

SWITZERLAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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VERSION: 24 MAY 2019 (v02.000)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

With its longstanding tradition and experience in international arbitration, Switzerland remains one of the preferred arbitral seats in the world. Swiss arbitrators continue to be among the most frequently appointed and Swiss substantive law among the most frequently chosen laws to govern international contracts. Chapter 12 of the Swiss Private International Law Act ("PILA") is a modern and innovative arbitration law. Its main strengths include its clarity and conciseness, making it easily accessible for (foreign) lawyers and non-lawyers alike, as well as the great importance afforded to party autonomy, meaning that the parties are free to fashion the proceedings in accordance with their specific needs. Switzerland's reputation for neutrality and stability and its courts' consistent pro-arbitration approach further explain why parties often choose Switzerland as a place of arbitration and why numerous arbitration institutions are based here.

Key places of arbitration in the jurisdiction?	Geneva, Zurich, Lugano, Lausanne. ¹
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	Absent an express agreement to the contrary, the arbitrator's contract implies a duty of confidentiality for the arbitrators. It is controversial whether the arbitration agreement implies a duty of confidentiality for the parties. They may enter into an express confidentiality agreement. ²
Requirement to retain (local) counsel?	There is no requirement to retain Swiss counsel for arbitration proceedings with a seat in Switzerland. By contrast, applications to the Swiss Supreme Court must be signed by the party or an attorney who is authorised to represent parties before the Swiss courts pursuant to the Swiss Federal Lawyers' Act ("LLCA" or " <i>Loi fédérale sur la libre circulation des avocats</i> " in French, " <i>Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte</i> " in German) or in accordance with an international treaty (Article 40(1) of the Swiss Supreme Court Act ("SCA")). Concerning proceedings before the <i>juge d'appui</i> , the Swiss Code of Civil Procedure ("CCP") does not require the parties to be professionally represented by an attorney (Article 68(1) CCP). As under Article 40(1) SCA, pursuant to Article 68(2) CCP, they may however choose to be represented by a " <i>lawyer admitted to represent parties before the Swiss courts under the [LLCA]</i> ". ³

¹ Geneva and Zurich top the statistics for commercial arbitrations, with Lugano in the third place (see 2017 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin 2018-2, p. 60; [Swiss Chambers' Arbitration Institution Statistics \(2004-2015\)](#)). Lausanne is also a prominent place of arbitration, as the Court of Arbitration for Sport (CAS), which handles approximately 600 cases a year (see [CAS Statistics \(1986-2016\)](#)), is headquartered there and the CAS rules of arbitration provide that the seat of all CAS proceedings is in Lausanne (Article R28 CAS Code).

² Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford 2015, paras. 3.34, 4.188, 7.177; Noradèle RADJAI, Confidentiality of Arbitration in Switzerland, *Arbitration in Switzerland – The Practitioner's Guide*, Volume II, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, paras. 18-23.

³ Attorneys qualified in a Member State of the European Union ("EU") or the European Free Trade Association ("EFTA") may under certain conditions represent parties before the Swiss courts (Articles 21 to 29 LLCA), subject to the relevant provisions of cantonal law. In Geneva, attorneys qualified in a non-EU/EFTA Member State may under certain conditions obtain an *ad*

Ability to present party employee witness testimony?	As a rule, any person capable of testifying about the facts based on his or her own perception may be a witness, including the parties themselves. ⁴
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be conducted outside of Switzerland.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	The parties have a right to a decision on costs and the arbitral tribunal has an obligation to make such a decision, at the latest in the final award.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Swiss law does not prohibit third party funding. Under Article 12(1)(e) LLCA, Swiss attorneys cannot enter into a prior agreement with their clients providing for a contingency fee based entirely on the outcome of the case (<i>pactum de quota litis</i>); nor can they agree to waive legal fees in the event of an unfavourable outcome. A fee arrangement containing elements of a contingency fee (<i>pactum de palmario</i>) is allowed under certain conditions.
Party to the New York Convention?	Switzerland is a party to the New York Convention. There is no reservation of reciprocity.
Other key points to note?	∅
WJP Civil Justice score (2019)	∅

hoc authorization to assist a party before the Geneva courts. However, in order to represent the party before the Geneva courts, the non-EU/EFTA attorney must act with an attorney registered with a Swiss bar (Article 23 of the Geneva Lawyers' Act ("*Loi sur la profession d'avocat*" or "LPAV")).

⁴ Christian OETIKER, Ad Hoc Arbitration in Switzerland, *Arbitration in Switzerland – The Practitioner's Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 44.

ARBITRATION PRACTITIONER SUMMARY

Chapter 12 of the Swiss Private International Law Act (“PILA”) governs international arbitrations with a seat in Switzerland. Salient features of Chapter 12 PILA include its clarity and conciseness, party autonomy and arbitration-friendliness, namely through comparatively more favourable standards regarding (i) the validity of arbitration agreements (Article 178 PILA); (ii) the arbitrability of any matter involving an economic interest (Article 177(1) PILA); (iii) the assistance of experienced state courts in support of arbitration (Articles 179(2) and (3), 180(3) and 183-185 PILA); (iv) an exhaustive and narrowly defined list of grounds of annulment of arbitral awards (Article 190(2) PILA), including a possibility for parties without any territorial connection with Switzerland to waive their right to seek annulment (Article 192 PILA); and (v) an arbitration-friendly approach by Swiss courts towards the recognition and enforcement of foreign awards under the New York Convention (Article 194 PILA).

Date of arbitration law?	18 December 1987, in force as from 1 January 1989.
UNCITRAL Model Law? If so, any key changes thereto?	While Chapter 12 PILA is not based on the UNCITRAL Model Law, there are no major differences or inconsistencies between these texts.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p><u>Geneva:</u> <i>Tribunal de première instance</i> (Article 356(2) of the Swiss Code of Civil Procedure (“CCP”); Article 86(2)(d) of the Geneva Law on Judicial Organisation (“<i>Loi sur l’organisation judiciaire</i>” or “LOJ/GE”)); <i>Chambre civile de la Cour de Justice</i> (Article 120(1)(a) LOJ/GE).</p> <p><u>Lausanne:</u> <i>Tribunal cantonal</i> (Article 356(1) CCP; Article 47(1) of the “<i>Code de droit privé judiciaire vaudois</i>” or “CDPJ”); <i>Président du tribunal d’arrondissement</i> (Article 356(2) CCP; Article 47(2) CDPJ).</p> <p><u>Lugano:</u> <i>Tribunale di appello, Prima camera civile</i> or <i>Seconda camera civile</i>, depending on the subject matter of the dispute, sitting as a three-member court (Article 356(2) CCP; Article 48(a)(7) and 48(b)(4) “<i>Legge sull’organizzazione giudiziaria</i>” (“LOG”)) or as a single judge (Article 356(2) CCP; Article 48(a)(10) and 48(b)(7) LOG).</p> <p><u>Zurich:</u> <i>Obergericht</i> (Articles 356(1) and 356(2)(a) and (b) CCP; § 46 of the Zurich Law on Judicial Organisation (“<i>Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess</i>” or “GOG/ZH”)); <i>Bezirksgericht</i> (specifically, <i>Einzelgericht</i>) (Article 356(2)(c) CCP; §32 GOG/ZH).</p> <p>Assistance in matters of (i) constitution of the arbitral tribunal; (ii) challenge of arbitrators; (iii) any procedural matters, including provisional measures and the taking of evidence (Articles 179(2) and (3), 180(3) and 183-185 PILA).</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	Swiss courts (Article 265(1) CCP) and arbitral tribunals (unless the parties have otherwise agreed; Article 183 PILA) can grant <i>ex parte</i> provisional measures. However, as long as the arbitral tribunal is not yet constituted and no other private body, such as an emergency arbitrator, is available, the parties have no other

	option than to submit their request for (<i>ex parte</i>) interim relief to a state court. ⁵
Courts' attitude towards the competence-competence principle?	Articles 186(1) and (1bis) PILA establish and recognize the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Exhaustive and narrowly defined list of annulment grounds (Article 190(2) PILA): irregular constitution of the arbitral tribunal (a); incorrect decision on jurisdiction (b); <i>ultra</i> or <i>infra petita</i> decisions (c); violations of fundamental principles of procedure (d); and violations of public policy (e). These grounds are generally in line with Article V of the New York Convention, although the list in Article 190(2) PILA is more restrictive as it does not include the violation of the procedural rules agreed by the parties.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	While the Swiss courts have not yet decided this issue, Swiss commentators suggest that the recognition of awards annulled at the seat could be envisaged where the ground for annulment departs from those stated in Article V of the New York Convention, ⁶ or the annulment amounts to a manifest violation of the law of the country in which the award was made. ⁷
Other key points to note?	∅

⁵ Bernhard BERGER/Franz KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd ed., Berne 2015, para. 1275.

⁶ KAUFMANN-KOHLER/ RIGOZZI, *op. cit.* fn 2, para. 8.269.

