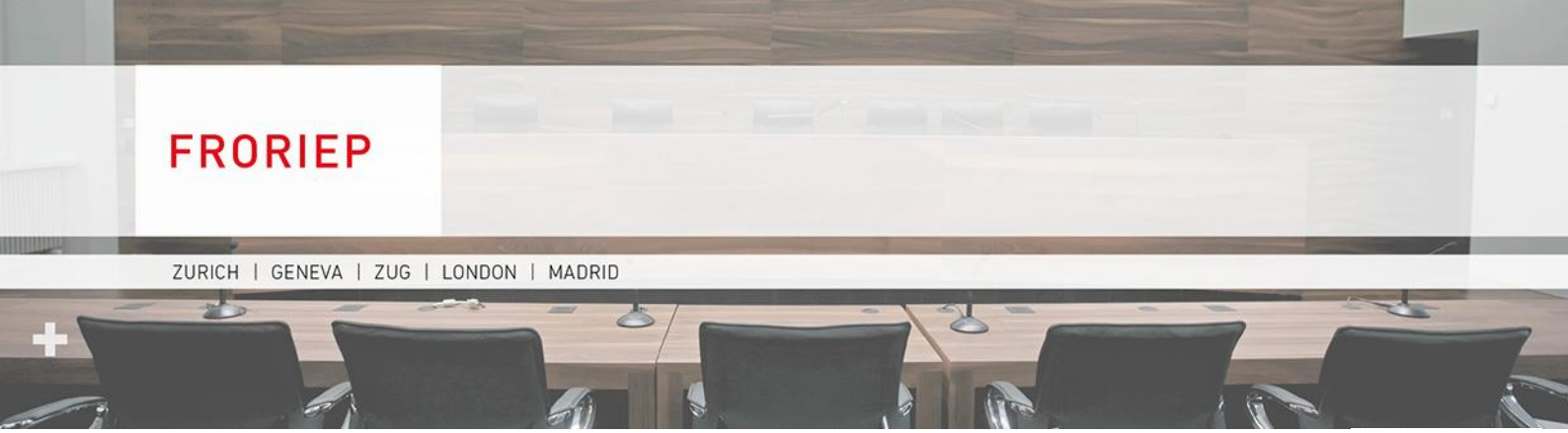

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BRUSHING-UP THE SWISS ARBITRATION LAW

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Introduction

On 11 January 2017, the Swiss Federal Council (which is the Executive Body in Switzerland) published its proposed amendments for the revision of Chapter 12 of the Swiss Private International Law Act (Chapter 12 PILA), which governs international arbitration in Switzerland.

As stated by the Federal Council, the aim of the draft bill is to "reinforce the attractiveness of Switzerland" as a hub for international arbitration. While emphasising that the Swiss arbitration law already offers very advantageous conditions, the Federal Council nevertheless sought to reinforce such attractive features and adopt a number of "punctual adaptations and modernisations".

A brief background

In force since 1989, Switzerland's international arbitration law has been at the forefront of modern arbitration laws worldwide. With its concise 19 articles, it is hailed as a clear, modern and liberal statute, granting parties wide autonomy, as well as flexibility to conduct the arbitral proceedings to their liking. Having proved to provide an arbitration-friendly judicial regime supported by an extensive arbitration case law and doctrinal writing, it therefore comes as no surprise that Switzerland is one of the preferred venues for hosting international arbitrations. As stated in a recent study conducted by the European Parliament, "Switzerland is without question one of the world's leading international arbitration jurisdictions"[1]. Moreover, it is widely recognised that Swiss law is among the top choices, along with English law, to govern international contracts.

On 3 February 2012, the Commission of legal affairs of the Swiss Parliament submitted a motion in order to maintain Switzerland's attractiveness as a leading centre for international arbitration. A group of experts was established and consultations with the Swiss Supreme Court, arbitral institutions such as the ICC, SCAI, CAS and WIPO were conducted.

The stated purpose of this proposal is to eliminate any ambiguities that are still present within Chapter 12, reinforcing its clarity, as well as formalising a number of noteworthy decisions from the Swiss Supreme Court. It further noted that the development of international commerce and foreign arbitral laws have also been a source of inspiration for the proposal.

[1] European Parliament, Directorate General for Internal Policies, *Legal Instruments and Practice of Arbitration in the EU – Study for the Juri Committee*, 2014, p. 181.

The relevant proposed amendments

There are a number of amendments proposed by the Swiss government of stylistic and technical nature which do not require particular attention.

Are however noteworthy the following modifications:

Form of the arbitration agreement

The current version of art. 178(1) PILA establishes that the arbitration agreement must be in writing or in any other written form that establishes the terms of the agreement. All parties to the arbitration agreement must adhere to such a form requirement. Following the regime in Germany, Austria and France, the proposed amendment establishes that it is sufficient if the proof for the existence of an arbitration agreement is fulfilled by one party only.

