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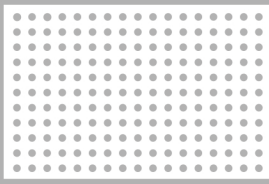

SWISS ARBITRATION ACADEMY

Volume 4

Selected Papers on International Arbitration

Editors:

Daniel Girsberger
Christoph Müller

Stämpfli Publishers

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Note from the Editors

The current edition of the SAA-Series on International Arbitration continues to contain the best graduation papers of all participants who successfully completed the post graduate studies in international arbitration and who have been awarded the "Certificate of Advanced Studies" in International Arbitration. This CAS is awarded by the Universities of Lucerne and Neuchâtel, in co-operation with the SAA Swiss Arbitration Academy. Besides stern academic standards, the papers must meet a high benchmark of topicality and relevance for international arbitration practitioners. The SAA-Series is edited by the two members of the academic supervisory board of the SAA's Academic Council.

In the current volume, you will find five research papers that touch upon different aspects of international arbitration and domestic Swiss arbitration. Caspar Feest examines whether arbitral awards that have been set aside at the seat of arbitration can still be enforced in other jurisdictions. Andreas Lienhard analyses the consequences of Swiss Supreme Court decision 136 III 467 on the arbitrability of domestic employment law disputes in Switzerland. Nicolas Pellaton elaborates on the procedural aspects of revision of arbitral awards in Swiss domestic and international arbitration. Barbara Schroeder de Castro Lopes discusses selected issues on alternative dispute resolution involving cross-border technology licencing agreements. Finally, Claudia Walz examines the circumstances under which interim measures before arbitral tribunals or national courts can be sought.

The Swiss Arbitration Academy (SAA) is a private institution founded and directed by members of its Academic Council. The CAS Arbitration is offered each year and is designed for lawyers, in-house counsel, and other professionals interested in cutting edge international dispute resolution education. During four modules of five days each, the program comprehensively examines all fundamental aspects of international commercial arbitration, including the practice and proceedings of the major arbitration institutions, such as the Swiss Chambers of Commerce, ICC, LCIA, SCC, DIS, VIAC, ICDR (AAA), CAS, WIPO as well as the SCAI. In addition, the program reviews the features of ad hoc arbitration. The rigorous program requires from each participant in-depth preparation and active participation during the training. All participants who successfully complete the course, which includes the submission of the final paper, are awarded the CAS Certificate. For further details, please visit www.swiss-arbitration-academy.ch.

The editors would like to thank the authors for their valuable contributions contained herein and are delighted to present their papers to the arbitration community. The editors further thank Stämpfli Verlag for its continued support in publishing these highly interesting and promising articles.

Lucerne/Neuchâtel, May 2018

Daniel Girsberger Christoph Müller

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List of Abbreviations

ADR	Alternative Dispute Resolution
Art./Arts	Article/s
BaslerKomm	Basler Kommentar: Legal commentary fromBasel
BernerKomm	Berner Kommentar: Legal commentary from Bern
BIT	Bilateral Investment Treaty
BGE	Leading decisions of the Swiss Supreme Court published in the official collection
BGG	Swiss Supreme Court Act of 17 June 2005 (SR 173.110)
CA	Cantonal Arbitration Convention of 27 March 1969 (SR 279)
CHF	Swiss Franc(s)
CO	Swiss Code of Obligations of 30 March 1911 (SR 220)
DEBA	Swiss Debt Enforcement Act of 11 April 1889 (SR 281.1)
ed./eds.	editor/s
et al.	et alii (and others)
European Convention	European Convention on International Commercial Arbitration of 21 April 1961
f./ff.	and the following page/s
Geneva Convention	Geneva Convention on the Executionof Foreign Arbitral Awards of 26 September 1927
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICC Rules	Rules of Arbitration of the ICC, amended and effective as of 1 March 2017
ICCA	International Council for Commercial Arbitration

ICDR	International Centre for Dispute Resolution, international division of the American Arbitration Association
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965
New York Convention	New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
Panama Convention	Inter-American Convention on International Commercial Arbitration of 30 January 1975
para./paras.	paragraph/s
RSDIE	Swiss Review of International an European Law
RSPC/RZZP	Swiss Review of Civil Procedure
SCCP	Swiss Code of Civil Procedure of 19 December 2008 (SR 272)
SLA	Swiss Labour Act of 13 March 1964 (SR 822.11)
SPILA	Swiss Private International Law Act of 18 December 1987 (SR 291)
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution, amended and effective as of 1 June 2012
TFEU	Treaty on the Functioning of the European Union of 13 December 2007
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 25 June 1985, with amendments as adopted in 2006
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969
WIPO	World Intellectual Property Organization

WIPO Rules	WIPO Arbitration Rules, amended and effective as of 1 June 2014
YCA	Yearbook Commercial Arbitration, Deventer
Zürcher-Komm	Zürcher Kommentar (legal commentary)
ZGB	Swiss Civil Code of 10 December 1907 (SR 210)
ZPO	Schweizerische Zivilprozessordnung (Zivilprozessordnung) vom 19. Dezember 2008 (SR 272), also referred to as Swiss Code of Civil Procedure (SCCP)
ZZZ	Swiss Review of Civil Procedure and Enforcement Law

Revision of Arbitral Awards in Switzerland – Procedural Aspects

Nicolas Pellaton

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I. Introduction

The mechanisms by which one can call an arbitral award into question differ from country to country[1] and are generally specific to arbitration in their nature and/or terms. In Switzerland, the following means are available: an action for annulment, a request for revision and a request for correction or interpretation.[2] 1

The present paper will focus on the procedural aspects relating to revision of arbitral awards rendered in Switzerland. Such procedural aspects will be examined in parallel for both domestic arbitration (Part III.) and international arbitration (Part IV.). 2

After general considerations on the concept of revision (Part II.) and general remarks on revision (Section III.A. and Section IV.A), the following aspects will be analysed: the decisions that can be subject to revision (Section III.B. and Section IV.B.), the competent authority to rule on requests for revision (Section III.C. and Section IV.C.), other admissibility requirements (Section III.D. and Section IV.D.), the proceedings (Section III.E. and Section IV.E.) and the decision on the request for revision (Section III.F. and Section IV.F.). Subsequently, the arbitration proceedings after a positive decision on the request for revision has been rendered (Section III.G. and Section IV.G.) and the decisions that can be taken at that stage (Section III.H. and Section IV.H.) will be analysed. The possibility to waive the right to apply for revision will also be examined (Section III.I. and Section IV.I.). Finally, brief conclusions will be made (Part V.). 3

II. The General Concept of Revision

As a general matter, revision can be defined as an extraordinary means of appeal, exceptional in nature, through which an enforceable judgment may be annulled (in whole or in part) and the case may be reassessed under specific 4

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1 See POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, para. 843 ff.; RIGOZZI/SCHÖLL, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IRPG, Basel 2002, p. 5-8; HIRSCH, Révision d'une sentence arbitrale 12 ans après, in: Jusletter of 04.01.2010, para. 51-61; VOSER/GEORGE, Revision of Arbitral Awards, in: TERCIER (Ed.), Post Award Issues, New York 2011, p. 43 ff., p. 44-52.

2 For statistics on revision of arbitral awards in Switzerland, see DASSER/WÓJTOWICZ, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, in: ASA Bulletin 2016, p. 280 ff., p. 283 ff.; VOSER/GEORGE (see footnote 1), p. 66-67.

and very limited circumstances.[3] Revision, which is a concept more familiar to civil law[4], aims at correcting a judgment that takes into consideration facts which retrospectively turn out to be incomplete or erroneous; however, revision is not a means to adapt the judgment to subsequent changes in the circumstances.[5] In Switzerland, two situations are traditionally recognized for the revision of judgments: (i) the decision has been influenced to the detriment of one of the parties by a felony or misdemeanour conduct or (ii) a party later discovers facts or important evidence[6] that could not have been submitted in the previous proceedings.

5 Revision is thus a remedy that primarily relates to *res judicata*.[7] In that sense, it should be noted that a judgment which has the effect of *res judicata* is undisputable, while a judgment that is no longer subject to an extraordinary appeal such as revision is irrevocable.[8] Revision "*is a compromise between, on the one side, legal certainty regarding the validity of decisions and, on the other side, justice not to maintain a judgment flawed in its foundations*"[9]. Revision serves to establish material truth, but it does not necessarily achieve such a purpose.[10]

6 Revision is generally considered as a subsidiary legal remedy, in comparison to other legal remedies. Thus, where grounds for revision are discovered

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3 See e.g. POUDRET/BESSON (see footnote 1), para. 843; PONCET, Obtaining Revision of „Swiss" International Arbitral Awards – Whence After *Thalès*?, in: Stockholm International Arbitration Review (SIAR) 2/2009, p. 39 ff., p. 41; BGE 4A_688/2012 and 4A_126/2013, Rec. 5.3.1; BGE 4A_666/2012, Rec. 5.2.1, RSPC 5/2013, p. 428 ff.

4 PONCET (see footnote 3), p. 41.

5 BGE 4A_105/2012, Rec. 2.2 (not published in BGE 138 III 542 but reproduced in RSPC 5/2012, p. 429), referring to BGE 86 II 385, Rec. 1, and BGE 73 II 123, Rec. 1. See also BGE 140 III 278, Rec. 3.3.

6 Cf. BGE 4P.285/2001, Rec. 5.2 (and references): "[i]*n the context of a review limited to the abstract causality, evidence will be considered as decisive when it can alter the disputed decision and change the conviction of the judge* […]" (free translation).

7 Cf. SCHWEIZER, Le recours en révision – Spécialement en procédure civile neuchâteloise, Diss. Bern 1985 [cited: SCHWEIZER, Diss.], p. 106; see also GÖKSU, Schiedsgerichtsbarkeit, Zurich St. Gallen 2014, para. 2246.

8 BOHNET, Procédure civile, 1st edition, Basel 2011, p. 271; ZOLLER, Observations sur la révision et l'interprétation des sentences arbitrales, in: Annuaire français de droit international, vol. 24, 1978, p. 327 ff., para. 7.

9 BGE 118 II 199, Rec. 2b/cc (free translation). See also BGE 142 III 521, Rec. 2.1; HIRSCH (see footnote 1), para. 39.

10 Cf. SCHWEIZER, Summary and Commentary on the Swiss Supreme Court Decision BGE 118 II 199, in: RSDIE 7/1993, p. 209 ff. [cited: SCHWEIZER, RSDIE], p. 213; see also BGE 142 III 521, Rec. 2.1.

within the time limit for setting aside the arbitral award[11] and where both legal means are used in parallel[12], the motion to set aside will, as a general rule, be dealt with first while the revision proceedings will be stayed until a decision on the motion to set aside is rendered.[13]

7 According to the Swiss conception of revision in civil proceedings, the revision procedure is divided into two parts: (1) the proceedings and decision on the request for revision (*rescindant*, *judicium rescindens*; the "***rescindant***"), after which the judgment is annulled if the invoked ground(s) for revision turn(s) out to be admissible and founded; (2) the further proceedings and new decision on the admissibility/merits of the case (*rescisoire*, *judicium rescissorium*; the "**rescisoire**"). In the first part (*rescindant*), the existence of a right to have the case reassessed is definitively decided upon by the entry into force of the decision on *rescindant*. If the request for revision is granted, the proceedings are, in the second part (*rescisoire*), renewed in whole or in part,

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11 See Art. 389 SCCP taken together with Art. 77 para. 1 lit. b and Art. 100 para. 1 BGG regarding set aside proceedings against domestic arbitral awards; Art. 191 SPILA taken together with Art. 77 para. 1 lit. a and Art. 100 para. 1 BGG regarding set aside proceedings against international arbitral awards.

12 See also BGE 142 III 521 (international arbitration), Rec. 2.3.5, regarding the specific situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed. The Supreme Court has considered, in what can be regarded as an *obiter dictum*, that it should be possible in such situations to request the revision of the arbitral award. The Supreme Court, however, decided to leave the question open (question also left open in BGE 4A_53/2017, Rec. 3.1).

13 See BGE 129 III 727, Rec. 1 (international arbitration), translated in part by MÜLLER, Swiss Case Law in International Arbitration, 2nd revised edition, Zurich 2010 [cited: MÜLLER, Swiss Case Law], p. 342-343; see also BGE 142 III 521, Rec. 2.1; VOSER/GEORGE (see footnote 1), p. 60, 63; STIRNIMANN, Revision of Awards, in: ARROYO (Ed.), Arbitration in Switzerland – The Practitioner's Guide – Commentary, Alphen aan den Rijn 2013, p. 1265 ff., para. 11. Regarding the various and complex coordination issues that may arise from such situations, see SCHWEIZER, De l'articulation des voies de droit directes contre les sentences arbitrales internationales suisses, in: BOHNET/WESSNER (Ed.), Liber Amicorum Knoepfler, Basel 2005, p. 375 ff. [cited: SCHWEIZER, Liber Amicorum Knoepfler], p. 397 ff.; DERAINS, La révision des sentences dans l'arbitrage international, in: BRINER/FORTIER/BERGER, Liber Amicorum Böckstiegel, Law of International Business and Dispute Settlement in the 21st Century, Köln 2001, para. 22-25. It should also be noted that further procedural coordination difficulties in domestic arbitration may arise from the fact that the authorities competent to rule on requests for revision and on motions to set aside are two different authorities (see BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd edition, Bern 2010 [cited: BERGER/KELLERHALS, 2010], para. 1784).

following the same procedural rules as those applicable to the proceedings that led to the initial decision.[14]

8 Revision is an extraordinary means of appeal[15], which "*means that it is a remedy that neither precludes the entry into force nor the enforcement of the decision, and which is generally limited in terms of grounds for appeal. By contrast, an ordinary means of appeal has suspensive effect and precludes the enforcement of the judgment, and allows in principle a broad review/re-examination of the matter*"[16].

