Centro Internacional de Arbitraje, Mediación y Negociación
Instituto Universitario de Estudios Europeos
Universidad CEU San Pablo
Madrid

Arbitraje
Revista de arbitraje comercial y de inversiones

volumen XI

2018 (3)

Ipro*lex*, S.L.

ISSN: 1888–5373
Depósito legal: M–6394–2008
Impreso en España – Printed in Spain

Torreblanca Impresores. Paseo Imperial, 57, 28005 Madrid (España)

Secretario

Gonzalo Stampa Casas

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Publicación: Ipro*lex*, S.L.
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Distribución: Marcial Pons
Ediciones Jurídicas y Sociales, S.A.
San Sotero, 6
28037. Madrid (España)
www.marcialpons.es

Arbitraje
Revista de arbitraje comercial y de inversiones
vol. XI nº 3 **2018**

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Recibido: 28 noviembre 2018
Aceptado: 12 diciembre 2018

Arbitraje, vol. XI, nº3, 2018, pp. 755–769

Revision of the Swiss Arbitration Act – A Status Report

Christian OETIKER *

Summary: I. Introduction. 1. The Project. 2. The Swiss Arbitration Act – the Status Quo. 3. The Purpose of the Revision. II. The Cornerstones of the Revision. 1. General Issues: A) Renunciation of the proposal to include the negative competence–competence; B) No Establishment of a National Juge d'appui; C) No Changes to Grounds for Challenging an Award; D) Relation to the Part 3 of the Civil Procedure Code. 2. New Provisions Based on Standing Case Law and Clarification of Open Questions: A) Applicability of the Swiss Arbitration Act; B) Duty to Make Complaints Immediately; C) Correction, Explanation and Completion of Arbitral Awards; D) Review of Arbitral Awards (Reopening of Proceedings); E) State Courts Apply Summary Proceedings. 3. Strengthening of the Party Autonomy: A) Unilateral Arbitration Clauses; B) "Arbitration in Switzerland" –Clauses. 4. Increase of User–Friendliness: A) Extended Support for Arbitration by the Swiss Courts; B) Appointment, Replacement and Removal of Arbitrators; C) Challenge of Arbitrators; D) Unified Form Requirements; E) English Submissions to the Swiss Federal Supreme Court; F) No Minimal Amount in Dispute Required for Appellate Remedies. III. Conclusion.

Abstract: Revision of the Swiss Arbitration Act – A Status Report

In the current revision of the Swiss Arbitration Act, the Swiss Government proposes soft changes to the current law. The focus lies on the inclusion of certain means established by the Swiss Federal Supreme Court's case law (with some clarifications), the strengthening of party autonomy, and the increase of user–friendliness. The most noticeable additions are new provisions on the appointment, replacement, removal, and challenge of arbitrators, on the correction, explanation, completion, and review of arbitral awards. The approach taken by the Government, maintaining the character of

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ISSN 1888–5373
DOI 10.19194arbitrajeraci.11.03.04

the Swiss Arbitration Act as a concise law dealing only with the necessary aspects of arbitral proceedings deserves full support: "If it ain't broke, don't fix it".

Keywords: Swiss Arbitration Act – Chapter 12 – Revision

Resumen: Revisión de la Ley de Arbitraje de Suiza – Un informe de la situación

En la actual revisión de la Ley de Arbitraje de Suiza, el gobierno suizo sugiere unas ligeras modificaciones a las normas vigentes. Este estudio contempla la inclusión de ciertos aspectos establecidos por la jurisprudencia del Tribunal Supremo Federal de Suiza (con algunas aclaraciones), a saber, el fortalecimiento de la autonomía de las partes y el aumento de la facilidad en el empleo de este procedimiento. Las aportaciones más relevantes se centran en el nombramiento, sustitición y remoción de los árbitros y en la corrección, explicación, finalización y revisión de los laudos arbitrales. El enfoque adoptado por el Gobierno, manteniendo el carácter de la Ley de Arbitraje de Suiza como una ley concisa que trata solo los aspectos necesarios de los procedimientos arbitrales merece un apoyo bajo el lema: "¡si funciona, para qué arreglarlo! .

Palabras clave: Ley de Arbitraje de Suiza – Capítulo 12 – Revisión.

