Current and future cases

As stated above, the new regulations permitting class actions in Italy entered into force on 1 January 2010.

Up to the time of writing this article, three class action claims have already been filed and are pending in the Italian courts. The Consumers Association Codacons filed two claims against two of Italy's biggest bank groups, Unicredit and Intesa Sanpaolo in the Court of Rome and the Court of Turin, respectively. Both claims relates to the alleged overdraft fees charged by banks to their clients.

In addition, Codacons is also the promoter for a class action claim in the Court of Milan against Voden Medical Instruments S p A, a pharmaceutical company, in relation to 'Ego test flu', a do-it-yourself detection test of the A and B flu viruses, including the virus for swine and avian flu.

It is understood that several class actions are likely to be filed in the near future, including an action against Microsoft Italia, the Italian subsidiary of Microsoft Corporation in relation to Windows preinstalled software (OEM).

It is easy to anticipate that the number of class action claims is likely to increase each and every day in the very near future.

Note

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Recent decision by the Federal Tribunal of Switzerland: Place of performance – limiting forum shopping

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The Swiss Federal Tribunal, the highest court of Switzerland, recently delivered a judgment in the field of international civil litigation which seems to strengthen its stance to limit claims brought by Swiss claimants in their own backyard in the absence of a jurisdiction clause simply based on the performance of certain obligations in Switzerland.

Background

The Federal Tribunal had to deal with a case involving a Swiss-based reinsurance company which had brought a claim against a Bermuda-based insurance company.[1] The Swiss reinsurance company (the complainant) had commenced proceedings for the repayment of US$5.75 million based on the contended invalidity of the reinsurance agreement with the Bermuda insured after it had originally paid out this amount under the reinsurance agreement to reimburse the Bermuda insurer. The Bermuda insurer itself had indemnified a company who had taken out insurance with them and which had suffered damages during hurricane Rita. The Bermuda based insurance company had on the other hand accepted the US$5.75 million payment as a part payment of a much larger reinsurance claim in the amount of US$12.5 million.

The Swiss based reinsurer brought its claim for repayment before the local district court at its place of incorporation in Switzerland. The respondent had neither appointed an agent entitled to receive correspondence nor filed a response to the claim. Nevertheless, both the district court and the appellate court dismissed the claim for of lack of jurisdiction. The district court held that because the payment of the insurance premiums, which would have been paid in Switzerland, was not contentious, the place of performance for this obligation was not relevant in the case at hand. This argument was upheld by the higher court. After unsuccessful proceedings

before the cantonal courts, the complainant brought its case before the Federal Tribunal.

Arguments by the complainant

The complainant argued that it was entitled to bring its claim at the place of performance based on Article 113 of the Swiss Federal Act on International Private Law (PILA) and that this place of performance was in Switzerland. It argued that the main duty of the respondent was the payment of insurance premiums and this duty needed to be fulfilled at the place of incorporation of the complainant, this being Switzerland. The complainant notably had thus not argued that the chosen jurisdiction was the place of performance of its own obligations but rather the place of performance of the counter-performance of the respondent. Further, it held that owing to the dissent and the subsequently required unwinding of the insurance agreement there existed a quasi-contractual relationship between the parties to restore them to the position they were in before the agreement. Consequently, the repayment of a sum of money was, under the applicable Swiss substantive law, a debt which needed to be discharged at the creditor's domicile, which in this case also led to a jurisdiction in Switzerland.

Reasoning by the Tribunal

The Federal Tribunal commenced its judgment by ascertaining that the case at hand was an international case raising the question of the applicable jurisdiction. It first held that because of the absence of a treaty dealing with questions of jurisdiction between Bermuda and Switzerland, which would have taken precedence over the Swiss statute governing international private law matters, and because the UK, as Bermuda's representative in international matters, had not extended the application of the otherwise applicable Lugano Convention to Bermuda, the PILA needed to be consulted in order to ascertain whether or not the jurisdiction in Switzerland could be justified. Further, the Federal Tribunal found that the parties had not decided beforehand on a jurisdiction for disputes emanating from their contractual relationship. Consequently, the PILA was determinant in deciding jurisdiction.

