

SWITZERLAND

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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 any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

With its longstanding tradition in international arbitration, Switzerland remains one of the preferred arbitral seats in the world, and Swiss arbitrators continue to be among the most frequently appointed. Chapter 12 of the Swiss Private International Law Act (“PILA”), the most recent amendments of which entered into force on 1 January 2021, is a modern and innovative arbitration law. Its clarity and conciseness make it easily accessible for (foreign) lawyers and non-lawyers alike, and the prominent role it affords to party autonomy means that 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 in the country.

Key places of arbitration in the jurisdiction?	Geneva, Zurich, Lugano, Lausanne. ¹
Civil law / Common law environment? (if mixed or other, specify)	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 in arbitration-related proceedings before the Swiss Supreme Court (e.g. annulment actions) must be signed by the party or by 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 represented by an attorney (Article 68(1) CCP). As under Article 40(1) SCA, pursuant to Article 68(2) CCP, they

¹ Geneva and Zurich top the statistics for commercial arbitrations, with Lugano in the third place (see 2019 ICC Dispute Resolution Statistics, available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>, at p. 28; Swiss Chambers’ Arbitration Institution Statistics 2019, available at https://www.swissarbitration.org/files/515/Statistics/SCAI%20Stats%202019_PDF_v20200609_for%20publication.pdf). Lausanne is also a prominent place of arbitration, as the Court of Arbitration for Sport (CAS) is headquartered there and the CAS rules of arbitration provide that the seat of all CAS proceedings is in Lausanne (Article R28 CAS Code). The CAS Statistics (1986-2020) confirm the trend toward a steady increase in the number of cases handled by the CAS, going from approximately 600 cases a year in the period from 2016 to 2019 to approximately 950 cases a year in 2020 (see CAS Statistics (1986-2020), available at https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2020.pdf).

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.

	may however choose to be represented by a “lawyer admitted to represent parties before the Swiss courts under the [LLCA]”. ³
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 and/or remotely?	Meetings and/or hearings can be conducted outside of Switzerland and/or remotely.
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 of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”). There is no reservation of reciprocity.
Party to the ICSID Convention?	Switzerland is a party to the ICSID Convention.
Compatibility with the Delos Rules?	There appear to be no significant incompatibilities with mandatory provisions of Chapter 12 PILA. For the avoidance of any doubt, under Article 7.4(e) of the Delos Rules, arbitral tribunals have the power “to review and revise any of its previous orders” on legal and factual issues, as opposed to “Awards” within the meaning of Article 8 of the Delos Rules. This is compatible with Swiss law which permits the review and reconsideration of procedural orders. However, under Swiss law, it is possible that a decision that was formally designated as an “order” in reality qualifies as an “award”. If so, the arbitral tribunal cannot reconsider such decision as doing so may be considered as an inadmissible violation of its <i>res judicata</i> effect.

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 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.

<p>Default time-limitation period for civil actions (including contractual)?</p>	<p>For contract claims, Article 127 of the Swiss Code of Obligations; "CO" stipulates the following default statute of limitation: <i>"All claims prescribe after ten years unless otherwise provided by federal civil law"</i>. For tort claims, Article 60(1) CO stipulates the following default statute of limitations: <i>"The right to claim damages or satisfaction prescribes three years from the date on which the person suffering damage became aware of the loss, damage or injury and of the identity of the person liable for it but in any event ten years after the date on which the harmful conduct took place or ceased"</i>.</p>
<p>Other key points to note?</p>	<p>∅</p>
<p>World Bank, Enforcing Contracts: <i>Doing Business</i> score for 2020, if available?</p>	<p>64.1</p>
<p>World Justice Project, Rule of Law Index: <i>Civil Justice</i> score for 2020, if available?</p>	<p>∅</p>

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) to (5), 180a(2), 180b(2) and 183-185a PILA); (iv) an exhaustive and narrowly defined list of grounds of annulment and revision of arbitral awards (Articles 190(2) and 190a(1) PILA), including a possibility for parties without any territorial connection with Switzerland to waive their right to recourse against arbitral awards (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, initially entered into force on 1 January 1989; revised version entered into force on 1 January 2021.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	While Chapter 12 PILA is not based on any version of 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>The above-listed courts are competent, within their geographical areas of jurisdiction, to handle applications for (i) the constitution of the arbitral tribunal; (ii) the challenge of arbitrators; (iii) assistance in connection with any procedural matters, including provisional measures and the taking of evidence (Articles 179(2) to (5), 180a(2), 180b(2) and 183-185a 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 so-called positive effect of competence-competence, empowering the arbitral tribunal to rule on its own jurisdiction. They do not enshrine the 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. Under the Swiss Supreme Court's case law, where a Swiss court is seized first with a substantive claim and confronted with an arbitration defence, it will decide on the jurisdiction of the arbitral tribunal with <i>full power of review</i> if the seat of the arbitration is outside of Switzerland (Article II(3) NYC), ⁶ but will limit itself to a <i>prima facie</i> review if the seat is in Switzerland (Article 7(b) PILA). ⁷
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Chapter 12 PILA contains no express provision to this effect. However, Article 189(1) PILA stipulates that "[t]he award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties". Moreover, the parties can waive their right to a reasoned award. Hence, while it should be rare in practice, it would be at least conceivable for parties to authorize the arbitral tribunal to render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award. However, the parties must be aware that they must immediately challenge, <i>i.e.</i> within 30 days of their notification, partial awards, decisions on jurisdiction, and preliminary awards (for irregular constitution or erroneous determination on jurisdiction; Articles 190(2)(a) and (b) and 190(3) PILA). They cannot postpone their obligation to immediately challenge such rulings by authorizing the arbitral tribunal to provide reasons in a subsequent award.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Article 190(2) PILA sets out the exhaustive list of available annulment grounds: 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.
Do annulment proceedings typically suspend enforcement proceedings?	As a rule, the introduction of annulment proceedings does not suspend the enforceability of the challenged award (Article 103(1) of the Supreme Court Act).
Courts' attitude towards the recognition and enforcement of	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

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

⁶ See, e.g., ATF 121 III 38, para. 2b; Supreme Court Decision 4A_279/2010 of 25 October 2010, para. 2.

⁷ See, e.g., ATF 138 III 681, para. 3.2.

foreign awards annulled at the seat of the arbitration?	departs from those stated in Article V of the New York Convention, ⁸ or the annulment amounts to a manifest violation of the law of the country in which the award was made. ⁹
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?	While the Swiss courts have not yet decided this issue, an arbitral tribunal's order to conduct the hearing remotely despite a party's objection should not in itself affect the recognition or enforceability of an ensuing award in Switzerland, unless such order would at the same time violate the parties' due process rights (Article V(1)(b) NYC) or an agreement of the parties (Article V(1)(d) NYC).
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	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".
Is the validity of blockchain-based evidence recognised?	Articles 182 and 184 PILA provide the parties and the arbitrators with broad freedom to fashion the arbitration proceedings according to the needs of the particular case, including to determine the admissible evidentiary means and the manner in which the evidence is gathered. While the Swiss courts have not yet decided the issue, the broad autonomy granted to the parties and arbitrators would support the admissibility of blockchain-based evidence, particularly in the presence of an agreement between the parties.
Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	The Swiss courts have not yet decided this issue. Regarding arbitration agreements, while the mandatory form requirements in Article 178(1) PILA are broad and flexible to adapt to future developments of technology and means of communication, Swiss scholars have expressed doubts that an arbitration agreement just in code would meet such form requirements. It should be ensured that the arbitration agreement is evidenced by text in a "human language" comprehensible to the parties and capable of being "evidenced by text". With respect to awards, under Article 189(1) PILA, it would appear conceivable in practice that the parties agree to their arbitral award being recorded on a blockchain.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	The Swiss courts have not yet decided this issue. Legal scholars have however expressed doubts that courts would recognize blockchain arbitration agreements (just in code) and/or awards as duly authenticated originals for purposes of recognition and enforcement under the New York Convention.
Other key points to note?	∅

⁸ KAUFMANN-KOHLER/ RIGOZZI, *op. cit.* fn 2, para. 8.269.

