

GAR CHALLENGING AND ENFORCING ARBITRATION AWARDS 2020

Switzerland

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Applicable requirements as to form of arbitral awards

1 Must an award take any particular form (eg, in writing, signed, dated, place, the need for reasons, delivery)?

Following the principle of party autonomy, article 189(1) of the Swiss Private International Law Act (PILA) – which governs international arbitration – establishes that the arbitral award shall first of all ‘be rendered in conformity with the rules of procedure and in the form agreed by the parties’. This means that it will be necessary to first review the applicable arbitration rules or, if any, applicable procedural rules as set forth in the arbitral proceedings whether there are any specific requirements as to the form of the award (or both). Unless the parties have agreed otherwise, article 189(2) of the PILA provides that the award ‘shall be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient’. Though extremely rare in practice, the parties are therefore free to waive the written-form requirement and can agree that the award be rendered orally. If the presiding arbitrator is in the minority and declines to sign, the award is still valid with the signatures of two other arbitrators.

Although the PILA does not mention any other details that the award must contain, in practice tribunals tend to follow the rules set out in article 384 of the Code of Civil Procedure (CCP), which regulates domestic arbitration. As such, an award would also usually contain the composition of the arbitral tribunal, the seat of the arbitration, the designation of the parties and their representatives, the parties’ prayers for relief, the operative part of the award on the merits, and the amount and allocation of the costs and party compensation.

A recent decision of the Swiss Federal Supreme Court dated 16 October 2019 analysed the notification of an incomplete and unsigned hardcopy version of an arbitral award and whether such notification triggered the statutory time-limit to challenge said arbitral award before the Swiss Federal Supreme Court (SFSC Decision 4A_264/2019 of 16 October 2019). The appellant considered that the notification of an incomplete and unsigned award was null and void and that the time-limit to challenge should not be triggered until a new arbitral award would be properly served. Yet, the Swiss Federal Supreme Court declared that under the principle of good faith in article 5(3) of the Swiss Federal Constitution, the appellant should have reported the procedural error with no delay and because it did not do so, it then forfeited its right to a new notification of the arbitral award and thus, the Swiss Federal Supreme Court considered the challenge as inadmissible for being filed late.

As to the form of notification of the award, Chapter 12 of the PILA does not deal with such detail. It is, therefore, a question primarily determined by means of the parties’ agreement, if any, or by the applicable arbitration rules, if any, or ultimately by the arbitral tribunal. It is common practice to notify the parties of the award by mail, be it registered mail or by courier service, in order to have a record of the date of receipt. On this matter, the Swiss Federal Supreme Court, for example, has recently stated that the valid notification upon which the time limit for the challenge of an award commences will have to be assessed in view of the applicable arbitration rules. Indeed, in its decision of 26 September 2018, the Swiss Federal Supreme Court confirmed that the 30-day time limit under article 100 of the Swiss Federal Supreme Court Act (SFSCA) to challenge an award rendered under the International Chamber of Commerce (ICC) arbitration rules commences with the notification of the signed original arbitral award, in view of article 35(1) of the 2017 ICC arbitration rules, and not with the advance courtesy electronic copy sent by the ICC.

Applicable procedural law for recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The PILA does not contain any provision governing modification, clarification or correction of an award. Nevertheless, useful guidance can be drawn from Art. 388 of the Swiss Code of Civil Procedure (CCP), which is considered to apply by analogy. Moreover, such a possibility is generally provided in most arbitration rules and would be acceptable under Swiss law in application of the principle of party autonomy. Moreover, the Swiss Federal Supreme Court has confirmed that an arbitral tribunal has the power to interpret an award or rectify an inadvertent mistake.

The Swiss Federal Supreme Court has also ruled that the interpretation or correction of an award will have to be contained in a fresh award, which will be capable of being challenged as any award under article 190(2) of the PILA.

According to the legislative proposal to reform Chapter 12 of the PILA (the Draft), currently under consideration before the Swiss Parliament and which will probably enter into force in 2021, new specific provisions on the interpretation and correction of awards by the arbitral tribunal are being debated (article 189a Draft PILA). Under the proposed provision, the parties may request the arbitral tribunal to rectify within 30 days of notification of the award, or the arbitral tribunal may sua sponte rectify within the same deadline, any arithmetical or typographical error, interpret any section of the award or render an additional award on such allegations submitted in the proceedings but omitted in the award.

Applicable procedural law for recognition and enforcement of arbitral awards

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Under the PILA, an award may only be set aside before the Swiss Federal Supreme Court (see article 191 PILA and article 77 SFSCA). There is no ‘appeal’ as such against an award before a court with full power of review as to the findings of fact and law.

