Complex Commercial Litigation

Contributing editors
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GETTING THE DEAL THROUGH

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Complex Commercial Litigation 2019

Second edition

Getting the Deal Through is delighted to publish the second edition of *Complex Commercial Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Nigeria and the United Arab Emirates.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Simon Bushell and Daniel Spendlove of Signature, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
October 2018

Switzerland

Dieter Hofmann, Oliver Kunz and Michael Cartier
Walder Wyss Ltd

Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial litigation is quite common in Switzerland, including in high-value complex matters. While Switzerland is a recognised hub for international arbitration and a significant part of international disputes tend to be resolved by arbitration, domestic commercial disputes are regularly resolved by litigation.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The market is quite busy in terms of domestic and international commercial disputes in which at least one party is domiciled in Switzerland. Notably, Swiss financial institutions have a strong preference for state court litigation in Switzerland.

The Swiss economy is strongly intertwined internationally and Switzerland has a neutral and efficient court system that is experienced with foreign litigants and applying foreign law. In particular, Swiss court judgments are readily enforceable in Europe. This being said, purely international disputes (ie, disputes without involvement of Swiss domiciled parties) are, however, more often resolved by arbitration, with Switzerland often seen as the seat of arbitration.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Switzerland uses a civil code system. Up until 1 January 2011, there were separate codes of civil procedures for each of the 26 cantons, which made litigation a distinctly local affair. On 1 January 2011, the unified Civil Procedure Code (ZPO) entered into force. In principle, the same procedures are applied throughout Switzerland; however, some local quirks may still persist. Moreover, the language of the court proceedings (German, French or Italian) depends on the respective court seised of the matter. Enforcement of monetary claims is subject to the Federal Statute on Debt Enforcement and Bankruptcy (SchKG).

In terms of substantive law, most commercial disputes will be subject to the Swiss Code of Obligations (OR). In general, Swiss contract law leaves the parties significant autonomy with few mandatory rules (consumer contracts, employment and rental agreements being notable exceptions).

With regard to international disputes, the parties can also make a choice of law, in which case the court seised of the matter will apply the chosen law.

Bringing a claim – initial considerations

4 What key issues should a party consider before bringing a claim?

A claimant will be expected to clearly substantiate and evidence its claim in court. Swiss courts tend to put a premium on documentary evidence over witness testimony. Also, as only limited production of documents is available, a well-documented claimant is at an advantage.

The ZPO takes a 'costs follow the event' approach with respect to court and legal fees. Accordingly, a claimant will need to make a cost and benefit analysis prior to bringing a claim.

5 How is jurisdiction established?

In domestic matters, jurisdiction is governed by article 9 et seq ZPO. Basically, jurisdiction is either (i) at the seat or domicile of the defendant, (ii) at the agreed forum or (iii) at specific places of jurisdiction for a variety of subject matters such as personality rights, family law, inheritance law, property law, contract law and so forth. For contract matters, jurisdiction is notably available at the place of the characteristic performance, while for tort claims jurisdiction also exists where the tortious acts took place or from where the harm arose.

In international matters, jurisdiction is governed by the Federal Code on Private International Law (IPRG) or the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention 2007). Again, jurisdiction is available either at the seat or domicile of the defendant, at the agreed forum or at a place of specific jurisdiction for a variety of subject matters. For international contractual matters, jurisdiction may also be available at the place of performance. With regard to tort claims the rules regarding jurisdiction mainly correspond to the ones in domestic matters.

6 Res judicata: is preclusion applicable, and if so how?

Yes, preclusion (res judicata) applies automatically. A court is not permitted to decide on the same matter between the same parties that has previously been ruled on.

In international matters, the issue of res judicata is, in principle, governed by the law of the forum. Foreign decisions which can be recognised in Switzerland have a preclusive effect (article 9 paragraph 3 IPRG). Moreover, the second court seized of the same matter would suspend its proceedings until the court first seized of the matter renders a decision. This is the case in a domestic scenario (article 126 ZPO), under the Lugano Convention (article 27 Lugano Convention 2007) as well as under the IPRG provided that it is to be expected that the foreign court renders a decision within a reasonable period of time, and said decision can be recognised in Switzerland (article 9 paragraph 1 IPRG).

