

Arbitration in Switzerland
The Practitioner's Guide

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Wolters Kluwer
Law & Business

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3377-9

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Printed and bound by CPI Group (UK) Ltd., Croydon, CR0 4YY

Part II – Domestic Arbitration under the New Swiss Code of Civil Procedure

I. Introduction

A. From the Concordat to the Swiss Code of Civil Procedure

Before the adoption of the Swiss Code of Civil Procedure of 19 December 2008 (ZPO),¹ in force as 1 from 1 January 2011, domestic arbitration in Switzerland was governed by cantonal law, notably by the inter-cantonal Concordat on Arbitration of 27 March 1969 (the Concordat)² which had been gradually ratified and implemented by all 26 cantons.³ International arbitration was (and still is) governed by federal law, notably by Chapter 12 of the Private International Law Statute of 18 December 1987 (PILS).⁴

This *dual system* was maintained also when the outdated Concordat was replaced with a new set of 2 federal rules.⁵ It was therefore decided to neither amend the well established and successful Chapter 12 PILS, nor to completely disregard the Concordat, which despite its limits and deficiencies “was generally accepted by practitioners as a useful set of rules”⁶ Instead, with a pragmatic legislative approach, a new set of rules on domestic arbitration – cast on the basis of the Concordat⁷ but with the appropriate updates based on the experience gathered with Chapter 12 PILS – was drafted and included in the new federal uniform code of civil procedure, which repealed the 26 cantonal codes of civil procedure. Domestic arbitration was thus given its own *sedes materiae* with Part 3 ZPO (Arts. 356 to 399), which is conceived as a comprehensive *law within the law*, in principle independent from the other parts of the ZPO that govern litigation before the state courts.

B. Main Innovations with respect to the Concordat

The aim to make domestic arbitration *more attractive* was the underlying rationale of the changes implemented with the adoption of Part 3 ZPO. Driven by the brilliant experience of Chapter 12 PILS, Part 3 ZPO is characterized by the primacy of the *party autonomy* and a more *liberal approach* as compared to the Concordat, which provides more flexibility to the proceedings.⁸ The deficiencies and shortcomings of the Concordat were cured by new provisions which reflect modern arbitration best practices. Where appropriate, generally accepted rules of Chapter 12 PILS were adopted. As a result, most of the major discrepancies that existed between international and domestic arbitration were smoothed out.

Among the major novelties with respect to the Concordat, it is worth mentioning the power of the 4 arbitral tribunal to order provisional measures⁹ and security for costs,¹⁰ the jurisdiction of the arbitral tribunal to hear set-off defenses,¹¹ the possibility for state courts to appoint all the arbitrators in case of

¹ SR 272.

² “Konkordat über die Schiedsgerichtsbarkeit” in German, “Concordat sur l’arbitrage” in French, “Concordato sull’arbitrato” in Italian.

³ The last canton to adhere to the Concordat was the canton of Lucerne, in 1995.

⁴ SR 291.

⁵ One of the main problems of the Concordat was that the implementation of any change or amendment required the approval and ratification of all 26 cantons.

⁶ Berger/Kellerhals, para. 72.

⁷ In principle, the literature and case law relating to the Concordat continue to be of relevance.

⁸ As opposed to the Concordat, Part 3 ZPO contains only few mandatory rules.

⁹ Art. 374 ZPO; for a commentary on this provision, see Netzle, ZPO, pp. 2402-2409; Habegger, ZPO, pp. 1835-1848.

¹⁰ Art. 379 ZPO; for a commentary on this provision, see Müller, ZPO, pp. 2432-2437; Habegger, ZPO, pp. 1899-1903.

