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Commercial Litigation and Enforcement of Foreign Judgments in Switzerland

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Abbreviations

This text uses the following abbreviations:

ATF	Official Collection of the Decisions of the Swiss Federal Supreme Court (German citation: *BGE*)
BJM	*Basler Juristische Mitteilungen*
CA	Swiss Copyright Act (German citation: *URG*)
CC	Swiss Civil Code (German citation: *ZGB*)
CO	Swiss Code of Obligations (German citation: *OR*)
F CPC	Federal Civil Procedure Code (German citation: *BZPO*)
LDCB	Federal Law on Debt Collection and Bankruptcy (German citation: *SchKG*)
OFJ	Federal Statute on the Organization of the Federal Judiciary (German citation: *OG*)
PA	Swiss Patent Act (German citation: *PatG*)
PIL	Federal Private International Law Statute (German citation: *IPRG*)
SJZ	*Schweizerische Juristenzeitung*
TA	Swiss Trademark and Denominations of Origin Act (German citation: *MSchG*)
ZH COC	Code on the Organization of the Courts of Zurich (German citation: *GVG*)
ZH CPC	Civil Procedure Code of Zurich (German citation: *ZPO*)
ZR	*Blätter für Zürcherische Rechtsprechung* (Official Collection of Decisions of the Courts of Zurich)

A. Introduction to the Swiss Legal System

I. Federal System

Switzerland does not have a complete separation between its federal and cantonal judicial systems. There are no lower federal courts of general jurisdiction. Hence, proceedings which ultimately may be brought on appeal before the *Bundesgericht*, literally translated "*Federal Court*" but in reality the Federal Supreme Court, all start in cantonal (i.e. state) courts.[1]

In appealing to the Federal Supreme Court the appellant can, in general, only invoke a violation of the Federal law. The court will, with limited exceptions, not review the facts of a case. The administration of justice rests largely with the cantons. Because of the political structure, there are many differences between the individual cantonal laws governing jurisdiction and the organization of the court system. Switzerland has 26 different cantonal civil procedure codes as well as a Federal Civil Procedure Code (*Bundeszivilprozessordnung*, hereinafter "F CPC"). Lower civil courts and special courts dealing with specific legal areas have different designations in the various cantons. While procedure and organization of the courts are constitutionally an area left to the cantons, the substantive civil and criminal law is almost entirely Federal law. The competence of the cantons has, however, been reduced *de facto* over the years by Federal legislation in matters of civil procedure which, for reasons of the hierarchical supremacy of Federal law, overrules cantonal law. Above all precedents set by the Federal Supreme Court have led to a certain harmonization of the different cantonal civil procedures.

[1] There are a small number of narrowly defined circumstances, under which the Federal Supreme Court has competence to decide a case as first (and only) instance, for example if it involves claims between cantons or against the Federation, or if the amount in dispute is at least CHF 20'000 and the parties have agreed on the Federal Supreme Court as sole instance (see Articles 41/42 OFJ).

II. The Role of Federal Law – Substantive Law and Governing Principles of Procedural Law

Federal Law does not only almost entirely govern Swiss substantive law but has also a considerable influence on civil procedure law in three ways:

(a) Substantive Federal law contains a growing number of provisions that erode the cantonal competence to regulate civil procedure. The biggest group of such provisions concerns jurisdiction rules for the courts in special matters such as family law, landlord and tenant disputes, employment law, company law and enforcement proceedings. For certain types of contracts, the inclusion of jurisdiction or arbitration clauses is inadmissible. Interim measures are available for the protection of the personality[2], in the context of divorce proceedings[3] and in intellectual property and unfair competition matters. Also governed by Federal law are questions of evidence, such as the burden of proof and the principle of free weighing of the evidence (*Grundsatz der freien Beweiswürdigung*). For some types of claims, Federal law prescribes a "simple and fast procedure", whereas, for others, Federal law provides that proceedings must be free of charge.

(b) In addition to those questions that are governed by specific and express provisions of Federal law, there is a second group of legal principles that are considered to be governed by Federal law, although they are clearly of a procedural nature. Those issues include the adequate interest in attaining a judgment on the merits (*Rechtsschutzinteresse*) that is required as a prerequisite for the institution of any lawsuit, *res judicata* and *lis pendens*.

(c) The third group of Federal rules influencing the cantonal procedure laws are procedural principles that are considered to flow directly from the Swiss Federal Constitution. The most important provision of the Constitution is Article 4, which provides that all Swiss are equal before the law, and Article 58, which guarantees

[2] Article 28 CC.
[3] Article 145 CC.

impartiality of the judiciary. Based on the former, the Federal Supreme Court has developed an abundance of case law under the title of "right to be heard". Those guarantees are intended to safeguard the procedural participation rights of the parties involved.

III. The Role of Cantonal Law – Procedural Law

Cantonal law governs civil procedure in as far as the above-mentioned provisions of Federal law do not apply. For that purpose, each of the 26 cantons has enacted a Civil Procedure Code. In Zurich, the subject matter is regulated in two separate Codes, namely the Civil Procedure Code (*Zivilprozessordnung*, hereinafter "ZH CPC"), which deals with the course of proceedings, and the Court Organization Code, establishing various courts and defining their jurisdiction (*Gerichtsverfassungsgesetz*, hereinafter "ZH COC").

IV. Concordats

Some of the problems created by the fact that there exist 26 different cantonal civil procedure codes, which differ considerably in some aspects, are alleviated by treaties (referred to as "Concordats"; *Konkordate*) concluded between the cantons with the purpose of facilitating the legal relations between the cantons and parties in different cantons in civil matters. Some of these concordats are of relevance to civil litigation, such as the Concordat on the Alleviation of the Duty to Post Security for Procedural Costs of 1903, the Concordat on the Legal Assistance in Civil Matters of 1974, the Concordat on Arbitration of 1969, and the Concordat on Enforcement of Civil Judgements of 1977.

V. The Legal Profession

1. General Remarks

The Swiss legal profession does not make any distinction between solicitors and barristers. Nor is there any limitation as to appearance

in the various specialised courts. Any lawyer who has been admitted to the Bar, a process which generally requires a law degree from a Swiss university, some practical training (between one and two years, depending on the canton) in a court and/or in a law firm and the passing of written and oral examination before a special commission, may practice in all areas of the law. The cantons are free to determine the conditions for admission to the Bar. Article 5 of the transitory provisions of the Swiss Federal Constitution provides, however, that a lawyer admitted to the Bar of any one canton can also request admission to any other cantonal Bar pursuant to the principle of reciprocal recognition of professional qualifications. Nevertheless, most lawyers tend to confine their practice to their own canton and maybe some neighbouring cantons, rarely venturing further afield, and particularly not into other linguistic regions of the country.

Undergraduate and graduate studies in law are offered at the universities of Basle, Berne, Fribourg, Geneva, Lausanne, St. Gall and Zurich. The law faculties of Berne and Fribourg offer courses in German and French, whereas the other law faculties provide courses in either German or French. Attorneys freshly admitted to the Bar contemplating international commercial practice in one of the larger Swiss law firms usually pursue further studies abroad. Until recently, a LL.M. degree from an American university was considered almost an unwritten prerequisite for an associateship in most of the large Swiss law firms undertaking internationally related legal work. However, developments within the European Community and the rapidly expanding possibilities of further education in European law within Europe are currently leading to a reorientation, which the opening of eastern Europe is likely to further accentuate.

Until recently, Swiss law firms tended to be small. However, a definite trend to bigger law firms can be observed today, even though the biggest in Switzerland generally do not have more than 25 to 50 lawyers.

2. Fees

Attorneys generally base their charges for services rendered on hourly rates. Each canton has enacted a schedule for lawyers' fees applicable to court proceedings, which takes into account not only the

amount in dispute, but also the difficulties of the case and the amount of work that had to be done by the attorney. By virtue of their professional Codes of Conduct established by the cantonal Bar associations as well as by statutes enacted by the cantons, Swiss attorneys are not permitted to enter into contingency fee agreements when acting as counsel in court proceedings. Expenditures such as charges for telecommunications, translation services, computerized information retrieval services, travel costs and accommodation etc. are charged separately.

Generally it is the losing party which has to bear all court costs as well as the prevailing party's attorney fees.

Clients dissatisfied with the charges can request itemization. If conciliation between the client and the attorney is not possible, the client may bring the case to the appropriate commission (e.g. the Fee Commission of the Zurich Bar Association for the Canton of Zurich). If still no settlement is possible, the client may, if a court proceeding was the basis for the claim of the attorney, institute a special procedure with the purpose of a judicial control of the attorney's invoice (*Moderationsverfahren*).

If an attorney is not paid by his client he will have to sue his client for payment, after he has requested (and obtained) liberation from his secrecy obligation from the competent commission of the Court of Appeals (ZH: *Aufsichtskommission über die Rechtsanwälte*).

B. Courts and Court System

I. Overview of the Court Systems in the Cantons (generally and Zurich in particular)

1. District Courts

The District Courts (*Bezirksgerichte*) are the courts of first instance in the Canton of Zurich. They decide cases with an amount in dispute upwards of CHF 8'000 or one that cannot be measured in monetary terms as first instance.[4] If the amount in dispute is less than CHF 8'000, the President or a Member of the District Court[5], sitting alone (Sole Judge; *Einzelrichter*), decides. The jurisdiction of the Sole Judge and the District Court is given in all cases where the law does not provide for the jurisdiction of any other court, such as the Commercial Court, or a specialized court such as the Employment Court or Landlord and Tenant Court.

2. Court of Appeals

The Court of Appeals (*Obergericht*) decides all appeals, recourses and nullity appeals against the decisions of the District Courts, Employment Courts, Landlord and Tenant Courts, as well as of the Sole Judges of those courts.[6] In intellectual property matters, the Court of Appeals decides as court of first instance. In addition, the Court of Appeals supervises the administration of the whole judiciary and enacts the relevant executive orders for all courts, commissions and authorities which are active in the administration of justice.

3. Court of Cassation

Zurich is one of only three cantons with a Court of Cassation (*Kassationsgericht*)[7], the other two being St. Gall and Appenzell. The Court

[4] §§ 26–37 ZH COC.
[5] §§ 19–25 ZH COC.
[6] §§ 38–49 ZH COC.
[7] §§ 66–69 ZH COC.

of Cassation decides nullity appeals against decisions of the Court of Appeals and the Commercial Court as well as their Sole Judges. With a nullity appeal, only a limited number of grounds can be raised, namely (i) the violation of an important procedural principle, (ii) obviously erroneous or arbitrary factual assumptions, and (iii) obvious violations of substantive law.[8]

The Court of Cassation consists of part-time judges who are elected by the cantonal Parliament and are usually either professors of Zurich University law faculty or practicing attorneys of the Zurich Bar.

4. Commercial Courts

Four Cantons (Zurich, Berne, St. Gall and Aargau) have a Commercial Court (*Handelsgericht*) which generally adjudicates disputes between parties both of whom are registered as firms in the Commercial Register.[9] However, some cantonal laws grant the parties considerable freedom as to whether an action can be brought in a specialized Commercial Court. The parties may opt to bring their dispute before a district court even though the prerequisites for Commercial Court jurisdiction are fulfilled. Generally at least the defendant has to be a firm listed in the Commercial Register.

Most cantons limit access to their Commercial Court to claims where the amount involved is at least CHF 8'000. Commercial Courts also decide cases regardless of the amount involved in certain specialized areas of the law, such as patent and trademark matters.

5. Specialized Courts

(i) Employment Courts (*Arbeitsgerichte*) are specialized courts in larger towns[10] to decide disputes between employers and their employees arising out of the employment relationship.[11]

The particular feature of Employment Courts is that they decide the cases before them by a panel composed of the presi-

[8] § 281 ZH CPC.
[9] For Zurich: §§ 57–65 ZH COC.
[10] In the canton of Zurich, they are provided for the towns of Zurich and Winterthur.
[11] §§ 8 et seq. COC.

dent, who is a regular judge, and two lay judges, one being a representative of the employees, and one being a representative of the employers. The lay judges are elected by the town council.

(ii) Landlord and Tenant Courts (*Mietgerichte*) exist in every district of the Canton of Zurich and decide disputes arising out of the landlord and tenant relationship.[12]

Similarly to employment courts, landlord and tenant courts are composed of one representative each of the landlords and tenants together with a president, who is a regular judge.

II. Appointment of Judges

District judges in courts of primary jurisdiction as well as district attorneys are often elected by the electorate, while judges of the higher cantonal courts are usually elected by the cantonal parliament.[13] A legal education is not always required for all levels of the cantonal judiciary. In most cantons today legal training and practice are preferred, even though they may not be required by law. Judges are elected for fixed terms, ranging from three to eight years. Upon expiry of a term re-election is possible and judges are regularly confirmed for further terms.

Commercial Courts are composed of professional judges on one hand and lay judges on the other. In practice, the bench in most commercial courts comprises of two professional judges and three lay judges. One of the professional judges usually presides. The professional judges are selected from the members of the cantonal Court of Appeal; the lay judges are elected by the cantonal Parliament from a group of persons proposed by either a chamber of commerce or private professional organizations of industry and commerce.[14] The

[12] §§ 14 et seq. ZH COC.

[13] This solution also exists in Zurich, where District Court judges are elected by the people of that district for a term of six years, and the judges of the Court of Appeals and the Court of Cassation are elected by the cantonal Parliament, also for six years. A large role is played by the political parties, because they nominate candidates for judgeships; independent candidacies are successful only rarely in rural, but never in urban, districts.

[14] For Zurich, see § 60 ZH COC.

Commercial Courts are recognized for their expertise in commercial matters due to the high level of qualification of their members.

III. Principles Governing Civil Procedure

1. General Principles

There are a number of general principles, so-called maxims (*Prozessmaximen*), which contain basic guidelines for the conduct of civil proceedings, and, more particularly, define the role of the parties and the judge and their respective duties. Among the most important general principles are the following:

(a) The parties have the power to determine the subject matter of a civil procedure, i.e. they decide whether, when, and the extent to which they intend to raise a claim or to acknowledge their mutual claims (*Dispositionsmaxime*).[15] The consequence of this principle is that it is up to the parties to decide whether they want to continue or stop proceedings (*ne procedat iudex ex officio*), and that the judge is bound by the motions filed by the parties (*ne eat iudex ultra petita partium*).

(b) It is the duty of the parties to provide the court with the facts of their dispute (*Verhandlungsmaxime*).[16] The court may use only facts that were alleged by one of the parties (*quod non est in actis, non est in mundo*), and the parties have to submit evidence only for factual allegations that are disputed by the other party. An exception to that principle exists in situations where public interests require the judge to take a more active role in the ascertainment of the facts; this is the case for instance, where the rights of minors are involved, in family matters, and in employment disputes (*Offizialmaxime, Untersuchungsmaxime*).[17]

[15] § 54 (2) ZH CPC.
[16] § 54 (1) ZH CPC.
[17] § 54 (3) ZH CPC; the question in what cases the judge has the duty to ascertain the facts *ex officio* is answered by specific provisions contained in the pertinent substantive law; see e.g. Articles 156 (1), 254 (1) CC, Article 343 (4) CO.

(c) It is an important feature of Swiss civil procedure that the Civil Procedure Codes contain relatively strict regulations as to the structure of the proceedings; in particular, the Procedure Codes require the parties to make their factual and legal allegations within their first or second brief. If a party fails to allege a fact in its second brief, this party risks exclusion of that allegation after the conclusion of the main proceedings (*Eventualmaxime*).[18]

(d) Although the parties determine the subject matter and the factual basis of the dispute, the procedure as such is conducted by the court (*Grundsatz der richterlichen Prozessleitung*).[19] The court has to ensure the due course of the proceedings, especially in cases where a fast procedure is mandated by statutory law.[20]

2. Iura novit curia

Swiss courts have the duty to apply the substantive Federal and cantonal law *ex officio*, i.e. regardless of whether the parties have pleaded the correct legal qualifications of the submitted facts. This duty is embodied in Federal[21] and cantonal law.[22] The consequence of the principle is that it is sufficient if the parties allege and prove the relevant facts of the dispute, whereas the law will be applied by the court. The parties are free, however, and in many cases well-advised to plead their view of the legal situation as well.

The courts have the duty to ascertain the contents of foreign law *ex officio*, but can require the parties to assist in that task. The court is empowered to shift the burden of proof for the content of foreign law to the parties only in disputes concerning monetary claims. If the content of foreign law is not ascertainable, the court has to apply Swiss law instead.[23]

[18] § 114, 115 ZH CPC; the regulations in the different Cantonal Procedure Codes vary considerably in this respect.
[19] § 52 ZH CPC.
[20] § 53 ZH CPC.
[21] Article 63 (1) and (3) OFJ.
[22] § 57 ZH CPC.
[23] Article 16 PIL.

3. Right to be Heard

The right to be heard (*Anspruch auf rechtliches Gehör*) is the single most important principle in Swiss procedural law. It is based directly on Article 4 of the Swiss Constitution, from which the Federal Supreme Court has developed a set of minimal requirements for the parties' opportunities to participate in the proceedings.[24] Among the rules developed by the Federal Supreme Court based on a party's right to be heard are the following:

(a) The right to be heard with factual and legal arguments as well as to comment on the arguments of the other party.

(b) The right to participate at all hearings and takings of evidence unless there is a statutory exception.[25]

(c) The right to be represented by counsel, if the amount in dispute and the factual situation so require.[26]

(d) The right to have access to the file of the case, unless there is a special secrecy interest of the other party.[27]

(e) The right to submit evidence with regard to all relevant facts.[28]

(f) The right to obtain a decision wherein the court states its reasons and discusses the arguments of the parties and the submitted evidence.[29]

A violation of any of these principles in a cantonal court proceeding can ultimately be challenged before the Federal Supreme Court by bringing a constitutional complaint (*staatsrechtliche Beschwerde*).[30]

[24] In Zurich, the right to be heard is also stated in § 56 ZH CPC.
[25] ATF 98 Ia 338.
[26] ATF 105 Ia 290.
[27] ATF 95 I 445.
[28] ATF 108 Ia 294.
[29] ATF 101 Ia 552.
[30] See *infra* K/IV.

4. Other Duties of the Court and the Parties

Although it is up to the parties to provide the Court with the factual background of their dispute, the Court has the duty to request clarification from the parties if their pleadings are unclear, incomplete or lacking precision (*richterliche Fragepflicht*).[31]

The parties to a civil proceeding have the duty to tell the truth and to act in good faith.[32] More particularly, they are prohibited from pursuing frivolous claims and from delaying the proceedings or hindering the other party's attempts to submit evidence.

