THE DISPUTE RESOLUTION REVIEW

Fourteenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

THE DISPUTE RESOLUTION REVIEW

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CONTENTS

PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 29 jurisdictions. The following chapters aim to equip the curious practitioner with an up-to-date and concise introduction to the framework for dispute resolution in each jurisdiction. Each chapter outlines the most significant legal and procedural developments of the past 12 months and the authors' views as to the big themes predicted for the year ahead. The publication will be useful to anyone facing disputes that cross international boundaries, which is ever more likely in a world that seems to be more interconnected with every passing year.

In compiling the 14th edition of *The Dispute Resolution Review*, I am reminded that despite the variety of legal systems captured in the publication, there is a clear common denominator. All systems are organised and operate to ensure parties have a means of resolving disputes that they cannot resolve themselves. I am reassured that, despite cultural, traditional and legal differences, the jurisdictions represented here are united by this common thread. It reflects an innate, international commitment to the rule of law and the rights of individuals. This edition will be a success if it assists parties to navigate different legal systems to achieve fair and efficient outcomes for whatever dispute they are facing.

Reflecting on the past year, I cannot help but add to the chorus of people who have noted how challenging, uncertain and tragic the events of the global pandemic have been, and continue to be (as I write this preface, the UK has returned recently to working from home in response to the Omicron wave). The law is a reflection of society, so naturally it has been shaped by these events. However, out of this tragedy has come some good. Our courts and tribunals have been quick to adopt new technology and processes to manage compounding caseloads and necessary new ways of working. As far as I can tell, this has been a global trend and – while there have undoubtedly been challenges – no court system has buckled and had to shut the door to justice. This is a tremendous achievement and a testament to the strength and resilience of courts around the world. It is encouraging to see that some of the emergency measures put in place to cope with the pandemic look set to become permanent features of dispute resolution in the year ahead. Here in my home jurisdiction, England and Wales, the use of remote hearings and electronic evidence, and the implementation of various pragmatic amendments to procedural rules, should make the justice system more accessible and efficient than it was pre-pandemic.

The year ahead, of course, brings new challenges, but also reasons for optimism. The fragility of our climate, and the pervasiveness of big data, will no doubt play more prominent roles in the legal sector's near future. Recent high-profile climate discussions such as COP26 have highlighted the growing urgency around curbing harm to the natural environment. The grassroots of this trend are evident as businesses and regulators set ambitious climate targets, and litigants face contractual, tortious and public law claims for climate-related matters. The

Okpabi litigation in the United Kingdom involving parent company tortious liability for an oil spill in Nigeria provides a prominent example of how the natural environment may play a greater role in our courtrooms in the year ahead.

I also suspect disputes relating to the use of data will be a theme in the legal sector in the near future. While the General Data Protection Regulation has set the basic framework for the protection of personal data, we are likely to see more claims relating to the use and abuse of personal data down the track. The United Kingdom Supreme Court in the *Lloyd v. Google* decision set out a path for group claimants to pursue collective actions in instances of unlawful processing of personal data (although the claimants in that matter, which involved the internet browsing history of 4 million Apple iPhone users, were ultimately unsuccessful). The global nature of big data suggests this trend will not be confined to the United Kingdom.

This 14th edition follows the pattern of previous editions, where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate a continually evolving legal landscape responsive to both global and local developments.

As always, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies can be found in Appendix 1 and highlight the wealth of experience and learning from which we are fortunate to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
Harpenden
January 2022

Chapter 23

SWITZERLAND

Karin Graf and Mladen Stojiljković[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Federal law regulates civil procedure in Switzerland. The organisation of the judiciary, however, is left to the 26 cantons. In addition, courts play an important role in interpreting and developing the law. After the first federal Swiss Code of Civil Procedure entered into force on 1 January 2011, numerous landmark cases have been rendered.

Legal scholars also fulfil an important function. They continuously reflect on the state of the law and legal science, and publish the results of their work in treatises and articles, which are collectively called 'the doctrine'. Courts take into account the work of legal scholars when deciding legal questions, particularly novel and complex ones.[2]

In civil and commercial litigation, federal law requires that each canton provide a first-level court and an appellate court, with free powers of review of both facts and law. The Swiss Federal Court then acts as the court of last resort with powers for full review of the law, but only a very limited review of the facts.

As an exception to the rule that parties must have two court levels in each canton, federal law requires that cantons specify a single court with exclusive jurisdiction within the canton over certain subject matters such as intellectual property and unfair competition. Federal law also gives cantons the option to create commercial courts with exclusive jurisdiction over commercial matters. Four cantons have made use of that option: Zurich, St Gallen, Aargau and Berne. Where a subject matter falls within the jurisdiction of such specialised commercial courts, the only option to appeal is directly to the Federal Court. Patent cases fall within the exclusive jurisdiction of the Federal Patent Court.