I. Introduction

1. The Project

On 24 October 2018, the Swiss Government published details of the on–going project to revise the Swiss arbitration act ("Swiss Arbitration Act") as contained in Chapter 12 of the Swiss Private International Law Act ("PILA"), consisting of the Dispatch[1] (German: *Botschaft*; French: *message*) explaining the project and the Draft[2] containing the wording of the proposed amendments. The project is based on a Preliminary Draft[3] and a Report[4] published on 11 January 2017 as well as the Report on the Results of the Consultation Proceedings dated 8 August 2018[5].

The initiative to revise the Swiss Arbitration Act (inhere also referred to as the "Act" or "Chapter 12") goes back to a motion submitted by the Legal Affairs Committee of the Swiss Parliament on 3 February 2012 with the aim of maintaining the attractiveness of Switzerland as an international place of arbitration[6]. The motion invited the Swiss Government to present a draft on the updating of Chapter 12. A parliamentary initiative of Chris-

[1] See https://www.bj.admin.ch/dam/data/bj/aktuell/news/2018/2018–10–24/bot–f.pdf.

[2] See https://www.bj.admin.ch/dam/data/bj/aktuell/news/2018/2018–10–24/entw–f.pdf.

[3] See https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017–01–11/vorentw–f.pdf.

[4] See https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017–01–11/vn–ber–f.pdf.

[5] See https://www.bj.admin.ch/dam/data/bj/aktuell/news/2018/2018–10–24/ve–ber–f.pdf. See summary in Dispatch, Sect. 1.3.4, p. 17–21.

[6] See motion no. 12.3012: https://www.parlament.ch/en/ratsbetrieb/suche–curia–vista/ geschaeft?AffairId=20123012.

tian Lüscher[7], which proposed the inclusion of the principle of negative competence–competence[8] in the Swiss Arbitration Act, had preceded the motion. The Legal Affairs Committee decided to join the initiative with the motion.

2. The Swiss Arbitration Act – the Status Quo

The Swiss Private International Law Act came into force on 1 January 1989. The Swiss Arbitration Act as contained in Chapter 12 of the PILA has not been amended since then. Following good Swiss legislatory tradition, the provisions are concise and the Act deals only with the cornerstones of arbitral proceedings.

The Swiss Arbitration Act is one of the key elements for Switzerland's renowned position as an international place of arbitration. The Act pursues in particular five goals: (1) to ensure the due constitution of the arbitral tribunal, (2) to guarantee due process, (3) to grant the parties the freedom to shape the procedure according to their needs (party autonomy), (4) to limit the grounds for challenging awards and to avoid a review of the merits, and (5) to provide support from the Swiss state courts for the arbitral proceedings.

The success of the Act fostered Switzerland's decision not to implement the UNCITRAL Model Law, neither when the latter was updated in 2006 nor in the current revision.

3. The Purpose of the Revision

In the Report and the Dispatch, the Swiss Government explicitly acknowledges the outstanding quality of the Swiss Arbitration Act[9]. Hence, it decided that the revision should be limited to three areas, maintaining in general the positive characteristics of the Act[10]: (1) updating the Act based on the standing case law of the Swiss Federal Supreme Court, including the clarification of certain open issues, (2) fostering party autonomy, and (3) increasing user–friendliness[11].

Updating an Act based on case law always carries the risk of creating an overly comprehensive body of rules, and inadvertently limiting the dynamics of possible developments. The Government was, therefore, rightly cautious in including only the most important portions of the Swiss Federal Supreme Court's case law, always having an eye on user–friendliness.

Party autonomy is one of the key features of arbitration and the Draft avoids implementing new provisions that would unnecessarily limit this. On

[7] See parliamentary initiative no. 08.417: https://www.parlament.ch/en/ratsbetrieb/suche–curia–vista/geschaeft?AffairId=20080417.

[8] See Section 0 below.

[9] Dispatch, Sect. 1.2, p. 8–9.

[10] Dispatch, Sect. 1.3.1, p. 12.

[11] Dispatch, Sect. 1.2.1–1.2.3, p. 9–12.

the contrary, it includes a number of proposals that will further strengthen the party autonomy granted under the Act.

The increase of the user–friendliness of the Swiss Arbitration Act is of particular importance for the numerous users from abroad. Indeed, the Government proposes to include a number of features in the Act itself that are presently included in other laws (such as the Swiss Civil Procedure Code and the act governing the proceedings before the Swiss Federal Supreme Court).

