GAR KNOW HOW LITIGATION

Switzerland

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Overview

1 Court system

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

The organisation is governed by cantonal law (article 3 et seq of the Swiss Civil Procedure Code, CPC). Generally, each canton has a conciliation authority and a first and second instance court. Decisions of the last cantonal instance are appealable to the Federal Supreme Court if certain requirements are met (article 72 of the Federal Supreme Court Act (FSCA)).

In principle, civil courts are competent for all civil law disputes. As the cantons are free to organise the jurisdiction ratione materiae, some cantons have established first instance courts that only hear specific types of civil disputes (eg, for matters of employment or rental law).

For certain complex matters – inter alia, IP law disputes (with the exception of disputes relating to certain aspects of patents for which the Swiss Federal Patent Court has exclusive jurisdiction, see below), cartel law disputes, disputes on the use of a business name – there is, as provided for by statute, the jurisdiction of a sole cantonal court (article 5 CPC). Certain cantons, inter alia, Zurich, established a commercial court that is the sole cantonal instance for commercial disputes when the requirements provided for in article 6 CPC are fulfilled. In cases where only the defendant is registered in a commercial register, the plaintiff may choose between the commercial and the ordinary court.

In Switzerland, cantonal courts have jurisdiction also concerning federal law with the exception of certain patent law disputes for which there exists exclusive jurisdiction of the Swiss Federal Patent Court.

Courts are independent from other branches of power such as the executive and the legislature.

As a matter of principle, there is no legal requirement to follow precedents (no stare decisis). Yet, as a matter of fact, cantonal courts tend to abide by the precedents of the Federal Supreme Court to avoid the risk of their decisions being overturned. A binding force of a higher court's decision exists if the decision is remanded to the lower court. Finally, a court decision may be binding in the context of res iudicata (ie, in any subsequent proceedings between the same parties concerning the same subject matter).

There are no juries in Switzerland.

2 The legal profession

Describe the general organisation of the legal profession.

The admission as a lawyer and the professional duties of lawyers are governed by the Federal Act on the Freedom of Movement for Lawyers (FAFML).

To represent parties before any court in Switzerland, lawyers must be registered with a cantonal register of lawyers. For such registration, lawyers must fulfil several requirements. As to the professional requirements, after successfully completing their studies in law at a Swiss university (under certain conditions also at a university abroad), lawyers must complete an internship of at least one year and must pass the cantonal bar exam (article 7 FAFML). Lawyers registered in a cantonal register are permitted to represent parties before any Swiss court. Personal requirements include the absence of a criminal conviction for acts incompatible with the legal profession, the absence of a deed of loss against them and the capacity of practising law independently (article 8 FAFML). Further, it is a lawyer's professional duty to have professional liability insurance in place, with a limit of liability of at least one million Swiss francs.

In Switzerland, there are no two categories of lawyers as in the UK where barristers are distinguished from solicitors.

Lawyers from EU/EFTA member states may temporarily represent clients before courts in Switzerland. While they cannot be registered in a cantonal register of lawyers, they have to adhere to the rules of professional conduct as well as to professional secrecy (articles 25, 12 and 13 FAFML). The permanent representation by lawyers from EU/EFTA member states before courts under their original professional title requires the registration with a cantonal supervisory authority over lawyers. The lawyers have to register with the supervisory authority of the canton in which they have a business address, and they must provide evidence of their admission in their home state (articles 27 et seqq FAFML). Finally, lawyers from member states of the EU/EFTA may be registered in the cantonal register for lawyers if they have passed a proficiency test or have been registered as lawyers active under their original professional title during at least three years and have effectively and regularly been active in the area of Swiss law or – if they have been active less than three years – have shown their proficiency to the (cantonal) examining commission (articles 30 et seq FAFML).

Specialised plaintiff or defendant bars are not known in Switzerland.

3 General

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

Civil courts are well organised and functioning. However, proceedings are usually quite expensive, which often discourages people from filing suit. Thus, in many cases, parties try to find an amicable settlement.

Access to justice is supported by the government. Several amendments to the CPC are currently discussed. Among others, the reform of the CPC is intended to facilitate access to court (eg, by reducing the advance on costs). Furthermore, it aims at strengthening the conciliation procedure and ensuring better coordination of proceedings. Additional contemplated revision points include the introduction of a legal privilege for in-house counsel and the possibility to allow court proceedings to be held in English. Further envisaged revisions include the enhancement of collective legal redress.

The caseload of the cantonal courts as well as of the Federal Supreme Court is high and increasing.

Typical "professional" or activist plaintiffs are not common in Switzerland. However, associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals may bring an action in their own name for a violation of the personality of the members of such group (article 89 CPC). Though, this instrument is hardly used in Switzerland (BSK ZPO-Klaus, 3rd ed. 2017, article 89 CPC, paragraph 9).

Jurisdiction

4 Jurisdiction and venue

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

The criteria for determining the geographic jurisdiction (venue) of a court depends on whether there is a matter of domestic or international litigation. In the first case, the venue is to be determined on the basis of the CPC. In international matters, the competent forum is to be determined on the basis of applicable treaties, such as the Lugano Convention (LugC) or the Federal Act on Private International Law (PILA). In a domestic and international context, as a matter of principle, litigation can be initiated at the seat or domicile of the defendant (article 10 CPC, article 2 PILA, article 2 LugC). Depending on the matter, alternative fora, such as the place of performance in a contractual dispute or the place of the harmful event in tort cases, are available.

