

# Switzerland

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## MAIN DISPUTE RESOLUTION METHODS

### 1. What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?

On 1 January 2011, the Swiss Code on Civil Procedure (CCP) came into force and replaced the various civil procedure laws of the cantons.

Large commercial claims are normally brought before the ordinary courts or settled through arbitration, and to a lesser extent mediation (see *Question 30*). The cantons of Aargau, Berne, Saint Gall and Zurich are to date the only cantons that have established specialised courts to hear commercial disputes as sole cantonal instances (*Handelsgericht*) (see *Question 3*).

## COURT LITIGATION - GENERAL

### 2. What limitation periods apply to bringing a claim and what triggers a limitation period?

Limitation periods are a matter of substantive civil law and, therefore, primarily set out in the Code of Obligations (CO).

The CO provides for the following limitation periods:

- Ten years for claims for which federal law does not prescribe a different limitation period.
- Five years for claims which by their nature require quick settlement, such as claims:
  - for rent, interest or other recurring payments;
  - by craftsmen;
  - relating to the sale of goods (exceptions apply);
  - relating to the work of legal counsel and notaries;
  - of employees.
- One year for tort claims. The period is calculated from the time the injured person becomes aware of the damage and of the identity of person liable (but not later than after ten years from the date of the action causing the damage).
- Claims based on unjust enrichment also become time-barred after one year.

### 3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?

In Switzerland, a federal state comprising 26 cantons, civil law and procedural law are regulated at federal law level, while the organisation of the judiciary lies within the competence of the cantons unless federal law provides otherwise.

The CCP prescribes a double instance within the judiciary of the cantons. Therefore, the cantons must establish a higher court for first (full) appellate review.

The highest court in Switzerland is the Federal Supreme Court (Supreme Court). Its proceedings are regulated by the Federal Act on the Federal Supreme Court.

Exceptions to the principle of double instance at cantonal level apply in the following circumstances.

#### Commercial Court

Under the CCP, the cantons may establish a Commercial Court as a sole cantonal instance to hear commercial disputes, its decisions being appealable only to the Supreme Court. A dispute is deemed commercial if all of the following conditions are satisfied:

- The claim concerns the commercial activity of at least one of the parties.
- The decision is appealable to the Supreme Court, that is, the amount in dispute is at least CHF30,000 (as at 1 February 2011, US\$1 was about CHF0.9).
- The parties are registered in the Swiss commercial register or a similar foreign registry.

#### Waiver

Both parties can agree to submit their matter directly to the higher cantonal court which will then decide as the sole cantonal instance, provided that the amount in dispute is at least CHF100,000.

### Sole cantonal instance

As a matter of federal law, the cantons must designate within their court system a court of exclusive first instance jurisdiction for civil disputes relating to, among others:

- Certain intellectual property rights.
- Competition law and unfair competition.
- The use of company names.
- Claims against the federal government.
- Claims relating to collective investment schemes.

### Patent claims

The federal legislator has recently established the Federal Patent Court to serve as a court of exclusive first instance jurisdiction for the whole of Switzerland in relation to patent infringement and patent validity matters.

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#### 4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

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Attorneys who are registered with one of the cantonal attorney registers can appear before any Swiss court. To register, attorneys must pass the bar exam in any of the Swiss cantons. Citizens from an EU member state or the European Free Trade Association (EFTA) who have registered with an EU/EFTA attorney register can appear before Swiss courts either:

- Temporarily, based on the freedom to provide services. The EU/EFTA attorney must, however, co-operate with a registered Swiss attorney.
- Permanently, if they register with the attorney register at the place where they practice. The EU/EFTA attorney can then practice freely, provided he appears before the Swiss court under his original title.

### FEES AND FUNDING

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#### 5. What legal fee structures can be used? Are fees fixed by law?

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Fees are not fixed by law and can be freely arranged between lawyers and their clients. Usually hourly rates are agreed on. Contingency fees are not permitted. Conditional fee arrangements, for example, providing for a bonus in the case of successful litigation, are permitted as long as the base fee for the lawyer provides a reasonable income.

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#### 6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

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### Funding

Parties usually finance litigation privately. If successful, a party may recover costs from its opponent.