Overall, the Swiss Government has chosen a well–balanced approach for its proposed revision. Lawyers always have many ideas how to improve a law further. However, it seems right to abstain from including provisions on aspects that do not necessarily require rules within the Swiss Arbitration Act. The proposal rightly maintains the approach of a uniform law that embraces different types of arbitrations with its lean and flexible structure.

II. The Cornerstones of the Revision

1. General Issues

A) Renunciation of the proposal to include the negative competence–competence

As stated, the entire process of the revision started with a parliamentary initiative to grant arbitral tribunals the so–called negative competence–competence[12]. In short, this principle means that only the arbitral tribunal itself is entitled to render a final decision on its own jurisdiction to the exclusion of state courts. The Swiss Government decided not to include that principle in the Preliminary Draft and the Draft. We submit that this was the right decision. The Swiss Arbitration Act provides for a well–balanced system which makes clear in what circumstances a state court may decide whether there is a valid arbitration agreement or not. Swiss courts are arbitration–friendly and there is no need to reserve the final decision to arbitral tribunals exclusively[13].

B) No Establishment of a National *Juge d'appui*

The Swiss Arbitration Act provides various possibilities to approach state courts to support the arbitral proceedings. In French, these courts are referred to as *juge d'appui*. The courts fulfilling this role are cantonal courts. There are 26 of these courts. Consequently, it is necessary to determine which *juge d'appui* has jurisdiction *ratione loci*. At the same time, this means that the caseload of each court, and hence, the experience of

[12] See Section 0 above.

[13] Dispatch, Sect. 1.3.3, p. 13–15.

certain judges is relatively low. To concentrate these proceedings, the possibility of establishing a single national *juge d'appui* was discussed in the course of the revision, but ultimately discarded[14]. The main reason adduced by the Government is that a new federal court would need to be established (since the Swiss Federal Supreme Court could not assume such competences and there are no other suitable federal courts for this role) and that this step seems disproportionate in view of the relatively small overall caseload.

A national *juge d'appui* would be a new and very attractive feature of Swiss arbitration. The reasons adduced by the Government are not entirely unfounded, but we submit that they are not compelling and could be overcome. Hence, the question should be reconsidered, although we must stress that the current cantonal *juges d'appui* fulfil their roles well and the issue is mainly relevant for a few arbitration hubs (mainly Zurich and Geneva and to some extent Basel, Bern, Lausanne and Lugano).

C) No Changes to Grounds for Challenging an Award

The Government proposes not amending the grounds for challenging arbitral awards as set out in Art. 190 PILA. We submit that this is an important point of this revision. The limited grounds for challenges combined with the relatively short time in which a decision is rendered are one of the main features of Swiss arbitration and ensure that the substance of the dispute is decided by the arbitral tribunal and that the award becomes enforceable within a reasonable timeframe.

The Draft does, however, propose explicitly setting out the time limit of 30 days for challenging an award explicitly in the Act (Art. 190(4) of the Draft). Hitherto, this time limit was contained in domestic procedural law. This welcome proposal will increase the user–friendliness of the Act.

D) Relation to the Part 3 of the Civil Procedure Code

Since the inception of the PILA in 1989, Switzerland has had a dual system governing arbitration. International arbitrations, in which at least one party has it seat outside of Switzerland, are governed by Chapter 12 of the PILA (herein referred to as the Swiss Arbitration Act), while domestic arbitrations, in which all parties have their seat in Switzerland, are governed by another law. For many years, this was Cantonal law. The Cantons, who had the power to legislate on court proceedings, had entered into the Intercantonal Arbitration Convention of 27 March 1969, a "multilateral convention" between the Cantons of Switzerland dealing with arbitral proceedings. When the new national Civil Procedure Code ("CPC") was enacted in 2010, the legislator maintained the dual system[15]. Domestic arbitrations are now

[14] Dispatch, Sect. 1.3.3, p. 15–16.

[15] Dispatch, Sect. 1.3.2, p. 13.

governed by Part 3 of the CPC (Art. 353–399). In view of the different scope, it contains a more detailed body of rules with more limitations compared to Chapter 12 (*v.gr.* different definition of arbitrability). The legislator was right not to transfer that new body of rules to international arbitrations, but to maintain the concise, liberal and flexible approach of the Act[16]. The current revision does not intend to make any changes to this approach[17].

