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DISPUTE RESOLUTION

Litigation and Enforcement in Switzerland: Overview

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MAIN DISPUTE RESOLUTION METHODS

1. What are the main dispute resolution methods used to resolve large commercial disputes?

In Switzerland, large commercial disputes are usually brought before the ordinary courts or settled through arbitration, particularly in international contexts.

Mediation is sought occasionally, however still to a lesser extent (see *Question 30*). The cantons of Zurich, Berne, St. Gallen and Aargau have long-established, specialised, efficient, and highly regarded commercial courts (*Handelsgericht*) that achieve high settlement rates (see *Question 3*).

Ordinary proceedings before the Swiss courts are adversarial in nature. The court manages the timeline and the evidence procedure. It forms its opinion based on its free assessment of the evidence taken. As a rule, a claimant will succeed with its claim if it can fully convince the court of all factual requirements of its entitlement.

Currently, parliamentary processes are underway to pave the statutory base for cantons to enable international litigants access specialised commercial courts in Switzerland. In the Canton of Zurich, the local legislator is considering establishing an International Commercial Court that could then take on international cases that could be run in English. Litigants seeking a stable and respected jurisdiction in a neutral venue for their dispute might find this new institution a welcome alternative to arbitration.

COURT LITIGATION

Limitation Periods

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

Most limitation periods are set out in the Code of Obligations (CO).

The CO provides for the following limitation periods:

- A general statutory limitation period of ten years for all claims (unless federal law prescribes a different limitation period).
- Five years for claims which by their nature require quick settlement, such as claims:
  - for rent, interest or other periodic payments;
  - by tradesmen, craftsmen and for medical treatment;
  - relating to the sale of foodstuffs and payments for board and lodging;
  - relating to the work of tradesmen and craftsmen, legal counsel and notaries; and
  - of employees.
- Three years for tort claims, calculated from the day on which the injured party has knowledge of the damage and the injuring party. A tort claim is unenforceable after ten years from the date of the injury. Where a criminal action is brought for wrongful death and bodily injury, a tort claim must be made within 20 years after the injury. Where a tort claim is bought in relation to an offence subject to a longer limitation period under criminal law, the longer period is also applicable to the tort claim.
- Three years for claims based on unjust enrichment, from the date on which the injured party becomes aware of its claim, but in any event ten years after the claim first arose.

Court Structure

3. In which court are large commercial disputes usually brought? Are certain types of disputes allocated to particular divisions of this court?

The Code on Civil Procedure requires the cantons to provide a double instance system within their judiciary. All cantons must establish a higher court for first (full) appellate review of first instance cantonal judgments. First and second instance courts are usually comprised of a three-member bench. There are no trials by jury. Commercial disputes are usually brought before the commercial court, if such a special court is established in the canton in which the defendant is resident. Labour matters and rental disputes are dealt with by specialised first instance courts.

The highest court in Switzerland is the Federal Supreme Court (Supreme Court), which can review final judgments of the cantonal high courts as to their compliance with federal law.

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

Commercial Court

Under the Code on Civil Procedure, the cantons are free to set up a commercial court with sole jurisdiction for commercial disputes in their territory. Decisions of commercial courts are appealable only to the Supreme Court. A dispute is deemed commercial if all the following conditions are satisfied:

- The dispute concerns the commercial activity of at least one of the parties.
- The decision is appealable to the Supreme Court owing to the amount in dispute, that is at least CHF30,000.
- The parties are registered in the Swiss commercial register or a similar foreign registry. Where only the defendant is registered in the commercial register, a claimant can choose to lodge its suit either before the commercial court (where the canton has established one) or with the competent ordinary first instance court.

Sole Cantonal Instance

Under federal law, the cantons must designate within their court system a court of exclusive first instance jurisdiction for disputes relating to certain specialised areas of law, such as:

- 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 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.

The answers to the following questions relate to procedures that apply in the ordinary civil courts.

Rights of Audience

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?

Rights of Audience/Requirements

In principle, Swiss courts do not require a party to be represented by an attorney. However, owing to the complexity of procedural rules, most parties in commercial disputes seek professional counsel to assist them.