Where no mandatory limitations apply, parties may agree upon a specific forum before or during the proceedings (article 17 CPC, article 5 PILA, article 23 LugC). In the ambit of the PILA, a forum agreement may only relate to financial disputes. A forum agreement shall be null and void if one party, in an abusive manner, is deprived of a Swiss venue (article 5 PILA). Moreover, the selected Swiss court may decline jurisdiction if none of the parties is domiciled, resident or established in the relevant canton and Swiss law is not applicable to the case (BSK IPRG-Grolimund/Bachofner, article 5 PILA, paragraph 50).

Jurisdiction ratione materiae is to be determined by cantonal law and, in principle, is not eligible to party selection, but exceptions exist (eg, under certain conditions for the plaintiff regarding the choice between the competence of a commercial or ordinary court).

5 Forum shopping

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

Securing a forum in Switzerland has become easier on the basis of a recent Federal Supreme Court decision. According to that decision, a negative declaratory action is admitted where the plaintiff has an appreciable interest, worthy of protection, in the immediate determination of a right.

This decision makes it easier for plaintiffs to file a negative declaratory action in Switzerland as the interest of securing a convenient venue is accepted as a sufficient interest in a negative declaratory action if the other party threatens to initiate proceedings abroad. Of course, the other requirements for a Swiss court to have jurisdiction over the dispute will also have to be fulfilled (DFT 144 III 175, c. 5.4).

The tactical considerations regarding a Swiss venue that come into play in a given scenario are manifold and may, among other things, include the following: duration of the proceedings; the applicable substantive law; the absence of "pretrial" discovery or disclosure; etc.

6 Pendency in another forum

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

For an action or application to be decided, the same matter cannot be the subject of pending proceedings (lis pendens, article 59, paragraph, 2 lit. d CPC, article 27 LugC, article 9 PILA). A matter is the same if the parties and the subject matter are identical.

In the case of lis pendens, a court will first stay the proceedings and once it is clear that the dispute is already pending before another court, declare the claim as non-admissible (BSK ZPO-Gehri, article 59 CPC, paragraph 17). In international matters, in the ambit of the LugC, the Swiss court will stay the proceedings if it was seised after the foreign court and if the matter in dispute as well as the parties are identical (article 27 LugC). Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction. In international cases not within the scope of the LugC, article 9 PILA has the same conditions, but additionally requires for a stay that a foreign decision be expected within a reasonable period of time and be recognisable in Switzerland. Once a foreign decision eligible for recognition is submitted to the Swiss court, it shall dismiss the action.

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, including in interim proceedings?

If a court is seised and confronted with an arbitration agreement, it will review its existence, validity and scope of application.

The Federal Supreme Court adopts two approaches. If the seat of arbitration is in Switzerland, the state court only has to proceed with a prima facie review of the agreement (article 7 PILA; DFT 138 III 681, c. 3.2 et seq). Conversely, where the arbitration has its seat abroad, the state court can fully review its jurisdiction (article II(3) NY Convention; Girsberger/Voser, International Arbitration – Comparative and Swiss Perspectives, 2016, 3rd ed, paragraph 509).

In both cases, the state court is not obliged to act ex officio. It will only refer the parties to arbitration if one of them so requests. Without any objection from a party (although it could raise such objection), the state court has jurisdiction on the basis of the assumption that such party has accepted the court's jurisdiction (Girsberger/Voser, International Arbitration – Comparative and Swiss Perspectives, 2016, 3rd ed., paragraph 507).

In domestic arbitration, article 61 CPC stipulates a prima facie examination. If the parties concluded an arbitration agreement, the seised court shall decline jurisdiction unless the defendant has made an appearance without reservation or where the court determines that the agreement is manifestly invalid or unenforceable or where the arbitral tribunal cannot be constituted for reasons that are manifestly attributable to the defendant. Yet, the preliminary examination whether the dispute exists and is arbitrable, must be examined by the state court with a full (unlimited) standard of review (DFT 140 III 367, c. 2.2.3).

A peculiarity concerns interim proceedings. For international arbitration, article 183 PILA does not establish an exclusive competence of the arbitral tribunal. Therefore, except for the parties' deviating agreement, state courts – in addition to the arbitral tribunal – also have jurisdiction to order interim measures (BSK IPRG-Mabillard, article 183 PILA, paragraph 5).

8 Judicial review of arbitral awards on jurisdiction

May courts in your country review arbitral awards on jurisdiction?

An arbitral award can be set aside if the arbitral tribunal wrongly accepted or declined jurisdiction (article 393 lit. b CPC, article 190, paragraph 2 lit. b PILA).

9 Anti-suit injunctions

Are anti-suit injunctions available?

Anti-suit injunctions are not available in Switzerland within the scope of application of the LugC. Whether anti-suit injunctions are allowed outside of the scope of application of the LugC has not yet been decided. However, the legal doctrine tends to consider anti-suit injunctions as not availing (DFT 138 III 304, c. 5.3.1).

