



# Arbitration Law Reform in Switzerland: William Tell's Apple-Shot<sup>1</sup>?

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## INTRODUCTION

Over the last decades, international arbitration has become a common dispute resolution mechanism not only for international commercial disputes but also for investor-state conflicts as well as for sports issues.

Unrattled by the increasingly fierce competition, Switzerland (in particular Geneva and Zurich) invariably ranks among the preferred seats for international arbitration<sup>2</sup>. The tradition of hosting international arbitral tribunals reaches back to the Alabama arbitration ("Alabama Arbitration") which took place in Geneva in the 19<sup>th</sup> century<sup>3</sup>. The Alabama Arbitration arose out of the United States' claims for compensation against Great Britain in the context of the American Civil War of 1861-1865<sup>4</sup>. This arbitration concerned claims that Great Britain had infringed its obligations of neutrality during the American Civil War by supporting the Southern States (*i.e.* Confederates). The United States sought compensation for Union ships sunk by Confederate ships, notably by the *Alabama* vessel, that hunted and raided the Unions' ships provoking great damages and losses<sup>5</sup>. The parties agreed to submit a highly delicate and political dispute to an international arbitral tribunal composed of five arbitrators seated in Geneva. In 1872, the arbitral tribunal ordered Great Britain to pay the equivalent of USD 15.5 million in gold to the United States<sup>6</sup>. The Alabama proceedings are today considered a milestone in the development of modern international arbitration. History buffs will recall that the five members of the arbitral tribunal in the Alabama Arbitration comprised an arbitrator from Brazil,

- 1 William Tell is a legendary Swiss hero who symbolizes the battle for political and individual freedom in Switzerland. Legend has it that, in the 13<sup>th</sup> and early 14<sup>th</sup> centuries, he defied the Austrian authority and, as a result, was forced to shoot an apple off the head of his son, Walter. Tell split the apple with the bolt from his crossbow. These events supposedly encouraged the people to rise against the Austrian rule.
- 2 Message, Section 1.1.1, p. 5.
- 3 INDLEKOFER, Manuel. *International Arbitration and the Permanent Court of Arbitration*. The UK: Kluwer Law International, 2013. p. 27-28.
- 4 INDLEKOFER, Manuel. *International Arbitration and the Permanent Court of Arbitration*. The UK: Kluwer Law International, 2013. p. 27-28.
- 5 INDLEKOFER, Manuel. *International Arbitration and the Permanent Court of Arbitration*. The UK: Kluwer Law International, 2013. p. 27-28.
- 6 BORN, Gary B. *International Commercial Arbitration*. 2<sup>nd</sup> Edition. The Netherlands: Kluwer Law International, 2014. p.13, footnote 59.

namely Marcos Antônio de Araújo, Viscount of Itajubá, sitting with arbitrators from the United States (Charles Francis Adams), Great Britain (Alexander Cockburn), Italy (Frederick Sclopis), and Switzerland (James Stämpfli)<sup>7</sup>. The Alabama Arbitration signaled the beginning of Switzerland's "*savoir-faire*" in the field of international arbitration. This influence continues even today.

There are several reasons for this success. Primarily, Switzerland offers a stable legal background, with consistent case law rendered by the Swiss Supreme Court (hereafter "Supreme Court"), excellent infrastructure to welcome arbitration users as well as a pool of knowledgeable and plurilinguistic arbitrators<sup>8</sup>. Its strongest suit is however undoubtedly its Swiss Arbitration Act, namely the Swiss Federal Act on Private International Law (hereafter "PILA"), which was adopted in 1989<sup>9</sup>. Its 12<sup>th</sup> chapter (hereafter "Chapter 12") governs international arbitration seated in Switzerland and has rightly been praised for its simplicity yet efficiency, serving as a model for many other rules and statutes. Notably, it is adapted both for institutional and *ad hoc* arbitration. In addition, the PILA is well-suited for international (or domestic) complex commercial disputes, investor-state arbitrations as well as sports disputes, which are usually referred to the Court of Arbitration for Sports ("CAS"), located in Lausanne<sup>10</sup>.

