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Preface

This book contains the written contributions of the speakers at the thirteenth conference on New Developments in International Commercial Arbitration, organized by the CEMAJ (Research Center on Alternative and Judicial Dispute Resolution Methods) of the University of Neuchâtel on 4 November 2022.

The goal of both the conference and this book is to provide practitioners, academics and students with an in-depth analysis of the latest developments in international commercial arbitration. That is why the New Developments conferences are not dedicated to a specific theme. The only common denominator of the different contributions is the novelty of their subject matters.

SÉBASTIEN BESSON and ANTONIO RIGOZZI examine the main amendments to Chapter 12 of the Swiss Private International Law Act (PILA), which entered into force on 1 January 2021. They present the changes which were chiefly aimed at clarifying the wording of the statute and codifying the Swiss Supreme Court's case law. They also analyse in more depth those amendments which have substantively improved the former legal framework and conclude with a critical assessment of the 2021 Reform.

CLARISSE VON WUNSCHHEIM examines the role of arbitration as a dispute resolution mechanism in the context of "shared economy" transactions. She looks at the concept of "shared economy" and how it interacts with arbitration as a commercial dispute resolution mechanism and the Swiss legal framework. She also examines key challenges that arise in this context such as the issue of the arbitrability of such disputes and of the validity of arbitration agreements related to such disputes. She concludes by exploring the interesting

The 2021 Reform of Chapter 12 PILA

SÉBASTIEN BESSON & ANTONIO RIGOZZI

Contents

I. Introduction

On 1 January 2021, a revised version of the Swiss law on international arbitration came into force. While the main amendments enacted with the revision directly concern Chapter 12 of the Swiss Federal Private International Law Act (hereinafter, "PILA")[1] and the Swiss Federal Supreme Court Act (hereinafter, "FSCA"), Part 3 of the Code of Civil Procedure ("CCP")[2] has also seen some adjustments as a result of the changes introduced in these statutes. Throughout this article, all of the aforementioned amendments will be referred to collectively as the 2021 Reform.

After almost two years from its entry into force, the 2021 Reform has not resulted in any remarkable case law or practice. This should not come as a surprise since the 2021

[1] Swiss Federal Act on Private International Law dated 18 December 1987 (effective since 1 January 1989), RS 291, available online at https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en; Chapter 12, International Arbitration, Art. 176 to 194; Law on the *Tribunal fédéral* dated 17 June 2005 (effective since 1 January 2007), RS 173.110, available online (in French) at https://www.fedlex.admin.ch/eli/cc/2006/218/fr.

[2] Code of Civil Procedure dated 19 December 2008 (effective since 1 January 2011), RS 272, available online at https://www.fedlex.admin.ch/ eli/cc/2010/262/en.

Reform was not intended to fundamentally overhaul Chapter 12 PILA.

An analysis of the genesis (more than a decade ago) of the 2021 Reform confirms that the aim was to reinforce the established advantages of the Swiss law on international arbitration, at a time when the arbitration laws of other countries were undergoing (much more significant) revisions (II). Examining the main amendments, we will present the changes that were chiefly aimed at clarifying the wording of the law and codifying the Swiss Supreme Court's case law and analyse in more depth those which have substantively improved the existing legal framework (III-X) before concluding with a critical assessment of the 2021 Reform (XI).

II. The Genesis and Objectives of the 2021 Reform

The PILA came into force on 1 January 1989[3] and its Chapter 12, with the exception of the introduction of Article 186(1*bis*) in March 2007,[4] had remained unchanged

[3] RO 1988 1776.

[4] Federal Law on Private International Law (Arbitration. Competence), Amendment of 6 October 2006, RO 2007 387, (in French) https://www.fedlex.admin.ch/eli/oc/2007/75/fr. Art 186(1bis) was enacted to correct the criticized jurisprudence of the *Fomento* case, where the Supreme Court had ruled that the rule of *lis pendens* under Art. 9 PILA also applied for pending foreign proceedings, in the context of an arbitration in Switzerland (Decision of the Swiss Federal Supreme Court [hereinafter, "DSFSC"] 127 III 279, 14 May 2001, Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A.). On the relationship between Art. 186(1bis) and Art. 372(2) CCP (providing for an opposite rule for domestic arbitration enshrining the principle of *lis pendens*) see especially S. BESSON, "The Relationships between Court and Arbitral Jurisdiction: The Impact of the New Art. 186(1bis) PILS", in Ch. Müller (ed.), *New Developments in International Commercial Arbitration 2007*, pp. 57-71, in particular, pp. 72-73. More generally, B. BERGER et F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, Sweet & Maxwell, 4th ed., 2021, paras. 1032-1063; G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration*

since then. If Chapter 12 PILA has stood the test of time, this is largely due to the fact that it was already innovative legislation at the time that it was first enacted.[5] Chapter 12 PILA is also remarkably user-friendly and has thus turned out to be a very successful law on international arbitration. Indeed, according to the government message explaining the draft Bill carrying out the amendments of the 2021 Reform (*Message du Conseil fédéral*, hereinafter, "Message"),[6] Chapter 12 PILA is, and has consistently been considered as a clear and precise law on arbitration, which grants the parties significant autonomy and flexibility, but also provides them with a transparent legal framework, guaranteed by the State courts.[7]

The origin of the 2021 Reform goes all the way back to a parliamentary initiative of 2008 (the so-called Lüscher initiative), aimed at including the negative effect of *Kompetenz-Kompetenz* into Article 7 PILA, along the lines of the perceived best practice adopted under French law. Ironically, as discussed below, this originally contemplated change was never implemented, but it paved the way for the 2021 Reform. Indeed, Mr. Lüscher's initiative was received with scepticism by the Swiss arbitration community and was

– *Law and Practice in Switzerland*, Oxford University Press, 3rd ed., 2015, paras. 5.60-5.64.

[5] P. LALIVE, J-F. POUDRET and C. REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Ed. Payot, 1989, "Le droit de l'arbitrage international en Suisse – Introduction", paras. 23-25; P. LALIVE and E. GAILLARD, "Le nouveau droit de l'arbitrage international en Suisse", *JDI,* 1989.905-963, *passim*. see also F. DASSER, "Revision of Chapter 12 of the PILA or Why and How to Modernize a (Still) Modern Law?" in Ch. Müller, S. Besson and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2020*, Bern, 2020, pp. 1-26, pp. 3-4; S. BESSON, "Salient Features and Amenities of Chapter 12 PILS", in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2nd ed., Wolters Kluwer, 2018, para. 96.

[6] Message on the Amendment of the Federal Law on Private International Law (Chapter 12 International Arbitration) of 24 October 2018, 18.076, FF 2018 7153, available online at https://www.fedlex.admin.ch/eli/fga/2018/2548/fr (in French).

[7] Message, pp. 8-9.

even openly criticised by prominent scholars.[8] However, the initiative had to be examined by the Legal Affairs Commission of the National Council (the lower house of the Swiss Parliament), which put the question of the need to reform the law on international arbitration on the parliamentary agenda. As a result, in 2012 the Legal Affairs Commission of the National Council adopted a motion instructing the government (*Conseil fédéral*) to present a draft in view of "cleaning up" (the term "*toilettage"* was used in the motion) the PILA's provisions governing international arbitration. The Legal Affairs Commission's goal was for Chapter 12 PILA to better reflect the case law that the Swiss Federal Supreme Court had developed over the years and to maintain Switzerland's status as a preferred seat for international arbitration, at a time when other countries had also been reforming their arbitration legislations,[9] including the relationship between the State courts and arbitral tribunals, which was at the heart of the Lüscher initiative.[10]

The legislative process has been summarised in detail in other articles.[11] For the purposes of this contribution, it suffices to recall the following main steps: (i) based on the governmental mandate, the Federal Office of Justice (hereinafter, "FOJ")

[8] See among others, B. BERGER, "Kritische Gedanken zur Revision von Artikel 7 IPRG im Lichte eines praktischen Beispiels", *ASA Bull.,* 2011.33 et seq.; S. BESSON, "Vision critique du projet de révision de l'art. 7 LDIP", *ASA Bull.,* 2011.574 et seq. For an opinion in favour of the revision, see e.g., P.-Y. TSCHANZ, "De l'opportunité de modifier l'art. 7 LDIP", *ASA Bull.*, 2010.478 et seq. For a summary of the various positions in this respect, see M. WIRTH, "Chapter 12 PILA - Is it Time for Reform? If Yes, What Shall be Its Scope?", in Ch. Muller and A. Rigozzi (eds), *New Developments in International Commercial Arbitration 2011*, Schulthess, 2011, pp. 51-77, in particular pp. 62-65.

[9] Message, p. 8. Motion 12.3012 of the Legal Affairs Commission (LAC) of 3 February 2012 "Loi fédérale sur le droit international privé. Maintenir l'attrait de la Suisse comme place arbitrale au niveau international" available online at https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20123012.

[10] Message, p. 8.

