

A NEW SWISS §1782?

ARTICLE 185A PILA AND THE ASSISTANCE OF SWISS COURTS IN SUPPORT OF FOREIGN ARBITRAL EVIDENTIARY PROCEEDINGS



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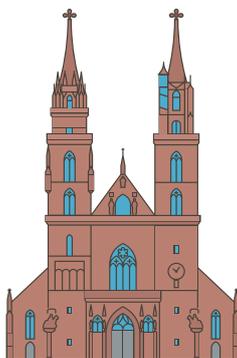
One difficulty of obtaining evidence in arbitration is the lack of coercive power of arbitral tribunals: without such coercive power, the evidence production in arbitration proceedings heavily relies on the voluntary production of the parties. However, if the evidence is in the hands of a third party or if a party is not cooperating, the arbitral tribunal has no direct coercive power to obtain the requested information. This is all the more so when the evidence is located in another jurisdiction.

Until 2020, a foreign arbitral tribunal seeking to obtain evidence in Switzerland would have to turn to its local state court or *juge d'appui* to send a request for mutual assistance in civil matter to Switzerland where it would be executed by a Swiss court. Given how cumbersome and slow mutual assistance proceedings may be, arbitration practitioners would rarely use this option.

This put Switzerland somewhat behind in terms of obtaining evidence of other countries, such as France, Germany,

England, and the United States of America (in the districts where courts agree to grant an §1782 application in support of arbitration proceedings).

This has now been remedied with the changes incorporated in Article 185a of the Swiss Private International Law Act (PILA) in the context of the revision of its Chapter 12, that entered into force on 1 January 2021.



Whereas most of the changes brought to Chapter 12 were meant to codify court practice, during the consultation phase of the legislative

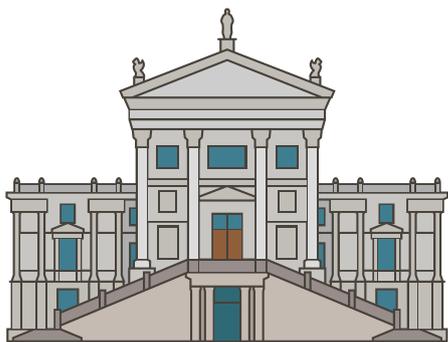
process, arbitration academics and practitioners suggested to incorporate a new provision to provide foreign arbitral tribunals and parties with a better access to Swiss courts, both to grant interim measures and to provide evidence.

Article 185a para. 2 PILA, which deals with the obtaining of evidence, has the following content:

An arbitral tribunal seated abroad or a party to a foreign arbitral proceeding with the consent of the arbitral tribunal may request the assistance of the court at the place where evidence is to be taken. Article 184, paragraphs 2 and 3, applies by analogy.

Swiss courts may now thus act as *juge d'appui* to obtain evidence in support of proceedings pending before foreign arbitral tribunals.

In principle, Swiss courts apply Swiss law, namely the Swiss Code of Civil Procedure (CCP) in the taking of evidence for foreign or international arbitration tribunals.



However, another innovation was brought by the 2020 revision of Chapter 12 of PILA with the addition of a second sentence to Article 184 para. 3 PILA, according to which Swiss courts may “upon request adopt or take into consideration other forms of procedure”.

This is similar to what is provided at Article 11a PILA regarding international judicial assistance to foreign proceedings. It is generally considered that “*other forms of procedure*” refer to the set of rules that the parties have agreed to apply in their arbitration proceeding or that the arbitral tribunal has decided to apply.

At the moment, there are no published appellate precedents on Articles 184 para. 3 or Article 185a para. 2 PILA. It is unlikely, however, that Swiss courts will agree to impose on Swiss third parties rules on the taking of evidence that would be radically different from those of the Swiss Code of Civil Procedure.

Admissible evidence under Swiss law (Article 168 CCP) is:

- a. testimony;
- b. physical records;
- c. inspection;
- d. expert opinion;
- e. written information;
- f. questioning and statements of the parties.

The evidence sought in Switzerland by arbitral tribunals will typically be testimony and physical records.

The taking of witness testimony in Switzerland is made by the court and the parties’ counsels are not entitled to cross-examine witnesses.

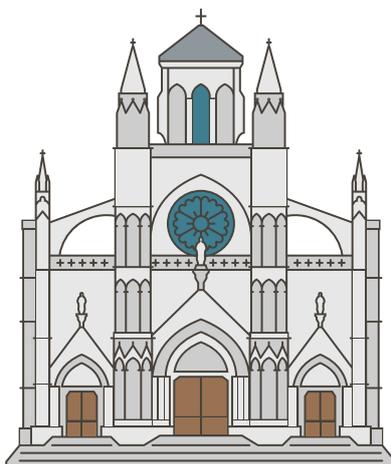
In respect of physical records, such as paper or electronic documents, Swiss courts will in principle not issue discovery-type orders but rather orders targeting specific documents.

Under the Swiss law, third parties may under certain circumstances refuse to cooperate to the giving of evidence.

Under Article 165 CCP, spouses, partners and close relatives of the person from whom information is sought have an absolute right to refuse to cooperate.

Under Article 166 para. 1 CCP, other third parties have a limited right to refuse to cooperate:

- In establishing facts that would expose them or a close associate as defined in Article 165 CPP to criminal prosecution or civil liability.
- To the extent that the disclosure of a secret would be punishable under Article 321 of the Swiss Penal Code (SPC), auditors excepted: professional secrecy of ecclesiastics, lawyers (to the exclusion of atypical activities, such investment advice, financial intermediation or management of companies), notaries, medical doctors, and their auxiliaries. However, with the exception of lawyers and ecclesiastics, they must cooperate if they are subject to a disclosure duty or if they have been released from duty of secrecy, unless they show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.
- In establishing facts that have been confided in him or her in his or her official capacity as a public official as defined in Article 110 para. 3 SPC.



Holders of other legally protected secrets may refuse to cooperate if they can show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth (Article 166 para. 2 CCP).

Banking secrecy is a typical example of other legally protected secrets within the meaning of Article 166 para. 2 CCP. The judge weighs up the interests and decides on a case-by-case basis if the disclosure duty outweighs the right to privacy and if banking secrecy should be lifted. In principle, a bank is not allowed to refuse to cooperate when information protected by secrecy relates to data of an essentially economic nature.

In conclusion, Article 185a para. 2 PILA is a powerful tool for arbitration tribunals or parties authorized by arbitration tribunals to obtain evidence in Switzerland. Time will tell to what extent Swiss courts will agree to adopt or take into consideration other forms of procedure than Swiss law in taking evidence for arbitral tribunals.

