

The New Swiss Law on International Arbitration

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Introduction

1. A major legislative reform has been brought about in Switzerland by the new Private International Law Act, 1987.^{1,2}

As an overall codification of the Swiss private international law, the Act deals with all three of the classical questions addressed by that branch of the law: the jurisdiction of the Swiss courts, the choice of applicable law and the recognition and enforcement of foreign judgments.

The Act deals with a very wide range of substantive law categories. Aside from traditional subjects such as family law, the law of succession, the law of property, the law of contract, the law of tort and company law, the Act also covers intellectual property, bankruptcy and the law of arbitration.

The Act consists of 13 Chapters. Excluding the first and last Chapters, which deal respectively with general provisions and transitional rules, each Chapter regulates a specific area of the law.

This study will deal mainly with the provisions contained in *Chapter 12* of the Act, that is *Art. 176-194*, which set out the rules relating to international arbitration.

Legislative History and the General Features of the New Law

2. Unlike a number of other European countries, Switzerland has updated its rules on international arbitration not by a separate piece of legislation, but within the general framework of codification³ of the conflict of laws.

Owing to the wide-ranging scope of the reform, it took fifteen years for the Bill to be drafted and to pass through the various stages of the parliamentary law-making process.⁴

In some areas, where the law was in a sorry state for a variety of reasons,⁵ the proposed reform had to break completely new grounds. In the field of arbitration, the legislator could build on an established and tested system of rules.

3. Traditionally, the law of arbitration, as regulated in the context of the law of civil procedure, was under the legislative competence of the Cantons, the States

forming the Swiss Confederation.

In 1969 a uniform law, the Swiss Intercantonal Arbitration Convention often referred to by its French title as the 'Concordat', was adopted. It is now in force in practically all Cantons.⁶ Although this is not a suitable place to embark on a discussion of its many achievements, it may be noted nevertheless that the Concordat provided modern and uniform rules on arbitration at a time when such uniform rules had become necessary.

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1 The new law has been discussed and commented on in quite a number of publications, many of which are listed in the selected bibliography at the end of this article. The Notes specify only the name of the author; the full reference can be found, unless otherwise indicated, in this bibliography.

A number of English translations of Chapter 12 on international arbitration have been published. The present article refers to that prepared by the Swiss Arbitration Association, published in its Bulletin No 3 of 1988 and in the preceding issue of this review.

For an English translation of the entire Act See KARRER/ARNOLD; however, their translation of Chapter 12 differs from that of the Association.

2 Hereinafter referred to as 'the Act'.

3 The word 'codification' is used as it is understood in civil-law countries. The Act breaks new ground in almost all of its chapters; only the provisions relating to the law of contract may be considered mainly as a codification (in the common-law sense) of the existing case law.

4 The decision to start a preliminary study, with a view to reforming the law, was taken in 1972 and a Federal Commission of Experts was set up a year later. The Act was enacted by Parliament on 18 December 1987.

5 Practically the whole area of jurisdiction and that of recognition and enforcement of foreign judgments was governed by Cantonal law and it was felt that uniform, federal rules on jurisdiction were required.

As regards the choice-of-law rules, the situation was, to say the least, somewhat complex. A federal Act dating back to 1891 (LRDC/NAG) covered mainly family law and the law of succession. Its rules applied to international situations only by analogy since that Act was originally intended to regulate choice-of-law in domestic situations prior to the unification of private law that was brought about by the Civil Code. On a number of issues, the courts had over time modified the old statutory rules in order to bring them in line with the needs of this century.

The choice-of-law rules on contract, tort, company law, bankruptcy and intellectual property were judge-made rules and the law in those areas was often very unclear.

6 The only exception being Lucerne.

Furthermore, the Concordat has no doubt been amongst the factors instrumental in consolidating Switzerland's position over the last two decades as a major arbitration centre.

The achievements of the Concordat and the quality of its rules were never in question so far as the law of domestic arbitration is concerned. The Concordat thus remains in force and applies to all arbitration proceedings and arbitration agreements which have no foreign connection.⁷

4. Nevertheless, the need was felt for new rules which specifically dealt with international arbitration. It came to be commonly thought that the legislature ought to take advantage of the overall reform and to include international arbitration within the Act. Indeed, a number of provisions of the Concordat were either too detailed or made in view of domestic arbitration.

In the area of domestic arbitration, there is, arguably, good reason for the legislature to regulate many aspects of procedure and to avoid injustice resulting from the award.

During the course of the debate concerning the reform there has been some argument that foreign parties choosing Switzerland as the forum for their arbitration also wished to benefit from the Swiss legal system and the control which its courts exercise over arbitrations.

While such control leaves some room for dilatory tactics, there can be no doubt that in a good number of cases the courts have corrected serious errors made by arbitrators, and parties must have felt that they were fortunate in being able to turn to the Swiss courts for redress.