The Swiss Federal Supreme Court has exclusive jurisdiction to hear applications for the setting aside of international arbitral awards rendered by arbitral tribunals seated in Switzerland. This exclusive jurisdiction is a key feature under Swiss law: there is only one level of court review and that is before the highest court of Switzerland. Moreover, the Swiss Federal Supreme Court interprets restrictively the grounds to set aside awards, explained below, and therefore would only set aside an international award under very limited circumstances. Statistically, only around 7 per cent of challenged awards have been set aside since 1989.

The grounds to set aside final and partial awards are provided in article 190(2) of the PILA: (i) improper constitution of the arbitral tribunal; (ii) incorrect ruling on jurisdiction; (iii) decision beyond the claims submitted to the arbitral tribunal or failure to decide a claim; (iv) violation of the right to be heard or equal treatment of the parties; and (v) violation of Swiss public policy. Article 190(3) of the PILA provides that preliminary awards can also be annulled on the grounds of improper constitution of the arbitral tribunal and incorrect ruling on jurisdiction. This list of grounds to set aside an award is exhaustive.

According to article 77 of the SFSCA, the procedure for setting aside an arbitral award is governed by the provisions of the Swiss Federal Supreme Court Act regarding applications for judicial review in civil matters, except for the following articles: 48(3), 90 to 98, 103(2), 105(2), 106(1) and 107(2) of the SFSCA. The formal and substantive requirements for a setting aside application provided in the SFSCA must be strictly followed, failing which the Swiss Federal Supreme Court will declare the application inadmissible and not examine the application on its merits.

The setting aside application must be submitted in one of the official languages of Switzerland – French, German or Italian. While the Swiss Federal Supreme Court may request a translation of the award, this is usually not the case when it is drafted in English. The Draft currently being debated in the Swiss Parliament also proposes that briefs can be submitted to the Swiss Federal Supreme Court in English (article 77(2bis) of the SFSCA as modified by the Draft), although the recent debates before the Swiss Parliament reveal that this proposal is not widely accepted. The party seeking annulment of the award must file its written application within 30 days of notification of the award, following which the Swiss Federal Supreme Court will require the applicant to provide security for the court costs within the usual time limit of 20 days. The Swiss Federal Supreme Court will then verify that the application is admissible and not patently unmeritorious, and then communicate the application to the arbitral tribunal and the opposite party and invite them to file comments. There are usually two exchanges of briefs among the parties, though further exchanges are not excluded. Thereafter, the Swiss Federal Supreme Court usually renders its decision within four to six months after receipt of the application to set aside the award, first in the form of a summary order, with the reasoning communicated later.

To increase the user-friendliness of the PILA, the Draft proposes stating the time limit of 30 days for challenging an award explicitly in the PILA (article 190(4) of the Draft).

Another salient feature of Swiss arbitration law is that the parties that have no domicile, habitual residence or place of business in Switzerland may, according to article 192(1) of the PILA, waive in advance their right to challenge the award in its entirety or limit the challenge to one or several of the grounds listed in article 190(2) of the PILA. Such a waiver must be explicit and must express the clear intention of the parties to waive the action for setting aside the award. Such a waiver is, however, not valid within the realm of sports arbitration, as confirmed by the Swiss Federal Supreme Court in its famous Cañas decision of 2007 (SFSC Decision 133 III 235 of 22 March 2007).

While not a setting aside proceeding per se, the Swiss Federal Supreme Court has also admitted the revision of awards, whereby the Swiss Federal Supreme Court may revoke an award in the same way as Swiss Federal Supreme Court judgments may be revoked under articles 123, 124(1)(d) and (2)(b), 126 to 128 of the SFSCA. The revision of an award is only possible under two circumstances: (i) when criminal proceedings establish that, by the commission of a crime, the arbitral decision was influenced to the detriment of the applicant; or (ii) when the applicant learns of important and cogent evidence that it could not have discovered and produced during the arbitration proceedings and that would have been likely to change the tribunal’s decision.

The party seeking a revision of an award must file its petition with the Swiss Federal Supreme Court within 90 days of becoming aware of the ground for the revision from the date of discovery and in any event within the absolute deadline of 10 years from the date on which the award has become final and binding, except if a criminal offence is the ground for revision, in which case the absolute deadline of 10 years does not apply. When the Swiss Federal Supreme Court grants a petition for

revision, it annuls the award and remits the matter to the same arbitral tribunal for a new ruling, or to a newly constituted tribunal. Such a remedy is of extraordinary nature and rarely successful. Since 1992, the Swiss Federal Supreme Court has only upheld a petition for revision on three occasions.

