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Switzerland to Become More Attractive for International Arbitration

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On 11 January 2017, the Swiss Federal Council proposed a revised version of the Swiss International Private Law Act ("SPILA") relating to international arbitration (art. 176 et seq.) with a view to increasing the attractiveness of Switzerland as a place of arbitration while preserving the concise, liberal and flexible traits of the SPILA. More precisely, the Federal Council aims at (i) updating the provisions of the SPILA by implementing elements of the Federal Tribunal's jurisprudence and clarifying ambiguities, (ii) reinforcing parties' autonomy and (iii) improving the law for a simplified application. This initiative follows on from the modernisation process initiated by other countries.

While the proposed amendments mainly relate to the SPILA, the Federal Tribunal Act ("FTA") and the Civil Procedure Code ("CPC") will also be affected if the proposed amendments are adopted by the parliament.

I. Implementing the Federal Tribunal's jurisprudence and clarifying ambiguities

A. Clarification of the scope of application of chapter 12 SPILA

In its current wording, article 176 I SPILA provides that the provisions of chapter 12 apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither his/her/its domicile nor his/her/its habitual residence in Switzerland.

In a decision of 2002 disputed among scholars, the Federal Tribunal held that one ought to take into account the parties' situation at the time when the arbitral proceedings are initiated rather than at the time when the arbitration agreement was entered into. This created legal uncertainty as one cannot determine from the outset, but only at the time when the parties start arbitration proceedings, which law will apply (chapter 12 SPILA or the internal arbitration rules contained in the CPC). The proposed revised article 176 I SPILA specifies that the parties are those *"to the arbitration agreement"* so as to make the time of the entry into the arbitration agreement relevant. This would however probably not affect the current federal jurisprudence for parties to arbitral proceedings who/which will not have signed the

arbitration agreement.

B. Ancillary procedures

As at today, the CPC is silent with regard to the type of proceedings applicable when the judge is seized in his capacity as "juge d'appui" (e.g. with regard to the appointment, challenge, replacement of arbitrators; see infra, IV with regard to the opportunity of creating a unique Swiss local judge). Hence a new article 251a is proposed which provides that ancillary proceedings relating to international arbitration be conducted in the form of summary proceedings (another provision would be amended to the same extent with regard to internal arbitration).

C. Means of recourse available against an award

While the Federal Tribunal reckons that an award may be rectified, interpreted, completed or revised, the SPILA does not as at today mention the possibility to challenge an award by way of correction, interpretation, addition or revision.

To fill this gap, draft articles 189a and 190a SPILA will, if adopted, exhaustively govern the recourses available against an arbitral award thereby incorporating the federal jurisprudence (these means of recourse are also available in the context of national arbitration in the CPC).

According to draft article 189a SPILA, unless provided otherwise, any party may require from the arbitral tribunal to **correct** obvious mistakes or **interpret** or **complete** certain passages of the award within a thirty day deadline following communication of the award. In the meantime, the arbitral tribunal may on its motion correct, interpret or complete its award. The request does not suspend the deadline to challenge the award before the Federal Tribunal but a new deadline starts for the sole part of the award which was corrected, interpreted or completed.

Draft article 190a SPILA expressly allows for the revision of an award, what both scholars and the Federal Tribunal already opine is possible. Thus, according to this draft provision, a party may request that an award be **revised** (i) if said party discovers relevant facts or means of proof after the arbitration (provided however that they are not subsequent to the award) and (ii) if criminal proceedings establish that the award was influenced to the detriment of the party challenging the award even in the absence of a conviction (if criminal proceedings are not possible, evidence may be adduced otherwise). The request may be filed within ninety days following the discovery of the revision motive (within a ten year time limitation period). The parties' autonomy will however prevail insofar as they may agree in their arbitration agreement or at a later stage to exclude the right to a revision.

D. Addressing the impossibility to request the appointment of an arbitrator by the local judge

Pursuant to article 176 III SPILA, if the parties have not specified the seat of the arbitral tribunal, the arbitrators themselves may choose it if both the parties and the arbitration institution designated by them failed to do so. If neither determined the seat, several provisions become inapplicable starting by article 176 I SPILA which

governs the applicability of the SPILA itself and extending to all the provisions governing the ancillary jurisdiction of Swiss tribunals and notably article 179 III SPILA which provides that where a tribunal is called upon to appoint an arbitrator, it shall make the appointment.