10 Sovereign immunity

Which entities are immune from being sued in your jurisdiction? In what circumstances? In what circumstances can creditors enforce a court judgment or arbitral award against a sovereign or a state entity?

The question of sovereign immunity is linked to the question of court jurisdiction. If sovereign immunity exists, the court shall declare the action as non-admissible.

Sovereign immunity is a respected principle in Switzerland. However, it only applies to acts performing whilst exercising sovereign authority (acta iure imperii) and not to acts which were performed by the state as a private person (acta iure gestionis; DFT 106 Ia 142, c. 3a). Foreign states are only exempted from domestic jurisdiction for acta iure imperii (eg, expropriation or confiscation). Conversely, no immunity exists for acta iure gestionis (ie, for all acts and omissions that, by their nature, are not exclusively reserved to the state (eg, contracts for work and services, supply contracts, etc)). If a foreign state has been convicted for an acta iure gestionis conduct, a further distinction as to the enforcement of the judgment must be made. Although it is principally possible to enforce a judgment against a foreign state, the assets in question must not serve the performance of governmental functions (Staehelin/Staehelin/Grolimund/Bachofner, Zivilprozessrecht, 3rd ed., Zurich 2019, p. 87 et seq).

The existence of an acta iure gestionis alone, however, is not sufficient for suing a state in Switzerland. Rather, a sufficient connection to Switzerland is required (eg, if the obligation from which the claims are derived was incurred in Switzerland or if it is to be performed here or if the foreign state has at least performed acts by which it has established a place of performance in Switzerland). Yet, it is not sufficient that the assets of the foreign state be located in Switzerland or that the claim be awarded by an arbitral tribunal in Switzerland (DFT 134 III 122, c. 5.2.2; 144 III 411, c. 6.3.2).

For a judgment against a state to be enforced in Switzerland, it must first be recognised by a Swiss court. Then, the creditor will proceed with the enforcement which – in case of monetary claims – is governed by the Swiss Debt Enforcement and Bankruptcy Act (DEBA). An effective measure is the initiation of an attachment proceeding (article 271 et seqq DEBA). A creditor can request the judge to attach a certain state's assets.

The state concerned may also waive its sovereign immunity (Staehelin /Staehelin/Grolimund/Bachofner, Zivilprozessrecht, 3rd ed., Zurich 2019, p. 87).

Foreign state banks may enjoy sovereign immunity in respect of assets serving sovereign functions. Foreign companies held by the state (eg, airlines) do not enjoy sovereign immunity. The legal situation with international organisations is regulated by agreements (Staehelin /Staehelin/Grolimund/Bachofner, Zivilprozessrecht, 3rd ed., Zurich 2019, p. 88 et seq). However, the Federal Supreme Court stated that international organisations benefit from immunity for all their actions (DFT 136 III 379, c. 4.3.1).

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?

In principle – subject to the exceptions in article 198 CPC (eg, claims for which the Commercial Court has jurisdiction) – a conciliation proceeding with the conciliation authority must be conducted before any action is brought (article 197 et seqq. CPC). If the conciliation attempt fails, the conciliation authority issues the authorisation to proceed based on which the plaintiff is entitled to file the action in court within three months. The initiation of civil proceedings (by filing an action or an attempt at conciliation) triggers lis pendens of the action (article 62 CPC).

As to the different types of available proceedings, a distinction is made between (i) ordinary proceedings (articles 219–242 CPC), (ii) simplified proceedings (articles 243–247 CPC) and (iii) summary proceedings (articles 248–270 CPC).

The general rule in civil litigation is that the parties have to substantiate the facts and to proffer evidence as well as contest the counterparty's allegations. Further, as matter of principle, the court shall not grant relief in excess of, or other than, what plaintiff claimed (non ultra petita principle, article 58 CPC, paragraph 1. There are, however, certain statutory exceptions where there is an ex officio establishment of facts and taking of evidence by the court (eg, in the area of children law).

In principle, the parties do not have to allege or proof the law; the court will apply it ex officio (iura novit curia principle, article 57 CPC; for details see question 30).

After the initiation of proceedings, the court is responsible for the direction of the proceedings and issues the required procedural orders. It may also attempt to achieve an agreement between the parties at any time (article 124 CPC). Apart from compliance with the procedural orders of the court, the parties do not have to undertake anything to further the proceedings.

They may, however, submit requests concerning the course of the proceedings (BSK ZPO- Gschwend, article 124 CPC, paragraph 1).

12 Statement of claim

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

The requirements for filing a claim vary depending on the type of proceedings:

- Ordinary proceedings: The statement of claim has to contain (i) the designation of the parties and their representatives, if any, (ii) the requests for relief, (iii) a statement of the value in dispute, (iv) the allegations of fact, (v) notice of the evidence offered for each allegation of fact and (vi) the date and signature (article 221 paragraph 1 CPC). Thus, the statement of claim requires detailed substantiation. A legal qualification is, however, not required.
- Simplified proceedings: The statement of claim to initiate simplified proceedings does not have to contain the grounds for the claim, but only a description of the matter in dispute. Furthermore, it can also be filed verbally on record before the court (article 244 CPC).
- Summary proceedings: The application for summary proceedings has to meet the same requirements as the statement of claim in ordinary proceedings (article 219 CPC). In particular, the application requires a detailed factual substantiation. In simple or urgent cases, the application may be filed orally on record (article 252, paragraph 2 CPC).