⁹ 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 Arbitration Centre (before 1 June 2021, the Swiss Chambers' Arbitration Institution ("SCAI")),¹⁰ the Court of Arbitration for Sport ("CAS")¹¹ and the World Intellectual Property Organization ("WIPO")'s Arbitration and Mediation Center.¹² 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.¹³

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") governs international arbitrations with a seat in Switzerland. It originally entered into force on 1 January 1989 and has been amended only lightly since then. The most recent amendments were adopted by the Swiss Parliament on 19 June 2020 and entered into force on 1 January 2021.¹⁴ Part 3 of the Swiss Code of Civil Procedure of 1 January 2011 ("CCP") governs domestic arbitrations.¹⁵

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 agreement¹⁶ had neither its domicile, habitual residence, nor its seat in Switzerland. Therefore, for determining the international character of the arbitration, the relevant point in time is the conclusion of the arbitration agreement.¹⁷

¹⁰ <https://www.swissarbitration.org/>.

¹¹ <http://www.tas-cas.org/fr/index.html>.

¹² <http://www.wipo.int/amc/en/center/background.html>.

¹³ See, for instance, 2019 ICC Dispute Resolution Statistics: <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>, p. 28; 2018 ICC Dispute Resolution Statistics: <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>, p. 25; 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; 2018 International Arbitration Survey: The Evolution of International Arbitration, conducted by White & Case and the School of International Arbitration at Queen Mary, University of London, pp. 9 and 12.

¹⁴ Available at: <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>. An unofficial English translation of the revised version of Chapter 12 PILA is available, among others, at: https://www.swissarbitration.org/files/899/Laws/20201231%20Chapter%2012%20PILA_English%20Translation_final.pdf.

¹⁵ 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>.

¹⁶ The revised Article 176(1) PILA overturns the controversial decision of the Supreme Court in case 4P.54/2002 of 24 June 2002, para. 3. In this case, the Court held that the application of Chapter 12 PILA would depend on the domicile, habitual residence or seat of the parties to the arbitration *proceedings*, rather than the arbitration agreement. Scholars noted that under this case law it would 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. On this debate, see 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.

¹⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.32; POUDRET/BESSON, *op. cit.* fn 16, para. 7; BERGER/KELLERHALS, *op. cit.* fn 5, para. 102.

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.¹⁸ Likewise, Article 176(2) PILA entitles the parties to opt out of the international and into the domestic arbitration regime. The validity of such opting-out/opting-in agreements are subject to the same requirements under the international and domestic arbitration regimes: the parties must clearly and unambiguously express their common intent to exclude one set of rules in favour of the other in a declaration that meets the form requirement applicable to arbitration agreements (Articles 178(1) PILA/Article 358 CCP – “evidenced by text”); an express reference to Chapter 12 PILA or Part 3 CCP (while advisable) is not required. If the arbitral tribunal agrees, the parties can agree to opt out/opt in at any stage before the award is rendered.¹⁹

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.²⁰ 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 “seat” within the meaning of Article 192(1) PILA. The general rules in Chapter 13 PILA (Articles 196 to 199 PILA) regulate issues of transitional law, and Article 7 PILA governs the effects of an arbitration agreement raised 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.²¹ 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).²² 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.²³

Finally, some provisions in other Swiss statutes may be relevant. Concerning the taking of evidence, Article 184(3) PILA provides that, in assisting the arbitral tribunal, the court at the arbitral seat applies “its own law”, *i.e.*, title 10 of the CCP (Articles 150-193 CCP). Moreover, Article 191 PILA refers to Articles 77 and 119a of the Swiss Supreme Court Act (“SCA”) for the procedure governing actions to annul the award and requests for revision of arbitral awards.²⁴

¹⁸ 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. Accordingly, even where the parties have opted out of Part 3 of the CCP, the arbitrability of domestic disputes is determined under Article 354 CCP, not under Article 177 PILA (see also ATF 145 III 266 of 7 May 2019, para. 1.3.3).

¹⁹ Supreme Court Decision 4A_7/2019 of 21 March 2019, para. 1.2.2 and ATF 145 III 266 of 7 May 2019, para. 1. 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 See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 20, para. 1.92; Sébastien BESSON, Salient Features and Amenities of Chapter 12 PILS, Arbitration, in *Switzerland – The Practitioner’s Guide*, Volume I, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 13.

²¹ BESSON, *op. cit.* fn 20, para. 14; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.92.

²² 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.

²³ 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.

²⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.93.

2.2 Main feature of Chapter 12 PILA: party autonomy

Chapter 12 PILA is a framework legislation. It comprises only 24 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 shape 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 forms to be followed by the arbitral tribunal in rendering its award(s) (Articles 188 and 189 PILA). Finally, under certain conditions, the parties can waive (in whole or in part) their right to seek the annulment or revision of the award (Article 192 PILA).²⁵

Chapter 12 PILA contains few mandatory provisions, from which the parties cannot derogate,²⁶ including (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);²⁷ (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 or revision of awards (Article 192(1) PILA); and (ix) the jurisdiction of the Swiss Supreme Court to hear annulment and revision 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*.²⁸ 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.²⁹

Article 178(2) PILA does not specify which are 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 encompasses such issues as its conclusion (*e.g.*, offer, acceptance and defects in consent), interpretation and performance (*e.g.*, delay or impossibility), as well as its objective and subjective scopes.³⁰

²⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.56; BESSON, *op. cit.* fn 20, para. 24; BERGER/KELLERHALS, *op. cit.* fn 5, para. 89.

²⁶ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 2.57. Cf. BERGER/KELLERHALS, *op. cit.* fn 5, para. 605 and BESSON, *op. cit.* fn 20, paras. 21 and 22.

²⁷ 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.

²⁸ ATF 119 II 380, para. 4a.

²⁹ 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.

³⁰ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.79; POUDRET/BESSON, *op. cit.* fn 16, para. 295; MÜLLER, *op. cit.* fn 29, para. 35.

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 so-called positive effect of 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”.³¹ In other words, an arbitral tribunal seated in Switzerland generally does not have to stay the arbitration until the state court or arbitral tribunal has decided on its own jurisdiction.³²

Article 186(1bis) PILA does not consecrate 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.³³ Under the Swiss Supreme Court’s case law, where a Swiss court is seized first with a substantive claim and confronted with an arbitration defence, it will apply Article II(3) NYC and decide on the jurisdiction of the arbitral tribunal *with full power of review* if the seat of the arbitration is outside of Switzerland.³⁴ By contrast, if the seat is in Switzerland, the court will apply Article 7(b) PILA and limit itself to a *prima facie review*, given that in this case the Supreme Court may “subsequently review whether the arbitral tribunal correctly assumed or denied jurisdiction” pursuant to Article 190(2)(b) PILA.³⁵

3.3 The formal requirements for an enforceable arbitration agreement

Article 178(1) PILA requires that an arbitration agreement be concluded “*in writing or by any other means 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.³⁶

3.4 Unilateral and statutory arbitration clauses

Article 178(4) PILA recognizes the possibility to include an arbitration clause in unilateral and statutory legal documents, such as wills and trusts, and articles of association, providing that Chapter 12 PILA applies to such arbitration clauses by analogy.