The Draft includes a comprehensive provision in article 190a of the PILA regarding the revision of awards with three alternative grounds for the revision of an arbitral award: (i) when a party subsequently discovers significant facts or decisive evidence that it could not submit in the earlier proceedings despite applying the required due diligence; (ii) in the event that criminal proceedings have established that the arbitral award was influenced to the detriment of a party by a criminal act; and (iii) in the event that a ground to challenge an arbitrator is discovered only after an award is rendered and if no other appellate remedy is available.

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Chapter 12 of the Swiss Private International Law Act (PILA) regulates international arbitration, defined as arbitral proceedings seated in Switzerland where, at the time of the conclusion of the arbitration agreement, at least one of the parties did not have its domicile or habitual residence in Switzerland. The resulting award, an international Swiss award, must be distinguished from a domestic Swiss award. This is the case when both parties have their domicile or habitual residence in Switzerland and the domestic arbitration proceedings are governed by Part 3 (articles 353 to 399 of the CCP).

International Swiss awards are considered “final” under article 190(1) of the PILA, which is understood to mean that they have the effect of a final and enforceable court judgment and thereby enjoy automatic enforceability. In the rare case in which the parties to the arbitration agreement have expressly agreed to waive some or all grounds for annulment pursuant to article 192(1) of the PILA Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) will be deemed applicable to the resulting award, pursuant to article 192(2) of the PILA. Such waiver is available, however, only where none of the parties has its domicile, habitual residence, or a business establishment in Switzerland.

Domestic Swiss awards, like international Swiss awards, have the effect of a final and enforceable court judgment pursuant to article 387 of the Swiss Code of the CCP. They are, therefore, immediately enforceable. Nevertheless, a party may request the competent Swiss court at the arbitral seat to certify the enforceability of such awards, pursuant to article 386(3) of the CCP and article 193(2) of the PILA. While purely optional, considering the immediate enforceability of such awards, the “certificate of enforceability” shall be requested at the High Civil Court of the Canton in which the arbitral tribunal had its seat as per article 356(1)(b) of the CCP for domestic Swiss awards, a rule that has been considered applicable by analogy by some authors for international Swiss awards.

With regard to international awards rendered in a seat outside Switzerland (ie, foreign arbitral awards), their recognition and enforcement are governed directly by the New York Convention, pursuant to article 194 of the PILA, even in the event the country of the seat is not a contracting state to the New York Convention. The New York Convention is directly applicable as Swiss law. Moreover, Switzerland has signed a number of bilateral treaties (in particular with Germany, Sweden, Austria, Belgium, Italy, Liechtenstein, the Czech Republic and Slovakia) that cover arbitral awards.

In addition to being a party to the New York Convention, Switzerland is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or Washington Convention), which entered into force for Switzerland on 14 June 1968. The Protocol on Arbitration Clauses of 24 September 1923 (the Geneva Protocol) and the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 (the Geneva Convention), of which Switzerland is a party, both ceased to have effect between contracting states of the New York Convention the moment the contracting states became bound by the treaty, as per Article VII(2) of the New York Convention.

Switzerland has signed more than 140 bilateral investment treaties (BITs) and other treaties containing investment provisions (the most recent ones being the European Free Trade Association (EFTA) (of which Switzerland is a member of) – Indonesia Economic Partnership Agreement of 2018 and the EFTA–Ecuador Free Trade Agreement of 2018), most of which are currently in force. To date, only Germany and China have signed more BITs than Switzerland.

The detailed procedures applicable to the enforcement of arbitral awards, including both those rendered in and those rendered outside Switzerland, are set forth in federal statutes. Enforcement of monetary claims is governed by articles 38 to 55 of the Federal Act on Debt Collection and Insolvency of 11 April 1889 (DEBA). Enforcement of non-monetary claims is governed by articles 335 to 346 of the CCP.

In view of Swiss case law and doctrine, Switzerland adopts a pro-enforcement bias to the New York Convention in practice. Swiss courts are very reluctant to review an arbitral tribunal’s determination on the merits and have interpreted narrowly the grounds on which enforcement may be denied.

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under article I(3) of the Convention?

Yes. The New York Convention entered into force for Switzerland on 30 August 1965. Upon accession, Switzerland had made a reciprocity reservation. However, the reservation was withdrawn on 23 April 1993 when Chapter 12 of the PILA, and article 194 thereof, entered into force.