If the foreign decision cannot be recognised in Switzerland, there is no preclusion.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Swiss courts will apply foreign laws either where the parties have chosen the application of foreign law (article 116 IPRG) or where the conflict of law rules point to such foreign law. In addition, Swiss courts may consider mandatory foreign rules if the court deems this appropriate in the given circumstances (article 19 IPRG).

The content of foreign law is to be established ex officio by the court; however, in commercial disputes the parties can be ordered to prove the content of the law as a matter of evidence. If the content of such foreign law cannot be determined or is not proven, the court will apply Swiss law.

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A claimant may seek injunctive measures (eg, an attachment order) against the defendant and its assets.

A defendant can file a protective brief against ex parte measures. Also, since an attachment order requires the creditor to show probable location of assets, a defendant may wish to move assets to other locales, albeit this in itself can constitute grounds justifying an attachment order.

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

A claimant can request an attachment order from the court at the defendant's place of residence or domicile, or at the place where assets are located if the claimant plausibly shows that its claim exists, that assets belonging to the debtor exist and that grounds for an attachment exist (article 271 et seq SchKG).

Prior to obtaining a judgment, a claimant can obtain an attachment order if the debtor has no domicile in Switzerland, and the claim has a sufficient connection to Switzerland or is based on a signed recognition of debt. Similarly, a claimant can obtain an attachment order if a defendant dissipates assets with the purpose of evading its liabilities, flees or is taking steps to flee. Further, special grounds for obtaining an attachment order exist.

Unless the claimant already holds a judgment against the defendant, the claimant must validate the attachment order by filing either debt enforcement proceedings or court proceedings against the defendant within short deadlines. Once a claimant has obtained a judgment, the judgment itself will suffice as grounds to obtain an attachment order.

A creditor is liable for any damage resulting from an unjustified attachment order and can be ordered to provide security for such damages.

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

For most claims, before going to court the claimant must apply for conciliation proceedings, which have the purpose of facilitating a settlement or an early disposal of claims.

However, in cases with a value in dispute of at least 100,000 Swiss francs, the parties can jointly waive the conciliation proceedings. Also, a claimant can unilaterally waive the proceedings if the defendant is domiciled outside of Switzerland or its address is unknown. Finally, no conciliation proceedings are required if the claim is filed with a commercial court.

Where the conciliation proceedings are mandatory, a claimant must attend the proceedings, otherwise its claim cannot proceed. A defendant, however, generally suffers no consequences if it does not attend.

11 What other forms of interim relief can be sought?

Pursuant to article 261 et seq ZPO, the court may order any interim measure if the claimant shows prima facie that it has a claim and that the measures are necessary to prevent irreparable harm. Such measures can include:

- an injunction (eg, a prohibition to undertake certain actions or modify or dispose of an object in dispute);
- an order to remedy an unlawful situation (eg, the confiscation of goods);
- an order to a register authority (eg, an instruction to an authority to block certain transactions or entries into a registry, such as the land registry or commercial registry) or to a third party (eg, prohibiting a third party from paying out sums);
- performance in kind; and
- the payment of a sum of money in the cases provided by the law.

This list of measures is non-exhaustive and the court may also grant other suitable measures. Moreover, interim relief can also be sought on an ex parte basis if necessary.

12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

While the ZPO provides for mediation (article 213 et seq ZPO), there is no requirement or expectation of parties to engage in such alternative dispute resolution (ADR). However, most court proceedings are preceded by conciliation proceedings (see question 10).

13 Are there different considerations for claims against natural persons as opposed to corporations?

In cantons where commercial courts exist (ie, in the cantons of Zurich, St Gallen, Bern and Aargau) claims involving corporations may be lodged with the commercial court. If only the defendant is registered in a commercial registry, the claimant can opt to either file a claim with the commercial court or to file it with the district court. If both parties are registered in a commercial registry, the claim has to be filed with the commercial court.