13 Statement of defence

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

In ordinary proceedings, the statement of defence must meet the same requirements as regards content and form like the statement of claim. The defendant must state which of the factual allegations of the plaintiff are accepted and which are disputed (article 222 CPC).

In simplified proceedings, the defendant has to file a written response if the statement of claim contains the grounds for the claim (article 245 CPC, paragraph 2). The requirements for such written response are lower than those for the statement of defence (article 222 CPC). A less complete statement (eg, without detailed contestations of the plaintiff's factual allegations or without detailed attribution of the means of evidence to the defendant's own allegations) should also be sufficient (Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, 2016, 2nd ed., paragraph 11.160). If the plaintiff did not include the grounds for its claim, the court will serve the defendant with the statement of claim and summon the parties to a hearing without the defendant having to file a written response (article 245 CPC, paragraph 1).

In summary proceedings, the court gives the opponent the opportunity to comment verbally or in writing on the applicant's application (article 253 CPC). The court decides by way of a procedural order whether an oral or written statement is to be made unless a verbal hearing is provided for by law. As regards content, the opponent's statement shall meet the same requirements as the statement of defence in ordinary proceedings (Kaufmann, ZPO Schweizerische Zivilprozessordnung, 2016, 2nd ed., article 253 CPC, paragraph 22).

14 Further briefs and submissions

What are the rules regarding further briefs and submissions?

In ordinary and simplified proceedings, parties can submit their statement of claim and statement of defence. The court shall order a second exchange of written submissions (reply and rejoinder) if the circumstances so require (article 225 CPC). If there was neither a second round of written submissions nor an instruction hearing, new facts and new evidence may be submitted at the beginning of the main hearing (article 229, paragraph 2 CPC). In contrast, the parties principally only have the opportunity to comment once on the subject matter in summary proceedings. In the context of these comments, new facts and evidence can be submitted without restrictions.

In addition, according to the Federal Supreme Court's precedents and based on due process considerations, the parties have the right to respond to any submissions of the other party in any types of proceedings regardless of whether the counterparty's submissions contained new facts or arguments and regardless of whether the submission is relevant for the court's decision (DFT 4A_215/2014, c. 2.1). However, the reply to the counterparty's submission must be submitted without delay (DFT 132 I 100, c. 3.3.4) (ie, the reaction to the counterparty's submission must be received by the court no later than 10 days after receipt of the counterparty's submission (DFT 5D_81/2015, c. 2.3.4)).

After the closure of file, new facts and evidence are only admissible if they qualify as "real" nova (ie, those facts and evidence that came into existence after the exchange of written submissions or after the last instruction hearing) or improper nova (ie, those facts and evidence that existed before the close of the exchange of written submissions or before the last instruction hearing, but could not have been submitted despite reasonable diligence) (article 229 CPC).

Prior to the closure of file, the statement of claim can be amended if the new or amended claim is subject to the same type of proceedings, and either a factual connection exists between the new or amended claim and the original claim or the opposing party consents to it (article 227, paragraph 1 CPC).

Amicus briefs are not admitted in Switzerland.

15 Publicity

To what degree are civil proceedings made public?

Hearings and any oral passing of judgement are – with certain exceptions – open to the public (article 54 CPC). Whether TV cameras or photographers are allowed in court, is subject to cantonal law.

Furthermore, judgments of the court have to be made accessible to the public – usually in anonymous form (Sutter-Sommer/Seiler, in: Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), 2016, 3rd ed., article 54 CPC, paragraph 13). In contrast, as a matter of principle, the court file is not public.

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?

The court may at any time attempt to achieve an agreement between the parties (article 124, paragraph 3 CPC). As a matter of fact, courts often try to conclude the proceedings by convincing the parties to settle. For this purpose, the court may hold an instruction hearing (article 226 CPC) during which the court will often provide an interim assessment of the factual or legal issues in dispute.

17 Mediation

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

Litigation is – with the exception of summary proceedings and certain other proceedings – mandatorily preceded by an attempt at conciliation (article 197 CPC). Upon request of the parties, the conciliation proceedings can be replaced by mediation. Mediation proceedings have the advantage of confidentiality and that the statements made by the parties during mediation proceedings may not be used in court proceedings (article 216 CPC).

During court proceedings, the court can recommend mediation to the parties or the parties can make a joint request for mediation at any time (article 214 CPC).

Interim relief

18 Forms of interim relief

What are the forms of emergency or interim relief?

Pursuant to the CPC courts can order any interim measure suitable to prevent imminent harm, in particular (article 262 CPC):

- an injunction;
- an order to remedy an unlawful situation;
- an order to a register authority or to a third party;
- performance in kind; or
- the payment of a sum of money in the cases provided by the law.

Furthermore, an attachment of assets is possible.

In the case of urgency and in the case of risk that the enforcement of a measure may be frustrated, interim relief without prior hearing the opposite party (ex parte) may be available (article 265 CPC).

19 Obtaining relief

What must a petitioner show to obtain interim relief?

