## PERIODIC LEGAL AND TAX INFORMATION REVIEW

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## WHAT IF FRANCE INTRODUCED A CITIZENSHIP-BASED TAX?

*France envisages a system under which a liability to tax would arise because of citizenship. What is the position?*

During the last presidential election campaign, several candidates - including François Hollande (or his advisers) - referred to a possible introduction of a **taxation based on French citizenship** as a tool to curtail **emigration for tax reasons**.

This "citizen tax" concept is not new and has been surfacing as a recurring item for about a decade in French tax policy debates.

One should stress at the outset that unlike the United States (for Federal taxes), France has never imposed taxation based on citizenship.

If France henceforth decided to introduce a citizenship-based tax liability, it should:

- significantly amend its domestic tax laws to introduce an exception to its basic principle of worldwide income taxation based on residence, in order to include non-resident French citizens;
- renegotiate double taxation treaties currently ratified by France to enable it to enforce its domestic laws. In that context, it is worth remembering that during the presidential campaign, François Hollande declared that renegotiation of double taxation treaties would concentrate on three countries: "Switzerland, Belgium and Luxemburg";
- implement an information exchange system for foreign financial institutions enabling France to double-check information regarding worldwide income of French non-residents (similar to the FACTA system).

After the entry into force of the Exit Tax in 2011 and given the current reforms targeted at high net worth individuals, one cannot exclude that France, faced with a massive wealthy taxpayer flight, might contemplate implementing a measure to deter candidates from emigrating for tax reasons.

In this context, France could replicate provisions introduced by neighbour States for taxpayers relocating in favourable tax jurisdictions. It is in this way that:

- **Germany** reserves the right to tax its citizens, even after they leave the country, for a period of ten years **on income whose origin cannot be established**;
- **Italy** reserves a "**tax tracing right**" over its citizens emigrating to tax heavens, unless they can prove that their new residence is not fictitious;
- Finally, **Spain** provides for the unlimited taxation of its citizens for a period of four years after their departure to a favourable tax jurisdiction.

***Contact: Alain Moreau***

### OUR OPINION

If a statute to that effect were introduced in France, we believe it would keep in line with the philosophy of the Exit Tax currently in force and be limited solely to **persons emigrating for tax reasons** (i.e. citizens leaving or having recently left France for reasons other than professional) to **favourable tax jurisdictions** (with an actual tax rate less than half the one which would have been applicable in France).

A system of temporary taxation based on French citizenship might then be introduced, which could, for example following the Exit Tax pattern, **be limited to eight years**.

## THE COURT OF JUSTICE OF THE EUROPEAN UNION AFFIRMS THE RIGHT OF NON-FRENCH UCITS TO CLAIM BACK FRENCH WITHHOLDING TAX

*As we predicted (see FBT NewsLex No. 2 of November 2011), the Court of Justice of the European Union (ECJ) held that European Union law precludes French legislation from withholding taxes on domestic source dividends received by undertakings for collective investment in transferable securities (UCITS) resident in another State, whereas such dividends are exempt from tax when paid to French resident UCITS.*

Ten disputed claims for refund of withholding taxes had been filed with the administrative court ("Tribunal administratif") of Montreuil, which referred the matter to the Council of State ("Conseil d'Etat").

The latter, in its opinion dated May 23, 2011, referred back to the ECJ the question of the lawfulness of withholding taxes on dividends paid to foreign UCITS.

In its judgment of May 10, 2012 (ECJ May 10, 2012 *Santander Asset Management SGIIC SA*, No. C-338/11), the Court held that French rules constituted a restriction on the free movement of capital, thus in principle contrary to European Union law, and denied that such discrimination could be justified under special provisions thereof.

Indeed, the Court considered, not only that resident and non-resident UCITS were objectively in the same situation (so that a discrimination cannot be justified), but also that there was no overriding public interest reason to justify different tax treatments.

The French Courts, bound by the CJE's decision, shall grant a refund of the withholding taxes wrongly levied between 2009 and 2012 to foreign UCITS having filed a claim to that effect **prior to December 31, 2014**.