14 Are any of the considerations different for class actions, multi-party or group litigations?

Class actions are not available in Switzerland.

Associations or 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 claims in their own name on behalf of the members of such group (article 89 ZPO). However, they are limited in the relief they can request. In particular, they cannot pursue financial claims.

In practice, where there are many similar cases, the courts will regularly pick out several key cases and stay the rest. These key cases will then be litigated (if necessary to the Federal Supreme Court) and the rest will often be settled along the principles established by the courts in the key cases.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Since a leading decision of the Swiss Federal Supreme Court in 2004, third-party litigation funding is generally permitted in Switzerland. There are, however, no specific statutory rules concerning third-party funding. The most important existing legal limits arise from lawyers' duties to exercise their activity independently, keep client-related information confidential and avoid conflicts of interest (see question 40).

Lawyers are prohibited from taking on cases on a purely contingent basis (pactum de quota litis or 'no win, no fee' arrangement), but can enter into agreements with a success fee component in addition to the usual fee (pactum de palmario/'uplift' arrangement). There has been a recent (criticised) decision of the Federal Supreme Court setting three boundaries for 'uplift' arrangements: (i) any such arrangement must be agreed at the outset of taking on the mandate; (ii) the non-success fee component of the fee must cover the lawyer's costs and minimal profit margin; and (iii) the success fee component of the fee should not exceed 100 per cent of the non-success fee component.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Where conciliation proceedings are required, claims are launched by filing a conciliation request setting out the claim in basic terms.

Where no conciliation proceedings are required or following the conciliation proceedings, claims are launched by filing a detailed written statement of claim. The statement of claim is usually structured as follows (article 221 ZPO):

- a description of facts; and
- legal reasoning (albeit not required as such; the court determines and applies the law ex officio).

Any allegations of fact are to be accompanied by offers of evidence. The statement of claim is to be accompanied by:

- the counsel's power of attorney;
- the authorisation to proceed from the conciliation authority or the declaration that conciliation is being waived (if applicable);

- the available documentary evidence; and
- a list of evidence offered.

The length of written submissions depends on the complexity of the case. They tend to be 30 to 150 pages in length for mid-sized claims.

17 How are claims served on foreign parties?

Generally, service is effected by the court pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, dated 15 November 1965. Depending on the country in question, other bilateral treaties may apply.

If no convention or treaty applies, claims are served by the court via diplomatic channels.

18 What are the key causes of action that typically arise in commercial litigation?

Key causes of action in commercial litigation are:
- breach of contract (failure or default to perform in kind, failure to pay, defective works, defective performance, etc); and
- tort (violation of rights in rem, violation of intellectual property rights, acts of unfair competition, etc).

19 Under what circumstances can amendments to claims be made?

Claims can be amended or changed (article 227 ZPO) if:
- the new or amended claim is subject to the same type of procedure as the pending claim; and
- a factual connection exists between the new or amended claim and the original claim; or
- the opposing party consents to the amendment of the claim.

In principle, a claimant may change or amend its claim at any stage of the proceedings. However, once the main hearing has commenced, a claimant can only change or amend its claim due to facts having occurred after the written pleadings have been completed, or if they existed before and could not, despite reasonable diligence, be argued and presented beforehand (article 230 ZPO).

20 What remedies are available to a claimant in your jurisdiction?

The following remedies are available (article 84 et seq ZPO):
- performance (ie, an order that the defendant be ordered to pay, do, refrain from doing or tolerate something);
- an unquantified payment claim, pursuant to which the amount is determined only after the evidentiary proceedings;
- an action to modify a legal relationship (ie, seek the creation, modification or dissolution of a specific right or legal relationship); or
- a declaratory judgment (ie, a finding by the court that a right or legal relationship exists or does not exist).

Save where otherwise envisaged by law, declaratory relief is not available where a request for performance is available (eg, it is not possible to seek declaratory relief that an amount is owed where such amount can be sought by means of a payment order).