[11] F. DASSER, "Revision of Chapter 12 of the PILA or Why and How to Modernize a (Still) Modern Law?", *op. cit.*, pp. 5-15, retraces the whole process.

appointed a group of experts[12] to examine the issues that could be of potential relevance; (ii) based on the experts' work, the FOJ drew up a "preliminary draft";[13] (iii) this preliminary draft was then subject to a broad consultation process[14] (iv) based on which the government issued a "draft" on 24 October 2018, accompanied by the above-mentioned explanatory Message;[15] and (v) after review, modification of

[12] This group of experts consisted of Professor Gabrielle Kaufmann-Kohler (University of Geneva), Professor Felix Dasser (University of Zurich), Mr Elliott Geisinger (Geneva) and Professor Daniel Girsberger (University of Lucerne). As indicated in the Message (p. 8), the FOJ has also consulted a group of sports arbitration specialists, namely, Mr Daniel Eisele (Zurich), Professor Ulrich Haas (Zurich), Mr Stephan Netzle (Zurich), Mr Michele Bernasconi (Zurich) and Professor Antonio Rigozzi (Neuchâtel and Geneva).

[13] The preliminary draft and the explanatory report on the modification of the PILA dated 11 January 2017 (in French), can be found at https://www.bj.admin.ch/ejpd/fr/home/actualite/news/2017/2017-01-11.html.

[14] The consultation process on the preliminary draft came to an end on 31 May 2017. More than 50 positions have been taken and comments have been conveyed to the FOJ between the publication of the preliminary draft and the end of the consultation period. The FOJ then published a report summarising its opinion on 8 August 2018 ("Modification de la loi fédérale sur le droit international privé (arbitrage international) Rapport sur les résultats de la procédure de consultation" (Consultation Report), available at https://www.ejpd.admin.ch/dam/bj/fr/data/aktuell/news/2018/2018-10-24/ve-ber-f.pdf.download.pdf/ve-ber-f.pdf). The Consultation Report noted that 19 out of 26 Swiss cantons, three political parties and 28 organisations and individuals, among which the ASA, ICC Switzerland, SCAI, the faculties of law of several universities, umbrella associations (such as the Federation of Swiss enterprises, the Swiss Trade Union and the Swiss Association of football players, in collaboration with FIFPro (World Players' Union)), professors, lawyers and law firms submitted comments about the preliminary draft. As noted in the Consultation Report, the reactions to the preliminary draft were "generally positive", save for some targeted criticism and alternative proposals made by several participants regarding specific provisions. All the position papers filed with the FOJ during the consultation period may be consulted at: https://www.fedlex.admin.ch/fr/consultation-procedures/ended/2017#DFJP.

[15] FF 2018 7153 (see above footnote 6). The Message contains a presentation and assessment of the project, a detailed comment of the new provisions, an analysis of the potential impact of adopting the project, as well as of the relation between the suggested text "with the legislature's program and with the Federal Council's strategies", and a review of the project's constitutionality and compatibility with Switzerland's international obligations and other existing laws. The text of the bill

certain points and debate before the two chambers of Parliament, the final text was adopted on 19 June 2020.[16] As indicated above, the legislative changes came into force on 1 January 2021.[17]

The initial aim of strengthening the characteristic features of the existing law in order to improve legal certainty and clarity was maintained during the entire process, which was conducted with the old saying "if it ain't broke, don't fix it" in mind.[18] This was to be achieved by codifying important holdings in the Supreme Court's case law and, in so doing, clarifying ambiguous points. In a nutshell, the 2021 Reform was intended to facilitate the statute's application.[19]

Along these lines, several amendments had the sole purpose of codifying case law (in particular, on the obligation to raise an objection to violations of procedural rules *immediately*, on the correction and interpretation of awards by the arbitral tribunal, and on the revision of arbitral awards). Tellingly, the only amendment that specifically departed from the case law was aimed at increasing the predictability of the application of Chapter 12 PILA.

Other modifications were intended to improve the readability of the text, particularly for non-Swiss users, since Chapter 12 PILA targets foreign parties and is in direct competition with

was published following the Message, FF 2018, 7201, and can be consulted at https://www.fedlex.admin.ch/ eli/fga/2018/2549/fr.

16 For further details on the issues discussed in the parliamentary proceedings, see in particular F. DASSER, "Revision of Chapter 12 of the PILA or Why and How to Modernize a (Still) Modern Law?", op. cit., pp. 11-15; D. GIRSBERGER and F. LORETAN, "Internationale Schiedsgerichtsbarkeit: Revision des 12. Kapitels IPRG", *SRIEL*, 2020.391-407; PH. HABEGGER, "Das Parlament verabschiedet die Revision von Kapitel 12 IPRG mit einem Feinschliff", *ASA Bull.*, 2020.548-579.

17 Loi fédérale sur le droit international privé (LDIP), Modification du 19 juin 2020, RO 2020 4179, https://www.fedlex.admin.ch/eli/oc/2020/767/fr.

18 F. DASSER, "Revision of Chapter 12 of the PILA or Why and How to Modernize a (Still) Modern Law?", op. cit., p. 9.

19 Message, p. 9.

the laws of other States[20] (many of which have undertaken similar efforts to reform their arbitration laws).[21] Importantly, the 2021 Reform eliminated all the references to the CCP[22] thus ensuring that Chapter 12 PILA is entirely self-standing and allowing its users to refer to a single law.[23]

There are only a few substantive changes to the regime governing international arbitration as set out in Chapter 12 PILA. Three of them are worth highlighting here, and their impact will be discussed below:

- The first relevant change is that the powers of the *juge d'appui* (i.e., the State court at the place of arbitration, which can be resorted to if any assistance is required during the arbitration proceedings) have been expanded. Notably, the *juge d'appui* can now appoint arbitrators in circumstances where an arbitration agreement does not contain any indication of a seat, and can intervene in support of foreign arbitrations.[24]
- The second notable change is that the possibility to obtain the revision of an arbitral award where a ground for challenge is discovered after the closing of the proceedings has been codified.[25]
- Thirdly, parties are now able to file applications to set aside an award (or a request for revision) in English before the Swiss Supreme Court.[26]

In the following sections we set out the main amendments to Chapter 12 PILA, which include changes to the rules

20 Message, p. 11.

21 Message, p. 22.

22 This is most notable as far as the constitution of the arbitral tribunal is concerned.

23 Ibid.

24 See *infra*, Chapters V.B and VII.

25 See *infra*, Chapter X.

26 See *infra*, Chapter IX.A.3.

governing: Chapter 12 PILA's scope of application (see below III); the arbitration agreement (see below IV); the constitution of the arbitral tribunal (see below V); the challenge and disqualification of arbitrators (see below VI); the *juge d'appui*'s assistance with respect to the arbitral process (see below VII); the correction and interpretation of awards, and additional awards (see below VIII); the setting aside of awards (see below IX); and the revision of awards (see below X).

III. The Provisions on the Scope of Application of Chapter 12 PILA Were Adjusted

Two amendments concern the scope of application of Chapter 12 PILA in the 2021 Reform – firstly the definition of an "international" arbitration, and secondly the manner in which a party may opt in (or out) of the regime under either the PILA or the CCP.

A. The internationality of the arbitration

Article 176(1) PILA defines the scope of application of Chapter 12 PILA, in particular when an arbitration is considered to be "international". Notably, and contrary to other arbitration statutes (see, in particular, Article 1504 of the French CCP), the requirement of internationality under the PILA does not depend on the nature of the dispute, but on the domicile or habitual residence of the parties.[27]

Prior to the 2021 Reform, an arbitration was deemed international under the PILA if at least one of the parties had,

[27] On this issue, see for instance, J.F. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, 2nd ed., Sweet & Maxwell, 2007, paras. 31-35; G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., paras. 2.26-2.35.

at the time of the conclusion of the arbitration agreement, neither its domicile nor its habitual residence in Switzerland. However, this formulation gave rise to difficulties in cases involving multiple parties as it was not clear whether the legislator had the parties to the arbitration *agreement* or the parties to the arbitration *proceedings* in mind. This led to difficulties in cases where only some of the parties to the original arbitration agreement were ultimately involved in the actual arbitration based on such agreement. In a judgment of 2002, the Supreme Court ruled that whether an arbitration was 'international' depended on the parties to the arbitration *proceedings.*[28] According to this case law, taking the hypothesis of an international consortium made up of two Swiss companies and several foreign companies, the arbitration would have been (i) domestic if it only opposed the two Swiss companies, and (ii) international if at least one foreign party was involved in the proceedings.

This case law attracted criticism,[29] in particular because the Supreme Court's solution undermined legal predictability (i.e., the very reason why the legislator chose to rely on the domicile of the parties and not on the nature of the dispute to start with) by not allowing a party to definitively determine the applicable regime (domestic or international) at the time of the conclusion of the arbitration agreement.[30] Recognizing the need to reinforce legal certainty,[31] Article 176(1) PILA now reads as follows: "*The provisions of this Chapter shall apply*

[28] DSFSC 4P.54/2002 dated 24 June 2002, reas. 3, *Bull. ASA,* 2003.131.

[29] G. KAUFMANN-KOHLER and A. RIGOZZI, "When is a Swiss arbitration international? Comments on a Swiss Federal Tribunal decision of June 24, 2002", Jusletter 7 October 2002; S. BESSON, "Réflexions sur la jurisprudence suisse récente rendue en matière d'arbitrage international", *ASA Bull.,* 2003.469-470. See also B. BERGER and F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, op. cit. (3rd ed., 2016), para. 79 et para. 101, and the references cited.

[30] S. BESSON, "Réflexions sur la jurisprudence suisse récente rendue en matière d'arbitrage international", *ASA Bull.,* 2003.470.