Therefore, the concepts contained in Part 3 of the CPC must not be applied to Chapter 12 of the PILA without due consideration. Equally, questions that are not dealt with in Chapter 12 must not automatically be submitted to the rules contained in the CPC. Rather, Chapter 12 must be interpreted independently. In this sense, we welcome that the Government proposes not to adopt the CPC–provisions on counterclaims, set–off, joinder of actions, or security for costs, but to leave room for different approaches in the international setting.

2. New Provisions Based on Standing Case Law and Clarification of Open Questions

A) Applicability of the Swiss Arbitration Act

As set out above, Switzerland has two arbitration acts, one applying to international cases (Chapter 12 of the PILA) and one to domestic cases (Part 3 of the CPC). The distinctive element is the seat of the parties. By virtue of Art. 176(1) PILA, Chapter 12 containing the rules for international cases applies if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. The provision leaves open whether the "parties" are all the parties to the arbitration agreement or only the parties participating in the arbitration (they are not necessarily the same).

Pursuant to the case law of the Swiss Federal Supreme Court, the parties to the arbitral proceedings are decisive for determining the applicability of Chapter 12. This means that at the time of the conclusion of an arbitration agreement, it is not definitely clear in all cases whether the PILA or the CPC will apply to possible arbitral proceedings.

Art. 176(1) of the Draft propounds to clarify that the application of Chapter 12 should depend on the parties of the arbitration agreement, not the parties of the arbitral proceedings[18]. This amendment of the current case law of the Federal Supreme Court is welcome because it ensures the predictability of

[16] Dispatch, Sect. 1.3.2, p. 13.

[17] Dispatch, Sect. 1.3.2, p. 13.

[18] Dispatch, Sect. 2.1, p. 24.

the applicable procedural framework at the time when the parties enter into an arbitration agreement.

B) Duty to Make Complaints Immediately

One of the most important aspects of the Swiss Federal Supreme Court's case law is the parties' duty to object immediately against any breach of procedural rules that it actually observed, or might have observed if applying the due diligence. A party who does not do so forfeits its right to invoke such breach later, including the challenge proceedings before the Swiss Federal Supreme Court. The Draft rightly proposes to include this fundamental principle in the Act explicitly (Art. 182(4) of the Draft)[19].

C) Correction, Explanation and Completion of Arbitral Awards

Pursuant to Art. 189a of the Draft, the parties should be allowed to apply to the arbitral tribunal to correct errors in the award, explain unclear parts thereof, and make an additional award on claims not included in the award[20]. The Swiss Federal Supreme Court has acknowledged that all of these means are available to the parties under the current Act. Including them into the Act will increase the awareness of these possibilities and clarify their scope.

With regard to the possibility of requesting the correction of awards, the Draft clarifies that this option applies only to the correction of typographical and arithmetical errors in the award. Hence, this is not a means for obtaining a substantive review of the decision.

The possibility of obtaining an explanation of certain parts of the award is limited to its operative part and, hence, does not apply to the reasoning. The parties may not ask the arbitral tribunal to explain what its reasoning means. The classical examples of explanations envisaged by the Draft are the correct identification of the parties, or the correct indication of the currency of an amount awarded.

Finally, a party may ask the arbitral tribunal to make an additional award on claims that have been asserted in the course of the arbitration but not included in the award. This rule relates to cases of *infra petita*, which is a ground for a challenge pursuant to Art. 190(1)(c) PILA. Hence, the possibility of completing an award is intended to avoid challenges in situations of *infra petita*.

The parties may request a correction, explanation, or completion of an arbitral award within 30 days from its notification. Such a request has no impact on the time limit for challenging an award. The arbitral tribunal may correct, explain, or complete its award *sua sponte* within the same time limit. In all cases in which an award is corrected, explained, or completed, a new

[19] Dispatch, Sect. 2.1, p. 33.

[20] Dispatch, Sect. 2.1, p. 35–36.

time limit for challenging the affected parts of the award starts from the notification thereof.

D) Review of Arbitral Awards (Reopening of Proceedings)

The current case law of the Swiss Federal Supreme Court allows the review of arbitral awards (German: *Revision*; French: *revision*; Italian: *revisione*). Some questions relating to the scope and the delimitations of this means have, however, not been decided yet. The Draft proposes the inclusion of a comprehensive provision in the Act, clarifying the most pressing open questions[21].