3.5 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.³⁷

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

³¹ 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.

³² BESSON, *op. cit.* fn 20, para. 33.

³³ POUURET/BESSION, *op. cit.* fn 16, para. 458; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 5.43.

³⁴ See, e.g., ATF 121 III 38, para. 2b; Supreme Court Decision 4A_279/2010 of 25 October 2010, para 2.

³⁵ See, e.g., ATF 138 III 681, para. 3.2.

³⁶ POUURET/BESSION, *op. cit.* fn 16, para. 193; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 1.94; MÜLLER, *op. cit.* fn 29, paras. 14 and 22.

³⁷ ATF 110 II 54, para. 3c.

the usages of the relevant trade.³⁸ 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, the global reference manifests the parties' intention to be bound by the arbitration agreement or such intention can otherwise be inferred from the circumstances of the case.³⁹

3.6 The subjective scope of the arbitration agreement and its 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.⁴⁰

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.⁴¹ For instance, a third party may be bound by the arbitration agreement if an original party to that agreement transfers it to the third party by way of an assignment of the main contract or of a claim.⁴² The transfer of an arbitration agreement may also occur by way of legal succession (universal or singular) or subrogation, e.g. when an insurer covers an insured loss and is thus subrogated to the rights of the insured party. Moreover, in insolvency proceedings, the bankruptcy trustee and the creditors who have been assigned claims of the debtor by the estate are bound by the arbitration agreement(s) entered into by the bankrupt party.⁴³

Further exceptions to the principle of privity of contract include cases where the arbitration agreement is extended to a third party.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ As another exception to the

³⁸ ATF 110 II 54, para. 3c.

³⁹ 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; POUURET/BESSION, *op. cit.* fn 16, paras. 213-226; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 451-464.

⁴⁰ ATF 129 III 727, para. 5.3.1; ATF 134 III 565, para. 3.2.

⁴¹ See, e.g., Supreme Court Decision 4A_450/2013 of 7 April 2014, para. 3.2. See also, KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.155-3.166. See, also, POUURET/BESSION, *op. cit.* fn 16, paras. 283-290; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 537-581; Tarkan GÖKSU, *Schiedsgerichtsbarkeit*, Zurich, St. Gallen 2014, paras. 656-662.

⁴² ATF 129 III 727, para. 5.3.1.

⁴³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.165.

⁴⁴ See, in particular, KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.167-3.179. See also POUURET/BESSION, *op. cit.* fn 13, paras. 258-259; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 537-581; GÖKSU, *op. cit.* fn 41, paras. 663-668.

⁴⁵ Supreme Court Decision 4A_44/2011 of 19 April 2011, para. 2.4. Not involving the extension of the arbitration agreement but nevertheless in relation to contracts concluded in favor of a third party (*stipulation pour autrui*; *Vertrag zugunsten Dritter*), see also Supreme Court Decision 4A_12/2019 of 17 April 2020, para. 3. In this case, the Court confirmed that if an arbitration agreement covers a dispute arising out of a contract, it also covers claims of a *signatory* of the contract for losses incurred by a third party beneficiary arising from a breach of obligations owed to that third party beneficiary under that contract.

⁴⁶ Supreme Court Decision 4A_128/2008 of 19 August 2008, para. 4.2.1. In this context, see also the Zurich High Court Decision LB190029-O/U of 12 March 2020, ASA Bull 3/2020, p. 685, upheld by the Supreme Court in Decision 4A_248/2020 of 20 October 2020, para. 4. In this case, the Zurich High Court confirmed that an arbitration agreement entered into by a limited partnership is also binding on the partnership's general partner. While the general partner may not have expressed his/her intent to assume the debts of the partnership under a contract, the assumption of the partnership's obligations, including the arbitration agreement, is provided by law, independently of such expression of intent.

⁴⁷ 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

principle of privity of contract, where two contracts are closely connected, arbitration proceedings initiated on the basis of the arbitration agreement contained in one of them may under certain circumstances be extended to the parties to the other contract.⁴⁸ Finally, an arbitration agreement may extend to a third party if its participation in the conclusion and/or performance of the underlying contract was such that its consent to be bound by the arbitration agreement is implied.⁴⁹

3.7 Arbitrability

3.7.1 Arbitrability *ratione materiae*

Under Article 177(1) PILA and subject to the exceptions detailed below, 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.⁵⁰ The notion of “economic interest” is interpreted extensively to make international arbitration widely available.⁵¹

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:⁵² (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 enforcement process;⁵³ (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.⁵⁴

The arbitrability of the dispute is determined by reference to the parties’ prayers for relief. If the requested relief is arbitrable, the arbitral tribunal may determine non-arbitrable preliminary questions in order to decide the main claim.⁵⁵

company that is a party to the arbitration agreement (KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.177, with references; POUDRET/BESSION, *op. cit.* fn 16, para. 258; MÜLLER, *op. cit.* fn 29, para. 71).

⁴⁸ 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.

⁴⁹ ATF 129 III 727, para. 5. See also ATF 145 III 199, para. 2.4, decided under the NYC but applying this same principle on the ground that the case law developed in relation to Article 178 PILA also governs the recognition and enforcement of an arbitration agreement under Article II(3) NYC. Concerning the extension of an arbitration agreement to a non-signatory state, see Supreme Court Decision 4A_636/2018 of 24 September 2019, para. 4.5.3, where the Court confirmed that an arbitration agreement signed by a state-controlled entity does not automatically extend to the controlling state. Rather, the Court applied the same “implied consent test” to the question of whether a non-signatory state is bound by an arbitration agreement as would apply to a non-state third party. Furthermore, concerning the extension of an arbitration agreement to a non-signatory sub-contractor, see 4A_124/2020 of 13 November 2020, para. 3. In this case, the Supreme Court considered that, for the purposes of extending an arbitration agreement to a non-signatory based on its involvement in contract, it is not sufficient for the non-signatory to have performed certain aspects of the contract in the role of sub-contractor. Rather, the sub-contractor’s involvement must be such that it expresses its (implied) intention to be bound by the arbitration clause contained in the main contract.

⁵⁰ 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; POUDRET/BESSION, *op. cit.* fn 16, 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 all CAS arbitrations are seated, by operation of Article R28 of the CAS Code.

⁵¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.46, with references; Pierre LALIVE/Jean-François POUDRET/Claude REYMOND, *ad Article 177 PILA, Le droit de l’arbitrage interne et international en Suisse*, Lausanne 1989, para. 2.

⁵² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.47-3.55; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 222-253.

⁵³ *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).

⁵⁴ ATF 118 II 353, para. 3c. *Contra*: BERGER/KELLERHALS, *op. cit.* fn 5, paras. 268-275.

⁵⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.38.

3.7.2 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.⁵⁶

According to the Swiss Supreme Court, a party's capacity is not governed by Article 178(2) PILA. 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).⁵⁷

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.⁵⁸ 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*.⁵⁹

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.⁶⁰

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.⁶¹ 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 (*i.e.* other than for provisional measures or the taking of evidence, which fall under Articles 183, 184 and 185a PILA).

