

COST AND FEE ALLOCATION IN CIVIL PROCEDURE IN SWITZERLAND

by

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Introduction

- 1 Switzerland is a federation of 26 Cantons. The division and separation of powers along the vertical axis of federal and cantonal authorities is regulated in the Constitution.
- 2 Under the Constitutions of 1848 and 1874 civil procedure law was a matter of cantonal law¹ as far as proceedings before cantonal Civil Courts of First Instance or cantonal Courts of Appeals were concerned. On the federal level the civil procedure law was again divided into two systems, one applicable to appeals against decisions of cantonal Courts of Appeals to the Swiss Federal Supreme and one applicable to proceedings in which the state of Switzerland is the defendant party. This diverse system of cantonal and federal procedure law was abrogated when the new Constitution of 1999/2000² became the law. Under the new Constitution the Federal Authorities received sole powers to regulate civil procedure in Switzerland.
- 3 After the inauguration of the new Constitution the Federal Authorities established a commission with the task to draft a new unified Federal Code of Civil Procedure. The drafters' aim was from the very beginning to draw from existing cantonal procedure law and to aim for a middle course. The new Federal Code of Civil Procedure is by and large not a piece of revolutionary legislation defining new concepts and boundaries in civil procedure but rather the restatement of principles carefully selected from existing cantonal codes which have been found time proven and likely to be accepted by the majority. The commission's predraft³ was reworked by the Federal Department of Justice and then presented to the two chambers of parliament in 2006⁴ which, after introducing further changes, approved and passed it on 19 December 2008⁵. The new

¹ For an overview and a listing of all 26 cantonal codes of civil procedure see <http://www.zpo.ch> (Kantonale ZPO; all codes in their original language downloadable).

² SR 101, dated 18 April 1999, in force since 1 January 2000; for an (unofficial) English translation provided by the Federal Department of Justice see <http://www.admin.ch/org/polit/00083/index.html?>

³ see Predraft and Report of the Expert Commission dated June 2003, available on <http://www.zpo.ch> (Materialien; only in German).

⁴ see Final Draft and Legislative Report on the Proposal for a Federal Code of Civil Procedure dated 28 June 2006, available on <http://www.zpo.ch> (Materialien; in German, French and Italian).

⁵ see verbatim reports of the debates in the National Council and the Council of States as published in the Official Bulletin, see <http://www.zpo.ch> (Materialien).

unified Federal Code of Civil Procedure⁶ will now enter into force on 1 January 2011 by which time the current diverse system consisting of 26 different cantonal civil procedure codes and federal legislation will belong to the past - more than 140 years after the issue has first been raised and discussed on the occasion of the annual meeting of the Swiss Bar Association of 1868.

In view of this long awaited and now imminent change, I shall concentrate in the following mainly on the new unified regime⁷.

- 4 The unified Federal Code of Civil Procedure is not the end of all diversity in Switzerland. The Code is applicable solely to proceedings before cantonal courts and national arbitration proceedings⁸ (provided the parties have not opted out accordance with Article 353 of the Federal Code of Civil Procedure in favour of the regulation on international arbitration as contained in the Federal Code of Private International Law). Proceedings before the Swiss Federal Supreme Court are subject to the Swiss Supreme Court Act⁹ and international arbitration is subject to the regulation contained in chapter 12 (Articles 176-194) of the Federal Code of Private International Law¹⁰ (provided the parties have not opted out in accordance with Article 176 al. 2 of the Federal Code of Private International Law in favour of the regulation on national arbitration as contained in the Federal Code of Civil Procedure).

⁶ The text is published in the three official languages of Switzerland German, French and Italian see <http://www.zpo.ch>. For an (unofficial) English translation of the Code, see STEPHAN V. BERTI, Schweizerische Zivilprozessordnung, TEXTOSpezial Gesetzesausgabe, Helbing Lichtenhahn Verlag, Basel 2009. **Most references to and citations of the Code used herein follow the translation of Stephan V. Berti.**

⁷ Practice and literature on the new Federal Code of Civil Procedure are naturally still scarce. A choice of first publications are: JACQUES HARDY, JEAN-MARC REYMOND, LAURA JACQUEMOUD-ROSSARI, DENIS TAPPY, JEAN-FRANCOIS PLOUDRET, FRANCOIS BOHNET, NICOLAS JEANDIN, Le Projet de Code de Procédure Civile Fédérale, Travaux de la journée d'étude organisée à L'Université de Lausanne le 8 mars 2007, édités par Suzana Lukic, Publication CEDIDAC 74, Lausanne 2008 ; BERNHARD BERGER, Zivilprozessrecht – Unter Berücksichtigung des Entwurfs für eine schweizerische Zivilprozessordnung, der bernischen Zivilprozessordnung und des Bundesgerichtsgesetzes, Stämpfli Verlag Bern 2008; ADRIAN STAEHELIN, DANIEL STAEHELIN, PASCAL GROLIMUND, Zivilprozessrecht nach dem Entwurf für eine Schweizerische Zivilprozessordnung und weiteren Erlassen – unter Einbezug des internationalen Rechts, Schulthess Verlag, Zürich 2008; DOMINIK GASSER, BRIGITTE RICKLI, Schweizerische Zivilprozessordnung (ZPO) – Kurzkomentar, Dike Verlag, Zürich/ St. Gallen 2010. For an exhaustive overview on pertinent literature see <http://www.zpo.ch> (Literatur).