In order to "*update Chapter 12 of the PILA while preserving its conciseness and flexibility*"<sup>11</sup>, the Swiss Federal Council (hereafter "Federal Council"), *i.e.*, the Federal Government of Switzerland, has been called upon by the Swiss Parliament<sup>12</sup> to update the above-mentioned Chapter<sup>13</sup>.

On 24 October 2018, the Federal Council provided more details regarding the proposed reform of the PILA under the form of a report (in French "*message*", hereafter "Message")<sup>14</sup> and a draft bill<sup>15</sup> (hereafter "Draft Bill"). The Message introduces the amendments the Federal Council suggests making in Chapter 12. Essentially, the Draft Bill aims at consolidating what has been seen as the strengths of the current PILA, while updating and modernizing some of its current provisions<sup>16</sup>. As indicated by the Message, the Draft Bill notably implements the Supreme Court's consistent jurisprudence developed over the last 30 years<sup>17</sup>. The Draft Bill, along with the Message, has now been handed to the Swiss Parliament, which will debate it, and possibly, adopt it. The Draft Bill

7 BISHOP, Doak R. *et al.* *Foreign investment disputes: cases, materials, and commentary*. 2<sup>nd</sup> Edition. The Netherlands: Kluwer Law International, 2014. p. 577.

8 Message, Section 1.1.1, p. 6.

9 Message, Section 1.1.1, p. 6.

10 Message, p. 2.

11 Message, p. 2.

12 Motion 12.3012 dated 03.02.2012; Message, p. 2.

13 Message, Section 1.1.3, p. 8.

14 See <https://www.admin.ch/opc/fr/federal-gazette/2018/7153.pdf> accessed on 10.01.2019.

15 See <https://www.admin.ch/opc/fr/federal-gazette/2018/7201.pdf> accessed on 10.01.2019.

16 Message, p. 2.

17 Message, p. 2.

is however only a project, still subject to change. The entry into force of the law reform is expected to take place in 2020-2021.

This article will first introduce the guiding principles of the proposed law reform (Section 1). It will then set forth the main features destined to remain unchanged in the Draft Bill (Section 2) before turning to some of the major elements that the Draft Bill proposes to change (Section 3). Last but not least, this article will set out the elements that have not been addressed by the Federal Council in the Draft Bill (Section 4).

## 1 GUIDING PRINCIPLES OF THE LAW REFORM

### 1.1 BROAD RULES MAINTAINED

Chapter 12 has always been lauded for its simplicity and conciseness, providing greater flexibility to arbitration users concerning the organization of the proceedings. Besides, it gives minimal grounds to challenge the arbitral award before the Supreme Court thereby, contributing to an efficient and fast method of dispute resolution<sup>18</sup>.

While preparing the Draft Bill, the Federal Council has decided to bear in mind these principles and not to propose a new and detailed version of Chapter 12, which should, therefore, remain slim, concise, and offer broad autonomy to the parties<sup>19</sup>.

### 1.2 KEY ELEMENTS FROM CASE LAW IMPLEMENTED IN CHAPTER 12

The Federal Council had to decide which rules developed by case law should be expressly incorporated in the Draft Bill (Section 2.1) and those which should remain unwritten and simply applied by the Supreme Court<sup>20</sup>. Therefore, only a selection of the essential rules developed by the Supreme Court over the last 30 years is added to the Draft Bill.

### 1.3 DUALISM OF LAWS MAINTAINED

Since the adoption of the PILA in 1989, arbitration in Switzerland has been governed by two laws. While Part 3 of the Swiss Civil Procedure Code (“CPC”) applies to domestic arbitration, *i.e.* when all parties have their domicile or habitual residence (or seat) in Switzerland, Chapter 12 of the PILA governs international arbitration, namely when at least one party is neither domiciled

18 Message, Section 1.3.1, p. 12.

19 Message, Section 1.3.1, p. 12.

20 Message, Section 1.2.1, p. 9.

nor has its habitual residence in Switzerland (or seat). This two-track system has historically emerged due to the federal structure of Switzerland and has traditionally been maintained since then<sup>21</sup>.