5. Publicity of Proceedings

Hearings before courts are in principle open to the public. A statutory exception exists for proceedings in family law matters. In addition, an exception can be made where it is justified because the subject matter might be a threat to public order or morality, or because overriding interests of one of the parties so require.[33]

6. Doctrine of Precedent

Judicial decisions under Swiss law, including Federal Supreme Court decisions, are, as a general rule, not binding on the courts in subsequent cases. Despite the non-binding nature of judicial decisions, in practice, legal precedents play a very important role in the Swiss judicial system. Trial courts and cantonal appellate courts in general follow rules established by the Federal Supreme Court and will deviate only after elaborating on the basis for not applying the precedent in the case at hand.

IV. Notices to the Parties

Notices from the court to the parties are usually sent by registered mail as so-called court documents (*Gerichtsurkunden*); only in

[31] § 55 ZH CPC.
[32] § 50 ZH CPC.
[33] § 135 ZH COC.

exceptional cases are they brought by an official of the court. To constitute a valid notification, they must be received by the party itself or a person who is empowered to receive documents for the party in accordance with the applicable postal regulations (*Postverkehrsgesetz*), i.e. persons living at the same address as the party.[34] The same principles apply for decisions of the courts.[35]

If a party deliberately obstructs notification, the notice is deemed to have been received. If the domicile of a party is not known, notice is given in the Official Gazette (*Amtsblatt*).[36]

It should be noted that there is no service of process in the American fashion, where plaintiff has to notify the defendant of a lawsuit. When an action is brought in a court, the court will inform defendant and set the deadline for filing a statement of defense or the date of a hearing.

[34] See §§ 173 et seq. ZH COC.
[35] § 187 ZH COC.
[36] § 183 ZH COC.

C. Rules on Jurisdiction of Swiss Courts in International Cases and Applicable Law

I. Domestic Jurisdiction

On the Federal level, the Swiss Constitution contains in Article 59 the most important jurisdiction rule. That provision lays down the general rule that a plaintiff has to bring a lawsuit against a defendant at the domicile of the latter. This principle goes back to Roman law (*actor sequitur forum rei*). Exceptions to this rule are admissible if another factor is more important than the defendant's domicile, such as the place where a business activity was performed, the *forum rei sitae* for real property, or assets in Switzerland of a foreign defendant. In recently enacted Federal legislation, exceptions to the general rule were made in situations where a plaintiff faces a stronger defendant. The plaintiff in such a situation is allowed to sue at his own domicile or at another place different from the domicile of the defendant.[37] The violation of the constitutional guarantee contained in Article 59 can be brought before the Swiss Federal Supreme Court by the defendant by means of a Constitutional Complaint.

Apart from the jurisdiction provisions contained in Federal constitutional or substantive law, the jurisdiction of the courts is regulated by the governing cantonal Civil Procedure Codes. The different Cantonal Codes are very similar in this regard. The Civil Procedure Code of Zurich contains the following provisions:

(a) The general forum at the domicile of the defendant prevails wherever Federal or cantonal law does not designate another jurisdiction. A lawsuit may also be brought at the habitual residence of a defendant, if the latter has given up his domicile without estab-

[37] See, e.g., Article 28b CC for lawsuits to protect personality rights; Article 114 (1)(a) PIL for lawsuits in consumer disputes; Article 343 (1) CO for lawsuits arising from employment contracts; Article 267 (a)(1) CO for lawsuits arising from landlord and tenant relations.

lishing a new domicile, or if the defendant does not have a domicile in Switzerland.[38]

(b) Lawsuits in connection with the professional subsidiary of a defendant can be brought at the place of that subsidiary.[39]

(c) If a party has chosen a special domicile for the performance of an obligation, a lawsuit against that party may be brought at that place.[40]

(d) Lawsuits of creditors of a deceased person may be brought against the deceased's estate at the last domicile of the deceased as long as his estate has not been divided among the heirs.[41]

(e) Lawsuits concerning real property and other *in rem* rights in real property must be brought at the place where that real property is listed in the public land register.[42]

(f) Lawsuits for property or other *in rem* rights in chattel as well as for claims that are secured by a chattel mortgage can be brought at the *forum rei sitae*.[43]

(g) Special jurisdictional regulations govern lawsuits in summary execution proceedings, such as bankruptcy, attachment as well as claims serving the prosecution of an attachment.[44]

(h) Claims arising from torts and lawsuits for a restraining order can be brought at the place of the underlying action or where that action has its effect, if the defendant does not have a domicile in Switzerland.[45]

(i) Forum clauses included by the parties in a contract or the statutes of a corporation in writing are binding. A court in the canton Zurich is only obliged to adjudicate a domestic dispute if at least

[38] § 2 ZH CPC.
[39] § 3 ZH CPC.
[40] § 4 ZH CPC.
[41] § 5 ZH CPC.
[42] § 6 ZH CPC.
[43] § 7 ZH CPC.
[44] § 9 ZH CPC.
[45] § 10 ZH CPC.

one party to the dispute is domiciled or has a subsidiary in Zurich.[46]

(j) Unconditional appearance of the defendant creates the jurisdiction of a court, if at least one party has its domicile in Zurich.[47]

(k) Several claims against the same defendant can, if those claims have a close connection, be brought before each court which is competent to adjudicate one of the claims. If, however, those claims are dependent on each other, the lawsuit can only be brought before the court that is competent to adjudicate the main claim.[48]

(l) If a plaintiff wants to bring a lawsuit against several persons who can be sued as co-defendants (*Streitgenossen*), but one court does not have jurisdiction over all those defendants, the Court of Appeals declares at the request of plaintiff one of the courts to have jurisdiction over all defendants.[49]

(m) A counter-claim can be brought before the same court as the main claim, if the counter-claim is closely connected with the main claim or could be made the subject of a set-off.[50]

II. International Jurisdiction

A Federal Statute on Private International Law (hereinafter "PIL") was enacted by the Swiss Federal Parliament on 18 December 1987, and became effective on 1 January 1989. Hitherto, Swiss choice of law rules, with the exception of rules relating to the law of persons, family law and inheritance law, had not been codified, and almost all choice of law questions – especially in the area of contract law – had

[46] § 11 ZH CPC; see, however, Article 5 (3)(b) PIL (governing international jurisdictional questions), according to which the court may not refuse a case if the dispute submitted by a forum clause has to be decided in application of Swiss law pursuant to the provisions of the PIL.
[47] § 12 ZH CPC.
[48] § 13 ZH CPC.
[49] § 14 ZH CPC.
[50] § 15 ZH CPC.

to be decided by the Federal Supreme Court using a case-law approach based on general principles. The PIL contains not only choice of law rules but also regulates in a comprehensive fashion jurisdiction of the Swiss courts and administrative bodies, as well as the recognition and the enforcement of foreign judgments, bankruptcies and composition agreements. Chapter XII of the PIL deals with international arbitration and replaces the 1969 Intercantonal Arbitration Concordat for arbitration involving at least one party not domiciled in Switzerland.

In line with the principle enunciated in Article 59 of the Swiss Constitution, Article 112 PIL provides that the Swiss court at the defendant's domicile or habitual residence (or at the location of a branch office or agency or other place of business) has jurisdiction for an action on a contract. In addition, a number of special jurisdiction rules apply, as follows:

(a) if the defendant has neither domicile, nor habitual residence nor a branch office in Switzerland, the creditor may bring his action at the place of performance;[51]

(b) in the case of consumer contracts the consumer has a choice of bringing his action either at his domicile or habitual residence, or at the offeror's domicile or in the absence thereof, at the offeror's habitual residence;[52]

(c) an employee may bring an action against his employer before the Swiss courts of the employee's domicile or habitual residence as well as at the place where the employee normally carries out his work or at the employer's domicile.[53]

For torts, the following general rules apply:

(d) the injured party may in general bring an action at the defendant's domicile, habitual residence or place of business;[54]

(e) if the defendant has neither domicile nor habitual residence in Switzerland, the injured party may bring an action at the place

[51] Article 113 PIL.
[52] Article 114 PIL.
[53] Article 115 PIL.
[54] Article 129 (1) PIL.

where the tortious act or the injury took place or took effect;[55]

(f) direct actions against insurance companies can be brought at the insurer's principal place of business or branch office or at the place where the act or the injury took place.[56]

Article 4 PIL provides for a subsidiary Swiss *forum arresti* jurisdiction for an action to validate an injunction restraining the disposal of assets; this is only available, however, if the PIL does not expressly provide for the jurisdiction of another Swiss court (see, however, Article 3 of the Lugano Convention).[57]

Before 1 January 1989, Swiss courts generally declined lawsuits brought by non-Swiss claimants based on an agreement by the parties as to the jurisdiction of a Swiss court and the choice of Swiss law as the law applicable to their agreement against a non-Swiss defendant for lack of jurisdiction. Such rejection was based on the relevant (close-connection test) provisions of cantonal civil procedure codes.[58] Article 5 (3)(b) PIL, together with Article 116 PIL, now provide that a Swiss court may not decline jurisdiction if the parties have made a choice of jurisdiction as well as an explicit choice of Swiss law. These new provisions prevent a Swiss court from declining a lawsuit brought by a non-Swiss claimant against a non-Swiss defendant for lack of jurisdiction provided that these parties have agreed that a Swiss court shall decide their dispute and that such dispute shall be decided in accordance with Swiss law.

This means that (non-Swiss) parties do not have to resort to arbitration in order to validly choose Swiss law as the law to govern their agreement. In addition, Article 197 (2) PIL provides as follows:

> *«Lawsuits and petitions which were rejected by Swiss courts or authorities for lack of jurisdiction before the entry into force of this Statute may be brought again after the entry into force of this Statute if pursuant to this Statute Swiss courts or authorities have jurisdiction and provided the claim can still be raised.»*

[55] Article 129 (2) PIL.
[56] Article 131 PIL.
[57] A more detailed discussion of attachment orders and their validation, see *infra* E/V.
[58] See, e.g., § 11 (2) ZH CPC.

The provision of Article 197 (2) PIL allows a non-Swiss claimant in an international context whose lawsuit against a non-Swiss defendant was declined by a Swiss court before 1 January 1989 (i.e., the entry into force of the PIL) for lack of jurisdiction to bring the same lawsuit again in a Swiss court.

III. Applicable Law

Article 116 PIL sets forth the general rule that contracts are governed by the law chosen by the parties. Like the Hague Convention of 15 June 1955 on the Law Applicable to the International Sales of Goods (which has been in force in Switzerland since 1972), the PIL provides that a choice of law clause is governed by that law.[59] In the absence of an effective choice of law clause, a contract is governed by the law with which, all circumstances considered, it is most closely connected (Article 117 PIL). The general choice of law rules regarding torts provide as follows:

(a) if tort-feasor and injured party have the same country of domicile, the law of that country applies;[60]

(b) if they are domiciled in different countries, the law of the country where the tort was committed applies provided the tortious act and the injury occurred in the same jurisdiction;[61]

(c) if the harmful effects occurred in a country other than the country in which the tortious act was committed, the law of the jurisdiction in which the harmful effects occurred applies, provided that the tort-feasor could have foreseen that the harmful effect could occur there.[62]

In addition, a number of special rules for different types of tort (such as product liability, unfair competition, traffic accidents, etc.)

[59] Article 116 (2) PIL.
[60] Article 133 (1) PIL.
[61] Article 133 (2) first sentence PIL.
[62] Article 133 (2) second sentence PIL.

apply pursuant to Articles 134 et seq. PIL. The parties may, after the harmful event occurred, elect the *lex fori* as the applicable law.[63]

Claims arising from unfair competition are governed by the law of the country where the harmful effect on the competitive position of a party occurred, except that claims concerning injuries which exclusively affect the business operations of the plaintiff are governed by the law of the state in which the business affected is located.[64] Claims arising from restraint of competition are governed by the law of the state in whose market the rights of the plaintiff are directly affected. If such restraint is governed by foreign law, the compensation awarded to the plaintiff must not exceed the compensation to which plaintiff is entitled under Swiss law. Therefore, punitive or treble damages, as are customary in the United States for such cases, are not awarded.[65]

Corporations are in general governed by the law under which they are constituted.[66] Thus, the law of the country of incorporation governs matters such as the capacity of a company to enter into legal transactions, as well as the capacity to sue and to be sued.

Articles 166 et seq. PIL somewhat mitigate the former practice of Swiss courts pursuant to which a foreign declaration of bankruptcy had, in principle, no effect in Switzerland unless one of the few treaties in force in this area applied. In a loosening of the so-called territoriality principle, Articles 166 et seq. PIL provide for the recognition of foreign bankruptcy decrees on the same basis as for foreign judgments, provided that the reciprocity requirement of Article 166 PIL is met. The liquidation of assets located in Switzerland and their transfer to the foreign bankrupt's estate can only be effected under certain safeguards designed to protect creditors residing in Switzerland.

[63] Article 132 PIL.
[64] Article 136 PIL.
[65] Article 137 PIL.
[66] Article 154 PIL.

D. Institution of Proceedings

I. The Role of the Justices of the Peace

Prior to filing the statement of claim the plaintiff must in most cases request the competent Justice of the Peace to summon the parties to attend conciliation proceedings.[67] In large litigations or where the parties are otherwise bent on court proceedings, the conciliation hearing is often treated in a somewhat perfunctory fashion, since the Justice of the Peace is generally neither qualified nor equipped to deal with complex commercial cases. Where no settlement is reached, the Justice of the Peace attests to this in a certificate (*Weisung*) issued to the plaintiff, who must then file such certificate along with his statement of claim within three months, failing which he must go through the conciliation procedure again.

With the filing of the statement of claim, the action commences and is pending (*rechtshängig*) under cantonal law. However, most of the effects of the action – including in particular the interruption of the statute of limitations[68] – will have already been triggered by the earlier request for conciliation proceeding. (In contrast to the situation under German procedural law: Pursuant to § 261 of the German Code of Civil Procedure an action is pending with the service of the statement of claim on the defendant.)

II. Filing with Court

The filing of the statement of claim (the *dies a quo* is that of the postmark evidencing the date of dispatch by mail to the court, or that of the effective receipt by the court) has a number of procedural consequences: save for the purpose of correcting points of form, a withdrawal of the action subsequent to the filing of the statement of claim furnishes the defendant with the defense of *res judicata* in the event

[67] See, e.g., § 102 ZH CPC.
[68] Article 135 (2) of the Swiss Code of Obligations.

of the plaintiff's bringing a fresh action on the same facts.[69] This is another marked contrast to, e.g., English Law (see Order 21 of the Rules of the Supreme Court). While § 191 (4) ZH CPC mentions it as an exception which must be invoked by the opposing party, a very recent decision of the Zurich Court of Appeal has qualified *res judicata* as a legal fact which, by virtue of an overriding rule of unwritten Federal law, must be considered *ex officio* by all courts. The filing of a statement of claim also bars the bringing of an action based on the same facts in another court for the duration of the Zurich proceedings. Here again, § 107 (2) ZH CPC mentions an exception (*lis alibi pendens*), but, in the light of recent court practice, it must be assumed that Zurich courts will in future consider themselves empowered to react to parallel litigation *ex officio*.

The plaintiff can only amend his claim within the limits imposed by § 61 ZH CPC, which provides that the amended claim must be intrinsically connected with the original. The court can refuse to admit the amendment if the defendant's procedural position would thereby be tangibly impaired or if the amendment would considerably prolong the proceedings.

III. Types of Actions

1. Action for Performance

An action for Performance (*Leistungsklage*) is the principle means by which a plaintiff may enforce a claim for performance, forebearance (*Unterlassung*) or tolerance (*Duldung*). The performance of a defendant may consist in a monetary payment or in the surrender or restitution of property. A defendant might also be forced to make a declaration, which can be enforced by substituting such declaration with the judgement or a declaration of the court.

2. Action for a Modification of Rights

Such an action (*Gestaltungsklage*) serves the purpose of establishing, altering or terminating the rights and the legal relationship between

[69] § 191 (2) ZH CPC read in conjunction with § 107 (4) ZH CPC.

the parties. It must be applied in all cases where the parties are not legally empowered to alter their legal relation by mutual agreement or where the parties cannot agree on the modification or termination of their legal relationship, making it necessary to obtain a court decree.

The following are the most important examples where actions for a modification of rights are used:

– Dissolution of an association or a foundation;[70]

– Annulment, divorce or separation of marriages;[71]

– Paternity suits;[72]

– Challenge of the will of a deceased, action for partition of the estate of a deceased;[73]

– Partition of co-ownership and joint ownership;[74]

– Transfer of real property;[75]

– Rescission of a contract;[76]

– Dissolution of all types of companies/corporations;[77]

– In addition, there are large numbers of actions in debt collection and bankruptcy proceedings where this type of lawsuit is appropriate.[78]

The decision of the court on such an action has the direct effect of modifying the pre-existing legal relationship of the parties.

[70] Articles 78, 88 (2) CC.
[71] Articles 121, 123, 137 CC.
[72] Articles 256, 259, 261 CC.
[73] Articles 519, 522, 535, 604 CC.
[74] Articles 651, 654 CC.
[75] Article 656 (2) CC.
[76] See, e.g., Articles 23, 195, 205 CO; *infra* H/I.
[77] Articles 545, 574, 619, 736, 770, 820 CO.
[78] See, e.g., Articles 77 and 80 LDCB.

3. Action for Declaratory Judgment

An action for a declaratory judgment (*Feststellungsklage*) is admissible only if there is no action for performance that can be brought by plaintiff. This condition is applied very strictly by Swiss and Zurich courts. Such an action is therefore possible only where the plaintiff has a legal interest in the declaration that a legal relationship exists (positive declaratory judgment) or does not exist (negative declaratory judgment).[79] This is the case if there is an uncertainty as to the legal situation which the plaintiff can no longer reasonably be expected to tolerate, and the elimination of which is not possible in any other way.

Federal substantive law explicitly mentions several cases where an action for declaratory judgment is admissible:

– Declaration of a patent and/or of its violation;[80]

– Declaration of the illegality of an action of a competitor;[81]

– Declaration of the illegality of an anticompetitive situation.[82]

4. Class Actions

Class actions are unknown under Swiss law. Claimants having a similar case against one defendant may however proceed jointly. Where several claimants have filed similar suits against the same defendant the court may decide to hear all the suits together. Consumer organizations have standing to sue on behalf of their members in certain cases under the Federal Unfair Competition Act.