A person can apply for free proceedings if it does not have sufficient funds to cover proceedings and the court does not view the matter as futile. A new application must be submitted for appeals proceedings.

Third-party funding is available and increasingly used. There are a few professional providers in the market.

### Insurance

Legal insurance is gaining popularity. Several large, and some specialised, insurance companies offer insurance for litigation costs.

### COURT PROCEEDINGS

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#### 7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

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Civil law court proceedings and the delivery of judgments are generally open to the public. However, the interest of the public in commercial cases is often limited. Copies of judgments (mostly disguising the parties' identities) are available to the public on request; briefs and documents filed by the parties are kept confidential. If there is a prevailing interest of non-disclosure of certain facts or evidence, the court can exclude the public from the entire proceedings, or parts of it.

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#### 8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

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There are no pre-action conduct rules, except that the parties must personally attend the conciliation hearing before the conciliation authority if both:

- A conciliation hearing is required by statute.
- Their place of residency or incorporation is in the same canton as the place where the conciliation hearing takes place.

Failure of the defendant to attend the conciliation hearing has no direct consequences but merely entitles the claimant to bring its claim before the court.

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#### 9. What are the main stages of typical court proceedings? In particular:

- How is a claim started?
  - How is the defendant given notice of the claim and when must the defence be served?
  - What are the subsequent stages?
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### Starting proceedings

Court proceedings normally start with a request for a conciliation hearing before the conciliation authority causing *lis pendens* (suit pending).



A claimant must file the lawsuit directly with the competent court without first requesting a conciliation hearing if:

- The dispute must be brought before a sole cantonal instance (see *Question 3, Sole Cantonal instance*).
- The proceedings concern certain actions filed under the Federal Debt Enforcement and Bankruptcy Act (DEBA).
- The proceedings concern the enforcement of a judgment rendered by a competent court of a signatory state to the EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention).
- The applicant applies to the court for a provisional measures order (for example, seizure of property and freezing of bank accounts).

In addition, a claimant can unilaterally forego the conciliation proceedings if the defendant has a foreign domicile.

The request for a conciliation hearing must include the name of the respondent, the remedy sought and details of the matter in dispute. A detailed statement of claim is not required. If the parties cannot agree on a settlement, the conciliation authority will issue a writ permitting the claimant to bring the dispute before the competent district court within three months.

Failure to submit a statement of claim to the competent court within three months does not preclude a case (no *res iudicata*). However, a claimant would have to resubmit the claim for conciliation if he wants to take the matter to court.

### Notice to the defendant and defence

Once the claimant has submitted the statement of claim, the court will send a copy of it to the defendant. Normally, the court orders the defendant to file a statement of defence within 20 days. Upon reasoned and timely application to the court, the filing period may be extended twice by up to 20 days at a time.

If the defendant fails to timely submit a statement of defence, the court will either:

- Grant a short extension and, in case of a repeated failure to submit a statement of defence, proceed to the main hearing.
- If the matter is ready for decision, render its judgment.

### Subsequent stages

A claimant has the right to reply to a statement of defence. The timing of reply and the method of presenting it depend on how the court intends to proceed in the matter. If the court deems it necessary, it may do one of the following:

- Order the parties to file a written reply and rejoinder respectively.
- Schedule a preparatory hearing where the parties will submit their reply and rejoinder orally.
- Directly proceed to the main hearing with the parties submitting their reply and rejoinder orally.

The parties can introduce new facts and evidence with their reply and rejoinder.

Litigants should be aware that pleading new facts and introducing additional evidence at the main hearing is not possible if a second exchange of briefs or a preparatory hearing with oral reply and rejoinder preceded the main hearing.

In relation to contentious facts, the court allocates the burden of proof according to substantive law and specifies which means of evidence will be permitted (for example, party statements, documents, witness testimony and expert opinions). On closing of the evidence hearing, the parties submit their closing arguments including a single rebuttal, following which the court renders its decision. At any stage of the proceedings, the court may propose to the parties to settle their dispute.

