Litigation

Switzerland

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gar know-how

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Overview

1 Court system

Describe the general organisation of the court system for civil litigation.

The Swiss court system is organised hierarchically. Even though substantive private law is a federal matter, any dispute concerning private law is generally initiated in a cantonal court. Each of the 26 cantons is required to implement a court of first instance and a court of second instance (article 75 of the Law on the Federal Tribunal of 17 June 2005 [LFT]). In certain areas of private law such as intellectual property, each canton has to appoint a court as a single instance. In trade law matters, cantons are free to establish a single court specialised in commercial matters (article 6 of the Swiss Civil Procedure Rules of 19 December 2008 [CPR]). The cantons of Aargau, Bern, St Gallen and Zurich have each established such a commercial court. The Federal Tribunal is the supreme court within the Swiss court system (article 1 LFT). It ensures a uniform application of private law.

The cantons are autonomous in determining the jurisdiction ratione materiae and the organisation of the courts in their territory (article 4 CPR). Each canton defines independently how many courts it implements, which matters of private law are dealt with by which court and how many judges (usually dependent on the amount in dispute) will decide upon a case. Cantonal laws usually provide for several district courts of first instance, a single court of second instance and certain specialised courts. The Anglo-American concept of juries is alien to Swiss law.

Cantonal courts and the Federal Tribunal are independent of each other and of any executive or legislative authority. Courts are only bound by the rule of law. Even though they are not formally required to follow precedents, cantonal courts tend to follow rather strictly the case law established by the Federal Tribunal to avoid judgments being overturned. In the absence of any applicable written legal provision or case law, a judge has the power to shape the law by applying the rule that would most likely be implemented by the legislator (article 1 of the Swiss Civil Code).

2 The legal profession

Describe the general organisation of the legal profession.

In Switzerland, only licensed attorneys can commercially represent clients in legal matters in a court or arbitral tribunal. Any licensed attorney may represent clients in any area of law in any court in Switzerland, cantonal or federal (article 4 of the Law on Attorneys of 1 January 2000 [BGFA]). There is no split bar between barristers and solicitors.

Admission to the bar requires a master's degree in law from a Swiss university, at least one year of legal practice, the successful completion of a cantonal bar exam, as well as registration with the cantonal bar at the main place of practice (article 7 BGFA).

European Union (EU) and European Free Trade Association (EFTA) nationals licensed as attorneys in their country are free to occasionally represent clients in Swiss courts without registration (article 21 BGFA). If they regularly represent clients in Swiss courts, registration with the cantonal bar is required (article 27 BGFA). Non-EU or non-EFTA nationals have to successfully acquire a master's degree in law from a Swiss University, pass the bar exam and fulfil all other prerequisites for admission to the bar.

3 General

Give a brief overview of the political and social background as it relates to civil litigation.

The rule of law and the independence of courts are cornerstones of Swiss litigation. The Swiss court system is efficiently and professionally organised and enjoys a high degree of trust among Swiss, as well as foreign, parties. The fact that legal costs are rather high in general and the rule that the losing party bears the legal costs as well as the other party's attorney's fees poses a risk for the party initiating proceedings. Even in litigation between businesses, parties usually try to reach settlement. Consequently, in general, Switzerland is not an overly litigious country. Nevertheless, due to the financial crisis and its still ongoing impact, the caseload of the Swiss courts has become heavier in recent times.

As the CPR are relatively new, there are no significant procedural or structural reforms to civil litigation in progress.

Jurisdiction

4 Jurisdiction and venue

What are the criteria for determining the jurisdiction and venue of the competent court for a civil matter?

Depending on the parties involved, the criteria for determining the forum are provided for either in international treaties such as the Lugano Convention (Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 [LugC]), the Private International Law Act (Federal Act on Private International Law of 18 December 1987 [PILA]) or the CPR. As a general rule, proceedings can be initiated in the competent forum at the domicile or seat of the defendant (article 2 LugC, article 2 PILA, article 10 CPR). Depending on the area of private law concerned, a plaintiff may also initiate proceedings at its own domicile or in another forum such as, for example, the place where the characteristic performance must be rendered in contractual disputes (article 5(1) LugC, article 113 PILA, article 31 CPR) or, in matters relating to tort, in the courts at the location of the harmful event (article 5 paragraph 3 LugC, article 129 PILA, article 36 CPR).

Parties generally have a right to agree upon a specific forum prior to or after the commencement of proceedings. In socially sensitive areas of private law such as individual employment or consumer law, parties may only decide upon a specific venue once the dispute has arisen (articles 23(5), 21 and 17 LugC, article 35 CPR). In a few matters such as the validity of patents, trademarks, etc, in LugC circumstances, the law states a binding forum with the consequence that the parties cannot agree upon a specific forum (article 22 paragraph 1 LugC).