¹¹ Art. 377(1) ZPO; for a commentary on this provision, see Habegger, ZPO, pp. 1885-1891; Netzle, ZPO, pp. 2423-2425.

multi-party arbitration,¹² the limitation of the remedies for setting aside the award (one court instance only)¹³ and last, but not least, the possibility to exclude altogether the applicability of Part 3 ZPO and submit the dispute to the provisions on international arbitration.¹⁴

C. Main Differences as Compared with Chapter 12 PILS

- 5 Generally, the provisions of Part 3 ZPO are more extensive and detailed if compared with Chapter 12 PILS. The Swiss legislature took also the opportunity to explicitly codify specific matters,¹⁵ generally accepted arbitration best practices¹⁶ as well as basic principles developed by case law.¹⁷
- 6 The major remaining material deviations from Chapter 12 PILS essentially derive from the Concordat and were deliberately maintained to take into consideration the different setting of domestic disputes. To begin with, the object of arbitral proceedings under Part 3 ZPO can be *any claim over which the parties can freely dispose*.¹⁸ The *scope of arbitrability* under Part 3 ZPO is thus wider than under Chapter 12 PILS, according to which only disputes of *financial interest* may be subject to arbitration.¹⁹ Besides, as it was already the case under the Concordat, pursuant to Part 3 ZPO an award can – *inter alia* – be set aside if it is *arbitrary*,²⁰ while under Chapter 12 PILS such challenge is limited to the narrower ground of *public policy* violations.²¹ Finally, under Part 3 ZPO, it is definitely not possible to waive the right to challenge the award through an action for annulment.²²

D. International Outlook and Opting out Opportunity

- 7 As already mentioned, the new federal provisions on domestic arbitration have significantly reduced the gap that previously existed in Switzerland between international and domestic arbitration. Thanks to this alignment, Switzerland can now offer a modern and practical framework that is not only suitable in purely national settings, but also for setups which are *domestic in form, but international in nature*. Swiss subsidiaries and other onshore entities controlled by international groups of companies can be expected to make wide use of, and benefit from, the updated domestic arbitration rules as a true alternative to litigation before state courts, where they might be confronted with inconveniences (such as the compulsory use of the official Swiss language(s) or a less familiar procedural framework).
- 8 Foreign-controlled entities operating or doing business in Switzerland and facing litigation against each other are the best candidates to even go one step further and make use of the perhaps most interesting innovation under the new provisions on domestic arbitration: the possibility to entirely exclude the application of Part 3 ZPO to the advantage of the provisions on international arbitration, notably Chapter 12 PILS, which shall then exclusively govern the dispute (so-called *opting out*).²³ Under the Concordat,

¹² Art. 362(2) ZPO; for a commentary on this provision, see Grundmann, pp. 2322-2330; Habegger, ZPO, pp. 1725-1737.

¹³ Art. 389(1) and Art. 390(2) ZPO.

¹⁴ Art. 353(2) ZPO; see below, para. 8.

¹⁵ E.g., the possibility to request the arbitral tribunal to correct, to interpret or to complete an award (Art. 388 ZPO).

¹⁶ E.g., similarly to Art. 12(1) UNCITRAL Model Law, Art. 361 ZPO explicitly refers to the duty of the arbitrators to disclose any circumstances which might give rise to doubts as to their independence or impartiality.

¹⁷ E.g., Art. 373(6) ZPO clearly states that any objection to violations of procedural rules must be raised without delay, otherwise it cannot be invoked later with the action for annulment (cf. BGE 119 II 386 para. 1a).

¹⁸ Art. 354 ZPO; for a commentary on this provision, see Wenger, ZPO, pp. 2269-2274; Weber-Stecher, pp. 1654-1666.

¹⁹ Cf. Art. 177(1) PILS.

²⁰ Art. 393(e) ZPO. An award is arbitrary, if it either rests on findings which are manifestly contrary to the facts on record, or if it rests on a manifest violation of law or equity.

²¹ Cf. Art. 190(2)(e) PILS.

²² Cf. Art. 192(2) PILS, pursuant to which such a waiver is possible (as to the preconditions that must be met for the waiver to be valid, see the commentary on Art. 192 PILS, Chapter 2 below).

