

Austrian Yearbook on International Arbitration 2019

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Challenging Arbitrators for Lack of Independence or Impartiality

Procedural Pitfalls from a Swiss Perspective

Nadja Jaisli Kull/Andrea Roth

I. Introduction

The right of parties to an independent and impartial arbitral tribunal has not lost any topicality. Indeed, the sensitivity around the issue of arbitrators' independence and impartiality appears to have increased in recent years. In particular, arbitral institutions such as the International Court of Arbitration of the International Chamber of Commerce (ICC) require a high (if not increasing) degree of transparency from arbitrators and are quite prepared to refuse their appointment or to approve challenges of arbitrators on the grounds of lack of independence and impartiality.¹⁾

This contribution will highlight procedural pitfalls from a Swiss perspective when challenging arbitrators in international arbitration proceedings. In a decision rendered in April 2018, the Swiss Federal Supreme Court rejected a request for the setting aside of a final award as belated, because the requesting party (instead of seeking the setting aside of the final award) should already have brought such setting aside proceedings against a procedural order with which the arbitral tribunal had rejected a challenge against two of the arbitrators.²⁾ While this decision concerns the rather rare situation where an arbitral tribunal is competent to rule on a challenge brought against it, this

¹⁾ See Andrea Carlevaris & Roció Digón, *Arbitrator Challenges under the ICC Rules and Practice*, ICC Dispute Resolution Bulletin, at 26 and fn 5 (2016), noting that in ICC arbitration proceedings the number of prospective arbitrators who were not confirmed had increased between 2006 and 2014. According to a recent statistic published by the ICC, 42 arbitrators were not confirmed or appointed in ICC arbitration proceedings in 2017, see ICC Practice and Procedure, *2017 ICC Dispute Resolution Statistics*, ICC Dispute Resolution Bulletin, at 57 (2018). See further fn 24 below for a statistical overview of the success rate of challenges brought before the ICC and the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI).

²⁾ Swiss Supreme Court, Apr 30, 2018, 4A_136/2018.

contribution will, in a broader context, outline applicable procedures and potential pitfalls when challenging arbitrators.

After an overview of the grounds for challenge under Swiss law (Section II) and the related duties of parties and arbitrators (Section III), the authors will discuss the challenge procedures during the arbitration proceedings (Section IV.A) and after the rendering of an award (Section IV.B).

II. Overview of Grounds for Challenge

A. Legal Bases

International arbitration proceedings seated in Switzerland are governed by Chapter 12 of the Swiss Private International Law Act (*Bundesgesetz über das Internationale Privatrecht* – PILA).³⁾ According to Article 180(1)(a) and (b) PILA, an arbitrator can be challenged if he or she fails to meet the qualifications agreed upon by the parties or if a ground for challenge exists under the applicable arbitration rules. Furthermore, according to Article 180(1)(c) PILA, an arbitrator can be challenged if “*circumstances exist that give rise to justifiable doubts as to his independence*”. As the Swiss Supreme Court has held in a leading decision, Article 180(1)(c) PILA refers to both independence and impartiality.⁴⁾ Chapter 12 of the PILA is currently subject to revision and the draft bill of October 2018 explicitly includes the requirement of impartiality in Article 180(1)(c) PILA.⁵⁾

Article 180(1)(c) PILA is mandatory and cannot be derogated by the parties in advance.⁶⁾ Accordingly, parties cannot waive or limit their right to an independent and impartial tribunal, *e.g.* by choosing arbitration rules providing for lower standards than the PILA.⁷⁾

³⁾ Domestic arbitration proceedings seated in Switzerland are governed by Part 3 of the Swiss Code of Civil Procedure (*Zivilprozessordnung* – CCP). This contribution will focus on the provisions of the PILA, and refer to the CCP only in specific cases.

⁴⁾ Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 (“Valverde” decision), consid. 3.3.1.

⁵⁾ The draft bill together with a report of the Swiss Federal Council is available at <https://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2018/2018-10-24.html>, last visited November 19, 2018. It is currently (as of November 2018) expected that the revised PILA will enter into force in summer 2020 or January 2021 at the earliest.

⁶⁾ See GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, INTERNATIONAL ARBITRATION, LAW AND PRACTICE IN SWITZERLAND, para. 4.107 (2015); DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION, COMPARATIVE AND SWISS PERSPECTIVES, para. 754 (3rd ed. 2016); Wolfgang Peter & Christoph Brunner, Art. 180, in BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT, para. 28 (Honsell *et al.* eds., 3rd ed. 2013).

⁷⁾ *E.g.*, KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.107.

In setting aside proceedings against arbitral awards before the Swiss Supreme Court, an arbitrator's lack of independence and impartiality can be raised under the ground of improper constitution of the arbitral tribunal according to Article 190(2)(a) PILA.

The standards of an arbitrator's independence and impartiality have been influenced by the IBA Guidelines on Conflicts of Interests in International Arbitration (IBA Guidelines).⁸⁾ Even though the IBA Guidelines have no statutory value,⁹⁾ parties, counsel and arbitrators are often guided by these principles.¹⁰⁾

In institutional arbitration, arbitrators must be independent and impartial also based on the applicable arbitration rules. For instance, according to Article 20(2) of the VIAC Rules of Arbitration and Mediation of 2018 (Vienna Rules) an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. The same or similar provisions are e.g. included in Article 10(1) of the Swiss Rules of International Arbitration of 2012 (Swiss Rules), Article 14(1) of the Arbitration Rules of the ICC of 2017 (ICC Rules) and the DIS Arbitration Rules of 2018 (DIS Rules).¹¹⁾

B. Overview of the Practice of the Swiss Supreme Court

The Swiss Supreme Court applies a very high threshold when assessing whether circumstances exist that give rise to justifiable doubts as to an arbitrator's independence or impartiality, and requires a significant degree of substantiation and proof of such circumstances.¹²⁾

⁸⁾ See, e.g., BERNHARD BERGER & FRANZ KELLERHALS, *INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND*, para. 786 (3rd ed. 2015).

⁹⁾ E.g. Swiss Supreme Court, Mar 20, 2008, 4A_506/2007, consid. 3.3.2.2; see also IBA Guidelines, Introduction, para. 6.

¹⁰⁾ See, e.g. BERGER & KELLERHALS, *supra* note 8, para. 787.

¹¹⁾ Articles 9.1 and 15.1 DIS Rules.

¹²⁾ See, e.g., Mariella Orelli, *Article 180 PILS*, in *ARBITRATION IN SWITZERLAND, THE PRACTITIONER'S GUIDE*, para. 12 (Arroyo ed., 2nd ed. 2018); Luca Beffa, *Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator – Is it time to change the approach?*, ASA Bulletin Vol 29 Issue 3, at 599 *et seqq.* (2011). In two decisions rendered in 2010, the Swiss Supreme Court dismissed the challenge of an arbitrator based on the ground of previous multiple appointments by one of the parties or connected persons in several other proceedings, because the Court considered the allegations as being based solely on newspaper articles without providing further details as to the timing and the parties involved, making them therefore too vague (Swiss Supreme Court, Jan 1, 2010, 4A_256/2009, consid. 3.1.2; Swiss Supreme Court, Jan 11, 2010, 4A_258/2009, consid. 3.1.2).

Article 180(1)(c) PILA allows for a case-by-case analysis,¹³⁾ which must be made based on objective circumstances.¹⁴⁾ The subjective impression of one of the parties is irrelevant.¹⁵⁾

It was a controversial subject over many years whether, under the PILA, the same standard of independence applied to a party-appointed arbitrator and to a presiding arbitrator (or sole arbitrator) jointly appointed by the parties or the institution.¹⁶⁾ In 2010, the Swiss Supreme Court clarified that the same standards apply to all members of the arbitral tribunal.¹⁷⁾

Regarding the IBA Guidelines, the Swiss Supreme Court has held that it considered these guidelines to be a valuable instrument when assessing an arbitrator's independence and impartiality, although they lack statutory force.¹⁸⁾ Occasionally, the Swiss Supreme Court refers to the IBA Guidelines in its decisions and assesses whether the specific circumstances of a case fall within the remit of the situations described in the IBA Guidelines.¹⁹⁾ However, while in one instance the Swiss Supreme Court relied on the IBA Guidelines to reject a challenge,²⁰⁾ the authors are not aware of any other decisions rendered by the Swiss Supreme Court where it confirmed a challenge of an arbitrator on the basis of the IBA Guidelines.

Circumstances giving rise to justifiable doubts may be found either in the personal behavior of the arbitrator or in his or her relationship with one of the parties, its counsel or third parties,²¹⁾ such as experts or witnesses appearing in the proceedings or other third parties having an interest in the

¹³⁾ See, e.g., Orelli, *supra* note 12, para. 9.

¹⁴⁾ See Swiss Supreme Court, Feb 9, 1998, 4P.224/1997, ASA Bulletin Vol 16 Issue 3, at 634 *et seq.* (1998), *consid.* 3a; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.112; Nathalie Voser & Eliane Fischer, *The Arbitral Tribunal*, in INTERNATIONAL ARBITRATION IN SWITZERLAND, A HANDBOOK FOR PRACTITIONERS 64 (Geisinger & Voser eds., 2nd ed. 2013).

