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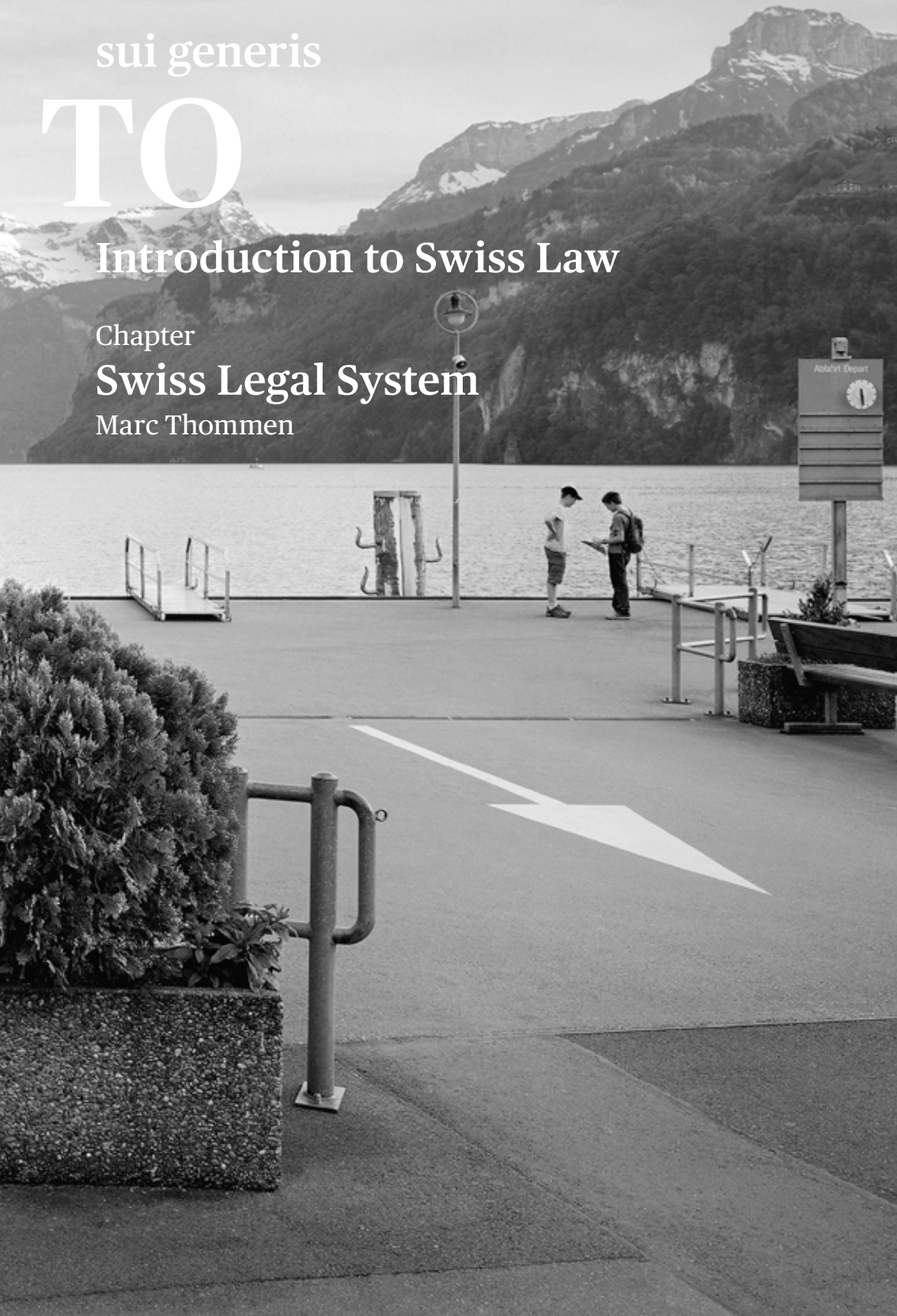
TO

Introduction to Swiss Law

Chapter

Swiss Legal System

Marc Thommen



Luisa Lichtenberger / Sophie-Katharina Matjaz

Civil Procedure

I. Swiss Civil Procedure Code

The first section of this chapter gives a brief overview of 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. The third and final part of this chapter discusses the main content of the Code (3.).

1. Constitutional Framework[2]

Under the Constitution of 1848 the cantons retained legislative power in matters of civil and civil procedure law. In 1898, the Confederation gained the right to legislate on civil law. A competence in civil procedure was not conferred. However, the federal legislator included some procedural provisions into the Civil Code (which came into force in 1907), such as rules on evidence. For example, Article 8 Civil Code: this 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.

