New Rules on Domestic Arbitration in Switzerland

Overview of Most Important Changes to the Concordat and Comparison with Chapter 12 PILA

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1. Introduction

In 2000, the Swiss Constitution was changed and the competence for procedural laws was transferred from each individual canton to the Swiss Federation. More than 10 years later, on 1 January 2011, the new Swiss Code on Civil Procedure ("CCP") will enter into force. This code will unify the currently existing 26 cantonal procedural codes.

The transfer of the competence for procedural matters from the cantons to the Swiss Federation also vested the Swiss Federation with the competence for unified provisions for internal domestic arbitration proceedings. As a consequence, as of 1 January 2011, the Concordat on Arbitration of 1969 ("Concordat")[1], which had so far unified the cantonal procedural codes on domestic arbitration, will be replaced by Part 3 of the CCP entitled "Arbitration" and consisting of Articles 353 to 399 of the CCP.[2]

As a basic principle, it was decided to maintain the distinction between domestic and international arbitration in that international arbitration proceedings will continue to be governed by Chapter 12 of the Swiss Private International Law Act ("PILA"). In other words, Switzerland will maintain its dual system.

The key purpose of this article is to explain the main principles and goals of the new provisions on domestic arbitration (see section 2 below) and to highlight the most important changes (see section 3 below) as compared to the existing provisions under the Concordat. The drafters of the CCP provisions on domestic arbitration have taken the opportunity to modernize the current regime of domestic arbitration and have introduced new

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1 AS **1969** 1093.

2 English translations are available in the following publications: Michael Schöll, Sourcebook on International Arbitration (Switzerland), Zurich 2008) p. 419 et seq. (draft of 28 June 2006); Stephen V. Berti (Ed.), ZPO – Schweizerische Zivilprozessordung, Basel 2009, p. 523 et seq.

provisions. Some of them are noteworthy also from the point of view of practitioners who are more familiar with Chapter 12 of the PILA governing international arbitration. Thus, the differences to Chapter 12 shall be briefly highlighted (see section 4 below). Finally, some concluding remarks will contain a personal assessment (see section 5 below).

2. Main principles and goals of the new provisions on domestic arbitration

The drafters of the new provisions on domestic arbitration decided to use as their basis the existing Concordat which is obvious from the fact that Part 3 of the CCP has the same structure as the Concordat.

However, as to the content of the Concordat, some fundamental changes have been introduced. They are based on the provisions of Chapter 12 of the PILA and the UNCITRAL Model Law as far as this was considered justified for domestic arbitration.[3] It should be added that the new provisions on domestic arbitration contain certain rules which can neither be found in Chapter 12 of the PILA nor in the UNCITRAL Model law but appear influenced by the body of case law, which mainly resulted from international arbitration, best practice rules or institutional rules applicable to international arbitration.

Since its entry into force in 1989, Chapter 12 of the PILA has been considered a very advanced code for international arbitration which derives its popularity and attractiveness from its underlying principles of flexibility and party autonomy. The Concordat is not nearly as attractive for the parties and has been considered as outdated, too rigid and providing for too much influence by state courts. Thus, the overall goal of the new provisions on domestic arbitration has been to enhance the attractiveness of domestic arbitration for the users by introducing the basic principles of flexibility and party autonomy. Also, there should be more independency from state courts.[4]

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3 BBl **2006** 7392.

4 BBl **2006** 7391.

3. Most important changes to the Concordat

Considering the above main goals of the new domestic arbitration provisions, the following changes to the Concordat should be highlighted:[5]

3.1 No list of mandatory rules

Article 1(3) Concordat provides for a long list of mandatory provisions. Such list has not been included in the CCP. This means that as of 1 January 2011, it will have to be determined, based on the interpretation of each provision, whether it is mandatory and thus cannot be abrogated by the parties. The same principle already applies for Chapter 12 of the PILA.[6]

3.2 No default application of state court procedural rules

Article 24(2) Concordat provides that where the parties had not agreed upon the procedural rules and absent an order of the arbitral tribunal, the procedural rules applicable before the Federal Supreme Court of 1947[7] should apply. In view of the intended additional flexibility, such provision has not been included in the CCP.

