Dispute Resolution Around the World

Switzerland
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1. Legal System

Switzerland is a civil law jurisdiction with a greater emphasis on codes than on case law. It is a federal republic of 26 cantons and half-cantons. The Federal Constitution provides the Federal Parliament with power to legislate in the field of civil and commercial law. It has enacted a civil code (regulating family law, inheritance law and the law of property) and a code of obligations (dealing with contract law and corporate law) which are in force throughout Switzerland. Switzerland is not a member of the European Union ("EU") or European Economic Area but has adopted certain EU laws in, for example, the fields of competition law and product liability.

Until the end of 2010, rules of civil procedure differed considerably between cantons since each canton had historically made its own rules. There is a new unified Federal Civil Procedure Code entering into force on January 1, 2011. This brief overview addresses the new system.

2. The Court System

The Federal Constitution affords considerable power to the cantons and each canton has control over the organisation and functioning of its own courts despite the unified Federal Civil Procedure Code. The structure and rules applicable to the cantonal courts thus differ somewhat from canton to canton. Generally speaking, however, cantonal courts have jurisdiction in all areas of the law and apply both cantonal and federal law.

The unified Federal Civil Procedure Code regulates the place of jurisdiction of a dispute in domestic matters whereas the Swiss Federal Act on Private International Law, or the Lugano Convention in case of civil and commercial matters with EU or EFTA states, deals with the question of jurisdiction of the Swiss court in cross-border disputes. Rules regarding the jurisdiction of the courts are fairly similar both in domestic and in international cases and, for instance, in actions arising out of a contract, jurisdiction lies with the court at the
domicile or the seat of the respondent or at the place where the act of performance that characterizes the contract in question is to be made.

Whether the proceedings are held in German, French or Italian depends mainly on the geographic location of the court.

**Courts of First Instance**

Each canton has at least one court of first instance (District Court) with the power to accept first instance jurisdiction in most cases. Small cantons like Geneva have only one whereas larger cantons, such as Zurich, have several courts of first instance.

Most cantons have introduced Justices of the Peace which may act as mediators and which also handle small value cases (less than CHF 8,000).

**Upper Court**

Each canton has an Upper Court that handles appeals from the court of first instance. It may also act as a court of first instance in some cases. All cases falling within certain specialist areas, such as intellectual property, unfair competition (if the value at stake exceeds CHF 30,000) and antitrust, must be handled by the Upper Court. The parties to a dispute can also agree to submit their case directly to the Upper Court in other cases if the amount in dispute exceeds a defined amount of CHF 100,000. Otherwise, there is a mandatory double layer of instances at the cantonal level.

**Special Courts**

Most cantons have separate courts to handle certain types of disputes. These include commercial courts, labour courts, landlord and tenant courts and administrative tribunals to handle public law cases.

**The Federal Supreme Court**

The Federal Supreme Court (civil) is located in Lausanne and handles appeals against decisions from the cantonal courts, but will generally
only review the application of federal law. Some cantons have introduced a Cassation Court to handle appeals that are not eligible for appeal to the Federal Supreme Court.

3. The Legal Profession

In contrast, for example, to England, where there is a distinction between solicitor and barrister, there is no such distinction in Switzerland between different types of attorneys. An attorney must be admitted to a cantonal bar and is then licensed to practice throughout Switzerland. Attorneys are referred to as avocat, Rechtsanwalt, Fürsprecher, Advokat or avvocato depending on the canton in which they practice and are admitted. Legal practitioners in Switzerland are subject to strict codes of ethical practice and operate under various regimes of self and state regulation. The rules have, however, been unified to a considerable degree with the entry into force in June 2002 of the Federal Act on Legal Profession.

4. Litigation

Conciliation Proceedings

As a general rule, to which there are several exceptions, the unified Federal Civil Procedure Code requires the parties to participate in a conciliation procedure before a claim can be submitted to a court. The Conciliation Judge summons the parties to a hearing at which, having heard their respective positions, he will try to identify a settlement which is satisfactory to both parties. If no settlement is reached, then the Conciliation Judge will attest to this in a certificate issued to the claimant that must be filed with the statement of claim within a given deadline of three months (save for rental disputes, 30 days) or give judgment himself in bagatelle cases.