### Third-party complaint

A defendant may file an application for a third-party complaint when filing the statement of defence or the reply in the original proceedings. In doing so, the defendant can submit a claim against a third-party against which it believes to have a claim, should its defence against the original claimant fail. Upon filing of the application, the court will render an interlocutory decision on the admissibility of the third-party complaint. Forum selection clauses or an agreement to arbitrate between the third-party claimant and third-party defendant or statutory provisions providing for a compulsory forum as regards the subject matter of the third-party complaint will render third-party complaint inadmissible. It is unclear to date whether third-party proceeding will be continued or written off if the claimant and defendant in the original proceedings reach a settlement and what legal remedies are available in such circumstances for the third-party defendant.

## INTERIM REMEDIES

### 10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

#### Conditions for trial

A court will only hear a dispute if it has jurisdiction (both in relation to the subject matter of the dispute and locality), which it examines *ex officio*. Further, the court examines whether the suit has been properly lodged (that is, following conciliation hearings) and whether the correct type of proceeding (ordinary, summary or simplified proceeding) has been chosen. If any of these conditions are not satisfied, the claimant is normally granted a short period of time to rectify any remediable mistakes and to re-file the claim. Otherwise, the case is not admitted.

#### Preliminary questions

The court may, at its discretion, render a judgment on a contested preliminary question (for example, jurisdiction or the standing of a party) if this may result in substantive cost and time savings. The judgments on preliminary questions must be appealed immediately. The common law summary judgment and similar types of rulings are not available in Switzerland.

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### 11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

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Unless an applicable treaty provides otherwise, the defendant can apply to the court to order the claimant to provide security for its costs if one of the following applies:

- The claimant has no domicile or registered office in Switzerland.
- The claimant appears insolvent.
- The claimant still owes court or party costs from a previous trial.
- Other reasons exist indicating that defendant's costs might be at risk.

In particular, the Lugano Convention does not permit the court to order security for the defendant's costs if the claimant has no domicile or registered office in Switzerland.

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### 12. In relation to interim injunctions granted before a full trial:

- Are they available and on what grounds are they granted?
- Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
- Are mandatory interim injunctions to compel a party to do something available in addition to prohibitory interim injunctions to stop a party from doing something?

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#### Availability and grounds

Interim relief can be sought before proceedings begin or at any later stage of the proceedings. If interim relief is sought prior to *lis pendens*, the court sets a deadline for the petitioner to file suit (in which case no conciliation hearing takes place). Swiss law distinguishes between two types of interim relief:

- Relief aimed at securing monetary claims.
- Other forms of relief dealing with non-monetary matters.

Claims to money may be secured by application to the court for an attachment order under the DEBA (see *Question 13, Availability and grounds*). All other interim measures are regulated by the CCP. For the latter the applicant must show that both:

- There is a realistic and imminent threat of, or actual injury, causing irreparable harm unless the injunction is granted.
- The underlying cause of action is likely to prevail on the merits.

The court may order the applicant to post security.

Interim relief may take the form of mandatory or prohibitory interim injunctions, such as:

- A cease and desist order.
- An order to perform an action or rectify a situation.

- An order prohibiting a person to dispose of certain items.
- An order that certain entries be taken on record in a public registry.
- An order to a bank that certain bank accounts be frozen.

#### Prior notice/same-day

Normally, a request for interim relief is followed by a hearing upon which the court renders its decision. In urgent cases, interim relief may be ordered by the court without notice to the other party, usually within 24 hours. Such order is followed by an oral hearing at a short notice.

#### Mandatory injunctions

Mandatory interim injunctions are available, in addition to prohibitory interim injunctions (see *above, Availability and grounds*).

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### 13. In relation to interim attachment orders to preserve assets pending judgment or a final order (or equivalent):

- Are they available and on what grounds must they be brought?
- Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
- Do the main proceedings have to be in the same jurisdiction?
- Does attachment create any preferential right or lien in favour of the claimant over the seized assets?
- Is the claimant liable for damages suffered as a result of the attachment?
- Does the claimant have to provide security?

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#### Availability and grounds

To secure monetary claims before a trial or debt enforcement proceedings, creditors can seek attachment orders based on the DEBA with the court where the assets to be seized are located or at the statutory venue for debt enforcement proceedings (*Betreibungsort*). A creditor must show to the court:

- That they have outstanding debts against the debtor.
- The existence of a statutory ground for attachment.
- The existence of assets and their location.