As a result, eligible funds shall have to file as soon as practicable a **claim** for refund of the disputed amounts with the Tax Office for non-residents in France ("Centre des impôts des non-résidents en France").

The taxes to be refunded by France amount to approximately 4 billion Euros.

In order to compensate for the recurring loss of revenues derived from the abolition of that tax, the French government proposes to introduce a 3 % surtax to the Corporate Tax (IS) on amounts distributed by French or foreign companies or institutions liable to IS, however with an exemption for UCITS.

***Contact: Alain Moreau***

OUR OPINION

Even though the right for foreign UCITS to obtain a refund of wrongly levied withholding taxes has been clearly recognized, the relevant foreign funds shall have to file a claim before French administrative courts before December 31, 2014, a deadline that may under no circumstances be extended.

Foreign banking institutions distributing mutual funds investing in French equities are strongly advised to make an audit of possible wrongly levied French withholding taxes and to take expert tax advice in order to assemble supporting documents for their future claim to be filed with French administrative courts.

# NEW SWISS RULES GOVERNING DISTRIBUTION OF COLLECTIVE INVESTMENT SCHEMES

*On June 18, 2012, the Council of States ("Conseil des Etats") approved the draft revised Federal Law on Collective Investment Schemes of June 23, 2006 (D-CISA). The National Council ("Conseil national") is to make its decision on this matter during its autumn session. The revised law is expected to enter into force at the beginning of next year. The draft revision contains significant changes regarding distribution activities, aimed at a better protection of investors. Those imply a redefinition of the concepts of distribution and of qualified investors and new rules applicable to the distribution of foreign collective investments in or from Switzerland. The changes are in line with the willingness to harmonize Swiss law on collective investments with provisions in force in the European Union, including the European Directive on Alternative Investment Fund Managers (AIFM Directive) in force since July 2011.*

In the draft revised CISA, the concept of "distribution" is replaced by that of "public offering". Unlike the situation under the law currently into force, any entity distributing shares in mutual funds shall be required to obtain a distributor's license even if it does business solely with qualified investors (Art. 19 para. 1 D-CISA). The draft law provides for a number of exceptions to that requirement. Among the latter, the purchase of collective investment schemes within the framework of an investment management agreement entered into with a licensed financial intermediary (such as a bank) or, under specific conditions, with an independent asset manager shall not be deemed as a distribution. In other words, an independent asset manager (meeting the criteria of Art. 3 para. 2, lit. c D-CISA) placing shares of investment funds in its clients' portfolios under a written discretionary management mandate shall not be required to apply for a distributor's license.

On the other hand, under the current draft law, whoever engages in promoting collective investments vehicles to independent asset managers shall be deemed as a distributor and subject to a license.

When the distribution activity concerns units of foreign investment funds, the promoter shall be required to appoint a local fund representative, which shall observe the duties set forth in Art. 124 CISA, i.e. the duty to report, publish and inform, as well as the codes of conduct of industry bodies. Furthermore, for distribution purposes, a distinction must be made between qualified and non-qualified investors. Indeed, as it is the case under the current regime, the public distribution of foreign collective investments requires the approval of the Swiss Financial Markets Supervisory Authority (FINMA), whereas such approval is not required when only qualified investors are targeted. . The draft revised law includes one additional authorization requirement, i.e. the conclusion of cooperation and exchange of information agreements between the FINMA and the concerned foreign authority(ies). In the final text of the law, this new condition shall probably be implemented only when required by the country of domicile of the investment fund.

The definition of qualified investors is also amended. Thus, high net worth individuals and investors entering into a written asset management agreement with a licensed financial intermediary shall no longer be automatically and unconditionally deemed as qualified investors. The former may request in writing to be deemed as qualified investors (*opt-in*; the draft law provides that the Federal Council shall define the criteria they shall meet such as a requirement of technical knowledge), while the latter shall be deemed as qualified investors unless they require in writing not to be deemed as such (*opt-out*; Art. 10 para. 3bis and 3ter P-LPCC). The Federal Council may, by executive order, deem other categories of investors to be qualified (Art. 10 para. 4 CISA).

