COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Switzerland

LITIGATION

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This country-specific Q&A provides an overview of litigation laws and regulations applicable in Switzerland.

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SWITZERLAND
LITIGATION

1. What are the main methods of resolving disputes in your jurisdiction?

As in most countries, disputes in Switzerland are either resolved through negotiations, where substantive law allows the parties to enter into settlement agreements, or via state court litigation. Alternatively, Switzerland also allows parties to enter into arbitration agreements as well as mediation as alternative dispute resolution methods. In practice, and depending on the region of the country, many disputes are solved by way of an in-court settlement, in particular after settlement facilitation of the reconciliation authority (justice of peace) or the court.

2. What are the main procedural rules governing litigation in your jurisdiction?

The basis of any legal procedure is the right to be heard. In addition, legal disputes must be judged by an independent, impartial court provided for by law. Civil litigation before the cantonal courts of first and second instance is governed by the Swiss Civil Procedure Code.

3. What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal?

What is the final court of appeal? The civil court system in Switzerland is generally a two-tier court system in which every canton (states) provides for a court of first instance as well as a court of appeal, with the Federal Supreme Court on the federal level acting as the highest court in Switzerland.

Generally, civil litigation will start at the courts of first instance whose decisions are subject to appeal with a cantonal court of appeal (superior court). The superior court's appeal decisions are subject to appeal before the Federal Supreme Court.

Apart from the Federal Patent Court, which has jurisdiction for all patent cases, there are specialised courts of first instance in the fields of labour and tenancy law.

Furter, the cantons of Zurich, Berne, Aargau and St. Gall have specialised commercial courts. In essence, these Commercial Courts act as courts of first instance, handling all disputes between commercial entities. Decisions of Commercial Courts may only be appealed to the Swiss Federal Supreme Court that has only limited powers of review.

4. How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

Ordinary court proceedings in general will take 1 to 2 years to from the start of the proceedings to the decision, depending of course on the complexity of the case and the workload of the court in charge.

5. Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

With minor exceptions, court hearings are public. However, court documents as well the submissions of the parties and exhibits filed in court proceedings are not public and generally cannot be accessed by the public.

6. What, if any, are the relevant limitation periods in your jurisdiction?

Limitation periods are governed by substantive law, i.e. they are not an issue of procedural law. The general limitation period for claims is 10 years. Shorter limitation periods of 3 years apply in cases of claims for damages based on tort or unjust enrichment.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

There are no specific rules regarding pre-action conduct in Switzerland, e.g. a plaintiff has no obligation to notify defendant that it will initiate legal proceedings. Correspondingly, a defendant is not obliged to respond to a pre-action letter etc. It is, however, quite common that counsel notify the opposing party by a letter before action before initiating legal proceedings. The rules of professional conduct impose certain limitation on attorneys representing parties in general, e.g. an attorney would not be allowed to directly contact opposing party if this party itself has appointed an attorney.

8. How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Except for cases that may directly go to the court of first instance (which is notably the case where a Commercial Court has jurisdiction), the claimant must first initiate reconciliation proceedings. If the parties do not find an amicable settlement, the reconciliation authority will issue the permit to sue to the claimant. The deadline to file a claim based on such permit to sue is 3 months. However, new reconciliation proceedings may initiated if the 3 month period has lapsed, i.e. a claimant is not obliged to file a claim with the court of first instance.

9. How does the court determine whether it has jurisdiction over a claim in your jurisdiction?

The question of jurisdiction in international cases is governed either by international treaties (in particular the Lugano Convention) or the Private International Law Act (PILA). In domestic cases, the Code of Civil Procedure (CPC) contains rules on jurisdiction. In practice, the main reasons for a court to accept its jurisdiction are i) corresponding jurisdiction agreements between the parties (usually contained in a jurisdiction clause in a contract between the relevant parties) or ii) that the court has jurisdiction due to the fact that it is the court at the domicile of defendant.

10. How does the court determine which law governs the claims in your jurisdiction?

The question only arises in international cases. Provided that no international treaty governing the issue is applicable (such as the Convention on the International Sale of Goods, CISG), the PILA contains the relevant provisions. The general rule is that the law with the closest nexus to the matter in dispute shall be applicable.

11. In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

As a general rule, parties are allowed to freely dispose of their claims, unless substantive law prohibits the parties from doing so. In fact, in most cases claims can be disposed of freely by the parties. Thus, the parties may reach a settlement either before or during pending proceedings. Settlement agreements reached in court are given the same status regarding enforceability as court decisions. This is also true for a settlement reached during the (mostly mandatory) reconciliation proceedings. Courts, in particular Commercial Courts, facilitate such settlements (by providing a preliminary assessment of the case on the basis of the written briefs and evidence filed up to a certain stage in the proceedings) and proactively nudge parties to reach such settlements.