The DEBA provides for six grounds based on which attachment of assets may be sought:

- The debtor has no permanent residence in Switzerland.
- The debtor is attempting to conceal assets or is planning to leave Switzerland to evade the fulfilment of its obligations.
- The debtor is on a journey through Switzerland or conducts business on trade fairs, provided that the claim must be settled immediately.



- The debtor does not reside in Switzerland and no other ground for attachment is available, provided that the claim has sufficient connection with Switzerland or is based on recognition of debt.
- The debtor holds a provisional or definitive certificate of shortfall against the creditor.
- The creditor holds a definitely enforceable title permitting him to have any objection by the debtor set aside (*definitiver Rechtsöffnungstitel*).

Unless the creditor has already commenced debt enforcement proceedings (*Betreibung*) or filed an action to obtain an enforceable title, it must do so within ten days of service of the copy of the attachment order. If the debtor objects to the summons to pay, the creditor must, within ten days of service of the objection, request the court to have the objection set aside or pursue his claim in ordinary court proceedings.

#### Prior notice/same-day

Attachment orders are granted by the court without notice to the other party. The other party must file an objection within ten days of learning of the attachment.

#### Main proceedings

If attachment is sought based on a decision rendered by a competent court of a Lugano Convention signatory state, the Swiss court seized with the request for attachment will in the same proceeding also render a decision on the enforceability of the foreign judgment without hearing the other party. The other party may then file an objection against:

- The declaration of enforceability within 30 days (if resident in Switzerland) or 60 days (if resident in another Lugano Convention state).
- The attachment within ten days of learning of it.

The question whether judgments from other states (non-members of the Lugano Convention) entitle a creditor to attach assets is the object of some controversy among legal scholars in Switzerland. As the relevant legal provision came into force only at the beginning of 2011, there exists no Supreme Court decision on the matter. On the face of it, the text of the new provision does not differentiate between definitely enforceable titles in the form of decisions from Lugano Convention states and decisions from the courts in other states. However, some authors have pointed out that the legislative aim of the introduction of the new attachment ground was primarily to eliminate the unequal treatment of domestic creditors *vis-à-vis* their Lugano Convention state counterparts and not to open up the attachment ground to all creditors with international judgments. The courts will eventually have to decide this contested question.

#### Preferential right or lien

An applicant who has secured the attachment of assets does not enjoy preferential rights or lien in relation to the attached property. An applicant must follow the ordinary debt enforcement process like any other creditor. However, if another creditor demands seizure of the assets before the applicant is in a position to do so, the applicant automatically and provisionally takes part in the seizure of property.

#### Damages as a result

An applicant is liable for damages incurred by the debtor as a result of an unjust attachment order.

#### Security

The court may demand that the applicant post security. It appears that this should not apply in relation to an attachment order based on a judgment of a Lugano Convention signatory state, as the Lugano Convention grants the applicant an unconditional right to request protective measures. However, it is not certain how the Swiss courts would resolve this issue.

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#### 14. Are any other interim remedies commonly available and obtained?

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In principle, only those interim remedies described in *Questions 12 and 13* are available. In certain areas of law (for example, family law, trust and estates) further remedies are available.

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### FINAL REMEDIES

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#### 15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

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The final decision of the court can order the defendant to either:

- Pay damages.
- Perform specific actions or desist from certain actions.

A declaratory judgment is also possible.

The amount of damages awarded to a claimant must compensate his loss (including interest) and cannot be punitive in nature. However, the court can in certain circumstances award reparation which does not correspond to the actual damage suffered. These remedies are limited to disputes involving bodily harm and emotional distress.

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### EVIDENCE

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#### 16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

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Parties to the trial and third parties must assist the court with the discovery of the facts of the case. Legal entities are subject to the same rules applicable to individuals.

A party can request the court to order the other party or a third party to disclose certain documents (such as written documents, drawings, plans, photographs) or electronic data, films or audio recordings and the like in its possession. The court will grant such request if it decides that the evidence is necessary to establish legally relevant facts of the case. The burden of proof as to the concerned document's authenticity lies with the party wishing to draw a legal conclusion from the facts alleged in the document.