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OUR OPINION

The new distribution rules as approved by the Council of States, partly addresses the concerns raised by the industry during the consultation procedure. Thus, the requirement of the conclusion of cooperation and exchange of information agreements between the FINMA and the relevant foreign authority(ies) even for distribution to qualified investors, initially provided for in the Federal Council's draft, was not retained by the National Council. It would have caused a damaging restriction on offers of products originating from "offshore" jurisdictions such as the BVI or the Cayman Islands. Equally welcome is the exemption - introduced by the Federal Council's draft and approved by the Council of States - enabling independent asset managers to freely pursue their discretionary asset management activities pursuant to Art. 3 para. 2 lit. c D-CISA, without any need for a distributor's license. On the other hand, the redefinition of the concept of qualified investor shall constitute an important change having direct consequences on the distribution of collective investments in Switzerland. There will be a need to monitor closely the forthcoming debates in the National Council as well as the draft CISA Implementing Ordinance, which should clarify questions left unsolved by the draft law.

## WILL SWISS LAW INTRODUCE PROVISIONS ON REMUNERATION OF TOP MANAGEMENT OF COMPANIES LIMITED BY SHARES?

*Current Swiss law is very liberal on the question of establishing the remuneration of company directors. Proposals of amendments to company law contained in a counter-proposal to a popular initiative could significantly change the rules of the game.*

The only provision currently contained in the Code of Obligations on the remuneration of directors deals with profit sharing in favour of directors. Under the law, such a distribution has to be provided for in the Articles of Association. It is comprised in the non-transferable duties of the general meeting of shareholders. As profit sharing in favour of directors became in effect obsolete, the absence of legal provisions enabled the board directors to introduce various forms of compensation in favour of their members, such as stock-options, shares or payment of fees. As a result, under current Swiss law, shareholders are not entitled to disclosure as to the principle or the extent of such compensation, or even as to the particulars thereof such as amount or reasons for granting. The same applies to remuneration of members of governing bodies who are not board members.

In Switzerland, the 2008 financial crisis triggered a "citizen" reaction by Thomas Minder, the head of a medium-size enterprise in the Canton of Schaffhausen, north of Zurich:
he launched a popular initiative to introduce the three following duties for Swiss companies listed in Switzerland or abroad: (i) an annual vote by the general meeting of shareholders on the total amount of remuneration, not only of members of the board of directors, but also of members of management and advisory board; (ii) a prohibition of severance payment and of bonuses for acquisition or sale of businesses, combined with a requirement that the articles of association expressly sets forth the amount of pensions, credits and loans granted to members of the governing bodies, bonus and profit sharing plans and the duration of employment agreements of management members; (iii) the principle of an annual and individual election of the members of the board of directors.

The filing and validation of this initiative forced the Federal Parliament to react. After several years of legal-political debates, Swiss Parliament recently agreed to submit to the people a counter-project consisting in an amendment to the company law provisions of the Code of Obligations.

This amendment would introduce stringent rules on the compensation of board members, management and advisory board of Swiss listed companies. The board of directors of these companies should issue specific written compensation regulations. Compensation should be determined taking into account the economic situation of the company, its long-term perspectives, and be consistent with the "duties, services and responsibilities of the beneficiaries". The general meeting of shareholders would have the power to approve these regulations or even to amend them. The Board of directors would also prepare a compensation report, the minimum content of which would be set forth in the Code of Obligations. This report, like the annual report, would be submitted to the approval of the general meeting of shareholders, which should also approve annually the aggregate amount determined by the board of directors for its compensation and that of management. Pursuant to the articles of association, this vote could have a binding or consultative nature. It would require a two-third majority. Severance and advance payments would be prohibited, unless the general meeting of shareholders made an exception if it deemed it in the company's interest. As to elections to the board of directors, the draft law provides that each board member should be individually elected annually and that the chairman should be elected by the general meeting of shareholders, unless the articles of association expressly delegate that power to the board of directors.

