Peter Honegger

10 Reasons for Choosing Arbitration in a U.S. – Swiss Context

NKF Dispute Resolution Team

Swiss Arbitration – Practical Aspects and New Developments

NIEDERER KRAFT & FREY

Abbreviations

AAA	American Arbitration Association
AJP	Aktuelle Juristische Praxis, Zurich
Art.	Article
ASA	Swiss Arbitration Association
BBl	Official gazette of the Federal Government in Switzerland (Bundesblatt der Schweizerischen Eidgenossenschaft)
BGE	Official Collection of the Decisions of the Swiss Federal Supreme Court (= Swiss Federal Tribunal) (Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts)
BK	Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Bern
BSK	Basler Kommentar zum schweizerischen Recht
Bull.	Bulletin
CAS	Court of Arbitration for Sport (Lausanne)
CC	Swiss Civil Code of 10 December 1907 (SR 210)
CCP	Swiss Civil Procedure Code of 19 December 2008 (SR 272)
cf.	confer/compare
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (SR 220)
cons.	consideration
DEBA	Swiss Debt Enforcement and Bankruptcy Act of 11 April 1889 (SR 281.1)
Diss.	Dissertation (thesis)
e.g.	*exempli gratia* (= for example)
ed.	edition/editor
eds.	editors
esp.	especially
et al.	*et alii* (= and others)
et seq.	*et sequens/et sequentes* (= and the following)
FAA	U.S. Federal Arbitration Act
FSCA	Federal Supreme Court Act of 17 June 2005 (SR 173.110)
i.e.	*id est* (= that is)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, as adopted by the IBA Council on 29 May 2010

IBA	International Bar Association
ICAS	International Council of Arbitration for Sport
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration of 1 January 2012
Id.	*idem* (= the same)
IOC	International Olympic Committee
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
lit.	*litera/literae*
no.	number
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 10 June 1958)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PC	Swiss Penal Code of 21 December 1937 (SR 311.0)
PILA	Swiss Private International Law Act of 18 December 1987 (SR 291)
pKSG	Polish Bankruptcy and Reorganisation Act
PwC	PricewaterhouseCoopers AG
S.Ct.	U.S. Supreme Court
SFT [1A…]	Decisions of the Swiss Federal Supreme Court that are not included in the Official Collection of Decisions (BGE)
SJZ	Schweizerische Juristen-Zeitung, Zurich
SR	Official collection of the Federal Statutes in Switzerland, in systematic order (Systematische Sammlung des Bundesrechts)
Swiss Rules	Swiss Rules of International Arbitration of 1 June 2012
U.S.	United States
WADA	World Anti-Doping Agency
ZK	Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, Zurich
ZR	Blätter für Zürcherische Rechtsprechung, Zurich

XII. 10 Reasons for Choosing Arbitration in a U.S. – Swiss Context

By Peter Honegger*

Switzerland, about the size of a pinhead compared to the globe, is not only a primary hub for international arbitration.[563] Far more, it headquarters global players like Nestle, Novartis, Roche, UBS, Credit Suisse, Zurich Insurance, Swiss Re, ABB, Holcim, leading international sports federations like FIFA, IOC and UEFA, and increasingly became a global or regional hub for foreign multinationals such as Glencore, Transocean, Altria, Dow Chemical and Google.

Most of these global players and other Swiss companies doing business abroad are concerned of being sued in the U.S. based on the concept of "minimum contacts"[564] or "doing business",[565] respectively, and of being confronted with abusive and expensive U.S.-style discovery and multi-million jury awards, such as the recent USD 23.6 billion jury award rendered in 2014 in the "Florida Smoking Case". Cynthia Robinson, the widow of the deceased smoker and plaintiff winning the litigation, when being interviewed by CNN on the USD 23 billion jury award, answered:[566]

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* The author would like to thank Bernhard F. Meyer and Georg Friedli for reviewing the manuscript with sharp eyes and for giving valuable comments.

