Kluwer Arbitration Blog

Switzerland to Become More Attractive for International Arbitration: Act 2

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On 11 January 2017, the Swiss Federal Council issued a draft bill to revise chapter 12 of the Swiss International Private Law Act ("SPILA") on international arbitration (as well as, to a lesser extent, the Federal Tribunal Act and the Civil Procedure Code ("CPC")), which was the subject of a previous publication on this blog.

On 24 October 2018, the Federal Council issued a revised bill, taking into account some of the comments made and concerns raised by interested parties with regard to the draft bill during the consultation phase, alongside a message for the attention of the Federal Parliament.

The goal of the proposed revision remains unchanged, *i.e.* (i) to update the provisions of the SPILA by implementing elements of the Federal Tribunal's jurisprudence and clarifying ambiguities, (ii) to reinforce the parties' autonomy and (iii) to ease the use of the SPILA.

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

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

To offset a heavily criticised decision of the Federal Tribunal, it was proposed in the draft bill that article 176 SPILA specify that the parties are those *"to the arbitration agreement"* so as to make the time when the arbitration agreement was entered into (as opposed to when arbitral proceedings were started) relevant when ascertaining whether chapter 12 SPILA applies. This proposal was maintained in the revised bill.

B. Request of the appointment of an arbitrator by the judge when the

arbitration clause does not provide for a seat or when the parties merely agreed that the arbitration would take place in Switzerland

Pursuant to article 176 III SPILA, if neither the parties nor the arbitration institution has determined the seat of the arbitral tribunal, the arbitrators will do so. What if the arbitral tribunal is not constituted yet? According to article 179 II SPILA, the judge at the seat of the arbitral tribunal can be seized. To break this vicious circle and avoid the inapplicability of provisions of chapter 12 SPILA (starting with article 176 I according to which chapter 12 applies to any arbitration if the seat of the arbitral tribunal is in Switzerland), article 179 II *in fine* of the revised bill provides for the competence of the Swiss tribunal seized first.

Also, the judge may appoint all arbitrators in case of a multipartite arbitration.

C. Duty to disclose

The duty (which is to remain until the arbitral proceedings have come to an end) for any person who is offered to act as an arbitrator to disclose immediately the existence of facts which could raise doubts as to his/her independence or impartiality raised no criticism during consultation and was maintained in the revised bill.

D. Duty to object immediately to breaches of procedural rules

By contrast with the draft bill which was silent on this point, the revised bill provides for the duty to immediately raise any violation of procedural rules, failing which the party suffering such violation will be barred from raising it at a later stage. This is typically true for a breach of the right to be heard as per a longstanding jurisprudence of the Federal Tribunal.

E. Means of recourse available against an award

The proposal to expressly address the rectification, interpretation, completion and revision of awards remains in the revised bill.

Whereas the draft bill provided two revision grounds, *i.e.* (i) the late discovery of relevant facts or means of proof which existed before the issuance of the award (*"although [the] party [challenging the award] showed the required diligence"* in the latest version), (ii) the demonstration (preferably by a criminal investigation) that the arbitral proceedings were influenced by the perpetration of a criminal offence to the detriment of the party challenging the award, the revised bill contains a third ground: the discovery after the end of the arbitral proceedings of a ground for recusal

provided that no other means of challenge is available.

While parties, none of whom/which has his/her domicile, habitual residence, respectively its seat in Switzerland, may renounce the right to seek revision of an award based on the late discovery of relevant facts or means of proof, (even) they may not waive such right if the arbitration was tarnished by the perpetration of a criminal offence. When applicable, the renunciation must be made in writing (with reference to art. 178 I of the revised bill, as for the opting out; *infra*, II. A.).

Besides, the revised bill provides that an award may be challenged before the Federal Tribunal irrespective of the amount in dispute.

II. Reinforcing the parties' autonomy

A. Opting out of the SPILA

The revised bill, as did the draft bill, provides that the parties to an arbitration may waive the application of the SPILA in favour or the CPC ("opting out") in the arbitration clause or later on, this time however only provided they do so in writing (by reference to art. 178 I SPILA).

B. Arbitration clauses in unilateral legal acts

Also unchanged is the proposed amendment whereby chapter 12 is to apply by analogy to unilateral arbitration clauses contained in wills, foundation bylaws, or trust deeds.

III. Improving the laws governing arbitration in the users' interest

A. The SPILA and nothing but the SPILA

As initially contemplated, current references in the SPILA to provisions in the CPC will be replaced with a set of new provisions with a view to making the SPILA a standalone set of rules for international arbitration.

B. Submissions in English before the Federal Tribunal

The proposal that submissions before the Federal Tribunal may be drafted in English remains despite some criticisms, notably from the Federal Tribunal itself.

C. Summary proceedings to apply to ancillary procedures

The proposal that the proceedings applied in case the judge acts as a "juge d'appui" (*e.g.* with regard to the appointment, challenge, replacement of arbitrators) be conducted in the form of summary proceedings remains.