The Constitution of 1999 still did not provide for centralised legislative powers. However, the legislator was empowered to regulate the territorial jurisdiction of Swiss courts.[3] Subsequently, the Swiss Jurisdiction Act was

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 www.fedlex.admin.ch (perma.cc/DXA5-U5RV). Besides this, 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 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 See chapter on Civil Law Principles and Family Law, pp. 229, for the detailed history to a unified civil law.

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

issued.[4] It contained unified rules on the territorial jurisdiction of Swiss courts in civil domestic matters.[5] It can be regarded as the first limited 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. The codes drew 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 Procedure Civile.* There were, however, substantial differences in the content and layout of the codes, for example in the structure of the proceedings and the procedural principles.

Nevertheless, it can be argued that a tradition of Swiss civil procedure did exist on the federal level prior to the federal code's entry into force, in two respects. First, federal laws such as the Debt Enforcement and Insolvency Act had substantial influence on civil procedure. Second, the jurisprudence of the Swiss Federal Supreme Court had a great influence on matters of procedure in civil law. For example, the Court decided in a case from 1988 that once an action is filed, the subject matter of the dispute may not be filed elsewhere between the same parties.[6] Still the variety of procedural codes proved to be a source of complication and legal insecurity.[7] Given these noted issues, the reform of the Swiss justice system was approved in a landslide on 12 March 2000.[8] This cleared the way for the drafting of the Civil Procedure Code.

Despite the Civil Procedure Code, the cantons retained responsibility in some procedural domains, such as the organisation of the courts and conciliation authorities (Article 122 II Constitution[9] and Article 3 Civil Procedure Code[10]), the administration of justice in civil cases, and the tariff authority.

Cantonal legislation on court structure regulates the composition of the courts and establishes the matters that fall under the courts' competence, i.e. their subject-matter jurisdiction. Federal law obliges the cantons to provide two cantonal instances of civil jurisdiction: there must be a possibility to appeal a first instance judgement to a cantonal appellate court (see Fig. 1).

4 Federal Act on the Jurisdiction in Civil Matters of 24 March 2000 (Jurisdiction Act), SR 272, no longer in force.

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

6 DFC 114 II 186; now codified in Article 64 Civil Procedure Code

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

8 86.4% of the voters and all cantons approved the reform. The turnout was 42%.

9 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.fedlex.admin.ch (perma.cc/7ARN-UVSH).

10 Henceforth, Articles cited in this chapter without specific mention refer to the Civil Procedure Code.

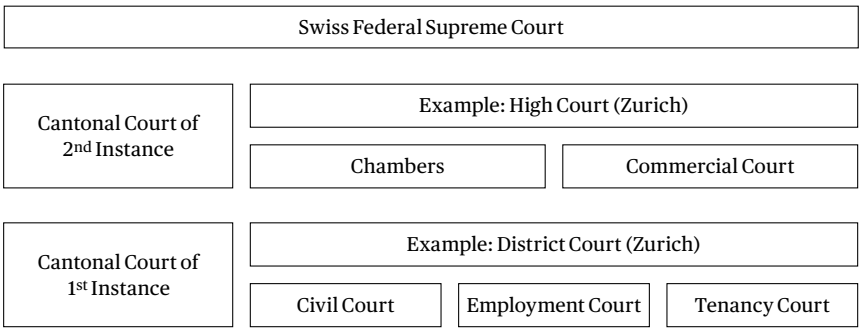


Figure 1: Court Organisation

2. Legislation

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, a commission of experts was established with the set purpose of considering the unification of civil procedure and producing a preliminary draft for a federal code. In 2002, the experts proposed to unify the cantonal courts' procedures 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. The idea of unification was mostly welcomed. In particular, the fact that the proposals avoided the introduction of a US-style class action was widely approved of. However, some details of the Code faced criticism: i.e. the strong emphasis on written form for civil proceedings was criticised for being likely to lead to unnecessarily lengthy proceedings. Further, there were demands for the introduction of mediation as an alternative to conciliation proceedings.

Following the national consultation procedure, a draft of the Swiss Civil Procedure Code[11] and an explanatory message were issued[12]. Parliament passed the act on 19 December 2008. It entered into force on 1 January 2011, replacing the 26 cantonal civil procedure codes and the Jurisdiction Act.

