THE DISPUTE RESOLUTION REVIEW

Fifteenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

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FIFTEENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 26 jurisdictions. The following chapters aim to equip the curious practitioner with an up-to-date and concise introduction to the framework for dispute resolution in each jurisdiction. Each chapter outlines the most significant legal and procedural developments of the past 12 months and the authors' views as to the big themes predicted for the year ahead. The publication will be useful to anyone facing disputes that cross international boundaries, which is ever more likely in a world that seems to be more interconnected with every passing year.

In compiling the 15th edition of *The Dispute Resolution Review*, I am reminded that despite the variety of legal systems captured in the publication, there is a clear common denominator. All systems are organised and operate to ensure parties have a means of resolving disputes that they cannot resolve themselves. I am reassured that, despite cultural, traditional and legal differences, the jurisdictions represented here are united by this common thread. It reflects an innate, international commitment to the rule of law and the rights of individuals. This edition will be a success if it assists parties to navigate different legal systems to achieve fair and efficient outcomes for whatever dispute they are facing.

Reflecting on the past year, it was only shortly after the previous edition of *The Dispute Resolution Review* went to print that Russia invaded Ukraine, with huge humanitarian, political and economic consequences. The war illustrates the fragility of peace and the rule of law and terrible human suffering that follows in their absence. While the paramount objective must be to restore peace, in commercial disputes terms, the sanctions imposed by both sides created urgent and sometimes novel legal disputes concerning assets that cannot be moved or dealt with, as has the sudden and unexpected rise in commodities prices.

This past year also saw the passing of Queen Elizabeth II. In legal terms, this meant that silks in England and Wales switched from 'Queen's' to 'King's' Counsel, and our own 'Queen's Bench Division' of the High Court reverted to the 'King's Bench Division' for the first time in 70 years.

Looking ahead, there are certainly new challenges on the horizon that will test dispute resolution systems around the world. In the United Kingdom, we have officially entered a period of recession that by some estimates is predicted to last around two years (in stark contrast to the transactional frenzy that followed the pandemic). Other jurisdictions are facing similarly sober economic outlooks, and I expect many practitioners are beginning to experience an increase in contentious restructuring and insolvency matters. For those pursuing such matters through the courts in the United Kingdom, the Supreme Court's October decision in *BTI 2014 v. Sequana* [2022] UKSC 25 provides guidance on when directors should have regard to creditors' interests.

This 15th edition follows the pattern of previous editions, where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate a continually evolving legal landscape responsive to both global and local developments.

As always, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies can be found in Appendix 1 and highlight the wealth of experience and learning from which we are fortunate to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
Harpenden
January 2023

Chapter 20

SWITZERLAND

Robin Moser, Remo Wagner, Johanna Hädinger and Nadine Spahni[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Switzerland is a popular country for international dispute resolution and is frequently chosen by international parties. This is not only attributable to Switzerland's neutrality but also to the fact that the court system is reliable, fair and balanced, and decisions are rendered reasonably quickly.

The Swiss court system is characterised by the federal structure of Switzerland. In civil litigation, the procedural rules for civil litigation have been harmonised through the adoption of the Civil Procedure Code (CPC) in 2011, but the organisation of the civil courts and conciliation authorities generally remained in the competence of the cantons. Consequently, each canton has its own court system. Federal law confines itself to set certain minimal standards, such as the principle of double instance. For certain commercial matters, each canton has the possibility to set up a commercial court with sole cantonal jurisdiction. The following four cantons have made use of this possibility: Zurich, St Gallen, Bern and Aargau.

Patent disputes are excluded from the cantonal jurisdiction and are dealt with by the Federal Patent Court. The Swiss Federal Supreme Court (SFSC) is the highest court in Switzerland and ensures that federal law is applied uniformly.

II THE YEAR IN REVIEW

The SFSC has rendered several important decisions concerning civil litigation in the recent past:

a Under Swiss civil procedure law, there is the possibility to only sue for a part of a claim, allowing the amount in dispute to be limited. This enables the suing party to limit the financial exposure for procedural and party costs, and further provides the possibility for the party to profit from simplified procedures. However, the SFSC has now ruled that it is never possible for the counterparty to counter-sue with a negative declaratory action concerning the full amount of the claim, even if this leads to the procedure being drawn into a different (more formal and expensive) type of procedure.[2]

1 Robin Moser is a partner, and Remo Wagner, Johanna Hädinger and Nadine Spahni are associates at Loyens & Loeff Switzerland. The authors thank Dumenig Stiffler for his valuable research and input.

