

# NEWSLETTER

## December 2006

# SCHELLENBERG WITTMER

Attorneys-at-Law

## The New Federal Supreme Court Act (FSCA)

A new judiciary organization at the Swiss federal level will be instituted on 1 January 2007. A Federal Administrative Court will be created and the new Federal Supreme Court Act (FSCA) will enter into force and replace the Federal Judiciary Organization Act of 16 December 1943. The FSCA introduces many innovations and changes the appellate procedures to be followed before the Swiss Supreme Court considerably.

### 1 Background of the Reform

Switzerland's highest courts, the Federal Supreme Court and the Federal Social Security Court, have been increasingly overburdened with new appeals during the 1980s and 90s. In 1993 expert advisers commissioned by the Federal Justice and Police Ministry came to the conclusion that a **global reform of the federal justice system** was necessary. This reform was approved by the Swiss people on 12 March 2000.

The reform did not only serve to limit the Federal Supreme Court's workload. Its other **goals** were the simplification of the appeals system, the elimination of shortcomings in terms of jurisdictional protection and the reinforcement of the role of cantonal courts in matters of cantonal law.

Some of these measures are already in force, such as the creation of the Federal Criminal Court. However, the most important changes will occur on **1 January 2007**. At that time, the Federal Administrative Court will be created, and the Federal Supreme Court Act of 17 June 2005 (FSCA) will replace the former Judiciary Organization Act of 16 December 1943 (JOA). According to a transitional provision, the FSCA will only apply to appeals of decisions rendered on or after 1 January 2007 (Art. 132 (1) FSCA). At a later stage, new federal codes of civil and criminal procedure will follow, and a Swiss Federal Patent Court will be established.

### 2 The New Structures

The main features of the new system are the following:

- I The **Federal Administrative Court** will replace numerous federal appellate commissions and ensure judicial review in matters governed by federal administrative law. Its procedure is governed primarily by the Federal Administrative Procedure Act. The new tribunal will review administrative decisions of federal authorities.
- I As the supreme judicial authority of Switzerland (Art. 188 (1) Cst. and Art. 1 FSCA), the **Federal Supreme Court** will review judgments rendered by the Federal Administrative Court, the Federal Criminal Court and the upper cantonal courts. These courts will serve as a filter for the Federal Supreme Court and will also be in charge of the time consuming task of establishing the facts of a case. In addition, the Federal Supreme Court will supervise the administration of the new Federal Criminal Court and Administrative Court (Art. 1 (2) FSCA).
- I The **Federal Social Security Court** will be integrated into the Federal Supreme Court.
- I The **seat** of the Federal Supreme Court remains in Lausanne, but two or more of its sections will sit in Lucerne (Art. 4 FSCA). The Swiss Parliament set the **number of justices** at 38 (currently 41) and of substitute judges at 19 (currently also 41).
- I Finally, the **Debt Collection and Bankruptcy Section** of the Federal Supreme Court will disappear, and appeals in matters of debt collection and bankruptcy will be integrated into the new appeal in civil matters. The function of the Federal Supreme Court as supervision authority in the same area will be shifted to the Federal Council, the Swiss government.



### 3 "Unified" Appeals

The current – and soon defunct – federal appeals system contains a confusing number of **appeal instruments**: the civil law appeal, the nullity appeal, the debt collection and bankruptcy appeal, the public law appeal and the administrative law appeal. In addition there is the nullity appeal in criminal cases instituted by the Federal Criminal Procedure Code.

The many possible appeals instruments were specified according to various criteria, such as the challenged decision, the grounds for appeal, the specific area of law or by the authority/court whose decision is being appealed.

Difficulties in selecting the appropriate instrument, especially between the public law appeal and other appeals, were common under the existing law, since each separate instrument had its own standards for admissibility. In the future there will only be **three "unified" appeals**, each linked to a distinct legal field – civil, criminal and public – and it will not matter whether the legal provisions applied in the challenged decision are of federal or cantonal law or of a constitutional or legislative nature. In addition, there will be a **subsidiary constitutional appeal**.

The great advantage is that the appellant will be able to submit one single appeal addressing violations of federal and cantonal law as well as of constitutional rights, if any (presently a separate appeal must be submitted in each instance).

### 4 The Appeal in Civil Matters

The notion of **"civil matters"** ("matière civile", "Zivilsachen") includes all civil law (the Civil Code, the Code of Obligations, specific regulations relating to these fields, intellectual property), public law cases linked to civil law, and the decisions rendered in matters of debt collection and bankruptcy.

