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## PRIVATE INTERNATIONAL LAW

### I. INTRODUCTION

#### A. CHARACTERISTICS

##### 1. Sources

###### a) *National legislation*

Swiss private international law was a body of **case law** for more than hundred years. The principles were developed by the Federal Tribunal by way of analogy with an old statute, enacted in the days before the Civil Code and designed primarily to govern **inter-cantonal** conflicts of law.

Since January 1, 1989, the Swiss private international law is governed by the **Federal Law of Private International Law** of December 18, 1987 (PIL). The PIL governs, in some 200 articles all aspects of the international application of private law. It regulates not only the **applicable law** (conflicts of law) but also the **jurisdiction** of Swiss courts and authorities in international matters and the **recognition** of foreign judgements and decisions. These three questions as well as the definition of domicile and nationality are dealt with generally in a first chapter. They are taken up again, but in a specific form, in each of the other ten chapters which all treat

successively jurisdiction, applicable law and enforcement. These chapters follow the structure of the Civil Code and of the Code of Obligations : Natural persons (ch. 2); marriage law (ch. 3); children and adoption (ch. 4); guardianship (ch. 5); succession (ch. 6); property law (ch. 7) intellectual property rights (ch. 8); law of obligations (ch. 9) and corporations (ch. 10). The Law on private international law concludes with a chapter on international bankruptcy (ch. 11) and on international arbitration (ch. 12).

The new law partly codified the principles developed by the Federal Tribunal and partly introduced new solutions. However, the fundamentals have not been changed (infra 2).

*b) International conventions*

International conventions are applicable in Switzerland, **without transformation**. In the field of private international law, they can be invoked directly before the courts and override the internal law including the PIL.

Switzerland is a party to numerous **multilateral conventions** listed according to the subject matter. They include the following instruments :

- 1° Procedure. **Lugano Convention** on jurisdiction and enforcement of judgements in civil and commercial matters of 1988; Hague Conventions on **Civil Procedure** of 1905/1954 (RS 0.274.11/12); Hague Convention Abolishing the Requirement of Legalisation for **Foreign Public Documents** of 1961 (RS 0.172.030.4); European Convention on **Information on Foreign Law** of 1968 (RS 0.274.161); European Convention on **State Immunity** of 1972 (RS 0.273.1).
- 2° Persons. U.N. Convention on the Legal Status of **Refugees** of 1951 and Protocol of 1967 (RS 0.142.30/301); U.N. Convention on the Legal Status

of **Apatrides** of 1954 (RS 0.142.40).

- 3° **Family and Maintenance.** Hague Convention on the **Recognition of Divorces and Legal Separations** of 1970 (RS 0.211.212.3); Hague Convention on the **Law Applicable to Maintenance Obligations** for Children of 1956 (RS 0.211.221.431); Hague Convention on the **Recognition and Enforcement of Decisions Relating to Maintenance for Children** of 1958 (RS 0.211.221.432); Hague Convention on the **Recognition and Enforcement of Decisions Relating to Maintenance Obligations** of 1973 (RS 0.211.213.02); U.N. Convention on the **Recovery Abroad of Maintenance Claims** of 1956 (RS 0.274.15).
- 4° **Children and Minors.** Hague Convention on Jurisdiction and the Law Applicable to the **Protection of Minors** of 1961 (RS 0.211.231.01); European Convention on Recognition and Enforcement of Decisions on the Right of **Custody** of 1980 (RS 0.211.230.01); Hague Convention on the Civil Aspects of International **Child Abduction** of 1980 (RS 0.211.230.02); European Conventions on the **Adoption** of Children of 1967 (RS 0.211.221.310); Hague Convention of Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of (RS 0.211.221.315).
- 5° **Successions.** Hague Convention on the Law Applicable to the **Form of testamentary Dispositions** of 1961 (RS 0.211.312.1).
- 6° **Contracts and Torts.** Hague Convention on the Law Applicable to **Sales Contracts** over Movable of 1955 (RS 0.221.211.4); Hague Convention on the Law Applicable to **Traffic Accidents** of 1971 (RS 0.741.31).

In addition Switzerland has concluded **bilateral treaties** on applicable law, jurisdiction and enforcement with the following countries : Austria, Belgium, Czechoslovakia, Federal Republic of Germany, Greece, Iran, Italy, Liechtenstein, Spain, Sweden and the United States of America.

## 2. Principles

The Swiss private international law is characterized by the principles of the habitual residence, party autonomy, a favourable attitude towards a recognition and a large place left to the appreciation of the judge.

### a) *The principle of the habitual residence*

Swiss private international law traditionally used the habitual residence as the **main connecting factor**. The PIL confirms this option. The habitual residence is the principal connecting factor in determining the status of persons and corporations, in the relationship between spouses, in divorce, in family law in general, in the law of succession, and to some extent even in torts. The nationality, especially a common nationality of both parties, plays a subsidiary role in some cases (e.g. Art. 44 II, 54 II, 61 III).

Consequently to the basic option in favour of the habitual residence, the PIL is generally hostile to the *renvoi*.