[31] Message, p. 24.

to arbitrations with their seat in Switzerland if at least one of the parties to the arbitration agreement, at the time of its conclusion, did not have its domicile, habitual residence or seat in Switzerland". In other words, the 2021 Reform made it clear that the international nature of an arbitration would be determined by reference to the parties to the original arbitration *agreement*.

B. Opting-in and opting-out of Chapter 12 PILA

Article 176(2) PILA allows parties to an international arbitration to exclude the application of Chapter 12 PILA and submit to Part 3 CCP, in other words, to opt for the domestic regime instead of the international regime. According to Article 353(2) CCP, the opposite is also possible, as the parties to a domestic arbitration may exclude the domestic arbitration regime and opt for the international regime of the PILA.

These provisions raise several questions,[32] mainly because the arbitrability of disputes is defined in different terms in the PILA[33] and the CCP.[34] These issues were not addressed in the 2021 Reform (and are beyond the scope of the present contribution). The 2021 Reform introduced a clear requirement with regard to the form of the parties' declaration opting out of the international regime and into the domestic

[32] See in particular S. BESSON, "Les limites au choix du droit applicable à l'arbitrage et au fond en matière interne", *RJN* 2014. pp. 19-41, in particular, p. 23. See also F. PERRET, "Les passerelles entre le droit de l'arbitrage interne et international: une particularité du droit suisse" in V. Heuzé et al. (eds), *Mélanges en l'honneur du Professeur Pierre Mayer*, Lextenso, 2015, pp. 687-695, in particular, pp. 690-692, and the references; I. ARMBAUEN, *3. Teil ZPO versus 12. Kapitel IPRG - Eine Gegenüberstellung im Kontext der Opting-out-Möglichkeiten, Unter besonderer Berücksichtigung der zwingenden Bestimmungen, der Schiedsfähigkeit und der Anfechtbarkeit von Schiedssprüchen*, PhD Thesis, Schulthess, 2016, in particular p. 146 et seq.

[33] Art. 177 PILA, which enshrines the very broad criterion of a "financial interest".

[34] Art. 354 CCP, which retains the more classic criterion of the free "availability" of rights.

one. According to Article 176(2) PILA's new wording, the declaration "*shall meet the conditions as to form set out in Article 178(1) [PILA]*". Article 353(2) CCP already required, in slightly different language, that an agreement to opt out of Part 3 CCP and into Chapter 12 PILA was subject to the formal requirements of Article 358 CCP, and now uses the same wording as Article 176(2) PILA ("*shall meet the conditions as to form set out in Article 358 [CCP]*"). Previously, the declarations under Article 176(2) PILA (and Article 353(2) CCP) had to be "express", which led to some confusion, in particular, as to whether the declaration was subject to more stringent formal requirements than those applicable to the arbitration agreement itself.[35] The language now used in both provisions resolves this confusion by requiring that the declaration to opt-in or opt-out is subject to a so-called "unified"[36] formal requirement.

IV. The Provisions on the Validity of the Arbitration Agreement Were Refreshed

The issue of the validity of the arbitration agreement was discussed extensively during the legislative process but eventually only two minor amendments were implemented by the 2021 Reform.

[35] The majority of the doctrine already considered that the same requirements were supposed to apply: cf. e.g., D. GIRSBERGER and N. VOSER, International Arbitration – Comparative and Swiss Perspectives, 3rd ed., Schulthess, 2016, para. 212; D. PIFFNER and D. HOCHSTRASSER, "Art. 176 IPRG", in H. Honsell et al. (eds), *Basler Kommentar – Internationales Privatrecht*, Helbing, 3rd ed., 2013, para. 45 and the references.

[36] The expression "unified form" appears in the Message, pp. 11 et 24.

A. Formal validity of the arbitration agreement

Certain proposed changes to relax the formal requirements under Article 178(1) PILA were ultimately not included in the 2021 Reform[37].

As a preliminary matter, it is worth recalling that the written form requirement of Article 178(1) PILA is different from the concept of the written form under Article 13 of the Swiss Code of Obligations ("CO")[38]. Specifically, Article 178(1) PILA does not require a signed text – for example a simple "OK" by e-mail suffices, if that "OK" is referring to the arbitration agreement.

The 2021 Reform only adjusted the wording of Article 178(1) PILA to the reality of today's communications by deleting the (outdated and thus potentially confusing) reference to "telegram, telex and fax" and simply adopting a more general formulation, requiring the conclusion of an arbitration agreement "*in writing or in any other manner that can be evidenced by text*". The new wording clarifies that arbitration agreements can validly be entered into, for instance, by Whatsapp; it will not need to be further adjusted to take into account the new means of communication that will inevitably appear in the future, as long as the content of such communications can be "evidenced by text".

This change does not affect the current regime, in particular the fact that the written form requirement is not strictly applicable in the event of an extension of the arbitration agreement to a (non-signatory) third party. Indeed, in this context, the Supreme Court has ruled that the formal

[37] See Message, p. 21.

[38] P. LALIVE, J.-F. POUDRET and C. REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, op. cit., Art. 178 LDIP, para. 10; G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 3.67 and the references; DSFSC 142 III 239, reas. 3.3.1.

requirement of Article 178(1) PILA does not apply to the extension of the scope of a (formally valid) arbitration agreement to a third party consenting to be bound by a valid agreement between the original parties.[39] Such consent can be given without necessarily respecting the form prescribed under Article 178(1) PILA.[40]

B. Arbitration agreement in a unilateral legal act or in articles of association

Turning to the substantive validity of the arbitration agreement, the 2021 Reform added a new (4th) paragraph to Article 178 PILA expressly stating that Chapter 12 PILA "*shall apply by analogy to an arbitration clause set out in a unilateral legal act or in articles of association*".

The Message itself indicates that the added value of this paragraph is limited, and that the change merely serves to clarify the admissibility of such arbitration agreements for legal certainty purposes.[41] The 2021 Reform does not, however, aim at regulating arbitration agreements contained in unilateral legal acts and articles of association. According to the Message, Article 178 PILA is sufficiently flexible "*to allow for the taking into account of the specificities of this kind of arbitration clauses*", and "*any potentially open issues can be resolved by the doctrine and the case law*".[42]

The Message illustrates the limitations of the new wording of Article 178(4) PILA by reference to an inheritance example:[43] The substantive validity of an arbitration agreement in a will can be determined by Swiss inheritance law, as Swiss law is one of the laws applicable to the validity of the arbitration

[39] DSFSC 129 III 727, reas. 5.

[40] S. BESSON, "Les parties à l'arbitrage", Revue Suisse de Procédure Civile, 2006.313-327, 316.

[41] Message, p. 26.

[42] Ibid.

[43] Ibid.

agreement under Article 178(2) PILA,[44] even if the will itself is governed by a foreign inheritance law. At the same time, the Message also makes clear that the issue of whether arbitration agreements contained in a will are valid under Swiss substantive inheritance law is not part of the 2021 Reform.[45]

Finally, as noted, arbitration agreements included in the articles of association of companies are also mentioned in the new Article 178(4) PILA. On this point too, the 2021 Reform does not bring any substantive changes.[46] At most, it confirms the validity of arbitration agreements contained in the articles of association and regulations of sports federations.

The difficulty of the subject rather lies in identifying the circle of persons bound by such clauses. The issue is discussed mainly with respect to corporate disputes as an arbitration agreement in the articles of association of a corporation might violate the prohibition against imposing additional obligations on shareholders beyond those provided by company law.[47] The 2021 Reform does not provide an answer to this question. However, a parallel reform of company law has now resolved the issue with the adoption of a new Article 697n CO, which expressly provides that: (i) the articles of association may provide for the resolution of company law disputes by an arbitral tribunal seated in Switzerland; and (ii) unless otherwise provided in the articles of association, the company,

[44] On the application of Art. 178 (2) PILA, see notably J.-F. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, op. cit., para. 300; B. BERGER and F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, Sweet & Maxwell, 4th ed., 2021, para. 391 et seq.; G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., paras. 3.75-3.80.

[45] Message, pp. 26-27, which sets out a useful summary of the Swiss law on this tricky question.

[46] Message, p. 28.

[47] Ibid.

its bodies, the members of the bodies and the shareholders shall be bound by such an arbitration agreement.[48]

V. The Regime Governing the Constitution of the Arbitral Tribunal Has Been Streamlined and Rendered More Effective

The next relevant amendments in the 2021 Reform concern the constitution of the arbitral tribunal, or, more specifically, the appointment and replacement of arbitrators, which is governed by Article 179 PILA.

