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English translation from German original

I. General observations and suggestions

1. ASA is an independently managed, not-for-profit association within the meaning of Article 60 et seq. of the Swiss Civil Code [ZGB]. It has over 1,200 members, approximately one third of whom are domiciled abroad. ASA's members are practitioners and academics involved in international and domestic arbitration. Since it was founded in 1974, ASA has become one of the leading arbitration associations, bringing together arbitration experts from all over the world. ASA is not an arbitration institution. It maintains local groups in all the Swiss regions and, since 2016, a South-East Asia Chapter based in Singapore.

2. This opinion is based firstly on the work of an ASA task force (consisting of Prof. Nathalie Voser, Zurich; Dr. Andrea Meier, Zurich; Dr. Michele Patocchi, Geneva; Dr. Christian Oetiker, Basel; Dr. Bernhard Berger, Berne) and secondly from a comprehensive internal ASA consultation process carried out with the local ASA groups in Zurich, Geneva, Basel, Berne, Vaud and Ticino. Where reference is made to majority opinions, this refers to the surveys and feedback from the local groups, collected, inter alia, at public events for the discussion of the revision proposal between January and March 2017.

1. On the basic characteristics and objectives of the revision proposal

3. ASA unreservedly shares the assessment expressed in the explanatory report on the revision proposal, according to which Chapter 12 of the PILA remains "a high-quality, innovative arbitration law", even thirty years after it was adopted. It is particularly appreciated for being clear and concise, and also for the fact that it affords the parties maximum autonomy and flexibility in structuring their proceedings, within a transparent framework that abides by the rule of law. When compared with its international counterparts, Chapter 12 of the PILA is an exception. Its originality and uniqueness as well as its fundamental principles should be preserved.

4. Therefore, ASA approves of and welcomes the general direction of the revision proposal. In ASA's view, the draft's basic features are in line with the precepts set out in Motion 12.3012, which mandated the Federal Council to "*update the provisions on international arbitration […] with the goal of maintaining Switzerland's attractiveness as a place for international arbitration*."

5. The "light revision" suggested in the preliminary draft of 11 January 2017 (incorporating the established case law of the Swiss Supreme Court; removing any unclear formulations; improving legal certainty and legal clarity; harmonisation of Chapter 12 with more recent developments), goes in the desired and right direction. Changes and amendments should be made only "to the extent necessary" or indeed "as little as possible". The rest should be left to the parties and the arbitral tribunal (see Art. 182 paras. 1 and 2 PILA). In

this, Chapter 12 PILA differs from many other arbitration laws, which in some cases set out considerably more comprehensive regulation. Keeping to the minimum is, in ASA's view, a “selling point” for Switzerland as a place for arbitration and this approach should be preserved. One of the most important of the fundamental pillars in private arbitration, and in Chapter 12 PILA in particular, is, and must remain, the principle of party autonomy.

6. In our opinion, one of the legislative priorities should be to make Chapter 12 more comprehensible to foreign users. More than any other federal act, Chapter 12 is addressed to foreign users, be they foreign parties who opt for Switzerland as the place of arbitration, foreign lawyers or arbitrators who are involved in Swiss-based arbitration proceedings. In light of this, ASA especially welcomes the following aspects of the revision proposal:

7. - Codification of case law of the Swiss Supreme Court which, over the last decades, has filled certain legislative gaps (for example, bringing the rules on independence/ impartiality of the arbitrators into line with recognised international standards; admissibility of revision of international arbitral awards; admissibility of the remedies of interpretation, correction and supplementation of arbitral awards).

8. - Removal from Chapter 12 of references to other legislation, such as the previous reference in Art. 179 para. 2 PILA to the Federal Swiss Code of Civil Procedure [CCP]. As far as possible, Chapter 12 should be comprehensible and applicable on a self-standing basis, with no cross-references to other legislation.

2. Relationship to various types of arbitration proceedings

9. ASA also shares the view expressed in the explanatory report, according to which Chapter 12 PILA, because of its characteristics (in particular its flexibility and autonomy in how proceedings are structured), can be used for very different types of arbitration proceedings. These include ad hoc proceedings, institutional arbitration proceedings, commercial arbitration, IP/IT arbitration, sports arbitration, investment arbitration, arbitration proceedings for associations, etc. Thus, we welcome the fact that the preliminary draft refrains from developing “special solutions” for individual types of arbitration proceedings and preserves the previous model of a uniform law on international arbitration. From ASA’s point of view, this is the best method for ensuring that Switzerland retains its optimal conditions as a venue for all these forms of international arbitral proceedings over the coming decades.

3. Relationship to Part 3 of the CCP

10. ASA approves the approach taken in the revision proposal whereby Chapter 12 will not “automatically” incorporate concepts that were introduced into Part 3 of the CCP in 2011 on domestic arbitration. There is good reason for retaining the dual system. In some cases it may be appropriate to incorporate provisions of Part 3 CCP in Chapter 12 PILA (or vice versa). However, the rules of international and domestic arbitration need not necessarily be the

same, nor formulated in equal detail in all areas. In particular, ASA welcomes the fact that the revision proposal refrains, for example, from regulating counter-claims, set-off, joinder or security for costs.

4. No regulation in the area of Art. 7 PILA

11. ASA shares the view expressed in the preliminary draft, according to which there is no need to introduce the principle of the negative effect of competence-competence and its extension to arbitral tribunals based abroad. ASA has examined the proposal put forward in the "Lüscher Initiative" in detail. It shares, however, the view expressed in the explanatory report according to which the matter is controversial in legal commentary and that at present no clear solution has been formulated (Report, p. 14). ASA also shares the view expressed in the report (on p. 14) according to which this topic has hardly ever led to any concrete problems in legal practice. Thus, in our opinion, there is no urgent need for action.

5. No creation of a national *juge d'appui*

12. The reasons expressed in the report on the preliminary draft for not introducing a national *juge d'appui* are cogent. Moreover, the number of such proceedings is relatively small, so that again, we see no urgent need for action. Nor is there any convincing argument to be made to the effect that having a national *juge d'appui* would make Switzerland a more attractive arbitration venue. International arbitration proceedings conducted in Switzerland are predominantly located in the large cities of Zurich and Geneva, with, to a lesser degree, some proceedings being conducted in Basel, Berne, Lausanne and Lugano. Thus, by virtue of this fact alone, there are courts in these cities that are already familiar with *juge d'appui* proceedings. In the experience of ASA, these courts perform their *juge d'appui* tasks well.