### b) *Party autonomy*

The PIL makes a large place to the autonomy of the parties. The parties are free to elect the applicable law in **contracts** and **corporations**, by a choice law clause or by the incorporation. In addition, a limited choice of law is possible in the law of **matrimonial property regimes** (Art. 52), of **succession** (Art. 90 II, 91 II) and in **torts** (Art. 130 II).

The autonomy of the parties is limited mainly by the

order public (Art. 17) as well as by two articles which give effect to mandatory applications of Swiss and foreign law (Art. 18 and 19), much like the Rome Convention on the Law Applicable to Contractual Relationships of 1980.

*c) Favourable attitude towards recognition*

The PIL recognizes quite **liberally** foreign judgements and decisions. Reciprocity is never required, except for the recognition of foreign bankruptcy decrees. The foreign international jurisdiction is very broadly admitted, often to a larger extent than the one to which the PIL claims international jurisdiction for Swiss courts. Not seldomly, recognition is possible if a foreign decision is recognized in another foreign state (e.g. Art. 58, 65 I, 70, 78 II, 96 I).

The PIL claims **exclusive jurisdiction** only for actions concerning interest in real property (Art. 97) and for actions based on an agreed venue (Art. 5).

The most noticeable exception to this attitude stems from the protection accorded by the PIL to the jurisdiction at the place of the habitual residence of the defendant contracts and torts if this place lies in Switzerland (Art. 149 II). (See however, Art. 5 of the Lugano Convention as shall apply in Switzerland after a grace period.)

*d) Appreciation by the judge*

The conflicts rules of the PIL quite often favour a certain result (e.g. maintenances claims, limitations for treble damages). In addition, general provisions like the exception-clause (Art. 14) and the taking into account of mandatory provisions of Swiss and foreign law (Art. 18 and 19) gives the judge an important power of appreciation.

## B. GENERAL PROVISIONS

The first chapter of the PIL contains the general provisions on the jurisdiction of Swiss courts and authorities, on the applicable law and on recognition and enforcement of foreign judgements.

### 1. Jurisdiction

The international jurisdiction of the Swiss courts and authorities is regulated mainly in the **special part** of the PIL. Each section of the special part begins with the provisions on jurisdiction, and continues with the rules on the applicable law, and is terminated by the provisions on recognition.

The general provisions deal only with **common features**. They regulate namely the principles, the prorogation and the jurisdiction for provisional orders.

The main and subsidiary venue is the **habitual residence** of the defendant. The additional venue of the special part generally apply as additional possibilities, and in the law of obligations only if the defendant does not have his habitual residence in Switzerland. If the defendant does not have his habitual residence in Switzerland and if no other forum exists in Switzerland, the PIL provides a venue on the place of **situation of the assets** and allows for a validation of an attachment order there.

Concerning pecuniary claims, the parties can choose a Swiss forum (Art. 5). The **prorogation clause** must be made in writing or by any other means of communication which evidences the terms of the agreement by text. The Swiss court agreed upon must accept its jurisdiction if one party has its habitual residence or place of business in the canton of the court or if Swiss law is applicable to the case, by virtue of the conflict rules of the PIL or by virtue of a choice of Swiss law by

the parties.

Regarding **provisional orders**, Swiss courts have jurisdiction even if they do not have jurisdiction on the merits (Art. 10).

## 2. Applicable law

Generally speaking, the applicable law is the one which presents the closest relationship with the case. Normally, this relationship is defined by the detailed and numerous conflicts rules of the **special part**. If, for some reason and in a particular case, these rules fail to designate the law with which the case really presents a close relationship, but instead refer to one with only limited connections, the judge can apply another law which has much closer connection, on the basis of the famous exception clause of Article 15.

The law designated by the conflict rules of the PIL include all provisions applicable to the case under that law, be they private or public in character (Art. 13), except where the application of the foreign law would produce a result which is incompatible with Swiss public policy (Art. 17).

As indicated above, the PIL is hostile to the **renvoi**. The renvoi (of first and second degree) is accepted only in two specific cases, regarding the name (infra II), and some aspects of the law of inheritance (infra B/3), and more generally in matters of status (Art. 14).

In a way quite similar to the Rome Convention of 1980, the PIL regulates the application of **mandatory provisions** of Swiss and foreign law ("Lois d'application immédiate"). Mandatory provisions of **another** than law the one designated by the conflict rules may be applied under limited circumstances. The provisions must be closely connected with the case and has to be legitimate; manifestly preponderant

interests of a party must require their application and the result must be adequate under Swiss concepts of law (Art. 19).

**Mandatory provisions of Swiss law** which have the character of "lois d'application immédiate" must be applied regardless of the law designated by the PIL (Art. 17).

The **content of the foreign law** must be established **ex officio** by the judge who can require the parties to furnish assistance. This rule applies without restrictions in family law. For pecuniary claims, the judge may impose the burden of proof on the parties (Art. 16).