Recognition proceedings

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

For recognition and enforcement of domestic and foreign arbitral awards granting monetary relief, a request for debt collection must be filed with the local debt collection office located, in general, at the award debtor's Swiss place of domicile or registered office, pursuant to articles 46–55 of the DEBA. If the award debtor objects to payment, then the creditor can request a competent court at the place of the debt collection proceedings (the competent court within a particular canton is determined by cantonal legislation) to set aside the debtor's objection in summary proceedings. However, the debtor can still appeal the court's decision to set aside the objection to a higher cantonal jurisdiction by filing a complaint in accordance with articles 319–327a of the CCP.

For recognition and enforcement of domestic and foreign arbitral awards granting non-monetary relief, under article 339(1) of the CCP, the award creditor must file its request with the court located (i) at the domicile or seat of the debtor, (ii) where the measures are to be taken, or (iii) where the decision to be enforced was rendered.

Though not necessary considering the direct enforceability of arbitral awards, for mere recognition (stand-alone exequatur) of foreign arbitral awards, a request must be filed with the court defined by article 339 of the CCP and the applicable cantonal legislation.

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The court will have jurisdiction over an application for recognition and enforcement if: (i) the debtor is domiciled or has its registered office in Switzerland; (ii) the debtor has a branch in Switzerland and the claim to be enforced is derived from the operations of that branch; (iii) the debt is secured by a pledge or mortgage and the chattel or the real estate is located in Switzerland; or (iv) the foreign debtor has assets located in Switzerland and the creditor has obtained an attachment order against such assets pursuant to articles 271–281 of the DEBA.

In fact, it is important to note that a recognition and enforcement application can be filed at the same time as an attachment application, a very effective measure to limit the debtor's rights of disposal of the attached assets during the course of the enforcement and recognition proceedings. In such a case, the enforcement and recognition of the foreign arbitral award is assessed on a preliminary basis in the attachment proceedings. The attachment procedure is explained at question 28.

For the purposes of mere recognition proceedings, the applicant need not identify assets in Switzerland.

8 Are the recognition proceedings in your jurisdiction adversarial or ex parte?

Recognition proceedings in Switzerland are adversarial.

9 What documentation is required to obtain the recognition of an arbitral award?

An application for recognition of a foreign arbitral award must be accompanied by the following documents, as per article IV of the New York Convention: the duly authenticated original award, or a duly certified copy thereof (article IV(1)(a)); the original of the arbitration agreement or a duly certified copy thereof (article IV(1)(b)); and translations of the award and the arbitration agreement into one of the official languages of Switzerland: German, French or Italian (article IV(2)). The translation can be done by an official or sworn translator or by a diplomatic or consular agent depending on the canton, as explained in question 10.

The Swiss courts, in general, do not take a formalistic approach to these requirements. For example, if the award is rendered in English and the particular Swiss court is comfortable with using English, the court might not require a translation into one of the official Swiss languages. Furthermore, authentication of the award will not be required if the award debtor does not dispute its authenticity.

10 If the required documentation is drafted in another language than the official language of your jurisdiction, is it necessary to submit a translation together with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

As noted in response to question 9, Swiss courts may dispense with the requirement of submitting the award and the arbitration agreement in an official Swiss language in accordance with article IV(2) of the New York Convention. According to Swiss legal scholars, the Swiss enforcement court must accept a translation of a foreign award into any of the three official languages (German, French or Italian), even if the translation is not in the official language of the enforcement court.

Rules on authentication and certification vary from canton to canton. Some cantons provide for sworn translators; other cantons authorise public notaries to certify translations as to their correctness; in yet other cantons, the court may appoint a translator to prepare a translation. Swiss consular and diplomatic agents can also certify translations. Consistent with the less formalistic approach of Swiss courts, in general, it is only necessary that the consular agent certify the correctness of the first and last page of the translation of an arbitral award, including the particulars of the parties and the dispositive part of the award.

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An application to a Swiss debt collection office to enforce a monetary award must be accompanied by a maximum filing fee of 400 Swiss francs for a claim over 1 million Swiss francs. If the debtor files a formal opposition, the applicant must pay a maximum court fee of 2,000 Swiss francs to commence summary court proceedings. Other costs may apply depending on the complexity of the case and the applicable legislation of the canton in which the enforcement is sought. It is also important to note that any claims before a Swiss debt collection office must be formulated into Swiss francs. Thus, any claims in a foreign currency must be converted into Swiss francs at the exchange rate on the day on which the request is submitted (article 67(1)(3) DEBA).

12 Do courts recognise and enforce partial or interim awards?

Swiss courts recognise and enforce partial awards that decide on one or more prayers for relief or claims and finally resolve a part of the dispute. Such awards have res judicata effect.

