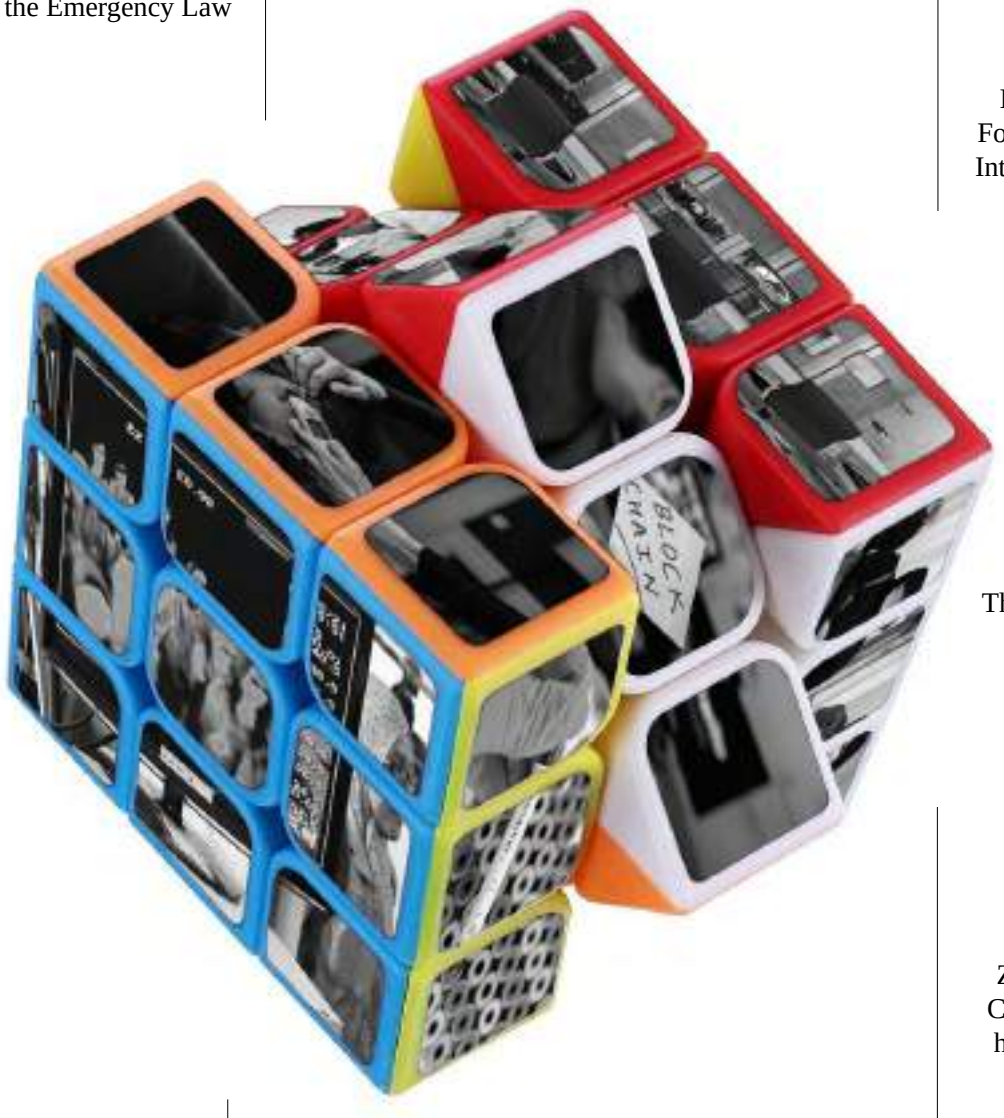
SWISS CHINESE

LAW REVIEW

German Virtual AGMs and the Emergency Law

How Covid-19 has Fostered Switzerland's International Litigation Hub



Thermal Cameras and GDPR

Zoom to the Future: Could virtual arbitral hearings be the new normal?

When Blockchain Meets Data Security

How the Legal World has Confronted Covid

50€ per issue / 250€ per year

Global Shipment Included

ISSN 2673-5407

Photo by Mikael Kristenson on Unsplash

How Covid-19 has Fostered Switzerland's International Litigation Hub

Cyrill Suess & Philippe Vladimir Boss

I. What's New in Switzerland's Judicial System Due to the Covid-19 Crisis?

The Covid-19 crisis has prompted many countries, among which Switzerland, into a sanitary emergency and an economic slowdown. However, the rule of law still applies and the judicial system had to find its own response to the crisis in order to remain operational and perform its mission.