Trial parties, third parties and witnesses do not need to testify and are entitled to withhold documents if they can invoke a statutory privilege (for example, attorney-client confidentiality (see *Question 17, Privileged documents*)) or have a particularly close personal relationship to a party (for example, being directly related or married). A party refusing to disclose documents without justification cannot be sanctioned but may bear the consequences of adverse consideration of the evidence. Failure by a third party to co-operate with the court may be punishable by a fine.

A court can take evidence at any point during the proceedings if either:

- The law provides for it.
- The applying party can:
  - demonstrate that the evidence may no longer be obtainable later; or
  - invoke another interest worthy of protection.

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#### 17. Are any documents privileged? In particular:

- Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances?
- If privilege is not recognised, are there any other rules allowing a party not to disclose a document (for example, confidentiality)?

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#### Privileged documents

Lawyer-client privilege only extends to lawyers registered in the cantonal lawyers register. In-house counsel do not benefit from this type of privilege and cannot legally hold back company documents which are in their custody. Correspondence relating to, and prepared in the course of, a specific mandate to or from external professional counsel is protected by privilege, irrespective of its location.

#### Other rules

A party may be entitled to withhold documents if it has a particularly close relationship to the party to the proceedings (see *Question 16*).

During settlement discussions parties frequently circulate proposals which they do not want to be used in subsequent court proceedings (without prejudice). Parties can maintain and need to indicate clearly that such documents shall not prejudice their position in later court proceedings if settlement negotiations fail. Courts generally respect the parties' agreement, provided their intention is clearly expressed in their earlier correspondence.

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#### 18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

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#### Witness statements

Witnesses give oral evidence under oath. In exceptional cases, a witness may issue a written statement. The court then decides

whether the written evidence is sufficient or whether the witness must also give oral evidence. Witness statements in the form of affidavits are uncommon and can conflict with the procedural law rules.

#### Cross-examination

There is no specific right to cross-examine. However, following the initial interrogation by the judge, each party may put additional questions to the witness through the judge. The CCP also allows a court to put witnesses against each other and against the parties.

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#### 19. In relation to third party experts:

- How are they appointed?
- Do they represent the interests of one party or provide independent advice to the court?
- Is there a right to cross-examine (or reply to) expert evidence?
- Who pays the experts' fees?

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#### Appointment procedure

Where the court comes to the conclusion that expert knowledge or a technical assessment of factual evidence is required, it can appoint one or several experts, if requested to do so by a party or of its own accord. The parties can express their opinion on the court's choice of expert and make their own suggestions before the appointment, if requested to do so by the court.

#### Role of experts

Specialist opinions given by experts at the request of the parties are considered by the court as party explanations and have no added weight. Court-appointed experts, however, act on behalf of the court and need to be independent. Their advice must be impartial. Such experts are subject to the same rules on conflicts of interest as judges.

#### Right of reply

The parties can comment on the questions posed to the expert and request other or further questions to be posed to the expert. The parties are entitled to comment on the expert's conclusion and can even request the appointment of a new expert.

#### Fees

Costs for expert fees must be advanced by the party requesting expert opinion. Should both parties request expert opinion, the advance may be split equally among the parties. Costs for court-appointed experts are also borne by the parties. The court takes into consideration the burden of proof when deciding which party must advance the costs. Expert fees are added to the court fees at the end of proceedings and are borne by the unsuccessful party (see *Question 22*). Alternatively, they can be split proportionally among the parties, reflecting the parties' varying degrees of success.

## APPEALS

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### 20. In relation to appeals of first instance judgments in large commercial disputes:

- To which courts can appeals be made?
  - What are the grounds for appeal?
  - What is the time limit for bringing an appeal?
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#### Which courts

Judgments rendered by a district court can be appealed to the higher cantonal court with the possibility of a further appeal to the Supreme Court if either:

- The amount in dispute is at least CHF30,000.
- A legal issue of major importance is at stake.

Judgments rendered by the Commercial Court can only be appealed to the Supreme Court.

#### Grounds for appeal

The higher cantonal court has full review competence on questions of law and of fact. The Supreme Court's review is in general limited to breaches of federal law.

#### Time limit

Judgments of district courts must be appealed within 30 days. Judgments of the higher cantonal courts as well as those of the Commercial Courts must also be brought before the Supreme Court within 30 days. In summary proceedings the time limit for bringing an appeal is only ten days.