The law reform has opened discussions as to whether both types of arbitration, domestic and international, should in the future be governed by a single law. The dualism of laws has nevertheless prevailed, and the two laws will still rule international and domestic arbitration<sup>22</sup>. Maintaining such a dichotomy of systems is preferable considering that both the laws obey to different visions. Chapter 12 is indeed more liberal and provides more wiggle room for the parties to tailor the arbitration proceedings. By contrast, the CPC sets forth more detailed rules guiding the parties during the arbitration. However, should the grass seem greener on the other side, the parties can keep the right to opt out from one law and submit their dispute under the other, just as the practice has been to this day (*i.e.* “opt out right”)<sup>23</sup>.

## 2 WHAT WILL CHANGE?

### 2.1 INCORPORATION OF THE SUPREME COURT JURISPRUDENCE INTO CHAPTER 12

#### 2.1.1 Clarification of the scope of application of Chapter 12

As presented above, parties agreeing to submit their dispute to arbitration must first determine either the CPC (*i.e.* domestic arbitration) or the PILA (*i.e.* international arbitration) will apply to their conflict. Such a distinction relies on the parties’ domicile or habitual residence (or seat) at the time the arbitration agreement was concluded (Section 1.3).

Dissensions persisted between Swiss commentators and the Supreme Court as to the *decisive moment* to determine the domestic or international character of arbitration and thus, the application of CPC or PILA to an arbitration (Section 1.3). While the former considered that Chapter 12 applied to the parties having *originally signed the arbitration agreement*, the latter considered that determining whether the parties were domiciled (or seated) in Switzerland should be analyzed at the *time of initiation of the proceedings*<sup>24</sup>. These distinct views created a legal uncertainty which has now been resolved in the Draft Bill.

In order to avoid any ambiguity in the future, the Draft Bill clarifies the scope of application of Chapter 12<sup>25</sup>, pursuant to which, the international

21 Message, Section 1.3.2, p. 13.

22 Message, Section 1.3.2, p. 13.

23 Message, Section 1.3.2, p. 13.

24 Message, Section 1.2.1, p. 9; Message, Section 2.1, draft Articles 176(1) and 192(1) of the PILA, p. 24.

25 Draft Articles 176(1) and 192(1) of the PILA.

character of a dispute will be analyzed by reference to the moment *the parties concluded the arbitration agreement*, as opposed to the moment the arbitral proceedings are initiated<sup>26</sup>.

This is a welcome clarification as it ensures greater predictability in the outcome for arbitration users.

### 2.1.2 Duty to raise procedural issues immediately

The Supreme Court considers that a party which *does not raise immediately* an alleged breach of its procedural rights *forfeits* its right to argue it in a subsequent challenge. This duty to immediately object against an alleged violation of one's procedural right has consistently been applied and severely sanctioned by the Supreme Court<sup>27</sup>. It has been a significant obstacle for parties wishing to challenge an arbitration award.

In order to ensure that foreign users are well aware of the consequences of not reacting promptly to an alleged violation, the Federal Council has decided to expressly state this rule in Chapter 12<sup>28</sup>. Therefore, in accordance with the principle of good faith, a party which observes a violation of its procedural right – or which should have noticed it had it diligently participated in the proceedings – must immediately raise it in order to be entitled to validly challenge the rendered decision on that ground<sup>29</sup>. The consequences of not reacting on time are severe as it will be considered that the alleged party waived its right to raise its objection in a subsequent challenge – even where the violation had chances of being upheld eventually.

### 2.1.3 Rectification, interpretation and additional award

In addition to annulment proceedings before the Supreme Court – expressly indicated in Article 190 of the PILA – the Draft Bill incorporates the other legal remedies open to the parties once the arbitral award has been rendered, namely rectification, interpretation, additional award (Section 2.1.3) and revision (Section 2.1.4)<sup>30</sup>. Although said remedies were not expressly listed in Chapter 12, the Supreme Court and Swiss commentators consider that they apply to arbitral awards as well<sup>31</sup>.

