Switzerland

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Abstract The report presents and discusses norms of Swiss law ensuring access to remedy for human rights and environmental harm that a company located in Switzerland may cause or contribute to cause through a foreign subsidiary or supplier abroad. In addition to questions of jurisdiction and applicable law in transnational matters, the report analyses current developments on parent company liability in Swiss private law. In particular, it presents the constitutional Responsible Business Initiative and its parliamentary counter-proposal. Both aim at implementing the United Nations Guiding Principles on Business and Human Rights. They suggest introducing a legal due diligence obligation regarding human rights and the environment for companies located in Switzerland making them applicable in cross-border cases as overriding mandatory provision. This report presents current discussions in Switzerland on the scope of corporate liability within a corporate group and along the supply chain in transnational matters.

1 Definition and Sources

1.1 Does Your Country Have a Definition of Corporate Social Responsibility?

There is no definition of corporate social responsibility in Swiss law. In April 2015, however, the Swiss Federal Council, the highest executive body in Switzerland,

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adopted a Position Paper on Corporate Social Responsibility.[1] Although the position paper has no legally binding effect, it defines the notion of corporate social responsibility as encompassing themes, such as working conditions, human rights, the environment, corruption prevention, fair competition, consumers interests, tax policies and transparency, that companies must take into account in parallel to the interests of the company owners.[2] Additionally, when the legal framework is insufficiently developed abroad, companies are expected not to exploit regulation gaps but to apply internationally recognized conduct standards. Among those norms, the Swiss position paper on corporate social responsibility cites in particular the United Nations Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines on Multinational Enterprises and the ISO norm 260000 on Social Responsibility.[3]

The position paper further contains an action plan, which is not the National Action Plan on the implementation of the UNGP (see *infra*, 1.3), in which Switzerland presents four strategies with regard to corporate social responsibility. The Swiss government plans to develop the definitional corporate social responsibility framework within international fora, such as the United Nations or the OECD; to support companies implementing their corporate social responsibility; to promote corporate social responsibility in developing countries and, finally, to work for the improvement of corporate transparency.[4] The position paper does not address the question of introducing a mandatory due diligence obligation for corporations operating abroad. They do not clarify the conditions of liability for these companies.[5]

1.2 Is Your Country a Member of the OECD?

Switzerland is a member of the OECD and has a National Contact Point (NCP) within the State Secretariat of Economic Affairs. The NCP accepts submissions raising specific instances regarding possible violations by companies of the OECD Guidelines. After an initial assessment, the NCP offers the parties involved its good offices. If the parties reach an agreement or find a solution to the dispute, the NCP

[1] Swiss Federal Council (SFC), La responsabilité sociétale des entreprises: Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement (1 April 2015) <http://www.news.admin.ch/NSBSubscriber/message/attachments/38882.pdf> hereinafter "SFC, Responsabilité sociétale des entreprises".

[2] *Ibid*., at 5.

[3] *Ibid*., at 6.

[4] SFC, Responsabilité sociétale des entreprises, 13–17.

[5] Weber (2016), p. 123; as noted Kaufmann (2016), p. 47.

publishes a final statement.[6] To date, some fourteen final statements have been published on the NCP website.[7] A recently published report presents the structure and activities of the Swiss NCP.[8]

Among other recent cases, the NCP received a written submission against the FIFA, which is headquartered in Zurich, concerning human rights violations of migrant workers during the construction of facilities for the 2022 World Cup in Qatar. The trade union Building and Wood Workers' International claimed that the FIFA violated the OECD Guidelines by appointing Qatar and failing to conduct adequate human rights due diligence since then to prevent well-documented human rights violations of migrant workers.[9] In May 2017, the parties agreed to publish a final statement in which the FIFA agreed to follow guidance from the OECD Guidelines and the UN Guiding Principles on Business and Human Rights and accepted responsibility in terms of contributing to ensure, including through the use of its leverage, a due diligence process on the FIFA World Cup-related construction sites.[10]

1.3 As a Member State of the United Nations, Has Your Country Taken Any Action Under the 2011 Guiding Principles? If Yes, Please Describe (National Action Plan, Etc)

Switzerland published its National Action Plan (NAP) on the implementation of the UNGP in December 2016. Additionally, it took measures regarding corporate social responsibility and due diligence in specific sectors. The NAP does not envisage the introduction of a mandatory human rights due diligence obligation in Swiss law. It also does not clarify the conditions of liability for human rights abuses committed by Swiss-registered companies abroad. To fill these gaps, a coalition of Swiss NGOs submitted a constitutional popular initiative that aims at introducing a specific provision on responsible business in the Swiss Constitution. In order to avoid a

[6]State Secretariat for Economic Affairs, National Contact Point for Switzerland: Information on the Specific Instances Procedure (November 2014).

[7]<https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP.html>.

[8]Kaufmann and Heckendorn (2018), pp. 29–33.

[9]NCP, Initial Assessment: Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood Workers' International (BWI), (13 October 2015).

[10]NCP, Final Statement, Specific Instance regarding the Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood Workers' International (BWI), (2 May 2017), 4.

popular vote, the parliament is currently elaborating a counter-proposal at the legislative level. These developments are presented in turn.