¹⁵⁾ See Swiss Supreme Court, Mar 28, 2002, ATF 128 V 82, *consid.* 2a; Swiss Supreme Court, Feb 9, 1998, 4P.224/1997, ASA Bulletin Vol 16 Issue 3, at 634 *et seq.* (1998), *consid.* 3a.

¹⁶⁾ See, e.g., BERGER & KELLERHALS, *supra* note 8, paras. 791 *et seq.*, with further references.

¹⁷⁾ Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), *consid.* 3.3.1; see, e.g., Peter & Brunner, *supra* note 6, para. 5.

¹⁸⁾ E.g., Swiss Supreme Court, Mar 20, 2008, 4A_506/2007, *consid.* 3.3.2.2; see also Matthias Scherer, *First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration, Case Note on Swiss Supreme Court Decisions 4A_506/2007 & 4A_528/2007*, ASA Bulletin Vol 26 Issue 3, at 588 *et seq.* (2008).

¹⁹⁾ See, e.g., Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), *consid.* 3.4.4; Swiss Supreme Court, Sept 7, 2016, ATF 142 III 521, *consid.* 3.3.2.

²⁰⁾ Swiss Supreme Court, Mar 20, 2008, 4A_506/2007, *consid.* 3.3.2.2.; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.130.

²¹⁾ See, e.g., Peter & Brunner, *supra* note 6, para. 15.

dispute.²²⁾ In the authors' impression the Swiss Supreme Court appears generally to apply a higher threshold than many arbitral institutions when deciding on an arbitrator's lack of independence or impartiality.²³⁾ Parties may therefore have a higher prospect of success in challenging an arbitrator before an arbitral institution than before the Swiss Supreme Court.²⁴⁾

Many of the challenges before the Swiss Supreme Court are made in relation to the arbitrator's personal behavior: in such cases, the challenging party typically argues that the arbitrator's lack of independence or impartiality manifests itself in the way in which the arbitrator has conducted the procedure, for instance by allowing the submission of new evidence to the detriment of the opposing party.²⁵⁾ The authors are not aware of any Swiss Supreme Court decision affirming a challenge on such grounds. Rather, the Swiss Supreme Court has consistently held that mere procedural errors or incorrect decisions on the merits, with the exception of severe cases, are not enough in themselves to give rise to justifiable doubts as to the arbitrator's independence or impartiality.²⁶⁾

When considering the arbitrator's current or past relationship with one of the parties or the party's counsel, the existence of circumstances giving rise to justifiable doubts may be affirmed in cases of a relationship of subordination, an economic or financial connection or interest, or the existence of emotional

²²⁾ See Orelli, *supra* note 12, paras. 17 *et seq.*; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, paras. 4.119 *et seq.*

²³⁾ See the following references for a review of the Swiss Supreme Court's and other Swiss courts' case law regarding international and domestic arbitral awards: Voser & Fischer, *supra* note 14, at 64 *et seq.*; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, paras. 4.113 *et seq.*; Orelli, *supra* note 12, paras. 13 *et seq.*; GIRSBERGER & VOSER, *supra* note 6, paras. 705 *et seq.*

²⁴⁾ A recently published statistical analysis of the Swiss Supreme Court's decisions rendered in setting aside proceedings against international arbitral awards shows that between 1989 and 2017 out of 52 requests for setting aside, in which the plea of improper constitution of the arbitral tribunal pursuant to Article 190(2)(a) PILA was raised, only two requests were successful, see Felix Dasser & Piotr Wójtowicz, *Challenges of Swiss Arbitral Awards, Updated Statistical Data as of 2017*, ASA Bulletin Vol 36 Issue 2, at 281 (2018). A statistical overview of challenges brought before the ICC shows an increase of the success rate from 6.1% in 2013 (four successful challenges out of 66 challenges filed) to 12.5% in 2017 (six successful challenges out of 48 challenges filed), see *2017 ICC Dispute Resolution Statistics*, *supra* note 1, at 57; see also Carlevaris & Digón, *Challenges under the ICC Rules*, *supra* note 1, at 26. In challenge proceedings before the SCAI approx. 12% of the challenges were successful between 2013 and 2017 (one successful challenge out of eight challenges filed), see Cesare Jermini & Luca Castiglioni, *Recent Developments in the Practice of the SCAI Arbitration Court*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2018*, at 11 (Müller/Besson/Rigozzi eds., 2018).

²⁵⁾ E.g., Swiss Supreme Court, Nov 24, 2017, 4A_236/2017, consid. 3.2.

²⁶⁾ E.g., Swiss Supreme Court, Dec 20, 1989, ATF 115 Ia 400, consid. 3b; see also with further references KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.114, p. 192.

ties between the arbitrator and one of the parties or the party's counsel with the potential to influence the arbitrator's judgment.²⁷⁾ For instance, the Swiss Supreme Court confirmed the existence of circumstances giving rise to justifiable doubts in a (clear) case where the arbitrator was contemporaneously acting as counsel against one of the parties in separate proceedings.²⁸⁾ This is one of the few examples where the Swiss Supreme Court concluded that an arbitrator lacked independence and impartiality. On the other hand, the fact that an arbitrator had represented one of the parties in the past without the general prospect of receiving further mandates from that party was not considered by the Swiss Supreme Court to give rise to justifiable doubts.²⁹⁾

The Swiss Supreme Court in its practice also relies on the assumption that arbitrators are capable of seeing past the circumstances surrounding their appointment when called to reach decisions in their role as arbitrators.³⁰⁾ Notably, the recurrent appointment of an arbitrator by the same party or the same counsel has not frequently been an issue in setting aside proceedings before the Swiss Supreme Court. The few cases identified by the authors were dismissed by the Swiss Supreme Court on formal grounds.³¹⁾

Finally, it should be noted that one of the most frequent reason why the Swiss Supreme Court has dismissed applications to set aside an award is the belated assertion of the grounds for challenge of an arbitrator during the arbitration proceedings. This demonstrates the importance for the parties of strictly following the applicable challenge procedures and their related duties, as set forth below.

²⁷⁾ See, e.g. *id.* para. 4.113; Orelli, *supra* note 12, paras. 13 and 15.

²⁸⁾ Swiss Supreme Court, Oct 6, 2008, ATF 135 I 14, consid. 4.3 (this decision concerned a domestic arbitral award); see the references cited in fn 23 for further examples.

²⁹⁾ Swiss Supreme Court, Oct 15, 2001, 4P.188/2001, consid. 2d.

³⁰⁾ See, e.g., Swiss Supreme Court, May 27, 2003, ATF 129 III 445, consid. 4.2.2.2.

³¹⁾ Swiss Supreme Court, Oct 9, 2012, 4A_110/2012, consid. 2.2.2 (the Swiss Supreme Court found that the challenging party had failed to apply due diligence in actively investigating the grounds for challenge); Swiss Supreme Court, Jan 1, 2010, 4A_256/2009, consid. 3.1.2 (according to the Swiss Supreme Court the challenging party had failed to immediately challenge an arbitrator after having learned of two previous appointments of that arbitrator by the same party; see also above fn 12); Swiss Supreme Court, Mar 20, 2008, 4A_506/2007, consid. 3.3.2.2 (the application for setting aside was dismissed because the Swiss Supreme Court found that the challenging party failed to sufficiently show that the members of the same association systematically appointed each other as arbitrators); see also KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.128.

III. The Duties of Parties and Arbitrators Related to Challenges

A. The Parties' Duty to Act in Good Faith and to Object Without Delay

According to Article 180(2) PILA, a party may not challenge an arbitrator nominated by it, or whom it was instrumental in appointing, except on a ground which came to the party's attention after such appointment. This rule is based on the parties' duty to act in good faith pursuant to Article 2(1) Swiss Civil Code (*Zivilgesetzbuch*).³²⁾ It includes both a situation where the party nominates a co-arbitrator for appointment by an arbitral institution and circumstances in which the party jointly with the opposing party nominates or appoints a sole arbitrator or the president of the arbitral tribunal.³³⁾

A party may challenge an arbitrator for lack of independence or impartiality *at any time* during the arbitration proceedings. Article 180 PILA does not provide for a specific time limit for such a challenge.³⁴⁾ However, as set out in Article 180(2) PILA, the principle of good faith requires parties to notify the arbitral tribunal and the opposing party about the grounds for challenge *without delay* after it has learned of such grounds.³⁵⁾ A party must not therefore keep grounds for challenging an arbitrator in reserve until the arbitration proceedings prove to be unfavorable.³⁶⁾ Accordingly, a party who has unsuccessfully challenged an arbitrator at the outset of an arbitration must also file a further challenge if that party discovers new facts giving rise to justifiable doubts as to the arbitrator's independence and impartiality.³⁷⁾

The parties' duty to raise the grounds for challenge immediately also applies to prospective arbitrators who have been nominated but not yet confirmed by the arbitral institution.³⁸⁾

³²⁾ *E.g.*, BERGER & KELLERHALS, *supra* note 8, para. 874.

