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123

When threatened by imminent litigation in an inconvenient jurisdiction,

filing a negative declaratory action before a Swiss court is an effective counter-measure. The Swiss Federal Supreme Court in a decision dated 14 March 2018 has taken a liberal approach as to the admissibility of such negative declaratory claims, reinforcing Switzerland's position in forum shopping and forum running.



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Securing a Swiss forum when threatened with litigation abroad

Until recently, Swiss law allowed negative declaratory actions to secure a forum in Switzerland in limited cases only. The Swiss Federal Supreme Court has now changed its position: In international settings, Swiss courts will from now on accept negative declaratory actions filed in cases where the opposing party has threatened to start litigation abroad. Provided that the other jurisdictional requirements under Swiss law are present, parties will now be able to secure a Swiss forum to resolve a looming dispute.

The forum in which a party can or must litigate may be decisive for the outcome of a case. Each party has a natural interest in securing the most convenient forum for its purposes and, to the extent possible, to block the dispute in other inconvenient forums. In this context, the possibility of filing a negative declaratory action levels the playing field between an alleged creditor and debtor: A party threatened by litigation in an inconvenient forum may rapidly file a negative declaratory action in a more convenient forum with the aim of creating *lis pendens*. Assuming that the courts at the inconvenient forum consider the negative declaratory action to create such *lis pendens* for the positive claim, the dispute will not take place in the inconvenient forum or at least will be stalled for a certain time.

Negative declaratory actions are therefore a powerful tool with which positive results can be achieved when faced with imminent litigation abroad. Until very recently, the Swiss Federal Supreme Court (FSC), the highest Court of Switzerland, considered that a claimant's interest to bring a claim before a Swiss court on the ground that the Swiss forum was more convenient was not sufficient for a Swiss court to accept a negative declaratory action. This has now changed. In its decision dated 14 March 2018 (Case No. 4A_417/2017), the FSC held that in international settings, provided that all other prerequisites for a Swiss court to have jurisdiction are present, a party threat-

ened by litigation in an inconvenient forum shall be deemed to have a sufficient interest to file a negative declaratory action in Switzerland. This further strengthens Switzerland's position in the game of forum shopping and forum running.

That being said, it is important to bear in mind that filing a negative declaratory action with a Swiss court will not give the "benefit" of unduly long proceedings as is infamously the case in other jurisdictions: Insofar as a Swiss commercial court has jurisdiction, its decision can only be reviewed by the FSC, guaranteeing a rather short duration of the proceedings compared to other European jurisdictions. In particular, Swiss courts will decide fairly rapidly whether or not they are competent to hear the case.

This begs the question, why then file a negative declaratory action in Switzerland? There are several reasons which make Switzerland an attractive forum. One obvious reason is that where Swiss substantive law applies due to an agreement between the parties, the courts hearing the case will be fully acquainted with the applicable law. In the absence of an agreement between the parties as to the applicable substantive law, situations may arise where the Swiss laws of conflict provide for a different law than the laws of conflict of another forum. In other words, securing a specific forum in some cases also means securing the substantive law applicable to the case. Last but not least, procedural law may also play a

crucial role and constitute a reason to choose Switzerland. The Swiss Civil Procedure Code does not allow for pre-trial discovery or disclosure nor does it provide for anything similar. Thus, in comparison to other jurisdictions where claimants enjoy the far-reaching effects of pre-trial discovery or disclosure, defending a case in Switzerland offers less risks and more predictability as to the outcome of the case. Further, the costs that come with pre-trial discovery or disclosure can be avoided. Of particular importance is that where Swiss substantive law is applicable, the party filing a negative declaratory action does not bear the burden of proof for the non-existence of the alleged claims. On the contrary, the burden of proof remains with the defendant who is treated as if he had filed a positive action. An alleged creditor will, therefore, as defendant, bear the burden of proof without being able to resort to discovery or disclosure proceedings.

Careful evaluation of the pros and cons of filing a negative declaratory action will have to take place before following such a path. Such a decision will have to be made on a case by case basis. However, the FSC has introduced with its recent decision a level playing field between Switzerland and other jurisdictions: Securing a Swiss forum by filing a negative declaratory action has become much easier and is now a real option to be considered in international cases. In international settings, a party threatened by litigation in an inconvenient forum may now well succeed in securing an available Swiss forum, by simply filing a negative declaratory action before the competent Swiss court.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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