INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND

BERNHARD BERGER
FRANZ KELLERHALS

FOURTH EDITION

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This standard work is one of the leading authorities on Swiss arbitration law. The fully revised and supplemented Fourth Edition provides up-to-date information on the law and practice of international and domestic arbitration in Switzerland, including on the recent revision of Chapter 12 PILA in 2020.

The book provides a comprehensive analysis of all relevant aspects of arbitration, including the concept of arbitration, the sources of arbitration, arbitrability, and all aspects concerning the validity and scope of the arbitration agreement and its autonomy. Other topics include competence-competence, the jurisdiction of the arbitral tribunal, the arbitral procedure, the effects and limits of arbitral awards, setting aside as well as the recognition and enforcement of awards in Switzerland.

Frequently referred to in the case law of the Swiss Federal Supreme Court, the book is an indispensable tool for legal scholars dealing in depth with a controversial issue. At the same time, it is an invaluable and user-friendly source of information and reference for arbitration practitioners in Switzerland and abroad.

The book's appendices contain useful supplementary materials, including a detailed table of cases and an accurate translation of the arbitration provisions of the Swiss Private International Law Act and the Swiss Code of Civil Procedure.

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Preface

More than 30 years have passed since Switzerland's international arbitration law, contained in Chapter 12 of the Swiss Private International Law Act (PILA), came into force in 1989. In 2011, comprehensive legislation on domestic arbitration contained in Part 3 of the Swiss Code of Civil Procedure replaced the previous Concordat on Arbitration. On 1 January 2021, the long-awaited revision of Chapter 12 of the PILA entered into force, which also entailed various adjustments to Part 3 of the CCP. Since the publication of the third edition in 2015, a wealth of new case law and legal writing has emerged.

The fourth edition has the same aim as the previous ones: to provide a comprehensive, concise analysis of the law and practice of international and domestic arbitration in Switzerland, to identify the relevant areas of academic debate, to contribute to the controversial issues with a pragmatic and arbitration-friendly approach and to highlight possible future developments. In order to maintain the proven format of a user-friendly source of information and reference for arbitration practitioners in Switzerland and abroad, selective reference will continue to be made to legal writing in preference to a detailed and up-to-date presentation of the case law of the Swiss Federal Supreme Court.

Special thanks go to all those who have contributed over many years through numerous discussions, suggestions and encouragement to continue and further improve this book.

Berne, August 2021 *B.B.*

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Abbreviations

AAA	American Arbitration Association
AJP	Aktuelle juristische Praxis, Lachen
al.	alinea
All E.R.	The All England Law Reports, London
Am. J. Int. L.	American Journal of International Law
Am. Rev. Int. Arb.	The American Review of International Arbitration
AmtlBull NR	Amtliches Bulletin der Bundesversammlung / Nationalrat (Official gazette of the Swiss National Council)
AmtlBull SR	Amtliches Bulletin der Bundesversammlung / Ständerat (Official gazette of the Swiss Council of States)
Arb. Int.	Arbitration International, The Journal of the London Court of International Arbitration, London
Arbitration	Arbitration: the Journal of the Chartered Institute of Arbitrators, London
Art.	Article
AS	Amtliche Sammlung des Bundesrechts (Official collection of the Federal Acts in Switzerland, in chronological order)
ASA Bull.	ASA Bulletin, Alphen aan den Rijn, The Netherlands
ASA	Association suisse de l'arbitrage (Swiss Arbitration Association)
ASDI	Annuaire suisse de droit international
ATF	Recueil officiel des arrêts du Tribunal fédéral, Lausanne (Official collection of the Decisions of the Swiss Federal Supreme Court)
B.Y. I. L.	British Yearbook of International Law
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Official gazette of the Federal Government in Switzerland)
BGB	Bürgerliches Gesetzbuch von 1896 (Deutschland) (German Civil Code)
BGE	Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts (Official Collection of the Decisions of the Swiss Federal Supreme Court)
BGFA	Bundesgesetz vom 23. Juni 2000 über die Freizügigkeit der Anwältinnen und Anwälte (SR 935.61) (Act on the Freedom of Movement of Lawyers)
BJM	Basler Juristische Mitteilungen, Basel
BK-[author(s)]	Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Bern, as of 1910
BlSchK	Blätter für Schuldbetreibung und Konkurs

Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1 of 16 January 2001
BSK-[author(s)]	Basler Kommentar zum schweizerischen Recht
BZP	Bundesgesetz über den Bundeszivilprozess vom 4. Dezember 1947, SR 273 (Code of Civil Procedure for Proceedings before the Swiss Federal Supreme Court)
c/	contra
CA	Concordat on Arbitration (Concordat sur l'arbitrage du 27 mars 1969)
CA	Cour d'appel
ca.	circa
CAS	Court of Arbitration for Sport
CAS Code	Code of Sports-related Arbitration and Mediation Rules, in force from 1 January 2021
Cass.	Cour de cassation
CC	Swiss Civil Code (Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, SR 210)
CCI	Chambre de commerce internationale de Paris
CCIG	Chambre de commerce et d'industrie de Genève
CCP	Swiss Code of Civil Procedure (Schweizerische Zivilprozessordnung vom 19. Dezember 2008)
cf.	confer
Chap.	Chapter
CIJ	Cour internationale de justice
CIRDI	Centre international pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats
CO	Swiss Code of Obligations (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) vom 30. März 1911, SR 220)
CPCI	Codice di Procedura Civile (Italian Code of Civil Procedure)
CPJI	Cour permanente de justice internationale
CR-[author(s)]	Commentaire romand du droit suisse
DCBA	Swiss Debt Collection and Bankruptcy Act (Bundesgesetz über Schuldbetreibung und Konkurs vom 11. April 1889, SR 281.1)
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e. V.
Diss.	Dissertation (thesis)
DPCI	Droit et Pratique du Commerce International, Paris
E.	Erwägung (consideration)
e.g.	for example
ECJ	European Court of Justice
ed.	editor
edn	edition
et al.	et alii
etc.	et cetera
EU	European Union

European Convention	European Convention on International Commercial Arbitration of 21 April 1961
FC	Swiss Federal Constitution (Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999, SR 101)
FG	Festgabe (liber amicorum)
FIDIC	Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers), Geneva
fn.	footnote
FS	Festschrift (liber amicorum)
FSC [4A_...]	Decisions of the Swiss Federal Supreme Court that are not included in the Official Collection of Decisions (BGE); available under www.bger.ch
FSCA	Federal Supreme Court Act (Bundesgesetz vom 17. Juni 2005 über das Bundesgericht, SR 173.110)
FusG	Bundesgesetz vom 3. Oktober 2003 über Fusion, Spaltung, Umwandlung und Vermögensübertragung, Fusionsgesetz, SR 221.301 (Swiss Merger Act)
Gaz. Pal.	Gazette du Palais (Paris)
Geneva Convention	Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 (SR 0.277.111)
Geneva Protocol	Protocol on Arbitration Clauses of 24 September 1923 (SR 0.277.11)
GestG	Bundesgesetz über den Gerichtsstand in Zivilsachen vom 24. März 2000 (former Swiss Staute on Jurisdiction)
GesKR	Gesellschafts- und Kapitalmarktrecht
GVP	Gerichts- und Verwaltungspraxis
i.e.	that is
IAI	International Arbitration Institute
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, adopted on 23 October 2014
IBA Guidelines on Party Representation	IBA Guidelines on Party Representation in International Arbitration, adopted on 23 May 2013
IBA Rules of Evidence	IBA Rules on the Taking of Evidence in International Arbitration, adopted on 17 December 2020
IBA Rules of Ethics	IBA Rules of Ethics for International Arbitrators (1987)
ibid.	ibidem
IBLJ	International Business Law Journal, London
ICC Bull.	The ICC International Court of Arbitration Bulletin, Paris
ICC Rules	Rules of Arbitration of the International Chamber of Commerce (ICC) of 1 January 2021
ICC	International Chamber of Commerce, Paris
ICCA Handbook	ICCA International Handbook on Commercial Arbitration, The Hague
ICCA Yearbook	ICCA Yearbook of Commercial Arbitration, Deventer
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution (international division of the American Arbitration Association)

ICDR Rules	International Arbitration Rules of the International Centre for Dispute Resolution, amended and effective 1 March 2021
ICLQ	The International and Comparative Law Quarterly, London
ICSID	International Centre for Settlement of Investment Disputes, Washington
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965 (SR 0.975.2)
ICSID Rev.–FILJ	ICSID Review–Foreign Investment Law Journal, Washington
ICSID Rules	Rules of Procedure for Arbitration Proceedings (Arbitration Rules), in force from 10 April 2006
id.	idem
IDR	Journal of international dispute resolution,
IJS	Internationales Jahrbuch für Schiedsgerichtswesen in Zivil- und Handelssachen,
ILA	International Law Association, London
ILR	International Law Reports, Cambridge
Int. ALR	International Arbitration Law Review, London
InVo	Insolvenz & Vollstreckung
IPrax	Praxis des internationalen Privat- und Verfahrensrechts, Bielefeld
JDI	Journal du droit international (Clunet), Paris
JdT	Journal des Tribunaux, Lausanne
JKR	Jahrbuch des Schweizerischen Konsumentenrechts
Jnl. Int. Arb.	Journal of International Arbitration, The Hague
JO	Journal officiel des Communautés européennes
JPS	Jahrbuch für die Praxis der Schiedsgerichtsbarkeit,
KTS	Konkurs-, Treuhand- und Schiedsgerichtswesen, Cologne
Kuko-[author(s)]	Kurzkommentar ZPO, Schweizerische Zivilprozessordnung, 3rd edn, Basel 2021
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules effective 1 October 2020
L.Q.R.	The Law Quarterly Review, London
LugC	Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (SR 0.275.11)
Mél.	Mélanges (liber amicorum)
N	paragraph number (in a textbook or commentary)
NCPC	Nouveau Code de Procédure Civile français
NF	Neue Folge
NJW	Neue Juristische Wochenschrift, Munich
No.	number
NR	Nationalrat (Swiss National Council)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (SR 0.277.12)
OJ	Organisation of the Judiciary (Loi fédérale du 16 décembre 1943 d'organisation judiciaire; RS 173.110)