But it was also realised that many foreign parties who, either by their own choice or that of an institution, arbitrated in Switzerland, had no particular inclination for a specifically 'Swiss arbitration procedure' or for control by the Swiss courts. They wished to see the arbitration conducted with as little outside interference as possible.

The logical solution was to provide a set of rules for international arbitration whereby the parties have almost unlimited freedom to settle the procedure, and the Swiss courts have only a very limited role to play.

The new Act provides such a degree of freedom for the parties to organise the procedure as they see fit and in accordance with their experience or customs. But if they wish to have a specifically Swiss style of arbitration, applying well-established principles of the Swiss system and relying on the control of the Swiss courts (which, particularly in the main arbitration centres are experienced in international cases), they are free to opt for arbitration under the Concordat.⁸

The adopted approach certainly is an apt solution. It offers to international litigants the option of either truly

international arbitration with minimal interference from the law and the courts of the place of arbitration or arbitration within the framework of the well developed legal system of a neutral country.

In both cases the proceedings also benefit from advantages of a more practical nature such as convenient location and good communications, an infrastructure which functions well and reliable services. Scholars tend to overlook these extra-legal aspects, but for arbitration practitioners they are not without import.⁹

5. In order to respond to the needs of international arbitration, a number of rules of the Concordat were discarded by the new Act.

The provisions on setting aside arbitral awards are the most prominent example of regulation specific to international arbitration proceedings.

The new rules (Art. 191) replace the old system under which a Cantonal court has jurisdiction, on a limited number of grounds, to hear an appeal against an award. A further appeal lies to the Federal Tribunal.

Under the Act, setting aside proceedings must be brought before a single court without any further redress being available. The grounds for appeal are more limited than those under the Concordat and in proceedings between foreign parties, setting aside may be excluded altogether. The new law thus attributes particular importance to the finality of arbitral awards.¹⁰

Among the other changes brought about by the new Act, one should note that it favours the formal validity of arbitration agreements by setting out more liberal criteria than those of the Concordat.¹¹

The Act also discards the rule of the Concordat which provides that an arbitration agreement may not exclude the right to appoint a lawyer as arbitrator¹² and the rule limiting the arbitrator's jurisdiction in relation to defences based on set-off.¹³

A further rule on domestic arbitration, whereby the tribunal lacks jurisdiction to order provisional measures, is replaced by a provision which confers such jurisdiction on the tribunal.¹⁴

7 On the application of the Concordat to international arbitrations, see *infra*, N 10.

8 Art. 176(2) of the Act.

9 For an introduction to arbitration under the Concordat, and guidance on practical aspects and further reference to relevant legal writing, see *International Arbitration in Switzerland*, published in 1984 by the Swiss Arbitration Association (ASA).

10 See *infra*, N 31 et seq.

11 See also *infra*, N 16.

12 Art. 7 Concordat; see Art. 180(1)(a) of the Act, whereby an arbitrator who fails to meet the requirements agreed upon by the parties can be challenged. See *infra*, N 19.

13 See Art. 29 Concordat.

14 See *infra*, N 24.

6. The new Swiss law is in tune with the overwhelming trend in favour of party autonomy which can be observed in all modern arbitration legislation and in UNCITRAL's Model Law.

On the one hand, the parties are free to choose the system of law which governs their arbitration agreement,¹⁵ the law or the rules determining the arbitration procedure¹⁶ and, of course, the proper law of, or the rules of law governing, the contract.¹⁷

On the other hand, the new law leaves ample scope for the parties to determine issues of substance and procedure either by express agreement or by reference to institutional rules.

The new rules aim to establish a *framework* and therefore regulate only the most fundamental questions; they are thus significantly more concise than the UNCITRAL Model Law and the new Dutch law.

The large degree of freedom which the Swiss and other modern enactments leave to the parties and to the arbitrators is not without risk. It places considerable responsibility on the arbitrators. Not only must they conduct the proceedings in a fair manner but they must also provide guidance to the parties and advise them of the procedure they intend to adopt in good time so as to avoid surprise or even frustration by reason of steps unfamiliar to the parties.

The Principal Features of Chapter 12

I. The General Provisions

Before analysing Chapter 12 of the Act, two provisions contained in Chapter 1 will be mentioned which are relevant to the law of arbitration.

7. The first of these provisions is Art. 1(2) of the Act, which emphasizes the overriding effect of international treaties. Art. 1(2) deals only with international treaties ratified by Switzerland. However, it is generally acknowledged that *customary* international law also overrides the rules contained in the Act.¹⁸

This is notably the case on issues of jurisdiction, where the jurisdiction of the Swiss courts established under the Act may be affected by the international rules on sovereign immunity.¹⁹

8. Art. 7 of the Act deals with the effect of arbitration agreements on the jurisdiction of the courts.

This provision substantially reflects Art. II (3) of the New York Convention, which has been ratified by Switzerland,²⁰ and also Sect. 1(1) of the English Arbitration Act, 1975.