²³ Art. 353(2) ZPO. As to the possible uncertainties on the effect of opting out, see Voser, ASA Bull. 2010, p. 756. Conversely, pursuant to Art. 176(2) PILS, the parties can agree that the provisions of Chapter 12 PILS are excluded and that the provisions of Part 3 ZPO should apply exclusively (so-called *opting in*).

this possibility did not exist given that Art. 1(1) was deemed to be mandatory, with the arbitration necessarily being governed by the Concordat.²⁴

II. General Overview on Part 3 ZPO

The next paragraphs briefly outline the basic principles and salient features of the new provisions on domestic arbitration, following the same structure as Part 3 ZPO. 9

A. General Provisions (Articles 353-356 ZPO)

Arbitral proceedings are governed by Part 3 ZPO, if (i) the seat of the arbitral tribunal is in Switzerland 10 and (ii) Chapter 12 PILS is not applicable.²⁵ The latter is the case, if at the time of the conclusion of the arbitration agreement none of the parties had its domicile/seat or habitual residence outside Switzerland,²⁶ or if the parties agreed to exclude the applicability of Chapter 12 PILS and to submit the proceedings to the provisions on domestic arbitration.²⁷

Any claim over which the parties can freely dispose of,²⁸ hence also non-monetary claims, can be submitted 11 to arbitration.

The seat of the arbitral tribunal is chosen by the parties or the body designated by them (such as an 12 arbitral institution), or, in the absence of any determination, by the arbitral tribunal itself.²⁹ If neither the parties, nor the body that they have designated, nor the arbitral tribunal have determined the seat, the latter is deemed to be at the place of the state court which would have jurisdiction over the matter in the absence of an arbitration agreement.³⁰ Unless the parties have agreed otherwise, the arbitral tribunal can conduct hearings, take evidence and deliberate at any other place.³¹

The residual jurisdiction of the state courts is limited to the minimum. The canton where the arbitral 13 tribunal has its seat designates an upper court which shall have jurisdiction to decide on motions to reconsider³² (or, as the case may be, on motions to set aside the award),³³ to accept the deposit of the arbitral award, respectively to certify its enforceability.³⁴ Either the same state court (though sitting in a different personal composition), or another court shall have sole jurisdiction to (i) appoint, challenge, remove and replace the arbitrators,³⁵ to (ii) extend the arbitral tribunal's term of office and to (iii) support the latter, e.g. in gathering the evidence (i.e. acting as so-called *juge d'appui*).³⁶

²⁴ Rüede/Hadenfeldt, p. 116; Jolidon, pp. 57-58; Berger/Kellerhals, para. 107b; Wenger, *ZPO*, para. 11 at Art. 353, with reference to BGer. 4P.28/1995 para. 2b (*ASA Bull.* 1996, p. 282), where the Supreme Court held that parties are not at liberty to internationalize a domestic arbitration.

²⁵ Art. 353(1) ZPO; for a commentary on this provision, see Wenger, *ZPO*, pp. 2264-2268; Weber-Stecher, pp. 1648-1654.

²⁶ Art. 176(1) PILS *e contrario*.

²⁷ Pursuant to Art. 176(2) PILS, such agreement must be in writing.

²⁸ Art. 354 ZPO (arbitrability). For an example of non-disposable claims according to mandatory provisions of employment law pursuant to Art. 341(1) CO, cf. BGE 136 III 467 paras. 2-4.

²⁹ Art. 355(1) ZPO; for a commentary on this provision, see Weber-Stecher, pp. 1666-1676; Wenger, *ZPO*, pp. 2275-2280.

³⁰ Art. 355(2) ZPO.

³¹ Art. 355(4) ZPO.

³² See below, para. 29.

³³ See below, para 28, footnote 76.

³⁴ Art. 356(1) ZPO; for a commentary on this provision, see Wenger, *ZPO*, pp. 2281-2283; Weber-Stecher, pp. 1676-1684.

³⁵ See below, paras. 17 and 19.

³⁶ Art. 356(2) ZPO in conj. with 375(2) ZPO.