9 Revision has no devolving effect (*effet dévolutif*; *Devolutivwirkung*), which means that the matter should – theoretically – not become pending in an appellate court but lie with the authority that rendered the decision.[17] In other words, revision is a means of retracting (*voie de rétractation*).[18]

10 As the competent authority for *rescindant* should theoretically be the same authority that rendered the decision whose revision is sought, a positive decision on *rescindant* could, where appropriate, be issued *uno actu* with the decision on *rescisoire*.[19]

III. Revision in Domestic Arbitration

A. General Remarks

11 The provisions of Part 3 of the Swiss Civil Procedure Code ("**SCCP**") (domestic arbitration; Art. 353-399 SCCP) apply if the seat of the arbitral tribunal is in Switzerland and if all the parties at the time the arbitration agreement was concluded had either their domicile or their habitual residence in Switzer-

14 Cf. SCHWEIZER, Diss. (see footnote 7), p. 287-288 and *passim*.

15 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 394; GULDENER, Das Schweizerische Zivilprozessrecht, Zurich 1948, vol. II, p. 489.

16 See BGE 141 III 596, Rec. 1.4.2 (free translation).

17 See SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 389; SCHWEIZER, note ad BGE 4A_14/2012, RSPC 4/2012 p. 337 ff.; see also BGE 118 II 199, Rec. 3. See e.g. Art. 328 para. 1 *ab initio* SCCP and Art. 333 para. 1 SCCP in Swiss state court proceedings.

18 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 394; GULDENER (see footnote 15), p. 489; see also BGE 113 Ia 62; BGE 118 II 199, Rec. 3; RIGOZZI/SCHÖLL (see footnote 1), p. 14.

19 BGE 5A_366/2016, Rec. 4 and 6.

land (Art. 353 para. 1 SCCP taken together with Art. 176 of the Swiss Private International Law Act, "**SPILA**").[20]

The SCCP expressly regulates revision in domestic arbitration in Art. 396-399 SCCP. Revision procedure in domestic arbitration is considered to be imperatively and exhaustively regulated by Art. 396-399 SCCP, which means that other procedural rules set forth in the SCCP do not apply.[21] 12

B. Decisions Subject to Revision

1. Domestic Nature

Decisions subject to revision under Art. 396-399 SCCP are those rendered in domestic arbitration under the provisions of Part 3 of the SCCP. 13

The parties cannot elect to opt out of the provisions of Chapter 12 of the SPILA (international arbitration) and (instead) opt into the provisions of Part 3 of the SCCP (domestic arbitration) based on Art. 176 para. 2 SPILA *after* a decision that may be subject to revision has been issued.[22] In other words, there can be no opt-out/opt-in agreement limited to the annulment/revision actions.[23] 14

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20 One can already note that the parties can elect to opt out of the provisions of Part 3 of the SCCP on domestic arbitration and opt into the provisions of Chapter 12 of the SPILA (Art. 176-194 SPILA) on international arbitration (Art. 353 para. 2 SCCP) and that, similarly, opt out of the provisions of Chapter 12 of the SPILA on international arbitration and opt into the provisions of the SCCP on domestic arbitration (Art. 176 para. 2 SPILA).

21 Under the former ICA: JOLIDON, Commentaire du Concordat suisse sur l'arbitrage, Bern 1984, para. 1 on Art. 41-43 ICA; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse – Edition annotée et commentée du Concordat sur l'arbitrage du 27 mars 1969 et des dispositions sur l'arbitrage international de la Loi fédérale du 18 décembre 1987 sur le droit international privé, Lausanne 1989, Art. 41 ICA, p. 234, Art. 42 ICA, p. 237. Under the SCCP: among others, GÖKSU (see footnote 7), para. 2296-2297.

22 Conversely, the parties cannot elect to opt out of the provisions of Part 3 of the SCCP in favor of the provisions of Chapter 12 of the SPILA based on Art. 353 para. 2 SCCP *after* a decision that may be subject to revision has been issued.

23 KAUFMANN-KOHLER/RIGOZZI, International Arbitration – Law and Practice in Switzerland, Oxford 2015 [cited: KAUFMANN-KOHLER/RIGOZZI, International Arbitration], para. 2.43.

2. Types of Decisions

15 The SCCP does not specify which types of decisions are subject to revision under Art. 396-399 SCCP. The opinions expressed in legal doctrine are unanimous on that point: the decisions which can be revised are (i) preliminary or interim awards (e.g. on the jurisdiction of the arbitral tribunal), (ii) partial awards (e.g. on liability) and (iii) final awards (which should include awards on agreed terms)[24].

16 The decisive criterion is whether or not the decision is binding for the arbitral tribunal itself. Therefore, decisions which are subject – for any reason whatsoever – to a new assessment or a reassessment by the arbitral tribunal in the course of the proceedings, such as procedural orders or interim measures, do not fall under the provisions of the SCCP on revision.[25]

17 The Swiss Supreme Court (the "**Supreme Court**") considered in that respect that "[f]*inal awards (*Endentscheide*) have the force* […] *of* res judicata […]. *Partial awards (*Teilentscheide*)* […] [are decisions] *in which the arbitral tribunal shall decide on a quantitatively limited part of the claims submitted, or, on one of the many contentious claims* [; these decisions] *too have the force of* res judicata [...] *but only for the claims on which the arbitral tribunal has ruled, excluding other or further conclusions* [...]. *As to preliminary or interim awards (*Vor- or Zwischenentscheide*), that govern preliminary procedural and substantive issues, they do not have the force of* res judicata*; nonetheless, and unlike simple procedural orders or guidelines that can be modified or revoked in the course of proceedings, preliminary or interim awards bind the arbitral tribunal from which they originate* […]. *Thus, to give one example, the arbitral tribunal that ruled, by an interim award, on the respondent's liability is bound by its decision on that particular point when it must render a decision, in its final award, on the quantum of the claimant's claims* […]".[26]

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24 Cf. BGE 139 III 133 in state court civil procedure: the state court settlement under Art. 241 SCCP, which has the effect of a decision entered into force, can be called into question by the means of the revision procedure under Art. 328 ff. SCCP.

25 Cf. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1763; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 41 ICA p. 234; cf. also SCHÜPBACH, Les voies de recours en matière d'arbitrage selon l'avant-projet de code de procédure civile, in: BOHNET/WESSNER (Ed.), Liber Amicorum Knoepfler, Basel 2005, p. 401 ff., p. 412-414; GULDENER (see footnote 15), p. 490.

26 BGE 128 III 191, Rec. 4a (free translation).

Expert opinions are not subject to revision[27] as they are (only) a type of evidence (see Art. 168 para. 1 lit. d SCCP and Art. 183 ff. SCCP). The issue whether arbitrator's expert opinions (*expertises-arbitrage*, see Art. 189 SCCP) are subject to revision is left open. 18

3. Decision of the Arbitral Tribunal vs. Decision of the Swiss Supreme Court

The author refers, *mutatis mutandis*, to the developments made under Section IV.B.3. below. 19

C. Competent Authority to Rule on *Rescindant*

1. The Solution Provided for by the SCCP

The request for revision must be filed with the highest cantonal court (the "**cantonal court**") designated by the canton in which the arbitral tribunal has its seat (Art. 356 para. 1 lit. a SCCP taken together with Art. 396 para. 1 SCCP).[28] This solution corresponds to the solution prevailing under the former Intercantonal Concordat on Arbitration of 1969 ("**ICA**") (cf. Art. 3 lit. f ICA).[29] 20

It arises from the preparatory works of the former ICA that the decision to grant cantonal state courts the power to rule on applications for revision of arbitral awards – instead of empowering the arbitral tribunals which rendered such awards – was deliberate. Indeed, state courts had been regarded as offering better guarantees to rule on the *rescindant*.[30] 21

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27 Cf. MÜLLER, Swiss Case Law (see footnote 13), p. 352 and references.

28 In Geneva: the Civil Chamber of the Geneva High Court (Chambre civile de la Cour de justice; Art. 120 para. 1 lit. a of the Judiciary Organization Act of 26.09.2011, RSG E 2 05). In Zurich: the Obergericht (Zurich High Court; Art. 46 of the *Gesetz vom 10.05.2010 über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess*, GS/ZH 211.1). For an example, see BGE 138 III 542, Rec. 1.1.

29 SCHWEIZER, Commentary on Art. 396-399 SCCP, in: BOHNET/HALDY/JEANDIN/SCHWEIZER/TAPPY (Ed.), Code de procédure civile commenté, Basel 2011 [cited: SCHWEIZER, SCCP Commenté], para. 18 on Art. 396 SCCP; cf. also Art. 42 ICA.

30 JOLIDON (see footnote 21), para. 25 on Art. 41-43 ICA; cf. also SCHWEIZER, SCCP Commenté (see footnote 29), para. 16 on Art. 396 SCCP.

22 More specifically, according to this view, which is shared by the case law and supported by the majority of legal scholars, state courts are more likely to ensure the efficiency of applications for revision, due to their permanent nature. By contrast, the mission of an arbitral tribunal ends with the issuance of the award, and it would be too burdensome to reconstitute the arbitral tribunal, sometimes many years after the award has been rendered.

23 As will be discussed in detail with respect to the revision of international arbitral awards (cf. Section IV. below), this argument is not convincing.[31]

24 One can already note that the solution provided for by the SCCP regarding the revision of domestic arbitral awards departs from the general rule prevailing in Swiss civil state court proceedings, according to which a request for revision must be filed with the authority that issued the decision whose revision is sought (*iudex a quo*).[32]

25 The "*iudex a quo*" rule also prevails in other countries. In France, for example, an application for revision brought against a French domestic arbitral award (cf. Art. 1502 para. 1 CPC-F) must be lodged with the arbitral tribunal that rendered the contested arbitral award (Art. 1502 para. 2 CPC-F).[33] However, in the event that the arbitral tribunal cannot be reunited, the application for revision can be lodged with the court of appeal that would have had jurisdiction to decide on other appeals against the arbitral award (Art. 1502 para. 3 CPC-F).[34]

26 One can also note that the solution provided for by the SCCP regarding the revision of domestic arbitral awards (i.e., to empower cantonal high courts) is

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31 Cf. also SCHWEIZER, SCCP Commenté (see footnote 29), para. 18 on Art. 396 SCCP and para. 5 on Art. 399 SCCP; SCHÜPBACH (see footnote 25), p. 418.

32 SCHWEIZER, SCCP Commenté (see footnote 29), para. 17 on Art. 396 SCCP; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1774, 1787; GULDENER (see footnote 15), p. 489, 523; BGE 118 II 199, Rec. 3. See also para. 9 above.

33 Art. 1502 CPC-F applies when the arbitral tribunal was established on or after 01.05.2011 (cf. Art. 3 para. 2 of the Decree n° 2011-48 of 13.01.2011 on the review of arbitration, JORF n° 0011 of 14.01.2011, p. 777).

34 As an example, in the matter "Crédit Lyonnais", the "*Consortium de réalisation*" (the organization responsible for managing the liabilities of the Crédit Lyonnais bank) filed a request for revision on 27.06.2013 with the Court of Appeal of Paris on the basis of Art. 1491 of the former CPC-F (version in force until 30.04.2011) against the arbitral award that granted, on 07.07.2008, the sum of EUR 405 mio (EUR 45 mio of which were compensation for moral damage) to Mr. Bernard Tapie (see <http://www.lemonde.fr/societe/article/2013/06/28/affaire-tapie-l-etat-a-depose-un-recours-en-revision-contre-l-arbitrage_3438380_3224.html>; <https://fr.wikipedia.org/wiki/Affaire_Tapie_-_Cr%C3%A9dit_lyonnais#cite_note-73> (accessed on 17.05.2018)).

in conflict with Art. 389 para. 1 SCCP that appoints the Supreme Court as the competent court to hear actions for annulment (*iudex ad quem*) against the same domestic arbitral awards.[35] BERGER and KELLERHALS consider in this respect that it would have been more appropriate to vest the Supreme Court with jurisdiction to decide on requests for revision of domestic arbitral awards as well.[36]

One can finally note that the preliminary draft bill of 11 January 2017 on the modification of Chapter 12 of the SPILA[37] neither contains any provision amending the provisions of Part 3 of the SCCP with respect to the authority competent to decide on *rescindant* nor provides any discussion in that respect. This is regrettable as the current revision would have been a good opportunity to consider unifying the rules on competence regarding actions for revision in domestic and international arbitration. 27

2. (No) Possibility of Derogating from the Solution Provided for by the SCCP

As mentioned above[38], the procedural rules pertaining to the revision of domestic arbitral awards are considered to be imperatively and exhaustively regulated by the SCCP. Therefore, the parties cannot in principle validly agree on vesting the/an arbitral tribunal with jurisdiction to rule on a request for revision of a domestic arbitral award (*rescindant*).[39] In the author's opinion, this solution remains questionable as it restrains the contractual freedom of the parties (cf. principle of party autonomy). 28

35 SCHWEIZER, SCCP Commenté (see footnote 29), para. 19 on Art. 396 SCCP.

36 Cf. BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015 [cited: BERGER/KELLERHALS, 2015], para. 1949; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1784.

37 See para. 66 below.

38 Cf. para. 12.

39 MRÁZ, in: BaslerKomm ZPO, para. 6 on Art. 396 SCCP; HIRSCH (see footnote 1), para. 44 and footnote 88; comp. SCHÜPBACH (see footnote 25), p. 418.