The venue of the competent court is determined by cantonal law. Usually, the venue depends on the amount in dispute and there are generally no special considerations when one of the parties is foreign. As Switzerland is not part of the EU, EU law and regulations do not apply.

5 Forum shopping

Does your jurisdiction commonly attract disputes that have a nexus with other jurisdictions?

Switzerland does not commonly attract disputes that have a stronger nexus with other jurisdictions. As opposed to other jurisdictions, Swiss law knows neither punitive damages nor class actions. However, Swiss courts are known to handle disputes efficiently and cost-effectively. As Swiss law is traditionally considered entrepreneur-friendly, Swiss enterprises in an international environment usually try to agree upon the competence of the court at the place of their registered office.

6 Pendency in another forum

How will a court treat a request to hear a dispute that is already pending before another forum?

Generally, if a dispute is already pending between the same parties in the same matter before another forum, be it Swiss or foreign, the court first seized remains competent to decide the dispute.

If a dispute is already pending before a court in another EU or EFTA member state, the LugC requires a Swiss court to stay the proceedings until the court first seized has decided upon its jurisdiction (article 27 LugC). This rule enables a party to initiate proceedings in states that are known to have a slow judicial system (known as torpedo actions), thereby blocking efficient proceedings. As Switzerland is not part of the EU, a plaintiff does not benefit from the new Brussels Regulation's rule according to which a court having exclusive jurisdiction will not stay the proceedings even if another court is seized first (article 31(3) of EU Regulation 1215/2012 of 20 December 2012).

If a dispute is pending before a court in a non-EU or non-EFTA state, a Swiss court shall stay the proceedings only if a judgment of the court first seized can be expected within reasonable time and is enforceable in Switzerland (article 9 PILA).

7 Deference to arbitration

How will the courts treat a dispute that is, or could be, subject to an arbitration clause or an agreement to arbitrate?

Switzerland has a long-standing, well-established arbitration tradition and enjoys the reputation of being very arbitration-friendly. In international arbitration, state courts have a duty to refer the parties to arbitration if they concluded a valid arbitration agreement (article 7 PILA). Since an arbitral tribunal in Switzerland has the competence to decide upon its own jurisdiction (competence-competence), state courts are only allowed to superficially examine the validity of the arbitration agreement and to refer the parties to state courts only if the parties did not intend to submit their dispute to arbitration (DFT 138 III 651, c. 3.2).

8 Judicial review of arbitral awards on jurisdiction

May courts in your country review arbitral awards on jurisdiction?

In Switzerland, arbitral awards may be set aside due to a lack of jurisdiction of the arbitral tribunal, either due to invalidity of the arbitration agreement or the fact that the scope of a valid arbitration agreement does not encompass the dispute between the parties, which the arbitral tribunal has decided (article 190(2)(b) PILA, article 393(b) CPC).

9 Anti-suit injunctions

Are anti-suit injunctions available?

There are no specific provisions regarding anti-suit injunctions in Swiss law. In a leading case, the Federal Tribunal declared the ECJ's *West Tankers*-judgment (*Allianz SpA v West Tankers Inc*, Case C-185/07 of 10 February 2009) binding on Swiss courts and therefore held that anti-suit injunctions are inadmissible to Swiss courts applying the LugC (DFT 138 III 304, c 5.3.1). Even though the Federal Tribunal left the issue open, legal doctrine generally considers anti-suit injunctions unavailable to Swiss state courts in international disputes outside the scope of application of the LugC (DFT 138 III 304, c 5.3.1). However, international arbitral tribunals in Switzerland are considered to have the power to order anti-suit injunctions in support of the arbitration (Kaufmann-Kohler/Rigozzi, *International Arbitration, Law and Practice in Switzerland*, Oxford 2015, para 5.75).

10 Sovereign immunity

Which entities are immune from being sued in your jurisdiction? In what circumstances?

Public international law is an integral part of Swiss law. The well-established principles on immunity of foreign states and their representatives also apply in Switzerland. Consequently, other sovereigns, foreign heads of state or government and foreign ministers in office enjoy absolute immunity and may not be sued in Swiss courts. Other government officials may also not be held liable for actions they performed in service of their mandate (acta iure imperii), but may be held liable for private actions (acta iure gestionis).

Procedure

11 Commencement and conduct of proceedings in general

How are proceedings commenced? To what extent will a court actively lead the proceedings and to what extent will the court rely on the parties to further the proceedings?