The Swiss National Action Plan 2016

On 9 December 2016, the Federal Council presented its National Action Plan (NAP) on the implementation of the UNGP, which should be read as a complement of equivalent value to the Position Paper on Corporate Social Responsibility of 2015.[11] The Federal Council expects corporations to conduct due diligence in their activities in Switzerland and abroad.[12]

Regarding access to remedy for victims of corporate abuses abroad pursuing to the third pillar of the UNGP, the Federal Council notes in the NAP that there is always a forum in Switzerland for torts when the corporation is domiciled in Switzerland. In addition, overriding mandatory provisions of Swiss law, in particular those relating to human rights, would in any event be applicable regardless of the law designated by the choice-of-law rules.[13] However, it acknowledges that there is no legally binding provision in Swiss law compelling corporations to conduct human rights due diligence in their operations abroad. In this regard, it notes that no other country has adopted such legally binding provisions and concludes that, in order to avoid that the Swiss economy be penalized, any regulation that Switzerland would introduce in that regard should be largely supported internationally.[14]

Recently, Switzerland commissioned a report to evaluate and compare international developments on access to remedy for victims of corporate abuses.[15] Despite some international legal developments identified in the report, and in particular the French Duty of Vigilance Law of 2017, the Federal Council does not recommend the adoption of regulatory measures in corporate law, tort law or international private law.[16] However, it mentions the pending responsible business initiative and its legislative counter-proposal. Both aim at introducing a mandatory due diligence obligation for corporations and clarifying the conditions of liability.[17] These discussions are presented below.

Legislative Measures Adopted in Specific Sectors

Beyond political developments concerning companies in all economic sectors, the Swiss government has taken some measures in specific sectors. The recent Federal Act on Private Security Services Provided Abroad (PSSA) applies to companies that

[11] Swiss Federal Council, 'Rapport sur la stratégie de la Suisse visant à mettre en œuvre les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme' (9 December 2016), 12; <https://www.parlament.ch/centers/eparl/curia/2012/20123503/Bericht%20BR%20F.pdf>; hereinafter National Action Plan.

[12] *Ibid*., 7–8.

[13] *Ibid*., 39.

[14] *Ibid*., 15.

[15] Kaufmann and Heckendorn (2018).

[16] Swiss Federal Council, Entreprises et droits de l'homme: analyse comparée des mesures judiciaires offrant un accès à la réparation (14 Septembre 2018), 14–15.

[17] *Ibid*., 15.

provides, from Switzerland, private security services abroad as well as to companies that establish, base, operate, or manage a company in Switzerland that provide such services abroad. It aims at prohibiting the provision of private security services for the purpose of direct participation in hostilities abroad or in connection with the commission of serious human rights violations.[18] These prohibitions apply expressly to parent companies and companies that subcontract the provision of a security service (subcontracting companies) to another company (the subcontractor).[19]

Regarding liability, criminal sanctions are in place for individuals who infringe the prohibitions.[20] Financial compensation for harm caused by private security services remains to be determined in accordance with general rules on torts under Swiss law. Interestingly, Article 6 PSSA clarifies that where a Swiss-registered company subcontracts the provision of a security service abroad, it shall ensure that its subcontractor performs that service in keeping with the constraints to which it is itself subject. Its liability for harm caused by the (foreign) subcontractor should be determined in accordance with the Swiss Code of Obligations.[21] The problem is that the Swiss Code of Obligations does not entail any specific provision on the extracontractual liability of subcontracting companies for harm caused to third parties by subcontractors and there is no relevant case law in that regard.[22]

Finally, the Swiss government has taken steps or is considering to adopt measures on corporate responsibility to respect human rights in the commodity sector.[23] It adopted a legally non-binding guide on the implementation of the UNGP in the commodity trading sector.[24] Switzerland is also following international legislative developments, in particular those in the European Union, on due diligence for importers of minerals originating from conflict areas.[25] It envisages the possibility to adopt similar provisions adapted to the Swiss context.[26] There is no recommendation, however, clarifying the conditions of corporate liability of parent, subcontracting or contracting companies in the commodity sector for human rights abuses.

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[18]Swiss Federal Act on Private Security Services Provided Abroad, art. 8 and 9.

[19]*Ibid*. art 5.

[20]*Ibid*. art 21–24.

[21]*Ibid*. art 6.

[22]Bueno and Scheidt (2015), p. 10.

[23]*See* Plateforme interdépartementale "matières premières", 3e rapport concernant l'état d'avancement de la mise en œuvre des recommandations (2 December 2016), Recommandations 11 and 12, at 13–14. <https://www.newsd.admin.ch/newsd/message/attachments/46473.pdf>.

[24]Swiss State Secretariat for Economic Affairs and Federal Department of Foreign Affairs, The Commodity Trading Sector: Guidance on Implementing the UN Guiding Principles on Business and Human Rights, 2018.

[25]Plateforme interdépartementale, at 14; *see* Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[26]National Action Plan, 29.

The Responsible Business Initiative and Its Counter-Proposal

In parallel to the above-mentioned developments, a coalition of NGOs in Switzerland launched the popular constitutional initiative called *Responsible Business: Protecting Human Rights and the Environment*. The initiative collected the requisite threshold of 100,000 signatures. It will be submitted to Swiss citizens unless a satisfactory counter-proposal is adopted. The popular initiative aims at adding a new Article 101a, under the heading "Responsibility of Business", to the Swiss Constitution. This provision aims at introducing a mandatory due diligence obligation for corporations as well as a specific liability rule in case of its breach,[27] which should fill the liability gap of the Position Paper on Corporate Social Responsibility and the National Action Plan.