Attorneys registered with one of the cantonal attorney registers can appear before any Swiss court. To register, attorneys must be admitted to the bar in one of the Swiss cantons.

Foreign Lawyers

Attorneys from an EU member state or the European Free Trade Association (EFTA), who have registered with an EU or EFTA attorney register, can appear before Swiss courts either:

- Temporarily, based on the freedom to provide services. An EU or EFTA attorney is free to provide services without registration for 90 days per year or less in Switzerland. Professional activities lasting longer than 90 days require the EU or EFTA attorney to co-operate with a registered Swiss attorney.
- Permanently, if they register with the attorney register at the place where they practise. An EU or EFTA attorney can then practise freely, provided they appears before the Swiss court under their original EU or EFTA title.

An EU or EFTA attorney can also register in one of the cantonal attorney registers and adopt the local title if they have practised in Switzerland for three years under their original title or have passed a qualification exam.

FEES AND FUNDING

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

Attorneys' fees can be freely arranged between lawyers and their clients. Hourly rates depending on the attorney's experience level are the norm. Contingency fees are not permitted. However, conditional fee arrangements providing for a bonus in the case of successful litigation are permitted if the base fee for the attorney provides a reasonable income. A conditional fee agreement must be made at the very beginning of the matter or after the matter is concluded. Party costs and court fees are calculated according to cantonal statutory rules and depend on the value in dispute.

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

Funding

Parties usually finance litigation privately. If successful, a party may recover costs from its opponent. Cost calculations are based on cantonal statutory tariffs and may not fully cover actual expenses.

A party can apply to the court to waive its court fees and to have a state-funded attorney if it does not have sufficient funds to cover proceedings in addition to its basic needs, and the court does not view the matter as futile. A new application must be submitted for appeals proceedings. As a rule, legal entities are, however, excluded from benefitting from free proceedings.

There are a few third-party funding providers in Switzerland and their services are becoming increasingly popular. Their services usually involve handing over a share of the claimed amount in successful proceedings. These services are permitted provided the attorney remains independent and free from influence in the execution of their mandate. The attorney is not allowed to participate in the funding. The Supreme Court has found that informing a client about the options of third-party funding can form part of the diligent performance of their mandate.

Insurance

Legal insurance is increasingly popular. Several large, and some specialised, insurance companies offer insurance for litigation costs.

COURT PROCEEDINGS

Confidentiality

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

The Code on Civil Procedure requires civil law court proceedings and the delivery of judgments to be public. Copies of judgments of the second instance courts and the Federal Tribunal can be requested by anyone and are frequently published online (in anonymised form). Court orders as well as briefs and documents filed by the parties and the court's deliberations are kept confidential. The court is authorised to partially or entirely exclude the public from certain proceedings if this is in the public interest or, on application by a party, in the protected interest of a concerned person (for example, trade secrets). However, public interest in commercial cases is usually limited. Family matters are always private with no public access. Pre-trial conciliation hearings and judicial settlement hearings are not open to the public.

Pre-Action Conduct

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?

There are no specific 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 request the authorisation to proceed and to bring its claim before the court. If the plaintiff is in default, the application for conciliation is deemed to have been withdrawn and the proceedings are dismissed as groundless.

A party failing to institute compulsory conciliation proceedings will not be admitted by the court with its claim.

Main Stages

9. What are the main stages of typical court proceedings?

Starting Proceedings

Court proceedings normally start with a request for a conciliation hearing before the conciliation authority, causing *lis pendens* (suit pending). While request by email submission are possible using a specialised software by the post, most requests for conciliation are still submitted in hard copy.

A claimant must file the lawsuit directly with the competent court without first requesting a conciliation hearing, among others, in the following cases:

- In summary proceedings.
- The dispute must be brought before a sole cantonal instance (see *Question 3, Sole Cantonal Instance*).
- Divorce proceedings.
- Proceedings concerning certain actions filed under the Federal Debt Enforcement and Bankruptcy Act or in summary proceedings (applications for provisional measures such as the seizure of property and freezing of bank accounts).
- A court has ordered a claim to be filed within a certain time period.

A claimant can also forego the conciliation proceedings if the defendant has a foreign domicile.

