



Article scientifique

Article

1988

Published version

Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

The New Swiss Law on International Arbitration

Lalive, Pierre

How to cite

LALIVE, Pierre. The New Swiss Law on International Arbitration. In: Arbitration International, 1988, vol. 4, n° 1, p. 2–24. doi: 10.1093/arbitration/4.1.2

This publication URL: <https://archive-ouverte.unige.ch/unige:101373>

Publication DOI: [10.1093/arbitration/4.1.2](https://doi.org/10.1093/arbitration/4.1.2)

The New Swiss Law on International Arbitration

by PIERRE LALIVE*

ON 18 December 1987, the Parliament of Switzerland finally adopted, by a nearly unanimous vote¹, a comprehensive 'Federal Act on Private International Law.' This statute, whose preparation by a group of experts had started in 1973, contained 200 articles and deals with practically all domains of private international law including (apart from the conflict of laws in the fields of family relations, corporations, contracts, torts, etc.) jurisdiction of Swiss courts, recognition and enforcement of foreign decisions, bankruptcy and arbitration.

A Chapter 12 of the Act (Articles 176 to 194) deals, for the first time in Swiss legal history, with 'international arbitration,' which is now clearly and officially distinguished from domestic arbitration, in contradistinction to the present regime of the so-called 'Concordat' (Intercantonal Convention on Arbitration, 1969, hereinafter 'CIA' as per its French acronym).

Having regard to the important rôle traditionally played by Switzerland as a host country to many international arbitrations — be they purely commercial, or inter-State, or between a State or State organisation and a private party — the following general presentation, although limited to essentials for reasons of space, will, it is hoped, be of interest to practitioners in the field of international transactions.

I. INTRODUCTION

In order properly to understand the philosophy and the novelty of this law, as well as the meaning of its principal provisions on arbitration, the reader must bear in mind the main features of the legal regime now obtaining in Switzerland² and some facts of the legislative history of the new Statute.

But a first question should be answered: Why was the need felt to legislate on

* Professor of Law, Geneva University, Attorney-at-Law, Lalive, Budin & Partners, Geneva; Member of the 'Institut de Droit international'; President, Swiss Arbitration Association; Member of ICCA and of LCIA.

¹ The vote was 127 in favour, 0 against (in the 'National Council') and 32 in favour, 8 against (in the 'Council of States', i.e. Cantons).

² The so-called 'Concordat' of 1969, i.e. a kind of uniform law of procedure, is in force in practically all Swiss Cantons — including the few which (like Geneva, Vaud, Basel, Bern, Ticino and more recently Zurich) play a significant role as seats of arbitrations; the sole exceptions are the Cantons of Lucerne and Thurgau.

the subject, less than twenty years after the adoption of the Swiss CIA? The CIA indisputably constituted a major advance at the time, not the least because it suppressed or at least diminished the baffling diversity of cantonal laws. It has been applied, by and large successfully, in a large number of international instances. Similarly, the question of the need for a particular *national* legislation could be raised, in the light of recent international conventions on the subject and, in particular, of the UNCITRAL 'Model Law.'

The answer to the first question – Why legislate at all? – is twofold. First, in a general statute purporting to constitute, as far as possible, a 'complete' Code of Swiss Private International Law, dealing in particular with international contracts on the one hand and with international jurisdiction of Swiss courts on the other, it would have been most strange to ignore such an important and expanding institution as international arbitration, which is commonly recognised today as 'the' ordinary method of settling international trade disputes (most of which are indeed of contractual origin). In this sense, Chapter 12 of the Act is to be considered as a normal and logical complement to Chapter 9, Section 1, on international contracts. Furthermore, the Swiss legislator had – rightly it is submitted – taken the position that questions of governing law and questions of jurisdiction and procedure are, on the international level, closely related and to some extent interdependent, so that they should not be viewed or regulated in isolation. In any case, international arbitration is based on a contract and should be characterised as possessing at the very least a mixed and not a purely procedural character. For those reasons, a chapter on international arbitration clearly had its place in the new Swiss law on Private International Law.

Let it be added in passing that it would be a mistake, when interpreting the new Swiss provisions on arbitration, to forget the general context of the Statute as a whole, for instance, questions such as the autonomy of the parties (a principle strongly emphasised by the new Statute) or the concepts of 'closest connection' or of 'ordre public' (public policy).

There was a second justification for federal legislation on the subject: the Concordat had been conceived and drafted in the early 60s, i.e. *before* the extraordinary expansion and diversification of international arbitration. The drafters of the CIA could hardly foresee, for instance, the important rôle that States or State-controlled organisations or companies were to play in that field, nor did they envisage the complexity of multiparty arbitrations or the increasing use of objections to arbitral jurisdiction or of appeals against arbitral decisions. Inevitably, the experience of the last decades had brought to light the need for modernisation or amendments of some parts of the Concordat.

More decisive, in the present writer's view, was the fact that the CIA, in the words of its leading promoter and author, Federal Judge André Panchaud, aimed at regulating *at the same time* three different types of arbitration: (1) domestic (2) international and (3) (domestic) arbitration organised by professional institutions or trade organisations.

However great the merits of the CIA, such an attempt to impose one and the same legal regime on both domestic and international arbitration could not and did not, it is submitted, prove entirely successful, and the lessons of experience confirm here the teachings of legal theory. To take but one example: it stands to reason that, on the municipal scene, arbitration represents both a direct competition for State courts and a potential danger to interests which the State has a duty to protect (be they the interests of the weaker party or those of third parties). Hence the need for a fairly strict regulation of domestic arbitration, for imperative provisions limiting the parties' autonomy and for sufficient possibilities of appeals to State courts against arbitral decisions.

'International' arbitrations, on the other hand, (however they may be defined) take place, by definition and in fact, in a very different context: that of Private International Law, i.e. one of (potential) conflicts of national jurisdictions and conflicts of laws. The very existence, in all countries of the world, of a body of rules called, for short, Private International Law shows that, according to a long and general experience of mankind, situations involving a relevant foreign element (i.e. international situations) generally call for distinct juridical treatment. For example, it is well-known that, in the field of contracts, the principle of autonomy of will or freedom of contract has a quite different scope or meaning than in domestic private law.

The same holds true, of course, in arbitration. When a dispute arises between two parties of different countries about the validity or performance of an international contract, and it is submitted for decision in a third neutral country to a panel of three individuals (often of different nationalities and legal backgrounds) chosen by the parties, how can it possibly be contended that – unless of course the parties had explicitly wanted such a solution – the arbitration process should be regulated as if no international element existed, i.e. that it should be treated as a purely domestic situation entirely governed by local rules of procedure (which may be a source of considerable surprise to the parties)?

But, curious though it may seem, this appears to be the position of those lawyers or politicians, in Switzerland and elsewhere, who refuse to recognise the specificity of international arbitration (both as to its functions and to its nature) and insist that arbitrations, whether domestic or international, can and should be treated alike.

Some twenty years of practical application of the Swiss Concordat have confirmed the inherent weakness of such an approach and the difficulty of Courts to find suitable solutions to new problems on the basis of a text which, as once stated by the Federal Tribunal, does not allow a distinct treatment for internal and for international arbitrations. For instance, more than two thirds of the provisions in the CIA are mandatory (Art 1) – a fact which, justified as it may be in domestic matters, runs clearly counter to the needs of international arbitration³.

