30. IPRs arbitration in Switzerland

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1. REGULATORY FRAMEWORK FOR ARBITRATION IN SWITZERLAND

As in most jurisdictions, Switzerland distinguishes between domestic and international arbitration in determining the *lex arbitri*, the applicable law at the seat of the arbitration. Domestic arbitration is regulated in Part 3 of the Swiss Civil Procedure Code (CPC)[1] and international arbitration is regulated in Chapter 12 of the Swiss Private International Law (PILA).[2]

By default, the domestic arbitration rules of the CPC apply when the arbitral tribunal is based in Switzerland and PILA does not apply.[3] PILA applies when the arbitral tribunal has its seat in Switzerland and at least one of the parties has its domicile, its habitual residence, or its seat outside of Switzerland at the time the arbitration agreement was concluded.[4] Correspondingly, in Switzerland the domicile of the parties and not the international nature of a dispute decide whether an arbitration is considered domestic or international. However, whether for domestic or international arbitration, the parties are free to choose either the CPC or PILA to rule their arbitration if they wish.[5] The differences in *lex arbitri* between the CPC and PILA are relatively few, and for the purposes of this chapter, we assume international arbitration governed by chapter 12 of PILA.[6]

Chapter 12 of PILA is considered as independent from the rest of the PILA.[7] The Chapter consists of merely 24 articles and focuses on the essentials, giving the parties broad discretion and autonomy in choosing their own procedural rules. The fundamental principle of party-driven proceedings and autonomy is held high, yet court assistance is available if desired. For example, Art. 179 PILA provides for assistance in constituting the arbitral tribunal, Art. 180b PILA for the challenge of arbitrators, and Art. 183 and Art. 184 PILA for interim measures and the taking of evidence. Switzerland has ratified the New York Convention on the

[1] SR 272 Swiss Civil Procedure Code of 19 December 2008 (Civil Procedure Code, CPC), available at <https://www.fedlex.admin.ch/eli/cc/2010/262/en> in German, French, and Italian with legal force, and for information only in Rumansh and English.

[2] SR 291 Federal Act on Private International Law of 18 December 1987 (PILA), available at <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> in German, French, and Italian with legal force, and for information only in English.

[3] Art. 353(1) CPC.

[4] Art. 176(1) PILA.

[5] Art. 353(2) CPC and Art. 176(2) PILA.

[6] See e.g. Andreas Furrer, Daniel Girsberger and Irma Ambauen, in: Andreas Furrer, Daniel Girsberger and Markus Müller-Chen (eds.), *Internationales Privatrecht: Art. 1-200 IPRG* (4th ed., Schulthess 2023), at Art. 176 ff.

[7] Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (4th ed., Stämpfli 2021), at 30.

Recognition and Enforcement of Foreign Arbitral Awards[8] and the Swiss courts will assist in the enforcement of foreign arbitration awards according to Art. 185a PILA.

International arbitration awards can be challenged only at one appeal instance – the Swiss Federal Supreme Court.[9]

Chapter 12, PILA applies to ad hoc and institutional arbitration. Among the more important institutional rules with a specific link to Switzerland or intellectual property are the Swiss Arbitration Centre Rules of International Arbitration[10] (formerly Swiss Chambers' Arbitration Institution (SCAI) Rules, or 'Swiss Rules'), the World Intellectual Property Office (WIPO) Arbitration Rules of the WIPO Arbitration and Mediation Center in Geneva and Singapore,[11] the Institution for IT and Data Dispute Resolution (ITDR) in Zurich,[12] and the Court of Arbitration for Sport (CAS) in Lausanne.[13]

2. GENERAL ARBITRABILITY OF INTELLECTUAL PROPERTY DISPUTES

Art. 177(1) PILA states that '[a]ny claim involving an economic interest may be submitted to arbitration'. This article is broad and broadly interpreted. The main obstacle to arbitrability in Switzerland would be a decision that is against public policy and that could be set aside on this basis, according to Art. 190(2)(e) PILA.