6. Duty to raise procedural protests immediately (Art. 182 PILA)

13. In our view, this fundamental principle should be expressly mentioned in the law. It is a central, undisputed tenet of procedural law that follows from the duty to act in good faith and thus also applies to arbitration proceedings based in Switzerland (see also, for example, Art. 373 para. 6 CCP). In practice, this principle is of great importance. There are numerous cases in which the Swiss Supreme Court has refused to hear the merits of a challenge because of waiver. It also is in the interest of foreign users of Chapter 12 to have this principle expressly stated in the law. In our view, the right place for this would be in Art. 182.

14. The following is a suggestion for the possible formulation of an Art. 182 para. 4 PILA:

"*A party that continues to proceed in the arbitration without promptly stating its objection to the non-compliance with any applicable procedural rule that*

should have been recognised by a reasonably diligent person, cannot rely on such non-compliance at a later stage."

7. Appeals in civil-law matters (Art. 190 PILA)

15. ASA welcomes the fact that the preliminary draft leaves Art. 190 PILA untouched, especially as regards the complete list of grounds for setting aside.

16. In response to the preliminary draft, there were individual suggestions that the time limit for initiating setting-aside proceedings should be extended to 60 or even 90 days. However, ASA considers the general 30-day time limit that also applies to appeals against arbitral awards (Art. 100 para, 1 of the Federal Supreme Court Act [SCA]) should remain unchanged. The short and streamlined annulment proceedings are an important selling point for arbitration in Switzerland. Switzerland's outstanding position by comparison with its international counterparts should not be adversely affected.

17. With a view to making Chapter 12 more user-friendly, ASA recommends, however, seeking a solution that allows the time limit of 30 days to be expressly mentioned in Chapter 12 itself, as is planned for the 90-day time limit for requests for revision (see Art. 190a para. 2 PILA preliminary draft). We would welcome a situation that allows the reader (in particular a foreign user) to see directly from Chapter 12 that the time limit is (only) 30 days. A possible solution for a new Art. 190(4) PILA could read as follows:

"*The time limit for the action for annulment is 30 days from notification of the arbitral award, subject to any suspension pursuant to Art. 46 of the Federal Supreme Court Act."*

8. The capacity of bankrupt foreign entities to be a party

18. In ASA's view, there is no need for legislative intervention on this topic, since the Swiss Supreme Court, in BGE/ATF 138 III 714, already corrected the adverse implications of the widely criticised Vivendi judgement (op. cit. 3.6).

9. Extension of arbitration agreement to third parties

19. ASA welcomes the fact that this (rather complex) topic is not addressed in the preliminary draft.

10. Relationship to pre-arbitral ADR proceedings

20 ASA considers that it is reasonable to refrain from legislating on this complex point. Also, a recent judgement by the Federal Court (BGE/ATF 142 III 269) has already provided considerable guidance on this issue, and may even have resolved it. Once again, there is no requirement for regulation here.

II. Opinion on the individual reforms suggested

1. On Art. 176 para. 1 PILA preliminary draft (specification of the scope of application of Chapter 12)

21 ASA welcomes the suggested specification of the scope of application of Chapter 12. The intended correction of the Swiss Supreme Court's case law is in the interest of legal certainty and legal clarity, in particular for parties to an arbitration agreement domiciled in Switzerland. This will make the scope of application of Chapter 12 clearer – which must be welcomed – by ensuring in future that all relationships that are cross-border at the time of the conclusion of the arbitration agreement can be conducted according to the rules of international arbitration (Chapter 12 PILA).

22. However, in ASA's view the formulation "*their domicile or habitual residence, their establishment or registered office, is not in Switzerland*" is not compatible with the declared objective of the revision proposal. Through the addition of "establishment", there is a risk of uncertainty in relation to legal entities, since, according to the wording an international arbitration relationship is also in place if two parties domiciled in Switzerland conclude an arbitration agreement, provided that one of them has at least an establishment abroad. Conversely, an establishment in Switzerland would turn a foreign party into a Swiss one, which in certain configurations could lead to the application of the CCP. Therefore, the addition of "establishment" should be avoided.

23. In addition, we recommend that the "registered office" rather than "domicile" should be mentioned first, since arbitration proceedings would most often be used by legal persons.

24. ASA proposes the following suggested formulation:

"The provisions in this section apply to arbitral tribunals based in Switzerland, provided that, when the arbitration agreement is concluded, at least one of the parties to the arbitration agreement has <u>its registered office, domicile or habitual residence</u> outside Switzerland."

2. On Art. 176 para. 2 PILA preliminary draft (subsequent "written" agreement)

25 In ASA's view, the suggested specification of a subsequent "written" agreement should be dropped. The criterion of "express declaration" also extends to the "subsequent agreement". Thus, the addition is superfluous in terms of content and the purpose is not clear. Moreover, the recommended addition would give rise to new, unresolved questions and problems, e.g. whether written form pursuant to the Code of Obligations, or written form within the meaning of Art. 178 para. 1 PILA, is intended.

26. The same problem also arises with Art. 192 para. 1 PILA, where the applicable legal text already mentions that a waiver of annulment can be made *"through an express declaration in the arbitration agreement or in a subsequent, <u>written</u> agreement".* ASA suggests that these two provisions should be coordinated and unified as indicated above.

3. On Art. 178 para. 1 (written form requirement for arbitration agreements)

27. ASA welcomes the suggested adjustments to Sentence 1 Art. 178 para. 1 PILA, preliminary draft. They bring about consistency with the identical formulations in Art. 358 CCP and Art. 17 para. 2 CCP. By way of an aside, it would make sense, for reasons of coherence, to make the corresponding adjustments to the now out-dated Art. 5 PILA at the same time.

