

The Importance of Swiss Law in International Arbitration

1 Swiss law is **very frequently chosen** as the law applicable to international commercial contracts.

2 After English law, Swiss law is deemed to be the **most attractive law** applicable to the parties' contracts.¹ Indeed, along with English law, Swiss law is, on average, three times more attractive to commercial parties than any other law.²

3 This is confirmed by the recent **statistics** of the International Chamber of Commerce (ICC), according to which, Swiss law is consistently the second or third most popular law chosen to govern the parties' contract.³ This popularity of Swiss law is also confirmed by the recent statistics of the Swiss Arbitration Centre, according to which in 75 per cent of cases between 2004 and 2020, Swiss law was the applicable law.⁴

4 The popularity of Swiss law as the law chosen to govern the parties' contract is also confirmed by **surveys** carried out of international commercial actors. Indeed, according to the Queen Mary/White & Case 2010 International Arbitration Survey: Choices in International Arbitration,⁵ Swiss law is the third most popular law used by corporations behind English and New York law. In addition, according to a survey

¹ Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws', (2014) 34 *Nw. J. Int'l L. and Bus.* 455, p. 459.

² Cuniberti, 'Contract Laws', p. 472.

³ ICC Dispute Resolution 2020 Statistics, p. 17 (third most popular after English and US law); 2019 ICC Dispute Resolution 2019 Statistics, p. 15 (second most popular after English law); ICC Dispute Resolution 2018 Statistics, p. 13 (third most popular together with French law after English and US law).

⁴ SCAI Arbitration Statistics 2020, p. 3. In addition, in 81% of the new cases in 2020, Swiss law was the applicable law.

⁵ See page 14 of the survey available at www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf (accessed 19 December 2022).

carried out of 100 European businesses in 2008,⁶ Swiss law was the second most preferred choice of governing law in cross-border transactions.

5 Many **reasons** are cited for the popularity of Swiss law as the law governing the parties' contract.

6 First, on the one hand, Swiss law allows international commercial actors **to agree freely on the rights and obligations** in their contractual relationship.⁷ In this regard, there are very few mandatory provisions under Swiss law.⁸ Article 19(1) of the Swiss Code of Obligations (CO) allows parties to freely determine the subject matter of a contract, within the broad limits set out by the mandatory law (see paras 69–70). Swiss contract law is also not subject to European Union (EU) law or too complicated rules about general terms and conditions (see paras 305–326). Moreover, even international commercial actors in Germany reportedly have a policy of choosing Swiss law as the law applicable to their contracts in order to avoid German law's rather strict regulation of general terms and conditions in business to business (B2B) contracts.⁹ Furthermore, Swiss law guarantees that the agreement that these actors make is binding.¹⁰

⁶ Stefan Vogenauer, 'Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law – A Business Survey – Final Results' (2008) available at fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf (accessed 19 December 2022), p. 14.

⁷ Philipp H. Haberbeck, 'Reasons for the Attractiveness of Swiss Contract Law to International Commercial Actors', *Inside Law*, 22 December 2017, available at <https://insidelaw.ch/reasons-for-the-attractiveness-of-swiss-contract-law-to-international-commercial-actors/> (accessed 19 December 2022); with respect to the principle of freedom of contract under Swiss law, see Eugen Bucher, 'Law of Contracts', in Dessemontet and Ansay (eds), *Introduction to Swiss law*, 3rd edn (The Hague/Boston: Kluwer Law International, 2004), p. 109; and Pierre Tercier and Pascal Pichonnaz, *Le droit des obligations*, 6th edn (Geneva/Zurich/Basel: Schulthess, 2019), paras 554 et seq.

⁸ Christoph Wildhaber, 'Franchising-Switzerland: Pre-contractual Disclosure Obligations', International Law Office, 14 November 2006.

⁹ Sebastian Brachert and Andreas Dietzel, 'Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht', (2005) *Zeitschrift für das gesamte Schuldrecht* 441; Horst Eidenmüller, 'The Transnational Law Market, Regulatory Competition and Transnational Corporations', (2011) *Indiana Journal of Global Legal Studies* 720; Stefan Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence', (2013) 21 *European Review of Private Law* 23, 36, 63.

¹⁰ Haberbeck, 'Swiss Contract Law'; see Tercier and Pichonnaz, *Droit des obligations*, paras 1008 et seq.

7 On the other hand, these actors can also rely on the **values of fairness and justice** reflected in, for example, Article 2(1) of the Swiss Civil Code (CC) ('Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations') (see paras. 71–72). The reasonable and fair expectations of international commercial actors against sharp dealing are thereby also protected.¹¹

8 Second, the **neutrality of Swiss contract law** is also one of the reasons cited for the popularity of Swiss law as the governing law of the parties' contract.¹² Indeed, Swiss law does not favour any particular party in commercial dealings.