In contrast, interim or preliminary awards, understood as decisions that clarify a preliminary issue, are not enforced but may be recognised. For example, a preliminary award by a tribunal in Switzerland upholding its jurisdiction has res judicata effect and will bind a court or tribunal later seized with the matter.

The determination of whether a decision constitutes an “award” depends not on the words used to describe it, but rather on the contents of the decision. Procedural orders and orders of provisional measures are not enforceable as awards, but costs awards are considered final decisions constituting awards. A settlement embodied in a “consent award” that finally resolves one or more of the claims may be recognised and enforced as an award.

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under article V of the Convention?

With respect to foreign awards, the grounds enumerated in article V of the New York Convention are the exclusive grounds on which a Swiss court may refuse recognition and enforcement, according to article 194 PILA. Swiss courts interpret these grounds restrictively. Even if one of the grounds is found to have been established, the Swiss courts have discretion to grant enforcement and recognition. In the past 20 years, enforcement has been denied in a very limited number of cases, evidencing Switzerland’s stance as an arbitration-friendly jurisdiction.

Regarding international Swiss awards, the available grounds for annulment are those provided for in article 190(2) of the PILA, which are largely similar to those under the New York Convention (see question 3 for a detailed overview).

14 What is the effect of a decision recognising the award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

There are three types of decisions recognising an award in Switzerland. First, it is possible to request from a competent court (defined by article 339 of the CCP and by cantonal legislation) a stand-alone exequatur decision declaring the recognition and enforceability of an award without further proceedings. Such a decision gives the award res judicata effect and makes the award immediately enforceable. Second, an award creditor may initiate execution proceedings for monetary or non-monetary relief without requesting a declaration of recognition and enforceability. In this case, exequatur is decided only as a preliminary question, does not appear in the operative part of the court’s decision, and lacks res judicata effect. Third, a party may combine its request for exequatur with execution proceedings.

A party may appeal the court's decision granting exequatur to the higher cantonal court and, if unsuccessful, may appeal to the Swiss Federal Supreme Court. The appeal, however, has no automatic suspensive effect on the decision on exequatur or the decision on execution.

A party may appeal the court's decision to set aside the debtor's objection in debt enforcement proceedings to the higher cantonal court and, if unsuccessful, to the Swiss Federal Supreme Court.

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

If exequatur is denied, a party may appeal to the higher cantonal court, and again to the Swiss Federal Supreme Court.

A court's decision granting the debtor's objection in debt enforcement proceedings may be appealed to the higher cantonal court and, if unsuccessful, to the Swiss Federal Supreme Court.

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The enforcement court has discretion to adjourn enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration, under article VI of the New York Convention. The award debtor must establish on a prima facie basis that the award is likely to be set aside, and that its request is not merely a dilatory tactic. The enforcement court may consider all relevant factors, including the likelihood of success of the annulment proceedings, although the award debtor's financial stability is not likely to be considered as a sufficient reason to stay enforcement.

Recognition proceedings, unlike enforcement proceedings, are not subject to adjournment in Switzerland, consistent with article VI of the New York Convention.

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The enforcement court may, at the request of the party seeking enforcement, and in line with article VI of the New York Convention, require the award debtor to post suitable security. The practice of courts regarding the ordering of security varies to a large extent from one canton to another. In principle, the security needs to be paid in cash or provided in the form of a bank guarantee issued by a Swiss bank.

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? In case the award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

An award that has been fully set aside at the seat of arbitration will, in general, be denied recognition and enforcement in Switzerland, consistent with article V(1)(e) of the New York Convention. Although current Swiss case law does not entirely exclude the possibility that an award that was set aside at the seat of the arbitration might be enforced under extraordinary circumstances, the Swiss courts have not been called upon to address such circumstances.

If an award has been partly set aside at the seat of the arbitration, and where the portion that is set aside is severable from the portion that has not been set aside, leading Swiss scholarly writing indicates that it is possible to obtain recognition and enforcement of the portion that has not been set aside.

If the award is set aside at the seat of the arbitration after a Swiss court has issued a decision recognising or granting enforcement of the award, scholarly writing supports the view that the award debtor may request cancellation of the decision granting enforcement, applying article V(1)(e) of the New York Convention by analogy.

Service

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of procedural documents issued during arbitral proceedings, including orders and awards, is to be effected according to the applicable, relevant rules chosen by the parties – be it directly or by reference to specific arbitration rules or decided by the arbitral tribunal.

If the seat of arbitration is in Switzerland and a party in Switzerland refuses to accept delivery of an international award, the arbitral tribunal may request judicial assistance under PILA, article 185. The Swiss court would apply CCP, articles 136–141.