563 Livschitz Tamir, Switzerland – as Arbitration Friendly as It Gets, *supra,* pp. 9–11.

564 Born Gary B./Rutledge Peter B., International Civil Litigation in U.S. Courts, 5th ed., New York 2011, p. 116 *et seq.;* Fellas John, Transnational Commercial Litigation and Arbitration, Oceana Publications Inc., New York 2004, pp. 79–109; Kreindler Richard H., Transnational Litigation, A Basic Primer, Oceana Publications Inc., New York 1998, pp. 28–29.

565 The U.S. Supreme Court recently, in *Daimler AG v. Bauman,* 134 S. Ct. 746, 761 n. 19 (2014), substantially increased the requirement of U.S. *in personam* jurisdiction to an „at home" standard noting that only in an exceptional case can „a corporation's operation in a forum other than its formal place of incorporation or principal place of business … be so substantial and of such a nature as to render the corporation at home in that state."

566 http://edition.cnn.com/2014/07/19/us/florida-tobacco-verdict/ (last visited on 14 August 2015).

> "Fist I heard 'millions', I didn't know it was 'b', with a 'b', 'billions', and I still can't believe this."

In that 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 disfavour forum selection clauses.[567] That rule still applies after the Atlantic Marine case, recently decided by the U.S. Supreme Court.[568]

However, U.S. courts consistently show deference to arbitration clauses.[569] 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.[570] The Restatement of Foreign Relations, in the context with recognition of foreign judgments, says[571]:

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567 BORN/RUTLEDGE, *supra* footnote 564, pp. 464 *et seq.*

568 *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). But see also Restatement of the Law, Third, The Foreign Relations Law of the United States (St. Paul 1987), § 421 Comment h and Reporter's Note 6.

569 KREINDLER, *supra* footnote 564, pp. 36–37; RUBINO-SAMMARTANO MAURO, International Arbitration Law and Practice, 3rd ed., JurisNet, New York 2014, pp. 1426–1432.

570 *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S. Ct. 2449, 41 L.Ed. 2nd 270 (1974).

571 Restatement of the Law, Third, *supra* footnote 568, § 488 Reporter's Note 1.

> "Under United States law, however, even issues that might not be arbitrable in a domestic transaction may be covered by arbitration in an international transaction … Furthermore State or local statutes removing certain kinds of disputes, *e.g.*, those between a manufacturer and a dealer, from arbitration cannot prevail over an agreement to arbitrate that is covered by the New York Convention."

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.[572]

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: In 1992, Ms. Stella Liebeck, then 79, spilled a cup of McDonald's coffee onto her lap, burning herself. A New Mexico jury awarded her USD 2.9 million in damages.[573] In 2013, the most frivolous but successful lawsuit has been reported as follows: Ms. Merv Grazinski of Oklahoma City sued Winnebago because she set the brand new motorhome's cruise control to 70 while driving on the freeway and got up from the driver's seat to go make herself a sandwich. The vehicle crashed and overturned. The jury awarded her USD 1.75 million plus a new motor home. Winnebago actually changed their manuals on the basis of this suit.[574]

Arbitration proceedings *per se* exclude jury trials. Much rather, the parties select arbitrators based on their knowledge and insight in the relevant commercial practices. PwC's "International Arbitration Survey 2013: Corporate

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572 Bernhard F. Meyer has drawn my attention to the fact that he has been teaching this recommendation in the seminar of the Swiss-American Chamber of Commerce „USA Wirtschaftsrecht" the manuscript of which remained unpublished http://amcham.ch/events/p_past_events_ch.asp?year=2011 (last visited on 14 August 2015).

573 *See* www.stellaawards.com (last visited on 14 August 2015).

574 http://www.mclaughlinlawyers.com.au/McLaughlinAssociates888/Page/29789/Only+in+America!.aspx (last visited on 14 August 2015).