The most frequently used and popular alternative dispute resolution procedure is arbitration. The organisation of the arbitral procedure is left to the parties. Arbitrators have to be independent and impartial, treat the parties equally and grant them the right to be heard. State court intervention is limited to what is necessary to assist the arbitral tribunal and the parties in the taking of evidence, the appointment of arbitrators, or the enforcement of orders and awards. Arbitrators' decisions on the merits have the same effect as court judgments. Awards can be challenged directly before the Federal Court. The grounds for challenge are limited and are practically identical to those under Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In domestic arbitration, the scope of review is somewhat broader as it includes the clear violation of law or equity, and factual findings that are manifestly contrary to the record.

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1 Karin Graf is a partner and Mladen Stojiljković is counsel at Vischer Ltd.

2 See Article 1(3) Swiss Civil Code (instructing courts to follow the established doctrine when interpreting statutes).

II THE YEAR IN REVIEW

i Confirmation of an arbitral award granting damages in a currency not claimed

The Federal Court upheld an International Chamber of Commerce (ICC) arbitral award in which the arbitral tribunal had awarded Turkish investors compensation in Syrian lira even though the investors had requested damages in US dollars.[3] Had the award been made in US dollars, the value of the compensation at the time of the award would have been about five times higher.

The challenge was based on two grounds. The first was that, to award compensation so low as to be only a fraction of the loss actually incurred, violated public policy. The Federal Court explained that all relevant circumstances must be considered, including the investors' free choice to invest in Syria. It also played a role that a state is not necessarily liable in the same way in wartime as it is in times of peace, and that Syria was still in an exceptionally difficult situation. Against this background, the amount of compensation did not, in the assessment of the Federal Court, violate public policy.

The second ground was *ultra petita* (i.e., the argument that the tribunal had awarded something other than had been claimed). The Court conceded that, technically, Syrian lira was something other than US dollars. It found, however, that the investors lacked a legitimate interest in having the award set aside on that ground because they had not sufficiently shown that they would be able to obtain a more favourable decision if the award were annulled. The Federal Court assumed that, most likely, the arbitral tribunal would dismiss the claim in US dollars and insist on awarding Syrian lira. The arbitral tribunal was free, after all, to attribute the risk of currency loss to the investors and not to the state.

ii Facts of general notoriety

Facts of general notoriety need not be proven.[4] Sometimes, however, it is unclear to which facts this applies. Last year, the Federal Court rendered a number of judgments that shed more light on what qualifies as a fact of general notoriety. Two decisions deserve special mention.

On 30 June 2021, the Federal Court decided that the price of shares that are traded on a public stock exchange lacks notoriety and have to be alleged and proven.[5] The Court confirmed that not all information that can be found on the internet is a fact of general notoriety. It also needs to come from a generally reliable source. This was the case, for example, for information provided by government agencies, but not for the price of publicly traded stock.[6]

In another decision of 14 September 2021, the Federal Court confirmed its prior case law that certain facts established in prior proceedings between the same parties may also count as facts of general notoriety. The Federal Court may thus rely on them even if neither party has introduced them into the proceedings.[7]

3 Decision 4A_516/2020 of 8 April 2021.

4 Article 151 CCP.

5 Decision 5A_1048/2019 of 30 June 2021.

6 Decision 5A_1048/2019 of 30 June 2021, paragraph 3.6.6.

7 4A_122/2021 of 14 September 2021, paragraph 2.3.4.

iii Counterclaims for declarations of non-liability

Court costs in Switzerland depend on the amount in dispute, which can deter claimants from claiming the full amount. Claimants sometimes file only a partial claim hoping that this will reduce costs in two ways: first, by reducing the cost advance they have to pay; and second, by reducing the overall costs in the event that they lose. Respondents often react by filing counterclaims for declarations of non-liability. This takes away the second advantage claimants seek, namely to limit the scope of the dispute. A complicating factor is that the law requires disputes worth 30,000 Swiss francs or more to be subject to the ordinary procedure, while those worth less are subject to the simplified procedure. This scenario has led to a considerable number of controversial decisions in recent years.

On 22 January 2021, the Federal Court confirmed its case law that, if the claimant files a partial claim that due to its value (below 30,000 Swiss francs) is subject to the simplified procedure, the respondent may impose the ordinary procedure if he or she files a counterclaim for a declaration of non-liability that exceeds 30,000 Swiss francs.[8] This weakens claimants' ability to keep costs of a litigation low. The Swiss legislator is re-evaluating the rules relating to this scenario in the ongoing revision of the CCP.

iv Dismissal of partial claims bars re-litigating the whole claim

On 23 March 2021, the Federal Court decided that when a partial claim is dismissed, the dismissal has res judicata effect for the entire claim. The background was as follows: a foundation had sued a bank for payment of 100,000 Swiss francs. The bank argued that a different court had already dismissed an identical claim and that the new action was barred by res judicata. The Federal Court agreed. It explained that if a claimant makes a partial claim, he or she impliedly argues that the claim is potentially higher. If the partial claim is dismissed, the court determines not only the non-existence of the partial claim, but also the allegation that the claim could be higher.