Similarly, the number of possibilities of 'appeals' against awards (Art 36 CIA) has certainly far less justification in international arbitration than in

domestic matters. This (and the resulting faculty of abuse and dilatory tactics) was widely felt as a main weakness of the Concordat, notwithstanding the distinct policy of many Swiss courts to adopt a strict interpretation and to reject a majority of requests for annulment of awards⁴.

The need for a more modern legal régime, specially conceived for the conditions and needs of international disputes, could thus and can hardly be denied. This was no doubt the basis for the French decision, a few years ago, to adopt two separate decrees, respectively for internal and for international arbitration⁵. True it is that a few countries have adopted a different approach: a case in point is that of The Netherlands' Statute of 1986⁶. In this connection two observations should suffice: first, there is of course no theoretical objection against a legislator choosing, if he so wishes, or dares, to extend to domestic arbitrations the liberal and flexible regime required by international arbitration (while the converse is, in our submission, not true). Second, the Dutch Statute appears precisely to illustrate the drawbacks of what may be called the 'uniform' or identical treatment of both kinds of arbitrations: due to the need for taking care of some domestic situations (for instance, the desiderata of the Dutch building industry), the Act has become a lengthy and (unnecessarily) detailed document, inevitably less flexible than the French or Swiss provisions on international arbitration⁷.

A second question was raised above and must now be answered: Since the need for modern legislation on international arbitration could hardly be disputed, why did the Swiss legislator not content himself with adopting, perhaps with minor modifications, the UNCITRAL Model Law? Following intense and clever propaganda by the UNCITRAL Secretariat, many countries are now considering adopting, or have recently adopted, the so-called Model Law on International Arbitration. This is true, in particular, of developing countries and of countries without much experience or without a

³ All the more so since it is settled law in Swiss Private International Law that domestic or internal public policy must be sharply distinguished from, and more narrowly interpreted than, 'international public policy', see e.g. decisions of the Swiss Federal Tribunal, ATF/BGE 87 I 191; 88 II 1.

⁴ See on this, e.g. the Message of the Federal Council (Government) to Parliament, of 10 November, 1982 (No. 2101, in particular No. 2101, 27) and the remarks of Mrs. Josi Meyer, MP (Bull. Stén. C.E., 2 June, 1987).

⁵ On domestic arbitration, see Decree No. 80-354 of 14 May, 1980 and, on international arbitration, Decree No. 81-500 of 12 May 1981; they amend the French Code of Civil Procedure. Numerous comments have been published, in particular by well-known French specialists like Messrs. P. Bellet, M. de Boisseson, G.R. Delaume, J.-L. Delvolvé, Y. Derains, B. Goldman, E. Mezger and J. Robert.

⁶ The Netherlands Arbitration Act of 1 July, 1986 has been the subject of recent comments by Dr. Michael Bühler, in RIW (Recht der Internationalen Wirtschaft) 1987, pp. 901-905. See also many articles by Prof. P. Sanders, e.g. in *Pace Law Review*, Spring 1984, vol. 4, No. 3, p. 581; *Journal of Business Law* 1987 July, p. 321; *Rassegna dell'Arbitrato* 1987 No. 1-2 p. 27; and by Prof. J.C. Schultz in 6 *IPRax* 1987, p. 383 and in *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, No. 93, November 1986 3-61.

⁷ The Dutch approach was criticised on that basis by several international experts at a seminar organised in Paris on 16-17 November, 1987 by the ICC Institute of International Business Law and Practice.

modern legislation on the subject. Why did Switzerland not simply follow suit?

This solution was in fact never seriously considered, for several and, it is submitted, decisive reasons. The first of these was not, as might be expected, purely historical or chronological (the preparation of the Swiss draft was well on its way before work was started on the Model Law). From the point of view of a country like Switzerland, with a long tradition and experience in arbitration, the Model Law appears to be, rather than an ideal modern legislation, an interesting compromise between conflicting approaches, reached on several points at the level of the 'lowest common denominator', and more valuable politically speaking than because of its intrinsic value. Be that as it may, no proposal appears to have been made, either in Parliament or elsewhere, in favour of substituting the Model Law for the draft Chapter 12. It would seem that other developed countries with experience in international arbitration share the same reluctance.

II. THE NEW LAW

(a) *The legislative history*

If only in order not to be misled by the *travaux préparatoires* of the Statute⁸, one peculiar feature of Chapter 12's legislative history is worth keeping in mind. Alone out of the 13 chapters of the Federal Statute, the chapter on international arbitration met with strong opposition: it was first suppressed by one Chamber of Parliament⁹, then reintroduced by the other and substantially modified in the last stages of parliamentary procedure, to be finally approved quasi-unanimously¹⁰. The end result is thus more 'complete' and much more satisfactory than the Government's Draft which, for political reasons, had adopted a 'minimalist' and somewhat timid approach¹¹.

(b) *Scope of the law*

The law applies only to international arbitration, defined in Art 176, for the

⁸ The reader should be aware of the fact that, in Civil Law countries, reference to such *travaux préparatoires* is viewed, as a rule, as a legitimate means of interpretation of Statutes.

⁹ On 13 March, 1985, the Council of States, composed of representatives of the Cantons, had decided by 18 votes against 17 to delete the Chapter (then 11), on the (clearly erroneous) ground that arbitration - international or domestic - was a 'procedural' matter and thus, under the Constitution, within Cantonal and not Federal jurisdiction.

¹⁰ The National Council had no doubt on the constitutionality of Chapter 12. Enlisting the assistance of experts from the Swiss Arbitration Association (ASA), it undertook to improve the Government Draft of November 1982, while preserving its original structure. The new text was adopted by the Council on 12 September, 1987 and by the other Chamber on 2 October, 1987.

¹¹ See the Draft of 10 November, 1982, published with a 'Message' outlining the reasons for legislative action and containing a detailed commentary. On arbitration, the Government stressed the need to maintain the traditional role of Switzerland and to adapt the law to modern developments. The Draft contained only 12 articles and did not deal with important practical points of procedure.

purpose of the Statute, as (a) arbitration between parties of which one (at least) had its domicile or habitual residence outside Switzerland at the time when arbitration was agreed upon¹² and (b) the 'seat' of which is situated in Switzerland¹³.

On this second condition, it will suffice to note that the seat of the arbitral tribunal may be fixed in Switzerland¹⁴ either (i) by agreement of the parties or (ii) by an arbitration institution designated by them or (iii) in default of either, by the arbitrators.

Under Art 176, para 2 – a last-minute addition accepted by Parliament as a political compromise – Chapter 12 is not to be applied to international arbitrations where (i) the parties have excluded in writing its application and (ii) they have agreed to apply exclusively cantonal rules of procedure (of the seat) relating to arbitration¹⁵. This curious provision offers an additional option to the parties and may seem harmless enough. It is unlikely to receive frequent application, if only because of its strict, cumulative conditions: existing arbitration clauses providing for arbitration in some Swiss cantons under the local procedure can hardly have 'excluded in writing' the application of Chapter 12 of a Statute yet to be enacted!

