

Litigation and enforcement in Switzerland: overview

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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?

In Switzerland, large commercial claims are usually brought before the ordinary courts or settled through arbitration. The Sports Arbitration Court (CAS) located in Lausanne, Switzerland is host to one of the most important arbitration forums in the world.

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

COURT LITIGATION

Limitation periods

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

Limitation periods are a matter of substantive civil law, most of which are found in the Code of Obligations (CO).

The CO provides for the following limitation periods:

- A general statutory limitation period of ten years (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 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 the person liable. A tort claim will become unenforceable owing to the statute of limitations after ten years from the date of the action causing the damage.
- Claims based on unjust enrichment also become time-barred after one year.
- The Federal Government made proposals to amend the absolute limitation periods. If passed, tort and enrichment claims will become time-barred after three years after knowledge of the damage and tortfeasor, or the enrichment event respectively.

Court structure

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?

The Code on Civil Procedure (CCP) prescribes a double instance system within the judiciary of the cantons, under which 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.

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

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. These decisions are 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.
- 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 may choose to lodge a suit before the Commercial Court or with the ordinary courts.

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 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 also 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.



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

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

Foreign lawyers

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 is free to provide services without registration if done for 90 days or less per year in Switzerland. Professional activities lasting longer require the EU/EFTA attorney to 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 may then practice freely, provided he appears before the Swiss court under his original title.
- An EU/EFTA attorney may also register in the attorney register and adopt the local title if he has practiced in Switzerland for three years under his original title and has passed a qualification exam.

FEES AND FUNDING

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

Attorneys' fees may be freely arranged between lawyers and their clients and hourly rates are the norm. Contingency fees are not permitted. However, conditional fee arrangements 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. Party costs are calculated according to cantonal statutory rules.

- 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 statutory tariffs and may not fully cover actual expenses.

A party can apply to the court to dispense it from having to advance court fees and to have a state-funded attorney assist it 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.

There are a few third-party funding providers in Switzerland. Their services usually involve handing over a share of the claimed amount in successful proceedings.

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 CCP requires civil law court proceedings and the delivery of judgments to be public. However, public interest in commercial cases is usually limited. Copies of judgments (mostly in anonymised form) may be requested by anyone and are published online. 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 proceedings, if this is in the public interest or, upon application, in the protected interest of a concerned person. Conciliations 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 receive the writ and to bring its claim before the court. A party failing to institute 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).

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

- The dispute must be brought before a sole cantonal instance (see *Question 3, Sole cantonal instance*).
- Divorce proceedings are at stake.
- Proceedings concerning certain actions filed under the Federal Debt Enforcement and Bankruptcy Act (DEBA) or are dealt with 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 may also forego the conciliation proceedings if the defendant has a foreign domicile.

The conciliation request must include the name of the respondent, 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 a writ 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 iudicata* consequence. However, a claimant would have to go through the conciliation procedure again before he 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 may be extended once between 20 and 60 days depending on the complexity of the matter.

If the defendant fails to submit a statement of defence in time, 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 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 the parties hold settlement talks. The Commercial Court of Zurich has a standing practice of holding settlement talks after the first exchange of briefs and manages to settle about two-thirds of all cases coming before it.

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 it has a claim, should its defence against the original claimant fail. On filing of the application, the court will render an interlocutory decision on the admissibility of the third-party complaint.

If the court admits the complaint and the third-party decides against taking part in the proceedings, it is later barred from invoking such defences as would have been available to it during the original proceedings with regard to the matters of fact on which the case is based. The matters of fact become binding on the third-party when it is faced with a claim by the original defendant.

Forum selection clauses or an agreement to arbitrate between the third-party claimant and the third-party defendant or statutory provisions providing for a compulsory forum as regards the subject

matter of the third-party complaint will render the third-party complaint inadmissible. All parties may appeal against the final judgment in as far as the verdict affects them.

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 enjoys 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 may, 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. Such 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.
- Other reasons exist indicating that defendant's costs might be at risk.

International treaties may prohibit Swiss courts from requiring a claimant to secure cost. The Lugano Convention, for example, 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 of the proceedings. If interim relief is sought prior to *lis pendens*, the court sets a deadline for the petitioner to file suit (no conciliation required). Swiss law distinguishes between interim relief measures aimed at securing monetary claims and measures dealing with non-monetary matters.

Claims to money may be secured by applying 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 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 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 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.

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.

Mandatory injunctions

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

Rights of appeal

Interim orders by a first instance court are subject to appeal to the cantonal high court. A further appeal to the Federal Tribunal is possible if the appellant were otherwise to suffer harm which would be difficult to rectify if the appeal were not granted or if the decision by the Federal Tribunal could 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 debt enforcement proceedings, creditors can apply for the attachment of goods based on the DEBA for the whole 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.

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 travelling 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, he 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 signatory state).
- The attachment within ten days of learning of it.

The Supreme Court confirmed that judgments from other states (non-members of the Lugano Convention) also entitle a creditor to attach assets.

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.

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

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.

