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Appeals 2021

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Appeals*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mark A Perry and Perlette Michèle Jura of Gibson, Dunn & Crutcher LLP, for their continued assistance with this volume.



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JURISDICTION

Court system

1 | Outline and explain the general structure of your country's court system as it relates to the commercial appellate process.

In Switzerland, commercial matters are handled by civil courts. Typically, in the Swiss civil court system there are three instances of the courts. In commercial matters, there are, however, often only two (a higher cantonal court or commercial court and the Federal Supreme Court). Civil law disputes concerning patents (for instance, litigation over patent validity and patent infringement) are handled by the Federal Patent Court.

The Federal Civil Procedure Code (CPC) applies to all civil proceedings before cantonal courts. The structure of the court system is regulated independently in each of the 26 cantons, but remains similar in most cantons. Generally, there is a conciliation authority, cantonal court or courts of first instance and a cantonal court of second instance. Article 75 of the Act on the Federal Supreme Court (FCA) requires the cantons to appoint 'higher courts that decide as courts of appeal' as the last cantonal courts. Decisions of the first cantonal instance can be appealed before the second cantonal instance.

The Swiss civil procedure system, as it relates to commercial disputes, provides for various legal remedies:

- appeal, objection, revision, clarification and rectification in the proceedings before the cantonal courts; and
- appeal in civil matters, subsidiary constitutional appeal, revision, clarification and rectification with regard to proceedings before the Federal Supreme Court.

The most relevant legal remedies are the appeal and the objection in the proceedings before the cantonal courts, and the appeal in civil matters to the Federal Supreme Court. The other legal remedies are discussed where appropriate.

At the cantonal level, the appeal is the main and full legal remedy, for example, against a decision of a court on the merits of a case; whereas, the objection is a subsidiary legal remedy with certain limitations, for example, against procedural rulings of a court.

The decisions of the last cantonal instance and the Federal Patent Court can be appealed before the Federal Supreme Court (article 72 of the FCA). The appeal in civil matters before the Federal Supreme Court is subject to certain conditions. Generally, a minimum value of the claim is required (15,000 Swiss francs in employment and tenancy law cases; 30,000 Swiss francs in any other cases). This minimum value of the claim is not required:

- if a fundamental point of law is at stake (which the Federal Supreme Court accepts to be the case only on rare occasions);
- if a federal law provides for a single cantonal instance;

- against decisions of the Federal Patent Court; and
- in certain debt collection and bankruptcy matters.

The appellant must have participated in the proceedings before the previous instance (or not have been given the opportunity to participate) and show that he or she has been particularly affected by the appealed decision and has an interest worthy of protection in its annulment or amendment.

Swiss civil procedure law is strongly oriented towards written procedure, which is particularly true in appeal proceedings.

Civil matters

2 | Are there appellate courts that hear only civil matters?

Generally, the same courts decide on civil and criminal (and, in the case of the Federal Supreme Court, also administrative) law appeals. However, appellate courts are usually organised in different chambers that are specialised in civil, criminal or administrative law.

Appeals from administrative tribunals

3 | Are appeals from administrative tribunals handled in the same way as appeals from trial courts?

No. Administrative proceedings and appeals in administrative matters are different from those applicable in civil law matters. Administrative matters are subject to separate procedural codes and rules and are primarily handled by administrative courts. Administrative courts exist on the cantonal as well as the federal level. One main difference of administrative appeal proceedings compared to civil litigation is that in administrative law, the principle of official investigation by the court typically applies (although, in practice, it is still the parties that present the facts of the case to the courts).

Representation before appellate courts

4 | Is there a separate appellate bar or other requirement for attorneys to be admitted before appellate courts?

No. Every attorney licensed in Switzerland may file appeals before all cantonal appellate courts and appeals in civil matters before the Federal Supreme Court. However, there are many procedural hurdles and peculiarities to consider in appeal proceedings, and the chances of success depend highly on the attorney's skills and experience. The practice of the cantonal appellate courts varies somewhat and it is an advantage if the attorney is familiar with their requirements and their approach to appeal procedures.