OLG	Oberlandesgericht
OMPI	Organisation mondiale de la propriété intellectuelle
op. cit.	opus citatum
ord.	ordonnance
p./pp.	page(s)
para./paras	paragraph number(s)
PCA	Permanent Court of Arbitration (The Hague)
PILA	Private International Law Act (Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987, SR 291)
Pra	Die Praxis des Bundesgerichts: monatliche Berichte über die wichtigsten Entscheide des schweizerischen Bundesgerichts einschliesslich Sozialversicherungsentscheide, Basel
Q.B.	Queen's Bench Division (Law Reports)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Recht
recht	recht: Zeitschrift für juristische Ausbildung und Praxis, Bern
rev.	revised
Rev. arb.	Revue de l'arbitrage, Paris
Riv. dell'Arb.	Rivista dell'Arbitrato
Rome Convention	Convention on the law applicable to contractual obligations of 19 June 1980, OJ C 27 of 26 January 1998
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
RSDIE	Revue suisse de droit international et de droit européen, Zurich
RVJ	Revue valaisanne de jurisprudence, Sion
SAG	Schweizerische Aktiengesellschaft, Zeitschrift für Handels- und Wirtschaftsrecht, Zürich
Sc.	Section
SCC	Swiss Criminal Code (Schweizerisches Strafgesetzbuch vom 21. Dezember 1937, SR 311.0)
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as of 1 January 2017
SchiedsVZ	Zeitschrift für Schiedsverfahren (German Arbitration Journal), Munich
SIALR	Swiss International Arbitration Law Reports, Juris Publishing
sic!	Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht, Zurich
SJ	La Semaine Judiciaire: paraissant à Genève: revue de jurisprudence, Geneva
SJIR	Schweizerisches Jahrbuch für Internationales Recht
SJZ	Schweizerische Juristen-Zeitung, Zurich
SPR	Schweizerisches Privatrecht, Basel and Stuttgart
SpuRt	Zeitschrift für Sport und Recht, Munich and Bern

SR	Systematische Sammlung des Bundesrechts (Official collection of the Federal Acts in Switzerland, in systematic order)
SRIEL	Swiss Review of International and European Law
SVIT	Schweizerischer Verband der Immobilienwirtschaft
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Arbitration Centre of June 2021
SZW	Schweizerische Zeitschrift für Wirtschaftsrecht, Zurich
ULR	Uniform Law Review/Revue de droit uniforme, Rome
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 25 June 1985, as amended in 2006
UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings (2016)
UNCITRAL Rules	UNCITRAL Arbitration Rules of 15 December 1976; revised UNCITRAL Arbitration Rules of 25 June 2010, in force as from 15 August 2010
Unidroit Principles	Unidroit Principles of International Commercial Contracts (2016)
v.	versus
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969, SR 0.111
vol.	volume
WIPO	World Intellectual Property Organization
WIPO Rules	WIPO Arbitration Rules, effective from 1 June 2020
W.L.R.	The Weekly Law Reports, London
YCA	Yearbook of Commercial Arbitration, Deventer
ZBJV	Zeitschrift des Bernischen Juristenvereins, Bern
ZCC	Zurich Chamber of Commerce
ZEuP	Zeitschrift für Europäisches Privatrecht, Munich
ZK-[author(s)]	Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, Zurich, as from 1909
ZPO	Zivilprozeßordnung vom 30. Januar 1877/12. September 1950 (German Code of Civil Procedure)
ZR	Blätter für Zürcherische Rechtsprechung, Zurich
ZSR	Zeitschrift für Schweizerisches Recht, Basel
ZZP	Zeitschrift für Zivilprozess, Cologne
ZZPInt	Zeitschrift für Zivilprozess International, Cologne

Chapter 1
Introduction

§ 1 ARBITRATION AS A PARTICULAR FORM OF DISPUTE RESOLUTION

I. The concept of arbitration

Arbitration stands in contrast to state court proceedings, *i.e.* the jurisdiction of the ordinary courts (herein also referred to as "state courts"). 1

Arbitral tribunals act in place of state courts. They have the power to issue final, binding and enforceable decisions on disputes of private or public law between private parties and/or public authorities. Arbitral tribunals are composed of private persons appointed by agreement of the parties.[1] 2

This definition of arbitration is based on the following features: 3

Arbitration is based on private agreement.[2] This agreement usually takes the form of a contract between the parties involved (see paras 277–635). It may also arise from membership or participation in a legal entity whose articles of incorporation provide for arbitration as a method of dispute resolution (see paras 465–469). With certain limitations, arbitration may even arise from unilateral legal acts (see paras 470–476). When arbitration panels are established by law, they do not qualify as arbitral tribunals, even though they are sometimes (and incorrectly) referred to as such.[3] 4

Any person, whether a natural or legal person or public authority, may be a party to arbitration. As in the private sector, governments and state- 5

[1] Similarly, *e.g.* Kaufmann-Kohler and Rigozzi, N 1.16.
[2] BGE 137 III 37 E.2.2.1.
[3] See *e.g.* Rüede and Hadenfeldt, Supplement to the 2nd edition, 11. See also ZR 2005, 181–184.

controlled public or private entities may submit to arbitration as a means of dispute resolution (see paras 369–388).

6 The arbitral tribunal is composed of one or more arbitrators. The arbitrators are chosen by the parties either directly (*e.g.* by agreement on a sole arbitrator) or indirectly (*e.g.* by agreement on an appointing authority or, in the absence of such, by the competent state court at the seat of the arbitration). The appointment of an arbitral tribunal is a voluntary act, not the result of specific legal provisions.[4]

7 Arbitrators perform the functions assigned to them by the parties as private individuals, not as representatives of the government or state judiciary.[5] This applies even if the arbitrators are appointed by the *juge d'appui* or if the parties have agreed that a state court should act as the appointing authority (see paras 807–810).

8 Arbitral tribunals primarily resolve disputes of private law. However, public law disputes can also be the subject of arbitration,[6] for example disputes arising from administrative contracts or investment treaties. In all cases, however, the disputed claim must meet the requirement of arbitrability (see paras 181–276).

9 While arbitration is built on consent and arbitrators act as private individuals, arbitration is unique in that arbitral tribunals have the power to make a final and binding decision on the dispute before them. This power is based on statutory authorisation granted to the arbitral tribunal by the applicable *lex arbitri* (see paras 11–15, 70–119). Furthermore, it results from the fact that states are willing to recognise and enforce domestic and foreign arbitral awards. Arbitral tribunals are thus on the same footing as state courts when it comes to the power to make final, binding and enforceable decisions.[7]

II. The sources of arbitration

10 Arbitration is a method of dispute resolution that the parties can largely determine as they see fit. However, they can only make use of this freedom within the framework of a (functioning) legal system. If arbitration were not tied to a system of norms, it would completely depend on the cooperation of the parties involved. In this case, the

[4] Poudret and Besson, N 8.
[5] Rüede and Hadenfeldt, 3; Poudret and Besson, N 7–8.
[6] Lalive, Poudret and Reymond, Art.1 N 1.2; Jolidon, Art.5 N 421 lit. i; Göksu, N 23.
[7] Poudret and Besson, N 11; Rüede and Hadenfeldt, 4.

arbitral procedure could regularly be obstructed or thwarted. With a view to the principle of party autonomy, arbitration therefore aims to detach the procedure as much as possible from local or national laws. At the same time, however, the arbitration process is indeed dependent on a reliable (local) legal framework as soon as a party refuses to cooperate, so that the support of state courts is necessary to keep the proceedings on track. This reciprocity between party autonomy on the one hand and the law regulating arbitration on the other reveals which norms govern arbitration and how they relate to each other hierarchically. This theme will recur in several of the following Chapters of this book.

1. Priority of party autonomy

The principle of party autonomy is the most salient feature of arbitration. First of all, the jurisdiction of the arbitral tribunal is based solely on the will of the parties, whereas any state court, even if the forum is chosen by the parties, derives its jurisdiction from national or international law. In addition, the parties largely determine the composition of the arbitral tribunal, the seat of the arbitration, the applicable arbitral procedure, the language of the proceedings and numerous other aspects. 11

However, there are limits to the parties' freedom. In particular, the concept of arbitrability and the scope of certain fundamental procedural guarantees are not at the free disposition of the parties (on the mandatory provisions of the Swiss *lex arbitri*, see para.605). 12

2. Arbitration rules

Only rarely do the parties use the extensive freedom afforded to them to tailor the procedure entirely to their needs (*ad hoc* arbitration). Rather, they resort to already existing models and arbitration rules, which they declare to be an integral part of their arbitration agreement. By such reference, the parties agree on a pre-existing set of rules that provide solutions to common problems, such as a party's failure to designate an arbitrator or the parties' failure to agree on the seat of the arbitration or the language of the proceedings. 13

Arbitration rules are typically instruments created by organisations offering arbitration services (institutional arbitration), such as the International Court of Arbitration of the International Chamber of 14

Commerce in Paris, the London Court of International Arbitration, the American Arbitration Association, the Swiss Arbitration Centre, the German Institute for Arbitration, the WIPO Arbitration and Mediation Center in Geneva, the International Centre for the Settlement of Investment Disputes in Washington, the Singapore International Arbitration Centre and many others (see paras 25–33). The current versions of the arbitration rules of these institutions show a clear trend towards international convergence. In particular, the concepts developed under the auspices of UNCITRAL have left their mark on almost all arbitration rules (see para.15). There is intense competition between the numerous organisations offering arbitration services. There are many different reasons why one institution is preferred over another. Decisive factors include the location, local tradition, reputation, experience and specialisation of an organisation or the estimated level of arbitrators' fees, registration and administrative costs.

15 There are also model arbitration rules for *ad hoc* arbitration. The best known and most important are the UNCITRAL Arbitration Rules of 15 December 1976 (revised on 25 June 2010). In many respects, they have successfully harmonised the principles and methods of different legal systems. This success explains why the UNCITRAL Rules are increasingly used in international *ad hoc* arbitration, especially in cases under the auspices of the PCA such as *ad hoc* investment arbitrations.[8] Some arbitral institutions have adopted the UNCITRAL Rules as their own with few modifications.[9] However, parties who prefer *ad hoc* arbitration sometimes also agree that the rules of a particular institution (*e.g.* the ICC or LCIA Rules) shall be applied by analogy, *i.e.* without submitting the case to the institution.