Pursuant to Art. 7, where the parties have concluded an arbitration agreement, the court must decline jurisdiction and refer the parties to arbitration²¹ unless the defendant proceeded on the merits without making an objection, or the arbitration agreement is null and void, inoperative or incapable of being performed. To

this extent the provision is identical with that of the New York Convention.²²

However, Art. 7(c) of the Act goes on to provide a further exception, viz. the case when an arbitral tribunal cannot be constituted for reasons manifestly attributable to the conduct of the defendant.

It is submitted that this difference between the Act and Art. II(3) of the Convention is merely apparent. It is difficult to see how the exception described in Art. 7(c) could not come within the words 'inoperative or incapable of being performed'.

II. The Scope of Application of the New Rules

9. Since the Act is intended to regulate only international matters,²³ it follows that Chapter 12 deals only with *international* arbitration.

Art. 176(1) defines those international arbitrations which fall within the scope of application of the Act: at the time when the arbitration agreement was concluded, at least one of the parties to the arbitration agreement must neither have domicile nor habitual residence in Switzerland.²⁴

¹⁵ See *infra*, N 13.

¹⁶ See *infra*, N 23.

¹⁷ See *infra*, N 27.

¹⁸ See the Government's Report on the Act, Message concernant une loi sur le droit international privé du 10 Novembre 1982, No 82.072, 35 N. 212 (all the references to the Government's Report relate to the French text of the separate edition published by the Federal Stationery Office in Bern, and not to the 'Feuille fédérale'/'Bundesblatt').

¹⁹ On the Swiss practice in relation to sovereign immunity, see e.g. FORNI, Die Gerichts- und Vollstreckungsimmunität fremder Staaten in der bundesgerichtlichen Rechtsprechung, XLII ASDI 9-15 (1986); P. LALIVE, Note sur la jurisprudence suisse en matière d'immunité d'Etats, in *Chronique de jurisprudence suisse*, 114 Clunet 969-1008, 1000-1008 (1987). On the Swiss practice concerning the European Convention on State Immunity (1972), see KRAFFT, La Convention européenne sur l'immunité des Etats. Aperçu de quelques développements récents de la jurisprudence du Tribunal fédéral, XLII ASDI 16-26 (1986).

²⁰ This introduction will not deal with recognition and enforcement of foreign arbitral awards. It may be briefly noted, however, that the recognition and enforcement of foreign arbitral awards in Switzerland are governed by the Convention even when the award has not been rendered in a contracting State.

²¹ In Swiss law, effect is given by the court to an arbitration agreement not by staying proceedings, but by declining jurisdiction.

²² In view of the fact that Switzerland ratified the New York Convention, one may well wonder whether Sect. 7 of the Act was necessary. On the one hand, the Act expressly refers to the New York Convention in Art. 7 on the recognition and enforcement of foreign arbitral awards; on the other hand, by virtue of Art. 1(2), a treaty ratified by Switzerland overrides the Act.

²³ See Art. 1(1).

²⁴ If the parties to the arbitration agreement are both domiciled in Switzerland the arbitration therefore qualifies as a domestic arbitration under Art. 176(1) of the Act even though they are both non-Swiss nationals.

If a foreign company has a branch office in Switzerland, the arbitration agreement made between that branch and a Swiss company comes within the scope of application of the Act (See also BLESSING, 19). Such an arbitration agreement is binding on the foreign company under Swiss law on the ground that branch offices, as opposed to subsidiaries, are mere territorial subdivisions of the principal office and have no legal personality themselves.

Surprisingly enough, companies are not expressly mentioned in Art. 176(1). The solution is provided by Art. 21, whereby the registered office of a company replaces domicile for the purposes of the Act. This principle also extends to Art. 176(1).

Thus it is neither nationality – which is one of the criteria in English law²⁵ – nor the substance matter of the dispute which serves to determine the international nature of an arbitration, but the domicile or the registered office of the parties to the arbitration agreement. In the course of drafting the Act a criterion based on the subject matter of the arbitration such as that used in French law,²⁶ was considered but rejected as being too vague.²⁷

The Act further requires that the ‘seat’ of the arbitral tribunal be in Switzerland (Art. 176(1)).

The term ‘seat’²⁸ has been subject to much controversy in Switzerland.

It is sometimes distinguished from the ‘place of arbitration’, a term commonly used in England and in international texts. The distinction emphasizes, not a physical location, but a link with a legal system, comparable to the ‘seat’ of a legal relationship in the sense used by SAVIGNY.²⁹

Today the matter is probably of little consequence and, in the context of the Act³⁰ an English speaking lawyer may, for all practical purposes, treat the term as synonymous with the place of arbitration.