III COURT PROCEDURE

i Overview of court procedure

The procedures used in civil cases are set forth in the Swiss Code of Civil Procedure (CCP).[9] The organisation of the courts and conciliation authorities remains with the cantons.[10]

Swiss civil procedure is governed by the principle that the parties are in control of the proceedings. They decide, inter alia, what claims to bring, if and when to file a lawsuit, and when to accept a claim. The parties are also primarily responsible for adducing the facts required to adjudicate the case. They have to make specific allegations of fact, submit evidence and request the taking of evidence.

The pleading standard is quite strict. Facts have to be alleged with particularity and specificity. This presents particular difficulties in complex commercial cases where expert testimony is required to prove a fact, such as a construction defect or a lost profit claim based

8 DFT 147 (2020) III 172.

9 Swiss Code of Civil Procedure of 19 December 2008.

10 Article 3 CCP.

on a discounted cash flow method. The courts dismiss a significant number of cases for failure to meet the pleading standard. They generally provide only limited assistance and guidance and, in any event, only to parties not represented by lawyers.

The standard of proof is generally high. Courts typically apply the same standard of proof in civil cases as they do in criminal cases. They generally require a claimant to prove each fact beyond reasonable doubt. Only where such a high standard cannot be expected, for example when proving causation in tort law, courts are satisfied with the lesser standard of high probability.

The burden of proof is generally borne by the party who is relying on a fact for its claim or defence.[11] Thus, the claimant typically bears the burden of proof for all elements of his or her claim. Respondents are only expected to declare in clear terms whether they admit or dispute the claimant's factual allegations. However, they are not expected to explain why they dispute them. Bare denials are admissible as long as they specifically refer to each fact alleged by the counterparty (general denials at the beginning of a written submission would be considered inadmissible). Courts are reluctant to impose on respondents a duty to give reasons for disputing the claimant's allegations out of concern that this could amount to an unjustified reversal of the burden of proof. It is, accordingly, not unheard of for respondents to present no affirmative defence but to limit themselves to a denial of the claimant's allegations.

Proceedings are divided into three phases: a written phase where parties exchange initial pleadings, an evidentiary phase in which the court takes evidence, and the judgment phase in which the court deliberates and delivers the judgment.

The proceedings rely heavily on written submissions and documentary evidence. Witness testimony is often distrusted and is rarely given great weight (this tends to be different in criminal proceedings). Courts can decide to hold preparatory hearings and take certain evidence at any time during the proceedings. The main hearing itself, if there is one, is often limited to a small number of key witnesses, if any, and the parties' closing arguments. Some courts routinely ask the parties to waive the right to the main hearing as they find it of limited use. Where the case is ripe for decision without an evidentiary phase, the courts will issue a judgment based only on the written pleadings.

ii Procedures and time frames

In civil cases, there are three types of procedures: ordinary, summary and simplified.

The rules for ordinary proceedings will apply unless the law provides otherwise.[12] In most cases in ordinary proceedings, with certain exceptions, the claimant will first have to file a conciliation request before a conciliation authority. The parties have a duty to appear before the conciliator in person or, if they are corporations, send directors or duly authorised representatives. Parties can be excused from appearing in person under certain circumstances.

A considerable number of cases settles at this stage. By way of example, in Zurich in 2020, about 65 per cent of all cases filed with the conciliation authority settled. Conciliators can, but are not obligated to, issue binding judgments in cases where the amount in dispute is 2,000 Swiss francs or less. If the conciliation fails, the claimant will have three months to file a claim with the competent court.

After a claim is filed, the court will ask the claimant to pay a cost advance. The exact amount depends on the canton and its local rules. All cantons make costs dependent on the

11 Article 8 Swiss Civil Code.

12 Article 219 CCP.

amount in dispute (where the dispute has no monetary value, different rules apply). As a rule of thumb, for a claim worth 100,000 Swiss francs, the court costs will be 10 to 15 per cent of the value of the claim in most cantons. The costs increase not linearly but digressively with the amount in dispute. Costs are ultimately borne by the losing party.

Court costs in Switzerland are relatively high and are sometimes perceived as harmful barriers to justice, particularly for parties who are not much above the threshold of being considered indigent. Only indigent parties qualify for state-funded legal aid. The Swiss Federal Council has recognised the problem and proposed changes to the CCP, among which the reduction of cost barriers is a key element (see Section VII).

In practice, each side has an opportunity to make two written submissions. Thereafter, the court determines whether the case should proceed to the evidentiary phase or if it can be dealt with without any taking of evidence.

It is customary for Swiss courts to invite parties to confidential court-assisted settlement discussions at an early stage in the proceedings. This typically occurs between the first and second rounds of written submissions. As part of such settlement discussions, the court gives the parties its preliminary views about the strengths and weaknesses of each side's case and indicates what it would regard as a reasonable range for a possible settlement. Many cases do settle as a result. By way of example, in the Commercial Court of Zurich, more than 50 per cent of all filed cases eventually settle.

The duration of proceedings depends on numerous factors, including the factual and legal complexity of the case, and the size and experience of the court. In many cases, however, parties can expect the first level court to issue a judgment within two to three years. On appeal, the cantonal courts typically decide within one to two years. The Federal Court decides a majority of its cases within six to nine months.

