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Dispute Resolution

in 47 jurisdictions worldwide

2011

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Published by
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Dispute Resolution 2011

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Dispute Resolution 2011
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

ISSN 1741-0630

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

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Switzerland

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Litigation

1 Court system

What is the structure of the civil court system?

Broadly speaking, Switzerland has a three-tier system. The judiciary for the first and second (appeal) instance is governed by cantonal law, whereas appeals to the Federal Court, the highest court, are governed by federal law. Larger cantons have more than one first instance court. As a rule, disputes with a limited amount in dispute are to be brought before a single judge, whereas larger claims are heard by a full court, usually called a district court and typically consisting of three judges and one court secretary. Some cantons have specialised courts, such as labour courts and landlord and tenant courts. Against the first instance decision, an appeal may be filed to the second instance cantonal court, which in the Canton of Zurich is the Superior Court. For certain subjects there is only one cantonal instance, in particular for general commercial matters, which can be brought before a commercial court in four cantons (Zurich, Berne, St Gallen and Aargau). The commercial courts consist of senior professional judges and commercial judges chosen from the particular industry or trade in question. In Zurich, a commercial court judgment is rendered by two superior court and three commercial judges, assisted by a court secretary. Three superior court judges and a court secretary are required in the Canton of Zurich for an appeal judgment. A federal law appeal lies against the last cantonal decision, usually the second instance cantonal court or the commercial court. At the Federal Court, judgments are usually handed down by three and sometimes five judges and a court secretary. A nationwide first instance federal patents court will come into operation on 1 January 2012.

Effective 1 January 2011, the Swiss Code of Civil Procedure (CCP) of 19 December 2008 entered into force. It brought a unification on the federal level of the codes of civil procedure of the 26 cantons. The CCP applies to the procedure before the cantonal courts, whereas appeals to and other cases before the Swiss Federal Court are governed by the Federal Act on the Federal Tribunal of 17 June 2005.

2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

In commercial litigation, the parties and their lawyers present the case to the judge. The judge may point out specific issues and address questions to the parties to clarify their pleadings. He or she will examine the witnesses in witness hearings.

Juries do not exist in Switzerland.

3 Limitation issues

What are the time limits for bringing civil claims?

Under Swiss law, limitation periods are deemed a matter of substantive law.

Contractual claims prescribe within 10 years, if the law does not provide otherwise (eg, five years for periodic payments and fees for certain types of services). Claims for tort and unjust enrichment become time barred after one year. There are, however, many exceptions to these rules. The statute of limitations is observed by the court only if pleaded. Limitation is interrupted and will restart when an action is filed. The parties are free to waive the statute of limitations for a certain time.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Should a claimant require information or documents from the opposing party to assess the validity of his or her potential claim or to substantiate his or her claim, a respective request to the other party should be considered since the court, when allocating the costs, will review whether the action was brought in good faith.

The destruction of a document or other piece of evidence in a situation where a litigation is imminent may be held by the court, when it has to assess the evidence, to show that such destructed document or other means of evidence was favourable to the counterparty's legal position.

5 Starting proceedings

How are civil proceedings commenced?

Usually, civil proceedings are commenced by asking the justice of the peace for a conciliation hearing. If the parties are not reconciled, the justice of the peace will issue the writ that will allow the claimant to start the proceedings at the court by filing his or her statement of claim and the writ. No justice of the peace procedure takes place for actions that are brought before the commercial court, in actions for divorce and in actions in certain specialist areas, such as intellectual property law, cartel law and unfair competition law. The parties can also jointly waive the justice of the peace procedure for claims exceeding 100,000 Swiss francs, and a claimant can unilaterally waive the same if the defendant is domiciled abroad.

6 Timetable

What is the typical procedure and timetable for a civil claim?

If the conciliation before the justice of the peace fails, the claimant has three months to introduce the action by filing a written statement of claim that will be served on the defendant by the court. The serving of judicial documents outside Switzerland is effected pursuant to the corresponding rules of service applicable in the country where service is sought; between member states of the Hague Convention of 1965 on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, the rules of this Convention will apply. In addition, bilateral agreements may apply.

After the filing of a statement of claim the court will usually set a term for the defendant to file his or her statement of defence. Thereafter, the court may, in simple cases, summon the parties to the main hearing. In more complicated cases, it will order a second exchange of written briefs or summon the parties to a settlement conference. After the second written or oral pleading of the defendant the court usually issues a closing order, which means that for exceptional reasons no further factual pleadings are allowed. Afterwards, the main hearing will be held during which the evidence may also be heard. Thereafter, the parties can comment on the evidence either orally or in writing. Finally, the judgment will be rendered.