Choices in International Arbitration" showed the following three key factors companies consider when appointing an arbitrator.[575]

> "The most influential factors in the appointment of arbitrators were the individual's (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitral process; technical (non-legal) knowledge and language were also cited but were less influential."

However, 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 strikingly, 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 that has become (another) ultimate nightmare.

Liability cases in the U.S. are investigated by the parties and their lawyers (not by the judge). Pre-trial discovery is a technique by which each side in a civil litigation seeks, prior to trial, to obtain from the other side information useful

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575 http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf (last visited on 14 August 2014) pp. 5, 21, 22; see also http://www.pwc.com/gx/en/arbitration-dispute-resolution/ (last visited on 14 August 2015).

in establishing its position.[576] The 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. For Swiss companies that find themselves as defendants in U.S. liability litigation, the discovery process is not only burdensome, but also extremely expensive. On top, violations to comply with discovery requests notoriously triggers draconic sanctions under U.S. law, particularly in case of failure to comply with a court order.[577]

In international arbitration it is quite common to rely on the IBA Rules.[578] 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".[579]

In arbitration proceedings, sanctions for not complying with discovery requests are not dealt with in UNCITRAL Model Law, the FAA and the PILA. Gary Born states the principle:[580]

> "Nothing in the UNCITRAL Model Law, the U.S. FAA, the Swiss Law on Private International Law, or other leading arbitration statutes empowers arbitral tribunals to impose fines or other penalties on either parties or nonparties to an international arbitration."

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576 Barron William M./Kurtz Birgit, Litigation and Arbitration in the USA, Prozessführung und Schiedsgerichtsbarkeit in den USA, German American Chamber of Commerce Inc., New York 2009, pp. 35–42 and 133–142.

577 Art. 37 Federal Rules of Civil Procedure, see http://www.ilnd.uscourts.gov/LEGAL/frcpweb/FRC00040.htm (last visited on 14 August 2015) and https://www.law.cornell.edu/rules/frcp/rule_37 (last visited on 14 August 2015); Haydock Roger S./Herr David F./Stempel Jeffrey W, Fundamentals of Pretrial Litigation, 9th ed., West Publishing Co., St. Paul, MN, 2013, pp. 537 *et seq.*

578 http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited on 14 August 2015); see Meyer Bahar Valerie/Madonna-Quadri Martina/Bohnenblust Eva-Viola, Drafting the Arbitration Agreement, *supra* p. 32; Born, *supra* footnote 25, Vol. 1, p. 201.

579 Art. 3.3 a) and b) IBA Rules. The result under the ICC Rules is similar, *see* Craig W. Laurence/Park William W./Paulsson Jan, International Chamber of Commerce Arbitration, ICC Publication No. 594, 3rd ed., Oceana Publication Inc., Dobbs Ferry, New York 2000, pp. 450–456.

580 Born, *supra* footnote 25, Vol. 2, p. 2315, *see also* p. 2389. The same applies to the ICC Rules, *see* Craig/Park/Paulsson, *supra* footnote 579, p. 450.

As for Switzerland, this principle applies generally. Swiss arbitral tribunals have no coercive powers, but they can request (judicial) assistance of state courts with a view to gather evidence.[581] In Swiss international arbitration practice, compulsory discovery proceedings are hardly ever used. Much rather, the arbitral tribunal will take into consideration a party's refusal or failure to produce when weighting the evidence and it can draw adverse inference from such failure.[582]

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. A number of U.S. courts, such as in *Superadio v. Winstar Radio*, have upheld orders by arbitral tribunals imposing monetary sanctions on parties refusing to comply with discovery requests.[583] International arbitral tribunals, including U.S., rather than imposing sanctions or seeking the (judicial) assistance of state courts[584] to enforce discovery orders, more likely draw adverse inferences from a party's refusal to produce requested documents or witnesses.[585] CRAIG/PARK/PAULSSON state that U.S. courts have routinely upheld the right of arbitrators not to order any discovery whatsoever:[586]

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581 Art. 184 para. 2 PILA, art. 375 para. 2 CCP. Quite noteworthy, judicial assistance in evidence taking is given to locally seated tribunals only, but not to arbitral tribunals with their seats abroad. BERGER/KELLERHALS, *supra* footnote 1, para. 1370.