The seat of the arbitral tribunal can be determined by the parties to the arbitration agreement, by the arbitration institution designated by the parties or by the arbitrators (Art. 176(3)).

10. The parties are at liberty to contract out of the new provisions contained in Chapter 12 of the Act and to submit their dispute to the Cantonal law governing arbitrations, that is to the Concordat (Art. 176(2) of the Act).

Three requirements must be satisfied for such a choice to be effective: the parties must (1) agree *in writing*, (2) exclude the application of Chapter 12 of the Act and (3) agree on the *exclusive* application of the Cantonal rules on arbitration.

It is disputed whether arbitration agreements made before the enactment of the new rules and which provide for arbitration under a specific cantonal law³¹ or refer to the Concordat satisfy the requirements of this provision. Owing to practice and the use of standard forms such clauses might be adopted even after the new Act has come into force. In that case, there can be no doubt that they do not exclude Chapter 12.³²

III. *The Arbitration Agreement*

The Act, following the Concordat, uses the expression ‘arbitration agreement’ as the general term referring to arbitration clauses in contracts concerning possible

future disputes, as well as agreements made to submit a dispute which has already arisen.

The Act deals with three main questions relating to arbitration agreements: it regulates (a) the arbitrability of disputes, (b) the substantive validity of arbitration agreements and (c) the formal requirements with which an arbitration agreement must comply.

(A) 11. Art. 177(1) deals with the question whether the dispute which arises is capable of being settled by arbitration. In many countries, certain types of dispute cannot be referred to arbitration, mainly for reasons of public policy.³³

The question arises whether and how far the law of international arbitration gives effect to domestic and foreign rules that are intended to restrict the arbitration of certain matters and therefore to impose limitations on the validity of arbitration clauses.

The Swiss legislature did consider a solution based on choice of law principles and eventually decided not to proceed on this basis due to the difficulties inherent in determining the proper law with respect to arbitrability.³⁴

25 Sect. 1(4) of the Arbitration Act 1975 and Sect. 3(7) of the Arbitration Act 1979. Another difference between the Swiss and the English definition should be noted. Whereas under the English Arbitration Act, 1979, an international arbitration is an arbitration which does not fall within the definition of a domestic arbitration (Sect. 3(7), Arbitration Act, 1979; Sect. 1(4), Arbitration Act, 1975 – the difference between those sections being irrelevant for present purposes), the Swiss legislature chose to proceed differently: Art. 176(1) defines international arbitration and all the arbitrations that do not fall within the words of that definition are deemed to be domestic arbitrations.

26 Arbitrations which involve the interests of international trade. Art. 1492 of the New Code of Civil Procedure reads: ‘Est international l’arbitrage qui met en cause des intérêts du commerce international’.

27 See Message, cited Note 18, 191 No 2101.21.

28 ‘Siège’, ‘Sitz’, ‘sede’ in the original versions.

29 Therefore, PANCHAUD, who formed this concept in Swiss law, spoke of the seat not of the ‘arbitral tribunal’ but of the ‘arbitration’.

30 For the use of the term in the Concordat and the debates on its choice, see JOLIDON, 81–85.

31 Eg ‘Arbitration to be conducted in accordance with the laws in force in Geneva’, ‘Arbitration to be held in Zurich in accordance with local law’.

32 See P. LALIVE, Le chapitre 12, 212; BLESSING, 20–21.

33 The position varies from one country to another: patent disputes, family matters, or anti-trust issues can be arbitrated in some countries but not in others.

34 See The Government’s Report, cited note 18, 192–193, No 2101.22. The Report underlines that the usual choice-of-law approach, consisting of party autonomy and a residual objective rule, could be of only limited assistance on the issue of arbitrability.

As regards party autonomy, this conclusion seems justified since most rules on arbitrability by their very nature exclude party autonomy.

Where the parties have failed to agree on the law governing the arbitration agreement, the determination of the proper law is a none too easy task. The proper law of the contract, the law of the seat of the arbitral tribunal, the law of the country where the parties are domiciled and even the law of the country where enforcement will be sought may each have a connection with the arbitration.

Instead, the Act sets out the criterion of arbitrability directly in a substantive rule (Art. 177(1)): any dispute involving property³⁵ can be submitted to arbitration; the search for the applicable law is thus avoided. However, difficulties cannot thus be totally overcome, particularly as public policy must be taken into account.³⁶

12. Art. 177(2) of the Act addresses a particular aspect of capacity in relation to arbitration agreements; this is sometimes termed 'subjective arbitrability'.

