SWITZERLAND

The Reform of Swiss International Arbitration Law has entered Home Stretch—an Update

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Making Something Excellent Even Better

Swiss law on *international* arbitration is part of the Swiss Private International Law Act (PILA) as its Chapter 12. Swiss law on *domestic* arbitration is part of the Swiss Code of Civil Procedure. Arbitration proceedings are international, according to Swiss law, if at least one of the parties to the arbitration agreement, at the time of its signing, is not domiciled in Switzerland. Furthermore, the parties, in *domestic* cases, can opt *in* to Swiss international arbitration law, whereas in *international* cases, they can opt *out* of Swiss international arbitration law, choosing domestic arbitration law instead.

The current version of Chapter 12 PILA was enacted, subject to very minor subsequent amendments, in 1989. It has been a success story with parties from all over the world. Parties value its clarity, its precision, and its simplicity. While Chapter 12 PILA covers by and large the same issues as the UNCITRAL Model Law 1985, the Swiss legislator decided to enact an independent and unique version of an arbitration law. In a nutshell, it would seem that the main feature of Swiss international arbitration law, singling it out amongst arbitration laws from other jurisdictions, is its high regard for party autonomy.

Given its overall success, one may question whether Swiss international arbitration law even requires fundamental reform. While a thorough review process was launched in order to assess possible shortcomings and areas that might need improvement, and the Zurich University of Applied Sciences School of Management and Law was tasked with an in-depth market and regulatory cost assessment study, it quickly turned out that the current Swiss international arbitration law was already highly competitive in an international arena, served its users and other stakeholders well, and did not require major adjustments.

Yet, in 2012, the Swiss parliament, eager not to rest on its laurels, requested the government, i.e. the Swiss Federal Council, to prepare a draft bill that "*preserves the attractiveness of Switzerland as an international arbitration hub*". Following the release of a first draft in 2017 and subsequent public consultations, the Swiss Federal Council, in 2018, issued a revised draft that focuses on three main objectives:

- codification of case law of the Swiss Federal Court;
- rendering Chapter 12 even more user friendly; and
- further strengthening party autonomy in line with international developments.

> STRENGTHENING PARTY AUTONOMY IN LINE WITH INTERNATIONAL DEVELOPMENTS

The most important innovation, from a practical perspective, may have been the proposed possibility to make, in the context of annulment proceedings, submissions to the Swiss Federal Court in English. We had reported on these developments already in last year's Expert Guide.

After consultation in the two chambers of the Swiss parliament, the second chamber finally adopted the reform, with only minor amendments, on 9 June 2020. It is therefore time for a brief update.

Submissions to the Swiss Federal Court in English

Today, any submissions to the Swiss Federal Court must be filed in one of the official languages (German, French, Italian, or Romansh). Exhibits in a language other than German, French, or Italian must be filed together with a translation. This rule even includes exhibits in English, which are accepted by the Swiss Federal Court without translation only where all parties agree.

The language requirements of the Swiss Federal Court conflict with the fact that the majority of international arbitration proceedings seated in Switzerland are conducted in the English language and may involve parties who are not fluent in any of the official languages. In these cases, translating a party's

own (draft) submissions and those of the other party can be a very costly and time-consuming task. In annulment proceedings, where time is of the essence especially for the applicant (who must prepare and file a request to set aside an international arbitral award within a mere 30 days from receipt), translating drafts and documents can be a daunting exercise.

The government's draft bill enabled the filing of submissions in English in order to make annulment proceedings for many foreign parties much more user friendly. The chamber of the Swiss parliament first reviewing the draft bill proposed to go even further and requested that the Swiss Federal Tribunal be obliged to also provide a signed English translation of its decisions. However, the other chamber of the Swiss parliament rejected this proposal in its entirety. After further consultation, the two chambers agreed, as a compromise, to adopt the government's initial proposal: the Swiss Federal Tribunal will, in the future, accept submissions in English, although its decisions will not be translated into English. This is likely to be seen as a major improvement of Swiss arbitration law in practice.

Codification of Case Law of the Swiss Federal Court

The draft bill further sought to bring the text of Chapter 12 PILA up to date with the case law of the Swiss Federal Court and to clarify certain open issues that are currently not dealt with in Swiss international arbitration law.

In line with the case law of the Swiss Federal Court and Swiss domestic arbitration law, the draft bill provided for the right of a party to request the arbitral tribunal to correct typographical errors in its award, to explain considerations in its award, or to render an additional award on claims omitted.

Furthermore, the draft bill confirmed the right of a party to request, in limited cases, a reopening of the proceedings by way of a decision of the Swiss Federal Court (*Revision* / review), in addition to the right to request the setting aside of the award. These limited cases include situations where (i) relevant facts or evidence come to light after the completion of the arbitration proceedings; where (ii) criminal investigations show that the award was tainted by illegality; and/or where (iii) circumstances have come to light after the completion of the arbitration proceedings that call into question an arbitrator's independence or impartiality.

In line with the case law of the Swiss Federal Court and Swiss domestic arbitration law, the draft bill also provided that a party forfeits its right to object to a violation of procedural rules if the objection is not promptly raised.

Responding to uncertainties created by the case law of the Swiss Federal Court, the draft bill expressly clarified that arbitration proceedings are international if one party to the arbitration agreement was not domiciled in Switzerland at the time the agreement was signed. The parties' domicile at the time the proceedings are commenced is irrelevant in this respect.

Finally, the draft bill clarified that any ancillary proceedings before Swiss state courts (the so-called *juge d'appui*) are governed by the rules on summary proceedings.

The Swiss parliament, by and large, accepted these proposals of the Swiss government.

Rendering Chapter 12 Even More User Friendly

The draft bill sought to render Swiss international arbitration law more user friendly for international users.

With this goal in mind, the government proposed to further strengthen the character of Chapter 12 as a self-contained set of rules, by removing references to the provisions of the Swiss Code of Civil Procedure and incorporating the content of those provisions directly into Chapter 12.

Furthermore, the draft bill sought to unify the form requirements for all arbitration-related agreements.

The two chambers of the Swiss parliament had also no objections to this aspect of the government's draft bill.

Further strengthening Party Autonomy

Finally, in line with the prevailing view in Switzerland, the draft bill expressly confirmed that arbitration clauses included in unilateral acts, such as for example in a will or a trust deed, can have legal force. This amendment is a welcome confirmation that international succession and trust matters can be safely submitted to arbitration in Switzerland.

The Swiss parliament again had no objections.

Conclusion

The reform of Chapter 12 PILA was thus welcomed by the Swiss parliament without major changes. The most visible improvement, from a practical perspective, and in particular for international parties, will be the possibility to file annulment submissions with the Swiss Federal Tribunal in English. This is a huge step in the direction of making the Swiss Federal Tribunal as accessible to international parties as its counterparts in the English-speaking world.

The reform contains also many other improvements, but the legislator refrains from extensive reconstruction works. For the users of Swiss international arbitration, this is good news. Chapter 12 PILA, under the wise guidance given by the Swiss Federal Court, has been working well for many years. Rather than simply following international trends, Swiss international arbitration law has in fact developed and shaped many of those trends over the past decades. In addition, Swiss international arbitration law of the future will be even more accessible and transparent, with the reform further enhancing clarity and precision as well as the user friendliness of Swiss international arbitration.