26 Message, Section 1.2.1, p. 9; Message, Section 2.1, draft Articles 176(1) and 192(1) of the PILA, p. 24.

27 Message, Section 1.2.1, p. 9-10; Message, Section 2.1, draft Articles 176(1) and 192(1) of the PILA, p. 24.

28 Draft Article 182(4) of the PILA.

29 Message, Section 1.2.1, p. 9-10; Section 2.1, draft Article 182(4) of the PILA, p. 33.

30 Draft Article 189a of the PILA.

31 Message, Section 1.2.1, p. 9; Message, Section 2.1, draft Article 189a of the PILA, p. 35-36.

Pursuant to the Draft Bill, the parties will be entitled to require an *interpretation of the operative parts* of the award<sup>32</sup>. As a practical example, this solution will entitle the arbitral tribunal to remove ambiguity from the award concerning the wrong designation of a party<sup>33</sup>.

*Rectification*, which will also be expressly provided by Chapter 12 of the PILA too, allows correction of typographical or mathematical omissions or errors in an award<sup>34</sup>.

Last but not least, in accordance with the Draft Bill, the parties will be entitled to seek an *additional award* where the arbitral tribunal did not decide upon all the matters submitted to it so that an undecided issue which is still in dispute can be decided<sup>35</sup>.

Although the arbitral tribunal may rectify, interpret or issue an additional award *sua sponte*, parties wishing to do so must file a request *to the arbitral tribunal, within 30 days* following the *notification of the award*<sup>36</sup>. Said deadline, however, does not stay the short deadline of 30 days to challenge the final award before the Supreme Court, should there be a ground for such a challenge<sup>37</sup>.

This clarification is welcome as it reinforces legal certainty and contributes to a better understanding of their open options for the parties without cross-referencing to other laws which international users may be less familiar with.

#### 2.1.4 Revision of the award

The Supreme Court and Swiss commentators agree that the *revision* of an international award is possible under Swiss law<sup>38</sup>. Such an extraordinary remedy refers to the procedure leading to the *reconsideration of a final and binding award* following the discovery of certain new facts or after discovering that the award was influenced by a criminal act<sup>39</sup>.

The three grounds to seek such a remedy will be added to the PILA to ensure greater legal security<sup>40</sup>. The first ground concerns new facts that could not be submitted earlier by a party, despite acting with the required diligence<sup>41</sup>. To be admissible, the said factual elements – which cannot have arisen after the issuance of the award – must be of vital importance and a decisive nature

32 Message, Section 1.2.1, p. 9; Message, Section 2.1, draft Article 189a of the PILA, p. 35-36.

33 Supreme Court Decision 130 III 125, para 2.3, dated 09.12.2003.

34 Message, Section 1.2.1, p. 9; Message, Section 2.1, draft Article 189a of the PILA, p. 35-36.

35 Message, Section 1.2.1, p. 9; Message, Section 2.1, draft Article 189a of the PILA, p. 35-36.

36 The Draft Bill will mention this deadline at draft Article 190a (4) of the PILA.

37 Message, Section 2.1, draft Article 189a of the PILA, p. 36.

38 Message, Section 2.1, draft Articles 190a and 192(1) of the PILA, p. 37.

39 Message, Section 2.1, draft Articles 190a and 192(1) of the PILA, p. 37.

40 Message, Section 2.1, draft Articles 190a and 192(1) of the PILA, p. 37.

41 Draft Article 190a(1)(a) of the PILA.

to the outcome. In this regard, a high threshold will have to be satisfied to discuss the matter. The second ground relates to cases that were influenced, to the detriment of the alleged party, by the commission of a criminal act<sup>42</sup>. The third ground relates to challenging an arbitrator on such grounds that were discovered only after the award was rendered<sup>43</sup>. The Federal Council having opted to keep this third ground has nonetheless indicated that this option is only admissible if no other remedy is open to the alleged party (*i.e.* just if a challenge to the Supreme Court is not admissible anymore)<sup>44</sup>.

This revision procedure takes place before the *Supreme Court*<sup>45</sup>, and must be initiated within *90 days* following the discovery of the ground and *up to 10 years* from the moment the award became final and binding (except for the second ground which does not have a similar limitation period)<sup>46</sup>.