As far as judicial proceedings in Switzerland are concerned, the Federal Government has taken various measures to accommodate for the restrictions of the stay-at-home recommendation and to limit the spread of the virus. These measures include the suspension of specific procedural deadlines from 20 March 2020 until 19 April 2020, a simplified notification of certain decisions, the possibility for the Bankruptcy Office to sell seized assets through online auction platforms as well as the possibility to use video- and teleconference in some cases.

These changes occur while Switzerland is reforming its civil procedural framework (II) The possible videoconferencing in court proceedings during the Covid-19 crisis (III) might be a chance for further developments of Switzerland as a hub for international dispute resolution (IV)

II. A Small Change Within A Vast Reform Package

The enactment of the videoconferencing provision in support of the COVID crisis did not emerge as a surprise.

Prior to the crisis, the Federal Council, the Government of Switzerland, had undertaken the preliminary work towards a legislative amendment of the Code of Civil Procedure (CCP), which would have included substantial changes to many aspects in the conduct of civil litigation. On 2 February 2018, a working document (Explanatory Report) issued by the Federal Council initiated the process. This document suggested modifications including the reduction of court fees, multiple instruments aimed at allowing various actors to take part in a joint litigation as well as strengthening conciliation. The changes suggested by the Federal Council were intended at fostering Switzerland's attractiveness as a hub for international dispute resolution.

These suggested modifications did not include any provision on the use of videoconference in civil court proceedings. However, in the course of the slow but inclusive Swiss legislative process (including consultations with all 26 local States, political parties and interested parties such as e.g. law faculties and lawyer's associations), the Federal Council suggested, in a final proposition dated 26 February 2020 which is now before Parliament for debate and vote, to include the possibility for local States to allow videoconferencing in civil court proceedings. One reason to introduce videoconferencing lied in its need in international litigation in Switzerland and international legal assistance in civil matters. It shall be stressed that this regulation leaves it to each local State to decide whether they are videoconferencing in civil court proceedings.

Under the current proposition, States can but are not obliged to allow for videoconferencing in civil court proceedings. It will come down to each individual State to decide on the possibility of videoconferencing. In the federal structure of Switzerland, each State is in charge of the judicial organisation and its budget. While it seems reasonable to assume that the economic hubs in Switzerland (such as Zurich, Basel, Bern or Geneva) will probably allow videoconferencing, it is

questionable whether smaller states will pass the budgets to offer this technology.

The actual impact of the proposed possibility to allow videoconferencing will be assessed once it has been enacted into law. However, the Covid-19 crisis is giving videoconferencing in legal proceedings a kickstart effect. On 16 March 2020, Switzerland went into a soft lockdown with a stay-at-home recommendation. As far as courts were concerned, the decision remained with each of the 26 local States. Most cancelled court hearings and limited the remaining hearings to urgent matters (especially those including imprisonment or childcare). On 16 April 2020, the Federal Council enacted an order allowing the use of videoconferencing in civil proceedings where the court and all the parties agree to their use. Now that physical hearings are being rescheduled, not many hearings were replaced by videoconferencing. However, the courts started to assess the different technical options and were given an opportunity to consider conducting hearings by videoconferencing. We hope that this increases acceptance and use of such a possibility in the future.

The Federal Council acted on its emergency powers due to the sanitary crisis deriving from the Swiss Federal Constitution. Hence, this regulation is temporary and limited until 30 September 2020 (latest). In order for videoconferencing to remain available after that date, a specific decision of Parliament will be necessary.

III. Videoconferencing during the COVID crisis

The main characteristic of the offered video- and teleconferencing option in civil court proceeding during the Covid-19 crisis is that a court can grant its use to the parties, which must both agree to it (specific rules apply in family matters). Hence, it will first depend on each court to offer or not offer the option, and the parties have no right to demand it. No consent of the parties is required in cases where reasonable grounds such as emergency or for the hearing of witnesses or experts replace the party's consent.

The court may forbid the public to attend the videoconference, but accredited journalists must be admitted where the principle of publicity shall be respected. There is no designated platform to host such video- and teleconferences. The one chosen shall guarantee the simultaneity of the sound and image and data protection and security through encryption. As a minimum, the used servers should be based in Switzerland or the European Union. Guidance has been issued in this regard by some data protection bodies in Switzerland.