## CLASS ACTIONS

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### 21. Are there any mechanisms available for collective redress or class actions?

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A typical class action is not possible under Swiss law. Claims must be brought by individual claimants.

An instrument which does permit a certain degree of collective redress is the right of associations and organisations to file claims on behalf of their members if they have made the protection of certain interests as their aim. Where an injury of such interests is alleged, the association can start a claim against the parties causing damage and can request that either:

- The damage be prevented or removed.
- The court acknowledge that the harm has occurred.

Several claimants can file a suit against a single defendant. Depending on whether the claimants are required by law to proceed together or not, the CCP contains differing provisions in relation to the effect of each claimant's submissions on other claimants.

In addition, several claimants basing their claims on the same set of material facts can bring their suits before the court individually and request a stay in all but one of the proceedings until a lead judgment is rendered by the court.

## COSTS

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### 22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

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The losing party is ordered to compensate the successful party for the costs of representation. If a party is successful in part, a proportionate payment is ordered.

Under the CCP, the cantons have kept their competence to set the tariffs by which the cantonal courts calculate the court and party compensation fees. The CCP, however, contains a few general rules on the matter and has included a provision that authorises courts to request advance payment of the expected court fees of a claim before starting proceedings. It is expected that this will become the norm and claimants need to be aware that litigating in Switzerland will in all likelihood require payment of a security at the outset.

In relation to appeals proceedings before the Supreme Court, the cost award is calculated according to a regulation issued by the court itself. The following factors, among others, are considered in deciding the final cost award:

- The claim amount.
- The complexity of the matter.
- The duration and stages of the proceedings (pleadings, hearings, evidence and settlement negotiations).

Courts very rarely take pre-trial offers into account.

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### 23. Is interest awarded on costs? If yes, how is it calculated?

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If the unsuccessful party is ordered to pay a certain amount, the interest on that amount that has accrued up to that date is included in the cost order. From the date of the judgment, the successful party can also demand payment of interest at the statutory rate of 5% per year.

## ENFORCEMENT OF A LOCAL JUDGMENT

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### 24. What are the procedures to enforce a local judgment in the local courts?

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Enforcement procedures depend on whether a party has been ordered to pay damages or perform a specific act. Judgments ordering the payment of damages are enforced under the DEBA. The party with the judgment in its favour can start summary



enforcement proceedings by requesting the court to set aside the opposition of the defendant raised against the payment summons and to order the continuation of enforcement through the attachment of goods (natural persons) or bankruptcy proceedings (legal persons).

Judgments for specific performance are enforced under the CCP and must also be requested in summary proceedings with the enforcement court at the place of residency (natural persons) or at the place of registered office (legal persons). Enforcement requests can also be brought at the place where these measures are to be executed or where the original judgment was rendered.

The claimant must submit the documents showing that his claim is enforceable. The judge then orders the obliged party to effect performance under threat of penal consequences and payment of a fine if performance is refused. The judge can also authorise the requesting party to retain a third party to substitute performance. The claimant is entitled to have his claim for specific performance changed into a claim for damages if the defendant continues to resist enforcement.

## CROSS-BORDER LITIGATION

### 25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

In all commercial disputes, the parties can choose a foreign governing law. However, certain matters are excluded from this principle:

- Contracts over immovable property, in relation to which Swiss courts always apply the law applicable at the property's location.
- Matters relating to consumers, employees and intellectual property rights are only subject to laws which have a connection to certain objective criteria (for example, the place of residency of the consumer, place of employment, or place of registration of the intellectual property rights).

### 26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The courts generally respect the choice of forum clauses within the scope of the relevant statutes and treaties. These clauses must be in writing and can relate to an existing or future dispute. However, there are also certain specific rules, for example:

- Disputes concerning consumers must generally be filed with the competent court at the consumer's domicile, unless the consumer agrees to a different jurisdiction.
- Disputes concerning employees are heard by the competent court at the employee's domicile or at the place of employment.

- Disputes concerning the rent of immovable property must be filed with the competent court at the place of the property in question.

