Sophie-Katharina Matjaz
Civil Procedure

I. Swiss Civil Procedure Code

The first section of this chapter examines the long path that ultimately led to a unified civil procedure in Switzerland. First, the constitutional framework within which Swiss civil procedure laws[1] operate (1.) and the legislative process that resulted in the Civil Procedure Code of 2008 (2.) are described. Finally, the third part of this section discusses the main content of the Code (3.).

1. Constitutional Framework

When the Swiss confederation was founded in 1848, one of its key features was (and still is) the autonomy of its 25 cantons.[2] Legislative power was at their full disposal,[3] including matters of civil and civil procedure law. Members of

1 The most important enactment on civil procedure in Switzerland is the *Swiss Civil Procedure Code* of 19 December 2008 (Civil Procedure Code, CPC), SR 727, which contains the procedural framework for conducting and deciding civil law disputes; see for an English version of the Civil Procedure Code www.admin.ch (https://perma.cc/PE8T-RMBT). Besides, there are other laws of significance for civil procedure: The *Debt Enforcement and Insolvency Act* of 11 April 1889, SR 281.1, contains provisions on the enforcement of monetary claims and on insolvency proceedings. The *Federal Act on the Federal Patent Court* of 20 March 2009 (Patent Court Act, PatCA), SR 173.41, governs proceedings before the Federal Patent Court; see for an English version of the Patent Court Act www.admin.ch (https://perma.cc/NXD3-NSXP). The *Federal Act on Federal Civil Procedure* of 4 December 1947 (Federal Civil Procedure Act), SR 273, determines rules for disputes that are tried before the Federal Supreme Court as the first instance. The *Federal Act on the Federal Supreme Court* of 17 June 2005 (Federal Supreme Court Act), SR 173.110, governs the position and organisation of the Federal Supreme Court and proceedings before the Federal Supreme Court as an appellate court. The *Federal Act on International Private Law* of 18 December 1987, SR 291, determines the jurisdiction of Swiss civil courts and the applicable law in international matters. Finally, there is a variety of *cantonal legislation* on court organisation and subject-matter jurisdiction.

2 There were 25 cantons at this point in history. As the canton of Jura acceded to the federation in 1979, there are 26 cantons in Switzerland today.

3 Article 3 of the Federal Constitution of the Swiss Confederation of 12 September 1848 stated that the cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution and that they exercise all rights that are not vested in

the Swiss Lawyers Association had begun to consider the benefits of unifying Switzerland's civil and civil procedure law as early as in 1860. The first attempt to do so was narrowly rejected by both the people and the cantons in 1872.[4] Although the enforcement of monetary claims and the insolvency law were unified by the Debt Enforcement and Insolvency Act in 1889 and the competence regarding substantive civil law was transferred to the federal legislator in 1898,[5] the cantons largely retained their power to enact legislation on civil procedure during this period. But competence in civil procedure matters was granted to the federation where it was considered indispensable in ensuring the uniform application of the civil law. This meant that the original Civil Code contained some procedural provisions, such as rules on evidence. Even after the codification of Swiss civil procedure law on a federal level, these provisions were left to remain in the Civil Code and can therefore still be found in this legislation. An example for such a rule is contained in Article 8 Civil Code: unless the law provides otherwise, the burden of proof for establishing an alleged fact shall rest on the person who would derive rights from that fact.

While neighbouring countries had successfully codified their civil procedure law by the end of the 19th century, discussions about expediency and potential versions of a unified procedure law would continue for nearly another century in Switzerland. The 1999 version of the Constitution still did not provide for centralised legislative powers, although the federal legislator was enabled to regulate the territorial jurisdiction of courts for the whole of Switzerland.[6] Subsequently, the Swiss Jurisdiction Act was issued.[7] It contained unified rules on the territorial jurisdiction of Swiss courts in civil

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the confederation. The provision still exists in its original form today (Article 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch [https://perma.cc/M8UJ-S369]).

4 253'606 people declared themselves in favour of adopting the draft that would have transferred substantial legislative competences towards the federal legislator, while 260'859 people rejected it.

5 For details on the enactment of the Swiss Civil Code of 10 December 1907 (Civil Code), SR 210, see the Chapter on Civil Law, pp. 271, and for details on the enactment of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (Code of Obligations), SR 220, see the Chapter on the Law of Obligations, pp. 305. See for an English version of the Civil Code www.admin.ch (https://perma.cc/DV8N-FFT2) and for an English version of the Code of Obligations www.admin.ch (https://perma.cc/AJ2U-V3MB).

6 Articles 30 and 122 of the Constitution in the version dated 18 April 1999.

7 Federal Act on the Jurisdiction in Civil Matters of 24 March 2000 (Jurisdiction Act), SR 272.

domestic matters and entered into force on 1 January 2001.[8] Despite being limited in its scope, it can be regarded as the first codification of Swiss civil procedure law on the federal level.

Since the 19th century, a total of almost 100 civil procedure codes have been issued by the cantons. These codes took influence from one another as well as from foreign civil procedure legislation. For example, the legislation in the French-speaking part of Switzerland was strongly shaped by the French Code de Procédure Civile. Varying developments in each canton meant there were substantial differences in the content and layout of the codes. For example some cantonal legislators decided to concentrate the proceeding in a main hearing where also evidence was taken (Bern, Lucerne, Vaud). In other cantons the taking of evidence preceded (Valais) or followed up on the main hearing (Zurich). In some cantons conciliation proceedings were mandatory before a claim could be filed (Lucerne, Valais, Zurich), in other cantons the conduct of such proceedings remained at the parties' disposal (Bern, Vaud). Significant differences appeared also in the weighting of procedural principles. For example, the cantonal code of Bern allowed the modification or correction of facts up until the party submissions during the main hearing while the canton of Vaud committed the parties to present all relevant facts during the initiation phase of proceedings. The age of the cantonal codes at the time that the Civil Procedure Code entered into force in 2011 was also extremely varied: for example, the code from the canton of Basel Stadt dated from 1875, while the canton of Glarus' code had been more recently issued in 2001.

Nevertheless, it can be argued that a tradition of Swiss civil procedure did exist on the federal level to some extent prior to the federal Code's entry into force, in two respects. First, certain federal laws which had substantial influence on civil procedure were already in existence (such as the Debt Enforcement and Insolvency Act, the Jurisdiction Act, and the Civil Code mentioned above). Second, a number of questions of civil procedure were addressed at the federal level by the Swiss Federal Supreme Court in various landmark cases. For example, the Federal Supreme Court decided in 1988 that once an action is filed, the subject matter of the dispute may not be made pending elsewhere between the same parties.[9] Later this principle was codified in the Jurisdiction Act (Article 35) and can now be found Article 64 Civil Procedure Code.

8 The Jurisdiction Act was replaced by the Civil Procedure Code on 1 January 2011.

9 BGE 114 II 186.

Still the variety of procedural codes proved to be a source of complication and legal insecurity, as the Federal Council indicated in its Message[10] supporting the unification of Swiss civil procedure.[11] At the turn of the millennium, the necessity of unifying civil procedure law on a national level was clear. The reform of the Swiss justice system was put to popular vote and approved in a landslide victory on 12 March 2000.[12] This cleared the way for the drafting of the Civil Procedure Code.

To this day, there are some domains in the area of civil procedure where the cantons retain responsibility. These areas are the organisation of the courts and conciliation authorities (Article 122 II Constitution and Article 3 Civil Procedure Code), the administration of justice in civil cases, and the tariff authority.

First, the cantons are responsible for creating their own court systems. Cantonal legislation on court organisation regulates the composition of the courts and establishes the matters that fall under these courts' competence, i.e. their subject-matter jurisdiction. Federal law does impose some limits on cantonal autonomy and discretion in this area, however: namely, it obliges the cantons to provide two cantonal instances of civil jurisdiction. This is referred to as the double-instance principle, meaning that the cantons must provide the possibility to appeal a first instance judgement to a cantonal appellate court.