⁷ BERGER/KELLERHALS, *op. cit.* fn 5, para. 2083; Sébastien BESSON/Luc PITTET, *La reconnaissance à l'étranger d'une sentence annulée dans son Etat d'origine - Réflexions à la Suite de l'Affaire Hilmarton*, 16 ASA Bulletin (1998), p. 525.

JURISDICTION DETAILED ANALYSIS

1. Introduction

Thanks to its arbitration-friendly legal framework and longstanding dispute-settlement tradition, Switzerland is home to a number of well-known arbitral institutions, including the Swiss Chambers' Arbitration Institution ("SCAI"),⁸ the Court of Arbitration for Sport ("CAS")⁹ and the World Intellectual Property Organization ("WIPO")'s Arbitration and Mediation Center.¹⁰ Together with its stable political environment and strong professional and academic expertise in the field, these factors contribute to making Switzerland one of the leading international arbitral seats.¹¹

2. The law governing international arbitration in Switzerland

2.1 Swiss arbitration law: a dual system

Swiss law regulates domestic and international arbitration in separate statutes. Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PILA"), in force as from 1 January 1989, governs international arbitrations with a seat in Switzerland.¹² Part 3 of the Swiss Code of Civil Procedure of 1 January 2011 ("CCP") governs domestic arbitrations.¹³

Under Article 176(1) PILA, Chapter 12 PILA applies if (i) the arbitral seat is in Switzerland and (ii) at the time of the conclusion of the arbitration agreement, at least one of the parties to the arbitration proceedings¹⁴ had neither its domicile nor its habitual residence in Switzerland. Therefore, for determining the international character of the arbitration, the relevant point in time is the conclusion of the arbitration agreement.¹⁵

Article 353(2) CCP allows the parties to opt out of the domestic and into the international arbitration regime, even if the requirements of Article 176(1) PILA are not fulfilled.¹⁶ Conversely, Article 176(2) PILA entitles the parties to opt out of the international and into the domestic arbitration regime.

⁸ <https://www.swissarbitration.org/>.

⁹ <http://www.tas-cas.org/fr/index.html>.

¹⁰ <http://www.wipo.int/amc/en/center/background.html>.

¹¹ See, for instance, 2016 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin 2017-2, pp. 111-112; 2017 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin 2018-2, pp. 60-61. See, also, the 2015 study commissioned by the JURI Committee of the European Parliament, reporting that Switzerland was the most highly recommended seat for international arbitration; 2010 International Arbitration Survey: Choices in International Arbitration, conducted by White & Case and the School of International Arbitration at Queen Mary, University of London, pp. 17-20.

¹² Available at: <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>. An unofficial English translation of Chapter 12 PILA is available, among others, at: https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf. For a translation of the full PILA, see http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf.

¹³ Available at: <https://www.admin.ch/opc/fr/classified-compilation/20061121/index.html>. An English translation of the CCP, provided solely for 'informative purposes' and with no legal force, is also available on the Swiss Federal Legislative Compilation website, at <https://www.admin.ch/opc/en/classified-compilation/20061121/index.html>.

¹⁴ Supreme Court Decision 4P.54/2002 of 24 June 2002, para. 3. *Contra*: KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.33; Jean-François POUDRET/Sébastien BESSON, *Comparative Law of International Arbitration*, 2nd ed., Zurich 2007, para. 35, noting that the Supreme Court's case law entails that it may not be possible to determine the law governing the arbitration at the time of the conclusion of the arbitration agreement, but only with the start of the arbitration proceedings.

¹⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.32; POUDRET/BESSION, *op. cit.* fn 14, para. 7; BERGER/KELLERHALS, *op. cit.* fn 5, para. 102.

¹⁶ See however Supreme Court Decision 4A_7/2018 of 18 April 2018, para. 2.3.3, where the Supreme Court suggested in an obiter dictum that the parties may not circumvent the more restrictive notion of arbitrability under Article 354 CCP by opting out of Part 3 of the CCP and into Chapter 12 PILA, at least as far as mandatory claims arising out of employment contracts are concerned.

Chapter 12 PILA constitutes a stand-alone Arbitration Act, largely independent of other provisions in the PILA. However, some provisions of other chapters of the PILA may be relevant for the purposes of international arbitration.¹⁷ For instance, Articles 20 and 21 PILA define the notions of “domicile” and “habitual residence” in Article 176(1) PILA, and Article 21(4) PILA defines the notion of “business establishment” within the meaning of Article 192(1) PILA. The general rules in Chapter 13 PILA (Articles 196 to 199 PILA) govern issues of transitional law, and Article 7 PILA governs the effects of an arbitration agreement before a Swiss court seized of the merits of the dispute.

Some provisions in other chapters of the PILA may apply by analogy in international arbitration.¹⁸ For instance, the Swiss Supreme Court has held that arbitral tribunals may apply the conflict of laws rules in other chapters of the PILA to determine the law governing the capacity and authority of parties to enter into an arbitration agreement (Articles 35-36 PILA and Articles 154-155 PILA).¹⁹ It has also been submitted that arbitral tribunals can take the mandatory rules of third states into account, if the requirements of Article 19 PILA applied by analogy are met.²⁰

Finally, some provisions in other Swiss statutes may be relevant. Concerning the appointment, removal or replacement of an arbitrator, Article 179(2) PILA explicitly provides for the application by analogy of certain provisions of the CCP (Articles 360, 361(2) and (3), 362, 370 and 371 CCP).²¹ Article 191 PILA refers to Article 77 of the Swiss Supreme Court Act (“SCA”) for the procedure governing actions to annul the award, and Article 123 SCA applies by analogy to requests for revision of arbitral awards.²²

2.2 Main feature of Chapter 12 PILA: party autonomy

Chapter 12 PILA is a framework legislation. It comprises only 19 provisions, most of which are not mandatory. The parties can choose between the international or domestic arbitration regime to govern their arbitration (Article 353(2) CCP and Article 176(2) PILA). They can constitute their arbitral tribunal (Article 179(1) PILA) and determine the arbitration proceedings according to their needs (Articles 182(1) and 183 PILA). Moreover, the parties can choose the rules of law applicable to the merits of the dispute or authorise the arbitral tribunal to decide *ex aequo et bono* (Article 187 PILA). They can further determine the procedure and form in which the arbitral tribunal shall make its awards (Articles 188 and 189 PILA). Finally, under certain conditions, the parties can waive (in whole or in part) their right to seek the annulment of the award (Article 192 PILA).²³

¹⁷ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.92; Sébastien BESSON, Salient Features and Amenities of Chapter 12 PILA, Arbitration, in *Switzerland – The Practitioner’s Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 13.

¹⁸ BESSON, *op. cit.* fn 17, para. 14; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.92.

¹⁹ Supreme Court Decision 4A_428/2008 of 31 March 2009, para. 3.2, 28 ASA Bulletin (2010), pp. 109-110; ATF 138 III 714, para. 3.3.2. ATF (Arrêts du Tribunal fédéral; BGE in German and DTF in Italian) is the acronym used to refer to the Supreme Court’s official reports. These reports reproduce important decisions (generally in excerpted form) some time after their publication (in full) on the Court’s website (www.bger.ch), under the standard “unreported” reference number (*i.e.*, in the format of the reference given for the first decision cited in this footnote). The numbers in ATF references indicate the volume (in the case cited here, 138), section (III) and first page (714) where the decision in question can be located in the printed version of the reports (the ATF collection is also available online at www.bger.ch). Unofficial English translations of the Supreme Court’s decisions rendered in arbitration matters from 2008 onwards can be found at <http://www.swissarbitrationdecisions.com/decisions>.

²⁰ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 7.96, with references to Swiss scholars and to Supreme Court Decision 4P.119/1998 of 13 November 1998, para. 1.a, 17 ASA Bulletin (1999), pp. 529-536. Cf. BERGER/KELLERHALS, *op. cit.* fn 5, paras. 1425-1431.

²¹ BESSON, *op. cit.* fn 17, para. 17; Mariella ORELLI, ad Article 179 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, paras. 33-34; Sophie THORENS-ALADJEM, Le juge d’appui en matière d’arbitrage interne et international, 35 ASA Bulletin (2017), pp. 532-535. See also ATF 139 III 511, para. 4 concerning Article 360 CCP (number of arbitrators).

²² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.93.

²³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.56; BESSON, *op. cit.* fn 17, para. 24; BERGER/KELLERHALS, *op. cit.* fn 5, para. 89.

Chapter 12 PILA contains a few mandatory provisions from which the parties cannot derogate:²⁴ (i) the choice of a Swiss arbitral seat will trigger the application of Swiss arbitration law (Article 176(1) PILA); (ii) the definition of arbitrability, *i.e.*, of disputes that can be submitted to international arbitration in Switzerland (Article 177(1) PILA); (iii) the form requirements for arbitration agreements (Article 178(1) PILA);²⁵ (iv) the principle of competence-competence (Article 186(1) PILA); (v) the requirement that arbitrators be impartial and independent (Article 180(1)(c) PILA); (vi) the compliance with fundamental principles of procedure (Article 182(3) PILA); (vii) the grounds for the annulment of awards (Article 190 PILA); (viii) the requirements for the waiver of the right to seek the annulment of awards (Article 192(1) PILA); and (ix) the jurisdiction of the Swiss Supreme Court to hear annulment actions (Article 191 LDIP).

