

# Switzerland

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## Introduction

Switzerland has a civil law legal system, at the crossroads between Germanic and French legal traditions. The organization of the Swiss legal and judicial system reflects the political and federalist structure of Switzerland. The state comprises a Confederation of 26 cantons structured in three distinct political levels: the Confederation (the federal state), the cantons (the states), and the municipalities (the local authorities).

The Confederation has authority in respect of all areas that have been entrusted to it by the federal Constitution. The cantons exercise sovereign rights which are not assigned to the Confederation. They also exercise rights which the federal Constitution does not forbid them to exercise by a specific rule.

Swiss laws are hierarchical: federal laws take precedence over cantonal constitutions and laws, constitutional rules prevail over ordinary statutes, and statutes take priority over regulations promulgated by government or administrative authorities.

Civil procedure is primarily regulated by the Swiss Code of Civil Procedure (SCCP), which entered into force on 1 January 2011.<sup>1</sup> It provides a unified set of rules regulating civil procedure. A true Copernican revolution, the unification of the rules of Swiss civil procedure into one single code marks one of the most important developments in the Swiss legal order since the unification of substantive law in civil, commercial, and criminal matters at the beginning of the twentieth century.

Before the SCCP, each canton had its own code of civil procedure. These codes differed substantially. Variation was particularly seen in the codes from the German- and French-speaking parts of Switzerland, on account of the influence of the Germanic and French legal traditions prevalent in Switzerland.

Additionally, the federal Constitution and several federal statutes contained procedural rules. Moreover, the Swiss Federal Supreme Court also developed an

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<sup>1</sup> An English translation of the Swiss Code of Civil Procedure is *available at* <https://www.admin.ch/opc/en/classified-compilation/20061121/index.html>. English is not an official language of Switzerland. The translation is provided for information purposes only and has no legal force.

unwritten civil procedural law on several basic issues. The multiplicity of rules made it onerous and complex to take legal action in Switzerland and was a source of legal uncertainty.

The SCCP aimed to eliminate these obstacles by unifying the civil procedural laws. It is a relatively concise code, comprising 408 articles regulating civil procedure and domestic arbitration. It largely draws on existing cantonal codes, particularly those of the Swiss-German cantons.

This chapter first sets out the legal framework applicable to civil procedure in Switzerland. It then presents the judicial organization in Switzerland and, finally, addresses selected issues of Swiss civil procedure.

## **Legal Framework**

### **In General**

The SCCP is a key source of civil procedural rules. However, other instruments also contain rules impacting civil procedure, such as the Civil Code (CC), the Code of Obligations (CO), the Debt Collection and Bankruptcy Act (DCBA), the Private International Law Act (PILA), and other international instruments concerning civil procedure.

### **Swiss Code of Civil Procedure**

The SCCP regulates all procedural phases of civil proceedings before cantonal courts. The Federal Act on Civil Jurisdiction (FACJ) was repealed by the SCCP. Consequently, the SCCP now governs the establishment of territorial competence in domestic cases. The SCCP also regulates the enforcement of decisions pertaining to non-monetary claims (enforcement of decisions pertaining to monetary claims being regulated by the DCBA).<sup>2</sup> Finally, the SCCP regulates domestic arbitration, which was earlier governed by the Inter-Cantonal Concordat on Arbitration (Arbitration Concordat).

The Swiss government is currently working on a (partial) revision of the SCCP<sup>3</sup> with the global objective to facilitate access to Swiss courts and to improve the practical application of the SCCP.

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<sup>2</sup> Discussed in ‘Enforcement of Monetary Claims’, *below*.

<sup>3</sup> The proposed amendments are *available at* <https://www.admin.ch/opc/fr/federal-gazette/2020/2693.pdf>.

## Civil Code

The Civil Code (CC) entered into force in 1912.<sup>4</sup> The Introductory section contains general principles of Swiss law applicable to all kinds of legal relationships.<sup>5</sup> The remainder of the CC is divided into four parts:

- Part I: Law of Persons, which regulates the status of natural and legal persons, associations, and foundations;<sup>6</sup>
- Part II: Family Law, which regulates engagement, marriage, divorce, matrimonial property law, kinship, and guardianship;<sup>7</sup>
- Part III: Law of Succession, which regulates succession and the status of heirs;<sup>8</sup> and
- Part IV: Property Law, which regulates ownership and possession, other rights *in rem*, and the Land Register.<sup>9</sup>

Besides substantive provisions, the CC also contains provisions which considerably impact civil procedural issues. Article 1 of the CC, for instance, attributes a general competence to Swiss courts to fill in any lacunae in the law. In the absence of a provision, courts are to decide in accordance with customary law and, in the absence of customary law, in accordance with rules that they would make as legislator.

Another example is Article 8 of the CC, which sets out a fundamental principle of the Swiss legal system, namely, that the burden of proof for the existence of an alleged fact rests on the person who derives rights from such a fact. Furthermore, Article 4 of the CC requires courts to render their decision based on principles of equity and justice.

## Code of Obligations

### *In General*

The Code of Obligations (CO) also entered into force in 1912. It is the fifth Part of the CC, comprising Swiss contract law and corporate law.<sup>10</sup> The CC and CO together regulate practically the entire substantive private law of Switzerland. The CO is divided into five divisions:

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4 An English translation of the Swiss Civil Code is *available at* <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>. English is not an official language of Switzerland. The translation is provided for information purposes only and has no legal force.

5 Civil Code, arts 1–10.

6 Civil Code, arts 11–89c.

7 Civil Code, arts 90–456.

8 Civil Code, arts 457–640.

9 Civil Code, arts 641–977.

10 An English translation of the Swiss Code of Obligations is *available at* <https://www.admin.ch/opc/en/classified-compilation/19110009/index.html>. English is not an official language of Switzerland. The translation is provided for information purposes only and has no legal force.

- Division I: General Provisions, which contains provisions applicable to all specific types of legal relationships regulated by the CO;<sup>11</sup>
- Division II: Types of Contractual Relationship, which regulates the specific types of contractual relationships such as sales, lease, employment, contracts for works, services, and similar relationships;<sup>12</sup>
- Division III: Commercial Enterprises and Cooperatives, which governs the various types of corporations under Swiss law;<sup>13</sup>
- Division IV: The Commercial Register, Business Names, and Commercial Accounting, which provides for the commercial register kept in each canton, the general principles of business name composition, and the duty to maintain and archive business ledgers;<sup>14</sup> and
- Division V: Negotiable Securities.<sup>15</sup>

Like the CC, the CO contains provisions which have a direct impact on civil proceedings. In situations where the exact value of damage cannot be precisely quantified, Article 42(2) of the CO grants courts a broad discretion to assess the damage resulting from a tortious act or contractual breach. This being said, the claimant continues to bear the burden of submitting all available information and evidence that may allow the court to assess the damage. Another example is Article 53 of the CO, which emphasizes the strict independence between parallel criminal and civil proceedings, stating that:

‘When determining fault or lack of fault and capacity or incapacity to consent, the court is not bound by the provisions governing criminal capacity nor by any acquittal in the criminal court. The civil court is likewise not bound by the verdict in the criminal court when determining fault and assessing compensation.’

Other procedural provisions exist in relation to specific types of contracts. For instance, Article 273 of the CO, applicable to lease contracts, sets forth a time limit for challenging a notice of termination.

### **Debt Collection and Bankruptcy Act**

Another important instrument of Swiss procedural law is the Debt Collection and Bankruptcy Act (DCBA). While the enforcement of non-monetary claims is governed by the SCCP, the enforcement of monetary claims, including attachment of assets, is regulated by the DCBA.<sup>16</sup>

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11 Code of Obligations, arts 1–183.

12 Code of Obligations, arts 184–551.

13 Code of Obligations, arts 552–926.

14 Code of Obligations, arts 927–964.

15 Code of Obligations, arts 965–1186.

16 Discussed in ‘Enforcement of Monetary Claims’, *below*.

### **Private International Law Act**

Civil proceedings taking place in an international context are regulated by the rules of private international law of Switzerland, as codified in the Private International Law Act (PILA) and by other bilateral and multilateral instruments. The PILA governs the jurisdiction of Swiss judicial and administrative authorities, the applicable law, the conditions for recognition and enforcement of foreign decisions, bankruptcy and composition agreements, and international arbitration.<sup>17</sup>

The PILA further contains a general carve-out provision for matters governed by international treaties; some of these matters were drafted within international *fora* such as the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), or the International Institute for the Unification of Private Law (UNIDROIT).