D. Other Admissibility Requirements

1. Parties (Standing to Sue; Interest in Bringing Proceedings)

29 Revision of a domestic arbitral award can only be requested by a party to the proceedings that led to the arbitral award in question, or by its successor(s).[40]

30 The requesting party must establish that it has a specific and actual interest in the annulment and reiteration[41] of (all or part of) the arbitral award in question.[42] According to BERGER and KELLERHALS, the fact that an arbitral award has already been successfully enforced is not a sufficient reason to prevent its revision.[43] However, legal doctrine is divided on this issue; reference is made in this respect to the developments and references made below regarding the revision of international arbitral awards.[44]

31 Should the requesting party have no standing to sue and/or no legal interest in bringing proceedings, the request for revision is to be declared inadmissible, which means that the merits of the request will not be examined.

2. Time Limits

32 According to Art. 397 para. 1 SCCP, a request for revision must be filed within 90 days of discovery of the ground(s) for revision (relative time limit).[45] According to Art. 397 para. 2 SCCP, the right to request revision expires 10 years after the arbitral award comes into force (absolute time limit)[46], except in case of an arbitral award affected by a criminal offense in the sense of Art. 396 para. 1 lit. b SCCP.[47]

33 The statutory time limits set out in Art. 397 SCCP are mandatory; they can neither be extended contractually by the parties nor by the court (cf. Art. 144

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40 BGE 4A_688/2012 and 4A_126/2013, Rec. 3.

41 Cf. Sections III.F.1. and III.G. below.

42 Cf. BGE 4A_596/2008, Rec. 3.5.

43 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1778; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1941.

44 See para. 111.

45 For further details, see BERGER/KELLERHALS, 2015 (see footnote 36), para. 1939.

46 The former ICA provided for an absolute time limit of 5 years: see Art. 42 ICA.

47 For further details, see BERGER/KELLERHALS, 2010 (see footnote 13), para. 1776; MRÁZ, BaslerKomm ZPO, para. 1-8 on Art. 397 SCCP.

para. 1 SCCP).[48] Said time limits should, however, be suspended during judicial recesses (cf. Art. 145 SCCP) – this corresponds to the solution adopted by the Supreme Court in the context of revision of international arbitral awards.[49]

A request for revision submitted after one of the time limits provided for in Art. 397 SCCP has elapsed is inadmissible.[50] 34

3. Language(s)

The request for revision must be written in (one of) the official language(s) of the canton in which the arbitral tribunal has its seat. The same applies to the opposing party's and the arbitral tribunal's answers[51] to the request for revision. 35

The preliminary draft bill on the modification of Chapter 12 of the SPILA[52] does not contain any provision amending or supplementing the provisions of Part 3 of the SCCP with respect to the language of the request for revision in domestic arbitration. By contrast, the preliminary draft bill contains a draft new Art. 77 para. 2bis of the Swiss Supreme Court Act ("**BGG**") which provides that memorials – which includes requests for revision of international arbitral awards – can be filed with the Supreme Court in English.[53] 36

One can note, however, that it follows from the draft new Art. 77 para. 2bis BGG that decisions by the cantonal court on *rescindant* can be challenged before the Supreme Court[54] in English. 37

E. Proceedings on *Rescindant*

1. Power of Review of the Cantonal Court

A request for revision is an "unlimited" means of appeal.[55] This means that the cantonal court has a full power of review, *de facto* and *de jure*, within the 38

48 GÖKSU (see footnote 7), para. 2292-2293; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 42 ICA p. 238.
49 Cf. para. 121 below.
50 For an example, cf. BGE 4A_688/2012 and 4A_126/2013, Rec. 5.3.
51 See respectively para. 40-41 below.
52 See para. 66 below.
53 See para. 124 below.
54 See Section III.F. below.

framework of the grounds for revision invoked. With regard to the nature of the review that must be carried out by the court, the author refers, *mutatis mutandis*, to the developments made below in Section IV.E.1.

2. Proceedings

39 Except for two provisions that regulate specific procedural issues (Art. 330 and 331 SCCP, applicable by reference of Art. 398 SCCP), the SCCP does not define the proceedings pertaining to the phase of *rescindant*.

40 Pursuant to Art. 330 SCCP, the cantonal court shall invite the respondent to respond to the request for revision, unless the court considers that the request is "obviously inadmissible or obviously unfounded". This refers to the admissibility/merits of the request for revision (*rescindant*) and not to the admissibility/merits of the claims that were decided upon by the arbitral tribunal and which would have to be re-examined by the same tribunal (*rescisoire*) in case of a positive decision on *rescindant*.

41 The arbitral tribunal should also be invited to comment on the request for revision.[56] It should be provided with a copy of the decision on *rescindant* as well.

42 Pursuant to Art. 331 para. 1 SCCP, the request for revision does not have suspensive effect, i.e., does not suspend the enforceability of the arbitral award.[57] Art. 331 para. 2, first sentence, SCCP, however, provides that the cantonal court may grant such suspensive effect.

43 Suspensive effect is generally granted upon request. It should be mentioned that suspensive effect may also be granted *ex officio* – even though Art. 331 SCCP does not expressly provide for such solution.[58] However, such situation seems quite unlikely to happen in practice.

44 According to the Swiss Federal Council's Message regarding the SCCP, the cantonal court seized with a request for suspensive effect shall consider the

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55 Cf. SCHWEIZER, RSDIE (see footnote 10), p. 214.

56 MRÁZ, BaslerKomm ZPO, para. 4 on Art. 398 SCCP; GÖKSU (see footnote 7), para. 2303; on this question, cf. also para. 132 below in international arbitration.

57 Cf. also BERGER/KELLERHALS, 2010 (see footnote 13), para. 1777; under the former ICA, JOLIDON (see footnote 21), para. 27 on Art. 41-43 ICA; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 41 ICA p. 234; cf. also GULDENER (see footnote 15), p. 490.

58 Cf. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1777; GÖKSU (see footnote 7), para. 2301. See also para. 134 below in international arbitration.

likelihood of success of the revision and the extent of the damage that a denial of suspension could cause.[59]

Art. 331 para. 2, second sentence, SCCP also allows the cantonal court to order if necessary – on demand and probably also *ex officio* – (other) protective measures, e.g. order a party who obtained suspensive effect to provide security. This provision is to be considered as taking precedence over Art. 374 SCCP which provides that the relevant state court or – unless the parties have agreed otherwise – the arbitral tribunal, may order interim measures at the request of a party.[60] 45

The requesting party and the defendant should have the possibility to reply. The right to reply derives from the right to be heard and the adversarial principle. Insofar as the right to be heard should have the same meaning and scope in arbitration as in the regular judicial system[61], the right to reply should also apply in arbitration. In practice, the Supreme Court grants the right to reply in arbitration in the context of actions for annulment;[62] the same should apply to revision of arbitral awards. 46

The cantonal court must give reasons for its decision on *rescindant* in writing (Art. 29 para. 2 Fed. Cst.; cf. also Art. 239 SCCP in civil state court procedure). The parties cannot validly renounce their right to obtain a reasoned decision by the cantonal court on *rescindant* (comp. with Art. 384 para. 1. lit. e SCCP regarding the reasoning of domestic arbitral awards).[63] 47

F. Decision on *Rescindant*

1. Types and Effects

At the stage of *rescindant*, the cantonal court may decide in three ways: (i.a) declare the request inadmissible, for example on the grounds that it is time-barred or that the requesting party lacks interest or (i.b) reject the request on the merits if the ground(s) for revision is/are not legitimate, or (ii) grant the request for revision if the ground(s) for revision is/are legitimate and, conse- 48

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59 SWISS FEDERAL COUNCIL, Message regarding the draft SCCP, Official Gazette 2006 p. 6841 ff., p. 6988; see also GÖKSU (see footnote 7), para. 2302 and references.

60 On this question, cf. also para. 136 below in international arbitration.

61 See e.g. SCHWEIZER, SCCP Commenté (see footnote 29), para. 33 ff. on Art. 393 SCCP.

62 BGE 4A_509/2013, Rec. 1.2; BGE 4A_234/2010, Rec. 2.2 *in fine* (not published in BGE 136 III 605).

63 Cf. SCHWEIZER, SCCP Commenté (see footnote 29), para. 2 on Art. 398 SCCP.

quently, annul (in whole or in part[64]) the contested arbitral award and remand the case to the arbitral tribunal for a new decision (cf. "cassatory nature") on the admissibility/merits of the case (*rescisoire*; cf. Art. 399 para. 1 SCCP).[65]

2. Legal Remedies

49 In the absence of any provision in Part 3 of the SCCP stating that the decision of a cantonal court on *rescindant* shall be final and not subject to any appeal[66,67], the cantonal court's decision on *rescindant* is subject to an appeal to the Supreme Court.[68]

50 A decision rendered by the cantonal court *rejecting* the request for revision of a domestic arbitral award (cf. situations i.a. and i.b. mentioned in para. 48 above) is a final decision (*Endentscheid*) in the meaning of Art. 90 BGG. As such, it is subject to an (immediate) appeal to the Supreme Court, without any

64 A partial annulment of the arbitral award implies that the considered issue(s) in the arbitral award is/are independent from other issue(s) of the case. See BERGER/KELLERHALS, 2010 (see footnote 13), para. 1779; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 43 ICA, p. 240; MRÁZ, BaslerKomm ZPO, para. 6 on Art. 399 SCCP; cf. also GULDENER (see footnote 15), p. 491. See also, in international arbitration, BERGER/KELLERHALS, 2010 (see footnote 13), para. 1810; STIRNIMANN (see footnote 13), para. 60, 63.

65 BGE 138 III 542, Rec. 1.2; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 43 ICA, p. 240; cf. also e.g. GÖKSU (see footnote 7), para. 2306. Cf. also SCHÜPBACH (see footnote 25), p. 418-419, who specifies that the parties may, after a positive decision on *rescindant*, agree to waive arbitration and initiate state court proceedings on *rescisoire*. See also, in international arbitration, BGE 134 III 286, Rec. 2; BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff.; BGE 4A_12/2012, Rec. 3.1.1; PFISTERER, in: BaslerKomm SPILA, para. 97 on Art. 190 SPILA.

66 By contrast, in case the parties expressly declared that the arbitral award can be contested by way of an appeal to the highest cantonal court rather than to the Supreme Court (cf. Art. 319 para. 1 SCCP), Art. 390 para. 2, second sentence, SCCP provides that the cantonal court's decision ruling on the ordinary appeal is definitive.

67 Art. 332 SCCP, which provides that a decision on *rescindant* rendered by a state court may be challenged by way of an appeal, does not apply to revision of domestic arbitral awards. Indeed, said provision is not part of the provisions which are referred to in Part 3 of the SCCP on revision of arbitral awards: Art. 398 SCCP, which regulates the procedure of revision of domestic arbitral awards, only refers to Art. 330 and 331 SCCP (which are both applicable to revision of state court decisions).

68 BGE 138 III 542, Rec. 1.1 and references.

particular restrictions in that respect.[69] The Supreme Court confirmed such approach in a recent decision.[70]

A decision rendered by the cantonal court *granting* the request for revision and remanding the case to the arbitral tribunal (cf. situation [ii] mentioned in para. 48 above) is to be considered as an interim decision (*Zwischenentscheid*) in the meaning of Art. 93 para. 1 BGG. As such, it is subject to an immediate appeal before the Supreme Court, however, under the restrictive conditions provided by Art. 93 para. 1 BGG.[71] Such conditions should in principle be met, as an appeal against a positive decision on *rescindant*, if successful, would potentially prevent lengthy and costly discovery proceedings during the phase of *rescisoire* (cf. Art. 93 para. 1 lit. b BGG). 51

In the author's opinion, the situation presented above is satisfactory and is not to be understood as providing for a "two-stage set of recourse".[72] The author recalls in that respect that revision is a means of retracting and not an appeal *stricto sensu* in a higher court, i.e., that it does not have a devolving effect.[73] In the author's opinion, this explains and justifies that a decision on *rescindant* can be appealed to the Supreme Court. 52

For the sake of completeness, the author indicates that the cantonal court's decision on *rescindant* is itself subject to revision. The same applies for the Supreme Court's decision ruling on the appeal against the cantonal court's decision on *rescindant*. 53

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69 See e.g. GEISINGER/MAZURANIC, Challenge and Revision of the Award, in: GEISINGER/VOSER (Ed.), International Arbitration in Switzerland – A Handbook for Practitioners, Alphen aan den Rijn 2013, p. 223 ff., p. 273; MRÁZ, BaslerKomm ZPO, para. 12 on Art. 399 SCCP; GÖKSU (see footnote 7), para. 2307; SCHWEIZER, SCCP Commenté (see footnote 29), para. 2 on Art. 332 SCCP.

70 BGE 138 III 542, Rec. 1.1 and references.

71 GÖKSU (see footnote 7), para. 2307; MRÁZ, BaslerKomm ZPO, para. 12 on Art. 399 SCCP. See also SCHWEIZER, Diss. (see footnote 7), p. 288-289; SCHWEIZER, SCCP Commenté (see footnote 29), para. 2 on Art. 332 SCCP.

72 Comp. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1783 and 1784: "*a two-stage set of recourse is simply inefficient and stands in contrast to the action for annulment where, precisely for reasons of efficiency, a single-stage set of recourse has been implemented*"; see also BERGER/KELLERHALS, 2015 (see footnote 36), para. 1948.

73 See para. 9 above.

G. Proceedings on *Rescisoire* (i.e., After a Positive Decision on *Rescindant*)

1. Reconstitution of the Arbitral Tribunal

54 Since revision does not have a devolving effect[74], the cantonal court, after a positive decision on *rescindant*, should not *stricto sensu* have to "remit" the case to the arbitral tribunal (*renvoi*; *Rückweisung*) for a new decision, as is imprecisely stated in Art. 399 para. 1 SCCP.[75] The arbitral tribunal's mission should be considered as reactivated *ipso jure* by the cantonal court's judgment.[76] In practice, however, the (*de facto*) reconstitution of the arbitral tribunal generally occurs on request of one of the parties.[77]

55 As mentioned above[78], there may be difficulties in reconstituting the arbitral tribunal, *inter alia* in view of the time that may have elapsed since the issuance of the arbitral award. Furthermore, if the request for revision is granted (*rescindant*) on the grounds that the arbitral award was affected by a criminal offence committed by one or several of the members of the arbitral tribunal[79], the concerned person(s) would have to be replaced.[80] The SCCP, however, provides solutions for several specific situations.

