV* (1999) ECR I-3055, Case C 126/97).

Generally, the standard of review applied by the Swiss Supreme Court to petitions for setting aside an award is deferential, the review itself is limited in scope, and the grounds for setting aside are limited. Challenges are successful only in extreme cases, approximately 7% of the time. Swiss law also provides parties with the option to waive challenges to the award up to when the award is issued (Article 192 PILA). Parties may avail themselves of this option, however, only where none of the parties has its domicile in Switzerland and the waiver is clear and specific.

Availability of Treble/Punitive Damages

According to a decision of the Swiss Supreme Court and leading Swiss scholarly writing, an arbitral tribunal seated in Switzerland does not violate Swiss public policy by awarding treble/punitive damages, if the tribunal deems it appropriate to award such damages and the applicable foreign laws provide for such damages. (Supreme Court Decision 4P.7/1998 of 17 September 1998, reasons 3(c)).

No Interference by European Courts and Competition Authorities

A very attractive feature of arbitral proceedings in Switzerland is that Switzerland is not part of the EU and so the decisions of Swiss arbitral tribunals are not subject to the interference or review of the European courts and Competition Authorities.

Further, unlike in the case of certain countries in the EU, Swiss arbitral tribunals have no duty to seek the view of the Swiss competition authorities on any potential issues of Swiss competition law. To date, no Swiss arbitral tribunal has involved the Swiss competition authorities, so no delays or disruptions would be caused on that ground.

Conclusion

Switzerland is not just generally one of the most popular places of arbitration worldwide; it is also a very attractive place for arbitrating antitrust claims, both when raised as a defense as well as for affirmative antitrust claims. Switzerland has a very wide concept of arbitrability and a highly favorable interpretation of arbitration clauses with broad language, which result in a wide scope to resolve antitrust claims by way of arbitration. Arbitrating antitrust claims in Switzerland also allows for the possibility to claim treble damages. Finally, the review by Swiss courts will be strictly limited and there will be no room for interference by Swiss or EU competition authorities and EU courts.

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