Service of judicial documents in Switzerland (ie, documents issued within state court proceedings) is governed by CCP, articles 136–141. In general, service is effected through the court by means of registered mail and/or mail against return receipt or, upon agreement of the recipient, by electronic means. In addition, in case the recipient's domicile in Switzerland is unknown or service of process is impossible or impracticable, or the recipient has not named an agent for service of process, then service may be effected by publication in the official cantonal or federal gazette.

Swiss law does not contain provisions on service of extrajudicial documents.

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Service of procedural documents issued during arbitral proceedings, including orders and awards, is to be effected according to the applicable, relevant rules chosen by the parties – be it directly or by reference to specific arbitration rules – or decided by the arbitral tribunal.

If a party prevents service from being effected, the arbitral tribunal can request a Swiss court to proceed by way of judicial assistance in accordance with the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the Hague Service Convention) or the Hague Convention on Civil Procedure of 1 March 1954.

The provisions governing the service of judicial and extrajudicial documents on a defendant located outside Switzerland depend on the defendant's state of domicile.

Switzerland is party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and to the Hague Convention relating to civil procedure of 1 March 1954. If the defendant is located in a country not party to said Conventions and no bilateral treaty exists, the Swiss authorities apply the Hague Convention on Civil Procedure (as per article 11a(4), PILA).

Identification of assets

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several databases and publicly available registers that may be useful for identifying an award debtor's assets, as well as the status of a debtor. Some of the registers allow one to search by the owner's name. For example:

- The Swiss Land Registry provides public access to ownership details for identified properties and details of certain registered charges, and a person showing a legitimate interest may request additional information.
- The Swiss Car Registry, Ship Registration Office, and Maritime Navigation Registry Office provide ownership and other information regarding motor vehicles, inland ships, and deep-sea vessels and yachts sailing under Swiss flag, respectively.
- The Swiss Aircraft Registry provides information regarding Swiss registered aircraft, and it is possible to search by the owner's or holder's name.
- Trademarks, patents and designs are registered with the Swiss Federal Institute of Intellectual Property, and may be searched by the owner's name.
- Financial and auditing reports of companies listed in Switzerland are published on the website of the relevant exchange: the SIX Swiss stock exchange or the BX Berne eXchange.
- Information regarding individual debtors and corporations subject to debt enforcement or bankruptcy proceedings may be obtained from the debt collection and bankruptcy offices by certain persons demonstrating a legitimate interest.

- Ownership of certain tangible assets may be registered at the debt collection office where the acquirer of the asset is domiciled, and such records are publicly accessible.

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

An award debtor will not be compelled to disclose the existence and location of assets during attachment or enforcement proceedings.

Enforcement proceedings

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

As described in question 28, the courts may order the attachment of assets as an interim measure in Switzerland, including on an ex parte basis, pursuant to articles 271–281 of the DEBA. Usually, this consists of blocking bank account of financial institutions in Switzerland. There is also the possibility to request the compilation of an inventory, pursuant to article 162 DEBA. Once the inventory has been prepared by the debt collection office, the debtor cannot dispose of any of the assets listed in the inventory for a period of four months, thus effectively consisting as an interim measure. Alternatively, and only in the case of fraudulent or criminal acts, a creditor may request a freezing order under the Swiss criminal procedure law.

An award creditor may obtain interim measures against assets owned by a sovereign state, provided that the assets are not subject to immunity. For instance, the asset must not have been allocated to activities of the sovereign state in the exercise of its sovereign powers (*jure imperii*). (For more details, see question 34.)

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings ex parte?

The main interim measure against assets is an attachment order (articles 271–281, DEBA). An award creditor may seek an order of attachment on an ex parte basis. The procedures are described under question 28.

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The main interim measure against immovable property is an attachment order (articles 271 to 281, DEBA). Special regulations on enforcement against real estate will apply (eg, the Ordinance of the Swiss Supreme Court on the Enforcement on Real Estate).

26 What is the procedure for interim measures against movable property within your jurisdiction?

The main interim measure against movable property is an attachment order (articles 271 to 281, DEBA). In the context of enforcement against movable property, Switzerland has special legislation and is a signatory state to a number of specific conventions containing provisions on the seizure of and enforcement against movable property, including aircraft and ships.

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There is no specific procedure in place, but trademarks and patents registered with the Swiss Federal Institute of Intellectual Property may be seized according to normal attachment proceedings.

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings ex parte?

A party seeking enforcement may obtain a civil attachment order (freezing order) pursuant to articles 271–281 of the DEBA. Attachment proceedings may be conducted ex parte before a competent court at the award debtor's seat in Switzerland or where the assets are located. The requirements for an attachment depend on whether it is requested prior to, or after, issuance of an award.