Parties to the Proceedings

The main parties to court proceedings are the claimant(s) and defendant(s). Hearings and oral pronouncements of judgments are
generally open to the public and judgments are made available to the public, save where the public interest or an involved person’s legitimate interest so necessitates.

A person alleging a legal interest that pending proceedings be decided in favour of one of the parties has the right to intervene in such proceedings by making an application to the court. Alternatively, a third party claiming a better right to an object that wholly or partially excludes the rights claimed by the parties in pending proceedings relating to such object can bring action against both litigants before the Court of First Instance at which the proceedings are pending. Finally, a party that intends to hold a third party liable or fears that it may be held liable by a third party in the event that it succumbs in pending proceedings can request such third party to support it in the proceedings.

Despite some political pressure, the Federal Civil Procedure Code does not provide for any “class actions” as known in many common law jurisdictions.

**Written Submissions**

The statement of claim to be submitted by the claimant in order to fully commence court proceedings must contain the name of the parties, a detailed statement of the relevant facts and should, to the extent possible, take issue with the facts that are likely to be asserted by the defendant. It must also set out the relief sought from the court and provide a list of the available documentary evidence for each allegation, as well as a Power of Attorney of the legal representation.

The parties are not required to present legal arguments as it is presumed that the courts know the law. In practice, however, the parties do present legal arguments, except in unusual cases where it may be expressly forbidden to do so.
The unified rules of procedure encourage the claimant to raise arguments and present evidence in the initial statement of claim, since later filing may be prohibited, depending on the circumstances.

After the claimant has filed its statement of claim, the court sets a deadline for the defendant’s response, usually ranging between one and three months. The requirements for the statement of defence are similar to the ones for the statement of claim. Defendant’s brief should also contain the comments of the defendant to each of the claimant’s allegations. The defendant may also bring a counterclaim at this stage of the proceedings. It is then up to the court to decide whether it wants to allow a further exchange of written briefs or whether it wishes to proceed directly with the main hearing of the case.

**Hearing and Decision of the Court**

In the main hearing, the parties have the opportunity to plead their case orally. It is in the court’s discretion to order preparatory hearings in order to prepare the main hearing and the taking of evidence. The judge then hears evidence and interviews witnesses and parties through direct questioning and/or rogatory letters. Parties have limited opportunities to cross-examine witnesses.

After all the witnesses have been heard, the parties are entitled to present orally or, if both parties agree, in writing their final arguments that take into account the witness testimony and all the evidence presented. The court then renders its judgment. The decision is not necessarily given with the reasons, but written reasoning must be provided if requested by one of the parties within ten days following notification of the decision.

Any award for damages is limited to the amount actually suffered, and punitive damages are not available under Swiss law. On a money judgment, a statutory interest rate of 5% usually applies.
Appeals

Different procedures apply depending on the error that is alleged to have occurred in the final judgment or interlocutory decision that is to be challenged. The following provides just a brief outline.

Whether a party may appeal a judgment depends largely on the type of claim and the amount in dispute. The appeal must be lodged within a fixed deadline of thirty days. A judgment rendered by a Court of First Instance can normally be fully reviewed by the Upper Court (ordinary appeal) if the claim in dispute exceeds CHF 10,000. The parties may, depending on the specific issues in dispute, be allowed to make new allegations and to raise new defences. Hence, it is generally possible to challenge findings of fact, the exercise of judicial discretion and the application of the law in ordinary appeal procedures.

In contrast thereto, judgments rendered for monetary claims below CHF 10,000 are considered final and can only be challenged due to incorrect application of the law and manifestly incorrect application of the facts (subsidiary appeal). In case of such subsidiary appeals, the Upper Court has only very restricted power to review the factual basis of the challenged judgment.

If the amount in dispute is higher than CHF 30,000, it is, moreover, possible to challenge an appeal decision of the Upper Court before the Federal Supreme Court. An appeal to the Federal Supreme Court can only be made once no further cantonal appeal on the merits is possible and must thus be made within a non-extendable deadline of thirty days.

