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New Law Maintains Switzerland at the Forefront of International Arbitration

Sebastiano Nessi (Schellenberg Wittmer Ltd) · Saturday, August 22nd, 2020

The revision process of Chapter 12 of the Swiss Private International Law Act (PILA), governing international arbitration in Switzerland, was initiated in 2008 through a parliamentary motion. It led to a general mandate for the Swiss government to "touch up" Swiss international arbitration law with a view to aligning the statutory text with Swiss case law and modern international practice.

On 19 June 2020, the final draft bill was approved. It is expected to enter into force in early 2021.

The stated objectives of the revision, were fourfold: first, codifying the case law developed by the Swiss Supreme Court in the field of international arbitration; second, clarifying the issues not expressly stipulated in the law; third, strengthening party autonomy; and fourth, increasing user-friendliness. During the parliamentary debates, the need to preserve and increase Switzerland's attractiveness as a seat of international arbitration was also mentioned.

This revision brings Swiss arbitration law (composed of 19 articles, i.e. Articles 176 to 194 PILA) up to date while maintaining its conciseness and flexibility. By increasing legal certainty and modernising certain features of Swiss arbitration law, while ensuring at the same time that any new provision would regulate only "as much as necessary" and "as little as possible" in order to preserve party autonomy, the new Swiss arbitration law goes a long way toward ensuring that Switzerland remains one of the most attractive arbitral seats in the world. The key points of the revision are discussed below.

The scope of application of the PILA

Article 176 provides that the PILA shall apply if at least one of the parties has its domicile, habitual residence or seat outside Switzerland at the time of conclusion of the arbitration agreement.

Under the current law, there was some uncertainty as to whether the time of conclusion of the arbitration agreement or the time of the initiation of the arbitration would be decisive in determining the parties' seat or domicile.

Article 176 PILA now clarifies that a party's seat or domicile at the time of conclusion of the

arbitration agreement is decisive, thereby deviating from the current case law of the Swiss Supreme Court, according to which the international nature of a dispute is assessed by reference to the domicile or seat at the time of the initiation of the arbitration. Therefore, a later change in a party's domicile or seat after the conclusion of the arbitration agreement would have no impact on the applicability of the PILA.

The written form requirement – new opportunities for wills and trust arbitration

Article 178 PILA provides that arbitration agreements are valid if made in writing or in any other form that allows the arbitration agreement to be evidenced by a text. This new wording clarifies that emails and other forms of modern communications constitute valid means to demonstrate the existence of a valid arbitration agreement.

Also, Article 178(4) PILA now expressly confirms that an arbitration agreement may be included in unilateral legal acts or instruments, such as last wills, bylaws, or trusts. This new provision, however, does not alter the existing requirements with regard to the substantive validity of an arbitration agreement, which also apply to arbitration clauses contained in unilateral legal acts. The impact of this new provision in the context of wills and trust arbitrations (and notably the limits to the possibility of extending arbitration agreements to non-signatories, such as beneficiaries) remains to be seen.

Appointment and replacement of arbitrators

Article 179(1) PILA provides that arbitrators are appointed or replaced in accordance with the procedure set out in the arbitration agreement. Article 179(1) further clarifies that unless the parties have agreed otherwise (directly or by reference to the rules of an arbitration institution), a three-member panel will be appointed.

Article 179(2) PILA provides that where the parties have not specified such a procedure in the arbitration agreement (directly or by reference to the rules of an arbitration institution), the Swiss state court at the seat of the arbitration is competent to appoint the arbitrators. With a view to "saving" incomplete arbitration agreements, this provision then goes on to clarify that if the parties have not determined the seat of the arbitration or simply referred in their arbitration agreement to *arbitration in Switzerland*, the Swiss state court seized first is competent to decide on the appointment of the members of the arbitral tribunal.

Also, Article 179(4) PILA clarifies that, if the parties have failed to appoint the arbitrators in a multiparty arbitration, the competent Swiss state court has the authority to appoint all members of the arbitral tribunal.

Finally, Article 179(6) PILA now codifies the arbitrators' duties in terms of independence and impartiality, that were not expressly codified previously, but were considered by courts of law.

Direct access of foreign arbitral tribunals and foreign parties to Swiss state courts

Enforcing interim or provisional measures can be a very difficult exercise if said measures have been ordered by an arbitral tribunal sitting outside of Switzerland.

Article 185(a) PILA now grants foreign arbitral tribunals and foreign parties direct access to Swiss state courts for interim relief or the taking of evidence in support of foreign arbitrations. This new provision has the clear benefit of sidestepping the burdensome path of international legal assistance.

Another welcome clarification is that the proceedings before said Swiss state courts shall be conducted under the provisions of the Swiss Code of Civil Procedure on summary proceedings.

Codification of the parties' duty to object immediately to procedural irregularities

This general principle under which a party must immediately object to any procedural irregularities, failing which such party would be considered to have waived its right to object (which was already well anchored in the jurisprudence of the Swiss Supreme Court) is now expressly stipulated in Article 182(4) PILA.

Express statutory provisions regarding correction, interpretation and amendment, and revision

Under the current law, only the grounds to have an award set aside were listed, although the Swiss Supreme Court has acknowledged that parties may also rely on further remedies, such as correction, interpretation and amendment, or revision of an award.

The new law sets out self-explanatory provisions on those remedies which clearly improve their user-friendliness for foreign users:

- Article 189(a) provides that the parties can apply to the arbitral tribunal within 30 days after the award was rendered to seek correction, interpretation or amendment thereof. Importantly, such applications do not generally suspend the 30-day time limit to file any setting aside application.
- Article 190(a) provides that a party may seek the revision of an arbitral award within 90 days after the discovery of a ground for revision, such grounds including the discovery of new and material facts, criminal proceedings revealing that a criminal offense influenced the arbitral award, or the discovery of a ground to challenge an arbitrator after the conclusion of the arbitral proceedings. Article 191 clarifies that foreign parties can waive their right to file an application for revision, with the notable exception that no waiver would ever be possible for the ground that the award was influenced by a criminal offense.

Submissions to the Swiss Supreme Court in English

As one of the most controversial amendments, the new Swiss arbitration law allows parties to submit setting aside (or revision) applications in English.

Switzerland is one of the few jurisdictions where any application to set aside (or revise) an award

must be brought directly before the country's highest court, that is the Swiss Supreme Court. The Swiss Supreme Court drafts its decisions in one of the country's official languages (those being German, French, Italian or Rumantsch). Until now, the parties were also required to submit their briefs in one of those languages.

The new law authorises the parties to file memorials in English. That being said, the Swiss Supreme Court's decisions and correspondence will still be issued in one of Switzerland's official languages.

In the author's view, allowing parties to submit applications in English is likely to lead to a reduction in translation work, which will constitute a significant improvement in light of the very short time limit for filing setting aside applications (only 30 days). With that in mind, offering counsel the possibility of drafting their memorials in English and, by way of consequence, exchanging any preliminary drafts with their clients in that language presents the significant advantage of saving time and minimising any translation costs that could have been incurred otherwise, and making sure that no ideas or issues get lost in translation. This is all the more important since the underlying case materials are more often than not drafted in English. As such, the new law helps better serve the client's interests and, more generally, the dynamic between counsel and their clients.

One may however legitimately wonder about the narrow scope of application of this linguistic amendment. It might have made sense to introduce English as a language in all other arbitration-related judicial proceedings as well, that is, before Swiss state courts assisting arbitral tribunals during the arbitration, or in the context of enforcement proceedings. The revision did not elect to take that route.

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