Appeals to the Federal Supreme Court are particularly challenging, because review by the Federal Supreme Court is statutorily limited to arbitrariness and legal errors but does not generally include a reassessment of the facts of the case. In practice, the Federal Supreme

Court strictly adheres to these legal restrictions and, therefore, rejects a substantial number of appeals, including many appeals drafted and submitted by attorneys, on formal grounds. A common mistake before the Federal Supreme Court is, for example, just to repeat the legal reasoning already invoked before the lower court, without addressing in detail which parts of the lower court's (contrary) reasoning are in breach of law.

Multiple jurisdictions

5 | If separate jurisdictions exist for particular territorial subdivisions or subject matters, explain their main differences as to commercial appeals.

The organisation of the court system at the cantonal level is governed by cantonal law and, thus, is different in every canton. Larger cantons typically have several district courts of first instance. Smaller cantons often have only one court of first instance for their entire territory. The main features of the court systems as they relate to appeals are defined in federal law and are, therefore, identical in all cantons.

In commercial matters, substantive and procedural law is unified on a federal level. A licensed attorney may appear before any court in Switzerland.

For certain matters, jurisdiction is assigned by federal law to only one sole cantonal instance (article 5 of the CPC), which means that the claim must be brought directly before the cantonal high court. Consequently, there is no appeal at the cantonal level. Article 5 of the CPC applies, in particular, to disputes relating to:

- intellectual property;
- antitrust and certain unfair competition matters;
- the use of a company name;
- the appointment of a special auditor for a joint-stock company; or
- certain disputes related to financial market laws.

Of particular relevance are designated commercial courts. Certain cantons (Zurich, St Gallen, Bern and Aargau) have designated commercial courts that have jurisdiction as the sole cantonal instance for commercial disputes (article 6 of the CPC provides this as an option for the cantons). A dispute is considered a commercial dispute if:

- it concerns the commercial activity of at least one party;
- the decision is subject to an appeal in civil matters to the Federal Supreme Court; and
- at least the defendant is registered in the Swiss Commercial Register or in an equivalent foreign register (if the plaintiff is not registered in a commercial register, he or she may choose between the commercial court and the ordinary court).

The cantons can also assign to the commercial court the matters in the responsibility of the sole cantonal instance (see above) and disputes relating to the law of commercial companies and cooperatives. The commercial courts are highly specialised. For example, the Zurich Commercial Court, besides a chamber for mixed industries, has specific chambers for:

- banks and insurances;
- revision and fiduciary services;
- construction and architecture;
- chemistry, pharmaceuticals and drugstores;
- foodstuffs and stimulants;
- machinery and electrical industry;
- competition and intellectual property;
- overseas and wholesale trade and haulage; and
- the textile industry and trade.

The judicial body consists of judges (usually of the cantonal appellate court) and lawyers, as well as representatives from the corresponding industries.

In matters decided by a sole cantonal instance or by a commercial court, there is no appeal or objection at the cantonal level and only appeals to the Federal Supreme Court are available. Appeals to the Federal Supreme Court are generally limited to questions of law and only allow for a reassessment of the material facts of the case under very narrow circumstances. Depending on the case, the lack of a full legal remedy may be a drawback, especially because some commercial courts tend to be stricter regarding the procedural requirements for the substantiation of facts than the ordinary courts of first instance. This high hurdle, in combination with the very limited review of questions of fact by the Federal Supreme Court, make the choice of an experienced attorney all the more important. In general, however, jurisdiction of a sole cantonal instance or a commercial court is considered an advantage because the case will be decided by a professional panel of judges with specialist experience within a relatively short period of time.

In monetary disputes with a value of at least 100,000 Swiss francs, the parties can agree that the action shall be filed directly before the higher cantonal court, which then decides as the sole cantonal instance (article 8 of the CPC) (ie, only an appeal in civil matters to the Federal Supreme Court is possible).

BRINGING AN APPEAL

Deadlines

6 | What are the deadlines for filing an appeal in a commercial matter?

Generally, an appeal or objection in a civil law matter must be filed within 10 or 30 days, depending on a number of factors, such as the procedure and type of decision. Owing to the somewhat complicated legal framework applicable to appeals, other legal remedies and the applicable deadlines, an attorney must, as a first step after receiving a court decision, examine carefully which legal remedy can be lodged and within what time limit.

