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THE REVISED SWISS ARBITRATION LAW

Arbitration is a popular method for the effective and efficient resolution of commercial disputes. Switzerland, with its tradition of neutrality and cultural diversity, has become one of the leading places for arbitration worldwide. In 2021, Switzerland enacted its revised arbitration law, Chapter 12 of the Swiss Private International Law Act. The revision introduced new provisions, which make the arbitration law more accessible for foreign users. At the same time, the legislator avoided overloading the law with unnecessary provisions. The Swiss arbitration law remains concise and straightforward and will continue to serve the international arbitration community well.

Key words: *Arbitration law, party autonomy, PILA, reform, Switzerland*

INTRODUCTION

On 21 June 1985, the United Nations Commission on International Trade Law adopted the UNCITRAL Model Law on International Arbitration. Two years later, in 1987, Switzerland introduced Chapter 12 of the Swiss Private International

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Law Act (hereinafter: “PILA”) as arbitration law governing international arbitration proceedings in Switzerland. Chapter 12 PILA, while guided by many of the Model Law’s overarching principles, is an independent and unique version of an arbitration law. Parties and arbitration practitioners appreciate the law for being clear and concise and also for affording the parties maximum autonomy and flexibility.

After entering into force on 1 January 1989, Chapter 12 PILA had not been subject to major amendments. Even so, Chapter 12 PILA remained a good and modern arbitration law that helped Switzerland become a popular seat for international arbitration proceedings. To further enhance Switzerland’s standing as attractive and innovative place of arbitration, the Swiss legislator, in 2012, initiated a revision of Chapter 12 PILA. Considering the arbitration law’s overall success, the legislator opted for a “*light revision*” which was to preserve the originality of Chapter 12 PILA as well as its fundamental principles.¹

The goals of the revision were (i) to codify relevant case law of the Swiss Federal Court, (ii) to render Chapter 12 PILA more accessible and user-friendly by removing any unclear formulations and cross-references to other legislation, and (iii) to further strengthen party autonomy.²

The revised Chapter 12 PILA entered into force on 1 January 2021. Since then, the Swiss Federal Court has had a few opportunities to apply the amended provisions. This article will provide an overview of the main amendments made in the context of the revision and discuss two recent applications of the revised provisions by the highest Swiss court.³

THE MAIN REVISIONS

The Scope of Application

Chapter 12 PILA, in its Art. 176, governs the scope of its application and the conditions for opting out of such application. In principle, Chapter 12 PILA applies to international arbitration proceedings seated in Switzerland, while Part 3 of the Swiss Civil Procedure Code governs domestic arbitration proceedings.

¹ For the reform process and details on all amendments see Philipp Habegger, “Das revidierte Kapitel 12 IPRG über die Internationale Schiedsgerichtsbarkeit”, *Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht*, Dike, Zurich, 2021, 371-388.

² Simon Gabriel, Johannes Landbrecht, “Swiss International Arbitration Law”, *ICC Bulletin*, Issue 1, 2022, 49.

³ For a more detailed discussion of the changes made in the context of the revision and a comparison to the UNCITRAL Model Law, see S. Gabriel, J. Landbrecht, op. cit., 49-60.

According to the wording of the 1987 version, the PILA applied if, at the time of the arbitration agreement's conclusion, at least one party was domiciled outside Switzerland. This wording was ambiguous as it did not specify whether the requirement applied to the parties to the *arbitration agreement* or the parties to the *arbitration proceedings*: In the case of contracts between multiple parties, a dispute may, for example, arise between some but not all contractual parties. In such a situation, not all parties to the arbitration agreement necessarily also become parties to the arbitration proceedings.⁴

According to the Swiss Federal Court, Chapter 12 PILA applied if one of the Parties to the *arbitration proceedings* was domiciled outside of Switzerland at the time of the arbitration agreement's conclusion. The Swiss Federal Court decided that the seat of any further contractual parties that are not involved in the proceedings should not be relevant in determining whether the arbitration is international or domestic.⁵

Scholars and legal commentators criticized the Swiss Federal Court's approach, arguing that it would better serve the interest of legal certainty, to consider the domicile of all parties to the *arbitration agreement*. Otherwise, the determination of the applicable procedural law would only be possible once the arbitral proceedings were initiated.⁶

With the revision, the legislator clarified that the relevant criterion to determine whether an arbitration was international and, thus, whether Chapter 12 PILA applied, was the domicile, habitual residence, or seat of the parties to the *arbitration agreement* at the time of its conclusion. The legislator thus changed the Swiss Federal Court's previous practice and parties to multi-party arbitration agreements can now be certain of the applicable procedural law, irrespective of which of these parties will ultimately participate in arbitration proceedings.