⁸ Part 3 (Articles 353 – 399) of the Federal Code of Civil Procedure is devoted to national arbitration and will replace the former Cantonal Treaty on National Arbitration dated 27 March 1967. Article 353 al. 2 permits that parties may exclude in writing the applicability of the Federal Code of Civil Procedure and choose instead the application of the rules regarding international arbitration as set forth in Chapter 12 of the Federal Code of Private International Law.

⁹ SR 173.110, dated 17 June 2005, in force since 1 January 2007.

¹⁰ SR 291, dated 18 December 1987, in force since 1 January 1989 as revised; for further reference see STEPHAN V. BERTI (editor), International Arbitration in Switzerland – An Introduction and Commentary on Article 176 – 194 of the Swiss Private International Law Statute, Helbing Lichtenhahn/ Kluwer Law International, Basel/ The Hague 2000,

*The Concept of Costs under the new Federal Code of Civil Procedure*¹¹

- 5 The new Federal Code of Civil Procedure contains a whole chapter on "Costs of the Proceedings and Legal Aid"¹². The respective Title 8 comprises 28 articles, starting with Article 95 and ending with Article 123. The Title is subdivided into four chapters dealing with "Costs of the Proceedings", "Determination and Collection of Costs", "Special Rules", and "Legal Aid".
- 6 The chapter on "Costs of the Proceedings" (Article 95 through Article 103) contains a definition of court costs and party costs and deals with questions relating to the claimant's obligation of having to advance prospective court costs and providing security for the respondent's costs.

According to the statutory definition set forth in Article 95 court costs comprise a flat fee for the (mandatory) conciliation proceedings, the judgment fee, the costs of the evidentiary proceedings, translation costs and the costs for the representation of a child in family law proceedings. Party costs comprise the costs of professional counsel, necessary expenses and, if justified in a particular case, appropriate compensation for the inconvenience caused to parties not represented by professional counsel.

Prospective court costs have to be advanced if so ordered by the court (Article 98)¹³. A respondent can pursuant to Article 99 request from claimant security for his prospective party costs (*cautio iudicatum solvi*) if the claimant is domiciled or does have its seat in a country with which Switzerland does not maintain a treaty on court and party costs, if the claimant appears to be insolvent, if the claimant owes costs from previous proceedings or where there are other grounds for assuming that the claim for party costs may be at risk¹⁴. Article 100 and Article 101 define the type and manner in which advances have to be paid and securities have to be provided. Article 102 deals with the costs and their application in connection with taking evidence.

¹¹ **References to an Article without specification are always to the new Federal Code of Civil Procedure.**

¹² The application of Title 8 in arbitration is subject to the parties' will which may instead choose that the costs are equally shared by the parties or applied according to the tribunal's discretion.

¹³ Arbitral tribunals enjoy equal powers pursuant to Article 378. If a party fails to advance the costs requested, the other party can advance all of the costs or withdraw from the arbitration proceedings. In the latter event the withdrawing party may introduce new arbitration proceedings or bring action in a state court.

¹⁴ Article 379 grants the same power to arbitral tribunals if the claimant appears insolvent with equal consequences as set forth in Article 378 in the event of default. This provision is a novelty without equality in the Federal Code of Private International Law.