Neither the denominations for the institutions nor the substantive requirements for the jurisdiction of the courts are uniform amongst the cantons. For example, individual cantons can decide whether they want district courts to be responsible for settling criminal and civil cases for a specific territorial area (as in the canton of Zurich) or a cantonal civil court with an exclusive jurisdiction in civil matters (as is the case in Basel Stadt). In some cantons, single judges are only used in proceedings with a value in dispute[13] below a certain amount. For example Basel Stadt, Lucerne, and Zurich in

10 In Swiss legislation proceedings a message is a report by a federal authority that accompanies a draft for a legislative act submitted to parliament by that authority. Its purpose is to inform parliament about the suggested draft, its goals, and underlying problems. Messages are published and often used for interpretation of the law.

11 Message on the Swiss Civil Procedure Code (CPC), Federal Gazette No 37 of 19 September 2006, pp. 7221, p. 7228.

12 86.4 % of the voters and all cantons approved the reform. The turnout was at 42 %.

13 The value in dispute is the (estimated) economic interest that the plaintiff has in pursuing the case.

principle use single judge proceedings for cases with a value of up to CHF 30'000. For proceedings with a value in dispute higher than CHF 30'000, multi-judge courts are provided in these cantons. Other cantons use single judges for cases of higher value or use single judges regardless of the value in dispute (as in Bern where a judgement is delivered by a single judge in first instance proceedings, no matter how high the value in dispute is). Cantons can also use particular courts for specific types of disputes. For example, the canton of Zurich provides special courts for commercial (at second instance), employment, and tenancy matters. The cantons can also set up rules on the eligibility of judges. For example, cantons may allow laymen on the bench. This remains particularly common in rural areas, where judges often hold other jobs alongside their judgeship. They are usually supported by a legally trained clerk.

Secondly, the administration of civil justice lies in the hands of the cantons: although the Civil Code and the Code of Obligations are acts of the federal parliament, they are administered by cantonal courts. Only civil disputes between the confederation and a canton or disputes between cantons are tried directly by the Federal Supreme Court in Lausanne (known as direct proceedings, Article 120 Federal Supreme Court Act). However, such cases only occur rarely.

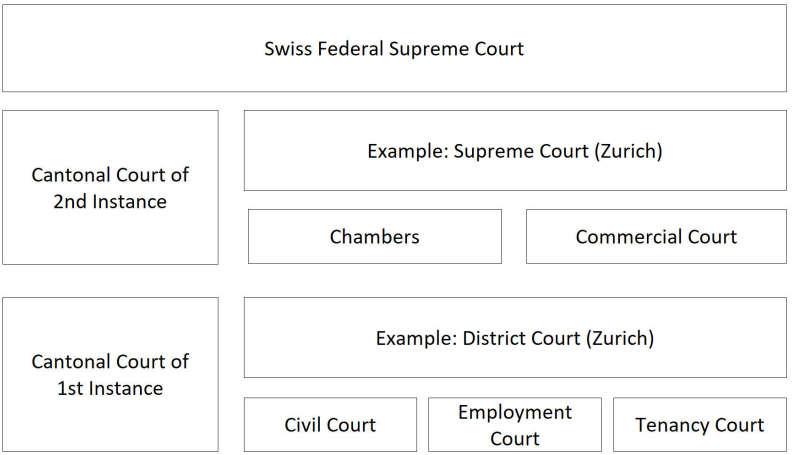

Figure 1: Court Organisation

Finally, the cantons retain the exclusive competence to set tariffs for procedural costs (Article 96 Civil Procedure Code).

2. Legislation

As mentioned, by the end of the 20th century it was becoming increasingly clear that there was a need to unify civil procedure in Switzerland. Thus, in 1999, the then acting head of the Federal Department of Justice and Police Arnold Koller established a commission of experts with the set purpose of considering the unification of civil procedure in Switzerland and producing a preliminary draft for a federal code. In 2002, the commission delivered the preliminary draft to the Federal Department of Justice and Police together with an accompanying report. They proposed to unify the procedure before cantonal courts by uniting established institutions from different cantonal codes, without using any specific code as an archetype. Proceedings before the Federal Supreme Court and court organisation would not be affected.

From June to December 2003, the preliminary draft was submitted to a national consultation procedure.[14] Almost everyone welcomed the idea of unification. The participants in the consultation procedure supported the concept of continuing the tradition of the cantonal civil procedure laws as far as possible and introducing innovations where this was considered useful. In particular, the fact that the proposals avoided the introduction of a US-style class action (meaning proceedings where one of the parties is a group of people who are represented collectively by a member of that group) was widely approved of. The inclusion of the Jurisdiction Act into the new federal Code without changing its content also met approval. However, there was some minor criticism on the details of the Code: the strong emphasis on written form for civil proceedings was criticised for being likely to lead to unnecessarily long proceedings. Further, the provisions on the admissibility of new facts and evidence were considered too strict. Finally, it was demanded that mediation as an alternative to conciliation proceedings be introduced.

14 Article 3 of the Federal Act on the Consultation Procedure of 18 March 2005 (Consultation Procedure Act, CPA), SR 172.061; see for an English version of the Consultation Procedure Act www.admin.ch (https://perma.cc/HS8B-2PVT).

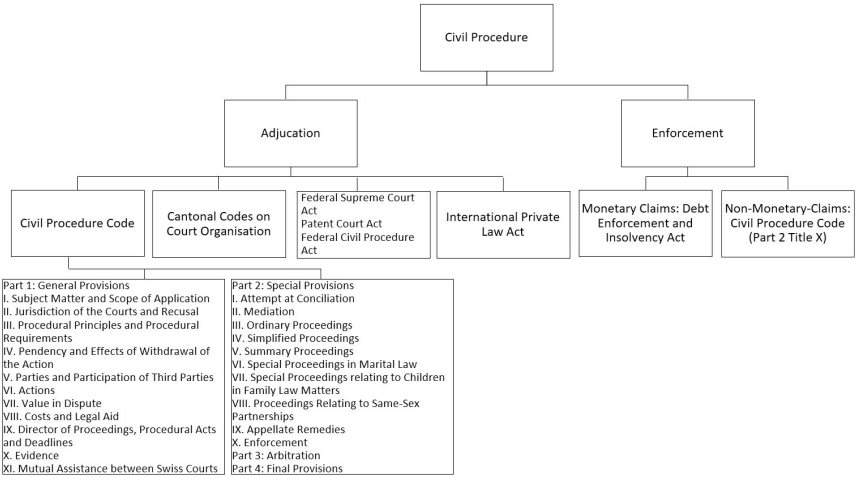

Figure 2: Civil Procedure Laws

Following the national consultation procedure, the Federal Council assigned the task of drawing up a Draft of the Swiss Civil Procedure Code[15] and an explanatory message[16] on to the Federal Department of Justice and Police. During the creation of this Draft, the criticisms from the national consultation procedure were taken into account. The Draft was adopted in June 2006 and submitted to the members of parliament together with the Message. Subsequently, after just over a year of debates, parliament passed the federal Civil Procedure Code on 19 December 2008. It entered into force on 1 January 2011, replacing the 26 cantonal civil procedure codes and the Jurisdiction Act.

The nationwide standardisation of civil procedure by the Civil Procedure Code was not exclusively met with approval. It was sometimes criticised by academics for being poorly drafted and for the fact that it was not motivated by any legal policy issues apart from that of unification itself. Nonetheless, there was a broad consensus that the introduction of the Civil Procedure Code was an important step in the right direction in many ways. For instance, it became a lot easier for lawyers to represent clients in other cantons. The unification also enhanced the academic debate about civil procedure in

15 Draft of the Swiss Civil Procedure Code, Federal Gazette No 37 of 19 September 2006, pp. 7413.

16 See footnote 11. See also footnote 10 for an explanation of the message in the Swiss legislation process.

Switzerland: before the introduction of the Civil Procedure Code, there was only limited publishing on cantonal codes, meaning that there was often a lack of literature for legal professionals to rely on. Also, since the introduction of the Code, there has been an increase in federal judicial activity concerning civil procedure in Switzerland which has led to enhanced predictability of court decisions, thus improving legal certainty.

