

GETTING THE
DEAL THROUGH 

Complex Commercial Litigation 2018

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Published by
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First published 2017
First edition
ISSN 2515-3730

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	5	Ireland	55
Simon Bushell and Daniel Spendlove Signature Litigation LLP		Michael Byrne Matheson	
Brazil	7	Israel	63
Rafael Zabaglia, Luiz Gustavo Mide and Isabella Simão Menezes Levy & Salomão Advogados		Barak Tal, Hanital Belinson-Navon and Roey Sasson Yigal Arnon & Co	
British Virgin Islands	13	Japan	69
Andrew Thorp, Jonathan Addo and Mark Rowlands Harneys		Tomoki Yanagisawa TMI Associates	
Cyprus	24	Mexico	74
Nicos Georgiades and Andrea Psara Georgiades & Pelides LLC		Leyla Bello Escobar and Juan Carlos Zamora Müller Baker McKenzie Abogados SC	
England and Wales	31	Netherlands	78
Simon Bushell, Daniel Spendlove and Matt Peacock Signature Litigation LLP		Margie Breugem and Michiel Harbers Rutgers Posch Visée Endedijk NV	
Germany	39	Portugal	84
Alexander Kirschstein Osborne Clarke		Sandra Ferreira Dias and Sandra Jesus Caiado Guerreiro	
Gibraltar	44	Switzerland	89
Elliott Phillips and Steven de Lara Signature Litigation		Dieter Hofmann, Oliver Kunz and Michael Cartier Walder Wyss Ltd	
India	50	United States	95
Kunaal Shah, Anirudh Kapoor and Kartik Adlakha Trilegal		Ryan D Frei and Ashley P Peterson McGuireWoods LLP	

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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 seized 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 seized 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. While a party can issue a witness testimony, Swiss courts tend to put a premium on documentary evidence. 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 enforcement of judgments in civil and commercial matters (the Lugano Convention) of 30 October 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.

Should a defendant start an overlapping proceeding, he or she is barred from doing so under the ZPO, pursuant to the principle of *lis pendens*. Moreover, IPRG and the Lugano Convention 2007 contain rules pursuant to which a second court seized of the same matter shall suspend its proceedings until the court first seized of the matter renders a decision.

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. Also, foreign decisions can have a preclusive effect to the extent that such foreign decisions are capable of being recognised in Switzerland.

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 assets of a defendant.

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

Once a claimant has obtained a judgment, the judgment itself will suffice as grounds to obtain an attachment order.

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.

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 above 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, instructing an authority to block certain transactions or entries into the registry, whether 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 alternative dispute resolution (ADR). However, most court proceedings are preceded by conciliation proceedings (please 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.

14 Are any of the considerations different for class actions, multiparty 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 suspend the rest. These key cases will then be litigated (if necessary to the Federal Supreme Court) and the rest of the cases will often be settled along those principles.

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

None with regard to third-party funders. Lawyers are prohibited from taking on cases on a purely contingent basis, but can enter into agreements with a success fee component in addition to the usual fee.

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. This request can also be made orally, in which case it will be transcribed.

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 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.

Hearings consist of instruction hearings (article 226 ZPO) in which the court summons the parties to discuss the matter in dispute in an informal manner, to complete the facts, to facilitate a settlement or to prepare the main hearing.

Otherwise, there is the main hearing (article 228 et seq ZPO) in which the court will take evidence and the parties can make final statements regarding the evidence taken and on 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).

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 claimant's 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, if there is a justifiable interest on the part of the claimant, whether the court has jurisdiction, whether the parties have the capacity to be parties and to take legal action, *lis pendens*, or *res judicata* (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 of 1 March 1954 relating to Civil Procedure) require Switzerland to treat foreign 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;
- an instruction hearing before the court;
- 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 in which the dispute is pending (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 such third parties against 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 CC, 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 lists the admissible means of evidence (eg, 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, namely 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 of something other than specifically requested by the parties.

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

There is a stronger emphasis on documentary evidence over oral evidence. Moreover, expert opinions of a party are considered to be mere party allegations. Only court-appointed experts are considered as 'expertise' in terms of evidence.

With regard to witness evidence, it should be noted that discussions with potential witnesses are frowned upon and considered as to potentially taint the evidentiary value of this witness. In this vein, witness statements are generally not used.

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

Where the court (ie, a judge), has the necessary technical or commercial expertise to review and evaluate such evidence, it can make necessary determinations to be considered by the court. However, the court must disclose the measure of any technical or commercial expertise of the court to the parties for 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).

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 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 CPC). 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 material in nature (article 125 ZPO).

Trial

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

The actual pleadings are generally done solely by written submissions, with the main hearing reserved for taking evidence, namely questioning the parties and witnesses, and making final comments on the matter. The main hearing usually lasts a few hours only, depending on the number of witnesses heard.

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

Jury trials do not exist in Switzerland.

42 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. However, 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.

43 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. This being said, article 293 StGB prohibits reporting on documents or hearings that have been declared secret.

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 Swiss Civil Code on grounds of a violation of personality rights.

44 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

45 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 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).

46 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 establishment of the facts.

Depending on the nature of the dispute, the amount in dispute must exceed a certain monetary amount 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.

47 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.

48 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

49 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 Swiss Statute on Lawyers.

50 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, either 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.

51 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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ISSN 2515-3730



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