The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Switzerland: Litigation

This country-specific Q&A provides an overview of Litigation in Switzerland.

It will cover methods of resolving disputes, details of the process and the proceedings, the court and their jurisdiction, costs and appeals and opinions on future developments.

This Q&A is part of the global guide to Litigation. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/litigation-dispute-resolution/

Country Author: Wenger & Vieli

The Legal 500

Philipp C. Lindenmayer, Partner

p.lindenmayer@wengervieli.ch

The Legal 500

Dr. Marco Cereghetti, Partner

m.cereghetti@wengervieli.ch

The Legal 500

1. ## What are the main methods of resolving commercial disputes?

Commercial disputes the parties cannot resolve out of court, are mainly resolved by the Swiss state courts (starting with the district courts or specialized commercial courts).

The Swiss judicial system generally attaches great importance to an amicable settlement of disputes. Accordingly, the courts usually try to reach an amicable solution between the parties at a relatively early stage of the litigation proceedings within the framework of a settlement hearing (e.g. after a first exchange of submissions, which is the practice of the Commercial Court of Zurich). Under such a settlement agreement, it is customary that the court costs (usually reduced in order not to jeopardise a settlement) are borne equally by the parties and the parties waive any indemnity payments, i.e. bear their own costs.

Furthermore, a so-called conciliation hearing before the Justice of Peace (prior to the ordinary proceeding) is mandatory for most cases. If no settlement can be reached during such hearing (which is often the case in complex and/or long lasting disputes), the claimant party needs to file its claim during a certain period of time (usually within three months) with the competent court. However, no such hearing takes place, i.e. the lawsuit has to be filed directly with the court, if the commercial court has jurisdiction. This is usually the case for certain subject matters (e.g. unfair competition disputes) or if (i) the dispute concerns the commercial activity of at least one party and reaches a certain amount in dispute, and (ii) the parties are registered in the Swiss Commercial Registry or in an equivalent foreign registry. As of today, the cantons of Zurich, St. Gallen, Bern and Aargau have such specialized commercial courts at which a mixed panel of judges and experts ("expert judges") of the economic sector in question decide over a case.

2. What are the main procedural rules governing commercial litigation?

The most important source is the Swiss Code of Civil Procedure of 19 December 2008, which is part of the Swiss public law and which regulates the relationship of the court as a state body to the parties to the proceedings and the rights and obligations of the parties in the proceedings conducted by the court. Civil procedure law is in principle mandatory law and cannot be amended by party agreement. In addition to the Code of Civil Procedure, other laws regulate court proceedings, in particular the jurisdiction and organisation of courts, court fees and the amount of compensation to be paid by the losing party to the prevailing party. It should be noted here that both the court fees and the amount of the party compensation depend to a large extent on the amount in dispute.

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

Like many other jurisdictions, Switzerland has three instances – district, cantonal and federal level – with the highest instance being the Federal Supreme Court in Lausanne. If the amount in dispute is less than CHF 30'000, the last court of appeal will be the cantonal court.

In the cantons of Zurich, Bern, St. Gallen and Aargau, commercial disputes usually skip the district level and have to be filed with the commercial courts on the cantonal level with the

Federal Supreme Court being the appellate court.

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

In contrast to common law legal systems, no distinction is made in Switzerland between pre-trial discovery, exchange of submissions and the actual trial. There is also no jury procedure. The decision is made in all points by the court. According to the Swiss system, the trial begins with the filing of the statement of claim. In commercial matters, the procedure is usually written. Each party is entitled to two complete submissions. Depending on the outcome of this exchange of submissions, a proceeding on taking of the evidence takes place, the outcome of which the parties may also comment on. In the context of such a procedure, document production requests of the parties, which were submitted by the parties within the framework of their pleadings are also be dealt with by the court.

