BÄR & KARRER

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SWISS ARBITRATION 2.0: RECENT REVISIONS AND INNOVATIONS

The first half of 2021 has already seen several legislative, regulatory and practice changes in the field of international arbitration in Switzerland. These have involved the entry into force of the new provisions on international arbitration in the Private International Law Act (PILA), the revision of the Swiss Rules of international arbitration, the conversion of the Swiss Chambers' Arbitration Institution (SCAI) into the Swiss Arbitration Centre Ltd. and the launch of the Swiss Arbitration platform. The changes adopted, while maintaining the arbitration-friendly environment that has contributed to the success of Swiss arbitration up to now, have brought further efficiency and user-friendliness to the international arbitration process. The intention is to add further depth to Switzerland's attractiveness as a place for international arbitration. This briefing sets out the key new features.

THE REVISION OF THE SWISS LAW OF INTERNATIONAL ARBITRATON

On 1 January 2021, new provisions of Chapter 12 of the Swiss International Private Law Act (PILA), which governs international arbitration proceedings in Switzerland, entered into force. It was the first time since the adoption of the PILA in 1987 that the Act was subject to a complete review The revision was deliberately kept „light" to preserve the acknowledged qualities of Chapter 12, in particular its brevity (19 articles, 24 following the revision) and the resulting broad autonomy given to the parties.

The objectives of the revision were to reinforce the autonomy of the parties further, to improve the security and clarity of the law, to incorporate important principles established by the Swiss Supreme Court in its case law and to facilitate the application of the law in the interests of the users.

A brief highlight of some of the new provisions follows below. The complete version of the new law (in English) can be found at *https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en*

SCOPE OF APPLICATION

The revision clarifies the scope of application of Chapter 12 PILA: namely, it applies if, at the time that the arbitration agreement was concluded, at least one of the parties thereto did not have its domicile, its habitual residence or its seat in Switzerland. The key moment to assess the foreign domicile or residence is therefore the time of the conclusion of the arbitration agreement, and not, as previously held by the Swiss Supreme Court, the time of the commencement of the arbitration.

FURTHER STRENGTHENING OF PARTY AUTONOMY

Several new provisions in Chapter 12 reinforce party autonomy. Among those, is the express recognition that unilateral arbitration clauses (e.g. in trusts or articles of incorporations) are valid under the same conditions as bilateral clauses (Art. 178(4) PILA), the possibility to seize any state court in Switzerland and confer jurisdiction on the first court seized to assist in the constitution of the arbitral tribunal in case the arbitration clause simply refers to „Arbitration in Switzerland" with no further mention of a specific city (Art. 179(2) PILA).

ABILITY TO FILE CHALLENGE SUBMISSIONS IN ENGLISH BEFORE THE SWISS SUPREME COURT

One of the most debated new provisions is Article 77 of the Supreme Court Act which now allows parties to file their submissions in challenge proceedings against an international arbitral award in English. Notwithstanding this, The Supreme Court will continue to issue its decisions on challenges in one of Switzerland's official languages, namely German, French, Italian or Romansh. This possibility should be welcomed in a field where a majority of arbitration proceedings are conducted in English. That said, due to the specific requirements regarding the way submissions must be presented to the Supreme Court and the importance of being closely familiar with the case law of the Swiss Supreme Court, it is advisable to seek the assistance of Swiss qualified lawyers. Moreover, and depending on the circumstances, it may be prudent in some cases to keep filing submissions to the Supreme Court in an official language. A careful evaluation of the pros and cons should be made in each specific case.

With respect to challenges, it is worth noting that the relatively short and non-extendable time limit of 30 days is now expressly provided at Article 190(4) PILA and not only in the Supreme Court Act as previously. In addition, deciding on an issue that had been left open by the Swiss Supreme Court for years, Article 77 of the Supreme Court Act now clearly confirms that a challenge is available against an international arbitral award irrespective of the value in dispute.

INCREASED USER-FRIENDLINESS

As mentioned, one objective of the revision was to facilitate the application of the law and its access to users. With this in mind, all pre-existing references to the Swiss Civil Code of Procedure (CPC) governing domestic arbitration were replaced by self-contained provisions in Chapter 12, such as specific provisions on the nomination, removal and challenge of arbitrators (see Arts. 179, 180, 180a et 180b PILA).

DIRECT ACCESS TO THE SWISS COURTS IN SUPPORT OF FOREIGN ARBITRATION

The new article 185a PILA allows foreign arbitral tribunals or parties to arbitration proceedings abroad to make a direct request for the assistance of a Swiss court for the enforcement of provisional or protective measures, or for the taking of evidence. This development is positive news for foreign parties and arbitrators who will no longer need to go through international mutual assistance in civil matters which is often both time-consuming and tedious.