Capacity is, as a rule, governed by the law of domicile for natural persons, and by the law of the registered office (law of incorporation) for legal entities.³⁷

Art. 177(2) provides a separate rule for States and for State controlled enterprises and organisations. These entities may not rely on their own law in order to contest the arbitrability of a dispute covered by the arbitration agreement³⁸ or their capacity to be a party to an arbitration.

The Government's Report justifies this provision on the basis of the need for certainty.³⁹

The rule is intended to defeat occasionally abused defences, such as prohibitions on arbitration enacted by a State subsequent to the conclusion of an arbitration agreement. In Switzerland the *Losinger* case, naturally, springs to mind.⁴⁰

However, reliance by a State on its own law concerning capacity and arbitrability does not necessarily amount to abuse. In the present writers' opinion Art. 177(2) therefore should be applied only after careful consideration of the facts.

(B) 13. Under Art. 178(2) of the Act, the substantive validity of an arbitration agreement is determined by the law chosen by the parties, which may be the law governing the merits of the dispute, or more usually the proper law of the contract, or even Swiss law. For the arbitration agreement to be valid it is sufficient that any one of these systems should regard it as being valid.

14. Art. 178(3) of the Act goes on to provide two substantive rules which are intended to apply to arbitration agreements irrespective of their proper law.

The first is the rule whereby arbitration agreements are severable and are not affected by the invalidity of the contract to which they relate, (Art. 178(3), first part of the sentence). The rule is not peculiar to Swiss law but is widely regarded as a general principle of the law of arbitration.⁴¹

This point had already been acknowledged by the Federal Tribunal in 1930.⁴² By virtue of Art. 178(3), the principle now applies to all those international arbitration agreements that are within the scope of the Act, irrespective of the proper law.

Where the arbitration agreement is *itself* tainted by an

invalidating event,⁴³ it will be either voidable or null and void, as the case may be. This may, or may not, coincide with the nullity of the contract in which the arbitration clause is contained.

The application of the first part of Art. 178(3), requires the determination of two distinct points: (a) any invalidating events which may affect the contract as a whole must first be identified; (b) a distinction must then be made between those invalidating events which affect only the main contract, those which affect only the arbitration agreement and those which affect both.

Only the events which belong to the two latter categories are capable of invalidating the arbitration agreement, provided that they operate under all the systems referred to by Art. 178(2).

Whether in such a case the invalidity of the arbitration agreement falls to be determined by the courts or by the arbitrators is a question which remains to be addressed and which will be examined at a later stage.⁴⁴

³⁵ Such being the translation of the terms 'en matière patrimoniale', 'jeder vermögensrechtliche Anspruch', 'qualsiasi pretesa patrimoniale' of Art. 177(1). The terms do not easily translate into English. We follow the translation of the Swiss Arbitration Association which favours the term 'property' ('Any dispute involving property . . .'), which must be interpreted in its widest sense.

'Patrimonial' as an adjective literally means 'relating to the *patrimoine*'. For a better understanding of this term, widely used in civil law jurisdictions, it may be helpful to make reference to NICHOLAS, French Law of Contract, London 1982, 28-29:

'The *patrimoine* is the totality of an individual's economic assets and liabilities, ie those rights and duties which are capable of valuation in money terms. The nearest analogy in English law is the rather imprecise notion of 'estate' of a deceased person. The *patrimoine* consists of property (*biens*) and obligations. (. . .) The *patrimoine* is thought of in terms of a balance sheet, the assets constituting the *actif* and liabilities the *passif*. (. . .) It is thus in the *patrimoine* that property and obligation meet and merge.'

³⁶ Under Art. 177(1) an arbitrator is not bound to give effect to foreign restrictions on arbitration even if they are of a public policy nature. But disregarding them may create difficulties in the enforcement of the award.

In ICC arbitration for instance, the arbitrators will need to consider restrictive rules on arbitrability at least to the extent that they are under a duty to make every effort to ensure that the award is capable of being enforced (Art. 26 of the ICC Rules).

It may also be noted that, at least indirectly, the New York Convention requires arbitrability by the law of the country where enforcement is sought, as want of arbitrability is one of the grounds on which recognition and enforcement can be refused (Art. V(a); see also Sect. 5(3) of the English Arbitration Act, 1975).

³⁷ Art. 35, 154, 155(c) of the Act.

³⁸ This seems to follow from the general rule of Art. 177(1) of the Act and a specific rule for public entities might not have been necessary in this respect.

³⁹ The Government's Report, cited Note 18, 193 No 2101.2

⁴⁰ See Permanent Court of International Justice, Order of 27 June 1936 Series A/B Fasc. 67.

⁴¹ See for instance Art. 16(1), last sentence, UNCITRAL Model Law; Sect. 14.1, last sentence, of the Rules of the London Court of International Arbitration.