³³⁾ *Id.* para. 873.

³⁴⁾ See however the revised provisions of the draft bill of the PILA of October 2018 discussed below in Section IV.A.2.

³⁵⁾ This duty also applies to the other arbitrators in whose appointment the challenging party was not involved, *e.g.* the co-arbitrator nominated by the opposing party or the presiding arbitrator appointed by the arbitral institution without prior nomination by the parties: *see* Swiss Supreme Court, May 27, 2003, ATF 129 III 445, consid. 4.2.2.1; Peter & Brunner, *supra* note 6, para. 21; Orelli, *supra* note 12, para. 22.

³⁶⁾ *See* Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.2.2; Swiss Supreme Court, May 27, 2003, ATF 129 III 445, consid. 3.1; BERGER & KELLERHALS, *supra* note 8, para. 874; Peter & Brunner, *supra* note 6, para. 22.

³⁷⁾ Beffa, *Challenge of international arbitration awards*, *supra* note 12, at 603.

³⁸⁾ *See* Swiss Supreme Court, May 29, 2013, 4A_620/2012, consid. 3.6; Swiss Supreme Court, Nov 21, 2003, ATF 130 III 66, consid. 4.3; GIRSBERGER & VOSER, *supra*

Further, the Swiss Supreme Court has held that the closer the arbitration proceedings are to a final award, the sooner a party must raise any grounds for a challenge, even if the party's knowledge of such grounds is incomplete.³⁹⁾

If a party fails immediately to raise the grounds for challenge during the arbitration proceedings, it is barred from invoking the right to challenge at a later stage.⁴⁰⁾ In particular, the party may no longer assert an arbitrator's lack of independence or impartiality in setting aside proceedings against the arbitral award.⁴¹⁾

Notably, Article 180(2) of the draft PILA of October 2018 no longer includes the requirement to raise the grounds for challenge without delay. In the authors' view this deletion, which is due to the newly proposed challenge procedure with specific time limits as set out in Article 180a draft PILA (see Section IV.A.2 below), does not change the parties' general duty to act in good faith as described above. Accordingly, also under the draft PILA, the parties must not hold grounds for challenge in reserve and must raise the grounds for challenge even in cases where their knowledge is incomplete if the arbitration proceedings are close to a final award.

B. The Arbitrators' Duty of Disclosure

An arbitrator in international arbitration proceedings must disclose to the parties those circumstances that may give rise to justifiable doubts as to his or her independence or impartiality, which is reflected in numerous institutional rules.⁴²⁾ Although the PILA does not contain a specific provision about the arbitrators' duty of disclosure,⁴³⁾ such duty has been recognized by the Swiss Supreme Court based on pre-contractual and contractual obligations.⁴⁴⁾ The draft bill of the PILA of October 2018 explicitly includes the arbitrators' duty of disclosure in Article 179(6) PILA.

The arbitrators' duty of disclosure under Swiss law encompasses all facts that may give rise to justifiable doubts as to his or her independence or impartiality,⁴⁵⁾ which must be assessed on an *objective* basis.⁴⁶⁾ In contrast, a *subjective* standard for independence is applicable under Article 11(2) ICC

note 6, para. 769; Simon Gabriel, *Strengge Rügeobliegenheit in Ablehnungskonstellationen*, dRSK, para. 20 (2013, available at www.weblaw.ch).

³⁹⁾ See Swiss Supreme Court, Mar 14, 1985, ATF 111 Ia 72, consid. 2b.

⁴⁰⁾ See, e.g., Orelli, *supra* note 12, para. 23.

⁴¹⁾ E.g., Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.2.2.

⁴²⁾ E.g., Article 16(4) Vienna Rules; Article 9(2) Swiss Rules; Article 11(2) ICC Rules; Article 9.4. DIS Rules.

⁴³⁾ Cf. on the other hand with regard to domestic arbitration Article 363 CCP.

⁴⁴⁾ E.g., Swiss Supreme Court, Mar 14, 1985, ATF 111 Ia 72, consid. 2c.

⁴⁵⁾ See, e.g., *id.* consid. 2c.

⁴⁶⁾ See, e.g., Voser & Fischer, *supra* note 4, at 66.

Rules which provides that a prospective arbitrator must disclose any facts that might call into question the arbitrator's independence "in the eyes of the parties".⁴⁷⁾ The arbitrator is therefore required to take into account the specific views of the parties and not just a range of objective factors or criteria.⁴⁸⁾

The Swiss Supreme Court does not seem to rely on the IBA Guidelines with respect to the scope of the duty of disclosure. In a decision rendered in 2012,⁴⁹⁾ the Swiss Supreme Court did not discuss the arbitrator's failure to disclose before and during the arbitration proceedings multiple appointments as arbitrator by one of the parties – a situation that would have been covered by the IBA Guidelines' Orange List.⁵⁰⁾ Rather, the Court dismissed the application to set aside the award because the challenging party had failed immediately to invoke the grounds for challenge during the arbitration proceedings.⁵¹⁾ The Swiss Supreme Court further held that the arbitrator's duty of disclosure only extends to the facts for which the arbitrator had reason to believe that they were not known by the other party.⁵²⁾ This much criticized⁵³⁾ decision serves as an example of the Swiss Supreme Court's very restrictive approach when assessing an arbitrator's alleged lack of independence or impartiality.⁵⁴⁾

The Swiss Supreme Court's restrictive approach is further confirmed by its practice that the failure of an arbitrator to disclose does not, in itself, constitute a ground for challenge.⁵⁵⁾ For a successful challenge, it is necessary for the non-disclosed facts to give rise to justifiable doubts as to the arbitrator's independence or impartiality. The arbitrator's failure to disclose is not considered by the Swiss Supreme Court.⁵⁶⁾

⁴⁷⁾ See JASON FRY, SIMON GREENBERG & FRANCESCA MAZZA, *THE SECRETARIAT'S GUIDE TO ICC ARBITRATION*, para. 3-385 (2012); Carlevaris & Digón, *Challenges under the ICC Rules*, *supra* note 1, at 27, noting that under Article 11(2) ICC Rules an *objective* test for impartiality applies.

⁴⁸⁾ See FRY, GREENBERG & MAZZA, *supra* note 47, para. 3-385, noting that the subjective standard creates a variability and flexibility that might for example prevent the trivial and unnecessary disclosure that can result from very detailed guidelines.

⁴⁹⁾ Swiss Supreme Court, Oct 9, 2012, 4A_110/2012.

⁵⁰⁾ Article 3.1.3 IBA Guidelines.

⁵¹⁾ Swiss Supreme Court, Oct 9, 2012, 4A_110/2012, *consid.* 2.2.2.

⁵²⁾ *Id.* *consid.* 2.2.2 with reference to Swiss Supreme Court, Mar 14, 1985, ATF 111 Ia 72, *consid.* 2c.

⁵³⁾ See Hansjörg Stutzer & Michael Bösch, *Multiple Appointments of an Arbitrator: Does the Swiss Federal Supreme Court really see no Limit?*, Arbitration Newsletter Switzerland (2012, available at www.thouvenin.com); Jean Marguerat, *Indépendance et impartialité de l'arbitre: le devoir de révéler de l'arbitre éclipsé*, Jusletter (2013); Marco Stacher, *Rechtsprechung des Bundesgerichts in Schiedssachen (2011 und 2012)*, AJP, 102, at 104 *et seq.* (2013).

⁵⁴⁾ See, e.g., Manuel Arroyo, *Article 190 PILS*, in *ARBITRATION IN SWITZERLAND, THE PRACTITIONER'S GUIDE*, para. 31 (Arroyo ed., 2nd ed. 2018).

⁵⁵⁾ E.g., Swiss Supreme Court, Oct 15, 2001, 4P.188/2001, *consid.* 2f.

⁵⁶⁾ See *id.* *consid.* 2f.; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, paras. 4.164 *et seq.*

In contrast, arbitral institutions such as the ICC take into account an arbitrator's failure to disclose when deciding on a challenge, although the failure to disclose in itself is not a ground for challenge.⁵⁷⁾ The authors are also aware of a decision of the Board of the VIAC under the Vienna Rules, in which the Board considered the appearance of the challenged arbitrator's lack of independence or impartiality to be enhanced, because the arbitrator had failed to disclose the facts giving rise to the challenge.⁵⁸⁾

C. The Parties' Duty to Investigate

According to the restrictive practice of the Swiss Supreme Court, a party not only has a duty to challenge an arbitrator without delay based on facts known to the party but also based on facts that the party *should have known* had it exercised due diligence under all the circumstances.⁵⁹⁾ The parties have a so-called *duty of curiosity* (or *devoir de curiosité*), which requires them to make their own enquiries failing which they forfeit the right to raise a ground for challenge at a later stage.⁶⁰⁾ The draft bill of the PILA of October 2018 explicitly includes the parties' duty to investigate in Article 180(2) PILA.

