Complex Commercial Litigation 2021

Contributing editor
Simon Bushell

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2017
Fourth edition
ISBN 978-1-83862-315-9

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

Complex Commercial Litigation
2021

Contributing editor
Simon Bushell
Seladore Legal

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Australia, Bermuda, China, Mexico, Portugal and Thailand.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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.

Lexology 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 the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

London
October 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Switzerland

Martin Molina and Christoph Bauer
Kellerhals Carrard

BACKGROUND

Frequency of use

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

Commercial litigation is the standard method to resolve high-value, complex disputes in Switzerland. While Switzerland continues to attract a large number of international arbitration cases, state-court litigation remains a common means to resolve both domestic and international commercial disputes.

Litigation market

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?

Thanks to its open and internationally connected economy, Swiss courts and law firms are well experienced with the regular participation of international litigants and the application of foreign laws. International disputes are mainly carried out before the courts of the economic centres.

Owing to Switzerland's perceived neutrality, its reliable and efficient court system and the enforceability of Swiss judgments under the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (2007 Lugano Convention), Switzerland is often chosen by international parties as a 'neutral' venue for resolution of international disputes.

Legal framework

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 is a civil law jurisdiction. The general legal framework for commercial litigation is codified at the national (federal) level and thus unified, with notable exceptions (eg, regarding language of the proceedings, court organisation and costs) that may differ from canton to canton.

Litigation proceedings are conducted under the Swiss Civil Procedure Code (CPC) and the enforcement of monetary claims is subject to the Swiss Debt Enforcement and Bankruptcy Act (DEBA). The CPC entered into force in 2011, replacing the 26 cantonal codes in force until then. Although litigation proceedings are now governed by the same, unified rules, some local peculiarities remain.

In international matters, the Swiss Private International Law Act (PILA) (or, as the case may be, any applicable treaty) will come into play to determine such matters as jurisdiction and applicable law. The PILA is liberal when allowing parties to choose the law applicable to their relations, provided that the parties' relationship is sufficiently international.

Where Swiss law applies, the dispute will most often be subject to the Swiss Code of Obligations (CO), which contains the main rules of Swiss contract law. In general, Swiss contract law emphasises the parties' autonomy in commercial agreements and includes rather few mandatory rules (notably for consumer, employment and rental agreements).

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

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

As claimant, a party is expected substantiate and prove its claim to the court. The requirements as to substantiation and evidence are rather high. Serious preparation is thus advisable before bringing a claim. While all types of evidence are equally valid under the Civil Procedure Code (CPC), Swiss courts tend to give documentary evidence more weight than witness testimony. Sufficient documentation for a claim is thus important, in particular because the threshold for obtaining production of documents is high.

A claimant should not only consider the chances of winning the case in court, but also the implications for its commercial interests, the costs of the proceedings ('loser pays'), and the risks of enforcement (in particular the solvency risk).

Establishing jurisdiction

5 | How is jurisdiction established?

For international disputes, the establishment of jurisdiction is governed either by the Swiss Private International Law Act (PILA) or the 2007 Lugano Convention. The latter, within its scope of application, takes precedence over the PILA. Both instruments foresee the general jurisdiction of the courts at the domicile of the defendant, but accept forum selection agreements for a wide array of disputes. There are, however, specific rules of alternative or exclusive jurisdiction for a variety of subject matters.

For domestic disputes, the establishment of jurisdiction is governed by articles 4 et seqq CPC. As a general rule, the courts at the domicile of the defendant have jurisdiction over a dispute, provided that the parties have not agreed on another forum. However, there are a variety of rules of alternative or exclusive jurisdiction depending on the subject matter of a dispute.

A defendant may challenge the court's (territorial) jurisdiction by raising a corresponding objection at the outset of the proceedings. If it wishes to do so, a defendant should raise the objection before submitting any arguments on the merits, failing which it will be deemed to have accepted such court's jurisdiction. Other (non-territorial) jurisdictional challenges may be made at a later stage.

While anti-suit injunctions are neither available in Switzerland nor binding upon Swiss courts, the Swiss Federal Supreme Court has recently opened the door to claims for negative declaratory relief to prevent an opposite party from forum-running to courts abroad.

Preclusion

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

Res judicata is applicable in Switzerland and precludes a party from relitigating a case and a court from deciding on the same matter between the same parties that has previously been ruled on.

A foreign judgment will have preclusive effects in Switzerland, provided that it can be recognised (article 9(3) PILA). Foreign judgments that cannot be recognised in Switzerland do not have a preclusive effect.

Applicability of foreign laws

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

Swiss courts will apply foreign law if such law is applicable due to the parties' choice of law or pursuant to the PILA's conflict of law rules. In addition, a Swiss court may consider mandatory rules of foreign law if the facts of the case have a close link to such foreign law and if legitimate and manifestly preponderant interests so require (article 19 PILA).

