Notes

1 Law of 22 December 2008, No 203; The Ministry of Justice has commented that the new rules are an important step to speed up civil proceedings.
2 See Article 51 of Law No 133/2008.
3 See Law of 29 December 1993, No 580; EU Directive No 52/2008.
4 See Article 60, paragraph 3, q, of Law No 69/2009.
5 At the time of writing this article, no regulations on fees of experts' opinions used in Mediation in civil proceedings have been issued yet.
6 See Article 60, paragraph 3, n, of Law No 69/2009.
7 At the time of writing this article, there is no further discipline on fiscal benefits applicable to Mediation in civil proceedings.
8 It is worth noting that judgments on preliminary questions have been simplified by using order instead of decision (see Article 45, paragraphs 3, 4, 5, 6, 7 of Law No 69/2009). It has also been provided that the judge can order the party who has raised without good cause a judge's recusal to pay legal fees and a fine up to €250. These rules look at avoiding instances of judge's recusal on no legal basis.
9 See Article 91 of code of civil procedure.
10 See Article 45, paragraph 14, of Law No 69/2009.
11 See Article 45, paragraph 17, of Law No 69/2009.
12 See Article 52, paragraph 5, of Law No 69/2009.
13 See Article 46, paragraph 8 and 52, paragraph 3, of Law No 69/2009 introducing Article 257 *bis* and 103 *bis* of code of civil procedure providing with rules on written testimony.
14 Law No 69/2009 provides that new regulations have to be released by the Ministry of Justice in order to discipline the Model of Affidavit. At the time of writing of this article no further regulations on affidavits have been passed yet.
15 Fines are provided for witnesses who do not answer the questions or do not send the affidavits back to the Court within the scheduled time frame.
16 See Article 47, paragraph 1, of Law 69/2009, introducing Article 360 *bis* of code of civil procedure.
17 See Article 54 of Law No 69/2009.
18 An order is more simplified than a full decision. Orders do not need extended reasoning and in many cases they are not even provided for judicial review.
19 See Article 51 of Law No 69/2009.

Lawsuits by foreigners in Switzerland based on the Lugano Convention

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The authors look at a recent decision in Switzerland that addresses jurisdiction issues for foreign litigants under the Lugano Convention.

Introduction

In December 2008, the highest court of Switzerland, the Federal Supreme Court, delivered a judgment of note in the field of international civil litigation.[1] The Supreme Court had to adjudicate a case brought before it by three siblings resident in Pakistan who had appealed against a judgment of the lower instance, the Commercial Court of the Canton of Zurich, which had held that it was competent to hear a suit brought against a bank based in Zurich by a fourth sibling of the said family. The father of the four children had recently passed away and the claimant had confronted the bank in Zurich which had allegedly entertained a banking relationship in the amount of more than CHF 70 million with the deceased with a request for information. The bank refused to grant such a request in the absence of a joint request by all four heirs. The three siblings joined proceedings and took over the defence on behalf of the bank. The respondents challenged the jurisdiction of the Commercial Court and claimed that the place of last residency was the only place were such a claim for information based on the law of succession could legally be brought before a court (Article 86 of the Private International Law Act/PILA). The Commercial Court dismissed the jurisdictional challenge and claimed to be competent to rule in the matter. This decision was appealed by the respondents and was eventually brought before the Supreme Court.

Decision by the Supreme Court

The Supreme Court analysed the matter and pronounced that the case was indeed an international case as one party (the fourth sibling and claimant) was not resident in Switzerland. Under such circumstances,

the Private International Law Act (PILA) became applicable in answering which court had jurisdiction, unless an international treaty took precedence (Article 1 subsection 2 PILA). As the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (of 16 September 1988, in force in Switzerland since 1 January 1992, SR 0.275.11) generally applies to civil and commercial matters in international contexts, the Supreme Court further examined whether the matter at hand could be argued under the scope of the Treaty or whether it fell under one of the categories excluded from the ambit of the Treaty.

The Supreme Court explained that the question of the applicability of the Lugano Convention could not be decided based on a general provision but rather needed to be viewed for each one of its jurisdictional provisions. In the case at hand, the Supreme Court reviewed Article 2 subsection 1 of the Lugano Convention which provides for a forum at the place of incorporation of the defendant of a claim. It dealt with the question of whether the provision could be invoked where the claimant himself did not reside in one of the contracting countries of the Lugano Convention. As the Lugano Convention itself does not contain any explicit provision on this question, the Supreme Court concluded that the question needed to be decided based on an autonomous interpretation of the Convention.

