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## Switzerland

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## Switzerland\*

Swiss conflicts law or private international law (PIL) definitely needed to be revised and completed, based as it is today on a Federal law of 1891 called LRDC.<sup>1</sup> This law dates back to a time when Swiss cantons still had separate systems of private law. After the enactment of the Swiss Civil Code in 1912, the LRDC lost its initial purpose to govern conflicts of law between cantons and therefore became the only law applicable to regulate the international conflicts of laws.

Thus, the LRDC constitutes only indirectly a private international law legislation and is fairly incomplete. In fact, it only governs some aspects of the law of persons, of family law and successions. For this reason, the Swiss Federal Council decided in 1972 to initiate a legislative procedure to draft a totally new and comprehensive PIL legislation, including new subjects such as contracts law, torts, company law, jurisdiction, execution of foreign judgments, and arbitration.

### I. The Codification Procedure of Swiss Private International Law

An experts commission, responsible for drafting the PIL legislation was named in 1973.<sup>2</sup> After having consulted the different legal and economic groups concerned, a final draft of a Federal Law was proposed in November 1982<sup>3</sup> by the Federal Council to the Federal Assembly (Parliament), which consists of two Chambers, the National Council and the Council of States. Generally, the draft was well accepted by the Federal Assembly, which did not make significant amendments. The legislative debates are about to be concluded and have now boiled down to the settling of differences between both Chambers, essentially regarding matters on commercial arbitration and consumer protection. These matters were refused by the Council of States in March 1985, but were accepted by the National Council in December 1986.

Apart from these two exceptions, it is possible today to outline the main characteristics and general principles of the new PIL legislation, which should come into force on January 1, 1988.

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1. Law on Relationships between Citizens Established or In Stay, Recueil systématique 211.435.1 (Swiss).

2. 1973 FEUILLE FÉDÉRALE I 1620.

3. 1983 FEUILLE FÉDÉRALE I 255.

## II. Structure and Main Features of the New Legislation

### A. STRUCTURE

The Federal Law distinguishes itself from other European laws. Not only does it govern the question of the law applicable to each substantive field, but also matters of jurisdictional competence as well as the recognition and enforcement of foreign judgments. The Federal Law includes twelve chapters. Chapter One provides the provisions applicable to the other chapters and handles questions of jurisdiction, of applicable law, and of recognition of foreign judgments. Chapters Two to Nine deal with the regulation of conflicts of laws in subjects such as marriage, descent, succession, company law, and law of contracts. The Federal Law also provides various clauses on more specific matters such as international bankruptcy (Chapter Ten), international arbitration (which, even though disputed, will certainly be maintained in the text—Chapter Eleven). Chapter Twelve deals with the implementing and transitory provisions of the Law.

### B. MAIN FEATURES OF THE NEW LEGISLATION

#### 1. *Jurisdiction*

Article 2 of the Federal Law states that claims must be brought in the place of the defendant's domicile, conforming to the general principle stated in article 59 of the Federal Constitution.

Article 4 offers to the plaintiff a subsidiary forum when it appears impossible for the plaintiff, under the specific circumstances, to bring an action before a foreign jurisdiction. Even where no forum is provided by the Federal Law, article 4 in this case gives jurisdictional competence to Swiss courts. This jurisdiction of necessity will be in the place that has sufficient points of contact with the specific issue.

Regarding the choice of jurisdiction, article 5 states that the written form is sufficient even if parties are not bound by agreement. This choice may result from an exchange of correspondence or telex. Materially, the dispute shall be related to a particular legal relationship. On the other hand, the provision limits the question of the choice of jurisdiction to patrimonial issues, a concept calculated mainly to exclude matters of status, but which might create some problems when applied. Finally, the choice of jurisdiction shall designate a well-defined court, excluding the possibility of electing a country as forum.

Article 6 provides that the defendant must raise the defense of lack of jurisdiction at the beginning of the procedure. If he fails to do so, he will be regarded as having accepted the improper jurisdiction by tacit consent.

Concerning litispendence, article 9 restates the well-established rules applied by Swiss courts: when an action is already in course between the same parties on a similar issue abroad, the Swiss judge will have to defer the proceedings if a decision capable of recognition in Switzerland can be expected within a reasonable period of time. Paragraph 2 states a new rule establishing that litispendence begins when the plaintiff's petition is filed with the conciliation court.