According to the proposed Article 101a of the Swiss Constitution, companies in Switzerland must respect internationally recognized human rights and environmental standards and ensure that these are also respected by companies under their control.[28] Concretely, the initiative requires companies to carry out appropriate due diligence, as defined in the UNGP.[29] Beyond mandatory due diligence, the initiative text specifies that corporations are liable for the damage caused by themselves and by those under their control unless they can prove that they took all due care to avoid the damage, or that the damage would have occurred even if all due care had been taken.[30] If the Swiss electorate accepts the constitutional initiative, a mandatory due diligence provision and a liability rule for Swiss-based corporations operating abroad will have to be elaborated and implemented in the sub-constitutional federal legislation, probably in the Swiss Code of Obligations (CO).[31]

As a result of the initiative, the Parliament is currently discussing a counter-proposal in the form of a modification of the Swiss Code of Obligations. The counter-proposal is drafted with a view to avoidinga popular vote; if it is adopted, the initiative committee may withdraw the initiative. To date, the counter-proposal restricts the Popular Initiative in two respects. First, proposed Article 716a CO, which defines the due diligence that some companies are required to conduct, is limited to large companies and those active in specific sectors at risk. Second, proposed Article 55 CO introduces a specific liability provision, which would however apply only to parent companies for the harm caused by controlled subsidiaries and not to suppliers. Finally, Article 139a SPILA entails a specific rule to ensuring application of these provisions in international matters. Each element presents specificities presented below in light of existing Swiss law.[32]

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[27] Art. 101a(2)(b) and (c) Responsible Business Initiative.

[28] Art. 101a(2)(a) Responsible Business Initiative.

[29] Art. 101a(2)(b) Responsible Business Initiative.

[30] Art. 101a(2)(c) Responsible Business Initiative.

[31] Bueno (2020), pp. 243–426.

[32] Bueno (2019), pp. 360–362.

2 Characterisation

2.1 Rules Pertaining to Company Law

As the discussion on the counter-proposal shows, there is currently no provision in Swiss company law aiming at ensuring that companies or the board of directors of a company respect human rights, the environment or other societal interests abroad. With respect to companies limited by shares, Article 716a of the Swiss Code of Obligations (CO) enumerates an exhaustive list of non-transferable duties of the board of directors. Regarding social responsibility, Article 716a(1) para 5 CO states to date that the board of directors has the duty to overall supervise the persons entrusted with managing the company, in particular with regard to compliance with the law, operational regulations and directives.[33] The counter-proposal to the Responsible Business Initiative aims at modifying this provision by adding that it must supervise them as well with regard to compliance with provisions relating to human rights and the environment [34]

So far, The duties of the board of directors, however, only relate to the protection of the company's interests and not those of affected third parties.[35] Article 754 CO makes this clear by stating that the individual members of the board of directors of the company are liable for any loss or damage arising from intentional or negligent breach of their duties both to the company and to the individual shareholders and creditors, however not to third injured persons. In this regard, the counter-proposal not only does not modify this individual liability provision for the members of the board of directors, but also excludes the liability of individual members of the board of directors for a damage caused by a controlled company.[36]

2.2 Rules Pertaining to the Law of Contract

There are no specific rules in Swiss contract law aiming at implementing corporate social responsibility of Swiss-based companies for their activities abroad. Conversely, however, Article 5 of the Posted-Workers Act[37] requires that subcontracting companies in the construction sector ensure that all their subcontractors respect minimum wages and labour standards when employing workers in Switzerland. Accordingly, the contracting company must take all contractual measures in order to oblige its subcontractors to respect those minimum standards in Switzerland.[38]

[33]Swiss Institute of Comparative Law (2013), p. 42.

[34]Proposed Art. 716(1)(5) CO.

[35]Swiss Institute of Comparative Law (2013), pp. 45–46; Forstmoster (2015), p. 172.

[36]Proposed Art. 759a CO.

[37]Loi fédérale sur les mesures d'accompagnement applicables aux travailleurs détachés et aux contrôles des salaires minimaux prévus par les contrats-types de travail du 8 octobre 1999.

[38]Ordonnance sur les travailleurs détachés en Suisse, art. 8c.

2.3 Rules Pertaining to Law of Torts

To date, there is no specific mandatory provision in Swiss tort law that requires Swiss-based companies to respect human rights, the environment or other societal interests when they conduct business abroad through a foreign subsidiary, supplier or subcontractor. Existing general rules of liability in tort law apply, provided Swiss law is applicable, to companies that cause a damage abroad through their own activities or through the activities of a foreign subsidiary or subcontractor. The Swiss literature concerning business and human rights discusses how to apply existing rules of fault liability (Article 41 CO) and of vicarious liability (Article 55 CO) to such situations.

General Conditions of Direct Liability (Fault Liability)
Article 41 CO establishes the general conditions of liability in tort law. Accordingly, any person, natural or legal, who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.[39] There are four conditions of liability under Article 41 CO: a damage, a relationship of causality between the harmful event and the damage, a wrongful act, and a fault.[40] There is a fault, understood as reproachable conduct, when a person wilfully or negligently does not meet an expected standard of conduct in given circumstances. A conduct is negligent, when a person does not want the result, but lacks to meet the diligence that can be expected from a person of the category of the tortfeasor.[41]

The judiciary also distinguishes between active conducts and omissions. In the event that an omission of the company is reproached, a duty to act is required to make that omission wrongful. Such a duty exists when the tortfeasor owes a duty of care to the injured party.[42] A duty of care exists, for instance, when it is expressly required by law or when an activity creates a specific risk for others.[43]