11 Draft of the Swiss Civil Procedure Code, Federal Gazette No. 37 of 19 September 2006 (BBl 2006 7221), pp. 7413.

12 See footnote 7 for an example of a message in the Swiss legislation process.

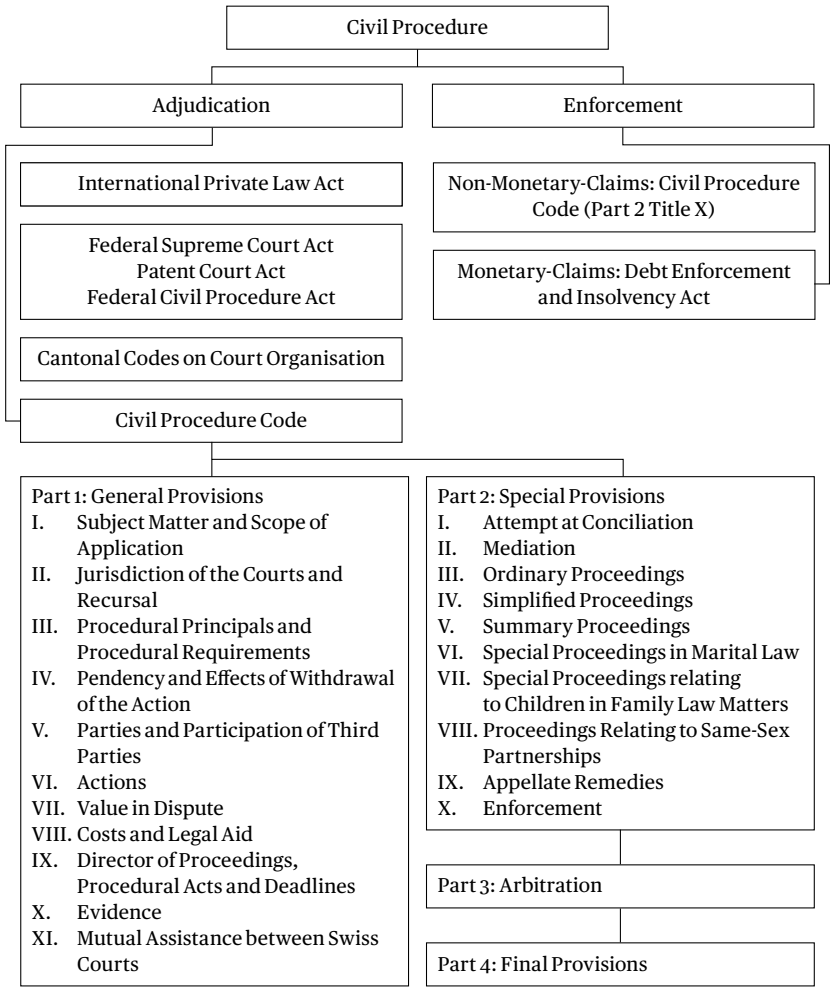


Figure 2: Civil Procedure Laws

Following the unification, it became a lot easier for lawyers to represent clients in other cantons. It also enhanced the academic debate about civil procedure in Switzerland: there had previously only been limited published material on the cantonal civil procedure codes, leading to a lack of literature for legal professionals to review and rely on. Since the Code's introduction, there has been an increase in federal judicial activity concerning civil procedure in Switzerland, leading to enhanced predictability of court decisions and 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 difficulties for lawyers practicing in different cantons.

Another aspect which has proven controversial is the lack of collective redress mechanisms. The legislator did not introduce class action lawsuits, because they were considered to be unsuited to the Swiss legal system. Instead, courts deal with proceedings involving multiple parties by relying on existing procedural instruments: in particular, the group action for associations and organisations (Article 89)[13] and the general joinder of claims which were filed separately but are closely related in substance (Article 90). However, it is now widely recognised that these instruments are no substitute for proper collective redress mechanisms.

On 2 March 2018, a preliminary draft for a partial revision of the Civil Procedure Code was submitted to a national consultation procedure. It aimed to improve access to collective redress by allowing collective enforcement of monetary claims, especially mass damages. The preliminary draft provided for the establishment of a new collective settlement procedure, by which it would be possible for a person accused of a rights violation to reach a settlement with the organisation that filed the relevant group action. As the proposals for strengthening collective redress were very controversial, they were detached from the revision and will be discussed separately.

3. Content

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.

The procedure for the enforcement of monetary claims as well as bankruptcy matters are regulated by the Debt Enforcement and Insolvency Act. In Switzerland monetary claims can be enforced without preceding substantive judicial assessment:[14] the authorities in these matters are debt enforcement

13 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 rights of the members of the group.

