SWITZERLAND'S ROLE AS A HUB FOR INTERNATIONAL DISPUTES

Introduction

Situated in Western Europe, Switzerland is a land-locked alpine country that encompasses a territory of 41,285 square kilometers. Given its tiny size and mountainous topography, the country's prominent role in the domain of energy arbitrage is a phenomenon worthy of investigation.

Through this article, my intention is to provide guidance on the role that Switzerland has been playing within the realm of arbitration, as well as to elucidate the primary obstacles that energy arbitration has encountered in the recent period, particularly in the aftermath of the Ukrainian conflict.

Arbitration framework in Switzerland

Switzerland has long been a favoured venue for international arbitrations, with its reputation for neutrality being a significant factor in this preference. Despite the end of the East-West division, the arbitration-friendly environment in Switzerland remains a key consideration, particularly in light of the expedited set-aside proceedings before the Swiss Federal Supreme Court.

Swiss law makes a clear distinction between domestic and international arbitration. The regulations for international arbitrations are laid out in Chapter 12 of the Swiss Federal Private International Law Act (PILA), which has been in effect since January 1, 1989. The most recent update to PILA took place on January 1, 2021, with the revised Chapter 12 incorporating crucial aspects of the jurisprudence on international arbitration developed by the Swiss Federal Supreme Court (SFSC). This update has eliminated existing legal ambiguities and replaced references to other laws with standalone rules, resulting in a comprehensive set of procedural guidelines that are easy to understand and implement.

The revised PILA clarifies that its rules on international arbitral proceedings apply if at least one party to the arbitration clause was not resident or domiciled or had its usual place of residence in Switzerland at the time the arbitration clause was concluded. Previously, the SFSC only looked at the parties of the arbitral proceedings. Additionally, it is now explicitly regulated by law that arbitration clauses can be validly included in unilateral legal acts such as articles of association of corporations, trust deeds, or testamentary dispositions.

In general, any financial dispute can be arbitrated in Switzerland, regardless of the substantive law governing the matter or the parties' national law. This objective arbitrability is not a conflict of laws rule but a substantive rule of international private law. Excluded from arbitration are matters related to the determination of legal status, such as those arising from family law, insolvency law, and intellectual property. Certain actions in debt enforcement and bankruptcy proceedings are also non-arbitrable.

Under Article 177(2) of PILA, a state or an enterprise held by or an organization controlled by a state that is party to an arbitration agreement cannot invoke its own law to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement. Moreover, Article 178(1) of PILA stipulates that the arbitration agreement must be made in writing or by other means of communication that permit it to be evidenced by text. This independent substantive rule of international private law avoids reference to domestic or foreign provisions on writing requirements. The agreement does not have to be signed, nor are there any requirements for an exchange of documents. Article 178(2) of PILA provides that an arbitration agreement is valid if it conforms to the law chosen by the parties or to the law governing the subject matter of the dispute, particularly the main contract, or to Swiss law. Finally, Article 178(3) of PILA stresses the autonomy of the arbitration clause in line with the separability principle.

Regarding the constitution of the arbitral tribunal, party autonomy is guaranteed, but in the absence of an agreement, the judge at the seat of the arbitral tribunal may be seized. An arbitrator may be challenged if they do not meet the qualifications agreed upon by the parties, if a ground for challenge exists under the parties' agreed-upon arbitration rules, or if circumstances exist that give rise to justifiable doubts as to their independence. The ground for challenge must be promptly notified to the arbitral tribunal and the other party. The updated PILA provides clarity on the appointment of members to an arbitral tribunal in cases involving more than two parties. If a party fails to appoint a member within the designated time, the state court may be asked to appoint a replacement member. In such cases, the state court may choose to appoint all members of the tribunal, or only those who were meant to be appointed by the defaulting party, at its own discretion.