B. Arbitration Agreement (Articles 357-359 ZPO)

- 14 The agreement to submit to arbitration (*arbitration agreement*) can either refer to an existing dispute (*submission agreement*) or to a future dispute (*arbitration clause*).³⁷ As to the form, the arbitration agreement must be in writing or in another form which can be evidenced by text.³⁸
- 15 In accordance with the principle of *severability* (or *separability*), the validity of the arbitration agreement cannot be disputed merely on the ground that the main contract (containing the arbitration agreement) is invalid.³⁹ The arbitral tribunal shall also have jurisdiction to decide in an interim or final award on the validity, respectively the scope of the arbitration agreement, or on any other objection aimed at challenging the jurisdiction of the arbitral tribunal (so-called *Kompetenz-Kompetenz* of the arbitral tribunal).⁴⁰ The plea that the arbitral tribunal lacks jurisdiction must in any case be raised prior to any pleadings on the merits.⁴¹

C. Constitution of the Arbitral Tribunal (Articles 360-366 ZPO)

- 16 The arbitral tribunal is deemed constituted when all its members have confirmed the acceptance of their mandate.⁴² In principle, the parties are free to decide on the number and on the appointment of the arbitrators.⁴³ In the absence of such an agreement, it is presumed that the number of arbitrators is three.⁴⁴
- 17 Where the arbitration agreement does not provide for a body to appoint the arbitrators (such as an arbitral institution), or where such body fails to appoint the arbitrators within a reasonable time, the appointment shall be made by the competent state court,⁴⁵ unless it clearly appears, after a *prima facie* scrutiny, that there is no valid arbitration agreement.⁴⁶ In order to guarantee a fair and equal treatment of all the parties involved, in *multi-party arbitrations* the competent state court even has the power to appoint all the members of the arbitral tribunal.⁴⁷

D. Challenge, Removal and Replacement of Arbitrators (Articles 367-371 ZPO)

- 18 Depending on the circumstances, the parties have the possibility to challenge the appointment of an arbitrator or even of the entire arbitral tribunal.⁴⁸ A party may in particular challenge an arbitrator if there are justifiable doubts as to his independence or impartiality;⁴⁹ a party may challenge the entire tribunal if the opposing party had a predominant influence on the appointment of the members of the

³⁷ Art. 357(1) ZPO; for a commentary on this provision, see Müller-Chen/Egger, pp. 2284-2292; Girsberger, *ZPO*, pp. 1685-1699.

³⁸ Art. 358 ZPO; for a commentary on this provision, see Girsberger, *ZPO*, pp. 1699-1705; Müller-Chen/Egger, pp. 2293-2298.

³⁹ Art. 357(2) ZPO.

⁴⁰ Art. 359(1) ZPO; for a commentary on this provision, see Müller-Chen/Egger, pp. 2300-2306; Girsberger, *ZPO*, pp. 1705-1712.

⁴¹ Art. 359(2) ZPO.

⁴² Art. 364(2) ZPO; for a commentary on this provision, see Grundmann, pp. 2338-2343; Habegger, *ZPO*, pp. 1743-1745.

⁴³ Art. 360(1) and Art. 361(1) ZPO. Pursuant to Art. 361(4) ZPO, in matters arising from renting of living accommodation, the parties can only appoint the conciliation authorities to act as an arbitral tribunal.

⁴⁴ Art. 360(1) ZPO. Pursuant to Art. 360(2) ZPO, where the parties have decided to have an even number of arbitrators, there is a (rebuttable) presumption that an additional member shall be appointed as presiding arbitrator.

⁴⁵ See above, para. 13.

⁴⁶ Art. 362(3) ZPO.

⁴⁷ Art. 362(2) ZPO.

⁴⁸ Arts. 367-368 ZPO.

⁴⁹ Art. 367(1)(c) ZPO. Cf. also Art. 363 ZPO, according to which any person who is offered a mandate as an arbitrator must disclose any circumstances which might give rise to justifiable doubts as to its independence or impartiality without delay, it being understood that such duty of disclosure persists throughout the entire proceedings.

arbitral tribunal.⁵⁰ In both cases, the challenging party has the duty to inform the arbitral tribunal and the opposing party of the challenge without delay.