### **International Instruments regarding Civil Procedure**

The principal international instruments ratified by Switzerland concerning international civil proceedings are:

- The 1954 Hague Convention relating to Civil Procedure (the 1954 Hague Convention);
- The 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents;
- The 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the 1965 Hague Convention);
- The 1968 European Convention on the Abolition of Legalization of Documents executed by Diplomatic Agents or Consular Officers;
- The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the 1970 Hague Convention);
- The 1972 European Convention on the Calculation of Time-Limits;
- The 1977 European Convention on the Abolition of Legalization of Documents executed by Diplomatic Agents or Consular Officers;
- The 1980 Hague Convention on International Access to Justice (the 1980 Hague Convention);
- The 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 1988 Lugano Convention); and
- The 2007 revised Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the 2007 Lugano Convention).

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<sup>17</sup> The Swiss parliament has recently revised the section of the PILA on international arbitration. The proposed amendments (which have not yet entered into force) are available at <https://www.admin.ch/opc/fr/federal-gazette/2020/5481.pdf>.

The 2007 Lugano Convention was concluded in Lugano on 30 October 2007.<sup>18</sup> It is the successor to the 1988 Lugano Convention, which is why it is often referred to as the revised Lugano Convention. At the same time, it also serves as a parallel agreement to Regulation Number 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).<sup>19</sup>

## Judicial Organization

### Court Structure

#### *Cantonal Organization*

Despite the unification of procedural rules for Switzerland, the organization of the judiciary remains in the hands of the cantons. Federal law mandates cantons to provide for a two-instance judiciary system: a first instance and the second, appellate instance.<sup>20</sup> For limited cases, a sole cantonal instance is sufficient. In larger cantons, there are several courts of first instance, one for each district. In smaller cantons, there is often one court for the entire canton.

The SCCP grants the cantons the option to establish a specialized commercial court (in German: *Handelsgericht*; in French: *Cour commerciale*). Four German-speaking cantons — Zurich, Bern, St. Gallen, and Aargau — have established such a court.<sup>21</sup>

This court forms part of the cantonal high court and serves as a court of first and sole instance for commercial matters. In practice, most international commercial disputes falling within the jurisdiction of the canton are brought before such commercial courts. Many cantons also have established other specialized courts, such as labor courts and/or landlord and tenant law courts.

Judges in Switzerland are elected either by the people, the (cantonal or federal) parliament, the government, or by a particular voting committee upon nomination of the political parties represented in the (cantonal or federal) government. A few cantons require the judges to have received legal education. Lay judges are common in lower courts and conciliation authorities in smaller cantons. Law clerks with legal training are always part of the court's composition.

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18 The signatories are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway, and the Republic of Iceland.

19 While the 2007 Lugano Convention entered into force for the EU, Denmark, and Norway on 1 January 2010, it has only found application in Switzerland since 1 January 2011 and since 1 May 2011 in Iceland.

20 Swiss Federal Tribunal Act, art 75(2).

21 Swiss commercial courts are likely to be further developed and improved with the current revision of the SCCP. Following an international trend, the Swiss government has included in the draft revision federal legal provisions allowing the cantons to create specialized courts or chambers for international commercial disputes.

### *Conciliation Authority*

In principle, court proceedings must be preceded by a conciliation hearing before a Conciliation Authority aimed at reconciling the parties in an informal manner.<sup>22</sup> Accordingly, each canton has at least one Conciliation Authority, while larger cantons may have more. The Conciliation Authorities significantly reduce the work load of the Courts: according to recent statistics for the canton of Zurich, approximately 64.4 per cent of the smaller disputes may be reconciled and closed already at the conciliation stage.<sup>23</sup>

For disputes relating to tenancy and lease of residential and business properties, the SCCP requires the Conciliation Authority to be composed of a chairman and two representatives of both a landlords' and tenants' organization. This particular composition aims at ensuring that the necessary practical and technical know-how is available for resolution of disputes in this specific field of law.

### *District Courts and Specialized Labor and Landlord/Tenant Courts*

As outlined above, district courts are, in principle, the ordinary cantonal first-instance courts for any kind of claim. If the value in dispute is below CHF 30,000, the disputes are referred in many cantons to a single judge. Cases where the value in dispute exceeds CHF 30,000 are typically referred to a panel of three judges.

Many cantons also have established specialized labor and landlord/tenant courts. Such courts also are composed of equal representatives from employers' and employees' organizations.

### *High Courts and Commercial Courts*

Each canton has a high court, primarily serving as an appellate court. With the consent of the defendant, disputes with a value of at least CHF 100,000 may be brought directly before the cantonal high court of sole instance. This provision aims at providing an efficient and fast procedure for significant disputes by skipping the conciliation and first-instance proceedings.

As already mentioned, some cantons have established commercial courts which are a division of the high court and deal exclusively with disputes in 'commercial matters'. For purposes of establishing the jurisdiction of commercial courts, a dispute is considered 'commercial' if the business activity of at least one party is involved, if the parties are registered in the Swiss Commercial Registry or in an equivalent foreign registry, and when the value in dispute is at least CHF 30,000.<sup>24</sup> If only the defendant is registered in the Commercial Registry and the other conditions are met, the claimant may bring his claim before the commercial courts or ordinary courts. In this regard, the Swiss Federal Supreme Court held that a customer's claim

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22 Discussed in 'Conciliation', *below*.

23 Annual Statistics 2019 of the Canton of Zurich, published in the annual report of the township of Zurich, *available at*: [https://www.stadt-zuerich.ch/portal/de/index/politik\\_u\\_recht/friedensrichteramt/aktuell/jahresbericht-2019.html](https://www.stadt-zuerich.ch/portal/de/index/politik_u_recht/friedensrichteramt/aktuell/jahresbericht-2019.html).

24 Code of Civil Procedure, art 6.

against his bank is characterized as a ‘commercial matter’ and thus falls within the jurisdiction of the commercial court.<sup>25</sup> Likewise, even where another specialized court such as the landlord/tenant court would, in principle, have jurisdiction *ratione materiae* but the parties to the dispute are two companies registered in the Swiss Commercial Registry (or an equivalent foreign registry), the dispute falls within the exclusive jurisdiction of the commercial court (to the exclusion of the specialized landlord/tenant court).<sup>26</sup>

Regardless of the value in dispute, commercial courts are competent to decide disputes related to intellectual property (IP) law, cartel law, as well as disputes under the Collective Investment Act and Stock Exchange Act.

#### *Swiss Federal Supreme Court*

The Swiss Federal Supreme Court is Switzerland’s highest court. Proceedings before the Swiss Federal Supreme Court are not governed by the SCCP but by the Swiss Federal Tribunal Act (SFTA). As an appellate body, the Swiss Federal Supreme Court ensures both the correct application of federal substantive law by the cantonal courts and continuity of legal practice in Switzerland. It is, as a rule, bound by the facts established by the courts of lower instance, except if the facts have been manifestly erroneously established or in violation of the law, and if the correction of the defect is likely to affect the fate of the case.<sup>27</sup>

All final cantonal court decisions (after exhaustion of the cantonal instances of appeal) may be appealed to the Swiss Federal Supreme Court, provided that the amount in dispute exceeds CHF 30,000. The grounds for appeal are limited to violations of federal and constitutional law (or laws). Certain disputes in matters of public law, such as disputes regarding competence between federal and cantonal authorities and financial disputes between cantons and/or the Confederation, must be brought directly before the Swiss Federal Supreme Court.

In case an appeal is successful, the Swiss Federal Supreme Court may either annul the cantonal decision and render a new decision itself or — where, for instance, the factual basis for a new decision is missing — it may remand the case to the first instance for a new decision, the cantonal court being then bound by the findings of the Swiss Federal Supreme Court.

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25 Decision of the Swiss Federal Supreme Court of 29 October 2012, case reference 138 III 694, confirming a decision of the Commercial Court of Zurich of 30 March 2012, case reference HG110192.

26 Decision of the Swiss Federal Supreme Court of 10 February 2014, case reference 4A\_480/2013.

27 FF 2001, 4135; Decision of the Swiss Federal Supreme Court of 24 August 2018, case reference 4A\_280/2018.

### Legal Profession

Representation in court by a lawyer is not mandatory in Switzerland for civil proceedings. Anyone may file a claim and/or defend himself before the court, even before the Swiss Federal Supreme Court.

If a court concludes that a party is manifestly not able to defend itself, it may order that party to appoint a representative. If the party does not comply with this injunction, the court may appoint a representative at the party's cost.

Professional representation of parties before the court (ie, representation on a regular basis and against remuneration) is reserved to lawyers admitted to a cantonal bar. However, a few proceedings, particularly summary proceedings and conciliation hearings, allow for a party to be represented by a third person other than a lawyer.