At the pre-award or pre-judgment stage, a party seeking an attachment must establish prima facie that:

- (i) it has a mature and unsecured claim against the debtor;
- (ii) at least one of the statutory reasons under article 271(1)(1)-(5) DEBA is fulfilled, namely:
 - (1) the debtor has no permanent place of residence in Switzerland;
 - (2) the debtor is concealing its assets, absconding or making preparations to abscond in order to evade the fulfillment of its obligations;
 - (3) the debtor is traveling through Switzerland or belongs to the category of persons who visits fairs and markets and the creditor's claim is to be fulfilled immediately;
 - (4) the debtor does not have its residence or seat in Switzerland, and the claim has a sufficient connection with Switzerland or is backed by a signed acknowledgment of debt;
 - (5) the creditor holds a certificate of shortfall against the debtor;
- (iii) the debtor has assets located in Switzerland.

The condition of a sufficient link with Switzerland is often one of the main issues that arises in a civil attachment proceeding. Such a link will be found to exist when, for instance, the underlying agreement has been entered into or must be performed at least partially in Switzerland or when a payment must be made in Switzerland, or when the contract is subject to Swiss law or provides for Swiss jurisdiction.

Based on article 271(1)(6) of the DEBA, once an award or judgment confirming the claim has been issued (and in other cases determined by article 80(2) of the DEBA), it is not necessary to establish a sufficient link with Switzerland, and a party seeking an attachment need only establish prima facie that it has a mature and unsecured claim against the debtor and the debtor has assets located in Switzerland.

The assets and their location must be precisely indicated in the request. As a preliminary question, the judge will examine prima facie whether the formal and substantive requirements of the New York Convention are met.

Court fees for a civil attachment request are a maximum of 2,000 Swiss francs. The court may require the applicant to provide security. Documents produced by the applicant must be translated into the language of the specific court, either German, French or Italian, depending on the region of Switzerland. The court typically renders a decision within a day.

Once the attachment is granted, the debtor may file an objection with the judge within 10 days of the receipt of the attachment minutes, and an adverse decision on the objection may be appealed to the higher cantonal court, and then to the Swiss Federal Supreme Court. Such an objection or appeal will not, however, render the attachment ineffective during the course of those proceedings. If the attachment is granted and the debtor does not successfully challenge it, the award creditor must commence debt collection proceedings within 10 days, or the attachment order will lapse.

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

See questions 25 and 28.

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

See questions 26 and 28.

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See questions 27 and 28.

Enforcement against foreign states

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Switzerland has not enacted legislation specifically governing recognition and enforcement of arbitral awards against foreign states. In general, Switzerland applies the doctrine of restricted immunity of states, whereby the foreign state generally enjoys immunity from claims arising out of activities performed in the exercise of sovereign authority (*jure imperii*). Activities performed by the foreign state of a commercial nature (*jure gestionis*) do not generally enjoy immunity.

Switzerland is an early signatory to the 1972 European Convention on State Immunity, and ratified the United Nations Convention on Jurisdictional Immunities of States and their Property on 16 April 2010 that also regulates state immunity

questions. The latter Convention, which codifies the principle of restricted immunity, is not yet in force, as it has yet to be ratified by 30 countries.

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Since Switzerland is a party to the European Convention on State Immunity of 16 May 1972, service of judgments and of documents by which proceedings are instituted is governed by article 16 of the Convention, which provides that service is deemed to have been effected by the receipt of such documents by the Ministry of Foreign Affairs.

Service of documents on other foreign countries not party to the Convention would have to be effected in accordance with the laws of the relevant foreign state.

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

As a preliminary comment, under article 177(2) of the PILA, states and state entities cannot assert immunity from the jurisdiction of an arbitral tribunal or contest their capacity by invoking the state's own laws.

The fact that a state has entered into an arbitration agreement does not, by itself, allow the award to be executed against the foreign state's assets. There are three conditions that must be fulfilled for the award creditor to execute against state assets when the state is a debtor: (i) the claim to be enforced arose from an act performed in a commercial capacity (*acta jura gestionis*); (ii) there is an "appropriate connection" between the legal relationship giving rise to the claim and Switzerland; and (iii) the assets of the state against which enforcement is sought are neither allocated/earmarked to nor intended for the state's sovereign activities, pursuant to DEBA, article 92(1)(11).