The level of diligence imposed on parties is high.⁶¹⁾ In particular, parties must not rely on the disclosure made by the arbitrators, as demonstrated by the Swiss Supreme Court's decision rendered in 2012 (see Section B above).⁶²⁾ In this case, the co-arbitrator nominated by the opposing party had failed to disclose at least seven appointments by the same party over the previous three years. During the arbitration proceedings, the challenging party's counsel learned of two of these appointments. At the hearing, counsel asked the co-arbitrator whether he, in light of these two previous appointments, considered himself independent and impartial, which the co-arbitrator confirmed. As counsel did not make further inquiries about other appointments of the arbitrator by the opposing party (*e.g.* by directly asking the arbitrator), the Swiss Supreme Court dismissed an application to set aside the final award on

⁵⁷⁾ See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, January 1, 2019, para. 19 (available at www.iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/); FRY, GREENBERG & MAZZA, *supra* note 47, para. 3-583; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.165; Carlevaris & Digón, *Challenges under the ICC Rules*, *supra* note 1, at 28 and fn 14.

⁵⁸⁾ The Board of the VIAC thereby referred to a decision of the Austrian Supreme Court, OGH, Aug 5, 2014, docket no. 18 ONc 1/14p.

⁵⁹⁾ See Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.2.2; BERGER & KELLERHALS, *supra* note 8, para. 881.

⁶⁰⁾ See Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.4.2; Swiss Supreme Court, Mar 20, 2008, 4A_506/2007, consid. 3.2.

⁶¹⁾ KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.153.

⁶²⁾ Swiss Supreme Court, Oct 9, 2012, 4A_110/2012.

the basis that the challenging party had failed to apply the required due diligence in actively investigating the grounds for challenge.⁶³⁾

The scope of the parties' duty to investigate is not entirely clear based on the Swiss Supreme Court's practice. On the one hand, based on the decision of 2012, it appears that a party must investigate in case of suspicion.⁶⁴⁾ On the other hand, the Swiss Supreme Court, particularly in sports arbitration cases, seems to require that the parties make general inquiries as to the arbitrator's independence and impartiality⁶⁵⁾ (e.g. by searching the arbitrator's website⁶⁶⁾), even without having any suspicion. In a 2006 decision, the Swiss Supreme Court appeared to criticize the challenging party for not having monitored the website of the Court of Arbitration for Sport, which is why the challenging party missed the publication of an award revealing the grounds for challenge.⁶⁷⁾ However, in a 2016 decision regarding a commercial arbitration case, the Swiss Supreme Court considered it irrelevant that the circumstances based on which the sole arbitrator was challenged had already been described in a publicly available press release that was several months old.⁶⁸⁾

In order to avoid the potential pitfalls of forfeiting the right to challenge an arbitrator and raising the plea of improper constitution in setting aside proceedings against the arbitral award, parties are wise not to rely exclusively on the arbitrator's disclosure but to at least conduct an internet search and consult the arbitrator's website for any obvious connections with the opposing or related parties, e.g. by reviewing press releases. Further, in particular where a party has incomplete knowledge of the grounds for challenge, it should seek clarification directly from the arbitrator.⁶⁹⁾

⁶³⁾ Swiss Supreme Court, Oct 9, 2012, 4A_110/2012, consid. 2.2.2.

⁶⁴⁾ See, e.g., Peter & Brunner, *supra* note 6, para. 23.

⁶⁵⁾ See Swiss Supreme Court, May 27, 2003, ATF 129 III 445, consid. 4.2.2.1; Swiss Supreme Court, Aug 14, 2008, 4A_234/2008, consid. 2.2.2.

⁶⁶⁾ See Swiss Supreme Court, Aug 14, 2008, 4A_234/2008, consid. 2.2.2.

⁶⁷⁾ Swiss Supreme Court, Aug 4, 2006, 4P.105/2006, consid. 4; see KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 8.138.

⁶⁸⁾ Swiss Supreme Court, Sept 7, 2016, ATF 142 III 521, consid. 2.2; the Swiss Supreme Court, however, eventually dismissed the application because it did not consider the circumstances to give rise to justifiable doubts as to the sole arbitrator's independence and impartiality; Hansjörg Stutzer & Michael Bösch, *Revision of an Award for Lack of Independence of an Arbitrator – an Invitation to the Law Maker*, Arbitration Newsletter Switzerland, at 4 (2016, available at www.thouvenin.com).

⁶⁹⁾ See KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 8.140.

IV. Challenge Procedure

A. Challenge of an Arbitrator during the Arbitration Proceedings

1. Applicable Procedure

Based on Article 180(3) PILA the parties are free to determine the challenge procedure. This also includes the parties' right to designate the authority competent to decide upon the challenge.

In institutional arbitration, the challenge procedure is normally governed by the applicable arbitration rules. By choosing the arbitration rules of an arbitral institution, the parties are considered to have implicitly agreed to such a procedure.⁷⁰⁾ The arbitration rules discussed in this contribution (Vienna Rules, Swiss Rules, DIS Rules and ICC Rules) all empower the arbitral institution to decide upon a challenge.⁷¹⁾

In ad hoc arbitration, the parties may designate an authority responsible for the appointment and challenge of arbitrators in their arbitration agreement. If the ad hoc arbitration is governed by the UNCITRAL Arbitration Rules, its Article 13(4) provides that the appointing authority is competent to decide upon the challenge. In the absence of a choice of an appointing authority by the parties, the Secretary-General of the Permanent Court of Arbitration at The Hague is competent to designate the appointing authority.⁷²⁾

The parties may also empower the arbitral tribunal to decide on the challenge.⁷³⁾ According to Section 18.2 of the (now revised) DIS Arbitration Rules of 1998 (DIS Rules 1998), the arbitral tribunal was competent to rule on the challenge unless otherwise agreed by the parties.

Finally, it has been suggested that parties may also designate a public authority of their choice to rule on the challenge, e.g. the president of the Commercial Court of Zurich (*Handelsgericht*).⁷⁴⁾

Without any agreement of the parties, Article 180(3) PILA provides that the judge at the seat of the arbitral tribunal, the so-called *juge d'appui*, is

⁷⁰⁾ See, e.g., BERGER & KELLERHALS, *supra* note 8, para. 888.

⁷¹⁾ Article 20(3) Vienna Rules; Article 11(2) Swiss Rules; Article 15.4 DIS Rules; Article 14(3) ICC Rules.

⁷²⁾ Article 6(2) UNCITRAL Arbitration Rules.

⁷³⁾ E.g., BERGER & KELLERHALS, *supra* note 8, para. 898.

⁷⁴⁾ See, *id.* paras. 897 and 807 *et seqq.*; GIRSBERGER & VOSER, *supra* note 6, para. 759; TARKAN GÖKSU, SCHIEDSGERICHTSBARKEIT, para. 1034 (2014).

competent to decide upon the challenge.⁷⁵⁾ The *juge d'appui* is appointed according to Swiss cantonal law.⁷⁶⁾

The PILA does not address whether the arbitration proceedings should be stayed during a challenge procedure.⁷⁷⁾ According to the Swiss Supreme Court, the arbitral tribunal is not required to stay the arbitration proceedings.⁷⁸⁾ The same rule is set out in Article 15.5 DIS Rules and Article 20(4) Vienna Rules.⁷⁹⁾ So, in the absence of a specific provision in the applicable arbitration rules, a party can generally not assume that the arbitral tribunal will stay the arbitration proceedings during any challenge proceedings.

The draft bill of the PILA of October 2018 explicitly provides that the arbitral tribunal can continue the proceedings without excluding the challenged arbitrator, unless the parties have agreed otherwise.⁸⁰⁾

2. Procedure before the Swiss Public Authority

If the Swiss public authority is competent to decide on the challenge (either the *juge d'appui* or the public authority designated by the parties), the procedure is governed by the rules of the Swiss Code of Civil Procedure (*Zivilprozessordnung* – CCP).⁸¹⁾ The CCP does not determine the type of procedure to be applied. According to the majority's view of legal commentators it is appropriate to apply the provisions on summary proceedings.⁸²⁾ This is also in line with the draft bill of the PILA of October 2018, which seeks to introduce a new Article 251a CCP stipulating that the provisions on summary proceedings apply to arbitral matters before the Swiss public authority. The

⁷⁵⁾ This stands in contrast to countries that base their arbitration laws on the UNCITRAL Model Law on International Commercial Arbitration, such as Austria, where the arbitral tribunal is competent to first decide upon the challenge by default, see Article 13(2) UNCITRAL Model Law and Section 589(2) Austrian Code of Civil Procedure (*Zivilprozessordnung*).

⁷⁶⁾ See Peter & Brunner, *supra* note 6, para. 28a; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.148; in the Canton of Zurich, the competent *juge d'appui* to decide upon a challenge of an arbitrator is the High Court of the Canton of Zurich (*Obergericht*).

⁷⁷⁾ In contrast, see Article 369(4) CCP which provides that in domestic arbitration proceedings the arbitral tribunal may continue the proceedings and render an award.

⁷⁸⁾ See Swiss Supreme Court, Feb 1, 2002, ATF 128 III 234, consid. 3b/bb; GIRSBERGER & VOSER, *supra*, note 6 para. 761; Peter & Brunner, *supra* note 6, para. 39.