3. National law

16 Arbitration, particularly international arbitration, has developed into an independent, largely self-sufficient procedure. In some key respects, however, arbitration still relies on national or local law. The interaction between party autonomy and national law is well expressed in Art.182(1)-(3) PILA:

[8] The most prominent example of the application of the UNCITRAL Rules remains the proceedings under the auspices of the Iran-United States Claims Tribunal, where a rich and publicly accessible body of case law has been created. See *e.g.* Stewart A. Baker, The UNCITRAL Arbitration Rules in practice: the experience of the Iran-United States Claims Tribunal, Deventer 1992.
[9] See *e.g.* the first edition of the Swiss Rules in 2004.

> (1) The parties may determine the arbitral procedure, directly or by reference to arbitration rules; they may also submit it to a procedural law of their choice.
>
> (2) If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules.
>
> (3) Regardless of the chosen procedure, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings.

The arbitral tribunal can and should therefore apply the procedural rules established or determined by the parties, as long as they do not violate fundamental procedural guarantees. 17

National law can sometimes be useful as a general guideline for the proceedings before the arbitral tribunal. In addition, national law is important when, for example, referring parties to arbitration, appointing arbitrators, challenging, revoking or replacing an arbitrator, ordering interim or conservatory measures or taking evidence. National law is also applicable in subsequent setting aside or recognition and enforcement proceedings. 18

The question of which national law is applicable to the various stages of arbitration is complex. At this point, only the most fundamental conflict of laws rules will be mentioned. The arbitral procedure is governed by the arbitration law of the country in which the arbitral tribunal has its seat (*lex arbitri*). The recognition and enforcement procedure, on the other hand, is governed by the law of the country in which recognition and enforcement of an arbitral award is sought (this also includes the international conventions ratified by that country, above all the New York Convention of 1958). 19

National arbitration laws vary from country to country, although they show a trend towards convergence. In part, this is the result of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (NYC). Another factor is the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 (as amended on 7 June 2006), which provides a comprehensive set of rules – from the conclusion of the arbitration agreement to the enforcement of the arbitral award. UNCITRAL's approach was to create a comprehensive set of rules that would find worldwide acceptance and could be successively adopted by national legislatures.[10] Since 1985, the Model Law has been directly adopted in numerous national legal systems. In addition, it has significantly 20

[10] Berger, 34–35; Schwab and Walter, 41 N 7.

influenced many other legislatures in drafting or revising their laws on arbitration. Switzerland has not followed the Model Law approach,[11] although various provisions of Chap.12 PILA indicate that the spirit of the Model Law has left its mark on it as well.[12] The UNCITRAL Model Law was an ambitious project. The success it has had so far is remarkable.

4. Treaties

21 Arbitration would not be so successful if it were not for an international framework ensuring the cross-border recognition of arbitration proceedings and their results, *i.e.* arbitral awards. In the course of the 20th century, numerous efforts were made in this area, so that arbitration today is encompassed by a complex system of multi- and bilateral conventions.[13] Above all, the extraordinary success of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC), which has since been ratified by more than 160 countries, has meant that today arbitral awards rendered abroad sometimes have a better chance of being recognised and enforced than judgments of foreign state courts in civil and commercial matters.

III. Ad hoc *v.* institutional arbitration

22 According to Art.182(1)-(2) PILA and Art.373(1)-(2) CCP, the parties may choose between *ad hoc* arbitration, where they can fully determine the arbitral procedure themselves, and institutional arbitration, *i.e.* arbitration administered and supervised by an arbitral institution.[14] The parties may choose one of the two options or a combination of the two, weighing the advantages and disadvantages with regard to the case in dispute or the situation at the time of the conclusion of the arbitration agreement.[15]

[11] On the reasons for this decision, see BSK-Hochstrasser and Burlet, Introduction N 180–188.
[12] On the history of Chap.12 PILA, see paras 85–119.
[13] On the conventions and treaties ratified by Switzerland, see paras 125–142.
[14] On the freedom to determine the arbitral procedure, see paras 1094–1108.
[15] See Lalive, Etudes Bellet, 301–321; Meyer-Hauser, Ad hoc Schiedsgerichtsbarkeit, 207–222; Schlaepfer and Petti, in: Geisinger and Voser (eds), 13–24.

1. Advantages and disadvantages

The most important advantage offered by *ad hoc* arbitration is flexibility. This can be an advantage for the appointment and composition of the arbitral tribunal. It can facilitate the proceedings (*e.g.* by accepting simplified rules of evidence) or dispense with time-consuming confirmation and scrutiny procedures, which are essential features of institutional arbitration. However, flexibility is only advantageous if there is a minimum spirit of cooperation between the parties and a basic understanding of how the arbitration should proceed. Especially in international cases, *ad hoc* arbitration relies on an "arbitration friendly" legal environment (as is the case with Switzerland) and the involvement of experienced arbitrators. Furthermore, it can be useful if the parties and/or their counsel have a similar cultural and legal background. In domestic arbitration, these conditions are usually met. This may explain why in Switzerland arbitration agreements providing for *ad hoc* arbitration are particularly common in cases without an international context. 23

Predictability, as opposed to flexibility, is an important advantage of institutional arbitration. For parties from different legal cultures, this advantage often outweighs the disadvantage of limited manoeuvring that comes with institutional arbitration rules. Predictability protects against surprises. This can be useful with regard to the conduct of the arbitration in general and the taking of evidence in particular. Thanks to the detailed fee schedules contained in most institutional arbitration rules, parties are also better able to anticipate the costs that will be involved. Without these fee schedules, the issue of costs is usually addressed only once the arbitrators have been appointed. These advantages of institutional arbitration are more important in cross-border transactions. Even if the country of the seat of the arbitration offers efficient judicial assistance, institutional arbitration is better suited to ensure that, despite recalcitrant parties or uncooperative arbitrators, the arbitration can be properly concluded. While institutional arbitration can claim official status, which can be advantageous in terms of recognition and enforcement of arbitral awards in countries that do not favour arbitration, *ad hoc* arbitration usually offers a higher degree of privacy where this is a priority. In its scope, the NYC does not distinguish between institutional and *ad hoc* arbitral awards. Both types are treated equally (see Art.I(2) NYC; see also Art.2(a) UNCITRAL Model Law). 24

2. Arbitral institutions and their sets of rules

25 There are numerous arbitration rules to which the parties can submit. Below is a brief discussion of those sets of rules that are particularly important in international arbitration from a Swiss perspective, either because of the frequency of their application or because the institution is located in Switzerland.

26 It should be noted that the structure of the arbitral procedure is not a particularly distinguishing feature in institutional arbitration rules. The differences manifest themselves primarily in the intensity with which the proceedings are administered and the arbitral tribunal is supervised by the institution (*e.g.* by fixing and collecting advances for the arbitrators' fees, monitoring the progress of the case, scrutinising the award, etc.).

a. Swiss Rules of International Arbitration

27 The Swiss Rules were first made available in 2004. Proceedings conducted under the Swiss Rules are administered by the Swiss Arbitration Centre (the legal successor to the Swiss Chambers' Arbitration Institution).[16] The original version of the Swiss Rules was based on the UNCITRAL Rules with various innovations and adaptions.[17] The Swiss Rules were amended in 2012 and again in 2021, with the continued purpose of providing users around the world with an efficient and reliable framework for arbitration (see Introduction, (b)). The Arbitration Court of the Swiss Arbitration Centre, an independent body composed of leading arbitration practitioners of Swiss and other nationalities, is responsible for the administration of arbitration cases under the Swiss Rules and the final authority for the proper application of the Swiss Rules. The approach of the Swiss Rules is to limit the institution's control of the arbitral process to what is necessary, which contributes to a lean administration.

[16] It should be noted that the services of the Swiss Arbitration Centre (as well as those of the other institutions mentioned below) are no longer confined to the administration of arbitration cases, but extend to a wide range of other ADR services, including acting as appointing authority or fund holder in UNCITRAL and other *ad hoc* proceedings.
[17] See the overview provided by Peter, SchiedsVZ 2004, 57–65.

b. ICC Arbitration Rules

The International Chamber of Commerce (ICC), with its headquarters in Paris, runs one of the most important arbitral institutions. Since its establishment in 1923, more than 25 000 arbitration cases, with participants from well over 100 countries, have been administered. The International Court of Arbitration of the ICC (the Court) is responsible for the supervision and administration of the cases submitted to the ICC Rules. The Court is assisted by the Secretariat, headed by the Secretary General. The ICC Rules provide for comprehensive supervision of the proceedings (including scrutiny of the award by the Court) and administration of the arbitration costs by the institution. In the ICC's annual statistics, Switzerland regularly occupies top positions in terms of arbitral seats, arbitrators and the law applicable to the dispute. 28

c. LCIA Arbitration Rules

The London Court of International Arbitration (formerly The London Chamber of Arbitration) is over 100 years old and operates an arbitral institution in London with a structure consisting of an Arbitration Court (the LCIA Court) and a Secretariat headed by the Registrar. The LCIA administers cases submitted to the LCIA Rules. The LCIA Court is the final authority for the proper application of the LCIA Rules. Unlike many other institutional arbitration rules, the LCIA's administrative charges and the fees charged by the arbitral tribunals acting under the LCIA Rules are not based on sums in issue. After the registration fee, which is payable with the Request for Arbitration, hourly rates are applied by the arbitrators and by the LCIA. 29

d. WIPO Arbitration Rules

The World Intellectual Property Organization (WIPO) has its headquarters in Geneva where it operates an independent dispute resolution centre known as the WIPO Arbitration and Mediation Center. The Center has created the WIPO Arbitration Rules and, based on them, the WIPO Expedited Arbitration Rules. These Rules are particularly tailored to cross-border disputes that may arise or have arisen in the field of intellectual property. 30

e. Code of Sports-related Arbitration

31 The International Council of Arbitration for Sport (ICAS) is a Swiss foundation created in 1994 and based in Lausanne, Switzerland, where it operates an arbitration institution known as the Court of Arbitration for Sport (CAS). The arbitration rules are those issued by ICAS, *i.e.* the Code of Sports-related Arbitration. The rules apply in two types of cases, namely:

- when the parties have agreed to refer a sports-related dispute to CAS ("ordinary arbitration proceedings"); or
- where the dispute arises from a decision of a sports federation, sports club or other sports-related institution, to the extent that the statutes and regulations of such institutions or a specific agreement provide for an appeal to CAS ("appeal arbitration proceedings").