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

Hearings are usually public, but the public may be excluded upon request of either party, if the requesting party establishes a legitimate interest. It can however be noted that commercial litigation does not attract a lot of public interest, which is why court hearings are usually not visited by persons other than representatives of the parities. Settlement hearings are in most cases not public as a matter of principle. Documents filed at court are not available to the public.

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

Under Swiss law, limitation periods are a matter of the substantive law and are mainly set forth in the Swiss Code of Obligations. A contractual claim becomes time-barred usually after 10 years – 5 years if it is a periodic performance such as salaries or rents. There are however several notable exceptions to these general rules, depending on the nature of the claim.

Non-contractual claims for damages are time-barred 1 year after the injured party has learned

of the damage, but no later than 10 years after the damage occurred.

It is important to note that the courts do not take such limitations into account ex officio, but only if a party raises the respective objection to the merits of the claim.

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

Besides the possible necessity to hold a hearing before the Justice of Peace prior to the filing of the statement of claim (see above), there are no pre-action conduct requirements set forth by the law.

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

A commercial proceeding is commenced like other litigation by filing a statement of claim with the competent court / Justice of Peace (see above). All case correspondence (submissions etc.) is forwarded and served to the other party through the authorities (not by the parties).

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

While the material jurisdiction of the court seized (e.g. of the commercial court) is examined by the court ex officio, the territorial jurisdiction is examined only upon objection of the defendant party (except in cases of mandatory territorial jurisdiction). Territorial jurisdiction is set forth in national (Code of Civil Procedure) and international civil procedure law (mainly the Lugano Convention and the Swiss Federal Code on International Private Law), whereby agreements on the territorial jurisdiction are generally accepted and are also customary in commercial contracts.

10. How does the court determine what law will apply to the claims?

The applicable law is determined ex officio. In an international context, the Swiss courts apply the Swiss Federal Code on Private International Law in order to determine the applicable law on the merits. This Code further provides the possibility for the parties to choose the law for certain types of legal relationships (e.g. for commercial contracts). Accordingly, the court is bound by a (valid) choice of law made by the parties and has therefore to apply the chosen law. Switzerland can therefore be considered as very liberal in respect to contractual provisions on the applicable law. However, if the parties in an international context chose a place in Switzerland to have jurisdiction over disputes, the parties would in all likelihood chose Swiss law to be applicable, not only because of the familiarity of the Swiss courts with Swiss law, but because Swiss law with its equitable and predictable nature is met by the parties with great acceptance.

If the court is not familiar with a foreign applicable law, it may require the parties to cooperate in determining the content and the meaning of the foreign law.

Switzerland furthermore ratified several international conventions regarding the choice and the application of law to particular subjects of private law, such as the Vienna Convention on the International Sale of Goods (CISG).

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

The parties may terminate a pending proceeding at any time by acknowledging or withdrawing the action or by a settlement (which then also regulates the cost consequences of the proceeding) with legal effect (res iudicata). Furthermore, proceedings are written off as closed when they become baseless (in the event that the subject matter of the dispute or the interest in legal protection ceases to exist). In this case, the consequences of the costs shall be regulated in accordance with the parties' responsibility for the case becoming baseless.

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

According to the Swiss Swiss Debt Collection and Bankruptcy Act (DEBA), in order to secure

monetary claims a creditor may request the freezing of certain assets of the debtor, which are located on Switzerland, including bank accounts ("measure in rem", not "measure ad personam").

The issuance of a freezing order against specific assets of a debtor according to the DEBA requires a specific reason for such issuance.

According to article 271 of the DEBA, a creditor may apply for a freezing order with respect to specific assets located in Switzerland (see above), and with respect to an unsecured matured claim for the following six reasons:

- the debtor has no fixed domicile;
- the debtor is concealing his assets, absconding or making preparations to abscond so as to evade the fulfilment of his obligations;
- the debtor is passing through or belongs to the category of persons who visit fairs and markets, for claims which by their nature must be fulfilled at once;
- the debtor does not live in Switzerland, and none of the other grounds for a freezing order is fulfilled, provided the claim has a sufficient connection with Switzerland or is based on a recognition of debt pursuant to art. 82 para. 1 DEBA;
- the creditor holds a provisional or definitive certificate of shortfall against the debtor;
- the creditor holds a definitive title to set aside the objection.