⁷⁹⁾ Article 24(4) Vienna Rules further provides that “*the arbitral tribunal may not issue an award until after*” the challenge has been decided.

⁸⁰⁾ Article 180a(3) draft PILA of October 2018.

⁸¹⁾ See BERGER & KELLERHALS, *supra* note 8, para. 902; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.150; Voser & Fischer, *supra* note 14, at 67.

⁸²⁾ See BERGER & KELLERHALS, *supra* note 8, para. 902; Peter & Brunner, *supra* note 6, para. 28b.

request for challenge before the Swiss public authority must be brought against the arbitral tribunal and the opposing party.⁸³⁾

Article 180(3) PILA does not set out a time limit for the submission of a request for challenge to the competent Swiss public authority. Some legal commentators therefore propose to apply the 30-day time limit according to Article 369(2) and (3) CCP applicable to challenges in domestic arbitration proceedings.⁸⁴⁾ These provisions set out the following procedure: Within 30 days of becoming aware of the grounds for challenge, the challenging party must submit a written and reasoned request for challenge to the arbitrator facing such challenge, with a copy going to the other members of the arbitral tribunal and the opposing party. If the arbitrator does not resign, the challenging party must file a request for challenge with the Swiss public authority within 30 days of receipt of the arbitrator's response.⁸⁵⁾

While the challenged arbitrator and the opposing party should be given the opportunity to comment before starting proceedings before the Swiss public authority, it is not without risk to rely on the rather long time limits applicable under the CCP as set forth in the previous paragraph, which do not directly apply in international arbitration proceedings.⁸⁶⁾ Instead, a party would be well advised to initiate proceedings before the Swiss public authority *as soon as possible* but in any event no later than 30 days after becoming aware of the grounds for challenge, in order to comply with the Swiss Supreme Court's requirement to raise the grounds for challenge immediately (Section III.A above).

Under the draft bill of the PILA of October 2018, unless the parties have agreed otherwise,⁸⁷⁾ the following procedure applies: Within 30 days of becoming aware of the grounds for challenge, a party who intends to challenge an arbitrator must submit a written and reasoned request for challenge to the arbitrator facing such challenge and notify the other members of the arbitral tribunal of the request.⁸⁸⁾ If the challenged arbitrator does not voluntarily resign or does not respond to the request, the challenging party can seek removal of the arbitrator before the Swiss public authority within 30 days of

⁸³⁾ *E.g.*, Orelli, *supra* note 12, para. 32.

⁸⁴⁾ *E.g.*, KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.151.

⁸⁵⁾ *See* KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.151; BERGER & KELLERHALS, *supra* note 8, paras. 893 and 900.

⁸⁶⁾ *See also* Voser & Fischer, *supra* note 14, at 68.

⁸⁷⁾ *See* Article 180a(1) draft PILA of October 2018. An agreement of the parties as to the challenge procedure for example exists if the parties in ad hoc arbitration proceedings have agreed on the application of the UNCITRAL Arbitration Rules and have designated a Swiss public authority as appointing authority. In this case, the challenge procedure as set out in Article 13 UNCITRAL Arbitration Rules and described below in Section IV.A.5 applies.

⁸⁸⁾ Article 180a(1) draft PILA of October 2018.

submission of the request for challenge.⁸⁹⁾ This proposal reflects the procedure suggested by some legal commentators as set out above, with the exception that the 30-day time limit to file the challenge before the Swiss public authority already begins straight after submission of the request for challenge to the arbitrator rather than after receipt of the challenged arbitrator's response.

According to Article 180(3) PILA, the decision of the Swiss public authority is final.⁹⁰⁾ This means that there can be no appeal of the decision to a court of higher instance.⁹¹⁾ In addition, the decision of the Swiss public authority cannot be indirectly reviewed in setting aside proceedings before the Swiss Supreme Court against the arbitral award.⁹²⁾

3. Procedure before the Arbitral Tribunal

The arbitral tribunal can be competent to decide on a challenge either based on the parties' explicit agreement or because the parties have agreed on the application of arbitration rules designating the arbitral tribunal as the competent authority to decide on a challenge (such as under the DIS Rules 1998).

As in the procedure before the Swiss public authority, the PILA does not stipulate a time limit for when a party must file its request for challenge to the arbitral tribunal. Unless the parties have agreed otherwise, the authors submit that the same rules as for the procedure before the Swiss public authority should apply. Accordingly, the challenging party must file the request for challenge to the arbitral tribunal as soon as possible but no later than 30 days after becoming aware of the grounds for challenge.

Unless the parties have agreed otherwise, Swiss legal commentators advocate that the arbitral tribunal shall decide on the challenge without the participation of the challenged arbitrator.⁹³⁾

⁸⁹⁾ Article 180a(2) draft PILA of October 2018.

⁹⁰⁾ See also Article 180a(2) draft PILA of October 2018.

⁹¹⁾ See Swiss Supreme Court, Sept 7, 2016, ATF 142 III 521, consid. 2.2.4.2; Swiss Supreme Court, Jul 3, 2002, ATF 128 III 330, consid. 2.2; legal commentators suggest that the decision can only be appealed on other grounds than the ground of lack of independence or impartiality, such as a violation of the right to be heard (see GERHARD WALTER, WOLFGANG BOSCH & JÜRGEN BRÖNNIMANN, INTERNATIONALE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ, at 111 (1991); BERGER & KELLERHALS, *supra* note 8, para. 915).

⁹²⁾ Swiss Supreme Court, May 2, 2012, ATF 138 III 270, consid. 2.2.1; Swiss Supreme Court, Jul 3, 2002, ATF 128 III 330, consid. 2.2; BERGER & KELLERHALS, *supra* note 8, para. 913; Orelli, *supra* note 12, para. 36, with further references criticizing the Swiss Supreme Court's practice; see the diverging provision applicable in domestic arbitration proceedings, Article 369(5) CCP.

⁹³⁾ See BERGER & KELLERHALS, *supra* note 8, para. 898, with reference to Swiss Supreme Court, Jul 15, 1998, ATF 114 Ia 153, consid. 3a/aa, deciding on the challenge of a state judge; Orelli, *supra* note 12, para. 29.

The PILA does not stipulate the form in which the arbitral tribunal must decide on the challenge. The arbitral tribunal can therefore record its decision either in the form of a procedural order or as an interim (or preliminary) award.⁹⁴⁾

Before the April 2018 Swiss Supreme Court decision mentioned in the introduction,⁹⁵⁾ it was not entirely clear whether and under what circumstances an arbitral tribunal's decision on a challenge can be subject to setting aside proceedings before the Swiss Supreme Court.⁹⁶⁾ Some legal commentators submitted that if the arbitral tribunal decides on the challenge in the form of a procedural order, the order itself cannot be subject to setting aside proceedings, because it is not an "interim award" that can be autonomously challenged pursuant to Article 190(3) PILA.⁹⁷⁾ Rather, such a decision must be challenged in setting aside proceedings along with the next challengeable award.⁹⁸⁾

In the April 2018 decision, the Swiss Supreme Court ruled that an arbitral tribunal's decision on a challenge must be submitted to setting aside proceedings within 30 days of its notification, even if rendered in the form of a procedural order.⁹⁹⁾ In this case, arbitration proceedings seated in Switzerland were initiated under the DIS Rules 1998. Based on Section 18.2 DIS Rules 1998, the arbitral tribunal was competent to decide on a party's challenge of two arbitrators. The arbitral tribunal dismissed the challenge by procedural order (*Verfügung* in the German original of the Swiss Supreme Court decision). Instead of immediately submitting an application to set aside the procedural order before the Swiss Supreme Court, the challenging party sought to set aside the later final award. The Swiss Supreme Court considered the application to be belated. According to its consistent practice, a party not only has a right but also a duty autonomously and immediately to seek the setting aside of an interim award dealing with the arbitral tribunal's constitution or its jurisdiction

⁹⁴⁾ Note that the PILA in Article 190(3) uses the term "preliminary award" (*Vorentscheid*) while the CCP in its Article 392(b) uses the term "interim award" (*Zwischenentscheid*). The distinction between "interim" and "preliminary" award is of no practical relevance (BERGER & KELLERHALS, *supra* note 8, paras. 703 and 1691; Swiss Supreme Court, Sept 18, 2003, ATF 130 III 76, consid. 3.1.3) and the authors will in the following refer to such a decision as "interim award".

⁹⁵⁾ Swiss Supreme Court, Apr 30, 2018, 4A_136/2018; a partner in the authors' law firm was involved in this case as a member of the arbitral tribunal that rendered the challenge decision in question.

⁹⁶⁾ See, e.g., Matthias Leemann, *Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator*, ASA Bulletin Vol 29 Issue 1, 17 (2011), with further references.

⁹⁷⁾ BERGER & KELLERHALS, *supra* note 8, para. 911 and fn 89; Orelli, *supra* note 12, para. 35; see also Peter & Brunner, *supra* note 6, para. 29.

⁹⁸⁾ See BERGER & KELLERHALS, *supra* note 8, para. 911; GÖKSU, *supra* note 74, para. 1045.