The appeal in civil matters will be open in principle in pecuniary and non-pecuniary, contentious and non-contentious matters, assuming the standards of admissibility are met.

Nevertheless, it will not be possible to challenge decisions concerning opposition to a trademark registration by an appeal in civil matters (Art. 73), nor can such an appeal be used regarding decisions on civil claims that have to be adjudicated within the framework of criminal proceedings (art. 78 (2) FSCA).

Issues regarding the general constitutionality and conformity to federal law of **cantonal legislation** in civil matters are subject to the appeal in matters of public law (Art. 82 b FSCA).

An appeal is **admissible** if the appellant demonstrates a legal interest to have the challenged decision modified or set aside, and has taken part in the proceedings before the previous court, or has been unduly prevented from participating (Art. 76 FSCA). This broad definition ("take part") appears to

include guarantors, intervenors, petitioners in non-contentious proceedings, as well as authorities and third parties who are given party rights by substantive law.

To reduce the workload of the Federal Supreme Court, the new Act increases the required minimum **amount in dispute** in pecuniary matters. The current limit of CHF 8,000 will be raised to CHF 15,000 in employment and lease matters and to CHF 30,000 in all other matters (Art. 74 FSCA). For the first time this limitation will also apply to certain non-contentious matters.

If the lower limit is not reached in pecuniary cases, the appeal will still be admissible if the dispute raises a **legal question of principle**, if a Federal Act prescribes a single cantonal judicial authority, if the appeal is lodged against a decision rendered by a cantonal supervisory authority in matters of debt collection and bankruptcy, or against a decision issued by a bankruptcy or composition judge (Art. 74 (2) FSCA). When the amount in dispute cannot easily be ascertained, a prudent appellant will demonstrate that the case raises a legal question of principle. The Federal Supreme Court has yet to define this notion. The Report of the Federal Council to the Federal Parliament in support of the draft act suggests that this notion includes a legal issue never addressed by the Federal Supreme Court, the reassessment of a questionable line of precedents, and the confirmation or disavowal of a line of precedents that was not respected in the challenged decision.

### 5 The Appeal in Criminal Matters

The new appeal in **criminal matters** allows an appellant to raise all grounds for appeal in the same filing, once again forsaking the current need to file separate appeals depending on the different grounds. The appeal in criminal matters is admissible against decisions in criminal matters, decisions on civil claims that have to be adjudicated within the framework of criminal proceedings, and against decisions on the enforcement of criminal sanctions and other measures. The penal or administrative nature of the authority that has rendered the decision will not matter. Nevertheless, the appeal will not apply to decisions issued by the Complaint Court of the Federal Criminal Court, unless they are related to constraint measures (Art. 79 FSCA).

The appellant must have a **legal interest** and have taken part in the proceedings before the previous court / authority (Art. 81 FSCA).

The legislature has decided not to require a minimum **amount for the dispute**. As a consequence, the subsidiary constitutional appeal will not play a very important role in this field.

### 6 The Appeal in Matters of Public Law

The appeal in **matters of public law** is admissible against decisions that are based on federal or cantonal public law, forsaking the current need for separate appeals.

Art. 83 FSCA lists certain decisions that cannot be challenged by way of an appeal in matters of public law. A respective decision by the Federal Administrative Court is final. A respective cantonal decision, however, may be subject to a subsidiary constitutional appeal, under certain circumstances.

Contrary to the other unified appeals, the appeal in matters of public law does not require the appellant to demonstrate a specific legal interest; a **factual interest** to have the challenged decision modified or set aside is sufficient. Therefore the admissibility requirements are less restrictive than under the old public law appeal.

For the appeal in matters of public law, in pecuniary disputes, the lower limit of the **amount in dispute** will be CHF 30,000 in matters of State liability and CHF 15,000 in employment matters subject to public law. As for the appeal in civil matters, the appeal will be open when the dispute raises a legal question of principle even when the minimum amount in dispute is not reached (Art. 85 FSCA).

## 7 Some Common Rules Governing the "Unified" Appeals

### 7.1 Grounds for Appeal

Grounds for the "unified" appeals are a violation of **federal law** (including of the Swiss Federal Constitution), of **international law**, of **cantonal constitutional rights**, and, most recently, of **intercantonal law**. A violation of **cantonal law** as such (provisions on voting rights, elections and votes excepted) can only be raised if it amounts to a violation of a constitutional right, e.g. in case of arbitrariness (Art. 95 FSCA).