28. The recommended regulation on "half-written form" in Sentence 2 of Art. 178 para. 1 PILA, preliminary draft was a somewhat controversial point in the course of ASA's internal consultation. Among other things, concerns were raised regarding whether this would undermine the consensual nature of arbitration, since only one party would be protected, for which there is no justification, or that the half-written form contradicted the principle in the established practice of the Swiss Supreme Court, according to which the text of an arbitration agreement must clearly reproduce the will of both parties to dispense with the jurisdiction of the state courts. It was also claimed that the previous regulation on form in Art. 178 para. 1 PILA has hardly ever led to any problems in practice, so that there was no need for regulation.

29. However, overall there was majority support within ASA's consultation for the recommendation on "half-written form" for the reasons mentioned in the explanatory report. It should also be noted that, in legal commentary, many authors argue convincingly in favour of the view that the "half-written form" is already admitted under the applicable regulation in Art. 178 para. 1 PILA. On that understanding, the recommended amendment would constitute merely a clarification.

4. On Art. 178 para. 4 PILA preliminary draft (arbitration clauses in unilateral legal transactions)

30. ASA understands the suggested provision on "arbitration clauses in unilateral legal transactions" in Art. 178 para. 4 of the PILA preliminary draft, with reference to the explanatory report (p. 20), to the effect that it would serve primarily to clarify that no objection on the basis of formal invalidity can be made against such arbitration clauses, provided that they can be evidenced by a text. The report confirms, with a reference to Art. 178 para. 2 PILA that the question of substantive validity is resolved in the case of arbitration clauses in unilateral legal transactions *"in the same way as in arbitration agreements, according to the law chosen by the parties as being applicable to the dispute, in particular to the main contract, or according to Swiss law*" (p. 20).

31. In ASA's view, the point made in the explanatory report (at the bottom of p. 20 and top of p. 21) that, in any case, it is a mandatory in principle under Swiss law that the arbitration clause in question be validly made in a unilateral legal transaction, is also significant. It would be desirable for this to be spelled out in the text of Art. 178 para. 4 of the PILA preliminary draft (drawing on Art. 1066 of the German Code of Civil Procedure and Art. 581 para. 1 of the Austrian Code of Civil Procedure). ASA suggests the following wording:

"For arbitration clauses that are validly made in a unilateral legal transaction, the provisions in this section shall apply by analogy."

5. On Art. 179-180 of the PILA preliminary draft (appointment, challenge, removal, replacement)

32. ASA welcomes the suggestion that the reference to the CCP contained in the present Art. 179 para. 2 should be deleted. Foreign users, in particular, should not have to consult several legislative acts unless necessary. However, if the current reference is deleted, the most important rules of the CCP concerning the appointment, challenge, removal and replacement, which apply today to Chapter 12 of the PILA by means of the reference in Art. 179 para. 2 PILA should be incorporated into Chapter 12. Otherwise, gaps will arise that will ultimately require the *juge d'appui* to apply the CCP rules by analogy.

33. Examples:

34. - According to the preliminary draft, the (crucial) question of how many members an arbitral tribunal should have, where the parties have not included a provision for this, is left unresolved. Under the current regime with the reference to Art. 179 para. 2 PILA, this question is automatically answered by reference to Art. 360 CCP.

35. - Art. 179 para. 2 of the PILA preliminary draft regulates the competence of the state courts in appointing and replacing arbitrators but leaves the question of how the court has to undertake the appointment or replacement open. This is clearly regulated at present with the reference in Art. 179 para. 2 of the PILA to the CCP rules (regarding appointments see Art. 362 para. 1 CCP; regarding replacement see Art. 371 CCP).

36. - With the present reference in Art. 179 para. 2 PILA to the CCP rules, the procedure for a challenge before a state judge is clearly regulated (see Art. 369 CCP). The new provision recommended in Art. 180 para. 3 of the PILA preliminary draft falls short of the provision in Art. 369 CCP. Thus, it is unclear, for example, whether the preliminary draft dispenses with the process whereby, at a first stage, the challenge should be addressed to the arbitrator challenged and – only where the latter opposes this - the challenge is to be submitted to the State Court (see Art. 369 paras. 2 and 3 CCP). The explanatory report does not discuss these questions, although it does mention that the challenge procedure is based on the domestic arbitration regulations in Art. 369 CCP (see report, p. 23). ASA would be pleased to see the two stages of the challenge procedure retained in Chapter 12 of the PILA in future, particularly since this solution is widely used in international ad-hoc arbitration due to a similar regulation in the UNICTRAL Arbitration Rules (see Art. 13 UAR). It should be examined, however, as to whether having two time limits of thirty days in Art. 369 is also appropriate in international arbitration. In our opinion, reducing the first time limit to 15 days, as is the case, for example, in Art. 13 UNICTRAL Arbitration Rules, would be reasonable.

37. In summary, ASA would be in favour of having the procedures of appointment, challenge, removal and replacement regulated in greater detail in Chapter 12 PILA than is the case in the preliminary draft. To the extent that this is appropriate and useful, in our view, this could be accomplished by a (partial) adoption of the corresponding provisions in the CCP, which currently apply to international arbitration as well via the reference in Art. 179 para. 2, although, as previously mentioned, it would also be acceptable if the two legislative acts did not entirely correspond (see para. 10 above).

6. On Art. 179 para. 2 of the PILA preliminary draft ("non-national" arbitration)

38. ASA welcomes this suggestion. Although such arbitration agreements are far less frequent in practice than "arbitration in Switzerland", in terms of the objective of promoting Switzerland's attractiveness as a venue for arbitration, it is reasonable that (following the French example – see Art. 1505 para. 4 of the *Code de procédure civile*), in Switzerland the state courts lend their support for the constitution of an arbitral tribunal also in case of a "non-national" arbitration agreement.

39. The question arises as to whether Chapter 12 PILA should, in the case of "non-national" arbitration agreements, additionally require that the arbitral seat be selected "in Switzerland" on the basis of Art. 179 para. 2. In ASA's view, there is no need to specify this. As a further token of faith in private autonomy, Chapter 12 should leave it up to the arbitral tribunal or the parties to determine the seat, whether in Switzerland or abroad.