### 3. Recognition

As with regard to the direct international jurisdiction, the PIL defines the jurisdiction of foreign courts and authorities in every section of its special part. The general provisions state the principle according to which a foreign judgement must be recognized in Switzerland if the **defendant** has his **habitual residence** in the State in which the decision was rendered, or if he has submitted to the jurisdiction of this State by a prorogation agreement or tacitly (Art. 26).

As a rule, recognition does **not** depend upon **reciprocity**, except for the recognition of foreign bankruptcy decrees. Recognition may be refused if a party establishes that he was not duly notified of the proceedings or that the decision was rendered in violation of fundamental principles of Swiss procedural law, especially in violation of due process of law, or if, in a general way, recognition would be manifestly incompatible with material Swiss public policy (Art. 27).

## II. NATURAL PERSONS

The short first chapter of the PIL special part deals with legal capacity, the capacity to act and the name of natural persons.

Swiss law regards **legal capacity** as a matter of public policy. The principle of legal capacity is therefore always governed by Swiss law (Art. 34 I). The questions of the beginning and the termination of legal personality, however, are governed by the law applicable to the main legal relationship (Art. 34 II).

The **capacity to act** is governed by the law of the habitual residence (Art. 35). But for the security of transactions, a person who lacks capacity under the law of his habitual residence, is regarded having capacity if the other party was entitled to rely on it under the law of the State where the transaction took place (Art. 36).

The **name** of a person having his habitual residence in Switzerland is governed by Swiss law. The name of a person having his habitual residence abroad is governed by the law of his habitual residence but Swiss law accepts a renvoi of first and second degree (Art. 37 I). In both cases, the person can request that his name be governed by the State of which is a national (Art. 37 II).

## **A. MARRIAGE AND RELATIONSHIP BETWEEN PARENT AND CHILD**

### **1. Conclusion of marriage**

**Jurisdiction** to perform marriage is granted very **generously** to Swiss authorities. Swiss authorities have jurisdiction when either one of the future spouses has his habitual residence in Switzerland or is Swiss citizen. Even nationals without habitual residence in Switzerland can perform marriage in Switzerland, if the marriage is recognized in the

State of citizenship or habitual residence of both spouses (Art. 43).

As far as this **substantial conditions** are concerned, a marriage will be performed in Switzerland when either the conditions of Swiss law or of the law of the State of citizenship of one of the spouse are satisfied (Art. 44).

The legislator tried to avoid marriages which are valid in a foreign country, but not in Switzerland. Therefore, the PIL is very generous with respect to **recognition**. Any marriage validly performed abroad is recognized in Switzerland, except if a Swiss spouse or spouses having their habitual residence in Switzerland have tried to fraud Swiss law (Art. 45).

## 2. Divorce

The Swiss court of the habitual residence of the defendant has always **jurisdiction** for actions on divorce. (Art. 59/a) In addition, a Swiss citizen or a foreigner residing in Switzerland for more than one year can sue for divorce at the habitual residence of the plaintiff or, under restrictive circumstances, at the place of Swiss citizenship (Art. 59/b, 60).

Divorce and separation are **governed** by Swiss law or by the law of the State of a common foreign citizenship, if only one of the spouses has his habitual residence in Switzerland **and** if this law does not impose extraordinarily severe conditions on divorce (Art. 61). The law applicable on the **ancillary effects**, especially on the matrimonial property regime and the effects of paternity as well as the protection of minors is designated by the special provisions applicable for these matters (Art. 63).

Foreign decisions on divorce or separation are **recognized** in Switzerland if they were rendered in the State

of the habitual residence or of the citizenship of one of the spouses, or if they are recognized in one of these States. Restrictions to recognition apply if none of the spouses or only the plaintiff had his habitual residence in the State in which the decision was rendered (Art. 65).

### 3. Matrimonial property regimes

The matrimonial property regime is **governed** by the law of the State in which both spouses are domiciled simultaneously (Art. 54 I a). If the spouses are not domiciled in the same State, the law of the State in which they were last domiciled simultaneously applies (Art. 54 I b). If the spouses were never domiciled in the same State and if they do not have a common State of citizenship, the PIL subjects their matrimonial property regime to the Swiss regime of separate property (Art. 54 II and III).

A **choice of law** is possible for the matrimonial property regime. The choice of law must be made in writing or be implied in a marriage contract, and it can be changed at any time. The spouses may choose the law of the State in which they are domiciled, or will be domiciled or the law of the State of one spouse's citizenship (Art. 52 and 53).

The law applicable on the marital property regime **changes** when the spouses change their domicile or their choice of law. Unless the spouses were subjected to a marriage contract or decided in writing to maintain the former law, the new law applies with retroactive effect from the date of marriage (Art. 55).

### 4. Relationship between parent and child

The relationship between parent and child is governed by the principle of the **habitual residence of the child**. The

habitual residence of the child determines the jurisdiction and the applicable law (Art. 66, 68). Nevertheless, actions to ascertain or contest paternity can be brought before the court at the habitual residence of the mother or the father, and the law of the State of a common citizenship is applicable when neither the father to the mother has the habitual residence in the same State as the child.