IV. Procedural Motions

Motions can basically be filed on anything with regard to which a court can issue an order. However, the Swiss courts do not have the

[79] § 59 ZH CPC.
[80] Article 74 Patent Act.
[81] Article 9 (1)(c) Unfair Competition Act.
[82] Article 8 (1)(a) Cartel Act.

power to dismiss a case by a summary judgment without considering the merits of the case. There are, however, a number of motions that help to rationalize the procedure, namely:

(a) A plea of lack of jurisdiction, which the defendant must – as a rule – raise in his statement of defense.

(b) A motion to the court that it concentrate for the time being on a preliminary question, e.g. whether the claim, were it to succeed, would be barred by the statute of limitations, or whether the defendant is a party to the contract in question. In general, an appeal will lie against the decision of the court on such preliminary questions.

(c) A motion to stay the proceedings, e.g. until an identical or similar question has been decided by another court in proceedings already pending.

V. Examination of Requirements and Jurisdiction by Court

It is the duty of a court to examine at the beginning of a proceeding whether all requirements, which are a condition for a judgement on the merits, are met:[83]

– whether the court has jurisdiction in the case;

– whether the parties and their representatives have the legal power and authority to act;

– whether plaintiff has a legal interest in its lawsuit;

– whether the proceeding was instituted correctly.

The issue of *locus standi* of the parties, i.e. the question whether plaintiff is the creditor and defendant the debtor of the claim in dispute, goes to the merits of the case and is not considered to be a condition that has to be decided by the court upon the commencement of the proceedings. The same applies to a statute of limitation defense

[83] § 108 ZH CPC.

raised by defendant. Both of these issues are decided in the judgment on the merits, and not in a preliminary decision on the conditions of the proceedings.

As far as the jurisdiction of the court is concerned, it is important to note that defendant must raise the defense of lack of local or subject matter jurisdiction of the court (*Einrede der Unzuständigkeit*) with his statement of defense (*Klageantwort*). Afterwards, this defense is no longer admissible. If the defense is raised, the court has to give an immediate decision on its jurisdiction, i.e. without ordering further pleadings on the merits.[84]

If the court finds that not all the requirements for the commencement of proceedings are met, the lawsuit will be dismissed without prejudice, i.e. the decision to dismiss has no *res judicata* effect and does therefore not preclude plaintiff from filing the same lawsuit in another court or the same court, if the conditions are met at a later stage.

VI. Parties to the Proceedings and other Participants

In addition to the usual setting in a civil procedure, the following additional participants are possible:

1. Joinder of Parties

This is a situation in which either on the plaintiff's or on the defendant's side there is more than one party to a dispute which can only be decided with effect on each of these joint litigants (*Streitgenossenschaft*) in a uniform manner.[85] The requirements for a joinder of parties are defined by substantive law. The most important cases, so-called necessary joinder of parties, are disputes involving partnerships (*einfache Gesellschaft*) and communities of heirs (*Erbengemeinschaft*) in particular with regard to their dissolution. The effect of such necessary joinder of parties is that the partnership or community of heirs lack standing if not all of its members participate in the

[84] § 111 ZH CPC.
[85] §§ 39 et seq. ZH CPC.

proceeding, which leads to the dismissal of the case *a limine* (*notwendige Streitgenossenschaft*). The most important consequence of necessary joinder of parties is that they can all be sued in the same court, even if normally only one of those parties would be subject to that court's jurisdiction.[86]

In addition, joinder of parties also exists in cases where several persons, who are part of a legal relationship, may either be plaintiffs or defendants in the proceeding (*einfache Streitgenossenschaft*). Other than in cases of necessary joinder of parties, however, these joint litigants are entitled to lead the proceedings independent of each other. There is no common jurisdiction of one court over all joint litigants; the general rules apply.[87]

2. Third Party Intervention

A third party is entitled to intervene in a dispute between two other parties as long as it is able to provide *prima facie* evidence that it has a legal interest in the outcome of the dispute (*Nebenintervention*). The party intervening on the side of one litigant can argue in favor of the supported party; the third party's actions are attributed to the litigant unless the actions are expressly refuted by the litigant or are in obvious contradiction of the litigant's arguments.[88]

3. Third Party Notice

A litigant may give notice to a third party to intervene on its behalf in a proceeding, if the litigant party plans to raise a claim against the third party should the litigant party lose the case (*Streitverkündung*). The notified party is then entitled to intervene on behalf of the notifying party.[89]

The effects of the third party notice are determined by substantive law. It has relevance, e.g., where defendant has acquired insurance for the claims that are raised in the proceeding; if defendant gives

[86] § 39 ZH CPC.
[87] § 40 ZH CPC.
[88] §§ 44/45 ZH CPC.
[89] §§ 46 et seq. ZH CPC.

notice to his insurance, the latter will afterwards be precluded from arguing that defendant had not defended himself efficiently in the trial.[90]

VII. Significance of *Lis pendens*

The fact that a lawsuit between two parties concerning a specific claim is pending between two parties has several significant effects on the relationship between those two parties:

(a) No second identical lawsuit can be brought in any court. Defendant is furthermore entitled to raise the defense of *lis alibi pendens* against any such identical action.[91] Under Swiss law, two actions between the same parties are considered to be identical if they are based on the same factual basis (*identischer Lebensvorgang*). The decisive factor in the determination of identity is whether there are identical underlying facts, and not whether the claims are based on the same legal grounds. It is not possible, e.g., to bring a contractual and a tort claim against the same defendant in separate proceedings, if both of the claims are based on the fact that defendant has injured plaintiff in the course of the performance of a contractual duty.

(b) If a lawsuit is pending, it cannot be withdrawn by plaintiff without *res judicata*-effect.[92]

(c) Once a lawsuit is pending with a court which had jurisdiction to adjudicate the claim at the time of the institution of the proceedings, later events that would eliminate this jurisdiction are not relevant (so-called *perpetuatio fori*).[93] A defendant therefore

[90] See Article 193 CO for the effects of third party notice in the context of sales contracts, where buyer is faced with claims from a third party. If seller is notified and does not intervene, he is bound by the outcome of the proceedings, unless he can prove that the case was lost due to negligence of buyer.
[91] § 107 (2) ZH CPC.
[92] § 107 (4) ZH CPC.
[93] § 16 ZH CPC.

cannot escape the jurisdiction of the competent court once a lawsuit against him has been filed.

(d) Once a lawsuit has been filed and the matter is pending, its terms can be altered or extended only under narrowly defined conditions. New or further claims can be brought only if they are in close connection with the original claim.[94] The court is empowered to refuse such extension of the claims if the position of defendant is materially affected or the proceeding is delayed considerably as a consequence thereof.[95]

(e) The matter in controversy or object at issue may not be altered to the disadvantage of the other party without leave of the court, in particular if the taking-of-evidence would thereby be impeded.[96]

VIII. Counter- and Set-Off Claims

1. Counter-Claim

Once a lawsuit is pending, the defendant may itself raise a counter-claim, which is in fact an independent lawsuit against plaintiff adjudicated in the same proceedings (*Widerklage*). In order for the counter-claim to be admitted the court also has to have subject-matter jurisdiction with regard to the counter-claim and the counter-claim must be adjudicatable in the same type of proceedings. If the main claim is withdrawn, the counter-claim remains pending.[97]

Whereas some Cantonal Procedural Codes (as well as the PIL in international settings)[98] require that the counter-claim has a close connection to the main claim (*Konnexität, sachlicher Zusammenhang*), the Zurich CPC does not contain such requirement in § 60.

As to the point in time until which a counter-claim can be raised, § 117 ZH CPC states that a counter-claim must be filed with the statement of defense; it can be brought before the court at a later stage

[94] § 115 ZH CPC.
[95] §§ 61 and 107 (1) ZH CPC.
[96] § 107 (3) ZH CPC.
[97] § 60 ZH CPC.
[98] Article 8 PIL.

either if plaintiff agrees or if the narrow conditions of § 115 ZH CPC are fulfilled.[99]

2. Set-Off Claim

The difference between a counter-claim and a set-off claim (*Verrechnung*) is that the latter does not have the procedural independence from the main claim that is attributed to a counter-claim. The right to set-off is embodied in substantive law[100] and as such can be raised at any time during the proceedings, if the statutory requirements embodied in the Code of Obligations are fulfilled. Unlike a counter-claim, a set-off claim is adjudicated only up to the amount that the main claim is granted, even if the set-off claim is for a higher amount. If the main claim is withdrawn, the proceedings are closed and the set-off claim will not be adjudicated.

[99] See *infra* F/III.
[100] Articles 120 et seq. CO.

E. Provisional and Interim Measures

I. Types of Provisional Measures

According to §§ 110 et seq. ZH CPC, the court orders, at the request of a party, the appropriate measures for the duration of the proceedings, if the requesting party can show that it would otherwise suffer a disadvantage that cannot be easily remedied with the final decision. In cases of special urgency, such orders can be issued without having heard the other party, who has then the opportunity to file an objection against the order within 10 days.[101]

Federal and cantonal law distinguish between the following measures:

1. Conservatory Measures

Conservatory Measures (*Sicherungsmassnahmen*) are intended to secure the enforceability of a future judgment and therefore serve the purpose of maintaining the *status quo* for the duration of the proceedings. The most common conservatory measure is a prohibitory order against the sale of the subject of the dispute, e.g. by notification to the register for real property.[102] The Code of Obligations also deals with the situation where two parties are in dispute over the question as to which of them is the creditor for a claim (*Prätendentenstreit*); in that situation, the debtor is entitled to refuse payment to either of them and to make payment into court instead, thus avoiding the danger of a payment to a non-creditor.[103] The securing of the future enforceability of monetary claims is comprehensively regulated by the Federal provisions regarding the attachment (*Arrest*) of a debtor's assets;[104] cantonal civil procedure codes therefore do not deal with such attachments.[105]

[101] § 110 (2) ZH CPC.
[102] Articles 960/961 CC.
[103] Article 168 CO.
[104] See *infra* E/V.
[105] ATF 86 II 295.

2. Regulatory Measures

Regulatory Measures (*Regelungsmassnahmen*) are designed to regulate the situation between parties to an on-going relationship, which makes such measures necessary, for the duration of the proceedings. This is the case, e.g., in lawsuits for the resolution of a corporation. The most frequent field of application for regulatory measures concerns divorce proceedings, however, where the court has to decide on the alimonies payable until judgment is entered.

3. Provisional Performance Measures

Such measures (*Leistungsmassnahmen*) serve the purpose of ordering interim enforcement of an alleged claim for the duration of the proceedings in cases where the performance at the time the judgment is rendered would be futile[106] or even disadvantageous for plaintiff.[107]

As a general rule provisional performance measures are not admissible for monetary claims.[108]

II. Pretrial Discovery

Pretrial discovery comparable to the American discovery proceedings does not exist in Switzerland. There are only limited possibilities to have evidence taken by a judge prior to filing a suit, e.g. if a witness is about to leave the country or if evidence is likely to be destroyed. Only the judge can compel the parties (or third parties) to produce documents and only the judge can call witnesses.

Cantonal procedural law provides for the "*probatio ad perpetuam rei memoriam*", the taking of evidence which might no longer be available by the time the lawsuit is brought (inspection of perishable goods, expertise on a building which is about to be pulled down, interrogation of an aged witness etc.). For instance, §§ 231 et

[106] For example where a covenant not to compete shall be enforced.
[107] E.g. where the publication of the counter-statement in a newspaper would again remind the public of the damaging statements.
[108] The exception to that general rule concerns family law matters.

seq. ZH CPC provide that a party may at any time file a petition for preliminary proceedings to take evidence concerning a fact or facts which it intends to plead in pending or future court proceedings, if that party can show that the taking of the evidence would be impossible or more difficult at a later stage. The preliminary taking of evidence is an independent procedure which may be introduced prior to or during an ordinary court proceeding. Its purpose is the preservation of evidence, i.e. to anticipate the taking of evidence by a judge in order to save such evidence from an imminent danger of loss or destruction.

Furthermore, in some cantons administrative bodies or magistrates may, upon application by an interested party, draw up an official report on certain facts which can be established without special expertise (*amtlicher Befund*).[109] For example, they might make a report on damaged goods as ascertained on arrival, they may take samples, thus avoiding their later manipulation, or they may certify the service of documents etc. From a procedural viewpoint, the reports rendered by such officials qualify as public deeds, the accuracy of which is presumed by law; any party wishing to demonstrate the contrary carries the burden of proof.[110]

III. Orders against the Transfer or Disposal of Assets

The civil procedure codes of most of the Swiss cantons do not prohibit the defendant from selling or assigning the assets in dispute (real estate, moveables, securities etc.), and even where provisions to this effect exist, they normally contain no sanctions. Thus the enforcement of the judgment of a public court or an arbitration award may be futile if the plaintiff will be left with nothing other than a claim for damages.

This situation can be avoided by the plaintiff applying for an injunction or a preservation order by which the transfer or disposal of the assets at issue will be prevented. Such orders are available in all cantonal jurisdictions either before or while the main suit is pending.

[109] § 234 ZH CPC.
[110] See Article 9 CC.

Although the defendant is restrained by § 107 (3) ZH CPC from any acts which would be detrimental to the object of the dispute (but not the sale thereof), the sole effective means of restraint is that of an interim injunction pursuant to § 110 ZH CPC, for which the president of the court ruling on the main action has competence.

The order may consist of a formal prohibition addressed to the defendant combined with the threat of penal sanctions. In the case of moveables, e.g. shares in a company, the competent judge may also order that these be deposited with the court for the duration of the proceedings. With regard to real estate, the court may enter an order in the land register temporarily blocking transfer of title.

IV. Precipitated Orders, Emergency Sale of Goods

Articles 92 and 93 of the Swiss Code of Obligations (superseding cantonal procedural law) deal with the seller's rights where the buyer wrongfully rejects the offered goods. Similar provisions are also contained in the Swiss Code of Obligations in Article 204 (sale of perishable goods shipped to a buyer who refuses acceptance) and Article 427 (goods consigned for sale on commission). In all these cases, an order may be obtained in summary proceedings without the requirement of a formal lawsuit having been commenced, and independent of whether the matter will be brought before a cantonal court or an arbitration tribunal.

V. Pretrial Attachment Orders Securing Money Claims

An attachment order pursuant to Articles 271 et seq. LDCB is a court order prohibiting the transfer or disposal of assets of the defendant until the plaintiff's claim has been ascertained in a collection procedure (summary proceedings) or in ordinary proceedings before a state court or an arbitral tribunal. This is a very powerful expedient to prevent the debtor from dissipating his assets until such time as these can be realised in order to satisfy the creditor's claim.

An attachment order is granted *ex parte* by the judge of the place

where the assets of the defendant are situated.[111] The plaintiff has to provide *prima facie* evidence of the existence of the assets and a claim due and payable against the defendant.[112] The defendant is unable to intervene in the attachment procedure and there is no contradictory hearing after the order has been granted. This will probably change when a revised law enters into force in 1997.

The defendant's rights are nevertheless protected in three different ways:

(a) The judge granting the attachment order may require the plaintiff to post a bond in order to cover possible damages to the defendant resulting from an unjustified attachment;[113]

(b) The attachment is only a provisional remedy and is forfeited within 10 days unless the plaintiff pursues his claim in what is called the "validation" procedure (*Arrestprosequierung*);[114]

(c) The defendant may move for a discharge of the injunction (*Arrestaufhebungsklage*) based on certain narrow procedural grounds.[115]

Quite frequently in international commercial disputes, the third party is a bank where the defendant holds his accounts, but the third party may also be the defendant's customer, agent, distributor or its subsidiary owing the defendant a certain sum of money. The party in whose hands the assets or accounts payable are blocked is prohibited by law from disposing of them or surrendering or paying them to the defendant. Violation is a criminal offence under Article 169 of the Swiss Federal Penal Code.

Attachment orders may be directed against persons residing outside Switzerland as well as against foreign companies, but only in exceptional cases against Swiss residents. The grounds for an attachment (*Arrestgründe*) are listed in Article 271 LDCB as follows:

[111] In Zurich the Sole Judge of the District Court decides in summary proceedings; § 213 (11) ZH CPC.
[112] Article 272 LDCB.
[113] Article 273 LDCB.
[114] Article 278 LDCB.
[115] Article 279 LDCB.

(a) The debtor has no fixed abode;

(b) The debtor is about to flee or is hiding assets;

(c) The debtor is in Switzerland in transit, if the claim is of a nature that it is usually paid instantly;

(d) The debtor does not have his residence in Switzerland;

(e) Earlier attempts to enforce monetary claims against the debtor resulted in bankruptcy or certificates of shortfall.

An attachment order is available regardless of whether the plaintiff is itself resident in Switzerland. As a result, in many cases, even though both the defendant and the plaintiff are foreign residents, Swiss jurisdiction can be established by the mere fact that assets of the defendant are located in Switzerland (*forum arresti*).[116]

[116] Article 4 PIL; see, however, Article 3 of the Lugano Convention, which explicitly excludes the *forum arresti* (i.e. jurisdiction at the place of the attachment) for lawsuits against defendants who have their domicile in another member state of the Lugano Convention.

F. Main Proceedings

I. Exchange of Written Briefs

To take the ZH CPC as an example, the following rules apply: For disputes with an amount in dispute exceeding CHF 12'000 proceedings take the form of written pleadings.[117] The preparatory part of the main trial, referred to as the "*Hauptverfahren*", consists of a double exchange of briefs, i.e., the statement of claim (*Klageschrift*) answered by the statement of defense (*Klageantwort*), followed by a further plaintiff brief (*Replik*) and defendant reply (*Duplik*). In very complicated cases the court can order a third exchange of briefs (*Triplik/Quadruplik*). The court has wide-reaching powers pursuant to § 118 ZH CPC to summon the parties to appear for an oral hearing (*Referentenaudienz*) at which it can clarify the facts of the case by questioning the parties and attempt to assist them in reaching a settlement. As a rule, the court will avail itself of this expedient after the first exchange of briefs if at such time the facts in dispute are already reasonably clear. As a rule, the Commercial Court will summon the parties to a conciliation hearing (*Referentenaudienz*) after the first exchange of briefs. The court is represented by a judge, a lay commercial judge and a court secretary, who present their preliminary view of the case to the parties and outline an off-the-record proposal for a settlement. If the latter is rejected, the parties will at least benefit from having an insight into the court's provisional assessment of the case. The Zurich Commercial Court has an outstanding reputation for the way in which such hearings are conducted, and a high percentage of cases filed with the Zurich Commercial Court are indeed settled during or as a result of the first *Referentenaudienz*. Where this is not the case, the trial resumes, as the case may be, with either the second exchange of briefs or, where the *Hauptverfahren* has already been completed prior to the hearing, by entering the evidentiary stage.