2 Decision of Federal Supreme Court 4A_395/2021 of 7 October 2021, cons. 3.2.

b The Swiss Act on Private International Law (PILA) does not provide for rules on the allocation of procedural or party costs. The SFSC held that, as a consequence, Swiss authorities and courts have to apply the rules of the CPC to decide on the allocation of costs, a decision that is also applicable in international cases.[3]

c Switzerland generally follows a 'cost follow the event' approach when it comes to allocating procedural and party costs in civil procedure. The SFSC clarified that costs are allocated to the parties only by taking into account the overall result of the procedure and not how the court decided on procedural motions. Thus, if a party is successful in having a case against it dismissed, it should not bear any costs, even if the court initially had ruled against that party on several procedural motions.[4]

d Even after Brexit, Swiss courts still remain competent in procedures linked to the United Kingdom if those procedures have been initiated under application of the Lugano Convention and are still pending after the transition period ending on 31 December 2020.[5] Furthermore, UK judgments rendered before 31 December 2020 can still be enforced in Switzerland based on the Lugano Convention.[6]

e When a monetary claim between two parties is due in one currency (e.g., the euro), it may not be claimed in another currency (e.g., Swiss francs) in a Swiss court and a corresponding claim would need to be dismissed. Even if foreign law would be applicable to the claim, the question of whether a judge may or may not convert a claim from one currency to another would be governed by Swiss procedural law, which does not allow the court to award anything other than what the party is asking.[7]

f If the contractual relationship between two parties is governed by multiple contracts, which include contradicting jurisdiction or arbitration clauses, the jurisdiction or arbitration clause contained in the most recent contract can be assumed to correspond to the true will of the parties.[8]

III COURT PROCEDURE

i Overview of court procedure

Civil litigation is usually preceded by conciliation proceedings before a cantonal conciliation authority.[9] If no settlement is reached, the claimant may file an action in the first instance court.[10] Decisions of the first instance court may be challenged before the second instance court. Decisions of the second instance court may in turn be appealed to the SFSC. Decisions of the SFSC are final with the exception that they may be challenged before the European Court of Human Rights in Strasbourg on grounds of a violation of the European Convention on Human Rights.

3 Decision of Federal Supreme Court 4A_505/2021 of 19 October 2021, cons. 7.

4 DFC 148 II 182, cons. 3.2.

5 Decision of Federal Supreme Court 4A_133/2021 of 26 October 2021, cons. 4.1.2.

6 DFC 147 III 491, cons. 6.1.2.

7 Decision of Federal Supreme Court 4A_502/2021 of 25 April 2022, cons. 4.1.3.

8 Decisions of Federal Supreme Court 4A_27/2022 of 10 May 2022, cons. 2.4-2.5.

9 Article 197 CPC.

10 Articles 209(1) and 209(3) CPC.

ii Procedures and time frames

Conciliation proceedings

During the conciliation hearing, the parties shall attempt to settle their dispute amicably to avoid court proceedings. The claimant may initiate conciliation proceedings by filing a request with the competent cantonal conciliation authority. The request must identify the counterparty and include the prayers for relief as well as a description of the dispute. The hearing has to take place within two months of receipt of the request. Statements made by the parties during the hearing are neither recorded nor may they be used in subsequent proceedings. If the parties fail to reach an agreement, the claimant (in certain rent and lease matters: the rejecting party) may file an action with the first instance court within three months.[11]

The costs depend on the canton and are typically based on the amount in dispute. The costs range from 50 Swiss francs to up to 10,000 Swiss francs, but in most cantons the cap is lower. In certain social matters the conciliation proceedings are free of charge.[12]

Under certain circumstances, no conciliation proceedings take place, such as in summary proceedings (as described below), for certain actions under the Debt Enforcement and Bankruptcy Act (DEBA) or in disputes before a cantonal commercial court. Furthermore, the parties may mutually waive the conciliation proceedings if the amount in dispute exceeds 100,000 Swiss francs. The claimant may unilaterally skip the conciliation proceedings if the defendant's domicile is abroad or unknown.[13]

First instance court proceedings

The CPC provides for three different types of proceedings: ordinary, simplified and summary proceedings. In family law matters, special proceedings may apply but they will not be further discussed in this chapter.