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Actual damages (ie, diminution of assets) and loss of profits are recoverable. A claimant bears the burden of proving its damage. However, where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party (article 42, paragraph 2 OR).

There is no concept of punitive damages.

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

The following steps are open to a defendant in the early stages of the proceedings:
- raising (procedural) objections such as lack of jurisdiction, res judicata, lis pendens, etc (article 59 ZPO). While these objections are to be examined ex officio, in particular with respect to jurisdictional defences, it should be noted that a defendant risks accepting jurisdiction by entering an appearance on the merits without objecting to jurisdiction (article 18 ZPO);
- requesting security for party costs (article 99 ZPO) (see question 28);
- requesting security for damages resulting from interim measures (articles 264–265 ZPO, article 273 SchKG);
- raising a counterclaim together with the statement of defence (article 224 ZPO);
- requesting that proceedings be limited to individual issues (article 125 ZPO); and
- issuing a third-party notice to the party that the defendant may wish to take recourse against (article 78 ZPO) or by filing a third-party action against the aforementioned party (article 81 ZPO) (see question 25).

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

The structure of the statement of defence is essentially the same as that of the statement of claim and the same type of documents are to be attached (see question 16). The defendant must state which specific allegations of fact of the claimant it disputes or acknowledges (article 222, paragraph 2 ZPO).

The court will set the defendant a time limit for response, and upon reasoned request such time limit can be extended.

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

In principle, a defendant may change or raise a defence at any stage of the proceedings. However, once the main hearing has commenced, a defendant is limited to raising new facts and presenting additional evidence to the extent that they have only occurred after the written pleadings have been completed, or if they existed prior to this, could not, despite reasonable diligence, be argued and presented beforehand (article 230 ZPO).

25 How can a defendant establish the passing on or sharing of liability?

The defendant can make a third-party notice (article 78 ZPO) by which the defendant notifies a third party that proceedings are pending and that the third party may intervene in these proceedings. If the third party chooses not to intervene, in principle, such third party is bound to the negative outcome of the proceedings.

The defendant can also file a third-party action (article 81 ZPO) together with its statement of defence or as reply, by which such third party is made a defendant in its own right with respect to the party filing the third-party action. The court seised of the main matter then decides whether to conduct the main proceeding and the third-party action together in one proceeding or as separate proceedings.

26 How can a defendant avoid trial?

There is no trial as such in Switzerland. The pleadings (statement of claim and defence, reply and rejoinder) are typically made in writing, while the main hearing is comparatively short. For a description of proceedings, see question 42. Requests for summary judgments are not available under Swiss law. A defendant can, however, request that the proceedings be limited to certain issues. It can, for example, dispute jurisdiction or raise a statute of limitation defence and request the court to first rule on these defences.

A significant number of cases do not proceed to a hearing due to a settlement between the parties.

27 What happens in the case of a no-show or if no defence is offered?

As a general principle, if the defendant fails to appear or participate in the proceedings, the proceedings are continued in the defendant's absence (article 147 ZPO). This has the effect that a claimant's allegations of fact are not considered disputed and, accordingly, if a claimant's presentation of facts is consistent, logical and supports the requisite elements of the claim, the court will render judgment in

favour of the claimant. However, if the court has serious doubts as to the truth of an undisputed allegation of fact, it may take evidence on this point ex officio (article 153, paragraph 2 ZPO).

Moreover, the court will examine ex officio whether the procedural requirements are met, that is, whether the claimant has a justifiable interest in the litigation, whether the court has jurisdiction, whether the parties have the capacity to be parties and to take legal action, and if lis pendens or res judicata applies (article 59 et seq ZPO).

Other defences, which are to be examined only on the motion of the defendant (eg, statute of limitations), will not be considered.

28 Can a defendant claim security for costs? If so, what form of security can be provided?

In case of ordinary proceedings (article 99 ZPO), a defendant can request security for party costs if the claimant:

- has no residence or domicile in Switzerland;
- appears to be insolvent, notably if a claimant has been declared bankrupt or is involved in ongoing composition proceedings or if certificates of unpaid debts have been issued;
- if the claimant owes costs from prior proceedings; or
- if, for other reasons, there seems to be a considerable risk that the compensation awarded for party costs will not be paid.