Of course, there remains room for progress. There are still 26 different cantonal acts on the organisation of civil courts: this results in a lack of clarity for legal subjects as well as for practitioners and means that there is still difficulty for lawyers who want to practice in different cantons. Also, some authors point out that cantonal customs have not been eliminated by the introduction of a federal code; instead, there seems to be a tendency to implement the new Code in a manner that respects old cantonal traditions. This is connected to the fact that that the Civil Procedure Code is – by international comparison – very compact in terms of the number of articles it contains (408) as well as regarding the length of those articles. In the Message on the Draft of the Civil Procedure Code, the legislator even expressed its pride in having the "*courage to leave gaps*"[17] in the spirit of simplicity and comprehensibility. Some argue that this is beneficial in that it helps lay judges to better understand the law and provides the courts with a certain flexibility to tailor proceedings to the circumstances of a certain case. But this terseness also opens the door for cantonal idiosyncrasies and thus legal uncertainty.

Another aspect of the Code which has proven controversial is its lack of proper collective redress mechanisms. The legislator decided not to introduce the Anglo-American concept of class action lawsuits when it passed the new Code in 2011. This was because it was considered that this procedural tool would not fit with the Swiss legal system, which rests on the fundamental principle that only the holder of a legal right can assert that right. Thus, instead, courts in Switzerland deal with proceedings involving multiple parties by relying on existing procedural instruments: in particular, the group action for clubs and organisations (Article 89 Civil Procedure Code)[18] and the general joinder of claims which were filed separately but which are closely related in substance (Article 90 Civil Procedure Code). However, it is now widely recognised that

17 Message Civil Procedure Code, p. 7236.

18 Article 89 Civil Procedure Code allows associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals to bring an action in their own name for a violation of the personality of the members of the group.

the existing instruments for aggregating claims are no substitute for proper collective redress mechanisms. For example, just recently in late December 2017, a Swiss consumer protection organisation filed for damages against Volkswagen on behalf of 6'000 people in light of the emissions scandal. In order to do so, they had to develop a complicated concept of combining different legal remedies, thereby breaking completely new ground. Consumer protection organisations are among the sharpest critics of the lacking possibilities for collective redress in Swiss civil procedure.

The demand for collective redress mechanisms is to be seen in connection with the more fundamental problem of ensuring access to justice.[19] Court fees and reimbursement of lawyers' fees differ greatly within Switzerland as these are still areas where the cantons retain exclusive competence. Additionally, in Switzerland the plaintiff is usually obliged to pay court fees and the costs of his or her lawyer in advance (Article 98 Civil Procedure Code). So proceedings might not only be economically pointless in cases with a low value in dispute; also, claimants may be prevented from filing an action due to a lack of readily available finances.

On 2 March 2018 a preliminary draft for a partial revision of the Civil Procedure Code was submitted to a national consultation procedure. It aims in particular to improve collective redress in Switzerland. To this end the preliminary draft stipulates a readjustment of the group action. Under current legislation associations and other organisations can file non-monetary claims (prohibiting an imminent violation, putting an end to an ongoing violation or establishing the unlawful character of a violation) to safeguard collective interests (group action, Art. 89 Civil Procedure Code). In the future, collective enforcement of monetary claims, especially mass damages, shall be possible. Examples could be the selling of faulty products, but also unfair business practices that concern a large number of people. Also, the preliminary draft provides for the establishment of a new group comparison proceeding oriented towards a similar instrument that exists in the Netherlands since 2005. Essentially it shall be possible for a person accused of a rights violation to reach a settlement on the consequences of that rights violation with an organisation legitimated to file a group action. A court could then declare this settlement binding for all affected persons if they do not claim their refusal within three months ("opt out").

19 Tanja Domej, The Swiss Federal Code of Civil Procedure: Achievements and missed opportunities, Tijdschrift voor Civiele Rechtspleging, 24 (2), pp. 36, pp. 40.

Other proposed adjustments concern costs of civil proceedings: advance payments that the court can demand from the plaintiff shall be limited to half of the amount of the expected court costs (as opposed to the whole of the expected costs under current law, Article 98 Civil Procedure Code). Also, court costs shall be set off against the advances paid by the parties only to the extent that the parties are charged. So the collection risk shall lie with the state instead of the parties in the future. These adjustments stem from the criticism mentioned above, deeming current cost law as an access barrier and so-called paywall for those seeking legal protection. The deadline for the national consultation procedure is 11 June 2018.

3. Content[20]

The Swiss Code of Civil Procedure contains 408 Articles. They are divided up into four parts which are themselves subdivided into several titles.

Part 1 contains general provisions and consists of eleven titles. Title 1 (Articles 1–3) regulates the subject matter and scope of application of the Civil Procedure Code. It is applicable to contentious civil matters (Article 1 lit. a), i.e. disputes between two adverse parties (known as contradictory procedure) that do not concern public law. To a limited extent, the Code is also applicable to court orders made in non-contentious matters (Article 1 lit. b). These are procedures with only one party: for example, a woman who applies for a declaration that her husband is presumed deceased because he has been missing for a long period of time without any indication that he is still alive.

The procedure for the enforcement of monetary claims as well as bankruptcy matters are regulated by the Debt Enforcement and Insolvency Act. The collection of debts is called *Betreibung* in Switzerland and is special in that it is possible to enforce money claims by legal compulsion without preceding substantive judicial assessment.[21] Therefore, competent authorities in

20 In the following text, where articles are mentioned without referencing their source of law, they are located in the Swiss Civil Procedure Code of 19 December 2008 (Civil Procedure Code), SR 727.

21 The creditor can address a demand for enforcement to the competent enforcement authority, specifying legal ground and amount of his claim (Article 67 Debt Enforcement and Insolvency Act). Upon receipt of the demand for enforcement, the enforcement authority issues an order for payment (Article 69 Debt Enforcement and Insolvency Act) and serves it to the creditor and debtor. The order contains the request to the debtor

these matters are to a large extent so-called debt enforcement offices and bankruptcy offices and not courts. For example, a debt collection procedure is initiated by the creditor addressing his demand for enforcement to the debt enforcing office. Still, the Debt Enforcement and Insolvency Act stipulates some procedural steps in debt collection and bankruptcy proceedings to be carried out by court orders. An example would be the opening of bankruptcy. For such court orders in cases involving debt enforcement and bankruptcy law, the Civil Procedure Code is also applicable (Article 1 lit. c).

Furthermore, the Code is also applicable to arbitration in domestic cases (Article 1 lit. d), i.e. if both parties have their domicile and habitual residence in Switzerland at the time of signing the arbitration agreement.

The Code governs the procedure to be followed before cantonal courts. Provisions for complaint proceedings before the Federal Supreme Court are contained in the Federal Supreme Court Act. So-called direct civil proceedings that are tried before the Federal Supreme Court at first instance are subject to the Federal Civil Procedure Act. These cases are very rare and concern for example conflicts between the federation and the cantons or between the cantons among each other.

The second Title of Part 1 (Articles 4–51) regulates the jurisdiction of the courts. As explained above, subject-matter jurisdiction is mostly governed by cantonal legislation. In contrast, territorial jurisdiction, determining the geographical area in which a court will have competence (place of jurisdiction), is regulated by federal law. The Civil Procedure Code establishes general places of jurisdiction. For natural persons, this will be the court at the location of the defendant's domicile (Article 10 I lit. a). For defendant legal entities, this will be the court at the location of the company's registered office (Article 10 I lit. b). The general place of jurisdiction applies if no other (specific) place of jurisdiction is provided for. Specific places of jurisdiction are for instance provided for disputes which concern immovable property (Article 29: the court at the place where a property is or should be recorded in the land register), employment law (Article 34: the court at the domicile or registered office of the defendant or where the employee normally carries out his or her work), or consumer contracts (Article 32: for actions brought by the consumer: the

to pay his debts plus the costs of the enforcement within 20 days to the creditor. If the debtor wants to contest the claim, he can do so by raising an objection within ten days from being served the order for payment (Article 74 Debt Enforcement and Insolvency Act). If an objection is raised, the progress of the enforcement procedure is interrupted until a court makes a decision on the claim.

court at the domicile or registered office of one of the parties and for actions brought by the supplier: the court at the domicile of the defendant). Most places of jurisdiction are of an optional nature, meaning that the parties may choose the court they want to have jurisdiction over an existing or future dispute arising from a particular legal relationship (Article 17). For optional places of jurisdiction it is also possible for the defendant to consent tacitly to the jurisdiction of an incompetent court by entering an appearance on the merits without objecting to the court's jurisdiction (acceptance by appearance, Article 18). Few places of jurisdiction are of mandatory nature, in these cases it is not possible for the parties to agree on the jurisdiction of a court at another place and acceptance by appearance is excluded. For example, an action based on marital law can exclusively be brought before the court at the domicile of either of the parties (Article 21). Finally, some places of jurisdiction are designed as partly mandatory, meaning the parties may agree on a different place of jurisdiction only after a dispute has arisen. This is for instance the case for consumer or tenancy contracts (Article 35).