The non application of the **foreign law** designated by Swiss private international law will also constitute a ground for appeal, as well as, in non-pecuniary cases, the improper application of foreign law (Art. 96 FSCA).

**Facts** can only be reviewed by the Federal Supreme Court if they were established in an obviously inaccurate manner or in violation of the law by the previous court / authority, and only if the correction can change the outcome of the proceedings.

When the challenged decision is a decision on **interim relief**, the grounds for appeal can only be violations of constitutional rights, as in the current practice.

### 7.2 Suspension of Decision and Interim Relief

In most cases, the filing of the appeal will not **suspend the challenged decision**, but the judge in charge of conducting the proceedings can grant the suspension, by petition or ex officio. However, the appeal will suspend the previous decision when it is filed against a constitutive judgment in a civil matter, or in criminal matters against a sentence without probation or a measure involving personal restraint, or against some decisions in the field of international mutual assistance in criminal matters (Art. 103 FSCA).

The judge in charge will also be competent to grant **other interim remedies**. Cantonal authorities and the Court's president will no longer have any authority in that field (cf. Art. 58 JOA).

### 7.3 Remedies

Under the "unified" appeals the Federal Supreme Court will not be limited to upholding or reversing the challenged decision. Although the Court will still have the possibility of remanding the matter to the previous court / instance or to the first instance in charge of the case in order for them to issue a new decision (Art. 107 FSCA), the Federal Supreme Court will be entitled to **issue a new decision** in substitution of the challenged decision. This is new in criminal and constitutional matters. Therefore the appellant can request either the reversal of the challenged decision or a new decision. It is advisable to request both, one subsidiary to the other.

### 7.4 Filing

The new Act sets a uniform **time-limit** of 30 days for filing an appeal, applicable to interlocutory as well as final decisions. However the time-limit will still be shorter in some particular fields such as in debt collection and bankruptcy, international criminal assistance (10 days), or bill of exchange and cheque collection matters (5 days) (Art. 100 FSCA).

In the past a party had the possibility to join an appeal of the other party. This will no longer be possible. A party who has benefited from a decision but would like a better judgment in case of an appeal by his adversary will have to file a regular appeal within the prescribed time-limit. The appeal can still be withdrawn if it turns out that the other party does not challenge the decision.

## 8 The Subsidiary Constitutional Appeal

The Parliament has added a **subsidiary constitutional appeal** to remedy possible shortcomings in the appellate system (Art. 113 FSCA). To a certain limit, the Federal Council's draft bill left the task of supervising the enforcement of fundamental rights to the Cantons. Yet, the Federal Supreme Court's duty to ensure a uniform application of federal law could have been put partly in danger, and some cantonal decisions could have been referred directly to the European Court of Human Rights. According to the new Act, the subsidiary constitutional appeal is available against decisions by the superior cantonal authorities that cannot be challenged with a regular appeal pursuant to Art. 72 to 89 FSCA. However, this appeal will not be available against decisions rendered by federal or communal authorities, or non-governmental authorities such as arbitral tribunals.

To be entitled to lodge a subsidiary constitutional appeal, the appellant must have a legal interest (Art. 115 FSCA) and claim the **violation of one or several of his fundamental rights**. The Federal Supreme Court has to decide whether the requirements will be the same as those applied to the current public law appeal.



If the **admissibility of a "unified" appeal is doubtful**, a lawyer will be well advised to include a subsidiary constitutional appeal in the same submission. This is particularly important in case of an appeal in civil or public law matters when its admissibility is based on the existence of a legal question of principle. Both appeals must be lodged as part of the same submission and will be decided by the Federal Supreme Court in a single set of proceedings (Art. 119 FSCA).

Most of the **procedural rules** governing the "unified" appeals apply by analogy to the constitutional appeal procedure (Art. 117 FSCA).

## 9 Future Perspective

This short introduction to the main changes resulting from the new Federal Supreme Court Act shows that the federal appeals system has been harmonized to a large extent and as a result will become simpler. Some difficulties still exist, however. For instance, it will be difficult to know with certainty if a dispute raises a legal question of principle. The addition by the Parliament of a subsidiary constitutional appeal raises complex issues. A careful appellant will have to submit subsidiary arguments and file two appeals simultaneously when their respective admissibility is not clear – at least they can be joined in one single appeal. We hope that the Federal Supreme Court will succeed in providing clear definitions to the vaguer notions of the Act, and in unifying the case law rendered by its different sections.

## Contacts

The content of this Newsletter does not constitute legal advice and may not be relied upon as such. Should you wish advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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