Under Swiss law, the parties first have to go through mandatory conciliation proceedings before a designated authority of the state (article 197 CPR). Consequently, proceedings are initiated by a simple request for conciliation by a plaintiff. If the conciliation proceedings fail, the plaintiff may file its detailed statement of claim in a cantonal court of first instance (article 209(2) CPR).

As a general rule, the parties must present the facts of the case and deliver the necessary proof (article 55(1) CPR). Courts, generally, do not unilaterally advance the proceedings; it is up to the parties to do so. However, if the relief sought by a party is unclear or contradictory, the court has a duty to grant that party an opportunity to clarify by asking the appropriate questions (article 56 CPR). In matters of individual employment law and social tenancy law for a disputed amount under 30,000 Swiss francs, the court shall ensure the parties have the opportunity to assert the relevant facts (article 247(2) CPR).

The CPR require Swiss courts to actively conduct the proceedings (article 124 CPR). Courts are allowed to and shall determine the number of briefs exchanged together with the parties and organise hearings. Further, courts may request a party to present additional evidence

(article 153(2) CPR) or upon request of a party or sua sponte appoint independent expert witnesses or other witnesses if needed (article 170 CPR). Witnesses are interrogated by the court and not by the parties (article 172 CPR). Courts may also decide to bifurcate the proceedings and to first hear the parties' submissions on jurisdiction (article 125 CPR).

12 Statement of claim

What are the requirements for filing a claim? What is the pleading standard?

If the mandatory conciliation proceedings fail, a plaintiff is allowed to file its statement of claim (see question 11). In any case, the statement of claim must contain an accurate description of the relief sought, a description of the matter in dispute and the name of each party (article 221(1) CPR). Where payment of money is sought, the requested amount has to be exactly stated. If an injunction is sought, a plaintiff has to describe the injunction requested as accurately as possible. However, the level of detail of the submissions is generally dependent on the amount in dispute.

Generally, if the amount in dispute is higher than 30,000 Swiss francs, the rules on ordinary proceedings apply (article 229 et seq). In such a case, a statement of claim has to contain a detailed substantiation and proof of each element of fact relevant to the claim. If a party fails to meet the requirements of substantiation, it eventually loses its claim.

In socially sensitive matters or cases in which the amount in dispute is below 30,000 Swiss francs, a simplified procedure applies with a focus on an oral hearing in court (article 243 CPR). Therefore, the statement of claim in such a case generally does not require a substantiation of the claim, but rather the submission of the relevant evidence.

13 Statement of defence

What are the requirements for answering claims? What is the pleading standard?

The pleading standard of a statement of defence mirrors the statement of claim and is, hence, also dependent on the amount at dispute (see question 12). In any case, a statement of defence must contain the prayer of relief, which is generally a rejection of the plaintiff's claim. In ordinary as well as in simplified proceedings, a defendant has to contest each allegation made by the other party and to substantiate by means of evidence why the allegations of the plaintiff do not hold true (article 222(2) CPR).

14 Further briefs and submissions

What are the rules regarding further briefs and submissions?

The rules on further briefs and submissions apply both to plaintiff and defendant. As a general rule, parties should make their factual submissions as early as possible. Legal assertions and submissions can be altered or amended at any time during the proceedings.

Factual assertions may, generally, be amended freely during the period of exchanging briefs up until the main hearing in court (article 229 CPR). After this point in time, an amendment of factual assertions is only permissible in restricted circumstances (article 229 CPR). In simplified proceedings, where there is no second exchange of briefs, the parties are allowed to amend or alter factual assertions at the beginning of the main hearing in court (article 229(2) CPR). An amendment or alteration of the prayers for relief is permitted only under restricted circumstances such as the agreement of the opposing party to the amendment or a strong enough connection with the previous prayers for relief prior to the main hearing (article 227 CPR). After the main hearing, the prayers for relief can only be altered based on new facts that a party could not have reasonably known prior to that point in time (article 230 CPR).

The concept of amicus curiae briefs does not exist under Swiss law.

15 Publicity

To what degree are civil proceedings made public?

Main hearings and pronouncements of judgments are generally public (article 54 CPR). However, TV cameras and photographers are not allowed in courtrooms. If a dispute involves business secrets or personal interests of a party, the public can usually be excluded from the proceedings. The parties' briefs, submitted evidence and other filings are not public and may, generally, not be consulted by anyone else but the court and the parties. In private law matters, judgments are published in an anonymised form. Whereas the Federal Tribunal continuously publishes all judgments on its electronic database, there are still several cantons that have not yet established databases and regularly publish the judgments rendered by their courts.