The Arbitration Agreement

The formal validity.- According to Art. 178(1) PILA, the arbitration agreement must be made in writing or any other means of communication allowing it

⁴ Daniel C. Pfiffner, Daniel Hochstrasser, *Basler Kommentar zum Internationalen Privatrecht*, 4th ed., Helbing Lichtenhahn, Basel, 2020, Art. 176 PILA N 43; Christian Oetiker, *Zürcher Kommentar zum IPRG*, 3rd ed., Schulthess, Zurich, 2018, Art. 176 PILA N 88.

⁵ Decision of the Swiss Federal Court (hereinafter: "DFC") 4P.54/2002 of 24 June 2002, cons. 3.

⁶ D.C. Pfiffner, D. Hochstrasser, *op. cit.*, Art. 176 PILA N 43; C. Oetiker, *op. cit.*, Art. 176 PILA N 91.

to be evidenced by text. The provisions sets out a simplified version of the regular written form under Swiss law, as it does not require a signature.

The formal requirements have not changed with the revision. The legislator merely modernized the statutory language by no longer referring to outdated modes of written communication such as telegram, telex, and fax. Consequently, the case law of the Swiss Federal Court on the 1987 PILA remains relevant.⁷

The law applicable to the substantive validity.- The provision of Art. 178(2) PILA does not itself regulate the requirements for a valid arbitration agreement. Rather, it is a conflict of laws rule setting out three alternative laws for determining the substantive validity of arbitration agreements: (i) the law chosen by the parties, (ii) the law governing the main contract, and (iii) Swiss law.⁸

According to the validation principle, arbitral tribunals shall apply the law which validates and gives effect to the arbitration agreement. In line with this so-called *in favorem validitatis* principle, it suffices under Art. 178(2) PILA that the arbitration agreement is valid under one of the three alternative laws named.⁹ The provision, which was not subject to the revision, further illustrates the arbitration-friendly stance of the Swiss international arbitration law as it minimizes the potential for challenges to the substantive validity of an arbitration agreement.¹⁰

Arbitration clauses in unilateral acts.- The newly included Art. 178(4) PILA stipulates that the provisions of Chapter 12 PILA shall apply by analogy to arbitration clauses set out in unilateral legal acts or articles of association. This provision is expected to facilitate international arbitration proceedings in particular in inheritance disputes as well as company- and trust-related matters.

The Swiss Federal Court's application of the revised provisions.- In a recent decision, the Swiss Federal Court dealt with the validity of an arbitration agreement under the revised Art. 178 PILA. The claimant in that case was a company seated in the United States. The respondent was an insurance company seated in Liechtenstein. After a claims event in the United States, the claimant sought insurance coverage from the respondent and eventually initiated Swiss international

⁷ DFC 4A_460/2021 of 3 January 2022.

⁸ DFC 119 II 380 of 2 September 1993, cons. 4.a; Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 4th ed., Stämpfli, Berne, 2021, para. 391 et seq.; S. Gabriel, J. Landbrecht, op. cit., 52; C. Oetiker, op. cit., Art. 178 PILA N 28.

⁹ DFC 129 III 727 of 16 October 2003, cons. 5.3.2.; Daniel Girsberger, Nathalie Voser, *International Arbitration, Comparative and Swiss Perspectives*, 4th ed., Schulthess, Zurich, 2021, 2/355; Dieter Gränicher, *Basler Kommentar zum Internationalen Privatrecht*, 4th ed., Helbing Lichtenhahn, Basel, 2020, Art. 178 PILA N 45 et seq.; C. Oetiker, op. cit., Art. 178 PILA N 32.

¹⁰ B. Berger, F. Kellerhals, op. cit., para. 392.

arbitration proceedings against the respondent based on an arbitration agreement in an insurance policy. The respondent disputed the existence of a valid arbitration agreement.