All requests for a review must be submitted to the Swiss Federal Supreme Court and not to the arbitral tribunal as *iudex a quo*. In principle, a request for review must be submitted within 90 days from the discovery of the ground, and within ten years from the date when the award became final and binding (Art. 190a(2) of the Draft). If the Swiss Federal Supreme Court accepts that the ground for a review exists it quashes the arbitral award and remits the case to the arbitral tribunal to render a new award.

The Draft proposes three grounds for the review of an arbitral award.

Pursuant to the first ground (Art. 190a(1)(a) of the Draft), a party may request the review of an arbitral award if it subsequently discovers significant facts or decisive evidence that it could not submit in the earlier proceedings despite applying the required due diligence. Facts and evidence that arose after the arbitral award was made may generally not be invoked. Hence, genuinely new facts are not a valid ground for requesting a review. Furthermore, the discovered facts and documents must be significant and decisive, *v,gr.*, they must be apt to lead to a different outcome of the proceedings. As the Swiss Federal Supreme Court put it in a recent decision, they must be relevant not only to the determination, but to the arbitral tribunal's appraisal of the facts[22]. It is also clear that this ground for review must not be abused to make up for omissions in the parties' conduct of the proceedings[23]. The party requesting the review must establish why it was unable to present the invoked new facts and evidence during the proceedings despite applying due diligence.

The second ground relates to criminal acts influencing the outcome of the arbitral proceedings. Pursuant to Art. 190a(1)(b) of the Draft, a party may request the review of an arbitral award if criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a criminal act (felony or misdemeanor). A conviction of the wrongdoer by a criminal court is not required. If criminal proceedings are not possible for some reason, the existence of a relevant criminal act may be

[21] Dispatch, Sect. 2.1, p. 37–38.

[22] Decision of the Swiss Federal Supreme Court ("DSFC"), 21.11.2016, 4A_412/2016, c. 2.2.

[23] DSFC, 6.10.2010, 4A_237/2010, c. 3.

established in another appropriate manner. The time limit of ten years for requesting a review does not apply to this ground.

The third ground proposed in the Draft is the most discussed. One of the reasons is that the Swiss Federal Supreme Court left that specific question open in a recent decision, referring explicitly to the current revision of Chapter 12 in which the legislator should decide the issue. The question is whether a party who discovers grounds for challenging an arbitrator after the award is rendered should be allowed to request a review of the award.

Art. 190a(1)(c) of the Draft proposes the inclusion of such a ground for requesting a revision, but only if no other appellate remedy is available. Hence, this ground is available only once the time limit of 30 days for challenging an award pursuant to Art. 190(2) PILA has lapsed. Otherwise, the concerned party must challenge the award.

In substance, we submit that this ground for revision is not strictly necessary. On the one hand, while there may exist blatant cases in which the possibility of a review is without doubt justified, we think that these are very limited exceptions. On the other hand, groundless challenges of arbitrators are used as delaying tactics relatively often. Granting the possibility of challenging an arbitrator after the arbitral proceedings are terminated and the award has become final and binding potentially opens a further opportunity for delaying tactics. In view thereof, we submit that the Federal Supreme Court should apply this ground restrictively if it is eventually included in the Act.

Art. 192(1) of the Draft proposes that the parties may exclude the possibility of a review if none of them is Swiss[24]. The only exception is the review for criminal acts influencing the outcome of the award (Art. 190a(1)(b) of the Draft), which should be mandatory. We submit that the Draft is right in allowing the parties to exclude the possibility of a review in analogy to the exclusion of challenges (Art. 192(1) PILA). In our view, this possibility should apply to all grounds and the mentioned exception is not necessary. After all, the parties are also allowed to exclude the challenge of awards for a violation of public policy.

E) State Courts Apply Summary Proceedings

State courts may support arbitral proceedings in various respects. The question is how these proceedings should be framed. The Draft proposes the inclusion of a new provision in the Swiss Civil Procedure Code, pursuant to which the rules on summary proceedings apply to all such auxiliary proceedings[25]. This is a welcome clarification. It ensures that the auxiliary proceedings supporting arbitration are handled in a simple and swift manner.

[24] Dispatch, Sect. 2.1, p. 37–38.

[25] Dispatch, Sect. 2.3, p. 41.