In principle, each canton has its own requirements for the training and certification of lawyers to be admitted to the cantonal bar. The Federal Act on Free Circulation of Lawyers (FAFCL) of 23 June 2000 sets forth minimal requirements for admittance to a cantonal bar. It provides professional rules for Swiss lawyers, such as avoidance of conflict of interests, duty of independence, and duty to take out professional liability insurance. It also provides sanctions in case of violation.

Finally, the FAFCL regulates the status of foreign lawyers from countries within the European Union (EU) and prescribes relatively flexible requirements for a foreign qualified lawyer (of an EU country) to provide legal services or act as a lawyer in Switzerland.

### Legal Aid

The key principle of equality before justice, provided by the federal Constitution,<sup>28</sup> requires that any individual, regardless of his financial situation, must have the possibility to defend his rights in court, provided he does not initiate proceedings in a way contrary to the principle of good faith.

The SCCP therefore provides that each person is entitled to legal aid if he does not have sufficient financial resources and if his case does not seem devoid of any chance of success. Legal aid may also be granted with respect to certain prayers for relief if the prayers for relief can be split.<sup>29</sup>

To obtain legal aid, the applicant must, in the request for legal aid, present his financial situation, indicate the merits of the case, and indicate the available evidence.

If the court concludes that the conditions for legal aid are fulfilled, the applicant is exempt from paying court costs, advances, and/or securities.<sup>30</sup> In addition and where necessary, the applicant may obtain a *pro bono* counsel paid by the canton, especially if the counterparty is represented by legal counsel. If legal aid is granted,

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<sup>28</sup> Federal Constitution, art 29(3).

<sup>29</sup> Decision of the Swiss Federal Supreme Court of 16 April 2016, case reference 4D\_62/2015.

<sup>30</sup> Also discussed in 'Costs', *below*.

the applicant is, however, not exempted from paying compensation to the opposing party if the latter prevails.

A court may overrule its decision to grant legal aid at a later stage if the conditions are no longer met or if it turns out that they were never fulfilled. In any event, the party having received legal aid must reimburse such costs if his financial situation subsequently improves. A decision granting legal aid to a party is limited to the respective proceedings, meaning that even if legal aid was granted in first instance proceedings, a new request is required for possible appeal proceedings.

As a rule, legal aid may only be granted to individuals but not to legal entities/corporations. It is possible to attribute legal aid to a corporation only in exceptional circumstances, such as when the sole asset of a corporation is in dispute before the court and when the corporation's beneficial owners are impecunious.

## **Civil Proceedings**

### **In General**

This section is structured according to the standard course of action of a civil claim before Swiss courts, starting with the question of jurisdiction and ending with the issuance of a judgment and its enforcement.

### **Establishing Jurisdiction**

#### *Territorial Jurisdiction*

Since 1 January 2011, the determination of the place of jurisdiction in civil proceedings is primarily regulated by the SCCP. Jurisdiction for enforcement of monetary claims is regulated by the DCBA.<sup>31</sup> Jurisdiction over a dispute entailing international aspects — for example, if either the claimant or defendant has his permanent residence or its registered seat outside Switzerland — is not regulated by the SCCP, but by the PILA, by the applicable 1988 or 2007 Lugano Conventions, and by other international instruments entered into by Switzerland. The jurisdiction provisions of the SCCP are largely similar to the provisions of the 1988/2007 Lugano Conventions and those of the PILA.

A place of jurisdiction is only mandatory if the law expressly provides so. In the absence of a mandatory provision, parties are free to select a forum for their existing or future disputes, which is common in practice. The choice of a forum must be agreed upon in writing or by another form, allowing it to be evidenced and reproduced in text form.

Depending on the place of domicile or seat of the parties involved, forum selection clauses made in an international context must be examined in the light of the PILA or the Lugano Convention. Notably, pursuant to Article 5(3) of the PILA, the Swiss court selected to adjudicate an international dispute may deny its competence, except

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31 Discussed in 'Enforcement of Monetary Claims', *below*.

for cases where a party has his permanent residence or registered seat in the canton of the selected venue or in cases where Swiss law applies to the disputes pursuant to the PILA (or as agreed between the parties).

In the absence of a forum selection clause, the SCCP provides for a general place of jurisdiction at the defendant's permanent residence or registered seat (in Switzerland). Besides the ordinary place of jurisdiction at the seat of a corporation, the SCCP offers an alternate venue: the defendant's place of business establishment or local branch (for claims arising out of the defendant's commercial or professional activity).

The SCCP also sets forth special venues depending on the subject matter of the dispute (eg, family law or contract law), the existence of other relevant connections (eg, place of business establishment), or the claims or parties involved (eg, counterclaims or third-party claims).

For contractual claims, the SCCP has introduced a forum at the place of performance of the characteristic obligation under the contract. This forum is aligned with the contractual forum provided by the 1988/2007 Lugano Conventions, although certain types of contracts are subject to a more restrictive choice of place of jurisdiction (eg, contracts regarding the lease of immovable property, where the territorial jurisdiction is exclusively determined by the location of the immovable property).

#### *Material and Functional Jurisdiction*

The determination of material jurisdiction (ie, jurisdiction determined according to the subject matter of the dispute) and functional jurisdiction (ie, jurisdiction according to the relevant court) rests with the cantons.<sup>32</sup>

#### *Decision on Jurisdiction and Related Effects*

Courts examine *ex officio* (ie, on their own accord) whether they have territorial and material jurisdiction over the dispute. Each party also may raise a plea to jurisdiction if the jurisdiction of the court seized is disputed. Nevertheless, except for cases of mandatory venues, a court is deemed to have territorial jurisdiction if the defendant proceeds on the merits without having raised the court's lack of jurisdiction.

If a court does not entertain the claim due to lack of jurisdiction and the same claim is re-introduced before the proper court within one month, the date of the first filing is deemed to be the date of pendency. As a result, the claimant is protected if the statute of limitations would otherwise have lapsed.

Pursuant to the so-called *perpetuatio fori* principle, once the action is pending, the seized court maintains its territorial jurisdiction even if the required prerequisites are no longer satisfied in the course of the proceedings.

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<sup>32</sup> Discussed in 'Cantonal Organization', *above*.

Furthermore, claims filed before the proper court cannot be withdrawn without having a *res judicata* effect, unless the claim had not been notified to the defendant or the defendant agreed to its withdrawal.

Finally, according to the doctrine of *lis pendens*, when two courts, Swiss or foreign, are seized with the same matter, the court subsequently seized with the matter must stay the proceeding until the first court decides on its jurisdiction.

Once the jurisdiction of the first court has been established, the other court has to refuse its jurisdiction and close the proceedings. For Swiss courts to consider being seized with the “same matter”, a claim must be made between the same parties and concern the same subject matter.

### Swiss Civil Procedure

There are several key procedural principles which apply to all civil proceedings before Swiss courts. Among these procedural principles is the general duty to act in good faith, as set forth in Article 2 of the CC and Article 52 of the SCCP.<sup>33</sup>

This duty concerns all parties to the proceedings and prohibits the parties (including their legal representatives) from initiating proceedings without legitimate interest, causing unnecessary delays or costs, or acting in a contradictory manner.

In principle, all court proceedings are public, with the exception of the conciliation and family law proceedings.<sup>34</sup> Proceedings may be held completely or partially in camera in case of overriding public interests or private interests of a person involved (this applies to both natural and legal persons such as companies). The judge enjoys wide discretionary powers to balance the conflicting interests at stake, but the fundamental principle of open court and resulting (limited) publicity of judicial proceedings may only be departed from in exceptional cases.

Civil proceedings in Switzerland are typically governed by the adversarial principle. This principle is set forth in the SCCP, which states that:

‘(1) The parties must present the court with the facts in support of their case and submit the respective evidence.

(2) This rule shall not apply where the law provides that the court shall establish the facts and take the evidence *ex officio*.’<sup>35</sup>

It is therefore up to the parties to plead the facts upon which they base their claim and offer sufficient evidence. Only in a limited number of ‘social matters’ do courts enquire, establish the facts, and take the evidence *ex officio*. These matters are, among others, divorce proceedings, labor law disputes up to a value in dispute of

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33 The Code of Civil Procedure, art 52, states: ‘All those who participate in a proceeding must act in good faith’.

34 The federal Constitution, art 30(3), states: ‘Unless the law provides otherwise, court hearings and the delivery of judgments shall be in public’. A similar provision is stated in the Code of Civil Procedure, art 54.

35 Code of Civil Procedure, art 55.

CHF 30,000, and landlord/tenant disputes.<sup>36</sup> The common law principles of discovery and disclosures are alien to Swiss proceedings. The claimant must, as a rule, be able to present its case and have the evidence to support it.