Pretrial settlement and ADR

16 Advice and settlement proposals

Will a court render (interim) assessments about any factual or legal issues in dispute? What role and approach do courts typically take regarding settlement? Are there mandatory settlement conferences between the parties at the outset of or during the litigation?

For reasons of efficiency, Swiss courts may make interim assessments about legal issues such as the jurisdiction of the court or factual issues such as whether a party has suffered damages (article 125 CPR). Courts may also hold instruction hearings to freely discuss the matter in dispute with the parties, to complete the facts if needed, to attempt to reach an agreement between the parties and to prepare the main hearing (article 226 CPR). At any stage of the proceedings, a court may order a suspension so that the parties can negotiate a settlement (article 126 CPR). A court under the CPR also has the right to proactively encourage the parties to reach a settlement (article 124(3) CPR). Swiss courts frequently make use of this power. Unless expressly stated otherwise, the parties have to conduct mandatory conciliation proceedings before a state authority at the outset of any litigation (see question 11).

17 Mediation

Is referral to mediation or another form of ADR an option, or even mandatory, before or during the litigation?

Parties are free to replace the mandatory conciliation proceedings at the outset of any litigation with mediation proceedings (article 213(1) CPR). At any time during the proceedings, the parties may collectively request mediation proceedings (article 214(2) CPR). If the circumstances so provide, a court may, at any time, suggest mediation to the parties (article 214(1) CPR). Although the CPR is pro-mediation, parties to litigation rarely request this form of ADR in business law matters.

Interim relief

18 Forms of interim relief

What are the forms of emergency or interim relief?

Under Swiss law, interim relief may be granted in the form of an attachment of assets or an injunction. There are three main types of interim measures: safeguarding measures, regulatory measures and executory measures. Basically, safeguarding measures aim at preserving the matter in dispute for the time being, namely, until the dispute has been decided by the court. Regulatory measures are intended to regulate the

parties' relationship while the principal proceedings are pending. By ordering executory measures, provisional obligations may be imposed on a party.

In cases of great urgency, and when there is a risk that the enforcement of the measure will be frustrated, the court has the power to order the interim measure immediately and without hearing the opposing party (ex parte measures). However, the opposing party may subsequently seek to have the interim measure set aside.

Under Swiss law, it is possible to request interim relief even if the principal action is not yet pending before a court (article 263 CPR). However, if the court grants the requested interim relief, it sets the requesting party a deadline for filing the principal application, subject to the ordered measure becoming automatically ineffective in the event of default. If the principal action is already pending before the court at the time interim relief is sought, the applicant does not need to initiate separate proceedings but is entitled to request such relief within the proceeding concerning the principal action.

19 Obtaining relief

What must a petitioner show to obtain interim relief?

To obtain an injunction, the petitioner needs to show credibly that he or she has an underlying claim that is violated or that such violation is imminent and fast action is essential because the (imminent) violation of this claim threatens to cause not easily repairable harm. Ex-parte interim relief is, however, only granted if there is some special urgency that is greater than in cases of 'ordinary' injunctive relief and that requires the court to act immediately and without first hearing the opposing party.

To obtain an attachment, the petitioner must show credibly that the following conditions are met:

- he or she has a monetary unsecured matured claim against the debtor;
- there is a valid reason for attachment, which means that, but for the attachment, there would likely be no more assets to enforce a later court decision against. The reasons for attachment are enumerated in the Swiss Debt and Bankruptcy Act (DEBA). Attachment can be granted, for example, if the debtor has no fixed domicile, if the debtor is concealing his or her assets, absconding or making preparations to abscond so as to evade the fulfilment of his or her obligations, or if the debtor does not live in Switzerland and none of the other grounds for a freezing order is fulfilled, provided the claim has a sufficient connection with Switzerland or is based on a recognition of debt pursuant to article 82(1) DEBA; and
- finally, it must be shown credibly that there are assets owned by the debtor at the place where the attachment is sought. This constitutes an essential limitation that – to a certain extent – also applies in cases where the attachment is used as a title of execution with regard to seeking enforcement of Swiss or foreign court decisions (see also questions 40 and 41).

The petitioner is liable for any loss or damage caused by an unjustified interim measure.

Decisions

20 Types of decisions

What types of decisions (other than interim relief) may a court render in civil matters?

Normally, a court renders a final and binding decision by which it either decides not to consider the merits or by taking a decision on the merits (article 236(1) CPR). Partial decisions are not expressly stated but generally accepted. A court may render a partial decision by which it only decides some of the legal requests in cases where multiple claims are involved, some of which are ripe for decision and some of which need, for example, further taking of evidence.