The parties are free to determine the challenge procedure.⁵¹ If the parties fail to designate a body that shall have the authority to rule over the (challenge) dispute, the challenge shall be decided by the competent state court.⁵² Unless otherwise agreed by the parties, the challenge proceedings do not hinder the arbitral tribunal from continuing the proceedings and rendering an award.⁵³ The decision on the challenge of an arbitrator can only be reviewed along with the award.⁵⁴ The same procedure applies *mutatis mutandis* to the removal⁵⁵ and replacement⁵⁶ of a member of the arbitral tribunal. 19

E. The Arbitral Procedure (Articles 372-380 ZPO)

The parties are free either to determine the rules applicable to the arbitral procedure themselves, to determine them by reference to a set of rules of arbitration (e.g. issued by an arbitral institution), or to submit the arbitral procedure to a procedural law of their choice.⁵⁷ In the absence of any determination by the parties, the procedural rules shall be determined by the arbitral tribunal,⁵⁸ which must conduct the proceedings in compliance with the minimal standards of due process (equal treatment of the parties and right to be heard in contradictory proceedings).⁵⁹ Complaints relating to violations of the procedural rules must be raised without delay, failing which the right to a later challenge of the award (based on that procedural irregularity) is forfeited.⁶⁰ 20

Arbitral proceedings become pending once a party seizes the arbitral tribunal designated in the arbitration agreement or, in the absence of any designation, once a party initiates proceedings for the appointment of the arbitral tribunal, or, as the case may be, when a party starts the agreed-upon conciliation attempt.⁶¹ If proceedings regarding the same dispute between the same parties are simultaneously pending before a state court and an arbitral tribunal, the second-seized instance shall stay its proceedings until the first-seized instance has made a decision on its jurisdiction.⁶² 21

Arbitral proceedings can be conducted by or against multiple parties (*multi-party arbitration*), provided that all parties are mutually bound by one or more corresponding agreements to arbitrate and the claims raised are identical or factually related.⁶³ The intervention of a third party and the joinder of a third party (called upon to participate by a third party action) further require the leave of the arbitral tribunal.⁶⁴ Counterclaims as well as factually related claims between the same parties are admissible only if they are covered by an arbitration agreement, respectively by corresponding arbitration agreements between 22

⁵⁰ Art. 368(1) ZPO; for a commentary on this provision, see Weber-Stecher, pp. 1777-1779; Schnyder/Pfisterer (in Sutter-Somm *et al.*, eds., *Kommentar zur Schweizerischen Zivilprozessordnung*, Zurich 2010), pp. 2360-2366.

⁵¹ Art. 369(1) ZPO; for a commentary on this provision, see Schnyder/Pfisterer, pp. 2367-2370; Weber-Stecher, pp. 1780-1789.

⁵² Art. 363(3) ZPO; see above, para. 13.

⁵³ Art. 369(4) ZPO.

⁵⁴ Art. 369(5) in conj. with Art. 393(a) ZPO; see below, para. 28.

⁵⁵ Art. 370 ZPO; for a commentary on this provision, see Schnyder/Pfisterer, pp. 2371-2374; Habegger, *ZPO*, pp. 1790-1795.

⁵⁶ Art. 371 ZPO; for a commentary on this provision, see Habegger, *ZPO*, pp. 1796-1805; Schnyder/Pfisterer, pp. 2375-2379.

⁵⁷ Art. 373(1) ZPO; for a commentary on this provision, see Müller, *ZPO*, pp. 2391-2401; Habegger, *ZPO*, pp. 1814-1834.

⁵⁸ Art. 373(2) ZPO.

⁵⁹ Art. 373(4) ZPO.

⁶⁰ Art. 373(6) in conj. with Art. 393(d) ZPO.

⁶¹ Art. 372(1) ZPO; for a commentary on this provision, see Habegger, *ZPO*, pp. 1806-1813; Müller, *ZPO*, pp. 2380-2390.

⁶² Art. 372(2) ZPO.

⁶³ Art. 376(1) ZPO; for a commentary on this provision, see Netze, *ZPO*, pp. 2417-2422; Habegger, *ZPO*, pp. 1870-1885.