The third Title of Part 1 (Articles 52–61) regulates the basic principles of civil procedure such as acting in good faith (Article 52), the right to be heard (Article 53), the court's duty to enquire (Article 56), ex-officio application of the law (Article 57), and the principles of the production of evidence (Article 55). Title 3 also lists procedural requirements (Article 59). Those are the formal requirements for proceedings, like for example the proper filing of the statement of claim, a legitimate interest of the plaintiff, the case not being the subject of pending proceedings elsewhere, and the subject-matter and territorial jurisdiction of the court seized. Title 4 (Articles 62–65) governs pendency and withdrawal of the action. As soon as an action is filed, a case becomes pending (Article 62 I). If the claimant withdraws the action, he cannot bring proceedings against the same party on the same subject matter again (Article 65).

Title 5 (Articles 66–83) contains rules on the parties. Anyone who is legally capable has the capacity to be a party (Article 66). Natural persons are always legally capable,[22] while legal entities have to be pronounced legally capable by the law. Any person with capacity to act[23] has the capacity to take legal action (Article 67 I). A person without capacity to act (for example, a child) may act through a legal representative (Article 67 I). A party may choose whether or

22 Article 11 Civil Code: *"Every person has legal capacity"*.

23 Article 13 Civil Code: *"A person who is of age and is capable of judgement has the capacity to act"*.

not to be represented in proceedings (Article 68 I). Professional representation is essentially reserved to lawyers (lawyers' monopoly), although the cantons may provide exceptions in some areas such as for representation before conciliation authorities or before the special courts for tenancy and employment matters (Article 68 II). For example, the canton of Zurich allows employees of a tenants or employee organisation to represent clients that belong to these organisations before tenancy and employment courts in cases with a value in dispute of CHF 20'000 or less. Title 5 also regulates the joinder of parties (Articles 70–72), third party intervention (Articles 73–77), and the substitution of a party (Article 83).

Title 6 of Part 1 (Articles 84–90) regulates different types of actions. There are three main types of actions in Switzerland. One is the action for performance, which is where the claimant demands that the court order the defendant to do something, refrain from doing something, or tolerate something (Article 84). For instance, the court may demand that the defendant hand over a certain item. Second, there is the action to modify a legal relationship, by which the claimant demands the creation, modification, or dissolution of such a relationship or a specific right (Article 87). Typical examples are filing for divorce or challenging a resolution of an association's general assembly. Third, an action for a declaratory judgement is used to demand that the court establish whether or not a right or legal relationship exists (Article 88). It is subsidiary to the action for performance and the action to modify a legal relationship.

The other titles of Part 1 contain rules on the calculation of the value in dispute (Title 7) and on costs and legal aid (Title 8). At this point it should be noted that the federal Code regulates the determination and allocation of procedural costs while the competence to set the tariffs for procedural costs (deciding how high costs are) lies with the cantons (Article 96). Further rules in this Part include provisions on procedural acts and deadlines as well as on the direction of proceedings by the court (Title 9) and mutual assistance between Swiss courts (Title 11).

Part 1 Title 10 (Articles 150–193) contains the rules on evidence. Evidence is required to prove facts that are both legally relevant and disputed (Article 150). The court forms its opinion on the case based on its free assessment of the evidence taken (Article 157). Evidence that relates to publicly known facts, facts known to the court, and commonly accepted rules of experience shall not be taken into account (Article 151). Article 29 II Constitution defines the right to be heard, which is mirrored in the Code's so-called right to evidence (Article 152 I). A party is entitled to have the court accept the

evidence that he or she offers in the required form and time. However, there is a key exception to the right to evidence: the court's so-called anticipated evaluation of evidence. This allows a judge to refuse to accept evidence if he or she is already convinced that a certain fact is true or false before taking the evidence, or if already convinced that the evidence offered is unsuitable. Some authors see this practice as inherent to the free assessment of evidence and necessary with a view to the constitutionally granted[24] need for speed (the Civil Procedure Code obliges the courts to issue the required procedural rulings to enable the proceedings to be prepared and conducted efficiently, Article 124 I). Indeed, the principle of the free assessment of evidence means that the court forms its opinion on whether a controversial fact is true or false through free assessment of the available evidence. It is certainly true that in some constellations there will be a point when a judge is convinced that his opinion is established and cannot be affected by taking (more) counterevidence. As an example one could assume a case in which the fact to be proven is that A bought a car from B and the available evidence includes a notarized signed purchase agreement, written communication between A and B about the purchase, an expert opinion that confirms the authenticity of A's signature, and the statement of the notary who was present during the conclusion of contract. If A now offers the testimony of his wife claiming that she was abroad with A on the day of the contract conclusion and he therefore could not have signed the contract, it would be comprehensible that such a statement would not change the court's opinion about A having bought the car from B. As a matter of fact, it would be unfavourable if the judge was obliged to take any evidence being offered despite of his opinion making being concluded, as this could open doors to parties considerably prolonging cases. Of course, for the anticipated evaluation of evidence to be acceptable, the court may only refuse to accept evidence if it is sure that it will not change its opinion, not in cases of doubt. This is especially given when evidence is generally unfit to prove a certain fact, for instance an expert opinion can generally not prove the agreement of will between two parties. Some authors regard the rejection of generally suitable evidence that is seen as unfit in a particular case by subjective assessment of the court as permissible, for instance when only the testimony of a strongly biased witness is offered as sole evidence. Still, it must be noted that

24 Article 29 I Constitution: *"Every person has the right to* [...] *have their case decided within a reasonable time".*

the questioning of witnesses and parties and also their confrontation can provide valuable indications for their credibility and therefore, anticipated evaluation of evidence can be problematic.

Article 168 I lists the admissible types of evidence (numerus clausus of evidence): testimony, physical records, inspection, expert opinion, written statements and questioning, and statements of the parties. A witness must disclose if parts of his statement are based on information that was not obtained by his or her direct sensory perception but given to him or her by another person (hearsay evidence). Such statements do not possess direct evidential value, but can be included as circumstantial evidence when assessing the probative force of other evidence. Expert opinions commissioned by the parties have no evidentiary force and are essentially treated in the same way as a party statement. However the preliminary draft for a partial revision of the Civil Procedure Code from 2018 proposes to consider them as physical records.

The distribution of the burden of proof is determined by Article 8 Civil Code, rather than the Civil Procedure Code: this provision states that unless the law provides otherwise, the burden of proof for establishing an alleged fact shall rest on the person who would derive rights from that fact. Consequently, the party asserting a claim is obligated to prove the legally relevant facts giving rise to and substantiating the claim. For example, if the claimant demands that the defendant hand over an object in fulfilment of a purchase contract, the claimant has to prove the existence of said contract as he is deriving his claim from it. Contrarily, the defendant has to prove possible objections, like the contract being invalid or the object having been handed over and the contract therefore already being fulfilled. There are also legal provisions which establish a presumption of certain facts as long as there is no proof to the contrary (presumption of facts). An example of such a provision is Article 3 I Civil Code, which states that where the law makes legal effect conditional on a person's good faith, there shall be a presumption of good faith. This means that in such cases, the party invoking good faith is released from the obligation to prove it; it is presumed to exist by law. The reason rules about the burden of proof can be found in the Civil Code is a historical one: at the time of the enactment of the Civil Code it was considered vital to regulate such matters on the federal level to ensure the uniform application of civil law, even though at this point civil procedure was still the cantons' domain. Even after the codification of Swiss civil procedure law on a federal level, these provisions were not transferred but left to remain in the Civil Code which is why they can still be found there.