Even though Art. 109 PILA addresses which court has exclusive jurisdiction regarding Swiss intellectual property rights in an international dispute, the article is not to be understood to limit the application of arbitration to intellectual property.[14] Likewise, note that the Lugano Convention 1988[15] on the jurisdiction, recognition, and enforcement of the decisions in civil matters and trade matters between Switzerland and the European Community does not apply to arbitration.[16] Accordingly, arbitral tribunals can arbitrate on validity and infringement of Swiss intellectual property rights, including registered rights and copyright.[17] Nevertheless, this does not go as far as allowing a decision to grant or enter a registered right at the Swiss Federal Institute of Intellectual Property (IPI).[18]

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8 Art. 194 PILA.

9 Art. 191 PILA.

10 See <https://www.swissarbitration.org/>.

11 See <https://www.wipo.int/amc/en/>.

12 See <https://itdr.ch/>.

13 See <https://www.tas-cas.org/>.

14 Frank Vischer and Nicolas Mosimann, in: Markus Müller-Chen and Corinne Widmer Lüchinger (eds.), *Zürcher Kommentar zum IPRG - Band II - Art. 108a-200, Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987* (3rd ed., Schulthess Juristische Medien AG 2018), at Art. 109 IPRG para. 17.

15 See <https://www.fedlex.admin.ch/eli/cc/2010/801/de>.

16 Art. 1(2)(d) LugC, SR 0.275.12, <https://www.fedlex.admin.ch/eli/cc/2010/801/de>.

17 Christian Oetiker, in: Markus Müller-Chen and Corinne Widmer Lüchinger (eds.), *Zürcher Kommentar zum IPRG - Band II - Art. 108a-200, Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987* (3rd ed., Schulthess Juristische Medien AG 2018), at Art. 177 IPRG para. 36; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland* (above n. 7), at 75.

18 Id.

Concerning foreign intellectual property rights, these are similarly arbitrable under Art. 177(1) PILA. However, because foreign jurisdictions and intellectual property registers may or may not recognize or enforce such a decision, the decision may have an *inter partes* effect only, or even not be enforceable elsewhere.

3. PATENT ARBITRATION

Patent arbitration disputes commonly concern license agreements, for example the scope of the license regarding the right to sublicense, the geographical scope, etc. To this extent, patent arbitrations may be handled like any other contractual dispute. However, the more particular patent issues of patent infringement and patent validity mostly arise between parties that are not in a contractual relationship. In some infringement cases, the patent owner may also assert that the allegedly infringed patent is standard-essential, opening up the dispute to antitrust considerations. In the absence of a contract, the parties could agree to voluntarily arbitrate the dispute rather than to resort to state courts. In complex portfolio disputes involving multiple patents and multiple jurisdictions, this could be an efficient solution for sophisticated commercial parties in terms of cost, flexibility, and speed. On the other hand, the lack of arbitrability of patent validity in many jurisdictions will be unattractive for a respondent that is defending against alleged patent infringement. To date, it seems like most patent infringement and validity disputes are however not arbitrated.[19]

3.1 Arbitrability of Patent Infringement

Arbitrability is limited by the *lex arbitri* and public policy, including that some matters are under the exclusive jurisdiction of state courts. Patent infringement is generally considered a question of fact rather than law and is considered arbitrable in most jurisdictions. This is also true for Switzerland.[20]

3.2 Arbitrability of Patent Validity

Some jurisdictions consider questions of patent validity fundamentally non-arbitrable. The argument is that if the right can only be granted by the state, the privileges equally can only be withdrawn by the state. In other words, these jurisdictions consider patent validity to be a matter of exclusive jurisdiction of state courts and arbitration may not be used to circumvent it.[21]

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[19] See e.g., Christian Fischer, 'Patent Disputes Involving Standards – Is Arbitration a Solution?', in: Daniel Girsberger and Christoph Müller (eds.), *Selected Papers on International Arbitration, Vol. 6* (Stämpfli Verlag AG 2021).

[20] Christian Hilti, Alfred Köpf, Demian Stauber and Andrea Carreira, *Schweizerisches und europäisches Patent- und Patentprozessrecht* (4th ed., Stämpfli Verlag AG 2021), at 520; Andrea Mondini and Raphael Meier, 'Patentübertragungsklagen vor internationalen Schiedsgerichten mit Sitz in der Schweiz und die Aussetzung des Patenterteilungsverfahrens', in: sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht (2015), 289, 290.