International treaties take precedence over the statutory rules. The most important international treaty is the Lugano Convention, applicable to civil and commercial matters. Under the Lugano Convention and subject to certain limitations (for example, in relation to consumer and insurance matters) the parties can either:

- Conclude a jurisdiction agreement.
- Include a jurisdiction clause in their contractual arrangements which provides that both:
  - a foreign country has jurisdiction (as long as the foreign country is a Lugano Convention member state);
  - the country having jurisdiction is not the defendant's place of domicile.

The local courts respect this practice.

### 27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

#### International agreements

When serving foreign procedural notices to parties in Switzerland, a foreign party must comply with international treaties governing international civil procedure matters and must make use of the means of judicial assistance. Switzerland is party to two major multilateral treaties:

- HCCH Convention on Civil Procedure 1954 (Hague Civil Procedure Convention).
- HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention).

#### Serving process

The Hague Civil Procedure Convention requires the requesting party or the locally competent authority to use the consular channels to send the documents to be served to the consular representation in Switzerland, which then approaches the Swiss Federal Department of Justice to effect service on the party resident in Switzerland.

The Hague Service Convention requires parties to request their local authorities to forward requests for service according to a model request to the competent central authority in Switzerland. Each canton has its own central authority, which serves process on persons domiciled in its territory. As far as the law applicable in the country of the party requesting service permits lawyers to serve documents, these persons are recognised as judicial officers and may also approach the central authority directly.






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**28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?**

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**International agreements**

To take evidence from a Swiss-domiciled witness, the rules of the multilateral treaties to which Switzerland is a member must be complied with, for example:

- The HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention).
- The Hague Civil Procedure Convention.

**Procedure**

Under the Hague Evidence Convention, the procedure is as follows:

- The competent judicial authority of the requesting state transmits its letter of request to the central authority in Switzerland. The central authority's duties are assumed at cantonal level. After examining the request, the central authority forwards the application to the Swiss Federal Department of Justice indicating whether it supports the granting of authorisation.
- The cantonal authorities then take evidence at the witness's place of domicile.

Under the Hague Civil Procedure Convention, the following procedure applies:

- The competent authority of the state in which the request is made must transmit its request to its diplomatic representation in Switzerland.
- The diplomatic representative of the requesting state in Switzerland then transmits the request to the Swiss Federal Department of Justice.
- The Swiss Federal Department of Justice transmits the request to the competent local judicial authority in the canton where the witness is domiciled, which then takes the evidence.

The Hague Evidence Convention replaces Articles 8 to 16 of the Hague Civil Procedure Convention (*Article 29, Hague Evidence Convention*). Therefore, if a signatory state has concluded both treaties, the Hague Evidence Convention takes precedence.

Controversy exists as to the extent to which companies with registered office in Switzerland may be subject to pre-trial discovery in foreign proceedings. Requesting the surrender of evidence located in Switzerland to foreign authorities or parties may constitute a violation of Articles 271 (prohibited acts for a foreign state) and 273 (economic intelligence service) of the Swiss Criminal Code or other special statutory provisions (such as banking regulation and data protection regulation). Switzerland made a reservation under the Hague Evidence Convention in relation to letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

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**29. What are the procedures to enforce a foreign judgment in the local courts?**

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If the judgment was rendered by a court of a Lugano Convention signatory state, an enforcement application must be filed with the competent Swiss court, along with a copy of the judgment satisfying the conditions necessary to establish its authenticity and a certificate issued by the court that rendered the judgment (*Annex V, Lugano Convention*). The court must decide on such application in ex parte summary proceedings and shall declare the judgment enforceable immediately on satisfaction of the formalities under Annex V, without reviewing whether there are grounds to deny recognition and enforcement. The party against whom the enforcement is sought is not heard until the appeal stage.

If the judgment was rendered by a court of a state not party to Lugano Convention, the enforcing party must file with the competent court:

- A complete and authenticated copy of the decision.
- A confirmation that no ordinary appeal can be lodged against the decision or that the appeal is final.
- For judgments rendered by default, an official document establishing that the defaulting party was duly summoned and that it had the opportunity to enter a defence.

The other party is entitled to a hearing and to introduce evidence. The competent court dealing with the matter may, on a party's request, order protective measures without hearing the other party.