[48] Art. 697n CO, which will enter into force on 1st January 2023 (see https://www.bj.admin.ch/bj/fr/home/wirtschaft/gesetzgebung/aktienrechtsrevision14.html), is part of the provisions on the Swiss joint stock company law, adopted by parliament on 19 June 2020 (same day as the Chapter 12 PILA revision), RO 2020 4005, available at (in French) https://www.fedlex.admin.ch/eli/oc/2020/746/fr. Art. 697n CO further states, under paragraph 2, that in case of statutory arbitration, "*the arbitration proceedings are governed by Chapter 3 of the CCP*; [Chapter 12 PILA] *is not applicable*", which excludes the possibility of concluding an opting out agreement in favour of Chapter 12 PILA. Paragraph 3 provides that "*the statutes may regulate the details, in particular by reference to arbitration rules. They shall ensure that the persons who may be directly affected by the legal effects of the arbitral award are informed of the commencement and conclusion of the proceedings and may participate in the constitution of the arbitral tribunal and in the proceedings as interveners*". With respect to this new provision, see for instance R. ALLEMAN, "Setting the Ground for Corporate Arbitration in Switzerland: Swiss Parliament Approves New Rules for Arbitration of Corporate Law Disputes", Kluwer Arbitration Blog, 17 August 2020, http://arbitrationblog.kluwerarbitration.com/2020/08/17/setting-the-ground-for-corporate-arbitration-in-switzerland-swiss-parliament-approves-new-rules-for-arbitration-of-corporate-law-disputes/; H.-U. VOGT and P. SCHMIDT, "Schiedsklausel in Vereinsstatuten – Bermerkungen zum Bundesgerichtsurteil 5A_1027-2018 vom 22. Juli 2019 und zur Revision des 12. Kapitels IPRG und des Aktienrechts", Partie I, *ASA Bull.*, 2020.75-95; *Id.,* Partie II, *ASA Bull.*, 2020.315-337.

A. Stand-alone regime for the appointment and replacement of arbitrators

The first notable amendment is the deletion of the reference in Article 179 PILA – formerly found in paragraph 2 – to the provisions of the CCP as being applicable "by analogy". This amendment is probably the most prominent example of the intention to improve the readability of Chapter 12 PILA's text,[49] particularly for its foreign users. The legal regime does not change but it can be more easily understood by reference to a single piece of legislation.

The rules of the CCP (that were applicable by analogy) are now expressly set out in Article 179 PILA. For instance, it is now immediately clear that "[u]*nless the parties have agreed otherwise, the arbitral tribunal shall consist of three arbitrators, whereby two of the arbitrators are appointed by each of the parties and the two arbitrators so appointed unanimously select the third arbitrator as the president of the tribunal*" (Article 179(1) PILA).

The PILA has also incorporated in its Article 179(5) the rule set out in Article 362(2) CCP, according to which "*[i]n the case of a multi-party arbitration, the State court may appoint all arbitrators".* This rule provides that the court *may* appoint all arbitrators. Swiss courts will thus enjoy more flexibility than the French courts under Article 1453 French CCP,[50] which does not grant the court any discretion. Along the lines of the provisions in Article 12(8) (and Article 12(9)) of the ICC Rules,[51] the Swiss court will be in a position to take into account all the circumstances of the case and possibly decide that the claimant can be allowed to appoint an arbitrator even

[49] Message, p. 11.

[50] Art. 1453 French CCP is applicable in international arbitration by the reference of Art. 1506 French CCP.

[51] For a recent illustration, cf. CA Paris – Chambre commerciale internationale, 26 janvier 2021, *PT Ventures SGPS S.A. v. Vidatel Ltd., Mercury Serviços de Telecomunicações SA and Geni SA*.

in cases where there are multiple respondents, if the latter belong to a group of companies or have otherwise aligned interests.[52] The Message also makes clear that Swiss courts can decide, under Article 179(5) PILA, to appoint only the arbitrator of the defaulting party or side – and not all the arbitrators – in order to avoid purely strategic behaviour on the part of several claimants or respondents.[53]

B. The extension of the jurisdiction of the *juge d'appui*

The second notable amendment in the 2021 Reform is the addition to Article 179 PILA of a rule extending the jurisdiction of the Swiss *juge d'appui* for the purposes of the appointment and replacement of arbitrators in two cases: (i) where the seat of arbitration is in Switzerland (without further specification of a specific canton or city); and (ii) where the seat has not been designated at all.

1. Arbitration "in Switzerland"

The first situation relates to the federal structure of Switzerland, namely that (despite the fact that the law governing civil procedure is now unified at the federal level) judicial organization remains a matter of cantonal law.[54] In

[52] See for instance T. GÖKSU, "Art. 362 – Nomination par l'autorité judiciaire" in I. Chabloz, P. Dietschy-Martenet and M. Heinzmann (eds), *CCP – Code de procédure civile: Petit commentaire*, Helbing, 2021, para. 17; PH. HABEGGER, "Art. 362 ZPO", in K. Spühler, L. Tenchio and D. Infanger (eds), *Basler Kommentar: Schweizerische Zivilprozessordnung*, 3rd ed., Helbing, 2017, para. 32. Under Swiss law, it is accepted that this flexibility applies even where the arbitration agreement expressly provides for the right of each party to designate an arbitrator (see for instance J.-F. POUDRET, "Arbitrage multipartite et droit suisse", *ASA Bull.*, 1991.8, 19). For a discussion of these questions under French law, see CH. SERAGLINI and J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, LGDJ, 2nd ed., 2019, para. 771, pp. 765-767.

[53] Message, p. 30.

[54] The courts are established by cantonal laws and there are therefore no "Swiss" courts – except for the Supreme Court which is an appellate body.

this context, the effectiveness, and indeed the validity, of an arbitration agreement providing for an *ad hoc* arbitration with a seat in Switzerland without mentioning a place that would allow one to identify the relevant canton had been questioned (as the claimant was unable to identify and therefore seize a court – inevitably cantonal – to appoint the arbitrator on behalf of a recalcitrant respondent). The 2021 Reform has adopted the doctrinal view that in such situations the claimant should be able to seize a cantonal court of its choice and request the commencement of arbitration proceedings:[55] "*If the parties* […] *have merely agreed that the seat of the arbitration shall be in Switzerland, the State court first seized shall have jurisdiction*" (Article 179(2) PILA). In practice, this will allow the claimant to choose the State court of the canton of its choice, for example, the Geneva Court of First Instance,[56] the President of the Lausanne District Court,[57] or the Obergericht of Zurich.[58] Once the State court has appointed the arbitrators, the arbitral tribunal can then specify the seat of the arbitration (Article 176(3) PILA).[59]

2. The "blank clause"

The 2021 Reform modifies Article 179(2) PILA even further to also allow for the intervention of the State court first seized in another, less straightforward, situation, namely when "*the parties have not designated a seat*" (nor an effective

[55] Message, pp. 28-29, referring to S. BESSON, "L'efficacité de la clause 'arbitrage en Suisse' et de la clause blanche", in J.-D. Bredin et al. (eds), *Liber Amicorum Claude Reymond*, Paris 2004, pp. 11-27, where the rationale is based on the prohibition of an abuse of rights by the claimant and the reasoning is more nuanced than suggested by the Message; see also, for instance, B. BERGER and F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, op. cit. (4th ed., 2021), para. 756.

[56] Art. 86(2)(d) of the Loi sur l'organisation judiciaire du Canton de Genève.

[57] Art. 47(1) al. 1 of the Code de droit privé judiciaire vaudois.

[58] Art. 46 of the Loi sur l'organisation judiciaire dans la procédure civile et pénale du Canton de Zurich.

[59] Message, p. 29.

contractual mechanism for the appointment of arbitrators); i.e., a so-called "blank clause".

Other legislations allow the *juge d'appui* to intervene, including with respect to the appointment of arbitrators, in the absence of a designated seat, but often provide for additional requirements to be met. For instance, Section 2(4) of the English Arbitration Act allows the intervention of an English court where the seat is not determined if, "*by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so*".[60] In France, Article 1505 CCP allows the French *juge d'appui* to intervene "*when one of the parties is exposed to a risk of denial of justice*".[61]

The new Swiss rule under Article 179(2) PILA goes further, as it allows the Swiss *juge d'appui* to intervene in all cases where the seat is not designated, regardless of whether there is any link with Switzerland or a risk of denial of justice (whatever the exact meaning to be given to these expressions may be). In doing so, the Swiss legislator seems to have decided to offer a place of asylum, as it were, for any party confronted with an arbitration agreement that does not provide for a seat and/or for an appointment mechanism for arbitrators. This is achieved by providing for a special kind of universal jurisdiction of the "first seized" State court in Switzerland to resolve deadlocks in the constitution of the arbitral tribunal. The Message does not fix any restrictions on this universal jurisdiction of the Swiss courts under Article 179(2) PILA and justifies the solution based on what we could call a pro-arbitration bias of Swiss law (by reference to the principle *in*

[60] R. MERKIN, L. FLANNERY, *Arbitration Act 1996*, 6th ed. 2020, §2.4, p. 35; *Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC), 3 August 2010.

[61] See in particular Art. 1505(4) which codifies (and indeed expands) the case law of Cass. civ. 1re, 1 février 2005, *Etat d'Israël v. NIOC*, Rev. arb., 2005.693, note H. Muir Watt.

favorem validitatis and the idea that this will enhance the attractiveness of arbitration in Switzerland).[62]

C. Codification of the arbitrators' duty to disclose

Finally, it is also worth mentioning that the 2021 Reform has codified[63] the so-called duty to disclose in a new Article 179(6) PILA: "*A person who has been approached to serve as arbitrator must promptly disclose any circumstances that may give rise to justifiable doubts as to his or her independence or impartiality. This obligation shall persist for the duration of the proceedings*."

Whilst the general duty of disclosure seems universally accepted today, its scope and the consequences of its violation are not uniform across jurisdictions.[64] As far as Switzerland is concerned, traditionally, the case law of the Supreme Court was both (i) lenient towards arbitrators by providing that a breach of the duty of disclosure is not a ground for challenge (or a ground to set aside the award) in and of itself,[65] and (ii) particularly demanding towards the parties, by imposing an obligation to raise any grounds for challenge not disclosed by the arbitrators when these are based on publicly accessible

[62] Message, p. 29.

