Dispute Resolution 2020

Contributing editors
Martin Davies and Alanna Andrew

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Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Alanna Andrew of Latham & Watkins, for their continued assistance with this volume.

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Switzerland

Philipp C Lindenmayer and Flavio Peter
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LITIGATION

Court system

1 | What is the structure of the civil court system?

Switzerland has a federal structure. Accordingly, its jurisdiction and court system lies in the competence and responsibility of the different states, which are called cantons. However, the law of civil procedure (unlike to the laws of court organisation) is federal law and, therefore, unified in Switzerland, and the cantons are obliged by federal law to provide two instances of civil jurisdiction, that is, district courts and courts of appeals, where certain areas of law (such as labour law and rental law) are assigned to specific, specialised departments within the district courts.

There are certain exceptions to the requirement of two instances, which pertain, in particular, to intellectual property and antitrust matters that must be referred to a single (higher) cantonal instance or (for patent matters) to a specialised federal court. Furthermore, four Cantons (Zurich, Berne, St Gallen and Aargau) maintain commercial courts that are as single cantonal instance competent for commercial disputes with a certain amount in controversy between legal entities registered in a Swiss commercial register or a comparable foreign register.

The ordinary procedure is generally preceded by a conciliation procedure before a justice of peace (there are numerous exceptions, for example, if a single cantonal court has jurisdiction or if the summary procedure is used). If no agreement can be reached at such a hearing, the case must be brought before the ordinary court.

In ordinary proceedings, the district court generally judges in tribunals, in simplified proceedings (i.e., for amounts in dispute of up to 30,000 Swiss francs) or in summary proceedings (which also include proceedings concerning provisional measures or injunctions), a single judge has jurisdiction. The higher courts (which also include single cantonal instances) adjudicate between three and five judges.

Judgments of the district courts may, if the preconditions are met, be referred to the courts of appeal, and those judgments (as well as those of single cantonal instances), if the preconditions are met, to the Swiss Federal Supreme Court.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The judges conduct the proceedings, including the taking of evidence, and apply the law ex officio, while the facts (with exceptions) must be substantiated by the parties (the requirements in this regard are comparatively high in Switzerland). The Swiss system does not hold pre-trial discovery proceedings conducted by the parties and does not provide for jury trials.

In principle, judges are elected directly by the people or by representatives of the people within the framework of a political process, which does not alter their obligation to remain strictly impartial and independent. This system ensures that the political spectrum is also reflected in the judiciary.

Limitation issues

3 | What are the time limits for bringing civil claims?

Under Swiss law, limitation periods are a matter of the substantive law and are mainly set forth in the Swiss Code of Obligations. Contractual claims generally become time-barred after 10 years or five years if it is a periodic performance such as salaries or rent. There are exceptions to these general rules, depending on the nature of the claim. Tort claims and claims out of unjust enrichment become time barred after three years. The prescription period starts to run in general when the claim becomes due.

In principle, the limitation periods are not at the disposal of the parties. However, the parties may contractually waive the assertion of the statute of limitations (mostly up to a certain point in time and to the extent that the statute of limitations has not yet occurred at the time of the declaration).

The limitation period may be interrupted by an acknowledgement of the debt, the initiation of debt enforcement proceedings or by bringing a lawsuit before the justice of the peace or (if no conciliation procedure is to be conducted) before the competent court. In the case of such interruption the applicable limitation period starts again.

The court does not consider the limitation of a claim ex officio. Therefore, the parties must invoke the statute of limitations if they want to argue against a claim in this respect.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

In principle, there is no specific pre-action behaviour required by Swiss law. In particular, there is no obligation to threaten or announce the filing of a lawsuit.

In practice, of course, before initiating legal action, attempts are usually made to find an amicable solution between the parties. Pre-trial discovery proceedings are unknown to the Swiss system.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

In principle, the procedure is initiated by a written claim and a request for a conciliation hearing with the justice of the peace. If no amicable settlement is reached at such hearing, the claiming party must file the

lawsuit with the competent court within three months. If this deadline is not met (and if no specific time limit for filing an action is applicable), the conciliation procedure can be repeated and thus the action can still be brought.

The petition to the justice of the peace can be limited to the prayers for relief and a brief explanation of the nature of the dispute.

