

Revised and Reinforced Swiss Juge D'Appui & the Debate on Centralizing It

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The draft bill for the revision of the 12th Chapter of the Swiss Private International Law ("PILA") was recently approved by the Swiss legislator (as analyzed previously on this blog). Besides permitting the filing of set-aside motions in the English language, the provisions regulating the court assistance have also been revised and adjusted with the respective provisions of the Code of Civil Procedure ("CCP"). In addition, the preparation phase of the draft bill saw a debate on the centralization of the Swiss courts that support arbitration proceedings. In this post, the focus will be on the introduction of the tasks of these courts, the revision of the provisions regulating their duties and the debate on their unification.

The state court at the place of arbitration, which can be resorted to if any assistance is required during the arbitration proceedings, is called the "support judge" (*juge d'appui*). These courts are vested with the power to assist in the appointment, replacement and challenge of arbitrators, the enforcement of interim measures, and the taking of evidence. However, their competence is usually considered as secondary. In other words, in most of the cases, either the arbitral tribunal or the arbitral institution has the authority to order such actions. But the necessity for state courts to perform these tasks appears in cases where these reliefs cannot be obtained from the arbitral tribunal/arbitral institution -*which may occur in ad hoc arbitration*- or because they are not coercive on the parties.

Therefore, the state courts located at the seat can be seized in order to get the required and coercive order.

Role of the Swiss State Courts during and after Arbitration

The Swiss *juge d'appui* has many powers to assist in international arbitration proceedings, which is specified in the PILA. These are:

- Appointment and Replacement of an Arbitrator (**Art. 179 PILA**)
- Challenge, Revocation, and Removal of an Arbitrator (**Art. 180a and 180b PILA**)
- Enforcement of Provisional and Conservatory Measures (**Art. 183 PILA**)
- Taking of Evidence (**Art. 184 PILA**)
- Deposit and Enforceability Certification of Arbitral Awards (**Art. 193 PILA**)
- Further Judicial Assistance (**Art. 185 PILA**)

The first three of these tasks, which were touched upon with the revision, will be discussed below.

Appointment and Replacement of an Arbitrator (Art. 179 PILA)

Under the PILA, arbitrators are appointed and replaced by the state court located at the seat, in the absence of any contrary agreement between the parties.

Prior to the revision, the PILA referred solely to the respective articles of the CCP, which regulate domestic arbitrations. Now the procedure of the appointment and replacement of arbitrators is explicitly regulated for international arbitration proceedings in the PILA: before applying to the state court, the applicant party should first give notice to the defaulting party or to the arbitrators (regarding the appointment of the chairman) to make the necessary appointment. After 30 days of such notice, the Swiss court at the seat of arbitration can be seized for the appointment of the arbitrator. When deciding, the *juge d'appui* will also consider the candidates proposed by the defaulting party[fn]Mariella Orelli, in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide (Second Edition)*, Kluwer Law International, 2018, p. 110, para. 36.[/fn], thus, prioritizing party autonomy.

Finally – the revised PILA reconfirms the preexisting regulation whereby, if the state court judge is designated as an appointing authority, it can appoint an arbitrator unless a summary examination shows that no arbitration agreement exists between the parties.

Challenge, Revocation, and Removal of an Arbitrator (Art. 180a and 180b PILA)

A further duty of the *juge d'appui* is to decide on the challenge of an arbitrator. The previous version of the PILA regulated that, absent an agreement between the parties, a party seeking to challenge an arbitrator should first communicate the request of challenge to the arbitral tribunal and the other party. Only thereafter would resorting to the state court be possible.

The new Art. 180a PILA addresses this issue more comprehensively and sets forth that the state court can be approached within 30 days after the filing of the request to the tribunal unless the challenged arbitrator withdraws from office or the parties to arbitration agree on the revocation of the arbitrator. This procedure already existed under Art. 369/3 CCP and was applied by analogy, however, it was not codified under the PILA until recently.