The ZH CPC contains few requirements regarding the form of

[117] § 125 in conjunction with § 119 ZH CPC.

written pleas. § 106 (1) ZH CPC provides that the statement of claim must determine the parties and their counsel, specify the relief sought (in the form of a "*Rechtsbegehren*"), quantify the litigious value and "indicate brief reasons" why the relief sought should be granted. The ZH CPC does not forbid, as do some other cantons, observations on points of law. On the other hand, a party will not, in theory at least, be at a disadvantage if it fails to expound on the legal inferences to be drawn from the facts, since the maxim *jura novit curia* (i.e., the court knows – and applies – the law), applicable to all proceedings before Swiss courts by virtue of an unwritten rule of Federal law, releases the parties from the burden of pleading points of law.[118] This is in contrast to the English concept of the judge acting as umpire who need have no recourse to legal materials apart from those cited to him by counsel. However, in complex commercial cases, attorneys will of course be at pains to actively assist the court in its search for the applicable legal norms.

The plaintiff must in all events plead full and complete facts permitting the court to subsume these under a legal norm, failing which his action will be dismissed for lack of substantiation. Cantonal law determines in what form and within which time limit the facts must be pleaded; where the cause of action is subject to Federal private law, it is the latter which determines whether the facts as pleaded are sufficiently substantiated for the court to subsume them under the law.[119] § 113 ZH CPC requires that means of evidence be submitted along with the briefs or at least named therein.[120]

II. Oral Proceedings

In cases with an amount in dispute of less than CHF 12'000, before a Sole Judge, in cases involving family law matters and unfair compe-

[118] See *supra* C/III/2.

[119] See the instructive case in the Federal Supreme Court decision ATF 108 II 337, where the plaintiff failed to fulfill the Federal law requirements.

[120] However, should the trial reach the evidentiary stage it is imperative that a party re-lists all the means of evidence upon which he intends to rely on in his *Beweisantretungsschrift*, upon pain of preclusion.

tition, as well as in some cases before the Employment Court and the Landlord and Tenant Court, the proceedings are conducted orally, which means that the parties are invited to a Hearing, where they have to plead their cases (*Hauptverhandlung*).[121]

The sequence of the pleadings is the same as described *supra*, i.e. the statement of claim is followed by the statement of defense, followed by another pleading of each party.

Even in those cases, however, the court has the power to order written proceedings, if it deems oral proceedings inappropriate under the circumstances of the case.[122]

III. Conclusion of the Main Proceedings

Upon conclusion of the *Hauptverfahren*, evidence will, if necessary, be taken on facts which are legally relevant (to the cause of action) and still in dispute. Consequently, as a corollary to the plaintiff's duty to substantiate his factual pleadings, the defendant is bound to clearly deny all factual allegations made by plaintiff that he does not accept. Where the cause of action is subject to Federal private law, it is again the latter which determines when a fact can be deemed properly disputed. A general denial without further details will usually be insufficient.[123] The above remarks apply *mutatis mutandis* for the second exchange of briefs. Facts not pleaded in each party's last brief are in principle barred from being presented at a later stage of the proceedings.[124] However, the exceptions pursuant to § 115 ZH CPC are extensive. Notwithstanding § 114 ZH CPC, the following are admissible after the cut-out point stipulated in that provision:

(a) Requests which were occasioned during the course of proceedings;

(b) Submissions, denials and objections which can be immediately established either from the documents on file or from newly submitted documents;

[121] §§ 119 et seq. ZH CPC.
[122] §§ 123/124 ZH CPC.
[123] ATF 117 II 113.
[124] § 114 ZH CPC.

(c) Facts which a party credibly asserts it was unable to invoke earlier, despite reasonable efforts;

(d) Facts which the court must appraise of its own motion (*ex officio*);

(e) Submissions and denials occasioned by the judge's exercising his right to seek clarification from the parties of unclear, incomplete or ambiguous pleadings pursuant to § 55 ZH CPC.

This large catalogue of exceptions to the so-called *Eventualmaxime*, i.e., the rule that all facts must be pleaded by a certain point in the proceedings or will otherwise be precluded, is not exactly conducive to pleading discipline. Indeed, the open invitation to laxness is compounded by the fact that if the case pending in a district court later goes on appeal before the Zurich Court of Appeals (*Obergericht*), § 267 ZH CPC operates to reopen the pleadings: the statement of appeal and the answering brief may contain submissions, denials and objections hitherto unpleaded, even if these were known to the party prior to the cut-out before the first-instance court. The only sanction for tardiness is the imposition of costs where the court holds the delay to have been unnecessary.[125] However, if a case has been decided by the Commercial Court, it can only be appealed to the Federal Supreme Court where new facts must not be introduced.[126]

IV. Summary Proceedings

Based on a large number of provisions in Swiss Federal substantive law, which require the cantons to provide for a simple and fast procedure for specific claims, the cantonal procedure codes contain a special type of proceedings commonly referred to as summary proceeding (*summarisches Verfahren*). Competent for the adjudication of claims brought in a summary proceeding is the Sole Judge at the locally competent District Court.[127] The particular features of the summary procedure are that the parties are limited to such means of evidence as they can immediately submit to the judge, such as docu-

[125] § 66 ZH CPC.
[126] See *infra* K/II.
[127] § 23 ZH COC.

ments and written party statements, and that they provide for default decisions in case of non-appearance of the defendant party.

In Zurich, summary proceedings are governed by §§ 204 et seq. ZH CPC. The Code contains an exhaustive list of substantive issues that are decided in summary proceedings; they include subject matters governed by the Federal Law on Debt Collection and Bankruptcy,[128] the Civil Code,[129] and the Code of Obligations.[130] If the factual situation cannot be ascertained sufficiently, the Sole Judge has to transfer the case to the ordinarily competent court.[131]

In addition, a summary proceeding can be instituted by a party to obtain an order (*Befehl*) in cases where the factual and legal situation is clear, or where, before ordinary proceedings could have been instituted, such orders are necessary to avoid a disadvantage for that party that cannot be later reversed.[132]

[128] § 213 ZH CPC.
[129] §§ 215–218 ZH CPC.
[130] §§ 219/220 ZH CPC.
[131] §§ 221 ZH CPC.
[132] §§ 222 et seq. ZH CPC.

G. Evidentiary Proceedings

I. General Observations

Common rules also apply to the evidentiary stage which follows the fact-collecting *Hauptverfahren* (trial). Evidence will only be heard with regard to disputed facts which have a bearing on a possible cause of action upon which the plaintiff's request for relief might be founded.[133] Commercial litigation is governed by the so-called *Verhandlungsmaxime*, pursuant to which the court does not collect facts of its own motion, but confines itself to appraising the facts pleaded by the parties.[134] While the court is in principle bound by facts which both parties declare to be true, it nevertheless has statutory power to order the taking of evidence on such points should it for some reason doubt the parties' unanimity.[135]

The evidentiary stage of the trial is divided into three parts. First, the court issues a decree detailing all the points in dispute with regard to which it intends to hear evidence specifying which party bears the onus of proof and setting both parties a time limit to present their individual means of evidence (*Beweisauflagebeschluss*).[136] Second, the parties reply with an evidentiary brief (*Beweisantretungsschrift*) accompanied by the individual means of evidence to the extent that these are not documents which have already been submitted to the court. The brief must specify all means of evidence upon which the party intends to rely, even if he has already designated them in a previous brief.[137] Means of evidence in Zurich are: documents, witnesses, expert witnesses, inspection by the court (*Augenschein*) and, in stalemate situations, a qualified statement by one of the parties (*Beweisaussage*).[138] Witnesses are not cross-examined as such, since all questions addressed to them should be put by the

[133] § 133 ZH CPC.
[134] See *supra* C/III/1.
[135] § 142 (2) ZH CPC.
[136] § 136 ZH CPC.
[137] §§ 137 et seq. ZH CPC.
[138] For a more detailed description of admissible means of evidence, see *infra* G/V.

judge. However, in certain situations the judge might permit direct questioning by opposing counsel. A record is kept of oral evidentiary hearings, the court secretary usually having recourse to a tape recorder to supplement his own shorthand notes. There are no court reporters in the U.S. style, who produce *verbatim* transcripts of hearings.

The court reacts to the *Beweisantretungsschriften* with a decree specifying which means of evidence it will admit (*Beweisabnahmebeschluss*)[139], and then proceeds to hear such evidence. The parties are given the opportunity to pronounce on the result of the evidentiary hearings, and then the case is ready for judgment.

II. Burden of Proof

The question as to which party bears the burden of proof for a fact is governed by the applicable provisions of substantive law. As a general rule, Article 8 CC states that, in the absence of a specific statutory provision, an alleged fact has to be proven by the party who bases a claim on that fact. If such fact cannot be proven, the judge must decide against the party having the burden of proof, i.e. this party has to suffer the consequences of the lack of proof.[140] In addition, the Code of Obligations and the Civil Code contain a large number of provisions which state explicitly which party has the burden of proof.[141]

The general rule of Article 8 CC suffers some modifications:

(a) A party is not obliged to prove negatives (*negativa non sunt probanda*).

(b) In some cases, however, a party might be obliged to prove the absence of a fact by demonstrating that it has done all that reasonably could have been done to avoid a certain thing from happening.

[139] § 140 ZH CPC.
[140] ATF 107 II 275.
[141] See e.g. Article 97 CO, according to which an obligee who cannot perform is liable, unless he can prove that he is not responsible.

(c) A shift of the burden of proof can be ordered by the judge if the other party has made it impossible for the burdened party to submit evidence.

(d) Statutory presumptions (*praesumptiones iuris*) establish the assumption that certain facts exist or do not exist.[142] Of course the other party has the possibility of refuting the presumption by proving the opposite.

III. Duty to Allege and to Substantiate

A party bringing a lawsuit has the duty to allege all those facts which are necessary in order to trigger the application of the legal provisions on which the plaintiff's claims rely (*Behauptungslast*). In addition, such allegations must be as clear and specific as to enable the taking of evidence thereon (*Substanzierungslast*). Whereas the question to what extent this substantiation is necessary is governed by Federal law, cantonal law determines at what stages of the proceedings it is still possible to substantiate factual allegations.[143]

Failure to allege or substantiate factual allegations which are prerequisites for a specific course of action entitles and obliges the court to dismiss the action.

IV. Proof of Foreign Law

The Federal Statute on Private International Law contains explicit rules regarding proof of foreign law. The statute's entry into force in 1989 ended a period where a set of different cantonal statutes and case law as well as fragmentary Federal Supreme Court decisions made it difficult to determine the standard that courts might apply. In general, Swiss courts have to determine and to apply foreign law *ex officio*.[144] The judge is entitled to require that the parties help him in

[142] Article 17 CO, e.g., creates a statutory presumption that an abstract acknowledgement of debt is proof for the existence of such debt (ATF 105 II 187).
[143] ATF 108 II 339.
[144] Article 16 PIL.

this process. If pecuniary rights are at stake the judge can place the burden of proof on the parties. If it is not possible to determine the content of the foreign law, the court applies Swiss law.[145] Furthermore, a court must disregard foreign law if the result which its application produces is deemed contrary to Swiss public policy (*ordre public)*.[146] A Swiss court also has to disregard foreign law if it violates Swiss provisions contained in the PIL which cannot be waived even by consent of the parties.[147] A Swiss court can apply foreign *ius cogens* (e.g. foreign competition laws) if a party to a lawsuit has an overriding interest that this be applied and such interest merits protection from the viewpoint of Swiss law.[148] This provision certainly confers the courts with broad discretion. Furthermore, it should be noted that Switzerland is a member of the European Convention concerning the Exchange of Information on Foreign Law (of 1968).

V. Types of Evidence

Admissible forms of evidence are:

1. Documents

In commercial disputes, documents establishing the relationship between the parties, such as contracts, bills of lading, invoices, correspondence and so forth are usually the primary source of evidence. Third parties must produce relevant documents in their possession unless they have a right to refuse to testify. In addition to the documents already on file, the parties may request the court to order the opposing party or any third parties which are in possession of relevant documents to submit those to the court.[149] If a copy of a document is submitted, the court can ask to see the original; the court can request

[145] Article 16 (2) PIL.
[146] See also *infra* M/XII.
[147] Article 18 PIL.
[148] Article 19 PIL.
[149] §§ 183, 184 et seq. ZH CPC.

that documents in a foreign language be translated by the party who has the burden of proof.[150]

Affidavits as such are in general not admissible as evidence in Switzerland, although a party might choose to file an affidavit obtained abroad as a document, indicating to the court that the person making the affidavit could be heard as a witness.

2. Witnesses

In principle, every person is considered to be capable and obliged to take the stand as a witness in civil litigation. As far as minors under 18 years are concerned, it is in the court's discretion to decide on the admissibility of their testimony.[151]

Certain persons may refuse to testify altogether (e.g. spouses, children and parents),[152] other persons may claim a special privilege (e.g. attorney – client privilege) with regard to certain issues. Zurich courts may e.g. compel a bank official to testify under certain circumstances, weighing the interest of the bank, its client and the interest of the parties involved.[153]

3. Overseas Witnesses

In general every person summoned before a Swiss court is obliged by law to appear before a court to testify orally. The parties to a case are excluded from testifying as witnesses. Under Swiss procedural laws it is primarily the judge who will question the witness, although the parties can propose further questions. In international cases, pertinent bilateral treaties and the Hague Convention on Civil Procedure (of 1954) govern the procedure for testimony by witnesses abroad. Pursuant to this Convention the consul of the country requesting the testimony of a witness may forward the request to the competent body. Switzerland has ratified the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the Hague Convention on the Taking of Evidence

[150] § 185 ZH CPC.
[151] § 157 ZH CPC.
[152] § 158 ZH CPC.
[153] §§ 159/160 ZH CPC.

Abroad in Civil or Commercial Matters (1970), and the Hague Convention on the International Access to Justice (1980).

4. Expert Witnesses

Experts are nominated by the court in the event that the judges themselves do not have sufficient expertise to decide the factual matter in question. However, the parties may nominate the experts of their choice. It is also the court that decides which questions the appointed expert should answer. The parties can submit supplementary questions to the court which may include them in the questionnaire. Experts usually file a written report (*Gutachten*), and may afterwards be invited to answer questions of the court and the parties at the occasion of a hearing.[154] They are subject to the same duty to tell the truth and the same criminal sanctions for violations of that duty as witnesses.[155]

5. Party Statements

The cantonal Procedure Codes differ in the way they treat statements by the parties themselves (*persönliche Befragung*). Although the parties may be questioned by the court, their statements are not considered as evidence if they are in favour of that party itself under the Zurich Code.[156]

If it is justified by the evidentiary situation, the court can request one of the parties for a so-called evidentiary statement (*Beweisaussage*); a party making an evidentiary statement is subject to the same punitive sanctions as a witness.[157]

6. Inspection by the Court

A court may conduct on-site inspections (*Augenschein*) if this seems appropriate; such inspection might also be delegated to an expert.

[154] §§ 171 et seq. ZH CPC.
[155] § 174 ZH CPC in conjunction with Article 307 of the Swiss Federal Penal Code; the same provision applies for court translators.
[156] § 149 ZH CPC.
[157] § 150 ZH CPC.

Parties must tolerate inspections of their person and of goods in their possession. The same is valid for a third party unless this party has a witness privilege in the sense of the above-mentioned §§ 158–160 ZH CPC.[158]

VI. Principle of Free Weighing of Evidence

The principle that a court or judge is free to weigh and consider the evidence submitted by the parties according to the conviction he has gained during the proceedings (*Grundsatz der freien richterlichen Beweiswürdigung*) is embodied in Federal[159] as well as in cantonal law.[160] It means that there may not be established any rules determining the manner in which a judge has to weigh different kinds of evidence (Article 10 CC). It is in the court's power to draw its conclusions from the witness' statement regardless of the number of witnesses presented by one side, relying on the credibility, clarity and firmness of a witness statement, as well as the correspondence between different pieces of evidence and witness statements.

As an exception to this rule, Article 9 CC provides that public registers and notarized documents constitute evidence for their content, unless their incorrectness has been proven.

VII. Conclusion of the Evidentiary Proceedings

Once the taking of all evidence that the parties indicated, and that was considered admissible by the court, is concluded, the parties are invited by the court to comment on the results of the taking of evidence.[161] Such comments are made either at the occasion of the last evidentiary hearing or, as is more common in complex cases, in a final brief to the court.

[158] §§ 169, 170 ZH CPC.
[159] Articles 40 et seq. F CPC.
[160] § 148 ZH CPC.
[161] § 147 ZH CPC.

H. Particular Claims

I. Claims for Breach of Contract

Proceedings have to be commenced and the case heard like any ordinary action as described in the general section.

If the goods delivered prove to be unsatisfactory, the Swiss Code of Obligations (hereinafter referred to as "CO") grants the buyer certain remedies:

(a) Voidability of the contract because of mistake (error), fraud or duress.

(b) Voidability of the contract because of disparity between the respective consideration (unconscionability or "economic duress").

(c) Remedies for breach of warranty.[162]

(d) (General) claim for breach of contract.[163]

1. Voiding the Contract because of Mistake (Error), Fraud or Duress

A buyer may independently of any claim arising out of warranty, void a contract based on mistake (error), fraudulent misrepresentation or duress.[164] Thus, if a situation occurs where a party is, by application of the "principle of confidence", bound by the apparent meaning of its declaration even if another meaning was intended, such party may nonetheless be allowed to void the contract because of mistake (error).

Under Swiss Law the doctrine of mistake (error) is a broad one; it includes the so-called theory of "error as to the basis of the contract" (*Grundlagenirrtum)*, whereunder a contract is voidable if

[162] Articles 197 et seq. CO.
[163] Articles 97 et seq. CO.
[164] Articles 23 et seq. CO.

one of the parties has agreed to enter into the agreement in reliance on a fundamental assumption which later proves to have been wrong provided that such reliance was recognized or should have been recognized by the other party.[165]

Similarly, a party forced to enter in a contract by duress or deceived by a fraudulent misrepresentation can rescind the contract. The party rescinding the contract because of fraudulent misrepresentation or duress is not liable for damages incurred by the other party and might under certain circumstances be entitled to claim damages it suffered as a consequence of the contract.