The statement of claim is filed with the competent court (either directly or after a conciliation hearing) and must contain the prayers for relief and the reasoning of the claim (in the simplified procedure, the reasoning can also be provided at the oral hearing). The statement of claim is then served to the opposing party with a deadline to file the answer to the statement of claim. If the court summons the parties directly to an oral hearing immediately after the filing of the statement of claim, the answer to it must be given orally. However, usually the court orders the defending party to file a written statement of defence. After an initial exchange of submissions (or oral claim and response, if applicable), the parties have the opportunity for a full second presentation of their case (reply and rejoinder). In more complex proceedings, and especially in commercial disputes, the proceedings (except for questioning parties and witnesses in proceedings of taking the evidence) are generally in writing.

The service of all trial-related documents (party submissions, court orders, etc) is conducted by the court.

The judges conduct the proceedings, including the taking of evidence, and apply the law ex officio, while the facts (with exceptions) must be substantiated by the parties (the requirements in this regard are comparatively high in Switzerland). The courts, in particular the specialised courts and the commercial courts, are therefore in principle able to deal efficiently with very large and complex cases in any field of law.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The typical procedure is an exchange of two written submissions or oral presentations, with the possibility to make further comments on new assertions of the other party, followed by either directly a judgment or the proceeding of taking the evidence followed by a judgment after the parties had the opportunity to comment on the outcome of the evidence proceeding.

It is also possible (and quite common at the commercial courts) that the court conducts (with or without presenting its preliminary opinion to the parties) a settlement hearing after a first round of submissions before the proceeding continues.

Regarding the timetable, one must count (in regular proceedings) roughly one year per instance if no proceeding of taking the evidence (at the court of first instance) is conducted.

Case management

7 | Can the parties control the procedure and the timetable?

The management of the process lies with the court. Accordingly, the parties have relatively little influence on the proceeding and the time frame.

The individual submissions must be made within certain deadlines set by the court. These time limits can in principle be extended, which the parties always make use of. The parties can also request the court to conduct a settlement hearing to accelerate the process. In principle, the court will not ignore such requests. The parties can of course terminate the proceedings at any time (especially in commercial matters) by withdrawing the claim, acknowledging the claim or by reaching a settlement.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no such duty in the context of legal proceedings. Such duty may however exist based on the substantive law (eg, preservations duties related to bookkeeping documents), which may have consequences in a court proceeding (depending on the nature of the dispute).

The parties may make document production requests. Those requests must, however, be very specified, that is, identify the requested document and be reasoned as to relevance and materiality to the case (no fishing expedition, no pre-trial discovery). If a party does not comply with such requests (granted by the court), that behaviour may be taken into account by the court when assessing the evidence.

If it is requested that an interim measure be ordered ex parte and thus without hearing the opposing party, the requesting party is in principle obliged to submit the written position of the opposing party (if any), even if it does not correspond to one's own position (which is usual) and may contain the arguments of the opposing party.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Correspondence and work products of a lawyer are privileged if the lawyer is acting in this capacity as legal counsel (and not, for example, as financial adviser or board member). Accordingly, the attorney–client privilege is limited to the typical professional activities of an attorney. In-house counsel cannot invoke the attorney–client privilege.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Since the Swiss system does not know pre-trial discovery, such exchange is usually not made. The parties rather have to submit the evidence together with their submissions. Furthermore, witnesses are questioned by the court, and written witness statements are not admissible evidence. Expert reports submitted by a party have no more value than a party assertion. A party may however request the court to obtain an expert report on a specific topic, which report will then be an admissible piece of evidence.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Documentary evidence must be filed by the parties together with their respective assertions they want to have supported by that evidence. The same applies for witnesses who need to be invoked by the parties. If the court deems it necessary, it will summon and question the witnesses at a hearing during the proceeding of taking the evidence. The parties are entitled to ask additional question.

If so invoked by the parties, experts are appointed by the court. The parties need to be heard at every step of this appointment. Experts can be heard during a hearing or provide a written report, which again can be commented on by the parties.

Both witnesses and experts are obliged to the truth under threat of prosecution.

Interim remedies

12 | What interim remedies are available?