On the other hand, like the Minder initiative, this draft amendment to the Code of Obligations imposes no similar obligations to non-listed companies. For these, the draft law only introduces provisions authorizing the use of electronic media for the preparation of general meetings of shareholders and slightly clearer provisions on the appointment of an independent representative of shareholders.

***Contact: Christophe Wilhelm***

OUR OPINION

Recent excessive remunerations granted by companies, even Swiss ones, to their directors unfortunately imposed a strengthening of the law. The provisions of the draft amendment to the Code of Obligations represent a step in the right direction and constitute the most appropriate response to this problem.

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## NEW SWISS RULES OF INTERNATIONAL ARBITRATION

*New Swiss Rules of International Arbitration (in French: Règlement suisse d'arbitrage) came into force on June 1, 2012 and supersede the former rules in force since 2004. It is therefore worthwhile to summarize innovations brought about by the new rules.*

The Chambers of Commerce and Industry of Switzerland (Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich) followed the trend of most arbitral institutions towards more efficient and less costly procedures. The revision of the Swiss Rules of International Arbitration ("the Rules") forms part of a constant effort to promote Switzerland as an arbitration jurisdiction. Parties willing to settle their dispute within the framework of the Rules should benefit from the best possible tools. However, the revision was meant to be "*light*" in order to avoid disrupting rules with a proven track record.

The main innovations are as follows:

- a new entity, the Swiss Chamber's Arbitration Institution (the official name exists only in English), was created to offer the services rendered by the Chambers of Commerce and Industry in arbitration matters;
- the Rules shall apply to both international and domestic arbitration;
- the powers of the Arbitration Court (formerly "Arbitration Committee") were extended: it shall have power to extend and reduce deadlines and to rule on the removal of arbitrators;
- parties shall have a duty to proceed in good faith and to cooperate to smooth proceedings; failure to comply shall carry sanctions in the award of costs;
- deadlines for appointment and removal of arbitrators were shortened;
- a requirement for evidence submission simultaneously with the filing of the pleadings was introduced;
- third parties' joinder in the proceedings was facilitated;
- the provisions on consolidation were clarified;
- arbitration tribunals were granted power to order interim measures of protection, including *ex parte* orders;
- an emergency relief procedure was introduced, providing for appointment of an emergency arbitrator.

The format of this paper does not allow us to elaborate on each of these new provisions. Suffice it to say that the introduction of an emergency arbitrator is the major innovation as parties may henceforth seek emergency relief from an arbitrator appointed solely to that effect. The parties shall therefore no longer be under a duty to apply to ordinary Courts to obtain urgent protective measures. Even though this provision is important, one might qualify its impact. The Stockholm Chamber of Commerce, in the first year after introducing an emergency arbitrator procedure in January 2010, experienced only four petitions of that nature.

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### OUR OPINION

The introduction of emergency relief procedures was broadly welcomed by practitioners. Whilst we join in that enthusiasm wave, we however wish to qualify the practical impact thereof: only special cases will justify resorting to that system, which moreover still lacks a track record. In our opinion, the fact that the Rules now apply to both international and domestic arbitration should be even more welcome as it will facilitate the use of this type of alternative dispute resolution, so far too infrequently used by companies active in Switzerland. Taking into consideration problems arising from litigating a case in a less familiar national language, Switzerland is a fertile ground for domestic arbitration development.

## CORRECTION OR INTERPRETATION OF JUDGMENTS UNDER THE NEW SWISS CIVIL PROCEDURE CODE - A CHALLENGE FOR PRACTITIONERS

*Lata sententia, judex desinit esse judex. Once a judgment is rendered, the judge may not go backwards. Recognizing the problem, the former Geneva law of civil procedure (LPC - GE) provided, under Articles 153 to 159 of the chapter entitled "Interpretation and Revision", several possible remedies when a factual or legal mistake was contained in a judgment. A specific remedy (Article 160 LPC - GE) was granted for clerical errors and offered an informal way of correcting a judgment. The new Swiss Civil Procedure Code (CPC) henceforth governs in one provision only (Article 334 CPC: "Interpretation and Correction") all motions for review aimed at clarification of a decision. Revision - a matter different from interpretation or correction of a judgment - is dealt with in a separate CPC chapter and shall not be discussed here.*

Within the stringent framework imposed by the principle of "*res judicata*", Article 334 CPC grants a possibility to have a decision modified when it lacks clarity, or is self-conflicting, incomplete, in contradiction with the opinion or contains a clerical error. There remains a formal distinction between interpretation and correction of a decision, but the CPC submits both matters to the same rules as to form and jurisdiction, so that they are treated equally.