The statute of limitations for the avoidance of a contract based on mistake or fraudulent misrepresentation is one year from when such ground becomes known to the buyer.[166] In the case of duress, the statute of limitations commences from the time it ceased. It seems reasonable to assume that in the case of error an absolute time limit of 10 years pursuant to Article 127 CO will apply (starting – by virtue of Article 130 CO – with the conclusion of the contract).[167]

2. Voiding the Contract because of Disparity between the Respective Consideration (Unconscionability)

For completeness' sake an additional remedy (of lesser practical importance) should be mentioned here, namely, the right of a party to rescind the contract according to Article 21 CO. This provision allows a party to rescind the contract within one year after its conclusion if such contract results in an obvious disparity between the respective consideration and was concluded as a result of the party exploiting the distress, inexperience or improvidence of the other (rescinding) party. Cases of successful invocation of Article 21 CO are extremely rare in practice, especially among sophisticated business partners.

[165] Article 24 (i)(4) CO.
[166] Article 31 (1) and (2) CO.
[167] However, the Supreme Court has not yet explicitly decided whether the general 10 year statute of limitations applies.

3. Claim for Breach of Warranty (Articles 197 et seq. CO)

The buyer has the choice whether he wants a reduction of the price or – in sufficiently severe cases and with the approval of the judge[168] – a rescission of the whole transaction, (both) possibly combined with an award for damages. If the contract of sale between the parties is for the delivery of fungible goods, the buyer may in lieu of the rescission of the contract or of the claim for reduction of the contract price demand the delivery of goods in conformity with the contract.

In order to protect his rights, the buyer must upon receipt of the goods inspect them and give immediate notice of the discovery of a defect to the seller. In the case of defects not apparent in the course of inspection conducted with reasonable care, the buyer must give immediate notice when such defects subsequently appear[169] in order to safeguard his rights. If seller delivers an *aliud*, the buyer has a claim based on non-performance and thus breach of contract according to Article 97 CO. The rigid breach of warranty rules and thus the buyer's duty to immediately inspect the goods and give immediate notice of the discovery of a defect are most likely not to apply in such a case.[170]

It is important to note that a one year statute of limitations applies and that defects which do not appear within the period of one year from the delivery of the goods do not give a cause of action against the seller,[171] unless the parties have stipulated a contractual warranty for a longer period. An exception applies if the buyer can prove that he has been defrauded (intentionally misled) by the seller. In such case the buyer (quite apart from any other remedies he may have in tort or under fraudulent misrepresentation) is not barred by the one year statute of limitations;[172] instead the ten year prescription generally governing contractual obligations applies.[173] This 10-year statute of limitations commences with the delivery of the goods.

[168] Article 205 CO.
[169] Article 201 CO.
[170] See also Federal Supreme Court in ATF 94 II 29.
[171] Article 210 (1) CO.
[172] Article 210 (3) CO.
[173] Article 127 CO.

4. General Claim for Breach of Contract

According to Article 97 CO, the seller shall compensate the buyer for damages incurred *«if the performance of an obligation cannot (at all) or not duly be effected ... unless the seller proves that no fault is imputable to him»*. In the case of a contract for sale and the delivery of defective goods by the seller, the buyer may choose to base his claim against the seller on these general grounds, rather than invoking the rule specifically governing the breach of warranty in sales. However, the Federal Supreme Court has repeatedly held[174] that the same rules regarding the statutes of limitations apply as in the case of the special remedy for breach of warranty under the statutory provisions as to contracts for sales. Thus, the one year statute of limitations, as provided for in Article 210 CO (i.e. one year from the delivery of the goods) will apply instead of the usual 10 years statute of limitations generally applicable to claims based on Article 97 CO. Seeking remedy under the general rules for breach of contract, namely Articles 97 et seq. CO, will not dispense the buyer from having to prove that he has met all the tests required under Article 201 CO (i.e. immediate inspection and immediate notice in case of discovery of defects).

II. Claims for Breach of Contract for Sale of Shares

Proceedings will have to be commenced and heard like any ordinary action as described in the general section.

The acquisition of shares (including controlling blocks) in a corporation is regulated by Articles 184–215 CO, relating to the sale of moveable goods. Many of these rules are non-mandatory and may be waived by tacit, oral or written agreement. The most important rules are found in Articles 190 and 214 CO concerning default by either party, in Article 185 CO regulating the passing of risk (and benefit) with regard to the purchased shares of assets, and in Articles 197 et seq. CO concerning breaches of representations and warranties.

[174] See, e.g., ATF 63 II 401.

In the case of the sale of a controlling block of shares, the Federal Supreme Court has, so far, refused to apply Articles 192 et seq. CO with regard to the state and condition of the underlying business, unless the seller has given express representations and warranties. However, the court has allowed the acquirer to rescind the contract in accordance with Article 24 (1) (4) CO in the absence of a warranty clause if the net value of the business is considerably lower than expected.

Article 201 CO requires the purchaser to examine the delivered goods as soon as possible and to object immediately if any defects are discovered. This rule also applies to the purchase of shares. Article 210 CO provides that all claims of defects of the purchased goods (or breaches of warranty) are time-barred unless the acquirer starts court proceedings within one year of completion of the sale of the share. Neither Article 201 nor Article 210 CO is mandatory, and legal counsel of the acquirer should insist on indemnity clauses clearly providing for a more flexible mechanism in the event of a breach of warranty.

Article 205 CO allows the acquirer to rescind the contract if representations and warranties prove to be false. However, in many cases the seller will request the acquirer to waive this right (at least for the period subsequent to the completion of the agreement) and confine himself to damages or indemnity payments for breach of contract by the seller.

III. Claims to Enforce Copyrights, Patents and Trademarks

1. Copyrights

Switzerland enacted a new Statute on Copyright and Neighbouring Rights and its implementing Ordinance on 1 July 1993. A separate Act and its implementing Ordinance, which became effective at the same date, cover the protection of the topography of semiconductor chips. On an international level, Switzerland is a signatory to the following conventions: Berne Copyright Convention (Paris Revision 1971), Universal Copyright Convention (Paris Revision 1971), Inter-

national Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961), Convention for the Protection of Producers of Phonograms against Unauthorized Duplications of their Phonograms (Geneva, 1971), Convention relating to the Distribution of Programme-Carrying Signals transmitted by Satellite (Brussels, 1974), Convention establishing the World Intellectual Property Organisation (Stockholm, 1968).

The copyright owner may seek civil and criminal remedies against copyright infringers. Civil claims must be addressed to the cantonal courts designated for copyright matters (in most cantons, such as Zurich, the Court of Appeals).[175] An appeal to the Federal Supreme Court is possible. Proceedings may be brought in the court at the defendant's domicile and also in the court of the place where the infringing action took place or the result thereof occurred, at the plaintiff's discretion.[176]

2. Patents

Swiss patent law is codified in the Federal Patent Act of 25 June 1954 as amended in 1976, and its implementing Ordinance of 19 October 1977 as amended in 1986. A draft bill is currently under discussion aimed primarily at improving the protection of inventions in the field of biotechnology. Switzerland is currently party to the following international conventions: European Patent Convention of 5 October 1973, Patent Co-operation Treaty of 19 June 1970, Convention relating to the harmonization of certain terms in the area of material patent law of 27 November 1963, the Strasbourg Convention on the International Classification of Patents of 24 March 1971 and the Budapest Treaty on international recognition of deposit of micro-organisms for patent procedures of 28 April 1977. By virtue of a bilateral treaty with Liechtenstein of 22 December 1978, Switzerland and Liechtenstein became a combined territory for patent purposes in the sense of Article 45 of the Patent Cooperation Treaty.

The patent applicant or owner may seek civil and criminal remedies against infringers of the patent application. Civil claims must be

[175] § 45 (2) ZH COC.
[176] Article 64 CA.

addressed to the cantonal court designated for patent matters, which is the Commercial Court in cantons which have established one, such as Zurich.[177] An appeal to the Federal Supreme Court is possible. Proceedings may be initiated in the court at the defendant's domicile and also in the court of the place where the infringing action took place or the result thereof occurred, at the plaintiff's discretion.[178] In infringement actions, the defendant will routinely invoke nullity of the patent. Consequently, the court will have to assess the novelty and non-obviousness of the patent. Since the courts will usually revert to an expert opinion for those issues, patent litigations are often time-consuming and expensive. Thus, patent actions are rarely fought through to the Federal Supreme Court.

3. Trademarks

A new Federal Trademark Act became effective as of 1 April 1993. On an international level, Switzerland is a signatory to the Madrid Agreement in its Stockholm version of 14 July 1967 and the Nice Agreement regarding the classification of goods and services in its Geneva version of 13 May 1977.

Civil and criminal remedies are available to the trademark owner in the event of an infringement. Civil claims are to be addressed to the cantonal court designated for trademark matters. The court competent in patent matters is in most cantons designated for trademark matters as well, e.g. in Zurich the Commercial Court.[179] An appeal can be brought to the Federal Supreme Court. The plaintiff can choose between the forum at the defendant's domicile, the forum at the place where the infringing action took place or the forum of the place where the result thereof occurred.[180]

4. General Observations

In all intellectual property matters, the party claiming a violation of its rights will have a strong interest to obtain immediate relief,

[177] § 61 (1)(1) ZH COC.
[178] Article 75 (1)(a) PA.
[179] § 61 (1)(1) ZH COC.
[180] Article 58 (1) TA.

because the actual procedure might take several years. A final decision after such a long time might be of little value to the plaintiff, if the infringing party had the opportunity to illegally use the rights of plaintiff during that time. The remedies awarded by the court might in such cases prove insufficient to eliminate the disadvantages suffered by the injured party. It must be mentioned in this context that Swiss law does not provide for treble damages, and that Swiss courts are extremely conservative in awarding damages. They do so only if and to the extent that damages are actually proven by plaintiff.

Therefore, most intellectual property litigation starts with a request by plaintiff for an injunctive order from the competent court. Such requests can be filed with the Sole Judge of the competent court before the actual lawsuit has been brought; the court will issue an order, if the requesting party has made its claims credible and has demonstrated that, in the absence of an order, it would suffer damages that cannot be remedied easily.[181] Such orders can even be issued without having heard the defendant, who then has the possibility of raising an objection. If the Sole Judge finds that an ordinary proceeding is necessary to adjudicate the dispute, he sets a time-limit for plaintiff to file an ordinary lawsuit; in case of failure to bring the lawsuit, the order expires.

An alternative, although less efficient way to obtain injunctive relief, is to ask the competent court for such an order as a provisional measure after the ordinary proceeding has been instituted.[182]

[181] § 222 et seq. ZH CPC.
[182] § 110 et seq. ZH CPC.

I. Judgment

The case is ready for judgment once either all material facts are no longer in dispute or all evidence has been heard. Judgments in all cases are rendered by three judges, i.e., either three district judges, or three Commercial Court judges, except in cases falling under the jurisdiction of a Sole Judge.[183] There are no juries in civil trials anywhere in Switzerland. If necessary, a vote on the question of admissibility of the action precedes a vote on the merits. A dissenting judge can put his dissenting opinion on record, as can also the court secretary, who has an advisory vote in Zurich. The decision is handed down orally or in writing, with written reasons subsequently supplied unless waived by the parties.

I. Judgment on the Merits

A judgment on the merits (*Sachurteil*) decides the issue that was the subject of the lawsuit. It may either be based on the findings of the court or on declarations of the parties such as settlement, acknowledgement by defendant or withdrawal of the action by plaintiff.[184] Final judgments close the proceedings, whereas partial judgments decide only a part of the issues in dispute.[185]

If a judgment on the merits is not appealed by one of the parties, or cannot be subject to an appeal, it has *res judicata*-effect, which has two aspects:

(a) Formal *res judicata* (*formelle Rechtskraft*) means that the proceedings between the parties with regard to that dispute are concluded and the decision is enforceable.[186]

(b) Substantive *res judicata* (*materielle Rechtskraft*) means that the findings of the court are binding for later proceedings between the

[183] See *supra* C/I.
[184] § 188 ZH CPC.
[185] § 189 ZH CPC.
[186] § 190 ZH CPC.

same parties or their successors with regard to the rights and duties that were the subject of the decision.[187]

II. Interest

Statutory interest at a rate of five per cent per annum from the day of debtor's default may be recouped in court proceedings, if no other rate of interest has been agreed upon; between merchants, higher interest is due if the prime rate was above five per cent at the place where the payment had to be made.[188] The rate of interest of five per cent is also applicable in tort claims from the date of defendant's tortious conduct.

III. Procedural Judgments

Procedural judgments (*Prozessurteile*) must be distinguished from judgments on the merits in that they do not decide the issues of the case, and therefore have no *res judicata*-effect. They dismiss a lawsuit, e.g., because of lack of a prerequisite or lack of jurisdiction of the court.[189]

IV. Cost of Proceedings

1. Court Fees

Court fees are levied pursuant to fees schedules which vary from canton to canton and which usually are established by the cantonal Court of Appeals. The court fees are rather modest in Switzerland. According to the Zurich fee schedule (*Gerichtsgebührenverordnung*), the court fees for a proceeding with an amount in dispute of CHF 100'000, are between CHF 6'500 and CHF 8'500; where the amount in dispute is CHF 1'000'000, the bracket is CHF 23'000 to

[187] § 191 ZH CPC.
[188] See Article 104 CO.
[189] See *supra* D/V.

CHF 30'000. In summary proceedings, the fee is reduced to one third of those amounts.

2. Court Fees to be Borne by Losing Party

As a general rule, the losing party has to bear the cost of the proceedings. If neither of the parties wins entirely, the fees are to be borne by the parties in accordance with the percentage of their winning and losing.[190] If plaintiff's claim was for CHF 100'000, and a judgment is entered for CHF 66'000, plaintiff will have to pay 1/3 and defendant 2/3 of the court fees.

3. Security for Costs

In general a plaintiff does not have to furnish security for costs when commencing an action in a Swiss court, although the cantonal civil procedures contain various exceptions, for instance for cases where the plaintiff is insolvent or where the plaintiff is neither domiciled in Switzerland nor in a country which has ratified the Hague Convention on Civil Procedure (1954). In some cantons, the courts examine *ex officio* if security for costs has to be posted (e.g. Canton of Zurich), whereas in others the opposing party has to specifically demand that a court impose such a security.

V. Attorney's Fees

Attorneys generally base their charges for services rendered on hourly rates. For court proceedings, each canton has enacted a schedule for attorney's fees, which takes into account not only the amount in dispute, but also the difficulties of the case, and the amount of work that has to be done by the attorney. Expenditure of the attorney such as cost for telecommunications, translation services, computerized information retrieval services, travel costs and accommodation are reimbursable separately. Based on the examples used for court fees, the attorney's fees awarded by a court in Zurich in

[190] §§ 64 et seq. ZH CPC.

application of the fee schedule (*Anwaltsgebührenverordnung*) would lie between CHF 9'000 and CHF 18'000 if the amount in dispute was CHF 100'000, and between CHF 28'000 and CHF 56'000, if the amount in dispute was CHF 1'000'000. The court has discretion to award less if it finds that the particular circumstances of the case justify doing so.

By virtue of their professional Codes of Conduct established by the cantonal Bar Associations as well as by statutes enacted by the cantons, Swiss attorneys are not permitted to enter into fee contingency agreements if they act as counsel in court proceedings.

Under Swiss civil procedure rules – by contrast to US civil procedure laws – fee shifting is the general rule. Thus, in a litigation the losing party has not only to pay court fees, but the court will also award the winning party reasonable compensation for its legal fees.[191]

[191] See, e.g., §§ 68 et seq. ZH CPC.

J. Appeal Procedures in the Cantons

I. General Principles of Appeal Procedures

Given that 26 cantonal codes of civil procedure exist, appeal procedure within the different cantons may vary considerably. A certain unifying effect has been attained by procedural provisions contained in Federal laws, and by the practice of the Federal Supreme Court, which over the years has developed a body of unwritten procedural norms which derogate cantonal law and apply in appellate proceedings as well.[192] However, a uniform Federal system exists to appeal to the Federal Supreme Court final judgments of the upper courts of the cantons. The applicable norms are set out in the Statute on the Organization of the Federal Judiciary of 16 December 1943 (hereinafter OFJ). One, or in some cases two out of three forms of appeal might lie against any given judgment rendered by a cantonal court.

II. Appeal *Stricto Sensu*

An appeal (*Berufung*) can be brought before the Court of Appeals against decisions of the District Courts and the Employment Courts, if the amount in dispute is above CHF 12'000 or cannot be estimated due to the nature of the matter, against decisions of the Sole Judge, if the amount in dispute is above CHF 8'000, and in some cases decided by Landlord and Tenant Courts.[193] The appeal has suspensive effect, which means that the appealed decision has no *res judicata*-effect and cannot be enforced.[194] The appeal must be lodged in writing with the court which gave the judgment within 10 days from written communication of the same. The court of first instance then sends the file to the Court of Appeals, which sets a time-limit for the appealing party to file its motions and to state the reasons for the appeal. Afterwards,

[192] See *supra* A/II.
[193] § 259 ZH CPC.
[194] § 260 ZH CPC.

the other party is granted the opportunity to file an answer.

Both parties are permitted to make new allegations and to raise new defenses in the appeal proceedings; the only exception applies to parties who were in default in the first instance.[195] After both parties have filed their briefs, the Court of Appeals can either invite the parties for a hearing, where they have the opportunity to further plead their case, or order a further exchange of briefs.[196]

After the conclusion of the proceedings, the Court of Appeals can either confirm or reverse the decision of the first instance, or remand the case for further taking of evidence or completion of the main proceedings and new decision to the first instance.[197]

III. Recourse

In addition to the Appeal, the Zurich Civil Procedure Code provides for a recourse (*Rekurs*) against final decisions of the District Courts, the Employment Courts and the Landlord and Tenant Courts as well as the Sole Judges which are not judgments in the sense that they do not decide the merits of the case (*Erledigungsbeschlüsse*), provided that the amount in dispute is above CHF 12'000 or cannot be assessed due to the nature of the matter, or CHF 8'000 in cases both before the Sole Judge. Recourse can also be filed if a judgment is attacked only for the regulation of the cost and attorney's fees therein. Finally, decisions of these courts and judges may be attacked if they dismiss the defense of lack of jurisdiction, refuse to grant gratuitous proceedings to a party, stay a proceeding, request security from a party, or order provisional measures.[198]

The other important field of application of the Recourse is against decisions made in summary proceedings, if they terminate the proceedings and if the amount in dispute is at least CHF 8'000 or cannot be determined.[199]

[195] § 267 ZH CPC.
[196] § 268 ZH CPC.
[197] §§ 269/270 ZH CPC.
[198] § 271 ZH CPC.
[199] § 272 ZH CPC; decisions granting an attachment (see *supra* E/V) cannot be subject to a recourse.