Timetable for the Resolution of a Dispute

Litigation in Switzerland can be costly and time consuming. It can easily take between six to twelve months to obtain a first instance judgment and much longer in complex cases. The judgment of the court is not binding until all possibilities of appeal have been exhausted. Proceedings in the second instance usually also last for at
least six to twelve months, whereas the proceedings before the Federal Supreme Court tend to be slightly shorter. A litigant determined to delay judgment can therefore cause proceedings to continue for six years or more before there is a final judgment of the Federal Supreme Court.

The situation is a little better in cantons with commercial courts. Nevertheless, it is rarely possible to obtain a final judgment in less than three years even where both parties share an interest in resolving the dispute swiftly.

**Summary and Fast-Track Proceedings**

The unified Federal Civil Procedure Code requires all cantons to provide for an expedited procedure, generally referred to as “summary proceedings” or simplified proceedings, which apply when the amount at stake does not exceed CHF 30,000. Such proceedings are, moreover, available where a creditor can produce a final judgment in its favor or a written acknowledgement of debt signed by the debtor. Such proceedings are generally completed in two to six months. The procedure is much simpler and more flexible compared to ordinary proceedings. The parties are limited to the evidence that they can immediately submit to the judge, such as documents and written party statements, and there are provisions for the issuance of a default judgment if the defendant fails to appear. The appeals provided for the ordinary proceedings are basically available, but the deadline is reduced to ten days.

In addition, with the new rules coming into force in 2011, the court may also make orders in clear-cut cases where the facts are not in dispute or can be proved immediately, provided that the legal situation is clear. The application of this specific summary procedure is nevertheless expected to be restrictive.

Finally, notarised deeds relating to any kind of performance are enforceable in the same manner as judgments, provided that (a) the obligated party has expressly declared in the deed that it submits to
direct enforcement;(b) the deed indicates the legal ground for the performance owed and (c) such performance is due, sufficiently specified and recognized by the obligated party in the deed.

**Recovery of Legal Costs**

The unsuccessful party in legal proceedings usually bears the costs of the litigation. These costs include court fees and the fees paid by the prevailing party to its lawyers in accordance with tables of fees established by cantonal and federal authorities. If there is only a partial victory by the claimant, then costs will be awarded accordingly. For example, if the claimant wins half its case, then the court fees will be split equally between the parties and each party will bear its own lawyers’ fees. The responsibility for costs is usually determined by the court in the main judgment.

An exception to this general rule applies in labour and rental disputes where each party bears its own legal costs. However, court fees for these proceedings are generally low, if not free for small first instance cases.

Litigants who are unable to pay for their own attorney are, as a general rule, eligible for legal aid and are not required to pay court fees.

**Security for Costs**

Under the new unified Federal Civil Procedure Code, the court can require the claimant to provide security for the fees of the Court of First Instance and it is common for appellants to be required to provide security for the fees of the Upper Court. A foreign or insolvent claimant is compelled to provide security for both court fees and the legal fees of the defendant.
5. Interim Remedies

Conservatory Measures

A party may submit a motion for a preliminary injunction prior to the filing of an action or pending an action. However, injunctive relief will be granted only if the application can show that the applicant is likely to prevail on the merits and that, in the absence of an injunction, it would suffer irreparable harm since conservatory measures are intended to secure the enforceability of a future judgment.

The most common measure is an order prohibiting the disposal of an object that is the subject of a dispute. The enforcement of monetary claims can be secured through the issuance by a court of an attachment order over other assets. An attachment order prohibits the transfer or disposal of the assets of the defendant until the claimant’s claim has been determined in collection proceedings (e.g., proceedings which seek to enforce monetary claims, or in ordinary proceedings before a court or arbitral tribunal). It is not possible to obtain an attachment order where the claim is already secured by a mortgage or a pledge.

An attachment order is available pursuant to the provisions of the Federal Code on Debt Collection and Bankruptcy where:

(a) the creditor has an enforceable court judgment against the debtor; this new possibility of attachment in Switzerland effective as of January 2011 is a major improvement for the creditors since it abolishes the previous discrimination between foreign and Swiss creditors relying on an enforceable decision.