Several international treaties (eg, the Hague Convention relating to Civil Procedure of 1 March 1954) require Switzerland to treat nationals of the respective member states of the Convention the same as Swiss nationals and bar security for costs merely on the basis of a foreign domicile or place of residence.

Security can be provided in cash (wire transfer) or in the form of a guarantee of a Swiss domiciled bank or an insurance company admitted to do business in Switzerland (article 100, paragraph 1 ZPO).

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

A typical sequence of procedural steps is as follows:

- conciliation request, followed by a conciliation hearing (where such is mandatory);
- written statement of claim;
- written statement of defence;
- a second round of briefs (reply and rejoinder); and
- the main hearing: the court hears witnesses and takes evidence, and the parties then comment on the evidence taken.

The court may, after the first exchange of briefs, hold an instruction hearing to hold settlement talks. In particular, the commercial courts will often take this approach and a significant part of cases get settled at this stage.

30 Can additional parties be brought into a case after commencement?

Yes. Third parties can be brought into a case or intervene into a case, primarily as follows:

- third-party (principal) intervention: a person who claims to have better right to the object of a dispute may bring a claim directly against both parties (article 73 ZPO);
- third-party accessory intervention: a person who has a credible interest in a pending proceeding may intervene in support of a party and raise all defences or affirmative positions in support of this party (article 74 ZPO);
- third-party notice: a party may give notice to a third party which it may want to take recourse against in case of a loss in the main proceedings (article 78 ZPO); and
- third-party action: a party may file an actual action against such third party against which it takes recourse in case of a loss in the main proceedings (article 81 ZPO).

In addition, the court has the option of consolidating claims against or by other parties (article 125 ZPO).

31 Can proceedings be consolidated or split?

Yes. If it simplifies the proceedings, the court may order the separation of jointly filed actions or the joinder of separately filed actions. The court may also separate the counterclaim from the main claim proceedings (article 125 ZPO).

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

According to article 8 Swiss Civil Code (ZGB), the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact, unless the law provides otherwise.

The court is free on how it assesses the evidence that is taken (article 157 ZPO), albeit article 168 ZPO conclusively lists the admissible means of evidence:

- witness testimony;
- documentary exhibits;
- inspection;
- expertise;
- written statements requested by the court; and
- questioning or evidentiary statements of parties.

In principle, save where the law or case law provides otherwise, strict or full proof is required, meaning the court must – based on objective grounds – be convinced of the correctness of the allegations raised. Absolute certainty is not required; it is sufficient that the court has no serious doubts as to the correctness of the alleged facts or that any remaining doubts are minor.

33 How does a court decide what judgments, remedies and orders it will issue?

In principle, save where the law provides otherwise, the court is bound to the prayers for relief of the parties (article 58 ZPO); the court cannot award or order more than or something other than specifically requested by the parties.

34 How is witness, documentary and expert evidence dealt with?

There is a strong emphasis on documentary evidence over oral evidence. With regard to witness evidence, the witnesses are questioned by the court rather than cross-examined by the parties and their counsel (see question 37) and the court would typically only admit a limited number of additional questions to be put forward by the parties.

It should also be noted that contacts between counsel and potential witnesses are admissible under specific limitations only. They may potentially taint the evidentiary value of the witness. In this vein, written witness statements are not admissible evidence.

Expert opinions of a party are considered to be mere party allegations. Only court-appointed experts are considered as 'expertise' in terms of evidence.

35 How does the court deal with large volumes of commercial or technical evidence?

Disclosure or discovery like in the UK or US do not exist in Switzerland, therefore large volumes of evidence are rarely a problem. Where a judge has the necessary technical or commercial expertise to review and evaluate such evidence, he or she can make the necessary determinations. However, the court must disclose the measure of any technical or commercial expertise of the court to the parties and allow them to comment (article 183, paragraph 3 ZPO). This can, in particular, occur before the commercial courts, which have specialist lay judges.