D. Assistance by the judge to enforce interim measures

Today, article 183 II SPILA provides that the arbitral tribunal with a seat in Switzerland may seek assistance from the judge to enforce interim relief or conservatory measures it rendered. The revised bill extends this right to the parties to the arbitration, as supported by most scholars.

E. Assistance by the judge to foreign arbitral tribunals

An arbitral tribunal, the seat of which is abroad, or a party to a foreign arbitration may seek assistance from the judge at the place where interim relief or a conservatory measure is executed. Equally, such arbitral tribunal or a party to an arbitration abroad with such arbitral tribunal's agreement, may seek assistance from the judge at the place where evidence must be administered.

The aim is to spare the trouble of going down the often lengthy and burdensome road of international assistance in civil matters.

F. Laws applied by the judge when his assistance is sought to administer evidence

Today, whenever the judge's assistance is sought to administer evidence, he applies his own law. The revised bill enables the judge, if so requested, to take into account *"other forms of procedures"* and thereby mirrors article 11*a* II and III SPILA, which deals with the law applicable to judicial assistance carried out in Switzerland.

IV. What main substantial additions does the revised bill contain as compared to the draft bill of 2017?

Both the duty to object immediately to breaches of procedural rules (*supra* I. D.) and the assistance by the judge to foreign arbitral tribunals (*supra* III. E.) are novelties.

V. What has been left behind as compared to the draft bill?

A. No lesser standard for the arbitration agreement to be formally valid

Today, article 178 I SPILA reads *"[a]s regards its form, 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"*.

With its draft bill, the Federal Council, thereby taking example on other national legislations, had proposed that an arbitration agreement be valid as to its form also if only one of the parties had met the form requirement with the addition of the sentence *"[t]his condition is deemed met even though it is met by only one of the parties to the arbitral agreement"*.

This proposed amendment was mostly rejected in the consultation phase and is therefore not included in the revised bill. It was essentially feared that it would affect legal certainty, notably in the context of the recognition and enforcement of awards under the New York Convention.

B. The arbitrators do not get to determine the amount and dividing up of the fees and expenses

According to article 189 III of the draft bill, the arbitral tribunal was competent to set the arbitration fees and expenses and divide them among the parties. This initial proposal was strongly rejected during consultation and was accordingly abandoned.

VI. Conclusion

The tuned proposed revision of the SPILA offers slightly more balance between the will to modernise it and the need for legal certainty and will likely achieve its triple purpose if accepted by the Parliament and not challenged by way of a referendum, in which case the updated SPILA and the related amendments in other laws will enter into force at the very earliest in
January 2020.

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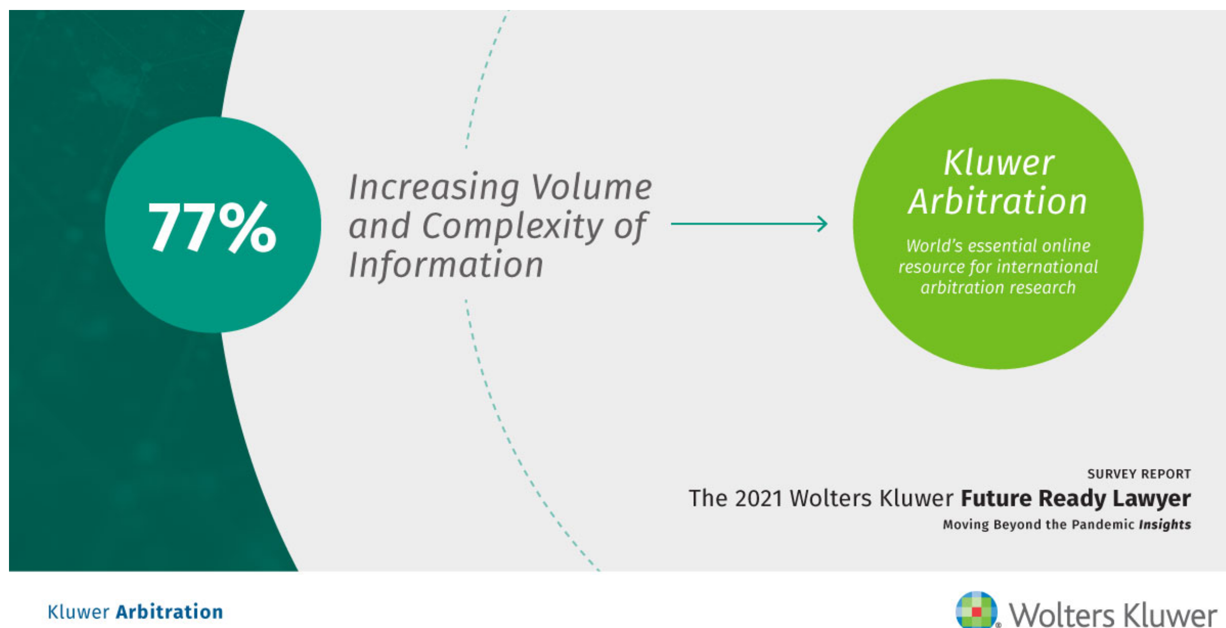

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