[63] The duty of disclosure is not a novelty – well before appearing in the text of the PILA it was beyond doubt that it applied in international arbitration in Switzerland and had been recognized by both doctrine and case law (DSFSC 111 Ia 72, reas. 2.c; DSFSC 136 III 605, reas. 3.4.4; see G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 4.157) and had already been codified in Art. 363 CCP for domestic arbitration.

[64] J.-F. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, op. cit., para. 429; the French case law seems to have evolved on this issue, as indicated in particular by C. SERAGLINI and J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, op. cit., para. 746.

[65] DSFSC 4P.188/2001 of 15 October 2001, reas. 2.f, *Bull. ASA,* 2002.321, 327.

information.[66] In this context, the Supreme Court had developed the concept of the parties' "duty of curiosity" regarding the existence of possible grounds for challenge.[67] Pursuant to this duty of curiosity, a party must carry out its own investigations to ensure that the arbitrator in question offers sufficient guarantees of independence and impartiality; it cannot rely on the arbitrator's disclosures, if any, being comprehensive and timely. Such investigations include using search engines and consulting sources that are likely to reveal a possible risk of bias on the part of an arbitrator (such as the websites of the main arbitration institutions, of the parties and of the parties' counsel's law firms). The Supreme Court accepted that the parties are not expected to engage in a systematic and thorough examination of each and every source relating to a given arbitrator, and recently clarified that having conducted relevant searches at the outset of the proceedings, a party cannot as a general rule be expected to continue its research throughout the arbitration, nor, *a fortiori*, to scrutinize the arbitrators' posts on social media during the arbitration proceedings.[68] In this last decision the Supreme Court was well aware that the new legislation was about to come into force and yet adjusted its case law without express reference to the new Article 179(6) PILA, which suggests that the 2021 Reform will not impact its future case law (and that

[66] In such circumstances the party can lose its right to invoke the ground for challenge in question (DSFSC 4A_318/2020, reas. 6.1 (not published in DSFSC 147 III 65); DSFSC 136 III 605, reas. 3.2.2; DSFSC 4A_110/2012 of 9 October 2012 reas. 2.1.2; DSFSC 4A_506/2007 of 20 March 2008 reas. 3.1.2)). This is an application of the principle of procedural good faith, which in this context means that the right to invoke the plea based on the irregular composition of the arbitral tribunal lapses if the party does not assert it immediately, especially if the outcome of the proceedings is unfavourable to the party seeking to rely on that ground.

[67] See DSFSC 136 III 605, reas. 3.4.2; see also DSFSC 4A_110/2012 of 9 October 2012, reas. 2.2.2; DSFSC 4A_763/2011 of 30 April 2012 reas. 3.3.2; DSFSC 4A_234/2008 of 14 August 2008, reas. 2.2.2; DSFSC 4A_528/2007 of 4 April 2008, reas. 2.5.3; DSFSC 4A_506/2007 of 20 March 2008, reas. 3.2.

[68] DSFSC 147 III 65, reas. 6.5.

the explicit reference to the duty of disclosure is essentially pedagogical in nature).

VI. The Rules Concerning the Challenge and Removal of Arbitrators Were Clarified

As part of the 2021 Reform, certain amendments to Articles 180, 180a and 180b PILA – which govern the challenge and disqualification of arbitrators – were also made.

Article 180 PILA (which sets out the grounds for challenge) has been modified only editorially, with Article 180(1)(c) PILA now providing that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's independence *"or impartiality"*. In the past, only the notion of independence was mentioned in this provision, but it was accepted in the case law that lack of impartiality was also a ground for challenge.[69]

A new Article 180a PILA was added to set out the "*challenge procedure*", along the lines of what is provided for by Article 369 CCP for domestic arbitration.

- Article 180a(1) PILA provides that "[u]*nless the parties have agreed otherwise and if the arbitration proceedings have not yet been concluded, written notice of the request for challenge stating the grounds must be given to the challenged arbitrator and the other members of the arbitral tribunal within 30 days of the date on which the requesting party becomes aware of the grounds for the challenge or could have become aware thereof had it exercised due diligence*".

[69] Message, p. 31, referring to the *Valverde* case, DSFSC 136 III 605, reas. 3.2. See also reas. 3.3.1 of that decision, with the references cited.

- Article 180a(2) PILA provides that "[t]*he requesting party may, within 30 days of the submission of the request for challenge, challenge the arbitrator before the State court"* and confirms that "*the decision of the State court is final*".

As with other changes discussed above, the 2021 Reform ensures that the regime concerning challenges is exhaustively set out in the PILA. Under the previous regime, the procedure was set out only summarily and commentators suggested that the procedure and the time limits set out by Article 369 CCP for domestic arbitration could be used as a guide (even if, unlike what was provided for with respect to the appointment of the arbitrators, the statute did not contemplate the analogical application of the domestic arbitration regime).[70]

A new Article 180b PILA has been included to govern in a more comprehensive way the removal of arbitrators. Article 180b(1) PILA sets out the obvious principle that "[a]*ny arbitrator may be removed by agreement of the parties"*. Article 180b(2) PILA restates the principle previously set out in Article 179 PILA that "*a party may apply, with reasons and in writing, to the State court for the arbitrator's removal*" and newly sets out the cause for removal, namely that the "*arbitrator is unable to perform his or her duties within a reasonable time or with due diligence*". It is submitted that these requirements will be interpreted narrowly and that the courts will not lightly remove an arbitrator.

The references to the State court in Articles 180a and 180b PILA are to the cantonal court of the seat of the arbitration and not the Supreme Court, which has jurisdiction only in the event of an application to set aside or a request for the revision of the award (nor is the State court a "federal *juge d'appui*", the creation of which was discussed in the framework

[70] G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 4.150 and the references.

of the revision of the law, but was eventually not implemented).[71]

Both in the context of a challenge and a removal, Articles 180a and 180b PILA specify that the decision of the State court is final. This means that the State court's decision is not subject to an immediate appeal before the Supreme Court. That being said, in our opinion, it does not mean that a decision to reject[72] a request for challenge or removal cannot be reviewed later, indirectly, in the context of an action to set aside the award based on Article 190(2)(a) PILA (irregularity in the composition of the arbitral tribunal).[73] As this possibility is expressly provided for in domestic arbitration by Articles 369(5) and 370 CCP,[74] it is regrettable that Articles 180a and 180b PILA are silent on this issue and that

[71] Cf. *infra*, Chapters IX and X.

[72] The situation is obviously different in the event of a (mistaken) admission of a request for challenge or revocation, since the party in question would not be able to demonstrate a real procedural prejudice, given that it was in any case able to appoint a new arbitrator.

[73] S. BESSON, "Réflexions sur la jurisprudence suisse récente rendue en matière d'arbitrage international", *Bull. ASA*, 2003.463, 470-472, criticising contrary case law of the Supreme Court (DSFSC 128 III 330, reversing a previous decision that was consistent with the position expressed herein), which the Supreme Court subsequently confirmed (DSFSC 138 III 270). Also critical, J.-F. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, op. cit., para. 791, G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 4.156, with the references cited; M. ORELLI, "Art. 180 PILS", para. 36, in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2nd ed., Kluwer, 2018, adding (in agreement with B. BERGER and F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, op. cit. (3rd ed., 2016), para. 915), that the decision on recusal or dismissal should be reviewable in the context of an application to set aside the award if a ground of appeal against the procedure that led to this decision (e.g., the violation of the right to be heard of the party who requested the recusal or dismissal), as opposed to its result, were to be invoked before the Supreme Court.

[74] Art. 369(5) CCP provides that the court's decision on a challenge of an arbitrator can only be reviewed through a set aside application before the Swiss Federal Supreme Court and Art. 390 CCP stipulates that the same applies to decisions concerning removals.

the opportunity was missed to clarify this once and for all also in international arbitration.[75]

As a final matter, it is worth noting that Article 180a(3) PILA newly clarifies that "[u]*nless the parties have agreed otherwise, during the challenge procedure the arbitral tribunal may proceed with the arbitration and render an award, with the participation of the challenged arbitrator*". The same rule has not been contemplated in the event of a request for removal. However, it is submitted that the arbitral tribunal should be allowed to continue the proceedings in order to avoid any delay in cases where the ground for removal is the alleged inability by the arbitrator "*to perform his or her duties within a reasonable time*" within the meaning of Article 180b(2) PILA.

VII. The Role of the *Juge d'appui* Has Been Extended

Chapter 12 PILA has promoted and developed the notion of "assistance" of the State court in arbitration proceedings, which has given rise to the use of the expression *juge d'appui* (supporting court).[76] In addition to the above-mentioned situations where the appointment, challenge and removal of arbitrators is requested, the *juge d'appui* can also provide its 'support' with respect to provisional measures ordered by the

[75] See DSFSC 141 III 444.

[76] See in particular P. LALIVE, J.-F. POUDRET and C. REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, op. cit., *passim*, and in particular ad Art. 185 LDIP, paras. 1-2. Although the text of the PILA does not contain this wording, the French legislator "borrowed" it during the 2011 Reform (see Arts. 1451-1458, 1460-1461, 1463 and 1505 French CCP; E. GAILLARD and P. DE LAPASSE, "Commentaire analytique du décret du 13 janvier 2011 portant réforme du droit français de l'arbitrage", *Cah. arb.,* 2011.263, 270).

arbitral tribunal (Article 183(2) PILA),[77] the taking of evidence (Article 184(2) PILA), and any "further assistance" (Article 185 PILA). The 2021 Reform reinforced this role of the Swiss courts in several respects.

