Amendment of Swiss law related to international arbitration

Switzerland is one of the most sought-after locations for international arbitration. In order to maintain this status and to promote its attractiveness, the Swiss Parliament adapted the rules on international arbitration in June 2020. This legal compass intends to highlight the key amendments which will most likely enter into force on 1 January 2021.

1. The amendments at a glance

The legal provisions related to international arbitration in Switzerland are contained in Chapter 12 of the Swiss Private International Law Act (PILA). The purpose of the revision is to transpose central elements of the Federal Supreme Court’s case law into these provisions. In particular, this concerns the scope of Chapter 12. In order to determine the scope of application, it is now expressly referred to the parties to the “arbitration agreement”. In addition, the duty to give notice of defects in case of procedural flaws, as developed by the Federal Supreme Court in its case law, is to be legally enshrined.

Moreover, the Swiss legislator intends to further improve the user-friendliness of the law. For example, it will be possible to file submissions to the Swiss Federal Supreme Court in English in connection with international arbitration proceedings. In addition, Swiss courts will be able to provide direct support to foreign arbitration tribunals in the taking of evidence, also by taking into account foreign forms of evidence such as cross-examination.

Finally, and in line with international developments, party autonomy will be strengthened. The revised provisions provide a new legal regulation of arbitration clauses in unilateral legal transactions. In addition, provisions are included in cases where the arbitration agreement of the parties does not specify the seat of arbitral tribunal or simply specifies the seat to be in Switzerland.

1.1 Amendments regarding arbitration clauses

Under current law, an arbitration agreement has to be in writing, by telegram, telex, telex, telex, or any other means of communication that establishes the terms of the agreement by a text (article 178 para. 1 PILA).

Even after the revision, all parties to an arbitration agreement must give their consent in one of the aforesaid forms. In order to clarify that e-mails and other forms of modern communication are such forms, the wording of article 178 para. 1 PILA will be simplified by requiring that an arbitration agreement has to be in writing or any other means of communication that establishes the terms of the agreement by a text.

Moreover, the revised law will now explicitly state that formal valid arbitration clauses can also be contained in unilateral legal acts, such as trust deeds, wills or statutes.
1.2 Appointment and Replacement of an Arbitrator in the absence of an agreement

For the purpose of user-friendliness, the provision regarding the appointment of the members of an arbitral tribunal (article 179 revPILA) will be exclusively regulated in the PILA and not, as previously, by reference to the Swiss Code of Civil Procedure (CCP).

Thus, in principle, the parties determine the composition of the arbitral tribunal and its appointment. In the absence of such agreement, whether express or in the absence of any reference to the rules of an arbitral institution such as the ICC Rules or the Swiss Rules, the appointment of the arbitral tribunal shall be incumbent upon the ordinary court at the seat of the arbitral tribunal.

In doing so, the state court assumes that the arbitral tribunal shall consist of three members, each party appointing one arbitrator and the two arbitrators appointing the chairperson. If the parties cannot agree on the appointment, the ordinary court at the seat of the arbitral tribunal may be called upon. If the parties have not determined the exact location of the arbitral tribunal, but have merely stated that arbitration is to be held in Switzerland, the state court first seised shall have be competent. This court shall set a 30-day time limit within which the parties may constitute the arbitral tribunal after all, otherwise its members shall be appointed by the state court. The arbitral tribunal may refuse the appointment only if there is no arbitration agreement between the parties.

1.3 Duty to raise an objection (“Rügepflicht”)

The grounds for challenging the arbitral award are very limited, not least in the interest of the parties (article 190 PILA). The rationale behind this is to prevent years of “protracted proceedings”. Although the violation of minimal standards such as the right to be heard or the equality of the parties can be challenged, this is only admissible if these flaws were challenged immediately during the arbitral proceedings. This principle, developed in the case law, will now be explicitly enshrined in article 182 para. 4 revPILA. According to this provision, a party who continues the arbitral proceedings without immediately raising an objection against a confirmed or a recognizable violation of the procedural rules may not subsequently invoke such violation.

The express provision is to be welcomed insofar as the mere withholding of the notice of defects in order to raise it only in the event of an unfavourable outcome of the proceedings is even more vehemently opposed.

1.4 Auxiliary procedures

During the legislative process, the idea of a national juge d’appui was raised, i.e. a central authority responsible for all support by state authorities, such as the establishment of the arbitral tribunal and assistance in the taking of evidence. However, in view of the small number of cases, this idea was abandoned after all. This makes sense, since the juge d’appui will only be called upon if the agreed arbitration rules fail, which will be the case especially in ad-hoc-proceedings. In contrast, in institutional arbitration, where the proceedings are conducted by the respective institution, the need for support by state authorities takes a low priority.

Nevertheless, it should still be possible to bring proceedings before state courts if the arbitral tribunal’s orders are ineffective, i.e. if the arbitrators or third parties are reluctant in course of the taking of evidence. For example, in the case of precautionary measures (article 183 revPILA), the affected party shall now also be entitled to address the state court, which was previously only permitted to the (foreign) arbitral tribunal. Since the party concerned has its own right to have the precautionary measure enforced, this new feature is welcomed.