In a first tort law case in Switzerland submitted after the adoption of the UNGP, a Bangladeshi worker and trade unions argued that the FIFA, which is registered in Zurich, attributed the 2022 World Cup to Qatar despite well-documented abuses due to the kafala sponsorship system. Such a system prohibited the claimant, to quit, change work or leave Qatar without the consent of his sponsor-employer, who retained his travel documents.[44] In addition, the trade unions reproached the FIFA for omitting to require reforms of labour market from Qatar.[45] Regarding compensation based on Article 41 CO (fault liability), the Commercial Court of Zurich found that the claim did not demonstrate precisely enough what acts or omissions of

[39] Art. 41 CO.
[40] Werro (2012a), art. 41 § 7; Kessler (2015), 321, § 2c.
[41] Werro (2012a), art. 41 § 57; Kessler (2015), § 48a.
[42] Werro (2012a), art. 41 § 77; Kessler (2015), § 37.
[43] Werro (2012a), art. 41 § 79–81.
[44] Handelsgericht des Kantons Zurich, HG160261-O [unpublished], 3 January 2017, 13.
[45] *Ibid*., 14.

the FIFA did violate the claimant's rights. It found further that the FIFA did not have a direct possibility to influence Qatari law or was not directly involve in the construction of infrastructure projects. In any event, even if it could be proved that the FIFA had such a leverage over Qatar, the matter would not be of a commercial nature, and therefore the Commercial Court would not be competent.[46] The Court did not place the case into the business and human rights debate or made a reference to the international due diligence standard, despite a parallel proceeding before the Swiss National Contact Point.[47]

To date, there is thus no objectified standard of conduct or case law establishing what is the conduct expected from a Swiss-registered company operating abroad with regard to human rights or the environment. There is also no express legal obligation for companies to actively prevent a harm abroad. By requiring companies to carry out appropriate due diligence regarding human rights and the environment,[48] both the Responsible Business Initiative and its counter-proposal aim at introducing such specific standard of conduct based on the UNGP in Swiss law.

For public companies limited by shares, the proposed article 716a CO of the counter-proposal establishes that the board of directors must take measures to ensure that the company respects provisions related to human rights and the protection of the environment, including in its activities abroad.[49] Concretely, according to the proposed provision, the board of directors must identify and assess actual and potential human rights and environmental impacts; take measures to prevent risks and mitigate violations as well as track the effectiveness of the measures and account for how it addresses impacts. This due diligence applies explicitly over impacts resulting from activities of controlled companies within a corporate group as well as business relationships along the supply chain.[50] In contrast to the responsible business initiative, this mandatory due diligence shall apply to companies, controlled companies included, reaching two out of the three following thresholds: a balance sheet of 40 million CHF, a turnover of 80 million CHF or employment of 500 employees.[51] Nevertheless, smaller companies are also subject to the same due diligence when their activities present a particular risk.[52]

Liability for Damage Caused by Others

Article 55 CO currently relates to the liability that an employer, as a principal, holds for a tort caused by auxiliaries. Accordingly, an employer is liable for the loss or

[46] *Ibid*., 15. *See also* Bueno (2017), p. 1019.

[47] *See* also the outcome of the mediation process at the Swiss National Contact Point in Sect. 1.2 above.

[48] Art. 101a(2)(b) Responsible Business Initiative.

[49] This provision shall apply by analogy to limited liability companies, cooperatives and associations.

[50] Proposed Art. 716^{abis}(1) *in fine* CO.

[51] Proposed Art. 716^{abis}(3) CO.

[52] Proposed Art. 716^{abis}(4) CO.

damage caused by his employees in the performance of their work unless he proves that he took all due care to avoid a loss or damage of this type or that the loss or damage would have occurred even if all due care had been taken. The three conditions of liability under article 55 CO are a wrongful act of the auxiliary in the performance of his or her work; a relationship of subordination between the auxiliary and the employer; and the absence of a proof that the employer took all due care in selecting, instructing, and supervising that person.[53]

It is discussed in the literature concerning business and human rights whether Article 55 CO could apply to hold a parent or a subcontracting company responsible for the damage caused by a controlled subsidiary or subcontractor abroad.[54] Indeed, the notion of employer in Article 55 CO does not require an employment contract or any other contract but the existence of a practical relationship of subordination.[55] A part of the literature, however, considers that auxiliaries cannot be legal persons[56] while, for the other part, there is no reason to exclude that a relationship of subordination may exist between two legal entities,[57] as known in other countries. They argue accordingly that Article 55 CO should encompass liability of companies for the harm caused by other companies under their control,[58] including subsidiaries within a corporate group.[59]

By establishing a specific liability for parent companies in the proposed Article 55 CO, the counter-proposal clarifies the scope of this liability.[60] Companies subject to due diligence obligations, as presented above, are liable for the damage caused by a controlled company in violation of a provision relating to human rights and the environment. The parent company is not liable if it can prove that it took the required measures to protect human rights and the environment or that it could not influence the controlled company.[61] This specific liability for the damage caused by a controlled company in the counter-proposal would not apply for the damage caused by economically dependent companies outside a corporate group, such as independent suppliers.[62]

[53]Werro (2012b), art. 55, § 6.

[54]Membrez (2012), p. 31; Kaufmann et al. (2013), p. 43; Bueno and Scheidt (2015), p. 9.

[55]Werro (2012b), art. 55, § 7. Kessler (2015), § 8.

[56]Kessler (2015), § 8. Swiss Supreme Court, DFT 42 II 611, 615 (23 November 1916). *See* Werro (2012b), art. 55, §8.

[57]Kuonen (2007), pp. 498–500.

[58]*Ibid*., p. 500.

[59]Membrez (2012), p. 32; Von Büren (2005), p. 954.

