Precedent in Switzerland

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Introduction

I was asked to speak about the role of precedents in the area of private and commercial law in Swiss Courts. This means that I will not talk about precedents in criminal or public law cases.

We need to have a basic knowledge of the judicial system of Switzerland to understand the role that precedents play. After reviewing the judicial system we will look into the role, significance, effects and limits of precedents and end with the question of a court's right to depart from its own precedents.

Swiss Judicial System

Switzerland is a federal state with 26 cantons. However, unlike the US, we do not have a federal and a state court system. The courts of first and second instance are cantonal and there is only one Supreme Court, the Federal Supreme Court. Currently civil procedure is mainly cantonal law. This means that Switzerland has 26 procedural statutes plus one for the Federal Supreme Court. This will change as of 1 January 2011 when the Federal Civil Procedure Act (FCPA) will come into force. For practical purposes I will only consider the new FCPA.

Cases concerning private law must, as a general rule, first go through a conciliation proceeding (Art. 197 FCPA). There are exceptions, notably for commercial cases (Art. 199 FCPA). If the parties do not settle their case at that stage (Art. 209 FCPA), the claim will be adjudicated by a court of first instance (Art. 219 ff. FCPA), which is called differently in different cantons (district courts, civil courts etc.). Four cantons (AG, ZH, SG, BE) have specialised courts for commercial cases as the only instance.

The decisions of the civil or commercial courts can be appealed if the litiguous amount is at least CHF 10.000 (Art. 308 (2) FCPA). The organisation of the appeal courts is a matter of cantonal law.

Lastly civil and commercial cases can be appealed to the Federal Supreme Court, if the litiguous amount is not less than CHF 30.000 (Art. 72 (1) Federal Law on the Supreme Court, FLSC). If the litiguous amount is less than that, the federal appeal is only admissable if the case poses a question of law of fundamental significance ("Rechtsfrage von grundsätzlicher Bedeutung", Art. 72 (2a) FLSC). The Supreme Court only examines questions of law.

The Swiss Supreme Court has seven chambers: two dealing with private and commercial cases, two for public and administrative law cases, one criminal chamber and two chambers dealing with social insurance cases. It has two seats: one in Lausanne and one in Lucerne. There are currently 38 Supreme Court Judges, 127 clerks that draft and write most of the decisions and also 19 judges that sit in addition to other day time jobs (professors, attorneys, judges from cantonal appeal courts etc.). This poses special problems in relation to precedents. We will come back to that.

The organisation of the judicial system influences and limits the use of precedents in Switzerland. The lower courts can relatively safely deviate from precedents if the litiguous amount is less than CHF 10.000, because in these cases there is in principle no appeal to the cantonal appeal courts. If the amount is between CHF 10.000 and 30.000 there is no appeal to the Federal Supreme Court save the case of a fundamental question of law.

Let me give you a recent example to illustrate this: The Swiss Code of Obligations (CO) states that a mandate, i.e. the contract between an attorney and his client, can be terminated at any time (Art. 404 CO). According to a long established, but disputed line of cases of the Federal Supreme Court this Art. 404 CO is mandatory: The parties are not allowed to contractually derogate from it. The rationale behind this is that a special relationship is the foundation of a typical mandate contract. The problem is that Art. 404 CO is also applied to atypical mandate contracts, e.g. outsourcing contracts, where the parties make large investments and no special trust is involved; they are purely commercial. Many lower courts oppose the interpretation of the Supreme Court that Art. 404 CO is mandatory. So one court decided the question differently and ruled that in atypical mandates the parties are not free to "hire and fire". Since the litiguous amount was less than CHF 30.000 there was no regular appeal. The only possibility was to argue that a fundamental question of law was involved. What happened? The Supreme Court did not accept the case with the somehow strange reasoning that it is not a fundamental question of law since its own case law is clear and unambiguous – so there is no reason to review the case. This, of course, produced the curious effect that the ruling of the lower court, which is in contradiction to the Supreme Court case law, was indirectly confirmed.

Role, Significance and Effects of Precedents in Switzerland

I like to point out that Swiss Law contains a classic and classy, but sometimes overlooked, provision which addresses the issue of precedents. Art. 1 of the Civil Code (CC) is a provision that is directed towards the courts and tells them how to decide cases. It states that "*the law applies according to its wording or interpretation to all legal questions in respect of which it contains a provision. In the absence of a provision, the court decides in accordance with customary law, in absence of customary law, in accordance with the rule which it would make as a legislator*". In other words: The courts are first and foremost bound by the statutes, codes etc. Only if there is no answer found therein, the court is advised to turn to customary law and is in the last resort allowed to formulate a general rule modo legislatoris. Art. 1 CC furthermore instructs the courts to "*follow established doctrine and case law*" when interpreting the statutes and finding the right rule.