The time-limit for a recourse is 10 days, and it has to be filed with the Court of Appeals. Otherwise, similar procedural provisions apply as to an appeal.[200]

IV. Nullity Appeal

A Nullity Appeal (*Nichtigkeitsbeschwerde*) can be brought against judgments and decisions in recourse proceedings if there is neither an appeal, a recourse nor the possibility for an appeal to the Federal Supreme Court.[201] Procedural orders may also be attacked by a nullity appeal if a disadvantage is imminent and could not be remedied afterwards, or if a significant waste of time and cost can be saved thereby.

Only the following grounds are permitted in a nullity appeal:

(a) A material procedural rule has been violated.

(b) The decision is based on an obviously erroneous or arbitrary factual assumption.

(c) The decision violates clear substantive law.

The nullity appeal has to be filed within 30 days with the Court of Cassation (against decisions of the Court of Appeals) or with the Court of Appeals (against decisions of the District Courts, the Employment Courts, the Landlord and Tenant Courts, and the Sole Judges).

The court deciding on the nullity appeal can either dismiss the nullity appeal, set aside the attacked judgments and remand the case for new decision, or enter a new judgment. The latter is only rarely done under exceptional circumstances, where the case is ripe for decision.

[200] §§ 275 et seq. ZH CPC.
[201] §§ 281/282 ZH CPC.

V. Revision

A revision proceeding (*Revision*) is a special appeal that can be filed under narrowly defined circumstances against a judgment that has acquired *res judicata*-effect. In particular, a revision is possible if facts and means of evidence are discovered by a party which would have led to a more favourable decision for that party and which could not have been discovered with due diligence in time. If a decision is based on a settlement or the withdrawal or recognition of the action, revision can only be requested if it is demonstrated that the declaration of a party is invalid under the applicable substantive law.[202]

A request for revision must be filed within 90 days since discovery of the facts providing for a ground for revision with the court that originally decided the matter.[203]

If the court finds that the request for revision is well-founded, it sets aside the judgments, takes the necessary procedural steps, and enters a new judgment.[204]

[202] § 293 ZH CPC.
[203] § 295 ZH CPC.
[204] § 298 ZH CPC.

K. The Role of the Federal Supreme Court

I. General Remarks

The Federal Parliament elects Supreme Court judges for a period of six years. While, according to a constitutional provision of 1874, it is not a prerequisite to have a formal legal education to be elected as a judge to the highest court, today only experienced legal professionals are elected to this position. Most of the judges in the highest court either held office in cantonal appeal courts, were experienced legal practitioners, or taught as professors of law at one of the universities prior to their election. Additional criteria are taken into account by the screening committee and by Parliament. The Federal Constitution requires that special consideration is given so that all official languages of Switzerland are represented in the highest court. Given the political nature of the election process, political affiliation and a candidate's personal legal philosophy are of considerable influence. Generally, the Federal Parliament voluntarily follows an unwritten rule that the Federal Supreme Court is of about the same political composition as the Federal Government. Therefore, a candidate who is not a member of one of the four political parties represented in the Federal Government, even if highly qualified, has only a slight chance to be elected as a Federal Judge. Despite this political election process and the fact that Supreme Court judges are only elected for a period of six years, the independence of the Federal Supreme Court has not been adversely affected. Federal Supreme Court judges are regularly re-elected upon expiry of their terms.

II. Appeal *Stricto Sensu*

This "classical" appeal (*Berufung*) lies against final judgments of the superior cantonal courts which are no longer subject on the cantonal level to any further ordinary means of appeal.[205] It is also available

[205] Article 48 (1) OFJ; "ordinary" appeal means that the term for filing commences with service of the judgment on the aggrieved party.

against interim judgments of such cantonal courts where a violation of Federal jurisdiction norms is alleged[206] and against other interim judgments (including preliminary questions of substance) providing that the test is met that, cumulatively, (i) the Federal Supreme Court could render an immediate final judgment on the case if it were to uphold the appeal and that (ii) thereby the time and the costs saved by the obviation of the necessity to carry out evidentiary proceedings would be so considerable as to warrant immediately invoking the Federal Supreme Court.[207] The appeal is admissible only when the underlying cause of action is derived from private law (*Zivilsache*). Where non-pecuniary rights are at stake, appeal is admissible in all events where the proceedings are contentious and also in the non-contentious proceedings enumerated in Article 44 OFJ. In contentious proceedings concerning pecuniary rights an appeal is admissible regardless of the amount in dispute in the cases set out in Article 45 OFJ, and in all other cases where the amount in dispute is at least CHF 8'000.[208]

The law provides for the following grounds of appeal:

(a) that the court below violated norms of Federal law, including treaties concluded by the Swiss Confederation with other countries.[209] Such norms are violated where a norm either expressed by or inferred by interpretation of Federal law has either not been applied or has been misapplied. The failure to subsume a given fact correctly under a norm of Federal law constitutes a violation thereof;[210]

(b) that the court below failed to apply foreign law in the manner prescribed by the Federal Statute on Private International Law;[211]

(c) that the courts below incorrectly decided that it was not possible to reliably identify the contents of such foreign law;[212] or,

[206] Article 49 (1) OFJ.
[207] Article 50 (1) OFJ.
[208] Article 45 OFJ.
[209] Article 43 (1) OFJ.
[210] Article 43 (4) OFJ.
[211] Article 43a OFJ.
[212] Article 43a (b) OFJ.

(d) where non-pecuniary rights are at stake, that the court below incorrectly interpreted the applicable foreign law.

The appellant must identify which norms of Federal law have in his opinion been violated by the cantonal judgment.[213] The appeal allows a full review *in iure*, but only a very restricted review *in facto*. The appeal must be lodged with the cantonal court whose judgment is the object of appeal within 30 days of service of the judgment on the appellant.[214] Providing the appeal is admissible, the filing of it prevents the cantonal judgment from gaining force of *res judicata* to the extent of the motions brought in the statement of the appeal.[215]

The cantonal court which receives a statement of appeal notifies the opposite party forthwith of the motions and, within one week, forwards the statement, a copy of the judgment under appeal and any previous interim judgments as well as the whole file and any such observations it wishes to make to the Federal Supreme Court.[216] If at the same time an extraordinary means of appeal (such as a nullity appeal) is lodged with a cantonal court against the judgment, then the Federal Supreme Court will stay the appeal proceedings and await the decision of the cantonal court.[217] It will be recalled that a (cantonal) nullity appeal can by definition not concern the violation of Federal law if there is a possibility of appeal to the Federal Supreme Court. If a Constitutional Complaint is filed simultaneously with a classical appeal, the Federal Supreme Court will first deal with the former.[218] During the appeal proceedings the cantonal court retains exclusive jurisdiction for any such provisional measures as might be necessary.[219] If the court unanimously decides that the appeal is inadmissible or unfounded, it dismisses it forthwith.[220] In all other cases, the statement of appeal is served on the defendant who is entitled to file an answer within 30 days.[221] A further exchange of written briefs is

[213] Article 55 (1) (c) OFJ.
[214] Article 54 (1) OFJ.
[215] Article 54 (2) OFJ.
[216] Article 56 OFJ.
[217] Article 57 (1) OFJ.
[218] Article 57 (5) OFJ.
[219] Article 58 OFJ.
[220] Article 60 OFJ.
[221] Article 61 (1) OFJ.

contemplated only in exceptional cases.[222] At the oral hearing each party is entitled to one speech. In exceptional cases, the court can order a further exchange of oral pleas.

The Federal Supreme Court's judgment will either (i) confirm the cantonal judgment, or (ii) quash the cantonal judgment and either replace it with a judgment of its own or refer the matter back to the cantonal court for judgment in the light of the considerations set forth in its judgment.[223]

III. Nullity Appeal

The Nullity Appeal (*Nichtigkeitsbeschwerde*) pursuant to Articles 68–74 OFJ is available as a subsidiary remedy against judgments against which the primary form of appeal is not available because of the lack of the litigious value reaching CHF 8'000. The grounds of appeal are even more limited, being confined to:

(a) that the court below incorrectly applied cantonal law instead of Federal law; or

(b) applied foreign law instead of Federal law or vice versa; or

(c) that the court below failed to apply the system of foreign law called for by Swiss conflict rules; or

(d) failed to ascertain the contents of the foreign law to be applied, or did so, but not with sufficient thoroughness; or

(e) that the court below violated provisions of Federal law (including treaties) concerning jurisdiction.

The statement of appeal must be lodged within 30 days of service of the judgment under appeal. Lodging the appeal does not of itself prevent the cantonal judgment attaining force of *res judicata*, but the president of the Federal Supreme Court can order otherwise, at his discretion making his order contingent upon the furnishing of security by the appellant.[224] The appeal must specify the judgment against

[222] Article 61 (5) OFJ.
[223] Articles 65 and 66 OFJ.
[224] Article 70 OFJ.

which it is directed and contain the appellant's motion, a copy of the judgment and a brief indication of which legal norms have been violated.[225]

The appeal must be lodged with the Cantonal Court, which forwards it to the Federal Supreme Court. Where the Federal judges are unanimous, they can dismiss the appeal forthwith. In all other cases the statement of appeal is served on the defendant who is entitled to file his response within the time limit set by the Court. The Court will subsequently deliberate and give its decision during a public hearing which the parties are at liberty to attend but without being entitled to make any oral pleas. If the Court upholds the appeal, it either quashes the cantonal judgment and refers the matter back to the court below for new judgment or, where questions of jurisdiction are at stake, gives judgment itself.

IV. Constitutional Complaint

Where constitutional rights have been violated in cantonal judicial proceedings, the aggrieved party can apply to the Federal Supreme Court for judicial review (*Staatsrechtliche Beschwerde*).[226] This remedy is absolutely subsidiary, i.e. only available where no other form of Federal appeal is available[227] and when all cantonal means of appeal have been exhausted, save where Articles 58–61 of the Federal Constitution are involved.[228]

The types of violation of constitutional rights which might be invoked can be divided into two broad groups. On one hand there are the guarantees derived from Article 4 of the Constitution, which provide that all are equal before the law. This principle has served as a basis for further guarantees, including the right to be heard, the prohibition of excessive formality, the prohibition of arbitrariness, and the right to adduce evidence in support of one's case. Further constitutional rights of a direct bearing in civil proceedings are

[225] Article 71 OFJ.
[226] Articles 84–96 OFJ.
[227] Article 84 (2) OFJ.
[228] Article 86 (2) OFJ.

contained in the Articles 58–61 of the Constitution. These are the guarantee of an impartial court[229], the principle – which suffers numerous exceptions – that the defendant is to be sued before the courts of his domicile[230], the principle of equal treatment of the citizens of all cantons[231] and the free enforcement of judgments within the Swiss Confederation.[232] Where these latter rights are at stake, it is not necessary (although permissible) to exhaust all cantonal means of appeal before invoking the Federal Supreme Court.

A motion for judicial review must be filed directly with the Federal Supreme Court within 30 days of service of the cantonal judgment.[233] A similar mechanism for unanimous dismissal exists as with the appeal *stricto sensu*.[234] An oral hearing is the exception.[235] If the Federal Supreme Court upholds the motion, it quashes the cantonal judgment and refers the matter back to the court below.

V. Revision

The OFJ also provides for the possibility of a revision (*Revision*) of judgments entered by the Federal Supreme Court.[236] With regard to the grounds that may serve as a basis for revision, reference is made to the remarks made in connection with cantonal proceedings.[237]

[229] Article 58 of the Constitution.
[230] Article 59 of the Constitution.
[231] Article 60 of the Constitution.
[232] Article 61 of the Constitution.
[233] Article 89 (1) OFJ.
[234] Article 92 OFJ.
[235] Article 91 OFJ.
[236] Articles 136 et seq. OFJ.
[237] See *supra* J/V.

L. Enforcement of Domestic Judgments

Article 61 of the Swiss Constitution provides that cantonal courts must enforce decisions rendered in other cantons. Accordingly, § 300 ZH CPC states that decisions are recognized and enforced if they have acquired *res judicata*-effect. Therefore, no difference exists between judgments rendered in the canton of Zurich and any other Swiss canton. No specific decision on the enforceability of such a judgment from another canton is necessary.

As far as the enforcement procedure is concerned, it must be distinguished between monetary claims, which are enforced in accordance with the provisions of the Federal Law on Debt Collection and Bankruptcy (LDCB), and any other types of claims, which are enforced in application of the pertinent provisions of cantonal law. Both types of proceedings are discussed in more depth in the following Chapter M on the Enforcement of Foreign Judgments.[238]

[238] See in particular II.

M. Enforcement of Foreign Judgments

In the field of recognition and enforcement of foreign judgments in civil matters, the Swiss legislature exercised its power to enact uniform regulations only as recently as 1989. The following is a description of the applicable law, and, in particular, the two major bodies of law that must be taken into account for the enforcement of foreign judgments, as well as the procedural rules that apply to enforcement proceedings.

I. Applicable Law

1. The Private International Law Statute

The Federal legislature exercised its power to regulate the enforcement of judgments from foreign countries by enacting the Federal Statute on Private International Law (PIL), which came into force on 1 January 1989.[239] It replaced the previously existing cantonal rules and established uniform Federal rules. The PIL contains not only choice of law rules, but also regulates in a comprehensive fashion for all private law matters jurisdiction of the Swiss courts and administrative bodies as well as the recognition and enforcement of foreign judgments, bankruptcy and composition agreements.

Pursuant to Article 25 PIL, a foreign judgment will be recognized in Switzerland only if all of the following three prerequisites are fulfilled:

(i) The courts or authorities of the state in which the judgment was made had proper jurisdiction;[240] and

(ii) no further ordinary appeal is possible against the judgment; and

(iii) there is no ground for refusal pursuant to Article 27 PIL.

[239] See supra B/II.
[240] See *infra* M/XIII.

2. The Lugano Convention

Switzerland ratified the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 in October 1991, and was one of the first countries to do so. The Convention, whose purpose is to extend the principles of the Brussels Convention of the European Union to other European countries, entered into force on 1 January 1992. As per 1 July 1995, it is applicable between the following countries: Finland, France, Germany, Ireland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. The Lugano Convention has been signed, but not yet ratified by Austria, Belgium, Denmark, Greece and Iceland.

Between signatory states, the Convention supersedes the treaties concluded between those countries and limits, as far as recognition and enforcement of foreign judgements is concerned, the scope of application of the PIL to judgments emanating from countries that have not ratified the Convention.

With regard to foreign judgments rendered in countries that ratified the Lugano Convention, the recognition process is facilitated. Article 26 (1) of the Convention stipulates the general rule of the *ipso jure* recognition of foreign judgments without any special procedure. Article 28, however, lists specific cases in which, exceptionally, the jurisdiction of the foreign court may be re-examined. The grounds for refusal are discussed in XII hereinafter.

II. Procedural Rules

1. For Money Judgments

If the foreign judgment concerns a monetary claim, the procedure is governed by the Federal Law on Debt Collection and Bankruptcy (hereinafter LDCB). Although this statute provides a uniform framework for the proceedings, the cantons have retained the power to designate the competent authorities to act under the rules of the LDCB. If enforcement of a money judgment is sought, it is therefore necessary to consult the Civil Procedure Code of the canton having

jurisdiction over the defendant in order to find out which court or judge will have to be addressed.

According to the rules of the LDCB, the judgment creditor initiates proceedings by an application containing the name and address of the creditor and the debtor and their representatives, the sum of the claim, and an indication of the nature of the claim (see Article 67 LDCB) to the debt collection office at the place of enforcement. The office serves a payment order (*Zahlungsbefehl*) on the debtor, summoning him to pay within twenty days or file an objection (*Rechtsvorschlag*) to the claim within ten days. If the debtor does neither, the creditor can apply that distraint be levied on the debtor's goods forthwith. If the debtor files an objection, the creditor can then apply for the objection to be set aside in summary proceedings (*Rechtsöffnungsverfahren*). It is in the context of these proceedings that the material prerequisites for recognition and enforcement are examined.

2. For Other Judgments

If the judgment does not sound in a money claim (but is e.g. a judgment ordering specific performance or ordering the defendant to relinquish a chattel or to refrain from certain activities), the procedure does not fall under the ambit of the LDCB as just described, but rather under the provisions of Cantonal civil procedure laws regarding the enforcement of non-money judgments. Article 29 PIL contains the following provision as to the enforcement proceedings, which are to be followed and implemented by cantonal procedural laws:

> «1. The application for recognition or enforcement must be filed with the competent authority of the Canton in which the judgment is submitted. The application must be accompanied by:
>
> (a) a complete and notarized copy of the judgment;
> (b) a confirmation that no ordinary appeal lies against the judgment or that the latter is final; and
> (c) in the case of a judgment *in absentia* a document showing that the defeated party was duly served and within sufficient time to enable it to defend itself.

2. In the procedure for recognition and enforcement the party opposing the application must be heard. It may submit evidence.

3. Where a judgment is submitted within the context of a preliminary question, the authority concerned can itself decide the question of recognition.»

It is thus left to the cantons to provide for an enforcement procedure and for appropriate sanctions if the debtor refuses to perform.[241] The following remarks describe the proceedings in the Canton Zurich, but apply also for most other cantons.

The recognition and enforcement procedure takes place before the Sole Judge of the court of first instance (ZH: District Court). He decides in a summary proceeding, the essential feature of which is that, due to the narrow scope of the issues typical for enforcement proceedings, the parties have only limited rights to file evidence. Although there usually is a hearing before the deciding judge, the latter's inquiry is usually limited to an examination of the documents submitted by claimant and the arguments of defendant that can be proven immediately. A party seeking enforcement of a foreign judgment is therefore well-advised to make sure that all required documents and eventual translations and legalizations are filed with the request for enforcement. This also includes, in cases of default judgments, evidence with regard to proper service or notification of the defendant.

The decision of the District Judge can be appealed within ten days to the Court of Appeal of the respective canton. Finally, there is the possibility of filing a Constitutional Complaint (*Staatsrechtliche Beschwerde*) to the Swiss Federal Supreme Court. The scope of review of the Federal Supreme Court is very narrow, with the Supreme Court controlling only whether the Court of Appeal has applied the provisions of the PIL in an arbitrary manner, or, in a given case, whether the attacked decision violates the provisions of a treaty (such as, in particular, the Lugano Convention).