Summary proceedings

Summary proceedings are the fastest and cheapest way to obtain a decision under the CPC and may be brought in all cases designated by law, including interim measures (as described below), clear cases (as described below) and certain actions under the DEBA and PILA, as well as non-contentious matters.[14] While a written or oral application is sufficient to initiate summary proceedings, evidence must be provided in the form of physical records. Oral evidence is only permissible on an exceptional basis. Summary proceedings can include a hearing, but the court may also render its decision solely based on the court file.[15] The time frame of summary proceedings typically ranges from a few weeks to several months.

11 Articles 197–209 CPC.
12 Article 113(2) CPC.
13 Articles 198–199 CPC.
14 Article 248 CPC.
15 Articles 252–256 CPC.

Simplified proceedings

Simplified proceedings apply in matters with an amount in dispute below 30,000 Swiss francs and, regardless of the amount in dispute, in certain social matters. The claimant initiates simplified proceedings by filing a reasoned or unreasoned statement of claim. The court then either invites the counterparty to respond in writing or summons the parties to a hearing directly.[16] Simplified proceedings typically take a few months.

Ordinary proceedings

In all other cases, the ordinary proceedings apply with usually two exchanges of written briefs (statement of claim or statement of defence and reply or rejoinder) followed by a main hearing, including the taking of evidence. The court may also, at any time, hold instruction hearings to discuss the dispute in an informal manner, to conduct settlement negotiations or to prepare the main hearing. The defendant may file a counterclaim if such claim is subject to ordinary proceedings as well.[17] Ordinary proceedings usually take between one and two years, sometimes longer.

Court fees

The court fees depend on the canton and may vary significantly. The claimant is usually requested to advance the estimated costs at the beginning of the proceedings. Costs are ultimately determined and allocated by the court in the final decision. In general, the losing party must bear the costs, which are set off against the advance paid by the claimant. In case of a settlement in court, the parties may agree on a different cost allocation. In addition to the court costs, the losing party must bear the prevailing party's attorney fees, which are determined by the court in line with the applicable cantonal tariff.[18]

Second instance court proceedings

There are two main appellate remedies: the appeal and the complaint proceedings. An appeal against a first instance decision is permissible if the amount in dispute exceeds 10,000 Swiss francs. It is, however, excluded for decisions in relation to enforcement actions and certain actions under DEBA. The appeal constitutes a comprehensive remedy in the sense that the appellant may contest the decision on the grounds of incorrect application of the law and incorrect determination of facts. The legal force and enforceability of the contested decision are suspended for the duration of the appeal proceedings (i.e., 'suspensive effect'), subject to certain exceptions (e.g., interim measures). However, the appellate court may authorise early enforcement. The appeal must be lodged with the second instance court within 30 days of service of the respective decision (summary proceedings: 10 days). New facts and evidence are permissible if submitted immediately and if they could not have been submitted before. The counterparty is granted a time limit to file a response unless the court concludes that the appeal has no merit anyway. The appellate court has the possibility to hold a hearing but rarely does and normally decides based on the case file. It may nevertheless take evidence if

16 Articles 243–247 CPC.

17 Article 219 et seqq. CPC.

18 Articles 95–112 CPC.

necessary. In its decision, the appellate court may confirm the challenged decision, make a new decision (including on costs) or reverse the decision and remand the case to the first instance court.[19]

Complaints constitute the second appellate remedy. They are available against final and interim decisions of the first instance court that are not subject to appeal or in case the law only allows this remedy. A complaint is more limited than an appeal since only an incorrect application of law and an evidently incorrect determination of facts may be challenged. Moreover, the filing of a complaint does not generally have suspensive effect and new facts and evidence are not admissible. Decisions in complaint proceedings are almost exclusively rendered without a hearing.[20]

Appellate proceedings may take between a few weeks to approximately two years, depending on the canton and the specific circumstances of the case. The costs for appellate proceedings are typically a bit lower than the first instance costs.

