Swiss Law – A Success Story

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Switzerland is excellently placed in the competition between jurisdictions. This is due to its neutrality, a business-friendly legal system, the natural authority of the judges and arbitrators, but also to the prevailing mercantile spirit and the liberal image of man.

Competition between Jurisdictions

Law is increasingly seen as a product. The rules of private international law in many cases allow companies to choose a favourable law for their business activities. The attractiveness of a **legal system** is also important for the legal services industry. For their part, states have an interest in attracting business actors to increase economic activity, secure jobs, and generate tax revenues. National legislatures are, thus, competing and striving to improve the quality of their regulations.

Advertising campaigns in England, Germany, and France

In Europe, states and other institutions are advertising the attractiveness of their regulatory environment. Jurisdictions, legal institutions, and the framework of substantive and procedural law are the subject of such marketing activities aimed at corporate decision-makers. In 2007, the *Law Society of England and Wales* published the brochure "England and Wales: the jurisdiction of choice", which touts the advantages of English law and describes the reasons for its success. In particular, the pamphlet focuses on the **flexibility**, **predictability**, and **certainty** of English contract law and the overall quality of the English civil justice system. In December 2019, the *Law Society* produced a second report entitled "England and Wales: A World Jurisdiction of Choice", which highlights the strengths of the law, jurisprudence, and lawyers in England and Wales, and the advantages of London as a seat of arbitration. The report also states that the status of England and Wales as a global legal centre will not be affected by **Brexit**.

In response to the 2007 English push, the German Federal Ministry of Justice in 2008 launched a campaign to promote the German legal system, publishing a brochure entitled "Law Made in Germany" ("**LMiG**"). The pamphlet was written by the *Alliance for German Law*—an umbrella organisation of German professional associations which, surprisingly, includes the Association of

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German Judges. The authors claim that German law is "*more efficient, less expensive and more predictable than other legal systems*", contending that **codified law** offers advantages in terms of legal certainty. The brochure also discusses advantages of the German court system, such as expedient proceedings and moderate fees. LMiG further contends that Germany is becoming more attractive as a location for arbitration proceedings.

In the same vein, the *Alliance for German Law* collaborated with the *Fondation pour le Droit Continental*—an organisation of the French legal profession—to publish another promotional pamphlet entitled "Continental Law – global - predictable - flexible - cost-effective". The document highlights the provision of equitable solutions through **codified law** and the importance of good faith in the context of civil obligations.

In 2012, "Law Made in Germany" was published in a second edition, and in 2014 in a third edition. LMiG holds events at regular intervals, one of the most recent ones on whether there is a need for a commercial court in Germany.

Switzerland's Position

Numbers

Switzerland has refrained from initiatives like the ones above, and judging by the data, the small country in the heart of Europe does not seem to require them. For decades, Swiss law has been one of most frequently chosen national laws in **arbitration proceedings** under the rules of the International Chamber of Commerce (ICC), after the law of England and Wales and the United States. In 2020, the top four countries selected as arbitration locations continued to be Switzerland (104 cases), France (88 cases), the United States (88 cases), and the United Kingdom (85 cases). In terms of the number of arbitrators, the United Kingdom in 2020 had the highest number with 220 arbitrators (14.5%), followed by the United States with 153 (10%), Switzerland with 135 (8.9%), France with 101 (6.6%), Brazil with 88 (5.8%), and Germany with 81 (5.3%).

Swiss law is chosen not only when a Swiss company is involved in a contract, but also for contracts between **non-Swiss parties**. The choice of substantive law is then often accompanied by the choice of jurisdiction or place of arbitration. Swiss arbitrators actively seek settlements, and most parties are used to bargain.

Supposed Reasons for the Popularity of Swiss law

When it comes to the reasons for choosing Swiss law, the flexibility and business friendliness of its legal system are generally cited. The latter manifests itself in a pronounced **freedom of contract**, party autonomy, and the conciseness and easy accessibility of the codified law. There is, moreover, hardly any risk of gaps leading to the invalidity of the entire contract. Where the parties have agreed on the essential aspects of their contract (essentially performance

and consideration), a valid contract has been entered into, and any gaps can and will be closed by recourse to non-mandatory statutory law and general principles.