Accordingly, the draft bill contains an additional sentence to article 179 II SPILA providing for the jurisdiction of the Swiss tribunal first seized.

II. Reinforcing the parties' autonomy

While the current wording of article 178 I SPILA provides that an arbitration agreement is valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text, the proposed revision (inspired by the corresponding provision governing internal arbitration) provides that such an agreement is valid if made in writing *"or by any other means which permits it to be evidenced by a text"*. More importantly, the revised text provides that said condition is deemed to be met even though it is satisfied by only one party to the arbitration agreement, in which case the validity of the agreement as regards its substance will still be examined in light of article 178 II SPILA (which is not due to change).
Thus, to take the example cited by the Federal Council, if party A sends party B a written proposal to enter into a contract which contains an arbitration clause and party B starts performing the contract without signing it, the arbitration clause would be considered as accepted by party B provided that performance of the agreement would be formally reckoned (art. 178 I SPILA) as the acceptance of the offer made by party A as a matter of substantive law (art. 178 II SPILA).

Article 178 SPILA is further due to be completed by a new paragraph extending to unilateral arbitration clauses (and not solely arbitration agreements) contained for example in a will or a trust deed.

The requirements for the parties to renounce the application of chapter 12 SPILA in favour of the internal rules of arbitration (part 3 of the CPC) will continue to be stringent for the sake of legal certainty: a written agreement will be necessary.

III. Increasing of the appeal of the laws governing international arbitration

Rather than amending the SPILA with references to articles of the CPC governing internal arbitration which would apply by analogy, a consolidated version of the SPILA has (rightly) been preferred in view of easing the understanding of the Swiss rules governing international arbitration for foreigners. Accordingly, existing references in the SPILA to provisions in the CPC will be replaced.

Today, briefs filed before the Federal Tribunal must be filed in an official language and may thus not be filed in English. The door is however not completely closed to English as the Federal Tribunal often renounces the requirement of a translation of exhibits in English filed by a party before it unless the other party or parties object thereto.

It is proposed that submissions may be drafted in English in the future. The aim is to

avoid translation expenses for the parties. Bearing in mind that the proposed revision does not impact existing restrictions applicable to foreign lawyers to represent parties before the Federal Tribunal, the parties who/which were represented in arbitral proceedings by a lawyer not admitted to represent such party before the Federal Tribunal may be tempted to have such lawyer draft the submission(s) and have it (them) filed by a local lawyer in his/her own name as this would avoid the need to inform the local lawyer of the specifics of the dispute (in some cases perhaps the need for translation) and the related costs. This may however be a miscalculation, aside from political considerations of protectionism, professional ethics or civil liability issues. Indeed, neither the limited grounds for challenging an arbitral award nor the very stringent formal requirements relating to the drafting of the submissions (particularly the recourse), which both explain the very low success rate of challenges of arbitral awards in Switzerland, will be altered in the revised law. The purpose sought with this proposal is solely to avoid translation costs with the Federal Tribunal not to facilitate challenges of awards. No amendment of the FTA with regard to the language of the decision is foreseen such that the decision will still be rendered in an official language (but which one?). Lastly, this proposal may be regarded with some reluctance not only by Swiss lawyers but by the federal judges themselves.

IV. What the Federal Council has decided not to amend

Tomorrow like today, jurisdictional objections will be examined differently depending on whether the seat of the arbitral tribunal is in Switzerland (in which case art. 7 SPILA will apply) or abroad (in which case art. II/3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will apply).

The scope of the examination by the judge seized of an action in a matter in respect of which the parties have entered into an arbitration agreement will continue to be limited to a summary examination when the seat of the arbitral tribunal is in Switzerland whereas the scope of the judge's examination will be full whenever the seat of the arbitral tribunal is abroad.

