Opting Out of the Domestic Arbitration Regime and Into the International Arbitration Regime, and Vice Versa: The Case of Switzerland

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Introduction

The *lex arbitri* of Switzerland is well-known for affording parties maximum autonomy and procedural flexibility. In line with these principles, parties to international arbitration proceedings have the possibility to opt out of the otherwise applicable Chapter 12 of the Swiss Private International Law Act ("**PILA**") and to opt into the statutory rules governing Swiss-seated domestic arbitration proceedings as set out in Section 3 of the Swiss Civil Procedure Code ("**CPC**"). The reversed option is available to parties to domestic arbitration proceedings as well, *i.e*. to opt out of the application of the CPC and to opt into the application of the PILA. This post will outline the practical aspects of this matter, with emphasis being put on the applicable case law from the Swiss Federal Supreme Court.

PILA v. CPC: Why Would Parties Prefer One Over the Other?

One of the main differences between the statutory rules of the PILA and the rules of the CPC is the more limited grounds to annul an arbitral award rendered in international arbitration proceedings. In domestic arbitration, an award can be annulled if the result of the award is arbitrary because the award is based on findings that are manifestly contrary to the facts on record, or because the award is based on a manifest violation of the applicable law or the principles of equity (Article 393(e) CPC). In international arbitration, however, a party may not challenge an award on the ground that the award is arbitrary. The only available ground allowing a substantive review of an arbitral award is the ground of incompatibility of the award with public policy (Article 190(2)(e) PILA), which is to be assessed more restrictedly than the ground of arbitrariness (*see, e.g.,* the decision of the Federal Supreme Court, ATF 138 III 322, consid. 4.3.2). Furthermore, under the CPC, an award can also be annulled on the ground of manifestly excessive fees and expenses fixed by the arbitral tribunal (Article 393(f) CPC). No such ground exists under the PILA.

In certain instances, parties to international arbitration proceedings may thus have an interest to opt into the statutory rules available in domestic arbitration proceedings. In other instances, parties to

domestic arbitration proceedings may prefer to have more limited grounds available to set aside an arbitral award and have thus an interest to apply the arbitration rules as set out in Chapter 12 of the PILA. For example, an international sports federation seated in Switzerland may want to apply the same *lex arbitri* to its procedures against athletes before the Court of Arbitration for Sport ("**CAS**") in Lausanne, irrespective of whether the athlete is domiciled in Switzerland or abroad[fn]Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 3rd. ed., Berne 2015, para. 114.[/fn].

Legal Bases

Article 176(2) PILA and Article 353(2) CPC both provide that the parties may exclude the *lex arbitri* applicable to their proceedings and agree on the other *lex arbitri* as set out in the CPC or the PILA (which otherwise would not apply) by an express declaration in the arbitration agreement or in a subsequent agreement. Such agreement must be in writing (Article 353(2) in connection with Article 358 CPC; *see* the decision of the Federal Supreme Court, ATF 115 II 390, consid. 2b/bb, with regard to the PILA).

According to the long-standing practice of the Federal Supreme Court established in international arbitration, a mere agreement of the parties to apply either Chapter 12 of the PILA or Section 3 of the CPC to their arbitration proceedings (without excluding the *lex arbitri* otherwise applicable) is not enough (*see e.g.* the decision of the Federal Supreme Court, dated 19 November 2013, Case no. 4A_254/2013, consid. 1.2.3, with further references). Rather the agreement must:

i. contain an express agreement to opt out of the *lex arbitri* otherwise applicable,
ii. contain an express agreement to opt into either Chapter 12 of the PILA or Section 3 of the CPC, and
iii. be in writing.

Most of the agreements to be assessed by the Federal Supreme Court up until now merely contained opting-in clauses but no opting-out clauses. For example, an agreement read "*These proceedings shall be governed by the Swiss Concordat on Arbitration* [which was the *lex arbitri* that applied to domestic arbitration before the CPC came into force]" (*see* the decision of the Federal Supreme Court, dated 19 November 2013, Case no. 4A_254/2013). As requirement (i) was not met, the Federal Supreme Court considered this agreement to be invalid without being required to assess the sufficiency of an opting-out agreement.