⁴² *Tobler v. Blaser*, ATF 59 (1933) I 177.

⁴³ For example mistake, illegality, fundamental change of circumstances subsequent to the execution of the agreement.

⁴⁴ See *infra*, N 26.

15. The second substantive rule provided in Art. 178(3) confirms the validity of arbitration agreements relating to future disputes. Again, the principle is well established in the Swiss law of arbitration⁴⁵ and elsewhere.

There are probably not very many legal systems which continue to admit references to arbitration only, and deny validity to agreements to refer future disputes to arbitration.

Under the Act, the principle operates as a substantive rule which applies to arbitration agreements irrespective of their proper law.⁴⁶

(c) 16. Art. 178(1) of the Act deals with the formal requirements with which an arbitration agreement must comply. The provision contains a further substantive rule which expressly sets out the formal requirements as opposed to merely indicating the system of law governing the issue.

An arbitration agreement may thereby be contained in a document in writing,⁴⁷ a telegram, a telex or a telecopier message.

The provision also admits other unspecified means of evidencing the parties' common intention to enter into an arbitration agreement in order to keep pace with progress in telecommunication technology.

Whatever form the evidence takes, the existence and the terms of the arbitration agreement must be established by a *a text*, which means that the agreement must be expressed in words and must be evidenced in some permanent text on which the parties have agreed.

IV. Appointment and Challenge of Arbitrators

17. Art. 179 of the Act deals with the appointment, removal and replacement of arbitrators. Any such steps must be taken in accordance with the arbitration agreement (Art. 179(1)), which may determine these matters either directly or by reference to the arbitration rules chosen by the parties.

If the arbitration agreement contains no provision relating to appointment, removal and replacement (179(2)), the matter may be referred to a court at the place where the arbitral tribunal has its seat. The parties may also seek the assistance of that court where they fail to reach agreement on matters they intended to decide jointly, such as the designation of the presiding arbitrator or if the defendant fails to act.

The court will apply the Cantonal rules relating to the appointment, removal and replacement of arbitrators. Since cantonal law is no longer directly applicable to international arbitrations, Art. 179(2) specifies that the court apply that law by analogy.

18. Art. 179(3) addresses an issue which has in the past given rise to difficulties. Occasionally parties confer

upon the holder of a specific judicial office, the President of the Federal Tribunal for instance, a function for which the UNCITRAL Rules use the term 'appointing authority'. In such function, the designated judge may be called upon to appoint the sole or the presiding arbitrator if the parties fail to reach agreement or if one party fails to appoint an arbitrator as required under the relevant arbitration clause.⁴⁸

The Federal Tribunal has held on a number of occasions that a judge cannot make such an appointment if one of the parties objects to and challenges the validity of the arbitration clause.⁴⁹

The new rules allow and, indeed, require the judge to proceed with the appointment pursuant to such clauses, provided that a *prima facie* arbitration agreement exists.

19. Art. 180 of the Act deals with the challenge of the arbitrator.

The grounds for challenge are those provided in the arbitration rules on which the parties may have in fact agreed (Art. 180(1)(b)). The failure by the arbitrator to meet the requirements agreed by the parties (Art. 180(1)(a)) is a further ground for challenge. The parties have considerable freedom in their definition of such requirements.⁵⁰

Aside from these grounds, the arbitrator may also be challenged where the circumstances give rise to justifiable doubts as to his independence (Art. 180(1)(c)).

20. In the definition of this latter ground of challenge no distinction is drawn between the requirements which an arbitrator appointed by one of the parties must meet and the requirements applicable to a sole or presiding arbitrator.

⁴⁵ Sect. 4(2) Concordat.

⁴⁶ The provision may seem superfluous since agreements to refer future disputes to arbitration are valid under Swiss law and Swiss law is one of the systems of law referred to by Art. 178(2) of the Act.

⁴⁷ When an agreement must be contained in writing, it must be signed by all the parties it is intended to bind. This rule of the Swiss law of contract (Sect. 13 of the Code of Obligations) does not apply within the Act: signature is not required, See The Government's Report, cited Note 18, 194 No 2101.24.

⁴⁸ The wording of the French text seems to give the clause a wider scope, so that it appears to apply in all cases in which a court is called upon to appoint an arbitrator. ('Lorsqu'un juge est appelé à nommer un arbitre . . .'). The German and Italian texts specifically refer to the situation described ('Ist ein staatlicher Richter mit der Ernennung . . . betraut', 'il giudice cui è stata affidata . . .').

⁴⁹ *Chavannes v. Burnat*, ATF 18 (1892) 611, 617, *Société du Village suisse v. Henneberg et Allemand*, ATF 31 (1905) I 599; *Telefunken v. Cour de Justice de Genève et NV Philips*, ATF 78 (1952) I 352, 359 = ASDI XI (1954), 334; *Paperconsult AG v. Cepal*, ATF 88 (1962) I 100, 105 = ASDI XIX (1962), 234.