In principle, the contents of foreign law are to be determined ex officio by the court. In matters involving an economic interest, however, the court may require the parties to establish the contents of foreign law (article 16(1) PILA). If such contents cannot be established, the court may apply Swiss law (article 16(2) PILA).

Initial steps

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 should try to obtain information on whether the defendant's assets are sufficient to meet an eventual judgment, and where such assets are located. A claimant may consider seeking interim relief or an attachment order to secure such assets for enforcement of an eventual judgment.

Where ex parte measures are expected, a defendant may file a protective brief (Schutzschrift) with the potentially competent Swiss court(s). A defendant may also consider moving its assets to places unknown to the claimant or transferring them to a third party, though such behaviour in itself could serve the claimant as grounds for seeking an attachment order.

Freezing assets

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?

To freeze a defendant's assets located in Switzerland for the enforcement of a monetary claim, a claimant may consider requesting an attachment order (articles 271 et seqq of the Swiss Debt Enforcement and Bankruptcy Act (DEBA)). Obtaining an attachment order requires a so-called attachment ground pursuant to article 271 DEBA, inter alia:

- the claimant has an enforceable judgment or equivalent title against the defendant;
- the defendant has no permanent domicile;
- the defendant has no domicile in Switzerland, and the claim has a sufficient connection to Switzerland or is based on a signed acknowledgement of debt; or
- the defendant dissipates assets with the purpose of evading its liabilities, flees or is taking steps to flee.

Obtaining an attachment order requires that the claimant be able to show prima facie:

- that it has a claim against the defendant;
- that an attachment ground is given; and
- that it is able to identify specific assets in Switzerland belonging to the defendant.

The granting of an attachment order is an ex parte procedure before the court at the domicile of the defendant or at the location of the assets. A Swiss court is only competent to freeze assets on the territory of Switzerland. However, foreign freezing injunctions with extraterritorial effect may be recognised and enforced in Switzerland under the 2007 Lugano Convention.

Once the attachment order is granted, (1) the defendant is informed and entitled to protest whereupon the attachment order is reconsidered, and (2) the claimant is obliged to take specific procedural steps within short deadlines to preserve the effects of the attachment order. The claimant is liable for any damage caused by an unjustified attachment order and may be ordered to provide security.

Pre-action conduct requirements

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

As a general rule, an action can only be lodged after a formal conciliation proceeding (articles 197 et seqq CPC), which is aimed at facilitating a settlement or early disposal of the lawsuit. There are, however, several exceptions from this rule (eg, if an action is filed with a commercial court or if a defendant is domiciled abroad). In addition, the parties can jointly waive the conciliation if the amount in dispute is at least CHF 100,000.

Where no exception applies, a conciliation proceeding with the competent conciliation authority is a mandatory prerequisite to ordinary court action and non-compliance with such prerequisite will result in an early dismissal of the action on formal grounds. For conducting a valid conciliation proceeding, the claimant must attend the conciliation hearing. Conversely, the defendant generally suffers no procedural consequences for not appearing.

Other interim relief

11 | What other forms of interim relief can be sought?

A party may apply for interim measures before or during a pending proceeding (articles 261 seqq CPC), provided that such party can show prima facie that it has sufficient chances to succeed on the merits and that such measures are necessary to prevent a detriment that is irreparable or cannot easily be remedied. In the case of particular urgency, interim measures can also be requested ex parte.

The court has discretion to determine the most appropriate measure to prevent the impending disadvantage. Possible measures include:

- a prohibition (eg, a prohibition to take certain actions, or to dispose of the object of the dispute);
- an order to remedy a wrongful situation (eg, an order for confiscation of goods or to remove infringing materials from the internet);
- an instruction to a registry authority (eg, an order to block certain transactions or entries in the land register or the commercial register) or to a third party (eg, an order to a debtor to transfer funds);
- an order for performance in kind (eg, an order to continue delivery under a long-term agreement for the duration of the proceedings); or
- an order for provisional payment in the cases foreseen by law.

An interim measure only has provisional and temporary effects and may be reconsidered or revoked by the court upon a request by the opposite party.

Alternative dispute resolution

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?

Besides the mandatory conciliation proceedings, there is no requirement or expectation of parties to engage in ADR. By mutual agreement, the parties may choose to replace the mandatory conciliation proceedings by mediation (article 213 CPC). Also, the parties' contractual agreements may foresee to engage in ADR at a pre-action stage. Once the main proceedings are underway, the court may recommend, but cannot force, the parties to engage in commercial mediation. Nor are there any consequences if the parties decline to do so.

