



ARBITRATION LAW REFORMS:

The impact of the new Swiss Federal procedural law on Swiss arbitration

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Stockholm, 31 May 2011

INTRODUCTION

- New Swiss **Code of Civil Procedure (CCP)**
- Came into force on **1 Jan 2011**
 1. Revised provisions for **domestic arbitration**
 2. Unified Swiss **civil procedural rules**
- In parallel: adoption of the **revised Lugano Convention** on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2007
 - Certain changes for **attachment of assets** throughout Switzerland

NEW DOMESTIC ARBITRATION LAW (1)

- Long **consultation** process
- **Dual system** maintained - Two autonomous “codes”
 - Part 3 CCP: domestic arbitration
 - Chap. 12 PIL Act: international arbitration
- CCP supersedes the Inter-cantonal **Concordat** 1969
- Applies to arbitrations commenced after 1 Jan 2011
- Updated and **modern *lex arbitri***
 - Flexibility
 - Party autonomy
 - Independency from State courts

NEW DOMESTIC ARBITRATION LAW (2)

■ Why of interest?

1. Possibility to **opt** for the CCP in **international arbitration** (Art. 176.2 PiL Act)
2. Interesting **novel features** taken from:
 - Successful Chap. 12 PIL Act (Swiss international arbitration)
 - Recent practice in international arbitration?

NEW DOMESTIC ARBITRATION LAW (3)

- Criteria: arbitration **domestic** if at the time of the arbitration agreement both parties have
 - Legal / registered **seat**
 - **Domicile** / habitual place of **residence**
 - In Switzerland (Art. 20-21 PIL Act)
 - **Subject matter** of dispute irrelevant
 - In **multi-party contracts** with Swiss and foreign parties, key: **parties involved in the arbitral proceedings**

NEW DOMESTIC ARBITRATION LAW (4)

- Certain features maintained / amended because domestic disputes
- **Arbitrability** narrower: claim can be “disposed of” vs claim of “financial interest”
- Limited **grounds for review** of award (Art. 190.2(a) PIL Act; Art. 393 CCP)
 1. Irregular composition of Tribunal
 2. Incorrect decision on jurisdiction
 3. Decision beyond claims or failure to answer claims
 4. Violation of equal treatment or right to be heard
 5. Violation of public policy (international arbitration)

Award arbitrary on merits (domestic arbitration)

1. INCREASED PARTY AUTONOMY

- Concordat: insufficient flexibility and party autonomy
- Three key changes in CCP:
 1. Provision for **opting out in favour of PIL Act** incl. after signing arbitration agreement (Art. 353.a)
 - Multi-party contracts with Swiss and foreign parties
 - Arbitrability issue (Art. 177.1 PIL Act wider)
 - To avoid challenge on the merits
 2. No more listed **mandatory provisions**
 - To be determined by the Courts
 3. No **application of State procedural rules** by default (Art. 373)

2. SINGLE COURT FOR ANNULMENT

- Concordat: two instances: higher cantonal court and Federal Supreme Court
 - Strongly criticized
- **CCP: one instance for annulment proceedings** (Art. 389-390 CCP)
 - By default: Federal Supreme Court (as for international arbitral awards)
 - By express choice of the parties: competent cantonal court
- Increased efficiency - key to success of PIL Act

3. SET OFF DEFENCES AND COUNTERCLAIMS

- Concordat: **stay of arbitration** pending resolution of set off defence not arising out of same arbitration agreement (Art. 29)
- PIL Act: silent
- CCP (Art. 377): Tribunal has jurisdiction over
 - Set off defence covered by **another arbitration agreement** or forum selection clause
 - Counterclaim covered by **different but compatible arbitration agreement**
- Trend in international arbitration?
 - E.g. Swiss Rules (Art. 21.5 set off)