7. On Art. 179 para. 2 of the PILA preliminary draft ("Arbitration in Switzerland")

40. ASA welcomes the fact that the preliminary draft contains a provision resolving the "arbitration in Switzerland" problem. Although arbitration agreements of this kind are rare in practice, it should nevertheless be avoided that, in such cases, uncertainty or jurisdictional gaps might come about, due to federalism, ultimately making it impossible to conduct arbitration proceedings, even though the parties had clearly agreed to have any disputes resolved "in Switzerland." The recommended jurisdiction of the first *juge d'appui* to be approached is a simple and practical approach that makes sense.

8. On Art. 179 para. 2bis of the PILA preliminary draft (appointment in multiple-party proceedings)

41. The suggested solution whereby, in the absence of a joint appointment by several plaintiffs or defendants, the *juge d'appui* "may" appoint all the arbitrators, is pragmatic and makes sense. It makes it possible to use this instrument flexibly and to tailor it to individual cases.

42. However, ASA believes that the turn of the phrase "*das staatliche Gericht am Sitz des Schiedgerichts"* [the State Court at the seat of the arbitral tribunal] is too narrowly defined in relation to the amended provision on competence in

Art. 179 para. 2 of the PILA preliminary draft. ASA suggests that this wording be replaced by "*the competent State Court pursuant to para. 2":*

"In the case of a multiple-party arbitration case, the competent State Court, pursuant to para. 2, may appoint all members of the arbitral tribunal."

9. On Art. 179 para. 3 of the PILA preliminary draft (replacement)

43 ASA welcomes the suggested mention of "replacement". In other respects, our general observations on Art. 179-180 of the PILA preliminary draft apply mutatis mutandis (see paras, 32-37 above).

10. On Art. 179 para. 4 of the PILA preliminary draft (duty of disclosure)

44. ASA welcomes the incorporation of a provision on the duty of disclosure. The duty of disclosure is practically universally recognised in arbitration, not least due to being contained in Art. 12(1) of the *UNCITRAL Model Law* and Art. 3(a) of the *IBA Guidelines on Conflicts of Interest in International Arbitration*. It will help, *inter alia,* to avoid situations in which potential grounds for challenge that are known only to the arbitrator, first come to light during the proceedings or after their conclusion.

45. The formulation for the duty of disclosure suggested in Art. 179 para. 4 of the PILA preliminary draft draws from the wording in Art. 363 CCP. The latter is based on the wording in Art. 12(1) of the UNCITRAL Model Law ("*When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence*") and that in Art. 3(a) of the above-mentioned IBA Guidelines "*If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority…").* Thus, ASA's view, the suggested amendment meets the prevailing international minimum standard.

46. However, ASA recommends that on the topic of disclosure one should consider going a step further, the reason being that, from the perspective of the arbitrator, the question of whether a particular circumstance should be disclosed to the parties cannot be assessed solely on the basis of whether it might objectively give rise to justifiable doubts. In current international arbitration practice, circumstances are often disclosed to parties that might, from the parties' perspective (i.e. subjectively) give rise to doubts concerning the arbitrator's independence or impartiality but that as such do not constitute any risk of bias (seen objectively). The version of Art. 179 para. 4 put forward in the preliminary draft may give the misleading impression that only objective bases for assuming bias need to be disclosed or that any voluntary disclosure also constitutes an objective basis for bias. A possible alternative formulation that would remove this ambiguity, would be the following:

"A person approached to act as an arbitrator must promptly disclose the existence of circumstances that, from the perspective of the parties or otherwise, may give rise to reasonable doubts concerning his or her independence or impartiality. This duty shall remain in place throughout the entire proceedings."

11. On Art. 180 para. 1(b) of the PILA preliminary draft (alignment of the French text)

47. ASA welcomes the editorial alignment of the French text.

12. On Art. 180 para. 1(c) of the PILA preliminary draft (impartiality)

48. ASA welcomes the addition of "*or his/her impartiality*". This brings Chapter 12 PILA into line with currently prevailing international standards and the case law of the Federal Supreme Court.

13. On Art. 180 para. 2 of the PILA preliminary draft (duty of care)

49. ASA welcomes the addition of "*despite appropriate care*." This brings Chapter 12 PILA in line with the applicable case law of the Federal Supreme Court.

50. In ASA's view, however, there is a need for clarification of how Sentence 2 in paragraph 2 ("The ground for challenge must be notified without delay to the arbitral tribunal and the other party") relates to the new paragraph 3. It is not clear whether in a case of challenge to one's own arbitrator, other time limits will apply in future ("without delay" instead of within 30 days). ASA is of the opinion that this question needs to be resolved with a single solution for all challenges. The UNCITRAL Arbitration Rules, which are widely used in international ad hoc arbitration, do not distinguish in terms of time limits between challenges of one's own versus other arbitrators (see Art. 12 para. 2 and Art. 13 UAR). For reasons of simplicity, an analogous rule is required for Chapter 12 PILA.

14. On Art. 180 para 2bis of the PILA preliminary draft (removal)

51. ASA welcomes the suggested regulation concerning removal. In other respects, general observations on Art. 179-180 of the PILA preliminary draft apply mutatis mutandis (see paras, 32-37 above).

52. The requirement of written form in sub-para. a needs to be examined. Here too, a signature should not be required.

15. On Art. 180 para 3 of the PILA preliminary draft (challenge and removal procedure)

53. ASA calls for a more precise and detailed regulation of the challenge and removal procedure. For details, see para. 36 above.

16 On Art. 180 para 4 of the PILA preliminary draft (revision in the case of subsequently discovered grounds for challenge)

54. ASA welcomes the suggestion that where grounds for challenge are discovered after conclusion of the arbitration proceedings, there should, in the future, be the possibility of revision (on the basis of the considerations set out in BGE/ATF 142 III 521 E.2).

55. However, ASA is of the opinion that the solution in the preliminary draft raises some questions that need to be resolved:

56. - Relationship to actions for annulment: Clarity needs to be provided about what applies if the grounds for challenge come to light after conclusion of the arbitration proceedings but prior to the expiry of the 30-day time limit for actions for annulment. In ASA's view, there is a need to specify that the provisions on revision only apply where the ground for challenge is discovered after expiry of the time limit for actions for annulment. If the reason for challenge is discovered prior to the expiry of the that time limit, the party invoking it must, as under the law currently in force, challenge the arbitral award on the basis of Art. 190 para. 2(a) PILA. ASA suggests specifying Art. 180 para. 4 of the PILA preliminary draft as follows:

"If a ground for challenge only comes to light after expiry of the time limit for challenging an arbitral award, the provisions concerning revision shall apply."