The question whether a Swiss court (or arbitral tribunal) should grant an anti-suit injunction in support of arbitration in Switzerland is controversial. It has been argued that they should not do so, because such

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ ATF 138 III 714, para. 3.3.4.

⁵⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 3.103-3.104.

⁶⁰ 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 16, paras. 499-504.

⁶¹ POUURET/BESSON, *op. cit.* fn 16, para. 1026.

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.⁶²

4.3 Swiss court assistance in the constitution of the arbitral tribunal

Concerning the “*appointment or replacement*” of an arbitrator, under Article 179(2) PILA, “*in the absence of a party agreement or if the arbitrators cannot be appointed or replaced for other reasons*”, the parties may seek the assistance of the Swiss court at the place of the arbitration. Under Article 179(5) PILA, the court may appoint all arbitrators in case of a multi-party arbitration. To avoid potential impasses in situations where the parties have failed to determine the place of arbitration or have only agreed that the seat of the arbitral tribunal shall be in Switzerland without further specification, Article 179(2) PILA stipulates that “*the court first seized is competent*”.

To ensure the smooth constitution of the arbitral tribunal, Article 179(3) PILA directs the Swiss court called upon to appoint or replace an arbitrator to “*proceed with the request, unless a summary examination shows that no arbitration agreement exists between the parties*”. Article 179(4) PILA further directs the court, at the request of a party, “*to take the necessary measures for the constitution of the arbitral tribunal, if the parties or the arbitrators fail to comply with their obligations within 30 days after having been requested to do so*”.

Concerning the “*challenge*” of an arbitrator during the arbitration proceedings for one of the grounds listed in Article 180(1) PILA, under Article 180a(2) PILA, a party may, within 30 days from filing a request for challenge with the concerned arbitrator pursuant to Article 180a(1) PILA, request the Swiss court at the place of arbitration to decide the challenge. The decision of the court is final; it is not open to challenge in an annulment action against the arbitral award.⁶³ Article 180a(1) PILA reserves the situation where the parties have agreed otherwise, which includes the parties' submission of their arbitration to a set of arbitration rules that establishes a specific mechanism to decide challenges, as most institutional rules do.

Finally, with respect to the “*removal*” of an arbitrator, namely where that latter would be “*unable to perform his or her duties within a reasonable time or with due diligence*”, under Article 180b(2) PILA and “*unless the parties have agreed otherwise*”, a party may request the Swiss court, “*with reasons and in writing*”, to decide the removal. As under Article 180a(2) PILA, the court's decision is final.

4.4 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.⁶⁴

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

⁶² KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 5.66-5.74; 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.

⁶³ ATF 138 III 270, para. 2.2.1; ATF 128 III 330, para. 2.2.

⁶⁴ 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 20, 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; Sophie THORENS-ALADJEM, *Le juge d'appui en matière d'arbitrage interne et international*, 35 ASA Bulletin (2017), 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.

latter can be challenged before the Swiss Supreme Court on the ground of a violation of constitutional guarantees (Article 98 SCA).⁶⁵

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

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 343 CCP, Article 292 of the Swiss Criminal Code).⁶⁶

In addition to issuing interim relief and conservatory measures, the *juge d'appui* may also assist arbitral tribunals 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 (or a party) can "*request the assistance of the state court*" and such court applies "*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*".

Finally, concerning arbitral tribunals sitting outside of Switzerland or parties to foreign arbitrations, Article 185a PILA entitles them to request the assistance of the Swiss court "*at the place where a provisional or conservatory measure is to be enforced*". This renders obsolete the lengthy and cumbersome path of international cooperation.⁶⁸

4.5 Swiss court assistance in the taking of evidence

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.⁶⁹ Pursuant to Article 184(3) PILA, in assisting the arbitral tribunal, the state court applies "*its own law*", i.e., title 10 of the CCP (Articles 150-193 CCP).⁷⁰ However, upon request, the court may also take evidence for use in the arbitration procedure by "*applying or considering*" other rules than those in the CCP, such as by allowing cross-examination.⁷¹

Finally, under Article 185a(2) PILA, the Swiss court "*at the place where the taking of evidence is to be carried out*" may assist arbitral tribunals sitting outside of Switzerland or, with the consent of the arbitrators, parties to a foreign arbitration, in the taking of evidence in Switzerland.

5. The conduct of the arbitration proceedings

5.1 Control of the arbitrators' independence and impartiality

Under Article 179(6) PILA, "[a] *person who has been approached to serve as arbitrator must promptly disclose any circumstances that may give rise to justifiable doubts as to his or her independence or impartiality. This obligation shall persist for the duration of the proceedings*".

Article 180(1)(c) PILA then provides that an arbitrator can be challenged "*if circumstances exist that give rise to justifiable doubts as to that arbitrator's independence or impartiality*". Article 180(2) PILA makes clear that "[a]

⁶⁵ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.98-6.99; POUURET/BESSION, *op. cit.* fn 16, para. 637; BESSION, Arbitrage international et mesures provisoires, *op. cit.* fn 64, paras. 231 and 512; BOOG, ad Article 183 PILA, *op. cit.* fn 64, paras. 45-47.

⁶⁶ THORENS-ALADJEM, *op. cit.* fn 64, p. 535.

⁶⁷ See, in particular, BESSION, Arbitrage international et mesures provisoires, *op. cit.* fn 64, paras. 511-521; BOOG, ad Article 183 PILA, *op. cit.* fn 64, paras. 29-44.

⁶⁸ Felix DASSER, Revision of Chapter 12 of the PILA or Why and How to Modernize a (Still) Modern Law? New Developments in International Commercial Arbitration 2020, Christoph Müller/Sébastien Besson/Antonio Rigozzi (eds.), Stämpfli Editions, Bern 2020, pp. 17-18.

⁶⁹ POUURET/BESSION, *op. cit.* fn 16, para. 671; VEIT, ad Article 184 PILA, *op. cit.* fn 90, paras. 67-80.

⁷⁰ THORENS-ALADJEM, *op. cit.* fn 25, p. 536; VEIT, ad Article 184 PILA, *op. cit.* fn 93, para. 79; POUURET/BESSION, *op. cit.* fn 16, para. 671.

⁷¹ DASSER, *op. cit.* fn 68, p. 17.

party may challenge an arbitrator whom it has appointed or in whose appointment it has participated only for reasons of which, despite having exercised due diligence, it became aware of only after the appointment”.

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.⁷² This being so, the Supreme Court has clarified that *ex parte* communications may take place between a party-appointed arbitrator and the appointing party or its counsel if such communications are limited to the arbitrator’s availability and qualifications or the selection of the presiding arbitrator and take place prior to the latter’s appointment.⁷³

Article 180(1)(c) PILA is mandatory: the parties cannot waive in advance their right to an independent and impartial arbitral tribunal.⁷⁴

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.⁷⁵

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*”.⁷⁶

Swiss courts apply Article 180(1)(c) PILA restrictively and are thus reluctant in accepting the existence of justifiable doubts regarding an arbitrator’s independence and impartiality.⁷⁷

Regarding the procedure of the challenge, Article 180a(1) PILA expressly provides that “[u]nless the parties have agreed otherwise and if the arbitral proceedings are not yet concluded, the request for challenge shall be addressed, with reasons and in writing, to the challenged arbitrator and notified to the other arbitrators within 30 days of the requesting party becoming aware, or exercising due diligence ought to have become aware, of the ground for challenge”. Article 180a(3) PILA clarifies that “*during the challenge procedure the arbitral tribunal may proceed with the arbitration and render an award, with the participation of the challenged arbitrator*”, unless the parties have agreed otherwise.

