Switzerland

NEW ARBITRATION LAW

Arbitration; Civil procedure; Switzerland

As of the beginning of 2011, a new era has started for Swiss litigators. Up until now, civil procedural law was always a legal matter lying entirely in the competence of the Swiss Cantons. As a consequence of this, there were 26 civil procedural orders and many more customs amongst the Swiss civil courts which made litigating in courts other than the familiar ones very unpopular. This, however, is the past. As of this year, there is a Swiss Federal Civil Procedural Act ("CPA") in force which will unify the rules to be observed in litigation all over Switzerland.

Arbitration is qualified as a special kind of civil procedure. Therefore, so far, the 26 Cantons of Switzerland were competent to enact their own law. Fortunately, in this respect, there was more unity than with regard to litigation before the public courts. The 26 Cantons had concluded a treaty, the so-called Arbitration Concordat ("AC"), which laid down the basic rules of arbitration that were not left up to the parties to decide. In the course of the enactment of the CPA, the AC was replaced with new provisions in the CPA, namely arts 353 to 399 CPA (also called the Third Part of the CPA). Most of the provisions of the AC have been literally or almost literally copied into the CPA. Some of them, however, have substantially changed.

The authors will hereafter outline in brief which changes were made in the enactment of the CPA and what has remained identical.

As was the case before, the first question the parties will have to ask when entering into arbitration in Switzerland is the question on the applicable procedural law. Regular arbitrators will know that there is not only the new Third Part of the CPA but also the well-proven Twelfth Chapter of the Swiss Federal Private International Law Act ("PILA") which has neither been replaced nor amended with regard to its substantive content. If the parties have not agreed on the application of the one set of provisions or the other, the Twelfth Chapter of the PILA will apply to arbitration cases in which the seat of the arbitral tribunal is in Switzerland and in which at least one party was not domiciled or did not have its ordinary residence in Switzerland at the time the arbitral agreement was concluded. To the contrary, if the seat

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of the arbitral tribunal is in Switzerland and if the provisions of the PILA do not apply, the provisions of the Third Part of the CPA will govern the proceedings.

As of this year, however, the parties can bilaterally agree which set of rules (CPA or PILA) is to be applied. Both acts contain a provision pursuant to which the parties may agree that the respective other act be applicable. Such an agreement has to observe the formal requirements of an arbitration clause under the said act. So far, it was only possible to opt out from the PILAPILA and agree to apply the AC whereas this was not possible vice versa. Now, with the new CPA, all parties in all circumstances have this flexibility and may choose the applicable law pursuant to their liking.

The most important provisions of the CPA which differ from the previous provisions of the AC are the following:

(i) The arbitral agreement must be concluded in writing or in any other form which allows proof of the agreement by text (art. 358 CPA). The AC, so far, had requested an arbitral agreement to be concluded in writing which, according to Swiss law, meant that it needed to be signed by the parties. As new media have changed the way business is conducted nowadays, this restriction was no longer practicable, and the formal requirements have been adapted to modern reality.

(ii) Preliminary and protective measures can be ordered by the arbitral tribunal unless otherwise agreed by the parties (art.374 CPA). Previously, under the AC, this was not possible. The public courts had to be addressed which made proceedings more complicated and lengthy—a procedural nuisance which is now abolished.

(iii) If a party declares to set off the claim subject to arbitration with another claim, the arbitral tribunal may rule on the other claim as well (art.377 CPA). This was not the case previously. Under the CA, an arbitral tribunal had to stay the proceedings until a public court or another arbitral tribunal (depending on the applicable competence) had finally ruled on the other claim. This used to be a much-liked rule frequently abused by uncooperative defendants in order to stall the arbitration proceedings to the detriment of the respective claimants which has now been waived.

(iv) An arbitral award which is rendered under the regime of the CPA can be appealed with the Federal Supreme Court unless the parties agree on an appeal to the Cantonal Superior Courts (arts 389 and 390 CPA). However, whichever court is competent for such appeal, the grounds for appeal remain identical and restricted. The losing party may only claim that: (a) the arbitral tribunal was not formed correctly; (b) its decision on its competence was incorrect; (c) it decided *ultra petita* or *infra petita*; (d) it did not treat the parties identically or did not grant one or more parties its/their right to be heard; (e) its decision is arbitrary based on arbitrary facts or based on an obvious breach of law or justice; and (f) the fees and expenses charged are too high (art.393 CPA). Previously, any appeals had to be filed with the local Cantonal Superior Court while the grounds for appeal were determined by its own local law. As there were 26 Cantonal Superior Courts and 26 civil procedural orders, much depended on the seat of the arbitration. Thanks to the unification in the CPA, this is no longer the case.

All of these changes have been made in order to strengthen arbitration pursuant to the CPA. The parties have been given more possibilities to make choices, and loopholes have been eradicated. Thanks to the CPA, arbitration according to internal Swiss law has become more modern and more attractive than before.

Whereas the above-mentioned new provisions pursuant to (i) and (ii) are substantially identical pursuant to the PILA, the one pursuant to (iii) is slightly different and the one pursuant to (iv) is substantially different. The jurisdiction for the arbitral tribunal for a claim that is being set off with the one subject to litigation is not explicitly granted in the PILA. However, leading authors request that this be the case. Also, art.21 para.5 of the Swiss Rules of International Arbitration of the main Cantonal chambers of commerce and industry—a modern set of procedural rules chosen very frequently—explicitly states that the arbitral tribunal has jurisdiction to hear a set-off defence even if the arbitral tribunal was not competent to hear the matter if it was brought before it on a stand-alone basis. The appeal possibilities pursuant to the PILA include the ones mentioned in (iv)(a), (b), (c) and (d) above but not the ones of (iv)(e) and (f) above. Additionally, the PILA offers an appeal possibility in case of breach of the *ordre public* as well as, in art.192 PILA, the possibility to exclude any appeals at all provided that none of the parties has its domicile or ordinary residence in Switzerland.

The possibility to exclude any appeals is probably the provision of the PILA which differs most from the CPA which does not offer this choice. This provision is also the basis of many arbitral agreements and many court cases. The authors refer to their discussion of the decision by the Federal Supreme Court No. 4P.172/2006 dated March 22, 2007 published in *International Sports Law Review* issue 3/07, the so-called "Cañas case" on the question under which circumstances a waiver of any appeals is valid.

Obviously, there are other differences between the provisions of the Third Part of the CPA and the Twelfth Chapter of the PILA such as the scope of arbitrability. In view of their flexibility to choose between the two sets of provisions, parties are well advised to think about the choice they are making before signing any arbitration agreements or to even consider revising their arbitration agreements in case the previously not chosen or not applicable act seems more favourable to them.

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