Otherwise, the court will generally appoint an expert to deal with matters requiring special commercial or technical expertise.

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Witnesses in Switzerland can be compelled to give evidence to a foreign court, provided such request is made in the correct form. Switzerland has entered into several multilateral and bilateral treaties governing the taking of evidence, in particular the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 or the Hague Convention relating to Civil Procedure of 1 March 1954.

If no other treaty applies, Swiss courts will apply the Hague Convention relating to Civil Procedure by default (article 11(a) IPRG).

Foreign persons can be summoned to appear as a witness if they have their domicile in Switzerland. Persons living abroad cannot be compelled to appear before a Swiss court as a witness. In such a scenario the Swiss court would have to hear the witness through an international mutual legal assistance request (eg, through the Hague Conventions).

It should be noted that pursuant to article 271 of the Swiss Criminal Code (StGB) it is a criminal act to undertake activities on behalf of a foreign state (including foreign state courts) without authorisation where such acts are the responsibility of a public authority or public official. Switzerland deems the taking of evidence in the territory of Switzerland to be within the sole purview of the Swiss courts. Accordingly, foreign court officials or lawyers acting in foreign court proceedings must avoid taking evidence in Switzerland outside the formal channels.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Witness evidence is taken by the court, with the parties limited to submitting additional questions or – with leave of the court – posing such questions directly. There is no cross-examination as such. The court can, however, order a confrontation of the witnesses or parties (article 169 et seq ZPO).

If the authenticity of a document is disputed by a party with sufficient reasons, the party relying on a document is required to prove its authenticity (article 178 ZPO). Such proof can, for example, be in the form of an expert report.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

First instance proceedings typically last 10 to 18 months.

Expedited summary proceedings are available for clear cases (ie, where the facts are undisputed or immediately provable and the legal situation is clear, article 257 ZPO). Moreover, summary proceedings are also available as part of the debt enforcement proceedings in case of monetary claims based on a signed recognition of debt such as a contract (article 82 SchKG).

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

See question 22.

A party may request that proceedings be limited to individual issues, which can be formal or substantive in nature (article 125 ZPO).

40 If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Litigation funding can help a claimant pass the comparatively high cost barriers in proceedings before Swiss courts.

The involvement of the funder does not have to be disclosed. Depending on the agreement between the funder and the claimant, the funder may exercise some control over the proceedings, which may pose a risk of conflict. Should a conflict of interest arise, a lawyer owes their professional and fiduciary duties to the client (ie, the party to whom the claim belongs) and not the funder.

Since the interests of the funder are typically of a solely economic nature, the funder usually does not have a sufficiently justified legal interest to constitute itself as an accessory party. There might, however, be a change of party if the funder acquires the claim in question before or during the trial.

If the defendant wins the case, only the claimant is liable for the reimbursement of the costs awarded to the defendant. The defendant has no direct recourse against the funder.

41 How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Administrative proceedings can be conducted before, in parallel with or after criminal proceedings, depending on the field of law. If there are parallel proceedings, the affected party may be confronted by the dilemma of whether it should fulfil its obligations to cooperate under administrative law or exercise its right to refuse to give evidence under criminal law. Pursuant to the nemo tenetur principle, the defendant has the right to remain silent without being sanctioned for it, and the statements made in administrative proceedings can only be used in parallel criminal proceedings if they have been taken in compliance with the principles of criminal procedural law. However, this principle does not apply without exception (ie, the statements may still be used in exceptional circumstances). A possible solution to avoid this dilemma would be to file an application for suspension of the administrative proceedings until the criminal proceedings are over.

Civil proceedings can take place before, in parallel with, or within criminal proceedings. If appropriate, a civil court can stay or suspend proceedings, in particular if their outcome depends on the outcome of other proceedings; however, in practice, civil proceedings are rarely stayed because of parallel criminal proceedings. A civil court is neither bound by an acquittal nor by a verdict of guilty of the criminal court. If, however, the criminal court has already decided upon civil claims, the civil court is bound by that verdict. If a party is involved in both criminal and civil proceedings, it may, provided it has access to the files of the criminal proceedings, use them in civil proceedings. This is a common strategy to obtain information that could otherwise (with the means of a civil procedure) not be obtained.

