



## SWITZERLAND: What does the new domestic arbitration regime teach us?

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**Domitille Baizeau** and **André Brunschweiler**, partner and associate at Lalive in Geneva and Zurich, consider features of the new regime governing domestic arbitration in Switzerland that may be of interest to international arbitration practitioners



Domitille Baizeau and André Brunschweiler

For over 100 years, Switzerland has been one of the preferred seats of international arbitration. Its success has been attributed to many factors including the country's political neutrality, the many international organisations it hosts and the high proportion of international contracts governed by Swiss law. The main reason nowadays is probably the clear and efficient legal regime governing international arbitration, contained in chapter 12 of the 1987 Federal Private International Law Act.

On the other hand, until the end of 2010, domestic arbitration was governed by the concordat on domestic arbitration of 1969, a treaty signed by the 26 Swiss cantons which proved difficult to bring up to date. Modernisation was achieved this year through the entry into force on 1 January of the Federal Swiss Code of Civil Procedure. In its chapter 3, the code replaces the concordat and provides a new legal framework for Swiss domestic arbitration that draws on the success of the Private International Law Act but also introduces novel features which arguably reflect modern international arbitration practice.

While the dual system separating domestic from international arbitration has been maintained, there is also a bridge between the two: parties to a domestic arbitration may now agree on the application of chapter 12 of the Private International Law Act, and parties to an international arbitration remain able to opt for chapter 3 of the Code of Civil Procedure. For this reason also, chapter 3 of the code is an important piece of legislation.

### Scope of application of the code: parties to the dispute

Chapter 3 of the code applies to any arbitration involving parties that have their legal or registered seat (or domicile in case of individuals) in Switzerland, at the time the arbitration agreement was entered into (and not when the dispute arose). Unlike under French law, the subject matter of the dispute remains irrelevant.

Even in the case of multi-party contracts involving both Swiss and non-Swiss parties, whether the domestic or the international arbitration provisions apply depends exclusively upon the seat/domicile of the parties involved in the arbitral proceedings – as confirmed by a Federal Supreme Court ruling of 2002.

### The new features of the code

The main new features of the code aim at improving the flexibility and the efficiency of the arbitral process by increasing party autonomy, avoiding multiple proceedings, and expanding the powers of the tribunal. Four categories of changes are identified below. However, the code contains many more significant amendments which reflect its modernity, including relaxed requirements as to the form of the arbitration agreement broad disclosure requirements for arbitrators, more detailed procedure for challenging and removing arbitrators and for the rectification and interpretation of awards, and a specific provision regarding the use of administrative secretaries.

#### *Increased party autonomy: limited scope of mandatory provisions*

It was an important goal of the code's drafters to provide for increased party autonomy, while ensuring compliance with the fundamental principles of procedural fairness, namely the parties' right to be heard, to enjoy equal treatment, and to participate in adversarial proceedings. This is reflected in three main changes to the domestic arbitration regime.

First, the new law no longer lists specific mandatory provisions. Mandatory features are left to be determined by case law (as under the Private International Law Act) and will most likely include primarily the fundamental principles of procedural fairness.

Second, the state court procedural rules no longer apply by default where the parties have not agreed on specific rules for the conduct of the arbitral proceedings, as was the case under the Concordat.

Last, the parties may now opt out of the domestic regime in favour of chapter 12 of the Private International Law Act, even after entering into the arbitration agreement (see article 353(2) of the code). This may enable the parties to avoid any possible challenge to the merits of the award. Indeed, the first four grounds for annulment available under the code (in article 393) are largely identical to those available in international arbitration (under article 190 of the Private International Law Act), and are relatively narrow: improper composition of the arbitral tribunal; incorrect decision on jurisdiction; decision that goes beyond the claims or fails to answer claims, and violation of the principles of equal treatment or right to be heard. However, a domestic award can also be challenged on the merits if it is 'arbitrary' because founded on 'findings which are manifestly contrary to the facts on records' or founded on 'a manifest violation of law or equity'. This ground for challenge, like the others, is mandatory and thus cannot be waived (unlike grounds for challenge in international arbitration). In international arbitration, an award may also be challenged for violation of public policy.

The ability to opt for the international arbitration regime may prove particularly attractive for international companies with registered offices in Switzerland (for tax reasons, for example) and those entering into

commercial transactions with companies also registered in Switzerland but essentially conducting business abroad.

*Increased efficiency of the process: single court for annulment proceedings*

It is widely recognised that one of the main strengths of the international arbitration regime in Switzerland is the 'one stop' challenge process. International awards may be challenged only before one court, the Federal Supreme Court, which is the highest court in the country. The process is fast and delays in annulment proceedings encountered in other jurisdictions are unheard of.

Until the code was enacted, domestic awards could be challenged through a two-step procedure, before the highest court of the canton of the place of arbitration, and then, the Federal Supreme Court. This was heavily criticised and the procedure has now been aligned with that for international cases: awards may be challenged only before a single court, which is by default the Federal Supreme Court, unless the parties expressly agree upon the designated cantonal court.

*Increased efficiency of the process: set-off claims, counterclaims, multiple claims and multiple parties*

Where claims are covered by different arbitration agreements and in cases of multi-party disputes, the code has opted for efficiency.

Under the concordat, the arbitral tribunal was compelled to stay the arbitration pending the resolution, either by another arbitral tribunal or by the courts, of a claim or defence invoked as a set-off and not covered by the same arbitration agreement. This provision obviously led to much abuse by respondents and has now been abandoned. Instead, the arbitral tribunal has jurisdiction over any set-off defence falling outside the scope of the arbitration agreement and covered by another arbitration agreement or forum selection clause; and any counterclaim covered by a different but 'compatible' arbitration agreement (meaning, according to Swiss scholars, having at least the same seat, number of arbitrators, and applicable rules).

In addition, the code provides that factually-related claims by or against *multiple* parties and factually-related *multiple* claims between the *same* parties may be heard in the same arbitral proceedings, provided that the arbitration agreements are 'compatible'.

These provisions are clearly aimed at improving the attractiveness of domestic arbitration over domestic court litigation. Whether they also reflect a modern trend in international arbitration remains to be seen, but they certainly closely reflect the mechanisms already found in the Swiss Rules of International Arbitration (articles 4 and 21.5).

*Modernisation: power of arbitral tribunal to grant interim measures and security for costs*

Two further provisions are worth mentioning as they result in more independence from the state courts, even if the latter continue to play an important role in support of the arbitral process.

First, the code, in line with the Private International Law Act and most modern international arbitration laws, now provides for the concurrent jurisdiction of the arbitral tribunal and the state courts to grant interim measures. However, it also specifically provides that a party aggrieved as a result of an unjustified interim measure may raise its claim in the arbitration proceedings.

Secondly, the code specifically grants the arbitral tribunal the power to order security for costs. This general power is found in some arbitration laws – for example the English Arbitration Act 1996, but not the Swiss Private International Law Act – and in certain arbitration rules, for example the rules of the LCIA and WIPO.

However, under the code, the tribunal's power is limited in three ways: an order may only be made against the claimant; only with respect to the respondent's legal costs (and not the arbitration costs); and the claimant must 'appear to be [financially] insolvent'.

**Long overdue**

In Switzerland, a new domestic arbitration law was long overdue. The new law provides for a modern domestic arbitration regime, balancing the need for party autonomy and flexibility on the one hand, and efficiency on the other. Arguably, the two most important changes are the single annulment proceedings; and the wide powers of the arbitral tribunal in case of set-off, counterclaim, multiple claims, and multiple parties.

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