This leads us to a few observations on a problem untouched by Chapter 12, that of 'intertemporal application.' From the moment when the Federal Statute on Private International Law enters into force (at a date to be determined by the Federal Government¹⁶), all cantonal laws on arbitration, to the extent they apply to international disputes (i.e. in practice the Swiss Concordat) will lose any validity¹⁷. But questions remain as to the 'immediate application' of the

¹² The Statute has thus chosen, out of various possible ways, to define what is 'international' by the simple and classical conflictual method (rather than the French substantive criterion of 'involvement of the interests of international trade'). As to the time factor, it follows from Art 176 that an international arbitration may well take place in Switzerland between two parties domiciled there when the dispute arises.

¹³ Arbitrations taking place outside Switzerland may also be international in a broad sense, but not for the purpose of Chapter 12 – with the exception of those referred to in Art 194, on the recognition of foreign awards.

¹⁴ Article 176 does not actually require the parties – advisable though this clearly is – to designate a precise location in Switzerland. Difficulties may follow from a failure of the parties to mention a Swiss city as the seat of the arbitration. Art 185 being obviously inapplicable, would the Federal Tribunal accept a unilateral request to fix the seat on the basis of a clause 'arbitration in Switzerland'? It is submitted that it could and should. On the other hand, the President of the Swiss Arbitration Association is empowered (By-Laws, Article 9) to appoint arbitrators, fix a seat or take analogous decisions.

¹⁵ The last words ('relating to arbitration') are obviously important; they relate in practice to the Concordat of 1969 (CIA).

¹⁶ The date will be determined by the Government. The entry into force is expected to be on 1 January, 1989.

¹⁷ Except, of course, if the parties have made use of the option offered by Art. 176, para 2, or to the limited extent Chapter 12 itself refers to Cantonal Law (see e.g. Art 183 para 2 and Art 184, para 2).

new law to (a) arbitration clauses already entered into; (b) disputes already submitted to arbitration in Switzerland but not finally settled.

In the absence of special 'intertemporal' provisions relating to arbitration, reference must be made to the general rules of Chapter 13 of the Statute (Final Provisions) and, in particular, to Art 196 para 2 relating to those facts or acts which, though they came into existence before the entry into force of the Law, continue to produce legal effects after that date. The latter effects are in principle to be governed by the new law.

If the general principle appears clear enough, delicate problems of interpretation – which cannot be discussed here – may still have to be solved, having regard to the particular, consensual nature of arbitration, a field where the legitimate expectations of the parties may loom large and may constitute an obstacle to the immediate application of the new Act; all the more so since the basic philosophy of that Act, as will presently appear, is to give the largest possible scope to the autonomous will of the parties.

(c) *Arbitrability*

One of the conditions of the arbitrator's jurisdiction is, of course, the validity of the arbitration agreement, and one of the conditions of such validity relates to the object of the dispute; this is the vexed question of the 'arbitrability' of the dispute, which may be raised either before the arbitrators or before a State court (at the beginning of the proceedings or at the stage of recognition of the award).

A comparison of the various solutions successively adopted by the Geneva Protocol of 1923, by the New York Convention of 1958, by the Geneva Convention of 1961, and by Art 5 of the Concordat¹⁸, to name but a few examples, illustrates the difficulty of the problem of applicable law¹⁹. After a thorough study, the Commission of Experts came to the conclusion that this was a question of substance (perhaps with a public policy content) and not of procedure. It hesitated for some time between a 'conflictual' approach and a 'material' approach, finally to adopt the latter. Hence the text of Art 177 para 1: Any dispute of a 'patrimonial nature', i.e. which can be valued in money terms, may be submitted to arbitration; this is a rule of 'substantive private international law' which is fairly clear and easy to apply²⁰, much more so than more precise wording such as that of Art 5, already quoted, of the Swiss CIA ('any right of which the parties may freely dispose of . . .') or of Art 1 of the

¹⁸ Article 5 CIA provides that 'the arbitration may relate to any right of which the parties may freely dispose unless the suit falls within the exclusive jurisdiction of a State authority by virtue of a mandatory provision of the law.'

¹⁹ Well-known examples are disputes relating to patents, securities, anti-trust matters, etc. Cf. Dutoit-Knoepfler-Lalivè-Mercier, *Répertoire de droit international privé suisse*, vol. I, ed. Staempfli, Berne, 1982, at No. 100–114, hereinafter *Répertoire* . . .

²⁰ See Anton Heini, in a report to the Swiss Arbitration Association in 1972, p. 12.

Swedish Act (which refers to 'any question in the nature of a civil matter which may be compromised by agreement . . .'), two formulae which, in fact, raise more problems than they resolve.

True it is that this rule does not and cannot absolutely guarantee the future recognition abroad of an award rendered in Switzerland, but it has the merit of giving a satisfactory solution to what the Swiss Government rightly called 'one of the most difficult problems of international arbitration.'²¹ The provision is bound to have a healthy preventive effect, i.e. to limit preliminary objections and dilatory tactics.

To sum up, any claim, whether of contractual or extracontractual origin, which can be valued in money is in principle capable of being submitted to arbitration. This rather broad concept of 'arbitrability' appears to be in keeping with present trends in other countries, such as the USA, and with international arbitration practice²².

Arbitrability, in its widest sense, may be considered as including capacity to arbitrate. It should be noted that the question is not regulated by Art 177 para 1 but by the general rules of Private International Law relating to the capacity of individuals (Art 33 of the Statute) or corporations (Art 149-150). But a special provision, that of Art 177 para 2, deals with the capacity of States or State-controlled organisations or enterprises, in an innovative manner which deserves attention.

It is hardly necessary to emphasise either the important role played in international arbitration by States or State-controlled bodies, or the frequency of cases in which, in the last decade especially, States or State-controlled entities have attempted to evade or annul, through various devices, an undertaking to arbitrate²³.

In order to increase juridical certainty and to prevent, as far as possible, the repetition of similar tactics by defending States or State organisations, the Statute adopts what has been considered by some as a bold solution, in keeping with the fundamental principle of 'good faith' (which prevails in the whole of Swiss law, see e.g. Art 2 Swiss Civil Code):

'If a party to the arbitration agreement is a State or an enterprise or organisation controlled by it, it cannot rely on its own law to contest the arbitrability of a dispute or its own capacity to be a party to an arbitration.'

There is no doubt that such a provision needs to be interpreted in the light of the circumstances of each concrete case; it may be, for instance, that the private party could not in good faith rely on Art 177 para 2 when it was fully aware,

²¹ Message, at No. 2101.22, p. 192.

²² For the USA, it will suffice to refer to the well-known cases of *Scherk v. Alberto Culver and Mitsubishi*.

²³ Cf. e.g. P. Lalive, 'Some Threats to International Investment Arbitration', in *IICSID Review* No. 1, Spring 1986, pp. 26-40, and 'Sur la bonne foi dans l'exécution des contrats d'Etat', in *Mélanges R. Vander Elst*, Bruxelles, 1986, pp. 425-451. Some illustrations, among many, are the old *Losinger* case, the Libyan cases (*Texaco, Liameco*). *Turiff Construction (Sudan) Ltd.*, *SGTM/Bangladesh*, etc.

and had accepted, the restrictions imposed by the 'personal law' of the State or State-controlled organisation with regard to arbitrability or to capacity²⁴. But this important provision can hardly be called revolutionary. It appears to be in harmony with analogous exceptions to the rule that capacity is governed by the 'personal law,' as well as in harmony with the present needs of international commerce.