⁵⁰ An arbitration clause whereby the arbitrator must be a 'merchant', a 'seller' or a 'commercial man' is therefore perfectly admissible under the new law and can be enforced under Art. 180(1), (See eg GAFTA Arbitration Rules (No 125), Sect. 4:3).

However, the use of the term 'independence' reflects the legislature's view that in international arbitrations the standards by which arbitrators, particularly those appointed by one of the parties, are measured, are not necessarily those which apply to the judiciary.⁵¹

21. Pursuant to Art. 180(2) a party may challenge the authority of an arbitrator he has appointed or in the appointment of whom he participated only for reasons of which that party became aware subsequent to the appointment. The arbitral tribunal must be given notice of the ground of challenge without delay.

Failure to do so amounts to a waiver of the right to challenge. It is submitted that the provision relating to notification of the grounds of challenge in good time also applies to arbitrators in the appointment of whom a party has not participated.

The requirement of express notification appears to be so worded as to apply solely to the grounds for challenge and not to the actual challenge itself. It is indeed a very serious matter for a party to challenge an arbitrator and one which requires careful consideration.

On occasion doubts as to an arbitrator's independence may result from a series of successive acts, each of which, taken individually, may not justify the serious move of a challenge. In such a situation one may expect that the aggrieved party will give notification without delay of the grounds for challenge; however, one may accept that he reserves the challenge.

If and when the challenge is later made, the court or relevant authority will determine whether, in view of the lapse of time since the notice, the challenge is, under the circumstances, abusive.⁵²

This solution in the Swiss Act seems to be more appropriate than the unfortunate provision of Art. 2(8)(2) of the 1988 ICC Rules, which provide that a challenge must be made within 30 days of the date on which the party making the challenge becomes aware of the facts and circumstances on which the challenge is based.

22. The challenge is decided by the court of the seat of the arbitral tribunal unless the parties have agreed otherwise (Art. 180(3)). This provision resolves a difficulty which has in the past arisen when arbitration rules such as those of the ICC provide for the challenge of arbitrators a procedure distinct from that of the Concordat. Under the Act, such distinct procedures prevail and in ICC arbitrations only the procedure of the ICC Court of arbitration will apply.⁵³

V. *The Arbitral Procedure*

23. Art 182 deals with rules of procedure and, again, leaves a great deal of freedom in this respect to the parties and to the arbitral tribunal. Three aspects deserve closer consideration.

(i) The procedure is primarily determined by the agreement between the parties. The arbitral tribunal is bound by the agreement and decides only those points of procedure which the parties have not settled.

However, where rules of procedure have been determined jointly by the parties and the tribunal, for instance in the terms of reference for a particular case, the parties may not modify them without the approval of the arbitral tribunal. Of course, the arbitral tribunal is also bound by the agreement.

Such agreements between the parties and the tribunal on procedural points must be distinguished from those cases where the tribunal or its chairman consults the parties before making a decision on such points.

It is indeed often advisable for the tribunal to consult the parties in order to avoid surprise and any possible misunderstanding which is particularly prone to arise when the parties, their counsel and the arbitrators come from different legal backgrounds.

However, the parties' prior or subsequent assent in the settling of the procedure by the tribunal should not be construed as an agreement between the parties which binds the tribunal and prevents it from subsequently modifying the procedure when this may become necessary or desirable.

(ii) The rules of procedure may be either drafted *ad hoc* or incorporated by reference to an existing set of rules such as those of the ICC, UNCITRAL, or of any of the commodity exchanges.

Art. 182(1) states that the parties may even submit the procedure 'to a procedural law of their choice'.

Thus, an arbitration in Switzerland could be conducted under English law. Such a choice of a foreign law of procedure probably has to be characterised as an incorporation of the foreign law rather than as a 'choice of law' as the term is normally understood in the conflict of laws.⁵⁴ Thus, the choice would apply only to the conduct of the procedure by the arbitrators. Issues such as those relating to the intervention of the courts in the arbitration procedure probably would not be determined under the chosen foreign procedural law but under Swiss law.

⁵¹ For a discussion of the legislative policy expressed in the choice of the term independence see A. BUCHER, *Le nouvel arbitrage*, 62 et seq.

⁵² A. BUCHER, *Das Kapitel 11*, [implied solution]; *contra* BLESSING, 40.

⁵³ In *A., B. et C. v. D.* (ATF 111 (1985) Ia 255), it was held that in an arbitration in Switzerland a party could not be required first to bring a challenge before the ICC Court of Arbitration since Art. 21 of the Concordat mandatorily required that a challenge had to be decided by the court of the seat of the arbitral tribunal. Under the Act the case would have to be decided differently.