582 NATER-BASS GEBRIELLE/ROUVINEZ CHRISTINA, in: Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration, Commentary, 2nd ed., Zurich 2013, art. 24 para. 41.

583 *Superadio LP v. Winstar Radio Prods., LLC*, 844 N.E.2nd 246, 253 (Mass. 2001); BORN, *supra* footnote 25, Vol. 2, pp. 2316–2317, at footnotes 1052 and 1056, as well as p. 2390, at footnotes 320–322, citing various U.S. case law. *See also* CRAIG/PARK/PAULSSON, *supra* footnote 579, p. 452.

584 Particularly under § 7 FAA that allows subpoenas on persons within the judicial district, but *not* outside the U.S. Under 28 U.S.C. § 1782 the U.S. offer their evidence to foreign tribunals: U.S. courts may order persons within the judicial district to produce documents and give testimony „for use in proceeding in a foreign or international tribunal". *See* BORN, *supra* footnote 25, Vol. 2, pp. 2408-2409.

585 BORN, *supra* footnote 25, Vol. 2, pp. 2391–2393. *See also* CRAIG/PARK/PAULSSON, *supra* footnote 579, pp. 452–453.

586 CRAIG/PARK/PAULSSON, *supra* footnote 579, pp. 452–453.

> "Moreover, even in jurisdictions like the United States which provide the broadest scope of discovery in civil proceedings (depositions, document production, interrogatories, demand for admissions, etc.) the courts have routinely upheld the right of arbitrators not to order any discovery whatsoever: if the parties had wanted to insist on the full panoply of procedures available at law they should not have decided on arbitration."

In the international context (outside Switzerland), it is unclear whether a tribunal can apply to a state court in the arbitral seat and ask the latter to lodge a request for international judicial assistance to a foreign state court under the Hague Evidence Convention.[587] There is little reported authority on the point, one saying that the mechanism of the Hague Evidence Convention is not available[588], the other saying it is.[589]

It is remarkable that so far no mention was made that U.S.-style discovery and "fishing expeditions" can best be avoided by choosing arbitration, preferentially by choosing the Swiss arbitration hub.[590]

4. Arbitration in U.S. Consumer Disputes?

U.S. law generally permits and recognizes the validity of arbitration clauses in consumer disputes[591], subject to restrictions based on principles of unconscionability and due notice.[592]

The U.S. Federal Arbitration Act (FAA) undoubtedly extends to disputes between merchants and consumers and there is nothing in the FAA that ex-

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587 http://www.amcham.ch/members_interests/downloads/110126_CH_mutual_assistance.pdf (last visited on 14 August 2015).

588 Born, *supra* footnote 25, Vol. 2, pp. 2422–2423.

589 Lobsiger Adrian/Markus Alexander R., Überblick zu den vier neuen Konventionen über die internationale Rechtshilfe, SJZ 92 (1996), pp. 180–182.

590 Also in this context it is noteworthy that Bernhard F. Meyer has been touching upon this advantage in the seminar „USA Wirtschaftsrecht" the manuscript of which remained unpublished, *see supra* footnote 572.

591 Müller Danièle, Excursion: Arbitration in the U.S. – Mandatory and Inequitable?, *supra,* pp. 157–176.

592 Born, *supra* footnote 25, Vol. 1, p. 1014.

cludes 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.[593] Lower U.S. courts have criticized the arbitration friendly approach of the Supreme Court, an Alabama court quite openly excoriated[594]:

> "Enforcement of arbitration contracts for the purchase of consumer goods or services is beset by a number of problems implicating the Seventh Amendment. The reality that the average consumer frequently loses his/her constitutional rights and rights of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises a putrid odor which is overwhelming to the body politic."