Parties to the proceedings as well as third parties have a duty to cooperate in the taking of evidence (Article 160 I). They must give truthful testimony, produce the required physical records, and allow an examination of their person and/or property. In the case of a party's unjustified refusal to cooperate in this area, the law does not allow for the imposing of any fines or sanctions whatsoever. Instead, the refusal is taken into account during the appraisal of evidence; this can in fact have all the more serious consequences. For example, if a party refuses to produce a certain document although it is known to be in possession of it, the court might use the refusal as an indication for the assumption that the document features the content claimed by the opposing party. For situations where third parties refuse to cooperate without a valid reason, the courts have a number of measures at their disposal, including imposing a disciplinary fine or ordering compulsory measures (Article 167 I), like the enforcement of witness appearances or the seizure of documents.

Part 1 Title 10 also sets out the rules for dealing with illegally obtained evidence. The taking of evidence can be formally unlawful, for example when a witness gives testimony without being advised of their right to refuse to cooperate (although third parties have a general duty to cooperate, they are under certain circumstances given the right to refuse, for instance if they are or were married to, cohabit with or have a child with a party [Article 165 I]). Such a testimony is usually not admissible as evidence. Evidence can also be obtained in infringement of the substantive law, for example when a letter is opened in breach of the privacy of a sealed document (Article 179 Criminal Code)[25] or a conversation is recorded in breach of Article 179bis Criminal Code. Such illegally obtained evidence is generally not admissible, unless there is an overriding interest in finding the truth (Article 152 II). The public interest in finding the truth is assumed to be higher the more prevalent the principle of ex-officio investigation (meaning the courts must inquire into the "material" truth ex officio instead of relying on the facts presented by the parties) is in a proceeding. This principle is strongest pronounced in cases concerning children in family matters, which is why in these cases also the public interest in finding the truth appears highest. Least weight is attached to the public interest in finding the truth in proceedings without any ex-officio investigation and in matters of voluntary jurisdiction. The private interest in finding the truth

25 Swiss Criminal Code of 21 December 1937 (Criminal Code), SR 311.0; see for an English version of the Swiss Criminal Code www.admin.ch (https://perma.cc/4QS4-CWQ5).

rises and falls with the sum of the value in dispute. The interest in finding the truth must be weighed against the interest in protecting the legal right that was violated by the unlawful taking of evidence. Generally, physical and psychological integrity stands above material goods, which means that evidence obtained by violence or threat is not admissible in claims proceedings.

Part 2 of the Civil Procedure Code contains special provisions. In its first Title (Articles 197–212) the rules for conciliation attempts are set out, while its second Title (Articles 213–218) regulates mediation. A conciliation attempt is an informal proceeding in which a conciliation authority tries to reconcile the parties in an informal manner and that serves to avoid a court proceedings. The conciliation authority assesses the conflict and can propose a solution. Mediation is an even less formal voluntary and confidential dispute resolution procedure guided by an independent third party that is only responsible for the procedure while the subject of the negotiations and the development of solutions largely lie in the hands of the parties. In line with Swiss tradition the law values consensus-based solutions between the parties and therefore mandates an attempt at conciliation before a case can be brought before a court (Article 197). There are a number of exceptions, for example for summary proceedings and family matters (Article 198). Also, the parties can agree to wave any attempt at conciliation in financial disputes which have a value of at least CHF 100'000 (Article 199). The organisation of conciliation authorities is regulated by the cantons and therefore can take several forms. Many cantons use so-called justices of the peace, who are often non-lawyers, being elected by the public into the role. Some cantons provide specific conciliation centres and a few cantons hold conciliation proceedings in courts. About half of such conciliation attempts are successfully settled, although the numbers differ substantially between the cantons. Parties can agree to use mediation rather than the conciliation proceedings (Article 213) but this option is only rarely used.

The remaining Titles of Part 2 of the Civil Procedure Code contain rules on the different types of proceedings. Title 3 (Articles 219–242) regulates the ordinary proceedings at first instance that apply in general civil cases where the value of dispute exceeds CHF 30'000. The established rules concern the exchange of written submissions, hearings, the taking of evidence, and decisions. Title 4 (Articles 243–247) regulates simplified proceedings. These proceedings apply in financial disputes with a value in dispute not exceeding CHF 30'000. Title 5 (Articles 248–270) concerns summary proceedings: these are applied in cases where the facts or the law are clear, where matters are non-contentious, and in various other specific circumstances as provided by

law (for example in proceedings fixing a time limit for legal transactions by minors or persons subject to a general deputyship; proceedings of acceptance of an oral will or proceedings appointing, dismissing, and replacing a company's liquidator). Titles 6, 7, and 8 set out special provisions which apply in cases of marital disputes, proceedings concerning children in family matters, and proceedings concerning same-sex partnerships. Title 9 (Article 308–334) establishes the legal remedies available to the parties (appeal, objection, review) and Title 10 regulates the enforcement of decisions concerning non-money-claims (for instance the delivery of a moveable property or the restoration of earlier conditions on a property), while the enforcement of money claims is regulated by the Debt Enforcement and Insolvency Act.

Part 3 (Articles 353–399) of the Code regulates arbitration in domestic cases, i.e. where both parties have their domicile and habitual residence in Switzerland at the time of signing the arbitration agreement. Arbitration in cross-border cases is subject to the Private International Law Act. Finally, Part 4 (Articles 400–408) regulates the implementation of the Code.

II. Principles

Civil procedure in Switzerland is constrained by a set of principles outlined by the Civil Procedure Code. For example, all those who participate in proceedings must act in good faith (Article 52). Further, the parties' right to be heard must be respected (Article 53). Court hearings are public and judgements must both be pronounced publicly and made accessible to the public (Article 54 I). The court applies the law ex-officio (Article 57). In the following paragraphs, four other fundamental principles will be examined.

1. The Principle of Party Disposition as a Rule

In Swiss civil procedure, the parties largely have the power to decide the time, subject matter, and duration of proceedings: this is what is known as the principle of party disposition. In this regard, the only principle that the Civil Procedure Code explicitly mentions is that of non ultra petitia. It states that the court may not award a party anything more than or different from that requested (Article 58 I). Nonetheless, the principle of party disposition is recognised as being generally applicable to Swiss civil procedure, including matters like the initiation and closing of proceedings. The courts do not open proceedings on their own initiative; instead, the claimant decides whether or not to file an action. The claimant also determines the subject of the proceedings through his or her claim, i.e. what he or she is demanding from whom. If a claim is divisible, an action for only part of the claim can be filed (Article 86). Because of the principle of non ultra petitia, the court is restricted to the claimant's request. The principle of party disposition also means that the proceedings can be brought to an end by the parties at any point. Procedural institutions to end a proceeding are settlement or acceptance of the claim and withdrawal (Article 241). They have the same effect as a binding decision.

The principle of party disposition is complemented by the court's duty to enquire (Article 56). If a party's submissions are unclear, contradictory, ambiguous, or manifestly incomplete, the court provides an opportunity for either party to clarify or complete the submission by asking appropriate questions.

Shortly after the entry into force of the Civil Procedure Code, it was heavily disputed whether the court merely had a right to enquire or an actual obligation to do so. It is now recognised that the court is indeed obligated to ask questions.

2. The Principle of Ex-Officio Assessment as an Exception

Another exception to the principle of party disposition in Swiss civil procedure is the principle of ex-officio assessment (Article 58 II). It means that the court has a duty to independently assess the case before it; it deprives the parties of their free disposal over the matter in dispute and means that the court is not bound by the parties' requests. In Swiss civil procedure, the principle of ex-officio assessment is applied where the public interest requires that the parties are deprived of their free disposal. Such a reason may be, for instance, the protection of weaker parties (like minors). For example, the court can award more child maintenance than the amount requested by the claimant or than the amount the parties had agreed on in a divorce settlement.