Pursuant to the draft Article 192(1) of the PILA, parties are entitled to waive (including in advance) their right to request a revision of the award, provided that none of them is domiciled nor seated in Switzerland (except with respect to the second ground which is of a mandatory nature and cannot be waived by the parties)<sup>47</sup>.

### 2.1.5 Summary procedure before the State “*Juge d’appui*”

Should the parties need assistance from State courts (in French, often referred to as “*Juge d’appui*”), the proceedings will be conducted under a summary procedure, as provided by Articles 251a and 356(3) of the CPC. This *addendum* in the law will ensure that auxiliary procedures are held in a simple and timely manner<sup>48</sup>.

## 2.2 SUBSTANTIVE AMENDMENTS OF CHAPTER 12 OF THE PILA

### 2.2.1 Arbitration clauses to be admissible in unilateral instruments or statutes

Pursuant to the draft Article 178(4) of the PILA<sup>49</sup>, an arbitral tribunal will have jurisdiction in cases where the arbitration agreement was provided in unilateral acts (*i.e.* a will, a trust, or a foundation) or statutes, provided that they are substantively valid under the law they are subject to<sup>50</sup>.

42 Draft Article 190a(1)(b) of the PILA.

43 Draft Article 190a(1)(c) of the PILA.

44 Draft Article 190a(1)(c) of the PILA.

45 Draft Article 191 of the PILA.

46 Draft Article 190a(2) of the PILA.

47 Message, Section 2.1, draft Articles 190a and 192(1) of the PILA, p. 37-38.

48 Message, Section 1.2.1, p. 10; Message, Section 2.3, draft Articles 251a and 356 al. 3 of the CPC, p. 41.

49 See also draft Article 697 of the Swiss Code of Obligations.

50 Message, Section 1.2.2, p. 10; Message, Section 2.1, draft Article 178(4) of the PILA, p. 25-28.

### 2.2.2 Arbitration clauses with no indication of a seat

It is common for parties wishing to submit their dispute to international arbitration to designate the seat of arbitration. Should they omit to do so, it will usually be for the arbitral institution to fill this gap. In some instances, a State court might be called upon to decide this issue<sup>51</sup>.

The Draft Bill<sup>52</sup> provides for subsidiary competence of the Swiss judge to determine the seat of arbitration, in the situation where the parties did not provide for a seat at all, or simply indicated “Switzerland” as the seat. In this context, the first Swiss judge seized of the matter will be competent to decide upon the issue<sup>53</sup>.

### 2.2.3 Challenges to the Supreme Court to be admissible in the English language

Given that the vast majority of arbitration proceedings are conducted in English, the Federal Council has proposed to enable challenges to the Supreme Court against an award to be filed in the English language. This proposition aims notably at avoiding translation costs. It also reinforces Switzerland’s attractiveness as an international arbitration hub<sup>54</sup>.

To this day, challenges to the Supreme Court are to be filed in any of the official languages of Switzerland, namely German, French, Italian or Romansh<sup>55</sup>. Pursuant to this proposition, the proceedings and the Supreme Court’s decision would, however, still be issued in one of the official languages and not in English<sup>56</sup>. To this day, subject to the parties’ agreement, the Supreme Court already accepts exhibits and appendices to the pleadings written in English to be filed as it is, *i.e.*, untranslated<sup>57</sup>.

This suggestion from the Federal Council has however already spilled a lot of ink and has been dividing practitioners. The Supreme Court, consulted on this precise motion, has indeed clearly raised its critical views considering that it would go too far to accept challenges in English<sup>58</sup>. On the other hand, it could be argued that the said proposition would strengthen the attractiveness of Switzerland from a global perspective and facilitate arbitration proceedings.

51 Message, Section 1.2.2, p. 10; Message, Section 2.1, draft Article 179(2) of the PILA, p. 28.

52 Draft Article 179 (2) of the PILA.

53 Message, Section 1.2.2, p. 10; Message, Section 2.1, draft Article 179(2) of the PILA, p. 28-29.

54 Message, Section 2.2, draft Article 77(2bis) of the Supreme Court Act, p. 40 (“SCA”).

55 Article 42(1) of the SCA.

56 Message, Section 2.2, draft Article 77(2bis) of the SCA, p. 40; Article 54(1) of the Supreme Court Act.

57 Message, Section 1.2.3, p. 12; Message, Section 2.2, draft Article 77(2bis) of the SCA, p. 40; Article 54(3) of the SCA.