Proceedings before the SFSC

The SFSC constitutes the final instance. The main remedy is the complaint. A complaint in civil matters is admissible against a final or partial decision of the highest cantonal civil court or courts, which act as the only instance (e.g., commercial courts). Preliminary and interim decisions may only be challenged before the SFSC if certain statutory requirements are met. The amount in dispute must be at least 15,000 Swiss francs in employment and tenancy law cases and 30,000 Swiss francs in all other cases. In certain cases, such as if a legal question of fundamental importance is to be decided, a complaint is admissible regardless of the amount in dispute. The appellant may claim a violation of federal law, international law and cantonal constitutional rights.[21] In case a complaint is not admissible, the appellant may file a subsidiary constitutional complaint instead, which is limited to the violation of constitutional rights.[22] Proceedings before the SFSC usually take a few months to a year. The costs are governed by the federal tariff[23] and range from 200 Swiss francs to 200,000 Swiss francs, depending on the amount in dispute.

Interim measures

The court having jurisdiction over a matter or the court at the place where the measure is to be enforced may order interim measures. It may order any interim measure suitable to prevent imminent harm, usually an injunction or an order to remedy an unlawful situation. The applicant must provide prima facie evidence that:

a a right to which it is entitled has been violated or a violation is anticipated; and

b such violation threatens to cause harm to the applicant, which is not easily reparable.

In cases of extraordinary urgency, interim measures may be ordered immediately and without hearing the counterparty. The court may, however, order the applicant to provide security

19 Articles 308–318 CPC.

20 Articles 319–327a CPC.

21 Articles 72–77 Act on the Swiss Federal Supreme Court (SFSCA).

22 Articles 113–119 SFSCA.

23 Tariff for court costs in Federal Supreme Court proceedings of 31 March 2006 (SR 173.110.210.1).

and amend or revoke the interim measure if necessary after having granted the counterparty a right to be heard.[24] Requests for *ex parte* interim measures are usually dealt with within 24–72 hours.

Clear cases

The CPC finally provides for expedited (summary) proceedings in cases where the facts are undisputed or immediately provable and the legal situation is clear. The respective decision has full legal effect and may be enforced like any other final decision. If the court finds that the case is not clear enough, it will dismiss the claim without prejudice.[25]

iii Class actions

As a matter of principle, legal action must be initiated by the individuals concerned. Two or more persons may jointly appear as claimants or be sued as defendants if their rights or obligations result from similar circumstances or legal grounds.[26] The Swiss legal system, however, is not familiar with class actions where a claimant initiates legal proceedings on behalf of a larger 'class' of persons who are not named claimants. The CPC provides for an exception only where associations or other organisations of national or regional importance are mandated by their articles of association to protect the interest of a certain group of individuals ('group action'). In this case, an organisation may bring an action in its own name and request the court to prohibit an imminent violation, eliminate an ongoing violation or establish an ongoing violation. Damage awards are not possible.[27] The SFSC recently dismissed a collective consumer protection action in connection with the Volkswagen emission scandal, arguing that the foundation that brought the claims had no standing to do so.[28] A revision of the CPC to introduce new collective remedies such as a class action with an opt-in possibility or group settlements was discussed in the parliament not long ago but ultimately postponed.

iv Representation in proceedings

Any natural or legal person with legal capacity to act may be a party in civil litigation and, consequently, represent itself. Natural persons who represent a legal person must be duly authorised to act on behalf of the company. This also applies for the conciliation proceedings. If a third party, which is not registered in the commercial register, aims to represent a legal person in conciliation proceedings, the SFSC has held that a general commercial power of representation (*kaufmännische Handlungsvollmacht*) is required and that a simple power of attorney (*bürgerliche Vollmacht*) is not sufficient.[29]

Parties are entitled (but not required) to appoint a legal representative in litigation proceedings. With a few exceptions, the professional representation of parties before civil courts is restricted to attorneys-at-law who are admitted to the bar.