14 The creditor can address a demand for enforcement to the competent enforcement authority, specifying the relevant legal ground and the amount claimed (Article 67

offices and bankruptcy offices, rather than courts. Still, the court's involvement is necessary to order some procedural steps, such as the opening of bankruptcy proceedings. The provisions within the Civil Procedure Code apply to such court orders (Article 1 lit. c).

The second Title (Articles 4–51) regulates the jurisdiction of the courts. As mentioned above, subject-matter jurisdiction is governed by cantonal legislation, while territorial jurisdiction (place of jurisdiction) is regulated by federal law. The 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 specific place of jurisdiction is provided for. Specific places of jurisdiction are, for instance, provided for disputes over immovable property (Article 29), employment law (Article 34), or consumer contracts (Article 32). Most places of jurisdiction are optional: the parties may choose the court they want to have jurisdiction (Article 17). Defendants can be found to have consented tacitly to the optional jurisdiction of an incompetent court if they enter an appearance on the merits without objecting to the court's jurisdiction (Article 18). Only few places of jurisdiction are mandatory, but where this does apply it is not possible for the parties to agree on the jurisdiction and implicit acceptance by appearance is excluded.

The third Title (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 4 (Articles 62–65) governs the rules for when a claim is considered to have started (and therefore become "pending"), as well as withdrawal of the action. As soon as an action is filed, a case becomes pending and is thus considered to have been started (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 has legal capacity can be a party to proceedings (Article 66). Natural persons always

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Debt Enforcement and Insolvency Act). Upon receipt of the demand on enforcement, the enforcement authority issues an order for payment (Article 69 Debt Enforcement and Insolvency Act) and serves it on the creditor and debtor. The order contains the request to the debtor 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 paused until a court decides on the claim.

have legal capacity,[15] while legal entities must be pronounced to have capacity by the law. Any person with capacity to act[16] is considered to have the capacity to take legal action (Article 67 I). A person without capacity to act (such as children) may act through a legal representative (Article 67 I). A party may choose whether to be represented in proceedings (Article 68 I). Professional representation is essentially reserved to lawyers, although there are exceptions for tenancy and employment matters (Article 68 II).

Title 6 (Articles 84–90) regulates the three main types of actions. The first type of action is the action for performance, where the claimant demands that the court orders the defendant to do something, refrain from doing something, or tolerate something (Article 84): for example, the court may order the defendant to pay damages to the claimant. 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 or obligation (Article 87): for example, a divorce decree. Third, an action for a declaratory judgement is used to demand that the court establish whether a right or legal relationship exists (Article 88): for example, whether a valid contract exists between two parties. The action for a declaratory judgement is subsidiary to the other actions.

Title 7 contains rules on the calculation of the value in dispute, Title 8 on costs and legal aid. Title 9 includes provisions on deadlines.

Title 10 (Articles 150–193) contains the rules on evidence. 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 does not have to be proven (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 for examination evidence that is offered in the required form and timeframe. However, courts may anticipate the evaluation of evidence. This allows a judge to refuse to examine evidence if he or she is already convinced of a certain fact before taking the evidence. Some legal commentators see this practice as inherent to the free assessment of evidence and necessary with a view to the constitutionally guaranteed[17] "need for speed" (Article 124 I). It is certainly true that at a certain point a judge will be convinced that his or her opinion cannot be affected by considering (more) counterevidence.

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

16 Article 13 Civil Code: *"A person who is of age and is capable of judgement has the capacity to act"*. See chapter on Law of Persons, pp. 255.

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

Of course, the court may only refuse to accept evidence if it is sure that it will not change its opinion, not where there is any doubt and not where evidence is simply deemed generally unfit to prove a certain fact. Further, the speedy trial argument should not be turned against parties who would happily accept prolonged proceedings if they are allowed to offer more evidence.

Article 168 I lists the admissible types of evidence. One particular issue is hearsay. A witness must disclose where parts of their statement are hearsay evidence. Such statements do not possess direct evidential value but can be included as circumstantial evidence when applicable. As for expert 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 expert reports as physical records, which would afford such reports a heavier evidential weight.

As set out above, the distribution of the burden of proof is determined by Article 8 Civil Code (rather than the Civil Procedure Code): the burden of proof for establishing an alleged fact shall rest on the person who would derive rights from that fact. There are also legal provisions which establish a presumption of certain facts, as long as there is no proof to the contrary. Article 3 I Civil Code states that good faith is presumed. This means that the party invoking good faith in a given case is not required to prove it.