In summary, the case was based on the following factual background: The claimant's mother company and several of its group companies had insurance coverage under contracts with several insurance companies, including the respondent. The insurance periods lasted from 1 January of one year to 1 January of the next year and the insurance policies' terms were renegotiated each year. Negotiations usually began in late summer and continued over the start of the new insurance period. At the end of December, the insurer issued a so-called insurance binder or insurance slip containing a preliminary confirmation of insurance coverage. The parties then signed the final policy only after the new insurance period had already commenced.

For the year 2014, the claimant's mother company and some of its group companies were insured against costs and losses resulting from legal disputes. Under the 2014 insurance policy, the respondent had granted coverage for losses exceeding USD 75 million up to a maximum of USD 225 million. Before the actual insurance policy was finally negotiated and signed, the respondent issued the 2014 insurance slip, which provided for exclusive jurisdiction of the state courts of Basel-Stadt, Switzerland. In contrast, the draft 2014 insurance policy contained an arbitration clause providing that all disputes arising from or in connection with the policy shall be determined "*outside the normal courts by a court of arbitration consisting of three judges. The seat of arbitration shall be Basel.*"

After the claimant initiated arbitration proceedings, the respondent objected to the jurisdiction of the arbitral tribunal. It argued that it had never signed the 2014 insurance policy filed by the claimant. Rather, it had signed another policy, under which the claimant was not a policyholder. Furthermore, the respondent relied on the jurisdiction clause in the 2014 insurance slip and argued that the arbitration agreement in the 2014 policy was irrelevant.

The arbitral tribunal bifurcated the proceedings and first decided on the issue of its own jurisdiction. In its award of 30 July 2021, the arbitral tribunal confirmed its jurisdiction. The respondent challenged the arbitral tribunal's award and requested the Swiss Federal Court to find that the arbitral tribunal lacked jurisdiction. The respondent submitted that the arbitration agreement, first, did not meet the form requirements of Art. 178(1) PILA and, second, was invalid due to a lack of consent.

In its considerations, the Swiss Federal Court confirmed that under Art. 178(1) PILA an arbitration agreement could be valid without signature and could,

e.g., be concluded by e-mail. The text must contain the essential elements of the arbitration agreement, i.e. the parties, a declaration of their intent to arbitrate, and the subject matter of arbitral proceedings.¹¹

The Swiss Federal Court compared the present case to a previously decided case where the arbitration agreement was contained in draft contracts exchanged between the parties. It stated that it considered such arbitration agreement formally valid, since it was evidenced by written text. Here, the respondent had received drafts of the 2014 policy containing the arbitration agreement in a supplement. Contrary to what the respondent argued, it did not simply remain silent after receiving such drafts. Rather, it declared its consent to the drafts in writing: “*Basically, we agree with the new wording you provided.*” While the respondent made some reservations to the draft, none of them concerned the arbitration agreement. Consequently, the Swiss Federal Court held that the arbitral tribunal had been correct in confirming the formal validity of the arbitration agreement based on the claimant’s draft 2014 policy and the respondent’s written declaration of consent.¹²

Regarding the question whether the claimant could rely on the arbitration agreement despite not having been involved in the conclusion of the insurance contract, the Swiss Federal Court pointed out that the form requirement of Art. 178(1) PILA applies only to the declarations of intent of the *original parties* to the arbitration agreement. Whether the arbitration agreement binds further parties must be decided in accordance with the applicable substantive law (Art. 178(2) PILA).¹³ In other words, whether or not an additional party may rely on an arbitration agreement is not a question of formal validity.

Consequently, the Federal Court rejected the respondent’s objection regarding the form requirement under Art. 178(1) PILA and confirmed the formal validity of the arbitration agreement.

Regarding the substantive validity of the arbitration agreement, the Federal Court pointed to Art. 178(2) PILA and the doctrine of separability. The arbitration agreement is separate from the main contract and not necessarily governed by the same law. The arbitral tribunal may also apply a separate law specifically chosen by the parties to apply to the arbitration agreement or Swiss law. At present, both parties agreed that Swiss law governed the substantive validity of the arbitration agreement.

¹¹ DFC 4A_460/2021 of 3 January 2022, cons. 3.1.2 with reference to DFC 142 III 239 of 18 February 2016, cons. 3.3.1.