[21] See, e.g., Fischer, 'Is Arbitration a Solution?' (above n. 19); Hilti, Köpf, Stauber and Carreira, *Schweizerisches und europäisches Patent- und Patentprozessrecht* (above n. 20), at 520.

But consider that a patent owner can transfer his economic rights and in state court can voluntarily limit or even revoke his patent. Given these rights, it is unclear why a patent owner should not be allowed to effectively assign the right to decide a patent's faith to an arbitral tribunal. If an arbitral tribunal were to invalidate a patent *inter partes*, this does not affect the public at large. If the arbitral tribunal were to invalidate a patent *erga omnes*, the public enjoys increased technology access and competition, thereby ultimately profiting. Conversely, allowing the enforcement of an invalid patent because its validity may not be questioned is not in the interest of the public. Correspondingly, it is by no means clear that the arbitrability of patent validity is against public policy. Even if patent validity were not directly arbitrable in the sense of a counterclaim by the respondent for patent infringement, it is likely that an arbitral tribunal would be able to address it as a preliminary question, effectively rendering an *inter partes* validity decision. The issue ultimately remains controversial in different jurisdictions but in Switzerland patent validity is considered arbitrable *erga omnes*.[22]

4. COPYRIGHT ARBITRATION

Most copyright arbitrations probably arise in the context of copyright license agreements and mostly concern regular contract issues.

In Switzerland, there are also several non-profit copyright-collecting societies: ProLitteris for rights to literature, photography, and visual art,[23] Société Suisse des Auteurs for authors' rights for stage and visual works,[24] Suisa for the rights in music, Suissimage for audiovisual works,[25] and Swissperform for neighboring rights.[26] These collecting societies negotiate royalties on behalf of their right holders with the Federal Arbitral Commission.[27] The commission is supervised by the Swiss Federal Office of Justice, while the collecting societies are supervised by the Swiss Federal Institute of Intellectual Property. The Federal Arbitral Commission comprises 25 elected members that form arbitral tribunals of five persons, whereby the president is assisted by two arbitrators each from the right holders and the right users.[28] The Federal Arbitral Commission is not a true arbitration tribunal, however, but rather a special kind of administrative court that tries to balance the different stakeholder interests in setting the roy-

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[22] There are, however, no court cases; Id.; Gerhard Frotz, 'Zur Reform des Urhebervertragsrechtes', in: Schweizerische Mitteilungen über Gewerblichen Rechtsschutz und Urheberrecht, issue 1/1976, at 38; Wei-hua Wu, 'International Arbitration of Patent Disputes' (2011) 10 J. Marshall Rev. Intell. Prop. L. 384, 391; Robert Briner, 'The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland', WIPO Publication No. 728, Worldwide Forum on the Arbitration of Intellectual Property Disputes, 3–4 March 1994, <https://www.wipo.int/amc/en/events/conferences/1994/briner.html>.

[23] See <https://prolitteris.ch/>.

[24] See <https://ssa.ch/en/>.

[25] See <https://www.suissimage.ch/>.

[26] See <http://www.swissperform.ch/>.

[27] See <https://www.eschk.admin.ch/>.

[28] SR 231.1 Federal Act on Copyright and Related Rights of 9 October (Copyright Act, CopA), available at <https://www.fedlex.admin.ch/eli/cc/1993/1798_1798_1798/en> in German, French, and Italian with legal force, and for information only in Rumansh and English; SR 231.11 <https://www.fedlex.admin.ch/eli/oc/2008/348/de>.

alties of the collecting societies.[29] Its decisions can be appealed at the Federal Administrative Tribunal.[30]

4.1 Arbitrability of Copyright Issues

Copyright disputes involving economic interest are in principle arbitrable in Switzerland.[31] Likely, this is also true for disputes involving the validity or scope of the copyright, given that even patent validity is considered arbitrable in Switzerland. Because copyrights are not registered or examined like patents, a copyright is not actively granted by the state and thus there is even less reason to prohibit its arbitrability from a public policy perspective. The question of whether the validity of a copyright is arbitrable *erga omnes* or *inter partes* is maybe less clear. Even though a copyright does have *erga omnes* effect, it is not a registered and published right. Correspondingly, contrary to the act of a patent grant that can be repealed *ex tunc* and *erga omnes*, there is no grant that can be attacked in the case of a copyright. For the copyright, the question of the copyright validity or scope typically comes up in a copyright infringement dispute or, rather academically, if a declaratory judgment of invalidity were sought. Because in such a case the declaratory judgment on the validity would only hold *inter partes*, this is also considered true for an arbitration.[32] Arbitration on copyright validity or infringement does not seem of great practical relevance.