The video- or teleconference will be recorded, which represents a very important change in today's court experience in Switzerland. For the time being, hearing transcripts are limited to a summary of the statements made, usually without consideration for hesitations, facial expressions or alike. With recorded video- or teleconferences, parties and judges will have the opportunity to review the exact wording and subtleties of the statements made at the hearing, namely the way a question was asked and an answer given in order to assess the credibility of a party or a witness. This may be a source of many controversies, especially in later stages of the proceedings where appeal courts have to review the lower court's assessment of such statements.

Finally, the temporary regulation on the use of videoconference allows the courts, in very specific cases where video- or teleconference cannot take place not to hold a hearing at all and conduct the proceedings only in writing. This is limited to specific situations, mainly those where an emergency arose making it necessary to proceed

photo by Jonas Zürcher on Unsplash

onwards. In any case, the right to be heard of all parties must be safeguarded.

IV. Switzerland As A Hub For International Dispute Resolution

In parallel to the efforts concerning video- and teleconference solutions in civil proceedings, the Swiss Parliament is currently working on further legislative modifications of the PILA and the CCP to increase the attractiveness of Switzerland as a hub for international dispute resolution.

The modifications to the international arbitration framework

The PILA as it stands now already offers excellent conditions for international arbitration. It has proven over decades with its liberal approach, which allows a high degree of flexibility for the parties seeking international arbitration. The currently proposed amendments to the PILA aim at further strengthening international arbitration in Switzerland. Besides transforming into statutory law the key elements of the Federal Supreme Court's case law on international arbitration, the proposed modifications mainly strive for improvement of the PILA's user-friendliness and for an extension of the party autonomy in line with international developments. We address below some of the contemplated changes.

Whereas the current PILA refers to other legal sources (namely the CCP) in certain cases, the contemplated renewed PILA is designed to regulate international arbitration in Switzerland comprehensively. Thereby, access to the Swiss arbitration regulation will be significantly easier for international lawyers that are not familiar with Swiss law.

In the context of extending the party autonomy the new PILA draft explicitly states the admissibility of arbitration clauses in unilateral legal affairs (such as last wills). Even though various courts have already acknowledged the arbitrability of such transactions, the lawmaker provides for clarity by enshrining this in federal statutory law. It can therefore be expected that arbitration clauses will increasingly be used in last wills, foundations, trusts or statutes to settle disputes in connection thereto.

Moreover, the suggested reform intends to assist with arbitration clauses lacking a determination of the arbitrators or the seat. Currently, parties are free to agree upon the seat of arbitration in the arbitration clause or later on. If the arbitration clause does not specify a seat of arbitration or merely refers to "Arbitration in Switzerland" the Swiss PILA and many arbitration rules provide that the designated arbitration institution resp. the arbitral tribunal itself determines the seat. However, in case the arbitration clause is also silent as to the applicable arbitration institution resp. the competent arbitrators, there is legal uncertainty in regard to the determination of the seat. Most practitioners derive from this that the arbitration clause does not meet the requirements of the PILA and arbitration proceedings can thus not take place in Switzerland. The proposed PILA addresses this unsatisfactory situation and provides for a simple solution by giving jurisdiction to determine the seat of arbitration to the regional Swiss court were the case was filed first. Through court assistance, the suggested PILA ensures that clauses lacking the aforementioned specifications will not be considered void.

That being said, the most visible change to Swiss arbitration would be the possibility to submit appeals to the Federal Supreme Court in English. Although some courts conduct settlement negotiations in English or waive the obligation to translate documents in English, submissions to Swiss courts must be made in one of the official languages (i.e. German, French or Italian). The only exception to this rule is the Federal Patent Court which already accepts submissions in English if the parties also agree to. The admission of briefs in English according to the PILA draft is intended at reducing the burden of translation on the parties.

The modifications of international court litigation framework

For various reasons Swiss contract law is among the most chosen laws to govern international transactions (developed, stable and commercially sophisticated). In order to prevent practical problems of interpretation, it is advisable to align the choice of law with the choice of court. Thus, when choosing Swiss law as the governing law of the contract, the choice of the Swiss jurisdiction, which conduct their proceedings in accordance with the CPP, is recommended.

Apart from the Corona related measures, the Swiss Parliament will soon discuss modifications of the CPP proposed by the Federal Council, amongst which the coordination of procedures, the privilege of in-house counsels and other measures to further facilitate international dispute resolution in Switzerland are particularly noteworthy.