The applicant must credibly show the following: (i) a right to which he is entitled has been violated or a violation is anticipated, (ii) such violation possibly causes him harm that (iii) cannot easily be remedied (article 261 CPC). Furthermore, (iv) a certain urgency is required and (v) the measure must be proportionate (BSK ZPO-Sprecher, article 261 CPC, paragraph 10). In addition, the court may make the order of precautionary measures conditional on the payment of a security by the applicant (article 264 CPC).

Article 265 CPC is a specific provision on precautionary measures. In cases of special urgency, and, in particular, where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party (ex parte) (BSK ZPO-Sprecher, article 265 CPC, paragraph 9).

For an attachment, the applicant will have to credibly show that he has an unsecured and due claim against the debtor, that there is a ground for an attachment as provided for in the DEBA, and that there are assets owned by the debtor (article 272 DEBA). The debtor has to credibly show the location of the debtor's assets.

Decisions

20 Types of decisions

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

In civil matters, a court may render final or interim decisions. Subject to further appeal to a higher instance, the final decision (article 236 CPC) concludes the proceedings and can either be a decision not to consider the merits or a decision on the merits. A final decision may also be given on only part of the claim (partial decision).

The court may issue an interim decision if 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 CPC, paragraph 1). An interim decision does not conclude the proceedings, but rather assesses a preliminary question. Such a question can be of a substantive or procedural nature (Kriech, DIKE-Komm-ZPO, article 237 CPC, paragraph 12). An interim decision must be challenged separately and may not be challenged later together with the final decision (article 237 CPC, paragraph 2).

Procedural rulings (article 124 CPC) aim to regulate the conduct of proceedings (eg, ruling on evidence and extensions of limitation periods set by the court).

In general, depending on the parties' claims, the court can render a decision for performance whereby the defendant is ordered to do, refrain from doing or tolerate something, a declaratory judgment, thereby holding that a right or legal relationship exists or does not exist or a decision regarding the creation, modification or dissolution of a specific right or legal relationship.

21 Timing of decisions

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

The court renders a final decision after the proceedings were carried out properly and when the facts of the case have been sufficiently clarified to enable it to rule on the requests for relief with sufficient legal justification (BSK ZPO-Steck/Brunner, article 236 CPC, paragraph 12 et seq).

An interim decision may be rendered by the court if 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. However, like the final decision, an interim decision can only be rendered once the full proceedings have been completed. Simplification of the proceedings are only possible with the agreement of the parties.

A comparable course of action as a US-style motion to dismiss is the court's option to limit, on its own motion or upon request of a party, the proceedings with regard to certain preliminary factual or legal issues or with regard to certain prayers for relief (article 125 CPC). Such issues may include, for instance, the question of the statute of limitations, standing to sue, the timeliness of the purchaser's notice to the seller specifying the nature of the lack of conformity or also procedural aspects such as res iudicata or jurisdiction (OFK ZPO-Jenny/Jenny, article 125 CPC, paragraph 3).

22 Default judgment
Under which circumstances will a default judgment be rendered?

A party is in default if it fails to accomplish a procedural act within the set limitation period or does not appear when summoned to appear (article 147, paragraph 1 CPC). In the case of default, the proceedings shall continue without the act defaulted unless the law provides otherwise. However, the court shall draw the parties' attention to the consequences of default (article 147, paragraphs 2 and 3 CPC).

However, if the statement of defence is not filed within the deadline, the court shall allow the defendant a short period of grace. If the statement of defence is not filed by the end of the period of grace, the court shall make a final decision where it is in a position to make a decision. Otherwise, it shall summon the parties to the main hearing (article 223 CPC).

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

The duration of legal proceedings depends on the complexity of the case and the workload of the court concerned. As a rule, civil proceedings at first instance hardly ever take less than one year (Girsberger/Peter, Aussergerichtliche Konfliktlösung, 2019, paragraph 474). A statistic of the High Court of the Canton of Zurich of 2019 shows that 75 per cent of first instance civil proceedings before the single judge are finished within six months. Before the collegial court, 50 per cent of cases are finished within 12 months.

Parties

24 Third parties – joinder, third-party notice, intervenors
How can third parties become involved in proceedings?

As a matter of principle, the substitution of a party is permitted only with the consent of all the previous parties, namely the opposing party (article 83, paragraph 4 CPC; Göksu, DIKE-Komm-ZPO, article 237, paragraph 3 CPC). Special legal provisions on the legal succession remain reserved. If the object is disposed of in the course of the proceedings, the acquirer may take up the proceedings in place of the alienating party (article 83 CPC, paragraph 1).

Under the CPC, the following options for third parties to join the proceedings are available:

