ATTORNEYS AT LAW

SCHELLENBERG WITTMER

APRIL 2019

Newsletter

Author:
Katherine Bell

INTERNATIONAL ARBITRATION

Revision of Switzerland's International Arbitration Law

Already today, Switzerland offers an excellent framework for international arbitration. In late 2018, the Swiss Federal Council published the draft bill for a revision of Chapter 12 of the Swiss Private International Law Act (PILA), which constitutes the *lex arbitri* governing arbitral proceedings seated in Switzerland. The revision seeks to further increase Switzerland's attractiveness as a seat of international arbitration.

1 BACKGROUND & OVERVIEW

The revision of Chapter 12 of the Swiss Private International Law Act (**PILA**) can be traced back to a parliamentary motion submitted in 2008, which led to a general mandate for the Swiss Federal Council to update the provisions on international arbitration. The mandate was for a "soft" revision focusing on maintaining the structure and excellent working of the current law.

During its preparatory work, the Federal Office of Justice engaged a task force consisting of four eminent experts in the field of international arbitration. Schellenberg Wittmer was represented in this expert group.

In January 2017, the preliminary draft bill was published. During the consultation process, the preliminary draft received predominantly positive feedback from Cantons, political parties, academics, arbitration organizations and practitioners.

On 24 October 2018, the Swiss Federal Council published the draft bill for the revised Chapter 12 of the PILA together with its supplementary report.

The stated objectives of the revision are:

- codification of the Swiss Supreme Court's **case law** and **clarification** of issues not expressly stipulated in the law;
- further strengthening of **party autonomy**;
- further increasing **user-friendliness**.

Chapter 12 of the PILA already grants the **parties' vast freedom when it comes to defining the modalities of the proceedings**. This characteristic is intended to be maintained and further strengthened in consideration of developments in the arbitration laws of other popular seats of arbitration.

> "The revision is aimed at softly modernizing Swiss arbitration law in order to further increase its user-friendliness."

Foreign parties might not be familiar with the Swiss legal system. For such parties in particular, it is easier if the *lex arbitri* is comprehensively set out in one act. Therefore, the draft bill provides for a **replacement of all references to the Swiss Civil Procedure Code** (**CPC**) with express provisions in the PILA. Hence, going forward the PILA will conclusively and autonomously govern the relevant aspects of international arbitration.

The following sections highlight the key proposed amendments.

2 KEY AMENDMENTS

2.1 SCOPE OF APPLICATION OF THE PILA

The draft bill provides that the PILA shall apply if **at least one of the parties** has its domicile, habitual residence or seat **outside Switzerland**. Under the current law, there was some uncertainty whether the time of conclusion of the arbitration agreement or the time of the initiation of the arbitration is decisive in determining the parties' seat or domicile. The draft bill clarifies that a party's seat at the **time of conclusion of the arbitration agreement is decisive**. The draft bill thereby deviates from the current case law of the Swiss Supreme Court, according to which the international character of a dispute must be assessed by reference to the domicile or seat at the time of the initiation of the arbitral proceedings.

2.2 FORM REQUIREMENTS FOR ARBITRATION AGREEMENTS

The revision intends to modernize the wording of the PILA provision governing form requirements for arbitration agreements. In line with the form requirements for domestic arbitration, the draft bill provides that the arbitration agreement must be made **in writing or in any other form which allows it to be evidenced by text**.

The preliminary draft of January 2017 provided for the possibility of a valid arbitration agreement if only one party meets the form requirements, while the other party could accept the arbitration agreement by any means, including tacitly. Following concerns expressed during the consultation process, this simplification of the form requirements was not adopted in the draft bill. Hence, all parties to an arbitration agreement must give their consent in a form allowing evidence by text.

The PILA provision setting out the form requirements for arbitration agreements is of a constitutive nature: it does not just serve evidentiary purposes, but constitutes a formal requirement for the validity of the arbitration agreement. In this context, the Swiss Supreme Court has clarified that this does not mean that the written arbitration agreement must be signed (even the circulation of drafts of a contract containing an arbitration agreement may in exceptional cases be sufficient to conclude a valid arbitration agreement).

The draft bill confirms that an **arbitration agreement may also be included in unilateral legal acts**, such as last wills, bylaws, or trusts.