CODIFICATION OF SWISS SUPREME COURT CASE LAW

To allow facilitated access to the relevant rules for users, the new law codifies some important principles established by the Swiss Supreme Court in its case law, such as the duty to raise an immediate objection to a procedural violation failing which the breach cannot be invoked at a later stage (Art. 182(4) PILA). The revision also codifies the ability to secure the revision of an arbitral award under certain conditions, as was already recognised by the Swiss Supreme Court in its case law (Art. 190a PILA).

THE NEW SWISS RULES OF INTERNATIONAL ARBITRATION

Another important development for Swiss arbitration is the revision of the Swiss Rules of International Arbitration („the Swiss Rules"), which entered into force on 1 June 2021, replacing the previous version of 2012. The new Swiss Rules apply to all proceedings where the Notice of Arbitration was filed after 1 June 2021.

The Swiss Rules initially came into force on 1 January 2004. Based on the UNCITRAL Arbitration Rules, they provided wide autonomy to the parties and broad discretion to the arbitral tribunal, with a „light touch" administration by the institution.

A first revision of the Swiss Rules was adopted in 2012, which notably introduced the successful emergency arbitrator procedure.

The catalyst for the recent revision was the decision to convert the Swiss Chambers' Arbitration Institution (SCAI) into the new Swiss Arbitration Centre following the decision in 2020 between SCAI and ASA to join forces (see below). As eight years had passed by that point since the last revision of the Rules in 2012, a review of the Swiss Rules in light of the practice of the SCAI Arbitration Court and Secretariat and the developments in international arbitration practice also seemed opportune.

The goal of the revision was to retain the flexibility of the Rules while adapting them to modern arbitration trends and strengthening the role of the institution in the supervision of proceedings. The revision process which started in the summer of 2020, was completed in a short time, following an in-depth consultation of practitioners and users. Only a few material changes were deemed necessary given the already modern, efficient and flexible framework of the Rules. Below are some of the notable features of the new Swiss Rules.

ENHANCED ROLE OF THE INSTITUTION

As mentioned, the revised Rules provide for a greater role for the Institution in the supervision of the arbitration proceedings. In particular, all communications must now be copied to the Secretariat (Article 16(2)). The Secretariat shall also hold the deposits for the advance on costs in all cases (the possibility for the arbitral tribunal to hold such deposits as previously provided by Appendix B section 4.1 having been deleted). Moreover, awards will no longer be notified by the arbitral tribunal, but instead by the Secretariat (Article 34(5)).

NEW RULES ON MULTI-PARTY / MULTI-CONTRACT ARBITRATION

This is one of the most significant revisions. The initial version of the Rules adopted in 2004 already contained a highly innovative provision regarding multi-party / multi-contract arbitration, Article 4 on „Consolidation and Joinder", which provided for the possibility to consolidate proceedings by decision of the institution (para. 1) and for the joinder/ participation of third parties by decision of the arbitral tribunal (para. 2).

Other provisions have now been added to cater for the variety of multi-party / multi-contract scenarios. A new Article 5 on the „Administration of Claims" reinforces the Court's gate-keeping function by extending the prima facie test made by the Court in situations where the respondent does not submit an Answer to the Notice of Arbitration or where it raises an objection to the arbitration being administered under the Swiss Rules, to multi-contract situations by allowing the Court not to proceed with the arbitration if the arbitration agreements are manifestly incompatible.

Article 4 mentioned above was replaced by two new provisions, namely Article 6 on „Cross-Claim, Joinder, Intervention" and Article 7 on „Consolidation". The former covers any cross-claim against a co-respondent, as well as the joinder or intervention of a third party and provides that a separate notice of claim should be made in those situations in the manner as the Notice of Arbitration under Article 3, which then applies by analogy.

The notice of claim shall be submitted to the Secretariat if the arbitral tribunal is not yet constituted, which will notify it to the addressee of the claim, all other parties and any confirmed arbitrator. In case of an objection, the Court shall render a decision applying Article 5 by analogy. If the notice of claim is filed after the constitution of the arbitral tribunal, the latter will decide it after consultation with the parties and taking into account all relevant circumstances, thereby enjoying a broad discretion.

Another innovation is provided under Article 6(4) which allows the arbitral tribunal to consider and decide, again with an important discretionary power, the request for the joinder or intervention of a third person in a capacity other than an additional party (e.g. a shareholder in a corporate dispute).

As previously, Article 7 provides the possibility for the Court to order the consolidation of proceedings, after taking into account all relevant circumstances, including the links between the claims and the progress already made in the respective proceedings. Article 7(3) clarifies that the proceedings shall be consolidated into the arbitration commenced first, unless the parties agree or the Court decides otherwise.