¹² DFC 4A_460/2021 of 3 January 2022, cons. 3.4.

¹³ DFC 4A_460/2021 of 3 January 2022, cons. 3.4.

According to the Swiss Federal Court, the arbitral tribunal had correctly applied the rules of interpretation under Swiss law. The arbitral tribunal had confirmed an actual common intention of the parties to enter into an arbitration agreement. Unlike the objective interpretation of the parties' statements according to the principle of good faith (which is a legal question), the assessment of the parties' true intentions is a question of fact. The arbitral tribunal's factual findings are not subject to judicial review of the Swiss Federal Court. Consequently, the Swiss Federal Court rejected the respondent's objections to the substantive validity.¹⁴

The Swiss Federal Court made clear that its previous jurisprudence on the formal validity of arbitration agreements would remain relevant despite the new wording of Art. 178(1) PILA. Its decision reconfirms Switzerland's arbitration-friendly stance and serves as a reminder that an arbitration agreement can be validly concluded by mere exchange of drafts.¹⁵ Furthermore, if the arbitral tribunal confirms the parties' true and actual intention to arbitrate, the Swiss Federal Court cannot and will not review such finding of fact, even if it is manifestly incorrect.

Appointment, Challenge, and Removal of Arbitrators

The PILA of 1987 referred to the provisions of the Swiss Civil Procedure Code for guidance on the constitution of arbitral tribunals as well as the challenge and removal of arbitrators. To make the PILA more user-friendly and accessible, the legislator decided to govern these issues with express provisions in the revised PILA. These provisions are enshrined in Art. 179 through 180b PILA.

Appointment and replacement.- According to Art. 179(1) PILA, the arbitrators shall be appointed and replaced in accordance with the parties' agreement. Unless the parties agree otherwise (e.g., in their arbitration agreement or by reference to institutional rules), the arbitral tribunal shall comprise of three members. Each party shall appoint one arbitrator and the two arbitrators shall jointly appoint a chairperson (default rule of Art. 179(1) PILA).

If the parties or members of the arbitral tribunal fail to take the necessary steps to appoint arbitrators, each party may seek the assistance from state courts. Where a state court is called upon to appoint a member of the arbitral tribunal,

¹⁴ DFC 4A_460/2021 of 3 January 2022, cons. 3.5.

¹⁵ On an arbitration agreement in drafts exchanged between the parties see Simon Gabriel, Jodok Wicki, "Vorvertragliche Schiedszuständigkeit", *ASA Bulletin*, Vol. 27, No. 1, 2009, 248.

it shall make the appointment, unless a summary examination shows that no arbitration agreement exists between the parties (Art. 179(3) PILA).

The state court at the seat of the arbitration is competent to assist with the appointment of the arbitral tribunal (Art. 179(2) PILA). If the parties agreed on arbitration in Switzerland without determining a specific seat, the Swiss state court first seized has jurisdiction to appoint an arbitrator. In the case of multi-party arbitration, it may even appoint all arbitrators (Art. 179(5) PILA).

From the new provisions just mentioned, it follows that arbitration agreements that do not designate a specific seat are not null and void under Swiss law. Rather, arbitration agreements providing for “*arbitration in Switzerland*” are in principle valid.

While recognizing the principle of party autonomy also in the context of arbitrators’ appointment, the revised Art. 179 PILA sets out default rules in case the parties do not make use of their autonomy. Thus, the lack of an agreement between the parties will not stand in the way of the arbitral tribunal’s appointment.

Challenge.- While the 1987 PILA already set out the grounds for a challenge of an arbitrator, the revised PILA contains a new provision clarifying the procedure to be followed for such challenge (Art. 180a PILA). Once again, the guiding principle is party autonomy.¹⁶ The parties may define the procedure for challenging an arbitrator in their arbitration agreement or by reference to specific arbitration rules. Institutional arbitration rules often stipulate that a challenge is to be decided by a body or authority within the institution (e.g., the Court of the Swiss Arbitration Centre under Art. 13(3) Swiss Rules).