German commentators in particular point to the lack of judicial review of General Terms and Conditions ("**GTC**") in **B2B-matters**. Under German law, certain clauses may be found invalid if, in the opinion of the court, they are unilaterally disadvantageous. The excessive case law of the German Federal Supreme Court occupied the 2012 German Jurists' Forum.

Switzerland only introduced a substantive review of GTCs in 2011, in a law that does not *a priori* seem to be the most suitable—the Act against Unfair Competition ("**UWG**"). According to Article 8 UWG, it is unfair to use general terms and conditions that provide for a significant and unjustified imbalance between contractual rights and contractual obligations to the detriment of consumers in a manner that violates good faith.

This general clause is essentially all that exists in Swiss law regarding GTCs. Unlike in German law, there are not even catalogues of invalid clauses for B2C GTCs. The use of unilateral GTCs in commercial transactions is, according to Swiss opinion, a competition law problem. The restrained regulation of GTCs is an outgrowth of the prevailing **liberal contract model**.

Switzerland as an Atypical Civil Law Country

The Status of Judges

Switzerland's success also lies in the fact that although the country is built on the idea of codification, it has the flair of a **hybrid** between Civil Law and Common Law. Article 1 of the Swiss Civil Code ("**CC**") gives the judge the power and the duty to act **as a legislature** in the absence of a provision and of federal customary law. However, Article 1 CC has not led Swiss courts to lapse into excessive judicial activism. They are—especially in contract and company law—restrained by international comparison. The Federal Supreme Court is particularly known for its cautious application of the prohibition of abuse of rights (see, *e.g.*, ATF 135 III 162, cons. 3.3.1.). Judges in other Civil Law jurisdictions of the EU tend to use general clauses such as good faith or abuse of rights to achieve overall social goals at the expense of one party to a contract. This leads to **unpredictability**; courts are enabled to overrule the terms agreed by the parties.

The main reason for the conservative attitude of Swiss judges is probably their method of **appointment**. Unlike in most other jurisdictions, judges are elected for a fixed term and must, if they wish to stay in office, stand for re-election at the end of their term. This keeps them from making big jumps, which would be problematic from a predictability point of view. The true function of Article 1 CC, thus, seems that it gives Swiss judges a **natural authority**. This self-assurance is probably also formative for

arbitrators.

Codification is Not Decisive

Both the "Law Made in Germany" initiative and the Franco-German "Continental Law" project assume that the codification of private law is a decisive location advantage. However, the most successful legal system—the English one—is characterised precisely by the lack of a comprehensive code. Factors for its success are the predictability associated with the system of **precedent**. There is no precedent system in the Common Law sense in Switzerland. However, the Federal Supreme Court regularly discloses changes in its case law (so-called "changes in practice"), thereby making an important contribution to legal certainty.

English commentators have asserted that historically academics (rather than practitioners) took the lead in drafting the continental codes, who were not well-disposed towards commerce and finance. Although Switzerland largely relies on codified law, Swiss law was never a scholarly law.

The Swiss legislature on many occasions adopts not only German law, but particularly the law of the European Union. However, the imported law is applied by judges socialised in Switzerland.

All in all, one may conclude that in the competition of legal locations, it is not decisive whether a legal system belongs to the Common Law or to the Civil Law.

Non-Legal and Pre-Legal Factors

Neutrality and Geographical Smallness

Switzerland's neutrality and its geographical location in the heart of Europe are also considered important factors in the international competition of legal systems. Moreover, neither the Swiss courts nor any other branch of government will meddle in arbitration proceedings. Along with the Federal Supreme Court's arbitration-friendly case law, neutrality certainly explains why Swiss nationals are regularly appointed as arbitrators and Switzerland is chosen as a venue for arbitration. Swiss contract law is said to benefit from that success because many parties assume that opting for Switzerland as the venue entails choosing Swiss contract law. To be sure, political neutrality is not synonymous with neutrality of contract law. However, neutrality is the most **essential requirement** for the exercise of judicial and arbitral functions; it is synonymous with independence and impartiality, and one may somewhat boldly say that the Swiss have that in their genes.