3. The arbitration agreement

3.1 The law governing the arbitration agreement

Regarding the law governing the substantive validity of the arbitration agreement, Article 178(2) PILA provides a conflict of laws rule *in favorem validitatis*.²⁶ To be valid, the arbitration agreement must comply with the requirements of at least one (*i.e.*, the most favourable) of the designated laws, namely the law chosen by the parties to govern the arbitration agreement, the law governing the dispute, or Swiss law. Since there is no hierarchy between the three legal systems designated by Article 178(2) PILA, in practice the substantive validity of the arbitration agreement is often assessed in application of Swiss law, on account of its arbitration-friendliness.²⁷

Article 178(2) PILA does not identify the individual aspects of the substantive validity of the arbitration agreement, but only determines the law applicable thereto. The substantive validity of the arbitration agreement covers its conclusion (*e.g.*, offer, acceptance and defects in consent), interpretation and performance (*e.g.*, delay or impossibility), objective and subjective scopes, as well as its termination or other modes of extinguishment.²⁸

3.2 Separability and competence-competence

Article 178(3) PILA establishes the principle of separability of the arbitration agreement, providing that “[t]he validity of the arbitration agreement cannot be contested on the ground that the main contract may not be valid or that the arbitration agreement concerns a dispute which has not yet arisen”.

Article 186(1) PILA recognizes the principle of competence-competence, stating that “[t]he arbitral tribunal shall decide on its own jurisdiction”. Article 186(1bis) PILA further specifies that the arbitral tribunal “shall decide on its jurisdiction without regard to an action having the same subject matter already pending between the same parties before a state court or another arbitral tribunal, unless serious reasons require staying the proceedings”.²⁹

²⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.57. Cf. BERGER/KELLERHALS, *op. cit.* fn 5, para. 605 and BESSON, *op. cit.* fn 17, paras. 21 and 22.

²⁵ See, however, ATF 142 III 239, para. 3.3.1, where the Supreme Court considered, but ultimately left open, the question whether the parties can agree to stricter form requirements than those in Article 178(1) PILA.

²⁶ ATF 119 II 380, para. 4a.

²⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.76-3.77; Christoph MÜLLER, ad Article 178 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 33.

²⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.79; POUURET/BESSON, *op. cit.* fn 14, para. 295; MÜLLER, *op. cit.* fn 27, para. 35.

²⁹ Article 186(1bis) PILA was introduced in March 2007 to reverse the Supreme Court’s *Fomento* decision (ATF 127 III 279) in which the Court had held that an arbitral tribunal seated in Switzerland and faced with an already pending foreign court proceeding in the same matter was to apply the *lis pendens* rule in Article 9 PILA by analogy.

In other words, an arbitral tribunal seated in Switzerland generally does not have to stay the arbitration until the foreign court or arbitral tribunal has decided on its own jurisdiction.³⁰

3.3 The formal requirements for an enforceable arbitration agreement

Article 178(1) PILA requires an arbitration agreement “*in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text*”. The arbitration agreement does not need to be signed and, contrary to Article II(2) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”), Article 178(1) PILA does not require an “exchange” of documents.³¹

3.4 Arbitration agreements by reference

The Swiss Supreme Court has long accepted the validity of arbitration agreements incorporated into a contract by specific reference, *i.e.*, where the contract expressly refers to the arbitration agreement contained in a separate document, such as general terms and conditions.³²

In case of a global reference, *i.e.*, where the contract globally refers to a separate document, without expressly referring to the arbitration agreement contained therein, the Supreme Court tends to decide on a case-by-case basis, in light of the circumstances of the conclusion of the contract, such as the parties’ experience and the usages of the relevant trade.³³ Furthermore, concerning the substantive validity of a global reference, where Swiss law is applicable pursuant to Article 178(2) PILA, the Supreme Court has held that it must be determined whether, in accordance with the principle of good faith, such global reference shows the parties’ intention to be bound by the arbitration agreement.³⁴

3.5 The subjective scope of the arbitration agreement and extension to third parties

According to the Swiss Supreme Court, questions regarding the subjective scope of the arbitration agreement pertain to the substantive validity of the arbitration agreement within the meaning of Article 178(2) PILA. Therefore, they must be decided in application of the most favourable law designated by this provision.³⁵

Under the principle of privity of contract, the parties are usually only those who have concluded the arbitration agreement. However, there are several exceptions to this rule.³⁶ For instance, a third party may be bound by the arbitration agreement if an original party to that agreement transfers it to the former by way of an assignment of the main contract or of a claim.³⁷ The transfer of an arbitration agreement may also occur by way of legal succession (universal or singular) or subrogation, *i.e.*, when an insurer settles an insured debt and is thus subrogated to the rights of the creditor. Moreover, in insolvency proceedings, the bankruptcy

³⁰ BESSON, *op. cit.* fn 17, para. 33. Article 186(1bis) PILA does not introduce the so-called negative effect of competence-competence, according to which the state court must refrain from ruling on a conflict of jurisdiction until the arbitral tribunal has rendered a decision on its own jurisdiction (POUDRET/ BESSON, *op. cit.* fn 14, para. 458; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 5.43).

³¹ POUDRET/BESSON, *op. cit.* fn 14, para. 193; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.94; MÜLLER, *op. cit.* fn 27, paras. 14 and 22.

³² ATF 110 II 54, para. 3c.

³³ ATF 110 II 54, para. 3c.

³⁴ Supreme Court Decision 4C.44/1996 of 31 October 1996, para. 2. For more details on arbitration agreements by reference, see KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.83-3.97; POUDRET/BESSON, *op. cit.* fn 14, paras. 213-226; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 451-464.

³⁵ ATF 129 III 727, para. 5.3.1; ATF 134 III 565, para. 3.2.

³⁶ See, in particular, KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.155-3.166. See, also, POUDRET/BESSON, *op. cit.* fn 14, paras. 283-290; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 537-581; Tarkan GÖKSU, *Schiedsgerichtsbarkeit*, Zurich, St. Gallen 2014, paras. 656-662.

³⁷ ATF 129 III 727, para. 5.3.1.

trustee and the creditors who have been assigned claims of the debtor by the estate are bound by the arbitration agreement entered into by the bankrupt party.³⁸

Further exceptions to the principle of privity of contract include cases where the arbitration agreement is extended to a third party.³⁹ For instance, a third party beneficiary to a contract containing an arbitration agreement may under certain circumstances be entitled to rely on that agreement in order to seek the performance of a right under the contract.⁴⁰ In some cases, an arbitration agreement in a contract may be extended to a third party guarantor who has promised to pay the debt of one of the parties or to perform that party's obligation.⁴¹ Furthermore, piercing the corporate veil may sometimes justify the extension of the arbitration agreement to a third party by allowing the arbitral tribunal to disregard the existence of a separate legal personality, if the reliance thereon would amount to an abuse of rights.⁴² As another exception to the principle of privity of contract, where two contracts are so closely connected that in reality they constitute a single transaction, arbitration proceedings initiated on the basis of the arbitration agreement contained in one of them may be extended to the parties to the other contract.⁴³ Finally, an arbitration agreement may exceptionally extend to a third party if its participation in the performance of the underlying contract was such that its agreement to be bound by the arbitration agreement is implied.⁴⁴

3.6 Arbitrability

3.6.1 Arbitrability *ratione materiae*

Under Article 177(1) PILA, any matter involving an economic interest, *i.e.*, any dispute with a value measurable in financial terms for one of the parties, may be submitted to international arbitration, irrespective of the law governing the merits of the dispute.⁴⁵ The notion of "economic interest" is interpreted extensively to make international arbitration widely available.⁴⁶

The following disputes are not arbitrable under Chapter 12 PILA because they do not involve an economic interest or because they are within the exclusive jurisdiction of state authorities:⁴⁷ (i) family law status issues that primarily affect personal rights, *e.g.*, marriage, divorce, separation, paternity, adoption, guardianship; (ii) claims for the mere registration or deposit of intellectual property rights (but differences arising from intellectual property rights, *e.g.*, patents, industrial design, trademarks, copyrights, including disputes concerning their validity, are arbitrable); (iii) in debt collection and bankruptcy matters, those legal actions in the Swiss Federal Act on Debt Enforcement and Bankruptcy ("DEBA") that are strictly related to the debt

³⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.165.

³⁹ See, in particular, KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.167-3.179. See also POUURET/BESSON, *op. cit.* fn 13, paras. 258-259; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 537-581; GÖKSU, *op. cit.* fn 36, paras. 663-668.

⁴⁰ Supreme Court Decision 4A_44/2011 of 19 April 2011, para. 2.4.

⁴¹ Supreme Court Decision 4A_128/2008 of 19 August 2008, para. 4.2.1.