A key principle related to the adversarial principle is that of party disposition, which is set forth in the SCCP and provides that:

‘The court may not adjudicate more or other than the claimant requested, or less than the opposing party has accepted as being due. This rule does not apply where the law releases the court from the binding nature of the parties’ prayer for relief.’<sup>37</sup>

According to this principle, courts cannot adjudicate more or something other than what the claimant explicitly requests. However, in certain proceedings, particularly family law matters, courts are not bound by the parties’ request. An important practical consequence of this principle is the claimant’s right to bring only a part of its claim before the court.

Despite these two core procedural principles, the court should request further clarifications or information from the parties if their submissions or declarations are unclear, contradictory, ambiguous, or incomplete.<sup>38</sup> Furthermore, in case the court has serious doubts about the accuracy of an undisputed fact, it may still take evidence *ex officio*.<sup>39</sup> For publicly known facts, such as currency exchange rates, no evidence is required.

Finally, Article 57 of the SCCP provides for the principle of *iura novit curia*, pursuant to which courts know the law and apply it *ex officio*. It follows that, in theory, parties do not have to include legal reasoning in their submissions to the court. In practice, however, most submissions comprise legal arguments with a view to guide the court in its examination of the case.

In the context of international matters, the PILA provides for an exception to this rule as regards foreign law, which must be established *ex officio*. To the extent a Swiss court has to apply foreign law, the parties may be ordered to assist. For financial disputes, parties even bear the burden of proof as regards the content of foreign law.<sup>40</sup> The application of provisions of foreign law is excluded if such application leads to a result that is incompatible with Swiss public policy.<sup>41</sup>

### **Procedural Prerequisites**

The main procedural prerequisites (ie, admissibility requirements) are listed in Article 59 of the SCCP. This list is not exhaustive and other prerequisites such as

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36 Also relevant is the Code of Civil Procedure, art 247.

37 Code of Civil Procedure, art 58.

38 Code of Civil Procedure, art 56.

39 The Code of Civil Procedure, art 153, states: ‘The court takes evidence *ex officio* whenever it has to ascertain the facts of its own accord. It may take evidence of its own accord if serious doubts exist as to the truth of an undisputed fact’.

40 Private International Law Act, art 16.

41 Private International Law Act, art 17.

the lack of jurisdictional immunity of the defendant must also be considered. Courts examine *ex officio* whether these requirements are met. In addition to the territorial and material jurisdictional requirements,<sup>42</sup> the claimant must always have a legitimate interest for filing a claim.

The court also will examine each party's capacity to be a party to the proceeding and to appear before the court. Furthermore, the court must verify that the claim is not the subject of an already pending litigation having a *lis pendens* effect or of an enforceable judgment having a *res judicata* effect. Finally, when applicable, the advance and security for costs must be fully paid.

### **Types of Proceedings**

#### *In General*

The SCCP provides for three types of proceedings: (i) ordinary proceedings, (ii) simplified proceedings, and (iii) summary proceedings. The SCCP also contains specific provisions applicable to proceedings in matters concerning matrimonial law, child and family law, and partnership law. These particular proceedings do not fall within the scope of this chapter.

Each of the three types of proceedings consists of three stages: the assertion stage, where the parties may plead their arguments and offer evidence available to them; the evidentiary stage; and the post-hearing stage, where the parties may comment on the result of the evidentiary phase before the judgment is rendered.

#### *Ordinary Proceedings*

Ordinary proceedings are regulated by Articles 219 to 242 of the SCCP. This set of rules applies to all proceedings to the extent that the SCCP does not provide otherwise. In particular, rules relating to ordinary proceedings apply to all kinds of financial disputes, such as commercial, IP, or competition disputes, where the value in dispute exceeds CHF 30,000.

A particularity of Swiss civil proceedings is that the ordinary proceedings are as a rule preceded by a mandatory conciliation attempt.<sup>43</sup>

Proceedings are initiated by filing a fully substantiated, written statement of claim. The statement must contain the names of the parties, the alleged facts, the value in dispute, and must list all available evidence substantiating the alleged facts. The claimant may — and as a rule should — include legal reasoning.<sup>44</sup>

Upon receipt of a statement of claim, the court seized assesses whether the procedural prerequisites are satisfied.<sup>45</sup> If they have been satisfied, the court will serve the defendant with a copy of the statement of claim and will set a deadline

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42 Discussed in 'Establishing Jurisdiction', *above*.

43 Discussed in 'Alternative Dispute Resolution Mechanism', *below*.

44 Discussed in 'General Principles of Swiss Civil Procedure', *above*.

45 Discussed in 'Procedural Prerequisites', *above*.

(as a rule, 20 days) for the defendant to file a written statement of defense and the necessary supporting evidence. This deadline may be extended upon a reasoned request by the defendant. Courts have broad discretion regarding the length of the extension. The claimant has no right to object to or appeal against a court order rendered in this respect.

When filing its statement of defense, the defendant may include a counterclaim, provided that the same type of proceeding applies to the counterclaim. If the defendant does not include the counterclaim in his statement of defense, he is barred from filing a counterclaim in the same proceedings, but may initiate separate proceedings.

Under the SCCP, a second exchange of briefs is not mandatory and should remain the exception. Court practice shows, however, that in more complex cases a second exchange of briefs is the rule. The court may call the parties for an oral main hearing directly after the first exchange of briefs. Also, the court may, at any time, hold an ‘instruction hearing’ in order to clarify the matter in dispute, complete the facts, attempt a settlement, or generally prepare the main hearing. The courts, as a rule, inform the parties of the purpose of such an ‘instruction hearing’, which is in German-speaking cantons often limited to settlement discussions.

At the main hearing, the parties defend their pleadings orally. An amendment of the statement of claim before the main hearing is admissible if the new or amended claim is subject to the same type of procedure and (i) a factual connection exists between the new or amended claim and the original claim; or (ii) if the opposing party consents to the amendment of the statement of claim. An amendment of the statement of claim at the main hearing is admissible only if the above conditions are satisfied and the amendment is based on new facts or new evidence. New facts and new evidence are, as a rule, only allowed at the main hearing if they occurred or were discovered after the exchange of briefs or after a possible instruction hearing, or if they existed earlier but could not be submitted despite reasonable diligence.

If there was no second exchange of briefs or no instruction hearing, it is possible to present new facts and evidence without limitation at the beginning of the main hearing. Following a second exchange of briefs of oral arguments, the parties are barred from introducing new facts or evidence, even if the court summons the parties to an additional hearing.<sup>46</sup> The parties may mutually agree to (partly) waive oral hearings.<sup>47</sup>

For a limited number of proceedings where the court has to establish the facts and take evidence *ex officio*, such as for labor law disputes with a value of up to CHF 30,000, new facts and evidence may be presented until the court has deliberated and rendered its decision.

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46 Decision of the Swiss Federal Supreme Court of 17 February 2014, case reference 140 III 312.

47 Code of Civil Procedure, art 233; decision of the Swiss Federal Supreme Court of 2 July 2015, case reference 4A\_47/2015.

### *Simplified Proceedings*

Simplified proceedings are governed by Articles 243 to 247 of the SCCP. This type of proceeding applies to small cases (ie, cases where the value in dispute is below CHF 30,000), as well as to disputes in ‘social matters’, such as landlord/tenant disputes, employment disputes, and consumer disputes.

Simplified proceedings are less formal, favor oral submissions, and give a more active role to courts. Indeed, a particular feature of the simplified proceedings is that courts should assist the parties (often not represented by lawyers) with respective questions in substantiating (or defending) their claims. Simplified proceedings never apply to disputes before sole cantonal instances, such as the high court or the commercial court.

Contrary to ordinary proceedings, a claimant may submit his claim orally before the court. In practice, however, oral deposition remains exceptional. When a statement of claim does not include any legal reasoning, the court will call the parties directly for a hearing. At the hearing, the claimant will have to further substantiate his claim orally and present the evidence available to him.

Likewise, the defendant has to answer the claim orally. This first round is followed by an oral reply from the claimant and a rejoinder from the defendant. As in ordinary proceedings, if the claim has been filed in writing, the court sets a deadline for the defendant to file its written statement of defense.

### *Summary Proceedings*

The SCCP provides for summary proceedings in Articles 248 to 270. Summary proceedings go even further in terms of simplification and expediency. They apply, in particular, to urgent requests and requests for provisional measures.

They also apply to ‘clear-cut cases’, which are non-contentious matters or matters where the facts can be immediately proven and where the legal situation is straight-forward and non-disputable. Summary proceedings also apply to specific proceedings under the DCBA, such as declaration of bankruptcy or attachment proceedings. The SCCP further contains a list of numerous matters which are referred to summary proceedings.<sup>48</sup>

As in simplified proceedings, a claimant may present his claim orally, provided that the facts of the case allow such a course of action. Here again, in practice, oral deposition remains exceptional. Upon receipt of a written statement of claim, courts generally call the parties directly for a hearing instead of ordering an exchange of briefs.