(d) *The arbitration agreement*

On the formal validity of the arbitration agreement, Art 178 para 1 has rightly preferred a 'substantive rule' to a rule of conflict of laws. It attempts to improve on Art II para 2 of the New York Convention by taking into account modern means of tele-communications, including those of the future, while specifying, in order to limit the possibility of frauds, that, whatever the means of communications used, it should be proved by a text or document.

With regard to 'material validity', on the contrary, Art 178 para 2 contains a 'conflict rule', of an alternative character, which indicates the policy of *favor validitatis* pursued by the Statute: the arbitration convention is valid whenever it complies with the conditions laid down either by the law chosen by the parties, or by the law governing the substance of the dispute (e.g. the main contract) or by Swiss law.

The practical importance of such a provision can hardly be overestimated, having regard in particular to the diversity and unsatisfactory character of the solutions now prevailing in comparative private international law: e.g. neither the law of the place where the agreement was signed, nor the law governing the main contract, nor the law of the seat of the arbitral tribunal can be considered as generally acceptable.

A similar policy of *favor validitatis* of the arbitration agreement (which involves the accepted risk that some awards rendered in Switzerland might not be recognised abroad) is illustrated by two ideas contained in para 3 of Art 178: (a) the affirmation of the binding character of the arbitration clause (notwithstanding any foreign rule which, as in the old French law and in some Latin American States, would require the signing of an agreement *after* the dispute has arisen); (b) the affirmation of the well-established principle²⁵ of the 'autonomy' or severability of the arbitration clause, in relation to the main contract – a principle which has long been recognised in Swiss court decisions, in contradistinction to the traditional attitude of English law²⁶.

Reference must also be made, in connection with the effects of a (valid)

²⁴ See on this, e.g. *Framatome v. Atomic Energy Organisation of Iran*, *Yearbook International Arbitration* 1983, pp. 94–117 and *Journal du droit international* 1984, p. 58.

²⁵ See e.g. the decision ATF 93 I 345 of 1967 (in the case *Motoren-, Turbinen- und Pumpen A.G.*), and 88 I 100, in *Paperconsult*.

²⁶ Cf. A. Redfern & M. Hunter, *International Commercial Arbitration*, 1986, at pp. 132ff. and A. Samuel, 'Separability in English Law,' in *Journal of International Arbitration* 1986 pp. 95ff.

arbitration agreement to a provision contained, not in Chapter 12, but in Chapter 1 (on the so-called 'general provisions' of the Statute), that of Art 7, according to which 'when the parties have concluded an arbitration agreement relating to an arbitrable dispute, the Swiss judge *must* decline jurisdiction, unless the defendant has discussed the merits without reservation, or the agreement is no longer valid or cannot be effectively enforced, or the arbitration tribunal cannot be constituted on grounds manifestly due to the defendant.'

(e) Constitution of the arbitration tribunal

On the constitution of an arbitration tribunal, the Statute contains two provisions (179-180) which are largely self-explanatory. The whole matter is governed by the autonomy of the parties, a fundamental principle of the whole chapter: the arbitrators are to be designated, removed or replaced in accordance with the agreement of the parties. Failing such an agreement, the judge of the 'seat' may be required to intervene and he should apply 'by analogy' (and not directly) the relevant provisions of cantonal law, i.e. in practice the Concordat. A useful precision is contained in Art 179 para 2, to the effect that the judge is bound, upon request, to appoint the arbitrator unless a summary examination reveals that no arbitration agreement exists between the parties. The same practice had generally been followed in the past but a degree of uncertainty, now eliminated, had arisen from a few (erroneous) decisions refusing appointment when the defendant party had invoked the invalidity of the arbitration agreement or the lack of jurisdiction of the designating authority²⁷.

Regarding challenge of arbitrators - a question which has assumed increasing practical importance everywhere - it is interesting to note that the Government draft had remained silent on this point (in contradistinction to a former draft of the Ministry of Justice). Parliament rightly decided to fill in this gap, and to regulate the grounds for challenge, in a concise and synthetic manner²⁸.

First, in keeping with the general philosophy of Chapter 12, an arbitrator may be challenged for a cause foreseen in the arbitration rules adopted by the parties. The same possibility exists when the arbitrator does not meet the qualifications agreed upon by the parties, a clause which is likely to raise certain problems of interpretation (e.g. it gradually appears that the arbitrator does not have a sufficient command of English or sufficient experience in

²⁷ See on this *Répertoire*, cited above note 19, No. 141-155; P. Lalive 'De la désignation par un tiers de l'arbitre international', in *Mélanges W. Schönenberger* 1968, pp. 373-386, and the decision of the President of the Federal Tribunal of 30 April, 1981 in *Amoco v. NIOC*, *Bulletin ASA* 1983 No. 1, p. 12.

²⁸ Compare to Art 18-19 CIA; see also UNCITRAL Rules, Art 10 and Model Law, Art 12.

maritime disputes). Finally, Art 180(c) provides for a possibility to challenge 'where circumstances give rise to legitimate doubts about the arbitrator's independence.'

It is worth noting here that a former version of this provision mentioned not only the independence, but also the impartiality, of the arbitrator. The latter condition appeared excessive to Parliament, at least in relation to a party-designated arbitrator, as well as perhaps too subjective. The condition of independence was eventually considered as both fundamental and sufficient²⁹.

Additional provisions make it clear that no arbitrator can be challenged by a party for reasons known before the appointment and that, in case of dispute, the objection procedure is governed by the agreement of the parties (the judge of the seat having merely a subsidiary rôle, in the absence of such agreement).³⁰

(f) Procedural questions

A distinctive feature of the new Swiss law of arbitration is the fundamental importance attached and the extremely wide scope given to the autonomy of the parties with regard to procedure. Subject to two limitations only (i.e. respect for the fundamental principle of equality of the parties and for their 'right to be heard in contradictory proceedings,' Art 182 para 3), the parties are totally free to adopt, directly or indirectly, any rules of procedure they like and, failing such agreement, such procedure will be established, 'so far as necessary', by the arbitral tribunal, either directly or indirectly, by reference to a law or to arbitration rules.

In contradistinction to the Government draft (whose former Art 173 para 2 provided, wrongly it is submitted, for application by analogy of cantonal procedure), the final text of the Statute eliminates any reference to the local rules of the seat of arbitration.³¹ Legislative history proves that such elimination was adopted, by a small majority, quite deliberately, in keeping with modern trends in international arbitration practice and following the advice of the experts of the Swiss Arbitration Association³².

As a result of the wide freedom thus granted to the parties and, failing their agreement, to the arbitrators, it became quite unnecessary to burden the Statute with detailed rules of procedure, along the lines of the UNCITRAL Model Law or the recent Dutch Statute of 1986. Provisions on points like oral

²⁹ Cf. ICC Arbitration Rules, Art 2(4).

³⁰ This provision will exclude in the future the possibility of decisions like that of the Federal Tribunal in *RAE v. Westland*, ATF 111 Ia 255 (Bulletin ASA, 1986, No. 1, p. 16) - whereby parties who had agreed to be bound by the ICC Rules need not respect Article 2 para 7!