- 7 The chapter on “Determination and Collection of Costs” (Article 104 through Article 112) sets forth the principle that all of the costs of the proceedings are, as a rule, to be determined and allocated by the court *ex officio* (Article 104 and 105). The principles to be applied by the courts are defined in the Articles 106 through 108 which shall be discussed in more detail below. Article 109 deals with costs in the event of a settlement. Article 111 defines the manner in which court costs shall be collected and Article 112 deals with deferment and waiver of court costs in case of hardship, states that the court costs are subject to an uniform statute of limitations of 10 years after termination of the proceedings and defines a statutory interest rate of 5% which is payable on arrears.
- 8 The chapter on “Special Rules” (Article 113 through Article 116) relate to those proceedings with respect to which the levy as well as the application of court costs and/or party costs follow special rules. Details shall be discussed below under Exceptions and Modifications.
- 9 The chapter on “Legal Aid” (Article 117 through Article 123) shall be discussed in detail below. Legal Aid is only available for proceedings before state courts. Art. 380 states explicitly that it is not available for arbitration proceedings.
- 10 Any court order and ruling regarding costs and their application can form subject of a separate appeal, albeit only the subsidiary form of appeal in accordance with Article 319 et seq.. The same applies to court orders denying partially or in whole legal aid. Grounds for a subsidiary appeal are incorrect application of the law and *manifestly* incorrect establishment of the facts. If the appeal is successful the court of appeals sets aside the decision or the procedural order and refers the matter back to the court below (Art. 327 al. 3a) or renders a new judgment if the matter is ripe for decision (Art. 327 al. 3b). Since each Canton followed its own practice on this subject, the new Federal Code of Civil Procedure emphasizes that principle, and thus avoiding any misunderstanding on the concept, by introducing a separate provision of appeal in every of the above discussed chapters¹⁵.
- 11 The principles set forth in Title 8 apply equally to courts of first instance and appellate courts. Where a court of appeals renders a new judgment on the merits of a case, it is required to also rule on the costs of the proceedings before the court of first instance (Article 318 al. 3).
- 12 The unification of civil procedure law as promulgated in the new Federal Code of Civil Procedure is limited to substantive rules. The figures and their calculation remain subject to separate Schedules

¹⁵ see Article 103, 110 and 121.

(Article 96 of the new Federal Code of Civil Procedure). In the Cantons those schedules are enacted by the legislator and are applicable to all procedures before cantonal civil courts.

- 13 Thus, the imminent inception of the new Federal Code of Civil Procedure will put an end to the former plurality in Swiss civil procedure, save for costs and fees which remain in the legislative realm of the Cantons. In addition, the jurisdiction of the cantonal courts *ratione materiae* continue to be governed by cantonal law, save where otherwise provided by Federal law. Examples of such encroachment of federal law into the cantonal sovereignty are the rule of "double instance", i.e., that Cantons are required to maintain two-tier court system consisting of courts of first instance and appellate courts¹⁶ (again, save, where Federal law provides otherwise by making it a rule that only one cantonal court shall have competence¹⁷), and the provisions regarding counterclaims¹⁸, interventional claims¹⁹, third party actions²⁰ and enforcement of judgments²¹.

The Basic Rules: Who Pays?

- 14 The principal rule in all of Switzerland is under the current diverse system as well as under the unified Federal Code of Civil Procedure (Article 106) that cost and fees are distributed in accordance with the outcome of the judgment. If the plaintiff is fully successful, then the defendant has to pay all of the costs and compensate the plaintiff in accordance with the applicable Schedule. If the action is dismissed for cause (lack of a formal requirement or withdrawal) or on the merits, then the plaintiff has to bear all of the costs and owes compensation to the defendant in accordance with the applicable Schedule. In between these two extremes, the costs and the fees are distributed between the parties in accordance with the plaintiff's degree of success. The new Federal Code of Civil Procedure provides for two important exceptions to this general rule which shall be discussed in the next chapters.
- 15 While only the claimant has to advance court costs (Article 98) and possibly provide security for the prospective costs of the respondent (Article 99), the obligation of advancing costs for the taking of evidence falls on both parties. Article 102 provides with respect to

¹⁶ see Article 74 al. 2 of the Swiss Supreme Court Act.

¹⁷ see Article 5 in which the Canton are directed to designate one court having sole cantonal jurisdiction in matters of disputes in connection with intellectual property, antitrust disputes, disputes relating to the use of the name of a legal entity, disputes governed the Unfair Trading Act, disputes governed by the Atomic Energy Liability Act, actions against the Confederation, the appointment of a special auditor in accordance with Article 697b of the Code of Obligations and disputes governed by the Collective Capital Investment Act and the Stock Exchange Act.

¹⁸ see Article 14 and Article 224.

¹⁹ see Article 73.

²⁰ see Article 81.

²¹ see Article 336 al. 2 and Article 267.

the costs of taking evidence that each party is obliged to advance to the court the costs caused by the taking of evidence which it has offered. Where both parties have offered the same evidence, they shall each advance half the costs. If one party fails to make the advance, the other can do so, failing which the evidence will not be taken, save for cases in which the facts have to be established *ex officio*²². The rule of Article 102 is in line with the general rule contained in Article 160 which states that the litigants as well as third parties have a duty to cooperate and participate in the taking of evidence, subject to a party's right of refusal as defined in detail in Article 163.