With respect to the consequences of a challenge, the parties can agree on the extent to which the procedural steps and decisions which have already been taken in the arbitration with the participation of the disqualified arbitrator should be maintained or repeated. Failing an agreement, the decision will be made by the tribunal in its new composition.⁷⁸

⁷² ATF 136 III 605, para. 3.3.1.

⁷³ Supreme Court Decision 4A_292/2019 of 16 October 2019, para. 3.4.

⁷⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.107.

⁷⁵ 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.

⁷⁶ ATF 142 III 521, para. 3.1.2; Supreme Court Decision 4A_506/2007 of 20 March 2008, para. 3.3.2.2. More recently see, *e.g.*, Supreme Court Decision 4A_292/2019 of 16 October 2019, para. 3.4 (also considering the IBA Guidelines on Party Representation of 2013, and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes of 2004).

⁷⁷ 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 75, paras. 11-18a.

⁷⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.167. The Supreme Court has held that, in a situation where an arbitrator was challenged and replaced after the hearing, the filing of the post-hearing briefs and cost statements, and after the arbitral tribunal had already deliberated and prepared a revised draft of the award, the arbitral tribunal in its new composition did not violate the parties’ right to be heard (Article 190(2)(d) PILA) or public policy (Article 190(2)(e) PILA) by

5.2 Party autonomy, arbitral 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.⁷⁹ Under Chapter 12 PILA, the parties' and, alternatively, the arbitrators' freedom to determine the arbitral procedure is only limited by the fundamental procedural guarantees of equal treatment and the right to be heard in Article 182(3) PILA, which are outside the scope of the parties' autonomy and thus cannot be waived.⁸⁰

Article 182(4) PILA makes clear that “[a] party that proceeds with the arbitration without immediately raising an objection to a violation of procedural rules which it knew or, exercising due diligence, ought to have known, may not subsequently raise such objection”.

The right to be heard as such does not require the arbitral tribunal to hold oral hearings.⁸¹ *A fortiori*, it also should not include a right for the parties to present their case at a *physical* hearing.⁸² While the Supreme Court has held that the Swiss Code of Civil Procedure does not provide a legal basis for imposing a remote hearing in *state court* proceedings without the consent of the parties,⁸³ it is doubtful that this decision would be directly transposable to arbitration proceedings.⁸⁴ Under Article 182(2) PILA, in the absence of any agreement to the contrary, the arbitral tribunal's broad power to conduct the proceedings as it considers appropriate should also encompass the organization of the hearing, such as its time, venue, length and other modalities, including the decision of whether the hearing should be held physically or remotely.⁸⁵

5.3 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.⁸⁶

deciding to resume the proceedings at the stage of the replacement of the challenged arbitrator and by refusing to repeat any prior procedural steps with the new arbitrator pursuant to Article 14 of the Swiss Rules (according to which “[i]f an arbitrator is replaced, the proceedings shall, as a rule, resume at the stage reached when the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise”). The Court also clarified that a party cannot challenge the award rendered by the arbitral tribunal in its *new* composition on the ground that the arbitral tribunal in its *original* composition was not properly constituted within the meaning of Article 190(2)(a) PILA, due to the presence of the disqualified arbitrator (Supreme Court Decision 4A_332/2020 of 1 April 2021).

⁷⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.03.

⁸⁰ Supreme Court Decision 4P.26/2005 of 23 March 2005, para. 3.1.

⁸¹ ATF 117 II 346, para. 1c; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.175; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1147. In this context, see also Supreme Court Decision 4A_486/2019 of 17 August 2020, para. 4, where the Court held that Article 6(1) of the European Convention on Human Rights (ECHR), under which everyone is entitled to a fair and public hearing, cannot be invoked as such under Article 190(2)(e) PILA (violation of public policy). Some legal scholars have questioned this decision's compatibility with the European Court of Human Rights' decision in *Mutu and Pechstein v. Switzerland* where it was held that Article 6(1) ECHR applies in “forced arbitrations”, including cases where the arbitration clause is contained in the statutes of an international sports federation (see, e.g. Frank SPOORENBERG/Daniela FRANCHINI, Article 6(1) of ECHR is not separate ground to challenge arbitral awards, case report published by International Law Office (ILO), 12 November 2020; Marco VEDOVATTI/Luka GROSELJ, Swiss Supreme Court confirms that Article 6(1) ECHR not directly applicable in setting aside proceedings, case report published by Practical Law).

⁸² Maxi SCHERER, The Legal Framework of Remote Hearings, International Arbitration and the COVID-19 Revolution, Scherer, Bassiri and Abdel Wahab (eds), Wolters Kluwer 2020, p. 97.

⁸³ ATF 146 III 194.

⁸⁴ Nicolas ZAUGG/Roxana SHARIFI, Imposing Virtual Arbitration Hearings in Times of COVID-19: The Swiss Perspective, Kluwer Arbitration Blog, 14 January 2021, available under <http://arbitrationblog.kluwerarbitration.com/2021/01/14/imposing-virtual-arbitration-hearings-in-times-of-covid-19-the-swiss-perspective/>.

⁸⁵ SCHERER, *op. cit.* fn 82, p. 76.

⁸⁶ BESSON, *op. cit.* fn 20, para. 45; BESSON, Arbitrage international et mesures provisoires, *op. cit.* fn 64 para. 214; BOOG, ad Article 183 PILA, *op. cit.* fn 64, paras. 5-6.

Although Chapter 12 PILA does not say so expressly, arbitral tribunals have the power to order provisional measures *ex parte*.⁸⁷

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.⁸⁸

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.⁸⁹

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*”.

5.4 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.⁹⁰ Furthermore, failing an agreement between the parties, the arbitral tribunal also cannot delegate its powers to take evidence to only one or some of its members.⁹¹

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.⁹² 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. Further, the evidence at issue must relate to a relevant fact, and it must be capable of establishing a fact that is still uncertain.⁹³

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).⁹⁴

⁸⁷ 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 16, para. 451; Ramon MABILLARD, ad Article 183 PILA, *Internationales Privatrecht, Basler Kommentar*, Heinrich Honsell, Nedim Peter Vogt, Anton K. Schnyder, Stephen V. Berti (eds.), 4th ed., Basel 2021, para. 16.

⁸⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.116; BESSON, *Arbitrage international et mesures provisoires*, *op. cit.* fn 64, para. 517; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1258; BOOG, ad Article 183 PILA, *op. cit.* fn 64, para. 9.

⁸⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.119-6.120. See, also, POUDRET/BESSON, *op. cit.* fn 16, para. 626; BOOG, Part III – Interim Measures in International Arbitration, *op. cit.* fn 87, paras. 32-39; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 1249-1254.

⁹⁰ BESSON, *op. cit.* fn 20, 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.

⁹¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 6.15; VEIT, ad Article 184 PILA, *op. cit.* fn 90, para. 2.

⁹² See Supreme Court Decision 4A_74/2019 of 31 July 2019, para. 3.2. The Court confirmed that the arbitrators were not required to request the author of a letter that had been submitted as documentary evidence to produce a witness statement and testify at the hearing. Rather, the arbitrators were entitled to assess the evidentiary weight of the document and the result of this assessment could not be challenged before the Supreme Court.