3.3 Opting out of the CCP and into Chapter 12 of the PILA

The Concordat demands mandatory application for domestic arbitration in Switzerland (Article 1(1) Concordat). The new CCP not only provides for more flexibility and party autonomy but even allows the parties to opt out of the CCP altogether and instead choose Chapter 12 of the PILA (Article 353(2) CCP). Such opting out has to be made in the form provided for the validity of the arbitration agreement, i.e. in writing or in any other form which permits to be evidenced by a text (Article 353(2) to be read together with Article 358 CCP).[8]

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5 An additional noteworthy change regarding multiple parties and multiple claims is addressed in Section 4 below.

6 It is established that the only mandatory rules are the right to be heard and equal treatment of the parties (Article 182(3) PILA).

7 SR 273.

8 The "mirror" provision in Article 176(2) PILA which allows the opting out of Chapter 12 of the PILA and the opting into the domestic regime will be adapted in order to refer to the relevant provisions of the CCP.

Apparently, the possibility to choose Chapter 12 of the PILA instead of the CCP is the result of criticism raised during the consultation procedure ("Vernehmlassungsverfahren") where it was voiced that the sometimes artificial distinction between national and international cases could lead to unjustified results.[9]

However, a closer look at the possible effects of the opting out raises doubts as to whether the consequences have been thought through in all respects. To deal in detail with the rather complex issues of the effect of the opting out/opting in with regard to areas with mandatory laws or with special procedural rules such as, in particular, employment relationships, would go beyond the purpose of the present article. Nevertheless, it should be mentioned that on the one hand, the opting out provision does not contain any restriction and there thus appears to be no legal basis to restrict the application of Chapter 12 of the PILA by national mandatory substantive or procedural law. Rather, restrictions would have to come from the limitations to the parties' choice of law.[10] On the other hand, it can hardly be said that a legal relationship becomes international only by opting into Chapter 12 of the PILA. Thus, one could also argue that the parties are bound by (all) mandatory Swiss law which is a larger body of provisions than the international mandatory rules as provided for by Articles 18 and 19 PILA.

In the following situations, it makes sense, in the view of the present author, to consider opting out of the CCP and opt into Chapter 12 of the PILA instead:

– In **sports arbitration,** the required distinction between international and domestic arbitration can lead to unequal treatment of the athletes.[11] For this reason, the Swiss sports association should include a provision in their arbitration clauses contained in their relevant regulations which provides that Chapter 12 of the PILA is applicable, independently of the domicile of the parties of the arbitration procedure and under the exclusion of the potentially applicable CCP.[12]

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9 BBl **2006** 7393.

10 Although Article 19 PILA is not directly applicable to arbitrations conducted under Chapter 12 of the PILA (which is considered to be an autonomous Chapter of the PILA), it is recognized that also arbitrators are obliged to apply provisions which are not part of the law chosen by the parties along the principles as laid out in Article 19 PILA.

11 For details, see Antonio Rigozzi/Yves Hochuli, *Die Internationalität der Schiedsgerichtsbarkeit in Sportstreitigkeiten,* in: Jusletter 27 November 2006).

