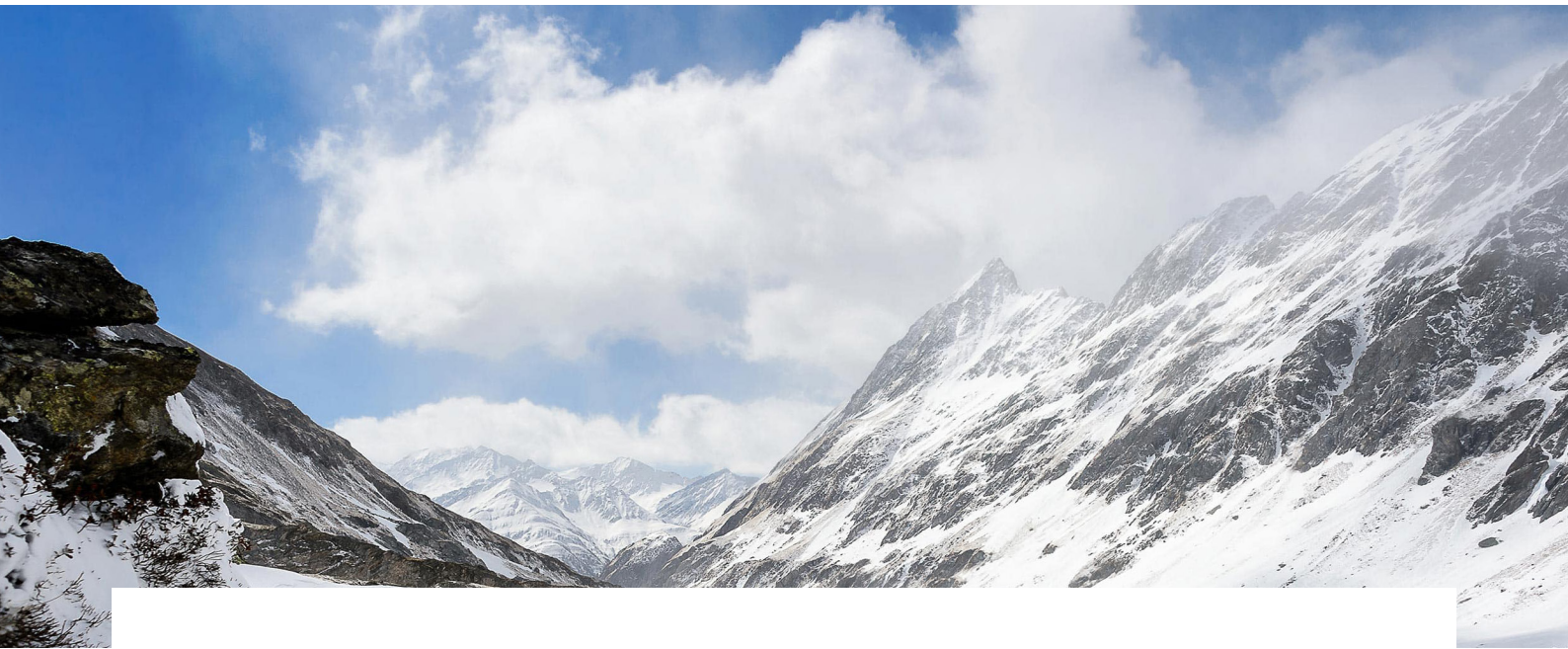




Revised Swiss arbitration law to enter into force on 1 January 2021

Jean Marguerat | Franz Stirnimann Fuentes | Tomás Navarro Blakemore | Davide Colacino

1. Introduction

On 19 June 2020, the Swiss Parliament approved the draft bill for the revision of Chapter 12 of the Swiss Private International Law Act (Chapter 12 PILA), which governs international arbitration in Switzerland. The draft bill will enter into force on 1 January 2021.

The revision strikes a fair balance between reinforcing Switzerland's attractiveness as a hub for international arbitration and modernising the law with the introduction of some new features such as, e.g., the possibility to submit a motion to set aside an arbitral award before the Swiss Federal Supreme Court in English. Overall, the amendments do not constitute a major upheaval for Switzerland's international arbitration law. Many modifications formalise accepted practises and established case law from the Swiss Federal Supreme Court. With the amended bill, the drafters maintained the succinct and user-friendliness of the Swiss law on international arbitration.