58 Message, Section 1.2.3, p. 12; Message, Section 2.2, draft Article 77(2bis) of the SCA, p. 40.

This question promises to be vividly debated by the two chambers of the Swiss Parliament.

## 2 WHAT WILL REMAIN UNCHANGED?

### 2.1 LABOR DISPUTES REMAIN UNCODIFIED IN CHAPTER 12

In its recent decision 4A\_7/2018 dated 15 May 2018, the Swiss Supreme Court indeed followed its previous landmark decision on the topic<sup>59</sup> and found that the validity of arbitration agreements in *domestic employment contracts* is limited. Disputes related to mandatory rules under employment law are not arbitrable as opposed to disputes related to issues of a dispositive nature. Further, as indicated by the Swiss Supreme Court, the limited arbitrability of disputes under domestic employment contracts cannot be circumvented by deferring them to international arbitration (*i.e.* under PILA), where there are no restrictions of the arbitrability of employment matters.

Although the Federal Council acknowledges that the workers are the weaker parties to labor contracts, it has considered that their particular situation was sufficiently protected through the application of the Supreme Court's consistent case law in the field and therefore, it decided not to touch on the matter in the Draft Bill<sup>60</sup>.

That being said, the Federal Council also admits that the “*issues of jurisdiction, applicable law and arbitration must be closely monitored in the context of the digitalisation of the labor market*”. Said issues are to be analyzed and reported by 2022 by the Federal Council<sup>61</sup>.

### 2.2 CONSUMERS DISPUTES REMAIN UNCODIFIED IN CHAPTER 12

Just like workers, consumers are usually the weaker party in contracts, considering that they typically have no say regarding the content thereof, notably with respect to general terms and conditions which can contain an arbitration clause. However, under the Swiss law, general terms and conditions will be considered abusive when there is an enormous and unjustified disproportion between the rights and obligations of the parties, which includes the introduction in the contract of an arbitration clause. In such cases, the consumers will be protected<sup>62</sup>.

59 Supreme Court Decision 136 III 467, dated 28.062010.

60 Message, Section 1.3.4, p. 17-18.

61 See <https://www.news.admin.ch/newsd/message/attachments/50255.pdf> accessed on 10.01.2019.

62 Message, Section 1.3.4, p. 17-19.

Given the above, the Federal Council has considered that no specific rule should be incorporated in Chapter 12 of the PILA<sup>63</sup>.

### 2.3 SPORTS DISPUTES REMAIN UNCODIFIED IN CHAPTER 12

Numerous sports organizations are located in Switzerland (*i.e.* FIFA, UEFA, IOC). These organizations and federations are usually subject to Swiss law, and most of them ultimately refer their disputes to the CAS, located in Lausanne. Having one entity dispensing justice in matters involving athletes, sports federations and stakeholders regarding disciplinary measures, procedural issues and doping procedures guarantee a certain uniformity and expertise in the resolution of sports disputes, which could not be achieved otherwise through State courts machinery. Such centralization of decision-making is thus welcome in the global development of modern sport<sup>64</sup>.

Although its impartiality and independence have been regularly questioned yet confirmed on several occasions by the Supreme Court<sup>65</sup>, the Federal Council has not considered it appropriate to amend Chapter 12 of the PILA by adding specific rules regarding sports disputes<sup>66</sup>. The *status quo* is thus likely to be maintained on this point.

## 3 WHAT HAS NOT BEEN ADDRESSED BY THE FEDERAL COUNCIL IN THE DRAFT BILL?

### 3.1 NEGATIVE EFFECT OF THE COMPETENCE-COMPETENCE PRINCIPLE

Should a party file its claim before a State court notwithstanding an arbitration agreement, the opposing party will raise the *exceptio arbitri* objection, pursuant to which the State judge will have to determine whether they are competent and whether or not the arbitral tribunal is competent.

