II. Swiss Tradition and Legal Culture

1. Tradition

Switzerland's current important – even leading – position as one of the most sought after countries in which to conduct international arbitration proceedings is primarily due to its deeply rooted **tradition of arbitration**. International arbitration in commercial issues, in disputes between corporations and also in relation to the status of citizens can be traced right back to the Middle Ages. The three **Feldkirch Charters of 1367, 1377 and 1381** (*"Feldkircher Freiheitsbriefe"*) should be mentioned here as an interesting example of the fact that the town of Zürich, for instance, already enjoyed a high reputation during the Middle Ages, extending beyond its boundaries: 8

> In 1376, Count Rudolf V. of Montfort-Feldkirch, living in constant fear of his life from invaders (particularly the Habsburgs), wished to grant the citizens of the town of Feldkirch generous rights. He embodied these in a charter, a kind of Magna Carta. In that charter the citizens of the town were assured of certain freedoms and stabilization of taxes. The citizens were given an assurance of inheritance rights. The citizens were also assured that they would not have to swear an oath of allegiance to any foreign lord (Regent) before he had sworn to respect those provisions and rights. If any dispute arose between the citizens and a new Regent it was provided that the issue would be referred to the mayor (*Bürgermeister*) and the town council of Zürich, which was therefore granted (arbitral) jurisdiction to decide the matter. The Bürgermeister and the town council of Zürich would in such cases have to decide whether the citizens had fulfilled their obligations to their lord (the Regent of Feldkirch), or whether the latter had impinged upon the "favours" (freedoms) granted to those citizens (see the original vellum document in the Zürich C.I. Stadt und Land State Archives, No. 986, 75 x 59 cm format). One particularly interesting feature of this document is the fact that Count Rudolf of Montfort also stipulated which sanctions would apply if one or other of the parties were not to abide by the decision arrived at by the Bürgermeister and the town council of Zürich. If the new lord (Regent) were not to comply with the ruling, the town of Feldkirch was to be given its freedom. On the other hand, if the town of Feldkirch did not comply with the decision, both the document and the freedom charters embodied in it would immediately be null and void. As a great deal of importance came to be attached to that freedom charter of 17 December 1376, the town of Zürich was asked, in a letter of 3 April 1377, to also affix its seal to that document and hold it in its safekeeping. The town of Zürich acknowledged receipt in a letter of confirmation dated 9 April 1377 (Zürich State Archives, document C.I. Stadt und Land No. 991). Just a few months later, on 13 November 1377, the Feldkirch dominion was bought by the House of Habsburg. From the arbitration point of view, it is regrettable that no such arbitration proceedings were in the end conducted before the Bürgermeister and town council of Zürich, the reason being that Duke Leopold III of Habsburg did, in fact, expressly acknowledge the rights of the Feldkirch inhabitants in his letter of 23 November 1377 (Zürich State Archives document C.I. Stadt und Land No. 992). – In April 1996, these famous Charters in their originals were returned by the Canton of Zürich to Feldkirch. 9

10 This is not the place to give a full historical account of the development of international arbitration in Switzerland. Some examples must suffice, such as the well-known **Alabama Arbitration** which took place in Geneva. These were proceedings between the United States and England, in which the point at issue was whether England had infringed its neutrality obligations by allowing the warship "Alabama" (which subsequently sank 70 ships belonging to the United States, before itself being sunk in the Atlantic off Cherbourg in the year 1864), to be built and fitted out in England. Both the United States and Great Britain agreed to arbitration proceedings in Geneva to determine the issues of fact and to decide on the substantial claims in damages brought by the United States against Great Britain. The arbitral tribunal sat at the *Hôtel de ville* in Geneva (in the very room in which the First Red Cross Convention was signed on 22 August 1864; the conference room has since been known as the "Alabama Room") and pronounced its award on 14 September 1872, which held that Great Britain had been in breach of its neutrality obligations and that the United States should be awarded damages in the then enormous amount of more than 50 million gold dollars.

11 The Alabama Arbitration can be considered as the birth of modern **public-law arbitration;** it was followed by other proceedings, based on the Yay Convention of 1874 between America and Great Britain. Thereafter, in **The First Hague Peace Conference of 1899,** procedural provisions were drawn up for this purpose, which were revised in **The Second Hague Conference of 1907**, when the ***Permanent Court of Arbitration*** at the Hague was founded.

12 It was not until the 20th century, however, that private international commercial arbitration, as we know it today, increased dramatically. The trend towards arbitration mirrors the upturn in international trade. Switzerland's geographic location in the centre of Europe, its development into a modern industrial country with particular emphasis on service industries, its neutrality and political stability, together with the fact that Swiss legal thinking is deeply rooted in both Roman and Germanic law, have all culminated in **Switzerland being the natural choice** for hosting international arbitration, particularly for the so-called **third country arbitration**. The latter concept is understood to mean arbitration on "neutral ground" (not necessarily "neutral" in a political sense), i.e. in a country to which neither of the antagonists belongs.