An amendment may become necessary in a number of cases, including if the prevailing party, when enforcing a judgment, would incur a loss, for instance if the order contained a mistake as to amount or currency of the judgment, or a wrong debt collection case number; while these mistakes are generally made by inadvertence, they are highly inconvenient.

As indicated in the Federal Council Message, all decisions, whether substantive or procedural, may be challenged by way of petition for interpretation or correction. It is furthermore established that there is no deadline requirement: a party may at any time submit such a petition to the court which rendered the challenged decision, even after a judgment was enforced.

The procedure for interpretation or correction nevertheless raises delicate questions.

Case law has not yet decided clearly whether a petition for correction or interpretation against a first instance court decision may be allowed while an appeal is still possible, or an appeal has actually been filed and is still pending. In such a case, there is a risk of conflicting judgments (between the corrected first instance court decision and that to be made on appeal).

Article 334 CPC does not expressly require that a decision be final or enforceable; it further provides that the court having rendered the challenged decision has jurisdiction to decide on a correction or interpretation. It follows that a lower court should be in a position to rectify, even *ex officio*, a judgment that can still be appealed if it ascertains that there was a contradiction or a missing element pursuant to Article 334 para. 1 CPC. However, it appears to us that a court might hardly do so if the case was referred to a superior court, at least for those matters submitted to the superior court. On the other hand, a correction or interpretation should remain possible for points not covered by an appeal. A lower court should also stay its proceedings as long as it is uncertain whether an appeal was lodged and which points it covers, and deny a petition for correction if an appeal or review request has been filed and covers points of the decision on which a correction was applied for.

In order to resolve these problems, some form of coordination between the relevant courts should probably be implemented.

Furthermore, it is worth reminding that corrected or interpreted decisions, as the case may be, shall be notified to the parties (see Article 334 para. 4 CPC), thus triggering a new deadline for appeal. This raises the second delicate question whether a "new start" is appropriate and in the affirmative, if the rights of the parties in connection therewith should be limited.

Let us imagine that a first instance court - for lack of coordination - entertains a petition for correction while an appeal is pending against the same decision before a superior court: a notification of a new judgment by the lower court could trigger a new deadline for appeal, possibly even allowing a party to present new grounds for appeal to the court before which the same matter would already be pending. Should that be allowed?

Even in the event a decision is made on a petition for correction while no appeal against the decision on the merits is pending, a "new start" of the appeal deadline would be questionable, unless grounds for a possible appeal are limited. It would indeed be unacceptable that a party might, as a result of a notification of a corrected decision, appeal a previously accepted judgment (except perhaps for the limited matter of the correction made).

In the same situation, the LPC-GE expressly provided that a subsequent notification of a corrected decision entailed a new deadline for appeal *solely* with respect to the points covered by a correction procedure. A relevant clarification of the CPC in that respect would be welcome and, absent a specific statutory provision, could hopefully come from court rulings.

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OUR OPINION

The CPC is still young and leaves many questions open. One may hope that courts, upon learned advice from attorneys, shall be pragmatic in their approach.