[60]Von Büren (2005), p. 954; *see* Art. 101a(2)(b) Popular Constitutional Initiative and commentaries at https://www.news.admin.ch/NSBSubscriber/message/attachments/30134.pdf.

[61]*See* Proposed art. 55(1^{bis}) CO.

[62]Proposed Art. 55(1^{ter}) CO.

3 Jurisdiction

3.1 Defendant's Domicile in Switzerland

An international claim in tort can be brought before Swiss courts whenever the defendant is domiciled in Switzerland. According to Article 2(1) of the 2007 Lugano Convention, which is in force in Switzerland since 2011, persons domiciled in a State bound by the Convention shall be sued in the courts of that State. The notion of domicile is defined by Article 60 of the Lugano Convention and it encompasses both the statutory seat and the "real" seat (which includes both the central administration and the principal place of business). Under this provision, a Swiss company can always be sued in a Swiss court for the alleged violation of CSR rules or standard, even if the violation has occurred, or has caused a damage, abroad.

It is also worth noting that—contrary to the courts of several foreign countries, in particular common law jurisdictions—Swiss courts cannot stay or dismiss an action on the ground that foreign courts (e.g. the courts of the place of the tort) are better placed to hear the case. Swiss courts do not apply the doctrine of *forum non conveniens*; in any event, the latter would be incompatible with the Lugano Convention.[63] This is in line with the Recommendation on Human Rights and Business, which was adopted by the Council of Europe.[64]

However, Swiss courts must stay their proceedings (and eventually dismiss the action) when proceedings having the same object and the same cause of action between the same parties were previously instituted before a foreign court. If the court first seized is a court in a State bound by the Lugano Convention, the court second seized must immediately stay the proceedings and then dismiss the action, once the foreign court has ruled on its own jurisdiction (art. 27 Lugano Convention). By contrast, if the foreign court first seized is that of a country not bound by the Lugano Convention, a Swiss court has to stay the proceedings only when it appears that the foreign court will render, within a reasonable timeframe, a decision that is capable of being recognised in Switzerland (Article 9(1) SPILA); the Swiss proceedings will then be dismissed only when such recognizable decision has been presented to the Swiss court (Article 9(3) SPILA).

Jurisdiction at the Place of the Tort

The jurisdiction of Swiss courts is more difficult to establish when the defendant is not domiciled in Switzerland, for example when a claimant intends to sue in Switzerland a foreign subsidiary of a parent company domiciled in Switzerland or a foreign supplier or subcontzractor of a company domiciled in Switzerland.

In such a case, the uniform jurisdictional rules of the Lugano Convention are still applicable when the defendant is domiciled in another State bound by the

[63]ECJ, 1.3 2005, in the case C-281/02, *Owusu*, ECR I-1383.

[64]Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers on human rights and business, (2 March 2016), para 34, *in fine*, "the doctrine of *forum non conveniens* should not be applied in these cases."

Convention (Article 3 Lugano Convention). Is this not the case, the jurisdiction of Swiss courts is governed by the national rules included in the SPILA (Article 4 Lugano Convention).

Both the Lugano Convention and the SPILA provide for rules of specific jurisdiction based on the criteria of the place of the harmful event (Article 5(3) Lugano Convention; Article 129 SPILA). Based on these provisions, a claim in tort can be brought both at the place of the conduct and at the place of the event.[65] In the case of a tort abroad, a foreign subsidiary or a supplier or subcontractor of a company domiciled in Switzerland can only be attracted before Swiss courts if it acted from within Switzerland.

Of course, this raises difficult questions on what kind of conduct may be regarded as relevant for the purpose of jurisdiction. According to the case law, when a tort results from a plurality of acts, the place of each of these acts is relevant for the purpose of establishing jurisdiction, with the exclusion, however, of purely preparatory (preliminary) acts.[66] As far as the harmful acts of a foreign corporate entity are concerned, it goes without saying that not only the place of the material activity will be regarded as "the place of conduct", but also the place where the relevant decisions of the competent corporate bodies were taken. However, this will normally be insufficient to establish the jurisdiction of the Swiss courts because a companies' decision are normally taken at the place of administration, which in the case of a foreign company is also located abroad.[67]

Would the answer be different if it is alleged (or proved) that the harmful decisions were actually taken and dictated by the Swiss parent company or facilitated by the latter lack of diligence? In this case, however, the harmful conduct (as an act or an omission) taking place in Switzerland would be that of the Swiss parent company—a company that is in any case subject to the jurisdiction of Swiss courts because of its domicile, as mentioned above. Such allegations would therefore normally prove insufficient to attract before Swiss courts the foreign subsidiary (and *a fortiori* an independent supplier or subcontractor).

In the *IBM(Geneva)/Germany* case,[68] the Swiss Supreme Court ruled on the jurisdiction of Swiss courts in a matter concerning the American company IBM's alleged involvement with the Nazi regime in Germany between 1933 and 1945. The claimants, who were detained in concentration camps during World War II, reproached IBM for supplying technology from its European branch in Geneva to the Nazi regime. They claimed for the civil compensation of the harm they had suffered based on Article 41 CO. A first instance judgment dismissing the claim for lack of jurisdiction was reversed by the Geneva Court of Appeal, which ruled that the Geneva courts had jurisdiction to hear the claim based on Article 129 SPILA. The Swiss Supreme Court affirmed this judgment. Without prejudice to the decision

[65] *See* Bonomi (2011a), pp. 1097–1098.

[66] DFT 125 III 346, points 4a and 4c; DFT 131 III 153, points 6.2 to 6.4.

