Conclusion

The choice of the currency is crucial in Swiss litigation. Counsel for claimant must carefully evaluate the factual background of the case and refer to precise case law to determine which currency is 'effectively due'. There are a few possibilities to correct a wrong choice of currency if the proceedings are not at an advanced stage. It is however easier to anticipate and take subsidiary prayers for relief so as to overcome the pitfalls of the strict application of Swiss law. When defending, counsel should carefully review the choice of currency made by the claimant, as it can also prove to be a fatal weapon: a claim denominated in the wrong currency can be derailed.

Notes

1 Swiss Supreme Court, ATF 134 III 151 and ATF 137 III 158.
2 Swiss Supreme Court, 4A_341/2016.
3 Art. 58(1) of the Swiss Civil Procedure Code.
4 Swiss Supreme Court, TF, 4A_341/2016.
5 Swiss Supreme Court, TF, 4C_191/2004.
6 Swiss Supreme Court, ATF 47 II 190.
7 Swiss Supreme Court, ATF 134 III 151 and ATF 137 III 158.
8 OIllivier/Geissbűhler, 'La monnaie des conclusions dans les litiges bancaires' (AJP/PJA December 2017) 1439.

Forum-running: Switzerland takes the lead

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The Swiss Federal Supreme Court reduces the requirement for legitimate interest in a declaratory judgment in an international context and thereby allows proceedings to be moved to Switzerland by means of actions for negative declaration.

Foreclosing effect of *lis pendens*

One of the primary concerns of European (and Swiss) international civil procedure law is to avoid, as far as possible, parallel proceedings regarding the same disputed subject matter. Indeed, the Swiss Federal Supreme Court has stated on various occasions that avoiding conflicting judgements is a matter of public policy.[1]

One of the tools for avoiding conflicting judgments is the foreclosing effect of *lis pendens*. Once they have been formally commenced, court proceedings foreclose subsequent court proceedings on the same matter within Europe. This effectively impedes courts from rendering different, possibly contradictory, judgments on the same matter. This principle is enshrined in Article 27 of the Lugano Convention (LC),[2] in Article 9 of the Swiss Private International Law Statute (PILA), and in Article 64 of the Swiss Civil Procedure Code (SCPC).

Forum-running

The foreclosing effect of *lis pendens* gives additional weight to the forum that decides on the case. Indeed, at least in an ideal world, there should only be one court that decides on the merits of the case, and the judgment of this court should be recognised in other states.

As a consequence, if proceedings are threatened and there are several courts that could claim jurisdiction for that case, the parties will be eager to submit their dispute to the court they deem to be the most appropriate for their interests (which will often be their home court). While the claimant can in fact choose the court in which he brings the claim, the defendant is subject to the claimant's choice. Hence, the defendant may be tempted to take the appropriate steps to bring such proceedings to a court it deems convenient. Because of the *lis pendens* rule and its foreclosing effect, it will need to do so before the claimant starts proceedings. If this undertaking is successful, the claimant will no longer be able to bring its claim in the forum of their choice. This is referred to as forum-running.

Sometimes, the defendant does not choose the court it deems most appropriate for its case, but simply opts for a particularly slow court in order to delay a possible judgement against it. The term torpedo action is often applied to this type of behaviour.

The most common method for forum-running is an action for negative declaration: for example, a party threatened with an action for performance in England sues the threatening party for declaration that the claim at issue does not exist before the Swiss courts. As a result of the foreclosing effect, such a negative declaratory action excludes a subsequent positive action for performance on the same claim.

Particular interest in declaratory relief

Under Swiss civil procedure law, a legitimate interest in the proceedings is a prerequisite for litigation (Article 59(2)(a) SCPC). Many years of Swiss Federal Supreme Court case law have established that, for declaratory actions, a particular interest in a declaratory relief is required: the claimant must have a material interest that is worthy of protection in the immediate determination of the legal position. This requires that the legal relationship between the parties is uncertain, that such uncertainty can be lifted only by a court and that the claimant cannot be expected to accept the continuance of such uncertainty since it impedes its freedom of action. The interests of the creditor have also to be taken into account.[3]

The hurdles to meet these requirements were quite high and largely excluded forum-running in Switzerland. Indeed, the Swiss Federal Supreme Court had expressly held that the mere interest of one party in choosing the court of jurisdiction that suits it is not recognised as a legitimate interest in declaratory judgment worthy of legal protection.[4] An unreasonable continuation of legal uncertainty was to be denied by the courts whenever an action for performance was expected in the near future. This is always the case in the circumstances described here, in which one party expects the other party to file an action for performance and, for that reason only, wants to file an action for negative declaration at a different (preferable) court. Hence, forum-running in Switzerland was not possible because the courts would not render a judgment on the merits due to the lack of a legitimate interest in the proceedings.