2.3 APPOINTMENT AND REPLACEMENT OF ARBITRATORS

Arbitrators are appointed in accordance with the procedure set out in the parties' arbitration agreement. Where the parties have not specified such a procedure (directly or by reference to the rules of an arbitration institution), the state court at the seat of the arbitration (the so-called *juge d'appui*) is competent to appoint the arbitrators.

Where the arbitration agreement does not name a seat or simply refers to "arbitration in Switzerland", the draft bill – in the spirit of *in favorem validatis* – provides that the first-seized Swiss state court is competent to decide on the seat of the arbitration and to appoint arbitrators. The draft bill further clarifies that, if the parties fail to appoint the arbitrators in a multiparty arbitration, the *juge d'appui* may appoint all arbitrators.

The draft bill also codifies the arbitrators' duties in terms of independence and impartiality, and provides for further provisions on challenge and dismissal of arbitrators. The current provision expressly only mentions independence, however it is accepted already today that impartiality is equally a standard any arbitrator must meet.

2.4 DIRECT ACCESS OF FOREIGN ARBITRAL TRIBUNALS OR PARTIES TO THE *JUGE D'APPUI*

In order to lend support to arbitral proceedings seated abroad, **the revised PILA grants foreign arbitral tribunals or parties direct access to Swiss state courts** (i.e. the *juge d'appui*) for interim relief or the taking of evidence in support of such foreign arbitration. Parties can turn to the Swiss state court at the place where the intended provisional measure or taking of evidence is to be enforced. Foreign arbitral tribunals and parties can thus avoid the burdensome path of international legal assistance.

Currently, neither the CPC nor the PILA sets out which procedure applies in cases where the arbitral tribunal or the parties seek the assistance of the *juge d'appui*. The draft bill clarifies that proceedings before the *juge d'appui* shall be conducted under the provisions of the CPC on summary proceedings.

2.5 CODIFICATION OF THE REQUIREMENT TO OBJECT WITHOUT DELAY

The principle that a party must **immediately object** to purported procedural irregularities otherwise it waives its right to object is well established in Swiss jurisprudence. The revised Chapter 12 of the PILA now expressly stipulates this duty.

2.6 EXPRESS PROVISIONS REGARDING REMEDIES AGAINST ARBITRAL AWARDS

In addition to the setting aside of an arbitral award, the Swiss Supreme Court has acknowledged that parties may rely on **further legal remedies**, such as correction,

explanation and amendment of the award, as well as the legal remedy of revision.

The draft bill adopts these remedies in two separate provisions:

> A party may file a **request for correction, explanation or amendment** of an arbitral award to the arbitral tribunal within 30 days after the award was rendered. Notably, such application does not generally suspend the 30 day time limit for filing a request for setting aside the award.

> A party may request the **revision** of an arbitral award within 90 days after the discovery of a ground for revision. The grounds for revision are limited and include the discovery of new and material facts, criminal proceedings revealing that a criminal offense influenced the arbitral award to the detriment of a party, or the discovery of a reason to reject an arbitrator after the conclusion of the arbitral proceedings.

In this context, the draft bill clarifies that foreign parties can not only waive their right to file an application to set aside an arbitral award, but also to revision.

"One of the most controversially discussed proposals is permitting parties to file submissions to the Swiss Supreme Court in English."

2.7 SUBMISSIONS TO THE SWISS SUPREME COURT IN ENGLISH

The Swiss Supreme Court currently accepts **exhibits in English**, while the legal briefs themselves must be drafted in one of Switzerland's official languages (i.e. German, French or Italian). As one of the most controversially debated amendments, the draft bill allows the parties to submit **setting aside applications in English** – the predominant language in international arbitration. Whereas the Swiss arbitration community appears divided on this issue, the Swiss Supreme Court has communicated its clear opposition. It remains to be seen how the Swiss Parliament will decide on the proposed amendment.

3 ISSUES NOT INCLUDED IN THE REVISION

The draft bill does not align the provisions of the PILA with those of the CPC. It was a conscious decision to maintain the dual system of codification of domestic arbitration in the CPC and international arbitration in the PILA. Whereas the CPC, with its more detailed set of provisions, offers the parties a certain degree of foreseeability, the purpose of the PILA with its limited and liberal approach is to maintain a large degree of flexibility and party autonomy.