The average duration of commercial civil proceedings before the courts of first instance is between one and two years. Where evidence must be heard or the case is complex, considerably longer time may be taken.

7 Case management

Can the parties control the procedure and the timetable?

The case management lies entirely with the court. In proceedings before the Zurich Commercial Court it is customary to have a settlement conference after the first exchange of written briefs, in which a delegation of the Commercial Court gives a provisional assessment of the legal situation and, based upon such assessment, invites the parties to engage in settlement discussions. If no settlement is reached at such meeting or in its aftermath the matter will continue by the second exchange of written briefs.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Under the Code of Obligations, companies are required to properly keep and preserve books, including accounting records and business correspondence, for 10 years. Under procedural law, it is the parties' general duty to cooperate in the evidence taking, except where the law provides for a right to refuse to testify or cooperate otherwise. Pending court proceedings, and also in the case that a party is aware that a court proceeding might be imminent, documents and other evidence should not be destroyed by the respective party, otherwise the court may draw a negative inference. The court will order a party to submit certain documents in its custody upon a specific request by the other party, provided the court holds such documents relevant to establish a fact.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Under the new CCP, a party can decline the production of documents should this cause a close person to risk penal investigation or civil liability or should a professional secrecy obligation (advocates, medical doctors, clergymen, etc) be at stake. Thus, documents exchanged with an advocate need not be produced wherever located. It would appear that advice from an in-house lawyer is not privileged; a bill that should have brought such privilege has failed in the legislative process.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

Written witness statements are quite common in arbitration, but not in state court litigation. Evidence is not heard prior to the main hearing except in special circumstances. The parties may choose to submit expert witness reports as part of their briefs, but in the event of controversy it is the court that will appoint an expert.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Witnesses give oral evidence. Expert witnesses usually submit a written report, but the court can ask them to appear in person and in particular to answer supplementary questions.

12 Interim remedies

What interim remedies are available?

A party may submit a motion for a preliminary injunction prior to the filing of an action or pending an action; however, injunctive relief will be granted only if the petitioner can show that it is likely to prevail on the merits and that, in the absence of an injunction, the petitioner would suffer irreparable harm. The CCP has introduced the 'protective brief', which had so far been accepted only in certain cantons. By means of a protective brief, a party fearing that an ex parte provisional measure may be ordered against it (for instance, an injunction prohibiting the use of a brand) may submit its position on the matter to the court. The protective brief is only communicated to the other party once the request for the ex parte measure has been filed. The brief becomes null and void six months after its filing and is returned to the concerned party. It is anticipated that the protective brief is a powerful measure for a party fearing the filing of an ex parte injunction against it, especially in the areas of intellectual property and competition law.

An attachment of assets is available in separate proceedings. An attachment can be based on a claim against a debtor with a domicile outside Switzerland if such claim has a sufficient link with Switzerland or if such claim is evidenced by an acknowledgement of debt in writing and duly signed. In addition, a creditor needs to show prima facie evidence that it has a claim against the debtor and that the debtor owns specific assets in Switzerland.

Interim remedies are available in support of foreign proceedings either based on article 31 of the revised Lugano Convention or based on article 10 Federal Private International Law Act of 18 December 1987 (PILA).

13 Remedies

What substantive remedies are available?

Most actions are taken for a money judgment, namely, payment of a defined amount of money in contract, tort or unjust enrichment. Depending on the substantive law, specific performance or a cease-and-desist order can be sought. In certain circumstances, an action can be taken for a declaratory judgment.

Basically, only the damages actually suffered need to be compensated. Punitive damages are not available; however, where provided, the court can award a payment for pain and suffering (tort moral).

14 Enforcement

What means of enforcement are available?

Money judgments are enforced in special summary proceedings under the Federal Debt Collection and Bankruptcy Act. If the action concerns an obligation to do something, to refrain from doing something or to tolerate something, the court can threaten penal sanctions under the Penal Code, impose fines, order sanctions, such as taking away a chattel or clearing premises, or give leave to obtain substitute performance.

Under the new CCP, a judgment may be enforced under certain circumstances even prior to its formal entry into force, if the appellate court grants leave for provisional enforcement. In such cases, the court may order conservatory measures or order the requesting party to provide security.

15 Public access

Are court hearings held in public? Are court documents available to the public?

Unless the law provides otherwise, court hearings and oral pronouncements of judgments are open to the public and judgments are made available to the public, usually in an anonymous form. In the public interest or in the legitimate interest of an involved party, the public can be completely or partially excluded. The new CCP leaves it to the cantons to decide whether deliberations between judges should also be open to the public. Court documents such as pleadings, witness testimonies and orders are not available to the public.