If the parties have not reached an agreement on any procedure, the challenging party shall submit a reasoned and written request for challenge to the challenged arbitrator and the other members of the arbitral tribunal within 30 days. The 30 day deadline starts running when the challenging party becomes aware of the grounds for challenge or, according to an objective test, ought to become aware of such grounds exercising due diligence (Art. 180a(1) PILA).

Within 30 days of having submitted the request for challenge, the challenging party may request the state court to reject the challenged arbitrator. According to Art. 180a(2) PILA, the state court’s decision is final. No recourse to the Swiss Federal Court is possible.¹⁷

¹⁶ B. Berger, F. Kellerhals, op. cit., para. 878; S. Gabriel, J. Landbrecht, op. cit., 54, D. Girsberger, N. Voser, op. cit., 3/739; Stefanie Pfisterer, Anton K. Schnyder, *Internationale Schiedsgerichtsbarkeit. In a nutshell*, 2nd ed., Dike, Zurich, 2021, 70.

¹⁷ B. Berger, F. Kellerhals, op. cit., para. 912; S. Pfisterer, A.K. Schnyder, op. cit., 71 et seq.

Removal.- According to the newly introduced Art. 180b PILA, any member of the arbitral tribunal may be removed with the agreement of the parties. The parties need not provide reasons for their agreement or follow any specific procedure or form requirement.

In addition, if an arbitrator is unable to carry out his or her duties within a reasonable time or with due care, Art. 180b(2) PILA allows any party to unilaterally apply to the state court for the arbitrator's removal. Again, the state court's decision is final.

The Assistance of State Courts

Underlining Chapter 12 PILA's arbitration-friendly stance, the law provides parties and arbitral tribunals with various options to obtain state court assistance. Specifically, state court assistance is possible for the abovementioned appointment, replacement or removal of arbitrators (Art. 179, 180a, and 180b PILA), provisional and conservatory measures (Art. 183 PILA), the taking of evidence (Art. 184 PILA), or any further assistance by a state court that may be required (Art. 185 PILA).

The newly introduced Art. 185a PILA now also allows parties to foreign arbitration proceedings and arbitral tribunals seated abroad to request the competent Swiss state court to assist with interim or conservatory measures.¹⁸ In this case, Art. 183(2) and (3) PILA, which deal with state courts' assistance in Swiss international arbitration, apply by analogy.

If a party does not voluntarily comply with the arbitral tribunal's orders, the arbitral tribunal could, already under the 1987 PILA, seek assistance of state courts to enforce its orders. With the 2021 reform, the legislator expressly granted the parties the right to seek state court assistance as well (Art. 183(2) PILA). Consequently, parties can now request the assistance of Swiss state courts without the arbitral tribunal's authorization.¹⁹

Challenge of Arbitral Awards

What stays the same.- One of the characteristics of the Swiss arbitration law is the limitation of possibilities to challenge arbitral awards. The Swiss Federal Court serves as the sole judicial authority for any recourse against an award. Furthermore, the initiation of setting-aside proceedings is only possible within a 30-day

¹⁸ B. Berger, F. Kellerhals, op. cit., para. 1296a.

¹⁹ S. Gabriel, J. Landbrecht, op. cit., 56.

time limit.²⁰ The short and streamlined proceedings for the challenge of arbitral awards are an important selling point for arbitration in Switzerland.

Awards governed by the PILA may be challenged on the limited grounds set out in Art. 190(2) PILA. Specifically, the award can only be challenged on the grounds that:

(a) The sole arbitrator was not properly appointed or the arbitral tribunal was not properly constituted;

(b) The arbitral tribunal wrongly accepted or declined jurisdiction;

(c) The arbitral tribunal decided claims which were not submitted to it or failed to decide claims submitted to it;

(d) The principle of equal treatment of the parties or their right to be heard in adversarial proceedings was violated;

(e) The award is incompatible with public policy.

The grounds for challenge have remained untouched in the revision of the PILA. To make the provision more user-friendly, the 30-day deadline (which already applied prior to the reform) was included in Art. 190(4) PILA. This allows foreign users to understand the time limit directly from Chapter 12 and without having to consult other Swiss laws.

What is new. - Prior to the revision, submissions to the Federal Court, including submissions in annulment proceedings, had to be filed in one of Switzerland's official languages (German, French, Italian, or Romansh). Since most international arbitration proceedings in Switzerland are conducted in English, the requirement to file submissions in one of Switzerland's official languages often required quite extensive translation work. Not only did such translation work generate significant costs, it also took up valuable time within the already short 30-day deadline.