Prosecution is the exclusive competence of the state authorities; there is no private prosecution as such in Switzerland. However, a victim of a criminal offence can bring civil claims within the criminal proceedings. This can be advantageous for the claimant, since in criminal proceedings the facts are established ex officio, which relieves the party of the burden of proof. Furthermore, criminal proceedings are often dealt with more quickly than civil proceedings. In practice, however, the criminal courts would tend to refer complex civil lawsuits to the civil courts.

Trial

42 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

There is no trial as such in Switzerland. The pleadings (statement of claim and defence, reply and rejoinder) are typically made in writing.

The court may conduct instruction hearings (article 226 ZPO) in which the court summons the parties to discuss the matter in dispute in a less formal manner, to complete the facts, facilitate a settlement or prepare the main hearing.

In the main hearing (article 228 et seq ZPO), the court takes evidence (namely questioning the parties and witnesses) and the parties can make final statements regarding the evidence taken and the matter itself. The parties can jointly waive the holding of a main hearing or jointly request that the final statements be done in writing (article 232 et seq ZPO).

The main hearing usually lasts only a few hours, depending on the number of witnesses heard.

43 Are jury trials the norm, and can they be denied?

Jury trials do not exist in Switzerland.

44 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Submissions and evidence submitted to the court are, in principle, not public and cannot be publicly accessed. However, this is governed by rules of the respective cantons and exceptions exist. Main hearings are, in principle, open to the public. Depending on the court, the deliberations of the court may also be public.

When required by public interest or the legitimate interests of involved persons, hearings can be held privately (article 54, paragraph 3 ZPO).

Moreover, pursuant to article 156 ZPO, courts shall take appropriate measures to ensure that taking evidence does not infringe the legitimate interests of any parties or third party, such as trade secrets.

45 How is media interest dealt with? Is the media ever ordered not to report on certain information?

Most cantons have a media contact for their respective courts and accredit reporters to report on public proceedings.

Moreover, article 28, paragraph 4 StGB stipulates that truthful reporting on public hearings is lawful.

Update and trends

A revision of the Swiss Civil Procedure Code (ZPO) is under way to make it easier for citizens to gain access to the courts. In particular, cost barriers and litigation cost risk are to be reduced, while collective redress is to be strengthened. Regarding cost barriers, the preliminary draft notably plans a 50 per cent reduction of the advance on court fees the claimant has to pay, in place of the current practice requiring the claimant to advance the full estimated costs of the proceedings.

With regard to collective redress, there are no class actions as such under Swiss law. Currently, there is the possibility of so-called group action rights (article 89 ZPO), which allow associations and organisations representing multiple damaged parties to bring non-monetary claims, but for the moment monetary claims such as damages, unjust enrichment or disgorgement of profits are not included. The preliminary draft proposes two main measures to strengthen collective redress: first, group action rights shall include said monetary claims; and second, the revision provides for collective settlement proceedings. It remains to be seen whether the proposal will get through parliament. It is not expected that the amendment will enter into force before 2020.

There have been several attempts by courts to order court-accredited reporters participating in public hearings to withhold certain information (eg, the names of accused in criminal matters), which, however, have been deemed to lack a sufficient legal basis. Courts would need to hold hearings in private if this is necessary to limit access to information also from the press.

Affected parties themselves may have the possibility of seeking injunctions against the media pursuant to article 28 et seq ZGB on grounds of a violation of personality rights.

46 How are monetary claims valued and proved?

Monetary claims are generally valued and proven by means of documentary evidence. If need be, a court-ordered expert opinion can be requested. Where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party (article 42, paragraph 2 OR).

Article 125 ZPO permits the court to limit the proceedings to specific questions or prayers for relief. As such, it is possible to have a decision first on the liability in principle. However, unless it leads to significant simplification of the proceedings, courts will not usually split off the quantum issue from the rest of the proceedings.