In a recent decision dated 7 September 2018, the Swiss Federal Supreme Court refused the enforcement of a foreign arbitral award against a state due to the lack of 'appropriate connection' and listed the following elements as qualifying to create an 'appropriate connection' with Switzerland: (i) an underlying claim that derives from an obligation established or to be performed in Switzerland; or (ii) Switzerland is the place of performance (SFSC Decision 144 III 411 of 7 September 2018). It is not sufficient, however, that a debtor has assets or the claimant is domiciled in Switzerland.

If it comes into effect, the United Nations may change Swiss law by restricting parties' ability to seek interim relief against sovereign assets, and may change the presumption that sovereign immunity only covers monetary assets that have been earmarked for public purposes.

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

A foreign state may waive immunity from execution. Where a state expressly and without reservation waives execution immunity upon entering into an agreement, even the state's assets being used for governmental purposes will become subject to execution, except for certain classes of assets, such as military assets or an embassy building.



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Dr Franz Stirnimann Fuentes is a partner in Froriep's Geneva office who focuses his practice on international arbitration and litigation as well as Swiss commercial law.

Dr Stirnimann has acted as counsel and arbitrator (chair, party-appointed, sole) in well over 50 international arbitrations (ICC, ICC, ICSID, Swiss Rules, SCC, DIS, LCIA, UNCITRAL and ad hoc), commercial as well as investor-State, and governed by various procedural and substantive laws. Several of those cases relate to transactions in Latin America or Spain. He also regularly acts as counsel in related proceedings before Swiss courts, including the Swiss Supreme Court.

Dr Stirnimann is a fellow of the Chartered Institute of Arbitrators (FCIArb) and is listed in the panel of arbitrators of a number of arbitral institutions (ICC, SCAI, LCIA, WIPO, CIMA, KLRCA, etc.). He is ranked by Who'sWho Legal International, as well as Chambers Global, Chambers Europe and Expert Guides, among others, for arbitration and dispute resolution.

He specialises in disputes relating to international joint ventures, M&A, shareholders, manufacture, licensing/IP, sales and investment disputes in the energy, mining, aviation, telecommunications, construction, infrastructure and finance sector. He also regularly acts as transactional counsel in these areas.

Dr Stirnimann, who is of Swiss and Latin American origin, is fluent in English, German, Spanish and French, and also works in Portuguese and Italian. He is both civil and common law trained and admitted to practise in Geneva, England & Wales, and New York. He holds a PhD from the University of Zurich, an LLM from Georgetown University and a JD from the Universities of Fribourg and Durham. He is a regular speaker and author of dozens of publications on arbitration-related topics and has been a lecturer teaching arbitration at a number of Swiss and Latin American universities.



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Jean Marguerat is a partner at Froriep in Geneva and specialises in international arbitration and international commercial litigation.

He has been involved in more than 70 international arbitration proceedings (ICC, Swiss Rules, CAS, VIAC, LCIA, UNCITRAL, DIA and ad hoc) acting in the capacity of both counsel and arbitrator, as well as legal expert. These proceedings involved sale of goods (including commodity trading), distribution, construction (including marine works), joint ventures, M&A and sport-related disputes.

Furthermore, he regularly acts as counsel in Swiss court proceedings, in particular with an international dimension (attachment proceedings, recognition and enforcement of foreign court decisions and arbitral awards, challenge of arbitral awards, etc.). Mr Marguerat is a member of several professional associations including the Swiss Arbitration Association (ASA, Co-Chair of the Geneva Group), the London Court of International Arbitration (LCIA), the Spanish Arbitration Club (CEA - Vice-President of the CEA Swiss chapter) and The German Institution of Arbitration (DIS). He is listed in the panel of arbitrators of a number of arbitral institutions (ICC, LCIA, WIPO and the Court of Arbitration of Madrid (CAM)). He is ranked by Who's Who Legal International, as well as Chambers Europe and Expert Guides, among others.

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He studied law and political science at the University of Granada (2011) with exchanges at the University of California in Berkeley and the University of Geneva and was admitted to the Spanish Bar in 2013. He also holds an LL.M. in International Dispute Settlement (MIDS) from the University of Geneva and the Geneva Graduate Institute (2015).

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Dr Reardon was previously an associate in a global law firm based in Washington. Prior to moving to the United States, he worked as Special Assistant to the President of the Swiss Competition Commission, and with a boutique law firm in Geneva, where he worked on a variety of corporate and litigation matters.

He regularly publishes in his fields of work, particularly in antitrust and complex litigation, and also speaks and gives lectures in these areas.

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Froriep is one of Switzerland's leading law firms, with around 60 lawyers and offices in Zurich, Geneva and Zug, as well as in London and Madrid, serving clients seeking Swiss law advice.

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