A separate set of arbitration rules issued by the CAS deals with sports-related conflicts which may arise during the Olympic Games. For other major sporting events (*e.g.* the FIFA World Cup), the CAS has enacted similar sets of rules for the settlement of disputes which may occur during the competitions (see para.1199).

The CAS, with the support of its office (the Court Office), supervises and oversees the administration of the proceedings. The individual cases, more than 400 each year, are decided by an arbitral tribunal (the Panel) consisting of either one or three arbitrators who are chosen from an extensive list of arbitrators.

f. UNCITRAL Arbitration Rules

32 The United Nations Commission on International Trade Law (UNCITRAL), based in Vienna, has established arbitration rules for *ad hoc* arbitration proceedings, which were approved by the United Nations General Assembly on 15 December 1976.[18] The current version of the Rules entered into force on 15 August 2010. The UNCITRAL Rules have found worldwide acceptance. They served as the rules for the Iran-United States Claims Tribunal and are frequently applied in investment treaty arbitrations. The decision to submit to the UNCITRAL Rules is a

[18] The UNCITRAL Rules should be distinguished from the UNCITRAL Model Law. The latter is not a set of (private) arbitration rules, but rather a model to be adopted or used as guidance by national legislatures.

genuine alternative to engaging an arbitral institution, as they contain detailed provisions on the constitution of the arbitral tribunal, the arbitral procedure and the determination and allocation of costs. In addition, the UNCITRAL Rules refer directly and indirectly to arbitral institutions: According to Art.6(2), either party may request the Secretary-General of the PCA in The Hague to designate an appointing authority – a useful provision especially if the seat of the arbitration is not yet determined when the proceedings are initiated, so that it may be difficult to identify a competent state court. Furthermore, Art.41(2) determines that the arbitral tribunal, in fixing its fees, shall take into account the schedule of fees of the appointing authority agreed upon by the parties or designated by the Secretary-General of the PCA, provided that such authority has issued a fee schedule.

g. Other arbitration rules

33 The Swiss Society of Engineers and Architects (sia) has published the SIA 150 headed "*Bestimmungen für das Verfahren vor einem Schiedsgericht*" as part of its comprehensive set of "norms" (the current version of the SIA 150 entered into force on 1 December 2017). These rules are designed to be particularly suitable for private dispute resolution in the fields of architecture, engineering and construction. To a rather limited extent, the Secretariat of the SIA lends its support to an arbitration conducted under the SIA 150. The SIA 150 is primarily tailored for use in domestic cases.

33a Another set of arbitration rules primarily geared to domestic disputes is that of the Swiss Homeowners Federation (HEV) and other institutions headed "*Reglement betreffend Vermittlung und Schiedsgericht Bau + Immobilien*" (2011). The Swiss Association for Arbitration in Inheritance Matters offers domestic and international arbitration services in inheritance matters in Switzerland; its Rules of Arbitration essentially consist of a slightly adapted version of the Swiss Rules of International arbitration (see para.27).

IV. Types of arbitration

34 In addition to the distinction between institutional and *ad hoc* arbitration (paras 22–24), arbitration can be characterised according to the subject-matter of the dispute, the area of law of the dispute or the

status of the parties. The following are commonly known types of arbitration.

1. Commercial arbitration

35 The term "commercial arbitration" is widely used in the international context without defining what is actually meant by a "commercial" dispute.[19]

36 The Swiss *lex arbitri* does not distinguish between disputes arising from legal relationships that are considered commercial and others. Rather, the concept of arbitrability in Art.177 PILA shows that the legislature did not intend to limit international arbitration to certain types of disputes. Nor did Switzerland, when adopting the NYC, declare that it would apply the Convention only to disputes considered commercial, as would have been possible under Art.I(3) NYC (see para.2040). Switzerland has also not adopted the European Convention of 1961 (see paras 143–145), which is only applicable to disputes arising out of "international trade". For Swiss domestic arbitration, the term "commercial arbitration" is also irrelevant.

2. Investment (treaty) arbitration

37 In recent decades, numerous bilateral and multilateral treaties have been concluded worldwide for the promotion and mutual protection of foreign investments, known as "investment treaties". Because of this development, which is expected to continue, investment arbitration has increased significantly worldwide (see para.140). Investment treaties take the form of international conventions concluded between states.[20] The contracting states express their will to promote mutual investment activity and to ensure the protection of investors from the other contracting state on their own territory. This protection includes the duty of the host state to tread foreign investments fairly and equitably *(fair and equitable treatment standard)* and not to hinder these investments in

[19] See *e.g.* Art.1(1) UNCITRAL Model Law where in a footnote the drafters explain that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. The German arbitration law, for example, which is based on the Model Law, is not limited to "commercial" disputes. For further information on the term "commercial arbitration", see Poudret and Besson, N 10.
[20] For details as to the investment treaties to which Switzerland acceded, see para.139.

their use or disposal through unjust or discriminatory measures *(principle of non-discrimination)*. Furthermore, a contracting state is obliged to treat foreign investors and their investments, as well as their returns from such investments, no less favourably than domestic investors or investors of a third state *(most favoured nation clause)*. In addition, a contracting state generally undertakes to grant free capital transfer to foreign investors in connection with their investment *(free transfer)*. Finally, direct or indirect expropriation or nationalisation of investments without equitable compensation is prohibited.

38 Most investment treaties provide for arbitration as a method of dispute resolution, whether for disputes between the contracting states or between a foreign investor and the host state. The latter is noteworthy in that the investor is entitled to invoke the dispute resolution clause of the treaty even though it is not a party to the treaty, has no contractual relationship whatsoever with the host state and has not entered into an arbitration agreement with the host state in the traditional sense.[21] Rather, the jurisdiction of the arbitral tribunal arises from the prior and unilateral declaration of the host state to submit any disputes concerning such investments to arbitration and from the subsequent consent of a foreign investor to submit a dispute to arbitration to the extent that it falls within the scope of the treaty. In many cases, the investor has a choice between arbitration under ICSID (see paras 136–142) and *ad hoc* arbitration under the UNCITRAL Rules.[22] Some treaties provide for tailor-made solutions.[23]

39 A frequently discussed question is whether an investor submitting to arbitration under a BIT is limited to asserting claims based on the investor's rights set out in the treaty (*treaty claims*) or whether, in addition, it may also assert claims arising from a contractual relationship between the investor and the host state or an enterprise controlled by that state (*contractual claims*).[24] Attempts to include contractual claims in a treaty arbitration are often driven by the investor's hope to find a more favourable forum ("forum shopping").

[21] See Poudret and Besson, N 4; Schäfer, IDR 2006, 2–3.
[22] See *e.g.* Art.9(2) of the BIT of 29 November 2002 between Switzerland and the Republic of Mozambique (SR 0.975.257.4).
[23] See *e.g.* Art.11 of the BIT of 28 October 1991 between Switzerland and the Republic of Bulgaria (SR 0.975.221.4).
[24] See *e.g.* BGE 141 III 495 E.3.2.2 concerning the Energy Charter Treaty; Berger, ASA Bull. 2020, p.50–52. See also *e.g.* Gill, Gearing and Birt, "Contractual Claims and Bilateral Investment Treaties – A Comparative Review of the SGS Cases", Jnl. Int. Arb. 2004, 397–412.

3. IP/IT-arbitration

40 If the dispute is arbitrable under the applicable arbitration law, the parties may submit intellectual property disputes to arbitration (for the limits under the Swiss *lex arbitri*, see paras 225–226).[25] The WIPO Rules (para.30) are specifically tailored to disputes of this nature.

41 In 1999, WIPO created the Uniform Domain Name Dispute Resolution Policy (UDRP) for disputes over abusive registration of domain names ("cyber-squatting"). The UDRP now applies to all generic top-level domains (gTLDs, *e.g.* .com, .net, .org, etc.) as well as to numerous country code top-level domains (ccTLDs, *e.g.* .ch, .fr, .nl, etc.). The UDRP is a simple, time- and cost-saving, transparent private administrative procedure to which the holder of a domain name submits during the registration process and which any organisation or individual can initiate. In an administrative procedure, the only remedies are the transfer or cancellation of a domain name. Other claims, such as that for damages, are outside the jurisdiction of the administrative panel. The decision of the panel is comparable to a "proposed judgment" (Art.210–211 CCP), *i.e.* the unsuccessful party can subsequently take the dispute to the competent state courts. As long as this possibility is not used, the UDRP can do without enforcement, as the registration authorities agree to implement the decisions of the panel on their own initiative.

4. Dispute resolution between states

42 Arbitration as a method of settling disputes between states has a long tradition in Switzerland. The famous "Alabama" arbitration between the United States of America and England supports this statement. An arbitral tribunal based in Geneva, of which Federal Counsellor Jakob Stämpfli was a member, was called upon to decide if England had breached its obligation to remain neutral. The warship "Alabama", which was responsible for the sinking of over 70 ships in the American Civil War, had been built in Liverpool on behalf of the secessionists. The arbitral tribunal, which met in the Hôtel de Ville in Geneva in the same room where the first Red Cross Convention was signed in 1864, answered the question in the affirmative and on

[25] On the advantages and benefits of arbitration in intellectual property disputes, see *e.g.* Legler, ASA Bull. 2019, 289–304.