56 Art. 399 para. 2 SCCP refers to Art. 371 SCCP in case the arbitral tribunal is no longer complete.

57 Art. 371 paras 1 and 2 SCCP address the issue of the replacement of an arbitrator. Art. 371 para. 1 SCCP provides that if an arbitrator must be replaced, the same procedure as for appointment applies, unless the parties agree or have agreed otherwise. Art. 371 para. 2 SCCP further indicates that, if the replacement cannot be effectuated in this way, the new arbitrator shall be nominated by the state court (cf. *juge d'appui*) that has jurisdiction under

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74 See para. 9 above.

75 Cf. SCHWEIZER, note on BGE 4A_14/2012, RSPC 4/2012, p. 337 ff., p. 346-347: "*inappropriate term since appeal does not have a devolving effect*" (free translation).

76 Regarding this matter, which should be considered equally in domestic and international arbitration (BGE 4A_14/2012, RSPC 4/2012, p. 337 ff., note SCHWEIZER p. 346-347, p. 346), cf. also Section IV.G.1. below.

77 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1943.

78 See para. 22-23.

79 See also footnote 12 above regarding the situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed.

80 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1944. See also para. 89 below (international arbitration).

Art. 356 para. 2 SCCP, unless the arbitration agreement excludes this possibility or becomes ineffective by the retirement of an arbitrator.

Art. 371 paras 3 and 4 SCCP define the duties of the newly constituted arbitral tribunal. Art. 371 para. 3 SCCP provides that in the absence of an agreement between the parties, the newly constituted arbitral tribunal shall decide on the extent to which procedural steps in which the replaced arbitrator has participated must be repeated. Art. 371 para. 4 SCCP specifies that the time limit within which the arbitral tribunal must issue its award is not suspended during the replacement procedure. 58

2. Repetition of (Part of) the Arbitral Proceedings

The arbitral tribunal only has to repeat or supplement the procedural steps which relate to the newly discovered fact(s) or evidence or which were affected by the criminal offence that was recognized in the meantime by a criminal court. Therefore, there is generally no need to repeat the entire arbitral proceedings.[81] 59

H. Decision on *Rescisoire*

1. Types and Effects

When deciding on *rescisoire*, the arbitral tribunal can either (i) annul/modify its (former) decision in whole or in part or (ii) come to the conclusion that the elements brought forward by the requesting party as ground(s) for revision (i.e., the newly discovered facts or evidence or the criminal offense) do not change the result of the original arbitral award, i.e., that the dispositive section of the arbitral award remains unchanged.[82] The decision includes a decision on the costs of the arbitration.[83] 60

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81 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1781; MRÁZ, BaslerKomm ZPO, para. 7 on Art. 399 SCCP; cf. also GULDENER (see footnote 15), p. 491.

82 Cf. MRÁZ, BaslerKomm ZPO, para. 8 on Art. 399 SCCP; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1980 (international arbitration).

83 Cf. GULDENER (see footnote 15), p. 491; Art. 333 para. 2 SCCP in state court civil procedure.

2. Legal Remedies

61 The decision on *rescisoire* is subject to an appeal to the Supreme Court (Art. 389 para. 1 SCCP)[84].[85] It is also subject to a (further) request for revision.

I. Waiver of the Right to Apply for Revision

62 As mentioned above[86], the procedural rules pertaining to the revision of domestic arbitral awards are considered to be imperatively and exhaustively regulated by the SCCP. Part 3 of the SCCP does not provide for any provision with respect to waiving the right to apply for revision. As a consequence, the parties cannot legitimately exclude the possibility to request revision of domestic arbitral awards.[87] In the author's opinion, this solution remains questionable as it restrains the contractual freedom of the parties.

63 One can also note that the preliminary draft bill on the modification of Chapter 12 of the SPILA[88] (international arbitration) provides that the parties, to the extent that neither of them have their domicile, habitual residence, place of business or seat in Switzerland, can expressly waive, in the arbitration clause or subsequently by means of a written agreement, part of their right to apply for revision (draft new Art. 190a para. 3 SPILA). By contrast, the preliminary draft bill neither contains any provision amending the provisions of Part 3 of the SCCP (domestic arbitration) with respect to a waiver of the right to apply for revision nor provides any discussion in that respect. This is regrettable as the revision of Chapter 12 of the SPILA, as it stands, creates a discrepancy between the relevant rules on the waiver of the right to apply for revision in domestic and international arbitration.

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84 Respectively, to the highest cantonal court in cases where the parties agree(d) that such court is competent instead of the Supreme Court (Art. 390 para. 1 SCCP). The decision of the highest cantonal court is then definitive (Art. 390 para. 2, second sentence, SCCP), i.e., cannot be subject of another appeal to the Supreme Court.

85 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1782.

86 Cf. para. 12.

87 MRÁZ, BaslerKomm ZPO, para. 6 on Art. 396 SCCP.

88 See para. 66 below.

IV. Revision in International Arbitration

A. General Remarks

The provisions of Chapter 12 of the SPILA (Art. 176-194 SPILA; international arbitration) apply if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties, at the time when the arbitration agreement was concluded, had neither its domicile nor its habitual residence in Switzerland (Art. 176 para. 1 SPILA).[89] 64

Chapter 12 of the SPILA in its present form remains silent on the question of revision in international arbitration. In a landmark decision of 11 March 1992,[90] the Supreme Court noted that the SPILA contains a proper *lacuna*[91] with respect to the revision of international arbitral awards rendered in Switzerland. Considering that *"[t]he revision of arbitral awards under Art. 176 ff. SPILA has established itself as an essential consequence of the rule of law"*[92] *and that 'the absence of any reassessment would constitute a clear violation of the fundamental principles of procedure'*[93], the Supreme Court thus created jurisprudentially (i.e., acting as legislator by virtue of Art. 1 para. 2 of the Swiss Civil Code ["**ZGB**"]) the possibility to (re)question the authority of an international arbitral award through the mechanism of revision.[94] The Supreme Court declared that the provisions on revision of decisions issued by 65

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89 One should remember (see footnote 20 above) that the parties can elect to opt-out of the provisions of Chapter 12 of the SPILA on international arbitration in favor of the provisions of the SCCP on domestic arbitration (Art. 176 para. 2 SPILA) and similiarly, can elect to opt-out the provisions of the SCCP on domestic arbitration in favor of Chapter 12 of the SPILA on international arbitration (Art. 353 para. 2 SCCP).

90 BGE 118 II 199.

91 And not a silence of the law; on this subject, cf. SCHWEIZER, RSDIE (see footnote 10), p. 212-213; RIGOZZI/SCHÖLL (see footnote 1), p. 9-11; SCHÜPBACH (see footnote 25), p. 402-403; BUCHER, in: CR LDIP, para. 60 on Art. 191 SPILA.

92 BGE 118 II 199, Rec. 2b/cc (free translation).

93 BGE 118 II 199, Rec. 2b/cc (excerpt translated in PONCET (see footnote 3), p. 42).

94 BGE 118 II 199, Rec. 2c. The French Court of Cassation, facing a similar issue, considered in its decision "*Fougerolle*" of 25.05.1992, confirmed by the decision "*Westman*" of 19.12.1995, that revision of international arbitral awards rendered in France is admissible on certain conditions and within certain limits (cf. DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 1 and references; cf. also RIGOZZI/SCHÖLL (see footnote 1), p. 7-8). The above-mentioned case law has been codified in the French Civil Procedure Code in Art. 1502 para. 1 and 2 CPC-F, applicable in international arbitration by reference of Art. 1505 para. 5 CPC-F (Cf. Decree n° 2011-48 of 13.01.2011 on the review of arbitration, JORF n° 0011 of 14.01.2011, p. 777).

the Supreme Court (Art. 123-127 BGG; formerly Art. 137 and 140-143 of the Federal Judicial Organization Act of 16 December 1943 ["**JOA**"][95]) apply by analogy to international arbitral awards rendered in Switzerland.[96]

66 On 11 January 2017, the Swiss Federal Council presented a preliminary draft bill on the modification of Chapter 12 of the SPILA.[97] The planned revision intends to amend the existing law by *inter alia* integrating the solutions developed in the case law of the Supreme Court over the last 30 years and to clarify certain issues which have so far remained unresolved.[98] The Swiss Federal Council noted that, although the Supreme Court and legal doctrine are unanimous in saying that international arbitral awards may be subject to revision, Chapter 12 of the SPILA does not contain any provision on the revision of international arbitral awards.[99] As it will be seen below, the preliminary draft bill contains draft new provisions on revision of international arbitral awards.[100]

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95 Since the entry into force on 01.01.2007 of the BGG, the provisions of the BGG apply (by analogy) to revision of international arbitral awards rendered in Switzerland, instead of the provisions of the former JOA (see BGE 134 III 286). There are no transitional law issues since the applicability of the rules on revision of Supreme Court's judgments to revision of international arbitral awards, as a judge-made law, is done by analogy (HIRSCH (see footnote 1), para. 49).

96 BGE 118 II 199, Rec. 4. See also BGE 142 III 521, Rec. 2.1.

97 See SWISS FEDERAL COUNCIL, Preliminary draft Bill dated 11.01.2017 on the modification of Chapter 12 of the SPILA, <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vorentw-f.pdf> (accessed on 17.05.2018)] [cited: SWISS FEDERAL COUNCIL, Preliminary Draft Bill].

98 See SWISS FEDERAL COUNCIL, Explanatory Report dated 11.01.2017 regarding the Preliminary draft Bill on the modification of Chapter 12 of the SPILA, <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vn-ber-f.pdf> (accessed on 17.05.2018)] [cited: SWISS FEDERAL COUNCIL, Explanatory Report SPILA], p. 2 and *passim*.

99 See SWISS FEDERAL COUNCIL, Explanatory Report SPILA (see footnote 98), p. 26 and 28.

100 Questions of transitional law will not be addressed in the present paper. One can, however, note that the preliminary draft bill on the modification of Chapter 12 of the SPILA does not contain any draft provision in that respect. Compare with Art. 405 SCCP, which provides that appellate remedies are governed by the procedural law in force when notice of the decision is given to the parties (para. 1) and that the review of a decision notified under the previous law is governed by the new procedural law (para. 2).

B. Decisions Subject to Revision

1. International Nature

Decisions subject to revision are those rendered in international arbitration under the provisions of Chapter 12 of the SPILA. 67

The parties cannot elect to opt out of the provisions of Part 3 of the SCCP (domestic arbitration) and (instead) opt into the provisions of Chapter 12 of the SPILA (international arbitration) based on Art. 353 para. 2 SPILA *after* a decision that may be subject to revision has been issued.[101] In other words, there can be no opt-out/opt-in agreement limited to the annulment/revision actions.[102] 68

2. Types of Decisions

Like the SCCP in domestic arbitration, Chapter 12 of the SPILA does not specify which types of decisions are subject to revision. Here too, it is commonly agreed that decisions subject to revision in international arbitration are (i) preliminary or interim awards, (ii) partial awards and (iii) final awards.[103] 69

The requirement is that the decision is binding for the arbitral tribunal itself, i.e., has acquired the force of *res judicata*. This is not the case when the arbitral tribunal made an explicit reservation with respect to a modification of its award.[104] In the case of preliminary or interim awards particularly, depending on the circumstances of the case, the situation should be carefully examined.[105] 70

Awards on agreed terms as well as termination orders arising from acceptance or withdrawal of a claim – which are all decisions putting an end to the arbi- 71

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101 Conversely, the parties cannot elect to opt out of the provisions of Chapter 12 of the SPILA in favor of the provisions of Part 3 of the SCCP based on Art. 353 para. 2 SCCP *after* a decision that may be subject to revision has been issued.

102 KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 2.43.

103 BGE 142 III 521, Rec. 2.1; BGE 134 III 286, JdT 2010 I 686, Rec. 2.2; BGE 122 II 492, Rec. 1b/bb; BGE 4P.102/2006, Rec. 1.

104 BGE 134 III 286, JdT 2010 I 686, Rec. 2.2; BGE 122 II 492, Rec. 1b/bb; BGE 4P.237/2005, Rec. 3.2; MÜLLER, Swiss Case Law (see footnote 13), p. 343-344.

105 See BERGER/KELLERHALS, 2015 (see footnote 36), para. 1968.

tral proceedings – could also, under particular circumstances, be subject to revision.[106]

3. Decision of the Arbitral Tribunal vs. Decision of the Swiss Supreme Court

72 When a party unsuccessfully challenged an arbitral award before the Supreme Court (cf. Art. 190-191 SPILA), the question arises whether such party shall apply for revision against either the award rendered by the arbitral tribunal or the decision of the Supreme Court, or against both decisions.[107]

73 The principle is that a motion for revision of the Supreme Court's decision can only be requested for reasons directly linked to such decision. For other reasons, the applicant must target the arbitral award.[108]

C. Competent Authority to Rule on *Rescindant*

1. The Supreme Court Has Declared Itself Competent

74 As mentioned above[109], the Supreme court filled what it considered to be a *lacuna* of Chapter 12 of the SPILA by stating, in 1992, that provisions regarding the revision of Supreme Court's judgments (Art. 123-127 BGG; formerly Art. 137 and 140-143 JOA) apply by analogy to revision of international arbitral awards rendered in Switzerland.[110]

75 In doing so, the Supreme Court designated itself as the competent authority for deciding on requests for the revision of such awards (*rescindant*). Indeed, Art. 124 para. 1 BGG – which then applies by analogy – provides that applications for revision of Supreme Court's judgments shall be filed with the Supreme Court.