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, it is not possible to impose fines or sanctions. Instead, the refusal is considered during the appraisal of evidence. For example, if a party refuses to produce a document, the court might use the refusal as an indication that the document features the content claimed by the opposing party. When third parties refuse to cooperate without a valid reason, a disciplinary fine or compulsory measures may be ordered (Article 167 I), like the enforcement of witness appearances or the seizure of documents.

Title 10 also regulates illegally obtained evidence. Evidence is *formally* unlawful when a witness gives testimony without being advised of their right to refuse to cooperate. Evidence can also be obtained in infringement of the *substantive* law, for example when a letter is opened in breach of privacy (Article 179 Criminal Code)[18] or a conversation is secretly recorded (Article 179bis

18 Swiss Criminal Code of 21 December 1937 (Criminal Code), SR 311.0; see for an English version of the Swiss Criminal Code www.fedlex.admin.ch (perma.cc/V8MH-MMRB).

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 higher in ex-officio investigations, e.g. in cases concerning children in family matters. The infringed private interest must also be weighed. Generally, evidence obtained through violence or threats is not admissible.

Part 2 of the Civil Procedure Code contains special provisions on conciliation (Articles 197–212) and mediation (Articles 213–218). A *conciliation* is a proceeding to reconcile the parties in an informal manner. It serves to avoid court proceedings.[19] The law mandates that parties go through conciliation proceedings before a case can be brought to court (Article 197).

Mediation is an even less formal dispute resolution procedure. It is guided by an independent third party. Parties can agree to use mediation instead of conciliation (Article 213), but this option is only rarely used.

Title 3 of Part 2 regulates the ordinary proceedings at first instance (Articles 219–242). Ordinary proceedings are conducted in civil cases where the value of dispute exceeds CHF 30,000. Title 4 (Articles 243–247) regulates simplified proceedings. These proceedings apply in financial disputes not exceeding CHF 30,000. Title 5 (Articles 248–270) concerns summary proceedings: these are cases where the facts or the law are clear or where matters are non-contentious. 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 following judgment (appeal, objection and review) and Title 10 regulates the enforcement of decisions concerning nonmonetary claims. As stated above, the enforcement of monetary 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.

19 See III.1 below.

II. Principles

Civil procedure 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) and 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 (Article 54 I). The court applies the law ex-officio (Article 57). In the following paragraphs, four further fundamental principles will be examined.

1. Party Disposition

According to the principle of party disposition the parties have the power to decide the time, subject matter, and duration of proceedings. Therefore, non-ultra petitia applies: the court may not award a party anything more or different than requested (Article 58 I). The courts cannot open proceedings on their own initiative. The claimants decide what claim they want to file and whether they wish to file it. If a claim is divisible, an action for only part of the claim can be filed (Article 86). The principle of party disposition also means that the party can end the proceedings at any point through settlement, acceptance of the claim or withdrawal (Article 241). These methods will 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 is obliged to ask appropriate questions to provide an opportunity for either party to clarify or complete their submissions.

2. Ex-Officio Assessment

The principle of ex-officio assessment (Article 58 II) is an exception to the principle of party disposition. It means that the court has a duty to assess the case before it. It deprives the parties of their free disposal over the matter and the court is not bound by the parties' requests as regards the procedure of the case. The principle of ex-officio assessment is applied where the public interest

requires that the parties are deprived of their free disposal over proceedings, for instance to protect a weaker party (like a minor). For example, the court can award a higher sum of child maintenance than the amount requested by the claimant.

The claimant must still file an action even if ex-officio assessment is applicable. State authorities may only initiate civil proceedings if this is explicitly provided for by federal law (such as in Article 106 Civil Code).[20] Appellate proceedings can never be initiated ex-officio.

3. Party Representation

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 obtain the facts necessary for deciding the case. In Swiss civil procedure, this principle is the rule, meaning that only the facts produced by the parties can form the subject matter of the proceedings. The parties must present the court with the facts in support of their case and submit any supporting evidence (Article 55 I). This can contradict the ideal of establishing the material truth. For example, if a party does not contest allegations of its opponent, the judge has to decide on the basis of these facts, regardless of his or her conviction of the truth. However, this result is justified by the principle of individual autonomy in civil procedure.

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. As with the principle of party disposition, the principle of party representation is also complemented by the court's duty to enquire, whereby the court will ask questions to allow either party to clarify or complete their submissions where unclear or incomplete. 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 Article 247.