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**ALTERNATIVE DISPUTE RESOLUTION**

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**30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries?**

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Large commercial disputes are usually settled through litigation or arbitration. Other ADR methods play a limited role, although mediation appears to have become more popular recently, as illustrated by an increasing number of organisations offering mediation services and training, or the adoption of the Swiss Rules on Commercial Mediation by the Swiss Chambers of Commerce and Industry in 2007 ([www.sccam.org/sm/en/](http://www.sccam.org/sm/en/)).

Arbitration (but not necessarily other forms of ADR) is more common in international commercial disputes than in domestic disputes.

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**31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?**

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Subject to mandatory conciliation in certain circumstances, ADR is not part of court procedures. Swiss courts cannot compel the use of ADR. However, courts are free to facilitate a settlement



during court proceedings or to encourage parties to resort to mediation.

Where a conciliation hearing is mandatory based on statutory provisions, the parties may jointly elect to use mediation instead. If a settlement cannot be reached, the conciliation authority will issue a writ permitting the claimant to proceed to the competent district court (see *Question 9*).

At all times during the court proceedings, parties can jointly elect to resort to mediation, thereby staying court proceedings. On joint application of the parties, the court may confirm a settlement reached through mediation during proceedings under the CCP. Such confirmation makes the mediation settlement equal to a court judgment. Settlements reached through mediation outside of court proceedings cannot be confirmed by the court. However, an authentic instrument confirming the outcome of the mediation can be issued under the cantonal law making the mediation result enforceable in the same way as a court judgment (see *Question 24*).

It is unclear whether non-compliance with a mediation clause would make a claim inadmissible in court or result in its dismissal. The Supreme Court left this question open in a 2007 judgment. It also held that, to be enforceable in court, a multi-tier dispute resolution clause providing for pre-trial arbitration or mediation should clearly set out the conditions (including time limits) for the arbitration or mediation proceedings.

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**32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?**

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In mediation proceedings, the mediation agreement governs the procedural rules. The parties are free to choose any rules to govern the mediation process. In the absence of a provision relating to evidence, the mediator conducts the proceedings as he considers appropriate.

Mediation must be confidential, and statements and admissions of the parties cannot be used in court. The same applies in relation to evidence obtained during mediation. Mediators are entitled to refuse to testify on matters relating to the mediation proceedings.

It is unclear whether an agreement by the parties regarding confidentiality and non-admissibility of evidence stemming from mediation proceedings can be enforced in court.

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**33. How are costs dealt with in ADR?**

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Costs are borne by the parties, subject to their mediation agreement.

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**34. What are the main bodies that offer ADR services in your jurisdiction?**

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The following organisations offer ADR services in Switzerland, among others:

- Swiss Chambers of Commerce and Industry, which adopted the Swiss Rules on Commercial Mediation in 2007.
- WIPO Arbitration and Mediation Center.
- Swiss Chamber of Commercial Mediation.

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**PROPOSALS FOR REFORM**

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**35. Are there any proposals for dispute resolution reform? Are they likely to come into force?**

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With the passing of the CCP, Switzerland has implemented a major reform of its civil procedure law in an attempt to harmonise proceedings which, until recently, varied significantly among the cantons. No major reform is expected in this field until some practical experience has been gained under the new Act.



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#### Recent transactions

- Representing claimants and defendants in high-level D&O claims.
- Acting for the administrators of London-listed Polly Peck in relation to all aspects of their work in Switzerland.
- Acting for a charity in claiming assets against various offshore entities (asset freezing and estate litigation).
- Acting for an insurance company in the recovery/coverage litigation related to CHF250 million fraud in a Swiss bank.
- Representing various clients in Madoff-related matters.
- Acting for a UK based bank in relation to a US\$250 million fraud with proceeds kept in Switzerland.

**Qualified.** Switzerland, 2004

**Areas of practice.** Business transactions (M&A); competition and regulatory matters; corporate and commercial; litigation and arbitration.

#### Recent transactions

- Representing claimants and defendants in high-level D&O claims.
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- Representing a global brewing-group in a cartel investigation where absolute geographic protection was alleged.
- As part of a global team, representing a foreign airline company in a cross-border cartel investigation.
- Representing a foreign manufacturer of tilt-and-turn window fixtures in an alleged price-fixing cartel.
- Advising a global IT services provider and a Swiss bank in a transaction restructuring the provision of IT services to the bank.



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