# 16. 7 Reasons for Choosing Arbitration in a U.S. - Swiss Context

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Switzerland, about the size of a pinhead compared to the globe, is not only a primary hub for international arbitration. Far more, it headquarters a multitude of global players (Nestle, Novartis, Roche and many others) that, as other Swiss companies doing business abroad, are concerned of being sued in the U.S. based on the concept of "minimum contacts" and of being confronted with abusive and expensive U.S.-style discovery and multi-million jury awards.

In this context, it is noteworthy that when negotiating commercial contracts, the jurisdiction or arbitration clause – mostly placed at the very end of a contract – is often seen as a mere boilerplate issue.

Swiss-based companies must, quite to the contrary, consider the following factors, many of which have not found their way into publications, when choosing dispute resolution clauses in contracts with foreign, particularly U.S. business partners:

## 1. Exclude Jurisdiction of U.S. Courts in the First Place

In the international context, Swiss companies increasingly choose arbitration not only to bridge different legal systems but more recently to specifically avoid being sued before U.S. courts.

Swiss companies experienced that a forum selection such as "exclusive jurisdiction of the courts in Zurich" does not always shield them from being sued in the U.S. as U.S. courts historically disfavor forum selection clauses. That rule still applies after the Atlantic Marine case, recently decided by the U.S. Supreme Court[1)].

However, U.S. courts consistently show deference to arbitration clauses. It is noteworthy that under U.S. law, even issues that might not be arbitrable in a domestic transaction, may be covered by arbitration in an international transaction.

Quite strikingly, no publication explicitly recommends arbitration, particularly the Swiss arbitration hub, as an effective tool to exclude jurisdiction of U.S. courts in the first place.

## 2. Arbitrator Selection in Lieu of Jury Trials

Excessive awards rendered by U.S. juries are a nightmare of Swiss companies. Many wild and outrageous awards have been reported throughout the world, such as the famous Stella award.

Arbitration proceedings per se exclude jury trials. Much rather, the parties select arbitrators based on their knowledge and insight in the relevant commercial practices. When selecting a (party appointed) arbitrator, it is equally decisive to take into consideration the personal impetus the arbitrator enjoys based on his professional and academic standing and his rainmaker skills.

In the international context, where parties of different jurisdictions are involved, predictability of the judgment is generally increased by the selection of learned arbitrators. In a U.S.-Swiss context the parties can, by appropriate arbitrator selection, increase predictability of an award as compared to judgments rendered by U.S. courts in general and as compared to U.S. jury trials in particular.

Quite surprisingly, no publication explicitly recommends arbitration, particularly the Swiss arbitration hub, as an effective tool to exclude jury trials in general and frivolous jury awards in particular.

## 3. Exclude U.S.-Style Discovery and Related Sanctions

In the international context, Swiss companies increasingly seek to shield themselves against U.S.-style discovery. The U.S. discovery process is broad and wide-ranging: it may include "fishing expeditions", and requests may require the production of thousands or even millions of documents, particularly emails.

In international arbitration it is quite common to rely on the IBA Rules on the Taking of Evidence. The IBA Rules are designed to exclude "fishing expeditions" and limit production to documents identified in sufficient detail and that are "relevant and material to the outcome of the case" (Art. 3.3 a) and b) IBA Rules, the result under the ICC Rules is similar).

For Swiss companies that find themselves as defendants in U.S. litigation, violations to comply with discovery requests, on top, notoriously trigger draconic sanctions under U.S. law, particularly in case of failure to comply with a court order.

In arbitration proceedings, sanctions for not complying with discovery requests are not dealt with UNCITRAL Model Law. As for Switzerland, this principle applies generally, Swiss arbitral tribunals have no coercive powers. In U.S. international arbitration practice, tribunals may have the power to impose monetary (but not criminal) sanctions for refusal to obey a discovery order. International arbitral tribunals, including U.S., rather than imposing sanctions, more likely draw adverse infer-ences from a party's refusal to produce requested documents or witnesses.

It is remarkable that so far no mention was made that excessive discovery and excessive sanctions can best be avoided by choosing arbitration, preferentially by choosing the Swiss arbitration hub.

## 4. Arbitration in U.S. Consumer Disputes?

U.S. law generally permits and recognizes the validity of arbitration clauses in consumer disputes, subject to restrictions based on principles of unconscionability and due notice.

The U.S. Federal Arbitration Act (FAA) extends to disputes between merchants and consumers and there is nothing in the FAA that excludes consumer transactions from arbitrability. The U.S. Supreme Court has unambiguously upheld the validity of arbitration clauses and recently upheld a predispute arbitration agreement covering personal injury and wrongful death claims[2)].

Criticism and recent legislative proposals, such as the Arbitration Fairness Act of 2013, restricting consumer arbitration, have induced arbitral institutions to adapt their rules with the aim to conduct proceedings at reasonable cost, in reasonably

convenient locations, within a reasonable time and without delay, taking into account the right of each party to be represented by a spokesperson of their choosing. It is quite noteworthy that most versions of the proposed Arbitration Fairness Act exclude international arbitration agreements, confirming the deference given by U.S. courts to arbitration clauses in the international context.