Claims against natural persons versus corporations

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

Under Swiss law, corporations generally have legal personality and the capacity of being a party to legal proceedings. Specifics apply for simple partnerships which are a common form of cooperation (eg, for construction projects).

Different considerations apply when lodging a claim against corporate defendants as opposed to natural persons, which include:

- 4/26 cantons (ie, Aargau, Berne, St Gallen and Zurich) have commercial courts for disputes involving corporations registered in the commercial register (or an equivalent foreign register). If both parties are registered, the commercial court is mandatorily competent. If only the defendant is registered, the claimant can choose between lodging his claim with the commercial court or the district court.
- Corporate defendants are subject to a different insolvency regime than natural persons, which has implications for the enforcement procedures, costs and risks. Particularly in insolvency situations, a claimant may consider pursuing a corporate defendant's directors and officers for liability, or its shareholder by piercing the corporate veil.

Class actions

14 Are any of the considerations different for class actions, multiparty or group litigations?

Class actions, group litigations or collective settlement proceedings are not available in Switzerland. A very limited exception applies for associations and other organisations which may lodge certain claims (except financial claims) in their own name on behalf of the members of a specific group, provided that their articles of association foresee to protect the interests of such group (article 89 CPC).

A legislation project to extend and strengthen collective redress is pending, but has recently been suspended. To work around the current deficiencies in collective redress, claimants may resort to exemplary litigation, aiming at obtaining prejudice on an unsolved legal issue.

Third-party funding

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

Third-party litigation funding is permitted in Switzerland since 2004 and an accepted practice. Several restrictions apply, inter alia:

- the client's lawyer must observe the professional duties, and be able to act in the sole interest of the client and freely from any instructions of the litigation funder;
- the litigation funder must act independently of the client's lawyer;
- litigation funding must not result in a circumvention of the restrictions on contingency fee arrangements; and
- funding fees must not offend good morals or constitute profiteering (ie, exploitation of a person in need).

Contingency fee arrangements

16 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?

The rules governing the legal profession prohibit lawyers from agreeing on a compensation which is entirely contingent upon the outcome of the case (pactum de quota litis; 'no win, no fee' agreement). The reasons for the prohibition are to protect the lawyer's independence, to protect the client against surcharging, and to preserve the public's trust in the lawyers' integrity.

However, it is admissible to add a success fee component (pactum de palmario; 'uplift' agreement) to a non-contingent base fee in the lawyer's compensation. According to court practice, the following restrictions apply:

- the success fee component must be agreed either at the outset of taking on the mandate, or after the end of the litigation, but not during its course;
- the non-contingent base fee component (on a hourly basis or flat) must cover the lawyer's costs and include a reasonable profit margin; and
- the ratio between the success fee and the non-contingent base fee must not create a risk of surcharging the client or jeopardising the lawyer's independence (while there is no fixed ratio, the Federal Supreme Court considers a ratio of 1:1 as 'clearly excessive').

A party's compensation for legal expenses by the (succumbing) counterparty is usually governed by a tariff on an ad valorem basis. Thus, the counterparty will not be obliged to indemnify the client for a success fee component in case of success.

THE CLAIM

Launching claims

17 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?

Claims are launched by initiating ordinary court proceedings, preceded, as the case may be, by mandatory conciliation proceedings. Conciliation proceedings are initiated by an application for conciliation, which includes the prayers for relief and a basic description of the matter in dispute (article 202 of the Civil Procedure Code (CPC)).

Ordinary court proceedings are initiated by filing a detailed statement of claim, which includes (1) the prayers for relief, (2) the allegations of fact and (3) an indication of the evidence offered for each allegation of fact (article 221(1) CPC). It may also (but need not) include a statement of legal grounds replied upon (article 221(3) CPC).

The following must be filed together with the statement of claim (article 221(2) CPC):

- the counsel's power of attorney;
- if applicable, the authorisation to proceed delivered by the conciliation authority or the declaration that conciliation has been waived;

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

The length of written submissions can vary substantially depending on the magnitude and complexity of the dispute (between a dozen to hundreds of pages).

Serving claims on foreign parties

18 | 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

Service of process to foreign-based parties is generally effected via the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 (1965 Hague Convention). Depending on the country where service must be effected, other (bilateral) treaties may apply.

Where no convention or treaty is in place, claims are served through the diplomatic channel.

Key causes of action

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

The most frequent causes of action in commercial litigation are claims for contractual performance (payment of money or specific performance) and breach of contract (damages). Other frequent causes of action include claims for corporate liability, insurance coverage, IP infringement, unfair competition and other torts.

Claim amendments

20 | Under what circumstances can amendments to claims be made?