(b) the debtor has no fixed domicile or residence in Switzerland and the claim either has a sufficiently close relation to Switzerland, or is based on a final enforceable decision or acknowledgement of debt in writing and signed;
(c) a debtor domiciled in Switzerland is about to flee or is hiding assets;

(d) the debtor’s presence is only temporary, or

(e) the creditor has a certificate of loss against the debtor, resulting from earlier collection proceedings.

An attachment order can be obtained ex parte without notice to the defendant on the basis of prima facie evidence. A successful application for an attachment order allows the applicant to bring subsequent substantive proceedings in the court where the assets are located even if that court would not otherwise have jurisdiction over the dispute. This rule does not apply where the defendant is domiciled in an EU or EFTA state as it is superseded by the provisions of the Lugano Convention.

An attachment of assets is forfeited after ten days unless the applicant completes a “validation procedure” within that time. The validation procedure requires the commencement (or, if already commenced, the continuation) of debt collection proceedings or the filing of an ordinary monetary claim with the courts. It should also be noted that the judge has power to require the applicant to post a bond to cover damages that may be awarded to the defendant should the attachment ultimately be held to be unjustified.

Other Interim Measures

Other interim measures are available to preserve the positions of the parties until resolution of the dispute if the applicant brings prima facie evidence that a) it has a right which has been violated or is threatened with violation and b) there is a risk that such violation will cause detriment that would not be easy to remedy.

These tools include measures to regulate ongoing relationships (such as in divorce proceedings and proceedings for dissolution of a corporation) and measures requiring or prohibiting certain specific actions (such as a prohibition on an article alleged to be defamatory).
Measures are also available to preserve evidence that might otherwise be hidden or destroyed before trial. Precautionary taking of evidence requests *prima facie* elements that evidence is endangered or that the applicant has an interest worthy of protection.

The unified Federal Civil Procedure Code also introduces the possibility of filing a preventive statement of defence for any persons having reason to believe that an application might be made for a provisional order, a freezing order or an enforcement order pursuant to the provisions of the Lugano Convention or for some other order to be made against them without having been heard beforehand. The preventive statement of defence is notified to the opposing party only if the latter initiates the proceedings in question. More than six months after its filing, the preventive statement of defence is disregarded if not renewed.

### 6. Enforcement of Domestic Judgments

A judgment rendered by any Swiss court in a civil action is recognised and enforced in all cantons provided it has been rendered by a competent court, the defendant was duly notified and the judgment has become final (e.g., no ordinary appeal is available).

Monetary claims are enforced in accordance with the Federal Law on Debt Collection and Bankruptcy.

With the new possibility offered to a creditor to obtain an attachment order on the basis of a Swiss enforceable court judgment (see above), it is very likely that enforcement of domestic judgment will start with such a legal step of the creditor.

Thereafter, the process continues with an application by the judgment creditor to the debt enforcement office, which is a state authority rather than a court. The enforcement office serves the debtor with a summons to pay and the debtor has then ten days to object to this summons. No reasons need be provided for the objection. If an objection is lodged, then the judgment creditor can apply to court in
summary proceedings for the objection to be set aside. If the objection is set aside, then the debtor has twenty days in which to commence ordinary court proceedings for a declaration that the claim is unfounded.

If no objection is raised within the relevant time limit or if the objection is set aside, then the creditor may apply for continuation of the enforcement proceedings. If the claim has been secured, then the security will be realised. If the claim is unsecured and the debtor is registered in the commercial register (e.g., as a company, cooperative, partnership, association, foundation or owner of a business or member of a partnership), enforcement occurs by way of insolvency proceedings. In all other cases, enforcement is achieved by the seizure of assets.

Non-monetary claims are also enforceable and the most common methods of enforcement for non-monetary claims are the forced return of goods to the creditor, the registration of the claim in public registers, or the imposition of penal interest or other penal sanctions.

Enforcement of a judgment on a monetary claim may take between six months and two years and a judgment on a non-monetary claim may take between nine months and two years to enforce.