12 Rigozzi / Hochuli, op. cit. footnote 11, note 24.

- According to the practice of the Federal Supreme Court, in a **multi-party contract concluded between Swiss domiciled and foreign domiciled parties** and containing an arbitration clause, the nature of an arbitration procedure (i.e. whether it is an international or a domestic arbitration) is determined according to the parties who initiated the procedure. If the parties involved in the procedure are all Swiss domiciled, the procedure will qualify as domestic arbitration and the Concordat will apply.[13] In order to avoid any uncertainty as to the applicable provisions in a later arbitration procedure (depending on who the parties in the procedure are), the "Swiss parties" should expressly abrogate the provisions of the CCP and opt for Chapter 12 of the PILA in the original contract. Thus, any arbitration that arises out of the multi-party contract will be determined according to Chapter 12 of the PILA.
- Under the CCP (like under the Concordat), the arbitrability of a dispute depends on whether the claim can be freely disposed of (Article 345 CCP) while the PILA declares that all claims of financial interest can be submitted to arbitration (Article 177 PILA). Although there might be situations where the criterion of the "financial interest" is more restrictive than the notion of "being able to dispose of",[14] in a business law environment, the restrictions resulting from the definition under the Concordat and as of 1 January 2011 of Article 354 CCP have a more important impact than any restrictions resulting in the definition in Article 177 PILA.[15] Therefore, if there is a risk that a dispute might not pass the **threshold of arbitrability according to Article 354 CCP** but would be qualified as a claim involving a financial interest, it might be useful to opt for Chapter 12 of the PILA.
- Article 361(4) CCP reflects the current Article 274(c) Swiss Code of Obligation ("CO") and provides that only the government

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13 Decision of the Federal Supreme Court of 24 June 2002 (4P.54/2002).

14 The message of the Swiss Federal Council (Botschaft des Bundesrates) mentions the exclusion from an association with a purely non-commercial purpose or issues of the violation of the personality under Article 28 Swiss Civil Code; see BBl **2006** 7393.

15 The Federal Supreme Court has recently rendered a decision where it held that arbitration clauses contained in an employment contract were not binding due to Swiss substantive law. In essence, the Federal Supreme Court held that the employee could not renounce certain rights and thus was not free to "dispose" of them in the sense of Article 5 Concordat/Article 354 CCP; see decision dated 28 June 2010, 4A_71/2010, ASA Bull. 4/2010, p. 813, cons. 4.6. However, as mentioned above, it would need further analysis to evaluate whether there are restrictions regarding the effect of opting out of the CCP regarding employment relationships.

authority competent to decide over **disputes arising out of a tenancy agreement relating to residencies** can act as arbitral tribunal in such issues. Since no similar rule exists under Chapter 12 of the PILA and no express reservation was made in the CCP, it can be assumed that in such disputes the Swiss parties can avoid this restriction by opting into Chapter 12.[16]

– Based on Article 393 CCP, a domestic award can be set aside if it is arbitrary. This allows for a broader scrutiny than the principle of *ordre public* which is applicable under the PILA. Therefore, if parties want to **limit the setting aside to *ordre public*,** this can be obtained by opting out of the CCP.

3.4 Competence of the arbitral tribunal to issue provisional or conservatory measures

Article 26 Concordat provides that the state courts have exclusive jurisdiction for interim relief and only grants the arbitral tribunal the right to suggest provisional measures which the parties, if they want, can accept.

The CCP is in line with the principle prevailing in international arbitration which provides that both the arbitral tribunal and state courts are considered competent to issue provisional measures unless the parties agree otherwise (Article 374 CCP).

Other than Article 183 PILA, which is limited to granting the competence to the arbitral tribunal, providing for assistance of the state courts and the possibility to order a security, Article 374 CCP is more detailed. It provides that if the interim relief results in any damage to the party opposing the relief, such party may claim such damage and – more importantly – that the arbitral tribunal has jurisdiction to decide over such claims in the pending

[16] Again, it will have to be further discussed and determined whether in purely domestic relationships Swiss mandatory rules will not prevail. In addition, also in international relationships some authors have qualified Article 274(c) CO as belonging to the Swiss *ordre public*, i.e. have qualified this provision as *loi d'application immédiate*. If this is the case, the restriction would also apply to domestic relationships even if an opt out was made. However, the premise that Article 274(c) CO (and consequently Article 361(4) CCP) is a *loi d'application immédiate* is not correct since the protection of an allegedly weaker party does not fall into the very strict category of provisions and principles which pertain to the substantive *ordre public* (same view: Bernard Berger/Franz Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, note 229, with further references). However, the issue has not yet been tested by the Federal Supreme Court. Also, in international arbitration, an arbitrator is not bound by Swiss mandatory law as a Swiss court would be under Article 18 of the PILA and, if any, rather principles along the lines of 19 of the PILA would apply.

proceedings. The arbitral tribunal may reduce the amount of damage if the request for interim relief was submitted *bona fide*.