The summary procedure applies only in the cases specifically mentioned in the CCP.[13] In practice, the most frequent types of cases subject to this procedure are interim relief, attachment of assets and certain court decisions in connection with fast-track debt collection proceedings. The difference to ordinary proceedings is that each party only has one written submission, that generally only documentary evidence is allowed and that time limits tend to be short.

The simplified procedure essentially applies to small claims, which are defined as claims worth less than 30,000 Swiss francs, as well as in some other narrowly defined cases.[14] The Swiss legislator's intention was to simplify the procedure to an extent that parties would not necessarily need a lawyer. This type of procedure is less formal and can be conducted entirely orally.

Interim relief is available in all cases where the claimant can show a credible case on the merits (*fumus boni iuris*) and a risk of irreparable harm if the requested order for interim relief is not issued (*periculum in mora*).[15] In particularly urgent cases, relief will be granted *ex parte*, without hearing the other party, but by affording the affected party the right to be heard soon thereafter.

Special rules apply to interim relief for monetary claims (attachment).[16] A court-ordered attachment serves as a lien on the debtor's property and thus prohibits the debtor from

13 Article 249-251a CCP.

14 Article 243 CCP.

15 Article 261 CCP.

16 Articles 271–280 Debt Collection and Bankruptcy Act (DCBA).

disposing of his or her assets. It increases the likelihood of recovery on the claim. To obtain an attachment order, the creditor must identify specific property belonging to the debtor (such as bank accounts, real estate, claims, etc.), and show a ground for attachment. The ground for attachment most commonly invoked is a binding and enforceable judgment or arbitral award (post-judgment attachment).[17] Pre-judgment attachments are more difficult to obtain. They typically require prima facie evidence of a meritorious claim, a debtor's domicile outside of Switzerland and a sufficient connection to Switzerland.[18] Additional requirements may apply where the defendant is a state that can invoke sovereign immunity.

iii Class actions

Swiss law does not have a class action procedure. Rather, it provides for a patchwork of group-litigation devices that serve more or less similar purposes, but are far less effective. This includes joinder of claims, consolidation of proceedings, and the right of certain organisations to sue on behalf of their members under certain narrowly defined circumstances.[19] In certain shareholder lawsuits, the judgment will have effects not only on the shareholders who filed the lawsuit but also on those who did not.[20] The law of collective investment schemes allows courts to appoint a representative for the investors of an open-ended collective investment scheme who intend to sue for damages.[21]

In practice, litigants have used further group-litigation devices. These include test cases (an agreement by parties to accept the result of the test case as binding in other cases), assignment of claims to one claimant, creation of ad hoc associations for the purpose of litigating claims and appointment of the same legal counsel for all similarly situated parties. Regarding the proposed new law to improve collective redress procedures, see Section VII.

iv Representation in proceedings

In Switzerland, all litigants – whether natural persons or legal entities – have a right to self-representation. Legal entities are self-represented by their directors, officers or other duly authorised employees. There is one notable exception where representation by a lawyer is mandatory, and it concerns certain types of criminal proceedings.[22] In practice, in all but the simplest cases, most litigants are represented by lawyers.

v Service out of the jurisdiction

Articles 136–141 CCP govern the rules on service of documents in domestic civil proceedings. A court order, summons or submission by a party will be served by registered mail or another form permitting confirmation of receipt. Where service of process is impossible or would lead to exceptional inconvenience, the Swiss court may resort to service by publication.[23] The relevant information can be published either in the official gazette of the relevant canton or in the Swiss Official Gazette of Commerce.

17 Article 271(1)(6) DCBA.

18 Article 271(1)(4) DCBA.

19 See Article 71 CCP (joinder), Article 125 CCP (consolidation); Article 89 CCP (organisations' right to sue on behalf of members).

20 See, e.g., Article 105 of the Swiss Merger Act.

21 Article 86(1) of the Federal Act on Collective Investment Schemes.

22 Article 130 Swiss Criminal Procedure Code.

23 Article 141 CCP.

Where the litigation takes place outside of Switzerland, service of process on respondents in Switzerland has to take place via legal assistance channels, governed either by the Hague Service Convention,[24] or, where the former does not apply, by the 1954 Convention on Civil Procedure.[25] Attempts to service process on a Swiss respondent directly and in circumvention of legal assistance channels may result in criminal liability under Article 271 of the Swiss Criminal Code.[26]

Where the litigation takes place in Switzerland and the respondent resides abroad, service of process will be governed by the relevant treaty with the respective state. The Swiss Federal Office of Justice has issued helpful practical guidelines on international judicial assistance in civil matters.[27] It has also published a legal assistance guide with information on the basic formalities that apply in each foreign state.[28]

Swiss courts may require a party domiciled abroad to appoint an agent for acceptance of service.[29] If a respondent fails to appoint such an agent, the courts may resort to service by publication.[30]

vi Enforcement of foreign judgments

Unless a treaty applies, the recognition and enforcement of foreign judgments will be governed by the Swiss Private International Law Act (PILA). There are three general requirements for the recognition and enforcement of foreign judgments: the foreign court's jurisdiction must have been established from a Swiss perspective; the foreign decision must be final; and there must not be a ground to refuse recognition and enforcement.[31] The first requirement in particular can present an insurmountable hurdle in practice if the respondent is domiciled in Switzerland and no provision of the PILA expressly recognises a foreign court's jurisdiction.[32]

The most notable multilateral treaty governing the recognition of foreign judgments is the Lugano Convention.[33] It applies to judgments rendered in Member States of the European Union. The main benefit of the Lugano Convention is that, with certain exceptions, the enforcement state cannot second-guess the jurisdiction of the court that rendered a judgment.[34]

24 Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 15 November1965 (Hague Service Convention).