Costs associated with the taking of evidence (witnesses, expert opinion etc.) are to be allocated in accordance with the same principle applied to the other court costs. Regarding experts, it needs to be differentiated, though, between those which are appointed unilaterally by one party (so called party experts) and those which are court appointed (so called court experts). The payment of party experts is principally the responsibility of the party which appoints such expert; it is possible to ask that those costs are compensated together with the attorney fees as necessary expenses (Article 95 al. 3a) but courts show in practice a great reluctance to award costs for party appointed experts, at least in full, on account that either the retaining of the expert is deemed to having been unnecessary in total or his/her services are found to be too expensive. On the other hand, the costs associated with court appointed experts are usually distributed like all other court fees.

- 16 In regard to the allocation of costs in the event of a settlement, Article 109 has adopted the current system that, as a matter of principle, the parties are free to agree on any distribution of the costs, save in the event that one party has been granted legal aid. In practice, the costs (court, experts, etc.) are usually shared in equal by the parties and each party bears its own fees. In the event that the settlement agreement contains no provision regarding costs, then the costs shall be allocated by the court in accordance with the general rule and its exceptions discussed in the next chapter.

Exceptions and Modifications

- 17 There a number of exceptions where the applicable laws specifically provide that the court is obligated or permitted to deviate from the basic rule that loser pays all.
- 18 The perhaps most important exception is contained in Article 107 which provides that the court can depart from the general rule set

²² see Article 55 al. 2 which applies currently only to cases involving children in family law matters (Art. 296.)

forth in Article 106 *at its discretion* where the court upheld the action albeit not to the extent of the sum claimed, where the court had to determine the amount of the claim at its discretion, where the claim in dispute was difficult to quantify, where the action was brought in good faith, in matters of family law and registered partnerships, where the proceedings were closed due to having become without object (save where the applicable substantive law provides otherwise), or where there are other circumstances which for reasons of fairness justify a different allocation of costs²³. In the alternative, the court does also have power to charge costs which have been caused neither by the litigants nor by an (identifiable) third party to the Canton in which the court has its seat.

- 19 Equally important is the exception stated in Article 108 of the new Code of Civil Procedure which states, without much ado, that unnecessary costs shall be charged to whoever caused them. This rule applies in particular in cases where one party causes undue protractions due to missing deadlines, filing submissions which are unnecessary in substance or in length, or a change in argument which could have been brought forward much earlier in the proceedings. Another example for the application of this rule is the widespread practice that each party shall bear the costs of self-appointed experts.
- 20 Article 113 and 114 list a number of proceedings with respect to which the applicable substantive laws provide that those are either free of charge or at minimal costs and that each party has to bear its own costs.

Article 113 deals with costs of conciliatory proceedings which will become mandatory under the new Federal Code of Civil Procedure²⁴. The general rule is that in conciliatory proceedings court costs are shared by both parties in accordance with their agreement if the case is settled (Article 109) or by the claimant if the case is referred to the court for further adjudication (Article 207) whereas party costs are borne by each party, definitely if the case is settled, and for the time being if the case is referred to the court for further adjudication²⁵. In certain areas the conciliatory proceedings are free of court charge by law²⁶.

²³ There is a heated and hereterto unsettled discussion whether and, if so, to what extent Article 107 shall be applied in case the claimant is not awarded more by the Court than what she/he has been offered by the defendant during conciliation.

²⁴ see Article 197 et seq. For more details see the next chapter on encouragement and discouragement of litigation.

²⁵ see DOMINIK GASSER, BRIGITTE RICKLI, above note 7, p. 101

²⁶ Article 113 al. 2 lists the following types of disputes: arising under the Equality Act dated 24 March 1995, under the Equality of Handicapped Persons Act dated 13 December 2002, arising from a lease contract relating to private or commercial housing or agricultural leases, arising from employment relationships or under the Personal Employment Leasing Act dated 6 October 1989 with an amount in controversy of less than CHF 30.000, under the Employee Participation Act dated 17 December 1993 or relating to supplemental medicare under the Illness Insurance Act dated 18 March 1994.

Article 114 contains a list of proceedings in which also the adjudication is free of court charge. The list in Article 114 is identical to the one set forth in Article 13 al. 2 save for disputes arising from lease contracts relating to private or commercial housing or agricultural leases. The latter are dealt with by courts as any other type of case with respect to which the conciliatory proceedings have yielded no settlement or final judgment.

Article 115 provides, in the spirit of the somewhat crafty Article 108, that parties which proceed in bad faith or wantonly can be held liable for costs even in proceedings for which, as a rule, no costs are charged.

Article 116 gives the Cantons the power to exempt further types of proceedings from court costs. Some Cantons have made use of this delegation of powers and provide free court services involving lease contracts relating to private or commercial housing or agricultural leases.

