

Complex Commercial Litigation

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Quick reference guide enabling side-by-side comparison of local insights into the litigation market and legal framework; pre-action considerations (including alternative dispute resolution); bringing and defending a claim; procedural steps; funding; costs; appeals; cross-border enforcement; the advantages and disadvantages of litigating in this jurisdiction; and recent trends.

Generated 15 September 2023

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BACKGROUND

Frequency of use

How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial litigation is, along with commercial arbitration, the most frequent method of resolving high-value, complex disputes in Switzerland. Commercial litigation represents the standard dispute resolution method in disputes where one or more parties are domiciled in Switzerland.

Law stated - 11 August 2023

Litigation market

Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The Swiss litigation landscape, particularly in the major centres such as Zurich, Geneva, Basel and Lausanne, exhibits an international character, in that, in many cases, one or more parties are domiciled or seated abroad.

In addition, Swiss law is often chosen by internationally operating parties as a neutral and fair set of laws, with a corresponding forum selection clause in favour of Swiss courts.

Law stated - 11 August 2023

Legal framework

What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Switzerland is a civil law jurisdiction. Several federal and cantonal statutes and international treaties govern civil procedure in Switzerland. The most important statute governing commercial litigation is the Swiss Civil Procedure Code which provides a unified set of rules governing civil proceedings before the cantonal courts. Proceedings before the Swiss Federal Supreme Court (which, as the court of last instance, acts as the court of appeal against decisions of the higher cantonal courts) are governed by a separate procedural code (ie, the Federal Supreme Court Act).

For certain subject matters, additional statutory regulations apply. The enforcement of monetary claims and the initiation of bankruptcy proceedings, for example, are additionally subject to the Swiss Debt Enforcement and Bankruptcy Act, while in cases involving an international element, the Swiss Private International Law Act or international treaties, in particular the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention), additionally apply and determine, among other things, the jurisdiction and the applicable law.

The organisation of the courts, and with it, the official languages permitted before the courts as well as the court costs, is regulated at cantonal level, which leads to regional differences.

Law stated - 11 August 2023

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

What key issues should a party consider before bringing a claim?

Unlike some Anglo-American jurisdictions, Swiss law recognises pre-trial discovery only to a very limited extent. A party must, in principle, produce the evidence on which it intends to base its claim. Before initiating legal proceedings, it is, therefore, necessary to check whether the alleged facts can be supported by evidence.

Law stated - 11 August 2023

Establishing jurisdiction

How is jurisdiction established?

Jurisdiction *ratione loci* in international cases is governed by the Private International Law Act (PILA) and/or international treaties (in particular, the Lugano Convention), whereas in purely domestic cases, jurisdiction will be governed by the Civil Procedure Code (CPC). As a matter of principle, a claim might be filed at the place of the defendant's domicile. For certain subject matters, there are mandatory rules of jurisdiction from which the parties cannot derogate. In the remaining cases, jurisdiction can be established by means of entering into appearance or by way of a forum selection agreement.

Jurisdiction *ratione materiae* is, in principle, governed by cantonal law, with the CPC setting certain parameters. The cantons may, for example, decide to set up a specialised court for commercial disputes (ie, a 'commercial court'). If they make use of this possibility, as the cantons of Zurich, Berne, St Gallen and Aargau did, the jurisdiction *ratione materiae* of the commercial court will, however, be governed by article 6 of the CPC.

A court must, in principle, examine its jurisdiction *ex officio* and dismiss an action if it finds that it does not have jurisdiction to hear it. With respect to jurisdiction *ratione loci*, an exception applies in that the defendant may tacitly consent to the jurisdiction of a non-competent court by entering an appearance on the merits. In order to avoid entering an appearance, the defendant must raise a plea of lack of jurisdiction before, or at least at the same time as making a statement on the merits of the case.

Under Swiss law, a court might decline jurisdiction only within narrow limits where none of the parties who entered a forum selection clause has its seat or domicile in the canton of the seat of the court (article 5 et seq, PILA). A forum non-conveniens assessment, as is known in common law jurisdictions, is alien to Swiss law. Moreover, under Swiss law, it is not possible to file an application for an anti-suit injunction preventing a party from bringing an action abroad. If a party fears being sued abroad, it may, in certain cases, be able to secure jurisdiction in Switzerland by bringing an action for a negative declaratory relief before a Swiss court.

Law stated - 11 August 2023

Preclusion

Res judicata: is preclusion applicable, and if so how?

Yes, Swiss law recognises *res judicata*. Once a decision has *res judicata* effect, it binds the parties by preventing them from relitigating the same case. Furthermore, subsequent courts are, in principle, bound by decisions that have become final and may not deviate from them.