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.[595]

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.[596]

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.

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593 *Marmet Health Care, Inc. v. Brown*, 132 S.Ct. 1201 (U.S. S.Ct. 2012).

594 *In re Knepp*, 229 B.R. 821, 827 (N.D. Ala. 1999).

595 BORN, *supra* footnote 25, Vol. 1, pp. 1017–1018. *See*, *e.g.*, the JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness http://www.jamsadr.com/rules-consumer-minimum-standards/ (last visited on 14 August 2015).

596 BORN, *supra* footnote 25, Vol. 1, p. 1018. The current text of the Arbitration Fairness Act of 2015, a bill assigned to a congressional committee on April 29, 2015, however, does not seem to exclude international arbitration agreements, *see* https://www.govtrack.us/congress/bills/114/hr2087/text (last visited on 14 August 2015).

5. Exclude Sanctions Under Art. 271 PC

In Switzerland, major legislation relating to sovereignty and secrecy, including articles 271 and 273 of the Swiss Penal Code (PC), was put into force in the 1930s in order to effectively protect the privacy and assets of Jews pursued by Gestapo agents.[597]

Art. 271 PC[598] generally prohibits both service of process Swiss territory for use in foreign proceedings.[599] U.S. practitioners and well-known authors, in this context, speak of Switzerland's extreme view of judicial sovereignty[600]:

> "Switzerland, like some other civil law countries, views service of process as a judicial function; therefore, any manner of service, including mailing process into Switzerland from the United States, is viewed as the assertion within its territory of U.S. judicial authority and a violation of its sovereignty. Since this procedure also violates the Swiss Penal Code, Swiss authorities could arrest a process server attempting to effect personal service of foreign process within Switzerland. Under Switzerland's extreme view of judicial sovereignty, letters rogatory are the only service method available in any litigation involving Swiss parties."

Art. 271 PC 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 PC:[601]

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597 Arts. 271 and 273 PC in fact reach back to the so-called Informers Law („Spitzelgesetz") of 1935 that was transferred in the Swiss Penal Code of 1937, *see* HAFTER ERNST, Schweizerisches Strafrecht, Besonderer Teil, Zweite Hälfte, Zürich 1942, p. 626. Equally, Swiss banking secrecy legislation was introduced in the 1930s to shield Jewish property from confiscation by the Third Reich, *see* MEYER BERNHARD F., Swiss Banking Secrecy and Its Legal Implications in the United States, 19 New Engl. L. Rev. pp. 18 *et seq.,* at pp. 26, 28 (1978).

598 The text of art. 271 PC is available under https://www.admin.ch/ch/e/rs/311_0/a271.html (last visited on 14 August 2015).

599 BSK StGB-HUSMANN, art. 271 para. 26–34.

600 NEWMAN LAWRENCE W./BURROWS MICHAEL, The Practice of International Litigation, 2nd ed., Juris Publications Inc., New York 2002, at III-62 *et seq.*

601 http://bern.usembassy.gov/obtaining_evidence.html (last visited on 14 August 2015).

> "Evidence may be obtained in Switzerland in two ways: under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or by the letters rogatory process. In addition, the Swiss penal code 271 provides that attorneys attempting to take a deposition or serve process in Switzerland outside of these authorized methods are subject to arrest on criminal charges."

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.[602] Quite to the contrary, if the parties agree to resolve disputes by way of arbitration, art. 271 PC 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.[603]

6. Avoid Sanctions Under Art. 273 PC

Another "stumbling block" in international litigation is art. 273 PC.[604] This provision prohibits Swiss companies from disclosing third party related information in foreign court proceedings.[605] 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[606] 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.[607]

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602 See above at footnote 568.

603 BSK StGB-Husmann, art. 271 para. 47. *See also* Website of the Swiss-American Chamber of Commerce I Members Interest I Legal I Prohibited Procedural Acts I co-authored by Frey Martin/Livschitz Mark.