- Principal intervention (article 73 CPC): A person claiming to have a better right in the object of a dispute may bring a claim directly against both parties. This claim must be brought in the first instance court already seised with the matter. Principal intervention is only admissible in the first instance proceedings.
- Accessory intervention (article 74 CPC): A person showing a credible legal interest in having a pending dispute decided in favour of one of the parties may intervene at any time as an accessory party. The intervenor may carry out any procedural acts in support of the principal party. However, the intervenor's procedural acts shall not be taken into consideration if they contravene those of the principal party (article 76 CPC). With regard to the effect of the intervention, generally a result that is unfavourable to the principal party is effective against the intervenor, as well. Exceptions to that rule apply where the status of the proceedings at the moment of intervention or the acts or omissions of the principal party have prevented the intervenor from making use of offensive or defensive measures; or the principal party has failed, wilfully or through gross negligence, to make use of offensive or defensive measures of which the intervenor was not aware (article 77 CPC).
- Third-party notice (article 78 CPC): A party may notify a third party of the dispute where, if unsuccessful, it might take recourse against that third party or be taken recourse against. Hence, to notify a third party, a reason that may give rise to a recourse proceeding must exist (BSK ZPO-Frei, article 78 CPC, paragraph 4). The third party may, without further conditions, intervene in favour of the notifying principal party or proceed in lieu of the notifying principal party, with the consent of the latter. If the notified third party refuses to intervene or does not answer the notification, the proceedings shall continue without considering the third party. With regards to the effects of the third-party notice article 80 CPC refers to article 77 CPC (see above).
- Third-party action (article 81 CPC): The notifying party may assert the rights it believes to have against the notified third party in case it is unsuccessful in the main proceedings. Since the third-party action is rather complex, it is admissible only in the ordinary proceedings (article 81 CPC, paragraph 3).

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?

Whether the court will take the evidence or whether it will rely on the parties, depends on whether the principle of production of evidence or the principle of ex officio investigation (article 55 CPC) is applicable.

Generally, it is up to the parties to present the facts of the dispute to the court. The parties must make sufficiently substantiated assertions and prove them. The court may found its decision only on allegations made by the parties. A limitation to this principle is the court's duty to enquire. If a party's submissions is unclear, contradictory, ambiguous or manifestly incomplete, the court shall give the opportunity to clarify or complete it by asking appropriate questions (article 56 CPC). The principle of ex officio investigation applies only in cases determined by law (article 55, paragraph 2 CPC). A court may, in the context of the free appraisal of the evidence, reject the parties' requests for taking of evidence if it has already established the relevant facts by other means of evidence or if it considers the evidence offered to be unfit from the outset.

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?

Parties to civil proceedings have the duty to cooperate in taking of evidence and in producing physical records if they are not privileged (article 160, paragraph 1 lit. b CPC). A party may request the court to oblige the counterparty to produce a specific record. Such production requests have to be precise and relate to specific documents. Fishing expeditions are forbidden in Switzerland (BSK ZPO-Schmid, article 158 CPC, paragraph 4b).

This must, however, be distinguished from any obligations to provide information under substantive law. For example, at the request of the insurer, the insured must provide any information that is useful to determine the circumstances under which the insured event occurred or to determine the consequences of the event (article 39, paragraph 1 of the Federal Insurance Contract Act).

According to article 163 CPC, there are certain grounds on which a party may refuse its cooperation. Where, however, a party refuses to cooperate without a valid reason, the court shall take this into account when appraising the evidence (adverse inference, article 164 CPC).

27 Witnesses of fact

Please describe the key characteristics of witness evidence in your jurisdiction. Is witness preparation allowed?

Any person who is not a party may testify on matters that he has directly witnessed (article 169 CPC). As the court is in charge of the proceedings, it will interrogate the witness (article 172 CPC). A party may request that the court ask the witness additional questions, or that the party be allowed to ask such questions with the consent of the court (article 173 CPC). Witnesses are required to tell the truth (article 171, paragraph 1 CPC).

In civil litigation proceedings, witness preparation is not allowed (ie, there are no witness statements). Even the mere contact between a lawyer and a witness may cause problems. A lawyer trying to influence a witness violates his professional duties, and criminal liability may be engaged. However, contacting a (potential) witness is admissible where this is in the interest of the own client, does not interfere with the investigation of the facts and where there is a material necessity (DFT 136 II 551, c. 3.2.2). If these conditions are not met and the witness is actually influenced, the lawyer – in addition to disciplinary measures – may also face criminal charges.

28 Expert witnesses

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

The court may obtain an opinion from one or more experts upon the request of a party or ex officio (article 183, paragraph 1 CPC). Only experts who were appointed by the court can provide an expert opinion. However, the court shall give the parties the opportunity to ask for explanations or to put additional questions (article 187 paragraph 4 CPC) if they concern substantial facts and are capable of providing evidence (DFT 123 III 485, c. 1). The court shall instruct the expert and shall submit the relevant questions to him, either in writing or orally at the hearing (article 185, paragraph 1 CPC) and shall give the parties the

opportunity to respond to the questions to be put to the expert and to propose that they be modified or supplemented (article 185, paragraph 2 CPC). In contrast, a party appointed expert has the same "evidentiary" value as a mere party allegation (BSK ZPO-Dolge, article 183 CPC paragraph 17). Experts are obliged to state the truth and, if they do not, may face criminal liability (article 184 CPC).

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?

Any person who is not a party may testify on matters that he or she has directly witnessed (article 196 CPC). The management bodies of a legal entity that is party to proceedings, are interrogated as a party (article 159 CPC). Conversely, normal employees may be interrogated as witnesses.

In cases where parties or third persons legitimately refuse to cooperate, the court may not infer that the alleged fact is proven (article 162 CPC). In contrast, if a third party refuses to cooperate without justification, the court may impose a fine up to CHF 1'000, threaten sanctions under article 292 of the Swiss Penal Code, order the use of compulsory measures or charge the third party the costs caused by the refusal (article 167 CPC).