12. What, if any, are the main types of interim remedies available in your jurisdiction?

The CPC contains general rules on interim relief. In order for a competent court to issue interim relief such as an injunction, the applicant must establish on a prima facie evidence basis that a) the applicant has a claim or right that has been infringed or is in danger of being infringed and b) that there is a threat that the applicant would suffer harm that cannot easily be remedied and that therefore necessitates the interim relief sought. The applicant must further also make the case for urgency, i.e. that the issue at hand cannot wait to be resolved in ordinary court proceedings. In case of an ex parte request, the applicant must show that the case necessitates the immediate action of the court and that it is necessary to issue the interim relief order before hearing the opposing party.

Interim relief can take the form of freezing orders that aim at maintaining a current situation, such as an injunction not to sell shares in a company. In certain circumstances courts are also willing to grant interim

relief de facto aiming at performance.

Any interim relief sought must be proportionate, i.e. the relief sought must be necessary and apt to prevent the harm applicant would credibly suffer if the relief is not granted.

Securing performance of monetary claims, i.e. payment, is exclusively dealt by specific attachment proceedings governed by the Swiss Debt Enforcement and Bankruptcy Act (DEBA). The prerequisites to get such an attachment differ considerably from the general rules applicable pursuant to the CPC. An attachment is in particular only granted if the applicant can establish on a prima facie that there are assets to be frozen that belong to the debtor and are located in Switzerland (e.g. by demonstrating that opposing party has a bank account in Switzerland).

13. After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

What is the usual timetable? The first phase of the proceedings is the allegation phase that starts with the written statement of claim submitted by the claimant and the answer to statement of claim (statement of defense) submitted by the defendant. In summary proceedings there is only one exchange of written briefs whereas in ordinary court proceedings a second round of pleadings must take place, either orally or in writing, the latter in practice in commercial cases being the standard.

The parties have to submit their documentary evidence along with their submissions. The pleadings also need to make reference to all other evidence the parties believe the court needs to take, such as witness and/or party testimony, the appointment of a court expert or requests ordering the counterparty (or third parties) to produce specified documents.

In ordinary court proceedings the court must hold a hearing unless all the parties to the proceedings waive their corresponding right. During said hearing the court may question witnesses and/or the parties, provided that the parties have made corresponding requests, and the parties may comment on the result of the taking of evidence. In cases where a second round of pleadings took place, new allegations and new evidence is only admitted under specific circumstances.

Usually, the parties are given around 60 days to submit their next submission, i.e. the answer to the statement of claim, the reply and the rejoinder. Depending on the canton and court, certain courts, in particular the Zurich Commercial Court, summon the parties to a hearing after the first exchange of briefs, in which the parties are not allowed to plead and the court attempts to facilitate an amicable solution based on a non-binding preliminary assessment of the case (settlement hearing). Sometimes the court combines such a hearing with the taking of evidence, partially taking additional evidence requested by the parties such as witness and/or party testimony.

In general, courts in Switzerland tend to favor documentary evidence over witness and/or party testimony. The court is not obliged to hear witness and/or party testimony (in spite of corresponding requests of the parties), but may limit the taking of evidence to the documentary evidence.

14. What, if any, are the rules for disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

In Swiss civil proceedings there is neither a pre-hearing fact discovery nor any discovery as it is known in the USA. There is also nothing comparable to what is known as disclosure in the UK.

During the proceedings the parties and/or third parties may, however, be obliged to cooperate in the taking of evidence. Although provided for in the Code of Civil Procedure, requests to produce documents are rarely granted by the courts and/or only to a limited extent. Such requests must be very specific. In fact, it is usually necessary to indicate that a specific document exists and that it is with the party that is requested to produce and what its likely content is. The courts further only order the production of documents if these documents are necessary to establish facts relevant to determine the outcome of the case.

Parties and/or third parties can invoke various grounds to refuse cooperation, such as attorney-client privilege as well as other secrets that must be protected. However, if the court qualifies the non-cooperation as unjustified it may take this into account when weighing the evidence.

Should a party be able to establish that the future taking of evidence would prima facie be in jeopardy, the court may grant a request for the precautionary taking of evidence before the claim on the merits has been filed. The courts are, however, very strict when dealing with such request and apart from certain well defined cases

(such as in construction matters when the construction has to proceed and the evidence would be lost if it is not taken) such requests are usually dismissed.