3. Strengthening of the Party Autonomy

A) Unilateral Arbitration Clauses

The Swiss Arbitration Act is based on the assumption that the parties enter into an arbitration agreement and does not explicitly relate to unilateral arbitration clauses. It is the prevailing view of Swiss commentators that unilateral arbitration clauses are allowed implicitly[26]. However, the Government is right in proposing an explicit provision to cover this. Art. 178(4) of the Draft simply states that Chapter 12 applies by analogy to unilateral arbitration clauses. The Report says that all further questions should be resolved by the arbitral tribunals, the state courts and the commentators[27].

It is important to note the distinction between the formal and the substantive permissibility of unilateral arbitration clauses. As the Report points out correctly, the proposed provision in Art. 178(4) of the Draft deals only with the formal permissibility and validity of such unilateral arbitration clauses. Whether they are permitted from a substantive point of view (*e.g.,* in a will or in articles of association) is a question of the law applicable pursuant to Art. 178(2) PILA[28].

B) "Arbitration in Switzerland"–Clauses

The seat of an arbitration is determined by the parties, the arbitral institution administering the proceedings, or the arbitral tribunal (Art. 176(3) PILA). Various provisions providing for the possibility of state court support for arbitral proceedings tie the state court's jurisdiction *ratione loci* to the seat of arbitration. Under the current Act, there is discussion as to whether arbitration agreements not determining a specific place as the seat such as "Arbitration in Switzerland" are valid[29].

Art. 179(2) of the Draft proposes resolving this issues by establishing a subsidiary competence of the state courts anywhere in Switzerland if the parties have not determined the seat of the arbitration at all, or not by reference to a specific place in Switzerland. This ensures that the arbitral tribunal can be constituted with the support of a state court. Once the arbitral tribunal is constituted, it can properly determine the seat of the arbitration (Art. 176(3) PILA) and thereby resolve any issues of which state court is competent for any further support of the proceedings.

[26] Dispatch, Sect. 2.1, p. 25–26.
[27] Dispatch, Sect. 2.1, p. 26.
[28] Dispatch, Sect. 2.1, p. 26–28.
[29] Dispatch, Sect. 2.1, p. 28–29.

This proposal entails a very welcome development since it may reduce the number of pathological arbitration agreements that fail to operate properly since the place of arbitrations is not sufficiently determined.

4. Increase of User–Friendliness

A) Extended Support for Arbitration by the Swiss Courts

The Act currently grants arbitral tribunals the right to address a Swiss state court if the parties do not comply with interim measures (Art. 183(2) PILA), or evidentiary orders (Art. 184(2) PILA), issued by the arbitral tribunal. The Draft proposes extending this possibility to the parties of arbitral proceedings and to arbitral tribunals and parties of foreign arbitral proceedings.

With regard to interim measures, Art. 183(2) of the Draft provides that, in addition to the arbitral tribunal as under the current Act, the parties of arbitral proceedings may approach the state court for support[30].

In addition, Art. 185a(1) of the Draft allows arbitral tribunals having their seat abroad (and that, hence, are not governed by the Swiss Arbitration Act), and the parties of foreign arbitral proceedings to approach Swiss state courts for support in connection with interim measures[31]. In this case, the Draft explicitly states that the state court at the place where the measure should be enforced is competent.

The approach is similar for evidentiary matters. Art. 184(2) of the Draft states that, in addition to the arbitral tribunal, the parties themselves may approach the state court at the seat of the arbitral tribunal for support. The state court in principle applies its own procedural laws. Art. 184(3) of the Draft proposes explicitly granting such state court the competence to apply, or have regard to, specific procedures relevant in the case (*v.gr.* of the *lex causae*) if requested[32].

Art. 185a(2) of the Draft opens up this possibility to foreign arbitral tribunals and parties to foreign arbitrations. The state court at the place where the evidence should be taken is competent[33].

These proposals entail an important extension of the Swiss state courts' support of arbitral proceedings in Switzerland and abroad. Indeed, according to modern understanding, state courts should be able to provide support to arbitral proceedings also if approached directly by the parties and in relation to arbitral proceedings seated abroad.

B) Appointment, Replacement and Removal of Arbitrators

[30] Dispatch, Sect. 2.1, p. 33.
[31] Dispatch, Sect. 2.1, p. 34–35.
[32] Dispatch, Sect. 2.1, p. 34.
[33] Dispatch, Sect. 2.1, p. 34–35.