604 The text of art. 273 PC is available under https://www.admin.ch/ch/e/rs/311_0/a273.html (last visited on 14 August 2015) but also reproduced, *e.g.,* in Born/Rutledge, *supra* footnote 564, p. 975.

605 BSK StGB-Husmann, art. 273 para. 30.

606 BSK StGB-Husmann, art. 273 paras. 27 and 30; Honegger Peter/Kolb Andreas, Amts- und Rechtshilfe: 10 aktuelle Fragen, NKF Publication 13, Zürich 2009, pp. 45–46.

607 BSK StGB-Husmann, art. 273 para. 64; Honegger/Kolb, *supra* footnote 606, p. 47.

Whether art. 273 PC equally applies in international arbitration has not been decided or discussed so far, not even in the leading commentary of the Swiss Penal Code.[608] In any event, it seems safe to say that art. 273 PC 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 PC are "show stoppers"[609] or at least "stumbling blocks".[610] 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 PC, but not when choosing the Swiss arbitration hub for resolving disputes.

Thus, by choosing arbitration in transnational disputes, Swiss companies can avoid conflicts with arts. 271 and 273 PC, particularly if they choose Switzerland as seat of the arbitration. Quite surprisingly, no specific publication has particularly addressed this crucial and decisive advantage of arbitration over litigation in the international context.

7. Confidentiality in Lieu of 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. The pertinent website of the U.S. judiciary, under "Federal Courts & The Public", sets the publicity standard at the following benchmark[611]:

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608 BSK StGB-Husmann, art. 273 paras. 50–56.

609 Arts. 271 and 273 PC are, however, not so-called blocking laws, Born/Rutledge, *supra* footnote 564, pp. 969 *et seq.,* 975, Lowenfeld Andreas F., International Litigation and Arbitration, St. Paul, Minn. 1993, pp. 698–708. *see also* Restatement of the Law, Third, *supra* footnote 568, § 421 Comment h and Reporter's Notes 1, 4 and 5.

610 Henrich Martin, Obtaining Evidence in Switzerland, The Dilemma and the Stumbling Blocks of Art. 271 and Art. 273 Swiss Penal Code, Swiss-American Chamber of Commerce, Yearbook 2009/2010, pp. 75–78; Honegger/Kolb, *supra* footnote 606, pp. 42–50.

611 http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsAndThePublic.aspx (last visited on 14 August 2015).

> "… An individual citizen who wishes to observe a court in session may go to the federal courthouse, check the court calendar, and watch a proceeding. Anyone may review the pleadings and other papers in a case by going to the clerk of court's office and asking for the appropriate case file … Court dockets and some case files are available on the Internet through the Public Access to Court Electronic Records system (known as PACER), at www.pacer.gov …"

Quite to the contrary, arbitration proceedings are generally held in private. Such exclusion of the public is undoubtedly one of the decisive factors why parties may wish to resolve a dispute by way of arbitration rather than litigation in state courts. Inconsistently with the perception that privacy and confidentiality are fundamental elements of arbitration proceedings, very few national laws or arbitration rules had specific rules on confidentiality for most of the 20th century.[612] The ICC Rules, for example, do not contain a confidentiality undertaking (except for the members of the ICC Court)[613], and it is a matter for the parties to agree on the degree of confidentiality they wish to associate with arbitral proceedings.[614] Similarly, the American Arbitration Association recommends that parties seeking confidentiality enter into a confidentiality agreement, the text of which encompasses three lines only.[615]

However, confidentiality is not confidentiality. Art. 44 Swiss Rules constitutes one of the most comprehensive regimes on confidentiality in arbitral proceedings.[616] Pursuant to this provision all awards and orders, all materials submitted by other parties and the deliberations of the arbitral tribunal are confidential, even the existence of arbitral proceedings is confidential. The duty of confidentiality extends not only to the parties, but also to the arbitrators, tribunal appointed experts, the secretary and staff.