To the extent that moral rights arising from a copyright are, by definition, not economic rights, i.e., inalienable and/or immutable, they are likely not arbitrable under Art. 177 PILA, which states that '[a]ny claim involving an economic interest may be submitted to arbitration'. Conversely, to the extent that some jurisdictions allow waivers of moral rights, it is likely that such a contractual agreement may be arbitrable. Again though, similar to patent validity, it is likely that an arbitral tribunal might nevertheless address non-arbitrable rights as preliminary questions.

5. DOMAIN NAME DISPUTES

Domain name disputes, i.e., disputes over whether or by whom a certain '.ch' or '.swiss' internet address may be used, center around the transfer of a domain name from one party to another, or the deletion of a domain name.

The main regulation is the Ordinance on Internet Domains (OID), based on the Telecommunications Act.[33] Based on the ordinance, the Swiss Federal Office of Communication has appointed the SWITCH foundation as the national top-level registrar. The foundation is independent and is overseen by a board representing various stakeholders such as cantons, universities, the Swiss Federation, the Swiss National Science Foundation, and others. While

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29 Reto M. Hilty, *Urheberrecht* (2nd ed., Stämpfli Verlag AG 2020), at 332.

30 See <https://www.bvger.ch/>.

31 Art. 177(1) PILA; Hilty, *Urheberrecht* (above n. 29), at 350.

32 Hilty, *Urheberrecht* (above n. 29), at 350.

33 Regulation: <https://fedlex.data.admin.ch/eli/cc/2014/701>; Act: <https://fedlex.data.admin.ch/eli/cc/1997/2187_2187_2187>.

SWITCH is neither party to nor directly involved in dispute resolution, its website nic.ch contains information about the dispute resolution process, including the rules of procedure.[34]

SWITCH, in turn, has appointed the WIPO Arbitration and Mediation Center as the dispute resolution provider. The procedural rules are an adapted version of the WIPO-initiated Uniform Domain Name Dispute Resolution Policy (UDPR) called the Rules of Procedure for Dispute Resolution Procedures for .ch and .li domain names (RPDR).[35]

The domain name resolution process at WIPO for Swiss domains is a form of non-binding arbitration in the sense that either party can take the dispute to an appropriate state court at any time,[36] leading necessarily to the termination of the proceedings. Even after a decision has been rendered, the parties have a 20-day window[37] to take the dispute to court, typically to the courts of Zurich.[38] Correspondingly, this dispute resolution process is a quick and cost-effective first step that probably suffices in many nuisance cases of cybersquatting, etc., but may only be the first step in a dispute between sophisticated commercial parties.

Under the RPDR, a WIPO domain name dispute resolution action must be based on an infringement in a 'right in a distinctive sign' that could also be brought in a Swiss court.[39] This includes trademarks, business names registered in the commercial registers, personal names, geographical indications, and actions based on unfair competition law.[40]

For Swiss-registered businesses, a claim on a domain name can be based on the required exclusivity of the business name under the Swiss Code of Obligations.[41] It is worth mentioning that Switzerland is a signatory to the Paris Convention for the Protection of Industrial Property[42] and the protections afforded there can be asserted. For example, under Art. 8 of the Paris Convention, trade names of unregistered businesses are afforded protection even without an accompanying trademark. Correspondingly, a foreign trade name not registered in Switzerland will be afforded the same name protection as a domestic business.[43] An action based on trade names will center on the issue of whether there is a danger of confusion or association between the party's businesses, essentially whether it is a case of passing off. This may include a claim that the respondent is trying to profit from the claimant's business goodwill, or the question of whether a trademark is infringed.[44]

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34 See <https://www.nic.ch/terms/disputes/>.