The conciliation request must include the name of the defendant, the remedy sought and a general description of the matter in dispute. If the parties fail to agree on a settlement, the conciliation authority will issue the authorisation to proceed permitting the claimant to bring the dispute before the competent district court within three months. Failure to submit the statement of claim within three months has no *res judicata* consequence. However, a claimant will have to go through the conciliation procedure again before they can take the matter to court.

Notice to the Defendant and Defence

Once the claimant has submitted the statement of claim, the court sends a copy of the statement to the defendant and usually orders the claimant to advance the court fees. After payment, the court orders the defendant to file a statement of defence within 20 days. Filing periods can be extended twice on reasoned application for further periods of 20 days depending on the complexity of the matter. Occasionally, the court will set one single long (non-extendable) deadline.

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

- Grant a short extension to the defendant and, in the case of 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

The subsequent stages of proceedings normally take place by exchange of written, non-electronic filings, as hard copy records are required by the courts.

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 can do one of the following:

- Order the parties to file a written reply and rejoinder respectively.
- Schedule a preparatory hearing where the parties 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. The court must inform the parties of every submission by another party. Based on the jurisprudence of the European Court of Human Rights, a party is entitled to reply to any unsolicited submissions within ten days.

Litigants should be aware that pleading new facts and introducing additional evidence at the main hearing is only permitted under very limited circumstances, 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 can propose the parties to hold settlement talks. The Commercial Court of the Canton of Zurich has a standing practice of holding intense settlement talks after the first exchange of briefs and manages to settle about two-thirds of all cases coming before it.

INTERIM REMEDIES

10. What steps can a party take for a case to be dismissed before a full trial? On what grounds can such applications 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 and locality), which it examines *ex officio*. The court also examines at the outset 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 can, on application and 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. Typically, preliminary issues will turn on jurisdiction or prescription matters. These judgments must be appealed immediately.

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

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.
- There are other reasons indicating that the defendant's costs may be at risk.

International treaties may prohibit Swiss courts from requiring a claimant to secure costs. For example, the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 does not permit the court to order security for the defendant's costs if the claimant has no domicile or registered office in Switzerland.

12. What are the rules concerning interim injunctions granted before a full trial?

Availability and Grounds

Interim relief can be sought before proceedings begin or at any later stage during the proceedings. If interim relief is sought before *lis pendens*, the court sets a deadline for the petitioner to file suit (no conciliation proceedings required). These measures may be made dependent on security being posted by the applicant.

Swiss law distinguishes between interim relief measures aimed at securing monetary claims and measures dealing with non-monetary matters.

Claims for money can be secured by applying for an attachment order under the Federal Debt Enforcement and Bankruptcy Act (see *Question 13, Availability and Grounds*). All other interim measures are governed by the Code on Civil Procedure. For the latter, the applicant must credibly show, but not prove, both that:

- 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 can order the applicant to post security.

Interim relief can 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 from disposing 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.

Standard of Proof

A court can order injunctive relief measures provided the applicant shows credibly that a right to which the applicant is entitled has been violated or a violation is anticipated; and the violation threatens to cause not easily reparable harm to the applicant.

Prior Notice/Same-Day

Normally, a request for interim relief is followed by a hearing at which the court renders its decision. In urgent cases, interim relief may be ordered by the court in ex parte proceedings, usually within 24 hours. If such order is granted, it is followed by an oral hearing at a short notice.

Prohibitory and Mandatory Injunctions

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

Right to Vary or Discharge Order and Appeals

Interim orders by a first instance court are subject to appeal to the cantonal high court. The defendant can request the discharge or modification of the order. A high court decision can be further appealed to the Federal Tribunal if either:

- The appellant was otherwise to suffer harm that would be difficult to rectify if the appeal was not granted.
- The decision by the Federal Tribunal can immediately lead to a final decision, thereby avoiding long and costly evidence proceedings.

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

Availability and Grounds

To secure monetary claims before a trial or in debt enforcement proceedings, creditors can apply for the attachment of a debtor's assets for the whole territory of Switzerland. Creditors 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.