FINAL REMEDIES

15. What remedies are available at the full trial stage? Are damages just 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.

The amount of damages awarded to a claimant must compensate his loss (including interest) and 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 and emotional distress.

The standard of proof for damages does not differ from the standard proof applied for other requirements for an action. The courts form their opinion based on a free assessment of the evidence taken.

EVIDENCE

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 case. Legal entities are subject to the same rules applicable to individuals.

Evidence is produced either with a legal brief or upon order by the court. Pre-trial (precautionary) taking of evidence may be ordered by the court when 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 identified documents (written documents, drawings, plans, photographs) or electronic data in its possession. 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. 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.

Privileged documents

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

Privileged documents

Lawyer-client privilege only extends to lawyers registered in the cantonal lawyers register. There is no privilege for in-house counsel, however, 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.

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 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 respect the parties' agreement, provided their intention is clearly expressed in their earlier correspondence.

Examination of witnesses

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?

Oral evidence

Witnesses give oral evidence under the threat of criminal punishment if they give false testimony. If the witness fails to appear, he 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 may obtain information in writing from a private person if it does not consider it necessary to examine this person as a witness.

Right to cross-examine

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.

Third party experts

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

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 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, needs to be disclosed at the evidence stage at the latest.

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 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 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. Should both parties request 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.

Expert opinions as precautionary evidence

A motion for an expert opinion can already be filed in a proceeding for the taking of precautionary evidence. This is in particular the case when the law grants the applicant such right or when the applicant shows credibly that the evidence is at risk or that the applicant has a legitimate interest. The costs for summary proceedings in such a case as well as the cost for the expert opinion shall be borne by the applicant. Within the scope of the requested expertise, the adverse party may raise additional questions without cost implications.

APPEALS

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

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 (see also *Question 3*).

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

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

Typical class actions are not possible under Swiss law. Claims must be brought by individual claimants.

Swiss law, however, permits associations and organisations to file claims on behalf of their members if they have made the protection of certain interests 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 acknowledges 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

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 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. Therefore, court fees as well as party compensation fees may differ among the cantons. Litigants should be aware that the cantonal fee schedules give courts a wide discretion in setting their own fees and awarding compensation for costs.

The CCP, contains only a few general rules on the matter; namely, it authorises courts to request advance payment of the expected court fees of a claim before starting proceedings. Additionally, the CCP provides that the claimant may be ordered 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 respondent's party costs. This is in particular the case where the claimant has no residence or registered office in Switzerland or a possible payment of compensation for the respondent's party costs is at risk.

Accordingly, foreign claimants need to be aware that litigating in Switzerland normally requires payment of an advance of the expected court fees and, 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 excluding such requirement by reason of their not being domiciled in Switzerland), posting of a security for respondent's party costs 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 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 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

24. What are the procedures to enforce a local 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 DEBA. The party with the judgment in its favour 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 CCP 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 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 that 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).

Parties should be aware that a choice of law provision in a contract on the international sale of goods providing for Swiss law to apply may result in the application of the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) or similar treaties, unless those treaties have been specifically excluded by the parties.

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 for a specific judicial proceeding 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).

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 automatically applies the 1954 Hague 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. 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. 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.

Note that, 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 HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970 (Hague Evidence Convention).
- The Hague Convention on Civil Procedure of 1 March 1954 (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 1954 Hague 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 central authority in Switzerland. The central authority's duties are assumed at cantonal level, while the Federal Office of Justice also acts as central authority.
- 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 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 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.

Enforcement of a foreign judgment

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

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 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. 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.

ALTERNATIVE DISPUTE RESOLUTION

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? What proportion of large commercial disputes is settled through ADR?

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.swissarbitration.org/sm/en/rules.php).

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

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 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.

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

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 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 mediation should clearly set out the conditions (including time limits) for the arbitration or mediation proceedings.

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 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.

33. How are costs dealt with in ADR?

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

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

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

- Swiss Chambers of Commerce and Industry (that is, the Chambers of Commerce of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich), which adopted the Swiss Rules on Commercial Mediation in 2007 (*see, www.swissarbitration.org/sm/en/rules.php*).
- 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 (*see, www.wipo.int/amc/en*).

PROPOSALS FOR REFORM

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

The Swiss Parliament is currently considering a proposal to amend certain statutes of limitation (*see Question 2*). Whether the entering into force of the amended Brussels I Regulation will eventually result in a revision of the Lugano Convention is currently unknown. It should be recalled that the 2007 revised Lugano Convention aimed to adapt and harmonise the 1988 Lugano Convention with the Brussels I Regulation. At least in relation to the recent amendments to the Brussels I Regulation, this parallelism was pierced.

The Swiss Parliament has referred a motion to the Federal Government to revise the current system of collective redress and introduce class actions. Whether the motion will be transposed into law remains to be seen.

ONLINE RESOURCES

The Federal Authorities of the Swiss Confederation

W www.admin.ch/ch/e/rs/rs.html

Description. The official state website of the Swiss Federation with links to government departments and current legislation as well as unofficial translations of certain federal acts.

