



AIBL Luncheon, 15 April 2011

The New Swiss Code of Civil Procedure, the Revised Lugano Convention and SDEBA:

Issues of interest for in-house counsels

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- Broad overview of the changes in:
 - Swiss Civil Procedure
 - Lugano Convention
 - Swiss Debt Enforcement and Bankruptcy Act

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II. Structure

I. Introduction

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III. Swiss Code of Civil Procedure

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« It usually takes 100 years to make a law, and then, after it's done its job, it usually takes 100 years to be rid of it. »

Henry Ward Beecher

III. Swiss Code of Civil Procedure

1. Unification of Rules on Civil Procedure

➤ **E pluribus unum...**

- Entry into force of SCCP: 01.01.11
- From 26 different cantonal civil procedures to 1 unified code
- Fills the gap between civil substantive law and procedural rules
- Faster and more flexible proceedings
- Emphasis on conciliation and ADR

➤ **...but:** Court organization remains at cantonal level!

III. Swiss Code of Civil Procedure

2. Types of Proceedings

➤ 4 main types of proceedings

- Ordinary proceedings (Articles 219 to 242 SCCP)
- Simplified proceedings (Articles 243 to 247 SCCP)
- Summary proceedings (Articles 248 to 256 SCCP)
- Special proceedings relating to family law (divorce, etc.) (Articles 271 to 301 SCCP)

III. Swiss Code of Civil Procedure

2. Types of Proceedings: Ordinary Proceedings (219 – 242 SCCP)

- Applicable if amount in dispute above CHF 30,000 (unless special rules apply)
- Default rules
- Stringent requirements of form for drafting the statement of claim / defense and for fact allegation
- Parties have burden of proof and duty of allegation (*maxime des débats*)

III. Swiss Code of Civil Procedure

2. Types of Proceedings: **Simplified Proceedings (243 – 247 SCCP)**

- In general: applicable if amount in dispute below CHF 30,000
- Article 243 §2 SCCP: list of matters to which simplified proceedings apply independently from the amount in dispute, e.g.:
 - *Law on equality between men and women*
 - *Termination / extension of lease agreement*
- Simplified statement of claim / defense (official form may be used)
- *Maxime inquisitoire sociale*

III. Swiss Code of Civil Procedure

2. Types of Proceedings: Summary Proceedings (248-256 SCCP)

- Articles 250 – 251 SCCP: list of matters to which summary proceedings are applicable:
 - *Provisional measures*
 - *Setting aside of objection to summons to pay*
 - *Attachment*
- Essentially written proceedings
- No conciliation attempt
- Almost only written evidence, likelihood is sufficient (lighter standard of proof)

III. Swiss Code of Civil Procedure

3. Focus: Conciliation Attempt (197 - 209 SCCP)

- Principle: *“First conciliate, then adjudicate”*
 - Conciliation attempt is mandatory, unless:
 - *Amount in dispute exceeds CHF 100,000;*
 - *Defendant is abroad;*
 - *List of exceptions (summary proceedings, divorce proceedings, ...).*
 - Parties shall be present in principle
 - Judgment proposal / award possible if conditions are met (Articles 210 and 212 SCCP)
- Parties shall carefully prepare conciliation hearings

III. Swiss Code of Civil Procedure

3. Focus: Statement of Claim / Defense (221 SCCP)

- Strict formalism to be respected in case of ordinary proceedings
- For **every** allegation of fact in the statement of claim / defense, parties shall offer exact evidence :
 - *Written evidence (documents, contracts)*
 - *Witnesses (name, address)*
 - *Parties' hearing*
 - *Others*
- Increased need for preparation and detailed internal investigation **before** filing the statement of claim / defense

III. Swiss Code of Civil Procedure

3. Focus: Labor Law

- Simplified or ordinary proceedings depending on value in dispute
 - Court costs apply (if litigation value > CHF 75,000 in Geneva)
 - *Tribunal des prud'hommes* still exists, but 3-judge panel instead of 5 (like in the past)
 - *Maxime inquisitoire sociale* applies if value in dispute < CHF 30,000
- If value in dispute > CHF 30,000 → **standard ordinary proceedings**