14 September 1872 ordered England to pay more than 50 million gold dollars in compensation to the United States.[26]

Many of Switzerland's bilateral and multilateral treaties currently in force provide for dispute resolution by arbitration. Some are briefly mentioned below. 43

a. The Permanent Court of Arbitration at The Hague

The Convention for the Pacific Settlement of International Disputes of 29 July 1899[27] and the Convention for the Pacific Settlement of International Disputes of 18 October 1907[28] both contain mechanisms for the amicable settlement of international conflicts between states. Switzerland has ratified both treaties;[29] over 100 countries have acceded to the 1907 Convention. 44

Art.38(1) of the 1907 Convention explicitly states that arbitration is an effective means of settling disputes between states: "In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle". 45

In Art.41 of the 1907 Convention, the contracting states confirmed that they would maintain the Permanent Court of Arbitration (PCA) established by the 1899 Convention. The PCA has jurisdiction over any dispute between contracting states, unless the parties agree to refer it to a special tribunal (Art.42). Each contracting state is entitled to designate a maximum of four persons to be on the list as members of the Court. The parties may select the arbitrators for their particular case from the list (Art.44–45). The PCA has its seat in The Hague. It maintains an office (the International Bureau), which is headed by the Secretary-General and supervised by a Board of Directors (Art.43 and Art.49). Detailed rules apply to the "Arbitration Procedure" before the PCA (Art.51–90), unless other rules have been agreed by the parties. 46

It should be noted that although the contracting states, by acceding to the Convention, recognise arbitration as a means of pacific dispute 47

[26] Details on the "Alabama" arbitration can be found in *Arbitrage de l'Alabama Genève 1872*, published by the *Chancellerie d'Etat* of Geneva in 1991.
[27] SR 0.193.211.
[28] SR 0.193.212.
[29] The Convention on 29 December 1900 and the 1907 Convention on 12 May 1910.

resolution, this does not mean that they automatically submit to the jurisdiction of the PCA. Rather, the PCA only has jurisdiction if and to the extent that the parties have signed a "Compromis" defining the subject-matter of the dispute (Art.52).

48 Since its foundation, the PCA has expanded its services:

49 Art.6 UNCITRAL Rules provides that the Secretary-General of the PCA may designate an appointing authority if the parties have not provided for one or if the institution agreed by the parties refuses to act. Where parties have agreed to *ad hoc* arbitration, whether under the UNCITRAL Rules or not, the Secretary-General of the PCA is regularly designated as the appointing authority.

50 In addition, the PCA has adopted the Permanent Court of Arbitration Arbitration Rules (2012) as well as numerous procedural rules for arbitration and conciliation (*Optional Rules*) to which the parties may submit. For example, reference can be made to the PCA Optional Rules for Arbitrating Disputes between Two States (1992), the PCA Optional Rules for Arbitration Involving International Organizations and States (1996), the PCA Optional Rules for Arbitration between International Organizations and Private Parties (1996), or the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001).

51 Furthermore, the PCA makes the resources of its International Bureau available for arbitration proceedings even if only one or no party has ratified the Convention. These services are even available for disputes of a purely civil or commercial nature between private parties.

52 The PCA maintains close relations with many other international arbitration institutions and in particular with the International Centre for the Settlement of Investment Disputes (ICSID, see paras 136–142).

b. OSCE Court of Conciliation and Arbitration

53 The Organization for Security and Co-operation in Europe (OSCE; formerly the Conference on Security and Co-operation in Europe, CSCE), of which Switzerland is a member, concluded the Convention on Conciliation and Arbitration within the OSCE on 15 December 1992. Switzerland ratified this Convention on

23 December 1993.[30] Today, over 30 states have acceded to the Convention, which provides for far-reaching pacific dispute resolution between contracting states. However, it is not meant to compete with existing institutions having the same objectives (Art.19), such as the PCA (paras 44–52).[31] In addition to conciliation provisions (Chapter III), it includes terms for settling disputes by arbitration (Chapter IV). The Convention provides for a Court consisting of a Conciliation and Arbitral Tribunal with its seat in Geneva (Art.1 and Art.10). The Court is composed of mediators and arbitrators nominated by the contracting states (Art.3). Recourse to arbitration is only admissible when the conciliation procedure has failed (Art.26(3)). An arbitral tribunal shall be constituted for each individual conflict, with the members of the panel to be selected from a list of arbitrators, in part by the parties themselves, and in part by the Bureau of the Court (Art.28). The Court is staffed with a Registrar who presides over a Bureau (Art.9). The Convention itself contains numerous procedural rules. In addition, the Court adopted further procedural rules.[32] However, the ratification of the Convention does not mean that a state automatically submits to the jurisdiction of the Court. Arbitration under the auspices of the OSCE remains voluntary for the contracting states.[33] On the other hand, the contracting states may unilaterally declare "that they recognise as compulsory, *ipso facto* and without special agreement, the jurisdiction of an Arbitral Tribunal, subject to reciprocity" (Art.26(2)).[34]

c. WTO Settlement of Disputes

54 The Agreement establishing the World Trade Organization (WTO) was ratified by Switzerland on 1 June 1995. Annex 2 to the Agreement contains an "Understanding on Rules and Procedures Governing the Settlement of Disputes".[35] This Understanding provides for the amicable resolution of disputes between members of the WTO (Art.3(7)). Its efficiency lies in the fact that if an amicable settlement is

[30] SR 0.193.235. See also Report OSCE, BBl 1993 II 1159–1174; Laurence Cuny, L'OSCE et le règlement pacifique des différends: La Cour de conciliation et d'arbitrage, Genève 1997.
[31] Report OSCE, BBl 1993 II 1162–1163.
[32] See the Rules of the Court of Conciliation and Arbitration within the OSCE of 1 February 1997.
[33] Report OSCE, BBl 1993 II 1165–1166.
[34] Switzerland has not made such a declaration. Instead, it made a reservation according to Art.19(4), *i.e.* that dispute resolution mechanisms of another international source shall prevail.
[35] SR 0.632.20; see Report GATT 1, BBl 1994 IV 339–346.

impossible, a binding decision may be rendered.[36] The dispute resolution system of the WTO has a strong advantage over its predecessor organisation GATT, in that decisions no longer have to be reached by unanimity, but by the "reverse consensus" principle.[37] The short time-limits applicable to the proceedings further increase the efficiency of the WTO dispute resolution mechanism.[38]

55 The Understanding governs all disputes between members of the WTO in relation to the interpretation and application of WTO law. This includes, in particular, the WTO Agreement itself, the GATT 1994 and the associated multilateral trade agreements, GATS, TRIPs as well as the plurilateral trade agreements.[39]

56 In order to handle the dispute resolution system,[40] Art.2 of the Understanding creates a Dispute Settlement Body (DSB), which has its seat in Geneva (like the WTO itself). A consultation procedure, which precedes the dispute resolution process, is part of the settlement mechanism. This procedure requires direct negotiations between the parties to the dispute. If the conciliation procedure fails, the parties may request that the DSB appoint a panel (Art.4(7)). If such request is approved, the panel, whose members are chosen from the list of experts maintained by the office of the DSB, will examine the dispute (Art.6 *et seq.*). The panel first delivers its findings in an interim report and ultimately in a final report (Art.15). The final report may be appealed by the parties to the Standing Appellate Body (Art.17). This Body performs a limited review of the panel's final report and issues its own report. The final report or the report of the Appellate Body must in turn be approved by the DSB (Art.16 and 17). If the Appellate Body adopts the report(s), the report(s) shall be final and binding.

57 The WTO Agreement provides for the implementation of reports approved by the DSB (Art.21) and sanctions against a party that fails to implement a report or fails to do so in a timely manner (Art.22–23).[41] Recourse to arbitration is again available for the resolution of differences arising at any stage of the procedure.

[36] On the binding character, see Schindler, 27–33.
[37] See Art.2(4) and the explanatory note: "The DSB [Dispute Settlement Body] shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision."
[38] Since 1 July 1995 when the Understanding entered into effect, over 600 cases were settled. See also Oesch, recht 2004, 192–205; von Segesser and Truttmann, in: Geisinger and Voser (eds), 304.
[39] See Schindler, 13; Oesch, recht 2004, 193, in particular at fn.10.
[40] On the procedure, see Schindler, 14–17.
[41] On the implementation and enforcement, see Schindler, 19–25.

d. Other international conventions

Switzerland is a party to many other international conventions that provide for dispute resolution by arbitration between states. These include over 120 bilateral and multilateral investment treaties (para.37) as well as the Energy Charter Treaty of 17 December 1994[42] Art.27 of which provides for *ad hoc* arbitration to resolve certain disputes between contracting states. 58

5. Arbitration within associations (including sports arbitration)

a. The concept

Many private organisations such as sports federations, trade associations, labour unions and similar bodies provide in their statutes or regulations that intra-group disputes shall be settled by arbitration ("*Verbandsschiedsgerichtsbarkeit*"). These mechanisms aim at enforcing the statutory rules and regulations of such organisations. This type of arbitration was mainly developed by trade associations to manage and settle their internal disputes. However, due to the limits imposed by antitrust law affecting such organisations, their importance has diminished considerably. This is particularly the case in the enforcement of price agreements, tariffs and supply obligations or in the sanctioning of territorial violations. The same concept is also found in other organisations that either directly or indirectly pursue economic goals, especially in sport. Due to the increasing economic importance of sport across all borders, international arbitration in this field has flourished in recent decades (see para.31). 59

"*Verbandsschiedsgerichtsbarkeit*" as discussed here should not be confused with arbitration before arbitral tribunals acting under the auspices of a professional or trade organisation such as the International Chamber of Commerce.[43] The latter's services are available to anyone, *i.e.* membership is not required to access arbitration under its rules. 60

[42] SR 0.730.0.
[43] See Rüede and Hadenfeldt, 110–111, 146–150, where the earlier case law of the Swiss Federal Supreme Court is reported.

b. Jurisdiction

61 The jurisdiction of a "*Verbandsschiedsgericht*" usually arises from the fact that the parties to the dispute are members of the association or federation. By becoming a member, each party has submitted (or is deemed to have submitted) to arbitrate before the arbitral tribunal within the limits of its jurisdiction *ratione materiae*, whether for "member *v.* member" or "member *v.* organisation" disputes. The jurisdiction *ratione personae* of the arbitral tribunal may even extend to a third party (non-member), provided that the latter has submitted (or must be deemed to have submitted) to that jurisdiction. This may be the case, for example, in sport where an athlete who is not him- or herself a member of the organising sports federation accepts the general conditions for participation in a particular competition organised by that federation.

c. Independence

62 Any arbitral tribunal must ensure its independence and impartiality in decision-making. This issue is of particular relevance in the context of arbitration within associations or federations, as the way in which the panel is appointed in these cases sometimes raises doubts as to whether the members are sufficiently independent of the parties, as required under Swiss law.[44]

63 The Swiss Federal Supreme Court, particularly in the context of challenges to awards of the Court of Arbitration for Sport (CAS), has defined the standards under which such a panel is considered sufficiently independent. Depending on the circumstances of the case (organisation *v.* member, organisation *v.* non-member, member *v.* member or member *v.* non-member), the applicable criteria and their relevance may vary. The standards established by the Federal Supreme Court apply regardless of whether the panel is acting under Chap.12 PILA[45] or Part 3 CCP and can be summarised as follows:

64 The requirement of independence and impartiality of an arbitral tribunal is subject to the same constitutional principles that apply to state courts, namely those of Art.30(1) FC.[46]

[44] On the issues of impartiality and independence, see paras 781–795.
[45] BGE 119 II 271 E.3b.
[46] BGE 129 III 445 E.3.3.3.