3.5 Possibility of set-off claims and counterclaims

Under the Concordat, a party can bring an arbitration procedure to a halt if it declares a set-off with a claim which does not fall under the jurisdiction of the appointed arbitral tribunal. Indeed, according to the criticized Article 29 Concordat, in cases of set-off, the arbitral tribunal has to suspend the arbitration until the competent court has rendered its decision on the existence of the set-off claim.

According to Article 377 CCP, the arbitral tribunal has jurisdiction to decide over a set-off claim independently of whether such claim falls under the arbitration clause or rather under a different arbitration clause or a forum selection clause. This rather extensive and arbitration-friendly solution is based on the arbitration rules of the Chambers, which is today reflected in Article 21(5) of the Swiss Rules of International Arbitration ("Swiss Rules").[17]

Interestingly, Article 377(2) CCP provides that the arbitral tribunal can hear a counterclaim if the arbitration clauses are compatible ("*übereinstimmend*"). Again, this is a very arbitration-friendly solution, since the compatibility does not require that the arbitral tribunal has jurisdiction over the counterclaim based on the *same* arbitration agreement under which the main claim was brought. Rather, it is sufficient that the parties have also concluded an arbitration clause regarding the counterclaim and that such clause is compatible with the "first" arbitration agreement.[18] The Swiss Rules, for example, do not provide for any rules on the requirement for the arbitral tribunal's jurisdiction over counterclaims and it is generally assumed that this means that the counterclaim must fall within the scope of the same arbitration agreement.[19] This also corresponds to the recently adopted UNCITRAL Arbitration Rules which provide in Article 21(3) that the arbitral tribunal can decide over a counterclaim if "it has jurisdiction over it".

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[17] BBl **2006** 7400. It should, however, be mentioned that compared to other institutional rules, the Swiss Rules are already rather extensive and arbitration-friendly in this regard.

[18] Compatibility, as a rule, means that two arbitration clauses refer to the same institution, have the same seat, the same language and provide for the same number of arbitrators.

[19] See Tobias Zuberbühler/Christoph Müller/Philipp A. Habegger (Eds.), Swiss Rules of International Arbitration, 2005, Article 21 Note 36.

3.6 Only one instance for appeals (to the Federal Supreme Court or a cantonal court)

In the first draft of the CCP, the structure of the appeal as it exists under the Concordat was maintained, which means that there were two instances: first, to the superior court in the canton of the place of arbitration and, second, to the Federal Supreme Court. This has raised strong criticism in the consultation process, since the fact that the Concordat provides for two instances was considered as being one of the main reasons for the lack of attractiveness of domestic arbitration as compared to international arbitration.

In the subsequent drafts of the CCP, these concerns have been taken into account and the CCP now provides for one instance only: As a default rule, this instance is the Federal Supreme Court (Article 389 CCP). However, the parties can choose by express declaration that the competent court of the canton where the arbitration is seated shall be the court that decides on the appeals against awards (Article 390 CCP).[20] It is clearly stated that the decision of this court shall be final, i.e. it is not the first instance but decides in lieu of the Federal Supreme Court.

3.7 Applicable law

The Concordat provides in Article 31(3) that the arbitral tribunal decides in accordance with the applicable law. This was generally understood as meaning that the arbitral tribunal has to apply Swiss conflict-of-laws rules, i.e. the PILA.[21]

The CCP has introduced a rule which is based on the corresponding provision of Chapter 12 of the PILA. According to Article 381 CCP, the arbitral tribunal shall, first of all, apply the law chosen by the parties. The German wording of Article 381(1)(a). CCP makes it clear that the parties are not limited to the choice of national laws but can also refer to "rules" of law such as UNIDROIT Principles or other embodiments of the *lex mercatoria*.

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[20] The Federal Supreme Court has left it open so far whether for a challenge of an award under Article 190 PILA, the generally necessary limitation of CHF 30,000 also applies; see decision dated 7 October 2008, 4A_258/2008, ASA Bull. 3/2010, p. 540, cons. 3.3. Therefore, the possibility to choose the competent court of the canton is recommended for future arbitration proceedings where the amount in dispute is likely to be lower than CHF 30,000.