In doing so, the Supreme Court considered the fact that the Lugano Convention was a parallel agreement to the existing Treaty of Brussels applicable in the European Union. This required the court to follow an interpretation which was in line with the jurisprudence and legal practice in Europe, in particular with regard to the Court of Justice of the European Communities.

With this in mind, the Supreme Court also noted that the aim of the Lugano Convention had been to incorporate Switzerland as a non-EU state into the existing harmonised system of jurisdictions in Europe. An interpretation by the Supreme Court standing in blatant contrast to such jurisprudence would undermine this effort. The Supreme Court thus concluded that the jurisprudence of the Court of Justice needed to be followed in principle.

The Supreme Court then examined the jurisprudence of the European Court of Justice and with reference to the Court's *Owusu case*[2] found that the Court of Justice applied the corresponding parallel provision of Article 2 of the Brussels Convention in all cases where a defendant was resident in a contracting state and one additional 'international element' coincided, such as in the case of a claimant residing outside a Treaty state. The Supreme Court followed that the case at hand was comparable and that consequently the jurisprudence of the Court of Justice was to be followed, an approach also supported by legal scholars in Switzerland.

The Supreme Court then turned to the actual claim filed by the claimant and held that such a request for information would without doubt be considered as a civil or commercial matter and it would thus fall under the ambit of the Lugano Convention as long as none of the exclusions of Article 1 subsection 2 became applicable. These exclusions provide, inter alia, that matters pertaining to wills and succession do not fall under the scope of the Lugano Convention.

The Supreme Court explained that neither it nor the Court of Justice had to date ever decided whether the right of an heir to request information and gain insight vis-à-vis a bank constituted a right that fell into this excluding category. The legal doctrine to the Treaty of Brussels, however, is clearly of the view that such claims do not fall under the exclusion, as they do not have their cause in the law of succession but rather originate in the estate of the original contractual partner and the status of the heir as their new holder *causa mortis* was merely a preliminary question.

The Supreme Court concluded that where the claim of the heir has its origin in the estate of the deceased and only the standing to sue is based on the law of succession, the Lugano Convention was applicable to the claim. The existence and scope of the right claimed needed not to be determined by the law applicable to the estate but rather by the law governing the contract in question. The Supreme Court thus found that the Commercial Court needed to apply the law applicable to the original banking relationship between the deceased and the bank in order to find out whether such a contractual claim for information existed under the original agreement. It was found that such a right did exist and the claimant had inherited this contractual right based on succession law.

Conclusion

i) The Supreme Court held that not only foreigners from a Lugano Convention state, but also foreigners from non-Lugano Convention states, could sue defendants residing in a Lugano Convention state if the cause for the claim brought against the defendant was of a civil or commercial nature.

ii) The Supreme Court also held that as long as only the standing to start an action had its origin in the law of succession, the contested right, however, originated in the assets of the deceased and was of a civil or commercial nature, the exclusion clause of the Lugano Convention could not be invoked. Therefore, heirs may individually pursue their right to information via-à-vis banks with which the deceased had maintained a contractual relationship at the time of his or her death.

Notes

1 Decision 4A_394/2008 of the Swiss Supreme Court of 18 December 2008. The decision is published in the reports of the Swiss Supreme Court's decisions volume 135 part III page 185 et seqq. The full text of the decision is also available at **www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954-direct.htm**.

2 Judgment of the Court of Justice of 1 March 2005, C-281/02.

Arbitration in the UAE – is it winning the war on litigation?

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Karim J Nassif briefly reviews the latest developments in Arbitration law in the UAE.

Introduction

There is a consensus that the Middle East needs a world-class arbitration centre especially if it wishes to continue to attract major international transactions. Dubai is fully aware of this and, as the Middle East's leading business place, has been working towards its implementation. Over the last few years, Dubai has observed the emergence of arbitration institutions with modern rules based on best international practices, a broad range of arbitrators, the involvement of high-caliber international arbitrators in major arbitration proceedings and the implantation of world-class arbitration legal practitioners. At the same time, the UAE has acceded to the New York Convention, which, along with the regional and Gulf Cooperation Council's conventions, is meant to facilitate the enforcement of arbitration awards in the Middle Eastern region.

Furthermore, Dubai courts' jurisprudence is increasingly encouraging parties to refer their differences to arbitration. The following review of the Dubai Court of Cassation jurisprudence illustrates this fact. The frame is set for Dubai but it lacks one last thing: the enactment of the long-awaited new arbitration law.

It should be pointed out from the outset, that the UAE – like other Gulf and Arab countries is inspired by the civil law system.[1] The following jurisprudential review, which is confined to the notions of capacity and authority in arbitration, the assignment of the arbitration clause and the principle of autonomy, and public policy and mandatory rules, should be viewed from that civil law perspective.