57. - Regulation of the basis for revision: A mere reference to the "*revision provisions"* in Art. 180 para. 4 of the PILA preliminary draft is insufficient, as the grounds for revision themselves remain unregulated. A subsequently discovered ground for challenge does not fall under Art. 190a para. 1 a of the PILA preliminary draft. It can only be subsumed under Art. 190a para. 1(b) of the PILA preliminary draft if it is associated with criminal acts on the part of the arbitrator concerned. This calls for a new ground for challenge to be created in Art. 190a para. 1 of the PILA preliminary draft, to be regulated separately and expressly. This would clarify that the only grounds for challenge that could be invoked would be reasons that could not have been raised in the course of the proceedings, despite appropriate care. This corresponds to the established practice of the Federal Supreme Court concerning subsequently discovered facts or evidence. The same must apply to subsequently discovered grounds for challenge. Moreover, in order to prevent abuse of the new ground for revision, one needs to ensure that only serious cases of lack of independence or impartiality can be brought. Otherwise, the danger arises that arbitral awards rendered in Switzerland could be challenged for trivial reasons and after considerable time has elapsed. Thus, ASA suggests as an overall solution to these problems, expanding Art. 190a para. 1 of the PILA preliminary draft by the following sub-paragraph c:

"A party can apply for the revision of a decision if… []

c. it subsequently discovers a manifest ground for challenge of a member of the arbitral tribunal that it was unable to raise in the course of the proceedings, despite appropriate care."

58. - Approval of the application for revision: ASA believes that the new ground for revision also requires a more specific formulation in Art. 119b SCA. This should clarify that the provisions on replacement apply if the arbitral tribunal, after approval of the ground for revision, is no longer fully constituted (see the analogous regulation in Art. 399 para. 2 CCP). ASA therefore suggests expanding Art. 119b of the SCA preliminary draft by the following paragraph 4:

"*If the arbitral tribunal is no longer complete, the provisions on the replacement of members of the arbitral tribunal shall apply."*

17. On Art. 183 para. 2 of the PILA preliminary draft (provisional measures)

59. ASA welcomes the fact that the preliminary draft retains the principle of the (optional) competing jurisdictions of the state courts on the one hand and the arbitral tribunals on the other.

69. ASA also welcomes the suggested alignment of para. 2, according to which, in the future, the parties (acting without the agreement of the arbitral tribunal) can directly apply to a state court for assistance. ASA would also be in favour of including a further specific formulation in Art. 183 para. 2 PILA, in the future, to the effect that "*the state court at the seat of the arbitral tribunal or at the place where the measure shall be enforced" is meant*".

61. In ASA's view, a clarification would further be useful in para. 2 to the effect that an arbitral tribunal or a party in foreign arbitration proceedings can also request the support of the state court in Switzerland where the measure is to be enforced.

62. It would also make sense for para. 2 to include the point that the state court must issue the necessary orders for enforcement of the measure. This would clarify that the state court's task is not to order its own provisional measure but merely to issue the orders needed to enforce such measures. In doing so, it will apply its own law. Thus, the state court can reformulate or alter a measure issued by an arbitral tribunal that is not known in Swiss law so as to reconcile it with Swiss law.

63. In line with the foregoing, ASA recommends expanding Art. 183 para. 2 of the PILA preliminary draft as follows and incorporating a new para. 3:

"[2] If the party in question does not freely submit to the ordered measure, the arbitral tribunal or a party can apply to the state court for assistance. An arbitral tribunal or a party to foreign arbitration proceedings can apply to the state court at the place where the measure is to be enforced.

[3] The court will issue the necessary orders for enforcement. In so doing, it will apply its own law."

18. On Art. 184 paras. 2 and 3 of the PILA preliminary draft (taking of evidence)

64. ASA welcomes the addition suggested in Art. 184 para. 3 of the PILA preliminary draft, which endeavours to align the provision with Art. 11a PILA. In ASA's view, there needs to be an explanation in Art. 184 para. 2 (by analogy with Art. 183 para. 2 PILA; see para. 60 above), that the court intended is the "state court at the seat of the arbitral tribunal or at the place of the requested taking of evidence".

65. Moreover, ASA recommends that, for matters relating to the taking of evidence, access should be granted to a Swiss *juge d'appui* for arbitral tribunals or parties in foreign arbitration proceedings. This approach might at first glance have little to do with Switzerland's attractiveness as a place of arbitration. However, we are convinced that by doing this, Switzerland would send out an important signal on the international arbitration scene (removal of unnecessary obstacles, speeding up of arbitration proceedings). The German legislation could be referred to as a possible model (Art. 1050 German Code of Civil Procedure). The use of this rule was described in detail by M. Wirth ("*Legal assistance from German courts to foreign arbitral tribunals in the taking of evidence – a Practice Report*", SchiedsVZ 2005, 66-71).

66. Against this background, we suggest expanding Art. 184 para. 2 of the PILA preliminary draft as follows:

"If conducting the procedure for the taking of evidence requires mutual legal assistance, the arbitral tribunal, or a party acting with the consent of the arbitral tribunal, can apply to the state court at the seat of the arbitral tribunal or at the place of the requested taking of evidence. An arbitral tribunal or a party to foreign arbitration proceedings may, with the consent of the arbitral tribunal, apply to the state court at the place where the requested taking of evidence is to take place."

19. On Art. 185 of the PILA preliminary draft (further assistance from the state court)

67. ASA would be in favour of clarification in the context of the amendment that further assistance from the state court within the meaning of Art. 185 PILA can be requested by the arbitral tribunal and also by a party (even without the consent of the arbitral tribunal). This is a rather uncontroversial area in legal commentary, particularly as Art. 185 PILA is considered a "catch-all" provision for very different types of "assistance" from a *juge d'appui* (see, for example, Berger/ Kellerhals, 3rd edition 2015, margin note No. 1228).