Additionally, PILA provides parties with the autonomy to determine the arbitral procedure, either by direct agreement, by referencing arbitration rules, or by submitting the procedure to a procedural law of their choice. The arbitral tribunal can determine the procedure to the extent necessary if the parties do not agree, subject to the requirement of equal treatment of the parties and the right of both parties to be heard in adversarial proceedings. The arbitral tribunal may order provisional or conservatory measures; if these are not complied with, the tribunal can seek the assistance of a state judge. The tribunal is responsible for conducting the taking of evidence and determining the law applicable to the merits of the case. In addition, the Swiss legislator added a paragraph to Article 186 of PILA to allow the arbitral tribunal to decide on its jurisdiction, notwithstanding a similar case before a state court or another tribunal, unless there are reasons to stay the proceedings. The tribunal must decide on jurisdiction by preliminary award before any defence on the merits.

The arbitral award is made by a majority or by the chair alone, subject to a different agreement by the parties. The arbitral tribunal may render partial awards. An action for annulment of an award can be brought on limited grounds within 30 days of notification of the award, with the Swiss Federal Supreme Court being the only judicial authority and instance to decide on set-aside actions. The recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention of 1958, with Switzerland being a party to the Geneva Protocol of 1923 and the Geneva Convention of 1927.

A peculiarity of the Swiss arbitration framework is the Swiss Chambers' Arbitration Institution. This institutional arbitration system replaced the former international arbitration rules of seven Swiss chambers of commerce and industry in 2004. The Arbitration Court, which comprises experienced international arbitration practitioners, has been granted the power to supervise arbitral proceedings under applicable arbitration law. While the 2004 Swiss Rules were originally based on the UNCITRAL Arbitration Rules 1976, they were modified to suit institutional arbitration and reflect contemporary practice and comparative law.

Overall, the Swiss legal framework for arbitration is designed to provide parties with a flexible, efficient, and effective means of resolving disputes in an international context.

Investor-state disputes involving Switzerland

In recent years, Switzerland has also taken a leading role in investment disputes that have been submitted to international arbitration under the terms of bilateral investment treaties (BITs). Switzerland is a state party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which became effective for Switzerland on June 14, 1968. Switzerland has entered into a large number of bilateral investment treaties (BITs).

In general, the reasons why Switzerland plays a significant role in Investor-State disputes are manifold. Firstly, it is home to many well-respected arbitration institutions, including the Swiss Chambers' Arbitration Institution and the International Court of Arbitration of the International Chamber of Commerce. These institutions offer a neutral forum for the resolution of disputes between investors and states. Secondly, as explained in the previous section, Switzerland has a legal framework that is very supportive of international arbitration, which is a preferred method of dispute resolution for many investors. The country's legal system provides for the enforcement of foreign arbitral awards and is also known for being efficient and impartial in handling such cases. Thirdly, Switzerland has entered into many BITs and other international investment agreements (IIAs) with countries around the world. These agreements provide investors with protection and guarantees against discriminatory treatment, expropriation, and other forms of harmful actions by states. Finally, Switzerland's reputation as a politically stable and economically prosperous country also contributes to its attractiveness as a destination for foreign investment, making it a hub for international business and dispute resolution. All of these factors have made Switzerland an important jurisdiction for resolving Investor-State disputes.

There are fifteen cases awaiting resolution at the International Centre for Settlement of Investment Disputes (ICSID) concerning Switzerland, out of which four cases are related to the energy sector.

One of these disputes involves Switzerland as an investor in another country and Contracting Party to a BIT, and the other three disputes are relevant because they have Swiss legal advisers involved.

Switzerland as Contracting Party

The ICSID dispute in which Switzerland is directly involved as investor and Contracting party to the BIT is the case Alpiq AG v. Romania (ICSID Case No. ARB/14/28). In this case, Alpiq AG, a Swiss energy company, has filed a claim against Romania for violating its obligations under the Switzerland-Romania BIT. Alpiq AG

invested in two hydroelectric power plants in Romania through its Romanian subsidiary and claims that regulatory measures introduced by Romania resulted in a significant reduction in the power plants' profitability and value.