A party may apply for interim measures before or during a pending proceeding. For the measure to be ordered, the requesting party must demonstrate that its chances of success in the matter are intact and that, without such a measure, it faces a disadvantages that cannot easily be remedied.

The measure is usually a provisional prohibition to perform a certain action. The provisional award of the actual plea is not possible in principle because of the prejudicial nature of such measure.

A party may request that the measure be ordered ex parte, that is, before hearing the opposing party. Such request, however, requires a high degree of urgency to be established by the requesting party.

If a party assumes to be addressed by an ex parte interim measure, it can deposit a special submission with the court that the party deems to be the competent court for such interim measure to protect its right to be heard. The court will then take this submission into account when deciding about the party's request for ex parte measures.

Monetary claims must be secured by freezing orders pursuant to the Swiss debt enforcement law, which lists reasons that allow those measure (such as an enforceable judgement).

Remedies

13 | What substantive remedies are available?

The action may consist of a claim for performance (including for a specific act or omission), a declaratory action or an action requesting a change of a legal right or status (eg, an action for divorce). For claims for damages, the claim is limited to the actual damage. Accordingly, the assertion of punitive damages is excluded and unknown to the Swiss system, as is the 'deep pocket' principle in general. The attribution of punitive damages in a foreign judgment may, via this, be an obstacle for the enforcement of such a judgment in Switzerland.

The claiming party can sue for default interest on monetary claims at a rate of (unless otherwise provided for in the contract) 5 per cent per year from the due date until performance.

Enforcement

14 | What means of enforcement are available?

Judgments adjudicating a certain amount of money are enforced by the Swiss debt enforcement law. If the debtor raises an objection against the respective payment order, that objection may be set aside in a summary proceeding in which the debtor has only very limited defensive arguments available against the judgment. When the objection is set aside, the debtor can avoid enforcement in his or her assets only by payment of that amount adjudicated. Other judgments are enforced by the courts in summary proceedings, and the enforcement court may request assistance from other authorities.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Civil proceedings, that is, in particular hearings and judgments are held in public. However, the public may be excluded when required by public interest or by the legitimate interests of an involved person, or may not be applicable at all (eg, in family law matters). Court documents are not public.

Costs

16 | Does the court have power to order costs?

The court costs as well as the indemnity that the losing party has to pay to the prevailing party are calculated according to special cantonal tariffs and depend in particular on the amount in dispute. The court distributes these costs between the parties as part of the judgment, taking into account the degree of win or loss of the parties.

After filing the claim, the claiming party is generally requested by the court to submit an advance payment of the amount of the presumed court costs (calculated according to the amount in dispute and the tariff). Under certain circumstances, the plaintiff may also be required to provide security for the indemnity of the opposing party. If advance payments are not made, the court will not enter the action.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Lawyers are prohibited from entering into agreements according to which the fees of the lawyer exclusively consist of a share of the proceeds of the claim or according to which the lawyer entirely waives the fees if the case is lost.

According to the Swiss Federal Supreme Court, success fees are permissible if: the non-success-related fee component is not only high enough to cover the lawyer's prime costs but also enables a reasonable profit; the success-related fee component is not so high in relation to the fee owed in each case that the independence of the lawyer is impaired and there is a risk of unconscionability; and the agreement is concluded at the beginning of the mandate relationship or after termination of the legal dispute, and not during the current mandate.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Legal expenses insurance is widespread in Switzerland and is particularly common in disputes relating to employment and rental law. Which cases are covered by the insurance exactly and to what extent depends on the respective policy.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Even though two or more persons may be (if all respective prerequisites are met) on the side of claimant or defendant in Swiss proceedings, class actions in the classic sense are not known in Switzerland.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Judgments of cantonal district courts (first instance) with an amount in dispute of at least 10,000 Swiss francs can be appealed to the cantonal court of appeal. The deadline for such appeal is 30 days, and the appellant may assert both an incorrect establishment of the facts and an incorrect application of law by the lower instance. Against judgments below 10,000 Swiss francs and procedural decisions, an objection can

be raised for the reason of incorrect application of the law or obviously incorrect establishment of the facts.

Decisions of the courts of appeal may be appealed to the Swiss Federal Supreme Court. The deadline for such an appeal is 30 days, and the amount in dispute must in general be at least CHF 30,000 Swiss francs. This highest instance is in general bound by the establishment of the facts by the lower instance, which is why, in general, only incorrect application of the law may be asserted.