With regard to Article 113 PILA which the complainant had invoked, the Federal Tribunal held that this provision needed to be read with a view to the court's own and the European Court of Justice's jurisprudence in connection with Article 5 Number 1 of the Lugano Convention which also dealt with the question of jurisdiction at the place of performance. Also, in instances where the validity of a contract was in dispute, a suit could be brought before the court of the place of performance at which said obligation was or should have been performed. It followed that in determining the place of performance it was not sufficient to simply chose any contractual obligation but rather the contractual obligation that corresponded to the obligation based upon which the complainant had raised its claim. The focus rested on the contentious primary duty and not on any counter-performances, ancillary duties or secondary duties such as the payment of damages ensuing because of the breach of the primary obligation. The Federal Tribunal explicitly found that the claimant had not argued that the place of performance for its own insurance duties had been in Switzerland.

In the case at hand, where the complainant was arguing that the contract was invalid because of a dissent among the parties, the Federal Tribunal held that it needed to ascertain over which essential duty the parties were in disagreement and hence claimed dissent. The mere fact that the rescission and unwinding of an agreement because of dissent necessitated the reversal of certain actions over which the parties had at the outset not been in disagreement did not make these issues contentious in hindsight. What is relevant for jurisdiction is the contractual duty over which the parties were actually in disagreement and because of which the claimed invalidity of the agreement is made. Jurisdiction according to Article 113 PILA could thus only be found at the place of performance of this contentious obligation.

Any extension of this principle accommodating other jurisdictions for claimants bringing before a court's attention the breach of other contractual duties would inevitably lead to a multitude of different court jurisdictions becoming available to the claimant – a tendency not supported by the legislation and which would be detrimental to legal predictability and certainty.[2]

The Federal Tribunal closed by stating that its stance was in line with legal doctrine pertaining to the application of Article 5 Number 1 of the Lugano Convention in connection with claims that did not have as their aim a particular performance but

rather the positive judgment on the validity or invalidity of a contract. In such cases where the claim rested on the purported breach of a particular contractual duty, the place of performance of this duty was determinant. The Federal Tribunal recently confirmed this jurisprudence in a case also involving jurisdiction at the place of performance based on Article 5 Number 1 of the Lugano Convention.[3] It clearly stated that Article 5 Number 1 of the said convention did not provide for a forum at the place of performance of any random contractual duty but rather at the place of performance of the particular contentious duty of the case brought before the court.

Conclusion

The Federal Tribunal concluded that because of these considerations it was decisive to identify the reason based on which a party was claiming the invalidity of a contract. If a party was claiming dissent over a material contractual duty then this was the object of the claim and its place of performance constituted the legally applicable place of performance.

The Federal Tribunal held that the complainant had argued that the parties were in dissent over the complainant's reinsurance duties and payout obligations in case of a reinsurance situation arising. The Federal Tribunal found that these duties were not to be performed at the complainant's place of incorporation in Switzerland and the complainant had also not claimed this either. The lower courts' decisions to decline jurisdiction in Switzerland were thus ultimately upheld. The decision confirms the Federal Tribunal's stance that it intends to block attempts by claimants to obtain jurisdiction 'at home' without basing their case on a true contentious primary obligation. The place of performance in cases where a claimant argues the invalidity of a contract will be decided along the same lines, namely assessing on which reasons the claimant is suggesting the invalidity of a contract. If a claimant holds that there existed dissent over a fundamental contractual duty, such duty is subject of the claim and thus the place of its performance fixes the place of jurisdiction.

Notes

1 Federal Tribunal Decision 4A_115/2009, the full text of the decision is available on the homepage of the Federal Tribunal under the referenced citation (go to: **www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm**); see also BGE 135 III 556 ff.

2 See Geimer, *Internationales Zivilprozessrecht*, 6th ed, Cologne 2009, p 527, No 1486; Geimer/Schütze, *Europäisches Zivilverfahrensrecht*, 3rd ed, Munich 2010, No 110 to Article 5 EuGVVO.

3 Federal Tribunal Decision of 20 August 2009, 4A_273/2009.

Swiss Federal Tribunal clarifies deadline to object to the attachment of a debtor's assets

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Switzerland is one of the most important financial centres of the world. According to a recent publication of the Swiss Bankers Association, Switzerland ranks third behind the US and the UK in terms of global assets under management, with assets worth around CHF 5,400 billion (around US$5,170 billion) being managed by Swiss banks. It does not come as a surprise that creditors regularly try to attach assets deposited by debtors with Swiss banks.[1]

Civil attachment based on the Swiss Federal Act on Debt Collection and Bankruptcy

Pursuant to Article 272 of the Swiss Federal Act on Debt Collection and Bankruptcy (DCBA), a creditor may obtain a civil attachment of specified assets of a debtor if it is established on a prima facie basis that:

- the creditor has a monetary claim against the debtor;
- assets belonging to the debtor are located