

Choice of law, jurisdiction and arbitration

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Since the governing law determines which of the rules of interpretation described above apply, it is the most important single decision in a multilingual contract. Before a Swiss court, the choice of law is governed by the Private International Law Act. Article 116 allows the parties to choose the law applicable to their contract, either expressly or with reasonable certainty from the terms of the contract or the circumstances. Absent a choice, Article 117 refers to the law of the state with which the contract has the closest connection, which is presumed to be the state of habitual residence or establishment of the party that is to perform the characteristic obligation. The language of the contract is one of the circumstances that a court may consider when it determines whether a tacit choice was made, but it does not on its own establish such a choice.¹

Switzerland is not bound by the Rome I Regulation, which governs the law applicable to contractual obligations before the courts of the member states of the European Union, Denmark excepted. A German or French court seised of a dispute will apply Rome I, while a Basel court applies the Private International Law Act. The two regimes lead to similar results in most commercial cases because both respect party autonomy and use characteristic performance as the default connecting factor. They differ in detail, especially for consumer and employment contracts and for the treatment of overriding mandatory provisions. Parties who can anticipate in which state a dispute will be decided should check the private international law of that state as well as the substantive governing law.²

Jurisdiction clauses between parties in Switzerland and the European Union are governed by the Lugano Convention of 2007, which entered into force for Switzerland on 1 January 2011. Article 23 of the Convention allows the parties to agree that the courts of a contracting state shall have jurisdiction, subject to formal requirements. The Convention also ensures the recognition and enforcement of the resulting judgments in the other

contracting states. The United Kingdom applied to accede to the Convention after its withdrawal from the European Union, yet its application did not obtain the consent of the Union. Judgments between Switzerland and the United Kingdom are therefore recognised under national law and bilateral arrangements, which makes arbitration attractive for contracts between Basel companies and English counterparties.³

Switzerland has not, as far as is known at the time of writing, ratified the Hague Convention on Choice of Court Agreements of 2005, to which the European Union and the United Kingdom are parties. Nor has it acceded to the Hague Judgments Convention of 2019. Before Swiss courts, choice of court agreements outside the scope of the Lugano Convention are governed by Article 5 of the Private International Law Act, which requires the agreement to be made in writing or in another form that permits proof by text. Drafters should therefore not assume that a choice of English or Swiss courts will be enforced in the other state on the basis of a multilateral convention.⁴

Arbitration is the preferred method of dispute resolution for many international contracts concluded in Basel, partly because it allows the parties to choose the language of the proceedings. International arbitration with its seat in Switzerland is governed by Chapter 12 of the Private International Law Act, revised with effect from 1 January 2021. The revision confirmed that submissions to the Federal Supreme Court in challenges against arbitral awards may be filed in English. The Swiss Rules of International Arbitration, administered since 2021 by the Swiss Arbitration Centre, provide that the tribunal shall determine the language of the proceedings in the absence of an agreement between the parties. The Basel Chamber of Commerce was among the chambers whose arbitration institutions merged into the Swiss Chambers' Arbitration Institution in 2004, the predecessor of the Swiss Arbitration Centre.⁵

A well-drafted arbitration clause for a multilingual contract designates the seat, for example Basel, the rules, the number of arbitrators and the language of the arbitration. It may add that documents in German or French can be submitted without translation, which saves cost when the arbitrators and counsel command those languages. The seat in Basel brings the proceedings under the supervision of the Federal Supreme Court and gives the parties access to the cantonal courts for interim measures and the appointment of arbitrators where needed. Basel has fewer arbitration practitioners than Zurich and Geneva, yet its location at the border and the

multilingual skills of its legal community make it a natural seat for disputes between Swiss, German and French parties.⁶

1 Notes

1. Arts. 116 and 117 of the Swiss Private International Law Act (PILA, SR 291). To be verified. ↩
2. Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I). To be verified. ↩
3. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 30 October 2007, in force for Switzerland since 1 January 2011, Art. 23. On the United Kingdom's application to accede, see the communications of the European Commission of 2021. Status to be verified. ↩
4. Hague Convention of 30 June 2005 on Choice of Court Agreements; Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Art. 5 PILA. Swiss ratification status of both conventions to be verified. ↩
5. Arts. 176 to 194 PILA as revised with effect from 1 January 2021; on submissions in English, see Art. 77 para. 2bis of the Federal Supreme Court Act (BGG, SR 173.110). Swiss Rules of International Arbitration (2021), provision on the language of arbitration. On the history of the Swiss Chambers' Arbitration Institution, see its publications. To be verified. ↩
6. On the choice of Basel as a seat of arbitration and the role of the cantonal courts under Art. 356 CPC and Art. 179 and 183 PILA, see the Swiss arbitration literature. To be verified. ↩

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