There are six grounds on which attachment of assets can 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 travelling through Switzerland or conducts business on trade fairs, if the claim must be settled immediately.
- The debtor does not reside in Switzerland and no other ground for attachment is available, if the claim has sufficient connection with Switzerland or is based on recognition of debt.
- The creditor holds a provisional or definitive certificate of shortfall against the debtor.
- The creditor holds a definitive enforceable title permitting them to have any objection by the debtor set aside (*definitiver Rechtsöffnungstitel*). An enforceable domestic or recognisable foreign judgment or arbitral award will entitle a party to request attachment of assets against its debtor.

Unless the creditor has already commenced debt enforcement proceedings (*Betreibung*) or filed an action to obtain an enforceable title, they 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 their claim in ordinary court proceedings.

Standard of Proof

The applying debtor must prove the grounds and prerequisites to a plausible degree.

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

In the main enforcement proceedings (*Rechtsöffnungsverfahren*), the applicant must demonstrate that its title, based on which it is seeking enforcement of its claim, is valid. The debtor's challenges are limited to arguments that the claim has in the meantime been discharged, deferred, or has lapsed.

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 proceedings also render a decision on the enforceability of the foreign judgment without hearing the other party. The other party can 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 signatory state).
- The attachment within ten days of learning of it.

Preferential Right or Lien

An applicant who has secured the attachment of assets does not enjoy preferential rights or lien over 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 can request the applicant to provide security.

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

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

FINAL REMEDIES

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

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, but will only be considered if specific performance cannot be requested.

The amount of damages awarded to a claimant must compensate their loss (including interest). Damages cannot be punitive in nature. However, the court can, under certain circumstances, award reparations that do not correspond to the actual damage suffered. These remedies are limited to disputes involving bodily harm/death and emotional distress.

The standard of proof for damages does not differ from the standard of proof applied in other areas of law. A claimant will need to demonstrate to the full conviction of the court the damages suffered in actual monetary terms. The court must be convinced, based on objective reasons, that the damages occurred in the claimed amount, and any doubts in this regard must be insignificant. In limited cases, where the damages cannot be quantified, the claimant can request the court to estimate the value of the loss or damage at its discretion. The court will estimate damages in such instances in light of the normal course of events and the steps taken by the injured party.

EVIDENCE

Document Disclosure

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

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

Evidence is produced either with a legal brief or on order by the court. Before initiating proceedings, the court can order a precautionary taking of evidence if the applicant shows prima facie evidence of an interest worthy of protection or has a statutory right to evidence. However, the applicant must pay for the court fees involved with the taking of evidence. There is no US style pre-trial discovery in Switzerland.

During trial, a party can request the court to order the other party or a third party to disclose certain specifically identified documents (written documents, drawings, plans, photographs) or electronic data in its possession. There is no distinction between documents held electronically or otherwise.

The court will grant such a request if it decides that the evidence is necessary to establish legally relevant facts of the case and will prescribe a deadline for the production of the requested evidence. General requests for document production are not permitted (no "fishing expeditions"). 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.

Documents are normally submitted in hard copy and are sometimes supplemented by a set of electronic documents.

While the CPO does not prescribe the retention of documents during a trial phase, provisions in the CO require commercial entities to keep their records for ten years. Not divulging papers that the court has identified as procedurally relevant may have the consequence of negative inference.

Privileged Documents

17. Are any documents or communications privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Privileged Documents

All correspondence relating to, and prepared in the course of, a specific mandate to or from external professional counsel (including patent attorneys) is protected by privilege, irrespective of its

location. This also applies to proceedings before the competition authorities and the Swiss Financial Supervisory Authority.

Lawyer-client privilege only extends to lawyers registered in the cantonal lawyers register. There is no privilege for in-house counsel, but a proposal has been included in the revisions to the CPO to alter this situation (see *Question 35*).

The "without prejudice" principle is not covered by statutory privilege, but is generally recognised by the courts when communication made in the context of genuine settlement negotiations is at issue (see below, *Other Non-Disclosure Situations*) and bar rules include the principle.