⁴² Supreme Court Decision 4A_160/2009 of 25 August 2009, para. 4.3.1. However, Swiss law does not recognise the group of companies doctrine to allow the extension of an arbitration agreement to affiliates belonging to the group of the company that is a party to the arbitration agreement (KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.177, with references; POUURET/BESSON, *op. cit.* fn 14, para. 258; MÜLLER, *op. cit.* fn 27, para. 71).

⁴³ Supreme Court Decision 4A_376/2008 of 5 December 2008, 27 ASA Bulletin (2009), pp. 776-778; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.178.

⁴⁴ ATF 129 III 727, para. 5.

⁴⁵ Supreme Court Decision 1P.113/2000 of 20 September 2000, para. 1b, 19 ASA Bulletin (2001), pp. 489-490; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.44-3.46; POUURET/BESSON, *op. cit.* fn 14, para. 338. This is particularly important for sports arbitration, for instance in connection with player transfer disputes, which involve decisions on the underlying employment relationships, a subject matter that is not arbitrable in several countries but is in Switzerland, where CAS arbitrations are seated (by operation of Article R28 of the CAS Code).

⁴⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.46, with references; Pierre LALIVE/Jean-François POUURET/Claude REYMOND, *ad Article 177 PILA, Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, para. 2.

⁴⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.47-3.55; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 222-253.

enforcement process;⁴⁸ (iv) criminal offences; (v) according to the Supreme Court, the arbitrability of a dispute may be denied to the extent that the claims at issue are to be heard exclusively by a state court, according to legal provisions that must be taken into consideration for reasons of public policy.⁴⁹

3.6.2 Arbitrability *ratione personae*

Chapter 12 PILA does not comprehensively govern arbitrability *ratione personae*, i.e., a person's capacity to enter into an arbitration agreement and to appear as a party in arbitration proceedings. As a prerequisite, a person or entity must have legal capacity, i.e. the capacity to be the subject of rights and obligations.⁵⁰

According to the Swiss Supreme Court, Article 178(2) PILA does not govern a party's capacity. Rather, it is determined by the conflict of laws rules in the PILA that govern the legal capacity of individuals (Articles 35-36 PILA) and legal entities (Articles 154-155 PILA).⁵¹

In the event of bankruptcy or other insolvency proceedings, the position of the Supreme Court is that the law of a party's place of incorporation determines whether a bankrupt debtor or a company having filed for bankruptcy has the legal capacity to enter into an arbitration agreement.⁵² However, the procedural consequences of bankruptcy on pending arbitration proceedings pertain to the substantive validity of the arbitration agreement and thus fall under Article 178(2) PILA and its conflict of laws rule *in favorem validitatis*.⁵³

Chapter 12 PILA contains an express provision on the capacity of states or state-controlled entities to arbitrate. Under Article 177(2) PILA, a state or state-controlled entity "cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement".

4. Intervention of domestic courts

4.1 Effects of an arbitration agreement before a Swiss court seized of the merits of the dispute

Under Article 7(b) PILA, a Swiss court seized of the merits of a dispute and faced with an arbitration defence must deny jurisdiction unless it finds that "the arbitration agreement is null and void, inoperative or incapable of being performed". The Supreme Court has continuously held that, if the arbitral seat is outside of Switzerland, the Swiss court must apply Article II(3) NYC and examine the validity of the arbitration agreement with full powers of review. By contrast, if the seat of the arbitration is in Switzerland, the Swiss court must limit itself to a *prima facie* examination of the arbitration agreement.⁵⁴

4.2 Anti-suit injunctions

It has been submitted that Swiss courts could possibly find a basis for issuing anti-suit injunctions in support of arbitration in Article 185 PILA.⁵⁵ This provision grants jurisdiction to the Swiss court at the seat of the arbitral tribunal (the so-called "*juge d'appui*") to assist the arbitral tribunal in any "other" procedural matter

⁴⁸ E.g. Articles 84 (clearance to proceed with debt collection proceedings), 85 (action for the annulment or stay of debt collection proceedings) or 265a(4) DEBA (action for a declaration that the debtor has or has not acquired new assets).

⁴⁹ ATF 118 II 353, para. 3c. *Contra*: BERGER/KELLERHALS, *op. cit.* fn 5, paras. 268-275.

⁵⁰ ATF 138 III 714, paras. 3.2 and 3.3; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.100. See also BERGER/KELLERHALS, *op. cit.* fn 5, paras. 344-368.

⁵¹ ATF 138 III 714, para. 3.3.2. See also KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.100-3.118; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 345-368.

⁵² ATF 138 III 714, para. 3.3.4.

⁵³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.103-3.104.

⁵⁴ ATF 138 III 681, para. 3.2. See also KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 5.32-5.47; POUURET/BESSON, *op. cit.* fn 14, paras. 499-504.

⁵⁵ POUURET/BESSON, *op. cit.* fn 14, para. 1026.

(i.e. other than for provisional measures or the taking of evidence, which fall under Articles 183 and 184 PILA respectively).

The question whether a Swiss court (or arbitral tribunal) should grant an anti-suit or anti-arbitration injunction in support of arbitration in Switzerland is controversial. It has been argued that they should not do so, because such injunctions are contrary to the principle of competence-competence and to the New York Convention, which calls for mutual trust between the contracting states' courts and arbitral tribunals.⁵⁶

5. The conduct of the proceedings

5.1 Control of the arbitrators' independence and impartiality

According to Article 180(1)(c) PILA, an arbitrator can be challenged "if circumstances exist that give rise to justifiable doubts as to his or her independence". The Supreme Court has held that Article 180(1)(c) PILA refers to both independence and impartiality within the meaning of Article 30 of the Swiss Constitution.⁵⁷ The standard set forth in Article 180(1)(c) PILA applies not only to the chairman or sole arbitrator, but also to party-appointed arbitrators.⁵⁸

Article 180(1)(c) PILA is mandatory: the parties cannot waive in advance their right to an independent and impartial arbitral tribunal.⁵⁹

The "justifiable doubts" referred to in Article 180(1)(c) PILA must be serious and the arbitrators' independence and impartiality must be assessed objectively, i.e., from the point of view of a reasonable third party observer; the subjective impressions of the party challenging the arbitrator are irrelevant.⁶⁰

The Swiss Supreme Court has on occasion referred to the IBA Guidelines on Conflict of Interest, stating that while they do not have force of law, they "constitute a useful tool and contribute to the harmonization and uniformity of the standards applied in international arbitration" and "should have an important influence on the practice of arbitral institutions and tribunals".⁶¹

Swiss courts apply Article 183(1)(c) PILA restrictively and are thus slow in accepting the existence of justifiable doubts regarding an arbitrator's independence and impartiality.⁶²

5.2 Swiss court assistance in the constitution of the arbitral tribunal

Under Article 179(2) and (3) PILA, in the absence of a party agreement, the Swiss court at the place of the arbitration may assist in the constitution of the arbitral tribunal, namely in the "appointment, removal or

⁵⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 5.72-5.73; BERGER/KELLERHALS, *op. cit.* fn 5, para. 677. See, also, the decision of the *Tribunal de première instance* of Geneva in the matter *Air (PTY) Ltd. v. International Air Transport Association (IATA) and C. SA*, C/1043/2005-15SP, 2 May 2005, 23 ASA Bulletin (2005), p. 736. See, however, POUURET/BESSION, *op. cit.* fn 14, para. 1032 (concerning anti-arbitration injunctions issued to prevent arbitration).

⁵⁷ ATF 136 III 605, paras. 3.2-3.3.

⁵⁸ ATF 136 III 605, para. 3.3.1.

⁵⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.107.

⁶⁰ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.112. See also BERGER/KELLERHALS, *op. cit.* fn 5, para. 860; Mariella ORELLI, ad Article 180 PILA, *Arbitration in Switzerland – The Practitioner's Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 13; Decision of the *Obergericht* of the Canton of Zurich of 13 September 2002, para. 5, available at: http://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/53948217FA347AE1C1256D09004CE0C1_VV020035.pdf; ATF 128 V 82, para. 2a; Supreme Court Decision 4A_210/2008 of 29 October 2008, para. 4.2.

⁶¹ ATF 142 III 521, para. 3.1.2; Supreme Court Decision 4A_506/2007 of 20 March 2008, para. 3.3.2.2.