New approach to legitimate interest

In a current decision, the Swiss Federal Supreme Court has overturned this case law, at least for international cases.[5]

Not governed by the Lugano Convention

The first question that the Swiss Federal Supreme Court considered was the applicable law. Indeed, the appellant argued that, contrary to the Court's earlier decision in DFSC 136 III 523, the question of whether a particular legitimate interest was required was not governed by national law, but by the Lugano Convention.[6]

The Court referred to the ECJ decisions Folien Fischer[7] and Kongress Agentur Hagen GmbH.[8] It also stressed that most Swiss commentators share the position expressed in DFSC 136 III 523, that national law governs the question of sufficient legitimate interest.[9]

The Court reiterated its earlier position that the scope of the Lugano Convention is limited to the issues of jurisdiction, recognition and enforcement. It found that the Convention does not contain an autonomous definition of the legitimate interest required for actions, for which the jurisdiction is based on its provisions.[10]

Lex fori *applies*

With regard to applicable law, the Swiss Federal Supreme Court needed to decide on the question of whether the requirements for requesting negative declaratory relief are procedural or substantive in nature. The Court referred to the enactment of the Swiss Civil Procedure Code in 2010, which rendered earlier case law – pursuant to which the question was substantive in nature – inoperable. It found that, by including the negative declaratory relief in the Civil Procedure Code (Article 88 SCPC), the legislator had made a statement in favour of its procedural nature, at least with regard to the required legitimate interest worthy of protection (*Rechtsschutzinteresse*). The Court concluded that the question of whether a request for negative declaratory relief requires a particular legal interest is governed by the *lex fori*.[11]

Interest in securing a sufficient place of jurisdiction

Hence, the Swiss Federal Supreme Court examined the question of whether under Swiss procedural law, the interest in securing a specific place of jurisdiction is a sufficient legitimate interest.

The Court confirmed that the three general requirements established in long-standing case law apply. Hence, a request for negative declaratory relief requires, in particular, that the legal relationship between the parties

is uncertain and that only a court can lift such uncertainty. The Court acknowledges that these requirements are usually fulfilled in situations in which the defendant wants to secure a place of jurisdiction. Hence, the third requirement, namely that the claimant cannot be expected to accept the continuance of such uncertainty since it impedes freedom of action, becomes pertinent.[12]

The Court stressed the fact that an action for negative declaratory relief by the (presumed) debtor does not negatively affect the creditor's position since he is prepared to commence court proceedings anyway. It also rejected the creditor's argument that being prepared to commence proceedings in England would not be the same as being prepared to do so in Switzerland, in view of the different levels of preparation for launching a claim.[13]

Furthermore, the Court openly acknowledged that the high threshold for legitimate interest in a declaratory judgement under Swiss law did not impede the phenomenon of forum-running, but only rendered it impossible for Switzerland. The effect of this was that the parties that could avail themselves of a Swiss forum were disadvantaged by international standards. It also recognised that the factual interest of conducting proceedings in one, rather than in another, country may be important because of the differences in the applicable procedural rules, the language of the proceedings and their costs.[14]

Possibility of torpedo claims?

The Swiss Supreme Court also considered whether recognising the interest in securing a place of jurisdiction as legitimate would lead to a further (undesirable) option for torpedo claims. The Court acknowledged that torpedo claims are not desirable, but was also very clear that Switzerland (or any other EU or LC Member State) could not tackle the issue by imposing strict rules on legitimate interest. Furthermore, it stressed that Swiss courts are not known for overly-lengthy proceedings and that there was no substantial risk of creating a Swiss torpedo.[15]

The Court's conclusion

These considerations led the Federal Supreme Court to conclude that a party's interest in securing a place of jurisdiction acceptable to that party for forthcoming court proceedings is now sufficient as a legitimate interest in legal protection, subject to abuse of rights. It is therefore now possible to bring impending legal proceedings in a foreign action into Switzerland by means of a negative declaratory action.

Conciliation proceedings constitute *lis pendens*

A specific feature of litigation in Switzerland is that each court action must be preceded by conciliation proceedings pursuant to Article 202-212 of the SCPC. These proceedings may be commenced quickly, since they do not require a fully-reasoned statement of claim. Rather, when the conciliation authority receives a request, it summons the parties to the conciliation hearing, allowing the respondent to submit an (optional) written response. After the conciliation hearing, the claimant has three months to initiate the court proceedings.

In the present context, it is important that Swiss conciliation proceedings under the Lugano Convention constitute the *lis pendens* of the action. This was found by an English Court[16] and will allow a party threatened with court action abroad and wanting to move these proceedings to Switzerland to act very quickly, without the need to file an action that has already been fully substantiated.

Conclusion

Overall, the Swiss Federal Supreme Court's new position has, with one stroke, rendered Switzerland very attractive for avoiding proceedings at an unsuitable foreign forum and as an alternative forum for the matter. There is no danger that this will create Swiss torpedo actions as the Swiss courts will deal with actions for negative declaration in their usual swift manner.

Notes

1 DFSC, 26.2.2105, 4A 374/2014, c. 4.2.1, with references.
2 The same principle is included in Art. 29 of the EU Regulation No 1215/2012. However, it does not apply to Switzerland.
3 DSFC 136 III 523, c. 5; 131 III 319, c. 3.5; 123 III 414, c. 7.b.
4 DFSC 136 III 523, c. 6.4; 131 III 319, c. 3.5.
5 DFSC 144 III 175, c. 5.4.
6 DFSC 144 III 175, c. 3.1.
7 25.10.2012, C-133/11, para. 22 and 24.
8 15.05.1990, C-365/88, para. 17.
9 DFSC 144 III 175, c. 3.2.
10 DFSC 144 III 175, c. 3.2.
11 DFSC 144 III 175, c. 4; DFSC, 23.9.2011, 5A_88/2011, c. 4.
12 DFSC 144 III 175, c. 5.2.1.
13 DFSC 144 III 175, c. 5.2.2.
14 DFSC 144 III 175, c. 5.3.2.
15 DFSC 144 III 175, c. 5.3.3.
16 *Lehman Brothers Finance AG v. Klaus Tschira Stiftung GmbH* [2014] EWHC 2782 (Ch).