³¹ It is submitted that this is an important step; foreign parties in particular need no longer fear the application of some local rule or local case-law quite unknown to them.

³² A minority proposal suggested by Messrs. Eisenring and Weber, MPs in the National Council, was adopted by 53 votes in favour and 49 against on 21 September, 1987.

or written proceedings, time-limits, intervention, amendment of claims, etc. are therefore absent from Chapter 12. However, it was thought necessary to deal, for instance, with important practical questions like that of *lis alibi pendens* (Art 181), provisional and conservatory measures (Art 183), and the taking of evidence (Art 184), in particular in order to clarify the respective powers of the arbitrator and of the judge called upon to assist in the conduct of the arbitration proceedings.

An interesting innovation, suggested by the Swiss Arbitration Association, 'reverses' the old and unsatisfactory rule of the Concordat (Art 26)³³ regarding provisional orders: the arbitrator's jurisdiction in those matters is clearly affirmed, while the judge has only a subsidiary rôle, upon the arbitrator's request and if a party does not voluntarily comply with those measures. A useful precision is introduced in Art 183 para 4, which allows the arbitrator or the judge to request appropriate security before ordering provisional or conservatory measures.

Somewhat similarly, Art 184 provides that the arbitrator is to conduct the taking of evidence and that he can, whenever necessary, request the assistance of the judge of the seat (who shall apply his own law), whereas the parties, with the consent of the arbitrator, can also request the assistance of the judge of the seat of the arbitration. Mention must also be made of the general provision of Art 185 which lays down the duty of the judge (of the seat of the arbitration) to provide any necessary assistance in other situations to the arbitration.

(g) Jurisdiction

Two provisions of the chapter (apart from those relating to arbitrability, 177, and to the arbitration agreement, 178) relate to the fundamental question of the arbitrator's jurisdiction: Art 186 and Art 190 para 2 on 'appeals'.

The first article does not call for much comment and did not give rise to much parliamentary discussion. It is in fact little more than a restatement of a well-established solution: that, quite traditional on the continent of Europe, of 'competence-competence' (already recognised by the CIA, Art 8 para 1): the arbitrator has jurisdiction to decide upon his own jurisdiction (provided of course that an arbitration agreement appears to exist at least *prima facie*)³⁴.

Similarly, the rule of Art 186 para 2 is no innovation: objections to jurisdiction must be raised prior to any defence on the merits. A last paragraph provides that, 'as a general rule,' the arbitral tribunal shall decide on its own jurisdiction by a preliminary ruling (which does not prevent it, if the objection

³³ Article 26, para 1 CIA 'The public judicial authority alone has jurisdiction to make provisional orders'.

³⁴ See, among many cases, *ATF Wetco* of 14 November, 1979, *Semaine judiciaire* 1980, p. 443, and 108 Ia 308; *Répertoire de droit international privé suisse*, vol. I No. 202, 209. The principle of 'Kompetenz-Kompetenz' has not always been recognised in Switzerland, e.g. *ATF* 7, 700 of 1881 and 35 I 52 of 1909.

is too closely related to the merits, from postponing the decision until the award on the merits)³⁵.

(h) *The award*

On the decision on the merits, Chapter 12 of the Act, as modified by Parliament, has considerably improved the extremely incomplete Government draft. Following suggestions of the Swiss Arbitration Association, Parliament has inserted an important provision on the applicable law, while refusing – rightly it is submitted – to limit the freedom of the arbitrator with respect to the applicable conflict rules. At a time when it was completing the drafting of a Code of Private International Law (which it must have considered as good and ‘progressive’), Parliament properly resisted the temptation of deciding that arbitrators sitting in Switzerland were bound to apply (the new) Swiss conflict rules to the merits of the dispute. The legislator was aware of the obsolete character of such a solution and of its lack of justification in many international cases (having little or no connection with the country of the seat of the arbitration); it was also informed of modern arbitration practice favouring, in many cases, the so-called ‘direct route’ instead of the traditional conflictual method.

In any case, the autonomy of the parties had to be given the widest possible scope in Chapter 12 as well, in keeping with the basic philosophy of the whole Statute; hence the wording of Art 187 para 1: ‘the arbitral tribunal shall decide in accordance with the rules of law chosen by the parties.’³⁶ Whereas the German text, probably due to an oversight, speaks in terms of ‘law,’ i.e. ‘Recht,’ it is submitted that the correct text is that suggested by the experts of the Swiss Arbitration Association, i.e. the French text, from which it follows that the parties are not bound to choose a national system of law, but may well adopt for instance general principles of law or the so-called *lex mercatoria*.

International arbitrators sitting in Switzerland are *bound* to apply the ‘rules of law’ chosen by the parties; this does not mean that they may or should disregard strictly mandatory or ‘public law’ provisions contained either in the law chosen by the parties or (a much more delicate problem, which cannot be entered into here) contained in some other law, e.g. that of the place of performance or of the domicile of one of the parties, or the like.³⁷ Failing such a

³⁵ Cf. UNCITRAL Rules Art 21,4 and Model Law, Art 16 para 3.

³⁶ The draft submitted by the experts of the Swiss Arbitration Association was somewhat more explicit: ‘the arbitrator shall decide in accordance with the rules of law chosen by the parties or, failing such a choice, with the rules he deems appropriate; he shall take account in all cases of the relevant trade usages’ (cf. ICC Rules, 13 para 5).

³⁷ On this most important question, see e.g. Art 7 of the EEC Rome Convention on the law applicable to international contracts, Art 19 of the Federal Statute on Private International Law (on the taking into account of mandatory rules of foreign law).

choice, the arbitral tribunal also enjoys wide freedom, although more limited: using the method of its choice (either 'conflictual' or 'direct'), it must apply the 'rules of law,' whether of national or 'transnational' origin, provided they have the closest connection with the case.

Further, Art 187 para 2, following a traditional principle in Switzerland, as shown by the CIA (Art 31 para 3), provides that the parties may authorise the arbitral tribunal to decide *ex aequo et bono*, on the basis of *équité*, i.e. of general concepts of justice (i.e. according to the prevailing view, as 'amiable compositeur'), in other words without being bound by specific legal rules, of substance or of procedure, of course within the limits of international public policy).³⁸ The fact that arbitrators have been authorised to decide on the basis of *ex aequo et bono* considerations does not enable them, it is hardly necessary to add, to disregard clear provisions in the contract.

According to tradition and following a rule in the CIA, Art 188 enables the arbitral tribunal, unless the parties have agreed to the contrary, to render 'partial awards', a useful device (e.g. in cases when a final decision on a question of principle, like that of liability, can be rendered before proceedings on the quantum of damages).³⁹

Another illustration of the liberal approach adopted by the Swiss legislator in Chapter 12 is to be found in Art 189 para 1, according to which 'the arbitral award shall be rendered pursuant to the procedure and in the form agreed upon by the parties.' This is of course in harmony with the provision, already mentioned, of Art 182. It follows that the award could, if the parties so wish, be rendered orally and/or without any reasons given.⁴⁰

The law provides further that, failing an agreement of the parties, the award must be rendered in writing, dated and signed and that it must contain reasons. Art 189 para 2 makes it clear also that the chairman's signature suffices – a useful precision in the light of the not inconsiderable number of cases in which, in the last decade, an arbitrator in the minority has refused to sign the award⁴¹.