Other Non-Disclosure Situations

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 that they do not want to be used in subsequent court proceedings (without prejudice). Parties can maintain and need to indicate clearly that these documents are without prejudice to their position in later court proceedings if settlement negotiations fail. Courts respect the parties' agreement provided their intention is clearly expressed in earlier correspondence.

Witnesses

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

Probatory Value of Different Types of Evidence

Witnesses give oral evidence and may be subject to criminal penalties for giving false testimony. A witness who fails to appear may be summoned or sanctioned with a fine. Witness statements are not common in Switzerland; however, in exceptional cases the court may admit a signed witness statement as a physical record. The court can obtain information in writing from a private person if it does not consider it necessary to examine this person as a witness.

As with every means of permissible evidence, the court must form its opinion based on its free assessment of the evidence taken. Accordingly, the law does not prescribe any rules on the probative value of evidence (except that public registers and official records are conclusive evidence of the facts stated in them, unless their content is proven to be incorrect). Whereas documentary evidence is generally regarded to be more reliable than witness testimony, the probatory value of a testimony can be very high depending on how such testimony is given.

Right to Cross-Examine

There is no specific right to cross-examine. However, following the initial interrogation by the judge, each party can put additional questions to the witness either:

- Through the judge.
- Directly to the witness, with authorisation by the judge.

However, these additional questions must not go beyond the issues on which the court heard testimony, and therefore solely serve to clarify the issues on which the court heard testimony. Questions that go beyond these issues, or repeat questions already asked by the judge, are not permitted.

The Code on Civil Procedure also allows a court to put witnesses against each other and against the parties.

Third Party Experts

19. What are the rules in relation to third-party experts?

Appointment Procedure

Where the court concludes 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 an expert and make their own suggestions before the appointment, if requested to do so by the court. Any evidence, including where a party wants to rely on an expert witness, must be disclosed at the evidence stage at the latest.

Role of Experts

Court-appointed experts act on behalf of the court and are subject to the same rules on conflicts of interest as judges. Specialist opinions given by experts at the request of the parties are considered by the court as party explanations and have no added evidential value.

Cross-Examination of Experts

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 conclusions and can under certain circumstances request the appointment of a new expert.

Fees

Costs for expert fees must be advanced by the party requesting the expert opinion. If both parties request an expert opinion, the advance may be split equally among 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

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Appellate Courts

Judgments rendered by a district court can be appealed to the higher cantonal court. A further appeal to the Supreme Court is only possible if either:

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

Judgments rendered by a commercial court (for the cantons that have established commercial court, see *Question 1*) can only be appealed to the Supreme Court.

There are no further conditions for bringing an appeal. In particular, the appellant does not need permission to bring an appeal.

Grounds for Appeal

The higher cantonal court has full competence to review questions of law and of fact. The Supreme Court's review is in general limited to questions of federal law (see also *Question 3*).

Time Limit

Judgments of district courts must be appealed within 30 days. Judgments of the higher cantonal courts and 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 ten days.

CLASS ACTIONS

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

Typical class actions are not available under Swiss law. Claims must be brought by individual claimants. There is an exception for 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 (for example, certain organisations whose mandate is to protect nature and heritage, or consumer interests). These can bring a group action (*Verbandsklage*) in their own name for a violation of the personal rights of the members of the group.

Where an injury to these interests is alleged, the association can request that either:

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

However, group actions are not widely used and the Federal Supreme Court only recently dismissed a group action launched by a consumer association for lack of standing. A proposal to revise and improve group actions has been withdrawn and postponed following critical feedback in a public consultation (see *Question 35*).

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 Code on Civil Procedure 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

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?

The losing party will be ordered to compensate the successful party's procedural costs. If a party is successful in part, a proportionate payment is ordered. Procedural costs include the:

- Court's costs.
- Winning party's costs. This includes the necessary outlays (for example, travel expenses and, in some cases, expert reports), the costs of professional representation and, in justified cases, reasonable compensation for personal efforts if a party is not professionally represented.

Under the Code on Civil Procedure, the cantons have kept their competence to set the tariffs according to which the cantonal courts calculate the court and party compensation fees. Therefore, court fees and party compensation fees may differ among the cantons. Litigants should be aware that the cantonal fee schedules:

- May not necessarily be in line with lawyers' fees.
- Give courts a wide discretion in setting their own fees and awarding compensation for costs.