⁹⁹⁾ Swiss Supreme Court, Apr 30, 2018, 4A_136/2018.

under Article 190(3) PILA,¹⁰⁰⁾ failing which the challenging party cannot invoke the same grounds in setting aside proceedings against any other later award.¹⁰¹⁾ In its April 2018 decision, the Swiss Supreme Court held that this applies to any interim decision of an arbitral tribunal on jurisdiction or on its constitution, including decisions on challenges for lack of independence or impartiality, irrespective of how the decision is designated.¹⁰²⁾ In this way, the Swiss Supreme Court effectively re-qualified the arbitral tribunal's procedural order as an interim award that must be challenged within 30 days from its notification.¹⁰³⁾

With this decision, the Swiss Supreme Court has now clarified how to set aside decisions on challenges issued by an arbitral tribunal: Irrespective of the decision's designation as a procedural order or an award, the challenging party must immediately initiate setting aside proceedings against such a decision, instead of waiting for the rendering of the final award. The time limit of 30 days to initiate the setting aside proceedings runs from the notification of the tribunal's decision.¹⁰⁴⁾

Even if this Supreme Court decision may be of limited relevance in view of the small number of cases where an arbitral tribunal decides on a challenge,¹⁰⁵⁾ it nevertheless serves as a reminder of the Swiss Supreme Court's strict "substance over form" approach when it comes to decisions rendered by the arbitral tribunal.¹⁰⁶⁾ Parties must carefully assess whether an arbitral tribunal's decision, irrespective of its designation, expressly or impliedly decides issues of the tribunal's jurisdiction or its composition, including issues relating to an arbitrator's lack of independence or impartiality, to identify those decisions

¹⁰⁰⁾ See Section IV.B.2 below for a list of awards that can be subject to setting aside proceedings.

¹⁰¹⁾ See Swiss Supreme Court, Jul 20, 2017, ATF 143 III 462, consid. 2.2; Swiss Supreme Court, Apr 30, 2018, 4A_136/2018, with further references; Arroyo, *supra* note 54, para. 240; Leemann, *Challenging international arbitration awards*, *supra* note 96, at 18.

¹⁰²⁾ Swiss Supreme Court, Apr 30, 2018, 4A_136/2018; for comments on this decision see Simon Gabriel, *How to Set Aside a "Procedural Order" on Arbitrators' Impartiality*, dRSK (2018, available at www.weblaw.ch); Christopher Boog & Simon Demaurex, *Swiss Supreme Court requalifies procedural order as interim award subject to immediate challenge* (2018, available at www.swlegal.ch/en/publications/blog-detail/procedural-order-requalified-as-interim-award-subj/).

¹⁰³⁾ Gabriel, *How to set Aside a "Procedural Order"*, *supra* note 102, para. 19.

¹⁰⁴⁾ Article 190(3) PILA and Article 100(1) Swiss Supreme Court Act (*Bundesgerichtsgesetz – SCA*).

¹⁰⁵⁾ Notably, this situation no longer occurs in arbitration proceedings under the DIS Rules as the revised version refers challenge decisions to the arbitral institution (see below Section IV.A.4).

¹⁰⁶⁾ See Arroyo, *supra* note 54, para. 239, for a general overview of the Swiss Supreme Court's "substance over form" approach.

that must be immediately challenged in setting aside proceedings before the Swiss Supreme Court.¹⁰⁷⁾

4. Procedure before the Arbitral Institution

Where arbitration rules apply under which the arbitral institution is competent to decide on a challenge, the applicable procedure and time limits for such challenge are governed by these rules.

Under the Vienna Rules, a party who intends to challenge an arbitrator must submit a substantiated challenge to the Secretariat within 15 days from the date the party became aware of the grounds for challenge.¹⁰⁸⁾ If the arbitrator does not resign, the Board decides on the challenge after having reviewed comments from the challenged arbitrator and the opposing party.¹⁰⁹⁾

Under the Swiss Rules, the same time limit of 15 days applies within which the challenging party must send its notice of challenge to the Secretariat.¹¹⁰⁾ If the parties do not agree to the challenge or the challenged arbitrator does not withdraw within 15 days following receipt of the challenging party's notice, the Arbitration Court decides on the challenge.¹¹¹⁾ The Swiss Rules further provide that the Court is not obliged to give reasons.¹¹²⁾

Under the ICC Rules, a longer time limit of 30 days applies, which starts to run from receipt of the notification of the appointment or confirmation of the challenged arbitrator or from the date when the challenging party was informed of the grounds for challenge.¹¹³⁾ The International Court of Arbitration decides on the admissibility and on the merits of the challenge after the challenged arbitrator, the opposing party and any other member of the arbitral tribunal have been given the opportunity to comment.¹¹⁴⁾ Upon request of a party, the Court may communicate the reasons for the decision made on the challenge.¹¹⁵⁾

Under the DIS Rules, the party challenging the arbitrator must file its request with the DIS no later than 14 days after it first obtained knowledge of the circumstances on which the challenge is based.¹¹⁶⁾ The Arbitration Council

¹⁰⁷⁾ See Gabriel, *How to set Aside a "Procedural Order"*, *supra* note 102, para. 20; Boog & Demaurex, *Swiss Supreme Court requalifies procedural order*, *supra* note 102.

¹⁰⁸⁾ Article 20(2) Vienna Rules.

¹⁰⁹⁾ Article 20(3) Vienna Rules.

¹¹⁰⁾ Article 11(1) Swiss Rules.

¹¹¹⁾ Article 11(2) Swiss Rules; Jean Marguerat, *Art. 11*, in *SWISS RULES OF INTERNATIONAL ARBITRATION*, paras. 18 *et seqq.* (Zuberbühler, Müller & Habegger eds., 2nd ed. 2013).

¹¹²⁾ Article 11(3) Swiss Rules.

¹¹³⁾ Article 14(2) ICC Rules.

¹¹⁴⁾ Article 14(3) ICC Rules.

¹¹⁵⁾ ICC Note to Parties and Arbitral Tribunals, *supra*, paras. 14 and 16.

¹¹⁶⁾ Article 15(2) DIS Rules.

decides on the challenge after having received comments from the challenged arbitrator, the other arbitrators and the opposing party.¹¹⁷⁾

In view of these different provisions, the parties must be aware of the specific time limits for filing a challenge applicable to their particular arbitration proceedings, which prevail over the Swiss Supreme Court's requirement to raise the grounds for challenge without delay (Section III.A above).¹¹⁸⁾

However, parties should not assume that they are exempted from their duty to investigate (Section III.C above) in view of applicable arbitration rules which only require the initiation of the challenge procedure within a certain time limit after the challenging party has acquired *actual knowledge* of the grounds for challenge.¹¹⁹⁾ While the arbitral institution may rely on the parties' actual knowledge in order to determine whether the challenge procedure has been initiated within the time limit required by the arbitration rules, the Swiss Supreme Court in its practice as described above in Section III.C does not appear to apply the standards set out in arbitration rules when ruling in setting aside proceedings.¹²⁰⁾ Accordingly, if the arbitral institution rejects a challenge on its merits and not because it was belatedly filed, the challenging party may still run the risk of forfeiting its right to raise the plea of improper constitution in setting aside proceedings if the party could have become aware of the grounds for challenge earlier, had it applied due diligence.

As is the case with any other private institution, the decision of the arbitral institution on a challenge cannot be directly submitted to setting aside proceedings before the Swiss Supreme Court, since such a decision is not an arbitral award.¹²¹⁾ This was unclear for some time in view of a Swiss Supreme Court decision rendered in 2013 which stated in an *obiter dictum* that the decision of the arbitral institution on the constitution of the arbitral tribunal would have been subject to setting aside proceedings.¹²²⁾ In 2017, the Swiss

¹¹⁷⁾ Article 15(3) and (4) DIS Rules.

¹¹⁸⁾ See KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.136; Marguerat, *Art. 11, supra* note 111, para. 9.

¹¹⁹⁾ This is for example the case under the Vienna Rules, see Günther Horvath & Rolf Trittman, *Article 20*, in HANDBOOK VIENNA RULES, A PRACTITIONER'S GUIDE, para. 21 (2014); see also FRY, GREENBERG & MAZZA, *supra* note 47, para. 3-581, stating that Article 14(2) ICC Rules in principle requires actual knowledge.

¹²⁰⁾ See, e.g., Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.2.2: in this decision the Swiss Supreme Court noted that Swiss law requires a party to raise a challenge of an arbitrator not only based on facts it had known but also on facts it should have known even though the wording of the applicable Article R34 Code of Sports-related Arbitration of the Court of Arbitration for Sport seems to only require actual knowledge of the grounds for challenge.

¹²¹⁾ See BERGER & KELLERHALS, *supra* note 8, para. 908; Leemann, *Challenging international arbitration awards, supra* note 96, at 16.

¹²²⁾ Swiss Supreme Court, Nov 13, 2013, 4A_282/2013, consid. 5.3.2 (unpublished in ATF 139 III 511); see, e.g., Gabriel, *How to set Aside a "Procedural Order"*, *supra* note 102, para. 25.