A. Provisional measures

With respect to the enforcement of arbitral orders on provisional measures, the revised Article 183(2) PILA specifies that the assistance of the State court may be requested not only by the arbitral tribunal but also, and newly so, "*by a party*". The Message[78] confirms that, on this point, the 2021 Reform merely implemented the view and the suggestions of the overwhelming majority of the doctrine.[79]

B. Taking of evidence

With respect to the taking of evidence, the principle that the Swiss *juge d'appui* shall apply its own law was reiterated in a

[77] The Swiss judge further has jurisdiction to take interim measures, which should not be confused with the role of assistance set out under Art. 183(2) PILA, as noted in the Message (p. 33).

[78] Message, p. 33.

[79] S. BERTI, "Artikel 183 IPRG", n° 16, in H. Honsell, N. P. Vogt, A. Schnyder, S. Berti (eds), *Internationales Privatrecht - Basler Kommentar*, 2nd ed., Helbing, 2007. Some authors, including J-F. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, op. cit., para. 637; G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 6.136 (note 172), and A. BUCHER, "Art. 183 LDIP", para. 12, in A. Bucher (ed.), *Commentaire romand LDIP*, op. cit., highlighted the challenges that may result from this limitation for the arbitral tribunal. Further to the adoption of Art. 374(2) CCP, which provides that the parties (provided that they have received the tribunal's consent) may also turn to the judge to enforce an arbitration order on interim measures, several authors expressed themselves in favour of an interpretation of Art. 183(2) PILA along the same lines (e.g., T. GÖKSU, *Schiedsgerichtsbarkeit*, Dike, 2014, para. 1941; Ch. Boog, "Interim Measures in International Arbitration", in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, 2nd ed., Kluwer, 2018, para. 36. It should be noted that the revised text of Art. 183(2) PILA is now more flexible than the text of Art. 374(2) CCP because it does not require the arbitral tribunal's consent.

new Article 184(3) PILA, with the added possibility that the judge may "*upon request,* […] *apply or consider other forms of procedure*". The fact that this addition replicates the general provision of Article 11a PILA on mutual assistance in civil matters does not mean that the additional requirements set out in this provision (in particular that "*this is necessary for the recognition of a right abroad and provided that there are no important countervailing reasons relating to the person*") shall apply to State court assistance in favour of an arbitral tribunal. By the same token we believe that the Message's suggestion that foreign procedural law can be applied or taken into account applies only "*if the arbitration agreement provides for general procedures, or procedures for the taking of evidence, [derived from] domestic or foreign law*" is overly restrictive.[80] In our view, the Swiss judge should be allowed to take into account foreign rules of procedure even if they were not provided for in the arbitration agreement. The impact of such uncertainty should not be overestimated, as concrete situations in which Swiss courts might have to resort to foreign rules of procedure to assist an arbitral tribunal are very limited.[81] More generally, the cases in which the parties or the arbitral tribunal resort to the *juge d'appui* in relation to the taking of evidence have been very rare. It is indeed both more common and efficient for arbitrators to draw adverse inferences when confronted with non-cooperation in the taking of evidence by a party. For example, we have never encountered any attempt in Switzerland to enforce a document production order issued by an arbitral tribunal. We

[80] Message, p. 34.

[81] L. RAESS, "Court Assistance in the Taking of Evidence – Switzerland's Way Forward", *SRIEL*, 2020.27, pp. 34-42, mentions the examples of cross-examination of witnesses or even of decisions ordering the filing of witness statements, two evidentiary measures which are not recognized in the Swiss CCP. However, he mentions that the Swiss "*juge d'appui*" would likely be reluctant to order such measures, especially if the arbitral tribunal has its seat in Switzerland, in which case it would be preferable if the arbitrators order the required measures themselves.

do not anticipate that the possibility that a foreign law may apply will significantly change things in this respect. A request for the Swiss court to summon an uncooperative witness is, on the other hand, not as rare[82] and foreign law might be of interest in particular when it provides for stronger sanctions in case of non-compliance with the court order.

C. Support in foreign arbitration proceedings

The main novelty with regard to the assistance of the State courts appears in the addition of Article 185a PILA, which newly regulates the Swiss courts' support in foreign arbitration proceedings. More specifically, it is now possible for foreign arbitral tribunals and parties to foreign arbitral proceedings to request the Swiss courts' support in matters of provisional measures and the taking of evidence (with the caveat that, with respect to the taking of evidence, a party may only request the assistance of the Swiss court if it has the consent of the foreign arbitral tribunal). It is suggested in the Message that this direct access to the Swiss *juge d'appui* is likely to be more effective than the ordinary mutual legal assistance mechanism, which is premised on the existence of a decision rendered by a foreign *juge d'appui.*[83] The only condition for this direct access to the Swiss court is that the execution of the provisional measure or the taking of the evidence in question must be intended to take place in Switzerland. By way of a practical example, Article 185a PILA could apply when a Swiss bank is directly or indirectly involved in the dispute.

[82] To provide two examples, see "Genève, Tribunal de première instance, Ordonnance du 24 février 2016 prévoyant la comparution d'un témoin" and "Genève, Tribunal de première instance, Citation d'un témoin, le 9 février 2015", reproduced in S. THORENS-ALADJEM, "Le juge d'appui en matière d'arbitrage interne et international", *ASA Bull.*, 2017.530, pp. 546-547.

[83] Message, pp. 34-35.

The new Article 185a PILA is reminiscent of provisions which already exist in other arbitration laws, in particular English law (Sections 43 and 44, in conjunction with Section 2(3) of the Arbitration Act), and German law (Articles 1025(2), 1041(2) and 1050 of the German ZPO). To our knowledge, no other European[84] arbitration law provides for such a possibility, which makes the 2021 Reform stand out internationally.

D. Consolidation of several arbitration proceedings

Finally, we note in passing that the legislator did not modify Article 185 PILA, which provides, in very broad and brief terms, that if the assistance of the State court is needed in cases other than the enforcement of provisional measures or the taking of evidence, the State court at the seat of the arbitration shall have jurisdiction. By leaving this general statement unchanged, the legislator has also failed to resolve the doctrinal controversy on whether it is possible under this provision to resort to the *juge d'appui* to obtain the consolidation of several arbitration proceedings.[85]

VIII. The Regime for the Correction and Interpretation of Awards as well as Additional Awards Was Codified

Prior to the 2021 Reform, Chapter 12 PILA did not regulate the correction and interpretation of awards, nor the issuance

[84] The same is now clear in the United States since the decision of the US Supreme Court in *ZF Automotive US Inc. et al. v. Luxshare* of 13 June 2022, 28 U.S.C. § 1782(a) permitting a district court to order discovery "*for use in a proceeding in a foreign or international tribunal*," although only a governmental or intergovernmental adjudicative body may qualify as such a tribunal, and the arbitration panels in these cases are not such adjudicative bodies.

[85] J. KNOLL, "Art. 185 PILS", para. 18 in M. Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, op. cit., and the references cited.

of an additional award for a claim which was raised before the arbitral tribunal but was not dealt with in the award.

Commentators almost unanimously considered that an arbitral tribunal seated in Switzerland had the power to issue corrective or interpretative decisions and additional awards even: (i) in the absence of an express legal basis; and (ii) if the arbitration agreement did not envisage such possibility (by, for example, referring to arbitration rules allowing for the correction and interpretation of the award, or the issuance of an additional award).[86] The Supreme Court adopted this principle in a landmark decision rendered in 2000.[87] However, it did not set forth a procedural regime to govern the modalities for obtaining a corrective or interpretative decision or an additional award. In particular, there was no indication as to the time limit for such requests, which led some authors to suggest that the regime provided for in domestic arbitration should apply by analogy, including Article 388(2) CCP, which provides for (i) a so-called relative time limit of 30 days starting from the discovery of the error, the parts to be interpreted or the additions to be made to the award, and (ii) an absolute time limit of one year starting from the notification of the award.[88] Others proposed applying, again by analogy, the 30-day time limit for the application to set aside an award.[89]

The addition of a new Article 189a PILA conclusively addresses all of the above: "*Unless the parties have agreed otherwise, either party may, within 30 days of the notification of the*

[86] See among others: J.-F. POUDRET and S. BESSON, *Comparative Law of International Arbitration*, op. cit., para. 762, with the references cited; P. LALIVE, J-F. POUDRET and C. REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, op. cit., Art. 191 LDIP, para. 6.

[87] DSFSC 126 III 524, reas. 2a and the references cited. See also DSFSC 137 III 85, reas. 1.2 on the arbitral tribunal's power to issue an additional award.

[88] B. BERGER and F. KELLERHALS, International and Domestic Arbitration in Switzerland, op. cit. (3rd ed., 2016), para. 1525.

[89] A. HEINI, Art. 190 IPRG, para. 63, in Girsberger et al. (eds), *Zurcher Kommentar zum IPRG*, Schulthess 2004.

award, request the arbitral tribunal to correct any clerical or computational errors in the award, to interpret certain parts of the award or to issue a supplement to the award on claims which were raised in the arbitral proceedings but not dealt with in the award. Within the same time limit, the arbitral tribunal may, on its own initiative, correct, interpret or supplement the award".