The revision improved this situation in that the Swiss Federal Court now accepts submissions in English (Art. 77 Federal Court Code).²¹ Particularly where the arbitration proceedings were conducted in English and the parties are not fluent in any Swiss official language, this revision may help reduce the costs of annulment proceedings.

In the case of submissions in English, the Swiss Federal Court has discretion to decide on the language of the proceedings before it.²² It will deliberate and render its decision in an official language of Switzerland, usually in French or in German.

²⁰ *Ibidem*, 58.

²¹ See in detail Johannes Landbrecht, "Rechtschriften an das Bundesgericht in englischer Sprache – nur in welcher?", *ASA Bulletin*, Vol. 39, No. 2, 2021, 309.

²² DFC 4A_460/2021 of 3 January 2022, cons. 1.

The Review – an Extraordinary Remedy against Arbitral Awards

The 1987 PILA did not expressly provide for any extraordinary remedies against arbitral awards. Nonetheless, the Swiss Federal Court in its constant jurisprudence allowed the so-called “*revision*” or “*review*” as legal remedy with distinct requirements compared to ordinary setting aside proceedings.²³

In the course of the 2021 reform, the legislator codified the Swiss Federal Court’s case law. According to the newly introduced Art. 190a PILA, a party may request a review of an award in three cases: (i) if it subsequently became aware of facts or decisive evidence which it could not have produced earlier although it had exercised due diligence, (ii) if the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanor, and (iii) if a ground for challenge of an arbitrator came to light only after conclusion of arbitral proceedings (even though the party concerned had exercised due diligence) and no other legal remedy is available.

While a party seeking to set aside an award must file its application within 30 days as from the notification of the award, the review remains possible far beyond this short deadline. The request for review can be filed within 90 days after discovery of the ground for review. Provided that this 90 day deadline is respected, a review of an arbitral award remains possible for 10 years after the award became legally binding. In the case of criminal behavior, a review remains possible even beyond these 10 years.

On 14 October 2021, less than one year after the revised PILA entered into force, the Swiss Federal Court rendered its first decision applying the new Art. 190a PILA on the remedy of review.²⁴ The background of the case can be summarized as follows:

The claimant was a British company, which had sold shares and participation certificates in a certain Swiss company to the respondent, a Swiss resident. On 29 October 2020, the arbitral tribunal seated in Geneva issued a final award ordering the respondent to pay CHF 1’130’917 to the claimant and the claimant to transfer 500 shares and 200 participation certificates in the Swiss company to the respondent. None of the parties challenged the award within the 30-day deadline.

²³ For a comprehensive review of decisions rendered by the Swiss Federal Court in revision requests between 2009 and 2019 see Catherine A. Kunz, “Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera?”, *ASA Bulletin*, Vol. 38, No. 1, 2020, 6-31.

²⁴ DFC 4A_422/2021 of 14 October 2021.

Several months later, on 3 September 2021, the respondent in the arbitral proceedings filed a request for review under Art. 190a PILA with the Federal Court. He argued that he had subsequently become aware of new and relevant facts, namely that the claimant's counsel had been in a conflict of interest at the time of the arbitral proceedings, since they had also advised the Swiss company whose shares were in dispute as well as its subsidiaries and several board members of these companies.

The Swiss Federal Court confirmed that under the new Art. 190a PILA, a party may seek review of an arbitral award, if it discovers relevant facts or conclusive evidence that it was unable to rely on in the arbitration proceedings despite having exercised due diligence. For an application for review to be successful on the basis of new facts and evidence, the Swiss Federal Court set out five conditions:

- i.) The applicant must allege one or more facts;
- ii.) The alleged facts must be material to the outcome of the case;
- iii.) The relevant facts already existed at the time the award was rendered;
- iv.) The relevant facts were only discovered after the award was rendered;
- v.) The applicant was not able to rely on the relevant facts in the arbitral proceedings, despite all diligence.²⁵