25 Convention of 1 March 1954 on civil procedure (1954 Convention on Civil Procedure); see Article 11(4) Swiss Private International Law Act (PILA).

26 Article 271 Swiss Criminal Code (illegal activities on behalf of a foreign state).

27 Federal Office of Justice, International Judicial Assistance in Civil Matters – Guidelines, Third Edition, 2013 (https://www.bj.admin.ch/bj/en/home/sicherheit/rechtshilfe/zivilsachen.html).

28 https://www.rhf.admin.ch/rhf/de/home/rechtshilfefuehrer.html.

29 Article 140 CCP.

30 Article 141(1)(c) CCP.

31 Article 25 PILA.

32 See Article 26(a) PILA.

33 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (Lugano Convention).

34 See Article 35 Lugano Convention.

vii Assistance to foreign courts

The Federal Office of Justice acts as the central authority for incoming requests for international judicial assistance in civil or commercial matters involving service of process or evidence under several treaties.

The main treaties in the area of international legal assistance in civil matters are the Hague Service Convention, the Hague Evidence Convention, the 1954 Convention on Civil Procedure and the Access to Justice Convention. In addition, there are numerous bilateral judicial assistance treaties and multilateral treaties with legal assistance provisions (particularly in the areas of family, inheritance and bankruptcy laws). In cases where no treaty applies, Swiss authorities will apply the 1954 Convention on Civil Procedure as having *erga omnes* effect.[35]

Acts of legal assistance will be carried out in accordance with Swiss law.[36] Foreign forms of procedure may also be followed, or taken into consideration on application of the requesting authorities where otherwise the act of assistance would not be recognised by the foreign authority and provided there are no important countervailing reasons relating to the person involved.[37] If a form of procedure under Swiss law is not recognised abroad and, as a result, a right worthy of protection would not be upheld there, the Swiss courts or authorities may issue documents or take a person's oath pursuant to the form required by the foreign law.[38]

Under the Hague Evidence Convention, the foreign court transmits a letter of request to the central authority in Switzerland.[39] The request will be executed by the authorities of the canton where the assistance is needed. The documents showing that the requested assistance was executed are then sent back by the central authority to the requesting authority by the same channel that was used by the latter.[40]

viii Access to court files

According to Article 30(3) of the Swiss Federal Constitution and Article 54(1) CCP, court hearings and the delivery of judgments shall be in public, unless the law provides otherwise.[41] The right to public hearings and judgments can be limited to protect a compelling public interest or an overriding private interest of one of the parties.[42] Proceedings in the area of family law are not public.[43]

There is no legal obligation for the cantonal and federal courts to publish their court dockets (i.e., to inform the public about all filed and ongoing cases). Most courts publish lists of upcoming hearings to the public if this is not excluded due to special circumstances. Such lists typically provide minimal information: place and time of the hearing, and a generic indication of the subject matter. In most commercial disputes, the subject matter

35 Article 11a(4) PILA.

36 Article 11a PILA.

37 Article 11a(2) PILA.

38 Article 11a(3) PILA.

39 Articles 2–4 Hague Evidence Convention.

40 Article 13 Hague Evidence Convention.

41 Article 30(3) Swiss Federal Constitution ('Unless the law provides otherwise, court hearings and the delivery of judgments shall be in public.').

42 Article 54(3) CCP.

43 Article 54(3) CCP.

will merely say 'claim'. The lists rarely, if ever, disclose the names of the parties to the dispute. It can, therefore, be quite difficult for the public to obtain specific information about ongoing proceedings.

The public may attend court hearings and observe the parties' oral pleadings, but it has no right to access the parties' written submissions and documentary evidence. This applies equally to ongoing proceedings as well as proceedings that have been completed.

In civil cases, federal law provides that judgments shall be made public.[44] However, it does not define the manner in which this has to occur. The Federal Court, and increasingly cantonal courts, publish most of their judgments online in anonymised form.

ix Litigation funding

In 2004, the Federal Court issued a landmark decision holding that a ban on all forms of third-party funding would be unconstitutional.[45] In 2015, the Court held that lawyers have a duty to advise their clients about the existence of third-party funding options.[46] While these developments have helped raise awareness about third-party funding, it is still not very common in the Swiss courts.

The law does not define the circumstances under which a third party may fund a litigation. Parties and funders are free to define the terms of the funding agreement within the general limits of contract law. Most notably, the funder cannot enter into an agreement that results in excessive gain that qualifies as usury. A usurious contract makes the funding agreement voidable and may result in criminal liability.[47] Third-party funding is not a regulated industry.