Pursuant to Article II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), the State judge shall refer the parties to arbitration, unless it finds that the agreement

63 Message, Section 1.3.4, p. 17-19.

64 Message, Section 1.3.4, p. 19-21.

65 Supreme Court Decision 4P.267/2002 (129 III 445), dated 27.05.2003, ASA Bull. 3/2003, p. 601, which confirmed independence and impartiality of the CAS, as provided in its following decision, Supreme Court Decision 4A\_260/2017, dated 20.02.2018, ASA Bull. 2/2018, p. 429. Since this decision has been rendered, the independence of the CAS has also been upheld by the European Court of Human Rights (“ECHR”) for the first time. The ECHR has indeed dismissed claims by two athletes who contended that proceedings before the CAS were insufficiently independent to be considered a fair trial. A violation of the right to a fair trial about the denial of public proceedings before the CAS was however recognized by the ECHR. See *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 02.10.2018. Following this decision, it should be noted that the CAS Code was modified and that said modifications entered into force on 01.01.2019. A public hearing is now possible at the request of a natural person (party to the proceedings) in a disciplinary matter in certain circumstances (new Article R57 CAS Code).

66 Message, Section 1.3.4, p. 19-21.

is null and void, inoperative or unenforceable. Said Article is nonetheless only applicable where the arbitration seat is located outside Switzerland. In the same vein, Article 7 of the PILA applies where the parties provided for a seat in Switzerland. Pursuant to Article 7 of the PILA, the Supreme Court has consistently held that following the negative effect of the competence-competence principle, the State judge reviewing its competence must limit itself to a *summary review*<sup>67</sup>.

The Supreme Court has, however, consistently ruled that a different level of review must be applied by the Swiss courts depending on either the seat of arbitration was in Switzerland or not<sup>68</sup>. The court's power of review should be limited to a *summary analysis* only when the arbitration is *seated in Switzerland* (Article 7 of the PILA). By contrast, a national judge should have a *full power of review* when the seat of the arbitration was *not located in Switzerland* (Article II (3) of the New York Convention)<sup>69</sup>. The Federal Council has refrained from introducing the principle of the so-called negative effect of the competence-competence rule in Chapter 12 of the PILA.

### 3.2 NATIONAL “JUGE D’APPUÏ”

During preliminary works, the idea of creating a unique “*juge d’appui*” to assist the parties during arbitration proceedings was raised. Such a solution would have ensured that national judges in charge of arbitration matters have the relevant expertise to render their decision in a speedy manner<sup>70</sup>.

This suggestion was, however, discarded for several reasons. Part of the reason is the fact that Switzerland has a federal judiciary system, where each Canton decides for its judiciary organization. Determining which State judge is competent (*i.e. ratione loci*) would, therefore, have been a first hurdle to overcome in case of international arbitration with two foreign parties, especially considering that the Supreme Court on its end would not be fit for such determination. The same conclusion applies to a purely administrative body, which would not be appropriate for these kinds of matters<sup>71</sup>.

Such an initiative would have, therefore, required the creation of a new judicial body. Although such an innovative solution could have increased Switzerland's attractiveness in the eyes of practitioners around the international community, it did not seem necessary. All in all, assistance from the State courts does not constitute a substantive caseload for national courts, who, in addition,

67 Message, Section 1.3.3, p. 13-15.

68 Supreme Court Decision 122 III 139, para. 2.a., dated 29.04.1996.

69 Message, Section 1.3.3, p. 14-15.

70 Message, Section 1.3.3, p. 15-16.

71 Message, Section 1.3.3, p. 16.

perform their task in a very satisfactory manner. The Federal Council has thus considered that the situation should remain as it is and has renounced to amend the PILA in this sense<sup>72</sup>.

## CONCLUSION

Overall, the reform of Chapter 12 of the Swiss PILA is not a game changer and only aims at reinforcing its strengths and modernizing particular elements, so that Switzerland may remain a world “*leader*”<sup>73</sup> in the most popular seat for international arbitration.

While the popular adage states that less is more, the law reform of Chapter 12 could well be considered by international arbitration users as William Tell’s apple-shot: right on the mark.

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72 Message, Section 1.3.3, p. 16.

73 Message, Section 1.1.1, p. 5.