MODERNISATION / DIGITALIZATION OF PROCEEDINGS

Several amendments also reflect recent trends towards the digitalization of the process. In particular, under the revised Article 3(1), the filing and notification of the Notice of Arbitration can be made electronically, and hard copies are no longer necessary, unless the Secretariat or the

Claimant request otherwise. This route is also offered to the respondent for the filing of the Answer to the Notice of Arbitration under Article 4(1).

Whereas the 2012 Rules already allowed the arbitral tribunal to hear witnesses through means that did not require their physical presence at the hearing, the new Article 27(2) expressly provides that any hearing may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties.

Another amendment in line with modern trends and practices is the duty imposed on the arbitral tribunal to discuss with the parties at the initial conference or promptly thereafter issues of data protection and cybersecurity „to the extent needed to ensure an appropriate level of compliance and security", as set out in Article 19(2).

OTHER SUBSTANTIVE CHANGES

A number of further changes were made to reflect modern arbitration practice, such as heightened requirements regarding arbitrators' disclosures (Article 12), the possibility for the arbitral tribunal to oppose the appointment of a new party representative in case the independence and impartiality of the arbitral tribunal would be threatened (Article 16(4)) and the clarification that any objection shall be raised prior to any defence on the merits, unless the arbitral tribunal allows a later objection in exceptional circumstances (Article 23(3)).

Finally, the revised Rules place an increased emphasis on alternative dispute resolution methods. As well as the opportunity (which already existed under the 2012 Rules) given to the arbitral tribunal to facilitate, with the agreement of the parties, the settlement of the dispute, the new Article 19(6) provides that the parties may, at any time during the arbitration, resolve their dispute by mediation, including following the Swiss Rules of Mediation or any other forms of alternative dispute resolution.

COSTS

The Schedule of Costs set out at Appendix B leaves the registration fees unchanged. The administrative costs of the Institution are however slightly increased to reflect the increased work of the Court and Secretariat. No administrative costs are charged for arbitrations with an amount in dispute lower than CHF 300,000. Those costs are capped at CHF 75,000 for amounts in dispute of CHF 250,000 and above. On the other hand, the scale of arbitrators' fees is slightly reduced; the Court has the discretion to approve fees above average under exceptional circumstances (e.g. if the arbitral tribunal's work has been significant). Overall, the total costs of an arbitration under the new Rules are generally lower than under the 2012 Rules.

THE SWISS ARBITRATION CENTRE

The revised Swiss Rules also reflect the conversion of the Swiss Chambers' Arbitration Institution (SCAI) into the Swiss Arbitration Centre Ltd, its legal successor. The Centre administers, since 1 June 2021, all cases conducted under the Swiss Rules.

Importantly, the conversion of SCAI into the Swiss Arbitration Centre does not affect the validity of arbitration or mediation agreements referring to the Swiss Rules, to SCAI or any cantonal Chamber of Commerce, which are now deemed to refer to the Swiss Arbitration Centre.

The Centre is supervised by a Board of Directors and, like before, by the Arbitration Court, which is composed of experienced arbitration practitioners (currently 25 members) who are based in Switzerland and abroad.

The Arbitration Court is assisted by a permanent Secretariat and includes Case Administration Committees, which ensure that the proceedings are handled in a timely and cost-effective manner, and a Special Committee, which is entrusted with important decisions such as the determination of the seat of the arbitration or the consolidation of proceedings.

The Centre operates from its offices in Geneva, Zurich and Lugano, at which Notices of arbitration can be filed. The Secretariat is effectively located in Geneva and Zurich.

THE SWISS ARBITRATION PLATFORM

At the same time as the entry into force of the revised Swiss Rules, on 1 June 2021, a new internet platform was launched online under the name of „Swiss Arbitration" (*https://www.swissarbitration.org*) regrouping information on the services and activities of the Swiss Arbitration Centre, the Swiss Arbitration Association (ASA), the Swiss Arbitration Academy, and the Swiss Arbitration Hub (which provides services for the organisation of hearings and the associated logistics). Swiss Arbitration is an innovative practical tool as it provides practitioners and users with a single-entry portal for everything related to commercial and investment arbitration with a Swiss connection: arbitration laws and regulations, organisation, services, know-how, resources and events.

CONCLUSION

The recent revisions and innovations reflected in the legal and regulatory framework of Swiss international arbitration as well as the creation of the new Swiss Arbitration brand demonstrate the dynamism and modernity of the Swiss arbitration market and the desire to serve users even more efficiently. This new environment reinforces Switzerland's prime position as a place of arbitration.

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