⁶² See the examples given in KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.114, with references; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 861-863; ORELLI, ad Article 180 PILA, *op. cit.* fn 60, paras. 11-18a.

replacement" of an arbitrator. In doing so, it must apply by analogy the relevant provisions of the CCP (Articles 360, 361(2) and (3), 362, 370 and 371 ZPO).⁶³

Moreover, under Article 180(3) PILA, the Swiss court "*having jurisdiction at the seat of the arbitral tribunal*" may decide challenges against an arbitrator based on one of the grounds listed in Article 180(1) PILA, if "*the parties have not determined the procedure for the challenge*". The decision of the *juge d'appui* is final; it is not open to challenge in an annulment action against the arbitral award.⁶⁴

5.3 The Swiss courts' power to issue interim measures in connection with arbitrations

While Article 183 PILA does not expressly grant Swiss courts a (concurrent) jurisdiction to order provisional measures, it does not exclude this jurisdiction. The parties may thus file a request for provisional measures directly with the competent court, even after the constitution of the arbitral tribunal.⁶⁵

The competent court is the one at the place where the provisional measure sought is to be implemented (Article 10 PILA or Article 31 of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Lugano Convention")). The Swiss courts' decisions are subject to appeal before the higher cantonal court under Articles 308(1)(b) and 310 CCP, and the decisions of the latter can be challenged before the Swiss Supreme Court on the ground of a violation of constitutional guarantees (Article 98 SCA).⁶⁶

In addition to issuing interim relief and conservatory measures, the *juge d'appui* may also assist the arbitral tribunal with the enforcement of such measures.⁶⁷ Article 183(2) PILA provides that where a party does not comply with a provisional measure from the arbitral tribunal, the latter can "*request the assistance of the competent court*" and "*such court shall apply its own law*". This means that the court may rephrase or modify the arbitral tribunal's provisional measures to render them compliant with "*its own law*". Unlike the arbitral tribunal, the *juge d'appui* can also provide for sanctions in case a party does not comply with the court's order (Article 292 of the Swiss Criminal Code).⁶⁸

Swiss courts can grant *ex parte* provisional measures (Article 265(1) CCP).

5.4 The conduct of the proceedings before the arbitral tribunal

5.4.1 Party and arbitrator autonomy and fundamental principles of procedure

Under Article 182 PILA, it is largely for the parties and, in the absence of a party agreement, for the arbitrators to determine the conduct of the arbitration.⁶⁹ However, they must abide by the fundamental procedural

⁶³ See *supra*, Section 2.1 (final paragraph). On the intervention by the *juge d'appui* in the constitution of the arbitral tribunal, see THORENS-ALADJEM, *op. cit.* fn 21, pp. 530-535.

⁶⁴ ATF 138 III 270, para. 2.2.1; ATF 128 III 330, para. 2.2.

⁶⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.95; Sébastien BESSON, Arbitrage international et mesures provisoires, Zurich 1998, para. 231; BESSON, *op. cit.* fn 17, para. 46; Christopher BOOG, ad Article 183 PILA, *Arbitration in Switzerland – The Practitioner's Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 28; THORENS-ALADJEM, *op. cit.* fn 21, p. 535. On the question whether the parties can agree to exclude the court's concurrent jurisdiction, and the conditions for such an agreement to be valid, see in particular KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.105-6.108.

⁶⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.98-6.99; POUURET/BESSION, *op. cit.* fn 14, para. 637; BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 65, paras. 231 and 512; BOOG, ad Article 183 PILA, *op. cit.* fn 65, paras. 45-47.

⁶⁷ See, in particular, BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 65, paras. 511-521; BOOG, ad Article 183 PILA, *op. cit.* fn 65, paras. 29-44.

⁶⁸ THORENS-ALADJEM, *op. cit.* fn 21, p. 535.

⁶⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.03.

guarantees of equal treatment and the right to be heard in Article 182(3) PILA, which are outside the scope of the parties' autonomy.⁷⁰

5.4.2 The arbitral tribunal's power to issue interim measures

Under Article 183(1) PILA, "[u]nless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures". Accordingly, the parties may limit or exclude the arbitrators' power to issue provisional measures.⁷¹

Although Chapter 12 PILA does not say so expressly, arbitral tribunals have the power to order provisional measures *ex parte*.⁷²

Arbitral tribunals are not bound by Swiss rules of civil procedure. In principle, they can grant provisional measures that are not available before Swiss state courts, such as English "Mareva" injunctions.⁷³

Swiss arbitration law is silent with respect to the requirements for provisional measures. It may however be said that, according to transnational standards, there must be (i) a risk of serious harm; (ii) urgency so that the relief sought cannot wait until the award; (iii) a showing that the claim is not manifestly without merit; and (iv) a balance of interest weighing in favour of granting the measure.⁷⁴

Finally, in conformity with Article 183(3) PILA, the arbitral tribunal "may make the granting of interim relief or conservatory measures subject to the provision of appropriate security".

5.5 Taking of evidence

Under Article 184(1) PILA, "[t]he arbitral tribunal shall itself take the evidence". Therefore, the arbitral tribunal cannot delegate the taking of evidence to the parties or a third party, such as the secretary to the arbitral tribunal or a state authority.⁷⁵ Furthermore, failing an agreement between the parties, the tribunal also cannot delegate its powers to take evidence to only one or some of its members.⁷⁶

Article 184(1) PILA authorises the arbitral tribunal to decide on the admissibility of the evidence submitted by the parties, as well as on its relevance and materiality. The arbitral tribunal may also determine the admissible evidentiary means and the manner in which evidence is gathered. While the parties have the right to be heard and to submit evidence, they must exercise this right in a timely manner and in accordance with the procedural rules, the evidence at issue must relate to a relevant fact, and it must be capable of establishing a fact that is still uncertain.⁷⁷

⁷⁰ Supreme Court Decision 4P.26/2005 of 23 March 2005, para. 3.1.

⁷¹ BESSON, *op. cit.* fn 17, para. 45; BESSON, *Arbitrage international et mesures provisoires*, *op. cit.* fn 65, para. 214; BOOG, ad Article 183 PILA, *op. cit.* fn 65, paras. 5-6.

⁷² BERGER/KELLERHALS, *op. cit.* fn 5, para. 1260; BOOG, Part III – Interim Measures in International Arbitration, *Arbitration in Switzerland – The Practitioner's Guide*, Volume II, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, paras. 44-47; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.124; POUDRET/BESSON, *op. cit.* fn 14, para. 451; Ramon MABILLARD, ad Article 183 PILA, *Internationales Privatrecht*, Basler Kommentar, Heinrich Honsell, Nedim Peter Vogt, Anton K. Schnyder, Stephen V. Berti (eds.), 3rd ed., Basel 2013, para. 11.

⁷³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.116; BESSON, *Arbitrage international et mesures provisoires*, *op. cit.* fn 65, para. 517; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1258; BOOG, ad Article 183 PILA, *op. cit.* fn 65, para. 9.

⁷⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.119-6.120. See, also, POUDRET/BESSON, *op. cit.* fn 14, para. 626; BOOG, Part III – Interim Measures in International Arbitration, *op. cit.* fn 72, paras. 32-39; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 1249-1254.

⁷⁵ BESSON, *op. cit.* fn 17, para. 47; Marc VEIT, ad Article 184 PILA, *Arbitration in Switzerland – The Practitioner's Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 2.

⁷⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.15; VEIT, ad Article 184 PILA, *op. cit.* fn 75, para. 2.

⁷⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.14, 6.16 and 6.32; VEIT, ad Article 184 PILA, *op. cit.* fn 75, paras. 65-66.

According to the IBA Report on the Reception of the IBA Arbitration Soft Law Products, while arbitral tribunals sitting in Switzerland usually do not consider themselves bound by the IBA Rules on the Taking of Evidence, they frequently refer to these Rules (in about 62 percent of cases).⁷⁸

Under Article 184(2) PILA, the *juge d'appui* may assist the arbitral tribunal in the taking of evidence, e.g. by summoning a witness to appear before the arbitral tribunal or ordering a third party to produce relevant documents.⁷⁹ In assisting the arbitral tribunal, the state court “shall apply its own law”, i.e., title 10 of the CCP (Articles 150-193 CCP).⁸⁰

5.6 The arbitral tribunal’s decision on jurisdiction

Article 186(1) PILA empowers the arbitral tribunal to decide on its own jurisdiction.⁸¹ As a rule, it will not do so *ex officio*, but only if one of the parties has raised a plea of lack of jurisdiction prior to any defence on the merits (Article 186(2) PILA).⁸²

Article 186(3) states that the arbitral tribunal “shall” in general decide on a plea of lack of jurisdiction by a preliminary decision. However, as an exception to this rule, the arbitral tribunal may decide to rule on its jurisdiction in the final award, e.g., where the jurisdictional issues are closely related to the merits of the dispute.⁸³

The arbitral tribunal’s decision on jurisdiction, whether rendered as a preliminary or a final award, is open for challenge under 190(2)(b) PILA. Under Article 190(3) PILA, the aggrieved party must challenge a preliminary award on jurisdiction within thirty days of its notification, without awaiting the final award.⁸⁴

5.7 Liability

The liability of arbitrators sitting in Switzerland is limited in relation to the exercise of jurisdictional functions, i.e., the arbitrators’ decisions relating to the adjudication of the claims before them, as well as decisions regarding procedural measures other than simple administrative formalities.⁸⁵ In this context, a damages claim against the arbitrators would be possible only in case of gross negligence. However, arbitrators may be liable in connection with non-jurisdictional acts or omissions (e.g. a failure to disclose a fact of which the arbitrator was aware that it would lead to his or her removal, a refusal to act, namely to sign an award, a resignation without good cause, a violation of confidentiality, and fraud or corruption).⁸⁶

⁷⁸ IBA Report on the Reception of the IBA Arbitration Soft Law Products, September 2016, paras. 42 and 56 available at <file:///C:/Users/SC/Downloads/Arbitration-soft-law-report-September-2016-final.pdf>.