The claimant still has to file an action if ex-officio assessment is applicable. State authorities may only initiate civil proceedings if this is explicitly stated by federal law: for example, this is the case for the action for annulment of marriage (Article 106 Civil Code).[26] Appellate proceedings can never be initiated ex-officio.

3. The Principle of Party Representation as a Rule

While the principle of party disposition stipulates how the subject matter of proceedings is defined, the principle of party representation concerns the question of how the court comes to know the facts and evidence it needs for

26 Grounds for marriage annulment are for instance that one of the spouses was already married at the time of the wedding; that one of the spouses lacked capacity of judgement at the time of the wedding and has not regained such capacity since; that the marriage was prohibited due to kinship; that a spouse has not married of his or her own free will or that one of the spouses is a minor.

deciding the case. In Swiss civil procedure, this principle is the rule, meaning that only the facts and evidence produced by the parties form the subject matter of the proceedings. This means that the parties must present the court with the facts in support of their case and submit the related evidence (Article 55 I). This can contradict the search for the material truth. For example, if a party does not dispute or concedes allegations of its opponent, the judge has to base his or her decision on these facts, regardless of his conviction of the truth. However, this is justified by the principle of individual autonomy in civil procedure. Like according to the principle of party disposition explained above, the parties can decide whether they want to bring proceedings before a court; they also can decide which facts they present in their statements.

The principle of party representation is limited in several ways: evidence is not required to be provided in support of publicly known facts, facts known to the court, and commonly accepted rules of experience. The latter can be based on general life experience (common sense) or on experiences from specific areas of life (trade and commerce, technology, art, etc.). An example would be the determination of the time spent on housekeeping based on statistical data. Facts can also be undisputed and therefore be considered proven. As with the principle of party disposition, the principle of party representation is also complemented by the court's duty to enquire. Again, this means that the court asks questions for either party to clarify or complete their submissions if they are unclear or incomplete. If this duty to enquire is exercised extensively, the proceedings acquire a more inquisitorial touch, something which runs counter to the idea of the principle of party representation upon which it is the parties' responsibility to present the relevant facts to the court which does not establish facts of its own. Therefore, it is widely recognised that the duty to enquire shall be exercised with great restraint towards parties who are legally represented, at least in ordinary proceedings. For simplified proceedings, a comparably stronger duty to enquire is imposed by the Civil Procedure Code (Article 247).

4. The Principle of Ex-Officio Investigation as an Exception

While the principle of ex-officio assessment means that courts are bound by the parties' requests, the principle of ex-officio investigation concerns the establishment of the facts in a case. Within the scope of the principle of

ex-officio investigation the courts cannot rely on the facts presented to them by the parties: they must inquire into the "material" truth ex officio, thus providing an exception to the principle of party representation. The principle of ex-officio investigation is highly relevant in criminal proceedings. It does not have the same significance in civil proceedings because civil courts cannot rely on the relevant investigation authorities. Distinction is to be made between the principle of limited ex-officio investigation (establish the facts) and the principle of unlimited ex-officio investigation (investigate the facts). Unlimited ex-officio investigation applies in proceedings concerning children in family matters. Limited ex-officio investigation applies in disputes concerning matters of discrimination under employment law and certain tenancy matters, as well as in tenancy, lease, and employment law disputes where the value in dispute does not exceed CHF 30'000. As with ex-officio assessment, the main reason behind ex-officio investigation is to protect the weaker party.

Where ex-officio investigation is required, the court questions the parties extensively and demands that they produce relevant materials, for example by calling witnesses. Still, due to the court's limited possibilities of investigation, it is up to the parties to describe the main facts, being prompted by the judge's questions where necessary. Only where unlimited ex-officio investigation applies does the court have the responsibility for establishing the relevant facts.

This means the involvement of the court in the establishment of the facts of a case can have the following manifestations in different proceedings:

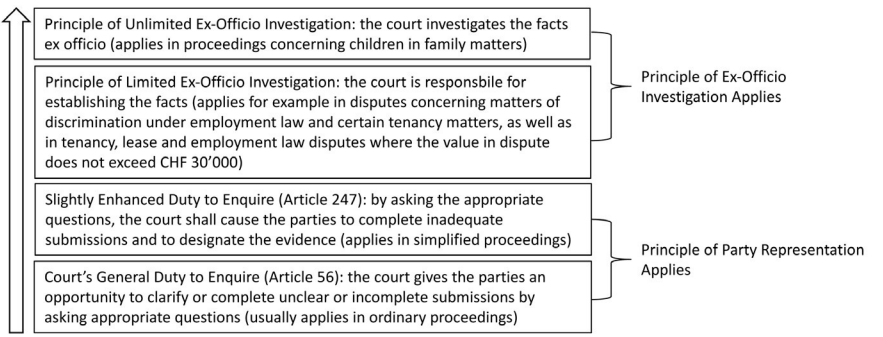

Figure 3: Levels of Court Involvement in Establishing the Facts

III. Institutions and Procedure

The institutions and procedure of Swiss civil justice can be best understood by chronologically following the course of a standard case. First, the attempt at conciliation, which is essentially mandatory before a case can be brought before a court, will be explained (1.). Subsequently, the rules for ordinary proceedings will be examined in detail (2.) following which a short overview of simplified and summary proceedings will be given (3.). Finally, the appellate remedies in Swiss civil procedure will be outlined (4.).

1. Attempt at Conciliation

As explained above, an attempt at conciliation is basically mandatory in Switzerland before a case can be brought to court (Article 197), although the law does provide for some exceptions (such as in summary proceedings). For financial disputes with a value in dispute of more than CHF 100'000, parties can agree to waive the conciliation attempt (Article 199 I). Like with cantonal courts, the federal law regulates the procedure before conciliation authorities but leaves their organisation to the cantons. The conciliation proceedings are initiated by the claimant filing an application for conciliation in the form of paper documents, either electronically (Article 130 I) or orally before the conciliation authority (Article 202 I). In their application, they must identify the opposing party, describe the prayers for relief and the matter in dispute. This is the minimum content required for a conciliation application (Article 202 II). With the filing of the application, a case becomes pending (Article 62): from this point, the same subject matter can no longer be filed elsewhere between the same parties (Article 64).

Conciliation authorities try to help the parties reach an agreement. The procedure is thus less formal than that followed in court proceedings. Conciliation hearings are also generally[27] not open to the public. After the application is

27 In disputes relating to the tenancy and lease of residential and business property the conciliation authority may allow full or partial public access to the hearings if there is a

filed, the conciliation authority serves the defendant and summons the parties to a hearing. The parties must appear in person. The statements made during the hearing are confidential and cannot be used subsequently in any court proceedings (Article 205). In financial disputes where the value in dispute is below CHF 2'000, the conciliation authority can decide on the merits on the plaintiffs' request (Article 212). If the value in dispute is below CHF 5'000, the conciliation authority can submit a proposed judgement to the parties, which has binding effect as long as it is not rejected by any of the parties within 20 days (Article 211). If the parties do not reach an agreement during the hearing and the conciliation authority can neither decide the case nor render a proposed judgement, it grants authorisation to proceed (Article 209 I). From this point, the claimant has three months to file the action in court if he or she wishes.

2. Ordinary Proceedings

Court proceedings are initiated by the claimant filing a detailed statement of claim (Article 221). If the value in dispute exceeds CHF 30'000, the ordinary proceeding applies. Provisions regulating ordinary proceedings apply to other proceedings unless there are specialised rules stipulated by law. After the statement of claim is received by the court, the preparation of the main hearing begins. The court examines whether the procedural requirements (such as the proper filing of the statement of claim, a legitimate interest of the plaintiff, the case not being the subject of pending proceedings elsewhere, and the subject-matter and territorial jurisdiction of the court seized) are met (Article 60), serves the statement of claim on the defendant, and sets a deadline for the submission of a written statement of defence (Article 222). If the defendant does not submit within the deadline (including a short period of grace)[28], the court can if feasible make a decision solely from the statement of claim (Article 223 II).