Moreover, the new Art. 180b PILA provides that the state court may remove an arbitrator if the applying party proves that the arbitrator fails to fulfil its obligation in a timely and duly manner. This has been a preexisting practice under Art. 370/2 CCP, which used to be applied by analogy.

Enforcement of Provisional and Conservatory Measures (Art. 183 PILA)

Unless otherwise agreed by the parties, the arbitral tribunal has the power to order provisional and conservatory measures. This notwithstanding, the arbitral tribunal may approach the state court for assistance if a party fails to comply with the order. The new version of the PILA also empowers the parties to arbitration to request assistance from state courts. Under this provision, a party or the arbitral tribunal can ask the state court to enforce measures, provided that they are known to the courts of the *lex fori*. Hence, a state court has the discretion to modify or

amend a measure ordered by the arbitral tribunal, to ensure that it conforms with Swiss law.

Finally, pursuant to the revision, the Swiss support judge is now competent to assist foreign-seated arbitral tribunals in the enforcement of interim measures, as well as in the taking of evidence (Art 185a PILA), as introduced previously on this [blog](#).

The Debate on Centralizing the Juge D'Appui

In Switzerland, the cantonal courts act as support judges. During the preparation phase of the draft bill, one of the debates in the [Federal Council](#) and the [consultation proceedings](#) (also see [here](#)) was related to whether to centralize the *juge d'appui* and to determine a sole competent authority, which could be resorted to for any judicial support relating to arbitration. The main goal behind this idea was to consolidate the expertise of support judges, given some of the judges' limited experience in such matters in those courts with a low caseload in this particular area. This initiative was aimed at determining a single specialized court, and, with it, to increase efficiency and know-how in the proceedings before the support judges.

During the discussions, one of the proposed solutions was to specify a single cantonal court, which would handle all court assistance matters. However, this was declined due to the federalist structure of the country. Though, some participants in the consultation proceedings offered to designate a single court for each canton or, alternatively, to specify one court for the German-speaking part of the country and one for the other cantons; but these suggestions were not assessed in the report of the Federal Council.

A further solution was to add these powers to the jurisdiction of the Federal Tribunal, which was later rejected, owing to the Federal Tribunal's distinct function, to ensure the uniform application of the law, compared to the function that a *juge d'appui* has.

Moreover, the delegation of the *juge d'appui's* administrative tasks (e.g. appointment, challenge and replacement of arbitrators) to an existing non-judicial institution, such as a Swiss arbitral institution or the Swiss Institute of Comparative

Law, was also recommended. However, such delegation was observed as an intervention to the jurisdiction of judges at the seat of arbitration and was not found to be an accurate notion, in particular when looking from the standpoint of foreign parties.

Hence, the final potential solution was the establishment of a new judicial authority. Nonetheless, this was also reversed, as the caseload of support judges was found to be too small to justify the establishment of a new body.

To conclude, the issue regarding the central support judge remains rejected; however, there is still a demand from some stakeholders to reconsider this issue in the future.[fn]Christian Oetiker, *Revision of the Swiss Arbitration Act - A Status Report*, *Arbitraje: Revista de Arbitraje Comercial y de Inversiones*, IproLex 2018, Volume 11, Issue 3, p. 759.[/fn]

Conclusion

With the revision, the duties of the Swiss *juge d'appui* in international arbitration proceedings are explicitly regulated under the PILA, and the support judge now has more power to assist both Swiss and foreign-seated arbitrations.

Nevertheless, the Swiss legislator preferred to keep the structure of the *juge d'appui* as it is and waived the idea of centralization for the time being.

In the author's view, the unification of the *juge d'appui* might be very interesting and unique, and it may aid to further boost the attraction of Switzerland as an international arbitration hub. Although it might be less cost-efficient, considering the low workload of the *juge d'appui*, the author finds that the establishment of a new judicial authority –or at least the designation of a single court for each canton– will further contribute to the specialization of the support judges. Furthermore, this centralization would be in line with one of the main targets of the recent revision – to increase the user-friendliness of the PILA.