⁷⁹ POUURET/BESSON, *op. cit.* fn 14, para. 671; VEIT, ad Article 184 PILA, *op. cit.* fn 75, paras. 67-80.

⁸⁰ THORENS-ALADJEM, *op. cit.* fn 23, p. 536; VEIT, ad Article 184 PILA, *op. cit.* fn 77, para. 79; POUURET/BESSON, *op. cit.* fn 14, para. 671.

⁸¹ See *supra*, para. 0.

⁸² BERGER/KELLERHALS, *op. cit.* fn 5, para. 691.

⁸³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 5.17; BERGER/KELLERHALS, *op. cit.* fn 5, para. 700.

⁸⁴ BERGER/KELLERHALS, *op. cit.* fn 5, para. 735.

⁸⁵ POUURET/BESSON, *op. cit.* fn 14, para. 449; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 4.185 and 4.192-4.194.

⁸⁶ POUURET/BESSON, *op. cit.* fn 14, para. 449; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 4.185 and 4.192-4.194; RETO JENNY, ad Article 45 of the 2012 Swiss Rules, *Arbitration in Switzerland – The Practitioner’s Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, paras. 5-6. See also, most recently, Supreme Court Decision 4A_76/2018 of 8 October 2018, para. 4.2, in a case where the sole arbitrator had failed to render his award within the time limit agreed with the parties, as a result of which the award was annulled (ATF 140 III 75). The sole arbitrator was subsequently found to be liable for the legal costs incurred by the claimant in the arbitration and in the annulment proceedings.

While provisions contained in institutional arbitration rules that limit the arbitrators' liability are in principle valid, they may not be enforceable in arbitrations in Switzerland in cases of intentional wrongdoing or gross negligence (Article 100(1) of the Swiss Code of Obligations).⁸⁷

5.8 The law applicable to the merits of the dispute

5.8.1 The determination by the arbitral tribunal of the applicable law

Under Article 187 PILA, arbitral tribunals must decide the dispute according to the "*rules of law*" chosen by the parties or, failing such a choice, according to the "*rules of law*" with which the case has the closest connection. The term "*rules of law*" encompasses not only national laws, but also a-national or transnational rules.⁸⁸

Arbitral tribunals are not bound by the conflict of laws rules contained in other chapters of the PILA (or the conflict of laws rules of any other state that might have a connection with the case). They may however seek guidance from such conflict of laws rules, provided that they do not contravene the provisions of Chapter 12 PILA. For instance, under Article 117(2) PILA, "*a connection is deemed to exist with the state of the habitual residence of the party having to perform the characteristic obligation*". Article 4(1) of the Rome I Regulation contains a similar provision.⁸⁹

Where the parties have authorised the arbitral tribunal to decide *ex aequo et bono* (Article 187(2) PILA), it may take account of what is fair and just in the circumstances and is not bound by any rule of law, not even mandatory provisions, unless they belong to public policy.⁹⁰

5.8.2 Mandatory rules

The parties' autonomy to choose rules of law applicable to the merits is limited by the application of mandatory rules (*lois de police*), such as competition law, environmental law, consumer law, or exchange control provisions.⁹¹

6. The award

6.1 The waiver of the requirement for an award to provide reasons

Article 189(1) PILA recognizes the principle of party autonomy with respect to the deliberation process and the form and content of the award, stating that "*[t]he arbitral award shall be made in conformity with the procedure and form agreed by the parties*". Article 189(2) PILA adds that "*[i]n the absence of such an agreement, the award shall [...] be in writing [and] reasoned [...]*". The Supreme Court has confirmed that Article 189(2) is not mandatory.⁹² While rare in practice, the parties can thus waive reasons.⁹³

⁸⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.193; JENNY, ad Article 45 of the 2012 Swiss Rules, *op. cit.* fn 86, para. 7.

⁸⁸ BESSON, *op. cit.* fn 17, para. 51; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 7.52; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 1382-1385; POUURET/BESSION, *op. cit.* fn 14, para. 691.

⁸⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 7.42.

⁹⁰ Peter BURCKHARDT/Rafael MEIER, ad Article 187 PILA, *Arbitration in Switzerland – The Practitioner's Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 66; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 7.67-7.68; POUURET/BESSION, *op. cit.* fn 14, paras. 710 and 717-719.

⁹¹ BESSON, *op. cit.* fn 17, para. 56; POUURET/BESSION, *op. cit.* fn 14, paras. 705-708; ATF 118 II 193, para. 5.

⁹² Supreme Court Decision 4P.114/2004 of 13 September 2004, para. 4. See, also, Article 32(3) of the 2012 Swiss Rules, according to which "*[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given*".

⁹³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 7.125-7.126.

According to the Supreme Court, a waiver of reasons does not imply a waiver by the parties of the right to challenge the award.⁹⁴

6.2 The waiver of the right to seek the annulment of the award

Under Article 192 PILA, “[w]here none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2”.

The parties can waive the right to seek the annulment of the award if they:⁹⁵ (i) have no territorial connection with Switzerland; (ii) have agreed the waiver of annulment proceedings in writing, and (iii) have made an “express statement” to that effect. The waiver cannot result from a tacit agreement, an agreement implied from the parties’ acts, or an indirect agreement by submission to arbitration rules that provide that the parties waive any right to appeal or that the award will be final.⁹⁶ While no specific wording or reference to Articles 190 or 192 PILA are required, the parties must have made a clear and unambiguous statement of their intention to waive their right to seek the annulment of the award.⁹⁷ Even though the annulment remedy is not an appeal in the sense of an appeal on the facts and the law, the Supreme Court has interpreted the parties’ express statement to exclude the “right of appeal” as a waiver of annulment proceedings.⁹⁸ By contrast, mere statements that the award is “final and/or binding” or “without appeal” do not operate as a waiver of annulment proceedings.⁹⁹ In addition to the three requirements just discussed, the waiver cannot be one-sided, but must be expressed by all the parties;¹⁰⁰ it must occur prior to the notification of the arbitral award;¹⁰¹ and can be made in whole or in part in the sense that the parties can exclude all annulment grounds listed in Article 190(2) PILA or only some of them. By contrast, the parties cannot limit their waiver agreement to certain awards of the arbitral tribunal. A valid waiver will apply to all awards that are open to challenge under Article 190(2) PILA and subsequent decisions correcting an award.¹⁰² Finally, being a contract, the waiver agreement must meet the substantive validity requirements of contracts.

The requirements for a waiver of annulment must be met when the waiver is made.¹⁰³

The Supreme Court has held that the parties’ valid waiver of their right to seek the annulment of the award may also extend to the remedy of revision of the award.¹⁰⁴

⁹⁴ Supreme Court Decision 4A_198/2012 of 14 December 2012, para. 2.2.

⁹⁵ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.49-8.75, with references; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 1848-1869; Domitille BAIZEAU, ad Article 192 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, paras. 6-37; POUURET/BESSON, *op. cit.* fn 14, para. 839.

⁹⁶ POUURET/BESSON, *op. cit.* fn 14, para. 839.

⁹⁷ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.57-8.60, in particular the review of topical Supreme Court cases at para. 8.58.

⁹⁸ See Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 2, including the review of the Supreme Court’s previous case law on this question in para. 2.1.2.

⁹⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.58, with references; BAIZEAU, ad Article 192 PILA, *op. cit.* fn 95, paras. 20-22.

¹⁰⁰ POUURET/BESSON, *op. cit.* fn 14, para. 839.

¹⁰¹ BERGER/KELLERHALS, *op. cit.* fn 5, para. 1851.

¹⁰² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.72; POUURET/BESSON, *op. cit.* fn 14, para. 839; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1860; BAIZEAU, ad Article 192 PILA, *op. cit.* fn 95, para. 39.

¹⁰³ POUURET/BESSON, *op. cit.* fn 14, para. 839.

¹⁰⁴ Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 3. On the revision of arbitral awards, see *infra*, Section 6.5 (final two paragraphs).