It is therefore quite surprising that no voices have been raised and no publications can be found encouraging Swiss companies to make use of arbitral dispute resolution also in the context with U.S. consumer disputes.

## 5. Exclude Sanctions Under Art. 271 Swiss Criminal Code

In Switzerland, major legislation relating to sovereignty and secrecy, including articles 271 and 273 of the Swiss Criminal Code (SCC), was put into force in the 1930s in order to effectively protect the privacy and assets of Jews pursued by Gestapo agents.

Art. 271 SCC not only prohibits the service of process, but also the gathering of evidence on Swiss territory for use in foreign proceedings. The website of the U.S. Embassy to Switzerland warns U.S. attorneys that the gathering of evidence in Switzerland may trigger criminal liability under art. 271 SCC[3].

The cumbersome restrictions of art. 271 generally apply only if the parties end up with litigation before U.S. courts, as a result of choosing a forum selection clause. Quite to the contrary, if the parties agree to resolve disputes by way of arbitration, art. 271 SCC will have little or no impact. This is particularly true if the seat of arbitration is in Switzerland, but also if the seat and arbitration proceedings are conducted outside Switzerland.

## 6. Avoid Sanctions Under Art. 273 Swiss Criminal Code

Another “stumbling block” in international litigation is art. 273 SCC. This provision prohibits Swiss companies from disclosing third party related information in foreign court proceedings. In fact, information relating to third parties such as clients, suppliers and employees may generally be disclosed only if

- such third party explicitly consents to disclosure or if
- the opposite party seeks such third party related information by way of judicial assistance, i.e. through the channels of the Hague Evidence Convention.

Whether art. 273 SCC equally applies in international arbitration has not been decided or discussed so far, not even in the leading commentary of the Swiss Criminal Code. In any event, it seems safe to say that art. 273 SCC does not apply if the seat of the arbitration is in Switzerland. Thereby the parties avoid that the proceedings qualify as “foreign” proceedings in the first place.

Generally, it may be said that in transnational litigation, much more than in transnational arbitration, arts. 271 and 273 SCC are “show stoppers” or at least “stumbling blocks”. More specifically, it can be said that Swiss companies, if and when being sued before U.S. courts, will be exposed to sanctions under both art. 271 and art. 273 SCC, but not when choosing the Swiss arbitration hub for resolving disputes.

Quite strikingly, no specific publication has particularly addressed this crucial and decisive advantage of arbitration over litigation in the international context.

## 7. Other Reasons for Choosing Arbitration in a U.S. – Swiss Context

Additional obvious advantages of arbitration over litigation that are, other than the above, dealt with in many publications are the following:

- *Flexibility:* If one party is from Mars and the other from Venus, as inherent in U.S.-Swiss dispute resolution, then arbitration is an effective way to bridge cultural gaps. This aspect is not new. The Swiss-American Chamber of Commerce has issued Arbitration Rules particularly considering legal and cultural differences of business partners from common law and civil law countries[4].
- *Avoid publicity:* Confidentiality is often essential if business secrets of the parties are at stake. Particularly if the alternative to arbitration is litigation before U.S. courts where not only the judgments, but also legal briefs are available over the internet. However, confidentiality is not confidentiality. Art. 44 Swiss Rules of International Arbitration constitutes one of the most comprehensive regimes on confidentiality in arbitral proceedings.
- *Cost and time:* Historically, arbitration proceedings are an alternative expected to be more quickly and less expensive than crowded state courts and associated lengthy proceedings. By choosing arbitration, the parties may limit rights to U.S.-style discovery that can be extremely expensive and time-consuming.
- *Finality:* Finality of the arbitral award and limited recourse, respectively, are a main driver inducing parties to choose arbitration rather than litigation. International arbitral awards rendered in Switzerland are only subject to a limited appeal, directly to the Swiss Federal Tribunal. The success rate is approximately 7% only, and the average appeal duration is normally less than 6 months.
- *Enforcement:* Judgments rendered by state courts, either U.S. or Swiss, will not automatically be enforced by the courts of the other state, as there is no bilateral or multinational treaty on recognition and enforcement. Quite to the contrary, arbitral awards are, as a result of the New York Convention, widely enforceable throughout the world, presently in close to 150 countries.

In a nutshell: Swiss companies should seize every opportunity to choose arbitral proceedings, preferably the Swiss arbitration hub, whenever doing international business bearing a risk of minimum contacts with the U.S. Arbitration clauses are generally given deference by U.S. courts, even in case of dispute resolution between Swiss companies and U.S. consumers.

1) *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas,* 134 S. Ct. 568 (2013), 571 U.S. __ (2013)
2) *Marmet Health Care, Inc. v. Brown*, 132 S. Ct. 1201 (2012), 565 U.S. ___ (2012)
3) http://bern.usembassy.gov/obtaining_evidence.html
4) https://www.amcham.ch/members_interests/p_business_ch.asp?s=5&c=1

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