

# International Arbitration in Switzerland: a revised legal framework in 2021

Effective as from 1 January 2021, the Swiss parliament enacted a number of revised provisions of Chapter 12 of the Swiss Federal Private International Law Act, 1987 (PILA) governing international arbitration (*lex arbitri*). This "light touch" revision aims at consolidating 30 years of cases decided by the Federal Supreme Court, reinforcing the parties' autonomy and making the application of the law even more predictable and user-friendly. Our newsflash provides a concise overview of the revision's most important features.

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## 1. Introduction

Chapter 12 (Articles 176-194) PILA has not been subject to significant amendments since its entry into force on 1 January 1989. In 2017, the federal government started preparing a revision of the law, which was finally adopted by the parliament on 19 June 2020 and came into force on 1 January 2021. The revision of the PILA ("R-PILA") includes certain amendments to other statutes, such as the Federal Supreme Court Act ("**FSCA**"), the Civil Procedure Code ("**CPC**") and the Swiss Code of Obligations ("**CO**").

2. Chapter 12 applies if at least one of the parties had neither its domicile, residence nor registered office in Switzerland at the time the arbitration

## agreement was entered into

In its initial version of 1987, Article 176(1) PILA defining the scope of application of the law was ambiguous, as it did not specify whether the requirement that at least one party has its domicile outside Switzerland applied to the parties to the *arbitration agreement* or the parties to the *arbitration proceedings*. In some circumstances, this could lead to uncertainty as to the applicable legal framework (CPC for domestic arbitration, PILA for international arbitration).

Article 176(1) R-PILA now expressly provides that the relevant criterion is the domicile, residence or registered office of the parties to the *arbitration agreement* at the moment of entering into that agreement.

## 3. Arbitration agreements are valid if contained in unilateral acts as well as in articles of association

It had been an unresolved issue under the 1987 PILA whether unilateral acts may contain a binding arbitration agreement or whether they constitute an offer to conclude an arbitration agreement.

Article 178(4) R-PILA now makes it clear that an arbitration clause may not only be included in a contract, but also in a unilateral act (e.g. a will, a foundation or a trust), as well as in articles of association which will allow more corporate disputes to be referred to arbitration in the future.

## 4. Improving the constitution of arbitral tribunals, as well as the challenge and revocation of arbitrators

For the important issues of the constitution of the arbitral tribunal, as well as the challenge and revocation of arbitrators, the 1987 PILA merely referred to the CPC. To improve user-friendliness, the legislature decided to include express provisions governing these issues in Chapter 12.

Article 179 R-PILA provides that arbitrators are appointed or replaced in accordance with the parties' agreement (typically applying the arbitration rules chosen by the parties). Unless the parties decide otherwise, there will be a three-member tribunal: each party appoints a co-arbitrator, and the two co-arbitrators appoint a presiding arbitrator. Failing an agreement on the constitution or if arbitrators cannot be appointed for any other reason, the state court at the place of the arbitration has jurisdiction to assist the parties. If the parties have not determined the place of the arbitration, or they have simply agreed that the seat will be in Switzerland, the court seized first (in whichever Swiss canton) may appoint an arbitrator, or all arbitrators in case of a multi-party arbitration.

Article 180 R-PILA governs the challenge of an arbitrator in a more detailed manner with a two-tier procedure in the absence of an agreement between the parties. An application to challenge an arbitrator shall be made to the tribunal members within 30 days following discovery of the grounds for such challenge (Article 180a R-PILA). Within 30 days of the application, the challenging party may request the state court at the place of the arbitration to remove the challenged arbitrator, the decision of the court being final without any possible appeal.

A relevant circumstance for challenges is the duty of each arbitrator to disclose without delay any facts that could raise legitimate doubts as to his or her independence or impartiality. This obligation, which lasts until the proceedings are closed, is now codified for international

arbitration (Article 179(6) R-PILA) as it was for domestic arbitration in the CPC.

According to Article 180b R-PILA, and unless the parties agree otherwise, if an arbitrator is not in a position to perform his or her tasks in due course and with due diligence, a party may request the state court at the place of the arbitration to revoke such arbitrator. The court's decision is final without any possible appeal.

## 5. Arbitral tribunals and parties to arbitration proceedings (in Switzerland and now also abroad) will benefit from a straightforward legal framework in relation to the taking of evidence and interim measures

Already under the 1987 PILA, arbitral tribunals or a party to the proceedings (with the arbitral tribunal's consent) could resort to the state court at the place of the arbitration if it required assistance in the process of taking evidence.

Aimed at avoiding long and costly proceedings of international legal assistance, the R-PILA contains new provisions allowing arbitral tribunals sitting abroad, or a party to such proceedings, to resort to the Swiss state courts where the taking of evidence or an interim measure should be executed (Article 185a R-PILA).

## 6. A party which has procedural objections must invoke them immediately

Consistent with the Federal Supreme Court's case law, Article 182(4) R-PILA now expressly provides that a party which fails to raise procedural objections immediately will forfeit its related rights.

## 7. More clarity as to the remedies available against awards

Under the 1987 PILA, the only remedy against awards expressly addressed were setting aside applications. The revised act now includes the clarification (previously contained in the FSCA) that an application must be filed within 30 days following notification of the final award (Article 190(4) R-PILA). The revised act also clarifies that there is no minimum amount in dispute for filing a setting aside application (Article 77(1) FSCA).

Moreover, the revised law expressly includes the additional remedies of correction, interpretation, requesting an additional award and revision, which had been applied by the Federal Supreme Court absent specific provisions in the 1987 PILA (Articles 189a and 190a R-PILA).

## 8. Parties may file their submissions before the Federal Supreme Court in English

As one of the main new features of the revision, parties to proceedings before the Federal Supreme Court are now allowed to file their submissions (to be understood in a broad manner) in English (Article 77(2bis) FSCA). The Supreme Court's decisions and communications will still be issued, and any public deliberation will be held, in one of Switzerland's official languages.

## 9. Other expected developments and improvements for arbitration in Switzerland

The revised provisions of Chapter 12 PILA are not the only novelty for 2021.

The Swiss Chambers' Arbitration Institution (SCAI) is expected to announce important changes arising from its new cooperation with the Swiss Arbitration Association (ASA), including a revision of the Swiss Rules of International Arbitration ("Swiss Rules").

The law governing Swiss companies limited by shares and limited liability companies will be revised with a new provision (Article 697n CO), in force from 1 January 2022, allowing arbitration agreements in companies' articles of association for corporate disputes. In that regard, SCAI is planning to adopt a new set of arbitration rules dedicated to corporate disputes, as supplemental provisions to the Swiss Rules.

Please do not hesitate to contact us in case of any questions.

**Legal Note:** The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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