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# Swiss courts dismiss foreign currency claims if the currency of the prayers for relief is wrongly denominated

Swiss law is often chosen by foreign parties to govern their contractual agreements, mostly due to Switzerland's stability and neutrality, its well-established case law and its highly liberal legal system which allows parties to shape contracts with little restriction. Nowadays, companies can easily open sub-accounts in different currencies to do business and convert currencies to make payments. Furthermore, anyone can readily access historical exchange rates which are available online and thus determine the value of any amount in different currencies. This could suggest that little or no attention is paid to the currency in which a monetary claim is denominated when a dispute arises.

Despite these facts, the Swiss Supreme Court case law on foreign currency claims is strict. Where a debt is in foreign currency, the creditor may assert its claim – whether contractual or tortious – only in that currency.[1] The creditor must express its claim for relief in the 'effectively due currency'.[2] The mere fact that Swiss courts have jurisdiction and/or Swiss law is applicable is not sufficient to conclude that a monetary claim can be denominated in Swiss francs. The consequences can be dire, as a claim denominated in the wrong currency will be dismissed, irrespective of its merits. The Swiss Supreme Court held that allowing a claim in another currency would be a decision

*extra petita* – which is prohibited by the Swiss Civil Procedure Code ('SCPC')[3] – as, in conception, a claim in Swiss francs and a claim in US dollars are different by nature (*aliud*), irrespective of their actual values. The claimant is not barred from re-filing its claim in the correct currency, as the decision only deploys *res iudicata* regarding the wrong currency used. This approach is consistent with the idea that the nature of the two claims is different, but may prove costly. The claimant will have to renew his/her claim (and make a new advanced payment for court costs) while still having to bear the court costs and party costs of the previous proceedings. This also leads to a significant increase in the length of the proceedings, especially in complex litigation.

This article aims at outlining the applicable rules for determining the currency of a claim, the difficulties that a claimant may face in certain contractual settings, the solutions that counsel can use to mitigate the risks and which procedural tools are available when a claim has been filed in the wrong currency,

## The rule of the effectively due currency

As a rule, the claim must be denominated in the 'effectively due currency'. However, this notion remains difficult to define. The Swiss Supreme Court held that:

> 'claims for contractual damages are not necessarily to be denominated in the currency of the contract. They must in principle be drawn up in the currency of the State in which the patrimonial damage occurred. Depending on the circumstances, the currency of the contract may remain determinative, particularly where damages replace a contractual payment obligation (eg, salary, fees, license fees)'.[4]

As a result, a bank responds in US dollars to a loss suffered by its client in relation to options denominated in dollars and whose profit should have been realised in US dollars.[5] In the same vein, the seller who does not fulfil his/her obligations must compensate in Deutsche Mark the lost profit suffered by the buyer who would have resold the goods in Germany.[6]

For a long time, the courts of some Swiss cantons had shown a certain tolerance regarding the currency mentioned in the prayers for relief for a claim for payment, when this was uncertain: the claim could be denominated in foreign currency, in foreign and Swiss currencies, or even only in Swiss francs if debt collection proceedings had been previously filed. The Swiss Supreme Court put an end to this practice in 2008 and 2010 judgments.[7] The principle of the 'effectively due currency' has since then been strictly applied by all Swiss courts. Consequently, claimants must be particularly cautious when analysing which currency (or currencies) may be validly claimed, as defendants may prevail when the wrong currency is claimed.

Where contracts directly stipulate the currency of the obligation, it is usually easy to determine the 'effectively due currency'. For instance, a claim pertaining to a letter of credit, loan or a bank guarantee stipulating an obligation in US dollars must be denominated in that currency. However, as stated above by the Swiss Supreme Court, claims for contractual damages are not necessarily denominated in the currency of the contract. An analysis on a case-by-case basis is therefore necessary to ascertain whether the currency of the contract corresponds to the currency in which or where the damage occurred. If there is a discrepancy, a diligent counsel must articulate the claim in each and all relevant currencies.

Furthermore, certain contracts do not stipulate the currency of the contract. In such cases, a claimant must be particularly cautious when determining the currency in which he/she denominated his/her claim. In a case, a claimant argued that he and a Swiss bank, established a partnership in which he brought his experience of the business world and the Turkish market by identifying opportunities to enter into transactions for the purchase or sale of goods for the bank, which in turn handled the administrative management and provided the financing necessary for the conclusion of these transactions. The profit generated by these transactions was split equally between them. His share was paid into an account opened in the bank's books. The amounts he claimed payment for corresponded to the amount shown on that account, namely $1,051,116, the equivalent of which in Swiss francs represented CHF1,217,286. The claim filed for CHF1,217,286 was dismissed on the grounds that this was not the correct currency. The Geneva Supreme Court held that Article 84 of the Swiss Code of Obligations ('CO') governs the currency of payments of all of pecuniary debts. Under this provision, a party making a foreign

currency claim in Switzerland is required to make a claim for payment in that currency. If the claimant wrongly makes a claim in Swiss francs, his/her claim must be rejected, as the debtor cannot be sentenced to pay something other than the original debt due. The judge cannot thus deviate from the prayers for relief for a payment claim denominated in Swiss francs and substitute a sentence in foreign currency.