A specificity of summary proceedings is that the evidence available is limited to documents. Other means of evidence are only admissible if the taking of such evidence does not delay the proceedings, or is indispensable for the purpose of the proceedings, or if the court has to establish facts *ex officio*.

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48 Code of Civil Procedure, arts 249 and 250.

## Provisional Measures

### *In General*

Provisional measures, or interim measures, are fundamental procedural devices aimed at the temporary regulation of a situation. Applications for provisional measures are governed by summary proceedings<sup>49</sup> and are subject to the conditions described below.

### *Conditions*

Under the SCCP, the applicant for an interim measure has to establish the likelihood that he is entitled, on the merits, to the same relief which the requested interim measure is intended to protect (ie, the likely existence of a valid cause of action on the merits); that there is an impending injury to the rights on which the applicant relies; and that if no interim relief is granted, the detriment resulting from the injury may not be easily remedied ('irreparable harm'). In practice, most applications for provisional measures are rejected due to absence of a risk of irreparable harm. This is primarily due to the fact that purely financial losses are generally not considered an 'irreparable harm', as an award of damages usually constitutes an adequate remedy.

In addition, the provisional measure requested has to respect the principle of proportionality and be appropriate in view of both parties' interests (balance of interests). Compliance with these criteria has to be established *prima facie*. The threshold is thus lower than that for full proof, but requires more than mere allegations.

If these conditions are fulfilled, courts may order any provisional measure suitable to prevent imminent harm. Article 262 of the SCCP only provides an illustrative list. Such provisional measures can take the form of an injunction, an order to remedy an unlawful situation, an order to a registry or to a third party, a performance in kind, or the remittance of a sum of money (if provided by law). Provisional measures against the media are subject to certain limitations and in particular the *prima facie* demonstration by the applicant that there is an imminent violation of his rights that may cause the applicant a particularly serious disadvantage/harm.<sup>50</sup>

In case of particular urgency, courts may also order provisional measures *ex parte* (ie, without hearing the opposing party). The success of an application for an interim measure depends largely upon the canton where the measures are sought. If the court grants provisional measures and the claimant has not yet initiated the main proceedings, the court will set a time limit for filing the claim on merits (validation proceedings).

### *Preemptive Brief*

The preemptive brief is a powerful instrument for a party fearing a request for *ex-parte* provisional measures or an attachment. It allows a party to submit his

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<sup>49</sup> Discussed in 'Summary Proceedings', *above*.

<sup>50</sup> Code of Civil Procedure, art 266.

position to the court in advance.<sup>51</sup> The court will only serve the brief to the counterparty if the latter files an application for an *ex parte* injunction. The preemptive brief remains in effect for six months after being filed, after which it must either be renewed, or an extension requested. Although the preemptive brief is particularly important in IP and competition law matters, it is available in all areas where an *ex parte* injunction is feared, including against attachment of assets, and even in relation to an anticipated international request for mutual legal assistance for the taking of evidence.

Preemptive briefs are not permitted in enforcement proceedings of foreign judgments under the 2007 Lugano Convention, as a court seized with a request for enforcement of a court decision rendered in one of the member states to the Convention has to declare such a decision immediately enforceable upon mere satisfaction of formal conditions. The opposing party is not heard and may object to such a declaration of enforceability only at a later stage.<sup>52</sup>

## **Types of Actions**

### *In General*

The SCCP provides for several types of actions, including (i) action for performance, (ii) action to modify a legal relationship, (iii) action for a declaratory judgment, and (iv) group action, which can also be combined under certain conditions.

### *Action for Performance*

By filing an action for performance, the claimant demands that the defendant be ordered to do, refrain from doing, or tolerate something. In an action for the payment of money, the amount must be specified. However, if it is impossible or unreasonable to quantify the amount of the debt at the start of the proceedings, the claimant may bring an action for a so-called unquantified debt. In such case, the claimant must indicate in its brief a minimal amount as a provisional value in dispute and must quantify the debt claim as soon as he or she is able to do so (ie, once evidence is taken or the required information is furnished by the defendant).

### *Action to Modify a Legal Relationship*

By filing an action to modify a legal relationship, the claimant demands the creation, modification, or dissolution of a specific right or legal relationship.

### *Action for a Declaratory Judgment*

There are two types of actions for a declaratory judgment: (i) the action to establish the existence of a right or legal relationship and (ii) the action to establish that the same does not exist (so-called negative declaratory relief proceeding).

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51 Code of Civil Procedure, art 270.

52 Lugano Convention 2007, art 41.

Declaratory relief proceedings are admissible under Swiss law but are subsidiary to other actions, and only available if no actions for performance or actions to modify a legal relationship are available. The claimant must demonstrate that he/she has a specific interest in the declaratory proceedings. According to a recent turnaround of the Swiss Federal Supreme Court's case law, the aim of a party to obtain *lis pendens* in view of (potential) future court proceedings abroad may constitute a sufficient legitimate interest to initiate negative declaratory relief proceedings in Switzerland.<sup>53</sup>

#### *Group Action*

The Anglo-American concept of class action does not exist in Switzerland. Swiss courts deal with proceedings involving multiple parties by relying on existing procedural instruments, in particular, the 'association' claim for clubs and organizations (so-called group action) and the general joinder of claims filed separately but which are, in substance, closely connected.

### **Alternative Dispute Resolution Mechanisms**

#### *In General*

The SCCP encourages out-of-court settlement of disputes by supplying the parties with two options: conciliation or mediation. Parties may resort to conciliation or mediation at any time during proceedings. Courts also may refer the parties to such alternative dispute resolution mechanisms.

#### *Conciliation*

Under the SCCP, conciliation proceedings are mandatory, except in a limited number of cases such as competition, IP, claims under the DCBA, summary proceedings, or claims falling within the competence of a sole cantonal instance (eg, the commercial court). The claimant can also unilaterally reject conciliation in certain cases — for example, when the defendant has his permanent residence abroad or the defendant's residence is not known to the claimant. Furthermore, when the amount in dispute is equal to or greater than CHF 100,000, the parties can mutually agree to omit conciliation proceedings. Contrary to ordinary court hearing, conciliation proceedings are not public and the statements of the parties in the conciliation proceedings may not be recorded or used subsequently in court proceedings.

Conciliation proceedings are initiated by filing a request for conciliation in writing or by oral deposition before a Conciliation Authority whereby, again, oral requests remain the exception. This request may take the form of a brief summary of the dispute or of a comprehensive statement of claim. As a rule, the parties must appear in person at the conciliation hearing. Legal entities must send someone

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<sup>53</sup> Decision of the Swiss Federal Supreme Court of 14 March 2018, case reference 4A\_417/2017.

duly and specifically authorized to represent the entity in the proceedings, otherwise the court may not entertain the claim.<sup>54</sup>

Parties domiciled or with seat abroad or out of the canton where the proceedings take place, as well as parties prevented from attending for serious reasons, are exempt from appearing personally and may send a representative instead. A foreign company having a branch in Switzerland is considered as having its domicile abroad according to case law and does therefore not have to appear in person, although this question is often debated in practice.<sup>55</sup>

Upon the claimant's request and when the value in dispute is below CHF 2,000, the Conciliation Authority can, without being so obliged, render a decision on the merits. In disputes with a value of up to CHF 5,000, the Conciliation Authority may choose to submit a 'proposition of decision' to the parties, which becomes final and binding unless a party objects to it within a period of 20 days. The conciliation authority may thus be considered as a type of small claims court.

A settlement reached by the parties in the conciliation proceedings has the effect of an enforceable decision. If the conciliation fails or if a party rejects the 'proposition of decision', the claimant is granted a leave to pursue the claim before the ordinary courts within three months of the authorization to proceed being granted.

### *Mediation*

On the request of all parties, conciliation proceedings can be replaced by mediation, either before or during the course of pending proceedings. Contrary to conciliation, the mediator acts as a neutral facilitator between the parties, without any decisional power.

The SCCP neither regulates the mediation proceedings nor prescribes qualifications for acting as mediator. The parties are therefore free to choose a mediator and applicable procedural rules. The parties may, in particular, agree to proceed under the rules of the Swiss Chamber of Commercial Mediation (SCCM), which the parties may modify by mutual agreement. In practice, it appears that mediation has not been resorted to frequently and is yet to develop.

Finally, the SCCP allows the parties to apply jointly for court approval of an out-of-court settlement agreement reached through mediation. Once approved, the settlement agreement has the effect of an enforceable judgment.

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54 Decision of the Federal Supreme Court of 17 February 2014, case reference 140 III 70. Non-legal (but mere factual) bodies may not validly represent a legal entity: Decision of the Federal Supreme Court of 17 April 2015, case reference 141 III 159.