⁵⁴ It is quite doubtful whether a foreign procedural law can be 'chosen' in the same sense as for instance a law is chosen to govern a contract.

(iii) By virtue of Art. 182(3), there are two overriding principles which apply irrespective of what the parties may agree or what and the arbitrators may decide:

- (a) the arbitrators must treat and be seen to treat the parties on an equal footing (the so-called principle of equality), and
- (b) the parties have a right to be heard, to present evidence and argument by way of an 'adversarial' procedure.

In the English translation the term 'adversarial'⁵⁵ was used to describe the requirement that the parties must be given an opportunity to express their position on the allegation and argument of their opponents. In this context it should not be understood as the antonym to 'inquisitorial'.

The substance of these two basic principles corresponds with the requirements of 'natural justice' in English law and with the rule contained in Art. 18 of the UNCITRAL Model Law.

24. Under Art. 183 of the Act the arbitral tribunal has jurisdiction to order interim measures of protection.

This provision departs from the approach of the Concordat, whereby the arbitrators do not have jurisdiction to make such orders.⁵⁶ The change is particularly welcome in view of the ICC Arbitral Referee Rules which, after many years of preparation, now seem ready to be about to become effective.⁵⁷

The Act does not specify the type of measures which an arbitral tribunal may order. It simply uses two terms which appear to establish a distinction between provisional and protective measures.⁵⁸

However, such a distinction hardly corresponds with established concepts and terminology in the Swiss law of civil procedure.⁵⁹ Indeed, the provisional nature of a measure ordered and the protection of a right or interest which it affords are two aspects of the same concept.

Thus, the two terms used by the Act for describing the measures should be understood not as an alternative but as cumulatively applicable. The term 'interim measures of protection' might best express this notion.

Among the types of measures which are normally considered in this context one might mention:⁶⁰

- (a) measures to prevent the frustration of enforcement of a future decision on the merits;
- (b) interim provisions for a continuing legal relationship during the dispute and
- (c) protection of evidence.

Future case law will have to determine whether and in what way these measures can suitably be ordered by international arbitrators.

Concerning the enforcement of interim measures, art. 183(2) provides that, failing voluntary compliance by

the parties, the arbitrator may seek the assistance of the courts to ensure compliance with the measures ordered by him.

This provision does not apply abroad. Furthermore, orders for interim measures are not awards and thus are not enforceable under legal provisions or treaties applicable to awards. Therefore, such orders on interim measures are not directly enforceable abroad.

However, they are not necessarily without interest to the beneficiary party: when this party addresses itself to a foreign court with a request for interim measures of protection, this court is likely to give particular weight to the request if the same or similar measures have been granted already by the arbitral tribunal.

25. As under the Concordat, the arbitration tribunal itself takes the evidence (Art. 184(1)).

The peculiar character of this provision must be pointed out to those arbitrators and practitioners used to English and American arbitration practice.

Art. 184(1) reflects a practice frequently followed in Switzerland and other countries of the European continent, where the arbitral tribunal, and in particular its chairman, often play a leading part in the taking of evidence, especially in the questioning of witnesses.

However, Art. 184(1) does not lay down a mandatory requirement and the parties and arbitrators are free to adopt an alternative approach to the taking of evidence, for instance that normally followed in England.

Where necessary, the tribunal or, with its leave, the parties may apply to the court or other public authorities of the place of the seat of the arbitral tribunal for assistance (Art. 184(2)), for instance for the taking of an oath, seizing documents or ordering letters rogatory. In practice, however, such requests have been quite rare in the past and are likely to remain the exception in the future.

⁵⁵ The French, German and Italian original use, respectively, the term 'procédure contradictoire', 'kontradiktorisches Verfahren' and 'in contraddittorio'.

⁵⁶ Sect. 26 Concordat.

⁵⁷ The ICC Commission on International Arbitration adopted the final text in its October 1988 session. Subject to the approval by other competent bodies in the ICC, the Rules can be expected to become effective in the second half of this year.

⁵⁸ The distinction is clearer in the French text which states that the tribunal 'peut ordonner des mesures provisionnelles ou des mesures conservatoires'; the German text speaks of 'vorsorgliche oder sichernde Massnahmen' and the Italian text of 'provvedimenti cautelari o conservativi'.

⁵⁹ In his leading textbook, HABSCHIED, for instance speaks of 'einstweilige Verfügungen' (HABSCHIED, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, Zurich 1986, 296) or of 'mesures provisionnelles' (HABSCHIED, *Droit judiciaire privé suisse*, Geneva, 2nd ed, 1981, 404). The Concordat used only this latter term.

⁶⁰ See HABSCHIED, cited Note 59, 296-298 and 406-409 respectively.