For appeal proceedings at the cantonal level, the deadline, for example, depends on the applicable procedure (ordinary proceeding or summary proceeding) and on the applicable legal remedy in question (appeal or objection).

A case is handled in the ordinary proceeding unless the law provides that the summary proceeding applies. The ordinary proceeding includes the two subtypes: regular ordinary proceeding and simplified proceeding, the latter applying if the value of the claim does not exceed 30,000 Swiss francs. The summary proceeding is generally faster than the ordinary proceeding and often applies in situations where only a provisional ruling is required; for example, for interim measures, but also for a rather lengthy catalogue of specific claims detailed in the Federal Civil Procedure Code (CPC).

Appeals or objections against final and interim decisions in ordinary proceedings must be filed within 30 days. Appeals or objections against decisions in summary proceedings (including interim measures) must be lodged within 10 days, as well as objections against procedural rulings.

If a court renders its decision without written reasoning (which is possible according to article 239 of the CPC), the litigant who wishes to appeal must request the court to provide written reasons within 10 days, and the deadline for the appeal only starts once the court has served the parties with its fully reasoned judgment. If no fully reasoned judgment is requested, this is deemed to be a waiver of the appeal or an objection against the decision.

For appeals to the Federal Supreme Court in commercial civil disputes, the deadline is 30 days from the receipt of the full decision (there are certain exceptions where shorter deadlines apply; however, those are not relevant for the commercial civil disputes within the scope of this publication).

The appeal must be filed no later than the last day of the deadline, either by filing with the court, or by handing over to Swiss Post or a diplomatic mission or consular office of Switzerland. Electronic submissions are possible for registered users, but remain uncommon in Switzerland. While it is possible that more electronic submissions have been made during the pandemic due to remote working recommendations, the rules for electronic submissions have not been relaxed. There is currently a reform proposal pending that would make electronic submissions mandatory but it is not expected to take effect before 2027. The deadlines for appeals are defined in the law and the courts are neither allowed nor able to grant deadline extensions. The law defines certain judicial vacations during which the deadlines usually stand still (however, not in all matters; for example, not in cases concerning interim measures).

The courts are required by law to provide in their decisions instructions on the right of appeal and the deadlines (article 238 of the CPC and paragraph 1, article 112 in connection with article 117 of the Act on the Federal Supreme Court). According to practice, the courts only have to mention the classical legal remedies (appeal, objection, appeal in civil matters or subsidiary constitutional appeal respectively). Owing to the somewhat complicated legal framework applicable to appeals, the other legal remedies and the applicable deadlines, it does happen in practice that the courts' instructions are incorrect. The law generally states that this shall not be to the detriment of the litigants. However, the appellate courts do not allow parties represented by a lawyer to rely on the correctness of a court's instructions. On the contrary, they expect lawyers to ascertain whether a court is mistaken and to file the appeal within the correct deadline regardless of the incorrect instructions of the lower court. The correctness of the instructions on the right to appeal in court decisions, and in particular the applicable deadlines, must, therefore, be double-checked diligently.

Procedural steps

7 | What are the key steps a litigant must take to commence an appeal?

An appeal in a civil law case is always directed at the next higher instance and must already contain the comprehensive rationale for the appeal (ie, the appellant must file a fully fledged submission, not merely a notice of appeal). The appellate court will usually require the appellant to pay a deposit for the expected court fees and then serve the appeal to the opposing party and ask for a response. The appellate court will also usually inform the lower instance court that its decision has been appealed.

Documentation

8 | How is the documentation for appeals prepared?

It is theoretically possible to refer to the records of the lower instance court, and often appellate courts will have the lower instance courts transmit their records ex officio. However, in practice, the appellant must refile the full documentation used before the lower instance also with the appellate court to prevent him or her from being criticised for not having sufficiently substantiated his or her appeal. The filing must be done on paper with sufficient hard copies for the court and the opposing party. Some courts appreciate it if the documentation is additionally provided in electronic form on a memory stick.

RIGHT OF APPEAL

Discretion to grant permission to appeal

9 | In commercial matters, may litigants appeal by right or is appellate review discretionary?