55 Decision of the Federal Supreme Court of 20 December 2016, case reference 4A\_533/2015.

## Procedural Acts

### *Language of Procedure*

The language of the proceedings depends on the official language of the canton where the court proceedings take place. Some cantons with several official languages allow for the use of one of these languages at the choice of the claimant. English is not an official language and can therefore not be the language of the proceedings. This is likely to change in the near future with the ongoing revision of the SCCP. The draft revision indeed foresees that English may be the language of the proceedings if provided by cantonal law and requested by all parties to the dispute.

In international disputes, most Swiss courts accept evidentiary documents in English, although courts may still request the parties to provide official translations of these documents. For witness hearings in a foreign language, courts organize accredited translators. The resulting costs form part of ordinary court costs to be borne by the unsuccessful party.<sup>56</sup> Depending on the canton, even conciliation or settlement hearings may partially be held in English, but this remains, however, in the courts' sole discretion.

### *Deadlines*

It is crucial to distinguish between statutory deadlines and deadlines set by courts: the former are provided by law, such as a deadline for appeal; the latter are set by a court, such as a deadline for filing a statement of defense or other submissions. Statutory deadlines may not be extended. As a rule, deadlines set by courts may be extended once, upon a justified request.

Except for conciliation proceedings and summary proceedings, both types of deadlines are suspended by 'court holidays'. Court holidays include Easter (the seven days preceding and succeeding Easter, being understood as Easter Monday), the period between 15 July and 15 August, and the period between 18 December and 2 January.

Deadlines start to run on the day following notification. The deadline is met when the submission is dispatched or handed over to a Swiss post office or, if abroad, to a diplomatic or consular office of Switzerland, by the last date of the deadline.

The SCCP now provides for the possibility to communicate electronically with the authorities.<sup>57</sup> When transmission is made electronically, the deadline is deemed to be complied with, provided that, before the deadline, receipt at the court's address has been confirmed by the relevant data processing system. Because of the insecurity regarding the good receipt of the documents submitted electronically (and since Swiss courts in spite of electronic deposition usually still request hard copies to be filed), lawyers have so far largely renounced to resort to this means of communication with courts. According to the most recent statistics, only 0.76 per

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<sup>56</sup> Also discussed in 'Costs', *below*.

<sup>57</sup> Also discussed in 'Service of Documents', *below*.

cent of the appeals filed with the Swiss Federal Supreme Court are transmitted electronically.<sup>58</sup>

A party having missed a deadline may request its restitution. The defaulting party must show either that the default is not attributable to it or that it bears only a minor fault. Such request must be made within 10 days following the default. In case the claimant does not pay the advance on court costs or if the defendant does not file a statement of defense within the set deadline, the court grants a short grace period (usually 10 days).

### *Service of Documents*

Due service of documents, in particular of court summons, is a crucial element of any civil proceedings. Defective service entails serious consequences, such as nullity in a domestic context or refusal of recognition and enforcement in an international context. The SCCP lists the documents that must be formally served: summons, orders, and decisions, as well as submissions of the opposing parties, though this is not an exhaustive list.

Summons, orders, and decisions are served by registered mail or in some other manner against confirmation of receipt. Other communications may be transmitted by ordinary mail. When a party is represented by legal counsel, service is made on its counsel. Service by registered letter is as a rule deemed effective on the seventh day following a fruitless attempt at service, provided the addressee had to reckon with service. If the addressee refuses personal service, it is deemed effective as of the day of refusal, provided that the person attempting service has recorded the refusal.

The SCCP has introduced the possibility of proceeding via electronic service, but only with the consent of the party concerned. Courts usually request hard copies of submissions made electronically. In practice, electronic communication is thus infrequent. When, despite reasonable investigation, a party's address is unknown, due service also may be made by publication in the official gazette of the canton or in the *Swiss Official Gazette of Commerce*. The same holds true if a foreign party did not elect a domicile in Switzerland.

For international situations, when a party is domiciled or seated abroad, the court may order the party to elect a domicile in Switzerland. When Swiss courts have to serve parties outside Switzerland or foreign authorities, service must proceed via channels of judicial assistance. Service of judicial or extrajudicial documents from abroad in Switzerland is considered as the exercise of public authority on Swiss territory. Accordingly, service of such documents on Swiss territory, without passing through the channel of judicial assistance, constitutes a violation of territorial sovereignty and entails penal consequences.<sup>59</sup> However, it is accepted that when the document in question has no legal effect or is not liable to have

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58 Annual Statistics of the Swiss Federal Supreme Court, *available at*: [https://www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/GB/BGer/fr/BGer-BGer-GB18\\_f.pdf](https://www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/GB/BGer/fr/BGer-BGer-GB18_f.pdf).

59 Swiss Federal Office of Justice, 'International Judicial Assistance in Civil Matters', 3rd ed (2003, last update January 2013), at pp. 2 and 9.

any legal effects on the addressee, the channels of judicial assistance need not necessarily be followed.<sup>60</sup>

Service of judicial or extrajudicial documents proceeds within the framework of international treaties to which Switzerland is party, such as the 1954 and 1965 Hague Conventions. Service also may proceed through bilateral treaties such as those with Austria, Belgium, France, and Germany. In the absence of any multilateral or bilateral treaty, Article 11a(4) of the PILA provides that the 1954 Hague Convention applies to a request for judicial assistance for service of documents in Switzerland. It also applies to requests originating in Switzerland.

### *Taking of Evidence*

Each party bears the burden of proof for the facts on which it bases its claims.<sup>61</sup> Under Article 152 of the SCCP, courts must authorize any admissible evidence, provided the evidence is submitted in time and in proper form. Parties have to present all available evidence in their first submission itself. Parties may be barred from presenting additional evidence subsequently, if the evidentiary means were already known and available to them.

The SCCP gives an exhaustive list of admissible means of evidence: witness testimony, documents, expert opinions, inspection, written statements from official authorities or individuals (if witness testimony appears to be unnecessary), and interrogation of the parties. Documentary evidence comprises audio recordings, films, electronic files, and the like. Private expert opinions by a party are not considered official means of evidence, but submissions of the party. By contrast, court-ordered expert opinions benefit from higher credibility.

In principle, individuals are required to cooperate in evidence taking. If a party refuses to cooperate without valid reasons, the court shall take this into account when appraising the evidence. Only in a few exceptional circumstances can they refuse to cooperate, such as when cooperating would expose them to criminal prosecution or civil liability or when they are bound by statutory secrecy obligations. Third parties may refuse to cooperate if they stand in a close relation (spouse, children, and other kind of kinship) to a party in the proceedings.

Pre-trial discovery as known in — amongst others — the US is alien to Swiss civil procedure. The SCCP allows taking of evidence before initiation of legal proceedings exclusively in cases where evidence is at risk or where the applicant has a justified interest. The threshold of “justified interest” is, however, relatively low. The taking of evidence prior to initiation of court proceedings for the purpose of assessing a party’s chances of success is, as a rule, considered as “justified interest”.<sup>62</sup> Evidence is mandatorily taken by the court upon the particular and reasoned request by a party.

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60 JAAC 1976 [40/I], at p. 105; Circular of 5 December 1956 from the Administrative Commission of the Supreme Court of the Canton of Zurich, RSJ 1957, at p. 16.

61 Discussed in ‘The Swiss Civil Code’, *above*.

62 Decision of the Supreme Court of 21 February 2013, case reference 4A\_322/2012.

At the first stage of evidentiary proceedings, the parties present available evidence in their submissions to the court. Also, parties may request a court to order the delivery of specific documents by the opposing party. Subsequently, the court will designate the admissible evidence, at its own discretion, by a procedural order. The court also determines which party carries the burden of proof and counterproof. Such orders may be modified at any time and may only be challenged if they threaten to cause not easily reparable harm.<sup>63</sup>

The court evaluates the evidence at its sole discretion. Evidence obtained illegally is only exceptionally admitted if there is an overriding interest in finding the truth. This confirms the generally accepted principle that a right may not be asserted by a tort.

Similar to service abroad or in Switzerland, the taking of evidence in an international context must be made via channels of judicial assistance. Indeed, from a Swiss perspective, the taking of evidence for a court proceeding falls within the powers of public authority. Accordingly, this type of act cannot be undertaken from abroad without authorization, as it would otherwise amount to a violation of Switzerland's sovereignty with penal consequences.<sup>64</sup>

However, it is not necessary to proceed by way of judicial assistance if a refusal to cooperate with a measure of taking of evidence from abroad only leads to consequences of a procedural nature, such as a factual claim of the other party being accepted as true.<sup>65</sup> The party concerned remains free to cooperate.