[21] See e.g. Pierre Lalive/Jean-François Poudret/Claude Reymond, Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, p. 171.

This is today also accepted under the corresponding Article 187 PILA although the German text does not provide the desirable clarity.[22]

Like in the PILA, the parties can entrust the arbitral tribunal to decide *ex aequo et bono*.

There is a difference to the PILA in that in the absence of a choice of law by the parties or an authorization to decide *ex aequo et bono*, the arbitral tribunal in a domestic case must apply the law which would be applied by a Swiss court. Thus, the CCP reflects the situation under the Concordat and the arbitral tribunal is not granted the same wide flexibility as provided for in Article 187 PILA. However, since Article 187 PILA refers to the law to which the case has the closest connection and since this is also the basic principle underlying the provisions of the PILA, this should not lead to any important differences in practice.

4. Differences to Chapter 12 of the PILA

Part 3 of the CCP on Domestic Arbitration contains 47 articles. This is considerably more than the 19 articles of the PILA. Thus, there are many rules in the relevant part of the CCP which cannot be found in the PILA.

There are differences which are based on the fact that it was politically not possible and/or desirable to depart from principles of the Concordat. The most prominent examples are the differences in the definition of the arbitrability ("possibility to dispose of" vs. "financial interest")[23] and the fact that under the CCP, it is still possible to appeal an award on the merits because it is arbitrary while the PILA, more restrictively, limits appeals on the merits to the violation of the *ordre public*.[24]

Of special interest, however, are provisions which are also **new** as compared to the Concordat since they can be viewed as what the drafters apparently considered as currently being best practice and state of the art in arbitration. There are three categories to be distinguished:

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[22] Other than the new Article 381(1)(a). CCP, which refers to "Rechtsregeln", Article 187 of the official German as well as the Italian text of the PILA refers to the chosen "Recht" and "diritto", respectively. Thus, it is today accepted that the French text referring to "règles de droit" corresponds to the intention of the drafters of the PILA.

[23] Article 354 CCP vs. Article 177 PILA.

[24] Article 393(e) CCP vs. Article 190(e) PILA. In addition, the CCP still provides for the possibility to challenge excessive disbursements and fees of the arbitrators (Article 393(f). CCP). A similar rule exists in the Concordat, albeit limited to the fees (Article 36(i). Concordat).

The *first category* of these rules has already formed part of the body of case law under the PILA but has not been explicitly expressed in the PILA. In particular, this is the case for the disclosure obligation of arbitrators (Article 363 CCP), the right to appoint an administrative secretary to the arbitral tribunal (Article 365 CCP), the possibility of consent awards (Article 385 CCP), rectification, interpretation and completion of the award (Article 388 CCP) and, finally, the revision of the award (Article 396 CCP).

Other situations and rules are known to practitioners specializing in international arbitration but are less clear in their content and their scope of application than the examples mentioned under the first category above. This *second category* comprises the already discussed unlimited possibility to raise set-off claims as well as the broad possibility to submit counterclaims in one and the same arbitration (Article 377 CCP). Another novelty which should be mentioned in this context is the provision on security for a party's outside counsel costs. While it is accepted in Switzerland as well as generally in international arbitration that arbitral tribunals can order security for costs,[25] the applicable *lex arbitrii* (or the institutional rules), generally speaking, do not provide for specific requirements to be applied. For Swiss domestic arbitration, this situation has now changed since Article 379 CCP sets out the requirements for security for costs. It is noteworthy that this provision seems rather limited insofar as it requires that only the respondent party can ask for security and only in case claimant is insolvent which, however, does not mean that formal insolvency or bankruptcy proceedings are necessary. In addition, in international arbitration, the security is, as a general rule, not only requested for the costs of legal representation but also for the costs of the arbitral tribunal since such costs would, very often, have to be borne in total by the losing party. Since the wording seems rather absolute, it will have to be decided by case law whether the provision on security for costs indeed wants to have the effect of curtailing the arbitral tribunal's flexibility, which would be typical of international arbitration in this regard.