At the first level of appeal, the litigants may appeal by right, and the appellate review is not discretionary. If the minimal value of the claim does not allow for an appeal, the litigant may file an objection by right (which is not subject to discretionary review either). There is a somewhat discretionary appellate review if the minimal value of claim for an appeal in civil matters to the Federal Supreme Court is not met and the claimant invokes a 'question of fundamental importance' as the basis for his or her appeal. In that specific case, the Federal Supreme Court may decide, at its discretion, whether the appeal would clarify a 'question of fundamental importance'.

Judgments subject to appeal

10 | Can litigants appeal any ruling from a trial court, or are they limited to appealing only final judgments?

The appeal at the cantonal level is (subject to the value of the claim being at least 10,000 Swiss francs) possible against final decisions, interim decisions and decisions regarding preliminary injunctions of the court of first instance (article 308 of the Federal Civil Procedure Code (CPC)). A final decision is a decision on the merits of the case closing the proceedings, or a decision not to consider the merits (article 236 of the CPC). This includes partial decisions on the merits. An interim decision is a decision issued by the court in case a higher court could issue a contrary decision that would put an immediate end to the proceedings and thereby allow a substantial saving of time or costs, and that, therefore, may be (and must be) challenged separately and immediately (article 237 of the CPC). An interim decision could, for example, concern the question of whether the claim has become time-barred or whether the court seized has jurisdiction.

Other court decisions, in particular final and interim decisions, and interim measures of first instance that are not subject to a regular appeal (eg, because the value of the claim is below 10,000 Swiss francs), other decisions and procedural rulings of first instance and undue delay by the court are subject to the objection (article 319 of the CPC).

There are a number of relevant differences between appeal and objection. Generally, the appeal is the regular and main legal remedy, whereas the objection has certain limitations. An appeal can be filed on the grounds of incorrect application of the law or incorrect establishment of the facts (article 310 of the CPC), an objection on the grounds of incorrect application of the law or clearly incorrect establishment of the facts (article 320 of the CPC). In an appeal proceeding, the opposing party may file a cross appeal together with the answer to the appeal (article 313 of the CPC; the cross appeal is rendered void if the main appeal is withdrawn); in an objection proceeding, a cross objection is not admissible (article 323 of the CPC). An appeal, in principle, has suspensive effect, while an objection does not.

The appeal in civil matters to the Federal Supreme Court is available against final decisions (article 90 of the Act on the Federal Supreme Court (FCA)) and partial decisions (which deal with only part of the requests made if these requests can be assessed independently of the others or conclude the proceedings for only some of the parties of the dispute). Against independently pronounced preliminary and interim decisions on questions of jurisdiction and requests for recusal, the appeal in civil matters is also available and these decisions cannot be appealed later on (article 91 of the FCA). Other preliminary and interim decisions are only subject to an appeal to the Federal Supreme Court if they may cause an irreparable disadvantage or if a successful appeal

would immediately bring about a final decision and, therefore, save a significant amount of time or money for extensive evidence proceedings (article 93 of the FCA). The appellant must show that these preconditions are met in his or her appeal. If the appeal against a preliminary or interim decision is inadmissible or has not been used, the preliminary and interim decisions in question may be appealed together with an appeal against the final decision if they affect its content.

SECURITY AND INTERLOCUTORY MATTERS

Security to appeal

11 | In a typical commercial dispute, must a litigant post a bond or provide security to appeal a trial court decision?

In practice, Swiss courts always require the plaintiff or appellant to make an advance payment for the court costs. As these advances are often prohibitively high, a reform is pending that would limit the advance payment to half the court costs in most cases. The reform would also limit the collection risk by refunding the advance payment to the prevailing party. Today, the court keeps the advance and the losing party must refund the prevailing party for the advance.

Generally, an advance payment for court costs is not due if the concerned party is granted legal aid. However, subject to particular exceptions, legal aid is not available to corporate or legal entities.

At the request of the defendant, the plaintiff must provide security for party costs:

- if they have no residence or registered office in Switzerland (this statutory provision is subject to opposite provisions in treaties, however, such as the Hague Convention on Civil Procedure 1954 (the Hague Convention));
- if they appear to be insolvent, notably if they have been declared bankrupt or are involved in ongoing composition proceedings, or if certificates of unpaid debts have been issued;
- if they owe costs from prior proceedings; or
- if for other reasons there seems to be a considerable risk that the compensation will not be paid (article 99 of the Federal Civil Procedure Code (CPC)).