35 See <https://www.wipo.int/amc/en/domains/cctld/ch/index.html>.

36 Art. 10 RPDR.

37 Art. 26(b) RPDR.

38 Art. 12(c)(ii) RPDR.

39 Art. 12 with Art. 1 RPDR.

40 SR 241 Federal Act on Unfair Competition of 19 December 1986 (Unfair Competition Act, UCA), available at <https://www.fedlex.admin.ch/eli/cc/1988/223_223_223/en> in German, French, and Italian with legal force, and for information only in English.

41 Art. 946 and Art. 951 CO, SR 220 Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations, CO), available at <https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en> in German, French, and Italian with legal force, and for information only in Romansh and English, in conjunction with Art. 29(2) CC, SR 210 Swiss Civil Code of 10 December 1907 (CC), available at <https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en> in German, French, and Italian with legal force, and for information only in Romansh and English.

42 See <https://www.wipo.int/treaties/en/ip/paris/>.

43 In conjunction with Art. 29(2) CC.

44 SR 232.11 Federal Act on the Protection of Trade Marks and Indications of Source of 28 August 1992 (Trade Mark Protection Act (TmPA), available at <https://www.fedlex.admin.ch/eli/cc/1993/274_274_274/en> in German, French, and Italian with legal force, and for information only in English.

6. SPORTS ARBITRATION AT THE CAS

Sports-related arbitration at the Court of Arbitration for Sport (CAS) in Lausanne is of practical importance in Switzerland.[45] Originally founded by the International Olympic Committee (IOC) based in Lausanne, the CAS is the dispute-resolution provider for many sports-related organizations, such as the International Federation of Association Football (FIFA). Many other international sports bodies have established themselves under Swiss law, probably at least partly because of the proximity to the IOC and the CAS. To ensure sufficient independence from the IOC, the CAS is administered and financed by the independent International Council of Arbitration for Sport (ICAS). Both ICAS and CAS are also associations and governed by Swiss law on associations.

The CAS hears cases that are of a commercial nature and sports-related.[46] This includes decisions taken by sports bodies established under Swiss law, as Swiss law allows members to challenge association resolutions.[47] Generally, the CAS deals with a very broad range of issues, including doping, media rights, sponsorships, player transfers, betting, and so on. In general, the CAS is an appeal instance to the internal dispute resolution mechanisms provided by each sports body. Because the CAS is in Lausanne and the seat of arbitration is fixed to Lausanne, Swiss *lex arbitri* applies.[48] The fixed seat in Lausanne is a peculiarity different from many other arbitration rules but presumably leads to more consistent jurisprudence. In the same vein, while previous CAS decisions are not binding on the CAS, it is common practice to refer to its case law. Most decisions are available online[49] as the appeal decisions are published by default, while ordinary proceedings are not. The venue and the materially applicable law, however, can be chosen by the parties.[50] The arbitral tribunal will, of course, always need to apply the relevant regulations of the concerned sports body. Another, often criticized, particularity of CAS arbitration is that the list of arbitrators available to the parties is closed and the list is controlled by the ICAS.

Note that for decisions that relate to EU competition law, it is important that the CAS closely follows the judgments of the European Court of Justice (ECJ) because competition law is considered part of public policy within the EU and thus subject to a public-policy enforcement challenge under the New York Convention.[51]

Since the Swiss PILA is applicable if at least one party is domiciled outside of Switzerland, CAS decisions can be appealed to the Swiss Federal Supreme Court.

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[45] See <https://www.tas-cas.org/>.

[46] R27 CAS Procedural Code, available at <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>.

[47] Art. 75 CC.

[48] SR 291 Federal Act on Private International Law of 18 December 1987 (PILA), available at <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> in German, French, and Italian with legal force, and for information only in English.

[49] <https://www.tas-cas.org/en/jurisprudence/archive.html>.

[50] R45 CAS Procedural Code.

[51] See, e.g., Case C 126/97 *Eco Swiss China Time Ltd. v Benetton International NV.* [1999] ECR I-3055, para. 39.

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