Furthermore, any application for review must be filed within the relative time limit of 90 days as from the discovery of the grounds for review. The time limit starts running once the applicant has sufficient knowledge of the facts to be able to invoke them, even if they cannot yet be proven with certainty. A mere supposition is, however, not sufficient to trigger the time limit. The applicant must establish the circumstances that are decisive to verify the compliance with the time limit.²⁶

Applying the above to the case in question, the Federal Court rejected the application for review as manifestly inadmissible. Apparently, some indications of the alleged conflict of interest already became evident during the arbitration proceedings, more specifically, at the evidentiary hearing on 13 March 2020. It follows that the alleged facts were not newly discovered in the sense of Art. 190a PILA, since the applicant already knew or ought to have known of them before the arbitral award was rendered. It further follows that the application did not meet the 90-day time limit.²⁷

²⁵ DFC 4A_422/2021 of 14 October 2021, cons. 4.4.1; see also DFC 4A_464/2021 of 31 January 2022, cons. 6.2.1.

²⁶ DFC 4A_422/2021 of 14 October 2021, cons. 4.4.2.

²⁷ DFC 4A_422/2021 of 14 October 2021, cons. 4.5.

In addition and for the sake of completeness, the Swiss Federal Court also noted that the application was not sufficiently reasoned in that the application failed to establish how the alleged conflict of interest could have influenced the legal conclusions reached by the arbitrators.

While the review is now expressly codified as an additional legal remedy in Art. 190a PILA, it remains to be seen whether parties will make more use of this remedy in the future. The Swiss Federal Court applies the requirements for a review in a strict manner and the chances of success remain modest. Nevertheless, the long time limits in which a review remains possible may encourage parties to make another attempt to overturn an unfavorable result.

For parties and counsel, it follows that, especially in high-value disputes, it may be premature to close an arbitration file 30 days after the award was rendered. Arbitrators in turn are well advised to keep the files and any personal notes on the case beyond the 30-day time limit for ordinary setting aside proceedings.²⁸

CONCLUSION

The revision of Chapter 12 PILA made the Swiss international arbitration law more accessible and user-friendly for foreign parties. Swiss law now allows submissions to the Federal Court in English, thereby reducing the need for costly translations. Moreover, the legislator codified the jurisprudence of the Federal Court where appropriate and corrected it where needed. It also incorporated matters into Chapter 12 PILA that had previously been regulated in the Swiss Civil Procedure Code, thereby reducing the need to research and examine other Swiss laws.

An additional benefit of the revision is the expansion of state court assistance, e.g. in appointing the arbitral tribunal, taking evidence, or enforcing provisional measures. Furthermore, the access to arbitration as such was expanded, in particular by expressly accepting the validity of unilateral arbitration clauses (e.g. in wills or trusts) and of arbitration clauses that do not stipulate a seat.

While the legislator, in the revision of Chapter 12 PILA, codified the Federal Court's jurisprudence on a number of issues, including e.g. the review of arbitral awards, these additions will not bring major changes. While the express regulation of the revision may increase the number of cases in which one of the parties seeks this remedy, the chances of success before the Swiss Federal Court have not increased and the proceedings are expected to remain lean and efficient.

²⁸ Simon Gabriel, "Application for 'Revision' of an Arbitral Award Rejected", in: *dRSK*, published on 5 January 2022.

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REVIZIJA ŠVAJCARSKOG ZAKONA O ARBITRAŽI

Rezime

Arbitraža predstavlja popularan metod efektivnog i efikasnog rešavanja privrednih sporova. Sa svojom tradicijom neutralnosti i kulturne različitosti, Švajcarska je postala jedno od vodećih mesta u svetu kad je reč o arbitraži. U Švajcarskoj je 2021. godine usvojen revidirani Zakon o arbitraži, sadržan u Poglavlju 12 švajcarskog Zakona o međunarodnom privatnom pravu. Revizijom su uvedene nove odredbe putem kojih je Zakon o arbitraži učinjen pristupačnijim za inostrane korisnike. Istovremeno, zakonodavac je izbegao opterećenje Zakona nepotrebnim pravilima. Švajcarski Zakon o arbitraži ostaje koncizan i napredan, nastavljajući da dobro služi međunarodnoj arbitražnoj zajednici.

Ključne reči: Zakon o arbitraži, autonomija volje, Zakon o međunarodnom privatnom pravu, reforma, Švajcarska

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