[67] If not, the company would be regarded as domiciled in Switzerland under Article 60 of the Lugano Convention (see supra).

[68] Swiss Supreme Court, Decision 4C.296/2004, 22 December 2004, DFT 131 III 153.

on the merits, the Court found that the claimant's allegation that IBM had supplied its Nazi clients with technology from its European branch in Geneva, was plausible.[69] Since it could not be excluded, on one hand, that IBM was responsible of acts of complicity in a genocide and, on the other hand, that such tortious acts had been committed in Geneva, this was sufficient for establishing the jurisdiction of the Geneva courts under Article 129 SPILA.

Jurisdiction Over Related Claims

The jurisdiction of Swiss courts over a foreign company is very difficult to establish even when the claimant purports to sue simultaneously in Switzerland both a Swiss parent company and its foreign subsidiary (or a supplier).

For sure, Article 6(1) of the Lugano Convention provides for a quite broad basis for joining proceedings brought against a plurality of defendants, provided that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings." However, as the other rules of special jurisdiction of the Convention, this provision is only applicable when the defendant is domiciled in a State bound by that instrument.[70]

By contrast, if the defendant's domicile is in a third country, Swiss jurisdiction can only be established on the basis of the SPILA. Now, according to Article 8a SPILA, when related claims are brought against several co-defendants, the Swiss court having jurisdiction over one of them can rule over all of the claims. For sure, this provision allows for the concentration of proceedings brought against several defendants; however, it is only applicable when every single defendant can individually be sued in Switzerland pursuant to other provisions of the SPILA. In other words, Article 8a SPILA does not provide a basis for international jurisdiction over foreign defendants, but only establishes which judicial authority is competent domestically, provided that all defendants are subject to the jurisdiction of Swiss courts.[71] When Swiss courts do not have jurisdiction over the foreign subsidiary (or supplier or subcontractor) of a Swiss corporation for harmful conduct taking place abroad, Article 8a SPILA is of no assistance.[72] For this reason, Article 8a SPILA is subject to some scholarly criticism for being too restrictive in international comparison.[73]

The same limitation also affects Article 8c SPILA, which allows the victim of a criminal act to bring a civil claim for compensation before the courts seized with the

[69]DFT 131 III 153 § 6.4. *See* Geisser (2013), p. 223.

[70]*See* the wording of Article 6 Lugano Convention ("A person domiciled in a State bound by this Convention may also be sued [. . .]."). An analogical application of this provisions to defendants domiciled in third countries is suggested in Schwenzer and Hosang (2011), p. 279; however, this solution (although desirable *de lege ferenda*) is difficult to reconcile *de lege lata* with the choice made by the Swiss legislator in Article 8a SPILA (see *infra*). *See also* Geisser (2017), p. 963.

[71]Bucher (2011b), p. 100.

[72]Geisser (2013), p. 238.

[73]*Ibid*., p. 240; Geisser (2017), p. 963; Bucher (2011b), p. 100; Schwenzer and Hosang (2011), p. 280.

criminal proceedings. As Article 8a SPILA (and contrary to Art. 5(4) of the Lugano Convention), this provision does not create a jurisdictional basis against foreign defendants but only allows for consolidation of criminal and civil proceedings when the alleged tortfeasor is subject (on some other basis) to the jurisdiction of Swiss courts.[74]

This solution of Swiss private international law is also too narrow if one considers the Recommendation on Human Rights and Business.[75] The Committee of Ministers recommends that Member States consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses when these are brought against foreign subsidiaries, provided that such claims are closely connected with claims against the parent company.[76] In other words, courts should be able to exercise jurisdiction in such cases against both the parent company, based within the forum country, and the subsidiary, based in a foreign jurisdiction.[77]

Forum of Necessity

In the absence of other jurisdictional bases, a claimant can try to assert jurisdiction based on Article 3 SPILA. According to this provision, when there is no other basis for jurisdiction in Switzerland, and proceedings are impossible or cannot reasonably be brought in the foreign country, Swiss judicial authorities have jurisdiction provided that the case has a sufficient connection with Switzerland. This exceptional rule, called *forum necessitatis*, may be relevant for actions in torts against a subsidiary or a subcontractor of a Swiss company domiciled abroad. It applies under two cumulative conditions: first, proceedings are impossible or it cannot reasonably be expected that they are brought in a foreign country and, second, the dispute has a sufficient connection with Switzerland.[78]

Such conditions are not easily satisfied. In the only decision of the Swiss Federal Court addressing Article 3 SPILA in an action in torts, a Tunisian citizen sued the Republic of Tunisia and a Tunisian Minister for compensation for acts of torture committed against him in that country by Tunisian nationals. The Court clarified that the goal of Article 3 is to avoid a denial of justice and that a forum of necessity could in principle be applied when the claimant risks of being politically persecuted abroad.[79] Legal scholars also unanimously consider that *forum necessitatis* should apply in cases dealing with human rights abuses abroad.[80] However, the court declined jurisdiction holding that the present case had no sufficient connection

[74]Bucher (2011b), p. 103.

[75]Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers on human rights and business (2 March 2016).

[76]*Ibid*., § 35.

[77]Council of Europe, Explanatory Memorandum to Recommendation CM/Rec(2016)3, §57–59. *See also* Geisser (2017), p. 963.

[78]Geisser (2013), p. 262.

[79]Swiss Supreme Court, Decision 4C.379/2006, para 3.4 (22 May 2007).