16 Costs

Does the court have power to order costs?

The court orders costs usually as a part of its final judgment on the dispute. The court fee is imposed on the unsuccessful party. In addition, that party is to indemnify the opposing party for its advocates' fees (party costs). If a party prevails only in part, the court fee and the reimbursement of party costs are allocated proportionally. The amount of the court fee and the award for party costs are based on the amount in dispute and are assessed pursuant to a statutory tariff schedule. The amount is increased if the matter is particularly complex or requires several rounds of written submissions, hearings or the taking of evidence.

At the outset of the proceedings, the plaintiff may be required on several grounds to post a security for the potential liability for the court fee. When the defendant is finally ordered to pay the court fee, the successful claimant who had to post a security is granted recourse on the defendant. The plaintiff may also be asked to post a security for the reimbursement of party costs to the opposing party. The most common ground that excuses the plaintiff from a security for costs is that the domicile of the plaintiff is in a country with which Switzerland has no treaty (such as the Hague Conventions of 1954 on Civil Procedure and of 1980 on International Access to Justice).

17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

A 'no win, no fee' arrangement is forbidden by the federal legislation on the bar as are contingency fee arrangements. However, it is lawful to agree on a premium in the event of a successful lawsuit in addition to the agreed basic fee, which must cover the actual costs of the lawyer. Parties may use third-party funding for civil proceedings, and such third party may take a share of the proceeds of the claim.

18 Insurance

Is insurance available to cover all or part of a party's legal costs?

A few insurance companies provide litigation funding, usually for larger claims exceeding a certain threshold, namely, fund all or parts of the litigation costs and bear the risks, if the claim fails, in exchange for a share of the proceeds as previously agreed.

Legal costs may also be covered under the terms of legal expenses insurance or liability insurance.

19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Apart from the joinder of parties, there is no general device for collective redress available to litigants. In some instances, non-profit organisations are allowed to bring an action to protect collective interests. They are, however, not allowed to seek damages on behalf of others.

20 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The cantons need to provide for two cantonal instances and two forms of appeal from the first to the second instance, except for commercial courts and other subject matter such as intellectual property, in which case one single cantonal instance will suffice. Against the judgment of the second cantonal instance, the commercial court, or any other sole instance court, an appeal may be filed to the Federal Court, basically for issues of federal law. Such appeal is governed by the Federal Act on the Federal Tribunal of 17 June 2005.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Under the proviso of bilateral or multilateral treaties, such as the important Lugano Convention, recognition and enforcement of foreign judgments is governed by article 25 et seq PILA. Basically, a foreign judgment is only recognised and enforced if, from the Swiss viewpoint, the foreign court or authority had jurisdiction, the foreign decision is final and can no longer be appealed ordinarily and the foreign decision is not contrary to fundamental principles of Swiss law.

It is important to point out that basically a foreign judgment cannot be reviewed on its merits. According to article 47 of the revised Lugano Convention, the creditor may request conservatory measures even before the opposing party has been heard in the enforcement proceedings.

22 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Switzerland is a contracting state to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 and also applies this Convention to requests for judicial assistance from non-contracting states (compare article 11a PILA).

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

International and domestic arbitration must be distinguished. An arbitration is deemed international if at least one of the parties did not have its domicile or its habitual residence in Switzerland at the time when the arbitration agreement was entered into.

The law of international arbitration is governed by the provisions in PILA's 12th chapter. It is an autonomous legislation not based on the UNCITRAL Model Law. There are no fundamental differences between chapter 12 PILA and the UNCITRAL Model Law, although chapter 12 is much shorter. Chapter 12 gives paramount importance to party autonomy for a number of issues and, in the absence of an agreement between the parties, to arbitral discretion. This is in harmony with the UNCITRAL Model Law.

The law of domestic arbitration is governed by the third part of the CCP (article 353 et seq). The CCP has introduced modern and arbitration-friendly legislation also for domestic arbitration.

Update and trends

Basically, the new CCP only applies to cases that were filed or appealed after 31 December 2010. Accordingly, reported court practice is still scarce and it remains to be seen over the next months (and probably years) how the new Code will be applied in practice, and to what extent cantonal habits will be given up in favour of a uniform national practice. The future will also show whether the new provisions (eg, the possibility of taking out an attachment to secure a judgment irrespective of the debtor's domicile) will in fact be greatly applied in practice.

In the area of domestic arbitration, the Zurich Chamber of Commerce has issued Supplementary Rules for the application of the 2004 Swiss Rules on International Arbitration to domestic cases.