Therefore, in practice, successful litigants will often only be compensated partially.

The Code on Civil Procedure only contains a few general rules on the matter. It authorises courts to request advance payment of the expected court fees of a claim before starting proceedings. Additionally, the claimant may be ordered by the court (on motion of the defendant) to post security (either in cash or in the form of a guarantee from a bank with a branch in Switzerland or from an insurance company authorised to operate in Switzerland) for the defendant's costs (see *Question 11*).

Accordingly, foreign claimants need to be aware that litigating in Switzerland normally requires payment of an advance of the expected court fees and posting of a security for the defendant's costs at the outset, provided there is no treaty in place between the place of residence of the claimant and Switzerland (for example, the 1954 or 1980 Hague Conventions on Civil Procedure or International Access to Justice, or a bilateral agreement, excluding such requirement by reason of their not being domiciled in Switzerland).

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

- Claim amount.
- Complexity of the matter.
- Duration and stages of the proceedings (pleadings, hearings, evidence and settlement negotiations).

The courts can, under certain circumstances, depart from the ordinary principles of liquidating procedural costs and award costs at their discretion. However, this only applies in individual cases where applying the general rules may prove to be rigid and unjust.

The courts rarely take pre-trial offers into account.

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

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 costs 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

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

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 Federal Debt Enforcement and Bankruptcy Act. The judgment creditor can start summary enforcement proceedings by requesting the court to set aside the opposition the defendant raised against the payment summons and to order the continuation of enforcement through the attachment of goods (for natural persons) or bankruptcy proceedings (for legal persons).

Judgments for specific performance are enforced under the Code on Civil Procedure and must also be requested in summary proceedings with the enforcement court at the place of residency (for natural persons) or at the place of registered office (for 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 their 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 their 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 so, are there any national laws or rules that may modify or restrict the application of the law chosen by the parties in their contract? What are the rules for determining what law will apply in the absence of any agreement and/or to non-contractual claims?

Contractual Choice of Law

Parties are generally free to choose the law applicable to their business relations. However, certain matters are excluded from this principle:

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

A choice of law provision in a contract on the international sale of goods designating Swiss law may result in the application of the UN Convention on Contracts for the International Sale of Goods 1980 or similar treaties, unless those treaties have been specifically excluded by the parties. Swiss courts usually interpret a choice of law clause merely referring to Swiss law as the applicable law, as a reference to the substantive law. For the sake of clarity, however, if the parties intend to exclude any conflict of laws principles from their choice of law, they should do so specifically.

No Choice of Law and Non-Contractual Claims

Absent a choice of law, the law applicable to a contractual dispute is the law of the state with which it is most closely connected (closest connection test).

With respect to non-contractual claims, the parties may choose any time after the event causing the damage that the law of the forum, that is Swiss law, will apply. Absent a choice of law by the parties, the Swiss Private International Law Act (PILA) determines the applicable law. If a tort violates an existing legal relationship between the tortfeasor and the injured party, the tort claim will be governed by the law applicable to the existing legal relationship.

Contractual Choice of Forum

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?

Swiss courts generally respect 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 (only after the dispute arose).
- Disputes concerning employees are heard by the competent court at the employee's domicile or at the place of employment; agreements on jurisdiction can only be entered into after the dispute arose.
- 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 on jurisdiction is the Lugano Convention. Under the Lugano Convention, the parties can either:

- Conclude a jurisdiction agreement.
- Include a jurisdiction clause in their contractual arrangements.

The local courts respect this practice, unless statutory law provides for a mandatory forum or declares it unlawful to waive the statutory forum before the dispute has arisen.

Service of Foreign Proceedings

27. If a party wishes to serve foreign proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction a 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 use the means of judicial assistance. Switzerland is party to two major multilateral treaties:

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

A number of bilateral agreements authorise direct contact between judicial authorities. There are also bilateral agreements that complement the Hague Conventions. Where there is no international agreement, Switzerland automatically applies the Hague Civil Procedure Convention to the foreign requests that it receives.