A claim can be amended if the new or amended claim is subject to the same type of procedure as the original claim and: (1) a factual connection exists between the new or amended claim and the original claim; or (2) if the defendant consents to the amendment (article 227 CPC).

Claims may, in principle, be amended until a party's second written submission or, in the absence of a second exchange of written submissions, until a party's first pleading at the main hearing. At this stage, an amendment of the claim is only admissible if the amended claim is based on new facts and means of evidence (article 230 CPC).

Claims may be reduced and prayers for relief may be withdrawn at any time before the judgment.

Remedies

21 | What remedies are available to a claimant in your jurisdiction?

The following remedies (actions) are available under the Swiss CPC:

- action for performance (demanding that the defendant be ordered to do, refrain from doing or tolerate something; article 84 CPC); this category includes actions for payment of a monetary sum, though if it is impossible or unreasonable to quantify the claim at the start of the proceedings, the plaintiff may bring an unquantified action for payment and quantify the claim once corresponding evidence has been taken (article 85 CPC);
- action to modify a right or legal relationship (demanding the creation, modification or dissolution of a specific right or legal relationship (article 87 CPC); and
- action for a declaratory judgment (demanding that the court establish the existence or inexistence of a right or legal relationship; article 88 CPC).

Recoverable damages

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

The following types of damages are recoverable (though they can also be limited or excluded contractually, except in cases of wilful conduct or gross negligence):

- actual loss (*damnum emergens*, ie diminution of assets and/or increase of liabilities); and
- lost profit (*lucrum cessans*).

Generally, only compensatory damages are recoverable, to the exclusion, for instance, of punitive damages.

The Swiss courts take a rather strict approach to the proof of the existence and amount of damages.

RESPONDING TO THE CLAIM

Early steps available

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

A defendant can take any of the following steps in the early stage of the proceedings:

- move to have the case dismissed on procedural grounds, for instance due to lack of jurisdiction, lis pendens, or res judicata (see list of conditions of admissibility article 59 of the Civil Procedure Code (CPC));
- move to have the case dismissed on substantive grounds, for instance due time-bar (prescription) or lack of standing to act or defend;
- request security for its legal costs (article 99 CPC); and
- request security for damages resulting from interim measures (articles 264-265 CPC, article 273 of the Swiss Debt Enforcement and Bankruptcy Act).

If the defendant has a counterclaim against the claimant, it may file a counterclaim together with the statement of defence (article 224 CPC).

If the defendant believes that a third party is liable, in whole or in part, for the claim, he or she may issue a third-party notice (article 78 CPC) or file a third-party action (article 81 CPC) against such third party.

If the defendant considers that the court does not have (territorial) jurisdiction, it should raise a corresponding objection at the outset of the proceedings as failure to do so may result in tacit acceptance of the court's jurisdiction (article 18 CPC).

Defence structure

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

The statement of defence must be filed within the time limit set by the court (article 222(1) CPC), which is usually between 20 and 60 days, while the time limits at the shorter end may usually be extended upon a reasoned request.

The same requirements apply for the statement of defence as for the statement of claim (article 222(2) CPC). Therefore, the statement of defence must include (1) the defendant's prayers for relief, (2) the

defendant's allegations of fact, including a statement of which of the claimant's factual allegations are accepted and which are disputed and (3) an indication of the evidence offered for each allegation of fact. It may also (but need not) include a statement of legal grounds replied upon.

The following must be filed together with the statement of defence:

- the counsel's power of attorney;
- the available documentary evidence; and
- a list of the evidence offered.

Changing defence

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

A defendant may change a defence under the same conditions as a claimant may amend its claim. A defence may thus, in principle, be changed until the defendant's second written submission or, in the absence of a second exchange of written submissions, until its first pleading at the main hearing. Thereafter, the amendment of a defence is only possible if the amended defence is based on new facts and means of evidence (article 230 CPC).

An acknowledgement of the claim is possible at any stage of the proceedings.

Sharing liability

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

If the defendant wishes to be able to pass on all or part of the liability to a third party, it can give notice of the proceedings to such third party (article 78 CPC). The notified third party may then (article 79 CPC):

- intervene in favour of the defendant, without further conditions; or
- proceed in place of the defendant, with the latter's consent.

Regardless of whether the notified party decides to participate in the proceedings, the outcome of the proceedings will, in principle, also be binding on the notified party (article 80 CPC cum article 77 CPC).

Alternatively, the defendant may bring a third-party action against such third party (article 81 CPC) together with the statement of defence. The defendant shall set out the prayers to be raised against the third party together with a brief statement of the grounds. After having heard the claimant and the third party, the court decides on the admission of the third-party action, a decision that may be challenged by way of a subsidiary form of appeal (article 82 CPC).