**Maintenance claims** are brought before the Swiss courts at the place of the habitual residence of the child or, in the absence of such residence in Switzerland, before the courts of the habitual residence of the defendant parent (Art. 79). The maintenance obligations are governed by the Hague Convention of 1973 on the Law Applicable to Maintenance Obligations.

## **B. INHERITANCE**

### **1. Principle**

The PIL is based upon the principle of the **unity of the succession**. It applies when one and the same law for the whole succession, and Swiss authorities have jurisdiction over movables as well as immovables unless exclusive jurisdiction claimed by the State in which real property is located takes precedence.

The PIL **distinguishes** between persons whose last domicile was within Switzerland and persons whose last domicile was in abroad. The PIL considers that Switzerland is mainly concerned with the first situation, but only in a subsidiary way with the second.

### **2. The decedent having been domiciled in Switzerland**

If the decedent had his last domicile in Switzerland, the

Swiss courts have **jurisdiction** for inheritance disputes as well as for probate proceedings (Art. 86). The Swiss court and authorities apply **Swiss law** as the law of the State of the last domicile (Art. 90 I).

However, a foreigner can make a **choice of law**. He may submit his estate by will or by testamentary contract to the law of one of the States of his citizenship. The choice of law is valid if he conserves this citizenship until his death and if he has not acquired Swiss citizenship (Art. 90 II).

### 3. The decedent having been domiciled abroad

If the decedent had his last domicile abroad, the Swiss authorities do not normally have jurisdiction. They have **jurisdiction only** if a Swiss citizen has submitted his estate or the parts of it located in Switzerland to Swiss jurisdiction, or if the authorities of the place of his last domicile do not deal with his estate (Art. 87). In addition, Swiss authorities have a jurisdiction, limited to the property located in Switzerland, for the estate of a foreigner having been domiciled abroad, if the authorities of his domicile do not deal with these properties (Art. 88).

For these situations, the PIL designates, as a rule, the **law** of the State of the **last domicile** of the decedent, but it recognizes a **renvoi** of first and second degree (Art. 91 I). Yet, if the decedent was a **Swiss** citizen and had submitted his estate, to Swiss jurisdiction, by will or by testamentary contract, Swiss law shall apply, unless the decedent has expressly reserved the law of his last domicile (Art. 91 II). In this case therefore, an election of Swiss jurisdiction is deemed to be an election of Swiss law, and vice versa (Art. 87 II).

## 4. Recognition

Foreign decision, measures and documents are recognized in Switzerland if they were rendered in the State of the last domicile of the decedent or were made pursuant to the law chosen by him, or if they are recognized in one of these States. If the decisions concern real property, they are recognized in Switzerland if they are established in the State where the property is located or recognized there (Art. 96).

## III. PROPERTY

### A. IN GENERAL

Real and movable property is subject to the **jurisdiction** and the **law** of the place where it is located. This holds generally for **real property** (Art. 97, 99).

Acquisition and loss of an interest in movable property is governed by the law of the place where it was located at the time when the decisive facts occurred (Art. 100 I); but the extent and the exercise of these interests are governed by the law of the place where the properties are located at that time (Art. 100 II). If the movable property is in transit, the acquisition and the loss of interest based on a legal transaction is governed by the State of destination (Art. 101).

### B. PLEDGE OF MOVABLE PROPERTY AND RETENTION OF TITLE

Normally, the **general rules** extend to pledge of **movable property** and retention of title : the law of the place where the property is located applies. For the pledge of **claims, securities** and **other rights**, the PIL designates the law of the State of the habitual residence of the secured creditor (Art. 105).

**Retention of title over property imported** into Switzerland must be modified in order to comply with the requirements of Swiss law. However, it remains valid for three months, but only amongst the parties, not against a bona fide third person (Art. 102). Retention of title over exported property is subjected to the law of the State of destination (Art. 103).

A **choice of law** for the acquisition and the loss of an interest in movable property is possible. A party may elect either the law of the State of shipment or of the State of destination or the law applicable to the underlying legal transaction (Art. 104 I). Here again, the bona fide third party is protected; such a choice of law cannot be applied against him (Art. 104 II).

### C. INTELLECTUAL PROPERTY

Switzerland follows the **territoriality** doctrine for the whole of intellectual property. As a matter of principle, intellectual property rights are governed by the law of the country for which protection of these rights is sought (Art. 110 par. 1 PIL). This system is rooted in the multilateral conventions to which Switzerland is party : the Paris Convention on Industrial Property, the Berne Convention on Copyright, and a number of conventions of lesser importance (the Rome and Geneva Conventions on neighbouring rights, for example). Interestingly, bilateral conventions on geographic denominations may depart from the territoriality doctrine, resulting for example on having foreign law applicable to circumscribe the conditions of use of a given denomination<sup>1</sup>.

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<sup>1</sup> See case Turrón de Alicante, decided by the EC Court of Justice November 10, 1992, GRUR Int. 1993, 76 ss.