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612 HOLLANDER PASCAL, Confidentiality under Art. 44 Swiss Rules in: 10 Years of Swiss Rules in International Arbitration, ASA Special Series No. 44, pp. 83 *et seq.,* p. 83.

613 Art. 6 of Appendix I and art. 1 of Appendix II to the ICC Rules of 2012.

614 Art. 22 (3) ICC Rules of 2012.

615 Drafting Dispute Resolution Clauses A Practical Guide, American Arbitration Association, Inc. 2013, at 32 https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 (last visited on 14 August 2015); *see also* MOSES MARGARET L., The Principles and Practice of International Commercial Arbitration, 2nd ed., Cambridge University Press, New York 2012, p. 54.

616 HOLLANDER PASCAL, *supra* footnote 612, pp. 86–93.

Confidentiality may conflict with the parties' disclosure duties, e.g. of the final award, under the relevant stock exchange rules (*ad hoc*-publicity) or other disclosure statutory duties *vis-à-vis* authorities and the general public or with contractual duties *vis-à-vis* private persons or entities. The parties should address the exceptions to confidentiality, unless the institutional rules do so.

8. Increased Flexibility and Reduced Hostility

Typically, parties to arbitration proceedings participate in structuring the rules, the proceedings and the time-table. Additionally, the Chairman and the co-arbitrators are expected to stand for neutrality.

Arbitration rules are tailor-made and far more flexible than many national rules of civil procedure. Tailored rules are particularly adequate and practical in the international context, if parties of different background seek to resolve a dispute. Where parties are represented by trusted and professional counsel a simple telephone conference call may avoid cumbersome submissions and decision making.

In a nutshell: 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.[617]

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617 https://www.amcham.ch/members_interests/p_business_ch.asp?s=5&c=1 (last visited on 14 August 2015).

9. Cost and Time Impact

Historically, arbitration proceedings are an alternative expected to be more quickly and less expensive than crowded state courts and associated lengthy proceedings.

However, ongoing criticism regarding the costs and the duration of international arbitrations, in particular ICC arbitrations, recently prompted revision of both the ICC Rules[618] and of the Swiss Rules[619] to achieve greater speed.[620]

Anyhow, arbitration may be far less expensive than a court trial, if the latter should be held in the U.S. By choosing arbitration, the parties may limit rights to U.S.-style discovery that can be extremely expensive and time-consuming.

If the alternative to arbitration is a court proceeding is Switzerland, arbitration is often more expensive than litigation. Swiss courts, such as the Zurich Commercial Court, tend to limit witness hearings while witness hearings and post-hearing briefs are typical elements of arbitration proceedings that have a significant impact on cost and time of the arbitration.

In Switzerland, it is customary that the successful party in litigation is entitled to reimbursement of its attorney's fees and costs, even though these will rarely cover actual attorney's fees. In the U.S., however, attorney's fees and costs are reimbursed by the unsuccessful party only, if the contract provides so.[621]

In arbitral proceedings, the parties are invited to submit their actual attorney's fees and to comment on the attorney's fees of the opposite party. The arbitral tribunal is generally granted the power to include the cost assessment in its final award. The tribunal is expected to allow the successful party to recover all or a substantial part of its actual attorney's fees from the opposite party.[622] This notwithstanding, there is a tendency of arbitral tribunals not to hurt ei-

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618 ICC Rules January 2012.

619 Swiss Rules June 2012.

620 Müller Christoph, Background of the 2012 Revision, What were the Main Objectives? in: 10 Years of Swiss Rules in International Arbitration, ASA Special Series No. 44, pp. 9 *et seq.,* p. 11.