7. Recognition and Enforcement of Foreign Judgments

Judgments rendered in civil and commercial matters by courts of EU or EFTA states are recognised and enforced in accordance with the provisions of the Lugano Convention. Recognition of other foreign judgments is subject to the provisions of the Swiss Federal Act on Private International Law (‘‘SPILA’’).
Recognition under the Lugano Convention

The Lugano Convention sets out the procedure for enforcement and the documents to be provided (with translation) together with the request.

Recognition under the Lugano Convention does not involve a review of the merits of the judgment rendered by the foreign court. The Swiss judge will only ensure that the application for recognition meets the formal requirements (the decision is final and binding) and order its enforcement. Any material objection to the recognition, if any, will be addressed before the upper instance judge. Said objections against the recognition of the foreign decision are:

(a) the foreign decision violates Swiss public policy in a grave way;
(b) the defendant was not present during the proceedings. unless it was given a proper opportunity to attend;
(c) the defendant was not duly served with the document which initiated the proceedings or with an equivalent document in sufficient time to enable it to arrange for its defence;
(d) the judgment is irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition is sought;
(e) the judgment is irreconcilable with an earlier judgment rendered in a non contracting state involving the same cause of action and between the same parties, provided that this earlier judgment fulfils the conditions necessary for its recognition in Switzerland.

Recognition of Other Foreign Judgments

Recognition of judgments from other states is ruled by the SPILA. Said decisions are recognised if the jurisdiction of the foreign court is
established and the judgment is final and binding except where one of the following grounds for refusal exists:

(a) the defendant proves that it was not duly summoned according to the law of its domicile or according to the law of its ordinary residence, except where it made an appearance in the proceedings without reservation;

(b) the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular if the right to be heard was denied;

(c) proceedings involving the same parties and the same subject matter were first brought in Switzerland, or adjudicated in Switzerland, or adjudicated in a third state and a decision has been made which satisfies the conditions for recognition in Switzerland, or

(d) recognition would be contrary to Swiss public policy.

The SPILA sets out the procedure for recognition and the authorities with competence to consider the request. Once the decision is recognised, it is enforced in the same way as a domestic judgment.

8. Arbitration

Switzerland has always played an important role in international arbitration because of its political stability, neutrality and the liberal approach of the Swiss legal system towards arbitration. Geneva is among the four most frequently used seats of arbitration worldwide, after London, Paris and New York.

In Switzerland, the most important arbitration centers are Geneva, Zurich and Basel for commercial arbitrations, whereas Lausanne is preferred for sports arbitrations. English is the most popular language for arbitration proceedings, but a significant number of cases are dealt with in German or in French as well.
The SPILA governs international arbitration in Switzerland. The object of arbitral proceedings can be any claim of which the parties can freely dispose. The parties can either establish the rules of procedure themselves or refer to the rules of procedure of an arbitration body or submit the proceedings to a procedural law of their choice. In Switzerland, it is common to do so by reference to the arbitration rules of one of the arbitration organizations, such as the International Chamber of Commerce (ICC) or the Swiss Chambers of Commerce (Swiss Rules for International Arbitration). UNCITRAL rules are also often chosen. International arbitration clauses are traditionally only recognised by the courts if they are agreed in writing by the parties, but the new unified Federal Civil Procedure rules also accept any other form evidencing them in the form of a text.

If all the parties concerned are domiciled or habitually resident in Switzerland, the relevant provisions dealing with domestic arbitration contained in the unified Federal Civil Procedure Code apply. The parties are also free to agree in writing to opt out or opt in the SPILA or the unified Federal Civil Procedure Code. Apart from a few specific rules listed in the unified Federal Civil Procedure Code and the SPILA about equal treatment of the parties and their right to be heard, all the rules of the unified Federal Civil Procedure Code and of the SPILA are non-mandatory and can thus be amended or supplemented by agreement between the parties.

Role of the Courts in Arbitration

In international arbitration proceedings, a party can apply to the arbitral tribunal for provisional or protective measures. Interim measures granted by the arbitral tribunal in international arbitration can not be set aside by the court. If the other party fails to comply with the measures ordered by the tribunal, the tribunal may apply to the court for an appropriate order.