24 Articles 261–269 CPC.

25 Article 257 CPC.

26 Known as 'joinder of parties', see Articles 70–71 CPC.

27 Article 89 CPC.

28 Decisions of Federal Supreme Court 4A_483/2018 of 8 February 2019.

29 DFC 141 III 159.

v Service out of the jurisdiction

Parties that are domiciled abroad may be requested by the court to provide a service address in Switzerland. If service of process in Switzerland is impossible, the court needs to serve procedural documents in line with the applicable Hague Convention of 1965 or through diplomatic channels. Details on the service of process in a specific country may be found in the country index of the Federal Office of Justice.[30] If service attempts are unsuccessful, the court may also publish summonses and orders in the official gazette.[31]

vi Enforcement of foreign judgments

The enforcement of a foreign judgment depends on whether the judgment originates from a member state of the Lugano Convention or not. Judgments rendered in a Member State of the Lugano Convention (i.e., the European Union, Norway and Iceland) are automatically recognised[32] and can be enforced quite easily. In practice, an enforcement request is often combined with a request for a freezing order. Judgments rendered in other states are enforced in accordance with the rules laid out in the PILA, which require that:

a the jurisdiction of the state in which the judgment was rendered is valid from a Swiss law perspective;
b the decision has become final; and
c no grounds for a refusal exist (e.g., improper service and violation of due process).[33]

vii Assistance to foreign courts

International judicial assistance in civil matters includes the service of documents and the taking of evidence. Service of process in Switzerland by a foreign state outside of the judicial assistance channels is generally considered a violation of Swiss territorial sovereignty.[34] According to the applicable Hague Conventions, the requesting state needs to forward a request to the competent cantonal central authority or the Federal Office of Justice in Berne, which then forwards the request to the competent authority. The request (e.g., service of process or a deposition of a witness) is executed in accordance with the law of the requested state (i.e., in Switzerland in accordance with the CPC). If the application of foreign law is requested, Swiss authorities try to accommodate insofar as this is compatible with Swiss law.

viii Access to court files

As a rule, court files are not public and may only be consulted by the parties. However, certain hearings are open to the public and access may only be limited or denied based on overriding public or private interests.[35] Conciliation and family law proceedings are never public. Judgments of the SFSC and of many second instance courts are systematically published in anonymised form. In addition, judgments are made available for inspection at the court in non-anonymised for a limited period right after they have been rendered.

30 Country index in the guide to international legal assistance published by the Federal Office of Justice (https://www.rhf.admin.ch/rhf/de/home/rechtshilfefuehrer/laenderindex.html).
31 Article 141(1) CPC; The same applies in administrative procedures (see Article 36 Administrative Procedure Act [APA]), however, not in criminal procedures.
32 Article 33(1) Lugano Convention.
33 Article 25 PILA.
34 See Article 271 of the Swiss Criminal Code.
35 Article 54 CPC.

ix Litigation funding

There are no statutory rules governing litigation funding, but the SFSC has ruled that litigation funding is permissible.[36] Although the Swiss litigation funding market is not particularly large, there are domestic and international funders that are active in Switzerland. If funding is granted, the client typically litigates the claim in his or her own name as it cannot authorise the funder to litigate the claim on his or her behalf.[37] An assignment of the claim to the funder is theoretically possible but rare in practice and typically limited to enforcement matters.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Federal Act on the Free Movement of Lawyers (FMLA) sets out the principles for practising lawyers in Switzerland, complemented by the code of professional conduct of the Swiss bar association. Article 12, letter c of the FMLA provides that lawyers must avoid any and all conflict between the interests of their clients and the interest of persons with whom they have a business or private relationship. First, this principle prohibits double representation; that is, situations in which lawyers represent opposing parties in the same proceedings. Second, it generally prohibits lawyers from accepting a case against a client for whom they are conducting another mandate at the same time. Third, lawyers may not take on a new case if their factual knowledge gathered during a former mandate could harm the former client. Lastly, lawyers must obviously avoid conflicts with their own interests. No distinction is made between the lawyer and his or her law firm for conflict purposes. The SFSC has ruled that a law firm forms a 'confidentiality unit' and hence that Chinese walls between lawyers of the same law firm are unfit and do not remedy a conflict situation.[38]

ii Money laundering, proceeds of crime and funds related to terrorism

In Switzerland, a lawyer's activity that is covered and protected by the legal privilege and professional secrecy is not subject to the Federal Act on Combating Money Laundering and Terrorist Financing (AMLA). In the context of dispute resolution, lawyers generally provide services that are covered by the attorney-client privilege. Thus, they are not subject to obligations in connection with money laundering and are, in particular, not required to perform know-your-customer checks or to report suspicious activities. However, any lawyer who knowingly accepts assets that originate from crime or are related to terrorism is liable to prosecution under the Swiss Penal Code (SPC).