68 ASA suggests the following formulation:

"If further assistance is needed from the state court, the arbitral tribunal or a party may apply to the court at the seat of the arbitral tribunal."

20. On Art. 187 para. 1 of the preliminary draft (alignment of the German text)

69. ASA welcomes the alignment of the German text with the French version (*règles de droit*). In terms of terminology, ASA believes, however, that the term *Rechtsregeln* is preferable to *Rechtsnormen*.

21. On Art. 189 para. 3 of the PILA preliminary draft (costs of the arbitration proceedings)

79. In Art. 189 para. 3, the preliminary draft provides that, in the future, the PILA should expressly state that, unless the parties have agreed otherwise, the arbitral tribunal shall decide on the amount and allocation of the arbitration and party costs. The explanatory report claims that there is a need to regulate this competence expressly in law, after the decision by the Federal Supreme Court in BGE/ATF 136 III 597 that an arbitral tribunal does not have the authority to render a binding decision on the amount of the arbitrators' fees. The report then mentions that it has deliberately refrained from incorporating an additional ground for challenge (on the basis that fees are manifestly too high), in order to avoid arbitral awards being more frequently contested in future only on the basis of costs.

71. In the course of the internal ASA consultations, this suggestion provoked mixed reactions. They ranged from unreserved agreement (for the reasons stated in the report) to outright rejection. One of the objections to the provision was that it constituted interference in a third-party relationship, i.e. the terms of appointment of the arbitral tribunal (*receptum arbitri*), which was said to be inappropriate. Another was that the Swiss Supreme Court had, in BGE/ATF 136 III 597, for comprehensible reasons (no one can be his or her own judge), denied the authority of the arbitrators to determine the amount of their fees comprehensively and finally. The concern was also expressed that arbitral tribunals, on the basis of Art. 189 para. 3 of the PILA preliminary draft, might be tempted in the future to use the arbitral awards as a means to collect outstanding fees and expenses, which would be questionable.

72. Apart from these controversial opinions, in the course of ASA's consultation it nevertheless proved possible to formulate the following essential points regarding the contested Art. 189 para. 3 of the PILA preliminary draft:

73. - A majority takes the view that a provision that would vest arbitral tribunals with the competence for setting their own remuneration would only be acceptable if accompanied by an addition to the grounds for challenge set out in Art. 190 para. 2 PILA, in order to prevent abuse. Otherwise, the representatives of this view claim, there would be a risk that the absence of any possibility of review would meet incomprehension and rejection from both users and critical observers of Switzerland as a place for arbitration.

74. - A majority takes the view that the exhaustive list of the grounds for challenge as per Art. 190 para. 2 PILA should remain unaltered, i.e. neither amended in terms of the content nor expanded (see margin note No. 15 above).

75. Taking account of both of these two majority-held views, ASA recommends that Art. 189 para. 3, as put forward in the PILA preliminary draft, should be dropped. The concern to make no changes to the list of grounds for annulment in Art. 190 para. 2 PILA, in our view, outweighs the interest in regulating the arbitral tribunal's authority to set the amount of its own fees comprehensively, finally and with no possibility of recourse.

76. Another reason why ASA believes that it is reasonable to drop Art. 189 para. 3 of the PILA preliminary draft is that the explanatory report correctly states that, in practice, this regulation "would only affect a small number of cases" since "the parties, by selecting institutional arbitration or in the course of the 'terms of reference' at the outset of the proceedings, expressly transfer the authority to decide on the arbitration and party costs to the arbitral tribunal" (p. 27). Thus, overall, it seems appropriate to leave this matter to be resolved by the parties and the arbitrators. There is no need for action here, i.e. no need for regulation.

77. In the interest of completeness, "unfortunate" situations such as the one in which the Swiss Supreme Court had to rule in BGE/ATF 136 III 597, can be avoided in all cases by the arbitral tribunal making its agreement to conduct the arbitration proceedings conditional on the provision of appropriate advances on costs.

22. On Art. 189a of the PILA (correction, interpretation and addition)

78. ASA welcomes the addition of the legal remedy of correction, interpretation and addition. It incorporates the Swiss Supreme Court's case law into the statute and will, in particular, serve as a useful guide for foreign users of Chapter 12.

79. In the formulation of the individual legal remedies, however, ASA would like to see more precise wording in order to avoid giving the impression – particularly to foreign users – that this could be used to request a "*revision au fond*". Art. 189a para. 1 of the preliminary draft should therefore contain a more detailed formulation in line with the practice of the Swiss Supreme Court, e.g. as follows:

"Unless the parties have reached an agreement to the contrary, each party can apply to the arbitral tribunal within 30 days from the issue of the award to have computational, clerical, printing or similar errors contained in the arbitral award corrected, to have individual parts of the operative part of the decision interpreted, or to seek an additional award on claims that were raised in the course of the arbitration but not decided in the operative part of the award. By the same deadline, the arbitral tribunal can also provide a correction, interpretation or addition on its own initiative.

23. On Art. 190 para. 2 of the PILA preliminary draft (alignment of the German text).

80. ASA welcomes the editorial alignment in para. 2 sub-para. a.

81. In editorial terms, moreover, in the German version of para. 2 sub-para. d – by analogy with the French text and in order to take account of the Swiss Supreme Court's case law – the addition "in adversarial proceedings" should be inserted.

24. On Art. 190a of the PILA preliminary draft (Revision)

82. ASA welcomes the inclusion of the remedy of revision and the associated codification of the Swiss Supreme Court's case law.

83. ASA would like to make the following observations and suggestions in relation to the details of the suggested regulation:

84. - On Art. 190a para. 1(a) of the PILA preliminary draft: the phrase "*in earlier proceedings*" should be replaced by "*in the course of the arbitration proceedings".* Moreover, the legislative text should clarify that the parties can only submit new facts and evidence that they were unable to submit during the arbitration proceedings despite appropriate care. This reflects the established practice of the Federal Supreme Court today. ASA suggests the following wording:

"A party can request a revision, if:

a. it subsequently learns of significant facts or finds crucial evidence which it was unable to submit in the course of the arbitration proceedings, despite appropriate care. Facts and evidence that only occurred after the arbitral award are excluded."