20 Article 106 provides that state authorities may initiate civil proceedings if for instance 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.

4. Ex-Officio Investigation

The principle of ex-officio investigation is an exception to the principle of party representation. It too concerns the establishment of the facts in a case. However, within the scope of the principle of ex-officio investigation the courts cannot rely on the facts presented by the parties: they must inquire into the "material" truth ex officio. While the principle is highly relevant in criminal proceedings, it does not have the same significance in civil proceedings. Civil courts cannot rely on investigation authorities. Ex-officio investigation can be limited (establish the facts) or unlimited (investigate the facts). Limited ex-officio investigation applies in disputes concerning matters of discrimination under employment law and certain tenancy matters. Unlimited ex-officio investigation applies in proceedings concerning children in family matters. The main goal of the ex-officio investigation is to protect the weaker party.

Where ex-officio investigation is required, the court questions the parties extensively and demands the production of relevant materials, for example by calling certain witnesses. Still, due to the court's limited avenues of investigation, it remains 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 full 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:

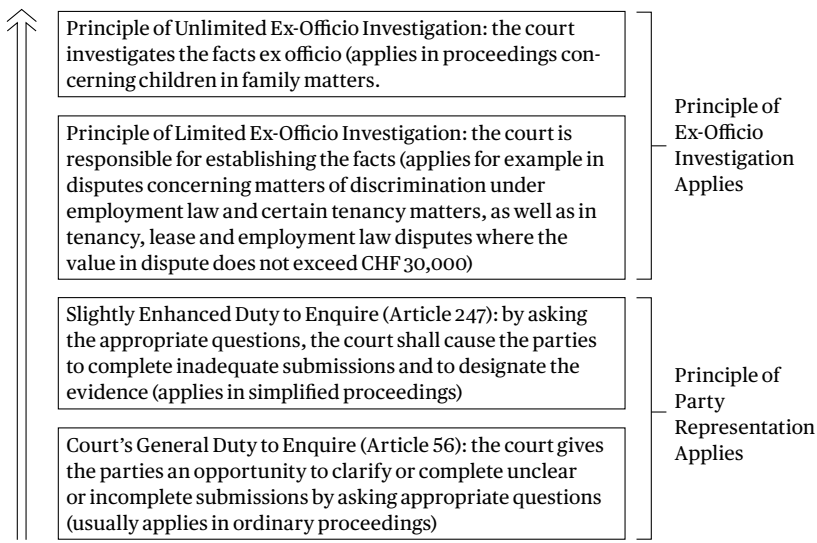

Figure 3: Levels of Court Involvement in Establishing the Facts

III. Institutions and Procedure

The institutions and procedure of Swiss civil justice can be best understood by following their application through the course of a standard case. First, the conciliation proceedings will be explained (1.). Subsequently, the rules for ordinary proceedings will be examined in detail (2.) and a short overview of simplified and summary proceedings will be given (3.). Finally, the appellate remedies will be outlined (4.).

1. Conciliation Proceedings

An attempt at conciliation is generally mandatory before a case can be brought to court (Article 197). The law does provide for exceptions. For example, in disputes exceeding CHF 100,000 parties can renounce conciliation. The federal law regulates the procedure before conciliation authorities but leaves their organisation to the cantons. Conciliation is initiated by the claimant by filing a written (Article 130 I) or oral application (Article 202 I). The application must identify the opposing party, the claim and the matter in dispute (Article 202 II). Once a case is filed, it becomes pending (Article 62).

Conciliation authorities try to help the parties reach an agreement. The procedure is less formal than in court proceedings. Conciliation hearings are generally[21] not open to the public. After the application is filed, the conciliation authority 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 up to CHF 2,000, the conciliation authority can decide on the merits of the claim (Article 212). If the value in dispute is below CHF 5,000, the conciliation authority may propose a judgement to the parties, which has binding effect if it is not rejected by any of the parties within 20 days (Article 211). If the parties do not reach an agreement the conciliation authority grants authorisation to proceed (Article 209 I). Authority to proceed is also granted if a judgement proposed by the conciliation authority is rejected by one or both

21 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 public interest.

parties. Once authority to proceed has been granted, the claimant has three months to file the action in court.

2. Ordinary Proceedings

Court proceedings are initiated by the claimant filing a detailed statement of claim (Article 221). The court 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, the court can decide solely from the statement of claim (provided the court considers it is in a position to make a decision on the facts available to it). Otherwise, the court will summon the parties to the main hearing (Article 223 II).