With regard to parties from countries that are, like Switzerland, signatory states of the Hague Convention, article 17 of the Convention prohibits that securities, bonds or deposits are imposed on such a party by reason of their foreign nationality or lack of domicile or residence in Switzerland.

Interlocutory appeals

12 | Are there special provisions for interlocutory appeals?

Different rules apply to appeals and objections against full and partial final decisions, interim decisions, procedural rulings and decisions on interim measures.

Injunctions and stays

13 | Are there special rules relating to injunctions or stays, whether entered in the trial court or on appeal?

Swiss law differentiates between interim measures (injunctions) and the suspensive effect of decisions (stays).

At the cantonal level, interim measures can, in principle, be requested from the court if the applying party can set forth that a right to which they are entitled has been violated or a violation is anticipated and the violation threatens to cause not easily reparable harm to the applicant (article 261 of the CPC). Decisions on interim measures are subject to the general rules on appeals, but certain particularities must

be taken into account. Generally, shorter deadlines apply. Against immediately enforceable interim measures (ie, an interim measure where the applicant asks the court to issue an immediate order before hearing the opposing party), no appeal is possible if the court refuses to grant the interim measure without hearing the opposing party.

Before the Federal Supreme Court, in appeals in civil matters against decisions on interim measures, grounds of appeal are limited to a violation of constitutional rights (article 98 of the Act on the Federal Supreme Court (FCA)).

In appellate proceedings before the Federal Supreme Court, the presiding judge may, either ex officio or at the request of one of the parties, take precautionary measures to maintain the existing situation or to safeguard threatened interests for the duration of the proceeding (article 104 of the FCA).

SCOPE AND EFFECT OF APPELLATE PROCEEDINGS

Effect of filing an appeal

14 | If a litigant files an appeal in a commercial dispute, does it stay enforcement of the trial court judgment?

The appeal at the cantonal level usually suspends the enforceability of those parts of the contested decision to which the prayers for relief in the appeal relate (article 315 of the Federal Civil Procedure Code (CPC)). However, upon request, the appellate court may authorise early enforcement. The suspensive effect may not be revoked if the appeal is filed against a judgment regarding the modification of legal relationships.

Certain exceptions apply to this rule. In particular, the appeal does not have suspensive effect if it is filed against a decision on interim measures. The enforcement of interim measures may be suspended in extraordinary circumstances if the party concerned is threatened with significant harm.

As opposed to the appeal, the objection does not, in principle, have suspensive effect (article 325 of the CPC). Upon request, however, the appellate court may defer the enforcement of the objected decision for the duration of the objection proceeding.

The appeal in civil matters to the Federal Supreme Court does not have a suspensive effect (unless with regard to decisions on the modification of legal relationships), but a suspensive effect can be granted by the Federal Supreme Court at the request of the appealing party (article 103 of the Act on the Federal Supreme Court (FCA)).

Scope of appeal

15 | On an appeal from a commercial dispute, may the first-level appellate court consider the facts and law anew, or is its power to review limited?

The framework for the judicial review of the appellate courts is defined by the following rules.

At the cantonal level, an appeal can be reviewed by the appellate court on the grounds of incorrect application of the law or incorrect establishment of the facts (article 310 of the CPC), and an objection on the grounds of an incorrect application of the law or on the grounds of clearly incorrect establishment of the facts (article 320 of the CPC).

With regard to the appeal in civil matters to the Federal Supreme Court, only violations of the law can be objected without restrictions; incorrect establishment of the facts by the previous instance can only be challenged if it can be shown that the establishment of the facts is clearly incorrect (which is difficult) or is itself based on a violation of the law (eg, procedural laws, violation of the prohibition of arbitrariness, violation of the right to be heard). The Federal Supreme Court will consider violations of federal laws, international law, cantonal constitutional rights and inter-cantonal law (article 95 of the FCA) and

(with certain limitations) the application of foreign law according to the rules of Swiss international private law (article 96 of the FCA). In appeal proceedings concerning interim measures, the Federal Supreme Court will only consider alleged violations of constitutional rights (article 98 of the FCA).

Further appeals

16 | If a party is dissatisfied with the outcome of the first-level appeal, is further appeal possible?