Avoiding trial

27 | How can a defendant avoid trial?

The defendant can cause the proceedings to end without a judgment by acknowledging the claim or entering into a settlement with the claimant. This has the same effect as a binding decision and leads to the dismissal of the proceedings without a judgment (article 241 CPC).

There is no institution such as the common-law 'motion to dismiss' or 'summary judgment' procedure in Swiss law. However, a defendant may raise a number of procedural or substantive defences, which, if upheld, may lead to an early dismissal of the claim before the proceedings reach the hearing stage. The defendant may request a limitation of the proceedings to this effect (article 125(a) CPC).

Case of no defence

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

If the defendant fails to enter an appearance, or to participate in the proceedings, it is deemed to be in default, with the effect that proceedings shall continue in the defendant's absence (article 147 CPC). If the defendant fails to timely file the statement of defence, and such failure is not remedied within a short period of grace, the court shall render a judgment, provided that the matter is ripe for decision (article 223 CPC).

To be noted is that the court examines ex officio whether the procedural requirements (conditions of admissibility) of a claim (jurisdiction, lis pendens, res judicata, etc) are fulfilled (article 59 CPC). However, it will not consider substantive defences, such as time-bar, without a corresponding objection of the defendant. Finally, the defendant's default does not mean the court must accept the claimant's allegations at face value; rather, it may take evidence ex officio if serious doubts exist as to the truth of an undisputed allegation of fact (article 153(2) CPC).

Claiming security

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

A defendant may claim security for its legal costs (article 99 CPC) if the claimant:

- has no residence or registered office in Switzerland (and there is no treaty dispensing the claimant from providing security for costs);
- appears to be insolvent, notably if it has been declared bankrupt or is involved in ongoing composition proceedings or if certificates of unpaid debts have been issued;
- owes costs from prior proceedings; or
- if for other reasons there seems to be a considerable risk that the defendant's legal costs will not be paid.

Once ordered by the court, the security may be provided in cash or in the form of a guarantee from a bank with a branch in Switzerland or from an insurance company authorised to operate in Switzerland (article 100(1) CPC). If the ordered security is not provided in good time, the claim is declared inadmissible (article 101(3) CPC).

PROGRESSING THE CASE

Typical procedural steps

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

The typical sequence of procedural steps in commercial litigation is as follows:

- conciliation request by the claimant, followed by a conciliation hearing (if mandatory);
- written statement of claim;
- written statement of defence;
- instruction hearing for settlement talks (within the discretion of the court, but done as a matter of course by commercial courts);
- second exchange of briefs (reply and rejoinder; may also be oral pleadings);
- main hearing for taking evidence (in particular witness testimony) and the parties' comments on the evidence taken; and
- judgment.

Bringing in additional parties

31 | Can additional parties be brought into a case after commencement?

Yes, additional parties can be brought into, or intervene in, a case. The main forms of inclusion are the following:

- principal intervention: any person who claims to have a better right in the object of a dispute may bring a claim directly against both parties (article 73 of the Civil Procedure Code (CPC));
- accessory intervention: any person who shows a credible legal interest in a pending case may intervene in support of such party (articles 74 et seqq CPC);
- third-party notice: a party may notify a third party of the dispute to extend the effects of a unfavourable judgment to such third party for an eventual recourse, whereupon such third party may support the notifying party (articles 78 et seqq CPC); and
- third-party action: a party may request the court to lodge an eventual action for recourse against a third party within the main proceedings for the case of an unfavourable judgment on the main claim (articles 81 et seqq CPC).

Furthermore, the court has discretion to consolidate proceedings against or by different parties (article 125(c) CPC).

Consolidating proceedings

32 | Can proceedings be consolidated or split?

Yes, the court may, in its discretion, consolidate or split actions for the purpose of simplifying the proceedings (article 125 CPC). It may also limit the proceedings to individual issues or prayers for relief.

Court decision making

33 | 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?

Article 168 CPC sets out an exhaustive list of the admissible means of evidence:

- witness testimony;
- documentary evidence;
- judicial inspection;
- expert opinion;
- written information requested by the court; and
- examination or evidentiary statements of parties.

All means of evidence carry equal weight and the court is free in its assessment of the evidence presented (article 157 CPC).

Pursuant to article 8 of the Swiss Civil Code (CC), the burden of proving the existence of an alleged and disputed fact rests on the person deriving rights from such fact, unless the law provides otherwise.

If no facilitating exception applies, Swiss law requires strict or full proof, meaning that the court must, on objective grounds, be convinced of the truth of the alleged fact and must not have any or only minor remaining doubts as to its existence.

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

In principle, the court is bound by the parties' prayers for relief (article 58 CPC) and cannot award or order more, or something different, than specifically requested by a party.