Post-trial

47 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

According to article 106 ZPO, the court will generally allocate costs pursuant to the principle of 'costs follow the event'. It should be noted that each canton has its own tariff on compensation for legal fees in court proceedings, which often follow an ad valorem approach and in part also envisage caps on the compensation that can be claimed. In practice, except for cases with large values in dispute, this means that a successful party will rarely receive full compensation for its actual legal expenses.

All decisions of the Federal Supreme Court are available online (www.bger.ch). Notable decisions are selected for hard-copy publication but are also available online. For the lower courts, availability of decisions depends on the canton.

Judgments are typically structured as follows:

- statement of facts;
- positions of the parties;
- decision of the court; and
- operative part of the judgment.

The length of judgments can vary considerably. Moreover, the court has the option of handing down the operative part of the judgment without a written reasoning, with the reasoned judgment to follow only if requested by one of the parties (article 239 ZPO).

48 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

In principle, there are two levels of appeals. District court decisions can be appealed to the cantonal courts of appeal, and such decisions in turn are appealed to the Federal Supreme Court. If the case is lodged directly with a commercial court, there is only one level of appeal to the Federal Supreme Court.

Most judgments of first instance courts can be appealed to the cantonal courts of appeal on grounds of either incorrect application of the law or incorrect establishment of the facts (article 310 ZPO).

The cantonal courts' decisions of appeal or decisions of the commercial courts can be appealed to the Federal Supreme Court on grounds of either incorrect application of the law or obviously incorrect (arbitrary) establishment of the facts.

Depending on the nature of the dispute, the amount in dispute must exceed a certain monetary threshold to be appealable.

Appeals to the cantonal courts of appeal tend to take six to 12 months and appeals to the Federal Supreme Court tend to take six to nine months.

49 How enforceable internationally are judgments from the courts in your jurisdiction?

Switzerland is a member of the Lugano Convention 2007 and thus participates in the simplified enforcement regime in most of Europe.

50 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

For the most part, foreign judgments will be enforced under the Lugano Convention 2007 and are thus subject to a simplified enforcement regime that also allows for freezing of assets in parallel to the recognition and enforcement proceedings.

Judgments from countries that are not members of the Lugano Convention 2007 can also be enforced in Switzerland pursuant to article 25 et seq IPRG.

Other considerations

51 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

The commercial courts in Switzerland (ie, in the cantons of Zurich, St Gallen, Bern and Aargau), are distinct in that the bench deciding the matter is made of professional (legally trained) judges and expert judges (ie, lay judges with experience in the respective area of dispute, for example, the financial industry or construction industry). This brings together the legal and technical know-how in deciding a matter without the need to resort to external experts.

Lawyers from member states of the EU and EFTA are permitted to represent parties before all Swiss courts as part of the free movement of services. In such case, they are subject to the rules of article 12 of the Federal Act on the Freedom of Movement for Lawyers (BGFA).

52 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

A practical issue of litigating in Switzerland is that the courts are, in principle, bound to the official language of their respective canton (ie, German, French or Italian); accordingly, submissions, hearings and deliberations, and judgments will be conducted in that particular language. Only before the Federal Patent Court – if the court and the parties agree – can proceedings be conducted in English.

This being said, Swiss courts have become more accepting of English-language exhibits without translations, and the Federal Supreme Court (albeit in a recognition and enforcement proceeding of an arbitral award under the New York Convention) has stated that one may expect a Swiss court to readily understand English.

53 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

The commercial courts have a strong history and practice of holding instruction hearings after the first exchange of briefs to hold settlement talks. The instructing judge will generally have prepared a

detailed memorandum as to the case with preliminary thoughts on the respective positions of the parties, including their burden of proof and the strength of their legal arguments, and may present quite concrete thoughts as to what a suitable settlement might be. As a result, a significant part of commercial cases get settled at an early stage of the proceedings.

There is no pretrial discovery available in Switzerland. A party can, however, avail itself of the anticipated taking of evidence, which can include requests for the production of specified documents, prior to initiating procedures (article 158 ZPO).

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