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106 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1969; RIGOZZI/SCHÖLL (see footnote 1), p. 13-14; STIRNIMANN (see footnote 13), para. 13; see also Section III.B.2. above (domestic arbitration).

107 See also para. 6 above on the question of concurrence/simultaneity of an action for annulment and a request for revision.

108 Cf. MÜLLER, Swiss Case Law (see footnote 13), p. 349-350 and references.

109 Cf. Section IV.A.

110 BGE 118 II 199, Rec. 4. See also BGE 142 III 521, Rec. 2.1.

According to the Supreme Court, this choice was made for "practical reasons".[111] It purported to establish some consistency with the former ICA which provided that the cantonal state court designated by the canton in which the arbitral tribunal has its seat was the competent authority to rule on requests for revision (*rescindant*) of domestic arbitral awards.[112] The Supreme Court was also convinced by the idea of a state court being the competent authority: *"since arbitral tribunals are generally not institutionalized, their mission expires at the end of the procedure. In some circumstances, it may be impossible to get back to the initial arbitral tribunal as arbitrators may be deceased or unreachable or may simply refuse to handle the case again. On the contrary, state courts provide precisely the guarantee to render a decision on the request for revision [...]. It is therefore justified to qualify the Supreme Court as the competent judicial authority* [to rule on applications] *for revision* [of international arbitral awards rendered in Switzerland]"[113]. The Supreme Court furthermore indicated that this solution *"takes into account the Legislator's wish to limit legal remedies; if a cantonal state court was instituted as a court of revision, its decisions could then be challenged before the Supreme Court through an appeal* […]"[114]. 76

The Supreme Court confirmed its case law in a decision rendered on 1 November 1996[115] (and, since then, in numerous decisions[116]). In this case, a party filed a request for revision of a partial award with the arbitral tribunal which was still seized of the case. The arbitral tribunal then issued its final award, by which it *inter alia* dismissed the request for revision for lack of jurisdiction. The Supreme Court held that the arbitral tribunal lacked jurisdiction over the request for revision of the (partial) award and therefore dismissed the action for annulment brought against the final award.[117] 77

111 Cf. BGE 122 III 492, Rec. 1a.

112 BGE 118 II 199, Rec. 3; cf. also BGE 122 II 492, Rec. 1b/aa.

113 BGE 118 II 199, Rec. 3 (free translation).

114 BGE 118 II 199, Rec. 3 (free translation).

115 BGE 122 III 492.

116 Cf. e.g. BGE in ASA Bulletin 1997, p. 498; BGE 134 III 286; BGE 4A_688/2012 and 4A_126/2013; BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff.

117 BGE 122 III 492, facts, p. 492.

2. The Preliminary Draft Bill on the Modification of Chapter 12 of the SPILA Confers Jurisdiction to the Supreme Court

78 The preliminary draft bill on the modification of Chapter 12 of the SPILA[118] provides, in the draft modified Art. 191 SPILA as well as in the draft new Art. 119b para. 1 BGG, that the Supreme Court has jurisdiction to rule on revision (*rescindant*) of international arbitral awards.

79 In its Explanatory Report of 11 January 2017 regarding the preliminary draft bill on the modification of Chapter 12 of the SPILA, the Swiss Federal Council indicated that "*in accordance with the case law*", the intended procedure provided by the preliminary draft bill follows and enshrines in law the rules set out by the BGG. The Swiss Federal Council, however, did not justify the decision to establish the Supreme Court as the competent authority to rule on revision (*rescindant*) of international arbitral awards.[119] This is regrettable since this question – which has been ruled upon by the Supreme Court acting as legislator by virtue of Art. 1 para. 2 ZGB – remains disputed among legal scholars.[120]

80 This being said, the solution that consists of vesting the Supreme Court with jurisdiction to rule on revision (*rescindant*) of international arbitral awards is most likely the solution that will be proposed by the Swiss Federal Council in the forthcoming (amended) draft bill on the modification of Chapter 12 of the SPILA which will be submitted to the Swiss Parliament.

3. Discussion on the Justification of Such a Choice

a) Introductory Remarks

81 The arguments developed by the Supreme Court in support of its case law[121] can be grouped into three categories: (i) the consistency with the solution prevailing in domestic arbitration, (ii) the conformity with the will of the Legislator to limit legal remedies and (iii) avoiding pitfalls arising from the passage of time and from the fact that the arbitral tribunal may be *functus officio*. As will be shown below (Subsections b. to d.), these arguments are

118 See para. 66 above.
119 See SWISS FEDERAL COUNCIL, Explanatory Report SPILA (see footnote 98), p. 26 and 28-29.
120 See Section IV.C.3. below.
121 See Sections IV.C.1. and IV.C.3.a. above.

unconvincing.[122] In particular, the support offered by the arbitral institutions and/or by the *juge d'appui* is not to be underestimated (Subsection e.). This leads the author to conclude that the arbitral tribunal should be the competent authority to rule also on *rescindant* (Subsection f.).

b) Consistency with Domestic Arbitration Should Not Prevail Over Conformity with General Rule Prevailing in Swiss Civil State Court Procedure

It must be kept in mind that the general rule prevailing in Swiss civil state court procedure is that a request for revision of a decision shall be filed with the authority which rendered that decision (*judex ad quo*).[123] Indeed, revision as a means of retracting has (should theoretically have) no devolving effect and is not (should theoretically not be) a legal remedy actionable before a superior court.[124] 82

As indicated above[125], the solution prevailing in domestic arbitration with regard to the competent authority to rule on revision (*rescindant*) does not follow the general rule prevailing in Swiss civil state court procedure – which the author considers regrettable. These limits, in the author's opinion, the validity of the argument of consistency between international and domestic arbitration. 83

One alternative solution (i.e., alternative to the – in the author's opinion – preferable solution of vesting the arbitral tribunal with jurisdiction to also decide on *rescindant*) could, *potentially*, be to provide, like Art. 356 para. 1 lit. a SCCP in domestic arbitration, that the highest cantonal court in which the arbitral tribunal has its seat has jurisdiction to rule on requests for revision (*rescindant*) of international arbitral awards. This alternative solution would ensure consistency with the system prevailing in domestic arbitration. It 84

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122 Comp. e.g. VOSER/GEORGE (see footnote 1), p. 74, qualifying this solution as appropriate.

123 Cf. para. 9 and Section III.C.1. above. See also SCHWEIZER, SCCP Commenté (see footnote 29), para. 18 on Art. 396 SCCP; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1774, 1787; BGE 118 II 199, Rec. 3.

124 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383, 389; comp. POUDRET/BESSON (see footnote 1), para. 846: "[a] *revocation is a challenge and it must logically be submitted to the jurisdiction competent to hear a challenge and not to the authors of the incriminated award*".

125 Section III.C.1.

would also overcome the absence of legal remedies against awards on revision (*rescindant*) – absence which the author considers problematic.[126]

c) The Argument Arising from the Will of the Legislator to Limit Legal Remedies Is Irrelevant

85 The "practical" solution – criticized by the author – of vesting the Supreme Court with jurisdiction to rule on requests for revision of international arbitral awards (*rescindant*), leads to a situation where there is no legal remedy against the decision on *rescindant*. The Supreme Court considers such solution as being in line with the Legislator's wish to limit legal remedies.

86 In the author's opinion, the absence of any means of appeal against the decision on *rescindant* is, on the contrary, problematic and should not be considered as an advantage.[127]

87 The *potential* alternative solution (i.e., alternative to the – in the author's opinion – preferable solution of vesting the arbitral tribunal with jurisdiction to also decide on *rescindant*) outlined above[128], i.e. to grant the highest cantonal court in which the arbitral tribunal has its seat jurisdiction over requests for revision (*rescindant*) of international arbitral awards, would create the possibility to file an appeal before the Supreme Court against the highest cantonal courts decisions on *rescindant*. This would not create a system of two instances of judicial review[129] and should, therefore, not be considered as harming the attractiveness of Switzerland as a place of arbitration.

d) The Passage of Time and/or the Fact That the Arbitral Tribunal May Be Functus Officio Are Not (Insuperable) Obstacles

88 The passage of time and/or the fact that the arbitral tribunal may be *functus officio*[130] are not (insuperable) obstacles to granting the arbitral tribunal the power to rule on *rescindant*.[131]

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126 See also Section IV.C.3.c. below.

127 Comp. BERGER/KELLERHALS, 2010 (see footnote 13), para. 1787; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1952; RIGOZZI/SCHÖLL (see footnote 1), p. 17-18.

128 See para. 84.

129 See also Section III.F.2. above.

130 Cf. BGE 4A_14/2012, RSPC 4/2012, Rec. 3.1.1: "[…] *in accordance with the maxim* lata sententia iudex desinit esse iudex*, the judge is divested of the case from the moment he renders his/her judgment, in the sense that he/she cannot change it anymore*

First, the arbitral tribunal may still be standing if the request for revision is directed against a preliminary/interim award or a partial award.[132] The difficulty arising from the fact that a request for revision may be based on the ground of a criminal offence committed by one of the arbitrators[133] can be solved by challenging the arbitrator in question (cf. Art. 180 para. 1 lit. b and c SPILA; see also Art. 369 SCCP in domestic arbitration).[134] 89

Second, an arbitral tribunal which is (was) *functus officio* can decide whether the conditions necessary for the renewal/rebirth of its judicial function are met, in the same way that it has the inherent power to rule on its own jurisdiction to deal with the claim initiated by a party (cf. principle of *compétence-compétence*).[135] 90

Third, it should be taken into account that if the request for revision is granted, then, in any case, the arbitral tribunal shall reconstitute itself or a new (in full or in part) arbitral tribunal shall be constituted[136], in order to rule on *rescisoire*.[137] One should, however, note that the Supreme Court's solution offers the advantage that the reconstitution of the arbitral tribunal is only necessary if the request for revision has been granted at the stage of *rescindant*.[138] 91

Fourth, and most importantly, it is necessary to underline that arbitral tribunals – at least when the arbitral tribunal is the same arbitral tribunal that issued the arbitral award which is the subject of the request for revision – are 92

[…]. *That which applies to the judge also applies to the arbitrator, in international arbitration as in domestic arbitration: the award is final once communicated to the parties (Art. 190 para. 1 SPILA), and as of this moment it has the same effects as legally-binding and enforceable state court decisions (Art. 387 SCCP). Thus, as soon as the final award is rendered, the arbitral tribunal's jurisdiction ends and such tribunal becomes* functus officio*, subject to various exceptions* […]" (free translation).

131 See DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 16 and 24; LALIVE/POUDRET/REYMOND (see footnote 21), Art. 43 ICA p. 240.

132 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383; SCHWEIZER, SCCP Commenté (see footnote 29), para. 17 on Art. 396 SCCP; DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 24; BUCHER, in: CR LDIP, para. 61 on Art. 191 SPILA.

133 Cf. BERGER/KELLERHALLS, 2010 (see footnote 13), para. 1802, footnote 58.

134 In such case, the challenge should be filed before or in parallel to the request for revision (also depending on the respective time limits which apply in that respect) and be dealt with before the request for revision.

135 DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 17.

136 BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff.

137 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383.

138 See also, among others, DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 24.

generally in a better position to assess the impact of new issues/elements occurring in the context of revision, be it at the stage of *rescindant* or *rescisoire*.[139]

93 The reconstitution of the arbitral tribunal could, however, present practical difficulties (death of an arbitrator, challenge of an arbitrator, etc.). As it will be shown below (Subsection e.), these difficulties turn out to be largely overestimated.

e) The Valuable Support Offered by the Arbitral Institutions and/or by the Juge d'Appui

94 The provisions of Chapter 12 of the SPILA (Art. 179 and 180 SPILA[140]) as well as the applicable institutional rules (if any) regarding the appointment, removal and replacement of arbitrators apply in any case. Should the arbitral tribunal have jurisdiction to also decide on *rescindant*, potential issues that may arise in the context of the (re)constitution of the arbitral tribunal and of the functioning of said arbitral tribunal could then be settled by applying such legal and institutional provisions. This valuable support should not be understated.[141]

95 In institutional arbitration, the arbitral institution is a permanent body to which the parties can refer in order to (re)create an (the) arbitral tribunal.

96 As an example, the ICC Rules address the specific issue of the replacement of arbitrators. Art. 15 para. 1 of the ICC Rules *inter alia* defines as grounds for replacement of arbitrators the decease of an arbitrator, an arbitrator's resignation or a challenge of an arbitrator. Art. 15 para. 3 of the ICC Rules, furthermore, provides that an arbitrator shall also be replaced on the own initiative of the ICC Court when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling its functions, or when the arbitrator is not fulfilling those functions in accordance with the ICC Rules or within the prescribed time limits. Art. 15 para. 4 of the ICC Rules also provides that, when an arbitrator is to be replaced, the ICC Court has discretion to decide whether or not to follow the original nominating process, and that, once reconstituted, the arbitral tribunal shall, after having invited the parties to comment, determine if and to what extent prior proceedings shall be repeated in front of the reconstituted arbitral tribunal. Art. 15 para. 5 of the ICC Rules finally provides that

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139 *Idem*, para. 11 and 15; RIGOZZI/SCHÖLL (see footnote 1), p. 16-17.

140 See also Art. 371 SCCP in domestic arbitration.

141 See in that sense KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.208 and 8.228.

subsequent to the closing of the proceedings, instead of replacing an arbitrator who has passed away or been removed by the ICC Court pursuant to Art 15 para. 1 or 2 of the ICC Rules, the ICC Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the ICC Court must take into account the views of the remaining arbitrators and the parties, and any other matters that it considers appropriate in the circumstances.