In banking litigation, the matter is even more complex. Banking agreements pertaining to the execution of transactions may be denominated in various currencies and/or the sale and purchase of financial products involving several currencies, such as general conditions relating to the banking relationship, deposit agreements, master agreements for foreign exchange over the counter (OTC) transactions and put and call options on currencies and metals. Furthermore, discretionary asset management agreements and advisory agreements often stipulate a 'reference currency'. This does not necessarily correspond to the currency in which the investments are carried out. Indeed, the assets are generally placed in financial products issued in (or related to) different currencies, in order to avoid the concentration of the portfolio on a single currency and thus to diversify the risks.

In this context, the principle of the 'effective due currency' varies depending, in particular, on the applicable rules to calculate the damage, the specific breach(es) of contract, and whether the risk of exchange rate fluctuation was accepted by the client.[8]

In asset management disputes (discretionary asset management agreement and advisory agreement providing for an ongoing monitoring of the portfolio) a distinction should be made in relation to two types of contractual breach: 1. a breach relating to the investment strategy (mismanagement/wrong advice in relation to the portfolio as a whole); and 2. a breach pertaining to certain individual investments (mismanagement/wrong advice confined to a part of the portfolio). In the case of the first, the damage calculation must cover the entire portfolio and the use of an hypothetical portfolio is admissible. As the client's portfolio is generally managed in a so-called 'reference currency', the damage should be calculated in this currency and the prayers for reliefs should, in turn, be denominated in the same one. In the second case, the damage computation should be limited to the particular investments (concrete calculation of the damage). In principle, the currency of the non-compliant transaction is the one in which the claim must be denominated (eg, if the disputed transactions are shares denominated in US dollars, the claim is to be denominated in US dollars also). However, where more complex transactions are disputed, for example, exotic options including multiple transactions in various currencies, this principle cannot be strictly applied. The court should then take this fact into account and show some flexibility in its decision on the basis of Article 42(2) CO which allows the court to estimate the damage at its discretion. In addition, when there is a discrepancy between the currency of the disputed transaction and that of the debited sub-account, there is a need to determine whether the client accepted the risk of exchange rate fluctuation.

## Procedural toolkit

To mitigate the risk of the claim being dismissed, counsel to the claimant can take so-called 'subsidiary prayers for relief', for example, first claiming the amount denominated in Swiss francs, then – if and only if the first claim is rejected – damages in US dollars, then in Euros, etc. Such 'waterfall' prayers for relief are allowed by Swiss law, but the claimant should precisely calculate the damage in each and all currencies and carefully consider which currencies to exclude.

If, during the course of the proceedings, it appears that the claim for relief has been denominated in the wrong currency, all is not necessarily lost. The amendment of the prayers for relief may be possible, depending on the stage of the proceedings. Before the first main hearing, the amendment will be granted if there is a factual connection between the actual and the new claim (Article 227 SCPC). Such a connection is, in our experience, always given when only the currency is changed, as the factual background of the case remains the same. After the main hearing, the amendment needs to be based on new facts or new evidence (Article 229 SCPC). In principle, it is too late to amend the currency in which the statement of claim has been filed. In our view, a way of fulfilling this condition would be to require an expert report on the damage calculation including the currency of the damage, thus ensuring that no mistake is made in this regard and allowing for an amendment of the claim if needed.

## Conclusion

The choice of the currency is crucial in Swiss litigation. Counsel for claimant must carefully evaluate the factual background of the case and refer to precise case law to determine which currency is 'effectively due'. There are a few possibilities to correct a wrong choice of currency if the proceedings are not at an advanced stage. It is however easier to anticipate and take subsidiary prayers for relief so as to overcome the pitfalls of the strict application of Swiss law. When defending, counsel should carefully review the choice of currency made by the claimant, as it can also prove to be a fatal weapon: a claim denominated in the wrong currency can be derailed.

**Notes**

1 Swiss Supreme Court, ATF 134 III 151 and ATF 137 III 158.
2 Swiss Supreme Court, 4A_341/2016.
3 Art. 58(1) of the Swiss Civil Procedure Code.
4 Swiss Supreme Court, TF, 4A_341/2016.
5 Swiss Supreme Court, TF, 4C_191/2004.
6 Swiss Supreme Court, ATF 47 II 190.
7 Swiss Supreme Court, ATF 134 III 151 and ATF 137 III 158.
8 OIllivier/Geissbűhler, 'La monnaie des conclusions dans les litiges bancaires' (AJP/PJA December 2017) 1439.