9 Third, Swiss law is said to be particularly **well suited to cross-cultural relationships** as the Swiss Code of Obligations (the main source of law for contracts) borrows concepts from several legal systems, in particular the French and the German legal traditions.¹³

10 Fourth, parties originating from Civil law jurisdictions may prefer to choose Swiss law, rather than the other popular laws of Common law jurisdictions such as English and US law, because of its **commonalities with the laws of several Civil law jurisdictions**, namely French and German law.¹⁴ Indeed, US law is the first contract law the choice of which European businesses try to avoid.¹⁵

11 Fifth, the Swiss Code of Obligations is **concise and easily accessible**.¹⁶ Indeed, it represents the best of the nineteenth-century Civil law legal tradition but is less complicated and more straightforward than the German *Bürgerliches Gesetzbuch* (German Civil Code) (BGB).¹⁷ Both the

¹¹ Haberbeck, 'Swiss Contract Law'; with respect to the role of good faith in the Swiss law of obligations, see Tercier and Pichonnaz, *Droit des obligations*, paras 99 et seq.

¹² Matthias Scherer and Michael Schneider, 'An Analysis of International Construction Contracts: Switzerland', in Knutson (ed.), *FIDIC – An Analysis of International Construction Contracts* (The Hague: Kluwer Law International, 2005), p. 313; Nadine Magand, 'Die Vorteile der Anwendung schweizerischen Rechts bei verborgenen Mängeln im Recht der internationalen Warenkaufverträge', (1996) *Recht der Internationalen Wirtschaft* 387, 389; Marc Iynedijan, 'Gas Sale and Purchase Agreements under Swiss Law', (2012) 30 *ASA Bulletin* 746.

¹³ Scherer and Schneider, 'International Construction', p. 313.

¹⁴ Cuniberti, 'Contract Laws', p. 514.

¹⁵ Vogenauer, 'Business Survey', p. 14.

¹⁶ Scherer and Schneider, 'International Construction', p. 313.

¹⁷ Bucher, 'Contracts', p. 107.

Swiss Code of Obligations and the Swiss Civil Code are available not only in the official languages of German, French and Italian but also in English.¹⁸ There is, moreover, a steady and predictable case law which is easily accessible. For example, all decisions of the Federal Supreme Court rendered since 1 January 2000 can be found on the website of this court.¹⁹

12 Finally, the popularity of Swiss law may also be explained by the **attractiveness of Switzerland as a seat of arbitration** on the basis that certain parties choose the substantive law of the jurisdiction of the chosen seat of the arbitration to govern their contract.²⁰ Indeed, Switzerland is among the top three most popular seats of arbitration in ICC arbitrations.²¹

13 Despite the popularity of Swiss law as the law governing the parties' contract, **most arbitrations do not involve Swiss parties**. Indeed, in 2020, there were only forty-eight Swiss parties, representing 1.91 per cent of the total number of parties in all 2020 ICC filings.²² In addition, in 2019, there were only sixty-seven Swiss parties, representing 2.68 per cent of the total number of parties in all 2019 ICC filings.²³ Furthermore, between 2004 and 2019, there were only 31 per cent of Swiss Chambers Arbitration Institution (SCAI, today's Swiss Arbitration Centre) cases in which the parties were Swiss.²⁴ There are, accordingly, a significant number of non-Swiss parties who will be involved in arbitration proceedings where their contract is subject to Swiss law.

14 Furthermore, **English** is usually chosen as the language of the arbitration proceedings. This is reflected in the recent ICC and SCAI Dispute Resolution Statistics, according to which in four-fifths of all cases, the arbitral awards were drafted in the English language.²⁵

¹⁸ See e.g., www.fedlex.admin.ch/eli/cc/27/317_321_377/en for the English translation of the Code of Obligations and www.fedlex.admin.ch/eli/cc/24/233_245_233/en for the English translation of the Swiss Civil Code (both accessed 19 December 2022).

¹⁹ www.bger.ch/index.htm (accessed 19 December 2022).

²⁰ Cuniberti, 'Contract Laws', p. 475 et seq.

²¹ ICC Dispute Resolution 2020 Statistics, p. 16 (most popular seat); 2019 ICC Dispute Resolution 2019 Statistics, p. 14 (third most popular seat); ICC Dispute Resolution 2018 Statistics, p. 12 (second most popular seat).

²² ICC Dispute Resolution 2020 Statistics, pp. 10–11, 24.

²³ ICC Dispute Resolution 2019 Statistics, pp. 9–10, 21.

²⁴ SCAI Arbitration Statistics 2019, p. 3.

²⁵ ICC Dispute Resolution 2020 Statistics, p. 19 and ICC Dispute Resolution 2019 Statistics, p. 16, stating that 80% and 79%, respectively of arbitral awards were drafted in the English language; SCAI Arbitration Statistics 2019, p. 3, stating that in 70% of all cases between 2004 and 2019, the language of the arbitration was English.

15 This **book** on international commercial contracts under Swiss law in the English language therefore **answers a need** of the growing number of arbitration practitioners all over the world.

Select Bibliography

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