⁶⁴ Art. 376(3) ZPO.

the parties.⁶⁵ By contrast, the arbitral tribunal has jurisdiction to hear a set-off defense, irrespective of whether the relationship out of which such defense is said to arise is within the scope of the arbitration clause, or is the object of another arbitration agreement or forum-selection clause.⁶⁶

- 23 The arbitral tribunal shall conduct the taking of evidence itself,⁶⁷ with the tribunal having the power to order provisional measures, including measures for the preservation of evidence.⁶⁸ If necessary, it may request the assistance of the state courts (i.e., of the *juge d’appui*).

F. The Award (Articles 381-388 ZPO)

- 24 In principle, the arbitral tribunal is free to limit the proceedings to specific issues or claims and to render interim or partial awards.⁶⁹ Unless the parties have agreed otherwise, the arbitral tribunal renders its award pursuant to the majority vote of its members.⁷⁰ Save where the parties have renounced, the arbitral tribunal must indicate in the award the facts and the (legal) reasoning on which the award is based.⁷¹ In case the parties reach a settlement agreement during the arbitral proceedings, they can request the arbitral tribunal to record the same in a *consent award* (award on agreed terms).⁷²
- 25 The arbitral tribunal decides the dispute either according to the rules of law chosen by the parties (be it a given state law or a private set of rules) or *ex aequo et bono*, if so authorized by the parties.⁷³ In the absence of such choice or authorization, it shall decide the dispute according to the law that the competent state court would apply.⁷⁴
- 26 As of its notification to the parties, the award has the same (*res judicata* and further) effects as a final and enforceable decision of a state court.⁷⁵

G. Remedies against the Award (Articles 389-399 ZPO)

- 27 The new provisions on domestic arbitration (only) provide for a one-instance remedy system, as it is the case in international arbitrations governed by Chapter 12 PILS. The ZPO distinguishes between two remedies for challenging an award: the action for annulment (*motion to set aside*) and the revision (*motion to reconsider*).
- 28 In principle, the action for annulment must be filed before the Swiss Federal Supreme Court.⁷⁶ The award can be set aside only on the (narrow and exhaustively listed) grounds provided by law, notably:

⁶⁵ Art. 376(2) and Art. 377(2) ZPO respectively.

⁶⁶ Art. 377(1) ZPO.

⁶⁷ Art. 375(1) ZPO; for a commentary on this provision, see Habegger, *ZPO*, pp. 1849-1870; Netzle, *ZPO*, pp. 2410-2416.

⁶⁸ Art. 374(1) ZPO.

⁶⁹ Art. 383 ZPO; for a commentary on this provision, see Arroyo, *ZPO*, pp. 2459-2465; Girsberger, *ZPO*, pp. 1923-1928.

⁷⁰ Art. 382(3) ZPO. If no majority is reached, the presiding arbitrator shall have the casting vote (Art. 382(4) ZPO); for a commentary on Art. 382 ZPO, see Arroyo, *ZPO*, pp. 2452-2458.

⁷¹ Art. 384(1)(e) ZPO; for a commentary on this provision, see Arroyo, *ZPO*, pp. 2466-2474; Girsberger, *ZPO*, pp. 1928-1941.

⁷² Art. 385 ZPO; for a commentary on this provision, see Gränicher, pp. 2475-2482; Girsberger, *ZPO*, pp. 1941-1945.

⁷³ Art. 381(1) ZPO; for a commentary on this provision, see Arroyo, *ZPO*, pp. 2440-2451; Girsberger, *ZPO*, pp. 1908-1914.

⁷⁴ Art. 381(2) ZPO. Except the (rare) cases where in an international setting the parties choose to *opt into* Part 3 ZPO (in which case the applicable law will be determined on the basis of the first eleven Chapters of the PILS), the applicable law will be Swiss law.

⁷⁵ Art. 387 ZPO. The term “notification” has been taken from and shall have the same meaning as under Art. 190(1) PILS. Under given circumstances, the award can already be effective and enforceable upon oral notification to the parties. Each party can request that a copy of the award be deposited with the competent state court (see above, para. 13) or that the latter certify the enforceability of the award (Art. 386(1) and (2) ZPO).