[241] See, e.g. §§ 300 et. seq. ZH CPC.

III. Foreign Judgments

1. Definition

The term "foreign judgment" is not defined in the PIL, but since it refers in Article 25 (1) to "courts" or "authorities" of the state in which the judgment was rendered, it is apparent that the scope of application of the PIL is not limited to decisions rendered by courts, but that its provisions may also be applied if a civil matter was decided by a competent administrative authority.

The Lugano Convention is generally applicable to "civil and commercial matters", without regard to the procedural setting; excluded are tax, customs and administrative matters (Article 1).

A foreign judgment will be recognized and enforced provided that no ordinary appeal is pending or if the judgment is final. An ordinary appeal is an appeal which has a term for filing commencing with the service of the judgment on all of the involved parties and which has suspensive effect. A judgment is considered final, on the other hand, if such appeal is not admissible. The mere possibility of reopening a case under narrowly defined circumstances (e.g. if new evidence is discovered or if the proceeding had been influenced by fraud) does not amount to an appeal in the sense of Article 25 (b) PIL. In order to determine whether a judgment is final in accordance with these principles, recourse must be had to the *lex fori* of the case.

2. Categories of Judgments

The following types of judgments are enforceable in Switzerland, if the requirements mentioned and briefly discussed hereinafter are fulfilled:

(a) Foreign judgments concerning monetary claims are enforceable, if the substantive prerequisites of the PIL or, where applicable, the Lugano Convention are fulfilled, in accordance with the already mentioned procedure governed by the Federal Law on Debt Collection and Bankruptcy (LDCB). Within the framework of this Federal law, the cantons (which are competent to legislate in all matters of civil procedure) may regulate minor details of such procedure.

(b) If a judgment is for specific performance, the material prerequisites of the PIL equally apply. However, the procedure is not governed by the LDCB, but rather by the provisions of the cantonal civil procedure laws regarding the enforcement of non-money judgments. It is thus left to the cantons to provide an enforcement procedure and appropriate sanctions if the debtor refuses to perform. If a defendant is obliged by a judgment to undertake certain acts, the competent public authorities will finally intervene on request of claimant, and authorize substitute performance at the defendant's expense if the latter fails to fulfill his obligations.

(c) There is no conclusive authority such as decisions of the Swiss Federal Supreme Court as to what extent interim injunctions and similar orders of foreign courts fall under the recognition and enforcement rules of the PIL. Fleeting mention of such measures is made in Article 50 PIL, which provides for the recognition of foreign judgments and all measures relating to matrimonial rights and duties. Article 96 (3) PIL provides that precautionary measures ordered in countries in which property of the *de cuius* is situated are recognized in Switzerland.

(d) Article 194 PIL provides that recognition and enforcement of foreign arbitration awards in Switzerland are governed by the New York Convention on Recognition and Enforcement of Arbitral Awards of 1958. Switzerland has been a signatory of this Convention since 1965. The only relevant effect of the enactment of Article 194 PIL in 1989 is a waiver of the First Reservation (limiting the effect of the Convention to countries granting reciprocity) made by Switzerland upon ratification pursuant to Article I(3) of the Convention.

In addition, prior to the signing of the New York Convention, Switzerland had already been a signatory state of the Geneva Protocol of 1923 on Arbitration Clauses and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards of 1958 Convention, and had concluded bilateral treaties with Austria (1960), Belgium (1959), Czechoslovakia (1926), Germany (1929), Italy (1933), Liechtenstein (1968), the former Soviet Union (1948), Spain (1896), Sweden (1936), and former Yugo-

slavia (1948). A party may avail itself of the provisions of such a treaty, if the requirements for enforcement thereunder are less strict than under the New York Convention (see Article VII of the New York Convention).

(e) The PIL contains special jurisdiction rules governing the recognition of foreign judgments regarding family and personal status.[242]

(f) There is still no definite authority on the status of multiple/punitive damage judgments under Swiss law. A Court of First Instance in the Canton of St. Gall held in 1982 that the recognition of a United States treble damages judgment was contrary to Swiss public policy due to the fact that penal elements are foreign to Swiss Civil Law.[243] The Court of Appeals of Basel recently took a more lenient view and upheld a judgment which apparently included punitive damages; the decision went on appeal to the Federal Tribunal, but the appeal was rejected on procedural grounds.[244]

(g) A judgment which is in itself the recognition of a previous foreign judgment may be enforced if it complies with the rules of recognition mentioned *supra*.

(h) The enforcement of judgments against the local state or any of its organs is guided by the general principles of public international law and hence not subject to civil enforcement procedures. Public or state-controlled corporations, however, may not claim sovereign immunity provided that they have a legal personality separate from the state.

(i) The PIL provides for a number of cases where it is sufficient for the recognition of the foreign judgment by Switzerland that the judgment, while not having been rendered in the country which Swiss law would consider to have jurisdiction, is recognized in that country. This is the case for judgments concerning matrimo-

[242] Articles 50, 58, 65, 70, 73/74, 78, 84/85 PIL.
[243] See SJZ 1986, p. 313.
[244] See BJM 1991, p. 31.

nial property,[245] successions,[246] and rights *in rem* in foreign real estate.[247]

(j) Apart from judgments which are against public policy (*ordre public*) there are no final foreign judgments which are not *enforceable* provided that they were based on proper jurisdiction and meet the procedural standards of Article 27 PIL or of the treaty provisions which may be applicable.

IV. Reciprocity

With the introduction of the Federal Statute of Private and International Law, in force since 1 January 1989, the previously prevailing reciprocity criterium has been abolished. It therefore makes no difference whether the country from which a decision emanates would enforce a Swiss judgment under comparable circumstances.

V. Currency Regulations and Restrictions

Switzerland does not have any exchange control regulations or restrictions which would prevent free transfer of any amount which may be recovered as a result of the enforcement of the foreign judgment.

Article 67 (1)(3) LDCB requires that monetary claims are expressed in Swiss Francs for the purposes of enforcement. If the foreign judgment orders payment in a currency other than in Swiss Francs, the amount of foreign currency awarded will be converted into Swiss Francs as of the day the payment order is issued.

VI. Documentary Requirements

According to Article 25 PIL, the application for recognition and enforcement must be filed with the competent cantonal authority and must be accompanied by

[245] Article 58 (1)(a–d) PIL.
[246] Article 96 (1)(a/b) PIL.
[247] Article 108 PIL.

(i) a complete and certified transcript of the judgment;

(ii) a confirmation (from the foreign court or authority) that no ordinary (i.e. suspensive) appeal lies against the judgment or that the latter is final (certificate of indefeasibility); there are no specific rules as to the from of such a confirmation, the decision on which is therefore within the discretion of the competent court;

(iii) in the case of a default judgment, a document showing that the defendant was duly served with the claim and granted sufficient time to conduct its defense.

The cantons providing for the procedural framework for the enforcement proceedings are not empowered to set additional conditions for enforcement.

Although it is preferred that originals of documents are filed, it is sufficient to submit certified copies. As to the form of the certification, it might be advisable to have an apostille affixed thereto. No special requirements apply for companies; the power of the representatives to act has to be proven to the court only if it is disputed by the opposing party. In such a case, a certified extract from the commercial register of the country of domicile of the company is considered sufficient.

VII. Conventions

In addition to the Lugano Convention, Switzerland is a signatory to the following Hague or European Conventions (as of 1 July 1995), some of which directly govern the enforcement of judgments in the pertinent field or contain provisions that are important for the enforceability of judgments:

– The Hague Convention on Civil Procedure, of 1 March 1954;

– The Hague Convention on the Jurisdiction of the Authorities and the Applicable Law in the Field of the Protection of Minors, of 5 October 1961;

– The Hague Convention on the Recognition and Enforcement of Judgements in Matters of Maintenance of Minors, of 15 April 1968;

– The Hague Convention on the Recognition and Enforcement of Divorces and Legal Separation, of 1 June 1970;

– The Hague Convention on the Recognition and Enforcement of Divorces and Legal Separation, of 1 June 1970;

– The European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, of 20 May 1980;

– The Hague Convention on the Civil Aspects of Child Abduction, of 25 October 1980;

– The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, of 15 November 1965;

– The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, of 18 March 1970;

– The Hague Convention on the International Access to Justice, of 25 October 1980;

– The European Agreement on the Transmission of Applications for Legal Aid, of 27 January 1977.

VIII. Authentication of Documents

There is no specific regulation regarding the authentication of documents. As a general guide-line, local courts will consider whether the foreign person who authenticated a document was authorized under his own local laws to do so. This, however, can only be determined on a case by case basis. As a practical advice, foreign parties should therefore always consider to have an apostille affixed (by the competent authority) to the documents.

IX. Translation of Documents

The question of recognition and acceptance of documents in foreign languages is governed by the procedural laws of the canton where

enforcement is sought. Each canton has one or two official languages (German, French or Italian, i.e. the languages spoken in Switzerland). In Zurich, the official language is German.

Generally, the enforcement of judgments in one of those official languages will not require a translation. As far as English is concerned, a judge might be willing to waive the translation requirement if the content of the judgment is clear. In all other cases, a legalized translation of the judgment into the official language of the canton of enforcement will be required. As to the certification of the judgment, there are no specific rules governing this issue; the decision on what certification is sufficient is considered to lie within the discretion of the competent judge.

X. Reopening or Review of Judgments

According to Article 27 (3) PIL as well as Article 29 of the Lugano Convention a foreign judgment may not be re-examined with regard to its merits. If a foreign judgment meets the requirements of Article 26 PIL (jurisdiction) and in the absence of grounds for refusals (Article 27 PIL), the local court will enforce the foreign judgment without further review on the merits.

The only exception to that rule is the public policy (*ordre public*) defense listed in both the PIL and the Lugano Convention. According to the practice developed by the Swiss Federal Supreme Court, there are two forms of violations of public policy. The first is addressed by Article 27 (1) PIL, i.e. a violation of public policy caused by the substantive result of the judgment. The other form is a violation by the manner in which the proceedings which led to the judgment in question were conducted. In both cases, however, the Swiss Federal Supreme Court has emphasized that the concept of public policy must be interpreted in a restrictive manner, and should not be used as a means to undermine the obligation assumed by Switzerland to recognize judgments emanating from other countries.

Allegations of fraud lead to a refusal of enforcement only if the defendant is able to demonstrate to the Swiss court that fraudulent behavior of plaintiff had deprived defendant of an adequate opportunity to present its case to the foreign court. Such a fact would be

considered a violation of the defendant's right to be heard. If, on the other hand, the alleged fraud concerns an issue upon which the foreign court had to decide, such as the veracity of testimony or the authenticity of documents submitted to the foreign court, the defense would not be successful, because the Swiss court would consider this to be a review of the merits of the case.

XI. Pending Proceedings

As mentioned above, a foreign judgment will be recognized and enforced only if no ordinary means of appeal lie against it and provided it is final. Since the risk of conflicting judgments arises as soon as proceedings concerning the same subject matter are pending between the parties before courts of different countries, Article 9 PIL provides for the following rule dealing with the problem of *lis alibi pendens*:

(i) If a lawsuit concerning the same subject matter that is the topic of the suit filed in Switzerland has already been filed abroad, i.e. prior to the filing in Switzerland, the Swiss court shall stay proceedings, if it can be assumed that the foreign court will, within a reasonable time, render a judgment which Swiss law would recognize.

(ii) A lawsuit is deemed filed in Switzerland at the point of time when the first procedural step necessary for the filing is taken. The initiation of conciliation proceedings (as they are mandatory in most Swiss cantons before the lawsuit can be brought before the court) suffices to constitute such step.

(iii) The Swiss court shall dismiss the lawsuit, which has been stayed during the time the foreign court took for its decision, as soon as the judgment rendered by the foreign court is submitted to the Swiss court, provided the foreign judgment is capable of recognition in Switzerland.

If, on the other hand, a lawsuit pending in another country was filed later than the lawsuit before the Swiss court, the Swiss court will continue its proceedings, if the defending party can not successfully plead lack of jurisdiction.

As far as the effects of appeals in the foreign country are concerned, a distinction must be made as to whether the foreign judgment is challenged by an ordinary or extraordinary appeal under the *lex fori*. In case of an ordinary appeal, the prerequisite for recognition that no ordinary right of appeal is available would be lacking and an application for enforcement would consequently be rejected.

Where extraordinary appeal lies against the foreign judgment, it would seem that the domestic courts would only have the power to refuse enforcement

– if a treaty provides that there is neither an ordinary nor an extraordinary right of appeal available to challenge the foreign judgment under the *lex fori*, or

– if the debtor/defendant can prove that the appeal – even though it is an extraordinary appeal – was granted suspensive effect under the *lex fori*.

XII. Defenses

The defendant may introduce any defenses which are appropriate and within the limits of judicial review. The two main sources of law mention the following defenses:

1. According to the Private International Law Statute

Pursuant to Article 27 PIL a foreign judgment will not be recognized in Switzerland:

(a) where recognition would be incompatible with Swiss public policy (*ordre public*);

(b) where a party can prove that it was not validly served with notice of the proceedings either under the law of its domicile or of its habitual residence unless such party submitted unconditionally to the proceedings;

(c) where a party can prove that the judgment was made in disregard of essential principles of Swiss procedural law, in particular where a party was denied its right to be heard; or

(d) where a party can prove that litigation between the same parties about the same matter has been instituted or decided earlier in Switzerland or that the matter has already been decided at an earlier date in a third country and such judgment is capable of recognition in Switzerland.

This list of grounds for refusal is exhaustive. A foreign judgment may not be examined with regard to its merits.[248]

2. Under the Lugano Convention

The grounds for refusal listed in the Lugano Convention are more restrictive and set out in Articles 27 and 28 of the Convention. According to those provisions, recognition of a judgment from another contracting state may only be refused:

(a) where recognition would be against Swiss public policy (*ordre public*);

(b) where the judgment was given in default, and the defendant was not duly served and in a timely manner to sufficiently prepare its defense;

(c) where the foreign judgment conflicts with an earlier Swiss judgment;

(d) where the court decided a preliminary question concerning personal status, matrimonial property rights, wills or succession in a manner incompatible with the private international law of Switzerland;

(e) where the judgment is in conflict with an earlier judgment in a non-contracting state, if the latter judgment fulfills the conditions necessary for its recognition;

(f) where the judgment is in conflict with the jurisdictional provisions contained in the Convention.

Switzerland has made a reservation to the Lugano Convention in Article 1 (a) of Protocol No. I thereto, which allows Switzerland to

[248] Thus, expressly, Article 27 (3) PIL.

refuse recognition of judgments rendered against a resident of Switzerland in the country of the place of performance of a contract, where the court based its jurisdiction on the place of performance.[249] This reservation, which is valid until 31 December 1999, had to be made because of Article 59 of the Swiss Federal Constitution, which provides that a debtor domiciled in Switzerland must be sued for personal debts at his domicile. By that date, Switzerland should amend that article of the Constitution accordingly.

XIII. Jurisdiction of the Deciding Court

The Swiss courts must examine *ex officio* whether the courts or authorities of the states in which the judgment was entered had proper jurisdiction.

1. Rules in the Private International Law Statute

(i) The PIL contains several rules indicating the circumstances under which Switzerland will recognize the jurisdiction of foreign authorities for the purposes of recognition and enforcement (so-called "indirect" jurisdiction). As a *general rule*, the jurisdiction of foreign authorities is recognized where it is provided for by provisions of the PIL or, failing this, where the defendant was domiciled in the country of judgment. Furthermore, special jurisdiction rules govern specific, usually non-commercial matters.

(ii) With regard to claims based on the law of obligations, Swiss law broadens the jurisdiction of foreign courts.[250] In particular, a foreign judgment is recognized provided that it was rendered:

(a) in the country where the defendant was resident, or

(b) in the country in which the defendant was habitually resident, the claims being connected with an activity carried out at that place;

[249] Article 5 (1) of the Convention.
[250] Article 149 PIL.

(c) where it relates to performance under a contract, in the country in which such performance is to be effected, if the defendant is not resident in Switzerland;

(d) where it relates to claims arising from consumer contracts, at the consumer's habitual residence;

(e) where it relates to claims arising from an employment contract, at the place where work was performed or the place of operation, always provided the employee was not resident in Switzerland;

(f) where it relates to claims arising from the operation of a business, at the place of business;

(g) where it relates to claims arising from unjustified enrichment, at the place where the activity leading to the enrichment occurred or took effect, always provided the defendant was not resident in Switzerland, or

(h) where it relates to claims arising from a tort, at the place where the tort was committed or where the damages occurred, always provided the defendant was not resident in Switzerland.

(iii) Foreign judgments regarding the insolvency (bankruptcy) of a debtor are recognized in Switzerland, provided that the reciprocity requirement is met (Articles 166 et seq. PIL). The liquidation of assets located in Switzerland and their transfer to the foreign bankrupt's estate can only be effected under certain safeguarding measures designed to protect creditors residing in Switzerland.

(iv) The PIL contains an extensive list of foreign jurisdictions which are recognized in the field of family and personal status law.[251]

[251] Foreign judgments or orders relating to matrimonial rights and duties of the spouses (measures for the protection of the conjugal union) (Article 50 PIL); matrimonial property rights (Article 58 PIL); divorce and judicial separation (Article 65 PIL); establishment or the contestation of the parental relationship (Article 70 PIL); recognition of an acknowledgement of the paternity of a child or of a declaration of legitimacy made abroad (Article 73/74 PIL); adoptions and similar acts (Article 78 PIL); relationship between parents and children (Article 84 PIL); protection of minors (Article 85 PIL).

(v) With regard to monetary claims, Article 26 PIL states that Swiss courts will recognize the jurisdiction of foreign courts or authorities to which the parties have submitted by agreement and in conformity with the requirements set forth in Article 5 PIL. The latter provision defines the formal minimum standard to be met in order that a prorogation agreement be recognized as a basis of indirect jurisdiction under Swiss law; the jurisdiction agreement must be in writing (including telegram, telefax or any other form enabling the proof of the agreement in text), and must not deprive a party of its Swiss forum provided under Swiss Law to protect that party.

(vi) Swiss law recognizes the jurisdiction of foreign courts and authorities over claims where the defendant submitted unconditionally to the proceedings, i.e. by pleading on the merits of the case without raising a plea of non-jurisdiction or by subsequently retracting such plea. A party, however, who expressly contests jurisdiction while also defending itself on the merits in the foreign court is not deemed to have submitted unconditionally to the proceedings and can still raise the lack of jurisdiction as a defense in the enforcement proceedings.