Encouragement or Discouragement of Litigation

- 21 Like the determination of costs, every canton has a different system regarding up-front payments required to be made by the plaintiffs. The general rule, however, is that a plaintiff, save for those who benefit from legal aid, have to make some sort of a down payment (Article 98). Some cantons follow a practice of asking the full amount of the presumed court costs in advance, whereby others require that a fraction is paid first subject to further requests during the proceedings.
- 22 Counsel are allowed, but no longer obligated, to ask for an advance for their fees up to the presumed maximum²⁷, unless the client is destitute and would qualify for legal aid²⁸.
- 23 In the current system there exists no particular consensus with regard to either encouraging or discouraging litigation apart from the traditional deterrents like costs. In some cantons, an attempt at dispute settlement is mandatory, either by making it obligatory that the dispute is first presented to the Justice of the Peace or by making the parties appear before the presiding judge for purposes of settlement discussions, usually after the plaintiff has filed the complaint and the defendant filed the answer to the complaint. The new Federal Code of Civil Procedures, however, attaches a great importance to settling disputes at the earliest possible stage. The parties must first make an attempt at conciliation or go through a

²⁷ The request of excessive advance payments is deemed to constitute a violation of Article 12 lit. (a) of the Federal Attorneys-at-law Act, SR 935.61, dated 23 June 2000.

²⁸ Article 12 lit. (g) of the Federal Attorneys-at-law Act provides for a statutory obligation for all attorneys-at-law to accept legal aid cases going to court in the canton in which they are registered.

mediation process before they can take the case to court proper²⁹, save for a defined set of exceptions listed in Article 198 and 199³⁰. Instead of formal conciliation proceedings the parties may jointly opt for out-of-court mediation in accordance with Article 213 et seq.

In sum, one could say that the new system in Switzerland aims on the subject of encouraging or discouraging litigation at a middle course which is designed to guarantee to anyone free access to court, at least in the formal sense, while at the same offering proceedings the aim of which is a rapid settlement of the dispute with a little burden to the system as possible. A strong incentive to settle cases in the context of a conciliatory proceeding are certainly the costs which formal court proceedings may entail. Settlement of the case at a very early stage is thus quiet common in Switzerland, especially in regard to "small" and "medium" claims, i.e., claims of up to CHF 100.000 (see below Chapter on Examples).

The Determination of Costs and Fees

- 24 The calculation of court costs and party costs is, as previously mentioned, subject to Schedules which form part of Cantonal law. The Cantonal Schedules follow by and large the same method of calculation but are very diverse in result. In most cases the costs are calculated in percent of the amount in dispute.
- 25 Court fees are deemed to being duties. Thus, they have to be modelled so that they cover the expenses incurred by the judicial system while at the same time being proportionate to the amount in controversy³¹. This seems like a conundrum impossible to be resolved satisfactorily³². Despite a constant rise of their fees do Cantons not cease to complain of the burden of costs of the judicial system which they are required to maintain. For the time being, it is not foreseeable to what ultimate result these discussions will lead to. Fact is, though, that litigation in Switzerland is in general deemed to being expensive and that costs pose a potential threat to the principle of free access to courts³³.

²⁹ See Article 194 et seq.

³⁰ Of particular interest is Article 199 subparagraph 2 which exempts all litigation against defendants living outside of Switzerland from mandatory conciliation.

³¹ see MATIN STERCHL, Gerichts- und Parteikosten im Zivilprozess, in: CHRISTIAN SCHÖBI (editor), Gerichtskosten, Parteikosten, Prozesskaution, unentgeltliche Prozessführung (und Modelle zur Beschränkungen ihrer Kosten), Stämpfli Verlag AG Bern 2001, p. 13.

³² For an interesting discussion of the necessary planning process required from a Canton see URS HODEL, Die Planung und Bereitstellung der Ressourcen für die Justizbehörden im Kanton Aargau, in: CHRISTIAN SCHÖBI (editor), Gerichtskosten, Parteikosten, Prozesskaution, unentgeltliche Prozessführung (und Modelle zur Beschränkungen ihrer Kosten), Stämpfli Verlag AG Bern 2001, p. 71 et seq..

³³ see MAX PLATTNER, JEAN-PIERRE SCHMID, Gerichtskosten und Rechtsschutzversicherung, in: CHRISTIAN SCHÖBI (editor), Gerichtskosten, Parteikosten, Prozesskaution, unentgeltliche Prozessführung (und Modelle zur Beschränkungen ihrer Kosten), Stämpfli Verlag AG Bern 2001, p. 65

- 26 Most Schedules for calculating court fees and attorney fees provide for what is called a basic fee determined in proportion to the amount in controversy. The basic fee is usually a spread between a minimum and maximum figure. This system is then supplemented by a catalogue of reasons which allow for an upgrade of the basic fee. There is a great variety of reasons which allow the court or the attorney to ask for an upgrade of the basic fee. The most common are the complexity of the controversy, the requirement of special knowledge, the urgency of the matter, the application of foreign law and the use of foreign languages.
- 27 Schedules are in general binding for court related work provided by attorneys. Increasingly more Cantons have introduced new legislation pursuant to which attorneys and clients are free to agree on the type and manner of remuneration within the narrow limits defined in the Attorney-at-law Act³⁴. These agreements are binding only upon the signatory parties. They do not bind the court when determining the party costs which the succumbing party has to pay to the successful party. Thus, by entering into such agreement, the client accepts the risk that the fee owed to his/her attorney is more than what he/she gets as compensation from the opposing party in case of full success.

Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims and Litigation Insurance

- 28 Article 12 lit. e of the Attorney-at-law Act³⁵ explicitly prohibits any attorney-client agreements before the conclusion of the proceedings which would give the attorney a percent of the sum won instead of a fee, or provide for a no win-no fee arrangement. This provision prohibits solely the undiluted *pactum de quota litis* and applies strictly to court related work³⁶. The Swiss Federal Supreme Court has recently ruled that an arrangement pursuant to which the client pays a reduced fee and in turn, the attorney gets a share in the sum won (*pactum de palmario*) is as a matter of principle compatible with Federal law, if permitted under the respective cantonal law³⁷. This decision may be viewed as the first light of contingency fees in Switzerland.
- 29 Class Actions similar to American law are still unknown in Switzerland after lengthy discussions which have started long before the drafting the new Federal Code of Civil Procedure. The closest in concept of class actions which have found a majority are the simple joinder of

³⁴ see above note 27. Regarding the permissibility of success oriented fees see the next chapter below.

³⁵ see above note 27

³⁶ see WALTER FELLMANN, GAUDENZ ZINDEL, Kommentar zum Anwaltsgesetz, Schulthess Verlag, Zürich 2005, p. 174 et seq.

³⁷ ATF 135 (2009) III 259 (in French).

actions in accordance with Article 71 and actions brought by an association under Article 89³⁸. The latter provides that associations and other organisations of Swiss national or regional importance that are by virtue of their statutes authorised to safeguard the interests of particular groups can bring an action in their own name against *violations of the personality rights* of members of such groups. Similar provisions are contained in other statutes³⁹.

- 30 Claims can, as a matter of principle, be sold under Swiss law, but there is no widespread practice in that regard, much less an industry. Before the Attorney-at-law Act became law in 2000, practicing counsels were subject to the law of the Canton in which they had their practice; and several of those cantonal laws did explicitly prohibit the sale of claims to counsel⁴⁰. Under the Attorney-at-law Act, however, a sale of claim by a client to the law firm is deemed to being permissible, provided the deal is done at arms' length, i.e., not to the sole advantage of the law firm, and the law firm in question does not counsel the client in regard to such sale⁴¹. The most common form, however, is the retention of the services of a professional debt collector who in most cases acts in the name and on account of the creditor against a fee and/ or percent of the sum won.
- 31 Legal insurance is known in Switzerland since about 1925⁴². Legal insurance is today regulated by the Insurance Contract Act⁴³ and in more detail in Article 161 et seq. of the Federal Ordinance on the Supervision of Private Sector Insurance Companies⁴⁴. It is a widespread industry providing a variety of legal insurance. Traditionally there are three types of legal insurance available: for car owners, for the private sector and for the professional / business sector. Many insurance companies provide only partial protection by excluding certain types of disputes such as family or estate matters and/or construction and neighbour law. Usually legal insurance covers all costs relating to bringing or defending a claim, but not the claim itself. Most of the insurances have a maximum coverage of CHF

³⁸ see ISABELLE ROMY, *Litiges de masse – Des class actions aux solutions suisses dans les cas de pollutions et de toxiques*, Editions Universitaires Fribourg Suisse, AISUF 161, 1997; ADRIAN STAEHELIN, DANIEL STAEHELIN, PASCAL GROLIMUND, above note 7, p. 160

³⁹ Examples are: actions by unions in connection with collective bargaining of employment contracts under Article 357b of the Swiss Code of Obligations, SR 220, dated 30 March 1911 as revised, actions by Professional and Economic Associations or Consumer Protection Organisations under Article 56 of the Trademark Act, SR 232.11, dated 28 August 1992 as revised and under 10 al. 2 of the Unfair Trading Act, SR 241, dated 19 December 1986 as revised

⁴⁰ see WALTER FELLMANN, GAUDENZ ZINDEL, above note 36, p. 179

⁴¹ see KASPAR SCHILLER, *Schweizerisches Anwaltsrecht*, Schulhess Verlag, Zürich 2009, p. 241 who argues for a wide application of this rule whereas WALTER FELLMANN, GAUDENZ ZINDEL, above note 36, p. 179 defend a more reserved view by pointing out that the sale of a claim is only permissible if the client participates in all of the profit.