What does that mean?

- Firstly, it seems from the wording that established doctrine and case law are put on the same level – but this is deceiving. It is recognised that the established doctrine is, compared to precedents, a source of minor importance.

- Secondly, the legal doctrine and the judicial precedents are established if they are materially convincing, reasonable and practicable.

- It is thirdly undisputed that a lower court is at least factually bound by precedents if they are convincing and reasonable (majority opinion in Germany: see Sebastian Schalk, Deutsche Präjudizien und spanische "Jurisprudencia" des Zivilrechts (Frankfurt a. M., 2009), p. 251 ff. w.f.r.; Alexy/Dreier, Precedent in the Federal Republic of Germany, in: Interpreting Precedents, A comparative Study, MacCormick/Summers (ed.), Darthmouth 1997, p. 17, at p. 26 ff.; Ernst Kramer, Juristische Methodenlehre, 2nd ed. (Bern, 2005), p. 210). Thus, a lower court judge will in practice rarely deviate from established case law – or even from a singular decision. Additionally, courts use precedents in their reasoning the same way they use statutes.

However, the question remains if precedents are sources of law like statutes, thus having the same binding force. If that is the case, it would, of course, be mandatory for the lower courts to adhere to precedents. It would also have the effect that attorneys who advise their clients in contradiction of precedents would be liable for damages. A few authors indeed argue that precedents can be viewed as a source of law (Kramer, op. zit., p. 214 f.). But it seems to be the minority opinion (opposing view e.g. BK/Meier-Hayoz, Art. 1 recital 475). Be that as it may: It is a fact that Swiss Civil and Commercial Law is substantially made of case law which interprets, complements and even changes statutory laws and sometimes creates new rules (Hans Peter Walter, Die Sicht des Schweizerischen Bundesgerichts, in: Ehrenzeller/Gomez et al. (ed.), Präjudiz und Sprache (Zürich/St.Gallen, 2008), p. 127, at p. 134).

A Swiss judge is, therefore, called to take precedents into account. We see this also to a certain extent e.g. in Italy (Italian Supreme Court, Nr. 10741, 11.5.2009). On the other hand it goes without saying that a decision is not void if it does not follow a precedent of a higher court. Sometimes even the opposite effect can be observed: The Supreme Court is quite willing to take dissenting decisions of lower courts into consideration (Franz Hasenböhler, Richter und Gesetzgeber in der Schweiz, in: Frank Richard (ed.), Unabhängigkeit und Bindung des Richters in der Bundesrepublik Deutschland, in Österreich und in der Schweiz, ZSR Beiheft, 2nd ed. (Basel, 1997), p. 99, at p. 112).

Limits of the Doctrine of Precedents

We have already talked about some limits of the doctrine of precedents in Switzerland due to the organisation of the judiciary system and due to the fact that precedents are not sources of law in the formal sense. There are more factors that constrain precedents.

- Firstly, decisions of the Supreme Court do not contain a great deal of facts. They are mostly focused on the doctrine and application of the law. Often the facts and the law are not properly separated; they are mixed together which makes it hard to recognise if the respective fact is a given or if it is part of the legal argumentation (Heinz Aemisegger, Länderbericht Schweiz: Gedanken aus der Sicht eines Praktikers, in: Ehrenzeller/Gomez et al. (ed.), Präjudiz und Sprache (Zürich/St.Gallen, 2008), p. 171, at p. 173). This is important when we speak about precedents because it is often difficult to decide whether the rule contained in a certain Supreme Court decision fits the particular set of facts of another case. Additionally there is a certain danger resulting from the so called "Leitsatz", a sort of head note that is added to the Swiss Supreme Court decisions that are published in the official journal. Even though they are merely attempts to summarize the main points of the case in a few words, legal practice has a tendency to turn them into rules that seemingly have to be applied to other cases irrespective of the facts at hand. Thus the danger is that lower courts take the head notes and treat them as precedents irrespective of the concrete facts underlying the reasoning.

- Secondly, the frequent use of obiter dicta obscures the reasoning and distracts from the core of the decision, the ratio decidendi. There is a notable tendency in Supreme Court decisions to not only concisely answer the relevant and litiguous questions of the case but to elaborate over many, many pages on general doctrinal questions of law.

- Thirdly, the Supreme Court decisions are mostly written by the clerks which often use text blocks that are not uniform across the different chambers. This creates problems if a lower court is supposed to follow the "established" case law.

- Fourthly, the Supreme Court has two ways of publishing its decisions: A certain number, supposedly the "important" ones are published in the Official Supreme Court Series. The rest – which constitutes the vast number of decisions – are only published on the internet. It is not always clear why a decision is published in the official journal or only on the internet. In terms of precedents you can not simply rely on the official journal, because important rulings are sometimes "only" posted on the internet.