6.3 Requirements for the rendering of a valid award

Under Article 189(2) PILA, absent an agreement between the parties, "*the award shall be made by a majority decision or, in the absence of a majority, by the presiding arbitrator alone. It shall be in writing, reasoned, dated and signed. The signature of the presiding arbitrator is sufficient*".¹⁰⁵

Even though Chapter 12 PILA is silent on this point,¹⁰⁶ and unless the parties have agreed otherwise, the final award must contain a decision on the amount and allocation of the arbitration costs and the parties' costs.¹⁰⁷

6.4 The annulment of awards

Arbitral awards rendered in Switzerland are not subject to an appeal on the facts or the law.¹⁰⁸ A review of the award is possible only by means of an annulment action before the Swiss Supreme Court (Article 191 PILA and Article 77 SCA) based on one or more of the grounds contained in the exhaustive and narrowly defined list in Article 190(2) PILA. Contrary to Article V(1)(d) NYC, this list does not contain the violation of the arbitral procedure, including procedural rules agreed by the parties. Such violations may be invoked only to the extent that they amount to a violation of the parties' right to be heard in an adversary procedure or to equal treatment within the meaning of Article 190(2)(d) PILA.¹⁰⁹

Under Article 190(3) PILA, preliminary and interim awards can be challenged only on the grounds identified in Article 190(2)(a) (irregular composition of the arbitral tribunal) and (b) PILA (wrongful acceptance of jurisdiction).¹¹⁰ For other grounds, the annulment action against the preliminary or interim award must be linked with a challenge against a subsequent partial or final award.¹¹¹

In accordance with Article 100(1) SCA, an annulment action must be filed against the challengeable award within thirty days of its notification in full (including reasons).¹¹²

¹⁰⁵ Regarding the (recommended) content of the award, see BERGER/KELLERHALS, *op. cit.* fn 5, para. 1483; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 7.124.

¹⁰⁶ Unlike the CCP, which requires arbitrators to include a ruling on costs in the (final) award (Article 384(1)(f) CPP).

¹⁰⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 7.129; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1611 with references; Micha BÜHLER/Marco STACHER, Costs in International Arbitration, *Arbitration in Switzerland – The Practitioner's Guide*, Volume II, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 7.

¹⁰⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.01.

¹⁰⁹ BESSON, *op. cit.* fn 17, para. 65.

¹¹⁰ ATF 130 III 755, para. 1.2.2. With ATF 140 III 477, para. 3, the Supreme Court clarified that the grounds enumerated in letters (c) to (e) of Article 190(2) PILA (award rendered *ultra* or *infra petita*, violations of fundamental rules of procedure and violations of public policy) can also be relied upon in challenges against preliminary and interim awards, provided they are raised only in connection with matters directly related to the constitution, composition or jurisdiction of the arbitral tribunal (e.g., where a violation of the right to be heard may have been committed in taking the evidence on jurisdictional issues).

¹¹¹ BESSON, *op. cit.* fn 17, para. 63. See, also, ATF 140 III 477, para. 3.

¹¹² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.35-8.36. In cases where the arbitral tribunal notifies the operative part of the award first (without the reasons), as is relatively frequent in CAS arbitrations, it is possible to file an application for annulment upon receipt of the operative part (which is enforceable as from its notification) in order to seek a stay of the award pending the communication of the reasons (Supreme Court Decision 4A_444/2016; 4A_446/2016 of 17 February 2017). On the *dies a quo* and Article 100(1) SCA's requirement of 'notification in full', which, where relevant, is to be read in conjunction with the applicable arbitration rules, see Supreme Court Decision 4A_40/2018 of 26 September 2018, para. 2, and Antonio RIGOZZI, Swiss Supreme Court clarifies starting point for computation of time limit to challenge ICC awards, 10 October 2018 <https://www.linkedin.com/pulse/swiss-supreme-court-clarifies-starting-point-time-limit-rigozzi/>. In this decision, the Supreme Court ruled that the statutory, non-extendable 30-day time limit to bring an application to set aside an arbitral award, starts to run, for awards rendered under the ICC Arbitration Rules, upon the notification of the original of the award to the parties, in accordance with Article 35(1) ICC Rules, and not upon the communication, via e-mail from the ICC Secretariat, of a 'courtesy copy' of the award.

Arbitral awards rendered in Switzerland have *res judicata* effect and are enforceable from their notification to the parties (Article 190(1) PILA).¹¹³ As a rule, the introduction of annulment proceedings does not suspend the enforceability of the challenged award (Article 103(1) SCA). However, the Supreme Court may suspend the enforcement of an award *ex officio*, which is most unlikely in international arbitration given the restrictive annulment grounds, or upon request (Article 103(3) SCA). In practice, such requests are granted only in exceptional cases and if (i) the enforcement of the award exposes the requesting party to irreparable harm; (ii) the applicant's interests prevail over those of the opposing party; and (iii) a *prima facie* review of the annulment application shows that it is likely to be well founded.¹¹⁴

In addition to suspending the enforcement of the award, the Supreme Court may also issue "other provisional measures" that are required to preserve the *status quo* or protect interests at risk of suffering irreparable harm pending the outcome of the annulment proceedings (Article 104 SCA).¹¹⁵

Statistically, the median duration of annulment proceedings is approximately 6 months from the filing of the challenge until the decision of the Swiss Supreme Court, although variance remains high. The Supreme Court will annul a challenged award only in about 7% of cases.¹¹⁶

6.5 The revision, interpretation or correction of an award

Chapter 12 PILA contains no provisions on the interpretation, correction or revision of arbitral awards. However, the Supreme Court has held that arbitral tribunals sitting in Switzerland can interpret or correct their own awards¹¹⁷ and that arbitral awards can be the subject of a revision.¹¹⁸

Concerning the correction and interpretation of international arbitral awards, Article 388 CCP, which applies to domestic arbitrations, may provide some guidance. Under Article 388(2) CCP, a party may submit a request for correction or interpretation within thirty days from the discovery of the error or of the part of the award that needs to be interpreted, but in no event later than one year from the notification of the award. However, in international arbitration it is advised to review the award promptly upon notification and to file a request without delay. Indeed, institutional arbitration rules may provide a (different) time limit from the notification or receipt of the award.¹¹⁹

The remedy of revision allows for the reconsideration of the award after it has come into force. It applies only in the presence of narrowly defined grounds, namely where the award was influenced by a crime or

¹¹³ ATF 117 Ia 166, para. 5a; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1630; POUDRET/BESSON, *op. cit.* fn 14, para. 853; BESSON, *op. cit.* fn 17, para. 74; Silja SCHAFFSTEIN, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals*, Oxford 2016, para. 4.72.

¹¹⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.92 and 8.95. For details on the conditions for granting the suspensive effect and a typology of cases, see Cesare JERMINI/Nicola BERNARDONI, *Suspensive Effect of Challenges Against International Arbitral Awards in Switzerland: A Trend Towards More Frequent Grants? in New Developments in International Commercial Arbitration 2011*, Müller, Rigozzi (eds.), Zurich, Basel, Geneva 2011, pp. 83-92.

¹¹⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.92-8.93.

¹¹⁶ For the most recent statistical analysis, see Felix DASSER/Piotr WOJTOWICZ, *Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017*, 36 ASA Bulletin (2018), pp. 276-294. While, as noted in the previous edition of this report, challenges in sports cases have tended over several years to be slightly more successful than those in non-sports cases, DASSER/WOJTOWICZ's latest analysis has shown that success rates for sports and non-sports challenges have converged in the 2016-2017 period, plateauing at slightly more than 7% in both areas (*ibid.*, pp. 279-280).

¹¹⁷ BESSON, *op. cit.* fn 17, para. 72 with reference to ATF 126 III 524, para. 2b.

¹¹⁸ Silja SCHAFFSTEIN/Sabina SACCO, *Commentary of Supreme Court Decision 4A_386/2015 (ATF 142 III 521) of 7 September 2016*, XIV *Revista Brasileira de Arbitragem* No. 56 (2017), p. 169; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.207 and para. 8.209; POUDRET/BESSON, *op. cit.* fn 14, para. 845. See also ATF 142 III 521, para. 2.1; ATF 129 III 727, para. 1; ATF 118 II 199, paras. 2 and 3.

¹¹⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 7.192-7.194; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1525; Maria HAUSER-MOREL/Jan Heiner NEDDEN, *Correction and Interpretation of Arbitral Awards and Additional Awards*, in *Post Award Issues*, Tercier (ed.), ASA Special Series No 38 (2011), p. 24. See, also, Article 36(2) of the 2017 ICC Rules; Articles 35 and 36 of the 2012 Swiss Rules; Article R63 of the CAS Code; Articles 37 and 38 of the 2013 UNCITRAL Arbitration Rules.

felony to the detriment of one of the parties or where relevant facts or conclusive evidence have come to light on which the parties were unable to rely during the course of the arbitration proceedings. If a request for revision is successful, the competent authority, *i.e.* the Swiss Supreme Court, annuls the award and remands the case to either the same or, if it is no longer possible to call upon the original tribunal (*e.g.*, because its members have died, cannot be reached or simply refuse to be seized again of the dispute), a new arbitral tribunal for a new award.¹²⁰

The Supreme Court has raised the question whether the subsequent discovery (*i.e.*, after the time limit to request the annulment of the award has expired) of a ground for the challenge of an arbitrator can be invoked as an additional ground for the revision of an arbitral award. So far, the Court has left this question open, noting that it should be addressed by the Swiss Parliament within the framework of the latter's mandate to reform Chapter 12 PILA.¹²¹ Indeed, as will be seen in further detail below, a reform of Chapter 12 PILA is currently underway. The Draft Bill for the revised Chapter 12 PILA contains provisions on the revision (draft Article 190a Draft Bill), as well as on the interpretation and correction of awards (draft Article 189a Draft Bill).¹²²