621 Barron/Kurtz, *supra* footnote 576, pp. 16 and 110.

622 Born Gary B., International Arbitration: Law and Practice, The Netherlands 2012, pp. 175–176.

ther party and to end up with "50:50 solutions". In multi-party disputes, whether national or international, arbitration is often a suitable and practical means to bundle interests and save cost.[623]

Aspects of time and cost efficiency are notoriously emphasized in arbitration publications, particularly with respect to the Swiss Rules.[624]

10. Finality and Enforcement

Last but not least there are two other most important advantages of arbitration for the resolution of international business disputes: Once rendered, decisions are final and enforceable.

Finality of the arbitral award and limited recourse, respectively,[625] 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.[626] The success rate is approximately 7% only, and the average appeal duration is normally less than 6 months.[627] If both parties are domiciled outside of Switzerland, they may generally waive the right to appeal against the award[628], thereby further shortening the arbitral proceedings.

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. Rather, enforcement of

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623 LIVSCHITZ TAMIR, Arbitration: An Efficient Solution for Multi-Party Disputes?, *supra* at pp. 63–86.

624 *See, e.g.*, ROHNER THOMAS, Expedited Procedure under Art. 42 Swiss Rules, in: 10 Years of Swiss Rules in International Arbitration, ASA Special Series No. 44, pp. 55–69.

625 LIVSCHITZ TAMIR, Switzerland – as Arbitration Friendly as It Gets, *supra,* p. 9.

626 Art. 191 PILA.

627 http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/switzerland-is-arbitration-friendly/index.html (last visited on 14 August 2015); DASSER/ROTH, *supra* footnote 51, pp. 460–466; *see also* http://www.arbitration-ch.org/pages/en/asa/news-&-projects/details/974.challenges-of-swiss-arbitral-awards-%E2%80%93-selected-statistical-data-as-of-2013.html (last visited on 14 August 2015).

628 Art. 192 PILA. There is some uncertainty whether the waiver includes a request for revision, BERGER/KELLERHALS, *supra* footnote 1, paras. 1981–1987.

the foreign judgment is governed by each country's domestic laws such as, in Switzerland, public policy, fair notice, right to be heard, no re-litigation[629] or, in the U.S., comity and reciprocity, due process, proper notice, public policy and fraud[630].

Quite to the contrary, enforcement of arbitral awards is much easier and one of the principal advantages of arbitration as a method of resolving disputes. REDFERN/HUNTER/BLACKABY/PARTASIDES summarize this general advantage as follows[631]:

> "Internationally, it is generally much easier to obtain recognition and enforcement of an international award than of a foreign court judgment. This is because the network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments. Indeed, this is one of the principal advantages of arbitration as a method of resolving international commercial disputes."

More specifically, arbitral awards are, as a result of the NYC, widely enforceable throughout the world, presently in close to 150 countries.[632] This obvious advantage of arbitration is dealt with in many publications, also in the U.S.[633]

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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

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629 Arts. 25–28 PILA.

630 FELLAS, *supra* footnote 564, pp. 537–567; BORN/RUTLEDGE, *supra* footnote 564, pp. 1090 *et seq.*

631 REDFERN ALAN/HUNTER MARTIN/BLACKABY NIGEL/PARTASIDES CONSTANTINE, Law and Practice of International Commercial Arbitration, 4th ed., London 2004, paras. 10–17.

632 http://www.newyorkconvention.org/new-york-convention-countries/contracting-states (last visited on 14 August 2015); *see* also LEHMANN ANDREAS, Recognition and Enforcement of Foreign Arbitral Awards in Switzerland – Avoiding Common Pitfalls, *supra* pp. 119–134.

633 *See, e.g.* MOSES, *supra* footnote 615, pp. 211–229.

clauses are generally given deference by U.S. courts, even in case of dispute resolution between Swiss companies and U.S. consumers.[634]

634 There is a hearsay exception that confirms the rule: A Swiss insurance carrier, in its contracts with insureds, apparently chose jurisdiction before U.S. courts to deter the counterparties from litigation, with a view to the costs, complexity, language and other disadvantages involved with litigation before U.S. courts.