30 Foreign law and documentation

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

According to the principle iura novit curia, courts shall apply the law ex officio (BSK-IPRG Mächler-Erne/Wolf-Mettier, article 16 PILA, paragraph 5). However, the parties can be obliged to provide a certain degree of support and in pecuniary claims, the burden of establishing the foreign law may be imposed on the parties. Finally, Swiss law is applied if the content of foreign law cannot be established (article 16, paragraph 2 PILA). In simple cases, the court may establish foreign law by own research.

If a party intends to submit documents in a foreign language, it normally has to provide a translation thereof. In practice, there is often no translation of English documents, at least where the relevant court members understand English and where no party requests a translation. Conversely, in front of the Federal Supreme Court, the parties and the court can renounce having the foreign-language documentation translated (article 54, paragraph 3 FSCA) (OFK ZPO-Jenny/Jenny, article 129, CPC paragraph 7 et seq).

31 Standard of proof

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

In civil litigation, the standard of proof is typically full proof. This is the case where the court is convinced that the alleged facts are correct. However, there are a few circumstances where "substantiation by prima facie evidence" or "preponderant probability" are sufficient.

"Substantiation by prima facie evidence" is commonly used in debt enforcement proceedings (eg, attachment orders) and in applications for interim measures.

"Preponderant probability" is sufficient where full proof is not possible or not reasonable and where there is a "necessity for evidence". Preponderant probability is for example sufficient for the proof of the natural causal connection in liability law (DFT 4A_220/2010, c. 8.2.1).

Appeals

32 Options for appeal

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

Basically, each canton has two court instances. In those cases, the CPC provides for the following appellate remedies at cantonal level: an appeal (article 308 CPC et seqq) and an objection (article 319 CPC et seqq). The last cantonal decision, as long as no exception applies, can be appealed to the Federal Supreme Court provided that the respective appeal requirements are met (article 72 FSCA).

In any case, a party may request the court that has decided as a final instance to review the final decision where certain grounds for review exist (so-called revision), for example, where a party subsequently discovers significant facts or decisive

evidence that could not have been submitted in the earlier proceedings and did not come into existence after the decision or where criminal proceedings have established that the decision was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one has been convicted by the criminal court (article 328 CPC, article 121 FSCA).

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

Depending on the applicable remedy, the court has a different standard of review. While an appeal can be filed on grounds of incorrect application of the law or of incorrect establishment of the facts (article 310 CPC), an objection can only be filed on grounds of incorrect application of the law or of obviously incorrect establishment of the facts (article 320 CPC).

In appeal proceedings, new facts and new evidence are admitted only if they are submitted immediately and if they could not have been submitted before. Conversely, in objection proceedings, new applications, new facts and new evidence are, in principle, not admissible (article 326 CPC).

Before the Federal Supreme Court, the standard of review is limited to the application of the law and the obviously incorrect establishment of the facts (article 97 FSCA). New facts and new evidence are considered only if the decision of the last cantonal instance gave reason for filing them (article 99 FSCA).

34 Duration of appellate proceedings
How long does it usually take to obtain an appellate decision?

The duration depends on several factors (ie, the subject of the decision, its length and complexity as well as the workload of the court). Appellate proceedings may take one to two years or in complex cases even longer. In 2019, the appeal proceedings before the Federal Supreme Court took between 147 and 235 days.

Special proceedings

35 Class actions
Are class actions available?

Class actions are not available in Switzerland, and work-arounds have been used in practice (such as assignments). However, a possibility for collective legal redress is the group action (article 89 CPC), which is different to the class action as the plaintiff organisation may not seek restitution. However, it is rarely used in practice (see question 3).

The situation of collective legal redress was assessed in Switzerland and the government concluded that the current legal framework does not sufficiently enable collective redress. Therefore, a revision of the CPC is planned. So far, no preliminary draft has been published.

36 Derivative actions
Are derivative actions available?

In corporate law, individual shareholders are entitled to sue for losses caused to the company against the wrongfully acting directors under certain conditions (article 756 CO). In addition, creditors of the damaged company are entitled to request for compensation of the company under certain conditions (article 757 CO).

In a bankruptcy context, each creditor is entitled to demand the assignment of those legal claims of the bankrupt estate that all creditors have waived (article 260 DEBA).

37 Fast-track proceedings
Are fast-track proceedings available?

Simplified and summary proceedings are faster. Civil claims in simplified proceedings are subject to less formalistic rules. The statement of claim is slightly simplified and a statement of the ground for the claim is not necessary (article 244 CPC). Moreover, the matter should be concluded at the first hearing (article 246 CPC). Summary proceedings are also faster. Among others, in principle, evidence is only allowed in the form of physical records (article 254 CPC) and shorter deadlines apply.

38 Foreign-language proceedings
Is it possible to conduct proceedings in a foreign language?

The proceedings are held in the official language of the canton in which the case is heard (article 129 CPC).

Effects of judgment and enforcement

39 Effects of a judgment
What legal effects does a judgment have?

Normally, decisions are binding on the parties involved in the proceedings (regarding lis pendens and res iudicata). However, depending on the subject of the decision, they can also have an effect on third parties.