In addition to this, Switzerland's geographical smallness shapes the character of those who were born and raised here. People from small countries are often accustomed to paying attention to others and listening to them. The Swiss are used to keeping to themselves. Self-deprecation is common, while a wiseacre-attitude is rare. **Pragmatism** takes the place of beckoning. These, too, are ideal prerequisites for judicial and arbitral activities.

Tradition of Arbitration

Switzerland is known for its **centuries-old tradition** of arbitration. For the period before the founding of the Federal State in 1848, the Historical Dictionary of Switzerland speaks of a "state-building function" of arbitration tribunals. In the 14th and 15th centuries, the idea of arbitration consolidated the Confederation.

Reference should also be made to the policy of "good offices", a collective term for various instruments of crisis and conflict management in Swiss foreign policy, such as assuming the role of host at international conferences or high-level meetings, representing foreign interests in a state, facilitating dialogue, or mediating in conflicts.

The Swiss preference for amicable solutions is evident in two other areas. First, it is customary for judges especially (but not only) in the commercial courts to actively seek a settlement. Second, the desire for conflict resolution by a (genuine) arbitral tribunal has prevented Switzerland from joining the EEA and concluding an Institutional Framework Agreement with the EU.

Mercantile Spirit

Switzerland is traditionally characterised by its commitment to free trade and open markets. Here, too, similarities with England exist. In both jurisdictions, the Hegelian glorification of the state as the "reality of the moral idea" has found few supporters. Nor has the French idea of "la Nation" as the only legitimate power prevailed. In Switzerland, the state is seen as a useful institution, nothing more. In this respect, the Swiss concept of the state is much closer to English and American thinking than to German or French.

In his book "Merchants and Heroes" from World War I, the leading German economist *Werner Sombart* described the Germans as a nation of heroes animated by primordial motives and the English as calculating **merchants**. If one were to apply this comparison to the Swiss, they would certainly belong to the merchants. Indeed, the business acumen of the Swiss has been described time and again throughout their history. The proverb "*point d'argent - point de Suisse*", which literally means that where there is no money, you will find no Swiss, goes back to the 17th century French playwright *Jean Racine*. It alludes to a time when many Swiss were sought-after and rather greedy mercenaries. But the phrase seems to be of lasting relevance. University of Zurich literature professor *Peter von Matt* has aptly observed that Switzerland, unlike Austria, France, or Italy, does not define itself to the outside world through its culture. Rather, it behaves like a utilitarian corporation and defines and presents itself from a **market** point of view.

Liberal Image of Man

Swiss judges assume that human beings are reasonable in the sense of "normal" and can basically take care of themselves. This liberal view of man manifests itself in particular in **contract law**, **the law of unfair competition**, and **trademark law**. It coincides, as far as can be seen, with the idea

of man underlying English law. In 1933 in *Hall v Brooklands Auto-Racing Club*, Lord Justice *Greer* referred to the reasonable man as "*the man on the Clapham omnibus*". Clapham is a borough in south-west London. The case was about whether the owners of a motor racing circuit would be liable for an accident. Spectators paid a fee and were allowed to watch the races; there were grandstands from which they could do so in safety. However, many of them preferred to stand along and outside the railings. Two cars collided, one shot into the air and crashed into the railings, killing two spectators and injuring others. Such an accident had never happened before. Lord Justice *Greer* noted that if the man on the Clapham omnibus were to witness such a car race he "*would know very well that there would be no barrier to protect him in the possible but highly unlikely event of a car passing through the barrier and getting through to the spectators*".

The man on the Clapham omnibus would therefore deny compensation to the victims who were injured by the car ([1933] 1 K.B. 205).

Conclusion

Switzerland is well placed in the competition between jurisdictions. Marketing efforts are not indicated. The German example teaches that **substance** is more important than promotion, and England does not owe its leading position to the actions of the Law Society. In addition to a liberal economic and legal system, extra-legal factors are decisive, especially the mercantile spirit and the liberal image of man. In recent decades, Switzerland has often been under pressure to adopt foreign law. Even then, experience teaches that Swiss judges can fit these imported norms into the domestic legal order. The above-mentioned legal and extra-legal elements also shape, *mutatis mutandis*, the activities of Swiss arbitrators.