Subject to certain preconditions, decisions of higher cantonal courts (including appellate courts, but also cantonal courts that act as first instance, such as commercial courts) can be appealed before the Federal Supreme Court.

Duration of appellate proceedings

17 | How long do appeals typically take from application to appeal to a final decision?

The Swiss justice system is generally quite fast. The duration of an appeal proceeding depends on the subject matter and the court. Appeal judgments at the cantonal level are usually handed down within six to 18 months. The Federal Supreme Court works rather quickly and usually decides within six months. In larger cases, the decision may take up to 18 months.

SUBMISSIONS AND EVIDENCE

Submissions process

18 | What is the briefing and argument process like in a typical commercial appeal?

In appeals proceedings, each party will usually submit one written statement to the appellate court (appeal and response to appeal). Oral hearings are theoretically possible, but not common. Based on constant legal practice, the constitutional right to be heard (paragraph 2, article 29 of the Swiss Federal Constitution and paragraph 1, article 6 of the European Convention on Human Rights 1950 (ECHR)) entails that either party has the right to reply to statements and files submitted by the other party. In practice, a party that is served with a corresponding submission of the other party without being requested by the court to respond must actively file a response directly with the court or, if an immediate reply is impossible, at least let the court know within 10 days of receipt that it wishes to file a response and request that the court sets a deadline.

New evidence

19 | Are appeals limited to the evidentiary record that was before the trial court, or can new evidence be introduced on appeal?

In a cantonal appeal proceeding, new facts and evidence are admissible only if they are submitted immediately and if it can be demonstrated that they could not be submitted in the first instance despite reasonable diligence. An amendment of the claim is possible if these conditions are fulfilled and the amendment is based on new facts or new evidence (article 317 of the Federal Civil Procedure Code (CPC)).

In an objection proceeding, new facts and evidence can generally not be introduced, subject to special provisions of law (article 326 of the CPC).

In appeal proceedings before the Federal Supreme Court, new facts and evidence may only be presented to the extent that the decision of the lower court is the cause for the introduction of the new facts

and evidence (article 99 of the Act on the Federal Supreme Court (FCA)). New claims or requests are no longer allowed at this stage.

New evidence of wrongdoing

20 | If litigants uncover new evidence of wrongdoing that they believe altered the outcome of a trial court judgment, can they introduce this evidence on appeal?

Yes. The corresponding rules on new facts and evidence also apply during later stages of an appeal proceeding.

Moreover, and on limited grounds, a judgment that has become final and legally binding may be revised upon request. The grounds for revision are:

- that a party discovers further significant facts or decisive evidence that they were unable to submit in the earlier proceedings (excluding facts and evidence that arose after the decision);
- that it is established that the decision was influenced to the detriment of the party concerned by a felony or misdemeanour; or
- that it is claimed that an acknowledgement, withdrawal or settlement of a claim was invalid.

A revision may also be requested on the grounds of a violation of the ECHR if the European Court of Human Rights has determined in a final judgment that the ECHR or its protocols have been violated. An application for a revision must be filed with a statement of the grounds within 90 days of the discovery of the grounds for revision (article 329 of the CPC).

Similar rules apply for the revision of decisions by the Federal Supreme Court (article 121 of the FCA); however, revisions do not play a significant role in practice.

New legal arguments

21 | May parties raise new legal arguments on appeal?

Yes. Parties may raise new legal arguments on appeal.

COSTS, SETTLEMENT AND FUNDING

Costs

22 | What are the rules regarding attorneys' fees and costs on appeal?

The rules regarding attorneys' fees and court costs on appeals vary from canton to canton. Generally, the losing party must bear the court costs and compensate the other party. The amounts depend on the value of the claim and the effort and experience necessary for the particular case. However, the statutory party compensation does not normally cover the effective costs for legal representation by an attorney, let alone by an experienced trial lawyer. Pure contingent fees (pactum de quota litis: pure performance-related fees) are prohibited under Swiss law. Conversely, according to a precedent of the Federal Supreme Court set on 13 June 2017, the pactum de palmario (a base fee that covers an attorney's basic efforts in combination with an additional success bonus) is permissible, with some restrictions. To date, these agreements remain uncommon in Switzerland.