The ICSID Convention[142] also provides that (the request for revision shall be formally addressed to the Secretary-General [Art. 51 para. 1 ICSID Convention] and that) if it is not possible to submit the request for revision to the tribunal which rendered the award (see Art. 51 para. 3, first sentence, ICSID Convention), then "*a new* [t]*ribunal shall be constituted in accordance with* [Art. 37-40 of the ICSID Convention]" (Art. 51 para. 3, second sentence, ICSID Convention).[143] 97

In *ad hoc* arbitration, the situation is more delicate.[144] The *juge d'appui* could, however, provide the necessary support (see Art. 179 para. 2 and Art. 180 para. 3 SPILA). 98

f) Interim Conclusion: The Arbitral Tribunal Should Be the Competent Authority to Rule on Rescindant

In the light of the above, the author considers that the arbitral tribunal should be the competent authority to rule on *rescindant*.[145] This would be in conformity with the *judex ad quo* principle which (theoretically) applies in that context.[146] The arguments supporting the "practical" – at first sight – solution 99

142 Switzerland signed the ICSID Convention on 22.09.1967 and the Convention entered into force on 14.06.1968. It should be noted that arbitrations under the ICSID Convention are not subject to any national arbitration law.

143 See also VOSER/GEORGE (see footnote 1), p. 54-55.

144 Cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international – Droit et pratique à la lumière de la LDIP, 2nd revised edition, Bern 2010 [cited: KAUFMANN-KOHLER/RIGOZZI, Arbitrage international], para. 853.

145 This is the solution adopted by the Organization for the Harmonization of Business Law in Africa (OHADA) in the Uniform Act on Arbitration adopted on 11.03.1999 and revised on 23.11.2017: according to Art. 25 para. 5 of the Uniform Act on Arbitration, the arbitral award may "*be subject to an appeal for revision before the arbitral tribunal* […]" (free translation). The Uniform Act on Arbitration is intended to apply to any arbitration where the seat of the arbitral tribunal is in one of the States Parties to the Treaty of 17.10.1993 (amended on 17.10.2008) on the harmonization of business law in Africa ("Treaty OHADA"; Art. 1 of the Uniform Act on Arbitration).

146 See para. 82 above.

which consists of vesting the Supreme Court with jurisdiction to rule on *rescindant* are unconvincing.[147]

100 The solution which confers the jurisdiction to rule on revision (*rescindant*) of international arbitral awards to the Supreme Court is, however – and regrettably –, most likely to be the solution which will be adopted in the forthcoming (amended) draft bill on the modification of Chapter 12 of the SPILA which will be submitted to the Swiss Parliament in the coming months.

4. Is the Supreme Court's Jurisdiction Exclusive?

101 The question arises whether the parties can derogate from the Supreme Court's jurisdiction to rule on requests for revision of international arbitral awards (*rescindant*)[148] by agreeing that the/an arbitral tribunal has jurisdiction to rule on such requests.[149] Legal scholars are divided on this question.[150]

102 In the author's opinion, the validity of an agreement between the parties providing for a specific procedural framework regarding revision should not be excluded. Indeed, such option follows from the principle of party autonomy. This position is justified by the fact that procedural rules pertaining to revision of international arbitral awards (i.e., Art. 123-127 BGG), as judge-made law, apply by analogy only, and therefore should not be considered as imperative and exhaustive.[151] The fact that the arbitral tribunal is, in some

147 See also, in that sense, SCHWEIZER, SCCP Commenté (see footnote 29), para. 18 on Art. 396 SCCP; SCHÜPBACH (see footnote 25), p. 402-403; comp. BGE 118 II 199, Rec. 3.

148 See Sections IV.C.1. and IV.C.2. above.

149 HIRSCH (see footnote 1), para. 44; STIRNIMANN (see footnote 13), para. 5-6.

150 *Pro*: KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.210; KAUFMANN-KOHLER/RIGOZZI, Arbitrage International (see footnote 144), para. 855; RIGOZZI/SCHÖLL (see footnote 1), p. 18-19; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1971; BERGER/KELLERHALS, 2010 (see footnote 13), para. 1802; SCHWEIZER, Doping – Request of Review/Revision, in: WILD (Ed.), CAS and Football – Landmark Cases, The Hague 2012, p. 167 ff. [cited: SCHWEIZER, CAS and Football], p. 169-171. *Contra*: POUDRET/BESSON (see footnote 1), para. 845; DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 19; GÖKSU (see footnote 7), para. 2297. Cf. also HIRSCH (see footnote 1), para. 45 and references ad footnote 90; ZOLLER (see footnote 8), para. 13, in international public law. See also VOSER/GEORGE (see footnote 1), p. 52-53, on the question of the "inherent power" of the arbitral tribunal to revise its awards.

151 See however para. 105-106 below: The Supreme Court considers to have exclusive jurisdiction. See also para. 107 below regarding the solution proposed in the preliminary draft bill on the modification of Chapter 12 of the SPILA.

cases, still formed[152] also speaks in favour of a possible "derogation" by the parties.[153]

Practically speaking, specific agreements between the parties regarding the specific procedural framework of a (possible) revision of arbitral awards are quite unlikely to happen – at least prior to the award.[154] This being said, one could imagine the set of rules of an arbitration institution to provide for such an attribution of competence.[155] In this regard, it is worth mentioning that the ICSID Convention[156] provides that requests for revision shall, if possible, be submitted to the tribunal which rendered the award (Art. 51 para. 3 ICSID Convention).[157] 103

Although the Code of Sports-related Arbitration does not provide for such a solution, a panel of the Court of Arbitration for Sport ("**CAS**") decided in one case that the arbitral tribunal has jurisdiction to rule on *rescindant*.[158] In that specific case, the CAS panel held that the parties agreed, after the award had been rendered, that the arbitral tribunal should have jurisdiction to determine whether there was any ground for a revision of the award, applying by analogy and for guidance the rules – including those of the BGG – which govern revision of court decisions.[159] 104

However, it should be noted that the Supreme Court considers it has exclusive jurisdiction with respect to the revision of international arbitral awards rendered in Switzerland, regardless of the nature of the award subject to the request for revision. The Supreme Court indeed declared that "*the principle established in* [the decision BGE 118 II 199] *is of general scope and applies* 105

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152 Cf. situation where revision is sought against a partial, a preliminary or an interim award. For an example, cf. BGE 122 III 492.

153 BERGER/KELLERHALLS, 2010 (see footnote 13), para. 1802, footnote 58; SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 383; DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 24. Comp. BGE 122 III 492. See also para. 89 above.

154 See however Section IV.I. below. Compare also with para. 68 above.

155 Cf. DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 20.

156 See footnote 142 above. It has to be noted that such arbitrations under the ICSID Convention are not subject to any national arbitration law.

157 See also VOSER/GEORGE (see footnote 1), p. 54-55.

158 CAS award 2008/A/1557 of 27.07.2009, <https://jurisprudence.tas-cas.org/Shared%20Documents/1557-R.pdf> (accessed on 17.05.2018).

159 CAS award 2008/A/1557 of 27.07.2009, <https://jurisprudence.tas-cas.org/Shared%20Documents/1557-R.pdf> (accessed on 17.05.2018), commented by SCHWEIZER, CAS and Football (see footnote 150), and also referred to by VOSER/GEORGE (see footnote 1), p. 53-54 and by KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.210.

to all revision cases in international arbitration"[160]. It also recently confirmed that "*the Supreme Court is the judicial authority to have jurisdiction on requests for revision of any international arbitral award* [...]"[161].

106 In view of the Supreme Court's constant case law, the defendant may object to the arbitral tribunal's affirmation of its jurisdiction to rule on the request for revision (*rescindant*) and, if need be, lodge an appeal with the Supreme Court on the ground that the arbitral tribunal wrongly accepted jurisdiction to rule on the request for revision (*rescindant*) (see Art. 190 para. 2 lit. b SPILA).[162]

107 Finally, it must be noted that the preliminary draft bill on the modification of Chapter 12 of the SPILA[163] provides, in the draft modified Art. 191 SPILA (see also draft new Art. 119b para. 1 BGG), that requests for revision of international arbitral awards may only be brought before the Supreme Court. This means that, like in domestic arbitration[164] and as is the case in international arbitration according to the current jurisprudence of the Supreme Court[165], the parties will probably not be allowed to vest the/an arbitral tribunal with jurisdiction to rule on a request for revision of an international arbitral award (*rescindant*). In the author's view, the validity of such solution – if adopted – would remain questionable as it restrains the contractual freedom of the parties (cf. principle of party autonomy).

D. Other Admissibility Requirements

1. General Requirements

108 The request for revision must fulfil the conditions mentioned in Art. 42 BGG.[166] Notably, Art. 42 para. 1 BGG requires that the briefs submitted to the Supreme Court be drafted in an official language, indicate the conclusions, the reasons and the means of evidence and finally, be signed; Art. 42 para. 3 BGG requires that all documents used as evidence be filed along with the respective briefs.

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160 BGE 122 II 492, Rec. 1b/aa (free translation); cf. also SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 382-383; HIRSCH (see footnote 1), para. 2-4.

161 BGE 4A_666/2012, Rec. 3.1, RSPC 5/2013, p. 428 ff. (free translation).

162 BERGER/KELLERHALLS, 2015 (see footnote 36), para. 1970.

163 See para. 66 above.

164 See Section III.C.2. above.

165 See para. 105 above.

166 GIRSBERGER/VOSER, International Arbitration in Switzerland, Zurich 2008, para. 1114.

2. Parties (Standing to Sue; Interest in Bringing Proceedings)

The author refers *mutatis mutandis* to the analysis made in Section III.D.1. above regarding the standing to sue requirement. GEISINGER and MAZURANIC also mention the issue of the admissibility of a request for revision filed by third parties. According to these authors, this issue is essentially the same as the issue of admissibility of third party challenges against arbitral awards.[167] 109

Like in domestic arbitration, the requesting party must establish that it has a specific and actual interest in the annulment of (all or part of) the international arbitral award in question.[168] This requirement refers to the general notion of interest in bringing proceedings[169]; it probably does not result from Art. 76 BGG since this provision only concerns the admissibility of actions for annulment filed with the Supreme Court under Art. 72 ff. BGG.[170] In the author's opinion, the interest requirement should not be interpreted too restrictively, in particular in view of the fact that the tribunal deciding on the *rescindant* should in principle neither prejudge nor discuss in detail the foreseeable outcome of the proceedings (if any) on *rescisoire*.[171] 110

Following the approach proposed by BERGER and KELLERHALS as well as by RIGOZZI and SCHÖLL, the author considers that the fact that the arbitral award has already been successfully enforced is not a sufficient reason to prevent its revision.[172] 111

A party requesting the revision of an arbitral award containing alternative or subsidiary reasons must challenge all alternative reasons, respectively the principal as well as the subsidiary reasons. When it fails to do so, it has no legal interest in obtaining revision of such award.[173] 112

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167 GEISINGER/MAZURANIC (see footnote 69), p. 263; cf. also RIGOZZI/SCHÖLL (see footnote 1), p. 24; STIRNIMANN (see footnote 13), para. 9.

168 Cf. HIRSCH (see footnote 1), para. 39 and footnote 78; GEISINGER/MAZURANIC (see footnote 69), p. 263; KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.211.

169 On this notion, see e.g. BGE 110 II 352, JdT 1985 I 354, Rec. 2.

170 Comp. KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.211.

171 See also Section IV.E.1. below.

172 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1809; RIGOZZI/SCHÖLL (see footnote 1), p. 25; comp. GÖKSU (see footnote 7), para. 2300.

173 RIGOZZI/SCHÖLL (see footnote 1), p. 25; GÖKSU (see footnote 7), para. 2300; cf. also BGE 138 I 97, Rec. 4.1.4, and references.

113 Should the requesting party have no standing to sue and/or no legal interest in bringing proceedings, the request for revision is to be declared inadmissible.

3. Time Limits

114 The Swiss Supreme Court Act, applicable by analogy pursuant to the Supreme Court's case law[174], provides for a relative time limit of 90 days (Art. 124 para. 1 lit. d BGG), respectively 30 days (Art. 124 para. 1 lit. a BGG) if the revision pursuant to Art. 121 para. 1 BGG can be requested (cf. situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed)[175], as well as for an absolute time limit of 10 years (Art. 124 para. 2 *in initio* BGG). However, according to Art. 124 para. 2 lit. b BGG, the absolute time limit of 10 years does not apply in case of an arbitral award affected by a criminal offense in the sense of Art. 123 para. 1 BGG.[176]

115 The preliminary draft bill on the modification of Chapter 12 of the SPILA[177] contains a draft new Art. 190a para. 2 SPILA which provides for (i) a single relative time limit of 90 days and (ii) an absolute time limit of 10 years, without exception.

116 According to Art. 124 para. 1 lit. d BGG (other grounds for revision), the request for revision shall be filed with the Supreme Court within 90 days (relative time limit) following the discovery of the grounds for revision, but at the earliest upon notification of the fully reasoned award or upon closure of the penal proceedings.

117 The Supreme Court pointed out that "*when several grounds for revision are invoked, the time limit begins to run separately for each one of them; it is therefore not the longest time limit that applies for the request for revision as a whole*"[178].

118 The Supreme Court in its case law provided details with respect to the degree of diligence which is expected from the requesting party. The Supreme Court considered, regarding the ground for revision provided for in Art. 123 para. 2 lit. a BGG, that "*the discovery of the ground for revision implies that the*

174 See Sections IV.A. and IV.C.1. above.

175 The Supreme Court has left this issue open: see footnote 12 above.

176 See also, among others, BERGER/KELLERHALS, 2010 (see footnote 13), para. 1804-1805; RIGOZZI/SCHÖLL (see footnote 1), p. 26-29; STIRNIMANN (see footnote 13), para. 15-19.