The Swiss case law is mostly to the effect that the law of the country where protection is sought also applies to the acquisition of the right, be it through registration or through conveyance of title. So, in a case where a business had been transferred in Germany between two German entities, all trademark rights passing along, the Federal Tribunal nonetheless considered that the expectancies for protection of these marks in Switzerland when registered at a later date were transferred under Swiss Law<sup>1</sup>. However, there are cases to the effect that conflicts between trade names are subject to the law of the common place of business of the parties<sup>2</sup>. The PIL now provides that the law governing the corporation applies to its name or trade name (Art. 155 lit. d). Nonetheless, the protection of the business name remains subject to the law of the country where protection is sought (Art. 157 par. 1). Contracts involving intellectual property rights are subject to the law of the transferor's or the licensor's place of business or domicile (Art. 122 par. 1).

Finally, the exhaustion of rights is not subject to express rules, so that case law shall decide whether the exhaustion of right follows from marketing abroad and where or only from marketing within Switzerland.

## **IV. CONTRACTS, TORTS AND CORPORATIONS**

### **A. LAW OF OBLIGATIONS**

The provision of the PIL on the conflicts of laws in the area of the law of obligations are based on a rich case law. The structure followed in the relevant Chapter Nine is as follows :

1. Contractual Obligations
2. Unjust Enrichment

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<sup>1</sup> RSPI 1992, at 252.

<sup>2</sup> ATF 91 II 125; RSPI 1976 at 64.

3. Torts
4. Common Provisions

### 1. Contractual Obligations

There is no legal definition of the "international contract". Some or all the following points of contacts shall exist with two or more States in order for the rules on jurisdiction and applicable law of the PIL to come into action :

- habitual residence, place of business or domicile of the parties; in addition to other elements, place of performance.

#### a) *Jurisdiction*

Lawsuits in contract are subject to the jurisdiction of the Swiss courts at defendant's domicile<sup>1</sup> or, if there is none, at his habitual residence. Lawsuits arising out of the activity of a business establishment in Switzerland are also subject to the jurisdiction of the courts at the place of business thereof.

According to the Lugano Convention (Art. 5 par. 1), Switzerland shall recognize, after a transitory period ending December 31, 1999, the jurisdiction of the place of performance of the contract, as concerns cases involving both Swiss residents and residents of other countries having ratified the Lugano Convention. For the time being and for all non-Lugano cases, jurisdiction is given at the place of performance within Switzerland only if the defendant has neither his domicile, nor his habitual residence, nor a place of business in Switzerland.

A consumer may not waive in advance his right of venue at his own domicile or residence in Switzerland. Lawsuits arising

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<sup>1</sup> In the following, habitual residence shall mean both habitual residence and domicile in the continental sense.

out of employment contracts are to be brought either at the general forum of the defendant's domicile or at the place where the employee performs his work; further, at the employee's domicile or habitual residence in Switzerland if he files the suit.

*b) Applicable Law*

1) Scope of applicable law

The law deemed to be applicable to the contract shall govern most questions of law, with the following general exceptions :

- the **capacity to act** which is subject to the law of domicile, with some safeguard if the act has been executed in a country where the incapable person would enjoy the capacity to act (Art. 35 *et seq* PIL);
- the commercial law of **agency**, that is subject to the law of the country in which the agent has his business establishment or in which the agent mainly acts in the particular case;
- the **modality** of the performance and the **formalities** for inspection, subject to the law of the country where they in fact take place or should take place;
- the **form** of the contract, subject to the law of the country where it is executed.

Some other restrictions to the application of the law of the contract may derive from the public policy provisions of the PIL (Swiss public policy, Swiss laws of direct application, such as Lex Friedrich on acquisition of real estate by foreigners, labour protection law, human rights; Mandatory provisions of foreign laws, if legitimate and clearly overriding interests of a party so require). As the case may dictate, further restrictions to the scope of application of the applicable law shall be based on the particular nature of the

rights involved in the transaction i.e. patent or trademark rights, validity of which may not be submitted by the parties to a law other than the law of the country where they are registered.

## 2) Applicable law

As a rule, contracts are governed by the law chosen by the parties. This choice is a contract in itself, validity of which is subject to the law chosen. Under Swiss law, it can be made at any moment even during the litigation. It may be implied in fact. It is totally free, no requirement as to a necessary point of contact being made by the new Swiss law (contrary to the former case law). It seems to be lawful to make a partial choice, bearing only on some matters. A change of choice is possible, but rights of third parties are reserved. Choice of law is excluded for contracts with consumers, and restricted for employment contracts.

If there is no choice of law, the contract is governed by the law of the country most closely connected with it. Switzerland follows the doctrine of the **characteristic obligation**, as developed by A. Schnitzer and adopted by our case law, very much like in the Rome Convention of 1980, i.e. the closest connection is assumed to exist with the country where the party which must discharge the characteristic obligation has its habitual residence, or place of business. A few statutory examples may suffice to illustrate that this is not necessarily the place where the performance of the characteristic obligation is due to take place :

- in contracts to convey title, the transferor's law shall apply;
- in rental, lending and loan, the renter, lender or creditor's law shall apply;

- in service contracts, the contractor's law shall apply;
- in deposit contracts, the keeper's law shall apply;
- in guarantee contracts, the guarantor or surety's law shall apply;
- in licence agreements, the licensor's law shall apply.