To justify the *status quo*, the Federal Council refers to the Federal Tribunal, which expressed the view that when it is seized of a recourse against an award, it has full power to review whether the arbitral tribunal rightly or wrongfully declared itself competent whenever the seat of the arbitral tribunal is abroad. One may however argue that instead of ruling on this point from the outset with full examination, the narrow scope of examination of the judge entails the risk of being counterproductive in the event the Federal Tribunal later denies the arbitral tribunal's competence, in which case the parties will have lost time and money (subject to article 186 I bis *in fine* SPILA).

The idea of a sole "juge d'appui" was also rejected for reasons relating to the federal structure of the State had a cantonal tribunal acted as the national local judge (why such cantonal tribunal rather than another?) and because this task would have interfered with the Federal Tribunal's duty had it been chosen to act in such capacity for its task must remain that of the uniform application of federal law in the country. Besides, it would have required the judges composing the tribunal in its contemplated capacity as local judge to recuse themselves in the event of a later recourse against

the arbitral award. The creation of a separate federal judicial instance was regarded as disproportionate.

V. Conclusion

The proposed amendments do not dramatically reshape the existing chapter 12 of the SPILA but tend to update it and make it easier to use and thus more appealing. The draft bill will be available for consultation until 31 May 2017.

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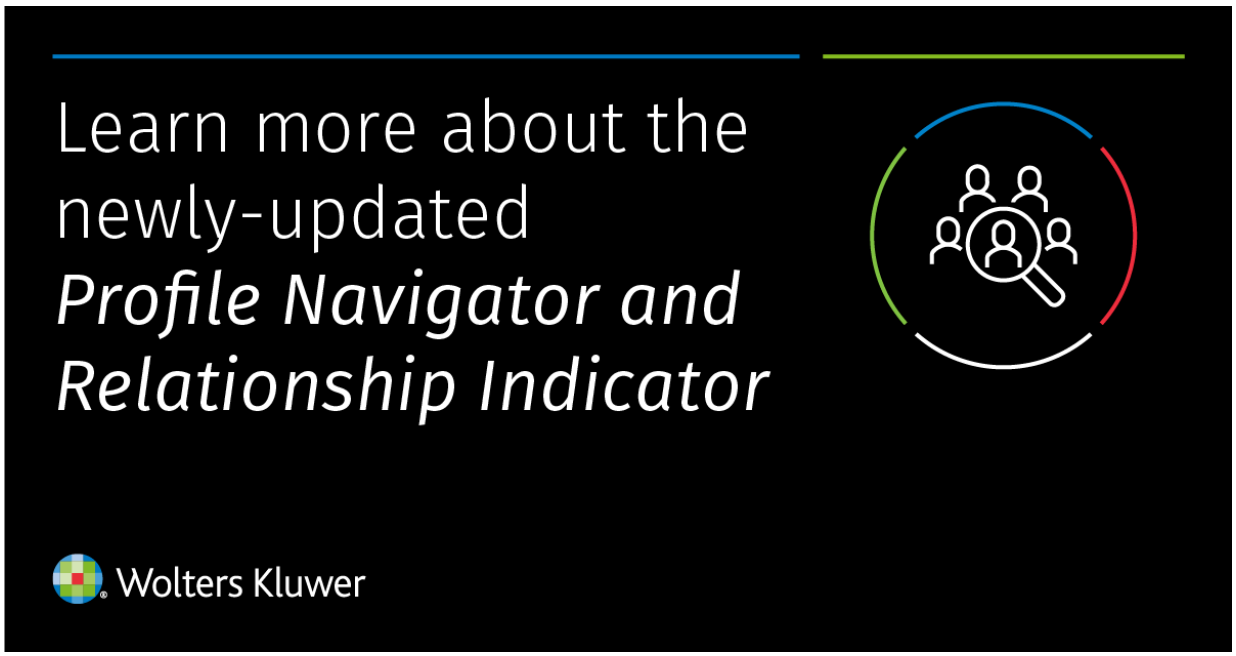

This entry was posted on Thursday, May 18th, 2017 at 7:29 am and is filed under Arbitral Award, Arbitration Act, Arbitration Agreement, Arbitrators, Seat of the arbitration, Summary procedure, Switzerland
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