iii Data protection

Lawyers are subject to the Federal Act on Data Protection (FADP) when they access and process personal data. Personal data may only be processed lawfully, meaning its processing must be carried out in good faith and must be justified and proportionate. If the data processing takes place in the context of pending court proceedings, the FADP is not applicable. Instead, the rules laid down by the procedure codes apply to data processing, as

36 DFC 131 I 223, cons. 4.8.

37 DFC 137 III 293, cons. 3.2.

38 DFC 145 IV 218.

for example the Swiss Code of Civil Procedure (CCP). In addition to the obligations under the FADA and the procedural codes, lawyers must comply with their professional duties, in particular professional secrecy, when processing and disclosing data.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

In Switzerland attorney-client communication is protected by attorney–client privilege. Lawyers are subject to professional secrecy for an unlimited period of time and this applies to everyone regarding information that has been entrusted by their clients as a result of their profession.[39] To be protected, a communication between an attorney and a client must relate to the attorney's typical professional activity, meaning legal advice and legal representation.

Pursuant to Swiss procedural laws governing civil, criminal and administrative proceedings, a party to the litigation (as well as a third party) has the right to refuse to produce correspondence between themselves and an attorney.[40] On the same basis, the attorney and the client may refuse to testify with respect to attorney–client communications.[41] Privilege is limited to communication with attorneys admitted in Switzerland and the European Union. Furthermore, Swiss law limits attorney–client privilege to communications exchanged with independent attorneys. As things stand, privilege does not extend to communications with in-house counsel. This provision is controversial and under scrutiny in the ongoing revision of the CPC.

ii Production of documents

If a document required by one party to prove its case is in the possession of the opponent or a third party, a request for the production of the document may be made in the course of the proceedings. In contrast to the common law understanding of document production, the document must be identifiable, and relevance and materiality must be demonstrated. Fishing expeditions are not permitted. Upon request, the court decides whether to order production. If a request is granted, the opposing party is supposed to surrender the document to the court. However, the court cannot force a party to produce a document. If the party refuses to produce the document without valid cause, the court may, however, presume that the fact, which the requesting party aims to prove with the document, is established. The situation is different if the document is in the possession of a third party. In this case, the court can oblige the third party to produce documents and may enforce such obligation.

A document is deemed to be in the possession of a party if such party has direct access to it, such as physically, via information technology systems or because the party has a contractual or statutory right to obtain a document from an agent or service provider. A litigant is, in principle, not required to obtain documents from related parties for production purposes if it only has indirect access to such documents. However, a related party may

39 Article 13(1) FMLA.

40 Article 160, 163 and 166 CPC; Article 171 and 264 Criminal Procedure Code; Articles 13, 16 and 17 APA.

41 Article 13(1) FMLA; Article 166(1), letter b CPC; Article 171 Criminal Procedure Code.

be addressed directly and ordered to produce evidence. Documents in possession of parties abroad and not accessible in Switzerland must be obtained by the court by way of international legal assistance.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The most commonly used alternative to litigation in Switzerland is arbitration. Other forms of ADR include mediation and expert determinations. Except for arbitration, the alternatives to litigation are not extremely popular since the litigation process includes mechanisms to settle disputes at an early stage.

ii Arbitration

Switzerland has a long arbitration tradition and is frequently chosen as the seat of arbitration by international parties. According to the statistics of the ICC, Switzerland was the most frequently chosen seat for ICC arbitrations worldwide in 2020.[42]

Swiss law governing arbitration is in two-parts: domestic arbitration is governed by Part 3 of the CPC[43] while the framework for international arbitrations is found in Chapter 12 of the PILA.[44] Arbitration is considered international if, at the time the arbitration agreement was concluded, at least one of the parties did not have its domicile, habitual residence or seat in Switzerland.[45] Swiss arbitration laws are very liberal and grant the parties significant discretion on how to structure the proceedings. Chapter 12 of the PILA was recently revised to make arbitration in Switzerland even more accessible and attractive. An arbitration agreement must be concluded in any form allowing it to be evidenced by text. The validity of the arbitration agreement is assessed independent from the main contract.[46] In international arbitration, any claim that involves an economic interest may be submitted to arbitration.[47] In domestic arbitration, a claim is only arbitrable if the parties may freely dispose over it.[48]

Institutional commercial arbitrations seated in Switzerland are most commonly administered by the ICC or the Swiss Arbitration Centre. Furthermore, there are specialised arbitral institutions, such as the Court of Arbitration for Sports (CAS) for sports disputes and the WIPO Arbitration and Mediation Centre for IP and technology disputes.