Article 189a(1) PILA provides for a single 30-day time-limit from the communication of the award. It is clear from the Message that the legislator has deliberately abandoned the above mentioned double regime for time-limits (one relative, from the triggering event and one absolute, from the communication of the award) provided for in domestic arbitration and opted for a single time limit from the communication of the award, which was considered as being both more efficient and in closer accordance with international practice.[90] Article 189a(1) PILA clarifies that the same time limit applies if it is the arbitral tribunal that intends to correct or interpret the award or issue an additional award on its own initiative.

As a final comment on time limits, it is worth highlighting that Article 189a(1) PILA specifies that the legal regime discussed above applies "*unless the parties have agreed otherwise*". As such, whilst the PILA sets out a framework for the correction and interpretation of awards as well as additional awards, any specific applicable provisions (and time limits) in the rules of arbitration institutions will continue to prevail.

The second paragraph of Article 189a PILA is a mere codification of the case law of the Supreme Court concerning (i) the nature of the award rendered following a request for interpretation/correction and the additional award as well as (ii) the possible interplay between requests for correction/interpretation or additional awards, on the one

[90] Message, p. 36.

hand, and the action to set aside the original award on the other:[91] "*The request does not suspend the time limits to set aside the award. With respect to the corrected, interpreted or supplemented part of the award, the time limit to set aside shall start anew*". This provision confirms that the available post-award remedies coexist and should, in principle, not interfere with each other.

The only aspect of the case law that has not been explicitly codified is that "*the possibility of seeking to have the award set aside on the ground that the tribunal has failed to decide on one of the claims* [Article 190 (2)(c)(2) PILA] *should not preclude the party* [concerned] *from applying to the arbitral tribunal for an additional award, which could render the application to set aside moot; however, in such a case, the setting aside proceedings should be stayed until the tribunal has rendered its decision on the request for an additional award*".[92] In our view, the 2021 Reform does not affect this case law.

IX. The Rules Concerning the Setting Aside of the Award Have Been Made More Predictable

Turning to the application for the setting aside of an arbitral award under Swiss law, the enumeration of the grounds for setting aside has remained unchanged. The version of the statute presented to the Parliament was prepared before Switzerland was for the first time condemned by the European Court of Human Rights for having allowed an arbitral award in breach of Article 6 ECHR, which means that the question of whether or not a violation of the ECHR should be considered

[91] DSFSC 131 III 164 (related to a correction request); DSFSC 130 III 125 (related to an interpretation request); DSFSC 137 III 85 (related to, among others, an additional award).

[92] DSFSC 137 III 85, reas. 1.2, free translation.

as a new independent ground for challenge was not discussed. In the meantime, the Supreme Court has confirmed that it is not.[93]

A. Procedure before the Supreme Court

1. Time limit to file the application to set aside

Article 190 PILA has only been modified on one point, with the addition of a new paragraph 4 expressly specifying that "[t]*he time limit* [to file the application to set aside] *is 30 days from the notification of the award*". As with many of the amendments discussed above, this is not a substantive change but rather an attempt to consolidate the Swiss law on international arbitration into a single, stand-alone piece of legislation. Previously, the same time limit was set out in the FSCA.

The fact that the time limit is now set out in the PILA does not change its nature. As was the case before, it cannot be extended (Article 47(1) FSCA) and it remains governed by the general rules of the FSCA, including with regard to its stay during judicial holidays (Article 46 FSCA) and its computation (in particular Articles 44 and 48 FSCA).[94]

There have, however, been two changes with respect to the procedural regime applicable to applications to set aside before the Supreme Court. Whilst Article 191 PILA continues to refer to Article 77 FSCA in this regard, the latter has been amended so as to set out the exceptions to the regular regime that apply when the decision sought to be set aside before the Supreme Court is an arbitral award.

[93] See, for instance, DSFSC 4A_564/2021 of 2 May 2022, reas. 4.1 and the references.

[94] See Message, p. 36. With respect to the computation and compliance with the time limit to file a setting aside application before the Supreme Court, see in particular G. KAUFMANN-KOHLER et A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., paras. 8.39-8.41.

2. Admissibility irrespective of the amount in dispute

The first amendment (Article 77(1) FSCA) provides that "*the application shall be admissible regardless of the amount in dispute*". This clarification does not come as a surprise since the Supreme Court had given clear indications that it was not inclined to apply, in arbitration matters, the (normally applicable) requirement of a minimum amount in dispute under Article 74 FSCA. The vast majority of legal commentators had also rightly pointed out that applying this requirement to an arbitral award would have been difficult to square with the principle that arbitration shall not be exempt from any sort of State control.[95] This question has now been settled by the 2021 Reform, with no need for the Supreme Court to definitively rule on the issue.

3. Applications filed in English

The second change is perhaps more spectacular but also more controversial. The 2021 Reform has added a new Article 77(2bis) FSCA, which provides that with respect to applications to set aside arbitral awards "*the written submissions can be filed in English*".[96]

As the Message points out, the Supreme Court has historically been tolerant of documents (the challenged awards and any accompanying exhibits) being submitted in the English language by not requiring that the parties produce translations into one of the Swiss official languages.[97] From now on, however, the parties will be able to submit their actual

[95] Message, p. 39 and the references. See also G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., paras. 8.42-8.45.

[96] It may be added that Art. 77(2bis) FSCA applies both to international and domestic arbitration.

[97] Message, p. 40; G. KAUFMANN-KOHLER et A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, op. cit., para. 8.79.

submissions in English as well. The new provision obviously covers all documents submitted to the Supreme Court in the context of an application to set aside an award.[98]

This does not mean, however, that the proceedings themselves will be conducted in English, nor that the Parties will receive a decision in English – indeed, the Supreme Court will continue using one of the Swiss national languages for both the procedure and its decisions.[99]

The option to make submissions in English before the Supreme Court was hotly debated and has given rise to some scepticism. Whilst the Message justifies the amendment as a way of cutting the translation costs (which would of course benefit the parties), in reality the change is more likely intended to showcase the Swiss legislator's and the Swiss arbitration community's support (or enthusiasm) for international arbitration.

Whether this innovation will ultimately be successful is, however, uncertain. Accepting submissions in English certainly demonstrates an open-mindedness towards, and confidence in, foreign users and their counsel, who will no longer need to draft their submissions in a foreign language (i.e., a Swiss national language) despite the arbitration having been entirely conducted in English. It could however, also amount to a 'poisoned gift' by creating the illusion that, the language barrier having fallen, parties and their legal advisors will be able to proceed before the Supreme Court without the support of Swiss lawyers who are experienced in the underlying law on the setting aside of arbitral awards. We believe that the Supreme Court will not show tolerance for applications that do not comply with the (strict) applicable procedural rules

[98] Message, p. 40.

[99] Message, p. 40; see Art. 54 FSCA. See G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 8.129.

simply because the document is written in English and is emanating from a foreign lawyer.[100]

B. Waiver of the action to set aside the award

Finally, it is worth mentioning that the 2021 Reform also adapted the manner in which the agreement to waive the right to bring an action to set aside, as provided in Article 192(1) PILA, must be made: "[t]*he agreement shall meet the conditions as to form set out in Article 178(1*)".

Previously, this provision required an express statement of waiver in the arbitration agreement or in a subsequent written agreement. The new statute has deleted the adjective "express" and, as just seen, now specifies that the waiver agreement shall comply with the written form requirement of Article 178(1) PILA,[101] thus unifying the formal requirements that are applicable within the ambit of Chapter 12 PILA (since, as discussed above, the same reference to Article 178(1) PILA has been added with respect to opting-in and opting-out agreements).[102]

One may wonder if this change is purely cosmetic or if it will lead to a relaxation of the requirements applicable to the waiver of the action to set aside. In particular, one may wonder whether the Supreme Court's case law, which denies the validity of an indirect waiver, that is, a waiver resulting

[100] It is worthwhile to recall that foreign lawyers that meet the requirements of Art. 40 SCA in conjunction with the relevant provisions of the Federal Act of the Free Movement of Lawyers (FMLA, https://www.fedlex.admin.ch/eli/cc/2002/153/en) can proceed freely before the Supreme Court. This applies in particular to lawyers licensed to practice in an EU or EFTA member State with a title corresponding to that of a lawyer in Switzerland, but also to lawyers of non-EU or EFTA member States, provided that they have an authorisation to practice the representation in justice in Switzerland in accordance with an international treaty.

[101] See above Chapter IV.A.

[102] See above Chapter III.B.

solely from the applicable arbitration rules,[103] will be overturned given that such case law relies on the former requirement of an "express" agreement, and that the waivers contained in arbitration rules are obviously in writing within the meaning of Article 178(1) PILA. We do not believe this will occur. Indeed, whether or not the legislation refers to an "express" waiver, the significant legal consequences of waiving the action to set aside are, in and of themselves, a compelling reason not to admit an indirect waiver of such recourse.[104]

We therefore believe that the change in Article 192(1) PILA should be considered as merely linguistic. In other words, it does not amount to a substantive change and does not affect the Supreme Court's current[105] case law, which should thus remain relevant despite the adaptation of the wording of Article 192(1) PILA.