Interim measures not against assets of a debtor / defendant are governed by the Code on Civil Procedure. Such measures are ordered if the requesting party credibly shows that (i) a right to which it is entitled has been violated or a violation is anticipated, and (ii) the violation threatens to cause not easily reparable harm to the requesting party. The court may refrain from ordering interim measures if the opposing party provides appropriate security.

The court may order any interim measure suitable to prevent the imminent harm, in particular an injunction, an order to remedy an unlawful situation, an order to a register authority or to a third party, performance in kind, or the payment of a sum of money in the cases provided by the law.

After issuing a freezing order or ordering an interim measure, the requesting party must prosecute the claim (by judicial actions) within short deadlines in order to uphold the freezing order / the interim measures until a final judgement or the enforcement of a judgement, respectively.

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

Together with their submissions (statement of claim, statement of defence, etc.), the parties must file all the documents in their possession and supporting their (substantiated) assertions. The filing of written witness statements is not common. Witnesses are rather questioned by the court to specific assertions made by the parties (assertions which are directly linked to specific witnesses) in the course of the proceeding on the taking of the evidence. If a (unsuccessful) hearing before the Justice of Peace preceded the filing of the statement of claim, the claimant party must also file the so called authorization to proceed, which is issued by the Justice of Peace.

After having received the statement of claim – and an advance payment by the claimant party up to the amount of the expected court costs – the court sets the defendant party a deadline to file the statement of defence, which time limit can be extended so that in principle (the practice of the cantons is different here) around two months are available for the submission of the statement of defence in the ordinary proceedings. The same deadlines apply in principle to the claimant's reply and the defendant's rejoinder, so that the (double) exchange of submissions is completed after approximately 6 to 8 months (depending on court holidays which respectively prolong the deadlines). The court then decides whether evidence proceedings should be carried out, which may take another 6 to 8 months. A first instance judgment can therefore be expected within a period of 12 to 18 months. The complexity of a case can of course significantly extend the duration of the proceeding. Within the proceeding, the court may, as already mentioned, conduct settlement hearings which are statistically often successful and lead to an end of the litigation by way of a settlement agreement.

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

During the pleading phase and upon a respective request of a party, the court can order the other party to produce specific documents. In order to prevent fishing expeditions, the requesting party needs to specify the document in the opposing party's possession in detail and

explain to the court how it will be relevant for the merits of the case. Such document production request are though not similar large scale pre-trial discoveries as known in common law jurisdictions.

If the document to be produced contains information or data which could harm the legitimate interests of a party or other individuals, in particular personal data or business secrets (e.g. information on customers, the company's financials, product secrets, etc.), the court must take the necessary measures to protect such interests. It is up to the affected party to request these measures, which are then ordered at the court's discretion. The court in particular can exclude the opposing party from having access to the documents submitted as evidence, or make only excerpts available. However, the opposing party needs to be informed on the core content of the documents and is entitled to ask supplementary questions. The court may also decide that only an independent expert has access to certain documents, and that the parties must direct inquiries on the content of the document to such expert. Other measures, if deemed practical, are permitted as well.

The parties and third persons have a limited or absolute right to cooperate under certain conditions, e.g. if subject to professional secrecy (doctors, lawyers, etc.) or if there is a risk for a third person to expose close family members to civil or criminal liability. Explicitly no exception exists however for the case, where such documents expose the party itself to such liability. In such case the party enjoys no right to refuse disclosure, and in the event of refusal, the court is allowed to interpret such failure to cooperate to the party's disadvantage.