More important still is the rule, in the same Art 189 para 2, that, in the absence of an agreement of the parties, the award shall be rendered by a majority decision or, failing such majority, by the chairman alone⁴².

³⁸ Cf. on this Art 190 para 2, on the grounds for setting aside the award, in particular lit. *d* and *e*.

³⁹ The notion of 'partial award' is not always easy to distinguish from that of procedural or interim decisions, as shown by practice under the CIA; see on this P. Jolidon, *Commentaire du Concordat suisse sur l'arbitrage* 1984 p. 461ff.

⁴⁰ It would thus be somewhat difficult to imagine how an unreasoned award could be set aside on a substantial basis like that of Art 190 para 2 lit. *e*, i.e. for violation of public policy.

⁴¹ In practically all cases, the refusal came from a party-designated arbitrator. In a recent instance, however, strange though it may seem, the chairman dissented and went so far as to refuse to sign the award rendered jointly by the two other arbitrators.

⁴² See a similar provision in Art 16 para 3 of the Rules of the London Court of International Arbitration; cf. also ICC Rules Art 19.

Whether dissenting opinions are allowed at all, or, if so whether they are to be considered as a part of the award, remains extremely doubtful unless, of course, there is an express or tacit agreement of the parties to that effect.

(i) *Setting aside the award*

On the question of 'appeals' or, rather, means of setting aside an award, Chapter 12 contains three articles (190 to 192) which undoubtedly constitute three major innovations. This is no cause for surprise: since the very beginning of the work on the new Statute (in the early seventies), a main purpose of the new legislation was to restrict the possibilities of appeals against arbitral awards and to simplify and accelerate the procedure for setting them aside. In particular, it was generally recognised that the provisions of the Swiss CIA in that respect were ill-suited to the needs of international arbitration and allowed far too many possibilities of delay for the losing party, notwithstanding the efforts of most Swiss courts. As already stated, but the observation is worth repeating, experience had abundantly proved that the necessary control of State courts over domestic arbitral awards simply cannot be transposed as such to international arbitral awards.

A frequent criticism, in particular among the many foreign users of arbitration in Switzerland, related to the number and especially the nature of the grounds for setting aside an award listed in Art 36 of the CIA; particularly difficult to understand for the non-Swiss lawyer was the concept of 'arbitrariness' of the decision, based on the long list of cases dealing with the constitutional principle of 'equality before the law' (Art 4 of the Swiss Constitution).⁴³

(i) *Grounds for setting aside*

The first innovation relates to the grounds for setting aside an award.⁴⁴ A first look at the text of Art 190 para 2 shows (a) that the list of grounds is shorter (five cases instead of nine) than that in the CIA; (b) that the list is 'exhaustive' and as precise as reasonably possible, in order to increase foreseeability and legal certainty; (c) that the concept of 'arbitrariness' of the award has disappeared.⁴⁵

The first three grounds in the list are traditional, borrowed from the CIA, and hardly call for comment: (a) incorrect designation of the arbitrator or constitution of the tribunal; (b) erroneous decision as to the arbitrator's jurisdiction; (c) decision *ultra petita* or *infra petita*. The last two grounds are new and were introduced by the 'National Council' (following suggestions by the

⁴³ See on this, e.g. *Répertoire de droit international privé suisse*, vol. I, No. 489-510 and *passim*.

⁴⁴ In contradistinction to the CIA, Chapter 12 does not use the term 'nullity proceedings' ('nullité', 'Anfechtung') but the generic term 'recours'. This does not seem to imply the legislator's will to exclude the 'revision' of an award obtained by fraud or another criminal act, contrary to what appears to be the case under the French Decree of 1981.

⁴⁵ The Government Draft, Art 177 para 2, still mentioned 'arbitrariness', together with 'denial of justice.'

Swiss Arbitration Association): (d) failure to observe the equality of the parties or their right to be heard in adversarial proceedings, and (e) the award is incompatible with public policy. The first wording compares favourably with Art 36(d) of the Concordat, which referred to the broader concept of violation of a 'mandatory rule of procedure' in the sense of Art 25 CIA. As to the (fundamental) 'right to be heard' or '*principe du contradictoire*,' it has been and will frequently be invoked (and there is little doubt that the idea of 'flexibility' of arbitral procedure or the inexperience of some arbitrators may well lead to unfortunate 'accidents' in that respect).

To sum up, the necessity of a precise mention of these two basic principles, in Art 190 para 2(d) could hardly be disputed⁴⁶. But the difficult question remained: could the list end here? In other words, could the list of grounds for 'appeal' be limited to these four cases, of a 'procedural' nature (in the broad sense), and not contain any ground relating to the content of the award?

Parliament has answered in the negative, quite understandably, but was faced with the difficulty of replacing the rather vague concept of 'arbitrariness' by a more suitable term. After two texts expressing the same idea were considered and rejected⁴⁷, the following wording was adopted: 'when the award is incompatible with public policy.'

This wording, which non-lawyer members of Parliament did not find altogether clear, calls for three remarks: first, it clearly refers to *international* public policy – which is traditionally distinguished, in Swiss Private International Law, from the so-called 'internal public policy' (both of them being 'Swiss' but far from identical). Second, it is well-established by Swiss case-law (see also the new provision of Art 17 on 'negative' public policy) that the concept has an exceptional character and must be interpreted and applied with the greatest reserve.⁴⁸ Thirdly, the question will have to be decided by courts, when called upon to interpret Art 190 para 2(e), whether the fact that the award has been rendered in Switzerland (e.g. in a case between foreign parties) constitutes such a sufficient connection as to justify the intervention of Swiss public policy⁴⁹.

(ii) *Judicial authority*

A second important innovation is found in Chapter 12: from now on, only *one*

⁴⁶ The list of grounds in Art 190 para 2, lit. a–d, is similar to that in Art V, 1 (a–d) and 2 of the New York Convention of 1958; Cf. also Art 1502 (1–4) of the French Decree of 1981 amending the Code of Civil Procedure.

⁴⁷ The Swiss Arbitration Association had suggested: 'When the recognition or enforcement of the award would be, because of the decision on the merits, manifestly contrary to international public policy'. The National Council preferred to say: 'When the award violates so manifestly fundamental principles of law that it is contrary to public policy'.

⁴⁸ See *Répertoire de droit international privé suisse*, vol. I, Arbitrage, No. 350ff., and vol. I, Contrat international, No. 93ff., and ATF 84 I 119, 123 Kreissparkasse Waiblingen.

⁴⁹ This condition of application of public policy (the so-called sufficient connection or '*Binnenbeziehung*') in Private International Law matters has received different interpretations in different contexts.

judicial authority will decide 'appeals' against arbitral awards. In contradistinction to the Government draft which while giving jurisdiction to a single cantonal court maintained the possibility of recourse to the Swiss Federal Tribunal, Parliament has decided (Art 191 para 1) that the only competent authority is the Federal Tribunal⁵⁰.