Swiss legal advisors in ICSID disputes

In the other cases, even though Switzerland is not a party to any of them, Swiss legal advisers are involved in the disputes: (i) the Glencore International A.G. v. Republic of Colombia (ICSID Case No. ARB/21/30) arose from a coal mining project in Colombia, where Glencore held a majority stake. Colombia imposed environmental regulations that allegedly rendered the mining project economically unfeasible. In this case, Swiss legal advisers represent Glencore, a company headquartered in Switzerland; (ii) the Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (ICSID Case No. ARB/15/31) is a dispute where Gabriel Resources, a Canadian mining company, and its subsidiary filed an investment dispute against the government of Romania arising from a gold mining project in Romania. Gabriel Resources claimed that Romania breached its obligations under the Canada-Romania BIT by failing to issue necessary permits and authorizations for the mining project and imposing regulatory measures making it financially unviable. In this case, a team of legal advisers, some of whom are from Switzerland, represent Gabriel Resources and its subsidiary; (iii) in the Lupaka Gold Corp. v. Republic of Peru (ICSID Case No. ARB/20/46), Lupaka Gold Corp., a Canadian mining company, represented by Swiss legal advisers, filed an investment dispute against the government of Peru arising from a mining project in Peru, where Lupaka had invested through its Peruvian subsidiary. Peru allegedly failed to issue certain permits and approvals for the project and imposed a moratorium on mining activities in the region where the project is situated, thereby breaching its obligations under the Canada-Peru Free Trade Agreement (FTA). Although this dispute may not be strictly related to the energy sector, as it involves a mining project in Peru, it may still be relevant to the energy sector since mining and energy are often closely connected industries. For example, mining companies may extract minerals that are used in energy production or provide fuel for energy generation, such as coal or uranium.

Finally, Switzerland's prominence in BIT disputes is due to its extensive BIT network, experienced law firms, neutral reputation, leading arbitration institution, and well-established legal system. These factors have made Switzerland a preferred destination for investors and a trusted partner in international investment disputes.

Energy arbitration case law in Switzerland

Although no arbitral institutions are exclusively focused on energy disputes in Switzerland, it is widely recognized that the current institutions, especially the Swiss Chambers' Arbitration Institution, offer satisfactory solutions for the energy sector. However, in order to strengthen Switzerland's position as a global litigation powerhouse, discussions are currently underway in the Zurich parliament to establish an international commercial court. Disputes concerning regulatory matters between state institutions and private parties are subject to administrative procedures and ultimately adjudicated in state courts. Disputes related to grid access, usage, fees, and electricity costs must first be brought before the ElCom. As a matter of principle, commercial disputes in the energy sector, such as those involving the construction and operation of facilities, plants, or supply agreements, are typically resolved through arbitration, as individual contracts often incorporate this method.

Despite the absence of specific procedures for energy disputes, Switzerland has experienced multiple disputes over the years. For example, in August 2021, the Society for Threatened Peoples (STP) and Swiss energy company BKW concluded an arbitration process within the framework of the National Contact Point of Switzerland (NCP) for the OECD Guidelines for Multinational Enterprises. The STP filed a complaint with the NCP in January 2020, alleging that BKW's participation in the "Fosen Vind" wind power plant in Norway violated the Indigenous community's rights by building on one of the most important reindeer winter pastures. The arbitration process, which lasted several months, resulted in BKW taking steps to protect Indigenous communities' rights and improve due diligence, including anchoring the right to Free, Prior, and Informed Consent (FPIC) in its internal guidelines, establishing break clauses that provide an exit mechanism from a business relationship in case of a violation of human rights standards, and setting up effective and low-threshold complaints mechanisms at the project level.

Challenges to energy arbitration

The unique features of the energy industry can create some procedural challenges in arbitration proceedings. Complex contracts and joint venture agreements involving multiple parties often require the consolidation of disputes. The commencement of multiple arbitrations, involving the same or similar facts

and legal issues, can present difficulties in consolidating the proceedings, absent the consent of the parties involved. While some arbitral institutions have introduced procedures for consolidation, many of these procedures can be imperfect and ineffective in real-world circumstances.