The parliamentary motion that led to the general revision of Chapter 12 sought a change to the scope of the so-called **negative effect of the competence-competence principle**, meaning that a state court faced with the argument that a valid arbitration agreement exists must limit its review of the existence of such agreement to a *prima facie* analysis. Currently, the Swiss Supreme Court applies this principle only when the arbitration is seated in Switzerland. When the seat is located outside of Switzerland, the Supreme Court, based on Article II(3) of the New York Convention, examines with full power of review whether a valid arbitration agreement exists. The motion of 2008 proposed to abolish this distinction and to limit the scope of review of Swiss state courts to a *prima facie* analysis regardless of the seat of arbitration. However, the Federal Council decided against this proposal, arguing that the Swiss Supreme Court's case law is clear and that there are very few problems in practice.

"The revision of Chapter 12 PILA is a welcome update to the Swiss legal framework for international arbitration."

Certain voices in the Swiss arbitration community called for the establishment of a **centralized *juge d'appui***, arguing that one central judicial body would allow for increased knowhow and efficiency. The Federal Council sided with the opposing voices, stating that the establishment of such a judicial body would be questionable from a federalist standpoint and not in line with Switzerland's current judicial set-up. The Federal Council also pointed to disproportionate costs as the expected case load would be low.

The draft bill does not contain provisions aimed at employee or consumer protection. The Federal Council pointed to the restrictive practice of the Swiss Supreme Court with respect to the arbitrability of domestic employment disputes. In addition, the Federal Council recalled that it is currently monitoring *inter alia* the impact on arbitration as a result of the digitalization of the employment market and will issue a comprehensive report by 2022. With regard to consumers, the Federal Council pointed out that there are already protective measures in place when it comes to the applicability and interpretation of general terms and conditions containing arbitration agreements. Hence, the Federal Council currently sees no need for special protective provisions for employees or consumers in the PILA.

In the same vein, the Federal Council found that there is **no necessity at this point in time to introduce a new legal framework specifically for sports arbitration** in the context of the revision of Chapter 12 of the PILA. Referring to a recent decision of the European Court of Human Rights, which held that the Court of Arbitration for Sport (**CAS**) and its structures are compliant with Article 6 of the European Human Rights Convention, the Federal Council stated that it was up to the CAS to review and potentially revise its structures and regulations. The Federal Council also pointed out that the independence of CAS arbitrators will continue to be reviewed by the Swiss Supreme Court under Article 190 PILA. The Federal Council intends to follow the developments related to the CAS, but sees no need to act in the course of revising Chapter 12 of the PILA.

4 CONCLUSION & OUTLOOK

The proposed revision of Chapter 12 of the PILA is a **welcome update** to the Swiss legal framework for international arbitration. The Federal Council has succeeded in striking a balance between introducing express provisions where clarification is needed whilst at the same time refraining from overloading Chapter 12 with

too many detailed provisions and new concepts. The PILA's character as a concise law dealing with the crucial aspects of arbitral proceedings while fully safeguarding party autonomy is maintained.

As a next step, the draft bill will be debated and voted on in Parliament. The revised PILA will likely not enter into force before January 2021. Notably, the new Chapter 12 will apply to all arbitrations commenced after the date of entry into force, i.e. also to arbitration agreements concluded before the enactment of the revision.

Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

In Zurich:

Prof. Dr. Nathalie Voser, LL.M.
Partner
nathalie.voser@swlegal.ch

Dr. Christopher Boog, FCIArb
Partner
christopher.boog@swlegal.ch

In Geneva:

Elliott Geisinger
Partner
elliott.geisinger@swlegal.ch

Philippe Bärtsch, LL.M.
Partner
philippe.baertsch@swlegal.ch

SCHELLENBERG WITTMER LTD / Attorneys at Law

ZURICH / Löwenstrasse 19 / P. O. Box 2201 / 8021 Zurich / Switzerland / T +41 44 215 5252

GENEVA / 15bis, rue des Alpes / P. O. Box 2088 / 1211 Geneva 1 / Switzerland / T +41 22 707 8000

SINGAPORE / Schellenberg Wittmer Pte Ltd / 6 Battery Road, #37-02 / Singapore 049909 / www.swlegal.sg

www.swlegal.ch

This Newsletter is available on our website www.swlegal.ch in English, German and French.