X. The Availability of Revision as a Remedy Was Codified and Expanded

The final amendments to the PILA that we wish to discuss in this contribution are those to the provisions governing the revision of arbitral awards. Revision is an extraordinary remedy which allows, in exceptional circumstances, the annulment of a decision that has entered into force.[106]

[103] DSFSC 133 III 235, reas. 4.3.1; DSFSC 116 II 639, reas. 2c.

[104] Cf. G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 8.59; DSFSC 133 III 235, reas. 4.3.2.3; see also DSFSC 116 II 639, reas. 2c.

[105] Other than the already mentioned decisions, see for instance DSFSC 4A_414/2012 of 11 December 2012, reas. 1.2; DSFSC 4A_464/2009 of 15 February 2010, reas. 3.1.2; DSFSC 4A_18/2007 of 6 June 2007, reas. 3; DSFSC 4P.62/2004 of 1 December 2004, reas. 1.2.

[106] G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., para. 8.206 et seq.; CH. SERAGLINI and J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, op. cit. para. 965 et seq. See also, with

Generally speaking the grounds for revision include the discovery of relevant new circumstances, or a finding that the award was affected by a criminal offence.

Prior to the 2021 Reform, the PILA did not contain any express provision allowing for the revision of arbitral awards. Accordingly, the Supreme Court found that there was a *lacuna,* which it filled by ruling that the revision of arbitral awards is an inherent feature of any system of law[107] and that it would thus hear applications for revision based on the same grounds on which its own decisions may be revised, and, for successful applications, that it would set aside the award and remand the case back to the arbitral tribunal (or, if applicable, a new arbitral tribunal to be constituted).[108] Many decisions have been rendered under this regime and, remarkably, three awards had been set aside on this basis.[109] For the sake of clarity and legal certainty, the legislator codified this case law in the context of the 2021 Reform by introducing an entirely new Article 190a PILA.[110]

A. Grounds for revision

Article 190(a)(1) PILA now sets out the available grounds for revision as follows: "*A party may request the revision of an*

respect to a comparison between the regimes of the Swiss and French revisions, S. BESSON, "Le recours contre la sentence en droit suisse", op. cit., pp. 118-120.

[107] DSFSC 118 II 199, reas. 2c.

[108] Ibid., reas. 3.

[109] For an in-depth analysis see G. KAUFMANN-KOHLER and A. RIGOZZI, *International Arbitration – Law and Practice in Switzerland,* op. cit., paras. 8.206-8.229. For a summary of the recent case law see C. A. KUNZ, "Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? A review of decisions rendered by the Swiss Supreme Court on revision requests over the period 2009-2019", *ASA Bull.*, 2020.6-31. The summary table at the end of this article shows that, in the more than 25 years between the establishment of the revision by the praetorian way in 1992 and the end of 2019, 40 requests for revision were introduced before the Supreme Court, but only 3 were granted. To these 3 must now be added the Sun Yang decision, DSFSC 147 III 65.

[110] Message, p. 37.

award: (a) if it subsequently discovers material facts or conclusive evidence which, despite having exercised due diligence, it was unable to invoke in the previous proceedings; facts and evidence which postdate the award are excluded; (b) if criminal proceedings have established that the award was influenced, to the detriment of the challenging party, by a crime or misdemeanour, even in the absence of any conviction; if criminal proceedings cannot be pursued, proof can be furnished by other means; (c) if, despite having exercised due diligence, a ground for challenge under Article 180(1)(c) was not discovered until after the conclusion of the arbitration and no other remedy is available."

Whilst the first two grounds – new facts or evidence (190(a)(1)(a)) and award affected by a criminal offence (190(a)(1)(b)) – simply replicate the ones that the FSCA contemplates for the revision of the Supreme Court's own decisions and which have been consistently applied by analogy over the years, the addition of the third ground (190(1)(a)(c)) resolves a previously undecided issue. The case law of the Supreme Court had previously left open the question whether it was possible to challenge the composition of the arbitral tribunal after the time limit to file an action to set aside, in particular, in the event of the subsequent discovery of grounds for challenge that existed at the time of the arbitral proceedings.[111]

This new ground for revision has already been applied in the well-known *Sun Yang* decision, even if the 2021 Reform had not entered into force at the time. This decision will remain particularly relevant as it illustrates the level of diligence that the parties must have exercised during the arbitration and

[111] DSFSC 143 III 589 reas. 3.1; DSFSC 142 III 521 reas. 2.3.5; DSFSC 4A_234/2008 of 14 August 2008 reas. 2.1; DSFSC 4A_528/2007 of 4 April 2008 reas. 2.5.

until the expiration of the time limit to file an action to set aside.[112]

B. Procedure

With respect to time limits, Article 190a(2) PILA requires any revision request to be filed 90 days from the discovery of the ground for the revision, and, at the latest, 10 years from the entry into force of the award. However, it also specifies that the absolute time-limit of 10 years is not applicable in cases where the award was affected by a crime or a misdemeanour to the detriment of the challenging party.[113]

The procedure for the revision of international arbitral awards before the Supreme Court is set out in a new provision of the FSCA.[114] Article 119a(2) FSCA provides that the application, which, by operation of the reference to Article 77(2bis) FSCA can also be drafted in English, will be notified by the Supreme Court to the arbitral tribunal and the other party, unless it is manifestly inadmissible, in which case it will be summarily dismissed. This is nothing new compared to the previous practice. The same applies to the possibility for the parties to request (or for the Court to order *sua sponte*) the stay of the enforceability of the award pending the outcome of the proceedings or other provisional measures (Article 119a(2), referring to Article 126 FSCA).

Article 119a(3) FSCA codifies the principle that if the Supreme Court accepts the application, the award is set aside and the matter remanded to the arbitral tribunal for a new decision. Given that the applications for revision can be filed long after the notification of the award, Article 119a(4) FSCA clarifies

[112] DSFSC 147 III 65, reas. 6.5.

[113] This special rule, resulting at the time from an analogous application of Art. 124(2)(b) FSCA, had allowed the revision of the award, issued 12 years earlier, in the so-called "Frégates" case (DSFSC 4A_596/2008 of 6 October 2009).

[114] Message, pp. 37, 40-41.

that if, for instance, one of the arbitrators has passed away, he or she shall be replaced in accordance with Article 179 PILA. It is submitted that the same rule applies in cases where the arbitral tribunal would still have the requisite number of arbitrators, but an arbitrator is not in a position or is not willing to continue to serve (either for health reasons or due to the fact that he or she has become conflicted).

Finally, Article 192(1) PILA has been revised to clarify[115] that the parties can waive their right to file an application for revision in the same way as the action to set aside, except for "*the right to revision under Article 190a(1)(b)* [which] *cannot be waived*". In other words, the Swiss legal system accepts that an award survives even if it is based on a factually wrong basis or if it has been rendered by an improperly constituted arbitral tribunal, if the parties so agree, but cannot tolerate, in any circumstances, that nothing can be done if an award was influenced by a crime or a misdemeanour.

XI. Critical Assessment and Conclusions

In our opinion, the 2021 Reform of the Swiss arbitration law has been a success. Having originated from a call to introduce a specific amendment pertaining to the relationship between the State courts and arbitral tribunals (the so-called negative effect of competence-competence) – which was ironically abandoned during the reform process – it was intended to be a light reform, and it remained so until the end. That said, the endeavour was not a done deal from the start. In particular, international arbitration is no longer a purely technical subject. The widespread public criticisms concerning the legitimacy of investment arbitration could – by the association

[115] The Supreme Court had expressed doubts in this regard and ultimately left the question open: DSFSC 4P.265/1996 of 2 July 1997, reas. 1a; DSFSC 4A_144/2010 of 28 September 2010, reas. 2.1; DSFSC 4A_234/2008 of 14 August 2008, reas. 2.1.

of ideas or ignorance about the specificities of this kind of arbitration – have spilled over onto commercial arbitration. Similarly, the recurrent questions about the fairness of CAS arbitration have also transcended the circle of insiders. The reform of the law on international arbitration could thus have become the subject of political debates which could have resulted in a broadened scope of review and in potentially unwarranted or problematic substantive amendments to the law. Fortunately, this did not happen and even relatively sensitive subjects such as arbitration in employment and consumer disputes were openly debated, but ultimately found not to require the introduction of new provisions.

The aim of the reform was to improve legal certainty and clarity, and to make the law more accessible for foreign users. This resulted in the codification of the case law and the incorporation of the rules of the CCP, which formerly applied by *renvoi*, into the PILA. As we have seen, there have been few substantive changes. We have highlighted three of them: the additional powers of the *juge d'appui*, in particular, to appoint arbitrators in the event of an arbitration agreement without any indication of a seat, and to intervene in support of foreign arbitrations; the possibility of the revision of an arbitral award where a ground for challenging an arbitrator is discovered after the closing of the proceedings; and lastly, the possibility to make submissions in English before the Supreme Court – an emblematic change, which does not have great practical importance but has rather more of a symbolic meaning.

With the 2021 Reform, the Swiss legislator has unambiguously reaffirmed its strong support for arbitration, as it had already done during the revision of the regime governing domestic arbitration (which entered into force in 2011). As noted in the Message, at the international level, Switzerland was historically, and remains, one of the most prominent seats of arbitration: the amendments adopted with

the 2021 Reform contribute to ensuring that the legislative framework remains the most suitable and supportive to the development of international arbitration in Switzerland.