The energy industry is experiencing an unprecedentedly complex period, characterized by a multitude of challenges, including long-standing issues like climate change and perennial hazards such as state interference, as well as a host of immediate challenges that were difficult to anticipate just five or ten years ago. These include the fallout from the COVID-19 pandemic, severe supply chain disruptions, an oil and gas supply crunch due to the Ukraine-Russia conflict, and the imposition of windfall taxes on oil and gas companies by many jurisdictions, driven by intense national debt and cost-of-living pressures. The convergence of these forces has contributed to soaring oil prices in 2022, only two years after the industry grappled with historically low prices. The full impact of this volatility on the long-term energy transition remains unclear, but in the short term, we can anticipate a rise in resource nationalism in response to energy security concerns, price reviews as parties seek to rebalance their contracts, and turmoil in investment markets.

While high oil prices have historically led to fewer disputes, the supply crisis and political instability accompanying this price spike are likely to increase disputes significantly. An increasing range of areas can be expected to lead to further energy disputes in the years ahead, including decarbonisation and climate change, the Russian-Ukrainian conflict, and the resurgence of state intervention.

The energy transition represents the largest and most diverse area for disputes, as the sector confronts the harsh realities of decarbonisation. Corporate decarbonisation policies may result in a mismatch between commercial counterparties, with differing approaches to decarbonisation resulting in different attitudes towards appropriate operational adjustments to reduce emissions. This can create uncertainty in existing contracts regarding how to manage the risks and responsibilities associated with fundamental changes within supply chains and joint ventures. The pace of change required by the energy transition will inevitably give rise to further disputes as new partnerships are implemented, M&A transactions are completed at speed, and construction projects built on overly ambitious timetables. Governments may also become key players in climate-change related disputes as they seek to amend or terminate longer-term hydrocarbon contracts or address decommissioning and environmental liabilities.

The conflict between Russia and Ukraine has contributed to much of the current oil price volatility and supply chain constraints. Sanctions against Russia have had far-reaching effects, particularly on its oil and gas sectors, while a Russian decree requiring European importers to pay in roubles has further threatened access to gas. These pressures have led to parties seeking to rely on force majeure and material adverse change clauses or negotiate exits from affected projects and contracts. Companies may also be considering investment treaty protections to recover lost value against a background of uncertain dispute resolution mechanisms and enforcement options under contracts with Russian entities. These pressures have also stoked Western calls for an accelerated clean energy transition and are expected to drive more frenetic M&A activity in the medium term.

In this turbulent setting, there are many reasons for increased state involvement in the energy sector. The Russia-Ukraine conflict has prompted a renewed focus on energy security, while governments are evaluating the impact of increased public spending to combat COVID-19, inflationary pressures, and climate change. I anticipate increased state involvement in windfall profit taxes, cost audits and cost recovery disputes, indirect government pressure on existing projects, and decommissioning and other environmental liabilities. The energy industry is under significant pressure, and casualties and collateral damage are likely to be inevitable.

Conclusion

Switzerland endeavors to remain at the forefront of the arbitration landscape by regularly updating its arbitration legislation. The recent revision and modernization of Switzerland's international arbitration law further enhance its appeal as a hub for international arbitration. In particular, the ability to use English, which is the predominant language in international arbitration, before the Swiss Chambers' Arbitration Institution (SCAI) is a welcome development. This change is also a boon for energy-related disputes, which primarily involve foreign companies. Nevertheless, the energy sector poses various challenges both in the present and in the future. Indeed, in addition to the typical challenges that arise in arbitration, the energy sector confronts an array of risks on many fronts. Despite these risks and the attendant potential for disputes, arbitration seems well-prepared to handle them.

The energy industry is currently grappling with a multitude of persistent structural and immediate challenges. Although it is difficult to recall a time when it was subject to such systemic risk, it remains all the more important to closely monitor how the Swiss arbitration system will respond to the multitude of challenges it will be called upon to address.

Recommended readings

Here below you may find some suggested readings on the topic:

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Waincymer J., Procedure and Evidence in International Arbitration, 2012