After a short background on the amended bill, this blog identifies and comments on the most relevant amendments that will enter into force in 2021 and which any user of arbitration related to Switzerland is well advised to bear in mind.

2. A brief background

In force since since January 1989, Switzerland's international arbitration law has been at the forefront of modern arbitration laws worldwide. With its concise 19 articles, it is hailed as a clear, modern and liberal

statute, granting parties wide autonomy and flexibility to conduct the arbitral proceedings to their liking. Having proved to provide an arbitration-friendly judicial regime supported by an extensive arbitration case law and doctrinal writing, it comes as no surprise that Switzerland is one of the preferred venues for hosting international arbitrations. Indeed, Switzerland was the third most selected place of arbitration according to the ICC 2019 Statistics.

On 3 February 2012, the Commission of legal affairs of the Swiss National Council submitted a motion to maintain Switzerland's attractiveness as a leading centre for international arbitration. A group of experts was established and consultations with the Swiss Federal Supreme Court, arbitral institutions such as the ICC, SCAI, CAS and WIPO were conducted.

In January 2017, the Swiss Federal Council (which is the Executive Body in Switzerland) published its proposed amendments for the revision of Chapter 12 PILA. The stated purpose of this proposal was to eliminate any ambiguities that are still present within Chapter 12 PILA, reinforcing its clarity, as well as formalising a number of noteworthy decisions from the Swiss Federal Supreme Court. It further noted that the development of international commerce and foreign arbitral laws have also been a source of inspiration for the proposal.

At the beginning of 2020, the Swiss Parliament dealt with the proposal and discussed, amongst others, the disputed provisions relating to the possibility to file a motion to set aside an arbitral award before the Swiss Federal Supreme Court in English. Ultimately, the Swiss Parliament approved the draft bill for the revision of Chapter 12 PILA in June 2020. The bill contains a number of amendments of stylistic and technical nature that do not require particular attention; the relevant amendments of Chapter 12 PILA are commented on below.

3. The relevant amendments

3.1. The scope of application of the PILA (art. 176 PILA)

The revised bill clarifies that Chapter 12 PILA applies if at the time of the conclusion of the arbitration agreement, at least one of the parties to the arbitration agreement had its domicile, habitual residence or seat outside of Switzerland. The provision enhances legal certainty since there was some uncertainty as to what was decisive in determining the application Chapter 12 PILA: whether the parties' seat or domicile at the time the parties agree to an arbitration clause or whether at the time of the initiation of the arbitration. The former solution has now been expressly stipulated.

3.2. Form of the arbitration agreement (art. 178 PILA)

The revised art. 178(1) PILA establishes that the arbitration agreement must be in writing or in any other form that allows the agreement to be evidenced by text (e.g., emails). All parties to the arbitration agreement must adhere to such form requirements. Following the regime in Germany, Austria and France, the amendment establishes that it is sufficient if the proof of the existence of an arbitration agreement is fulfilled by one party only. The form requirement also applies to a declaration of opting-out and a waiver of appeal pursuant to art. 176(2) PILA.

3.3. Arbitration agreements in unilateral acts and article of associations (art. 178(4) PILA)

A novelty that requires attention can be found in art. 178(4) PILA whereby the arbitral tribunal's competence may not only derive from an arbitration agreement concluded between two parties but also from an arbitration clause found in a unilateral act, such as a testament, foundation or trust or an arbitration clause in articles of associations. This amendment paves the way for arbitration in the context of corporate and inheritance disputes.

3.4. The appointment of arbitrators (art. 179 PILA)

The revised bill contains a comprehensive provision dealing with the appointment of arbitrators (art. 179 PILA). Amongst others, the following amendments were introduced.