According to Swiss law, in-house lawyers are not subject to professional secrecy, and thus not excepted from the duty to cooperate in the taking of evidence. This rule is however subject to review by the legislative in order to avoid discrimination of Swiss cooperation abroad.

Further exempt from the duty of disclosure upon court order is correspondence protected by the attorney-client-privilege. Neither the attorney, nor the client/party, nor third parties, have a duty to disclose privileged correspondence to the court. The privilege not only includes letters and e-mails, but also memos, strategy papers, draft agreements, draft settlement proposals or the like. The protection goes only so far, as it covers correspondence specifically in context of an attorney's activity in representing or consulting clients. Other activities sometimes carried out by lawyer, such as board memberships, asset management or clerk services, are not privileged.

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

Other than common law jurisdictions, Swiss law does not adopt the system of examination and cross-examination conducted by the parties themselves (and the judge as a "gate keeper"). The witness examination is rather conducted by the court at its own discretion. The parties may however ask the witnesses additional questions, either directly or through the court.

Written witness statements (depositions) are in principal permitted but not common in the Swiss litigation system. Such written statements are (even though not often) used in summary procedures (in particular regarding interim measures), where the only of evidence permitted is principally documentary evidence. The evidentiary value of written witness statements is however considered low, in particular where it is not supported by any oral examination or further evidence.

16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?

Upon the request of a party or ex officio, the court can, after first hearing the parties, appoint one or more experts. For the recusal of experts by the parties, the same grounds apply as apply to judges and judicial officers. An expert is instructed by the and submits the expert questions to the expert. The parties have the opportunity to comment the questions to propose modified and additional questions.

Even though the parties may submit expert opinions without any involvement of the court, reports of court-appointed experts generally enjoy a higher credibility, since they have to meet the same formal standards of independence and impartiality as court officials.

17. Can final and interim decisions be appealed? If so, to which

court(s) and within what timescale?

An appeal ("Berufung") to the cantonal high court (appellate court) is admissible against final and interim decisions of first instance and decisions of first instance on interim measures. In matters with a monetary value, an appeal is admissible only if the value of the claim is at least CHF 10,000. Appeals must be filed in writing and with a statement of the grounds with the appellate court within 30 days of service of the first instance's (reasoned) decision. If the decision was rendered in summary proceedings, the deadline for filing the appeal is 10 days.

The appeal may be filed on grounds of incorrect application of the law and/or incorrect establishment of the facts. The legal effect and enforceability of the contested decision is principally suspended.

Another remedy against first instant decisions is the objection ("Beschwerde"). An objection is admissible against (i) final and interim decisions and decisions on interim measures of first instance that are not subject to appeal, (ii) other decisions and procedural rulings of first instance in the cases provided by the law or if they threaten to cause not easily reparable harm, and (iii) undue delay by the court. The filing deadlines are the same as the deadlines for the appeal. The objection on the grounds of undue delay may be filed at any time.

An objection is admissible on the grounds of incorrect application of the law obviously incorrect establishment of the facts. The objection does not suspend the legal effect and enforceability of the contested decision. The appellate court does principally not suspend the enforceability of the contested decision.

Decision of the Cantonal rulings may be appealed to the Swiss Federal Court (supreme court) within 30 days since receipt. Claims with monetary value must at have an amount in dispute of at least CHF 30,000.

The courts release interim decisions, if they consider preliminary questions of procedural or material nature to be of core relevance for the outcome of the case (e.g. jurisdiction, validity of a contract, statute of limitation). Such interim decisions must be separately appealed, while the case is still pending, otherwise the respective decision becomes final and cannot be contested anymore in the context of an appeal against the final decision. Other interim decisions can only be appealed if the party concerned is threatened by not easily reparable harm.

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

For having decisions of EU member states, Norway and Iceland recognised and declared enforceable in Switzerland the relatively swift procedure of the Lugano Convention applies. The procedure is ex-parte, i.e. the opposing party can raise its objection only in the course of an appeal against the court's decision of enforcement.