Contracts on immovable property are subject to the law of the place of location.

## 2. Unjust enrichment

Claims based on unjust enrichment are governed by the law applicable to the (apparent) legal relationship on which the enrichment is grounded, or if none is found to exist, by the law of the country in which the enrichment took place. This provision apply if accounting of the profits for unlawful use of a trademark, copyright or patent is sought. It may also apply where the monies deposited with a bank are credited on another customer's account.

## 3. Torts

The PIL certainly constitutes a pioneering work in the field of conflict of laws for torts. The basic rule is to the effect that, when the wrongdoer and the injured party are habitually resident in the same country, liability in tort shall be governed by the law of that country<sup>1</sup>.

If both parties do not have a common country of residence, the law of the country where the tort has been committed is applicable. If the result does not occur in the

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<sup>1</sup> Cf. ATF 99 II 315 : where two Swiss residents have bought a car in Switzerland and experienced a car accident in France, the liability of the driver is subject to Swiss law.

same country, the law of the country where the result occurs is applicable if the wrongdoer could have expected the result to take place in that country.

If the tort is connected to an existing legal relationship between the parties, the law governing that relationship shall apply.

The parties may agree after the damaging event that the law of the forum shall apply. This may be the first step towards a settlement. Lawsuits based in torts are subject to the jurisdiction of the Swiss courts at the domicile, habitual residence or business establishment of the defendant; if the defendant is not a Swiss resident, the suit can be introduced at the place where the act occurred or where its result took place. If several defendants are subject to Swiss jurisdiction for the same facts, each judge has jurisdiction over all defendants; the court before which proceedings are first instituted shall have exclusive jurisdiction over all of the defendants.

There are a number of special rules on jurisdiction and applicable law, for example in case of damages that are caused by a nuclear plant or shipment, in case of a direct claim against an insurer, for claims arising out of traffic accidents (where the Hague Convention of May 4, 1971 shall apply), for product liability, for unfair competition and restraint of competition, for nuisance caused by or from an immovable property, and for violation of the right of personality.

#### **4. Common Provisions**

The PIL deals separately with a few questions arising out of a plurality of debtors, whatever the source of their obligation, be it a contract, a tort or unjust enrichment. It provides that contractual assignment of a claim is governed by the law of the claim, if no law has been chosen by the parties.

The currency in which payment must be made is determined by the law of the country where payment must be made. The statute of limitations is governed by the law applicable to the claim.

The rules of conflicts for Bills of Exchange and Notes are to be found in the Swiss Code of Obligations (Art. 1086 to 1095 and 1138 to 1142); they embody the Geneva Conventions on the Law Applicable to Drafts and to Checks of 1931.

## B. CORPORATIONS

### 1. Recognition of foreign entities

The PIL defines "corporations" as organized entities of persons and organized units of assets. Are corporations all forms of companies, foundations, associations, "*Anstalt*", etc. All legal entities are recognized in Switzerland, even if some of them, as the trust, are not known under Swiss municipal law. Switzerland is not party to the Hague Convention of July 1, 1985 on the Law applicable to trust.

Beside that very liberal recognition of foreign legal entities, the PIL is based upon the principle of incorporation, like the English, the Spanish and the Scandinavian statutes. The applicable law is the law of the country according to which they are organized. The statutory seat is only relevant; the real place of business plays no role as concerns the recognition of the foreign legal entity, unless the corporation does not fulfil the requirements of the country where it purports to be organized; in that case, the law of the place of the activity of the Board of directors ("*administration de fait*" / "*tatsächliche Verwaltung*") shall govern.

According to the most recent case law, the PIL does not allow the courts to push aside a so-called "fictitious seat" or place of organization. There would be no application of the

"*fraus legis*" argumentation against, say recognition of a Panama company that is in fact active in Switzerland and administered in Geneva, or against the recognition of a Lichtenstein establishment ("*Anstalt*") which may well purport to escape the rigorous provisions of Swiss law on family foundations<sup>1</sup>. The public policy exception of Article 17 PIL may well apply, however, as could Article 159 PIL.

The partnership ("*einfache Gesellschaft*" / "*société simple*") are subject to the law determined by the PIL provisions on contracts, as they are not recognized as legal entities. The question is open if a more durable partnership with more than two members should not be subject to the rules applicable to corporation.

## 2. Scope of applicable law and jurisdiction

As a rule, the law of the country of organization governs the legal nature of the corporation, its formation and dissolution, its capacity to act, its organization, the relationship between the corporation and its members, the liability for its debts, the power of representation of the persons acting on its behalf according to its organization (as opposed to general rules on agency), and their liability arising from the violation of corporation law.