⁴² For a detailed discussion of legal insurance in Switzerland see MAX PLATTNER, JEAN-PIERRE SCHMID, *Gerichtskosten und Rechtsschutzversicherung*, in: CHRISTIAN SCHÖBI (editor), *Grichtskosten, Parteikosten, Prozesskaution, unentgeltliche Prozessführung (und Modelle zur Beschränkungen ihrer Kosten)*, Stämpfli Verlag AG Bern 2001, p. 59 and seq..

⁴³ SR 221.229.1, dated 2 April 1908 as revised

⁴⁴ SR 961.011, dated 9 November 2205, as revised

250'000.00. In the event an insurance company denies coverage on account of judging the case to be hopeless, the company is by law obliged to provide to the insured a written opinion together with a notice that the insured can appeal the company's denial of coverage before an arbitral-like tribunal to be maintained by the insurance company⁴⁵.

Legal Aid

- 32 State Legal Aid is a constitutional right in Switzerland. Article 29 al. 3 of the Constitution⁴⁶ provides that anyone who does not have sufficient funds has the right to free legal advice, assistance and representation unless their case appears to have not prospect of success. Legal aid is provided by the Canton in which the court has its seat. However, the constitutional right is limited to state courts; legal aid is not available in arbitration (Article 380).
- 33 The new Federal Code of Civil Procedure contains in Article 117 through Article 123 a detailed set of rules dealing with all aspects of legal aid.
- 34 Legal aid is available to anyone, regardless of residency or citizenship, except for legal entities. To the latter legal aid is available only under extremely narrow circumstances⁴⁷.
- 35 Legal aid comprises a dispensation from the obligation to advance costs and to furnish security, a dispensation from having to bear court costs and, if necessary for the safeguard of rights, such as in cases where the opposing party is represented by counsel, the appointment of counsel. Counsel can already be appointed to prepare proceedings. Legal aid can be granted completely or partially. Under no circumstances, though, does legal aid dispense a party from the obligation to reconstitute the opposing party's costs awarded by the court in accordance with the general rules. Courts are permitted to revoke legal aid where entitlement has elapsed or never existed.
- 36 Legal aid has to be applied for separately before each instance. Applications for legal aid can be made before or after proceedings have been brought. The applicant is required to disclose income and assets, present its case and show the evidence; the applicant is allowed to propose a counsel of choice to the court. The court rules on the application in summary proceedings. The opposing party may be heard. It has to be heard where the court envisages dispensing

⁴⁵ see Article 119 of the Federal Ordinance on the Supervision of Private Sector Insurance Companies

⁴⁶ see above Note 2.

⁴⁷ For a discussion see DOMINIK GASSER, BRIGITTE RICKLI, above note 7, p. 103/104; FRANCOIS PAYCHÈRE, Principes de l'assistance judiciaire gratuite en droit international et constitutionnel et application devant les tribunaux : un état de la question, in: CHRISTIAN SCHÖBI (editor), *Grichtskosten, Parteikosten, Prozesskaution, unentgeltliche Prozessführung (und Modelle zur Beschränkungen ihrer Kosten)*, Stämpfli Verlag AG Bern 2001, p. 125

the applicant from furnishing security. Proceedings in connection of legal aid applications are free of charge, except in cases the application is made in bad faith or wantonly. Decisions on legal aid can be appealed by means of a subsidiary appeal in accordance with Article 319 of the new Federal Code of Civil Procedure.

- 37 A party that has been granted legal aid must make repayment as soon as it is in a position to do so. The Canton's claim of refund becomes statute-barred ten years after the termination of the proceedings for which legal aid had been granted.

Examples

- 38 As mentioned, court costs and party costs are subject to Schedules under Cantonal law. Each Canton follows its own system. In the following examples the current Schedules of the Canton of Basel shall be applied (which may possibly be revised in view of the imminent introduction of the new Federal Code of Civil Procedure and the accompanying Cantonal statute).

The following figures are rough estimates and pointing out the spread of what (in theory) may result in minimum and maximum under the applicable Schedules. Thus, in reality the greater part of cases are probably less gruesome as far as costs concerned.

- 39 Small Claims: The new Federal Code of Civil Procedure provides in Article 212 that small claims in which the amount in controversy is not more than CHF 2.000 may upon claimant's request be adjudicated by the conciliatory authority applying oral proceedings.

If so, the court fee may amount from CHF 80 to approx. CHF 200 plus expenses. The attorney fee *per party* could amount to a fee from CHF 500 to approx. CHF 1.150 plus expenses and 7.6% VAT.