85. - Regarding revision in the case of subsequently discovered grounds for challenge, see the submissions in para. 57 above.

86. - Regarding Art. 190a para. 2 of the PILA preliminary draft: if the absolute time bar to seek revision has elapsed, ASA submits that the same solution that applies elsewhere should also apply to international arbitral awards. There is no objective justification for restricting revision due to a crime or misdemeanour to ten (10) years in international arbitration (but see Art. 190a para. 2 of the PILA preliminary draft), whereas this ground for revision is not subject to any time bar in other fields of the law. If the right to seek revision due to criminal actions were to become time-barred after ten years, the only successful request for revision on this ground to date would have been rejected because it would have been time-barred (see BGer 4A_596/2008 of 6 October 2009). Therefore, it is suggested that the second sentence in Art. 190a para. 2 of the preliminary draft be replaced by the following:

"An application for revision must be filed within 90 days of discovery of the ground for the review. After expiry of a ten-year period from the notification of the arbitral award, revision can no longer be applied for, save in the case of Art. 190a para. 1(b)."

87. - On Art. 190a para. 3 of the preliminary draft: ASA is in favour of allowing the parties to agree to waive their right to contest the award by applying for revision as well as waiving their right to an action for annulment. The formulation of the provision in substantive terms should be coordinated with the new version of Art. 192 para. 1 PILA suggested (on this point see also paras. 94 et seq below).

88. ASA does not understand the justification for the suggested restriction of waiver in Art. 190a para. 3 of the PILA preliminary draft to revision due to subsequently discovered new facts and evidence. The reasons for this are as follows:

89. - Firstly, it is appropriate for the possibility of waiver to apply (also) to the new ground for revision of subsequently discovered grounds for challenge. This should in fact be the counterpart to the possibility of waiving an action for annulment due to the irregular composition of the arbitral tribunal (Art. 192 para. 1 in conjunction with Art. 190 para. 2(a) PILA).

90. - Furthermore, ASA considers that the prohibition on advance waiver in the case of crimes or misdemeanours (para. 1(b) of the preliminary draft) is not convincing. Art. 192 para. 1 PILA admits the waiver of annulment even for incompatibility with *ordre public* (public policy) and thus the most extreme form of substantive or formal "injustice". There are no plans to change this (and rightly so). However, if Art. 192 para. 1 PILA is to retain the previous full scope of waiver, then the same waiver should apply to revision. It is for the parties to restrict their waiver to individual grounds for revision in the course of exercising their autonomy to structure their relationship freely.

91. To summarise, ASA suggests the following wording for Art. 190a para. 3 of the preliminary draft (see also margin note No. 102 below regarding the waiver of actions for annulment):

"*The parties may, by means of an express declaration in the arbitration agreement or in a later agreement, exclude entirely the right to apply for revision of arbitral awards; they may also exclude only individual grounds for revision."*

92. ASA further suggests merging the provisions on the waiver of revision and the waiver of annulment into a single article, with the heading "waiver of legal remedies". In ASA's view, this should be done in Article 192.

25. On Art. 191 of the PILA preliminary draft (Appeal body)

93. Art. 191 of the preliminary draft extends the judicial authority of the Swiss Supreme Court to include revisions and states that the procedure in the case

of revision should be in line with the new Art. 119b SCA. These changes are a direct consequence of Chapter 12 PILA with provisions on revision (Art. 190a of the PILA preliminary draft) and thus do not give rise to any observations, other than that the margin heading should be adapted ("*forum for legal remedies*").

26. On Art. 192 para. 1 of the PILA preliminary draft (waiver of legal remedies)

94 According to the current legal situation, parties with their domicile, habitual residence or an establishment in Switzerland cannot validly submit to a waiver of annulment. The preliminary draft does not depart from this principle, without any explanation in the explanatory report. In ASA's view, however, there are good reasons for amending this:

95. - Reinforcing party autonomy: Chapter 12 is based on the principle of party autonomy. This principle would be further strengthened if, in future, Swiss parties were also to have a right to waive remedies.

96. - Anachronism: providing "special" protection for domestic parties "from themselves" does not seem like a contemporary approach. From the point of view of a foreign user, this would seem like an incomprehensible advantage for domestic users ("home turf").

97. Relationship to other arbitration venues: in general, parties knowingly agree on waiver clauses. Thus, if a Swiss party wishes to conclude a valid waiver agreement with a foreign party, in the current legal situation, a place of arbitration in Switzerland cannot be considered. The parties have to select a different jurisdiction (e.g. France). Thus, removing the current protection of Swiss parties "from themselves" is also in the interest of preserving and promoting Switzerland's attractiveness as a venue for arbitration.

98. - Reducing the Swiss Supreme Court's workload: allowing waiver for Swiss parties as well could also result in an overall reduction in the number of actions for annulment and requests for revision.

99. Thus, ASA suggests to examine whether, in the future, Swiss parties to international arbitration proceedings seated in Switzerland should be allowed to waive legal remedies. Allowing this seems reasonable, in particular since Swiss parties would (also) continue to enjoy the grounds for refusal pursuant to Art. V of the New York Convention in connection with the enforcement of awards (see Art. 192 para.2 PILA).

100. Moreover, for the reasons stated above in relation to Art. 176 para. 2 PILA preliminary draft, ASA suggests that the criterion of a subsequent "written" agreement in Art. 192 para. 1 PILA (see margin note No. 25 f. above) be dropped.

101. In light of the foregoing suggestions, Art. 192 para. 1 PILA could, in future, read as follows:

"The parties may, by means of an express statement in the arbitration agreement or by a subsequent agreement, waive the appeal against the arbitral decision, in full, or they may exclude one or more of the grounds for appeal listed in Art. 190 para. 2."

102. If the approach for allowing Swiss parties also to waive these remedies is not taken, in our opinion and by analogy with the suggestion concerning Art. 176 para. 1 PILA preliminary draft, "registered office" should be mentioned before "domicile" (see para. 22 above):

"If none of the parties have their registered office, domicile, habitual residence or an establishment in Switzerland, they may, by means of an express statement in the arbitration agreement or by a subsequent agreement, waive the action for annulment in full, or they may exclude one or more of the grounds listed in Art. 190 para. 2."