After the statement of defence is received, the court has several choices regarding the next procedural steps. It can proceed directly to the main hearing, order an instruction hearing or order a second written exchange before the main hearing. 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 will have the burden of proof for each fact. An instruction hearing can be held at any time during the proceedings. According to the Civil Procedure Code, the purpose of such an instruction hearing can be to discuss the dispute informally, complete the facts,[22] reach an agreement, or simply prepare for the main hearing (Article 226). Judges frequently and willingly make use of such instructional hearings for one simple reason: these hearings often serve the purpose of ending a dispute at an early stage of the proceedings by leading the parties to a settlement. This is because parties often become conscious at this stage that further litigation will be very costly and offers no predictable outcome. Settling the case early is not always in the interest of those seeking justice but is instead largely in the interest of the judges, who can save themselves the time-consuming processes of taking evidence and drafting judgments. Critical voices therefore claim that instruction hearings are legally approved ways for judges to avoid additional work.

The main hearing follows a formal structure. First, there are two rounds of oral statements by each party (Article 228). The second oral statement in the main hearing provides the parties with an opportunity to comment on the

22 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.

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. 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.

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 written statement be produced within ten days (Article 239).

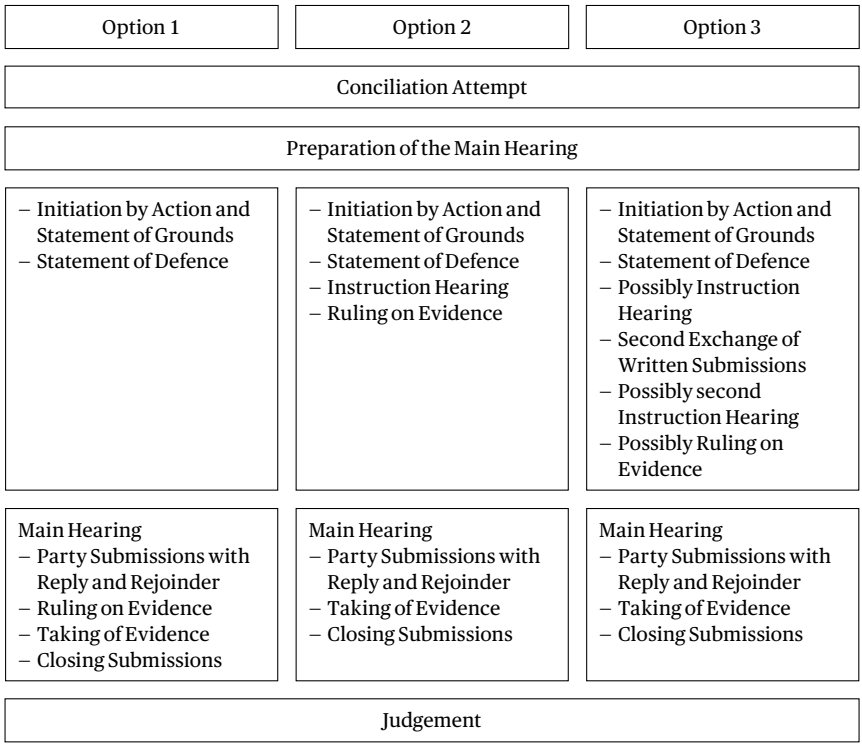

Figure 4: Possible Options for the Conduct of Ordinary Proceedings

3. Other Proceedings

Simplified proceedings (Articles 243-247) are less formal than ordinary proceedings and attribute a more active role to the court. A claimant may submit her claim to the court orally.

Summary proceedings (Articles 248-270) are even simpler and more expedient than simplified proceedings. They mostly apply in urgent matters and requests for provisional measures (i.e. stopping the publication of defamatory writings). They also apply in specific proceedings under the Debt Enforcement and Insolvency Act. As in simplified proceedings, a claimant may present the claim orally. In the context of summary proceedings, documents are principally the only evidence used.

4. Appellate Proceedings

The Civil Procedure Code comprises three appellate remedies: appeal, objection, and review.

An appeal (Articles 308-318) is the ordinary remedy against decisions of first instance if the value in dispute amounts to at least CHF 10,000. Decisions in non-financial matters can always be challenged by appeal. An appeal must be filed in writing within 30 days of service of a decision (Article 311 I), and may be filed either on grounds of the incorrect application of law or the incorrect establishment of facts.