The Swiss Chambers of Commerce Association for Arbitration and Mediation

W www.swissarbitration.org

Description. The official website of the Swiss Chambers' Arbitration Institution established by the chambers of commerce and industry of the Swiss cities of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

WIPO Arbitration and Mediation Centre

W www.wipo.int/amc/en

Description. The official website of the World Intellectual Property Organisation, a United Nations agency dedicated to the use of intellectual property as a means of stimulating innovation and creativity.

Practical Law Contributor profiles



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Areas of practice. Litigation and arbitration; corporate and commercial; financing and capital markets; private client; real estate and construction.

Recent transactions

- Bankruptcy litigation on behalf of creditors in Lehman bankruptcy.
- Representing a foreign investor in proceedings before the financial regulator in relation to an investment into an insurance company.
- Asset freezing and asset recovery litigation on behalf of private parties as well as on behalf of foreign states in connection with mutual legal assistance proceedings.
- Representing clients in ICC and Swiss Rules Arbitration proceedings.
- Representation of clients involved in administrative assistance proceedings in relation to the Federal Tax Administration and Federal Administrative Court.
- Acting on behalf of a retailer in a rental dispute concerning a flagship store.
- Representing claimants and defendants in high-level D&O claims.
- Representing a company in FINMA proceedings concerning legal assistance in connection with stock exchange trades.

Languages. English, German, French

Professional associations/memberships. Zurich and Swiss Bar Association; International Bar Association; Law Society (England and Wales); British-Swiss Chamber of Commerce.

Publications

- *Assessing the risks – Pre-trial costs in Switzerland, The Lawyer, March 2015, with Marcel Frey.*
- *Dispute Resolution in Switzerland, Corporate Disputes Magazine January – March 2014, with Marcel Frey.*
- *IFLR Switzerland Guide 2015 – Preliminary judicial protection, with Bernhard Lauterburg. The authors discuss interim relief in recent Swiss jurisprudence in several areas of law (contracts, bankruptcy, IP and competition) and highlight areas where it pays to be prudent.*
- *Precautionary taking of evidence – Swiss style pre-trial discovery? International Bar Association International Litigation News, April 2013, with Marcel Frey.*
- *Money laundering by omission – a landmark decision by the Swiss Federal Tribunal, Newsletter of the International Bar Association, Criminal Law Section News, September 2011, with Marcel Frey.*

Professional qualifications. Admission Switzerland, 2004; LLM, University of Cape Town, 2006

Areas of practice. Litigation and arbitration, business transactions (M&A); corporate and commercial; private clients.

Recent transactions

- Representing a company in FINMA proceedings concerning legal assistance in connection with stock exchange trades.
- Representing claimants and defendants in high-level D&O claims.
- Representing a foreign investor in proceedings before the financial regulator in relation to an investment into an insurance company.

Languages. German, English, French, Afrikaans

Professional associations/memberships. Zurich and Swiss Bar Association; SwissCham Southern Africa.

Publications

- *Assessing the risks – Pre-trial costs in Switzerland, The Lawyer, March 2015, with Dr Urs Feller.*
- *Dispute Resolution in Switzerland, Corporate Disputes Magazine January – March 2014, with Dr Urs Feller.*
- *Precautionary taking of evidence – Swiss style pre-trial discovery? International Bar Association International Litigation News, April 2013, with Dr Urs Feller.*



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Professional qualifications. Georgetown University Law Centre, LLM, 2006; admission Switzerland, 2010

Areas of practice. Competition and regulatory; corporate and commercial; litigation and arbitration.

Recent transactions

- Representing clients before state courts and arbitral tribunals.
- Advising on competition law (mergers, cartel investigations, distribution agreements).

Languages. German, English, French

Professional associations/memberships. Swiss and Berne Bar Association; Swiss Arbitration Association; *Studienvereinigung Kartellrecht e.V.*; Swiss Chapter of the *Ligue Internationale du Droit de la Concurrence*; International Bar Association.

Publications

- *Financier Worldwide*, April 2015 - Discussion with lawyers from Kirkland & Ellis and PricewaterhouseCoopers Legal about dawn raids and thereby focuses on dawn raids in competition matters.
- *IFLR Switzerland Guide 2015– Preliminary judicial protection*, with Dr Urs Feller. The authors discuss interim relief in recent Swiss jurisprudence in several areas of law (contracts, bankruptcy, IP and competition) and highlight areas where it pays to be prudent.
- *The Private Competition Enforcement Review, Swiss Chapter* (2011, 2012, 2013 edition), with Dr Christoph Tagmann; the 2014 edition with Prof. Dr Philipp Zurkinden.
- *Getting the Deal Through - Public Procurement, Swiss Chapter* (2012, 2013, 2014, 2015), with Prof. Dr Philipp Zurkinden.
- *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, Published in January 2010 by Bernhard C. Lauterburg in *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing), together with Noah Rubins (Freshfields Bruckhaus Deringer).