Supreme Court then clarified that neither the decision of the arbitral institution on the appointment of the members of the arbitral tribunal nor the decision on the challenge of an arbitrator can be directly submitted to setting aside proceedings.¹²³⁾ The arbitral institution's decision on the challenge can only be indirectly reviewed in setting aside proceedings against the first challengeable award.¹²⁴⁾

Consequently, following a negative decision by an arbitral institution on a challenge of an arbitrator, so as not to forfeit its rights, a party must commence setting aside proceedings against the *very first* challengeable award issued by the arbitral tribunal.¹²⁵⁾ This may be an interim award, which can be challenged in setting aside proceedings on the ground of improper constitution according to Article 190(3) PILA.¹²⁶⁾ In view of the Swiss Supreme Court's strict "substance over form" approach (Section 3 above), this also includes decisions rendered by the arbitral tribunal in the form of procedural orders that (expressly or impliedly) deal with the tribunal's jurisdiction or constitution.¹²⁷⁾

5. Procedure before any other Private Authority

In ad hoc arbitration proceedings, the parties may agree on any other private authority to decide on the challenge of an arbitrator.

In case the parties have agreed to the application of the UNCITRAL Arbitration Rules, the challenge procedure is set out in Article 13. According to Article 13(1) and (2) UNCITRAL Arbitration Rules, the challenging party shall send a notice of challenge to the opposing party, the challenged arbitrators and the other arbitrators within 15 days after it has been notified of the appointment of the arbitrator or after the circumstances giving rise to the challenge have become known to the party. If the opposing party does not agree to the challenge or the challenged arbitrator does not withdraw, the challenging party shall seek a decision on the challenge by the designated private authority within 30 days from the date of the notice of challenge.¹²⁸⁾

In cases where the parties have only designated a private authority to decide upon the challenge without agreeing on the application of the UNCITRAL

¹²³⁾ Swiss Supreme Court, Jan 27, 2017, 4A_546/2016, consid. 1.2.3, with further references to Swiss Supreme Court, May 2, 2012, ATF 138 III 270, consid. 2.2.1, and Swiss Supreme Court, Aug 19, 1992, ATF 118 II 359, consid. 3b; see also Swiss Supreme Court, Nov 24, 2017, 4A_236/2017, consid. 3.1.1.

¹²⁴⁾ Swiss Supreme Court, Jan 27, 2017, 4A_546/2016, consid. 1.2.3; see, e.g., Orelli, *supra* note 12, para. 34.

¹²⁵⁾ See, e.g., *id.*

¹²⁶⁾ See, e.g., *id.* para. 34, with reference to Swiss Supreme Court, Feb 17, 2000, 4P.168/1999, consid. 1b and 1c.

¹²⁷⁾ See Arroyo, *supra* note 54, para. 239 for a general overview of the Swiss Supreme Court's "substance over form" approach.

¹²⁸⁾ Article 13(4) UNCITRAL Arbitration Rules.

Arbitration Rules or any other challenge procedure, the authors find appropriate to apply the same procedural rules as applicable before the Swiss public authority (Section 2 above), requiring the challenging party to submit the request for challenge to the private authority as soon as possible but in no event later than 30 days after becoming aware of the grounds for challenge.

As mentioned in Section 4 above, a decision of any private authority cannot be directly challenged in setting aside proceedings before the Swiss Supreme Court. As is the case with a decision of an arbitral institution, the private authority's decision on the challenge can only be indirectly reviewed in setting aside proceedings against the first challengeable award.

B. Challenge of an Arbitrator after the Rendering of an Award

1. General Remarks

A party may wish to challenge an arbitrator after the arbitral tribunal has rendered its final award, in particular in a situation where it has become aware of the grounds for challenge after the rendering of the final award or where the designated private authority, such as an arbitral institution, has rejected a request to remove the arbitrator in question.

Depending on when a party learns of the grounds for challenge, it may raise the improper constitution of the arbitral tribunal due to an arbitrator's lack of independence or impartiality before the Swiss Supreme Court in an application for setting aside or in a request for revision of the award.

In cases involving a foreign award, the party may also invoke the ground of improper constitution of the arbitral tribunal in recognition and enforcement proceedings of a foreign award in Switzerland.

2. Setting Aside Proceedings

Arbitral awards rendered in Switzerland are subject to setting aside proceedings before the Swiss Supreme Court within 30 days following the notification of the award.¹²⁹⁾ The procedure is governed by the Swiss Supreme Court Act (*Bundesgerichtsgesetz – SCA*). The type of awards that are subject to setting aside proceedings are final awards, partial awards and interim awards, the latter, however, can only be challenged on the grounds of improper constitution of the arbitral tribunal or the wrongful acceptance of jurisdiction.¹³⁰⁾

The arbitrator's lack of independence and impartiality can be raised under the ground of improper constitution of the arbitral tribunal according to

¹²⁹⁾ Article 190 and Article 191 PILA and Article 100(1) SCA.

¹³⁰⁾ Article 190(3) and Article 190(2)(a) and (b) PILA; *see* BERGER & KELLERHALS, *supra* note 8, paras. 1680 *et seqq.*; Arroyo, *supra* note 54, para. 234.

Article 190(2)(a) PILA. In view of the Swiss Supreme Court's strict application of the parties' duty to raise the grounds for challenge immediately (Section III.C above) and the parties' duty to investigate (Section III.A above), the possibility to invoke Article 190(2)(a) PILA is limited to the following situations:

- The challenging party had become aware of circumstances giving rise to justifiable doubts as to the arbitrator's independence and impartiality *only after* the award was rendered but before the 30-day time limit to initiate setting aside proceedings had lapsed.¹³¹⁾ This also includes circumstances giving rise to justifiable doubts that the party could not have reasonably discovered earlier.¹³²⁾
- The challenging party had become aware of the grounds for challenge during the arbitration proceedings and initiated a challenge procedure before the designated private authority, but the private authority rejected the challenge before the award was rendered.¹³³⁾
- The challenging party had initiated the challenge procedure before the Swiss public or private authority during the arbitration proceedings but the arbitral tribunal rendered its award before the authority was able to decide on the challenge.¹³⁴⁾

The challenging party must therefore demonstrate that it had either unsuccessfully challenged the arbitrator already during the arbitration proceedings or that it had not been aware of the grounds for challenge *and* had duly complied with its duty to investigate.¹³⁵⁾

In the authors' view, Article 190(2)(a) PILA can also be invoked in a situation where the challenging party becomes aware of the grounds for challenge only after the arbitral tribunal has rendered a *partial* award but before the 30-day time limit to initiate setting aside proceedings has lapsed. In such a situation, the arbitration proceedings are still considered as ongoing and the private or public authority determined by Article 180(3) PILA is the competent authority to decide on the challenge. However, an affirmative decision of the public or private authority on the challenge does only lead to the

¹³¹⁾ See GIRSBERGER & VOSER, *supra* note 6, para. 769; BERGER & KELLERHALS, *supra* note 8, para. 1708(i).

¹³²⁾ E.g., KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 8.136.

¹³³⁾ See BERGER & KELLERHALS, *supra* note 8, para. 1708(iii); Peter & Brunner, *supra* note 6, 30; note that the decision of the Swiss public authority cannot be indirectly reviewed in setting aside proceedings (Section IV.A.2 above).

¹³⁴⁾ See BERGER & KELLERHALS, *supra* note 8, paras. 906 and 1708(ii); GIRSBERGER & VOSER, *supra* note 6, para. 763; with the exception of the Vienna Rules, this is possible under the other arbitration rules discussed in this contribution (Article 20(4) Vienna Rules, see Horvath & Trittmann, *supra* note 119, para. 2).

¹³⁵⁾ See Leemann, *Challenging international arbitration awards*, *supra* note 96, at 19.

removal and replacement of the arbitrator¹³⁶) but not to the setting aside of the partial award rendered before the challenge was raised.¹³⁷) Because of the partial award's *res judicata* effect, the newly constituted tribunal cannot revisit the partial award tainted with the apparent improper constitution of the arbitral tribunal.¹³⁸) If the challenging party intends to have the partial award set aside, it must initiate setting aside proceedings before the Swiss Supreme Court.¹³⁹) At the same time, the party should also initiate a challenge procedure before the competent private or public authority to avoid forfeiture of its rights to raise the plea of an arbitrator's lack of independence or impartiality against future awards. The challenging party may also request the Swiss Supreme Court to stay the setting aside proceedings pending the decision of the competent authority on the challenge. Although, the Swiss Supreme Court is not bound by a decision on the challenge rendered by a private authority,¹⁴⁰) it might choose to take into account an affirming decision when deciding on the setting aside of the partial award.