After the statement of defence is received, the court has several choices regarding the next procedural steps to be taken. It can proceed directly to the main hearing, order that an instruction hearing be held before proceeding to the main hearing, or order that a second written exchange be conducted before

public interest.

28 If the statement of defence is not filed within the deadline, the law orders the court to allow the defendant a short period of grace.

the main hearing. An instruction hearing can be held at any time during the proceedings to discuss the dispute informally, complete the facts,[29] reach an agreement, or simply prepare for the main hearing (Article 226). Courts can also take evidence during such hearings. Prior to the main hearing, the court delivers the so-called ruling on evidence (Article 154): here the court rules on the admissibility of each piece of evidence and determines which party has the burden of proof for each fact.

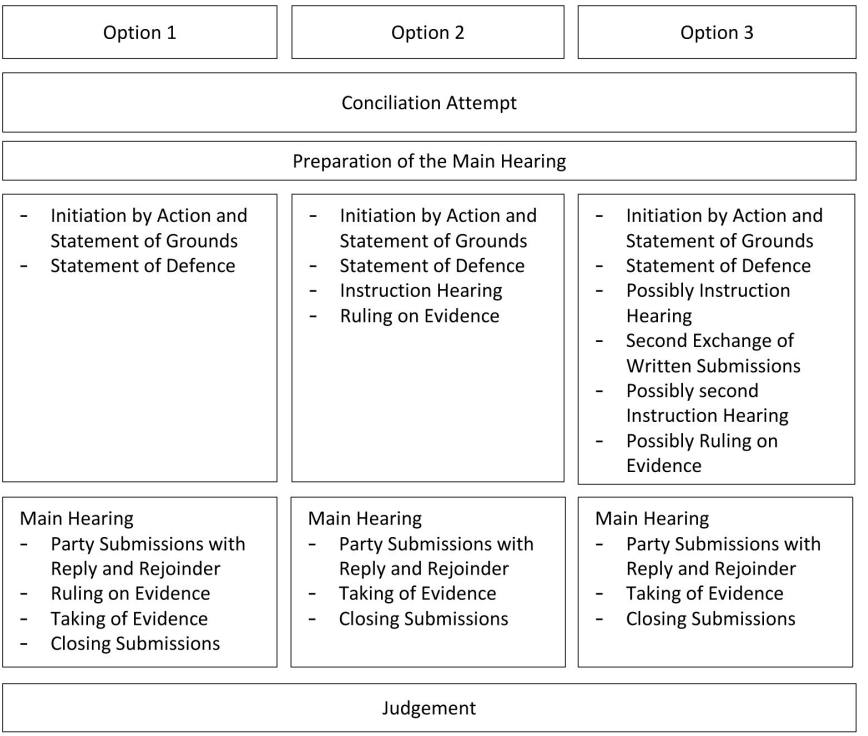

Figure 4: Possible Options for the Conduct of Ordinary Proceedings

29 In ordinary proceedings, the courts usually exercise their duty to enquire during the instruction hearing, giving the parties the opportunity to clarify, or complete their submissions by asking appropriate questions.

In Swiss civil procedure, the main hearing is structured in a fairly formal way. First, there are two rounds of oral statements taken from each party (Article 228). After the second round of written or oral statements, new facts and evidence are admissible only if they are introduced immediately and came into existence after the statements or, where they existed prior to this point, if the party was unable to introduce them earlier despite exercising reasonable diligence (Article 229). If the court decides to proceed directly to the main hearing after the statements of action and defence, parties can introduce new facts and evidence in their first oral statement. If the court decided to hold an instruction hearing for reasons other than simply reaching agreement, parties are generally not permitted to introduce any new facts or evidence in the main hearing (except if they arose after the instruction hearing or if they existed before but the party was unable to introduce them earlier despite exercising reasonable diligence). Instead, the parties can only comment on the statements that the other party made during the instruction hearing. The same goes for cases in which the court ordered a second round of written exchanges between the parties: here, the parties can only comment on the statements made by the other party in the last written exchange. So in conclusion, in Swiss civil procedure parties have two opportunities to bring new facts or evidence into the proceedings without limitation: First the statements of action and defence and second depending on the further course of the procedure either the second round of written exchanges, the statements during the instruction hearing, or the first oral statements during the main hearing.

The second oral statement in the main hearing provides the parties with an opportunity to comment on the other party's first statement. This is especially important in cases where new facts or evidence have been introduced. Thereupon, the court examines the evidence produced by the parties and indicated in the ruling on evidence (questioning witnesses, performing an inspection, etc.). Afterwards, the parties may comment on the result of the evidence and on the merits of the case (Article 232). Each party has the right to make a second round of submissions. Parties can jointly agree to dispense with the main hearing (Article 233). In such cases, no evidence is taken as this is exclusively done as part of the main hearing.

If the court is able to make a decision, it closes the proceedings either by deciding not to consider the merits or by making a decision on the merits (Article 236). If the proceedings are not presided over by a single judge, the court decides by majority. The court may give notice of the decision to the

parties without providing a written statement of the grounds, although the parties can request that such a statement be produced within ten days (Article 239).

3. Other Types of Proceedings

Simplified proceedings are governed by Articles 243–247. They apply in cases where the value in dispute is below CHF 30'000, as well as to disputes in social matters, such as tenancy disputes, employment disputes, and consumer disputes. Simplified proceedings are less formal, largely allow oral submissions, and attribute a more active role to the court. Contrary to ordinary proceedings, in simplified proceedings a claimant may submit his claim orally before the court.

The Civil Procedure Code provides for summary proceedings in Articles 248–270. These procedures are even simpler and more expedient than simplified proceedings. They apply, in particular, to urgent requests and requests for provisional measures. They also apply to non-contentious matters, matters where the facts can be immediately proven, or matters where the legal situation is straightforward and indisputable. Summary proceedings also apply to specific proceedings under the Debt Enforcement and Insolvency Act, such as a declaration of bankruptcy. As in simplified proceedings, a claimant may present his or her claim orally. In the context of summary proceedings, the only permitted form of evidence is documents. Other types of evidence are only admissible if the taking of such evidence does not delay the proceedings or if the court has to establish facts ex officio.

4. Appellate Proceedings

As mentioned above each canton has a second-instance, appellate court. The Civil Procedure Code knows three appellate remedies: appeal, complaint, and revision. Subsequent complaints against final cantonal decisions can, in limited circumstances, be filed with the Swiss Federal Supreme Court. Such complaints are governed by the Federal Supreme Court Act (Articles 72 et seqq. Federal Supreme Court Act).

An appeal (Articles 308–318) is the ordinary remedy against final and interim decisions of first instance if the value in dispute amounts to at least CHF 10'000. Decisions in non-financial matters can practically always be

challenged by appeal (for example, divorce cases). An appeal must be filed in writing within 30 days of service of a decision (Article 311 I). If the decision was rendered in summary proceedings, the deadline for filing the appeal is 10 days (Article 314 I). An appeal may be filed on grounds of the incorrect application of law (such as incorrect application of the Civil Procedure Code itself or incorrect application of substantial civil law) or the incorrect establishment of facts (such as incorrect assessment of evidence, incorrect assumption about whether facts have been claimed or not claimed).

Where an appeal is excluded, i.e. in financial cases with a value in dispute below CHF 10'000, a party may file an objection (Articles 319–327a). Objections are admissible on the grounds of the incorrect application of the law, but incorrect establishment of facts may be raised as a ground only if the establishment of facts has been obviously incorrect (Article 320). This is for instance presumed if the court determines facts based on an arbitrary assessment of evidence or if it assumes a fact that needs to be proven as proved without any records giving information on this fact. The deadline for filing an objection is 30 days from service of a court's decision (Article 321 I). In the case of summary proceedings, it is 10 days (Article 321 II). Contrary to an appeal, the filing of an objection does not, as a rule, suspend the legal effect and enforceability of the contested decision (Article 325 I). However, exceptionally, the appellate court may grant a suspension of the enforceability (Article 325 II). As opposed to appeals, new evidence, or new allegations of facts are, in principle, inadmissible (Article 326).