These principles provide that the organs or bodies of an association (*e.g.* the executive board) cannot act as an arbitral tribunal. The opposite would in many cases lead to the association issuing an award in its own affairs, which is "simply incompatible with the guarantee of independence."[47] This means that, for example, sanctions pronounced by such bodies cannot qualify as an arbitral award; rather, the decision rendered by such a body is in principle only a simple expression of will by the association concerned, *i.e.* an act of management and not a judicial act.[48] This also applies to the case where the party affected by the decision is not a member of the association, but only relies on it because without the recognition of its rules and regulations and thus submission to its internal dispute resolution mechanism, it would not have been able to participate in the relevant competition.[49] 65

Similarly, a panel that has no executive function in the association but has been appointed by one of its organs or bodies does not provide sufficient guarantee of independent decision-making. Unbalanced influence on the appointment of such a panel is frowned upon, even (or especially) when non-members are involved in the controversy. The lack of parity in the composition of the panel cannot be remedied by establishing grounds for challenge, requiring the arbitrators to be professional judges, or other precautions.[50] 66

However, a "*Verbandsschiedsgericht*" called to decide an "association *v.* member", "association *v.* third party" or "member *v.* non-member" dispute may well qualify as a proper arbitral tribunal, provided that its members are sufficiently independent of the association and/or its affiliates and the association does not have an undue (predominant) influence on the composition of the panel. Relevant criteria to determine whether there is sufficient independence include the influence of the association on issues such as the arbitration rules, the selection and qualification of the arbitrators or the financial interdependence between the arbitral tribunal and the association. 67

Taking these criteria into account, the Swiss Federal Supreme Court has examined in particular whether the Court of Arbitration for Sport (CAS) is sufficiently independent. In a first case in 1993, an *obiter dictum* 68

[47] BGE 119 II 271 E.3b.
[48] FSC 4A_612/2020 of 18 June 2021 E.4 (planned for publication).
[49] In this sense also BGE 97 I 488 E.3.
[50] BGE 97 I 488 E.3; BGE 80 I 336 E.4. However, the principle of parity is fulfilled in the case of arbitral tribunals set up by associations to settle disputes between them or their members, as provided for *e.g.* in many collective labour agreements between labour unions and employers' associations; see Rüede and Hadenfeldt, 149. On the right to parity, see also para.803–804.

expressed doubts as to whether the CAS was sufficiently independent in a dispute between the federation (the International Olympic Committee, IOC) and an athlete.[51] In a landmark decision in 2003, the Federal Supreme Court then found that the CAS offers sufficient guarantees for independent decision-making and thus qualifies as an ordinary arbitral tribunal. This result was favoured by a far-reaching reorganisation that significantly strengthened the independence of the CAS.[52] In 2018, the ECtHR also had to consider certain issues of due process before the CAS and, in particular, the impartiality and independence of the CAS and its arbitrators in light of Art.6(1) ECHR.[53] The ECtHR rejected the complaints of lack of independence and impartiality. However, in one of the cases, it affirmed a violation of Art.6(1) ECHR, as the CAS had rejected a professional athlete's request for a public hearing.

69 It is controversial whether the parties' right to control the composition of the arbitral tribunal may be restricted by obliging them to select the arbitrators from a predetermined list. A "list system" is indeed often practised by associations or federations in a well-intentioned attempt to ensure professional and efficient dispute resolution by specialists in the respective field. Contrary to some scholars, the Swiss Federal Supreme Court has not rejected the concept of a "list system" out of hand, but has expressed reservations when a party is in a position to exercise undue influence on the composition of the list. The list system used by the CAS, which includes over 300 persons nominated by various interest groups, was not objected to by the Federal Supreme Court.[54] It should be noted that Art.S18 of the CAS Code provides that CAS arbitrators and mediators may not act as counsel for a party before the CAS. This is certainly a useful additional measure by which the ICAS seeks to limit the risk of conflicts of interest, reduce the number of challenges and strengthen the independence of the CAS as such.

[51] BGE 119 II 271 E.3b. The issue did not need to be decided because the proceedings concerned a case in which the IOC was not involved as a party.
[52] BGE 129 III 445 E.3 with references to legal writing and case law. Confirmed in BGE 144 III 120 E.3.4 in a matter concerning FIFA.
[53] *Affaire Mutu et Pechstein c. Suisse* (Cases No. 40575/10 and 67474/10), Judgment of 2 October 2018.
[54] BGE 129 III 445 E.3.3.3.2. After all, the Federal Supreme Court added a critical comment on the transparency of the CAS list, but this was not relevant to the outcome of the case. See also FSC 4P.105/2006 of 4 August 2006 and the note by Kellerhals and Berger, ZBJV 2008, 230–232.

§ 2 ON THE SOURCES OF SWISS ARBITRATION LAW

I. National and international arbitration

As with state court proceedings, there is a significant divide between arbitrations that involve a purely domestic dispute and arbitrations that deal with a cross-border difference. The former is commonly referred to as national, internal or domestic arbitration, the latter as international arbitration. From the legislature's perspective, this divide can be approached in two different ways: The legislature can regulate it in a single arbitration act that covers both domestic and international arbitration (*code unique*),[1] or in two separate statutes (dual system).[2] 70

Switzerland applies the dual concept. Domestic arbitration is governed by Part 3 of the Swiss Code of Civil Procedure of 19 December 2008 (CCP), which has been in force since 1 January 2011 and replaced the former Concordat on Arbitration of 27 March 1969 (CA). International arbitration is governed by Chapter 12 of the Private International Law Act of 18 December 1987 (PILA). Constitutional considerations led to this solution. When the Concordat was created in the 1960s, it was applicable to both domestic and international matters. The prevailing opinion at the time was that arbitration was a matter of civil procedure that fell within the legislative competence of the cantons under the then Art.64(3) FC. When there was a general call for unified rules for international arbitration in the 1970s and 1980s, it was considered that these constitutional concerns were no longer relevant.[3] Therefore, in 1987, the federal legislature decided to include a set of rules on "International Arbitration" in Chap.12 PILA.[4] 71

[1] A variant of the *solution unitaire* is to add some provisions dealing specifically with international arbitration to a comprehensive law on arbitration.
[2] See Poudret and Besson, N 22–30 with references to the solutions chosen in other jurisdictions.
[3] Although the constitutional basis had not changed in the meantime; see Report PILA, BBl 1983 I 293–296, 457.
[4] The possibility of amending the Concordat to include the more recent developments in international arbitration was not a real alternative for practical reasons, as this would have required the consent of all signatory cantons.

72 According to Art.122(1) FC, in force since 1 January 2007, legislative competence in the area of civil procedure now lies with the Swiss Confederation. Nevertheless, the legislature has opted to maintain the dual system. International arbitration continues to be governed by the rules of Chap.12 PILA. Domestic arbitration has become part of the CCP as its Part 3. The preservation of the dual system was a pragmatic decision based on the consideration that the Concordat, which was repealed when the CCP came into force, was accepted by practitioners as a useful set of rules for domestic arbitration. Part 3 CCP has addressed the shortcomings of the former CA. Moreover, legal writing and case law on the Concordat continues to be of value and there was no need to revise Chap.12 PILA.[5] Last but not least, a separate law seems better suited to accommodate the differences between domestic and international arbitration than a *loi uniforme*.[6]

II. Part 3 CCP and its predecessor

1. Introduction

73 Long ago, both national and international arbitration in Switzerland were the subject of legislation in the individual cantons. The old cantonal codes of civil procedure contained different rules on arbitration. In addition, the complexity and details of the legislation varied greatly from canton to canton.[7]

74 In an attempt to bring clarity and uniformity to arbitration in Switzerland, the cantons created the Concordat on Arbitration of 27 March 1969 (CA), based on the former Art.7(4) FC (today Art.48 FC).[8] The concordat solution was preferred to federal legislation due to constitutional concerns (see para.71).[9] The Concordat was equivalent to cantonal law. It was a binding and conclusive law on arbitration for the signatory cantons and replaced the individual cantonal rules on arbitration (see former Art.46 CA). The legislative competence of the cantons that had

[5] See Report CCP, BBl 2006 7391–7392.
[6] See Perret, FS Kellerhals, 55.
[7] See *e.g.* Art.380–396 of the old Code of Civil Procedure of the canton of Berne (reprinted in Georg Leuch, Die Zivilprozessordnung für den Kanton Bern, 3rd edition, Bern 1956) or §§ 238–257 of the old Code of Civil Procedure of the canton of Zurich (conveyed in Frank Sträuli and Georg Messmer, Kommentar zur Zürcherischen Zivilprozessordnung, 2nd edition, Zurich 1982). See also Lanz, 1–5.
[8] On the origins of the Concordat, see Lanz, 1–16.
[9] See also BSK-Hochstrasser and Burlet, Introduction N 156–159.

acceded to the Concordat was limited to the aspects listed in the former Art.45 CA (*i.e.* proceedings before the cantonal courts and organisation of the judiciary).