According to the Swiss Supreme Court's practice, the challenging party does not need to prove that the arbitral tribunal would have issued a different award had the challenged arbitrator not participated in the arbitration proceedings, as the ground of improper constitution of the arbitral tribunal is of a formal nature.¹⁴¹)

The action of setting aside of an arbitral award is in principle of so-called cassatory nature, which means that the Swiss Supreme Court is only competent to set aside the challenged award and not to issue a decision on its own.¹⁴²) However, according to its practice, when setting aside proceedings are based on the ground of improper constitution of the arbitral tribunal, the Swiss Supreme Court has the power to remove the challenged arbitrator (if requested to do so by the challenging party).¹⁴³) The challenging party must therefore include an express request about this within its submission to set aside the arbitral award.¹⁴⁴)

¹³⁶) See KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 4.166; Voser & Fischer, *supra* note 14, at 69.

¹³⁷) E.g., FRY, GREENBERG & MAZZA, *supra* note 47, para. 3-648.

¹³⁸) *Id.* para. 3-648.

¹³⁹) See GÖKSU, *supra* note 74, para. 1050.

¹⁴⁰) See Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.1; Swiss Supreme Court, Jul 4, 2018, 4A_505/2017, consid. 4.1.

¹⁴¹) E.g., Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.3.2.

¹⁴²) Article 77(2) and Article 107(2) SCA; see BERGER & KELLERHALS, *supra* note 8, para. 1825.

¹⁴³) E.g., Swiss Supreme Court, Oct 29, 2010, ATF 136 III 605 ("Valverde" decision), consid. 3.3.3.1; see Stefanie Pfisterer, Art. 190, in BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT, para. 33 (Honsell *et al.* eds., 3rd ed. 2013)

¹⁴⁴) See Leemann, *Challenging international arbitration awards*, *supra* note 96, at 20.

3. Revision Proceedings

If the challenging party learns of circumstances giving rise to justifiable doubts as to the arbitrator's independence or impartiality only after the time limit to initiate setting aside proceedings has lapsed, the question arises of whether the party can seek revision of the award.

The PILA does not contain provisions dealing with the revision of an arbitral award.¹⁴⁵⁾ The Swiss Supreme Court has consistently held that arbitral awards can only be reconsidered in revision proceedings on limited grounds, *i.e.* if the award was obtained or influenced by a criminal offence, or new facts or evidence are subsequently discovered that existed at the time the award was rendered and that would have likely influenced the outcome of the proceedings.¹⁴⁶⁾

Whether the party seeking revision can also rely on new facts or evidence relating to the arbitrator's lack of independence or impartiality is, however, controversial.¹⁴⁷⁾ The question was left open by the Swiss Supreme Court in two decisions rendered in 2008.¹⁴⁸⁾ In 2016, the Swiss Supreme Court again had the opportunity to discuss this issue.¹⁴⁹⁾ Eventually, it rejected the application for revision as it denied the existence of circumstances giving rise to justifiable doubts as to the challenged arbitrator's independence or impartiality,¹⁵⁰⁾ without deciding whether an arbitral award can be subject to revision in case the challenging party became aware of the grounds for challenge only after the time limit to seek setting aside of the award had lapsed.¹⁵¹⁾ However, the Swiss Supreme Court in an *obiter dictum* appeared to indicate that a revision under such circumstances is possible.¹⁵²⁾

Article 180(3) of the draft PILA of October 2018 explicitly includes the possibility of seeking revision of an arbitral award in case the grounds for challenge are discovered only after the termination of the arbitration proceedings. According to Article 190a(1)(c) and (2) draft PILA, the deadline to file a request for revision is 90 days upon discovery of the ground to challenge the arbitrator.

¹⁴⁵⁾ The draft bill of the PILA of October 2018 seeks to include a new Article 190a PILA.

¹⁴⁶⁾ *E.g.*, Swiss Supreme Court, Mar 14, 2008, ATF 134 III 286, consid. 2; *see* Pfisterer, *supra* note 143, para. 94; Elliott Geisinger & Alexandre Mazuranic, *Challenge and Revision of the Award*, in *INTERNATIONAL ARBITRATION IN SWITZERLAND, A HANDBOOK FOR PRACTITIONERS* 259 (Geisinger & Voser eds., 2nd ed. 2013).

¹⁴⁷⁾ *See* with further references Geisinger & Mazuranic, *supra* note 146, at 260 *et seq.*

¹⁴⁸⁾ Swiss Supreme Court, Apr 4, 2008, 4A_528/2007, consid. 2.5; Swiss Supreme Court, Aug 14, 2008, 4A_234/2008, consid. 2.1.

¹⁴⁹⁾ Swiss Supreme Court, Sept 7, 2016, ATF 142 III 521, consid. 2

¹⁵⁰⁾ *Id.* consid. 3.3.

¹⁵¹⁾ *Id.* consid. 2.3.5.

¹⁵²⁾ *Id.* consid. 2.3.5; *see* Stutzer & Bösch, *Revision of an Award*, *supra* note 68, at 3.

Against this background, parties currently cannot rely with certainty on being able to seek revision of an arbitral award based on grounds for challenge they discovered only after the time limit to seek setting aside of the award has lapsed. Parties are therefore well advised to investigate potential grounds for challenge during the arbitration proceedings and before the lapse of the 30-day time limit to initiate setting aside proceedings.

Lastly, it has been suggested that the challenging party may file a request for *revision* of the Swiss Supreme Court's earlier *decision on the request for setting aside* if it learns of the grounds for challenge that existed during the arbitration proceedings after the expiration of the time limit to request the setting aside of the award.¹⁵³⁾ This is, however, only possible if the challenging party has already invoked the ground of improper constitution of the arbitral tribunal in the setting aside proceedings.¹⁵⁴⁾

4. Recognition and Enforcement Proceedings

Foreign arbitral awards are recognized and enforced in Switzerland in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).¹⁵⁵⁾

According to Article V(1)(d) NYC, the improper constitution of the arbitral tribunal can also be raised in recognition and enforcement proceedings. However, if the party failed to raise the grounds for challenge during the arbitration proceedings, it forfeits the right to object to the recognition and enforcement of the arbitral award in Switzerland based on Article V(1)(d) NYC.¹⁵⁶⁾ Notably, the Swiss Supreme Court held in a 2010 decision that the challenging party must show that the improper constitution of the arbitral tribunal had a causal impact on the outcome of the dispute.¹⁵⁷⁾ As mentioned above in Section 2, this is not required in setting aside proceedings.

Consequently, a party seeking to avert the recognition and enforcement of a foreign award because of an arbitrator's lack of independence or impartiality must already have raised the grounds for challenge in the foreign arbitration

¹⁵³⁾ BERGER & KELLERHALS, *supra* note 8, para. 871.

¹⁵⁴⁾ *Id.* para. 871.

¹⁵⁵⁾ Article 194 PILA.

¹⁵⁶⁾ See Swiss Supreme Court, Jul 28, 2010, 4A_233/2010, *consid.* 3.2.2; Swiss Supreme Court, Oct 4, 2010, 4A_124/2010, *consid.* 6.3.3.1; BERGER & KELLERHALS, *supra* note 8, para. 2076; Catherine Anne Kunz, *Enforcement of Arbitral Awards under the New York Convention in Switzerland – An overview of the current practice and case law of the Swiss Supreme Court*, ASA Bulletin Vol 34 Issue 4, at 853 *et seq.* (2016); CHRISTIAN JOSI, *DIE ANERKENNUNG UND VOLLSTRECKUNG DER SCHIEDSPRÜCHE IN DER SCHWEIZ*, 142 *et seq.* (2005), with further references.

¹⁵⁷⁾ Swiss Supreme Court, Jul 28, 2010, 4A_233/2010, *consid.* 3.2.1; see Kunz, *Enforcement of Arbitral Awards*, *supra* note 156, at 854; KAUFMANN-KOHLER & RIGOZZI, *supra* note 6, para. 8.265.

proceedings and initiated challenge proceedings in accordance with the rules applicable at the foreign seat.

V. Conclusion

In summary, parties must strictly follow the applicable challenge procedures and comply with their duties in order to avoid procedural pitfalls in Switzerland when challenging arbitrators for lack of independence or impartiality. In particular, in order to avoid forfeiture of their right to challenge, parties must act in good faith and raise the grounds for challenge without delay. In addition, parties must investigate circumstances giving rise to justifiable doubts as to the arbitrator's independence and impartiality and cannot exclusively rely on the disclosure made by the arbitrator. In case of incomplete knowledge of potential grounds for challenge, a party should seek clarification from the arbitrator.

When challenging an arbitrator, parties must comply with the applicable time limits and carefully assess when a decision on a challenge issued by the arbitral tribunal or a private institution can or must be challenged in setting aside proceedings before the Swiss Supreme Court. While a decision of the arbitral tribunal on a challenge (whether in the form of a procedural order or an arbitral award) must be challenged directly in setting aside proceedings within 30 days of its notification, a decision of an arbitral institution or any other private authority must be challenged together with the first challengeable award rendered by the arbitral tribunal. Finally, a decision of the Swiss public authority on a challenge is final and can neither be appealed to a court of higher instance nor be indirectly reviewed in setting aside proceedings against the arbitral award.

Any shortcomings in complying with the parties' duties and in following the applicable challenge procedure may result in a later dismissal by the Swiss Supreme Court of a parties' request to set aside an award for lack of an arbitrator's independence or impartiality.