Third-party funding is to be distinguished from two other forms of litigation funding that are more common in Switzerland. The first is legal expenses insurance, which covers attorneys' fees and legal fees in the case of a dispute the insurance covers. Such insurance is offered only to private individuals, and not to legal entities. The second is for indigent parties to exercise their right to state legal aid. This typically includes coverage of attorneys' fees (at the courts' tariff rates, which are typically far below market rates) and a waiver of court fees.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Freedom of Movement for Lawyers Act of 23 June 2000 harmonised the professional rules for lawyers in Switzerland. Article 12(c) of that Act provides that lawyers have a duty to avoid 'any conflict between the interest of their clients and the people with whom they are in a business or private relationship'.[48] In addition, Article 12(a) of the Act provides that the lawyer has a duty to act diligently and conscientiously. The Act, however, does not define the contours of these duties. The legislator has left this task largely to the courts.

If a conflict is apparent before the lawyer takes on a client's matter, the lawyer must decline to act. If the conflict becomes apparent after the lawyer has taken on the matter, he or

44 Article 43(1) CCP.

45 Decision of the Federal Court (DFT) 141 I (2004) 223.

46 Decision 2C_814/2014 of 22 January 2015, para. 4.3.1.

47 Article 21 Code of Obligations; Article 157 Swiss Criminal Code.

48 Article 12(c) Freedom of Movement for Lawyers Act.

she must withdraw. For the purposes of conflicts of interest, all lawyers who practice within a single firm are treated as a unit.[49] In other words, if one lawyer in a law firm is conflicted, all other lawyers are conflicted as well.

If an attorney fails to handle conflicts of interest properly, this can have the following consequences: professional discipline; civil liability for breach of contract (malpractice); and disqualification as counsel in the proceedings. The Federal Court decided in 2021 that courts are obligated to assess whether a conflict of interest is present and to disqualify legal counsel who fail to comply with their professional duties relating to conflicts of interest.[50]

Conflicts can be caused by the lawyers' own personal interests that are adverse to their client's interests. Lawyers may also not represent a client whose interests are directly adverse to a current client. Acting against former clients may also cause a conflict of interest if there is a concrete risk that the lawyer may use confidential information to the former client's detriment.

Chinese walls are considered an ineffective tool for avoiding conflicts of interests. In 2019, the Federal Court decided that even non-partners switching law firms may conflict the new law firm if, as part of their prior employment, they had access to information that they could use to the detriment of their former firm's client. As Chinese walls are ineffective, the Federal Court found that the only way of properly handling this conflict of interest was for the new law firm to withdraw from the representation.[51]

ii Money laundering, proceeds of crime and funds related to terrorism

The Federal Act on Combating Money Laundering and Terrorism Financing in the Financial Sector of 10 October 1997 (AMLA) imposes on financial intermediaries certain responsibilities in relation to money laundering.[52] This includes the duty to verify the identity of the client and the ultimate beneficial owner, and the reasons behind commercial transactions. It also obliges financial intermediaries to report suspicions of money laundering. Lawyers are not subject to the AMLA as long as they do not act as financial intermediaries. They are also expressly exempt from any reporting duty to the extent their activity is subject to professional secrecy under Article 321 of the Swiss Criminal Code.[53]

It is, however, possible for lawyers to commit the criminal offence of money laundering. The Swiss Criminal Code defines money laundering as carrying out an act to frustrate the identification, tracing or confiscation of assets that the offender knows, or has reason to believe, originate from a felony or aggravated tax offence.[54] The attorney's professional secrecy does not apply if the attorney him or herself is accused of money laundering.

Attorneys who believe that client money may be of dubious origin remain bound by their professional secrecy and may not disclose confidential client information to authorities. They may, however, and in some cases will be required to, withdraw from the representation.

49 See, e.g., Administrative Court of Zurich, VB.2019.00195, 2 September 2021, paragraph 2.6.

50 See Decision 5A_485/2020 of 25 March 2021.

51 See, e.g., DFT 145 (2019) IV 218, paragraph 2.4; Administrative Court of Zurich, VB.2019.00195, 2 September 2021, paragraph 2.6.

52 Article 2 AMLA.

53 Article 9(2) AMLA.

54 Article 305bis Swiss Criminal Code.

iii Data protection

The Swiss Data Protection Act of 19 June 1992 (DPA) regulates the processing of personal data (i.e., information that is related to an identifiable person). It applies to data of both physical persons and legal entities. There are several key principles that apply to the processing of data. The most important are transparency, lawfulness, accuracy, proportionality and good faith. Individuals whose data is processed have certain rights, including the right to request information on a controller's processing of their personal data, to correct errors in the data, to object against the processing or to ask a court for compensation in the case of unlawful processing. The Federal Data Protection and Information Commissioner has a website with many helpful resources covering areas such as, inter alia, international data transfer and a list of countries with adequate and inadequate levels of data protection.[55] The European General Data Protection Regulation (GDPR) may apply in cases where there is a sufficient nexus to Europe.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The CCP provides that the court may compel parties and non-parties to testify or produce evidence.[56] The law accords parties and non-parties certain privileges, such as exemptions from the duty to testify and produce evidence.