6.6 The enforcement of awards rendered in Switzerland

Arbitral awards rendered in Switzerland do not need to be confirmed by a judgment; they can be enforced like Swiss court judgments.¹²³

The DEBA (via Article 335(2) CCP) governs the enforcement of awards "*containing an order to pay a monetary compensation or to provide securities*". In particular, awards constitute a "*title*" to obtain the definitive lift of a suspension of a summon to pay ("*titre de mainlevée définitive*"; "*definitive Rechtsöffnungstitel*") within the meaning of Article 80 DEBA.¹²⁴ The enforcement of "non-monetary" awards (*i.e.*, declaratory awards or awards ordering specific performance) is governed by Articles 335-346 CCP.¹²⁵

Article 193 PILA provides for the optional deposit or certificate of enforceability of an arbitral award, but neither the deposit nor the certificate are preconditions for the recognition and enforcement of awards, in Switzerland or abroad.¹²⁶

6.7 The recognition and enforcement of foreign awards in Switzerland

Under Article 194 PILA, the New York Convention governs the recognition and enforcement of all foreign arbitral awards in Switzerland, whether or not the country of the arbitral seat is a contracting state; there is no reservation of reciprocity.¹²⁷

Swiss courts generally do not take a formalistic approach with respect to the requirements set forth in Article IV(1)(a) (duly authenticated original award or a duly certified copy thereof) and (b) NYC (original arbitration agreement or a duly certified copy thereof). The Supreme Court has held that where the authenticity of the

¹²⁰ ATF 118 II 199, para. 3; SCHAFFSTEIN/SACCO, *op. cit.* fn 118, p. 168; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.206, 8.212 and 8.224; BESSON, *op. cit.* fn 17, paras. 70-71.

¹²¹ ATF 142 III 521, para. 2.3.5. See also Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 3.1.

¹²² See *infra*, Section 8.

¹²³ BESSON, *op. cit.* fn 17, para. 75.

¹²⁴ BESSON, *op. cit.* fn 17, para. 75; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.281-8.282; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 2009-2016.

¹²⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.283; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 2006-2008 and paras. 2017-2021.

¹²⁶ BESSON, *op. cit.* fn 17, para. 76.

¹²⁷ BESSON, *op. cit.* fn 17, para. 77.

award or the arbitration agreement are not disputed, simple, non-legalized and/or non-certified copies of the award or arbitration agreement are sufficient.¹²⁸

7. Funding arrangements

Swiss law does not prohibit third party funding.¹²⁹ In particular, on 10 December 2004, the Supreme Court decided to strike down a draft law proposed by resolution of the Cantonal Council of Zurich, prohibiting parties from resorting to third party funding. According to the Court, a general ban on third party funding would violate the principle of freedom of commerce protected and guaranteed by the Swiss Constitution.¹³⁰

Under Article 12(1)(e) of the Swiss Federal Lawyers' Act ("LLCA" or "*Loi fédérale sur la libre circulation des avocats*" in French, "*Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte*" in German), attorneys cannot in advance enter into an agreement with their clients providing for a contingency fee based entirely on the outcome of the case. Specifically, the attorney's (entire) fee cannot be a percentage of the amount recovered (*pactum de quota litis*); nor can Swiss attorneys agree to waive legal fees in the event of an unfavourable outcome. However, the Supreme Court has held that a fee arrangement containing elements of a contingency fee, the so-called *pactum de palmario*, is allowed, albeit within limits. First, attorneys must obtain a fee independently of the outcome of the case, allowing them not only to cover their expenses but also to make a reasonable profit. Second, the contingency fee element must not be so important to result in the attorney losing his or her independence. Third, the *pactum de palmario* must be concluded either in the beginning of the attorney-client relationship or after the conclusion of the case, but not during the exercise of the attorney's mandate.¹³¹

8. Is there likely to be any significant reform of the arbitration law in the near future?

As indicated in the previous edition of the GAP, Chapter 12 PILA is currently undergoing a revision. The legislative process to that end is nearing completion. On 24 October 2018, the Swiss Federal Council, *i.e.* the executive branch of Government, published its Draft Bill on the reform of Chapter 12 PILA, accompanied by an Explanatory Report addressed to the Swiss Parliament.¹³²

The Federal Council's Draft Bill and Explanatory Report built upon the preliminary draft bill that had been released by the Swiss Federal Department of Justice (SFDJ) in January 2017,¹³³ in particular taking into account the observations filed by interested stakeholders during the ensuing public consultation period.¹³⁴

¹²⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.237, with references to Supreme Court Decision 4A_124/2010 of 4 October 2010, para. 4.2 and Supreme Court Decision 5A_427/2011 of 10 October 2011, para. 5.

¹²⁹ On this issue, see, for instance, Sebastiano NESSI, Third-party funding: a Swiss law perspective, Practical Law Arbitration Blog of 16 March 2016 available at: <http://arbitrationblog.practicallaw.com/third-party-funding-a-swiss-law-perspective/>; Noradèle RADJAI, Case notes on third-party funding – Switzerland, p. 37 available at: http://www.lalive.ch/data/publications/Third_Party_Funding.pdf.

¹³⁰ ATF 131 I 223.

¹³¹ Supreme Court Decision 4A_240/2016 of 13 June 2017, para. 2.

¹³² *Message concernant la modification de la loi fédérale sur le droit international privé (Chapitre 12 Arbitrage international) and Loi fédérale sur le droit international privé (LDIP) (Projet); Botschaft zur Änderung des Bundesgesetzes über das Internationale Privatrecht (12. Kapitel: Internationale Schiedsgerichtsbarkeit) and Bundesgesetz über das Internationale Privatrecht (IPRG) (Entwurf); Messaggio concernente la modifica della legge federale sul diritto internazionale privato (Capitolo 12: Arbitrato internazionale) and Legge federale sul diritto internazionale privato (LDIP) (Disegno)*, published in the Swiss Federal Gazette No. 47 of 27 November 2018, available at https://www.admin.ch/opc/fr/federal-gazette/2018/index_47.html.

¹³³ The SFDJ's Preliminary Draft Bill, which was also accompanied by an Explanatory Report, was published on 11 January 2017. Both the Preliminary Draft Bill and its accompanying Explanatory Report are available at: <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vorentw-f.pdf> and <https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vn-ber-f.pdf>

¹³⁴ Organizations such as the Swiss Arbitration Association (ASA), the Swiss Chambers' Arbitration Institution (SCAI), judges at the Supreme Court, various law firms, ICC Switzerland, Economiesuisse, universities, academics, as well as some political parties and several Swiss cantons filed observations on the SFDJ's Preliminary Draft Bill. The observations were collated and published online by the SFDJ in July 2017, at <https://www.admin.ch/ch/f/gg/pc/ind2017.html>. ASA has also issued brief

As the Federal Council's Explanatory Report makes clear,¹³⁵ even thirty years after its adoption in 1989, Chapter 12 PILA remains an innovative arbitration law of high quality. Its main strengths include its clarity and conciseness, as well as the great importance afforded to party autonomy, allowing the parties to fashion the proceedings in accordance with their specific needs and within a framework that secures the respect of the rule of law.¹³⁶ Therefore, the proposed reform of Chapter 12 PILA is limited to a "light revision", amending as little as possible and only to the extent necessary, with the goal of modernizing and strengthening Switzerland's position as a leading place for international arbitration. This goal is to be achieved by improving legal certainty and clarity, removing any unclear formulations, and rendering the arbitration law even more user-friendly, namely by incorporating the Supreme Court's established case law.

The Draft Bill is due to be reviewed and debated by both Swiss parliamentary chambers,¹³⁷ starting in the spring session of 2019.¹³⁸ At the time of writing, it is expected that the revised text of Chapter 12 PILA will be enacted in 2020 and enter into force in 2021.

observations on the Federal Council's Draft Bill of 24 October 2018, shortly after its release: <https://www.arbitration-ch.org/en/asa/asa-news/details/1010.asa-observations-on-the-chapter-12-revision.html>.

¹³⁵ See in particular Federal Gazette 2018, p. 7153 et seq. (<https://www.admin.ch/opc/fr/federal-gazette/2018/7153.pdf>), at p. 7154, pp. 7161-7164.

¹³⁶ See BESSON, *op. cit.* fn 17, paras. 78-95.

¹³⁷ The Swiss Parliament (*Assemblée fédérale; Bundesversammlung; Assemblea federale*) is composed of two representative chambers, the *Conseil National (Nationalrat; Consiglio nazionale)*, or lower house, representing the people, and the *Conseil des États (Ständerat; Consiglio degli Stati)*, or upper house, representing the cantons. Both chambers are called to vote on legislative projects submitted by the Federal Council.

¹³⁸ The parliamentary debates on the Draft Bill for the reform of Chapter 12 PILA can be followed via the Swiss Parliament's website's dedicated page, at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20180076>.