Finally, a court may issue an interim decision, provided that a higher court could issue a contrary decision that would put an immediate end to the proceedings and, thereby, allow a substantial saving of time or costs (article 237(1) CPR).

21 Timing of decisions

At what stage of the proceedings may a court render a decision? Are motions to dismiss and summary judgment available?

As a general rule, proceedings are governed by the requirement of rapid action, which obliges the court to swiftly drive a case forward and to decide it once it is ripe for decision. Accordingly, if the court finds that a procedural requirement is not met and, thus, renders a decision where it does not consider the merits, such decision may be issued right after the filing of a claim. By contrast, if the court has to decide a complex case on the merits, which involves a second exchange of written submissions and an extensive taking of evidence, it might take a long time until a decision is rendered.

Motions to dismiss and summary judgments are not available under Swiss law.

22 Default judgment

Under which circumstances will a default judgment be rendered?

A court may render a default judgment if the defendant fails to file his or her statement of defence (and also does not do so by the end of the granted grace period) and the matter is ripe for decision (article 223(2) CPR). Further, if a party fails to attend the main hearing, the court considers the submissions made and may rely on the presentation of the party present and on the information on file to render a decision (article 234(1) CPR). If both parties fail to attend the main hearing, the court dismisses the proceedings as groundless (article 234(2) CPR).

The defaulting party may apply for restitution, namely, the granting of a period of grace or the summoning of the parties again for a new appearance. To obtain such restitution, the defaulting party has to file his or her request within 10 days and has to credibly show that he or she was not responsible for the default (article 148 (1)(2) CPR).

23 Duration of proceedings

How long does it typically take a court of first instance to render a decision?

The duration of first instance proceedings varies from case to case due to several factors such as the size and complexity of the case, whether counterclaims are involved, whether a second exchange of written submission takes place, the parties' conduct as well as the court's workload. Decisions are usually rendered within six months to three years; complex cases, however, may last considerably longer.

Parties

24 Third parties – joinder, third-party notice, intervenors

How can third parties become involved in proceedings?

The substitution of a party is possible if the object in dispute is sold in the course of the proceedings (article 83(1) CPR). In any other case, the substitution of a party is only permitted if the opposing party agrees. Special legal provisions apply to legal succession (see also question 36).

A court may join the proceedings if a person who claims to have a better right to the object of dispute files a claim directly against both parties in the court in which their dispute is already pending in the first instance (article 73 CPR).

A person who is not a party to the dispute and who shows a credible legal interest in having the pending dispute decided in favour of one of the parties is permitted to intervene at any time as an accessory party and submit a respective intervention application to the court (article 74 CPR). Before deciding on the application, the court must hear the parties. The effect of such intervention is that a decision that is unfavourable to the principal party is generally also effective against the intervening party except under certain conditions set out by law such as the principal party had failed, wilfully or grossly negligently, to make use of offensive or defensive measures of which the intervening party had no knowledge (article 77 CPR).

A party may give notice to a third party to the dispute if, in the event of being unsuccessful, it might have a claim against or be subject to a claim by the third party. The notified party is also allowed to give notice to a further party. Again, the effect of a third-party notice is that a decision unfavourable to the principal party is generally also effective against the recipient of the notice.

Finally, the notifying party is entitled to assert any rights it believes to have against the recipient of the notice in the event that it is unsuccessful before the court that is dealing with the main claim (article 81(1) CPR).

Evidence

25 Taking and adducing evidence

Will a court take or initiate the taking of evidence or will it rely on the parties to request the taking of evidence and to present it?

Under Swiss law, it is the parties' duty to present to the court the facts and the related evidence that supports their case (article 55(1) CPR). A court does not usually initiate the taking of evidence and will thus only take into account the evidence presented to it by the parties, except in certain specific proceedings such as summary proceedings concerning bankruptcy and decomposition where the court has to establish the facts ex officio (article 255 lit. b CPR).

A court is generally required to accept the evidence that a party offers in the requested form and time (article 152(1) CPR). However, under certain circumstances a court may anticipate its consideration of evidence and refrain from taking certain evidence presented to it because it does not consider it relevant to the outcome of the case.

26 Disclosure

Is an opponent obliged to produce evidence that is harmful to it in the proceedings? Is there a document disclosure procedure in place? What are the consequences if evidence is not produced by a party?

Generally, a party has to prove its case and demonstrate the existence of all alleged facts from which it derives its rights (article 8 Swiss Civil Code). Thus, if the party filing a claim cannot produce evidence substantiating its claim, the court will consider the disputed facts not proven and will not grant the requested relief.