- **Determination of the seat (art. 179(2) PILA):** In the event the parties had not determined the seat or simply stated "Switzerland" as the seat of the arbitration, it has been debated in the doctrine what remedies the parties could undertake. With the inclusion of an additional phrase in art. 179(2) PILA, such a gap is filled: the state court first seized by the parties will be the competent one to fix the seat of the arbitration.
- **Appointment in multi-party proceedings (art. 179(5) PILA):** Following the well-known Dutco decision from the French Court of Cassation and the principle of equality of the parties in arbitration, the revised bill contains a new provision whereby the state court has the possibility to nominate all the arbitrators in the event there is neither an agreement among the parties nor a referral to an arbitral institution.
- **Disclosure obligation for the arbitrators: Art. 179(6) PILA** establishes the obligation for arbitrators to disclose any potential facts that could raise doubts as to their independence or impartiality. Such an obligation has to be maintained throughout the whole arbitration procedure.

3.5. The challenge and replacement of arbitrators (art. 180 PILA – art. 180b PILA)

The revised bill contains a new provision (art. 180a PILA) dealing with the procedure for challenging arbitrators based upon the grounds set out in art. 180 PILA. Unless the parties have agreed otherwise, a challenge must be made in writing to the challenged member of the arbitral tribunal (with a copy to the other members of the arbitral tribunal) specifying the facts and circumstances on which the challenge is based. For a challenge to be admissible, a party must submit it within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based or could have known of such facts and circumstances had it paid due attention. The requesting party may seek a final decision from the Swiss judge at the seat of the arbitration (the so-called *juge d'appui*) 30 days after the submission to the challenged member of the arbitral tribunal.

Article 180b PILA enables the replacement of an arbitrator upon mutual agreement by the parties. The parties may also request the replacement of an arbitrator before the competent *juge d'appui* should a member of the arbitral tribunal be unable to perform his duties within a reasonable period of time or with the necessary due diligence.

3.6. The parties' duty to challenge a violation of procedural rules immediately (art. 182(4) PILA)

Article 182(4) PILA enshrines the parties' fundamental duty to challenge any violation of the procedural rules immediately. A party which continues the arbitral proceeding without giving notice of a violation of the procedural rules which have been detected or which could have been detected had it paid due attention, may no longer assert this violation in the arbitral proceeding or a subsequent challenge proceeding before the Swiss Federal Supreme Court.

3.7. Provisional and protective measures (art. 183 PILA)

Under the current version of art. 183 PILA, only the arbitral tribunal was entitled to request the assistance of state courts in the event a party does not voluntarily comply with provisional or protective measures ordered by the arbitral tribunal. Such a right is now, under the revised bill, also extended to the parties.

3.8. Support to foreign arbitral tribunals and parties in foreign arbitral proceedings (art. 185a PILA)

Article 185a PILA grants foreign arbitral tribunals and parties in foreign arbitral proceedings direct access to Swiss courts in order to obtain provisional and protective measures or with the taking of evidence.

3.9. Correction and revision of arbitral awards (art. 189a PILA)

Despite the fact that the correction, interpretation, and amendment and the revision of arbitral awards were already available to parties based on the case-law of the Swiss Federal Supreme Court, there was no express basis for these remedies in Chapter 12 PILA. With the introduction of the new articles 189a and 190a PILA, this lacuna is ultimately resolved.

A request for correction, interpretation or amendment must be submitted before the arbitral tribunal within 30 days following the notification of the arbitral award. It should be noted that such a request does not stay the deadline for the setting aside proceedings.

As to the request for revision, it will have to be filed before the Swiss Federal Supreme Court within 90 days from the discovery of the ground for revision and within the absolute deadline of 10 years since the notification of the arbitral award. Moreover, art. 192(1) PILA states that the parties to an international arbitration proceeding cannot validly waive their right to revision in advance if neither of the parties has its domicile, seat or habitual residence in Switzerland.

3.10. Filings to the Swiss Federal Supreme Court may be submitted in English (art. 77(2bis) Swiss Federal Supreme Court Act)

Article 77 (2bis) of the Swiss Federal Supreme Court Act enables the parties to submit their submission regarding an appeal against an arbitral award in English and not only in one of Switzerland's official languages: German, French, Italian or Rumantsch. Up until now, it had only been possible to file the exhibits to such briefs in English, including the arbitral award. This does not, however, mean that the Swiss Federal Supreme Court will render its decision in English, its working languages being the official languages mentioned before.