The *third category* consists of the few actual differences between the provisions on domestic arbitration and Chapter 12 of the PILA. The following two differences are of particular interest since they could be viewed as expressing the view that the PILA is outdated in this respect and thus raise the question of adapting the PILA accordingly.[26]

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[25] For an overview, see Bernhard Berger, Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law, ASA Bull. 1/2010, p. 7-15.

[26] Other actual differences, of lesser relevance, are the choice of law and, more specifically, the default mechanism in cases where the parties have not chosen the applicable law (Article 381(2) CCP), and the *lis alibi pendens* rule (Article 372 CCP).

The first provision to be mentioned in this context is the definition of circumstances that might lead to a potential conflict of interest which needs to be disclosed by the members of the arbitral tribunal (Article 363 CCP) and which can give raise to the challenge of an arbitrator (Article 367 CCP). While the PILA limits the applicable test to a lack of independence (Article 180(1)(c) PILA), in domestic arbitration, the test will be the lack of independence **and** impartiality. The preliminary draft, like the PILA, provided only for the lack of independence and, according to the message of the Federal Council, the change in the final draft occurred for clarity purposes and in order to align the provision with foreign and international law.[27] This change sets aside any doubts as to the role of the co-arbitrator, which was the reason why the PILA had not mentioned the impartiality as the subjective factor in the first place: also co-arbitrators must fulfill the same high standard as the chairperson.

Second, the new Swiss domestic arbitration regime has a new provision on multiple parties and multiple claims as well as the joinder of third parties. Provided that there is a factual connection between multiple claims, or between claims by or against multiple parties, the consolidation and joinder, respectively, will not only be possible if all parties are bound by the *same* arbitration agreement but also if the arbitration agreements are *compatible* (Article 376(1)(a) and (b) CCP). With the latter rule, the CCP goes beyond party autonomy: even if the arbitration agreements are compatible and even if there is a factual connection between the claims, it cannot be said that by concluding one specific arbitration agreement, the parties to such agreement inevitably also agreed to conduct an arbitration procedure involving third parties. Also, with regard to multiple claims between the *same* parties, the CCP relies on the requirement of a factual connection and a compatible arbitration agreement (Article 376(2) CCP). Again, this goes beyond what can be considered as the agreement of the parties as it is commonly understood that the conclusion of one arbitration agreement does not automatically grant the arbitral tribunal jurisdiction to decide claims under another contract between the same party even if there is an arbitration agreement in the other contract.[28]

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[27] BBl **2006** 7396.

[28] In a decision rendered in 2008, the Federal Supreme Court had to decide on the issue of whether the arbitral tribunal could decide on claims between the same parties but falling under different contracts. It correctly held that this was a matter of interpretation of the scope of the arbitration agreement which formed the basis of the arbitration procedure and denied the arbitral tribunal's jurisdiction. In the present case, the Federal Tribunal's decision was supported by the fact that the arbitration clauses in the different contracts were not compatible. However, the wording used by the Federal Supreme Court makes it clear that it cannot be assumed that had the arbitration clauses been compatible, the arbitral

It is obvious that these restrictions to party autonomy are made in order to enhance the procedural efficiency of arbitration[29] and to put arbitral tribunals on the same level as state courts.

While the provision on claims by or against multiple parties and on multiple claims (Article 376(1) and (2) CCP) are a novelty not only with regard to the PILA but also with regard to the Concordat, the provision on the calling of a third party and the intervention by a third party (Article 376(3) CCP) is – content-wise – identical to Article 28 Concordat. It follows from the new text that such possibilities require that the third (called or intervening) party is bound by the same arbitration agreement as the one between the parties already in dispute. Thus, it is not a limitation of the party autonomy. Also, it requires consent of the arbitral tribunal.