Measures for taking of evidence abroad or coming from abroad can proceed within the framework of multilateral treaties (such as the 1954 and 1970 Hague Conventions) to which Switzerland is party or within the framework of bilateral treaties. As for the service of documents, in the absence of any multilateral or bilateral treaty, Article 11a(4) of the PILA provides that the 1954 Hague Convention applies to a request for judicial assistance for taking of evidence in Switzerland; it also would apply to a request originating in Switzerland.

### *Security for Costs*

Upon reasoned request by the defendant, the court may order the claimant to post security for the defendant's costs (attorney's fees) in case the claimant (i) is not domiciled in Switzerland, or (ii) appears to be insolvent, in particular if he is subject to bankruptcy or administrative proceedings, or (iii) owes costs from previous proceedings, or more generally (iv) if there are other grounds to assume that the defendant's costs will not be paid. No security may be ordered on the basis of item (i) against a claimant who is domiciled in a country with which Switzerland entered into a treaty excluding security for costs, *e.g.*, the 1954 and 1980 Hague Conventions. Security for the defendant's costs cannot be requested in summary

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63 Decision of the Supreme Court of 12 May 2017, case reference 4A\_128/2017.

64 Discussed in 'Service of Documents', *above*.

65 Swiss Federal Office of Justice, 'International Judicial Assistance in Civil Matters', 3rd ed (2003, latest update January 2013), at p. 20.

or simplified proceedings and divorce proceedings (*see* section ‘Types of Proceedings’, *above*).

The amount of the security for costs will be determined according to the applicable cantonal tariff. The claimant will usually be heard on the defendant’s request to provide security. If the claimant does not provide the security ordered by the court, the court will not entertain the claim.

### **Judgment or Close of Proceedings without Decision**

When the case is ripe for decision, the court will close the proceedings by rendering a decision on the merits or a declaration of non-admissibility. Court proceedings also may be closed by settlement or by acceptance or withdrawal of a claim. Under the SCCP, courts may directly order enforcement measures on the request of the prevailing party.<sup>66</sup>

For reasons of efficiency, courts may, at their own discretion or on a party’s request, render an interim decision limited to certain aspects of the claim, such as the existence or absence of specific procedural prerequisites (in particular, jurisdiction) or on the question of whether a certain claim is time-barred. As a rule, Swiss courts may only issue an interim decision if a higher court could issue a contrary decision that would put an immediate end to the proceedings and thereby allow a substantial saving of time or costs.<sup>67</sup>

As a rule, court decisions are notified to the parties, in writing, after the hearing. However, decisions may exceptionally be notified to the parties directly following the hearing. Such decisions also may be rendered without reasoning. On a request by a party, the court would have to provide its reasoning. In the absence of a request within 10 days following the notification, the parties are deemed to have renounced their right to challenge the decision.

### **Appellate Remedies**

#### *In General*

As outlined previously, each canton has a second instance, the appellate court. At the cantonal level, the SCCP offers three appellate remedies: appeal, objection, and revision. Subsequent appeals against cantonal decisions can, in limited cases, be filed with the Swiss Federal Supreme Court. Such appeals are governed by the SFTA.

#### *Appeal*

An appeal is the ordinary remedy against final and interim decisions at first instance and decisions on interim measures, if the value in dispute amounts at least to CHF 10,000. The value in dispute is determined on the basis of the relief sought in the statement of claim and not on the basis of the issues still in dispute when the decision subject to appeal is rendered.

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<sup>66</sup> Discussed in ‘Enforcement’, *below*.

<sup>67</sup> Code of Civil Procedure, art 237.

An appeal must be filed within 30 days after notification of the court decision. In case of summary proceedings, the deadline for appeal is 10 days. This is a statutory deadline, which cannot be extended. The grounds of appeal are not restricted. They may be based on grounds such as the incorrect application of law and/or incorrect establishment of facts. New facts and new evidence are considered only if they are submitted immediately and could not have been submitted in the first instance despite reasonable diligence. In principle, an appeal suspends the legal effect of the decision concerned. However, in exceptional cases where an appeal is devoid of any chances of success, the appellate court may authorize early enforcement.

### *Objection*

When an appeal is not admissible, such as when the threshold set for the value in dispute is not given, a party may raise an objection. This is a subsidiary form of appeal. The grounds upon which an objection may be brought are more restrictive. Incorrect establishment of facts may be raised as a ground only if it is flagrant.

The deadline for filing an objection is 30 days. In case of summary proceedings, it is 10 days. Contrary to an appeal, an objection does not, as a rule, stay the enforcement of the challenged decision. However, exceptionally, a stay may be granted. Contrary to an appeal, new evidence and/or new facts are, in principle, not admissible, even if they could not have been submitted in the first instance despite reasonable diligence.<sup>68</sup>

### *Revision*

A party can apply to the court of last instance to reopen proceedings leading to a final judgment if significant facts or evidence are discovered which were not available in the proceedings beforehand. Revision of a decision also may be requested when the decision was unlawfully influenced to the detriment of a party — for instance, by a felony or misdemeanor.

A revision must be filed within 90 days from discovery of the ground for revision and, at the latest, within 10 years after the decision has been rendered. This 10-year deadline does not apply if criminal proceedings have established that the decision was influenced by a felony or misdemeanor.<sup>69</sup> Similar to a complaint, a revision does not suspend the legal effect and enforceability of the decision.

### **Costs**

As a rule, courts determine the costs of the proceedings in the final judgment. The principle ‘costs follow the event’ is applicable. Accordingly, the unsuccessful party has to bear all costs. Costs include court fees and part of the legal expenses of the prevailing party (‘party compensation’). If a party prevails only in part, the costs will be divided between the parties in proportion to the outcome of the case. A party that proceeds in bad faith or wantonly can be made liable for costs even in

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68 Code of Civil Procedure, art 326.

69 Code of Civil Procedure, art 329.

proceedings for which, as a rule, no costs are charged. In the same perspective, unnecessary costs are charged to whoever caused them.

Court costs are regulated by cantonal tariffs. In financial disputes, court costs depend on the amount in dispute. Other factors can have an influence, such as the type of procedure, the complexity of the case, and the time spent by the court on the matter. The legal expenses reimbursed to the prevailing party, which do not necessarily cover a party's full legal costs, are taxed according to official rates. Costs for cantonal appeal proceedings are calculated based on the same principles.

The claimant is requested to pay an advance on court costs up to the full amount of the expected court costs. According to the SCCP, even if the claimant prevails, the advance is not paid back to him but directly set off against the costs of the proceedings. By doing so, courts shift the collection risk regarding the court costs to the prevailing party. This practice aiming at cutting down the number of new cases has been harshly criticized and will normally be abandoned with the current revision of the SCCP. The draft revision also foresees that advance on court costs will not exceed half of the anticipated court fees for most proceedings. These interesting adjustments will globally facilitate access to court.

If a claimant has no permanent residence or registered seat in Switzerland or if he appears to be insolvent, if he owes costs from previous proceedings, or if there are other grounds for assuming that the claim for party compensation is at risk, the defendant may request that the claimant be ordered to provide security for the estimated party compensation. However, such security deposit is prohibited by the 1954 Hague Convention or the 1980 Hague Convention as between their contracting parties.

## **Enforcement**

### *In General*

On a purely domestic level, a decision rendered in one canton is enforceable in the whole of Switzerland, pursuant to the provisions of the SCCP or of the DCBA, without any prior recognition proceedings.

Different regimes are applicable to the enforcement of decisions, depending on whether they concern non-monetary or monetary claims. Articles 335 to 352 of the SCCP apply to non-monetary claims, while monetary claims are governed by the DCBA.

Recognition and enforcement of foreign decisions in Switzerland are made pursuant to the multi- or bilateral treaties in force between Switzerland and the state in which the decision was issued. In this respect, the most important instrument in force in Switzerland is the 2007 Lugano Convention. According to this instrument, Swiss courts seized with a request for enforcement of a court decision rendered in one of the member states to the Convention must declare such a decision immediately enforceable if certain formal conditions are met. Swiss courts may in any event not review the merits of the case.

In the absence of any treaty, recognition and enforcement proceedings must follow the provisions set out in the PILA. Under the PILA, a foreign judgment will be recognized in Switzerland (i) if the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction, (ii) if no ordinary appeal can be lodged against the judgment or the judgment is final, and (iii) if there are no grounds for refusal as exhaustively listed in the PILA, such as violation of Switzerland's public order, defective service, or *res judicata*. The following subsections will concentrate on enforcement proceedings applicable on a purely domestic level.