## TIME LIMITATION OF CLAIMS FOR CONTRIBUTION ARISING UNDER DIFFERENT CAUSES OF LIABILITY: JUDGE-MADE RULES MAINTAINED IN SPITE OF NEW DRAFT LEGISLATION

*Rules on the statute of limitations have always caused much debate. In Swiss law, the matter, governed primarily by Articles 127 to 142 of the Code of Obligations (CO), is not treated in a uniform manner. It therefore gives rise to all sorts of academic discussions. The matter of time limitation of claims for contribution arising under different causes of action is no exception thereto. The Federal Tribunal (Swiss Supreme Court) resolved a number of questions related thereto in the past, before thoroughly analysing it in a judgment of September 26, 2006 (ATF 133 III 6). A first draft amendment of the CO as to time limitation matters could have brought about new rules; however, the question of time limitation of claims for contribution based on different causes has so far not been dealt with.*

Except for specific statutes, Swiss law does not have a general provision governing time limitation for claims for contribution. Our Supreme Court thus enjoys a broad discretion in that field.

It has been established that a claim for contribution based on a different legal basis of liability is an independent one: it is therefore subject to a time limitation different from that of the relevant principal claim.

Indeed, a claim for contribution only arises at the time the claimant fully pays the damage of a victim and becomes aware of the identity of the jointly liable person. Only when those two conditions are met does the judge-made one-year statute of limitations starts to run. The starting day may therefore be different in the event of several liable persons as these may be discovered at different points in time.

A claim for contribution may however not be filed *ad aeternam*. The Federal Tribunal held that there was an absolute limitation period of ten years after the relevant event occurred. This solution was motivated by a willingness to harmonize limitation periods applicable to principal and contribution claims in personal liability matters. Its drawback is that limitation starts to run even before a claim arises, because the plaintiff has not yet paid a victim.

Like a relative limitation period, an absolute limitation period may be suspended or interrupted pursuant to the rules of Articles 134 ss. CO; however, that result cannot be easily achieved: a debt collection procedure may indeed not be started by a plaintiff before a payment to a victim, as the corresponding claim has not arisen yet. Similarly, a legal action for payment of a claim which has not yet arisen appears hardly possible. As a result, it appears that the sole remedies for preventing the absolute limitation to run would be a third party claim within the meaning of Articles 81 ss. of the Code of Civil Procedure (CPC) or a notice of pendency ("dénonciation d'instance") pursuant to Articles 78 ss. CPC. That question would be worthwhile analysing by the Federal Tribunal which, as far as we know, has not yet decided the matter under the provisions of the CPC.

On the other hand, the Federal Tribunal did analyse the question of the consequences of a limitation of the principal action of a victim on that of a claimant for contribution. It held that such limitation may not be used as a defence against the action of a claimant for contribution. However, pursuant to case law, the latter has a good faith duty to give notice without delay to a contribution defendant already protected by time limitation against an action of the victim. Indeed, a defendant to an action for contribution, immune to a time-barred claim of the victim, might omit to keep evidence, so that his defences towards the claimant for contribution would be weakened. Failing such notice, a claimant for contribution shall be barred of any right to sue a jointly liable person.

A preliminary draft amendment of the Code of Obligations (statute of limitations) was issued by the Federal Council on August 31, 2011. The corresponding consultation procedure ended on November 31, 2011. Does that mean that Swiss law will in the near future introduce general rules on limitation of contribution claims? The answer is probably

negative as the preliminary draft does not include any general rule on the limitation of claims for contribution.

The conclusion is therefore that courts will continue to issue rules which may eventually bring about someday a comprehensive system governing claims for contribution against several debtors liable in respect of the same damage for different legal causes.

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OUR OPINION

The Federal Tribunal clearly established that a claim for contribution was independent and hence subject to a limitation period different of that of the main claim. That position should be welcome; nevertheless, our Supreme Court contradicts itself by subjecting a contribution claim to an absolute limitation period of ten years after an event giving rise to a damage, thus somewhat denying the independence thereof.

Furthermore, that absolute limitation period regrettably starts to run before the claim exists; besides, it is difficult to cause it to be suspended or interrupted. A claim for contribution based on a different legal cause should indeed be totally separated from a main claim. Logically, that absolute limitation period should not be maintained.

Regrettably, the preliminary draft amendment of the Code of Obligations does not deal with the system of time limitation of claims for contribution. Several contributors did mention it in the consultation procedure and one may hope that their remarks will be taken into consideration.

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