This positive finding does not mean that Switzerland should sit back and relax. One area in which the legislature should act is **private enforcement of antitrust law**. The preparatory work currently underway is insufficient in this respect. Moreover, the decision of the Council of States (the Swiss parliament's smaller chamber) not to allow English as a **procedural language** before Swiss commercial courts should be reconsidered.

Sources

Baudenbacher Carl, Wirtschafts-, schuld- und verfahrensrechtliche Grundprobleme der Allgemeinen Geschäftsbedingungen, Zurich 1983.

Id., Lauterkeitsrecht, Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG), Basel/Geneva/Munich/St. Gallen/Berlin 2001.

Id., "Law Made in Germany" – Has it paid off?, in: Werner F. Ebke/Dirk Olzen/Otto Sandrock (eds.), *Festschrift* für Siegfried H. *Elsing* zum 65. Geburtstag, 2015, 731 *et seqq*.

Baudenbacher Laura Melusine, Vom gemeineuropäischen zum europäischen Rechtsmissbrauchsverbot, Munich 2016.

Brunner Alexander/Nobel Peter, Behauptung des Schweizer Wirtschaftsstandorts im internationalen Justizwettbewerb, NZZ of 22.12.2021 (available here).

Bündnis für das deutsche Recht/Fondation pour le Droit Continental, Continental Law – global - predictable - flexible - cost-effective (available here).

Cardozo Benjamin N., The Nature of the Judicial Process, Quid Pro, LLC, 2010.

Cuniberti Gilles, The International Market for Contracts: The Most Attractive Contract Laws, 34 Nw. J. Int'l L. & Bus. 455 (2014)

Das Bündnis für das deutsche Recht, Brochure – Law Made in Germany (available here).

Delaware Division of Corporations, 2020 Annual Report Statistics (available here).

Diekmann Florian, Commercial Courts – ein Beitrag zur Stärkung des Rechtsstandorts Deutschland (available in German here).

Eidenmüller Horst, The Transnational Law Market, Regulatory Competition, and Transnational Corporation, Indiana Journal of Global Legal Studies, Issue 18, 2011, 713 *et seqq*.

Federal Department of Foreign Affairs FDFA, Good offices: effective dialogue makes great things possible (available here).

Graf von Westphalen Friedrich, AGB-Kontrolle. Auch im unternehmerischen Verkehr gerecht, Legal Tribune Online of 20 September 2012 (available in German here).

Historisches Lexikon der Schweiz, Schiedsgericht, (available in German here).

International Chamber of Commerce (ICC), Dispute Resolution 2020 Statistics, 14, 6, 17 (available here).

Manai-Wehrli Dominique, De la genèse d'une idée à l'idée d'un texte: histoire du pouvoir d'appréciation du juge selon l'art. 4 CCS, Geneva 1983, 11 *et seq*.

Papayannis Diego M., Independence, impartiality and neutrality in legal adjudication, Journal for Constitutional Theory and Philosophy of Law/Revija za ustavno teorijo in filozofijo prava 28 (2016), 33 *et seqq*. (available here).

PRIMEtime: English Law as an Asset – Reflections on Choice of Law after Brexit (available here).

The Law Society of England and Wales, England and Wales: the jurisdiction of choice (2008).

Wagner Gerhard Wagner, Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit, 2017.

Wood Philip, Why English law?, Draft 29 January 2019 (available here).

Sombart Werner, Händler und Helden, Munich 1915.

State Secretariat for Economic Affairs SECO, Teilrevision des Bundesgesetzes über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG). Erläuternder Bericht (available in German here).

Vogenauer Stefan, Regulatory Competition through choice of contract law and choice of forum in Europe: theory and evidence, European Review of Private Law, 1, 2013, 13 *et seqq*.

von Matt Peter, Das Kalb von der Gotthardpost. Zur Literatur und Politik der Schweiz, Munich 2012.

von Overbeck Alfred, Some Observations on the Role of the Judge Under the Swiss Civil Code, 37 La. L. Rev. (1977), 1976-1977.

Weibel Thomas, Swiss substantive law: an excellent choice of the applicable law in cross-border contracts (available here).