As to liability, if the business of a corporation organized under foreign law is executed in or managed from Switzerland, the liability of the directors or managers shall be governed by Swiss law. Lawsuits against a person liable under the law of corporation may be entertained before the Swiss courts at the defendant's domicile or his habitual residence. Further, all litigations under the law of corporations may be brought also to the Swiss court at the seat of the corporation. This jurisdiction

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<sup>1</sup> Compare ATF 117 II 494 with ATF 102 Ia 410, ATF 108 II 122 and 108 II 398.

cannot be waived for lawsuits arising from the public issue of shares and bonds. Claims therefore may be filed either under the law governing the company or under the law of the place of performance.

Finally, it should be noted that a company may not invoke the limitations of the power of representation of an officer or an agent which are unknown to the law of the country where the other party has its place of business or habitual residence, unless the other party knew or had reason to know of the limitations.

The PIL further regulates Swiss branch offices of foreign corporations, the transfer of corporation from abroad to Switzerland or from Switzerland to a foreign country, the protection of debtors if the corporation is to be stricken out of the Swiss Register of commerce, and recognition of foreign decisions regarding the corporation.

### **C. BANKRUPTCY**

The PIL provides for limited judicial assistance in international bankruptcy proceedings.

A foreign bankruptcy decree issued at the seat or the habitual residence of the debtor may be recognized in Switzerland upon a motion by the foreign receiver in bankruptcy or by one of the creditors. Recognition depends upon the usual conditions (*supra* I. B/3) as well as upon reciprocity.

Recognition puts an obstacle to all special enforcement measures in Switzerland and invalidates such measures - including attachments - of they exist already. It leads instead to an ancillary bankruptcy proceeding at the place where the Swiss assets are located. The procedure is simplified. Neither an assembly of creditors nor a committee of creditors is

formed. The competent bankruptcy office draws up an inventory of assets, issues a call to the creditors in the official Gazette of Commerce and prepares a schedule of claims. In this schedule are entered only claims secured by pledge and claims by creditors who enjoy one of the privileges mentioned in Article 219 par. 4 of the Federal Law on Execution of Debts and Bankruptcy (undergoing revision) and who are domiciled in Switzerland. If a creditor has been paid in foreign proceedings, that amount shall be deducted of his dividends in the Swiss proceedings.

After payment of the privileged creditors in Switzerland, but before the handing out of the surplus, the foreign schedule of claims is examined by the Swiss court having recognized the foreign bankruptcy decree. That court shall recognize the schedule, when the claims of creditors domiciled in Switzerland have been properly taken into account in the foreign schedule. Then the monies will be paid to the foreign receiver. If the foreign schedule is not recognized or not submitted for recognition within the period set by the judge, the balance shall be awarded to the common creditors domiciled in Switzerland.

## **V. INTERNATIONAL ARBITRATION**

Switzerland plays an important role in the field of international arbitration, both between States and between private parties to international commercial transactions, or between private parties and a foreign State or State agency. Switzerland is the seat of many arbitral tribunals that are appointed either by the International Chamber of Commerce, the London Committee for International Arbitration or the International Center for Settlement of Investments Disputes (ICSID).

## **1. Scope of the PIL**

The only codification bearing on arbitration proceedings used to be the 1969 Intercantonal Concordat on Arbitration adopted in all but one canton, Lucerne (SR 279). Since 1989, the Concordat governs only Swiss arbitration proceedings, while the Chapter 12 of the PIL applies to international arbitration. Nevertheless, the parties to an international arbitration may validly submit their dispute to the rules of the Concordat; they have to agree in writing that the provisions of the PIL are excluded and that the Concordat shall apply. Thus, existing arbitration clauses providing for arbitration in Switzerland are subject to the PIL.

For a case to be international, at least one of the parties has to have neither domicile nor habitual residence in Switzerland at the time of the conclusion of the arbitration agreement. For a litigation to be submitted to PIL, the seat of the arbitral tribunal, as determined by the parties or by the arbitration institution or by the arbitrators, has to be in Switzerland. Meetings of the arbitrators or hearings of the arbitral tribunal outside of Switzerland do not affect the seat.

## **2. Arbitrability**

Arbitrability is opened broadly. Any dispute relating to patrimonial interest may be submitted to arbitration. The legislature wanted to open up the arbitrability much farther than would have been accepted a few decades ago. Corporation law, validity of patents, trademarks, designs and copyrights, even antitrust claims may be brought before an arbitral tribunal.

A State or a State agency which is party to an arbitration agreement cannot invoke its own municipal law in order to contest the arbitrability of a dispute or its capacity to arbitrate, of course within the limits of the arbitration

agreement.

### 3. The arbitration agreement

The arbitration agreement shall be in writing, which for purpose of PIL includes telefax and any other means of communications that can establish the agreement by a text. A more liberal foreign law may lend it validity, if the agreement conforms to the law chosen by the parties either for this agreement or for their contractual relationship, or if it conforms to the law governing the litigation in the absence of choice of the applicable law.