Where the conditions for lodging an appeal are not met, a party may file an objection (Articles 319-327*a*). Objections are admissible on the grounds of the incorrect application of the law and obviously incorrect taking of evidence (Article 320). The deadline for filing an objection is 30 days from service of a court's decision (Article 321 I), or within 10 days in summary proceedings (Article 321 II).

Finally, a party can apply to have a proceedings reopened through a review (Articles 328-333) either if significant facts are discovered which were not available in the original proceedings (Article 328 I lit. a) or if the decision was unlawfully influenced (Article 328 I lit. b). This could include situations where an offence was committed during the proceedings—for example, a party to the original proceedings committing perjury (Article 308 Criminal Code) or perjury being committed by an expert witness, or a false translation of a given document being provided (Article 307 Criminal Code). A review must be filed within 90 days of the discovery of the relevant facts (Article 329 I) and within 10 years of the date the decision came into force (Article 329 II).

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).

IV. Landmark Cases

1. Dürrenmatt's Heirs[23]

The case of DÜRRENMATT's heirs established an important principle as to when persons will be required to appear jointly in proceedings. The famous Swiss author FRIEDRICH DÜRRENMATT died on 14 December 1990, leaving his wife CHARLOTTE DÜRRENMATT and his three children as his sole heirs. The publishing house he had worked with erroneously transferred the rights of theatrical performances of DÜRRENMATT's 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 the common property of his heirs; hence, they could only appear as joint plaintiffs. Consequently, CHARLOTTE DÜRENMATT—who had been listed alone in the statement of claim—was not a legitimate plaintiff. This principle was largely designed to protect an heir from suffering damages or losses due to the actions of another heir alone.

This decision occurred before the Civil Procedure Code 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 the rules for when two or more persons must appear jointly in proceedings has not changed since the entry into force of the Code of Civil Procedure.

2. Agreement on Jurisdiction[24]

In a case relevant to the rules on court jurisdiction, the claimant—a lawyer—filed an action to claim 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&Cs), which the defendant had signed. The Federal Supreme Court stated that parties can only waive jurisdiction at

23 DFC 121 III 118.

24 DFC 124 III 72.

the defendant's domicile if there is a consensus between them. Such a consensus will only exist 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 include, for example, the business experience of the waiving party and the arrangement of and emphasis on the jurisdiction clause within the T&Cs. The Federal Supreme Court established that a jurisdiction clause must be on prominent display and be clearly marked out in the T&Cs where one of the contracting parties does not have a lot of business experience. Otherwise, it cannot be assumed that that party wanted to waive jurisdiction at his or her domicile.

This principle of the interpretation of jurisdiction clauses was developed before the Federal Code of Civil Procedure entered into force. Nonetheless, the Swiss Federal Supreme Court has confirmed it in several more recent decisions following the Code's enactment.[25]

3. Filing an Appeal at a Court without Jurisdiction[26]

A woman filed an action against her employer before the employment court in Zurich, which subsequently dismissed her case. She filed an appeal against this judgement on the last day of the time limit for doing so via the Swiss Postal Services, addressing it to the employment court that had dismissed her claim. In reality, the High Court of Zurich 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 there was a lack of a legal provision for situations where the deadline to appeal was missed due to the application being filed at a court without jurisdiction and that this void had not been intended by the legislator; there was thus a gap in the law.

Before the Civil Procedure Code entered into force in 2011, the Federal Supreme Court had already held that it was a "principle of civil procedure" that filing an appeal at a court without jurisdiction 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 continued to apply following the entry into force of the Civil

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

26 DFC 140 III 636.

Procedure Code, albeit it held that there had been some slight modifications to the principle. In particular, given that court organisation is still an area within the cantons' domain, the Federal Supreme Court considered that it might not be possible for a federal authority or an authority from another canton that mistakenly receives an appeal to accurately determine the authority with jurisdiction, in order to forward the appeal on to it. Hence, the principle now only applies where 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 met. By contrast, if an appeal remedy is filed with any other authority without jurisdiction, compliance with the deadline can only be assumed if the authority without jurisdiction forwards the documents to the authority with jurisdiction within the deadline: notably, such authorities have no legal obligation to do so. Of course, there is some inconsistency to this rule: although the Federal Supreme Court obviously does not have confidence that the cantonal courts will be able to determine the competent authority, it nonetheless expects the claimant to do the same thing.

As the claimant in this case had filed the appeal against the judgement of the employment court with the first instance employment court itself within the time limit, the deadline was held to have been met.

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