⁹³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 6.14, 6.16 and 6.32; VEIT, ad Article 184 PILA, *op. cit.* fn 90, paras. 65-66.

⁹⁴ IBA Report on the Reception of the IBA Arbitration Soft Law Products, September 2016, paras. 42 and 56 available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#softlaw.

5.5 The arbitral tribunal's decision on jurisdiction

Article 186(1) PILA empowers the arbitral tribunal to decide on its own jurisdiction.⁹⁵ 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).⁹⁶

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.⁹⁷

The arbitral tribunal's decision on jurisdiction, whether rendered as a preliminary or a final award, is subject to challenge under Article 190(2)(b) PILA. Under Article 190(3) PILA, the aggrieved party must challenge a preliminary award on jurisdiction within 30 days of its notification, without awaiting the final award.⁹⁸

5.6 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.⁹⁹ In this context, a claim for damages 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).¹⁰⁰

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).¹⁰¹

5.7 The law applicable to the merits of the dispute

5.7.1 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.¹⁰²

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

⁹⁵ See *supra*, para. 3.2.

⁹⁶ BERGER/KELLERHALS, *op. cit.* fn 5, para. 691.

⁹⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 5.17; BERGER/KELLERHALS, *op. cit.* fn 5, para. 700.

⁹⁸ BERGER/KELLERHALS, *op. cit.* fn 5, para. 735.

⁹⁹ POUURET/BESSION, *op. cit.* fn 16, para. 449; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 4.185 and 4-192-4.194.

¹⁰⁰ POUURET/BESSION, *op. cit.* fn 16, 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 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.

¹⁰¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 4.193; JENNY, ad Article 45 of the 2012 Swiss Rules, *op. cit.* fn 100, para. 7.

¹⁰² BESSION, *op. cit.* fn 20, 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 16, para. 691.

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.¹⁰³

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.¹⁰⁴

5.7.2 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.¹⁰⁵

The Swiss Supreme Court, as well as a majority of scholars, consider that arbitral tribunals should take into consideration mandatory rules which are not part of the *lex causae* if the requirements of Article 19 PILA, applied by analogy, are met. In essence, Article 19 PILA’s test requires that (i) the mandatory rule at issue is intended to apply to international situations such as the one before the tribunal, (ii) there is, in the arbitral tribunal’s assessment, a close connection between the rule and the situation or dispute at hand, and (iii) the application of the mandatory rule does not lead to a result that is incompatible with transnational standards (understood as the standards generally accepted in a majority of states).¹⁰⁶

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.¹⁰⁷ While rare in practice, the parties can thus waive reasons.¹⁰⁸

According to the Supreme Court, a waiver of reasons does not imply a waiver by the parties of the right to challenge the award.¹⁰⁹

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

Under Article 192(1) PILA, “[i]f none of the parties has its domicile, habitual residence, or seat in Switzerland, the parties may, either in the arbitration agreement or in a subsequent agreement, exclude in whole or in part recourse against arbitral awards”.

¹⁰³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 7.42.

¹⁰⁴ Peter BURCKHARDT/Rafael MEIER, ad Article 187 PILA, *Arbitration in Switzerland – The Practitioner’s Guide*, Volume 1, 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 16, paras. 710 and 717-719.

¹⁰⁵ BESSION, *op. cit.* fn 20, para. 56; POUURET/BESSION, *op. cit.* fn 16, paras. 705-708; ATF 118 II 193, para. 5.

¹⁰⁶ See KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 7.96-7.98, and the other references in fn 23 above.

¹⁰⁷ 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”.

¹⁰⁸ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 7.125-7.126.

¹⁰⁹ Supreme Court Decision 4A_198/2012 of 14 December 2012, para. 2.2.

The parties can waive the right to seek the annulment of the award if they:¹¹⁰ (i) have no territorial connection with Switzerland; (ii) have agreed the waiver of annulment proceedings in a declaration that meets the form requirements applicable to arbitration agreements (Articles 178(1) PILA – “evidenced by text”), 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.¹¹¹ 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.¹¹² 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.¹¹³ By contrast, mere statements that the award is “*final and/or binding*” or “*without appeal*” do not operate as a valid waiver of annulment proceedings.¹¹⁴

In addition to the three requirements just described, the waiver cannot be one-sided, but must be expressed by all the parties;¹¹⁵ it must occur prior to the notification of the arbitral award;¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

The Supreme Court has held that the parties’ waiver of their right to seek the annulment of the award may also extend to the revision of the award.¹¹⁹

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*”.¹²⁰

¹¹⁰ 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 16, para. 839.

¹¹¹ POUURET/BESSON, *op. cit.* fn 16, para. 839.

¹¹² 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. However, in sports arbitration, a waiver of the right to challenge the award is in principle not enforceable against the athlete, even if it satisfies the formal requirements of Article 192 PILA (ATF 133 III 235, para. 4; Supreme Court Decision 4A_248/2019 and 4A_398/2019 of 25 August 2020, para. 4.2.2).

¹¹³ 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.

¹¹⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.58, with references; BAIZEAU, ad Article 192 PILA, *op. cit.* fn 110, paras. 20-22.

¹¹⁵ POUURET/BESSON, *op. cit.* fn 16, para. 839.

¹¹⁶ BERGER/KELLERHALS, *op. cit.* fn 5, para. 1851.

¹¹⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.72; POUURET/BESSON, *op. cit.* fn 16, para. 839; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1860; BAIZEAU, ad Article 192 PILA, *op. cit.* fn 110, para. 39.

¹¹⁸ POUURET/BESSON, *op. cit.* fn 16, para. 839.

¹¹⁹ Supreme Court Decision 4A_53/2017 of 17 October 2017, para. 3. On the remedy of revision as applied to arbitral awards, see *infra*, Section 6.5 (final two paragraphs).

¹²⁰ 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.

Even though Chapter 12 PILA is silent on this point,¹²¹ 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.¹²²

6.4 The annulment of awards

Arbitral awards rendered in Switzerland are not subject to an appeal on the facts or the law.¹²³ 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.¹²⁴ Unlike 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.¹²⁵

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).¹²⁶ 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.¹²⁷

In accordance with Article 190(4) PILA, an annulment action must be filed against the challengeable award within 30 days of its notification in full (including reasons).¹²⁸ Where the notification of the award is incomplete, the parties must raise the issue immediately with the arbitral institution or the arbitral tribunal, failing which they lose their right to request a new notification of the complete version of the award, and the 30-day time limit will thus run from the faulty notification.¹²⁹

¹²¹ Unlike the CCP, which requires arbitrators to include a ruling on costs in the (final) award (Article 384(1)(f) CPP).

¹²² 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. In its decision 4A_156/2020 of 1 October 2020, para. 6, the Supreme Court held that it is conceivable "in theory" that an award violates public policy within the meaning of Article 190(2)(e) PILA if the decision on costs is wholly disproportionate to the costs that a party could reasonably expect to incur in light of all the circumstances of the case, such that it violates in an intolerable manner the legal system's most fundamental principles.

¹²³ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.01.

¹²⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.01-8.205.

¹²⁵ BESSON, *op. cit.* fn 20, para. 65.

¹²⁶ 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) may be invoked in challenges against preliminary and interim awards, provided, and only to the extent that they are raised 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).

¹²⁷ BESSON, *op. cit.* fn 20, para. 63. See, also, ATF 140 III 477, para. 3.

