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Update

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Forum running through an action for a negative declaratory judgement is now admissible in Switzerland

According to a new Federal Supreme Court decision, securing an advantageous place of jurisdiction in Switzerland (so-called "forum running") in international disputes is a sufficient interest for an action seeking a negative declaratory judgement. This new precedent enables parties domiciled in Switzerland to anticipate foreign proceedings initiated by the counterparty by filing an action for a negative declaratory judgement to drag the case before a court in Switzerland.

New precedent by the Federal Supreme Court

Swiss parties who were confronted with an impending legal action by the counterparty abroad have so far not been in a position to pre-empt such an action by filing an action for a negative declaratory judgement (i.e. an action seeking a declaration that the claim asserted by the counterparty does not exist) in Switzerland. Pursuant to previous precedent (ATF 136 III 523), the Swiss Federal Supreme Court denied that there was a legitimate interest in the filing of such action to secure the jurisdiction of the Swiss courts. This restrictive precedent was widely criticised as discrimination of Swiss parties in international disputes.

In a new decision (4A_417/2017, awaiting official publication), the Swiss Federal Supreme Court has changed its view and now allows such actions.

The facts assessed by the Federal Supreme Court

The plaintiffs (the Swatch Group and two of its subsidiaries) had decided to stop supplying the defendant (an English wholesaler of watch parts) in the context of introducing a selective distribution system. The defendant requested the plaintiffs to confirm that they would resume the delivery as otherwise the defendant would file an action before the High Court in London for violation of European antitrust law without further notice. The defendant subsequently filed such action in London.

However, shortly before the filing of the action in London the plaintiffs filed an action for a negative declaratory judgment in the Commercial Court of the Canton of Berne in Switzerland. In this action, the plaintiffs asked for a declaration that they are not obliged to supply the defendant and that they do not owe the defendant anything in connection with the termination of

supply, in particular no damages.
The Commercial Court limited the proceedings inter alia to the question of whether the plaintiffs have a legitimate interest in such action. On the basis of Swiss law the Commercial Court denied such interest and dismissed the action on procedural grounds.

The plaintiffs filed an appeal against this decision with the Swiss Federal Supreme Court. In the complaint they in particular argued that the question of a legitimate interest should be decided on the basis of the Lugano Convention which would not require a special interest in a negative declaratory judgment. In the event that the Federal Supreme Court was to assess this question under Swiss law, the plaintiffs argued that no particular interest in a negative declaratory action was required under the Swiss Code of Civil Procedure (CPC) and that in any event such interest must be assumed in the present international dispute.

Summary of the Court's considerations

The Federal Supreme Court upheld the complaint by Swatch Group and its subsidiaries essentially for the following reasons:

First, the Federal Supreme Court follows its established precedent insofar as the Court considers that the question of a legitimate interest in an action for a negative declaratory judgment is not governed by the (otherwise applicable) Lugano Convention but by the applicable national law (c. 3.2.). The Court then raises the question (which since the entry into force of the CPC had been left open to date) as to whether the legitimate interest is a question of substantive law or procedural law. The Federal Supreme Court decides in favor of a procedural qualification, in particular because the legitimate interest is regulated in the CPC (as part of the general interest in legal protection which according to article 59 para. 2 CPC is a requirement for any civil proceedings). Therefore, the interest in an action for declaratory relief in a Swiss litigation is determined by Swiss law (*lex fori*) also in international matters, and not by the law applicable to the merits (*lex causae*) (c. 4.3.).

Departing from its previous precedent, the Federal Supreme Court then affirms, on the basis of Swiss law, that the aim of the plaintiffs (i.e. the defendants in the forthcoming foreign proceedings) to secure a favorable place of jurisdiction in Switzerland is a sufficient interest in an action for a negative declaratory judgment. The previous restrictive approach disadvantaged parties in Switzerland in disputes since they were denied a possibility to file such action in Switzerland while this opportunity was available to their counterparties abroad. In its new precedent, the Federal Supreme Court regards a party's actual interest in conducting the litigation in a particular country (and not in another country), and, thus, in being able to initiate an action for a negative declaratory judgment in Switzerland, as substantial. The reasons for this are in particular the different procedural rights, languages and duration and costs of litigation in different countries. However, this reasoning in principle only applies in international disputes and not to domestic litigation in Switzerland since in the latter case the choice of a particular jurisdiction is of much less importance (c. 5.3.).

In the opinion of the Federal Supreme Court, the admission of an action for a negative declaratory judgement is reasonable also from the perspective of the defendant (i.e. the plaintiff in the forthcoming foreign proceedings). Contrary to its previous precedent, the Court no longer assumes that the defendant would be unduly forced to litigate the case prematurely. In fact, in this situation the defendant is planning to initiate litigation abroad and thereby signals that he or she is prepared to conduct the litigation. The additional objection by the defendant that the admission of such actions for negative declaratory judgments would unduly burden the courts with unnecessary parallel proceedings is rejected by the Federal Supreme Court by reference to article 27 of the Lugano Convention (c. 5.2.). This provision prevents parallel proceedings by requiring any court other than the court first seized with the matter to stay the proceedings and to decline its jurisdiction as soon as the jurisdiction of the court first seized has been established.

In summary, the Swiss Federal Supreme Court holds in its new decision that, at least in international disputes, a party's interest in securing a preferential place of jurisdiction in forthcoming court proceedings must be qualified as a legi-

timate interest in an action for a negative declaratory judgment (c. 5.4.).

Relevance of the decision for Swiss parties

The new precedent by the Federal Supreme Court departs from the previous restrictive approach regarding the admission of actions for negative declaratory judgments to secure a place of jurisdiction. The Federal Supreme Court now primarily focuses on the practical advantages of conducting the litigation in the "home jurisdiction" (in particular the fact that proceedings are governed by procedural law with which the party is familiar and are conducted in the party's own language). The Court strongly relativizes its previous concerns regarding forum running (which were of a primarily theoretical nature) that had tipped the scales in favor of the restrictive approach and now aims at preventing a discrimination of Swiss parties in international disputes. Since in the case at hand the initiation of the foreign proceedings was imminent, the Supreme Court did not have to decide on how imminent foreign proceedings must be in order to establish a legitimate interest in filing an action for a negative declaratory judgment in Switzerland. This question, thus, remains open.

From the perspective of parties who are domiciled in Switzerland, the new precedent by the Federal Supreme Court is good news. It enables Swiss parties to conduct a "pre-emptive strike" by filing an action for a negative declaratory judgment to secure a preferential place of jurisdiction in Switzerland (provided that Swiss jurisdiction exists on the basis of the Lugano Convention or the Swiss Private International Law Act). In addition, the new precedent ensures that in cross-border disputes Swiss parties have the same procedural means available as their foreign counterparties. Indeed, in many other countries the filing of an action for a negative declaratory judgment is available.

The practical aspects which among others were decisive in the Federal Supreme Court's decision to admit actions for a negative declaratory judgment to secure the preferred place of jurisdiction in an international context exist only to a lesser extent in domestic legal disputes between parties who are both domiciled in Switzerland. This is particularly true since the entry into force of the unified Code of Civil Procedure. Nevertheless, there may also be practical interests in forum running in domestic disputes (in particular due to Switzerland's different national/procedural languages). However, based on the considerations in the new precedent, we do not expect that the Federal Supreme Court would also abandon its restrictive approach with regard to forum running in domestic disputes and would permit actions for a negative declaratory judgment also to this end.

Please do not hesitate to contact us in case of any questions.

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