Gradually, all 26 cantons joined the Concordat, the last being Lucerne in 1995. Since then, uniform rules have applied to domestic arbitration in Switzerland. However, the concordat solution had a considerable disadvantage, because any change or amendment to the Concordat had to be approved and ratified by all member cantons. This difficulty was one of the reasons why the Swiss Federal Council, when creating the Swiss Code of Civil Procedure (CCP), proposed replacing the Concordat with a federal law on domestic arbitration. 75

This proposal was to give domestic arbitration its own chapter in Part 3 of the new CCP as a counterpart to Chap.12 PILA. When it entered into force on 1 January 2011, Part 3 CCP replaced the Concordat, but retained much of its core (see paras 71–72). Like the Concordat and Chap.12 PILA, Part 3 CCP is based on the primacy of party autonomy. The parties have a wide margin of discretion in determining the arbitral procedure. The criticism of domestic arbitration voiced against the Concordat has also been duly taken into account in Part 3 CCP.[10] 76

2. Scope of application

Until Chap.12 PILA entered into force in 1989, the Concordat applied to both national and international arbitral tribunals seated in Switzerland. From 1989 onwards, the scope of the Concordat was limited to domestic arbitration. Accordingly, the scope of application of Part 3 CCP is also limited to domestic arbitration (Art.353(1) CCP). 77

Decisive for the applicability of Part 3 CCP is that: (i) the arbitral tribunal has its seat in Switzerland and (ii) the parties to the arbitration agreement, at the time of its conclusion, all had their domicile, habitual residence or seat in Switzerland (Art.353(1) CCP).[11] If at least one party had its domicile, habitual residence or seat abroad at the time the arbitration agreement was concluded, the arbitration shall be governed by Chap.12 PILA (Art.176(1) PILA). In determining the place of domicile, habitual residence or seat of a party, the arbitral tribunal shall 78

[10] See Report CCP, BBl 2006 7391–7392.
[11] Art.353(1) CCP and Art.176(1) PILA are interdependent. See therefore also the comments on the scope of Chap.12 PILA in paras 95–119.

apply Art.20 PILA (for natural persons) and Art.21 PILA (for legal persons).[12]

79 The nationality of the parties is irrelevant for the application of Part 3 CCP (or Chap.12 PILA).[13] The domestic (or international) character of an arbitration does not change just because, for example, one or more parties to the arbitration agreement (or even all of them) are Swiss subsidiaries of foreign parent companies.[14] The same applies if a party is domiciled, habitually resident or has its seat abroad, but is suing as the legal successor of a party that was domiciled in Switzerland at the time the arbitration agreement was concluded.[15] On the other hand, Part 3 CCP is no longer applicable after the 2020 revision of Art.176(1) PILA if only the parties to the arbitral proceedings are domiciled in Switzerland, while the arbitration agreement invoked was concluded with additional parties domiciled abroad, but who are not parties to the proceedings.[16] With the revised Art.176 PILA, the legislature has clarified that it is not the domicile, habitual residence or seat of the parties to the proceedings that is decisive, but rather the domicile, habitual residence or seat of (all) parties to the arbitration agreement at the time it was concluded.[17]

80 If the requirements of (i) Swiss seat of the arbitral tribunal and (ii) Swiss domicile, habitual residence or seat of all parties to the arbitration agreement at the time of its conclusion are met, Part 3 CCP shall apply to the proceedings even if the subject-matter of the arbitration has an international connection (see also paras 104–105).

81 As a further expression of party autonomy, the parties are free to extend the application of Part 3 CCP to arbitrations that would otherwise be governed by Chap.12 PILA. According to Art.176(2) PILA, the parties may exclude the application of Chap.12 PILA by a declaration in the arbitration agreement or in a subsequent agreement and agree to apply Part 3 CCP instead. The declaration to opt out of Chap.12 PILA (*i.e.* to

[12] See BSK-Pfiffner and Hochstrasser, Art.176 N 36–37; Lalive, Poudret and Reymond, Art.176 N 3 paras 2–3.
[13] Lalive, Poudret and Reymond, Art.176 N 3 para.2.
[14] Lalive, Poudret and Reymond, Art.176 N 3 para.3. In this context, the Swiss subsidiary's capacity to be a party to the proceedings is presumed, which does not apply to mere "branches" (*Zweigniederlassungen*), but to subsidiaries that are conceived as legal entities.
[15] FSC 4P.28/1995 of 27 October 1995 E.2a; for criticism, see Haymann, ASA Bull. 1996, 277–283 and Schweizer, SZIER 1997, 604–605.
[16] On this previous case law, see FSC 4P.54/2002 of 24 June 2002 E.3. For criticism, see Knoepfler, ASA Bull. 2003, 137–141; Besson, ASA Bull. 2003, 469–470; Schweizer, SZIER 2002, 596–597; Kaufmann-Kohler and Rigozzi, Jusletter of 7 October 2002.
[17] See Report Revision Chap.12 PILA, BBl 2018 7187.

exclude its provisions in favour of those of Part 3 CCP) must comply with the form provided for in Art.178(1) PILA (see paras 103–111).

Art.407(2) CCP contains a transitional provision that is largely obsolete today. It provides that arbitral proceedings that were pending when the CCP came into force on 1 January 2011 shall continue to be governed by the previous law, *i.e.* the Concordat, unless the parties agree that the new law shall apply. 82

3. Characteristics of Part 3 CCP

Swiss domestic arbitration, as codified in Part 3 CCP, is based on the principle of party autonomy. The parties are free to determine the arbitral procedure (Art.373(1) CCP) as well as all other aspects of the arbitration (such as the number and appointment of arbitrators, the determination of the seat of the arbitration, the power of the arbitral tribunal to order interim measures, etc.). Such determinations may be made at any time, whether in the arbitration clause (*clause compromissoire*), in a separate arbitration agreement (*compromis*) or even by a subsequent agreement concluded when the arbitration is already pending. The parties may override, amend, supplement or replace the provisions of Part 3 CCP by tailor-made solutions. Instead, they may refer to arbitration rules, the provisions of which may differ from those in Part 3 CCP.[18] In contrast to the former Art.1(3) CA, which contained a rather extensive list of mandatory provisions, Part 3 CCP follows the liberal approach enshrined in Chap.12 PILA. Thus, Part 3 CCP contains only a few mandatory rules (*e.g.* Art.354 CCP on arbitrability or Art.358(1) CCP on the form of the arbitration agreement). 83

Part 3 CCP is designed as an arbitration act. It constitutes a conclusive and exclusive regulation of domestic arbitration. It is therefore largely independent of the other Parts of the CCP dealing with proceedings in civil and commercial matters before state courts. Accordingly, the provisions of the other Parts generally do not apply to arbitral proceedings governed by Part 3 CCP.[19] 84

[18] Such references do not have to meet the formal requirement of Art.358(1) CCP. Even tacit agreements are valid. See Lalive, Poudret and Reymond, Art.1 N 2.2.
[19] See Report CCP, BBl 2006 7392.

III. Chap.12 PILA

1. Legislative history of Chap.12 PILA

85 The legal framework of international arbitration in Switzerland is part of Swiss private international law. Attempts to codify this area of law date back to the 19th century.[20] However, the decisive initiative for today's PILA came from the annual conference of the Swiss Lawyers' Association in 1971. The preliminary draft was published on 30 June 1978, the Report of the Federal Council on 10 November 1982; the Act was adopted on 18 December 1987 and entered into force on 1 January 1989.[21] The expert commission charged with establishing the preliminary draft succeeded in convincing the Federal Council to include regulations on international arbitration and to devote a separate chapter in the new law to "International Arbitration". In the 1970s, when the preparations for the PILA were made, it was difficult to get an overview of the legislative landscape for arbitration in Switzerland. About a third of the cantons (including Zurich) had not adopted the Concordat at all, but continued to regulate arbitration in their own civil procedure codes. Accordingly, arbitration law in Switzerland was fragmented and did not meet the basic needs of modern legislation on international arbitration. In its Report to Parliament, the Federal Council explained the need for a uniform legal framework on international arbitration as follows:[22]

> "The cantonal texts and the Concordat primarily concern domestic arbitration. They have not shown that they meet the needs of modern international arbitration. Fundamental questions, such as which law to apply to determine the validity of an arbitration agreement, remain open. Moreover, they contain numerous differences. This regulatory situation is difficult for the user of international arbitration. It damages the reputation that Switzerland should maintain in the field of international arbitration. Even though the situation improved with the creation of the Concordat and the adoption of a new Zurich Code of Civil Procedure (Art.238 *et seq*.), these rules do not fully meet the needs of international arbitration. On the one hand, they cannot be sufficiently coordinated with the arbitration rules of the most important arbitration institutions. On the other hand, they offer the potential for obstruction with all the possibilities for appeal. In some cases, this goes so far as to call arbitration itself into question."

[20] On the origins of the PILA, see Report PILA, BBl 1983 I 271–284.
[21] AS 1988 1831.
[22] Report PILA, BBl 1983 I 457.

In the debates in Parliament, the chapter on international arbitration was the most controversial part of the entire draft. After the matter failed in the Council of States, the National Council's committee substantially revised and supplemented critical parts of the draft submitted by the Federal Council. Both chambers finally accepted the revised version.[23] 86

2. The 2020 revision of Chap.12 PILA

Since its entry into force in 1989, Chap.12 PILA has become a success story both in Switzerland and abroad. The attractivity of Chap.12 PILA is based on its innovative approach, simplicity and clarity. Some thirty years later, on 1 January 2021, the first comprehensive revision of Chap.12 PILA came into force. The revision process was initiated by a motion in Parliament in 2012. The preliminary draft bill was published in January 2017.[24] The draft bill of the Federal Council was referred to Parliament in October 2018.[25] The final text of the revision was adopted by Parliament on 19 June 2020.[26] 86a

Overall, the 2020 revision ensures that Chap.12 PILA maintains its position as one of the most internationally regarded arbitration laws of high and innovative quality. It combines party autonomy with the guarantee of a reliable legal system. These qualities explain why Chap.12 PILA is fit to apply to many different types of arbitration, such as *ad hoc* proceedings, institutional arbitration, sports arbitration, investment arbitration, to name but a few. The revision builds on these key strengths and modernises the provisions of Chap.12 PILA on a selective basis. In particular, it implements the case law developed by the Swiss Federal Supreme Court since the entry into force of the PILA in 1989. The revision also aims to further strengthen the position of Chap.12 PILA as a stand-alone law on international arbitration, *e.g.* by keeping references to other laws to a minimum. The revision brings Chap.12 PILA up to date, but retains its conciseness and flexibility. One of the important innovations is that English becomes an admissible language for the filing 86b

[23] For details BSK-Hochstrasser and Burlet, Introduction N 166–169. See also AmtlBull SR 1985, 173–179; AmtlBull NR 1986, 1363–1369; AmtlBull SR 1987, 193–199; AmtlBull NR 1987, 1070–1073.
[24] Explanatory Report on the Amendment of the Federal Act on Private International Law (International Arbitration) of 11 January 2017 and Preliminary Draft Bill of the same date.
[25] Report on the Amendment of the Federal Act on Private International Law (Chapter 12: International Arbitration) of 24 October 2018 with Draft Bill of the same date; AS 2018 7163.
[26] AS 2020 4179, Amendment of 19 June 2020.

of written submissions before the Swiss Federal Supreme Court (Art.77(2bis) FSCA).