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 Office 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. The central authority approaches the competent court, which then serves documents by qualified postal delivery. If the law applicable in the country of the party requesting service permits lawyers to serve documents, these persons are recognised as judicial officers and can also approach the central authority directly. As it can prove difficult for the requesting state to know which of the 26 central cantonal authorities has jurisdiction, the Federal Office of Justice is also designated to be a central authority and passes foreign requests to the competent cantonal authorities.

Switzerland declared that it is opposed to the use in its territory of direct service through diplomatic or consular agents and any other direct form of service; accordingly, any judicial document must be served through the competent central authority.

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?

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:

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

A number of bilateral agreements authorise direct contact between judicial authorities. There are also bilateral agreements that serve to complement the Hague Conventions. Where there is no international agreement, Switzerland applies the Hague Civil Procedure Convention to the foreign requests that it receives.

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 Federal Office of Justice or directly to the competent cantonal authority.
- The competent cantonal authority then takes 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 Office of Justice.
- The Swiss Federal Office 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.

Notably, the surrender of evidence located in Switzerland to foreign authorities or parties in violation of the applicable international conventions to which Switzerland is a party 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. Therefore, requests that are formulated in general terms and require the opposing party to indicate the documents in their possession with the aim of obtaining information that bears no relation to the case or in an attempt to discover evidence to substantiate a claim ("fishing expeditions") are rejected.

Switzerland also made a reservation with respect to the taking of evidence by diplomatic officers, consular agents and commissioners. This is only possible on authorisation by the federal government (but a lawyer does not require an authorisation when collecting evidence in Switzerland during ordinary case preparation).

ENFORCEMENT OF A FOREIGN JUDGMENT

29. How are foreign judgments enforced in your jurisdiction?

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 the application in ex parte summary proceedings and 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 can, on a party's request, order protective measures without hearing the other party. The court will deny recognition if:

- It violates Swiss public policy.
- Procedural guarantees considered to be fundamental in Switzerland were not adhered to in the foreign proceeding.

A judgment rendered in a state not party to the Lugano Convention is considered a final judgment within the meaning of the Federal Debt Enforcement and Bankruptcy Act. A local court can grant exequatur on a summary review of the matter.

ALTERNATIVE DISPUTE RESOLUTION

30. What are the main alternative dispute resolution (ADR) methods used to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

Large commercial disputes are usually resolved 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, and the adoption of the *Swiss Rules on Commercial Mediation by the Swiss Chambers of Commerce and Industry in 2021*.

Arbitration (but not necessarily other forms of ADR) is more common in international commercial disputes than in domestic disputes. The Swiss Arbitration Centre regularly publishes a statistical overview of the cases it administers. The top three industry sectors between 2016 and 2020 were the manufacturing sector, the commodity mining and trading sector and the banking and finance sector, accounting for 46% of cases.

The Swiss Rules of International Arbitration were upgraded in 2021 to reflect, among others, the ongoing digitalisation. Paperless filings have become the new standard. Organising the proceedings expressly includes that the arbitral tribunal at an early stage discusses with the parties issues of data protection and cybersecurity, to ensure an appropriate level of compliance and

security. Any hearings may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties.

In contentious court proceedings, the court can recommend mediation to the parties at any time (see also *Question 31*). On joint application of the parties, the court may confirm a settlement reached through mediation during proceedings (*Code on Civil Procedure*). 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.

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

Apart from cases where conciliation proceedings are mandatory, 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 under statutory provisions, the parties can 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.

To be enforceable in court, a multi-tier dispute resolution clause providing for pre-trial arbitration or conciliation or mediation should clearly set out the conditions (including time limits) for the arbitration or mediation proceedings. Non-compliance with pre-arbitral mediation under a multi-tier dispute resolution clause may result in an annulment of the arbitral award.

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?

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 they consider 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.

In domestic arbitration, subject to the rules of the Code on Civil Procedure and international arbitration, the parties are free to agree on the procedural rules within the mandatory procedural limits (guarantees) prescribed by law.

Since arbitration, and more generally ADR, is contractual, confidentiality depends on the parties' agreement. For example, Article 44(1) of the Swiss Rules of International Arbitration provides that in principle, arbitration is confidential, unless the parties agree otherwise or disclosure is required by a party as a matter of law, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. Article 13 of the Swiss Rules of Mediation also contains a confidentiality clause.

