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Trends & Developments

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Niederer Kraft & Frey AG has one of the largest dispute resolution practice groups in Switzerland. They have been commended on both their ability to litigate and their ability to settle a case. They have extensive experience in international commercial arbitration under ICC and Swiss Rules as well as sports arbitration. NKF's litigation group regularly represents clients in a wide variety of cases covering such fields as banking, M&A, insurance, competition and antitrust, as well as commercial contracts ranging from commodities transactions, marketing and media to sports matters, amongst others. A diversity of expertise, paired with the quality and experience of their litigation lawyers, makes NKF a key player in the market.

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Introduction

Switzerland is a federal state composed of 26 cantons. Until 1 January 2011, each of these 26 cantons had their own respective law of civil procedure governing civil proceedings before their respective state courts. Since the Swiss Code of Civil Procedure entered into force on 1 January 2011, the landscape of Swiss civil proceedings has changed dramatically, and a unified procedural basis for state court litigation in Switzerland has been established.

In the little more than three years that have passed since the inception of the Swiss Code of Civil Procedure, one can observe a certain unification of case law on procedural matters, which will ultimately lead to even greater legal certainty.

Given the rather recent fundamental change in Swiss civil procedure, no major further statutory changes are expected in the coming years, as case law will continue to evolve on a number of features introduced by the Swiss Code of Civil Procedure on a unified level.

A few of these features may be of particular practical importance, and deserve a slightly closer look.

Court costs and attorneys' fees

When undertaking a cost-benefit analysis before deciding whether or not to commence litigation, the estimated costs of the proceedings are naturally critical. Notwithstanding that the Swiss Code of Civil Procedure was introduced to regulate civil procedure at federal level, the determination of the costs of proceedings has remained in the authority of the cantons.

Even though each canton has released tariffs on which court costs in such canton are determined, court costs in Switzerland can generally be regarded as reasonable. This is ensured by federal law that requires costs to be adequate and not beyond what is necessary to cover the costs arising in connection with the specific court proceedings. Furthermore, in terms of attorneys' fees, the amount of compensation of the prevailing party is generally decided by the court and depending on the canton this regularly will not cover the full amount of attorneys' fees incurred.

In terms of security for costs, a court is at liberty to request a plaintiff to provide security for the full amount of court costs estimated to arise. The court may also require a plaintiff to post security for the defendant's attorney's fees upon the reasoned request of a defendant; for example, if the plaintiff is domiciled outside Switzerland, has pending debts relating to court costs from prior proceedings, appears insolvent or if other reasons so justify. The danger of being subject to a security for costs order by the court is clearly intended to deter plaintiffs from bringing frivolous claims and should comfort defendants in that regard, at least to a certain extent.

It is likely that litigation funding by third parties will also be of increased relevance in Switzerland given the steady increase of its popularity in recent years, particularly in certain common law jurisdictions such as the UK, the United States and Australia. In principle, litigation funding by third parties is admissible in Switzerland, as expressly clarified by the Swiss Federal Tribunal. However, given the stringent terms of third-party funding agreements, one should bear in mind that a third-party funding agreement must not constitute profiteering – i.e. exploitation of a person in need – and must furthermore not cause any conflict of interest in the sense that the third-party funder should not unduly interfere in the client-attorney relationship. On a practical level, one must also observe that in contentious matters the professional rules of attorney conduct in Switzerland do not allow for attorneys to be paid on the basis of contingency fees only – a payment scheme third-party funders often seem to prefer. This may, at least to some extent, explain why third-party funding so far has not become too popular in Switzerland.

Production of documents

Disputing parties in Switzerland are not subject to a litigation hold. From the perspective of a party facing imminent litigation, unlike in certain common law jurisdictions, there are no pre-action conduct requirements that would apply to the party in Switzerland and that would oblige it to secure and maintain all relevant data in unchanged form for the purposes of the litigation and possible discovery proceedings. This being said, the lack of a litigation hold should not be understood as permission for a party to destroy evidence which, when assessed by a court, could have highly detrimental consequences and result in adverse inferences of a court when weighing the evidence.

Although in specific instances the taking of evidence as a form of precautionary measure is made possible by the Swiss Code of Civil Procedure, this precautionary form of evidence taking, or any other provision in Swiss civil procedure, does not permit the parties to conduct fully-fledged discovery proceedings as are particularly known in the US.

This notwithstanding, it is nevertheless possible to specifically request the production of documents in Swiss civil court proceedings, even though in practice production requests are very often not successful. Case law requires that the documents subject to production requests are described with sufficient specificity. Furthermore, the materiality and adequacy of such documents to prove disputed facts must additionally be shown, and it must be demonstrated that the information sought is under the control of the counterparty.

In essence, such case law mainly aims to prevent so called 'fishing expeditions', by which a party may hope to extract certain unknown information that may further its cause or which may also result in significant costs for the counterparty and pressure them into settling a case.

While a party fearing to be the addressee of production requests or quasi discovery proceedings can take comfort in the rather restricted approach Swiss case law has taken in this regard, a party justifiably in need of information being in the realm of the counterparty will face an obstacle that is difficult to overcome.