In domestic arbitration proceedings, provisional measures (including orders relating to the securing of evidence) may be granted by the Swiss courts or by the arbitral tribunal upon application by a party,
unless the parties have otherwise agreed. Applications are made to the local courts and the consent of the arbitral tribunal is not required.

The arbitral tribunal and the court can each order the requesting party to provide security to compensate the other party against any damage that may be caused to it should it ultimately be held that the provisional measures were not justified.

In addition, where the arbitration agreement does not provide for a body to appoint the arbitrators, the local court having jurisdiction shall make the appointment.

**Power to Set Aside an Award**

Swiss arbitration awards are rarely overturned, and the grounds for doing so are very narrow since a significant legal error needs to have occurred.

Awards made in a wholly domestic Swiss arbitration can be set aside by the Federal Supreme Court on any of a number of grounds like:

(a) the sole arbitrator has been improperly appointed or the arbitral tribunal has been improperly constituted;

(b) the arbitral tribunal has wrongly accepted or denied jurisdiction;

(c) the arbitral tribunal has ruled on matters other than the claims submitted to it, or failed to decide on one of the claims;

(d) the principle of equal treatment of the parties or their right to be heard in an adversarial procedure has not been observed;

(e) the result of the award is arbitrary because it is based on findings of fact which are contradicted by the documents on record or on a manifest violation of the law or of equity, or

(f) the fees and expenses determined by the arbitral tribunal for its members are manifestly excessive.
An application to set aside an award in Swiss international arbitration must be made to the Federal Supreme Court. The appeal is similar to the domestic one save that it can only be initiated on grounds (a) to (d) above, plus if the award is incompatible with public policy.

If none of the parties has its domicile, habitual residence or seat in Switzerland, the parties can fully exclude the power of the Swiss courts to set aside the award. The exclusion must be made expressly and in writing.

Enforcement of Arbitral Awards

A Swiss arbitral award is enforceable in Switzerland in the same way as a Swiss court judgment. An award of an arbitral tribunal that has its seat overseas can be enforced in Switzerland pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Swiss legislation applies the New York Convention regardless of whether or not the country that is the seat of the arbitration is a party to the convention. It is not necessary for the party seeking to enforce the award to have obtained a declaration of enforceability from the court at the venue of the arbitration.

9. Alternative Dispute Resolution

Alternative dispute resolution is not much used in Switzerland, except in family law disputes. Where it is used for commercial disputes, the main types of procedure employed are conciliation and mediation. The Swiss Chambers of Commerce have set up their unified Swiss Rules of Commercial Mediation based on the voluntary participation of the parties and their desire to resolve their dispute.

Conciliation

As mentioned above, the unified Federal Civil Procedure Code requires a mandatory conciliation hearing before any claim can be filed at court. Once proceedings are pending before a court, the civil procedure allows the judge to instigate settlement discussions. A judge
can propose settlement or the parties can ask the judge to suspend proceedings while they negotiate.

Special conciliation procedures are in place to handle landlord and tenant disputes, or employer and employee disputes. Federal law requires the establishment of special conciliation authorities who try to reach an agreement between the parties. The chairmen of these authorities are qualified judges. Lessors (Employers) and Lessees (Employees) are equally represented in the conciliation authorities by means of their associations or other organizations safeguarding similar interests.

**Mediation**

Mediation is a non-judicial method of conflict resolution in which a neutral third party helps the parties to overcome settlement barriers and to develop their own solution. Because of its speed and efficiency, the cost of mediation is only a fraction of the cost of court proceedings or arbitration. The parties can sometimes find creative solutions that satisfy their respective interests. The mediation process attempts to preserve the relationship between the parties in conflict and often helps to maintain ongoing relationships.

In the field of divorce law, voluntary mediation is becoming more and more popular. Some private mediation institutions are also trying to promote mediation in commercial matters, particularly for industries such as information technology and construction where the time factor is central. Swiss Chambers of Commerce have set up a mini-trial procedure that is intended to offer a quick and easy way of settling business disputes by causing the parties to focus on the main points in dispute.
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