Foreign judgments

21 What procedures exist for recognition and enforcement of foreign judgments?

Unless the applicability of an international treaty, foreign judgments are recognised according to the provisions of the Swiss international private law. According to this act, foreign judgments are recognised if jurisdiction of the foreign authorities was given according to the act, and if the judgment is enforceable. Furthermore, the foreign judgment must not contradict the formal or material public policy.

Regarding international treaties, Switzerland is a member state of the Lugano Convention, which is equal to the Brussels I Regulation. According to this convention, judgments rendered in a member state of the European Union or in another contracting state to the convention are recognised pursuant to the provisions of the convention.

Foreign proceedings

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Switzerland is a signatory state to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. According to this convention, judicial authorities of another contracting state may request the competent Swiss authority to take evidence in Switzerland for a foreign proceeding. However, Switzerland made a reservation that it will not execute requests for the purpose of obtaining pre-trial discovery of documents if:

- the request has no direct and necessary link with the proceedings in question;
- a person must indicate what documents relating to the case are or were in his or her possession or keeping or at his or her disposal;
- a person must produce documents other than those mentioned in the request for legal assistance, which are probably in his or her possession or keeping or at his or her disposal; or
- interests worthy of protection of the concerned persons are endangered.

ARBITRATION

UNCITRAL Model Law

23 Is the arbitration law based on the UNCITRAL Model Law?

International arbitration in Switzerland is governed by the 12th chapter of the Swiss Private International Law Act (SPILA), whereas domestic arbitration is governed by the 3rd book of the Swiss Code of Civil Procedure (SCCP).

While the SPILA is not based on the UNCITRAL Model Law, these two statutes were drafted around the same time and do not differ substantially.

Arbitration agreements

24 What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement needs to be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

The current text of the article 178 SPILA requires that the relevant declarations of intent of all parties be recorded in writing. Yet, in practice, neither a signature nor an exchange of document is required for a formally valid arbitration agreement, which is in line with the standard set forth by article 7(4) UNCITRAL Model Law Option I (as amended in 2006) and, therewith, more liberal than the formal requirements of article II of the New York Convention.

Choice of arbitrator

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the parties do not explicitly, or by reference to a set of arbitration rules, determine the number of arbitrators, the local state court may be seized with the question, which will apply by analogy the provisions of the SCCP. Pursuant to section 360 SCCP, the arbitral tribunal shall consist of three members.

Unless the parties have agreed on a specific appointment mechanism, each party shall appoint one arbitrator and the two party-appointed arbitrators elect the presiding arbitrator. Where the parties fail to choose a single arbitrator or to appoint a plurality of arbitrators, or if the arbitrators fail to agree on a chairperson, each party may seize the local courts at the seat of the arbitration to appoint the arbitrators or the chairperson, or both.

A party may challenge an arbitrator if the arbitrator does not meet the qualifications agreed upon by the parties, if a ground for challenge exists under the rules of arbitration as agreed by the parties, or if circumstances give rise to justifiable doubts as to his or her independence or impartiality.

A party may only challenge an arbitrator based on the grounds that came to that party's attention after such appointment. That challenge ought to be notified to the arbitral tribunal and the other party without delay.

If the challenged arbitrator disputes the challenge, the matter may be referred to the competent body designated by the parties or, absent any designation, to the local courts at the seat of the arbitration.

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

The parties may freely choose their arbitrator from a large community of experienced and highly qualified practitioners.

Switzerland is and remains one of the most popular hubs for international commercial arbitration and Swiss qualified lawyers are among those arbitration practitioners most often appointed on an international level.

Not only owing to recent initiatives, such as the Equal Representation in Arbitration Pledge, but also owing to intelligence on arbitrators being more readily available, the pool of potential arbitrators is growing and the diversity in appointments is ever increasing.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The parties are free to agree on the procedure to be followed by the arbitral tribunal, be it by specific agreement or by reference to a set of arbitration rules or any other procedural law.