A document disclosure procedure as practised in common law jurisdictions is not known under Swiss law. However, the parties are under a duty to cooperate in the taking of evidence. Accordingly, a court may order a party, upon specified request of the other party, to produce certain specific documents material to the outcome of the case. Broad requests will not be granted and fishing expeditions are not permitted.

If a party fails to cooperate without justification, the court is entitled to draw adverse inferences.

27 Witnesses of fact

Please describe the key characteristics of witness evidence in your jurisdiction.

Any person who is not a party to the proceedings may testify on factual matters that it has directly witnessed (article 169 CPR). Since the court generally does not take evidence ex officio, it only summons witnesses who have been produced by a party and whose testimony it considers relevant to the case. If summoned by the court, the witness has the duty to appear at the hearing and to tell the truth. Under certain circumstances set out by statutory law, the witness has the right to refuse testimony, for example, where such testimony would expose the witness to criminal prosecution or civil liability, or based on professional confidentiality. However, the witness is, nonetheless, under an obligation to appear before the court.

Under Swiss law, there are no written witness statements and the parties are not allowed to discuss the case with their witnesses before they testify. As a rule, a party should refrain from contacting its witnesses. It is the court that questions the witnesses. Generally, the court first asks witnesses to state their particulars and personal relationship with the parties and any other circumstances that may be relevant to their credibility. Then the court invites them to broadly state their factual observations and finally it goes on to ask specific questions. Subsequently, the parties have the possibility to request that further questions are put or, with the consent of the court, can ask the questions themselves during the hearing (article 173 CPR).

28 Expert witnesses

Who appoints expert witnesses? What is the role of experts?

Only the courts have the power to appoint experts who are able to give expert evidence. Evidence rendered by party-appointed experts is, in principle, qualified as mere allegation by the appointing party. For this reason, the courts appoint the experts but hear the parties first. Usually, the parties are invited to suggest an expert or at least comment on the court's suggestions. The court instructs the experts and submits the relevant questions to them. Again, the parties must be given the opportunity to comment on the questions and to request their modification or amendment. The court may order the expert to render a written report or to present their findings orally.

The expert is a person with special expertise who has to assess and confirm disputed questions of facts or foreign law that the court is not able to determine due to lack of the required knowledge. Experts are under a duty to tell the truth and become criminally liable if they commit perjury.

29 Party witnesses

Can parties to proceedings (or a party's directors and officers in the case of a legal person) act as witnesses? Can the court draw negative inferences from a party's failure to testify or act as a witness?

Under Swiss law, a party cannot act as a witness. Nonetheless, a court may question the parties on relevant facts of the case and may even order them ex officio to give evidence, subject to criminal penalties for failure to do so (article 191(1), 192(1) CPR). The parties have a duty to cooperate and are under obligation to tell the truth, but they may refuse cooperation if certain conditions are met, for example, if the taking of

evidence would expose a close associate or constitute a breach of professional confidentiality.

If a party legitimately refuses cooperation, the court is not allowed to draw negative inferences (article 162 CPR). On the contrary, a court is generally allowed to do so if the witness' non-cooperation is not justified.

If a company is a party to court proceedings, its directors and officers cannot serve as witnesses but are interrogated as a party (article 159 CPR). However, ordinary employees who are not considered directors and officers can act as witnesses.

30 Foreign law and documentation

How is foreign law or foreign-language documentation introduced into the proceedings and considered by the courts?

If foreign law is applicable to a case, the court needs to establish and consider it ex officio. The court may establish the foreign law by legal research of its own, by appointing a legal expert or by obtaining the required information from the Swiss Institute of Comparative Law. However, it is also at the court's discretion to request the parties' cooperation. In financial disputes, the court may impose the duty to establish the foreign law on the parties (article 17 PILA).

31 Standard of proof

What standard of proof applies in civil litigation? Are there different standards for different issues?

In civil litigation, full proof is usually required. Full proof is met if the court is convinced on the basis of objective aspects that a certain presentation of facts is correct. Absolute certainty is, however, not required.

In summary proceedings for obtaining interim relief, prima facie evidence is sufficient to establish a party's case. Such mere probability is sufficiently demonstrated if certain indications objectively establish some probability that a certain presentation of facts is correct while still other possibilities might come into consideration.

Appeals

32 Options for appeal

What are the possibilities to appeal a judicial decision? How many levels of appeal are there?

There are usually two levels of appeal: a decision rendered by a district court is normally appealable to the cantonal court of appeal. If the amount in dispute totals at least 30,000 Swiss francs, the decision of the cantonal court of appeal is, again, subject to appeal to the Swiss Federal Tribunal.