[80]Bucher (2011a), p. 64; Geisser (2013), p. 263; Schwenzer and Hosang (2011), p. 287.

with Switzerland. At the time of the facts, the claimant had been resident in Italy. The fact that the claimant subsequently decided to establish in Switzerland and that he had obtained political asylum in this country was (surprisingly) regarded as being insufficient.[81] The European Court of Human Rights has rejected a complaint against this decision, with a judgement[82] recently confirmed by the Grand Chamber.[83] To date, there is no reported case in Switzerland addressing the forum of necessity in a case concerning CSR.

4 Applicable Law

4.1 What Is the Law Applicable to Rules Relating to Corporate Structure? In Other Words, How Is the lex societatis *Determined?*

Article 154(1) SPILA states that companies are governed by the law of the state under which they are organized. However, Article 154(1) SPILA does only apply to company law matters as defined in Article 155 SPILA. This covers issues relating to the company's organization and to the internal relationships between the company and its shareholders. By contrast, assessing whether a parent company took all due care to prevent a harm caused by a subsidiary would be regarded as a matter of tort law, and not of company law. Therefore, the applicable law would have to be determined in accordance with the conflict of law rules relating to torts, as presented below.

4.2 What Is the Law Applicable to Rules Belonging to the Law of Contract? (State the Main Conflict Rule: "Autonomy of Will", for Example—Then the Conflict Rules Applicable by Default)

In the area of contracts, Swiss choice-of-law rules are largely based on party autonomy. Under Article 116 SPILA, a contract is governed by the law chosen by the parties. The freedom of choice is very broad, no link being required between the contract and the chosen law. By a choice of law, the parties can derogate from the

[81]Swiss Supreme Court, Decision 4C.379/2006, para 3.5 (22 May 2007). See the criticism by Bucher (2011c), p. 64 and Geisser (2013), pp. 317–320. By contrast, Schwenzer and Hosang (2011), p. 287, seem to accept such restrictive interpretation.

[82]CEDH, 21.6.2016, Naït-Liman, n° 51357/07.

[83]CEDH (Grand Chamber), 15.3.2018, n° 51357/07.

mandatory rules of the law that would have applied in the absence of choice, subject only to overriding mandatory provisions and public policy. However, contrary to arbitration (Article 187 SPILA), the parties cannot validly choose a set of non-state rules (soft-law rules) as the law applicable to the contract; if they do, their choice will only be regarded as an incorporation by reference, which cannot derogate from mandatory provisions of the applicable law.

In the absence of choice, the applicable law is that of the State having the closest connection to the contract (Article 117(1) SPILA). Subject to exceptional circumstances, such a connection is presumed to exist with the country of the habitual residence (or establishment) of the party who is to perform the characteristic obligation (Art. 117(2) SPILA).

4.3 What Is the Law Applicable to Rules Belonging to the Law of Torts? (State All the Conflict Rules in Your Country in the Order in Which the Courts Would Apply Them)

In international matters, the law applicable to claims in tort is to be determined by the SPILA. According to Article 133(2) SPILA, when the parties do not have their habitual residence in the same country, a claim in tort is governed by the law of the country in which the tort was committed. However, if the result occurred in a different country, the law of the latter applies provided that the tortfeasor would have been able to foresee that the result would occur there.

In the case of human rights violations or environmental harm abroad, the tortfeasor is normally in a position to foresee where a damage could arise. Therefore, Swiss law would normally be inapplicable under Article 133(2) SPILA. In particular, Article 41 CO (that governs fault liability) and Article 55 CO (that sets up the conditions of employer's liability) would generally not apply to such torts. This is the reason why both the Responsible Business Initiative and its counter-proposal specify that the proposed due diligence obligation and liability provision should read as overriding mandatory provisions, as presented below.

4.4 Does Your Country's Case Law Allow Verification of Whether the Applicable Law Is in Conformity with the Rules of International Human Rights Law, the ILO Conventions, or Other Mandatory Rules of International Law? Please Explain

Swiss private international law does not entail specific exceptions to ensure respect for international human rights law or ILO Conventions. According to Article

17 SPILA, however, the application of provisions of foreign law is excluded if such application leads to a result that is incompatible with the Swiss public policy. Legal scholars and practice interpret the notion of Swiss public policy as including not only fundamental rights as protected by Swiss law, but also, increasingly, internationally recognized human rights standards.[84] When the application of a foreign law provision is incompatible with the Swiss public policy, the judge must correct that result to make it compatible with such principles.[85]

Article 18 SPILA provides another exception to the application of the referred applicable law. Overriding mandatory provisions of Swiss law pursuing a "special goal", are applicable regardless of the law referred to by the Private International Law Act. Overriding mandatory provisions typically aim at protecting essential interests of the social, political or economic order.[86] To date, there is no binding CSR rules in the Swiss legal system. The question of their mandatory nature is therefore not discussed yet.

Aware of the risk that due diligence obligations in Swiss law may be inapplicable in transnational matters, the Responsible Business Initiative aims at ensuring the overriding mandatory application of the proposed mandatory due diligence obligation and the conditions of liability. This is expressly stated in the text of Article 101a (2)(d) as proposed by the initiators.[87]

In the same vein, the proposed Article 139a (1) SPILA in the counter-proposal requires application of Swiss law to determine the fault and the wrongfulness of the act or omission by companies that are subject to due diligence. A foreign law governing tort liability pursuant to Article 133 SPILA may nevertheless apply (usually the law from the State where the damage occurred) when its application would lead to an adequate decision in light of a Swiss conception of law or when a fault and a wrongfulness are not required under such law.