Evidence

35 | How is witness, documentary and expert evidence dealt with?

The parties must present their evidence in the correct form and in a timely manner, after which evidence may only be introduced under restrictive requirements. Swiss courts often show a preference for documentary evidence over oral evidence.

Documentary evidence available to a party must be filed together with its brief. While it is possible to request production of documents from the counterparty or a third party, Swiss courts are very restrictive in granting such requests.

Witnesses must testify orally; written witness statements are inadmissible as evidence. Witnesses are examined by the court and counsel is only admitted to submit supplementary questions. Contacts between counsel and potential witnesses are only admissible under specific limitations, and may potentially taint the evidentiary value of a witness' testimony.

Experts can be requested by the parties, but must be appointed by the court to qualify as 'evidence'. Expert opinions submitted by a party alone are considered mere allegations of such party.

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

Due to the absence of disclosure or discovery, the volumes of evidence are rarely excessively large. A judge can make the necessary determination, if he or she has the necessary special expertise to assess and weigh such evidence. Thereby, the court must disclose the special expertise of one of its members and allow the parties to comment (article 183(3) CPC). This may, in particular, occur before the commercial courts or other specialised courts (eg, the Federal Patent Court) that have technical judges. In the absence of such special expertise, a court will generally appoint an expert to provide an opinion on the issues relevant for deciding the case.

37 | 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?

If a request is made in the correct form, witnesses in Switzerland can be compelled to give evidence to a foreign court. Switzerland is a party to several bi- and multilateral 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 (1970 Hague Convention) and the Hague Convention relating to Civil Procedure of 1 March 1954 (1954 Hague Convention). If no treaty applies, Swiss courts will apply the 1954 Hague Convention by default (article 11(a) of the Swiss Private International Law Act).

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

Note that Switzerland has a blocking statute in article 271 of the Swiss Penal Code (SPC): According to said provision, it is a criminal act to conduct or facilitate activities on behalf of a foreign state (including foreign courts) on Swiss territory without lawful authority. The taking of evidence on Swiss territory is considered to be within the sole purview of the Swiss courts. Accordingly, it is illegal to take evidence in Switzerland for foreign court proceedings outside the formal channels.

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

Witnesses are examined by the judge. The parties' role is limited to submitting supplemental questions, which are usually posed by the judge or may, with leave by the court, be asked by counsel directly. Accordingly, there is no cross-examination. The court may, however, order a confrontation of witnesses or parties (article 174 CPC).

If the authenticity of a certain document is disputed with sufficient reasoning, the counterparty relying on such document as evidence is required to prove its authenticity (article 178 CPC).

Time frame

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

It is difficult to predict the duration of court proceedings. As a general rule, first instance proceedings may typically last 12 to 18 months (excluding conciliation, if any).

The means for expediting the proceedings depend on the specifics of a case (eg, if the fact and legal issues are undisputed or can successfully be presented as clear, or if a signed acknowledgement of debt is available).

Gaining an advantage

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

There are many tactics available to achieve an advantage. However, they usually depend on a party's role and the specifics of the individual case. A claimant may, for example, consider measures to limit its risks (eg, by submitting a partial or a step-by-step action, by freezing assets or obtaining interim measures, or by obtaining litigation funding). A defendant may, for example, consider playing for time (eg, by raising procedural objections) and/or increasing the cost of litigation for the claimant (eg, by requesting security for its legal costs or damage caused).

Impact of third-party funding

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

Third-party funding may enable a claimant to pass the high cost barriers for litigating in Switzerland and to litigate its case to the very end. It may also have an impact on the parties' incentives to reach, or refrain from, a settlement.

Impact of technology

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

The impact of technology is still limited in Swiss court proceedings. While electronic filing is possible since almost a decade, this option is seldom used and litigation proceedings are mainly 'paper-based'. With the exception of emergency legislation due to the Coronavirus, Swiss court hearings are held physically and witnesses have to appear in person before courts in civil procedures.

Parallel proceedings

43 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?

Civil proceedings can be conducted before, in parallel with or after regulatory or criminal proceedings. Due to the absence of disclosure and discovery in civil proceedings, claimants tend to await the evidence resulting from a regulatory or criminal proceeding before lodging their civil action. Defendants tend to try to slow down regulatory or criminal proceedings and to restrict potential civil litigants' access to such evidence.

Prosecution is within the exclusive competence of the Swiss authorities and there is no private prosecution. However, the victim of a criminal offence may include his or her civil claims in criminal proceedings. Unless the criminal court considers such civil claims to be too complex, this can be advantageous because criminal proceedings tend to be shorter than civil proceedings and because the facts are established ex officio.