## 2. *Applicable Law*

In dealing with questions raised by the effect of the choice of law rules of a country, article 13 of the Federal Law favors the theory which refers to the substantive internal foreign law, excluding its rules of conflicts of laws.<sup>4</sup> Exceptions to this principle may be allowed but only in the cases provided by the Federal Law itself or when it appears in the circumstances that the matter has very few connections with the foreign law indicated and many more points of contact with a third law.

Article 15 provides that the Swiss court will automatically establish the contents of the foreign law which, according to the appropriate connecting principle of the conflict of laws, it is directed to apply. This new rule, which conforms to a general trend noted in other countries, will authorize the subsidiary application of Swiss law only when the Swiss court, with the collaboration of the parties, fails to ascertain the relevant elements of the foreign law. According to the consistent practice of the Federal Tribunal,<sup>5</sup> the entire Swiss law itself will be then applied.<sup>6</sup>

Under article 16 the application of the designated foreign law will be precluded if it would lead to a result contrary to Swiss public order (negative effect of the *ordre public*). Indeed, the new Law adopts the positive effects of *ordre public*, including even foreign *ordre public*: the Swiss court may apply the provisions of the internal law of Switzerland or of a third foreign country when in specific circumstances the application of these provisions is imperative with respect to their purposes. Those provisions will then be taken into consideration if the matter is sufficiently related to such country, if major and preponderant interests command the application of the said provisions and if those interests are legitimate and worthy of protection in the particular case.

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4. Reference to the law of a country shall be regarded as including both private and public laws of this country. See *Resolution International Law Institute*, XXXI ANN. SUISSE DE DROIT INT'L 293 (1975).

5. See *Sznager v. Rodi*, Federal Tribunal, ATD 92 II 111.

6. Modifications of the Federal Act on Judiciary Organization is also considered to give to the Federal Tribunal the competence to control the correct application by cantonal courts not only of the new Federal Law on PIL but also of the foreign law designated.

This rule will allow to take into account imperative public order provisions of a third country and may be of a great importance in law of contracts regarding import and export restrictions, currency regulations, or restraint of trade legislation. In fact, the trend to adopt conflicts of laws rules based on an effort of international solidarity between countries' legislations can be more particularly observed in provisions related to products liability and unfair competition.

Regarding products liability, article 131 of the Law states that the injured party can bring his claims either under the law of the country in which he has his establishment, or, if not, his ordinary residence, or under the law of the country where the defective product was acquired. In a similar spirit, article 132 of the Law favors the general principle of public interest tending to protect the market and the consumers by providing that claims resulting from unfair competition shall be governed by the law of the country in which the act has its effects.

### 3. *Recognition and Enforcement of Foreign Judgments*

Article 23 enumerates three conditions under which foreign judgments may be enforced in Switzerland:

(1) The judgment must have been given by a court having jurisdiction (art. 23 al. a). Regarding this point, article 24 specifies that a foreign Court is deemed to have jurisdictional competence in the following cases: (a) when the foreign court has jurisdiction according to the provisions of the Federal Law itself, or, if not, when the defendant was domiciled in the country from which the judgment proceeds; (b) when, in patrimonial matters, parties submitted by agreement to the jurisdiction from which the judgment proceeds unless this agreement is void according to the provisions of the Federal Law; (c) when, in patrimonial matters, the defendant appeared in court without having expressly raised the exception of lack of jurisdiction of the foreign court; (d) when, in case of a recognition of judgment rendered on a counterclaim, the foreign court had jurisdiction to decide the principal claim and when there is a close connection between both claims.

(2) The foreign judgment shall be final and conclusive in the court which rendered it.

(3) If a party shall not be entitled to object to the enforcement of the judgment by raising one of the following reasons: (a) the summons to appear was not properly served, either under the law of domicile, or under the law of ordinary residence, unless the party agreed to proceed without having reserved his rights to plead incompetence; (b) the judgment was rendered in breach of the most elementary rules of procedure,

and, more particularly, when the party was precluded from asserting his rights; (c) when an action brought between the same parties on a similar matter is already in course in Switzerland or has already been adjudicated upon in Switzerland or in a third country by a judgment that could be enforced according to the rules of the Federal Law.