For all other decisions, the respective provisions of the Swiss Code on International Private Law applies, which provides for a contradictory proceeding where the opposing party can directly object against the request for recognition and/or declaration of enforcement.

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?

Generally, the losing party has the bear the court costs and to compensate the prevailing party for costs incurred in the course of the litigation. Such compensation is however in principal linked to the amount in dispute and not to the effective costs which incurred. Accordingly, and even though the court also considers other aspects whilst adjudicating the compensation (e.g. the complexity of the case), it is possible (in particular in cases of low amounts in dispute), that the compensation does not cover the effective cost.

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

Besides the group action ("Verbandsklage"), the Swiss litigation system does not know collective redress such as class actions. The group action means that associations and other organizations of national or regional importance that are authorized by their articles of association to protect the interests of a certain group of individuals may bring an action in their own name for a violation of the personality of the members of such group, and may request the court to prohibit an imminent violation, to put an end to an ongoing violation, or to establish the unlawful character of a violation if the latter continues to have a disturbing effect. Given the insignificance of group actions in litigation reality the Swiss legislative is considering to expand

the possible remedies also to financial remedies, as is the legislative considering to introduce group settlement procedures as a new tool for a sort of collective action.

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

A consolidation of different proceedings can be ordered by the court in order to simplify the proceedings.

As for the joinder for third parties, Swiss law provides for the following mechanisms:
Any person who claims to have a better right in the object of a dispute to the exclusion of the parties, may bring a claim directly against the parties in the court in which the dispute is pending (main intervention). The court may either suspend the proceedings until the case of the intervenor is finally concluded, or join the two cases.

Furthermore, any person who shows a credible legal interest in having a pending dispute decided in favor of one of the parties may intervene at any time as an accessory party and for this purpose submit to the court an intervention application (accessory intervention). The court decides on the application after hearing the parties. The intervenor may carry out any procedural acts in support of the principal party, provided they are permitted at the relevant stage of the proceedings. The intervenor may in particular make use of any offensive or defensive measures and also seek appellate remedies. The procedural acts of the intervenor must however not be contradictory to those of the party. A result that is unfavourable to the principal party is in principal also effective against the intervenor.

Eventually, a party may notify a third party of the dispute if, in the event of being unsuccessful, the party might take recourse against or be subject to recourse by a third party (third party notice; or third party action if the notifying party already makes claims against the notified party in the same proceeding).

22. Are third parties allowed to fund litigation? If so, are there any

restrictions on this and can third party funders be made liable for the costs incurred by the other side?

There is no restriction on the funding of litigation by third parties in Switzerland. Furthermore, legal protection insurances which cover court and lawyer's costs are quite common in Switzerland even though not in commercial litigation.

23. What, in your opinion, is the main advantage and the main disadvantage of litigating international commercial disputes?

A major advantage of the Swiss system is certainly the high competence of the judges and the other court staff, especially at the commercial courts, and the high standard and compliance with procedural guarantees and due process. As a disadvantage might qualify the advance on court costs, which the claimant party must pay. Such payment can be a barrier to invoke to the court. However, legislative efforts are underway to reduce such barrier.

24. What, in your opinion, is the most likely growth area for disputes for the next five years?

New technologies will certainly play a more important role in the commercial litigation market in the next 5 years as well as will play fields which become subject to more regulation.

25. What, in your opinion, will be the impact of technology on commercial litigation in the next five years?

In our opinion, no substantial changes in the Swiss commercial litigation are to be expected in the next 5 years due to technology. Obviously, new technologies will emerge and open new commercial fields which need to be legally explored and dealt with as it is currently (2018) the case with the blockchain technology, but such developments rather concern the substantive law. As for litigation itself, the legal framework, the course of the proceedings and the procedural rules will likely remain the same for the time being.