15. How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

In case a court wishes to hear witness and/or party testimony, the testimony is taken during a hearing. Such hearing may have been specifically set for this purpose or testimony is heard at the main hearingeted.

Depositions are alien to Swiss procedural law. Witness and party testimony is always given orally by the witness and/or the party during a hearing. The CPC does not provide for cross-examination, instead usually the court asks the questions based on what the parties have pleaded and to the extent that the parties themselves have requested the questioning of the witness/the party. Parties are allowed to ask follow-up questions, however, the court usually steps in if these questions go beyond what was pleaded by the parties.

16. Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)? Written expert reports filed by the parties have the same legal standing as the parties' allegations, i.e. they do formally not qualify as evidence. To get proper expert evidence, a party must request in its briefs that an expert shall be appointed by the court. In case the court deems that an expert must be appointed, the court will also instruct the expert.

Usually, the parties are allowed to submit questions for the expert to answer. However, ultimately the court decides whether the questions are admissible. Parties may make suggestions as to who should be appointed as an expert and may raise objections to experts proposed by the counterparty, such as lack of independence etc.

The expert provides a report to the court with his conclusions and the expert then is usually questioned by the court and the parties regarding his findings. Again, as with witnesses there is no cross-examination.

17. Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

If so, to which court(s) and within what timescale? Both final and interim decision are subject to appeal. In case a court of first instance issued the relevant decision, the appeal must be filed with the cantonal superior court whose decisions are then subject to appeal with the Swiss Federal Supreme Court.

The deadline to file an appeal is usually 30 days. For interim decisions and decisions issued in summary proceedings the deadline is 10 days. The appeal has to make explicit why the court of first instance decision must be lifted, i.e. to what extent the court of first instance erred when determining the facts or to what extent the court of first instance did not properly apply the law, and it has to further contain a request regarding what the appellant wants the appellate court to do once the decision has been lifted (i.e. decide itself on the merits or refer the case back to the lower court for a new decision). Appeal proceedings consist of one exchange of briefs (i.e. appeal and answer to the appeal) unless the appellate court orders a second round of briefs which is highly unusual. The answer to the appeal must be submitted within 30 or 10 days respectively, depending on what deadline was applicable for the appeal. Both deadlines are non-extendable.

The appellate court can issue a decision without holding a hearing, however, is free to summon the parties to an appeal's hearing which is, as the order for a second round of briefs, quite rare.

With a few exceptions, the appeal against final decisions provides for full scrutiny and the appellant may challenge both the fact-finding as well as the application of the law. Exceptions are made for certain summary judgments, for instance in enforcement matters, where there is only a limited appeal, allowing only to challenge the application of the law, whereas the facts established by the court of first instance can only be challenged on limited grounds.

Appeals with the Federal Supreme Court have only limited scrutiny. The Federal Supreme Court is in essence bound by the facts established by the lower court.

New facts and allegations are in general not admissible in appeal proceedings and the parties are with exceptions bound to what they have pleaded with the lower court.

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

As a general rule, a foreign decision must first be recognized and declared enforceable by a Swiss court before it takes effect in Switzerland. Switzerland has entered into a variety of treaties governing the recognition and enforcement of foreign judgments, most importantly the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention), a multilateral treaty entered into by Switzerland and the European Union as well as Denmark, Iceland and Norway. The Lugano Convention is the equivalent of Regulation (EC) No 44/2001 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. However, the Lugano Convention has not been amended to mirror the changes made to the Brussels I Regulation by the Recast Brussels I Regulation and there are no plans to amend the Lugano Convention. Notably, the UK – post Brexit – is no longer part of the Lugano Convention.

Provided that no treaty governs the recognition and enforcement of the relevant judgment, the rules set out in the Swiss Private International Law Act (PILA) apply.

Recognition and Enforcement under the PILA

The PILA allows recognition of foreign decisions, if the foreign court had jurisdiction pursuant to the provisions of the PILA governing jurisdiction, the foreign decision is final and binding and if no other specific reason to deny recognition applies, such as a violation of the public order. Reciprocity is no condition under the PILA.

The actual enforcement of a foreign decision once recognized and declared enforceable follows the same rules that apply for Swiss decision. Whereas monetary claims are enforced pursuant to the rules set out in the Debt Enforcement and Bankruptcy Act, all other decisions are enforced pursuant to the rules stipulated in the CPC.

Recognition and Enforcement pursuant to International Treaties (in particular the Lugano Convention)

The Lugano Convention applies in civil and commercial matters, excluding inheritance matters, bankruptcy, social security, and arbitration. The Lugano Convention allows for very broad recognition and enforcement of decisions rendered in a member state of the European Union (including Denmark), Iceland or Norway.