- Fifthly, as I have already said, the judicial organisation and the limits on the possibilities to appeal restrict the binding effects of precedents: If there is no claimant, or the claimant can not appeal due to procedural reasons, a decision that is in contradiction to a precedent will stand.

Departure from Precedents

The constitutional right to equal treatment under the law (Art. 8 (1) of the Constitution) requires that the Supreme Court observes its own precedents (BGE 1C-356/2009, 12.2.2010, E. 3.1.). However, it is admissable to depart from precedents, if there are serious and objective reasons and if "*the new solution better reflects the ratio legis, changed circumstances or altered legal views*" (BGE 5A-333/2009, 4.12.2009, E. 3; BGE 127 II 289, E. 3a; Kramer, op. cit., p. 251 ff.). The longer the current case law has been applied, the more weight these reasons have to carry (BGE 136 III 6, 6; BGE 135 II 78, 85; BGE 133 III 335, 338). The departure from a precedent must not just be the expression of a momentary fluctuation or a singular deviation. Rather it has to be a fundamental adjustment for all similar cases (BGE 2A-573/2002, 21.5.2003, E. 3.2; Reich/Uttinger, Praxisänderungen im Lichte der Rechtssicherheit und der Rechtsrichtigkeit, ZSR 129 (2010) I, p. 163, at p. 164 ff.). It has been said that there is a rebuttable presumption in favor of precedents (Kramer, op. cit., p. 254).

On the level of the Supreme Court I also like to point out Art. 23 FASC entitled "*departure from case law and precedent*". It states the conditions that need to be fulfilled for one chamber to depart from a precedent set by another chamber. Art. 23 FASC is necessary because the Supreme Court has, as I mentioned before, seven chambers. It is clear that a certain amount of coordination is needed to guarantee a consistent case law. Art. 23 FASC assumes that the legal question at hand relates to the ratio decidendi and not only to an obiter dictum (BGG-Komm/Seiler, Art. 23 N 3).

According to Art. 23 (1) FASC a chamber of the Supreme Court is only allowed to depart from a precedent established by one or more of the other chambers, if two thirds of the Meeting of Justices of these other chambers agree. Their decision is binding. It is interesting to note that disregard of Art. 23 FASC does not establish a ground on which an appeal on issues of law can be based.

The new practice is to be applied immediately and in all pending proceedings (BGE 4A-161/2009, 8.6.2009, E. 2.2; BGE 135 II 78, 85; BGE 132 II 153, 159). There are exceptions, though they are more relevant to procedural questions than to matters of substantial civil and commercial law. If the departure from or clarification of the precedent e.g. relates to the calculation of time limits for filing an appeal and a party would suffer a detriment, it is allowed to rely on the old precedent (BGE 135 II 78, 85). It is disputed if a departure from precedents should have a retroactive effect; in tax matters the Supreme Court has a tendency to give the new case law such effect (see Reich/Uttinger, Praxisänderungen im Lichte der Rechtssicherheit und der Rechtsrichtigkeit, ZSR 129 (2010) I, p. 163, at p. 175 ff.). The effect "ex nunc et pro futuro" has been criticized as unjust. Instead it has been proposed that the Supreme Court should announce a departure from a precedent in an obiter dictum and thus "warn" the legal community (Kramer, op. cit., p. 256 f.).

I researched the Supreme Court decisions of the last 50 years that were published in the official journal and that concerned matters of civil and commercial law. I found 62 departures from

precedents that were labelled as such of the published decisions. Of course, I might have missed one or the other, esp. because the Supreme Court had in some cases not published such decisions (e.g. Entscheid Anklagekammer v. 5.8.83, *Staatsanwaltschaft Kt. AG gg. Staatsanwaltschaft Kt. BS*, only cited 9 years later in BGE 118 IV 301) or the departure is disguised. A study conducted about 20 years ago shows that between 1875 and 1990 there were 731 departures from precedents, roughly 2.5 % of *all* the published decisions. Comparing these figures we can draw the conclusion that the Supreme Court is more willing to depart from precedents in the last decades than it used to be. This seems to be an interesting trend.

Conclusion

To sum up: It is safe to say that the courts in Switzerland respect and follow the ratio decidendi of precedents to a wide extent due to the rule in Art. 1 (3) CC. With the typical Swiss pragmatism they try to strike a balance between the advantages of the doctrine of precedents (certainty, consistency, predictability and uniformity of the law) and the necessity to decide every case on the merits and find a just and adequate solution with respect to the individual circumstances of the case at hand.

This concludes my remarks and I thank you for your attention.