TRIAL

Trial conduct

44 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 Swiss civil proceedings as the parties' main pleadings are generally made in written form. For the rest, there are essentially two types of hearings:

The court may at any time conduct instruction hearings to discuss the matter in dispute in an informal manner, to complete the facts, to attempt to reach a settlement and to prepare for the main hearing (article 226 of the Civil Procedure Code (CPC)).

At the main hearing, the parties may present their opening submissions (article 228 CPC), after which the court takes the evidence (article 231 CPC). Once the evidence has been taken, the parties may present their closing submissions, to comment on the result of the evidence and the merits of the case, though the parties may jointly waive oral closing submissions and request the submission of written submissions (article 232 CPC). The main hearing can last from a few hours to several days, depending on the number of witnesses to be heard or other evidence to be taken.

Use of juries

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

There are no jury trials in civil proceedings in Switzerland.

Confidentiality

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

The parties' submissions and evidence are normally not accessible to the public. However, hearings and oral pronouncements of judgment are open to the public and the court's judgments are made accessible to the public (article 54(1) CPC).

Cantonal law determines whether the deliberations of the court are public (article 54(2) CPC).

This being said, proceedings may be held completely or partially in camera when required by public interest or by the legitimate interests of a person involved (article 54(3) CPC).

Moreover, the court shall take appropriate measures to ensure that taking evidence does not infringe the legitimate interests of a party or third party, such as trade secrets (article 156 CPC).

Media interest

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

The authorities of most cantons offer media accreditation to journalists wishing to report on public hearings. The possibility exists to restrict hearing attendance to accredited journalists (ie, to the exclusion of the public). However, it is questionable whether the media can be ordered not to report on certain information pertaining to public hearings. Thus, the most effective means to restrict reporting on court proceedings is to hold hearings in camera.

If a party fears that media coverage would violate personality rights (article 28 et seqq of the Swiss Civil Code), it may request interim measures (which must, however, meet the strict requirements of article 266 CPC).

Proving claims

48 | How are monetary claims valued and proved?

Monetary claims are usually valued and proved by way of documentary evidence or, if necessary, by an expert opinion. Most discussions about the existence and quantum of damages turn around the causal link between said damages and the alleged breach. Where the exact value of the damage cannot be established, 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(2) CO).

Pursuant to article 125(a) CPC, to simplify the proceedings, the court may limit the proceedings to individual issues, such as the defendant's liability, and then decide in a further phase on the quantum.

POST-TRIAL

Costs

49 | 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?

The court decides on the amount and allocation of the court's fees and the parties' legal costs (article 95 of the Civil Procedure Code (CPC)). The amount of court fees and legal costs is determined based on the applicable cantonal tariff (article 96 CPC), usually on an ad valorem basis. The allocation is generally made based on the 'costs follow the event' rule, pursuant to which the losing party must bear the court fees and the winning party's legal costs (article 106 CPC).

The typical structure of judgments is as follows:

- procedural history and facts;
- reasons for the decision; and
- dispositive part of the judgment.

The length of judgments can vary between a few dozen to several hundred pages. Judgments are for the most part publicly available (upon a corresponding request). In addition, a large selection of commercial court and second instance judgments as well as all judgments of the Swiss Federal Supreme Court are published (in anonymised form) online.

Appeals

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

Most judgements – except where the law provides for a single cantonal instance (eg, the four commercial courts) – can be appealed in the second instance to the higher cantonal court. Judgments of the last cantonal instance may be appealed to the Swiss Federal Supreme Court.

The length of cantonal appeals proceedings can vary considerably between cantons, but is usually about six months to one year. Proceedings before the Federal Supreme Court usually last between six to nine months.

Enforceability

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

The enforceability of a Swiss judgment will depend on the regime applicable in the country where enforcement is sought. Because Switzerland is a party to the 2007 Lugano Convention, its judgments benefit from the simplified enforcement regime applicable throughout most of Europe.

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

Foreign judgments can be enforced in Switzerland either under bilateral or multilateral treaties, such as the 2007 Lugano Convention, or, where no treaty applies, under article 25 et seqq of the Swiss Private International Law Act.

Foreign monetary judgments can be enforced in a single proceeding that includes the decision on the recognition and enforceability of the foreign judgment (exequatur) and its actual enforcement against the debtor's assets. They further entitle the judgment creditor to attach any known assets of the judgment debtor in Switzerland to secure enforcement.

OTHER CONSIDERATIONS

Interesting features

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

The cantons of Aargau, Bern, St Gallen and Zurich have long-standing commercial courts that are specialised in resolving commercial disputes. An important feature of these courts is that they are composed of both legally trained professional judges and lay 'expert' judges with experience in a particular field or industry, such as financial services, construction, insurance, etc, thus combining legal and technical expertise without the need to resort to external experts.