(vii) A foreign judgment granted by default is only treated differently from any other kind of judgment if the facts that lead to the default judgment are such that they are qualified as a ground for refusal under the generally applicable rules (see *supra* M/XII). Swiss law does not provide any general criteria defining a possible default.

(viii) The Swiss court will determine the validity of a contractual choice of jurisdiction clause by applying Swiss law. If the Swiss court comes to the conclusion that the jurisdiction clause is not valid, it will refuse enforcement for lack of jurisdiction of the foreign court.

(ix) The enforcement of a foreign judgment in Switzerland serves no useful purpose if the defendant is not a citizen or resident of Switzerland, or at least owns assets or conducts a business in Switzerland. If enforcement of a judgment is sought against a defendant lacking all of these ties to Switzerland, the court

might refuse to grant recognition because it considers that the claimant does not have a legitimate legal interest in the recognition of the foreign judgment by Swiss courts.

2. Rules in the Lugano Convention

(i) Generally, the Convention is based on the principle that a defendant must be sued at its seat or domicile.[252]

(ii) The Convention contains in Articles 5 to 18 a comprehensive list of jurisdictional provisions that deviate from the domicile principle. Some of the provisions are discussed hereinafter.

(iii) A party to a contract can be sued at the place of performance of its contractual obligations.[253] This provision violates the reservation expressed by Switzerland,[254] and is therefore for the time being not applicable for residents of Switzerland. A judgment where the foreign court based its jurisdiction thereon would not be enforceable in Switzerland.

(iv) For monetary claims it is important to note that courts have jurisdiction at the place where a tort was committed,[255] at the place where criminal proceedings take place for connected civil claims,[256] and at the place where a defendant has a branch or representative office.[257]

(v) Article 6 deals with claims that can be brought before a court which already has jurisdiction for other reasons, such as counter-claims, cases with several defendants, etc.

(vi) Special rules are applicable to claims arising out of consumer and insurance contracts.[258]

[252] Article 2.
[253] Article 5 (1).
[254] See *supra* M/XII.2.
[255] Article 5 (3).
[256] Article 5 (4).
[257] Article 5 (5).
[258] Articles 7 to 15.

(vii) Exclusive jurisdiction is conferred (1) to the *fori rei sitae* for *in rem* actions;[259] (2) to the courts at the seat of a company for matters regarding the validity and dissolution of that company and actions of its organs,[260] and, (3) where entries into public registers or patent/trademark registrations are concerned, to the courts at the place where the register is kept.[261]

(viii) Articles 17 and 18 state that jurisdiction clauses concluded by the parties and the unconditional appearance of the defendant party are sufficient basis for the jurisdiction of a court in a contracting state.

XIV. Contractual Waivers of Service or Notice

A prior contractual waiver of service or notice is not a usual practice in Switzerland, and it is highly unlikely that such a waiver would be recognized and followed by a Swiss court.

Faced with a request for recognition and enforcement of a foreign judgment where the defendant has waived his right to be served or notified of the proceedings, a Swiss court would certainly refuse enforcement if the court concluded that the defendant's essential rights to be heard and to participate at the proceedings were impaired. It must be recalled that proper notice and the right to be heard are considered core elements of Swiss procedural public policy (*ordre public*) and both requirements are listed in Article 27 PIL as grounds for refusal of enforcement if violated.[262]

XV. Service Requirements

In the absence of violations of Swiss procedural public policy (*ordre public*), a Swiss court would respect the legal order of a foreign jurisdiction with regard to procedural rights. In order to pass the public

[259] Article 16 (1).
[260] Article 16 (2).
[261] Articles 16 (3) and (4).
[262] See *supra* M/XII.

policy test, the Swiss judge must be satisfied by evidence that the defendant was indeed notified of the foreign proceedings and the claims raised and factual allegations made by plaintiff. This includes the opportunity for defendant to take knowledge of the content of the briefs submitted by plaintiff (which therefore will have to be translated into the language of defendant) and due notice in advance of court hearings. In that connection, evidence of proper service should be submitted.

The primary source of law to consult for the appropriate way of notification is the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, of 15 November 1965, but other Hague Conventions contain rules as well.

XVI. Interest

In terms of the original judgment, the Swiss courts will recognize the interest awarded by the court as long as such interest does not violate Swiss public policy. It may be assumed that interest in excess of 18% *per annum* would be considered against Swiss public policy.

Statutory interest at 5% *per annum* from the day of the debtor's default can be recouped in the enforcement proceedings, if no other rate of interest has been agreed upon. The excess must be made the object of a separate action.

XVII. Time of Enforcement and Subsequent Action

It is very difficult to estimate the time required until a decision on recognition and enforcement is obtained, because this depends strongly on the case load of the court at the place of enforcement. Generally, for both money-judgments and other judgments, three months should be a reasonable estimate for the duration of the proceedings before the first instance. If the decision of the first instance is appealed by defendant, the appeal might take another three to six months. Finally, a Constitutional Complaint to the Swiss Federal Supreme Court will result in another delay of approximately six months.

Once enforcement is granted, money judgments are enforced in accordance with the rules contained in the LDCB. If defendant is a corporation or an individual registered as a merchant in the Commercial Register, the defendant is subject to a filing of claimant for bankruptcy, which leads to an automatic attachment of the entirety of the defendant's assets. If an individual is not registered in the Commercial Register, he is subject to the rules on bankruptcy only at his own request. Otherwise, the claimant can request the enforcement authorities for an attachment and subsequent liquidation of specific assets of the defendant, which leads to seizure of such assets, i.e. movables, immovables, claims etc., up to a value equal to the claim in question. There will be no civil imprisonment or restraint on leaving the country.

XVIII. International Treaties

In addition to the Lugano Convention, which has already been described above, four bilateral treaties are in force with the following countries: Belgium (Treaty of 29 April 1959), Austria (Treaty of 16 December 1960), Liechtenstein (Treaty of 25 April 1968); the Swiss-Czechoslovakian Treaty of 14 December 1896 is being applied with the two new republics which emerged out of the former Czechoslovakia. With the Czech Republic, Switzerland has already agreed formally on the future application. With the Slovak Republic, these negotiations are still ongoing.

XIX. New Action Instead of Enforcement

If the cause of action led to a judgment, the case is considered *res judicata*. A Swiss court would dismiss a new action on the original cause of action if the defendant raises the *res judicata* defense. In practice, it is highly unlikely that a defendant would raise such defense, since it would imply that the defendant recognizes the validity of the foreign judgment.

If, on the other hand, the foreign judgment would be considered unenforceable in Switzerland, a new action on the original cause of

action is possible. The question as to the period of limitation must be answered based on the substantive law applicable to the merits of the dispute.

N. Arbitration

I. General Remarks

Switzerland has a long-standing tradition in international arbitration, which is based on its geographical position in the center of Europe, its neutrality and political stability. For these reasons, Switzerland has for a long time frequently been chosen as a forum for international arbitrations.

There are two general types of arbitrations, namely *institutional arbitration*, i.e. arbitration administered by an institution such as the International Chamber of Commerce (ICC) in Paris[263] or one of the Swiss Chambers of Commerce[264], and *ad hoc arbitration*, where the tribunal is formed based on, and in application of, provisions found in the agreement of the parties.

Switzerland is also the seat of two rather new important arbitation organizations, namely the *Tribunal Arbitral du Sport* in Lausanne, which was established in 1984 under the umbrella of the International Olympic Committee (IOC), and the Arbitration Center of the World Intellectual Property Organization (WIPO) in Geneva, which opened in 1994, and has as its goal to provide services for conciliation and adjudication of disputes concerning intellectual and industrial property rights.

Another institution that should be mentioned is the Swiss Arbitration Association (ASA), an organization assembling more than 600 members from Switzerland and other countries; most of the members are attorneys or law school professors who are active in the field of arbitration as counsel to parties in arbitral proceedings or as

[263] Although the ICC has its headquarters in Paris, a large number of arbitral tribunals under the auspices of the ICC have their seat elsewhere, and Switzerland is one of the most frequent venues for proceedings.

[264] The most important of the Chambers of Commerce administering institutional arbitration in Switzerland is the Zurich Chamber of Commerce; in addition, the Chambers of Commerce of Geneva, Basle, Bern and Lugano as well as the Swiss-American Chamber of Commerce in Zurich and the Chamber of Commerce Germany-Switzerland, also in Zurich, provide for arbitration. For a set of their arbitration rules, contact the respective organization.

arbitrators. The purpose of ASA is to further the interests of domestic and international arbitration, e.g. by organizing conferences and working sessions at the occasion of which problems of arbitration are discussed and information is exchanged. In addition, ASA publishes the ASA Bulletin, a quarterly review containing articles and notes on arbitration law (mostly in English and French) as well as recent arbitral awards and court decisions involving arbitration matters, such as the recognition and enforcement of arbitral awards.[265] ASA does not, however, administer arbitration itself.

A detailed discussion of domestic and international arbitration in Switzerland would lead far beyond the scope of this introduction, which focuses on commercial (court) litigation. Reference is therefore made to the numerous publications on arbitration in Switzerland (some also in English), a selection of which are mentioned in the bibliography in Chapter O hereinafter. In the following two sections, we will limit ourselves to demonstrate the issues arising out of commercial arbitrations that can be subject to court proceedings in Switzerland.

II. Domestic Arbitration

Arbitration between parties that are domiciled in Switzerland is referred to as domestic arbitration. It is governed by the Concordat on Arbitration of 27 March 1969 (*Konkordat vom 27. März 1969 über die Schiedsgerichtsbarkeit*), which has been ratified by all 26 cantons. It is therefore applicable to all arbitral tribunals having their seat in the territory of Switzerland, unless one of the parties had its domicile or habitual residence outside of Switzerland at the time the arbitration agreement was concluded; in the latter case, the provisions of Chapter 12 of the Private International Law Statute (PIL) would apply.[266]

The Concordat provides in Article 3 that the "upper ordinary civil court of the canton, in which is located the seat of the arbitral

[265] For information on ASA and the ASA Bulletin, please contact the office of the ASA at *St. Alban-Graben 8, 4001 Basel*.

[266] See Article 176 PIL; for discussion of the provisions applicable to international arbitration, see *infra* III.

tribunal" is the competent authority having the following powers:

(a) to nominate the arbitrators if they are not designated by the parties or another authority is not mandated by the parties for that task;

(b) to decide on challenges and objections to arbitrators and on their replacement;

(c) to prolong the term of the arbitrators;

(d) to assist in evidentiary measures on request of the tribunal;

(e) to accept the arbitral award for deposition and for service to the parties;

(f) to decide on nullity appeals and Requests for Revision;

(g) to certify the enforceability of the arbitral award.

The competent authority in the Canton of Zurich to assist in evidentiary measures is the District Court at the seat of the arbitral tribunal, whereas in all other cases mentioned in Article 3 of the Concordat the Court of Appeals is the competent authority.[267]

Apart from a possible court assistance in evidentiary measures, courts play a role in arbitration proceedings usually only at the outset, if they have to appoint an arbitrator because the parties cannot agree on the person of the (sole) arbitrator, if one party does not designate its arbitrator, or if the party-appointed arbitrators cannot agree on a chairman. The proceedings before the arbitral tribunal are governed by the agreement of the parties (i.e. the institutional arbitration rules chosen by the parties) or determined by the tribunal itself.[268] Provisional and interim measures can only be ordered by courts, unless the parties voluntarily submit to the measures proposed by the arbitral tribunal.[269]

The second field where the involvement of the courts becomes important is if one of the parties is dissatisfied with the award rendered by the arbitral tribunal, and therefore seeks to bring an appeal against that decision. The Concordat provides that a nullity

[267] § 239 ZH CPC.
[268] Article 24 Concordat.
[269] Article 26 Concordat.

appeal can be brought against an arbitral award based on the following grounds:[270]

(a) that the arbitral tribunal was not duly composed;

(b) that it had incorrectly affirmed or denied its jurisdiction;

(c) that it had decided points that were not submitted to it or had not adjudicated a claim that was raised by a party;

(d) that a mandatory procedural rule in the sense of Article 25 of the Concordat[271] was violated;

(e) that the tribunal has adjudicated in favour of one party more or something else than this party had requested;

(f) that the arbitral award is arbitrary, because it is based on an obviously incorrect factual assumption or contains an obvious violation of law or equity;

(g) that the arbitral tribunal had decided after expiry of its term;[272]

(h) that the arbitral award does not fulfill the formal requirements of Article 33 of the Concordat[273] or that the holding of the award is not intelligible or is contradictory;

(i) that the remuneration of the arbitrators fixed by the arbitral tribunal is obviously too high.

The nullity appeal based on one or several of these grounds must be filed within 30 days after service of the arbitral award with the competent Court of Appeals at the seat of the arbitral tribunal.[274] If it

[270] Article 36 Concordat.

[271] This provision provides that in any case equal treatment of the parties must be guaranteed, which means in particular that the right to be heard, to inspect the file, to be present at evidentiary and oral hearings and to be represented by a representative of choice must be respected.

[272] Article 16 of the Concordat provides that the parties can limit the term of the office of the arbitral tribunal.

[273] This provision provides that the arbitral award must contain at least the following information: the names of the arbitrators and the parties, the seat of the tribunal, the claims and motions by the parties, the underlying facts and the legal reasons, a ruling on cost and attorney's fees, and the date and signatures of (at least the majority of) the arbitrators.

[274] Article 37 Concordat.

finds that the appeal is well-grounded, the Court of Appeals will set aside the award and remand the case for new decision to the arbitral tribunal. If the appeal concerns only the cost of the proceedings, the Court of Appeals itself decides on the remuneration of the arbitral tribunal.[275]

In addition to the nullity appeal, the Concordat provides for the possibility of a request for revision (*Revision*), which can be brought within 60 days of the discovery of a ground for revision, such grounds being (i) that the arbitral award was influenced by criminal actions which were the subject of a criminal judgment (unless such criminal proceeding is not possible), or (ii) that the arbitral award was rendered in ignorance of the existence of relevant facts or means of evidence, which could not have been brought to the attention of the arbitral tribunal by the party requesting revision.[276] Such a request for revision can only be brought within five years since notification of the arbitral award.

On request of one of the parties, the Court of Appeals confirms the enforceability of the arbitral award if both parties have recognized it, no nullity appeal has been brought against it, or such nullity appeal was not granted suspensive effect or has been dismissed.

III. International Arbitration

Commercial arbitration is governed by Chapter 12 of the Private International Law Statute if it qualifies as international, which means that at the time the arbitration agreement was concluded at least one party had its domicile or habitual residence outside Switzerland.[277] These regulations entered into force on 1 January 1989. Compared to the provisions of the Concordat (who are still applicable to purely domestic arbitrations), Chapter 12 has been described as a significant step towards liberalism, and thus serving the purposes and intentions of international arbitration. It provides for a higher degree of immunity of arbitration from intervention of state courts than the Concordat.

[275] Article 40 Concordat.
[276] Articles 41 et seq. Concordat.
[277] Article 176 PIL.

Nevertheless, the parties might still call upon state courts if necessary, for example for the appointment as well as for challenges of the arbitrators;[278] the arbitral tribunal can also refer to state courts for assistance to enforce provisional and securing measures during the arbitral proceedings as well as for the taking of evidence.[279]

The most significant difference between the provisions of Chapter 12 of the PIL governing international arbitration and the Concordat is that the grounds for a nullity appeal are more restrictive. Such an appeal can be filed with the Federal Supreme Court under the rules applicable to the Constitutional Complaint (*Staatsrechtliche Beschwerde*) as contained in the OFJ.[280] As grounds for an appeal, Article 190 PIL lists the following:

(a) if a sole arbitrator was appointed or the arbitral tribunal was composed in violation of the applicable rules;

(b) if the arbitral tribunal has incorrectly affirmed or denied its jurisdiction;

(c) if the arbitral tribunal has decided matters that were not submitted or has not decided submitted claims or requests;

(d) if the principle of equal treatment of the parties or the right to be heard has been violated;

(e) if the decision is incompatible with public policy.

Preliminary awards can only be attacked based on the grounds mentioned in al. (a) and (b).[281]

An important feature is that parties without domicile or habitual residence in Switzerland may, by express declaration, exclude the possibility of an appeal or at least specific grounds mentioned in Article 190 PIL.[282] For recognition and enforcement of foreign arbitral awards the New York Convention of 1958 is generally applicable.[283]

[278] Articles 179/180 PIL.
[279] Articles 183 et seq. PIL.
[280] Article 191 PIL; see *supra* K/IV.
[281] Article 190 PIL.
[282] Article 192 PIL.
[283] Article 194 PIL.

O. Literature

The following is a list of publications dealing with the issues discussed in this introduction. In addition to few English books on Swiss law, we have included some of the most important books in German (and French) on commercial litigation and arbitration.

I. English

AUF DER MAUR, ROLF	*Introduction to Swiss Intellectual Property Law*, Basle 1995.
BLESSING, MARC	*The New International Arbitration Law in Switzerland*, in: Journal of International Arbitration, Vol. 5 No. 2 (June 1988).
BUCHER, ANDREAS/ TSCHANZ, PIERRE-YVES	*International Arbitration in Switzerland*, Basle 1989.
DORSAZ, BERNARD	*Enforcement of Money Judgments in Switzerland*, in: Enforcement of Money Judgments Abroad, New York 1988.
PESTALOZZI, GMUER & HEIZ (ed.)	*Business Law Guide to Switzerland*, Wiesbaden 1991.
VOGT, NEDIM PETER	*Swiss Report*, in: Pre-Trial and Pre-Hearing Procedures Worldwide, London 1990.
VOGT, NEDIM PETER/ BERTI, STEPHEN V.	*Swiss Report*, in: Trial and Court Procedures Worldwide, London 1991.
VOGT, NEDIM PETER/ BERTI, STEPHEN V.	*Swiss Report*, in: Civil Appeal Procedures Worldwide, London 1992.

VOGT, NEDIM PETER/
BERTI, STEPHEN V. *Swiss Report*, in: Enforcement of Foreign Judgments Worldwide, London 1993.

II. German

AMONN, KURT *Grundriss des Schuldbetreibungs- und Konkursrechts*, 5th ed. Bern 1993.

GULDENER, MAX *Schweizerisches Zivilprozessrecht*, 3rd ed. Zurich 1979.

HABSCHEID, WALTHER J./
BERTI, STEPHEN V. *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht*, 2nd ed. Basle 1990.

HEINI/KELLER/SIEHR/
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