Document production is, however, of very limited practical relevance in Swiss legal practice. A claimant is compelled to build his or her case on documents that are available to him or her, since a document production phase follows only after the pleading phase has been completed.

Parties can refuse testimony or the production of evidence on two grounds, namely, if they, or someone close to them, would bear risk of criminal prosecution or civil liability, or if they would be criminally liable for breach of professional secrecy under Article 321 of the Swiss Criminal Code.[57] If a party refuses to testify or produce evidence without justification, the court may draw adverse inferences.

Non-parties may refuse to testify or produce evidence if they have family ties with one of the parties or some other close relationship.[58] The law provides several further privileges, including the attorney–client privilege as defined in scope by the professional secrecy obligation under Article 321 of the Swiss Criminal Code.[59] A non-party's unjust refusal to testify or produce evidence is subject to sanctions, which may include a fine of up to 1,000 Swiss francs, punishment under Article 292 of the Swiss Criminal Court (non-compliance with a court order), forced execution or imposition of costs.[60]

Attorney–client privilege under Article 163(1)(b) and 166(1)(b) CCP can be invoked not only by attorneys licensed in Switzerland but also by individuals with an equivalent licence from a foreign jurisdiction. The privilege applies only to the provision of legal services but not to ancillary services such as accounting, trust services and asset management.

55 https://www.edoeb.admin.ch/edoeb/en/home/data-protection.html.
56 Articles 160–167 CCP.
57 Article 163(1) CCP.
58 Article 165 CCP.
59 Article 166 CCP.
60 Article 167 CCP.

Under current law, in-house lawyers cannot invoke attorney–client privilege; only independent attorneys in private practice can do so. The Swiss Federal Council, however, has proposed changing the law in this respect (see Section VII).

ii Production of documents

There is no US-style pre-trial discovery mechanism in Switzerland. Even though a Swiss court can compel parties and third parties to produce certain evidence, it can do so only under very narrowly defined circumstances.

Before a Swiss court will compel the production of evidence, typically, the following five prerequisites need to be fulfilled:

a the requested document is necessary to prove a fact that has been alleged with sufficient detail;
b the fact is disputed;
c the fact is material to the outcome of the dispute;
d the requested document is described in sufficient detail; and
e the document is in the possession, custody or control of the requested party.

Some Swiss courts are stricter than others in applying these requirements. However, most courts will reject requests for broad categories of documents (e.g., all relevant correspondence) without specific reference to a disputed fact, and label them as an illegitimate fishing expedition.

The right to compel the production of documents extends not only to physical documents, but also to electronically stored information. Where the requested documents are in the possession of a third party and located outside of Switzerland, the Swiss court will have to use international mutual legal assistance.

If a party fails to produce documents in violation of a court order, the court may draw adverse inferences. If a non-party fails to produce documents, the court may impose sanctions and execute the order using law enforcement. When courts decide whether a failure to produce was justified, they take into account all relevant circumstances, including whether a privilege applies, or whether appropriate steps were taken to find a document or make accessible electronically stored information.

In practice, parties increasingly conduct internal reviews of electronically stored information, not because they might be compelled to produce it to the counterparty, but because it is in their self-interest to investigate the matter and preserve relevant evidence.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In Switzerland, the most frequently used alternative dispute resolution procedure is arbitration, while mediation and expert determinations are also available.

ii Arbitration

Switzerland is one of the world's premier destinations for international arbitration proceedings. By way of illustration, in 2020, Geneva and Zurich were among the five most frequently selected cities for arbitration cases administered by the ICC (together with Paris, London and New York). In 2020, Switzerland hosted well over 200 arbitration proceedings.[61]

Swiss law distinguishes between international arbitration (governed by Chapter 12 of the PILA), and domestic arbitration (governed by Title 3 of the CCP). An arbitration will be domestic if, at the time of contracting, both parties were domiciled in Switzerland; in all other cases, the arbitration will be international. The most notable differences between the two are in the definition of arbitrability (the definition in domestic arbitration is narrower) and the grounds for annulment of arbitral awards (domestic arbitration permits somewhat more extensive review). Swiss law permits parties to opt out of the regime for domestic arbitration in favour of international arbitration, and vice versa. Where all parties are non-Swiss, they may waive any judicial review of arbitral awards.[62]

Switzerland is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and regularly enforces foreign arbitral awards. Swiss courts are known for their arbitration-friendly and pro-enforcement approach.

2021 was a particularly eventful year for international arbitration in Switzerland. Several important arbitration-related reforms were passed: the much-anticipated reform of the Swiss law of international arbitration (i.e., Chapter 12 of the PILA), the revision of the Swiss Rules of International Arbitration and the transition of the Swiss Chambers' Arbitration Institution into the new Swiss Arbitration Centre.