If the provisions of the Lugano Convention are not met, recognition is denied. Decisions that manifestly run contrary to public order, or that are the result of proceedings in which the document initiating the proceedings was not properly served on the defendant culminating in a default judgment, are not recognised and enforced. Recognition is further denied if the foreign decision stands in irreconcilable conflict with a decision between the same parties be it a Swiss decision or an earlier foreign decision, provided that the latter can be recognised in Switzerland.

Switzerland is also party to a number of bilateral treaties on recognition and enforcement in civil and commercial matters, such as with Liechtenstein.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

Yes, Swiss civil procedure is governed by the loser-pays principle, so that in essence the losing party has to bear both the court costs (including costs from the taking of evidence such as expert costs) and further has to compensate the winning party for its legal costs.

Both court costs and legal costs are determined by the court based on the applicable cantonal tariffs. Therefore, not the actual costs incurred but an amount determined by the court, usually based on the amount at stake, is granted to the winning party.

It is important to note that claimant has to pay an advance on court cost at the beginning of the proceedings. The court usually requests an advance payment for the full amount of the court costs to be expected. The court may and usually does cover its costs from the advance payment, i.e. the party winning only gets a compensation claim against the losing party that still needs to be collected. The upcoming revision of the CPC will alleviate the cost risks by limiting the amount of the advance payment to 50% of the expected court costs and by prohibiting the courts from using the advance payment to cover its costs in case the claimant wins.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

There are still no significant mechanisms for collective redress in Switzerland. A corresponding project to amend the CPC has not passed the hurdles in parliament. A project to introduce some form of

collective redress is pending.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

The courts have a substantial degree of freedom in determining whether two or more proceedings pending with same court shall be combined.

Third parties can be joined to the proceedings upon request of one of the parties. The third party is however, not obliged to take part in the proceedings. The decision issued will not be directly enforceable against these third parties, However, in subsequent proceedings third parties will be bound to a certain extent by the negative decision issued in the proceedings they were summoned to join.

22. Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side? Switzerland allows third-party litigation funding. No limits apply, as long as the party to the proceedings is directly funded by a third party. However, third-party funding might collide with the rules of professional conduct insofar as counsel's independence may be in question and in such cases the rules of professional conduct prohibit counsel from entering into a correspondingly funded client relationship.

Both plaintiff and defendants may rely on third-party funding, however, typically it would be the plaintiff that uses litigation funding.

Third-party litigation funding is not administered by the courts, i.e. it is based on contract/agreement between the party to the proceeding and the funder. Typically, such agreements provide for the third party-funder to finance all costs of the litigation, in particular court costs, lawyers' fees, costs of experts, and also the compensation claim for legal costs of opposing party should it win.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction?

The impact of the COVID-19 pandemic on litigation and proceedings was very limited. In fact, after a short period of time during which court holidays were extended, in order to avoid court hearings and alleviate the parties from meeting deadlines, the court system went back to business as usual with certain restrictions, e.g. there were obligations to wear masks etc. Although legally admissible during the Covid-19 pandemic the use of video conferencing / virtual hearings was in general not made use of, and since the last general restrictions were lifted the courts are operating in the same way as before. This also is true for the electronic filing of submissions which although technically possible is still prevalently done via paper filings.

24. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

The main advantage of litigating international disputes is in general the professionalism and expertise displayed by the courts in dealing also with complex matters. This is particularly true for Commercial Courts that in most cases will have jurisdiction or whose jurisdiction can be chosen also in international settings if the parties agree on the corresponding venue and if Swiss law applies to the case (the latter being a negative prerequisite for the court not being allowed to decline jurisdiction if the PILA rules govern jurisdiction). Commercial Courts also deal fairly swiftly with matters, in particular if one takes into account that the court usually summons the parties to a hearing to explore the possibility to settle the case which in at least more than 80% actually leads to a settlement. In such cases the case takes more or less a year to be finally resolved. The biggest disadvantage are the costs as both court costs and party compensation claims may be substantial in particular if the litigation value is low, i.e. below CHF 1 Mio.

25. What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

We believe that litigation in the field of blockchain/distributed ledger technology will get more attention in the upcoming years.

26. What, if any, will be the impact of technology on commercial litigation in your

jurisdiction in the next 5 years?

Although some initiatives have been started to modernize the court system and to allow a digital file, the Swiss judiciary system currently still lacks a comprehensive system. However, we would expect that this will change in the upcoming years.

We would not expect that the courts will be early adopters of AI related services. In contrast, we believe that private practice will start to make use of such tools rather sooner than later also in litigation. It is difficult to grasp what the exact consequences of this will be.

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