Although the decision only enjoys res iudicata effect with regard to its ruling (ie, to the operative part of the decision), its scope may often only be determined by taking into account its considerations, in particular in the case of a dismissal of an action or in case of a set off (DFT 5A_51/2013, c. 3.3.).

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

The enforcement procedure is governed in article 335 CPC et seqq. However, decisions relating to the payment of money or provision of security are enforced according to the provisions of the DEBA (article 335, paragraph 2 CPC). Where there is a specific ground for attachment, a money creditor may initiate attachments proceedings. Also, debt enforcement proceedings may be initiated by a summons to pay, issued by a creditor by submitting a debt enforcement request to the debt enforcement and bankruptcy office.

Where the court making the decision has already ordered the necessary enforcement measures (article 236 CPC, paragraph 3), the decision may be directly enforced (article 337 CPC). Conversely, in cases where the direct enforcement may not be possible, a request for enforcement must be submitted to the enforcement court (article 338 CPC). The enforcement court enjoys an array of enforcement measures where the decision provides for an obligation to act, to refrain from acting or to tolerate something: for example, to issue a threat of criminal penalty under article 292 of the Swiss Penal Code; to impose a disciplinary fine not exceeding 5,000 Swiss francs; to impose a disciplinary fine not exceeding 1,000 Swiss francs for each day of non-compliance; to order a compulsory measure such as taking away a movable item or vacating immovable property; or to order performance by a third party (article 343 CPC).

41 Enforcement of foreign judgments
Under what circumstances will a foreign judgment be enforced in your jurisdiction?

The enforcement of a foreign decision requires its recognition. The procedure varies depending on whether the decision originates from a LugC-state. The procedure under the LugC is often much faster and simpler (Furrer/Girsberger/Muller-Chen, Internationales Privatrecht, 4th ed., 2019, paragraph 31 et seqq).

Both under the LugC as under the PILA, a recognised decision can basically be enforced in two ways:

- by initiating an exequatur proceeding: this proceeding has two phases, first the requesting party will request the foreign court to sign a declaration of enforceability (article 38 et seqq LugC, article 28 et seq PILA) and then proceed with the enforcement proceeding in Switzerland; or
- by directly initiating a debt enforcement proceeding for money judgments without requesting for an exequatur decision. In this case, the enforceability of the foreign judgment is decided on a preliminary basis during the enforcement proceeding.

A foreign decision may not be recognised where there is a ground for refusal (article 27 PILA, article 34 LugC), including, but not limited to, a manifest violation of the Swiss Public Order or res iudicata of a prior decision. Final decisions (ie, which according to the deciding foreign court have not been challenged or can no longer be challenged) that are recognised in Switzerland pursuant to the relevant provisions of the LugC or any other applicable treaty or the PILA and that are not monetary claims will be enforced in accordance with the provisions of the CPC.

Costs

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

Generally, costs are charged to the unsuccessful party (article 106, paragraph 1 CPC), which has to pay for the court costs, the own party costs as well as the party costs of the successful party.

In cases where no party is entirely successful, the costs are allocated in accordance with the outcome of the case (article 106, paragraph 1 CPC). Under special circumstances, the court may allocate the costs at its own discretion (article 107 CPC).

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?

A party is entitled to legal aid (ie, exemption from advances, security payments and court costs, as well as – if necessary – the appointment and compensation of a legal agent) if he or she does not have sufficient financial resources and his or her case does not seem devoid of any chances of success (article 117 CPC).

However, legal aid does not relieve the party concerned from paying party costs to the opposing party.

Legal aid exists in principle only for natural persons. Legal aid is only granted to legal entities if the sole asset of the company is the subject of the dispute and if the beneficial owner of the company is also insolvent (BSK ZPO-Rüegg/Rüegg, article 117 CPC, paragraph 3).

Another possibility for parties to get proceedings financed by a third party is the conclusion of legal protection insurance.

44 Contingency fees
Are contingency fee arrangements permissible? Are they commonly used?

In Switzerland, lawyers are not allowed to charge pure contingency fees. However, a contingency fee element may be taken into account to the extent that the outcome of the proceedings is not the only criterion to determine the fees. A fixed fee must be agreed and cover the lawyer's expenses and secure a small profit (Fellmann, Anwaltsrecht, Bern 2017, 2nd ed, paragraph 444 et seq).

This restriction, however, only applies in the case of proceedings before a court or an authority; in other disputed proceedings, a pure contingency fee may be agreed (Fellmann, Anwaltsrecht, Bern 2017, 2nd ed, paragraph 449).

45 Third-party funding
Is third-party funding allowed in your jurisdiction?

Third-party funding is allowed, but rare. In those circumstances, the conduct of the case remains a matter for the parties.

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

Because of the freedom of contract, lawyers can arrange their fee with their clients.

However, a limitation with regard to the possible compensation of parties is provided for in article 96 CPC. Pursuant to this, the cantons set the tariffs for the procedural costs, such as court's and party's costs. In this regard, a submitted statement of costs may be reduced by the court if it seems to be disproportionate compared to the subject matter of the dispute.

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Practice areas
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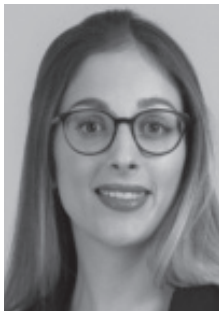

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