A last-minute political compromise in Parliament with supporters of 'cantonal sovereignty' and jurisdiction led to the addition of a further option: the parties may agree that 'appeals' against arbitral awards should be within the jurisdiction of the cantonal judge of the seat of the arbitration instead of that of the Federal Tribunal. There is little doubt, in the light of the very clear wording of Art 191 para 2, that in such a case no further appeal to the Federal Tribunal is possible (notwithstanding the opinion advanced by some specialists of constitutional law, according to whom one may not waive recourse to the Federal Tribunal). The unambiguous intention of the legislator, in any case, has been to limit to one judicial authority only (as a rule the Federal Tribunal) any power to review and set aside an arbitral award.

(iii) *Exclusion agreements*

The third major novelty concerning judicial review of awards is contained in Art 192, which embodies one of the very first proposals for reform suggested by the Experts in the 70's. In the words of a preliminary report of the Ministry of Justice (p.363), the freedom of the parties (at least when foreign to Switzerland) to exclude by agreement the jurisdiction of Swiss courts to review the award was 'a constant request of practitioners.'

This innovation had a dual purpose: on the one hand, 'to ensure the greatest possible effect to the obligation to settle disputes' by an arbitral award which should really be final and conclusive.⁵¹ At the same time, there was an increasing desire to diminish the burden of Swiss courts called upon, in a not inconsiderable number of cases, to adjudicate over (often dilatory) requests for setting aside an award in cases having no real connection with Switzerland.

According to Art 192, when neither of the parties has a domicile, residence or establishment in Switzerland, they can expressly agree, in the arbitration agreement or an ulterior written agreement, to exclude any 'appeal' against arbitral awards or they may exclude such proceedings to set aside the award for one or the other of the grounds listed in Art 190 para 2. Since the idea was first put forward by the 'Commission of Experts' (in the early seventies), in a

⁵⁰ Following the procedure of the so-called 'public law appeal', Art 84-96 of the Statute on Federal Judicial Organisation; this kind of appeal can only lead as a rule to the annulment of the decision. The request to set aside the award must be filed within 30 days from the communication of the award, i.e. from the moment the award is 'final' according to Art 190 para 1.

⁵¹ Message, No. 2101.17.

somewhat timid manner, it was gradually expanded and developed, in particular so as to include the possibility of partial exclusion.

The solution of the new law is in full harmony with the wide scope given, as already stated, by the whole Statute to the autonomy of the parties. It constitutes a reasonable and happy solution, it is submitted, between two extremes: one being the rather 'brutal' Belgian solution which excludes in such a case any jurisdiction of Belgian courts⁵² and, on the other hand, the régime of the Swiss Concordat which results in a hardly justifiable overload of Swiss courts in purely foreign cases in which they would normally have no jurisdiction whatever.

One should not overlook the fact that such waiver must fulfil formal conditions in order to avoid any doubt as to the real intention of the parties to exclude Swiss jurisdiction. Contrary to what appears to be the position in England, no exclusion agreement under Art 192 could be inferred from the simple fact that the parties have, for instance, adopted the ICC Arbitration Rules which provide that the arbitral award shall be 'final'.⁵³

There should be no misunderstanding on the real position of the new Swiss law in this field. The provisions which have just been mentioned do not mean that no setting aside of arbitral awards is desirable, except perhaps in the most extreme cases, or that arbitrators should be allowed – as now seems to be the case in France according to some decisions of the Paris Court of Appeal – to decide according to their 'sovereign appreciation' and escape practically any judicial review but a purely formal one. Although limited in number and in scope, the grounds for setting aside an award are sufficient, apart from their preventive effect, to diminish substantially the famous 'arbitral risk.'

The possibility of exclusion agreements under Art 192 does not contradict the basic position just outlined. It deals with a different problem; the question it attempts to answer is not 'Should there be any appeal, any review of arbitral awards' but 'In what country should such a judicial review normally or preferably take place'? Is it the country – or countries – where the award will have to be carried out, the country or countries of the parties' domiciles or establishments? Opinions may well vary as to the ideal solution but it is difficult to contend that the best possible solution is judicial review in the country of the seat of the arbitration, i.e. in a place chosen (directly or, quite often, indirectly) precisely because of its total lack of connection with the case and/or for reasons of convenience having no relation to the case.

⁵² The Belgium approach, described in J. Paulsson 'Arbitration Unbound in Belgium', *Arbitration International* was strongly criticised in the Seminar organised, on 16–17 November, 1987, by the ICC Institute of International Business Law and Practice, by several leading practitioners including Lord Justice Mustill, Prof. G. Bernini and others.

⁵³ ICC Rules, Art 24 para 2 provides: 'By submitting the dispute to arbitration by the ICC, the parties shall be deemed to have undertaken . . . to have waived their right to any form of appeal insofar as such waiver can validly be made.'

Having regard to the great variety of situations and interests involved, it is submitted that by far the best or, should we say, the least objectionable solution was to leave it to the parties themselves, in accordance, let it be repeated, with the general liberal philosophy of the whole Federal Statute, to decide whether, and to what extent, they preferred total acceptance of the 'arbitral risk' without any judicial review, at least in Switzerland, or whether on the contrary they wanted to keep some possibility of judicial redress.

As was to be expected, the idea of exclusion agreements met with some opposition in Parliament, where municipal arbitration-minded MPs found it hard to accept an absence of judicial protection for parties arbitrating in Switzerland. For those cases where the award (between foreign parties) must be enforced in Switzerland, Art 192 para 2 aims at filling a gap, in providing the application 'by analogy' of the New York Convention of 1958.

It is certainly premature to conclude this brief survey of the new Swiss law by attempting to suggest any value judgment, especially on a comparative basis; in any case, the present writer would hardly be in the best position to propose objective opinions on the subject. There is no single ideal arbitration system and this is no matter for regret: a good case can be made, on the contrary, in favour of a plurality of arbitration systems, between which practitioners can choose the one which is best-suited to their particular needs. Moreover, any national legislation, on arbitration as on other subjects, necessarily reflects a certain tradition, a certain experience, and a certain *Weltanschauung*. The new Swiss law is no exception to the rule. Chapter 12 of the Federal Statute on Private International Law is dominated, like other chapters, by a strong liberalism and characterised by the very wide scope recognised to the freedom of the parties (a fact which made it possible, and desirable, to avoid the rigidity and drawbacks of detailed rules). But State courts have an important role to play to assist the arbitrators and ensure a smooth functioning of arbitration proceedings. The new Swiss system can thus be described as both flexible and liberal, while a reasonable degree of judicial review over awards is maintained (unless foreign parties have chosen to exclude it).

Of course, many points of interpretation will arise which will have to be decided by practice and by the courts. One thing, however, seems certain: the new Federal law which has just been adopted – after many years of preparation and discussion, both outside Parliament and inside it – has been tailored to the specific needs and nature of international arbitration. If only for that reason alone, one may venture the view that its superiority over the Swiss Concordat of 1969 will be generally acknowledged. □

ANNEX*

The Swiss Federal Private International Law Act

CHAPTER XII

I. Scope of Application. Seat of the Arbitral Tribunal

Art 176

1. The provisions of this chapter shall apply to all arbitrations where the seat of the arbitral tribunal is situated in Switzerland and where at least one of the parties was, at the moment when the arbitration agreement was concluded, neither domiciled nor habitually resident in Switzerland.
2. The provisions of this chapter shall not apply where the parties have excluded its application by an agreement in writing and have agreed to the exclusive application of the rules of cantonal law relating to arbitration.
3. The seat of the arbitral tribunal shall be determined by the parties or the arbitration institution designated by them or, in default or either, by the arbitrators.