Following the revision of the UNCITRAL Arbitration Rules that became effective on 15 August 2010, the Swiss Chambers of Commerce have established a Rules Revision Committee to consider which aspects of the 2010 UNCITRAL Arbitration Rules should be incorporated into the Swiss Rules of International Arbitration. The Revision Committee is also likely to take guidance from the proposed modifications of the ICC Rules and other institutional rules. This revision of the Swiss Rules, which should make them equally compatible for use in domestic arbitration, is expected to be finished in the autumn of 2011.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement is valid as to its form if made in writing, by fax, e-mail or any other means of communication provided that it can be evidenced by a text (article 178(1) PILA and article 358 CCP). The signature of such a text by either party is not a requirement.

25 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In the absence of any provisions in the arbitration agreement or in the rules of arbitration referred to by the parties, each party will appoint one arbitrator (or an equal number of arbitrators) and the party-appointed arbitrators will jointly appoint one chairperson (article 179(2) PILA, article 361 CCP). If a party fails to appoint its party arbitrator or the party arbitrators are unable to agree on the chairperson, the court at the seat of the arbitration will appoint an arbitrator or the chairperson (article 179(2) PILA and article 262 CCP). In a multiparty arbitration, the court can appoint all the arbitrators (article 362(2) CCP).

An arbitrator may be challenged under the PILA and the CCP only:

- if he or she does not meet the requirements agreed by the parties;
- if the rules of arbitration agreed to by the parties provide grounds for challenge; or
- if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality.

A party may challenge the arbitral tribunal if the other party had a predominant influence on the appointment of its members (article 368 CCP).

A party may challenge an arbitrator whom it has appointed or in whose appointment it has participated only on grounds that it became aware after such appointment. Any grounds for challenge must be notified to the arbitral tribunal and the other party without delay (failure to do so would amount to a waiver of the right to challenge the arbitrator) (article 180(2) PILA, article 367(2) CCP).

26 Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

In international and in domestic arbitration, the parties are free to agree on the procedure to be followed (article 182(1) PILA, article 373 CCP). The parties need not refer to a particular system of law. They may simply set out the manner in which they wish the procedure to be conducted, either by incorporating provisions to that effect directly into the arbitration agreement or by referring to the arbitration rules of an institution. As an alternative, the parties may also refer to a procedural law of their choice (including foreign rules of civil procedure).

If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary (article 182(2) PILA, article 372(2) CCP). The arbitral tribunal may set up procedural rules of its own or refer to the arbitration rules of an institution or to a procedural law.

Irrespective of the procedure that has been chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard (due process) (article 182(3) PILA, article 372(4) CCP).

In commercial arbitration, the Swiss Chambers of Commerce are the most widely known Swiss dispute resolution institutions; they adopt unified rules of arbitration (Swiss Rules of International Arbitration) and provide arbitration services. In addition, arbitration proceedings in Switzerland are frequently conducted under the rules of international arbitration institutions, such as the International Chamber of Commerce (ICC) in Paris.

27 Court intervention

On what grounds can the court intervene during an arbitration?

The court can intervene in the appointment, removal and replacement of arbitrators if the parties have not made a respective contractual agreement (article 179(2) PILA). It will also decide on challenges of an arbitrator or the entire arbitral tribunal (article 180 PILA).

The court can also have jurisdiction to order interim measures or to assist the arbitral tribunal if a party, against which interim relief has been granted by the arbitral tribunal, does not comply with such interim relief voluntarily (article 183(2) PILA).

The arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the court at the seat of the arbitration for the taking of evidence (article 184(2) PILA).

28 Interim relief

Do arbitrators have powers to grant interim relief?

Unless the parties have agreed otherwise in their arbitration agreement or in a subsequent agreement, the arbitral tribunal may grant interim or conservatory relief at the request of a party (article 183(1) PILA and article 374(1) CCP).

This power of the arbitral tribunal is not exclusive and a party could also seek interim or conservatory relief from a court of competent jurisdiction.

29 Award

When and in what form must the award be delivered?

The arbitral award shall be made by the arbitral tribunal in accordance with the rules of procedure and in the form agreed upon by

the parties. In the absence of such an agreement, the award shall be made by a majority decision or, in the absence of a majority, by the chairperson of the arbitral tribunal alone.

The award must be in writing, reasoned, dated and signed (at least by the chairperson of the arbitral tribunal) (article 189 PILA).

Swiss law does not provide for a time limit within which the arbitrators should make their award. The parties can nevertheless agree to such a requirement, either directly in the arbitration agreement or by reference to arbitration rules (eg, article 24 of the ICC Rules of Arbitration; article 42 of the Swiss Rules of International Arbitration on the expedited procedure).