5. Concluding remarks

The new Swiss domestic arbitration regime is very arbitration-friendly: it respects party autonomy and introduces a high degree of procedural flexibility. It can safely be said that the goals which were set have been fulfilled. Thus, it gives a real alternative to state courts for domestic parties and it can be expected that it will lead to a boost of domestic arbitration in Switzerland. This will particularly be the case where, for some specific reasons (such as the necessity to translate many documents from English into the official court language, the need for higher discretion or the desire to have highly specialized "judges"), the parties would prefer arbitration to court litigation. With the new regime, such parties now have a real alternative.

The differences to the PILA, which were discussed, raise the question whether the PILA should be amended accordingly.

With regard to provisions which are from their content also known and applied in international arbitration (such as in particular security for costs), this would mean including them expressly in Chapter 12. Whether or not this makes sense would have to be analyzed for each of them separately. However, generally speaking, the advantage of a higher predictability for the users comes with a downside, i.e. the loss of flexibility, and therefore, in the view of the present author, amendments to the PILA should be introduced with high caution.

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tribunal would inevitably have had jurisdiction; see Decision of the Federal Tribunal dated 29 February 2008; 4A_452/2007, ASA Bull. 2/2008, p. 376, cons. 2 and in particular 2.5.2.).

[29] BBl **2006** 7400.

The conscious deviations mentioned regarding the definition of conflict of interest would indeed be a "nice to have" also in international arbitration. In practice, however, the difference between the two sets of requirements hardly leads to different outcomes.

This leaves the "real" novelty regarding the provisions of multiple parties (joinder) and multiple claims (consolidation). Here, as mentioned, the legislator has decided for the CCP to "scratch" party autonomy in the interest of procedural efficiency. The issue is somehow less delicate for the consolidation of claims between the same parties. However, also here, it cannot automatically be assumed that the parties agreed to have *one* arbitration procedure covering multiple claims. The CCP has replaced the necessary examination of the parties' real or constructive intent in this regard by the requirements of compatibility and connectivity.

While this seems to be justified in purely internal relationships because of the same legal background and the manageable setting, such provisions should not – at least for the time being – be introduced in international arbitration. In international arbitration, the value of party autonomy, which goes hand in hand with the predictability for the parties, is extremely important and any infringement of the party autonomy might have a deterring effect on the parties to choose arbitration. Also, there is a potential for contradictory awards since there is no guarantee that separately initiated arbitration proceedings would be stopped because of the joinder or consolidation decision of another tribunal. Thus, if, in an international setting, parties who want to join third parties or consolidate claims should provide for these situations in their contractual framework before a dispute arises.

In sum, the "new" regime of domestic arbitration has shown that the "old" one for international arbitration is still very up-to-date, or, more precisely, could be brought to a level which reflects the current understanding of best practice in international arbitration.

Nathalie Voser, *New Rules on Domestic Arbitration in Switzerland*

Summary

Until 2000, the competence for procedural laws in Switzerland had been vested with the cantons and not with the Swiss Federation. For domestic arbitration, a unification of the cantonal provisions had taken place through a Concordat, which is an agreement between cantons. The Concordat regarding domestic arbitration was concluded in 1969 ("Concordat").

On 1 January 2011, the new Swiss Code on Civil Procedure ("CCP") will enter into force. It regulates and unifies the civil procedure before State Courts throughout Switzerland. In its Part 3, it provides for a new set of rules for domestic arbitration.

The present article discusses the main principles and goals of the revised rules on domestic arbitration in Switzerland. Although the new rules are based on the Concordat, some changes have been introduced. The present article highlights the most important ones. The drafters of the CCP provisions on domestic arbitration have not limited themselves to amending the Concordat but have taken the opportunity to modernize the current regime of domestic arbitration and have thus introduced new provisions regulating the issues which have not been explicitly provided for under the old regime. Some of these provisions are specifically noteworthy also from the point of view of international arbitration practitioners because these provisions are also new in comparison to Chapter 12 of the Swiss Private International Law Act ("PILA"), which forms the Swiss *lex arbitrii* for international arbitration. The article therefore also briefly highlights the main differences of the revised rules on domestic arbitration as compared to Chapter 12 PILA.

Finally, as a concluding remark, the author addresses the question of whether, in light of the newly introduced rules on domestic arbitration, the PILA is in need of a revision as well.