III. Swiss Code of Civil Procedure

3. Focus: Lease related litigation (*baux et loyers*)

- Simplified proceedings always applicable to most frequent cases (objection to termination of lease, lease extension, abusive rent rates)
 - *CCBL* still exists, can still issue awards (*judgment proposal*, Article 210 §1 SCCP) in some particular cases
 - Proceedings remain free of charge in Geneva
 - *Maxime inquisitoire sociale* applies to objection to termination of lease, lease extension, abusive rent fees, independently of the amount in dispute
- Lease litigation under SCCP is “easier” than labor law litigation

III. Swiss Code of Civil Procedure

3. Focus: Clear-cut cases (257 SCCP)

- Conditions to apply clear-cut case rules:
 - a) *Facts are undisputed or can be proved immediately*
 - b) *Legal situation is also clear*
- Summary proceedings apply
- Simple official form may be used in order to initiate proceedings
- If judge decides that “clear-cut case” conditions are not met → dismissal without decision on the merits

III. Swiss Code of Civil Procedure

3. Focus: Preventive statement of defence (270 SCCP)

- “*Just in case*” defense brief
 - Shall be filed before any court which might be competent to issue the possible *ex parte* provisional measures or civil attachment
 - Statement of defense is served on the counterparty only in the event proceedings are initiated by this party
 - Validity: 6 months
- Interesting tool within the framework of multinational litigation

III. Swiss Code of Civil Procedure

3. Focus: Procedural Attorney - Client Privilege (160 SCCP)

- Before SCCP: no attorney - client privilege existed on documents which were no longer under the direct control of the lawyer
- Now: Article 160 §1(b) SCCP provides that:

“The parties have a duty to cooperate in the taking of evidence. In particular, they must:

[...]

b. produce documents; with the exception of lawyers' correspondence, to the extent it pertains to the professional representation of one party or third parties”

- Introduction of a kind of a procedural “attorney-client privilege” under Swiss procedural law

IV. Revised Lugano Convention

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1. General

- Entry into force (for Switzerland): 01.01.2011
- Revision put in line (again) the Lugano Convention with the correspondent *Brussels I* Regulation
- Applicable to new EU Members (Czech Republic, Cyprus, Slovakia, Slovenia, Hungary, Malta, Baltic States, Rumania and Bulgaria)
- Automatic application to future EU Members

IV. Revised Lugano Convention

2. Main Amendments

- Contractual forum → place of execution of the characteristic performance
- Stronger protection for consumers
- Independent definition of *litispence*
- Simplified exequatur and execution proceedings

IV. Revised Lugano Convention

3. Focus: Exequatur proceedings and provisional measures

- Exequatur is granted *ex parte* in first instance
- Counter-party shall be heard only in the second instance, in case of appeal against the exequatur request
- Material objections to the exequatur are analyzed only in the second instance
- In Switzerland, exequatur can be requested within the framework of a request for provisional measures

V. Debt Enforcement and Bankruptcy Act

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1. General

- Adaptation of SDEBA to SCCP and revised Lugano Convention
- No particular changes in debt enforcement proceedings
 - *Request to initiate DEP / issuance of summons to pay / objection*
 - *Proceedings to set aside objection (procédure de mainlevée): Summary proceedings (official form exists)*
- Substantial changes in civil attachment proceedings (*séquestre*)

V. Debt Enforcement and Bankruptcy Act

2. Focus: Civil attachment

- Adaptation of the SDEBA to the revised Lugano Convention
- Civil attachment is the new **provisional measure** in Switzerland pursuant to the revised Lugano Convention in case of exequatur proceedings
- New case of civil attachment (*séquestre CL*): Article 271 §1(6) SDEBA → civil attachment can be requested based on a definitive executory title
- No additional requirements (*≠ Ausländerarrest*, Article 271 §1(4) SDEBA)

V. Debt Enforcement and Bankruptcy Act

2. Focus: Civil attachment

- Consequences of SDEBA's amendments:
 - Civil attachment possible against a Swiss debtor
 - Switzerland became a sole "attachment territory" → an attachment request is sufficient to attach assets anywhere in Switzerland
 - Only one validation procedure necessary

VI. Conclusion

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Pros...

- Increase in efficiency, after adaptation period
- Increased transparency and foreseeability for (foreign) companies with Swiss entities in several cantons
- Substantial improvement for labor law cases
- Increased effectiveness for exequatur proceedings
- New, potentially interesting procedural tools

VI. Conclusion ... and cons

- Increased formal requirements in drafting legal briefs (ordinary proceedings)
- Increased work required (internal investigation) before filing
- CAVEAT: judicial organization remains cantonal

Questions ?