LEXOLOGY
Getting The Deal Through

Complex Commercial Litigation

in Switzerland

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BACKGROUND

Frequency of use

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 number of international disputes tend to be resolved by arbitration, domestic commercial disputes are regularly resolved by litigation.

Litigation market

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 the involvement of Swiss-domiciled parties) are, however, more often resolved by arbitration, with Switzerland often used as the seat of arbitration.

Legal framework

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 a 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 gives 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

Key issues to consider

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. As only limited production of documents is available, a well-documented claimant is also 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.

Establishing jurisdiction

How is jurisdiction established?

In domestic matters, jurisdiction is governed by article 9 et seq ZPO. Basically, jurisdiction is at the seat or domicile of the defendant, at the agreed forum, or 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 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 those in domestic matters.

Preclusion

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 that 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.

Applicability of foreign laws

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.

Initial steps

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. Since an attachment order requires the creditor to show probable location of assets, a defendant may also wish to move assets to other locales, albeit that this in itself can constitute grounds justifying an attachment order.

Freezing assets

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.

Pre-action conduct requirements

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. A claimant can also 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.

Other interim relief

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 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.

Alternative dispute resolution

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).

Claims against natural persons versus corporations

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

In cantons where commercial courts exist (ie, 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.

Class actions

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.

Third-party funding

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 41).

Contingency fee arrangements

Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

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, or uplift arrangement).

A recent (criticised) decision of the Swiss Federal Supreme Court set three boundaries for uplift arrangements:

- any such arrangement must be agreed at the outset of taking on the mandate;
- the non-success fee component of the fee must cover the lawyer's costs and minimal profit margin; and
- the success fee component of the fee should not exceed 100 per cent of the non-success fee component.

It should be noted that compensation for legal fees in state court proceedings is governed by tariffs set by the cantons (or the Confederation), generally on an ad valorem basis. Accordingly, a success fee will in any event not be recoverable as legal fees.

THE CLAIM

Launching claims

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 a 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 has been 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.

Serving claims on foreign parties

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.

Key causes of action

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).

Claim amendments

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).

Remedies

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).

Recoverable damages

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 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

Early steps available

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 29);
- 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 filing a third-party action against the aforementioned party (article 81 ZPO) (see question 26).

Defence structure

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 17). 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.

Changing defence

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).

Sharing liability

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.

Avoiding trial

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 30. 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.

Case of no defence

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 and 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 whether 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.

Claiming security

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

In the 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

Typical procedural steps

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 for settlement talks. In particular, the commercial courts will often take this approach, and a significant portion of cases are settled at this stage.

Bringing in additional parties

Can additional parties be brought into a case after commencement?

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

- third-party (principal) intervention: a person who claims to have a 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 that it may want to take recourse against in the 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 the 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).

Consolidating proceedings

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).

Court decision making

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 that 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.

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.

Evidence

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 38), 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.

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

Disclosure or discovery as found in the UK or US do not exist in Switzerland, and 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.

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 and 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.

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 that document is required to prove its authenticity (article 178 ZPO). Such proof can, for example, be in the form of an expert report.

Time frame

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 the case of monetary claims based on a signed recognition of debt such as a contract (article 82 SchKG).

Gaining an advantage

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

See question 23.

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

Impact of third-party funding

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 his or her 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.

Impact of technology

What impact is technology having on complex commercial litigation in your jurisdiction?

With the introduction of the ZPO in 2011, electronic filing was introduced across Switzerland before all civil courts. In

practice, electronic filing has not taken off, and the bulk of submissions are still made on paper. However, the courts have started to request receiving submissions and exhibits also in electronic form.

The Swiss courts have realised that more must be done and in February 2019, under the leadership of the Swiss Federal Department of Justice, launched the ambitious project called Justitia 4.0. By 2026, courts and parties will be able to exchange documents via a central portal and to access court files electronically, which should ultimately lead to an electronic case file.

Contrary to the Swiss Code on Criminal Procedure, which explicitly envisages that testimony may be given by video link, the ZPO has no similar provisions. However, considering that the court can dispense with the requirement that a witness appear in person, this suggests that testimony by video link remains available. Guidelines issued by the Federal Office of Justice on International Judicial Assistance in Civil Matters (third edition 2003, update of January 2013) mention that cross-border video links may be admissible within the strictures of the Hague Evidence Convention. It should be noted that outside mutual legal assistance proceedings such as the Hague Evidence Convention, cross-border video links may fall foul of Switzerland's blocking statutes (article 271 StGB; see question 37).

Parallel proceedings

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 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 administrative proceedings until 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 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

Trial conduct

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.

Use of juries

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

Jury trials do not exist in Switzerland.

Confidentiality

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 regarding trade secrets.

Media interest

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.

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 press access to information.

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.

Proving claims

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

Costs

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).

Appeals

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 a 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).

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 a 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.

Enforceability

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 found throughout most of Europe.

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 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

Interesting features

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 matters is made up 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 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 European Free Trade Area 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.

Jurisdictional disadvantages

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.

Special considerations

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 portion of commercial cases get settled at an early stage of 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).

UPDATES AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgements and policy and legislative developments of the past year?

56 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Under a decision of 14 March 2018 (BGE 144 III 175), the Swiss Federal Supreme Court held that it was admissible to file a negative declaratory action in Switzerland where the counterparty has threatened an action for performance abroad. While previously it was held that there was no legitimate interest in a (negative) declaratory action where an action of performance is available, the Swiss Federal Supreme Court now recognises that the wish of a party to secure a preferred jurisdiction is a legitimate interest. This decision opens up possibilities of forum shopping or forum running in international disputes (assuming there is jurisdiction in Switzerland) by filing a negative declaratory action in Switzerland instead of facing an inconvenient forum abroad.

In February 2019, the Swiss courts under the lead of the Federal Department of Justice launched the Justitia 4.0 project, which aims to create a secure portal for electronic filing and an electronic case file that can be accessed by the parties to proceedings by 2026 (see question 42).

As of 1 January 2020, the revised provisions governing statutes of limitations under the OR will enter into force, changing the various statute of limitations periods, the conditions for statute of limitations waivers and the conditions under which statutes of limitations are tolled.

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.