30 Appeal

On what grounds can an award be appealed to the court?

The grounds for appeal are limited both in international and domestic arbitration; they comprise (compare article 190(2) PILA and article 393 CCP):

- the arbitral tribunal has been incorrectly constituted (or the sole arbitrator was improperly appointed);
- the arbitral tribunal has wrongly assumed or denied jurisdiction;
- the arbitral tribunal has decided beyond the claims submitted to it or failed to decide on one of the claims; or
- the principle of equal treatment of the parties or their right to be heard in an adversary procedure (due process) has been breached.

Under the PILA, a further appeal ground is the incompatibility of the award with public policy.

Under the CCP, the award can also be challenged:

- if it is arbitrary in result;
- because it is based on findings of fact that are contradicted by the documents on record, or on a manifest violation of the law or of equity; or
- if the fees and expenses determined by the arbitral tribunal for its members are manifestly excessive.

The appeal has to be filed with the Federal Court. In domestic cases, the parties are free to agree that the second cantonal instance court at the seat of the arbitral tribunal should hear the appeal in lieu of the Federal Court.

In international arbitration the parties may exclude all appeal proceedings to the Federal Court (or limit such proceedings to one or several of the grounds set out in article 190(2) PILA) by an express statement in the arbitration agreement or by a subsequent agreement in writing, provided that none of the parties has its domicile, habitual residence or place of business in Switzerland (article 192(1) PILA).

31 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention of 10 June 1958 (article 194 PILA). Domestic awards are enforced in all Swiss cantons in the same way as a judgment made by a Swiss court. When the winning party is awarded a sum of money, the award is to be enforced within the framework of debt collection proceedings in accordance with the Federal Debt Collection and Bankruptcy Act and the rules of the CCP. The Swiss court of competent jurisdiction would examine the requirements of the New York Convention in such proceedings if the award to be enforced is a foreign award.

32 Costs

Can a successful party recover its costs?

Swiss law is silent on the assessment and allocation of costs in international arbitration. For domestic arbitration cases, article 384 (letter f) CCP requires the arbitral tribunal to rule in the award on the costs (including indemnity for lawyers' fees) and their allocation. The parties may make an agreement on the allocation of costs, either in their arbitration agreement or by reference to arbitration rules. Failing such an agreement, the arbitral tribunal has wide discretion as to costs. As a rule, arbitrators tend to follow the maxim 'costs follow the cause'.

Alternative dispute resolution

33 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

ADR has become more popular, but given the efficiency of the state courts and the long-standing tradition of arbitration in Switzerland, it still has limited practical relevance in the commercial context.

The new CCP contains certain provisions on mediation (article 213 et seq), but gives no definition of mediation. The organisation and conduct of the mediation is left to the parties (article 215 CCP). Basically, the parties can agree on mediation instead of conciliation proceedings taking place before the justice of the peace. In contentious proceedings, the court proceedings are stayed until one of the parties revokes the application for mediation or informs that the mediation has been terminated (article 214 CCP). The parties may request formal ratification by the court of an agreement reached in mediation. Upon ratification, the agreement can be enforced like a judgment and has the effects of res judicata. Without judiciary ratification, an agreement reached by means of mediation only has the effect of an ordinary private contract.

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34 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In state litigation, the court cannot compel, but recommends mediation to the parties (article 214(1) CCP). In international arbitration, there is no statutory requirement for any ADR proceedings prior or parallel to arbitration.

Miscellaneous

35 Arethere any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Besides the ordinary procedure for the enforcement of judgments, the CCP has introduced the concept of the enforceable deed. Such deed entitles its holder to directly seek enforcement of the claims it contains in a similar manner to a judgment. This is especially important for creditors who can now benefit from simplified enforcement proceedings. This puts Switzerland in line with the other contracting states to the Lugano Convention.

Effective 1 January 2011, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (Lugano Convention) was superseded by the revised Lugano Convention signed on 30 October 2007. The revision's aim was to clarify the grounds for assuming jurisdiction and to facilitate the recognition and enforcement of foreign judgments. The most important aspect is the enlargement of the territorial scope as a consequence of the eastern enlargement of the EU from 16 EU member states to include an additional 11 states (namely the Czech Republic, Slovakia, Slovenia, Hungary, Malta, Cyprus, Estonia, Latvia, Lithuania, Bulgaria and Romania; Poland joined earlier).

Equally, effective from 1 January 2011, the Federal Act on Debt Enforcement and Bankruptcy was amended to facilitate the enforcement proceedings for money claims under the Lugano Convention and to provide for nationwide validity of a judicial attachment order.

DISPUTE RESOLUTION 2011 ISSN 1741-0630