New Rules on Domestic Arbitration and Their Relation to the Rules Governing International Arbitration in Switzerland

Kluwer Arbitration Blog
February 19, 2010

Georg von Segesser (von Segesser Law Offices)

Please refer to this post as: Georg von Segesser, 'New Rules on Domestic Arbitration and Their Relation to the Rules Governing International Arbitration in Switzerland', Kluwer Arbitration Blog, February 19 2010, http://arbitrationblog.kluwerarbitration.com/2010/02/19/new-rules-on-domestic-arbitration-and-their-relation-to-the-rules-governing-international-arbitration-in-switzerland/

As of 1 January 2011, Swiss domestic arbitration proceedings will be governed by Articles 353 et seq. of the new Swiss Code on Civil Procedure ("CCP"). Articles 353 et seq. CCP will replace the Concordat on Arbitration ("Concordat"), currently governing domestic arbitration proceedings. The dichotomy between domestic arbitration and international arbitration will continue to exist, i.e., international arbitration proceedings will continue to be governed by Chapter 12 of the Swiss Private International Law Act ("PILA"). However, there are new possibilities for parties to chose between the two systems.

Currently, parties to an international arbitration can opt out of Chapter 12 PILA and subject their arbitration to the rules of the Concordat. This option remains under the CCP. By contrast, under the present regime, parties to a domestic arbitration cannot select Chapter 12 PILA to govern their arbitration. Under the new provision of Article 353 para. 2 CCP, they can. This will give parties a choice between two procedural regimes for domestic arbitrations. Although such opt-out clauses will not become effective before 1 January 2011, they can already be included in

arbitration agreements. Of course, parties can also choose to opt out of the CCP at a later point in time.

It is a matter of debate whether the ability to opt out of the new CCP is really necessary in purely domestic cases, in particular since the new domestic regime provided for in Articles 353 et seq. CCP is modern and reflects current international best practice. In multi-party arbitration agreements involving Swiss and foreign parties, however, the ability to opt out of the CCP will certainly enhance predictability with respect to the applicable procedural regime.

When entering into an arbitration agreement, the parties to a multi-party relationship cannot predict whether a dispute that might arise will be merely among the parties domiciled in Switzerland or whether it will also involve foreign parties. Under Swiss law, an arbitration is deemed "international" if (i) the arbitration agreement has been entered into by two or more parties, of which at least one was neither domiciled nor habitually residing in Switzerland at the time of the conclusion of the arbitration agreement, and (ii) such "foreign" party is the actual party to the arbitration proceedings. Consequently, in a multi-party relationship, if a dispute arises between two Swiss domiciled parties, the arbitration would be deemed "domestic", but if the dispute involves a foreign party, the arbitration would be deemed "international" and thus fall under Chapter 12 PILA. By opting for the arbitration to be governed by one of the two Swiss regimes, the parties will be able to eliminate this uncertainty from the outset.

Compared to the current regulation of domestic arbitrations, Articles 353 et seq. CCP contain several quite substantial improvements, including for example detailed rules on:

- the appointment of arbitrators in multi-party proceedings (Article 362 para. 2 CCP),
- the competence of the chairman to decide procedural issues by himself where either the parties to the arbitration or the co-arbitrators have given the chairman the power to do so (Article 373 CCP),
- provisional measures (Article 374 CCP),
- joinder of parties to the proceedings, both on the side of the claimant as well as the respondent (Article 376 CCP),
- the jurisdiction of the tribunal to decide counterclaims and set-off pleas (Article 377 CCP),
- security for costs, in particular where the claimant appears insolvent (Article 379

CCP).

As to the setting aside of an arbitral award (Articles 389 et seq. CCP), a challenge will continue to be available only on very limited grounds, namely in cases of (a) improper composition of the arbitral tribunal, (b) wrong decision on jurisdiction, (c) decision ultra, infra or extra petita partium, (d) violation of the principle of equal treatment of the parties and of the right to be heard, (e) award that is arbitrary in its result because it is founded on facts obviously contrary to the record or because it constitutes an obvious violation of law or equity, and (f) obviously excessive costs and fees of the arbitrators. The Federal Court will be the only state court instance available for hearing actions to set aside an arbitral award. The parties will, however, be able to agree instead to have their setting aside actions heard by the highest cantonal court at the seat of the arbitral tribunal. Moreover, the new Articles 353 et seq. CCP contain detailed rules on the correction, clarification and supplementation of an award (Article 388 CCP), as well as on the revision of an award (Article 396 CCP).

Georg von Segesser / Petra Rihar