3. Characteristics of Chap.12 PILA

87 The provisions on international arbitration are part of the PILA. Nevertheless, they are an independent set of rules.[27] The independence of Chap.12 PILA is reflected in the fact that the general provisions of the PILA are not applicable to international arbitration. Similarly, an arbitral tribunal is not obliged to apply the conflict of laws rules of Chap.9 PILA (Art.116 *et seq*.) for determining the law governing the merits of the case, but has greater discretion than a state court when deciding which substantive law should apply in the absence of a choice of law agreement (see Art.187(1) PILA).[28]

88 Chap.12 PILA was designed as an independent, stand-alone arbitration act. It constitutes a conclusive and exclusive regulation of international arbitration. With the entry into force of Chap.12 PILA, the Concordat therefore ceased to regulate international arbitration (and the same applies today to Part 3 CCP). Where Chap.12 PILA is silent on certain issues, the general rules of interpretation apply.[29]

89 Chap.12 PILA is based on a liberal concept. It is a solution that ensures more freedom than that of the CCP (and certainly than that of the former Concordat, in which the parties' room for manoeuvre was considerably restricted by mandatory provisions). The liberal character of the law can be deduced from the small number of provisions. This testifies to the drafter's intention to concentrate on the essentials. It is an expression of a system that leaves as much discretion as possible to the parties. The parties actually benefit most from this approach (party autonomy). Chap.12 PILA in particular ensures them the freedom to determine the composition of the arbitral tribunal (Art.179(1) PILA), the arbitral procedure (Art.182(1) or Art.183(1) PILA), and even provides for a limited possibility to waive recourse against the award (Art.192 PILA).

[27] Kaufmann-Kohler and Rigozzi, N 1.90.
[28] Lalive, Poudret and Reymond, Introduction N 26. For details on the conflict of laws provision in Art.187(1) PILA, see paras 1375–1437.
[29] BSK-Hochstrasser and Burlet, Introduction N 192; Addor, ZSR 1993 I 62–71.

The liberal tenor of Chap.12 PILA also affects the position of arbitrators. They have far-reaching powers. This is especially true if the parties have not determined the arbitral procedure themselves.[30] 90

The legislature's aim to let arbitration largely regulate itself and to limit state intervention to the necessary minimum does not indicate a state disinterest in arbitration as a means of dispute resolution. Rather, Chap.12 PILA is driven by the desire to promote the smooth functioning of international arbitration in Switzerland. Therefore, judicial assistance is available to parties and arbitrators if state intervention is deemed necessary. The latter demonstrates the arbitration-friendly approach of Chap.12 PILA.[31] 91

The need for a maximum of party autonomy in international arbitration is contrasted with the need for sufficient legal certainty. Chap.12 PILA finds the balance between these two different expectations by laying down constitutional guarantees: the independence of arbitrators (Art.180(1)(c) PILA; see paras 781–795), the equal treatment of parties and their right to be heard in adversarial proceedings (Art.182(3) PILA; see paras 1115–1151).[32] 92

The streamlining of the appeal against the award is another feature of Chap.12 PILA. The legislature has thus taken into account the criticism expressed in Switzerland, but also abroad, of the multi-level appeal system of the former Concordat.[33] Under Chap.12 PILA, the sole judicial authority for any recourse against the award is the Swiss Federal Supreme Court.[34] Subject to the conditions of Art.192(1) PILA, the parties may even waive recourse against the award in whole or in part (see paras 1839–1876). Furthermore, the exhaustive list of grounds for challenge in Art.190(2) PILA reflects the legislature's general intention 93

[30] For example, arbitrators may determine the seat of the arbitration (Art.176(3) PILA) and the arbitral procedure (Art.182(2) PILA), they may order interim and conservatory measures (Art.183 PILA) or issue partial awards (Art.188 PILA).

[31] The competent state court may be seised whenever the appointment, removal or replacement of an arbitrator is required (Art.179, 180b PILA), whenever the challenge of an arbitrator is in dispute (Art.180a PILA) or whenever an order for interim measures requires judicial assistance (Art.183 PILA). In addition, the general clause of Art.185 PILA provides that an arbitral tribunal seated in Switzerland may request further assistance from the state court.

[32] Report PILA, BBl 1983 I 457–458; Lalive, Poudret and Reymond, Introduction N 21.

[33] Report PILA, BBl 1983 I 464–465. Lalive, Poudret and Reymond, Introduction N 24.

[34] To designate the highest court in Switzerland as the sole judicial authority to set aside was a *formule audacieuse* (Reymond, ASA Special Series No. 1, 11–18). For reasons of harmonisation between national and international arbitration, Part 3 CCP follows the same approach; see Art.389 CCP and Report CCP, BBl 2006 7404.

to limit recourse against international awards rendered in Switzerland to a minimum.[35]

4. Constitutional basis

94 When the Swiss Federal Council decided to submit a bill to codify private international law, there was a great deal of controversy over whether the Confederation had the competence to regulate international arbitration, which was to be included in the new law. Art.64(3) FC in force at the time reserved the area of private law to the Confederation, while civil procedure law was left to the cantons. In which category does international arbitration fall? The Federal Council proposed federal competence[36] and Parliament agreed. The question of constitutionality of Chap.12 PILA was finally settled with the adoption of Art.122(1) FC, which declares that both civil law and civil procedure law fall within the competence of the Confederation (see paras 71–72).

5. Scope of application of Chap.12 PILA

95 Art.176 PILA governs the scope of application of international arbitration in Switzerland (Chap.12 PILA). As such, it forms the counterpart to Art.353 CCP, which determines the scope of application of Swiss domestic arbitration (Part 3 CCP; see paras 77–82).

96 According to the 2020 revision of Art.176(1) PILA, the provisions of Chap.12 PILA apply to arbitral tribunals seated in Switzerland if at least one party to the arbitration agreement, at the time of its conclusion, neither had its domicile, habitual residence or seat in Switzerland. The scope of application of Chap.12 PILA is thus defined by purely formal criteria in order to create the greatest possible clarity and legal certainty. The only two relevant criteria are (i) the seat of the arbitration, and (ii) the domicile, habitual residence or seat of the parties to the

[35] According to Art.393(e) CCP, which reproduces former Art.36(f) CA, the award may be challenged if it is "arbitrary". The Swiss concept of "arbitrariness" is often difficult to understand for foreign users of Swiss arbitration. Therefore, in Art.190(2)(e) PILA, this ground for challenge has been replaced by the possibility to challenge the award if it is incompatible with "public policy". At the same time, this amendment significantly raised the hurdle for successful challenge. For details on Art.190(2)(e) PILA, see paras 1758–1787.

[36] The Swiss Federal Council justified its opinion, *inter alia*, by referring to former Art.8 FC, which declared that the federal government is competent for Switzerland's foreign affairs. See Report PILA, BBl 1983 I 293–296.

arbitration agreement at the time of its conclusion. The domicile, habitual residence or seat of only the parties to the proceedings is irrelevant.[37] The new law also applies to arbitration agreements concluded before 1 January 2021.[38]

a. Territorial scope

In territorial terms, Chap.12 PILA always applies if the seat (or place) of the arbitration is in Switzerland (Art.176(1) PILA). 97

The seat of the arbitration binds the parties and the arbitral tribunal to a legally determined jurisdiction and the corresponding national arbitration law (*lex arbitri*).[39] According to Art.176(3) PILA, this territorial reference to Switzerland is primarily determined by the parties. They may determine the seat of the arbitration in the arbitration agreement or at a later stage (see paras 747–757). The parties may also entrust a third party, *e.g.* an arbitral institution, with the determination of the seat (see paras 760–763). If the parties have failed to determine the seat, either directly or by reference, Art.176(3) PILA provides that the arbitral tribunal shall determine the seat. The latter, however, presupposes that the arbitral tribunal can be constituted (see paras 764–766). The freedom of the parties (or the arbitral tribunal) to choose a place in Switzerland as the seat of the arbitration is not restricted by any other conditions. 98

If the parties do not designate a seat and if all alternative designation mechanisms (including Art.176(3) PILA) do not lead to the designation of a seat in Switzerland, various provisions of Chap.12 PILA are meaningless. The latter applies in particular to the scope of application of Chap.12 PILA itself, which requires a seat of arbitration in Switzerland (Art.176(1) PILA). Furthermore, it affects all provisions of Chap.12 PILA that provide for judicial assistance by a Swiss state court. With the 2020 revision of Art.179(2) PILA, this loophole was finally eliminated. A new second sentence has been added to Art.179(2) PILA, which provides that if the parties have failed to determine a seat and are unable to constitute the arbitral tribunal, the Swiss state court seised first shall have jurisdiction. That Swiss state court, as *juge d'appui*, shall 98a

[37] Report Revision Chap.12 PILA, BBl 2018 7187. The previous case law of the Swiss Federal Supreme Court on Art.176 PILA (FSC 4P.28/1995 of 27 October 1995 E.2a or FSC 4P.54/2002 of 24 June 2002 E.3) is no longer on point. See also para.79.
[38] Report Revision Chap.12 PILA, BBl 2018 7203. See also Tettamanti, ASA Bull. 2020, 823–825.
[39] Panchaud, SJZ 1965, 374: "*... ce siège de l'arbitrage relie les parties et leur arbitre, d'une part, à un cadre législatif national d'autre part ...*". On the seat of the arbitration, see para.741.