The CPP contains several instruments to handle cases jointly and in a coordinated manner and decide related disputes in one single procedure. The combination of claims in one action is currently often precluded due to the varying values in dispute, the various types of procedure or the material jurisdiction. The envisaged CPP draft aims at easing the combination of actions. As an example, if the mentioned differences are solely caused by the value in dispute, a combination of actions shall in future nevertheless be possible.

The parliamentary discussions on collective redress are rooted in similar considerations to those of the combination of actions. In the wake of the Diesel scandal, demands for legal remedies to enforce mass damages were raised. However, the current discussions are still in a preliminary phase and an actual class-action process will not be offered soon.

With view to other jurisdiction, a right of refusal to cooperate in civil proceedings for in-house counsels is likely to be implemented in the near future. Until now, only lawyers were privileged to refuse cooperation in court. By granting the same privilege to in-house counsels the discrimination of companies will be eliminated and aligning the privileges under the Swiss CPP to those in other countries. Some lawyer's associations have raised concerns about this.

The Federal Council intends to implement appropriate foundations so that the local states can create specialized courts or judicial chambers for international commercial disputes. In addition hereto, civil proceedings may in future also be conducted in English and in any of the official languages of Switzerland, irrespective of the official language of the respective state. These modifications will

allow Switzerland to further increase its attractiveness as dispute resolution hotspot not only for international arbitration, but also for international commercial litigation in general.

As a final remark, choice of court agreements are not always respected under divergent national rules. In particular, when cases are brought before courts other than the one designated by the parties, it may occur that such courts hear the case despite the choice of court agreement. The Hague Convention of 30 June 2005 on Choice of Court Agreements seeks to rectify this situation by ensuring the effectiveness of choice of court agreements. As an increasing number of countries (including China) has ratified or will ratify the aforesaid Convention, there is greater legal certainty with regards to choice of court clauses in international business. It is therefore under consideration that Switzerland will ratify this Convention in the same effort to modernize its civil proceeding regulation.

V. Conclusion

It appears that the Covid-19 crisis is giving an extraordinary chance to Swiss courts to take a step forward in their digitalization. The Swiss judicial system has not always been at the forefront of technological change, mainly for good reasons of confidentiality, equality and costs. The legislative bodies and courts have the opportunity to give videoconferencing a "free try" with "no obligation to buy". In addition, the already ongoing modernization and adaptation for international dispute resolution provides for the opportunity to include videoconferencing in the Swiss legal system preparing it not only for the next crisis but also strengthening its capabilities in international dispute resolution. Therefore, the worldwide emergency of the Covid-19 crises indirectly assists the agenda to further improve the business friendly and international Swiss legal system and to entice parties to choose Switzerland in their dispute resolution clauses.

Cyrill Süess and Philippe Vladimir Boss are partners at Bianchischwald, Switzerland.

The Flight for Survival: Legal Implications of Covid-19 for the Airline Business

Chan Kit Ho

Photo by Morning Brew on Unsplash

The global scale of flight grounding is so huge that airports cannot provide sufficient parking space. Consequently many aircrafts are being parked in the desert strips of Australia and the USA.

The airline industry is facing severe danger and prospects for recovery seem bleak. In 2003, after the SARS outbreak, it took carriers six months to recover. That outbreak was largely confined to the AsiaPacific region. Even before Covid-19 forced borders to close worldwide airlines experienced falling demand in January. If there is a recovery this time it will be far longer. Already, Virgin Australia has commenced voluntary administration and Avianca had filed for bankruptcy.

For customers, airports and employees a precise and situational understanding of contract law could make the difference between irrecoverable losses and a second chance. Whether Covid-19 amounts to a frustrating or force majeure event will largely depend on its impact on specific relationships.

Customers

Many customers will have been left in a tough spot if the terms of their ticket do not allow a full refund.

But in the absence of a relevant force majeure clause in the ticket contract could a customer who cancels their flight ticket claim that the contract was frustrated because of Covid-19? Such cases would have to be assessed individually. A customer has lower chances of invoking frustration if they cancelled a ticket before official advice cautioning against travel to their intended destination was issued. He may have a stronger argument if such travel advisory has been issued. A travel ban or mandatory quarantine requirement would advance his case. But absent such circumstances, it would be difficult for a customer who voluntarily cancels a ticket to invoke the doctrine of frustration for a refund.

Customers may look to other means of redress, such as any their insurance or

Publisher: Swiss Chinese Law Association

Address: Rue Rodolphe-Toepffer 8, 1206 Genève, Switzerland

Website: www.cnsla.org Email: journal@cnsla.org

ISSN 2673-5431