II. Arbitrability

Art 177

1. Any dispute, the resolution of which can be valued in money terms, can form the object of an arbitration.
2. If a party to the arbitration agreement is a State or an enterprise or organisation controlled by it, it cannot rely on its own law to contest the arbitrability of a dispute or its own capacity to be a party to an arbitration.

III. The Agreement to Arbitrate

Art 178

1. As regards its form, an arbitration agreement shall be valid if it is made in writing, by telegram, telex, teleprinter or any other method of communication which enables it to be proved by means of a text.
2. As regards its substance, an arbitration agreement shall be valid if it complies with the conditions laid down by either the law chosen by the parties, the law applicable to the substance of the dispute, in particular the law applicable to the main contract, or Swiss law.
3. The validity of an arbitration agreement cannot be disputed on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which has not yet arisen.

* *There is no official English translation of the Act.* Private translations, more or less satisfactory, have been circulated by some Swiss practitioners. The Swiss Arbitration Association will shortly publish a revised, 'semi-official' English text, a first *draft* of which is published here; it is based on a translation prepared by Mr Adam Samuel of Gray's Inn, Barrister-at-Law.

IV. The Arbitral Tribunal*Art 179***1. The Constitution of the Arbitral Tribunal**

1. The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.
2. In the absence of such an agreement, applications can be made to the court of the seat of the arbitral tribunal; it shall apply by analogy the provisions of cantonal law concerning the appointment, removal or replacement of arbitrators.
3. Where a court is asked to appoint an arbitrator, it shall grant the application made to it, unless a summary investigation reveals that no arbitration agreement exists between the parties.

2. The Removal of Arbitrators*Art 180*

1. An arbitrator can be removed if
 - (a) he does not correspond to the description agreed upon by the parties;
 - (b) there exists a ground for his removal in the arbitration rules agreed upon by the parties; or
 - (c) where the circumstances give rise to legitimate doubts about his independence.
2. A party can only request the removal of an arbitrator whom it appointed or in whose appointment it participated, on grounds of which it became aware after the making of the appointment. The arbitral tribunal and the other parties must be informed without delay of the grounds for removal.
3. In the event of a dispute and to the extent to which the parties have not provided for a procedure to govern the removal of arbitrators, the court with jurisdiction of the seat of the arbitral tribunal will make the final decision.

V. Lis Pendens*Art 181*

The arbitral proceedings commence the moment that one of the parties submits the dispute to the arbitrator or arbitrators nominated in the arbitration agreement or, in the absence of such a nomination, the moment that one of the parties initiates proceedings for the constitution of the arbitral tribunal.

VI. The Arbitral Procedure**1. The General Principle***Art 182*

1. The parties can, directly or by reference to arbitration rules, determine the arbitral procedure to be followed; they can also subject it to the procedural law of their choice.
2. Where the parties have not determined the arbitral procedure to be followed, it shall be fixed by the arbitral tribunal, so far as necessary, either directly or by reference to a law or arbitration rules.
3. Whatever procedure is chosen, the arbitral tribunal must ensure that the parties are treated equally and that their right to be heard in a contested proceeding is respected.

2. Provisional and Conservatory Measures*Art 183*

1. Unless the parties have agreed otherwise, the arbitral tribunal can order provisional or conservatory measures at the request of any party.

2. If the party so ordered does not comply voluntarily, the arbitral tribunal can request the assistance of the court with jurisdiction. The latter shall apply its own law.

3. *The Taking of Evidence*

Art 184

1. The arbitral tribunal shall conduct the taking of evidence itself.

2. Where the assistance of the judicial authorities of the State is necessary for the taking of evidence, the arbitral tribunal or the parties, with its consent, can request the assistance of the court of the seat of the arbitral tribunal; this court shall apply its own law.

4. *Other Cases*

Art 185

Where the assistance of the judicial authorities is necessary in other cases, the assistance of the court of the seat of the arbitral tribunal can be requested.

VII. Jurisdiction

Art 186

1. The arbitral tribunal shall rule on its own jurisdiction.

2. Any objection to its jurisdiction must be raised prior to any defence on the merits.

3. In general, the arbitral tribunal shall decide on its own jurisdiction by means of a preliminary ruling.

VIII. The Decision on the Merits

1. *The Applicable Law*

Art 187

1. The arbitral tribunal shall decide in accordance with the rules of law chosen by the parties or, in the absence of such a choice, in accordance with the rules of law with which the dispute has the closest connection.

2. The parties can authorise the arbitral tribunal to decide *ex aequo et bono*.

2. *Partial Awards*

Art 188

Unless the parties have agreed otherwise, the arbitral tribunal can render partial awards.

3. *The Arbitral Award*

Art 189

1. The arbitral award shall be rendered pursuant to the procedure and in the form agreed upon by the parties.

2. In the absence of such an agreement, the award shall be rendered by a majority decision, or in the absence of a majority, by the president of the arbitral tribunal alone. It shall be in writing, reasoned, dated and signed. For this purpose, the signature of the president of the tribunal shall suffice.

IX. The Finality of the Award, Setting aside Proceedings

1. *The General Principle*

Art 190

1. The award shall be final from the moment of its communication.

2. It can only be set aside where

- (a) a sole arbitrator has been incorrectly appointed or the arbitral tribunal has been incorrectly constituted;
- (b) the arbitral tribunal has incorrectly declared itself to have or not to have jurisdiction;
- (c) the arbitral tribunal has decided on claims which were not submitted to it or has omitted to decide on any claim submitted to it.
- (d) the principles of the equality of treatment of the parties or their right to be heard in a contested proceeding have not been observed;
- (e) the award is incompatible with public policy.

3. Setting aside proceedings can only be brought against a preliminary ruling, on the basis of sub-paragraphs 2(a) and (b) herein; time shall run from the communication of the ruling.

2. *The Court for Setting Aside Proceedings*
Art 191

1. Setting aside proceedings shall only be brought before the Federal Supreme Court; the procedure shall be governed by the provisions of the Judicial Organisation Act relating to public law appeals.

2. Nevertheless, the parties can agree that instead of the Federal Supreme Court, the court of the seat of the arbitral tribunal will decide such applications. The Cantons shall designate a single cantonal instance for this purpose.

X. Exclusion Agreements
Art 192

1. If neither party is domiciled, habitually resident or has a place of business in Switzerland, they can, by an express declaration in the arbitration agreement or in a subsequent agreement in writing, exclude all right to bring proceedings to set aside the arbitral award; they can also exclude the right to bring setting aside proceedings for any one or other of the grounds set out in Article 190(2).

2. Where the parties have excluded all right to bring proceedings to set aside the award and the enforcement of the latter is sought in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards shall apply by analogy.

XI. The Deposit of the Award and Certification of its Enforceability

1. Either party can, at its expense, deposit a copy of the award with the Swiss court of the seat of the arbitral tribunal.

2. The Swiss court shall certify, at the request of any party, that the award is enforceable.

3. At the request of any party, the arbitral tribunal shall certify that the award has been rendered in conformity with the provisions of this Act; such a certificate shall be equivalent to a deposit.

XII. Foreign Arbitral Awards
Art 194

The recognition and enforcement of foreign awards shall be governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. □