When a state court takes evidence on account of a (foreign) arbitral tribunal (article 184 revPILA), it should in future also be possible to take into account foreign forms of evidence in addition to the ones known under Swiss law. In international arbitration, where different legal cultures meet, forms of evidence such as cross-examination or witness statements are usually part of the taking of evidence. Although foreign forms of legal procedure can also be applied or taken into account under existing law (article 11a para. 2 PILA), this provision seems to have hardly been used in the taking of evidence in arbitration. It remains to be seen to what extent the new possibility will affect the taking of evidence in state courts.
Given the potential length of state court proceedings, arbitral tribunals are reluctant to reach out to state courts. Especially with regard to the taking of evidence, the reason for this is often that state courts generally do not directly support an arbitral tribunal seated abroad. In this case, the arbitral tribunal must take the tedious diversion of first addressing the state court at the seat of the arbitral tribunal, which then turns to the respective foreign state court in order to obtain judicial assistance. However, the situation differs in some countries such as France and England, where under certain circumstances foreign arbitral tribunals are directly supported by local state courts.

Switzerland is now following suit and provides that an arbitral tribunal domiciled abroad or a party to a foreign arbitration proceeding may address a Swiss state court to either enforce precautionary measures or to request assistance in the taking of evidence (article 185a revPILA); and this without having to go through the cumbersome procedure of judicial assistance. Since the arbitral tribunal assesses the evidence, the judicial assistance in taking evidence can also be provided without the consent of the parties to the arbitral proceedings. Conversely, a Swiss state court will not provide assistance if a party requests the taking of evidence without the consent of the arbitral tribunal. Such refusal may, under certain circumstances, lead to an infringement of the right to be heard. However, the Federal Supreme Court imposes more stringent requirements in this regard. The respective arbitral tribunal therefore enjoys a large discretion in soliciting assistance from ordinary State courts.

1.5 Legal regulation of the review

The review is a so-called extraordinary legal remedy, which has the effect of correcting legally binding decisions in the event of the subsequent discovery of new facts and evidence, as well as in the event of the impact of criminal acts on the original decision. The current provisions of the PILA on international arbitration do not contain provisions concerning the review. However, this legal remedy is indisputably available against international arbitration decisions as well.

The revised PILA now explicitly takes up the review and regulates in article 190a revPILA both the grounds and the procedure of a review in accordance with Swiss case law.

Under current law, the question of whether the parties can validly waive the legal remedy in advance in international arbitration is not settled. The Swiss Federal Supreme Court has also left this question unanswered in its case law. The new provision in the PILA provides for a middle course in this regard. If neither of the parties has its domicile, seat or place of habitual residence in Switzerland, the parties may, by means of a declaration in the arbitration agreement or in a subsequent agreement, exclude in advance the possibility to file a review on the grounds of subsequent discovery of new significant facts or evidence and the discovery of a ground for challenge only after the conclusion of the arbitral proceedings (article 190a para. 1 lit. a and c revPILA and article 192 para. 1 revPILA). In contrast, it is not permissible to waive the review on the ground that the arbitral award was influenced by a crime or an offence to the detriment of the party concerned, as established in criminal proceedings (article 190a para. 1 lit. b and article 192 para. 1 revPILA).

1.6 Legal provisions regarding other legal remedies

The parties to arbitration proceedings may either appeal against the arbitral award or file a request for review as outlined above. In addition, further legal remedies are available to the parties in accordance with the case law of the Swiss Federal Supreme Court. This concerns in particular the rectification, the clarification and the amendment of arbitral awards. Such additional remedies are now explicitly regulated in the PILA.

Unless the parties agree otherwise, either party may, within 30 days of the notification of the arbitral award, request that the arbitral tribunal rectify any errors of wording or calculation in the award, explain certain parts of the award, or issue a supplementary arbitral award with regard to claims that were raised in the arbitral proceedings but not addressed in the award. The arbitral tribunal may, within the same period of time, on its own initiative make a rectification, clarification or addition of the award (article 189a para. 1 revPILA). In this context, it should be noted that such request does not suspend the deadline for the application to set aside the arbitral award (article 189a para. 2 revPILA).
1.7 Use of English in the proceedings before the Swiss Federal Supreme Court

Arbitration proceedings are conducted predominantly in English. The Swiss Federal Supreme Court currently takes this into account by usually not requiring translations of documents and enclosures submitted in English in appeals against arbitral awards. However, the appeal itself must be drafted and filed in one of the official Swiss languages, i.e. in German, French or Italian.

With the amendment of the PILA entering into force, it becomes admissible to draft legal documents - broadly interpreted to include all submissions to the Federal Supreme Court - in English (article 77 para. 2bis revFSCA (revised Swiss Federal Supreme Court Act)). This amendment gave rise to some controversies during the legislative debates. In its consultation on the draft amendment, the Swiss Federal Supreme Court clearly rejected this proposal, in particular based on constitutional reasons.

For the sake of completeness, it should be noted that the above-mentioned amendment concerning the submission of legal documents in English is also being discussed in the context of the ongoing amendment of the Swiss Civil Procedure Code. According to the draft, cantonal law may provide that, at the request of all parties, the proceedings do not have to be conducted in the official language of the relevant canton, but that another national language or English may be used (article 129 para. 2 draft revCPC). If such proceedings have been conducted in English, legal documents before the Federal Supreme Court may also be drafted / filed in English (article 42 para. 1bis draft revFSCA).

2. Conclusion

The amendment of Switzerland’s international arbitration law is to be welcomed as it modernizes international arbitration law and increases Switzerland’s attractiveness as seat of international arbitrations tribunals.

Other than allowing submissions to the Swiss Federal Supreme Court to be drafted and filed in English, the amendments do not provide major new features. However, this does not seem necessary. Rather, the amendments provide useful clarifications which will lead to an increased user-friendliness of Switzerland’s international arbitration law.

Although the amendments will allow appeals to be drafted and filed in English, this does not alter the fact that knowledge and experience in Swiss law and litigation before Swiss courts are indispensable for the careful drafting of such appeals. This is particularly true in view of the fact that appeals against arbitral awards before the Federal Supreme Court are traditionally difficult.
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