Finally, a party can apply to the court that has decided as final instance in its case to reopen proceedings through a review (Articles 328–333) leading to a final judgment if significant facts or decisive evidence are discovered which were not available in the earlier proceedings (Article 328 I lit. a). Review of a decision may also be requested when the decision was unlawfully influenced to the detriment of a party (Article 328 I lit. b). Offences in this context are for instance perjury by a party to civil proceedings (Article 308 Criminal Code), perjury by an expert witness or false translation (Article 307 Criminal Code), issuing a false medical certificate (Article 318 Criminal Code), or bribery of Swiss public officials (Article 322ter Criminal Code). A review must be filed within 90 days of the discovery of the grounds for review (Article 329 I) and within 10 years of the date the decision came into force (Article 329 II). Like with objections, the filing of a review does not suspend the legal effect and enforceability of the decision (Article 332).

IV. Landmark Cases

1. International Case[30]

In this case, a firm that owned a Swiss patent and had its registered office in Denmark accused a firm with its registered office in Switzerland of infringing the aforementioned patent. The question was whether this qualified as an international matter in which case territorial jurisdiction would be determined by international treaties or if it should instead be subject to Swiss jurisdiction regulations. The Federal Supreme Court stated that the question of whether a matter was of international nature or not must be examined in each case individually and under the given circumstances. Therefore, it cannot be assumed that every case in which one party is of foreign nationality will automatically qualify as international. However, the Federal Supreme Court decided that a case will always qualify as international if one of the parties has its domicile or registered office in a foreign country. This applies regardless of the party's role in the proceedings (claimant or defendant).

The Federal Supreme Court rendered this decision with regards to the Swiss Jurisdiction Act, a piece of legislation that has since been replaced by the Federal Code of Procedure. However, the rules of the Jurisdiction Act were simply transferred in their full content to the Federal Code: thus, this landmark case on the international nature of a dispute is still relevant today.

2. Dürrenmatt's Heirs[31]

The famous Swiss author Friedrich Dürrenmatt (one of his most well-known works being the highly recommended play "The Physicists") died on 14 December 1990, leaving his wife Charlotte Dürrenmatt and his three children as sole heirs. However, the publishing house he had worked with erroneously transferred the rights of theatrical performances of Dürrenmatt's

30 BGE 131 III 76.

31 BGE 121 III 118.

work "Midas" to a Bavarian theatre. Thereupon, Charlotte Dürrenmatt filed an action for a declaratory judgement, demanding that the court declare the transfer of rights invalid. The Federal Supreme Court ruled that the rights on Dürrenmatt's work were common property of his heirs; hence, they could only jointly appear as plaintiffs. This is largely to ensure that none of the heirs suffer any damage due to the sole efforts of another heir. Consequently, Charlotte Dürenmatt–who had been listed alone in the statement of claim – was not a legitimate plaintiff: all of Dürrenmatt's heirs would have to have been listed in order for the claim to proceed.

This decision occurred before the Federal Code of Civil Procedure was enacted. Today, the mandatory joinder of parties is regulated by Article 70. Nevertheless, the decision is still important today, as the substantive civil law that determines which cases two or more persons must appear jointly in has not changed since the entry into force of the Code of Civil Procedure.

3. Agreement on Jurisdiction[32]

In this case, the claimant – a lawyer – filed an action for performance to claim the fees for his legal services against the defendant in Winterthur, though the defendant's domicile was in Schaffhausen. The claimant justified his petitioning of the court in Winterthur on an agreement on jurisdiction in his Terms and Conditions (T&Gs) that the defendant had signed. The Federal Supreme Court stated that parties can only waive jurisdiction at the defendant's domicile if there is a consensus between them regarding this matter. If an actual consensus in the sense of an agreement cannot be proven, it is the normative consensus[33] that counts. Such a consensus is only found if the contracting party can assume in good faith that the other party accepted the agreement on jurisdiction by signing the contract. Relevant factors in this context are, for example, the business experience of the waiving party, the arrangement of and emphasis on the jurisdiction clause within the T&Gs, etc. The Federal Supreme Court established that a jurisdiction clause must be on prominent display and be clearly marked out in the T&Gs if the contracting party does not have a lot of business experience. This is because otherwise it cannot be

32 BGE 124 III 72.

33 According to the principle of objective interpretation, a declaration of intention is to be understood the way the other party of the contract could and did in good faith understand it.

assumed that the party wanted to waive jurisdiction at his or her domicile (this requirement is known as the typographic practice).

As the typographic practice was developed before the Federal Code of Civil Procedure entered into force, doctrine largely assumes that it was abolished by the new Code and that nowadays, it is sufficient for an agreement on jurisdiction to be written, as opposed to clearly demarcated. Nonetheless, the Swiss Federal Supreme Court has confirmed its previous practice in several more recent decisions.[34]

4. Filing an Appeal with an Incompetent Court[35]

A woman filed an action against her employer before the employment court in Zurich which dismissed her case. She filed an appeal against this judgement on the last day of the time limit via the Swiss Postal Services, addressing it to the employment court that had dismissed her claim. In reality, it was the High Court of Zurich that had jurisdiction over the appeal. Thus, the High Court rejected the appeal on the basis that it had not been appropriately filed within the time limit. Upon a further appeal to the Federal Supreme Court, it was held that the lack of a legal provision covering situations where the deadline to appeal was missed due to the application being filed with an incompetent court was not intended by the legislator; thus there was a gap in the law.

Before the Federal Code entered into force in 2011, the Federal Supreme Court had already defined it as a "principle of civil procedure" that filing an appeal with an incompetent court and therefore missing the deadline to appeal does not preclude compliance with said deadline. This principle was also applied to situations where there was a gap in the regulation of this issue in the former cantonal codes. According to the Federal Supreme Court, this principle has continued to apply since the entry into force of the Federal Code, albeit in a slightly modified form. Specifically, because court organisation is still within the cantons' domain; it might not be possible for a federal authority or one from another canton that mistakenly receives an appeal to accurately determine the authority that actually has jurisdiction in order to forward the appeal on towards it. Hence the principle now only applies where

34 Judgment of the Federal Supreme Court 4A_4/2015 of 9 March 2015, consideration 2; Judgment of the Federal Supreme Court 4A_247/2013 of 14 October 2013, consideration 2.1.2.

35 BGE 140 III 636.

the party mistakenly addresses the appeal to the court that delivered the disputed judgement: as soon as the appeal is filed with this court, the deadline is considered to be met. By contrast, if an appeal remedy is filed with any other incompetent authority, compliance with the deadline can only be assumed if the incompetent authority forwards the documents towards the competent authority within the deadline: notably, such authorities have no legal obligation to do so. Of course this argumentation is not without cynicism as the Federal Supreme Court obviously does not have the confidence in the cantonal courts to determine the competent authority but requests the exact same thing from the claimant.

As the claimant in this case had filed the appeal against the judgement of the employment court with the employment court itself, the deadline was met.

5. Incorrect Instructions on Objection Remedies[36]

In this case, a party raised an objection to the decision of a supervisory authority in debt enforcement matters to the Federal Supreme Court, under the assumption the deadline for raising such an objection was 30 days from notification of the original decision. In this case, because the claimant objected to the decision of a cantonal supervisory authority in debt enforcement matters, the deadline was only 10 days. The party had been given incorrect instructions on the deadline by the supervisory authority. The Federal Supreme Court stated that, according to federal law, such incorrect instructions must not result in disadvantages for the party in question (Article 49 Federal Supreme Court Act).

But the Federal Supreme Court decided that this provision is only applicable if the party did not know and also could not have known despite exercising reasonable diligence that the instruction was incorrect. Further, it established that a person who is not legally trained and who is not represented by a legal agent cannot be blamed for not realising that an instruction was incorrect, except where they have relevant knowledge from prior proceedings. As this exception was not applicable in this case, the Federal Supreme Court declared the objection admissible despite the fact that the party had failed to comply with the 10 day deadline.

36 BGE 135 III 374.

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