Arbitration agreements in unilateral acts

An amendment that also requires attention can be found at Art. 178(4) whereby the arbitral tribunal's competence may not only rely on an arbitration agreement concluded between two parties but also on an arbitration clause found in an unilateral act, such as a testament, foundation or trust.

The determination of the seat

In the event the parties had not determined the seat or simply stated "Switzerland" as the seat of the arbitration, it has been debated in the doctrine what remedies the parties could undertake. With the inclusion of an additional phrase at Art. 179(2), such a gap is filled. The state court first seized by the parties will be the competent one to fix the seat of the arbitration.

Multiparty arbitration

Following the well-known *Dutco* decision from the French Court of Cassation and the principle of equality of the parties in arbitration, the draft bill proposes to integrate a new paragraph at Art. 179(2bis) whereby the state court has the possibility to nominate all the arbitrators in the event there is neither an agreement among the parties nor a referral to an arbitral institution.

Disclosure obligation for the arbitrators

The proposed paragraph at Art. 179(4) establishes the obligation for arbitrators to disclose any potential facts that could raise doubts as to their independence or impartiality. Such an obligation has to be maintained throughout the whole arbitration procedure.

Provisional and protective measures

Under the current version of art. 183 PILA, only the arbitral tribunal is entitled to request the assistance of state courts in the event a party does not voluntarily comply with provisional or protective measures ordered by the arbitral tribunal. Such a right is now, under the proposed amendment, also extended to the parties.

Decision on costs

There is no specific provision under the PILA that provides authority for the arbitral tribunal to issue a decision on the amount and allocation of costs. The Swiss Supreme Court noted this vacuum,[2] and emphasised the risk that a decision on these matters might not be enforceable without such a legal provision. With the proposed new provision at art. 189(3) PILA, the arbitral tribunal is now conferred with the power and the duty, unless the parties agree otherwise, to render a decision on costs.

Correction and revision of arbitral awards

Despite the fact that the correction, interpretation and complementation as well as the revision of arbitral awards were already available to parties by recurring to case law of the Swiss Supreme Court, there was no express basis for these remedies in Chapter 12 PILA. With the introduction of the new articles 189a and 190a PILA, this lacuna is ultimately resolved. Under the proposed amendments, a request for correction, interpretation or complementation must be submitted before the arbitral tribunal within 30 days following the notification of the arbitral award. It should be noted that such a request does not stay the deadline for the setting aside proceedings. As to the request for revision, it will have to be filed before the Swiss Supreme Court within 90 days from the discovery of the ground for revision and within the absolute deadline of 10 years since the notification of the arbitral award.

Filings to the Swiss Supreme Court

In relation to the revision of Chapter 12 PILA, the Swiss government also proposes to adapt the Swiss Supreme Court Act by adding a new provision (art. 77(2bis)) whereby briefs to the Swiss Supreme Court related to international arbitration can also be made in English (and not only in one of Switzerland's official languages: German, French, Italian). Up until now it had only been possible to file the exhibits to such briefs in English, including the arbitral award.

Comments

Overall, the proposed amendments do not constitute a major upheaval for Switzerland's international arbitration law. Many modifications simply formalise accepted practises and established case law from the Swiss Supreme Court. Some are new though, such as the proposed possibility to argue before the Supreme Court in English. With the draft bill, the drafters wished to maintain the succinct and user-friendliness of the Swiss law on international arbitration, which we consider positive.

There is not a concrete time-frame as to when such a proposal from the Swiss government may come into force. All interested parties have now until 31 May 2017 to submit their comments to the proposed amendments. Thereafter, the Department of Justice may take into consideration such comments and add further amendments. The Parliament will then have to vote on the final proposal.

If you have any comments or questions please do not hesitate to contact the authors or another lawyer of FRORIEP's arbitration practice group.

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[2] ATF 136 III 597, paras. 5.2.1 and 5.2.2.

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WHO IS FRORIEP?

Founded in Zurich in 1966, Froriep is one of the leading law firms in Switzerland, with offices in Zurich, Geneva and Zug, as well as foreign offices in both London and Madrid, serving clients seeking Swiss law advice.

We have grown a domestic and international client base ranging from large international corporations to private clients. Our unique, truly integrated, international structure mirrors our strong cross-border focus. We value and promote continuity and strong client relationships. Our teams are tailor-made, assembled from every practice area and across our network of offices.

Many of our lawyers are recognised as leaders in their practice areas, and our clients benefit from our in-depth knowledge and the rich diversity of talents, languages and cultures that makes our lawyers particularly versatile and adaptive.

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