Only one level of appeal exists concerning proceedings before a commercial court that has jurisdiction as sole cantonal instance for commercial disputes: if the amount in dispute totals at least 30,000 Swiss francs, the decision is directly appealable to the Swiss Federal Tribunal.

33 Standard of review

What aspects of a lower court's decisions will an appeals court review and by what standards?

Cantonal courts of appeal are entitled to comprehensively review matters of fact and law. New facts and new evidence are, however, only considered if the party submits them immediately and if they could not have been submitted before the lower court despite reasonable diligence (article 317(1) CPR).

Contrarily, the Swiss Federal Tribunal only reviews limited matters of law and fact: federal and international law, some aspects of cantonal law as well as the issue whether the lower court wrongly refrained from applying a foreign law are subject to judicial review. Further, the Swiss Federal Tribunal may review whether the lower court established the facts in a manifestly wrong way. New facts and evidence are only considered if the decision of the lower court first gave reason for filing them.

34 Duration of appellate proceedings

How long does it usually take to obtain an appellate decision?

How long appeal proceedings take depends mostly on the kind of decision, namely, whether a decision is dismissed for formal reasons without dealing with the merits of the case, whether the court of appeal decides the case on the merits or whether it annuls the judgment and sends the case back to the lower court. Again, the duration of appellate proceedings depends on the size and complexity of the case, the parties' conduct, as well as the court's workload. Appellate proceedings generally take approximately one to two years, but in a complex case they may take much longer.

Special proceedings

35 Class actions

Are class actions available?

The Swiss Civil Procedure Rules do not (yet) provide for class actions. In multi-party setups, practitioners resort to auxiliary constructs (such as assignments, pilot cases, or companies or associations between several parties who are basically in the same situation and, therefore, can sue, or be sued, as a group).

The Federal Council has dropped its idea to introduce sector-specific group actions or class actions for the financial industry. Instead, group actions are again being assessed as a potentially useful tool for all sectors, ie, as a new instrument in the Civil Procedure Rules. No changes are, however, to be expected in the short-to-mid-term.

36 Derivative actions

Are derivative actions available?

Derivative actions in corporate law permit a shareholder to bring an action in the name of the corporation against parties allegedly causing harm to the corporation (article 756 CO). Once the company has fallen into bankruptcy, and provided that neither the shareholders nor the estate bring forward claims for corporate liability, company creditors may also initiate derivative suits (article 757 paragraphs 1 and 2 CO). In practice, derivative actions are rare.

In bankruptcy proceedings, the bankruptcy administrator must offer to all the company creditors an assignment of those potential claims of the estate that the administrator does not intend to assert him or herself. Despite the misleading term 'assignment', the action brought forward by one or several company creditors is equally a derivative action (article 260 DEBA). If more than one creditor obtains such 'assignment', the creditors must invariably act together, which often renders such assigned claims very difficult to handle in practice.

Another form of derivative action becomes current in disputes pertaining to objects of a dispute that are, or have been, sold. The seller is no longer the rightful owner, but must, due to its former title, continue the litigation in the form of a derivative action unless the buyer takes over the litigation in its place (article 83 CPR).

37 Fast-track proceedings

Are fast-track proceedings available?

For amounts at dispute lower than 30,000 Swiss francs as well as for certain specific matters, the CPR provides for fast-track proceedings (article 243 CPR). After a mandatory conciliation (article 197 CPR), the proceedings are faster and somewhat less formalistic (eg, no compulsory written briefs, mainly oral proceedings; article 244 f. CPR).

In clear-cut cases, a claimant can initiate summary proceedings that, in the case of success, result in a normal (full-fledged) judgment (article 257 CPR).

38 Foreign-language proceedings

Is it possible to conduct proceedings in a foreign language?

Switzerland has four official languages (German, French, Italian, and Rhaeto-Romanic). Which of these languages is, or are, the language or languages of specific proceedings depends on the venue.

It is not possible, however, to conduct proceedings in a foreign language such as, for example, English. By contrast, exhibits need not necessarily be translated into the language of the proceedings, unless the court or counterparty so requests. Nonetheless, it is often advisable to translate the most relevant documents, or parts of documents, into the language of the proceedings since it is by no means guaranteed that a judge who claims to understand documents in English is actually capable of understanding all relevant nuances.

Effects of judgement and enforcement

39 Effects of a judgment

What legal effects does a judgment have?

In general, judgments only have effect between the parties to the proceedings (inter partes). This limited scope also has an effect on lis pendens and res iudicata.