The new law of international arbitration maintains all the key features that have made arbitration in Switzerland successful and attractive to international parties and achieves incremental improvements in selected areas. The key features of the new law include the possibility to make English-language submissions to the Federal Court; more broadly available court assistance; and clarifications, modernisations and codification of case law in certain areas.

The revised Swiss Rules of International Arbitration entered into force on 1 June 2021. The key changes relate to multi-party and multi-contract proceedings as well as amendments aiming to streamline arbitration proceedings through paperless filings and remote hearings. The new rules also address data protection and cybersecurity.

In addition, the Swiss Arbitration Centre endorsed the arbitration toolbox, developed by the Swiss Arbitration Association.[63] The toolbox is an innovative website that guides users through the entire arbitration process by way of a questionnaire, offering tools and solutions to questions that may arise in the course of arbitration proceedings.

61 In 2020, it hosted 135 ICC proceedings and 83 Swiss Arbitration Centre proceedings, not counting ad hoc arbitration.

62 Article 192 PILA.

63 https://toolbox-int.arbitration-ch.org/toolbox/home.

iii Mediation

Mediation is independent from the court system and entirely based on contract. The CCP expressly provides that the parties may opt to replace the mandatory conciliation proceeding before a claim can be filed in court with a private mediation.[64] In practice, parties rarely make use of this option. Mediation is quite common in family law and inheritance matters, but less frequent in commercial disputes.

In a landmark case in 2016, the Federal Court held that failure to comply with a mandatory pre-arbitral mediation requirement may result in a stay of the arbitration until the mediation requirement is fulfilled.[65] The Federal Court has been less willing, however, to stay litigation proceedings on the same ground, explaining that the CCP does not mention non-compliance with a mediation requirement as a permissible ground to stay proceedings.[66]

iv Other forms of alternative dispute resolution

Another alternative dispute resolution mechanism found in practice is expert determination by which an expert makes a determination about certain facts that the parties accept as binding.[67] Expert determination clauses are particularly frequent in purchase price adjustment mechanisms in M&A agreements, but they can also be found in, inter alia, shareholders' agreements and joint venture agreements. There are no formal rules governing an expert determination other than what is provided in the parties' contract.

Parties sometimes combine several forms of alternative dispute resolution. Multi-tiered dispute resolution clauses are quite frequent in practice, where the first tier consists of a cooling-off period, settlement negotiations or mediation, and the second tier consists of binding arbitration. Hybrid mechanisms such as arbitration-mediation-arbitration or mediation-arbitration have also been suggested. The mediator and the arbitrator should not be the same person.

VII OUTLOOK AND CONCLUSIONS

A lot is happening in the area of dispute resolution in Switzerland. Lawmakers are working on several important legislative projects.

The legislator is working on a revision of the CCP. One of the main goals of the revision is the reduction of cost barriers. Court costs should not be so high as to deter parties from pursuing meritorious claims. The proposed solution is to limit the courts' ability to ask for a cost advance to half of the expected overall costs (but not the overall costs as such). In addition, rather than the parties the cantons should have to collect compensation for court costs. Several other proposals are being discussed. This includes, inter alia, the introduction of in-house counsel privilege, the admissibility of party-appointed expert reports and the use of English as the language of proceedings.

As part of the current revision of the CCP, a proposal is on the table to allow cantons to create international commercial courts. A precondition for this is the ability to conduct

64 Articles 213–218 CCP.

65 DFT 142 (2016) III 296.

66 Decision 4A_132/2020 of 5 May 2020.

67 Article 189(1) CCP.

proceedings entirely in English. Several jurisdictions in the European Union, in particular in Germany, France and the Netherlands, already have chambers for international commercial disputes. The legislative process in Switzerland will likely take several more years.

On 10 December 2021, the Swiss Federal Council proposed a new law to strengthen collective redress procedures.[68] Following the mandatory consultation period, which showed strong resistance by a significant minority, the Federal Council decided to pursue incremental rather than radical improvements. The goal is to expand the ability of associations to sue on behalf of their members, a device that already exists but had been very narrowly defined. The ability to sue should not be limited to violations of personality rights, but extend to any private law claim. Associations must be non-profit, exist for at least 12 months, authorised in their by-laws to represent their members and be independent from the respondent. Affected individuals should be able to opt in. The new law also includes rules on collective settlements, which would require court approval before becoming effective. It is still unknown when the proposed law will come before parliament.

A revised Data Protection Act is expected to enter into force in the course of 2022. The old law came into force in 1992. It was high time to amend the law and address the new environment (e-commerce, social media, etc.), technological advances (digitalisation, artificial intelligence, etc.) and international standards. In 2018, the EU set a standard with the GDPR. The new Data Protection Act seeks to establish Switzerland as a jurisdiction with a data protection regime equal to that of the EU. The basic principles of data processing, however, will remain the same, with one exception: the new Data Protection Act will no longer apply to data about legal entities. In addition, violations are subject to fines of up to 250,000 Swiss francs (previously only up to 10,000 Swiss francs). It is expected that the new law might lead to an increase in data and privacy enforcement and, accordingly, litigation.

68 https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-86344.html.

Appendix 1

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