33. How are costs dealt with in ADR?

Costs are borne by the parties, subject to their mediation agreement or equivalent, or applicable arbitration procedural rules. For example, the Swiss Rules on International Arbitration, which can also be chosen for domestic arbitration, provide that the costs of the arbitration must in principle be borne by the unsuccessful party.

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

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

- Swiss Arbitration Centre, which adopted the:
  - Swiss Rules on Commercial Mediation in 2021; and
  - Swiss Rules on International Arbitration in 2004 (as revised in 2021), which can also be chosen for domestic arbitration.
- WIPO Arbitration and Mediation Center, a branch of the World Intellectual Property Organization established in 1994. This centre offers institutional mediation services for private parties.
- Swiss Chamber of Commercial Mediation (SCCM).
- Swiss Association of Mediators (SDM-FSM).

PROPOSALS FOR REFORM

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

Following the Swiss Parliament having referred a motion to the federal government to revise the current system of collective redress (see *Question 21*), the federal government prepared a legislative proposal. The competent committee of the National Council did not accept the Federal Council's proposal as in its view it left various questions unanswered. The committee requested the Federal Council to prepare a regulatory impact assessment and to provide comparative information on collective redress in EU member states. Given the committee's requests, it is not expected that the legislative proposal will be discussed in Parliament before 2024.

A proposal to amend the Code on Civil Procedure was recently submitted to the Swiss Parliament (for example, with respect to in-house counsel privilege and access to justice). The proposal has largely been settled between the two chambers of Parliament, although minor differences remain.

On 1 January 2023, the revision of the law on the company limited by shares took effect. According to the new Article 697n, the articles of association can provide that disputes arising out of company law must be adjudicated exclusively by an arbitral tribunal having its seat in Switzerland.

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Recent transactions

- Advising parties in sanctions-related matters and proceedings.
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- Enforcement proceedings based on a German freezing order against a foreign debtor holding assets in Switzerland.
- Assisting a Swiss bank as civil complainant in a complex fraud investigation.
- Assisting a Swiss bank in internal regulatory compliance reviews.
- Representing a foreign client in large-scale commercial litigation regarding infrastructure project.
- Issuing expert reports on issues of Swiss law for English High Court of Justice proceedings.
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- Assisting a sovereign fund in claims against a Swiss bank.

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Publications (among others)

- *For internationally active companies, continuing their business in Russia is a balancing act, Neue Zürcher Zeitung, 6 June 2023, p. 8, with Martin Heisch.*
- *Chambers Europe 2023, Switzerland - Statutory Arbitration Clauses under the new Swiss Corporate Law, April 2023, with Martin Heisch.*
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- *"One for all", or arbitration clauses with effect for unconcluded contracts?, The Lawyer, September 2020, with Marcel Frey and Nina Lim.*

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- Issuing expert reports on issues of Swiss law for English High Court of Justice proceedings.
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- Representing claimants and defendants in high-level D&O claims.

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Publications (among others)

- *INDEPTH FEATURE: Commercial Arbitration 2023 - Switzerland in: Financier, February 2023, with Reto Jenny.*
- *Overcoming hurdles in international debt collection in Switzerland in: Lawyer Monthly, March 2023*
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Recent transactions

- Representing clients before state courts and arbitral tribunals.
- Advising on competition law (unfair competition, mergers, cartel investigations, abuse of dominance, distribution agreements, and private enforcement of competition law).
- Advising on public procurement law and state aid law.

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Publications (among others)

- *SIWR - Commentary on Article 49a(1) of the Swiss Law on Cartels and other Restraints of Competition (forthcoming).*
- *GCR - The Guide to Life Sciences - First Edition (2022) - "Switzerland: Merger Control Reform Could Have Big Impact, Especially for 'National' Markets", with Philipp Zurkinden and Andrea Schütz.*
- *Litigation and Enforcement in Switzerland: Overview, March 2021, in Thomson Reuters Practical Law, with Urs Feller and Bernhard C. Lauterburg.*
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