A party who wishes to take recourse against a third party in the case of a negative judgment, or fears that it may be held liable by such third party, can involve that third party in the proceedings (article 78 CPR, litis denuntiatio). It may even request the court to rule on its relation regarding that third party within the same proceedings (article 81 CPR).

In later proceedings, only the decision as such is binding. The findings of fact do not become formally binding but may, nonetheless, be somewhat difficult to rebut. The application of the law does not become binding; as a matter of fact, Swiss law, based on the principles of civil law, only acknowledges limited effects to precedence.

In appeal proceedings, the findings of fact cannot always be challenged in full. While, in general, the upper cantonal court (the first appeal instance) usually performs a full review of the facts (without, however, usually taking new evidence), the Federal Tribunal's review is only very limited (see also question 33).

40 Enforcement procedure

What are the procedures and options for enforcing a domestic judgment?

Money claims are enforced by virtue of the Swiss Debt Enforcement and Bankruptcy Law. The creditor may either initiate enforcement by virtue of an ex parte freezing order (attachment or 'arrest') or else by a normal summons to pay.

All other judgments are enforced according to the principles stated in the CPR. As the case may be, the judgment can be enforced directly (eg, with access to a place or clearance of a leased property), the debtor may be forced to comply by virtue of a threatened fine, a third party may be ordered, or authorised, to fulfil in lieu of the debtor, a public register may be ordered to change an entry ex officio or the judgment may be converted into a damages claim (that, in turn, is enforced as a normal claim for payment).

41 Enforcement of foreign judgments

Under what circumstances will a foreign judgment be enforced in your jurisdiction?

Swiss law is very liberal as regards the enforcement of foreign judgments. Switzerland is a party to the Lugano Convention and, therefore, recognises and enforces virtually all European judgments in civil and commercial matters.

For all matters that do not fall within the scope of the convention, as well as for judgments from all other jurisdictions, recognition and enforcement are governed by Swiss Private International Law Act (PILA). As a general rule, final and binding foreign judgments are enforced when the jurisdiction of the ruling foreign court is not exorbitant from a Swiss perspective and neither the proceedings nor the judgment as such are against Swiss Public Order (article 25-27 PILA).

Like the creditor of a Swiss judgment, the creditor of an enforceable foreign judgment is entitled to a freezing order, if adequate, as a (non-compulsory) starting point to the enforcement proceedings.

Costs

42 Costs

Will the successful party's costs be borne by the opponent?

The successful party's costs as well as the court fees are, as a general rule, borne by the opponent (article 106 CPR). While, however, there are only limited restrictions to the fee arrangements a party agrees with its own lawyer, the compensation for legal fees the successful party is awarded is governed by a tariff. Moreover, courts almost invariably demand advance payments from claimants. If a claimant prevails, it is entitled, in the judgment, to claim from the defendant the court fees it has advanced. Therefore, the risk that the defendant is unable to pay remains with the claimant and is not assumed by the court.

Under specific circumstances, the costs are distributed according to equitable standards (article 107 CPR).

43 Legal aid

May a party apply for legal aid to finance court proceedings? What other options are available for parties who may not be able to afford litigation?

Parties who do not have the means to finance court proceedings are entitled to legal aid, provided that their claim is not unpromising (article 117 CPR).

In matters pertaining to parental custody, parties who are unable to finance litigation may be entitled to take recourse to cost-free mediation (article 218 paragraph 2 CPR).

(See also question 45 – third-party funding.)

44 Contingency fees

Are contingency fee arrangements permissible? Are they commonly used?

Contingency fees are not permitted in Switzerland (Swiss Federal Supreme Court, BGer 2A.98/2006). The fee arrangement between a party and its lawyer may, however, contain some elements of a contingency fee (pactum de palmario). Only pure contingency fees are prohibited.

45 Third-party funding

Is third-party funding allowed in your jurisdiction?

Third-party litigation funding is possible, but not (yet) very popular. One of the reasons for that situation is the fact that an application for third-party funding requires extensive preparatory work for which, typically, the respective party's lawyer would have to bear the economic risk.

46 Fee scales

Are there fee scales lawyers must follow? Are there upper or lower limits for fees charged by lawyers in your jurisdiction?

As explained in question 41, the compensation for lawyers' fees awarded to the prevailing party is governed by a tariff. By contrast, the fee arrangement between a party and its lawyer is, in principle, free. Fee matters are, however, governed by cantonal law. Cantonal legislation may provide for upper limits and certain formalities to be followed.

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Thomas Weibel is a partner in VISCHER's dispute resolution team. He has a wealth of experience in complex disputes both before state courts and arbitral tribunals. His practice focuses on:

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