⁷⁶ Pursuant to Art. 390(1) ZPO, the parties have the possibility to agree that the action for annulment is to be lodged with the cantonal court having jurisdiction according to Art. 356(1) ZPO (see above, para. 13). In such a case, it is not possible to challenge the decision of the cantonal court before the Swiss Federal Supreme Court. This would be

(i) if the arbitral tribunal was constituted irregularly;⁷⁷ (ii) if the arbitral tribunal wrongly found or wrongly declined jurisdiction;⁷⁸ (iii) if the arbitral tribunal ruled beyond the claims submitted to it (*ultra petita*), or omitted to rule on one of the claims submitted to it (*infra petita*);⁷⁹ (iv) if the principle of the equality of the parties or their right to be heard has been violated; (v) if the result of the award is arbitrary because it rests on findings which are manifestly contrary to the facts on record, or because it rests on a manifest violation of law or equity;⁸⁰ (vi) if the fees and expenses determined by the arbitral tribunal are manifestly excessive.⁸¹ The action for annulment can be lodged against every partial or final award.⁸² Interim awards can be challenged only on the two first-named grounds (i.e. lack of jurisdiction or irregular constitution of the arbitral tribunal).⁸³

The revision of an award may be requested before the competent cantonal court.⁸⁴ A party can file a motion to reconsider on the following grounds: (i) if it discovers new material facts or decisive evidence which already existed at the time the award was rendered;⁸⁵ (ii) if the award was affected or influenced by a criminal offense;⁸⁶ (iii) if the recognition or the withdrawal of the action, or the settlement of a dispute is not binding due to a defect of consent;⁸⁷ (iv) if the European Court of Human Rights has rendered a final decision finding that the ECHR or its Protocols have been violated.⁸⁸ If the court upholds the motion, it sets aside the award and remits the matter to the arbitral tribunal for a new decision.⁸⁹

contrary to the new one-instance-remedy system adopted by the new code. In any case, Art. 391 ZPO makes it clear that the action for annulment before a state court (be it the Swiss Federal Supreme Court or a cantonal court) is only admissible after the parties have exhausted all remedies, if any, provided in their arbitration agreement (so-called subsidiary nature of the action for annulment).

⁷⁷ Art. 393(a) ZPO; for a commentary on this provision, see Mráz, pp. 1980-2004; Schott, pp. 2529-2539.

⁷⁸ Art. 393(b) ZPO.

⁷⁹ Art. 393(c) ZPO.

⁸⁰ Art. 393(d) ZPO.

⁸¹ Art. 393(e) ZPO.

⁸² Art. 392(a) ZPO; for a commentary on this provision, see Gränicher, pp. 2521-2528; Mráz, pp. 1977-1979.

⁸³ Art. 393(b) ZPO; see above, para. 28 (i) and (ii).

⁸⁴ I.e., the cantonal court having jurisdiction according to Art. 356(1)(a) ZPO (see above, para. 13).

⁸⁵ Art. 396(1)(a) ZPO. Facts and evidence which came into existence only after the award was rendered are excluded.

⁸⁶ Art. 396(1)(b) ZPO; for a commentary on this provision, see Netzele, ZPO, pp. 2548-2553; Mráz, pp. 2012-2022.

⁸⁷ Art. 396(1)(c) ZPO. This is the case when the recognition, withdrawal or settlement was affected by a defect of consent, such as material error (Art. 23 CO), fraud (Art. 28 CO) or material duress (Art. 29 CO).

⁸⁸ Art. 396(2)(a) ZPO. Revision on the grounds of violation of the ECHR may be sought only if (i) a compensation is not appropriate to cure the consequences of the violation (Art. 396(2)(b)) and (ii) the revision is necessary to eliminate the violation (Art. 396(2)(c)).

⁸⁹ Art. 399(1) ZPO. If the arbitral tribunal is no longer complete, Art. 399(2) ZPO refers to Art. 371 ZPO (i.e., to the provision governing the replacement of the members of the arbitral tribunal).