Update on the Revision of the Swiss International Arbitration Law

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On 24 October 2018, the Swiss Federal Council released the report and the draft bill concerning the revision of the Swiss international arbitration law (Chapter 12 of the Swiss Private International Law Act, "PILA"). The purpose of the current revision is to modernize Chapter 12 PILA and to maintain the attractiveness of Switzerland as one of the most frequently chosen places for international arbitration.

The proposed amendments are designed

- **to implement key elements of the Swiss Federal Supreme Court's jurisprudence and to clarify open issues on international arbitration,**
- **to strengthen party autonomy, and**
- **to enhance the user-friendliness of the Swiss legal framework in international arbitration.**

The draft bill succeeds the preliminary draft bill ("Vorentwurf"), which was published by the Swiss Federal Council on 11 January 2017 (see previous Pestalozzi Legal Update). The preliminary draft generally received positive feedback by the cantons, political parties, academics, arbitration organizations and practitioners during the consultation procedure. With the exception of the simplified form requirement and the power of the arbitrators to decide on their own fees and costs, most of the proposed amendments were implemented into the draft bill.

The report and the draft bill are available on the homepage of the Swiss Federal Office of Justice in German, French and Italian. Before entering into force, the draft bill must be considered and adopted by the Swiss parliament.

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1. Scope of Application of the PILA

Chapter 12 PILA applies if the arbitral tribunal has its seat in Switzerland and if at least one of the parties has its domicile, habitual residence or seat outside Switzerland. Under the current law, uncertainty exists whether the time of conclusion of the arbitration agreement or the time of commencement of the arbitration is decisive to determine the seat of the parties. The draft bill clarifies that the seat at the time of conclusion of the arbitration agreement is decisive; a later change in the parties' seat has no impact on the applicability of Chapter 12 PILA.

2. Form Requirements

The draft bill contains a more simple and modern provision concerning the form requirement for arbitrations agreements. The arbitration agreement must be made in writing or in any other form which permits it to be evidenced by a text. Furthermore, the draft bill clarifies that an arbitration clause can also be contained in unilateral legal acts, such as last wills, foundations, trusts or statutes.

The preliminary draft provided for a simplification of the form requirement for arbitration agreements. According to the preliminary draft, only one of the parties had to fulfill the written form requirement for the valid conclusion of an arbitration agreement, while the other party could accept the arbitration agreement by any means. For example, one party sends an arbitration agreement by e-mail and the counterparty accepts the agreement orally by phone. During the consultation procedure, the proposed simplified form requirement was subject to a critical debate. As a result of this debate, the draft bill did not adopt the simplified form requirements contained in the preliminary draft. This means that generally all parties have to give their consent to the arbitration agreement in writing.

3. Appointment of Arbitrators

Arbitrators are appointed in accordance with the parties' agreement. If the parties fail to agree on the appointment of the arbitrators (directly or by reference to institutional rules), the state courts at the seat of the arbitration are competent to appoint the arbitrators. This provision could lead to a dead end if the parties cannot agree on a seat or if the arbitration agreement merely provides for "arbitration in Switzerland". The draft bill provides that, in absence of a specific seat, the state court which is seized first is competent to appoint the arbitrators.

The draft bill also clarifies that, if the parties fail to appoint the arbitrators in a multiparty arbitration, the competent state court may appoint all arbitrators. The current law does not explicitly address this issue.

4. Duty to Object Immediately

The principle that the parties must immediately object to procedural deficiencies is well established in Swiss jurisprudence. In a number of cases, the Swiss Federal Supreme Court has dismissed a setting aside application on the basis that a party failed to object to procedural deficiencies during the arbitral procedure, immediately after it happened. The draft bill adopts this general principle in an express provision.

5. Direct Access of Foreign Parties and Arbitral Tribunals to the Juge d'Appui

The arbitral tribunal has no coercive powers. If a party does not comply voluntarily with the arbitral tribunal's interim or protective measures, the arbitral tribunal or the parties have to rely on the support of state courts (the so-called juge d'appui) to enforce such measures. If the place of arbitration and the place of enforcement are both in Switzerland, the arbitral tribunal or the parties can rely on the assistance of the Swiss state courts. If the seat of arbitration is outside Switzerland, but enforcement is sought in Switzerland, the rules of international judicial assistance apply. This can be a very time consuming process, depending on the states involved.

The draft bill contains a new provision that grants foreign arbitral tribunals and parties direct access to Swiss state courts at the place where enforcement is sought. This applies to requests for interim and protective measures and the taking of evidence.

The draft bill also clarifies that requests for assistance before Swiss state courts are dealt with by way of summary proceedings.

6. Express Statutory Provisions Regarding Correction, Explanation and Amendment, and Revision

The current law only contains a provision concerning the setting aside of an award by the Swiss Federal Supreme Court. It is well established practice in Switzerland that parties may rely on further legal remedies against an arbitral award, such as correction, explanation and amendment as well as revision, depending on the circumstances. The draft bill adopts these remedies in two separate provisions.

A request for correction, explanation and amendment of an arbitral award has to be addressed to the arbitral tribunal within 30 days after the award was made. It is worth noting that the request for correction, explanation and amendment, according to the draft bill, does generally not suspend the time-limit to file a setting aside action.

According to the draft bill, a party may request the revision of an arbitral award within 90 days after discovery of a ground for revision. The grounds for revision are that new and material facts were discovered, that criminal proceedings revealed that a criminal offence has influenced the arbitral award to the detriment of a party, or that a reason to reject an arbitrator was discovered after the arbitration proceedings ended. The right to request a revision expires after 10 years from the time the arbitral award has become effective, except in cases of criminal offences.

7. Legal Briefs to the Swiss Federal Supreme Court May Be Submitted in English

Already today, the Swiss Federal Supreme Court accepts exhibits in the English language, provided that no party objects. The legal briefs themselves, however, must be drafted in one of the official languages (German, French or Italian). The draft bill goes even one step further in allowing the parties to submit their legal briefs in English, a practice that today only exists before the Swiss Federal Patent Court.

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The draft bill includes the introduction or clarification of the following rules in Swiss international arbitration law:

- **A change of the parties' domicile, habitual residence or seat after the conclusion of the arbitration agreement has no impact on the applicability of Swiss international arbitration law**
- **Modern and simple language concerning the form requirements for arbitration agreements; arbitration agreements can be included in unilateral acts; no simplification of the form requirement**
- **If the parties did not agree on a seat, the Swiss state court which is seized first is competent to appoint the arbitrators**
- **The competent Swiss state court may appoint all arbitrators in multi-party arbitrations**
- **Express provision that procedural deficiencies are to be notified immediately**
- **Foreign arbitral tribunals or parties are given direct access to a Swiss juge d'appui to enforce interim or protective measures and in the taking of evidence**
- **Summary proceedings apply to requests for assistance before Swiss state courts**
- **Express provision concerning the legal remedies of correction, explanation and amendment, and revision**
- **Legal briefs to the Swiss Federal Supreme Court may be submitted in English**

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