



PRE-TRIAL COSTS IN SWITZERLAND

Assessing the risks

With upfront costs on the rise, potential litigants will lean heavily on the judgement of their lawyers



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The Federal Tribunal of Switzerland, the country's highest court, recently dispelled the uncertainty that hung around the question of costs in connection with the precautionary taking of evidence.

This procedural instrument, introduced on a federal level with the new Civil Procedure Code (CPC) in 2011, entitles a party to apply to the court to secure evidence that could later be lost, where a statutory rule provides for the taking of such evidence or where an applicant can demonstrate a legitimate interest.

The intention of the measure was to enable potential litigants to assess their trial chances ahead of having to lodge a full court action. The hope was also to discourage potential claimants with weak cases, with the result of alleviating the courts' workloads.

Who pays?

One unresolved question had been which party would have to bear the court costs of such pre-trial proceedings and whether the opposing party would be entitled to party costs. In its decision of 6 January 2014 the Federal Tribunal addressed this issue.

It found that the general principle of allocation of costs according to the degree of a party's success in the outcome of the case (art.106 para.1 CPC) was not suited to the proceedings concerning the precautionary taking of evidence since these proceedings did not end in an outcome with a definite winner and loser. Rather, the pre-trial proceedings formed the basis for a later ordinary trial with a final judgment.

For this reason the court found that the rule of art.107 CPC was more suited to such proceedings. This provision allows that under special circumstances, where the general cost allocation rule would result in an inequitable outcome, the court can allocate costs at its own discretion.

The Federal Tribunal noted that the majority of scholars supported the notion that a party forced into the pre-trial proceedings should not have to bear the court costs at this stage of proceedings (under the caveat that the party might have to bear these costs if it lost in the main trial).

Further, the court accepted that a party being drawn into pre-trial proceedings should be entitled to party costs on condition that the court could reallocate such costs when adjudging the main claim.

It based its view on the fact that a counterparty could not recognise an application for the provisional taking of evidence and thus could not avoid the proceedings, since the court established whether

the preconditions for such an application were fulfilled ex officio.

Since the proceedings were conducted in the interest of the applicant, the court concluded that the rule of art.107 CPC offered a better solution. Allocating the costs to the applicant also ensured the potential claimant sat with the costs if he decided not to pursue the claim after the precautionary proceedings.

On the other hand, burdening the opposing party with the costs would be unsatisfactory since this would force the opposing party to go to court and file a negative declaratory action. This would run contrary to the legislative intent of avoiding unnecessary court cases.

The court thus held that party costs should be awarded to the opposing party.

In similar vein, the Federal Tribunal concluded in a different case that an applicant in art.158 CPC proceedings was not entitled to free proceedings or a state-funded attorney.

Despite the constitutional right of parties to access the courts and state support if they are not in a position to finance a valid claim or defend a frivolous action, the court again distinguished between the legal nature of the ordinary court proceedings and pre-trial proceedings.

The Federal Tribunal on 10 April 2014 found that, since the proceedings regarding the precautionary taking of evidence did not form part of proceedings that could have as a consequence the loss of a material legal right by the applicant, the constitutional right to free proceedings did not extend to such cases. The precautionary evidence proceedings aim to obtain factual evidence on the basis of which a claimant can assess whether or not he wishes to pursue his claim.

Only in the main trial, where the evidence secured by means of pre-trial proceedings would be adduced, could a party be granted the benefit of free proceedings and a state-funded legal representative.

Upfront advice

One consequence of the jurisprudence by the Federal Tribunal is that potential litigants must advance significant costs before being able to assess their chances of securing a court victory during the pre-trial phase of proceedings. They face court fees and their own and the opposing party's attorneys' costs before even having their prospects assessed.

Potential litigants will, more than ever, be depending on the risk assessment of their chosen attorney.