177 See para. 66 above.

178 BGE 4A_666/2012, Rec. 5.1, RSPC 5/2013, p. 428 ff. (free translation).

requesting party has sufficient reliable knowledge of the new fact in question to invoke it, even if it cannot provide clear evidence of such fact; mere speculation is not sufficient. With regard to new evidence, the requesting party shall have documentary evidence establishing it or have sufficient knowledge of such fact for requesting the taking of evidence. It is the requesting party's responsibility to establish the relevant circumstances which allow to verify whether the above-mentioned time limit has been met"[179].

119 The Supreme Court further considered, with respect to the ground for revision provided for in Art. 123 para. 1 BGG, that the time limit does not start to run before the closure of the penal proceedings[180] and shall start as soon as the requesting party is aware that the conviction entered into force or, if a conviction is no longer possible, as soon as it becomes aware of the breach of law and of the corresponding evidence.[181]

120 The Supreme Court also stated that "*it would be* […] *contrary to the exceptional nature of the revision procedure and to the spirit of case law related to Art. 124 para. 1 lit. d BGG to allow a party who discovered conclusive evidence to defer the filing of the request for revision and to benefit from the subsequent discovery of new evidence, only reinforcing the previous one, in order to artificially take advantage of the extension of the* […] *time limit provided by the above-mentioned provision*"[182].

121 The Supreme Court also decided that the statutory time limit of Art. 124 para. 1 lit. d BGG is suspended during judicial recesses (cf. Art. 46 BGG, which applies by analogy to the revision of international arbitral awards).[183] As a general matter, Art. 44-50 BGG, which regulate time limits before the Supreme Court, should apply to the revision of international arbitral awards.[184]

122 A request for revision submitted after any of the time limits provided for in Art. 124 BGG has elapsed is inadmissible.[185]

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179 BGE 4A_570/2011, Rec. 4.1 (free translation). See also BGE 4A_247/2014, Rec. 2.3.

180 BGE 4A_666/2012, Rec. 5.2.2, RSPC 5/2013, p. 428 ff. (free translation).

181 BGE 4A_596/2008, Rec. 3.3 (free translation), and references.

182 BGE 4A_666/2012, Rec. 5.2.1, RSPC 5/2013, p. 428 ff. (free translation); see also BGE 4A_105/2012, Rec. 2.2 (not published in BGE 138 III 542 but reproduced in RSPC 5/2012, p. 429, with a note by SCHWEIZER); GULDENER (see footnote 15), p. 488.

183 BGE 4A_222/2011, Rec. 2.2; see also BGE in RSDIE 1998 p. 580.

184 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1975.

185 GEISINGER/MAZURANIC (see footnote 69), p. 265.

4. Language(s)

123 The request for revision must be written in one of the official languages of Switzerland (Art. 42 para. 1 *in initio* BGG). The same applies to the opposing party's as well as to the arbitral tribunal's answers[186] to the request for revision.[187]

124 The preliminary draft bill on the modification of Chapter 12 of the SPILA[188] contains a draft new Art. 77 para. 2bis BGG which provides that memorials can be filed with the Supreme Court in English.

125 In its Explanatory Report of 11 January 2017 regarding the preliminary draft bill on the modification of Chapter 12 of the SPILA, the Swiss Federal Council indicated in that respect that *"English is the most used language in arbitration proceedings today. In view of the importance of said language, the Supreme Court is tolerant and often does not request, in the framework of challenges against international arbitral awards, translations of annexes and documents written in English. The preliminary draft bill goes further as it expressly provides, in a draft new Art. 77 para. 2bis BGG, that the parties can write and submit memorials in English to the Supreme Court in the framework of recourses and requests for revision against arbitral awards* […]"[189].

E. Proceedings on *Rescindant*

1. Power of Review of the Supreme Court

126 A request for revision is an unlimited means of appeal, which means that the Supreme Court has full power of review, *de facto* and *de jure*, within the framework of the grounds for revision invoked.[190]

127 In a decision of 16 October 2003, the Supreme Court has described the nature of its review at the stage of *rescindant* as follows: "[a]*s the judicial authority*

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186 See respectively para. 131-132 below. The opposing party and the arbitral tribunal can use another official language than the language chosen by the requesting party (cf. BGE 142 III 521, Rec. 1).

187 See also BGE 142 III 521, Rec. 1, regarding the question of the language of the decision of the Supreme Court.

188 See para. 66 above.

189 SWISS FEDERAL COUNCIL, Explanatory Report SPILA (see footnote 98), p. 28 (free translation).

190 Cf. para. 38 above.

having jurisdiction on requests for revision of an international arbitral award, the Supreme Court is not the competent authority to decide what will be the practical impact, resulting from the new facts invoked by the applicant, on the dispositive part of the award that shall be rendered in case the request for revision is granted. It is the arbitral tribunal, to which the cause is remanded, or another arbitral tribunal specially set up for this purpose, which has to decide on that question"[191].

128 Later in the same decision, the Supreme Court, however, added that "[t]*he role of the Supreme Court consists exclusively in a hypothetical review of the relevance of the new facts with regard to the legal reasons underlying the award for which the revision has been requested. In other words, the Supreme Court, when deciding on a motion for revision of an award* [...], *only has to verify, taking into account the legal reasons set forth in the challenged award, whether the new facts, had they been known by the arbitrators, would have led them, in all probability, to render a different award*"[192].

129 This last statement goes beyond what the author considers to be the proper scope of review of an authority in the phase of *rescindant*. Indeed, the Supreme Court should not have the power to assess "*whether the new facts, had they been known by the arbitrators, would have led them, in all probability, to render a different award*". It should only examine whether the new facts or evidence in question are relevant to the case and material to its outcome.[193] If this is the case, it shall remand the case to the arbitral tribunal (*rescisoire*) for further assessment of the respective new facts or evidence.

2. Proceedings

130 As indicated above, the Supreme Court decided that the provisions of the Swiss Supreme Court Act regarding the revision of decisions rendered by the Supreme Court apply by analogy to the revision of international arbitral awards.[194] The preliminary draft bill on the modification of Chapter 12 of the SPILA[195] plans to enshrine such solution in law (cf. draft revised Art. 191 SPILA).

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191 BGE 4P.117/2003, Rec. 1.2 (free translation).

192 BGE 4P.117/2003, Rec. 1.2, translated in part by MÜLLER, Swiss Case Law (see footnote 13), p. 351; cf. also RIGOZZI/SCHÖLL (see footnote 1), p. 47-51.

193 In that sense: KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.223.

194 See Sections IV.A. and IV.C.1.

195 See para. 66 above.

131 The opposing party shall be requested to submit its comments on the request for revision, unless the Supreme Court considers the request obviously inadmissible or obviously unfounded (cf. Art. 127 BGG applicable by analogy; see also draft new Art. 119b para. 2, second sentence, BGG). This refers to the admissibility/merits of the request for revision (*rescindant*) and not to the admissibility/merits of the claims which were decided upon by the arbitral tribunal and that may have to be re-examined by the same tribunal (*rescisoire*) in case of a positive decision on *rescindant*. The parties may also exercise their right of reply.[196]

132 According to the Supreme Court's practice, which in this regard is identical to set aside proceedings against international arbitral awards, the arbitral tribunal is also requested to submit its comments.[197] It should be noted that this practice does not derive *stricto sensu* from Art. 127 BGG, since the arbitral tribunal is neither a "previous authority" (as the arbitral award, whose revision is requested, is not a decision rendered by a state court), nor is it "a possible other party" or a possible "participant in the proceedings", and even less "an authority entitled to appeal" within the meaning of the said provision.[198]

133 The determinations of the arbitral tribunal, if any, may be useful for the Supreme Court's decision.[199] This brings us back to the issue discussed above regarding the authority having jurisdiction to rule on the *rescindant*[200]: if the arbitral tribunal is in a position to comment on the request for revision, it should then also be capable of (reforming itself and) ruling alone on the *rescindant*.

134 Pursuant to Art. 190 SPILA, international arbitral awards rendered in Switzerland are final once communicated to the parties. In principle, the request for revision does not have suspensive effect.[201] However, according to Art. 126 BGG, applicable by analogy, the Supreme Court has the power to grant the suspensive effect *ex officio* or upon request of one of the parties.[202] According to the preliminary draft bill on the modification of Chapter 12 of

196 Cf., *mutatis mutandis*, para. 46 above.

197 HIRSCH (see footnote 1), para. 41-42.

198 Comp. GÖKSU (see footnote 7), para. 2303; GIRSBERGER/VOSER (see footnote 166), para. 1116.

199 Cf. HIRSCH (see footnote 1), para. 43.

200 Cf. Section IV.C. above.

201 See, among others, PFISTERER, in: BaslerKomm SPILA, para. 97 on Art. 190 SPILA. See also para. 4 above: revision is an extraordinary means of appeal.

202 Cf. also SCHWEIZER, Diss. (see footnote 7), p. 272, who points out that the stay of the execution of the judgment is a true protective measure and is neither a characteristic of the request for revision nor one of its effects.

the SPILA[203], Art. 126 BGG would also apply, this time by reference of the draft revised Art. 191 SPILA.

Suspensive effect will rarely be granted since the decision is already legally binding, and has possibly been carried out in Switzerland and/or abroad. In deciding whether or not to grant suspensive effect, the Supreme Court shall in particular take into consideration the likelihood of success of the revision and the possible damage that a refusal to suspend could cause.[204] 135

Art. 126 BGG also provides the possibility for the Supreme Court to grant, *ex officio* or upon request of a party, "other protective measures". In contrast with Art. 331 SCCP applicable (by reference of Art. 398 SCCP) to revision of domestic arbitral awards, Art. 126 BGG does not expressly provide the possibility to order the provision of securities. This possibility should, however, be considered as being included in the notion of "protective measures" within the meaning of Art. 126 BGG. 136

Art. 126 BGG seems to take precedence over Art. 183 SPILA, which provides that the arbitral tribunal may order protective measures upon request of a party. The situation is, however, not entirely clear if one takes into account the fact that the arbitral tribunal is not necessarily *functus officio* at that stage (cf. revision of a preliminary, interim or partial award). In the author's opinion, a parallel jurisdiction of the arbitral tribunal and of the Supreme Court should be possible. If the situation cannot await the (re)constitution of the/an arbitral tribunal, and depending on the institutional rules that may be applicable, the parties could also refer the matter to an emergency arbitrator when possible (cf. e.g. Art. 29 ICC Rules; Art. 43 Swiss Rules). 137

F. Decision on *Rescindant*

1. Types and Effects

The author refers *mutatis mutandis* to the analysis presented above regarding the revision of domestic arbitral awards.[205] The author limits himself to indi- 138

203 See para. 66 above.

204 Cf. GÖKSU (see footnote 7), para. 2302 and the references.

205 See Section III.F.1. See also DASSER/WÓJTOWICZ (see footnote 2), p. 283 ff., who indicate that since 1992, 23 published decisions on requests for revisions have been issued by the Supreme Court, of which only two decisions grant the request for revision (the two arbitral awards in question were both rendered in international arbitration).

cating that the Supreme Court rules on the *rescindant* only.[206] This is reflected in the preliminary draft bill on the modification of Chapter 12 of the SPILA[207], which contains a draft new Art. 119b para. 3 BGG providing that "[i]*f the Supreme Court grants the request for revision, it cancels the award and refers the case back to the arbitral tribunal for a new decision*"[208].

2. Legal Remedies

139 The Supreme Court's decision on *rescindant* is not subject to appeal[209], which is, in the author's opinion, problematic. The decision on *rescindant* should (also)[210] be subject to an appeal in a higher court.[211] The fact that the decision is rendered by the highest state court in Switzerland – a solution which the author considers questionable[212] – *de facto* prevents the unsuccessful party to lodge any appeal against the decision on *rescindant*.

140 For the sake of completeness, the author indicates that the Supreme Court's decision on *rescindant* is itself subject to a request for revision.[213] In principle, the division of the Supreme Court that rendered the considered judgment has jurisdiction to rule on a request for revision of said judgment.[214]

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206 Cf. SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 395; KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.224. See also BGE 142 III 521, Rec. 2.1; BGE 4A_412/2016, Rec. 2.1 and 4.

207 See para. 66 above.

208 Free translation.

209 GÖKSU (see footnote 7), para. 2309.

210 See Section IV.H.2. below regarding legal remedies against decisions on *rescisoire*.

211 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 389.

212 Cf. Section IV.C.3. above.

213 Cf. BERGER/KELLERHALLS, 2010 (see footnote 13), para. 1816-1817; VOSER/GEORGE (see footnote 1), p. 65; GIRSBERGER/VOSER (see footnote 166), para. 1120; cf. also SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 400 for the consequences on the arbitral award of a decision on *rescindant* which would be subsequently challenged by a revision.

214 Cf. BGE 2F_11/2011, Rec. 1, in RSPC 6/2011, p. 500-501.

G. Proceedings on *Rescisoire* (i.e., After a Positive Decision on *Rescindant*)

1. Reconstitution of the Arbitral Tribunal

Since revision does not have a devolving effect[215], there is no need for the Supreme Court, in case of a positive decision on *rescindant*[216], to "remit the case" to the arbitral tribunal for a new decision (*rescisoire*). The arbitral tribunal's mission should be considered as reactivated *ipso jure* by the Supreme Court's judgment.[217] In practice, however, the (*de facto*) reconstitution of the arbitral tribunal generally occurs on request of one of the parties.[218] 141

The Supreme Court, in a decision of 23 March 2005, expressed its view on this issue as follows: "*the decision to annul puts an end to the revision proceedings itself and causes the previous proceedings to be reopened. It has an* ex tunc *effect so that* [the tribunal] *and the parties are placed in the situation they once were in when the cancelled judgment was rendered, the cause having to be decided upon as if the judgment never existed* […]"[219]. 142

The Supreme Court furthermore pointed out, in a decision of 2 May 2012, that "[a]*s to the arbitrators* [...] *their mission is not accomplished, or is reactivated if one considers that it had been temporarily accomplished. It is, therefore, not illogical to admit, in such a case, that the arbitral tribunal which rendered the annulled award and which shall render a new one, was never* functus officio […] *or was* functus officio *only during the time elapsed between the communication and the annulment of the award*"[220]. 143

As already stated above, there may be difficulties in reconstituting the arbitral tribunal, *inter alia* in view of the time that may have elapsed since the issuance of the arbitral award. Furthermore, if the request for revision is granted (*rescindant*) on the grounds that the arbitral award was affected by a criminal offence committed by one or several of the members of the arbitral tribu- 144

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215 See para. 9 above.