Settlement of first instance judgment after appeal lodged

23 | Can parties enter into a settlement agreement to vacate the trial court judgment after an appeal has been taken?

As long as the dispute is pending before a court, including cantonal appellate courts and the Federal Supreme Court, and the matter lies in the disposition of the parties (which is the case for commercial civil

disputes), the parties can always settle the case. In such a case, the court dealing with the case, depending on the specifics of the settlement, either records the settlement as such, as an acknowledgement of the claim or appeal, or as a withdrawal of the claim or appeal in the court record. A settlement, acknowledgment of a claim or appeal, or withdrawal of a claim or appeal, has the effect of a legally binding decision. The appellate court will then write off the appeal proceedings and usually charge a reduced fee for the court's costs.

Limits on settlement after commencement of appeal

24 | Are there any limits on settlement once an appeal has been taken?

No. In civil commercial matters that lie in the disposition of the parties, there are no such limits.

Third-party funding

25 | May third parties fund appeals?

Third-party funding is not prohibited in appeals or other stages of the civil proceedings. The topic of third-party funding has been discussed more frequently in recent years. Although it was uncommon in Switzerland in the past, litigation funding has the potential to become an increasingly important source of funding in commercial disputes.

Disclosure of litigation funding

26 | If litigation funding is permitted in an appeal, must funding sources be disclosed to the court or other parties to the litigation?

No. There is no rule requiring such disclosure.

JUDGMENTS, RELIEF AND NON-PARTIES

Decisions

27 | Must appellate courts in your country write decisions explaining their rulings? Can the courts designate the precedential effect of their decisions?

Generally, courts must write decisions explaining their rulings. Courts of first instance can provide their decisions without written reasoning (they only have to provide the written reasoning if one of the litigants requests it), but appellate courts always have to provide their decisions with written reasoning (paragraph 2, article 318 of the Federal Civil Procedure Code (CPC) and paragraph 5, article 327 of the CPC).

Courts cannot formally designate precedential effect of their decisions, but Swiss courts will generally attach great significance to decisions of other courts in past cases, especially of higher courts. The Federal Supreme Court may also decide to formally publish a decision in its official collection of case law, which gives a decision particular weight in future cases.

Non-parties

28 | Will the appellate courts in your country consider submissions from non-parties?

Amicus curiae briefs are unknown in Switzerland. An intervention by a third party who claims to have a better right in the object of the dispute to the total or partial exclusion of both parties is only possible if the dispute is pending in the first instance, but not in the appeal procedure.

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Relief

29 | What are the ordinary forms of relief that can be rendered by an appellate court in a civil dispute?

The appellate courts may reject the appeal or objection, annul the decision or procedural ruling of the lower instance and take a new decision on the merits, or remit the case to the lower instance.

UPDATE AND TRENDS

Current developments

30 | Are there any current developments or emerging trends that should be noted?

Currently, a reform of the Swiss Civil Procedure Code is pending. Apart from new rules regarding advance payments for court fees, many provisions of the Procedure Code are to be amended to better reflect case law or remove aspects that are unclear. A notable change is also the possibility to conduct proceedings in English or another official language of Switzerland, even if it is not an official language in the canton where the proceedings are taking place.

The federal government proposed a law in November 2020 that would make the entire justice system more digital. The reform would require courts and authorities to manage their case files digitally, and attorneys to make all submissions electronically. Private parties would still be allowed to file physical submissions. The reform is not expected to take effect before 2027.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Federal and cantonal governments have taken various measures to deal with the pandemic and to mitigate the economic effects of the pandemic, such as the closure of shops and restaurants, government compensation for short-time work and zero-interest loans for businesses.

During the first lockdown in spring 2020, the federal government used its emergency powers to extend deadlines in civil procedures and suspend debt enforcement for a few weeks. Virtual hearings in civil proceedings have been allowed in urgent cases. In non-urgent cases, courts have been authorised to order written submissions rather than hold hearings. In practice, most courts have now resumed in-person hearings with social distancing measures in place. The pandemic revealed the shortcomings of current procedural laws. The Federal Supreme Court ruled that a virtual hearing held by a court without the consent of both parties during the lockdown, but before emergency legislation providing for virtual hearings was passed, was not legal.

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