In the event, however, that the claimant does not request final judgment and the conciliatory proceedings fail, then the court costs as well as the attorney costs would presumably at least double.

- 40 Medium Claims: Amounts of more than CHF 8.000. require written proceedings and therefore, the basic fees are somewhat disproportionately higher than for disputes which are adjudicated in oral proceedings. In addition, it is calculated that the mandatory conciliation process has failed.

A claim of e.g. CHF 10,000 would lead to a court fee between CHF 1.300 and CHF 2.600 plus expenses. The attorney fee *per party* would amount to a fee between CHF 3.000 and CHF 10.500 plus expenses and 7.6% VAT.

A claim of e.g. CHF 100.000 would lead to a court fee from CHF 8.700 to CHF 14.000 plus expenses. The attorney fee *per party* would amount to a sum between CHF 11.000 and CHF 38.000 plus expenses and 7.6% VAT.

- 41 A large claim of CHF 1,000,000 would entail a court fee of CHF 28.0000 to CHF 60.0000 plus expenses. The attorney fee per party may amount from CHF 60.000 to CHF 200.000 plus expenses and 7.6% Vat.
- 42 The calculation of court costs and the attorney fees is as far as the applicable Schedules are concerned indifferent whether the losing party is the plaintiff or the defendant. The real difference between the two lies with the interest owed on the amount in dispute. If the plaintiff is not successful, he/she loses the claim and therefore gets no interest, whereas the succumbing defendant does not only have to pay the amount in dispute but also the interest accrued since the time the amount became first payable. In the absence of an agreement on the applicable interest rate, the statutory interest in Switzerland is fixed at 5% or, if it is a commercial dispute, the commonly higher commercial interest. Practice shows that the interest accrued during lengthy proceedings may potentially have a great influence on the kind of financial exposure of a defendant.

If the amount in dispute is CHF 100.000 the interest owed per year amounts to CHF 5.000 in minimum. Thus, if the proceedings are highly complicated and take three years until a final judgment is rendered, the succumbing *defendant* could face costs of up to CHF 115.000 (claim plus interest), CHF 14.000 (max. court fees), CHF 30.000 (estimated expert costs), CHF 90.000 (max. attorney fees of both parties, inclusive expenses and 7.6% VAT), i.e. CHF 250.000 in total.

- 43 From a practical point of view it should be noted, though, that an attorney faced with the risk of disproportionate amount of work in relation to his/her fee to be expected under the applicable Schedule will in practice ask for a fee agreement which allows him/her to bill services on the basis of a different scheme more agreeable to him or her. By entering into such agreement, though, the client runs the risk that the fee owed to his/her attorney is in all likelihood more than what he/she gets as compensation from the opposing party in case of full success in accordance with the applicable Schedules.

Conclusion

- 44 The new Federal Code of Civil Procedure is certainly a further landmark in the creation of a single market in Switzerland. At the same time, however, the fact that the Code is not an entirely new piece of legislation but rather a restatement of common principles of existing Cantonal law is a sure sign that the diversity among the former Cantonal Codes of Civil Procedure has decreased over time. Reasons for this convergence of cantonal law are mainly the practice of the Swiss Supreme Court regarding fundamental constitutional principles and the application of federal civil law as well as the ever growing number of international treaties dealing with aspects of civil procedure to which Switzerland is a signatory.
- 45 Access to court is, however, not only to be measured in light of applicable procedure rules. Equally important are of course costs and the risks associated therewith. As shown, the cost risks are manifold. One is that the costs are disproportionate to the amount in dispute which is a reality in Switzerland for claims below approx. CHF 130.000. Full-fledged litigation in that realm requires either legal aid or legal insurance or nerves of steel with total disregard of costs. If neither is available, then the prosecution of those claims in court is feasible only by way of settlement at the very beginning of the proceedings, i.e., in the context of the mandatory conciliation proceedings. The success of the conciliation proceeding depends largely on the ability of the presiding judge to mediate rather than to adjudicate. The other big cost risk in Swiss litigation stems from the newly introduced rules in Articles 107 and 108 which allows the court to depart from the general rule that the loser pays all if deemed fair under the particular circumstances. These rules apply to all kind of litigation to be performed under the Federal Code of Civil Procedure. For the time being, the experience with these rules is still lacking in order to make a fair statement whether these rules will remain the exception or will become the general rule over time, meaning that sooner or later both parties are supposed to bear their own costs and share in the court cost without regard to the outcome of the case.
- 46 In sum, proper commercial litigation in Switzerland is feasible for claims above CHF 130.000, unless the parties enjoy legal aid or legal insurance. Disputes for amounts in dispute below that threshold are in practice resolved largely by conciliation. Whether this is a development to be hailed as a further step in civilization of human mankind will be seen. Until then, the bill is paid by the middle class.