#### *Enforcement of Non-Monetary Claims*

Court decisions are enforceable in two cases: when the decision is final and no stay of enforcement has been ordered, or when the decision is not final but early enforcement has been granted. Direct enforcement is possible if the competent court has already ordered necessary measures of enforcement on the request of the prevailing party, provided the other party has not successfully filed a request for suspension of enforcement. Decisions can be directly enforced in the whole of Switzerland.

In other cases, the prevailing party has to submit a request for enforcement to the court of its choice, which may be the court at the permanent residence/registered seat of the unsuccessful party, or the court at the place where the enforcement measures are to be executed, or the court where the decision was rendered.

The request must be accompanied either by the decision itself or by an equivalent document (judicial settlement or certificate of enforceability). Courts decide on such requests in summary proceedings and examine *ex officio* whether the decision is enforceable and was duly notified to the opposing party. They may order provisional measures, if necessary, without prior hearing of the opposing party (ie, by an *ex parte* decision).

The opposing party may raise objections to enforcement. The grounds for objection on merits are limited to new facts or circumstances (*real nova*) that arose after the notification of the decision, such as extinction, deferment, limitation, or forfeiture.

If the decision orders the unsuccessful party to do, refrain from doing, or tolerate something, the enforcement court may order measures to ensure the enforcement, such as the threat of criminal sanctions pursuant to Article 292 of the Swiss Criminal Code<sup>70</sup> or administrative fines,<sup>71</sup> in addition to direct coercive measures or third-party performance.

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70 The Swiss Criminal Code, art 292, states: 'Any person who fails to comply with an official order that has been issued to him by a competent authority or public official under the threat of the criminal penalty for non-compliance in terms of this Article shall be liable to a fine'. Under the Swiss Criminal Code, art 106(1), the maximum amount of the fine is CHF 10,000.

71 Under the Code of Civil Procedure, art 343(1)(b) and (c), the court may either order a global administrative fine up to CHF 5,000 or an administrative fine up to CHF 1,000 for each day of non-compliance.

The prevailing party also may choose to request conversion by the enforcement court of the non-monetary obligation into a monetary claim, which can then be directly enforced by way of proceedings provided in the DCBA. The prevailing party also has the possibility of requesting conversion into a claim for damages — limited to the monetary equivalent of the obligation — at a later stage, if the other party fails to comply with the court's order.

#### *Enforcement of Monetary Claims*

**In General.** Pursuant to the DCBA, debt recovery proceedings may be executed either by seizure and realization of assets necessary to cover a specific creditor's monetary claim or by bankruptcy.

In the case of bankruptcy, all the debtor's seizable assets located in Switzerland are realized. The type of procedure depends, to a large extent, on the legal status of the debtor (*eg.* a natural person or a registered commercial entity). Bankruptcy is the only final enforcement remedy available against a debtor who is entered in the commercial register. However, such remedy may also be requested by any person who declares himself insolvent (which is possible only under certain conditions).

Swiss law also allows for voluntary bankruptcy for both natural persons and legal entities in case of insolvency, which has the advantage of a global management of liabilities by a collective procedure. If the claim is secured, enforcement must first be sought in the form of realization of collateral, before seizure and realization of other assets of the debtor or bankruptcy is requested.

**Debt Collection Proceedings.** Debt enforcement is generally initiated by debt collection proceedings. The creditor must submit a debt enforcement request to the Debt Collection Office (an administrative entity), usually at the place of the debtor's permanent residence or registered seat. One particularity of Swiss debt enforcement proceedings is that this request does not require any proof of the creditor's claim.

The Debt Collection Office then serves a summons to pay to the debtor, who must pay the debt within 20 days. Alternatively, the debtor may deny the claim by lodging an objection with the Debt Collection Office within 10 days from the service of the summons. If the debtor fails to do so, the proceedings continue and eventually lead to the seizure of the debtor's assets or to bankruptcy.

If the debtor has filed an objection, the creditor must request a court to set it aside in order to proceed with the enforcement of his claim. The procedure for setting aside the objection depends on the evidence the creditor has for his claim. It must be initiated within one year from the service of the summons, failing which the summons to pay will become time-barred and the creditor will have to renew his debt enforcement request to the Debt Collection Office.

If the creditor is in possession of an 'enforceable judgment', an enforceable deed against the debtor, or a judicial transaction, he may apply in summary proceedings before the court of enforcement for the definite setting aside of the objection. If

the creditor has a written acknowledgment of debt signed by the debtor, he may apply before the court of enforcement in summary proceedings for the provisional setting aside of the objection.

A written 'acknowledgment of debt' may take various forms, such as an unconditional declaration of the debtor that he agrees to pay a certain amount or a signed agreement (eg, loan, lease). If a provisional order for setting aside the debtor's objection is granted, the debtor can, within 20 days from service, obtain a stay of the proceedings by bringing an action on the merits in ordinary proceedings. If the debtor fails to do so or if the action is dismissed, the provisional order for setting aside the debtor's objection becomes final and the debt collection proceedings may be continued.

In all other cases, the creditor must pursue its claim on the merits in ordinary proceedings. In the absence of any objection or once the objection has validly been set aside, the creditor can request continuation of enforcement proceedings, which either lead to seizure of assets or opening of bankruptcy proceedings.

**Attachment Proceedings.** Creditors may obtain provisional seizure of a debtor's assets by way of attachment proceedings. The DCBA provides for an exhaustive list of cases in which attachment can be requested. The creditor can request a judge to order an attachment of the debtor's assets if he can show a *prima facie* claim against the debtor, if he can identify assets which can be attached, or if the debtor:

- Has no permanent domicile (neither in Switzerland nor abroad); or
- Is attempting to conceal assets or is planning to leave Switzerland to avoid the performance of his obligations; or
- Is passing through or belongs to the category of persons who visit fairs and markets and the claim, by its nature, must be fulfilled at once; or
- Does not live in Switzerland and no other grounds for attachment are available to the creditor, provided that the claim has sufficient connection with Switzerland or if the claim is based on a recognition of debt; or
- If the creditor holds a provisional or definitive certificate of shortfall against the debtor; or
- If there is an enforceable title against the debtor, such as a Swiss or foreign judgment, a court-approved settlement, an enforceable deed, or an arbitration award, which would otherwise allow the court to set aside an objection raised by the debtor against debt collection proceedings. In the latter two cases, the creditor does not need to prove that the claim for which attachment is sought has sufficient connection with Switzerland. No prior exequatur is required to obtain an attachment on the basis of a foreign court decision or foreign arbitral award as the exequatur may be requested as a preliminary issue in the attachment proceedings.<sup>72</sup>

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72 Decision of the Swiss Federal Supreme Court of 21 December 2012, case reference 139 III 135.

If debt enforcement proceedings are not already pending, an ordinary court action (at the appropriate forum in Switzerland or abroad) or debt enforcement proceedings must be initiated by the creditor to validate the attachment within 10 days from service of the attachment order.

The court at the place where the assets are located or at the place where the competent Debt Collection Office is located has jurisdiction for the attachment and the debt enforcement proceedings. However, the scope of the attachment may concern assets located in the whole of Switzerland. Pursuant to the PILA, attachment of assets of a foreign debtor establishes a place of jurisdiction in Switzerland in which the debtor may be sued or where the claim for which the attachment was granted may be prosecuted/validated. However, this forum is excluded under the scope of the 1988 or the 2007 Lugano Convention.

#### *Enforceable Deed*

As of 1 January 2011, Swiss law permits expedited enforcement outside judicial proceedings for claims mentioned in official deeds. These claims are thus ‘self-enforceable’.

Official deeds relating to any type of obligation may be enforced in the same way as a judicial decision, provided that the debtor expressly agreed to direct enforcement in the deed; the obligation and its legal grounds are sufficiently determined in the deed; and the obligation is due. However, direct enforcement is inadmissible for deeds relating to the performance of certain obligations, particularly obligations relating to tenancy and lease contracts and employment contracts.

The holder of the deed must present a request for enforcement of the deed to a notary public, who will serve the other party with a certified copy of the deed and set a deadline of 20 days for the performance of the obligation mentioned in the deed. If the other party fails to perform within that time limit, the holder of the deed may submit a request for enforcement to the enforcement court.

The procedure applicable to the enforcement of deeds relating to non-monetary claims is set forth in the SCCP.<sup>73</sup> Deeds relating to monetary claims are a means of definitively setting aside the debtor’s objection in debt collection proceedings.

However, contrary to the enforcement of judicial decisions, the obligated party can only raise objections that can be immediately proven. Neither the deed nor the decision of the enforcement court has a *res judicata* effect. Consequently, the obligated party may at any time request declaratory relief before the ordinary courts on the grounds that the obligation no longer exists or has been suspended.

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<sup>73</sup> Discussed in ‘Enforcement of Monetary Claims’, *above*.