The parties' autonomy is only limited by the mandatory principles of the right to be heard and the principle of equal treatment.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

There are only very limited possibilities for court intervention in arbitrations seated in Switzerland. The state courts at the place of arbitration may get involved with regard to the appointment, removal or replacement of an arbitrator. Their assistance may further be sought with regard to the enforcement of interim measures and the taking of evidence.

Moreover, for very limited grounds, the parties may challenge an arbitral award before the Swiss Federal Supreme Court. In international arbitration, the parties may exclude their right to challenge an arbitral award by explicit written agreement.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes, in principle the arbitral tribunal is competent to order interim measures, including preliminary measures to protect evidence as well as security for costs.

Absent an explicit agreement by the parties, however, the arbitrators' competence is not exclusive. Rather, in principle, state courts and arbitral tribunals have concurrent jurisdiction to order interim measures.

Since an arbitral tribunal does not have coercive powers, the arbitral tribunal may apply to the local state court to enforce any measures ordered by the tribunal with which the party concerned does not voluntarily comply.

Award

30 | When and in what form must the award be delivered?

In international arbitration in Switzerland, the parties have the autonomy to decide on the procedure and the form of an arbitral award. Absent any agreement, the procedural law states that the award will be in writing, set forth the reasons on which it is based, and be dated and signed.

Unlike many sets of arbitration rules, the procedural law does not stipulate a time period within which the tribunal needs to render the arbitral award.

Appeal

31 | On what grounds can an award be appealed to the court?

In international arbitration, an arbitral award may be challenged only on very limited grounds, namely if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; if the arbitral tribunal erroneously held that it had or did not have jurisdiction; if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; if the equality of the parties or their right to be heard was not respected; and if the award is incompatible with public policy.

The parties may challenge the arbitral award in front of the Swiss Federal Supreme Court, as the only and final instance.

While in international arbitration the parties may by express declaration exclude the right to challenge the arbitral award, the parties to a domestic arbitration cannot waive their right to challenge the award.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Switzerland is a member state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) since 1965. Hence, arbitral awards rendered by tribunals seated abroad may be enforced pursuant to the provisions of the NYC. Moreover, Switzerland has concluded many bilateral treaties with individual countries, such as Austria, Germany, Italy, Spain and Sweden, concerning the mutual recognition and enforcement of state court decisions and arbitral awards.

Domestic arbitral awards may directly be enforced in Switzerland pursuant to the provisions of the SCCP or, concerning the enforcement of monetary claims, as per the provisions of the Debt Enforcement and Bankruptcy Act (SchKG).

Costs

33 | Can a successful party recover its costs?

Neither the SPILA nor the SCCP contains provisions on the costs of arbitration and their respective allocation. It is in the parties' autonomy to decide on rules of cost allocation and, in practice, they usually do so by reference to a set of arbitration rules. Absent any agreement by the parties, the tribunal may decide on the allocation of the costs between the parties. While the tribunal enjoys wide discretion on how it intends to apportion the costs between the parties, the arbitral tribunal would usually apply the 'costs follow the event' rule, namely that the unsuccessful party has to bear the costs of the arbitration and compensate the successful party for the respective costs incurred.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

In particular, mediation has recently gained more attention in combination with arbitration. For instance, parties may freely agree to open a mediation window before or during an ongoing arbitration to settle the dispute.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

If the parties exclude the jurisdiction of the state courts and opt for a different dispute resolution process, they may freely choose between, for example, mediation or arbitration. The parties can also agree to combine certain ADR methods or to have different procedural steps. If the parties agree on such multi-tiered dispute resolution mechanism, under Swiss law, they have to comply with the agreed process and cannot just skip a step. For instance, where a mult-tier clause provides in a first step for a negotiation period of 30 days and in a second step for an arbitration, the parties must adhere to that process, failing which the arbitration may be stayed until the first procedural step has been complied with.

MISCELLANEOUS

Interesting features

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

UPDATE AND TRENDS

Recent developments

37 Are there any proposals for dispute resolution reform? When will any reforms take effect?

No update at this time.

wenger & vieli
Attorneys at law

Philipp C Lindenmayer
p.lindenmayer@wengervieli.ch

Flavio Peter
f.peter@wengervieli.ch

Dufourstrasse 56
Postfach
CH-8034 Zürich
Switzerland
Tel: +41 58 958 58 58
www.wengervieli.ch

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