Jurisdictional disadvantages

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

The absence of pretrial discovery as well as the rather high standards of proof applied by Swiss courts may make it difficult for certain claimants to prove their claims. Further, the requirement for claimants to advance the full court fees at the start of the proceedings can be quite burdensome in certain cases.

These disadvantages are, however, compensated by a very limited intrusion into a party's internal documents, the increased predictability of the outcome of the proceedings and the possibility for a successful claimant to recover the court costs and at least part of its legal costs in case of success.

Special considerations

55 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?

Many Swiss courts, notably the commercial courts in the German-speaking cantons, have a longstanding practice of holding instruction hearings after the first round of written submissions to hear the court's preliminary assessment of the case and hold settlement discussions. The instructing judge generally prepares a detailed note with his or her preliminary views on the parties' respective positions, including the facts they have to prove and the strengths and weaknesses of their respective arguments, and may even make concrete suggestions as to an amicable settlement.

This procedure allows the parties to settle the case based on the court's 'neutral' prima facie assessment at an early stage of proceedings. Where the case is not settled, the parties nevertheless benefit from valuable guidance as to what the court is interested in seeing in the further course of the proceedings.

UPDATES AND TRENDS

Key developments of the past year

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

In February 2020, the Federal Council adopted its message on the draft bill for the revision of the Civil Procedure Code (CPC) for the attention of parliament. With the draft bill, the initiative to establish international commercial courts, has reached an important milestone. The initiative, launched in 2018, foresees the possibility for the cantons to establish a specialised court (or a specialised chamber attached to an existing commercial court) for dealing with international commercial disputes. In this context, the draft bill includes the following adjustments to the CPC:

- possibility for the cantons to attribute jurisdiction to their commercial courts for certain types of international disputes and for the parties to bindingly select such courts for their international disputes;
- possibility to conduct proceedings in English as well as in other national languages (German, French, Italian) that are not the official language at the seat of the court; and
- various adjustments to the rules of evidence, inter alia, to allow the testimony of witnesses and experts by videoconference.

The Federal Council noted in its message the benefits of boosting Switzerland's reputation as a neutral and competent 'legal hub' for the resolution of international commercial disputes while making a significant contribution to Switzerland's dispute resolution market.

For the rest, the draft bill for the revision of the CPC includes the following key points:

- Facilitating access to court: As a basic principle, the advances on court fees are to be halved (with exceptions). Furthermore, the liquidation of legal costs is to be designed so that it is no longer the parties who bear the risk of collection from the other party, but the state.
- Improvement of legal certainty: With selective adjustments, the CPC is to be updated to reflect landmark decisions and made more user-friendly. A new right for corporate (in-house) lawyers to refuse testimony is further introduced. Finally, the revision prepares the foundations for a future establishment of special international commercial courts.
- Strengthening the conciliation procedure: The latter is to be extended to additional disputes and the competence of the conciliation authorities to propose decisions is to be expanded.

Kellerhals Carrard

Martin Molina
martin.molina@kellerhals-carrard.ch

Christoph Bauer
christoph.bauer@kellerhals-carrard.ch

Raemistrasse 5
Postfach, CH-8024 Zurich
Switzerland
Tel: +41 58 200 39 00
www.kellerhals-carrard.ch

The proposals for strengthening the collective redress of mass and scattered damage were highly controversial in the consultation process. In order not to jeopardise the largely uncontroversial part of the revision, the Federal Council has, therefore, decided to remove the issue of collective redress from the bill and deal with it separately.

As a next step, the draft bill will be discussed in the Swiss parliament towards the end of 2020.

Coronavirus

57 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Federal Council enacted two successive emergency ordinances to deal with the effects of the covid-19 pandemic in the administration of justice:

On 20 March 2020, the Federal Council enacted an ordinance to extend the Easter court recess in administrative and civil procedures, thus giving litigants and their counsel more time to comply with statutory and judicial deadlines. The extended court recess began on 21 March 2020 and ended on 19 April 2020.

On 16 April 2020, the Federal Council enacted an ordinance instituting further measures in relation to the coronavirus in the area of justice and procedural law. Among other things, it regulates the use of video conferencing in civil proceedings, which – although foreseen in the draft bill for the revision of the CPC – is not provided for in the current CPC and thus, under normal circumstances, not permitted without all parties' consent. In the same ordinance, the Federal Council decided to temporarily suspend certain formal requirements regarding the service of documents in debt enforcement proceedings (eg, payment orders). This ordinance entered into force on 20 April 2020 and will remain in force until the end of September 2020 (Swiss Parliament is about to debate over the Federal Council's proposal for emergency legislation).

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-315-9