13 It is, therefore, not surprising that, after the Alabama Arbitration, quite a number of other major disputes became resolved by way of arbitration proceedings which have taken place in Switzerland. For instance:

- the Award of 18 March 1930 in re *Hellenic Railways v. The Government of Greece,* rendered by the Arbitrators Thomas, Zakas and Bernard (British Yearbook of International Law, 1964, 201 ss.), or
- the Award rendered by Louis Python on 22 December 1954 in re *Alsing Trading Co. and Swedish Match Co. v. The Greek State* (International & Comparative Law Quarterly (ICLQ) 1959, 320 ss.), or
- the Award rendered by Panchaud and Ripert on 2 July 1956 in re *Société Européenne d'Etude et d'Entreprises (SEEE) v. The Socialist Republic of Yugoslavia* (Clunet 1959, 1074 ss.), or

- the Award of 23 August 1958 rendered by Sauser-Hall, Badawi/Hassan and Habachy) in re *Arabian-American Oil Company (Aramco) v. The Government of Saudi Arabia* (Rev. crit. 1963, 272 ss.), or
- the Award rendered by Pierre Cavin on 15 March 1963 in re *Sapphire International Petroleum Limited v. National Iranian Oil Company* (International Law Reports 1967, 136 ss.), or
- the Award rendered by René-Jean Dupuy on 19 January 1977 in re *Texaco/Calasiatic v. The Libyan Government* (ILM 1978, 3 ss.), or
- the Beagle Channel Dispute between *Argentina v. Chile* adjudicated by an Award of 22 April 1977 by Fitzmaurice, Gros, Petrèn, Onyeama and Dillard (ILM 1978/AFDI 1977, 408 ss.), or
- the Taba arbitration between *Egypt v. Israel* adjudicated by the Award of 29 September 1988 rendered by Lagergren, Bellet, Schindler, Sultan and Lapidoth (ILM 1988, 1421 ss.).

Certainly, the arbitration between Greenpeace and France adjudicated under the 14
chairmanship of Professor Claude Reymond and many other major cases with very substantial monetary claims involved would also be worth mentioning in this context.

The Swiss tradition also includes **ad hoc arbitration**. *Ad hoc* arbitral tribunals, as 15
the name implies, are set up *ad hoc* on the basis of an appropriate arbitration clause or arbitration agreement – i.e. without being administered by any arbitral institution. Until the Swiss Private International Law Act came into force on 1 January 1989, they were governed either by the individual Cantons' codes of civil procedure (which contained provisions, in varying shades of emphasis, relating to the appointment, challenge, dismissal and replacement of arbitrators, as well as rules governing arbitration procedure and recourse to set aside an award) or by the Intercantonal Concordat on Arbitration of 1969 (referred to below as the **"Concordat"**), according to the successive dates on which the Cantons acceded to the "Concordat".

In the second half of the 19th century, a new phenomenon started to flourish, sur- 16
facing at first amongst associations covering particular businesses and industries: the so-called **institutional arbitration**. We will come back to it in more detail.

2. Acknowledged Legal Culture

Swiss law has developed (within the context of Roman and Germanic law) into an 17
outstanding legal system of precision, balance, liberalism and liberality. Amongst foreign contracting parties, in particular, it has therefore become a **legal system to trust**, i.e. a legal system of preference in those cases where a contract between two non-Swiss parties was to be based on a "neutral" system of substantive law. There is therefore a high percentage of choice of law clauses in favour of Swiss substantive law to be found in contracts between non-Swiss parties, e.g. on the construction of off-shore oil platforms, the construction of pipelines in oil producing countries, the construction of infrastructure projects in developing countries (e.g. telecommunications

equipment, water and electricity supplies, power stations, port facilities, highways, military installations, hospitals, universities, dams, airports etc.) – in fact for the construction of all kinds of industrial plants and the supply of equipment. Choice of law clauses in favour of Swiss substantive law are found equally often in all kinds of commercial contracts, in joint-venture agreements, in long-term power and natural gas supply contracts, in mining concessions as well as in transactions on commodity futures exchanges.

18 This combination of two factors, namely the Swiss tradition as a neutral place of arbitration and the worldwide acceptance of its legal system, have culminated over the last 50 years in **Switzerland achieving a predominant position** in the international scene as one of the leading centres of arbitration.

19 This position would nevertheless be inconceivable if the two factors above were not supplemented by a third one: namely, the presence of a **modern arbitration law** in line with present-day needs and expectations.

20 What are these **needs and expectations in relation to a modern place of arbitration**? How can it be said that the Swiss *"Arbitration Act"*, Chapter Twelve of the Swiss Private International Law Act discussed here, fulfils these expectations? These questions will be discussed, in particular, in Part III of this Introduction. However, we will first attempt to provide a brief outline of the current international arbitration scene (Part III).