

Pestalozzi Update January 2017

Swiss International Arbitration Law to be updated

The Swiss Federal Council has published its draft bill to amend the Swiss International Arbitration Law

On 11 January 2017, the Swiss Federal Council released its draft bill to amend certain provisions and to propose the inclusion of new provisions in the Swiss International Arbitration Law (Chapter 12 of the Swiss Federal Act on Private International Law, "PILA"). The draft bill aims at implementing the key elements of the Swiss Federal Supreme Court's jurisprudence on international arbitration, strengthening party autonomy and enhancing the user-friendliness of the Swiss International Arbitration Law.

The recent release of the draft bill was accompanied by an official explanatory note. The draft bill and the explanatory note are both available on the homepage of the Swiss Federal Office of Justice in German, French and Italian (www.bj.admin.ch).

With this draft bill, the Swiss Federal Council has invited the concerned public, among others the Swiss Arbitration Association ASA, the Swiss Chambers' Arbitration Institution SCAI, the Swiss Bar Association SAV, ICC Switzerland, and the law faculties of Swiss Universities, to submit their respective comments on the draft bill by 31 May 2017. At this stage, it is yet uncertain whether the draft bill will enter into force or whether the Swiss Federal Council will re-consider certain proposed amendments.

The current Swiss International Arbitration Law (Chapter 12 PILA) came into force in 1989 and has ever since not been subject to major legislative review. According

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.

to the explanatory note, the proposed amendments to the Swiss International Arbitration Law aim at modernizing the legal framework for Swiss-seated arbitrations and at maintaining the attractiveness of Switzerland as place of arbitration. An empirical study of the European Parliament published in 2014 revealed that Switzerland was - by far - the most recommended seat for international arbitrations.

1. Express statutory provisions regarding revision and correction of arbitral awards

The sole express statutory remedy against arbitral awards made in Switzerland is a very limited right to request the setting aside of the award by the Swiss Federal Supreme Court. In addition to setting aside, the Swiss Federal Supreme Court has accepted to hear requests for revision, correction, clarification or supplementation of international arbitral awards based on

provisions that are directly applicable to domestic arbitral awards and state court judgments. The draft bill intends to set out expressly in the PILA the full and complete arsenal of available remedies, including revision and correction, against international arbitral awards rendered in Switzerland.

2. Scope of Application of the PILA

The proposed bill clarifies that the PILA applies if the arbitral tribunal has its seat in Switzerland and if – at the time of conclusion of the arbitration agreement – at least one of the parties had its domicile, habitual residence, seat, or place of business outside Switzerland. Under the current wording of the law and in light of a highly criticized judgment of the Swiss Federal Supreme Court, there is uncertainty as to when this requirement is to be assessed: at the time of contract conclusion or at the time an arbitration is commenced. The new wording clarifies that a change in the parties' domicile, habitual residence, seat, or place of business after the conclusion of the arbitration agreement will have no impact on the applicability of the PILA.

3. Simplified Form Requirements

Under the proposed bill, for the valid conclusion of an arbitration agreement, it would be sufficient that only one party fulfils the form requirements (i.e., any means of communication which permit the arbitration agreement to be evidenced by text). For example, one party sends an arbitration agreement by e-mail to another party who accepts it by whatever means. The draft bill also allows the conclusion of arbitration agreements by unilateral acts such as last wills, tender offers, instruments of constitution for foundations and trusts.

4. Appointment of Arbitrators in Multi-Party Arbitration

If the parties did not agree on a specific procedure for appointment in multiparty arbitrations (e.g., by reference to institutional rules), under the proposed amendments the competent state court may appoint the arbitrators. The current law does not explicitly address this issue.

5. Legal Briefs in English can be filed with the Swiss Federal Supreme Court

Under the current laws, the parties are required to submit their legal briefs in an official language of the Swiss Confederation, i.e., German, French or Italian (docu-

The proposed draft bill includes the introduction or clarification of the following rules in the Swiss International Arbitration Law:

- All remedies against international awards rendered in Switzerland, including revision and correction, are set out expressly in the statute
- Any change of the parties' habitual residence, seat, or place of business after the conclusion of the arbitration agreement will have no impact on the applicability of the Swiss International Arbitration Law
- Form requirements for arbitration agreements are simplified
- The competent state court may appoint all arbitrators in multi-party arbitrations
- Related state court proceedings are conducted under the rules for summary proceedings
- Legal briefs to the Swiss Federal Supreme Court may be submitted in English

ments in English are accepted by the Swiss Federal Supreme Court only if exhibits, supplementary documents, etc., are concerned). The proposed amendment allows the parties to submit their legal briefs in English, a practice already existing before the Swiss Federal Patent Court.

6. No national *juge d'appui*

Parliamentary motions initiating the review work had asked the Swiss Federal Council to specifically review the legal framework concerning the relationship between state courts and arbitral tribunals. The Swiss Federal Council, however, considers in its explanatory note that the current provisions in the PILA were sufficient and that there was no need for respective legislative amendments. The Swiss Federal Council for example rejected the idea of creating a national *juge d'appui*.

The current law does not stipulate the applicable procedural rules that apply to state court assistance (*juge d'appui*). The Federal Council now proposes applying the rules for summary proceedings of the Swiss Federal Civil Procedure Code ("CPC").

Finally, the draft bill does not address the existing rules on negative competence-competence. Swiss state courts have to decline jurisdiction if a party is able to rely on a valid arbitration agreement. For international arbitrations in Switzerland, the Swiss Federal Supreme Court considered that, in application of the current law, the state court's scope of review in such situation is limited to a *prima facie* standard. If, however, the arbitration agreement calls for arbitration outside Switzerland, then the state court may fully review the arbitration agreement. After consultation of concerned professional

associations and the law faculties of the Swiss universities, the Federal Council is of the opinion that the different treatment of Swiss and foreign international arbitrations in this respect does not have any practical impact.

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