New Leading Case Provides Clarity for Opting-Out Clauses

In a recent decision rendered on 7 May 2019 in French, the Federal Supreme Court was presented with the opportunity to assess whether the parties have agreed on a valid opting-out clause (Case no. 4A_540/2018, unofficial English translation available here; as the decision is intended for publication in the official collection it is to be regarded a leading case[fn]The Federal Supreme Court publishes all its leading cases in the official collection *arrêts du Tribunal federal* ("**ATF**"), namely decisions containing changes in case law, clarifications of earlier case law and confirmation of earlier case law that was established some time ago. Before 2000, only the decisions published in the official collection were publicly accessible.[/fn]).

The background of this decision was a domestic arbitration proceeding before the CAS. In the

proceedings before the CAS, the parties signed a procedural order (*l'ordre de* procédure) transmitted by the CAS that provided among others for the following:

> "*In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS) subject to the Code of Sports-related Arbitration (2017 edition) (the "Code"). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law*."

Before the Federal Supreme Court, the plaintiff argued that the parties had not validly opted out of Section 3 of the CPC as the agreement did not explicitly mention Section 3 of the CPC but only excluded "*any other procedural law*".

Thus, in this decision, the Federal Supreme Court had to assess whether the procedural order at hand contained an express agreement to opt out of Section 3 of the CPC as the *lex arbitri* otherwise applicable (requirement (i) as set out above).

The Federal Supreme Court considered this requirement to be met. According to the Court, a valid opting-out agreement did not need to explicitly mention Section 3 of the CPC or Chapter 12 of the PILA as long as the parties' intention to exclude the otherwise applicable *lex arbitri* was clear (Case no. 4A_540/2018, consid. 1.6.1.3). Here, the Court considered the wording "*to the exclusion of any other procedural law*" [emphasis added] to be sufficiently clear to demonstrate the parties' intention to exclude Section 3 of the CPC. The Court held that in view of Switzerland's dualist arbitration regime, an agreement providing for the application of Chapter 12 of the PILA to the exclusion of any other procedural law was to be understood as an exclusion of the alternative statutory rules set out in the CPC, which was particularly clear for two parties seated or domiciled in Switzerland and being assisted by lawyers when signing the procedural order (Case no. 4A_540/2018, consid. 1.6.1.4).

The Federal Supreme Court further clarified that an opting-out agreement can be concluded any time during the arbitration proceedings until the rendering of the award. Finally, in an *obiter dictum*, the Court indicated that the arbitral tribunal's consent would be required if the opting-out was agreed after the constitution of the arbitral tribunal (Case no. 4A_540/2018, consid. 1.6.2).

Concluding Remarks

This recent decision of the Federal Supreme Court is to be welcomed as the parties are not burdened with unnecessary formalistic requirements they must meet in order to validly opt out of domestic arbitration into international arbitration or *vice versa*. Although a valid agreement must contain an express agreement to opt out of the *lex arbitri* otherwise applicable and an express agreement to opt into either Chapter 12 of the PILA or Section 3 of the CPC, the Federal Supreme Court has clarified that the opting-out agreement need not explicitly mention the *lex arbitri* otherwise applicable as long as the parties' intention to opt out is clear.

Even though the decision concerned a domestic arbitration proceeding, it is to be expected that the Federal Supreme Court will apply the same requirements with regard to international arbitration proceedings. Nonetheless, in international arbitration proceedings not all parties may be familiar with Swiss law and its dual arbitration regime with Chapter 12 of the PILA and Section 3 of the CPC that either apply to international or domestic arbitration. Contrary to the parties in Case no. 4A_540/2018, some parties to international arbitration proceedings (in particular if not being assisted by lawyers)

may thus not necessarily understand the wording "*to the exclusion of any other procedural law*" to constitute an opting-out of the *lex arbitri* otherwise applicable to their dispute. In order to avoid any misunderstandings and any potential disputes, parties to international arbitration proceedings who wish to apply Section 3 of the CPC to their proceedings should consider to include an explicit reference to the statutory rules in their opting-out agreement, for example by using the following wording: "*The provisions of Section 3 of the CPC shall apply to the arbitration proceedings, to the exclusion of Chapter 12 of the PILA*".