216 See MÜLLER, Das Schweizerische Bundesgericht revidiert zum ersten Mal einen internationalen Schiedsspruch – Eine Analyse im Lichte des neuen Bundesgerichtsgesetzes, SchiedsVZ 2/2007 (no. 5), p. 64 ff.

217 Cf. BGE 4A_14/2012, RSPC 4/2012 p. 337 ff. Comp. STIRNIMANN (see footnote 13), para. 52; KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.225.

218 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1943 (domestic arbitration).

219 BGE 4P.198/2004 and 4C.294/2004, RSPC 3/2005 p. 303 ff. (rendered in a matter other than arbitration), Rec. 4.1 (free translation); STIRNIMANN (see footnote 13), para. 64.

220 BGE 4A_14/2012, RSPC 4/2012 p. 337 ff., Rec. 3.1.1 (free translation).

nal[221], the concerned person(s) would have to be replaced.[222] It may also be that arbitrators refuse to resume their duties within the (re)constituted arbitral tribunal – although they should not be allowed to do so without valid reason.[223] The parties should, in such situations, seek support from the competent arbitral institution (if any) and/or from the *juge d'appui* (see Art. 179 paras. 1 and 2 SPILA).[224]

2. Repetition of (Part of) the Arbitral Proceedings

145 The arbitral tribunal only needs to repeat or supplement the procedural steps which relate to the newly discovered fact(s) or evidence, or which were affected by the criminal offence having been recognized in the meantime by a criminal court. Therefore, there is generally no need to repeat the entire arbitral proceedings.[225]

146 The author refers to the legal doctrine available with respect to issues such as the evidence that can be provided and the arguments that can be presented by the parties, as well as the power of examination of the arbitral tribunal.[226]

147 The question arises whether the protective measures ordered by the Supreme Court during the phase of *rescindant*[227] subsist or not during the phase of *rescisoire*. The parties may consider requesting that the arbitral tribunal, if needed and where appropriate, orders new protective measures during the phase of *rescisoire*. In the author's opinion, one could also consider that the annulment of the arbitral award (*rescindant*), in view of its *ex tunc* effect[228], revives the protective measures ordered at the time by the arbitral tribunal during the arbitral proceedings.

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221 See also footnote 12 above regarding the situation where a party discovers a ground for the challenge of an arbitrator after the time limit for setting aside the arbitral award has elapsed.

222 Berger/KELLERHALS, 2015 (see footnote 36), para. 1979. See also para. 89 above.

223 STIRNIMANN (see footnote 13), para. 55-57; comp. BGE 118 II 199, Rec. 3, which mentions the arbitrators' refusal to (re)group.

224 See Section IV.C.3.e. above.

225 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1945 and 1979.

226 See e.g. KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.224 ff.; RIGOZZI/SCHÖLL (see footnote 1), p. 56-58 and *passim*; GEISINGER/MAZURANIC (see footnote 69), p. 272-273; GÖKSU (see footnote 7), para. 2310-2311; STIRNIMANN (see footnote 13), para. 60-67.

227 On the possibility of requesting that the arbitral tribunal orders protective measures during the phase of *rescindant*, cf. para. 137 above.

228 See para. 142 above.

Since 1 January 2012, the ICC Rules of Arbitration contain a provision concerning remission of arbitral awards to arbitral tribunals, which *inter alia* applies to revision.[229] Pursuant to Art. 36 para. 4 of the ICC Rules, "[w]*here a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35* [respectively: making the award; scrutiny of the award by the ICC Court; notification, deposit and enforceability of the award] *and* [of] *Article 36 shall apply* mutatis mutandis *to any addendum or award made pursuant to the terms of such remission. The* [ICC] *Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses*".[230] 148

H. Decision on *Rescisoire*

1. Types and Effects

When deciding on *rescisoire*, the arbitral tribunal can either (i) annul/modify its (former) decision in whole or in part or (ii) come to the conclusion that the elements brought forward by the requesting party as ground(s) for revision do not change the result of the original award, i.e., that the dispositive section of the arbitral award remains unchanged.[231] The decision includes a decision on the costs of the arbitration.[232] 149

2. Legal Remedies

The arbitral award issued following the Supreme Court's decision to admit the request on the *rescindant* is subject to an appeal to the Supreme Court.[233] It is also subject to a (further) request for revision. 150

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229 VOSER, Overview of the Most Important Changes in the Revised ICC Arbitration Rules, in: ASA Bulletin 2011, p. 783 ff., p. 809-810.

230 See also Art. 2 para. 10 of the Appendix III to the ICC Rules regarding the cost and fees of the arbitration.

231 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1980.

232 Cf. GULDENER (see footnote 15), p. 491; Art. 333 para. 2 SCCP in state court civil procedure.

233 BERGER/KELLERHALS, 2015 (see footnote 36), para. 1987; VOSER/GEORGE (see footnote 1), p. 65; GIRSBERGER/VOSER (see footnote 166), para. 1120; PFISTERER, in: BaslerKomm SPILA, para. 97 on Art. 190 SPILA.

I. Waiver of the Right to Apply for Revision

1. The Current State of the Question According to Case Law and Legal Doctrine

151 The Supreme Court initially left the question of whether the parties in international arbitration can waive the right to apply for revision[234] open, although suggesting that a waiver of revision would be ineffective.[235]

152 Legal doctrine is divided on this issue.[236] Among others, BERGER and KELLERHALS consider that a waiver of revision is admissible in principle. The author puts forward that specific reference to revision of arbitral awards is not necessary; the clear and incontestable expression of the common intention of the parties to waive "any recourse" against the award being sufficient.[237] The author also indicates that the waiver to apply for revision can either be general or relate to specific grounds for revision.[238] The author, moreover, points out that some specific circumstances, although they could not be invoked as grounds for revision, may be invoked as grounds for refusal during the *exequatur* phase.[239]

153 The question also arises whether a contractual waiver of a motion to set aside pursuant to Art. 192 para. 1 SPILA entails the (in)admissibility of the request

234 BGE 4P.265/1996, Rec. 1a.

235 SCHWEIZER, Liber Amicorum Knoepfler (see footnote 13), p. 376-377, referring to BGE in RSDIE 1998 p. 580, Rec. 1.

236 *Pro*: HIRSCH (see footnote 1), para. 46; POUDRET/BESSON (see footnote 1), para. 845; BERGER/KELLERHALS, 2015 (see footnote 36), para. 1982; GÖKSU (see footnote 7), para. 2249; VOSER/GEORGE (see footnote 1), p. 64. *Contra*: RIGOZZI/SCHÖLL (see footnote 1), p. 29-30; PATOCCHI/JERMINI, in: BaslerKomm SPILA, para. 22 on Art. 192 SPILA; BUCHER, in: CR LDIP, para. 5 on Art. 192 SPILA (this last author, however, proposes, in view of BGE 4A_234/2008, to admit an anticipated waiver of revision with respect to the grounds for revision which overlap with the grounds for appeal provided by Art. 190 SPILA). Taking a nuanced approach: KAUFMANN-KOHLER/RIGOZZI, Arbitrage International (see footnote 144), para. 861.

237 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1813-1813a. BERGER/KELLERHALS, 2015 (see footnote 36), para. 1981 ff.

238 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1814.

239 BERGER/KELLERHALS, 2010 (see footnote 13), para. 1815 (awards affected by a criminal offence, which can be considered as falling within the ground for refusal provided by Art. V para. 2 lit. b NYC); see also HIRSCH (see footnote 1), para. 117. Comp. POUDRET/BESSON (see footnote 1), para. 843, who – rightly in the author's view – relativize the scope of such a possibility.

for revision.[240] The Supreme Court, in a decision of 14 August 2008, left this question open, however pointing out in an *obiter dictum* that "*it appears difficult to admit that a party who has expressly waived its option to challenge the award, i.e., to invoke the plea provided for in* [Art. 190 para. 2 lit. a SPILA]*, may nevertheless seize the* [Supreme Court] *indirectly by invoking the same plea* […] *with a request for revision, otherwise* [Art. 192 SPILA] *would become a dead letter*"[241]. The Supreme Court, in a decision of 17 October 2017, confirmed this approach and enshrined it in its case law – thereby indirectly admitting that the parties can waive their right to apply for revision.[242]

In another decision, the Supreme Court had to determine how to understand the following sentence arising from an arbitration clause: "*neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision*". The Supreme Court considered that these terms clearly reflect the parties' will to exclude any legal remedy that may be brought before a state court against the arbitral award. Therefore, the Supreme Court held that the parties waived their right to bring an action for annulment against the arbitral award.[243] The Supreme Court, however, did not directly address the issue of the validity of a waiver of the right to apply for revision. 154

2. The Preliminary Draft Bill on the Modification of Chapter 12 of the SPILA

The preliminary draft bill on the modification of Chapter 12 of the SPILA[244] provides in the draft new Art. 190a para. 3 SPILA that the parties can expressly waive, in the arbitration clause or subsequently by means of a written agreement, part of their right to apply for revision, provided that neither of the parties has its domicile, habitual residence, place of business or seat in Swit- 155

240 MÜLLER, Swiss Case Law (see footnote 13), p. 343, 367.

241 BGE 4A_234/2008, Rec. 2.1, translated by BERGER/KELLERHALS, 2010 (see footnote 13), para. 1812. Compare with KAUFMANN-KOHLER/RIGOZZI, International Arbitration (see footnote 23), para. 8.217, who indicate that "*one should not overlook the fact that the availability of revision becomes all the more important precisely because under Swiss law the parties can validly waive their right to challenge arbitral awards*".

242 BGE 4A_53/2017, Rec. 3.2 (due for publication). For a commentary of this decision, see STOYANOV/SMAHI, Anticipatory Renunciation to Challenge Arbitral Awards Under Swiss Law – An Update, in: Kluwer Arbitration Blog, 10.01.2018, <http://arbitrationblog.kluwerarbitration.com/2018/01/10/recent-developments-swiss-arbitration-law/> (accessed on 17.05.2018).

243 BGE 4A_577/2013, Rec. 3.4.

244 See para. 66 above.

zerland.[245] According to the draft new Art. 190a para. 3 SPILA, such possibility would be available with respect to one of the two grounds for revision provided for in the draft new Art. 190a para. 1 SPILA, namely the ground for revision of Art. 190a para. 1 lit. a SPILA.

V. Conclusion

156 The instrument of revision of arbitral awards is to be considered as a necessary consequence of the rule of law in Switzerland.[246] It should be noted, however, that the laws of some countries do not provide for such a mechanism[247], and that the UNCITRAL Model Law on International Commercial Arbitration does not provide for the instrument of revision[248]. In any event, revision of arbitral awards rendered in Switzerland is and will remain an extraordinary legal means, which is allowed only in exceptional cases.

157 The preliminary draft bill on the modification of Chapter 12 of the SPILA[249] intends to fill the *lacuna* left by the current version of Chapter 12 of the SPILA with regard to the revision of international arbitral awards. Although one can consider that the project, as it stands, has some shortcomings in that respect, it has the merit of regulating the situation.

158 The preliminary draft bill, however, does not contain any modification of the provisions of the SCCP regarding the revision of domestic arbitral awards. The ongoing modification would, however, be an opportunity for harmonizing the procedure of revision of domestic and international arbitral awards. In particular, the competence to rule on the revision of domestic arbitral awards (*rescindant*) could be given to the Supreme Court instead of the cantonal courts.[250]

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245 See SWISS FEDERAL COUNCIL, Preliminary Draft Bill (see footnote 97).

246 Cf. para. 5 above.

247 See e.g., in international arbitration, Germany (cf. RIGOZZI/SCHÖLL (see footnote 1), p. 7; VOSER/GEORGE (see footnote 1), p. 46 and 50; HIRSCH (see footnote 1), para. 58) and England (cf. RIGOZZI/SCHÖLL (see footnote 1), p. 7; HIRSCH (see footnote 1), para. 57). Italy had once chosen to expressly exclude revision of international awards (cf. Art. 838 of the former SCCP-I, exclusion except when the parties explicitly agree otherwise), before reestablishing this possibility (cf. DERAINS (see footnote 13), Liber Amicorum Böckstiegel, para. 5; POUDRET/BESSON (see footnote 1), para. 847; RIGOZZI/SCHÖLL (see footnote 1), p. 7).

248 Cf. RIGOZZI/SCHÖLL (see footnote 1), p. 6; VOSER/GEORGE (see footnote 1), p. 45-46.

249 See para. 66 above.

250 See also para. 26-27 above. See, however, para. 84 above.

It will be interesting to see in that respect the solutions that will be proposed by the Swiss Federal Council in the forthcoming (amended) draft bill on the modification of Chapter 12 of the SPILA which will be submitted to the Swiss Parliament. 159

Finally, and from a general point of view, one can consider that numerous procedural difficulties, on both theoretical and practical levels, will continue to arise regarding the revision of arbitral awards in Switzerland. 160

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