¹²⁸ 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.

¹²⁹ Supreme Court Decision 4A_264/2019 of 16 October 2019, para. 1.

Annulment applications are not automatically inadmissible if drafted in a non-official language¹³⁰ (other than English), unless the applicant's disregard of the rule in Article 42(1) SCA constitutes an abuse of right. The Supreme Court will usually set a time limit for the applicant to provide a translation.¹³¹ Under Article 77(1)(2bis) SCA, annulment applications in English are admissible.

Arbitral awards rendered in Switzerland have *res judicata* effect and are enforceable from their notification to the parties (Article 190(1) PILA).¹³² 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 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.¹³³

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).¹³⁴

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 7.65 % of cases.¹³⁵

If an application for annulment is successful, the Supreme Court sets aside the award and remands the case, either to the original tribunal, or, if it is no longer possible to convene that tribunal (e.g., because its members have died, cannot be reached or simply refuse to be seized again of the dispute), to a new arbitral tribunal. The arbitral tribunal receiving the remanded case will have to render a new award based on the reasons given in the Supreme Court's annulment decision.¹³⁶ There are two exceptions to this rule: in case of an incorrect decision on jurisdiction (Article 190(2)(b) PILA), the Supreme Court will not only annul the award but also decide on the arbitral tribunal's jurisdiction. Likewise, when the Court annuls an award based on the lack of independence and impartiality of an arbitrator (Article 190(2)(a) PILA), it can order the removal of the arbitrator.¹³⁷

6.5 The revision, interpretation or correction of an award

Under Article 189a(1) PILA, unless the parties have agreed otherwise, either party may, within 30 days of the notification of the award, request the arbitral tribunal to correct any clerical or computational errors in the award, to interpret certain parts of the award or to issue a supplement to the award on claims which were

¹³⁰ Article 54(1) SCA specifies that the official languages are German, French, Italian and Rumantsch Grischun (a Romance language, spoken by about 0.5% of the population, predominantly in the Swiss canton of the Grisons).

¹³¹ Supreme Court Decision 4A_114/2020 of 20 May 2020, para. 3.

¹³² ATF 117 Ia 166, para. 5a; BERGER/KELLERHALS, *op. cit.* fn 5, para. 1630; POUURET/BESSON, *op. cit.* fn 16, para. 853; BESSON, *op. cit.* fn 20, para. 74; Silja SCHAFFSTEIN, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals*, Oxford 2016, para. 4.72.

¹³³ 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.

¹³⁴ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.92-8.93.

¹³⁵ For the most recent statistical analysis, see Felix DASSER/Piotr WOJTOWICZ, *Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2019*, 39 ASA Bulletin (2021), pp. 15-24.

¹³⁶ Supreme Court Decision 4A_462/2018 of 4 July 2019, para. 3.2; Supreme Court Decision 4A_348/2020 of 4 January 2021 (domestic arbitration), para. 3.

¹³⁷ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.120-8.121; Sébastien BESSON, *Le Recours contre la Sentence Arbitrale Internationale selon la Nouvelle LTF (Aspects Procéduraux)*, ASA Bull 2007, Vol. 25 No. 1, paras. 48-50.

raised in the arbitral proceedings but not dealt with in the award. The arbitral tribunal may do the same at its own initiative and within the same time limit.

Article 189a(2) PILA specifies that the request for interpretation or correction does not suspend the time limits for filing an annulment or revision application against the award. However, a new time limit starts to run with respect to the corrected, interpreted or supplemented part of the award.

The remedy of revision allows for the reconsideration of the award after it has come into force. Pursuant to Article 190a PILA, it applies only in the presence of narrowly defined grounds, namely where the award was influenced by a crime or felony to the detriment of one of the parties, 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, or where a ground for challenging an arbitrator under Article 180(1)(c) PILA was not discovered until after the conclusion of the arbitration proceedings and no other remedy is available.

Under Article 190a(2) PILA, a request for revision must be filed with the Swiss Supreme Court within 90 days of the discovery of the ground for revision and in any case no later than ten years from the date on which the award has come into force (except for cases falling under Article 190a(1)(b) PILA).

As with annulment applications, if a request for revision is successful, the Swiss Supreme Court annuls the award and remands the case, either to the original tribunal, or to a new arbitral tribunal.¹³⁸

Finally, as with the right to seek the annulment of an award, under the conditions set out in Article 192(1) PILA, the parties may waive their right to request the revision of an award, except for the ground provided in Article 190a(1)(b) PILA concerning awards influenced by a crime or felony.

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 immediately, and are placed on the same footing as Swiss court judgments.¹³⁹

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.¹⁴⁰ The enforcement of “*non-monetary*” awards (*i.e.*, declaratory awards or awards ordering specific performance) is governed by Articles 335-346 CCP.¹⁴¹

Article 193 PILA provides for the optional deposit or the issuance of a certificate of enforceability of an arbitral award, but neither the deposit nor the certificate is a precondition for the recognition and enforcement of Swiss awards, in Switzerland or abroad.¹⁴²

¹³⁸ ATF 118 II 199, para. 3; SCHAFFSTEIN/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. 168; BESSON, *op. cit.* fn 20, paras. 70-71. For a fuller discussion of the remedy of revision, see KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.206-8.229. See also Catherine A. KUNZ, Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera?, 38 *ASA Bulletin* (2020), pp. 6-31.

¹³⁹ BESSON, *op. cit.* fn 20, para. 75.

¹⁴⁰ BESSON, *op. cit.* fn 20, para. 75; KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, paras. 8.281-8.282; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 2009-2016.

¹⁴¹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 8.283; BERGER/KELLERHALS, *op. cit.* fn 5, paras. 2006-2008 and paras. 2017-2021.

¹⁴² BESSON, *op. cit.* fn 20, para. 76.

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.¹⁴³

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 award or the arbitration agreement are not disputed, simple, non-legalized and/or non-certified copies of the award or arbitration agreement are sufficient.¹⁴⁴

7. Funding arrangements

Swiss law does not prohibit third party funding.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷

8. Arbitration and blockchain technology

8.1 Is the validity of blockchain-based evidence recognised?

Chapter 12 PILA contains no express provisions on the admissibility of blockchain-based evidence, and at the time of writing the Swiss courts have not yet had an opportunity to decide this question. Articles 182 and 184 PILA grant parties and arbitrators broad freedom to fashion the arbitration proceedings according to the needs of the particular case, including to determine the admissible evidentiary means and the manner in which the evidence is gathered. The large autonomy afforded to parties and arbitrators would support the use of blockchain technology in the taking of evidence, particularly in the presence of an agreement between the parties.¹⁴⁸

¹⁴³ BESSON, *op. cit.* fn 20, para. 77.

¹⁴⁴ 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.

¹⁴⁵ 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.

¹⁴⁶ ATF 131 I 223. See also Supreme Court Decision 2C_814/2014 of 22 January 2015.

¹⁴⁷ ATF 143 III 600, para. 2; Supreme Court Decision 4A_512/2019 of 12 November 2020, para. 5.

¹⁴⁸ See Falco KREIS/Markus KAULARTZ, Smart Contracts and Dispute Resolution – A Chance to Raise Efficiency?, ASA Bull. (2019), Vol 37 No. 2, p. 348-350.

8.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

Chapter 12 PILA contains no express provisions on the use of blockchain technology for recording arbitration agreements or awards, and at the time of writing the Swiss courts have not yet had an opportunity to decide this question.