103. Finally, ASA, as mentioned above, would also be in favour of merging the provisions on the waiver of revision with the waiver of annulment (see margin note No. 92 above).

27. On Art. 193 paras. 1 and 2 of the PILA preliminary draft (certificate of enforceability)

104. ASA has no observations on the merely editorial adaptation of Art. 193 para. 1 of the PILA preliminary draft.

105. With regard to para. 2 of Art. 193 PILA, ASA proposes to specify – as in para. 1 - that it is the state court "*at the seat of the arbitral tribunal*" that is intended. This would eliminate any doubt about which state court has jurisdiction.

106. In addition, ASA would favour the correction of the practice of several cantonal courts, which issue certificates of enforceability only in adversarial proceedings. In a case where the respondent does not participate, adversarial proceedings can lead to considerable problems and delay in the enforcement of arbitral awards abroad, which is not in the interest of Switzerland as an attractive arbitration venue. Since a certificate of enforceability from the country of origin of the arbitral award alone is not sufficient to give rise to recognition or enforcement, in ASA's view it would be reasonable to state in Art. 251a CCP and Art. 356 para. 3 CCP that the certificate of enforceability is a deed under voluntary jurisdiction. The same matter could be clarified in the same place in the text with respect to the deposit of arbitral awards.

28. On Art. 77 para. 1 of the SCA preliminary draft (amount in dispute; English language)

107. ASA welcomes the suggested specification in Art. 77 para. 1 of the preliminary draft of the SCA, according to which an action for annulment is admissible

"*regardless of the amount in dispute".* Art. 77 para. 1 of the SCA is thereby given the status of a *lex specialis*, which takes precedence over the regulation on the requirement of economic value for a dispute to be admitted in civil-law actions for annulment pursuant to Art. 74. Admittedly, arbitration proceedings with an amount in dispute below CHF 30,000 are a rare exception. Nevertheless, the addition seems to favour legal certainty and makes sense in light of the right of access to justice.

108. By contrast, the suggested new Art. 77 para. 2bis SCA (that "legal briefs" can be drafted in English) provoked mixed reactions in the course of the internal ASA consultations.

109. Those in favour, essentially accepted the points made in the explanatory report (pp. 11-12), i.e. that English is the dominant language today in international arbitration and thus allowing English submissions would make it easier for the many users of arbitration who are based abroad to access the Swiss Supreme Court, reinforcing Switzerland's attractiveness as a place for international arbitration. It was also stated that it would lead to a reduction in translation work, which, in light of the short time limit for lodging an action for annulment (only 30 days), would constitute a significant improvement.

110. The opponents stated their concern, inter alia, that allowing submissions in English could lead to actions for annulment and requests for revision being increasingly drafted in future by foreign law firms, while the Swiss lawyers would end up playing a subsidiary role (if any). A further objection was that allowing English submissions could lead to an undesirable increase in actions for annulment and requests for revision, entailing a risk in terms of quality, in particular, since the legal remedies for challenging arbitral awards tend to be technical matters for which there is, in some cases, no suitable vocabulary in English and, moreover, the relevant legal texts (PILA and the Supreme Court Act) are not available in an official English version.

111. Overall, the internal ASA surveys indicated that the majority viewed the suggestion positively. Therefore, ASA approves the amendment. From ASA's point of view, the "protectionist" arguments are not convincing. The objective in revising Chapter 12 of the PILA is not to preserve the interests of certain groups of users but to reinforce Switzerland's overall attractiveness as a place for arbitration. The proposed amendment is appropriate for achieving this objective.

112. In connection with Art. 77 para. 2bis of the SCA preliminary draft, ASA would like to point out that the term "legal briefs" ("*Rechtsschriften*") is probably too narrow. The term "submissions" ("*Eingaben*") is preferable.

113. The suggested regulation in para. 2bis raises the question of which national language the Swiss Supreme Court should use for conducting its proceedings and reaching its decision, in the event that the appeal is lodged in English. According to the established case law of the Supreme Court, the decision should be issued in the national language of the action for annulment. In the

case of an annulment action in English, the Supreme Court will need to develop its own, independent practice in this matter.

114. It is unclear whether, according to the suggested wording, the possibility of lodging submissions in English is limited to actions for annulment or also applies to requests for revision. The explanatory report states that the intention is to facilitate the proceedings "*before the Federal Court as the competent judicial authority for actions for annulment and revisions in arbitration matters*". However, it should be noted that Art. 77 SCA clearly states that it refers only to "civil-law appeals". In order to avoid any confusion, there needs to be an additional paragraph expanding Art. 119b SCA (or a reference to Art. 77 para. 2bis).

29. On Art. 119b of the SCA preliminary draft

115. In ASA's view, as set out above, the provision should be expanded by a paragraph 4 (see para. 58 above). There are no other observations to be made.

30. On Art. 251a of the CCP preliminary draft

116. ASA welcomes the suggested new Art. 251a of the CCP preliminary draft, which generally refers to assistance proceedings before the courts (*juge d'appui* proceedings) in the form of summary proceedings.

31. On Art. 353 para. 2 of the CCP preliminary draft

117. See our observations on Art. 176 para. 2 of the PILA preliminary draft in paras. 25 et seq. above. These apply mutatis mutandis.

32. On Art. 356 para. 3 of the CCP preliminary draft

118. No observations.

33. On Art. 358 paras. 1 and 2 CCP

119. See observations on Art. 178 paras. 1 and 4 of the PILA preliminary draft in margin notes No. 27 et seq. and margin notes No. 30 et seq. above. These apply mutatis mutandis.

34. On Art. 367 para. 2 of the CCP preliminary draft

120 See observations on Art. 180 para. 2 of the PILA preliminary draft in margin notes No. 49 et seq. above. These apply mutatis mutandis.

35. On Art. 369 para. 6 of the CCP preliminary draft

121 See observations on Art. 180 para. 4 of the PILA preliminary draft in margin note No. 56 above. These apply mutatis mutandis.

36. On Art. 388 para. 3 of the CCP preliminary draft

122. No observations