4. MULTIPLES CLAIMS - MULTIPLES PARTIES

- Efficiency vs party autonomy
- Concordat and PIL Act: silent
- CCP (Art. 376):
 - Factually-related claims by or against *multiples* parties
 - Factually-related *multiple* claims between *same* parties
 - Same proceedings if concurring/compatible arbitration agreements
- Trend in international arbitration?
 - ICC Rules Art. 4.6 / LCIA Rules Art. 22.1(h)
Swiss Rules Art. 4.1 and 4.2
UNCITRAL Rules (2010) Art. 17.5

5. POWER TO GRANT INTERIM MEASURES

- Concordat: exclusive jurisdiction of State courts to order interim relief
- PIL Act (Art. 183) and all modern arbitration laws: power of Arbitral Tribunal
- CCP: **power of Tribunal and State courts** (Art. 374)
- But more **detailed** than PIL Act
 - Specific power of Tribunal to decide on a damages claim arising out of interim relief granted, in the pending arbitration

6. POWER TO ORDER SECURITY FOR COSTS

- Concordat and PIL Act silent
- CCP: **power of Tribunal to grant security for costs** (Art. 379)
- Alignment or restriction on international practice?
 - Only to a Respondent
 - Only for legal costs (not arbitration costs)
 - If Claimant “appears [financially] insolvent”

OTHER NEW PROVISIONS

- **Form of arbitration agreement** (Art. 358 CCP)
 - In writing (Art. 6 Concordat)
 - Or otherwise evidenced by a text (Art. 178.1 PIL Act)
- **Disclosure requirements** for arbitrators (Art. 363 CCP)
- More detailed **procedure for challenge and removal of arbitrators** (Art. 369-370 CCP)
- **Administrative secretary** (Art. 365 CCP)
- **Rectification interpretation** of award and **additional award** (Art. 388 CCP)
- **Many others:** number of arbitrators, choice of law, revision, consent awards

NEW CCP / REV. LUGANO CONVENTION: REFORM OF SWISS CIVIL PROCEDURE

- CCP: one of the most **important** developments in the Swiss legal system since unification of Swiss substantive law
- Puts an **end to multiplicity of rules**
- More **active role of State courts** at the outset
- No direct impact on role of State courts of seat in support of arbitration or in annulment proceedings (save the single court principle)
- With the adoption in parallel of the Revised Lugano Convention 2007
- **Impact on applications for attachment / freezing orders in Switzerland**

ATTACHMENT OF ASSETS IN SWITZERLAND PENDING ARBITRATION (1)

- Attachment order pending arbitral proceedings in Switzerland or abroad if
 1. Prima facie case on the merits
 2. Identifiable assets
 3. (i) Specific debt recognition (rare)

or

(ii) If debtor in Switzerland : debtor absconding /concealing assets

(iii) If debtor not in Switzerland: sufficient link to Switzerland

ATTACHMENT OF ASSETS IN SWITZERLAND PENDING ARBITRATION (2)

- *(New)* **Preventive brief**: objection to freezing order in advance
- Other option for creditor: **direct enforcement** of injunction obtained in Lugano Convention State
 - *E.g.* Worldwide freezing injunction in the UK

ENFORCEMENT OF AWARDS AGAINST ASSETS HELD IN SWITZERLAND

- Starting point for enforcement where debtor not domiciled in Switzerland
- (*New*) option of where Swiss debtor has assets in Switzerland
- Only criteria:
 1. Identifiable assets to attach
 2. Enforceable arbitral award
 - Sufficient even if:**
 - debtor is not domiciled in Switzerland
 - (*new*) claim has **no link to Switzerland**
- (*New*) **Preventive brief**: objection to freezing order in advance

CONCLUSION: LESSONS FOR SWEDEN?

■ What makes Swiss arbitration so competitive?

- Lakes and mountains? Watches? Chocolate?
- Integrity, neutrality and efficiency?
- **Simple concise arbitration-friendly law**

Primarily

➤ **The role given and exercised by State Courts**

1. Strong support of local courts without interference
2. A single court (the highest) for annulment proceedings
3. Limited grounds for annulment
4. Expeditious decisions on annulment

THANK YOU

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