When it comes to remedies against awards rendered by tribunals seated in Switzerland, Swiss law provides for an action to set aside[49] and an action to revise[50] arbitration awards. The SFSC is the only single instance. The grounds for a setting aside are very limited and only 7 per cent of the setting aside petitions are successful. Actions to revise an award are

42 ICC Dispute Resolution Statistics 2020, p. 16.
43 Article 353 et seq. CPC.
44 Article 176 et seq. PILA.
45 Article 176(1) PILA.
46 Article 178(3) PILA; 357(2) CPC.
47 Article 177 PILA.
48 Article 354 PILA.
49 Article 190 PILA; Article 389 et seq. CPC.
50 Article 190a PILA; Article 396 et seq. CPC.

almost never successful. Decisions on remedies against awards are rendered quickly (i.e., within seven months on average). If none of the parties are seated in Switzerland, they may completely waive the right to setting aside proceedings.[51]

Foreign arbitral awards are recognised and enforced in Switzerland according to the New York Convention (NYC). There is, in principle, no standalone exequatur procedure, but awards are recognised in the course of ordinary debt enforcement proceedings. Usually, a freezing order can be obtained based on a foreign arbitral award if the debtor or its assets, or both, are in Switzerland. The formal requirements of the NYC are applied pragmatically by the Swiss courts and the grounds for refusal of recognition are narrowly interpreted.

iii Mediation

Swiss law does not provide a mandatory framework for mediation. Instead, the CPC allows for the replacement of the mandatory conciliation proceedings by mediation and provides that court proceedings may be suspended at any time for the benefit of mediation proceedings.[52] Organisation and conduct of mediation are up to the parties and separate from conciliation and court proceedings.[53] Statements of the parties made during mediation may not be used in court proceedings.[54] An agreement reached through mediation can be granted the effect of a legally binding decision through court approval.[55] Mediation is frequently used in family law matters but rather uncommon in commercial matters. This is because the commercial litigation process is typically structured in a way that helps reaching settlements.[56]

iv Other forms of alternative dispute resolution

Swiss law provides that parties may agree on expert determination of disputed facts.[57] If they do, the determination by the expert is usually binding for the court, which is what distinguishes it from a usual expert opinion in civil court proceedings. The court is not bound if the parties are not free to dispose of the subject of the expert determination, grounds for recusal existed against the expert, or the opinion has not been stated in an impartial manner or is manifestly incorrect.[58] Other forms of alternative dispute resolution are not frequently used in Switzerland.

VII OUTLOOK AND CONCLUSIONS

The Swiss parliament is currently working on a major revision of the CPC. The goal is to increase the accessibility of the judiciary and to improve the practicability of the law. As of the end of 2022 there are still different views between the two chambers of the parliament regarding many of the proposed changes.

51 Article 192(1) PILA.

52 Articles 213 and 214 CPC.

53 Article 216(1) CPC.

54 Article 216(2) CPC.

55 Article 217 CPC.

56 In 2021, 58 per cent of the disputes in front of the tribunal of the Commercial Court Zurich were settled: 191. Rechenschaftsbericht des Obergerichts des Kanton Zürich über das Jahr 2021, A.2.2.5.3.

57 Article 189(1) CPC.

58 Article 189(3) CPC.

However, an agreement has been reached, among others, on the following topics:

a reduction of the advance on court costs: going forward, only half of the entire anticipated court costs (not all of them) are to be advanced by the claimant;

b procedural language: if the cantons allow for this possibility, in the future parties will be able to choose one of the national languages (German, Italian and French), even if this is not an official language at the seat of the court. Furthermore, in international commercial matters, parties will be able to choose English as the language of the proceedings; and

c remote participation: the revised law will provide the necessary basis to allow for videoconferencing to be used in Swiss civil procedures.

Finally, there is an ongoing legislative project that aims at introducing some sort of class action procedure. However, it is not yet clear what the timeframe is and whether the proposal will be supported by a parliamentary majority.[59]

59 See also Section III.iii.

Appendix 1

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