The current version of the Swiss Arbitration Act does not include rules on the appointment, replacement and removal of arbitrators. To the extent the parties' arbitration agreement does not contain any rules, the Act refers to the respective provisions of the Swiss Civil Procedure Code. The Draft proposes the inclusion of these rules in the Act itself. This will render them more accessible and increase the user–friendliness, in particular for foreign users. At the same time, the Draft proposes dealing with the appointment and replacement (Art. 179 of the Draft) and the removal of arbitrators (Art. 180b of the Draft) in two separate provisions. This brings more clarity to the provisions.

The provision proposed in Art. 179 of the Draft, dealing only with the appointment and replacement of arbitrators, is a combination of new features and the provisions already applying under the current Act through the reference to the CPC[34].

The first clarification is the fallback position with regard to the number of arbitrators. The last sentence of Art. 179(1) of the Draft states that the arbitral tribunals shall be composed of three members unless the parties agreed otherwise.

The competent state court to appoint and replace an arbitrator is the one at the seat of the arbitral tribunal. Art. 179(2) of the Draft proposes the establishment of a subsidiary competence of the state courts anywhere in Switzerland if the parties have not determined the seat of the arbitration at all, or by reference to a specific place in Switzerland[35].

Art. 179(4) of the Draft deals with the situation that one of the parties or the arbitrators (in relation to the appointment of the chairperson) do not comply with their duties in relation to the appointment of the arbitral tribunal pursuant to the applicable procedure. If they do not comply with such duties within 30 days from a request by one party, such party may request support from the state court, *e.g.*, the appointment of an arbitrator on behalf of a party[36].

Art. 179(5) of the Draft enshrines the rule, pursuant to which the state court may appoint all arbitrators in multi–party arbitrations in order to avoid unequal treatment of the parties, explicitly in the Act. The rule applies already by virtue of the reference to the CPC[37].

The arbitrators have an on–going duty to disclose any circumstances potentially affecting their impartiality or independence throughout the proceedings. Art. 179(6) of the Draft proposes the inclusion of such a duty explicitly in the Act[38]. The test established is "justified doubts". Arbitrators

[34] Dispatch, Sect. 2.1, p. 28.
[35] See Sect.0 above.
[36] Dispatch, Sect. 2.1, p. 28.
[37] Dispatch, Sect. 2.1, p. 30.
[38] Dispatch, Sect. 2.1, p. 30–31.

must disclose any circumstances causing such doubts immediately. We submit that justified doubts do not only include objectively justified grounds, but also subjectively relevant issues.

With regard to the removal of arbitrators, Art. 180b(1) of the Draft sets out the basic principle that the parties may remove an arbitrator by mutual agreement at any time. Furthermore, unless the parties have agreed otherwise, each party can request from the state court the removal of an arbitrator who is not in a position to fulfil his or her tasks in due course or with the due diligence. The request must be made within 30 days from becoming aware of the ground for the removal[39].

C) Challenge of Arbitrators

The Draft propounds more elaborate provisions on the challenge of arbitrators with two separate articles on the grounds for a challenge and the applicable procedure[40].

With regard to the grounds for a challenge, Art. 180(1)(c) of the Draft explicitly mentions justified doubts on impartiality in addition to independence[41]. This brings the text of the provision in line with the standing case law.

The Act currently contains the rule that a party may challenge the arbitrator it appointed, or in the appointment of whom it participated, only for reasons discovered after the appointment. Art. 180(2) of the Draft clarifies that, in addition, a challenge is only possible in these circumstances if the respective party was not aware of the ground before the appointment despite applying due diligence when assessing the impartiality and independence of the concerned arbitrator[42]. This increases the threshold for a challenge in such circumstances.

There may be situations in which a party discovers the ground for a challenge of an arbitrator only after the arbitral tribunal rendered its award. Art. 180(3) of the Draft proposes a new rule that such party can request a review of the award (Art. 190a of the Draft)[43].

Concerning the procedure for challenging arbitrators, the Draft follows the principles currently applying under the CPC[44]. Unless the parties have agreed upon a different procedure, the party challenging an arbitrator must submit the challenge in writing together with a statement of the grounds to the challenged arbitrator within 30 days of becoming aware of the ground. Notice of the request must be given to the other arbitrators within the same

[39] Dispatch, Sect. 2.1, p. 28.
[40] Dispatch, Sect. 2.1, p. 31–32.
[41] Dispatch, Sect. 2.1, p. 31–32.
[42] Dispatch, Sect. 2.1, p. 31.
[43] See Section 0 above.
[44] Dispatch, Sect. 2.1, p. 32.

deadline. Hence, the arbitral tribunal is the first addressee of any challenge (Art. 180a(1) of the Draft).