If the arbitration agreement appears to be valid *prima facie*, the Swiss courts shall decline jurisdiction (Art. 7 PIL). Validity and scope of the arbitration agreement is to be determined by the arbitrators. The arbitral proceedings are deemed to be pending from the time when one of the parties starts the procedure for appointment of the tribunal.

The arbitrators are appointed according to the arbitration agreement and the procedures of the institution they may have selected for resolution of the dispute. Failing such an agreement, the Swiss courts at the seat of the tribunal shall appoint the arbitrators. A judge cannot reject a request to this effect unless a summary examination shows that no arbitration agreement exists at all between the parties.

An arbitrator might be challenged if he does not meet the qualifications agreed upon by the parties (i.e. as to his nationality), or if he does not appear to be independent of both parties, or if the procedural rules of a given institution (e.g. ICC Rules) allow for a challenge.

#### 4. Procedure

The PIL does not lay down procedural rules, except the very basic principles. In institutional arbitrations, some rules are anyhow laid down by the institution. In ad hoc arbitration, the parties may determine the rules freely. If they did not determine the procedure in advance, the arbitrators can lay down the procedural framework, in a procedural order or in the terms of reference, if they choose to do so.

The arbitrators can issue interlocutory orders or injunction *pendente lite*. If a party does not willingly comply, the arbitrator may request the assistance of the competent State court, that shall apply his own law.

As Switzerland has made a pioneering attempt to grant interlocutory powers to the arbitrators, it seems that few other jurisdictions may enforce such provisional measures abroad. For these jurisdictions, some sort of procedure of *référé* (provisional orders, interlocutory orders, etc.) shall be in practice preferred to an *exequatur* procedure of the arbitrator's order.

The arbitrators may order measures of a procedural nature (sealing offices, possibly discovery) or measures aiming at safeguarding assets (freezing bank accounts, stopping a liquidation of the defendant corporation). Enforcing these measures abroad may require the assistance of the local courts.

The Swiss courts shall assist the arbitrators in the taking of evidence. The system of deposition as known in the United States is not practised in Switzerland.

The arbitral tribunal may decide on its jurisdiction in a preliminary or in the definitive award if there is a dispute in this regard. For example, a first set of terms of reference may be adopted towards the resolution of that issue, the parties being however under a duty faithfully to cooperate later for the

establishment of a second set of Terms of reference if the arbitral tribunal finds itself competent on some or all claims.

Unless otherwise agreed upon by the parties, the arbitrators may issue partial awards.

The arbitral tribunal shall apply for its decision on the merits the rules of law most closely connected to the case at bar. It is not necessarily bound by the conflict rules of the PIL. This provision means that the arbitrators might consider applying more than one municipal law, since it does not refer to a single body of law, but to "rules of law"<sup>1</sup>.

## 5. Appeal

The former system of dual challenge, first before the cantonal tribunal of the seat, then before the Federal Tribunal, was deemed to be cumbersome and lengthy, especially if other proceedings for an *exequatur* were necessary abroad.

There is now only one appeal, as a rule to the Federal Tribunal, or to the cantonal tribunal of the seat if the parties have explicitly agreed not to go to the Federal Tribunal.

The nature of this appeal is *sui generis*, but some of the rules on the appeal towards annulment are applicable, and the Federal Tribunal may only invalidate the sentence, without power to modify it. In case of invalidation, the arbitral tribunal originally competent is again competent, unless some specific grounds for challenging it may be asserted in view of the appeal proceedings. As a rule, the appeal does not entail a suspension of the effects of the award, but the President of the competent Court may order a suspensive effect. Therefore, the disbursement of monies or conveyance of title that are

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<sup>1</sup> In the French text of Art. 187 PIL; see P. Lalive, *in* CEDIDAC No. 9, Lausanne 1989, at 222-223.

based on an invalidated award are valid at the time they are made - but might be deemed to constitute an unjust enrichment in case of annulment of the award later on.

The five grounds for challenging the award are mentioned in an exhaustive way by the PIL :

- a) when the arbitrator(s) was not properly appointed;
- b) when the arbitral tribunal made an erroneously ruling on its jurisdiction;
- c) when the award went beyond the questions submitted to it or failed to decide on one of the claims;
- d) when the principle of equal treatment or the right to be heard was breached;
- e) when the award is contrary to (international) public policy as understood in Switzerland.

Very few awards have been invalidated since enactment of the PIL. Following cases are representative :

1. An arbitral tribunal should not decide an award when only two of his three members are present.
2. An arbitral tribunal should not reject for lack of jurisdiction a plea contending that a contract is null and void under Art. 85 of the Rome Treaty if the validity of the contract is an item subject to the arbitration agreement.
3. The right to be heard encompasses the right to obtain an expertise whenever the arbitrators or one of them is not technically knowledgeable.

If none of the parties have their domicile, habitual residence or business establishment in Switzerland, they may waive the right to appeal for invalidation of the award. The usual statement that "award shall be definitive" is not deemed to be a waiver. On the other hand, a clause stating that the award shall not be appealable should be construed as a waiver.

Finally, it is to be noted that Switzerland is a party to the

New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, but not yet to the 1961 Geneva Convention.

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