Attorney-client privilege

The question of privilege regularly stands at the very heart of a client-attorney relationship as the information relayed to the attorney is of a sensitive nature more often than not.

In this respect, the Swiss Code of Civil Procedure provides full deference to the secrecy obligations attorneys are subject to in Switzerland under the Swiss Criminal Code and the Federal Lawyer's Act. In other words, a lawyer subject to professional secrecy obligations may (and will under normal circumstances be obliged to) invoke legal privilege when giving testimony or producing evidence falling within the scope of such secrecy obligations.

Given the protection of the attorney-client privilege, the question of what falls within the scope of the attorney's secrecy obligations and who can invoke the privilege are not only central in providing the requisite comfort to clients, but also in raising the necessary awareness as to matters or persons that may not fall under the attorney-client privilege protection.

Clients can take comfort in the fact that the scope of attorneys' secrecy obligations in Switzerland are rather broad and, generally speaking, include everything conveyed to an attorney

in connection with a (prospective) attorney-client relationship. However, only information a lawyer has obtained as part of his core business is protected, which most notably excludes information an attorney learns as a private person or in a non-legal capacity e.g. as a business adviser, board member or asset manager.

Furthermore, one ought to be very much aware that, to date, attorney-client privilege does not apply to corporate in-house counsel in Switzerland, notwithstanding any attempts in the near past to change this situation. Hence, any information given to corporate in-house counsel remains at risk of becoming subject to production in Swiss court proceedings, barring any other admissible grounds based upon which production or testimony may be denied.

International arbitration

While the old inter-cantonal Concordat of 1969 regulating domestic arbitration in Switzerland was also replaced by the rules on arbitration provided in the Swiss Code of Civil Procedure, it is still international arbitration – governed by the 12th chapter of the Private International Law Act of Switzerland and thus not by the Swiss Code of Civil Procedure – that catches the limelight in terms of available alternative dispute resolution mechanisms in Switzerland.

When it comes to international arbitration, Switzerland ranges amidst the very top places both in regards to the use and quality of arbitration. It owes its fame largely to the fact that Switzerland has one of the most arbitration-friendly and liberal legal frameworks governing international arbitration proceedings seated in Switzerland, and extensive court practice stipulating a notably benevolent approach towards arbitration.

Swiss law and court practice deem all kinds of proprietary matters arbitrable and therefore capable of being resolved by way of international arbitration. This notably includes matters which many other jurisdictions would not consider abitrable, such as proprietary matters relating to employment, antitrust, family law, shareholder and real estate disputes. Arbitrating parties in Switzerland are also protected from unwarranted outside interference by state courts, be it domestic or foreign. Swiss law will not permit arbitration proceedings to be disrupted by the initiation of parallel state court proceedings outside Switzerland, nor may an arbitration agreement providing for arbitration seated in Switzerland be circumvented by commencing ordinary state court proceedings in Switzerland, since a Swiss state court will defer to the arbitral tribunal (already, or yet to be, constituted) when it comes to determining the validity of the arbitration agreement and, connected therewith, the jurisdiction to hear the case.

Additionally, the straightforward and fast-track appeals proceedings foreseen by Swiss law serve as a formidable tool to ensure and further enhance Switzerland's standing as a major arbitration hub on a worldwide scale. The appeals proceedings in relation to international arbitral awards rendered in Switzerland are limited to one instance only, such instance being the highest Swiss court, the Swiss Federal Tribunal. It is for this reason that appeal procedures are the exception rather than the rule and that final decisions on appeals of arbitral awards can generally be expected to be rendered within six to eight months.

The grounds for appeal are very restricted and most predominantly include matters relating to the proper constitution and jurisdiction of the arbitral tribunal as well as matters pertaining to due process, the right to be heard and equal treatment as well as grounds of public

policy. Additionally, the Swiss Federal Tribunal has shown great restraint in overturning arbitral awards. By way of example, since the Private International Law Act of Switzerland came into force in 1989, the Swiss Federal Tribunal has to date only overturned two arbitral awards on grounds of violation of public policy. Statistically speaking, while appeals based on grounds of lack of jurisdiction of the arbitral tribunal have a 10% chance of success, the likelihood of arbitral awards being overturned on appeal on other grounds is limited to about 6.5% only.

Although the Private International Law Act provides the possibility to opt out of its application, in practice parties very rarely do so, and much prefer to enjoy and benefit from the liberal and arbitration-friendly framework offered by Swiss law and court practice.

Outlook

As initially stated, no major statutory changes in terms of civil procedure are expected to occur in Switzerland within the next few years. However, there are two potential upcoming revisions that are nevertheless worth mentioning:

- The Swiss parliament has mandated the Swiss government to prepare a bill intended to moderately revise and update the entire 12th chapter of the International Private Law Act of Switzerland containing the rules applicable for international arbitrations seated in Switzerland; and
- The Swiss Federal Council has released a report pursuant to which the tools for collective legal protection ought to be improved and the introduction of, amongst other things, class actions into the Swiss procedural landscape (albeit not US-style) should be considered.

However, neither of these revisions is expected to enter into force within the next two years.