Furthermore, within 30 day from the submission of the challenge to the challenged arbitrator, a challenge may be made with the state court (Art. 180a(2) of the Draft). This allows the challenging party to pursue the challenge if the challenged arbitrator rejects it.

Art. 180a(3) of the Draft allows the arbitral tribunal to continue with the arbitration during the challenge procedure and make an award without excluding the challenged arbitrator, unless the parties have agreed otherwise. This is an important rule to avoid the abuse of the challenge procedure for delaying tactics.

D) Unified Form Requirements

The Swiss Arbitration Act includes a number of explicit references to agreements of the parties on certain issues. Art. 176(2) PILA provides the possibility to opt out of Chapter 12 and to apply Part 3 of the CPC instead. Art. 192(1) PILA allows the parties to exclude appellate remedies if none of them has its seat in Switzerland. The Draft makes clear that the form requirement applying to arbitration agreements in general as set out in Art. 178(1) PILA also governs these specific agreements by including a specific reference[45]. At the same time, Art. 178(1) of the Draft proposes updating the wording concerning the form requirement, deleting outdated forms of communication explicitly mentioned in the current Act[46].

E) English Submissions to the Swiss Federal Supreme Court

A topic hotly debated after the release of the Preliminary Draft last year was the proposal to allow submissions in English (in addition to German, French, and Italian) in the challenge (and the review) proceedings before the Swiss Federal Supreme Court[47]. The Draft still contains this proposal and it deserves support. However, one may expect that it will again be hotly debated in parliament. Among others, the Swiss Federal Supreme Court has expressed a negative view on this proposal in its observations on the preliminary Draft[48].

F) No Minimal Amount in Dispute Required for Appellate Remedies

The law governing the proceedings before the Swiss Federal Supreme Court requires there to be a minimal amount in dispute for certain appellate

[45] Dispatch, Sect. 1.2.3, p. 11.
[46] Dispatch, Sect. 2.1, p. 25.
[47] Dispatch, Sect. 2.2, 40.
[48] Report on the Results of the Consultation Proceedings, Sect. 3.1.8, p. 13.

remedies. The Draft proposes clarifying that such requirement does not apply to challenges of arbitral awards pursuant to Art. 190(2) PILA[49]. This is the correct approach since there is no other appellate remedy, and it is helpful to clarify this point.

III. Conclusion

The Government proposal for amending the Swiss arbitration act adheres to the principle "if it ain't broke, don't fix it". It is indeed important to maintain the character of the Swiss Arbitration Act as a concise law dealing only with the necessary aspects of arbitral proceedings. The proposed inclusions and amendments increase the user–friendliness and are, therefore, within the purpose of this revision.

Documents

Avant–projet concernant la modification de la loi fédérale sur le droit international privé du 11 janvier 2017 ("Preliminary Draft"), https://www.bj.admin.ch/dam/data/bj/aktuell/ news/2017/2017–01–11/vorentw–f.pdf.

Rapport explicatif concernant la modification de la loi fédérale sur le droit international privé (arbitrage international) du 11 janvier 2017 ("Report"), https://www.bj.admin.ch/dam/ data/bj/aktuell/news/2017/2017–01–11/vn–ber–f.pdf.

Message concernant la modification de la loi fédérale sur le droit international privé (Chapitre 12 Arbitrage international) du 24 octobre 2018 ("Dispatch"), https://www.bj.admin.ch/ dam/data/bj/aktuell/news/2018/2018–10–24/bot–f.pdf.

Projet concernant la modification de la loi fédérale sur le droit international privé du 24 octobre 2018 ("Draft"), https://www.bj.admin.ch/dam/data/bj/aktuell/news/ 2018/2018–10–24/entw–f.pdf.

Modification de la loi fédérale sur le droit international privé (arbitrage international), Rapport sur les résultats de la procédure de consultation du 8 aout 2018 ("Report on the Results of the Consultation Proceedings"), https://www.bj.admin.ch/dam/data/bj/aktuell/news/ 2018/2018–10–24/ve–ber–f.pdf.

[49] Dispatch, Sect. 2.2, p. 39.