Under Article 178(1) PILA, arbitration agreements are formally valid if made *“in any [...] manner that can be evidenced by text”*. What matters is that there is a visually perceptible text that can be kept and if necessary produced.¹⁴⁹ While Article 178(1) PILA provides flexibility to adapt to future developments of technology and means of communication, doubts have been expressed as to whether an arbitration agreement included in a smart contract's code would meet the mandatory form requirements in Article 178(1) PILA.¹⁵⁰ Therefore, it should be ensured that the arbitration agreement is evidenced by text in a “human language” comprehensible to the parties and not just in code that *“can be evidenced by text”*.¹⁵¹

As stated in section 6.1 above, Article 189(1) PILA stipulates that *“[t]he award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties”*. Moreover, Article 190(2) PILA does not provide for the setting aside of an award based on its form. Hence, while it should be extremely rare in practice (and not advisable), the parties are free in theory to waive the written-form requirement and to agree that the award shall be rendered orally.¹⁵² Therefore, in practice, it would appear conceivable that the parties agree to their arbitral award being recorded on a blockchain.¹⁵³

8.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

At the time of writing, the Swiss courts have not yet had an opportunity to decide this question. Some legal scholars have however expressed doubts that courts would recognize blockchain arbitration agreements (just in code) and/or awards as duly authenticated originals under the New York Convention for purposes of recognition and enforcement.¹⁵⁴

8.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

At the time of writing, the Swiss courts do not appear to have had an opportunity to consider this question. However, there are several elements that would support the admissibility of foreign awards signed by

¹⁴⁹ KAUFMANN-KOHLER/RIGOZZI, *op. cit.* fn 2, para. 3.67; POUDRET/BESSION, *op. cit.* fn 16, para. 193.

¹⁵⁰ KREIS/KAULARTZ, *op. cit.* fn 148, p. 343; Pascal FAVROD-COUNE/Kévin BELET, La convention d'arbitrage dans un smart contract, *Aktuelle Juristische Praxis / Pratique Juridique Actuelle* (2018), p. 1111.

¹⁵¹ KREIS/KAULARTZ, *op. cit.* fn 148, p. 343; FAVROD-COUNE/BELET, *op. cit.* fn 150, p. 1111

¹⁵² Martin MOLINA, ad Article 189 PILA, Arbitration in Switzerland – The Practitioner's Guide, Volume II, Manuel Arroyo (ed.), Kluwer Law International BV, The Netherlands, 2nd ed. 2018, para. 46 ; POUDRET/BESSION, *op. cit.* fn 16, para. 744.

¹⁵³ See however KREIS/KAULARTZ, *op. cit.* fn 148, p. 355, who submit that, in view of the recognition and enforcement of arbitral awards, *“an arbitration will [...] have to produce a physical copy of the final award”*, given that *“as of now, there will hardly be any courts willing to accept electronic, blockchain-authenticated awards”*. See also BERGER/KELLERHALS, *op. cit.* fn 5, para. 1482, according to who the *“waiver [of the right to an award drawn up in writing] implies that the parties renounce their right to obtain both an enforceable instrument and a title that is capable of being the subject of an action for annulment”*.

¹⁵⁴ KREIS/KAULARTZ, *op. cit.* fn 148, pp. 343-344 and 355; FAVROD-COUNE/BELET, *op. cit.* fn 150, pp. 1114-1115. But see Peter L. MICHAELSON/Sandra A. JESKIE, Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts, *Dispute Resolution Journal*,(2019), Vol. 74 No. 4, pp. 129-131. While these authors do not consider Swiss law, they opine that *“the current legal framework under the Convention appears to allow for recognizing and enforcing blockchain-based arbitral awards if they are valid under the law at the seat of arbitration and/or the place of enforcement. Clearly, over time, some jurisdictions may be more willing than others to recognize and enforce these novel forms of arbitral awards. It remains to be seen, once appropriate jurisprudence starts appearing from the former jurisdictions, just how open they will be and what conditions, if any, they will impose”*.

electronic signature for the purposes of the form requirements under Article IV(1)(a) NYC. First, as mentioned in section 6.7 above, 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). In particular, the Supreme Court has held that the authentication of the award's signatures may be dispensed with if the authenticity of the award presented for enforcement is not disputed by the party resisting enforcement.¹⁵⁵ Second, under Articles 182(1) and 189(1) PILA, the parties are free to agree on the procedure and the form of the award. In particular, they can agree on the application of arbitration rules that allow the arbitral award to be electronically signed, as is the case for example under Article 26.2 of the 2020 LCIA Rules. Third, under certain conditions, Swiss law recognizes secure, authenticated e-signatures as equivalent to a handwritten signature. However, such an authenticated e-signature must be obtained from a recognised authority.¹⁵⁶

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

As mentioned in section 2.1 above, the revision process of Chapter 12 PILA was completed in the summer of 2020 and the revised Act entered into force on 1 January 2021. The reform of Chapter 12 PILA was limited to a "light revision", amending as little as possible and only to the extent necessary. The goal was to modernize and strengthen Switzerland's position as a leading place for international arbitration, namely by improving legal certainty and clarity, removing any unclear formulations, and rendering the arbitration law even more user-friendly, in particular by incorporating the Supreme Court's established case law. It is unlikely that any significant additional amendments will be made in the near future.

10. Further reading

- Manuel ARROYO (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, Volume I, Kluwer Law International BV, The Netherlands, 2nd ed. 2018;
- Philippe BÄRTSCH/Dorothee SCHRAMM, *Arbitration Law of Switzerland: Practice & Procedure*, New York 2014;
- Bernhard BERGER/Franz KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd ed., Bern 2015;
- Andreas BUCHER (ed.), *Commentaire romand, Loi sur le droit international privé (LDIP) - Convention de Lugano (CL)*, Basel 2011;
- Heinrich HONSELL, Nedim Peter VOGT, Anton K. SCHNYDER, Stephen V. BERTI (eds), *Internationales Privatrecht, Basler Kommentar*, 4th ed., Basel 2021;
- Daniel GIRSBERGER/Nathalie VOSER, *International Arbitration - Comparative and Swiss Perspectives*, 4th ed., Zurich, Basel, Geneva 2021;
- Tarkan GÖKSU, *Schiedsgerichtsbarkeit*, Zurich, St. Gallen 2014;
- Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, *International Arbitration – Law and Practice in Switzerland*, Oxford 2015;
- Christoph MÜLLER/ Sébastien BESSON/Antonio RIGOZZI (eds), *New Developments in International Commercial Arbitration, years 2011 to 2020*;
- Pierre LALIVE/Jean-François POUDRET/Claude REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989;
- Jean-François POUDRET/Sébastien BESSON, *Comparative Law of International Arbitration*, 2nd ed., Zurich 2007;
- Matthias SCHERER (Editor in Chief)/Catherine Anne KUNZ (Editor), *ASA Bulletin*, years 1983 to present;
- Tobias ZUBERBÜHLER/ Christoph MÜLLER /Philipp HABEGGER (eds), *Swiss Rules of International Arbitration*, 2nd ed., Zurich, Basel, Geneva 2013.

¹⁵⁵ Supreme Court Decision 4A_124/2010 of 4 October 2010, para. 4.2.

¹⁵⁶ The limited list of such authorities is available under <https://www.sas.admin.ch/sas/en/home/akkreditiertestellen/akkrstellensuchesas/pki1.html>.

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