In addition, when addressing the liability of a parent company domiciled in Switzerland for the harm abroad caused by a controlled company having its seat abroad, the proposed Article 139a (2) SPILA only requires that Swiss law will be "taken into account" in order to determine whether the Swiss company is liable or can be exonerated from such liability.

[84]Geisser (2013), pp. 367, 372.

[85]*Ibid*., p. 367.

[86]Swiss Supreme Court, DFT 136 III 23 (1 October 2009), para 6.6.1; Bucher (2011c), p. 55. *See* also Geisser (2013), p. 444, and Kaufmann (2016), p. 49.

[87]Art. 101a(2)(d) Responsible Business Initiative, commentaries <https://www.news.admin.ch/NSBSubscriber/message/attachments/30134.pdf>.

4.5 Does Your Country's Case Law Allow the Application of Ethical Rules Instead of, or as a Complement to, the Applicable Law? Please Explain

Ethical rules, such as the UNGP or the OECD Guidelines on Multinational Enterprises may apply in theory as a complement to the applicable law. As presented above, there is no due diligence standard in Swiss law setting what is an expected conduct for Swiss-registered corporations operating abroad. In light of the absence of such due diligence standard, nothing prevents a ruling body to refer to international ethical rules of social corporate conduct to assess the conduct of Swiss-registered companies in a specific case. This could be relevant to determine whether a Swiss company committed a fault in tort law.[88] In practice, however, courts have not yet referred to international ethical standards, such as the UNGP or the OECD Guidelines to assess the conduct of Swiss-registered multinational corporations operating abroad.

5 Recognition and Enforcement of Judgments

5.1 Describe the Rules Applicable in Your Country to the Recognition and Enforcement of Foreign Judgments

Subject to specific bilateral treaties, foreign judgments in civil and commercial matters are recognised and enforced in Switzerland through two main channels. The Lugano Convention governs the recognition and enforcement of judgments rendered in a State bound by that instrument (Article 32 *et seq*. Lugano Convention), whereas the effects of judgments rendered in a third State are determined by the relevant provisions of the SPILA (Article 25 *et seq*. SPILA). The two regimes have some similarities, but present also very significant differences.

The most striking difference is that—contrary to most decisions under the Lugano regime—third country judgments can be recognised only if they were rendered by a court having jurisdiction within the meaning of Swiss law (Article 25(a) SPILA). With respect to foreign decisions rendered on tort law claims, the SPILA defines the jurisdiction of foreign courts in a very restrictive way. Such decisions are capable of recognition when they were rendered in the country where the defendant has its domicile or his place of business, provided that the claim arose out of the operation of such place of business (Article 149(1)(a) and 149(2)(d) SPILA) They are also capable of recognition, under the general rules, when the foreign court's jurisdiction

[88] Bueno (2017), p. 1015.

was based on a valid choice-of-court agreement, or on the tacit acceptance by the defendants (Article 26(b) and (c) SPILA).

By contrast, a decision rendered in the country of the tort (i.e. both the place of the conduct or the place of the damage) can only be recognised if the defendant was not domiciled in Switzerland (Article 149(f) SPILA). This significant restriction prevents the recognition and enforcement in Switzerland of a decision rendered against a company having its seat in Switzerland, even if the decision was rendered in the foreign country where the tort occurred.[89] It follows that, when the tort occurred in a third country, a claim against a company having its domicile in Switzerland should be brought before Swiss courts.

It should be noted that to the purpose of Article 149, the notion of "seat" is more restrictive than that of the Lugano Convention. Under Article 21 SPILA, a company normally has its domicile at the place of its statutory seat. If the corporate defendant is not registered in Switzerland but only has its central administration or its principal place of business there, Article 149 does not exclude the recognition of a foreign decision rendered at the place of the tort abroad.

No other jurisdictional basis can be invoked for the recognition of a foreign decision in a tort dispute. In particular, a decision rendered abroad against a foreign company on the basis of the connection existing with the claim simultaneously brought against a local company is not capable of recognition in Switzerland.

Beyond the jurisdiction of the foreign court, the SPILA provides for a number of grounds for denial of recognition, which are similar (although not completely identical) to those provided by the Lugano Convention (Article 27 SPILA, Art. 34 Lugano Convention). They are based on the violation of public policy, including fundamental principles of due process, and on the incompatibility with another Swiss or foreign judgments.

5.2 *If a Judgment Given Abroad Holds a Company Liable for Breach of the Rules of CSR, Is Your Country Likely to Recognise and/or Enforce That Judgment? Please Explain*

Subject to the jurisdiction of the foreign court and the absence of other grounds for refusal, nothing under the Swiss law should prevent the recognition and enforcement of a foreign judgment assessing the liability of a company for violation of CSR rules. In particular, the fact that the Swiss legal system does not include binding CSR rules yet would certainly not be an obstacle to the recognition of a foreign judgment based on the rules of a foreign law: as a matter of fact, the recognition of a foreign judgment in Switzerland is not affected by the law which was applied to the merits

[89] See the criticism by Bonomi (2011b), p. 1203.

of the dispute, subject to public policy. Furthermore, there is no reason to believe that Swiss international public policy could be an obstacle to the recognition and enforcement of such a judgement, provided—of course—that due process requirements were respected.

However, as mentioned above, Swiss law excludes the recognition and enforcement of a judgement rendered against a defendant domiciled in Switzerland, unless it was rendered at a foreign place of business (and the claim arose from the operation thereof), or jurisdiction was based on a choice-of-court agreement or on a tacit submission to the foreign court's jurisdiction (see *supra*, 5.1).

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