Law stated - 11 August 2023

Applicability of foreign laws

In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Swiss courts will apply foreign law in cases where the parties have chosen it as the applicable law or where the conflict of law rules refer to a foreign law.

Pursuant to article 16 of the PILA, Swiss courts will, in principle, establish the content of the foreign law *ex officio*. In matters involving an economic interest, the task of establishing foreign law may, however, be assigned to the parties.

Law stated - 11 August 2023

Initial steps

What initial steps should a claimant consider to ensure that any eventual judgment is satisfied?
Can a defendant take steps to make themselves 'judgment proof'?

A claimant may secure the future enforcement of a decision by filing an application for interim measures, such as an attachment order.

A defendant might file a protective brief with the court in order to prevent the granting of an *ex parte* interim measure application.

Law stated - 11 August 2023

Freezing assets

When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

To secure a monetary claim, a claimant may apply for an attachment order asking to freeze the assets belonging to the debtor located in Switzerland. The creditor must show *prima facie* the following:

- the existence of its claim;
- that the debtor has assets in Switzerland; and
- that one of the statutory grounds for obtaining an attachment is met (article 272 of the Debt Enforcement and Bankruptcy Act (DEBA)). Such grounds for attachment include the existence of an enforceable judgment against the debtor by the creditor or the fact that the debtor is attempting to conceal assets or is planning to leave Switzerland to evade the fulfilment of its obligations.

If the attachment order is granted, the debtor will be informed and provided with the opportunity to lodge an objection against the attachment order (article 278, DEBA). The creditor, for its part, will have to validate the attachment order within statutory deadlines.

The creditor is liable both to the debtor and to third parties for the damage arising out of an unjustified attachment (article 273, DEBA).

Law stated - 11 August 2023

Pre-action conduct requirements

Are there requirements for pre-action conduct and what are the consequences of non-compliance?

Swiss law does, in principle, not impose any requirements for pre-action conduct, such as sending a claim letter to the opposing side, as is customary in certain common law jurisdictions.

The actual court proceedings are, however, usually preceded by a conciliation hearing aimed at reaching a settlement of the matter (article 197, CPC).

There are several exceptions in which a prior conciliation hearing is not necessary (article 198 et seq, CPC). For example, the parties can jointly waive conciliation proceedings if the amount in dispute exceeds 100,000 Swiss francs, or the claimant can do so unilaterally if the defendant is not domiciled or seated in Switzerland. Furthermore, in cases before a commercial court, there is no requirement to undergo conciliation proceedings beforehand.

Law stated - 11 August 2023

Other interim relief

What other forms of interim relief can be sought?

Swiss law does not provide for a *numerus clausus* of possible provisional measures. Typically, the claimant might file a request to order the defendant to safeguard the status quo of the matter (eg, preventing it from disposing of the assets which are the subject matter of the litigation). Further, under some circumstances, the claimant may request that the defendant shall be ordered to comply with the obligations arising out of a contract. A court can, in principle, also issue orders against third parties or authorities (eg, to the officer of the commercial register).

For a provisional measure to be granted, the applicant must show a *prima facie* case that (1) a claim to which it is entitled has been violated or a violation is anticipated, and (2) said violation threatens to cause not easily reparable harm to the applicant.

Law stated - 11 August 2023

Alternative dispute resolution

Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

In Switzerland, court proceedings must, in principle, be preceded by a conciliation hearing before a conciliation authority aimed at settling the dispute (article 197, CPC). The parties may jointly request a mediation instead of a conciliation hearing (article 213, CPC). Furthermore, the court may summon the parties to a court-led instruction hearing at any time aimed at reaching a settlement (article 226, CPC).

In proceedings before the Zurich Commercial Court, it is customary for the parties to be summoned to such an instruction hearing after the first exchange of written submissions, at the beginning of which the court will present its preliminary assessment of the case.

Law stated - 11 August 2023

Claims against natural persons versus corporations

Are there different considerations for claims against natural persons as opposed to corporations?

Some cantons have specialised courts for commercial disputes. In these cantons (ie, Zurich, Berne, St Gallen and Aargau), the commercial court has, in principle, subject matter jurisdiction to hear commercial disputes where:

- the parties are registered with the Swiss commercial register (or in an equivalent foreign register);
- the business activities of one of the parties is affected; and
- the amount in dispute exceeds 30,000 Swiss francs.

If only the defendant is registered in the Swiss commercial register or in an equivalent foreign register, but all the other requirements are met, the claimant may choose between the commercial court and the ordinary court of first instance (article 6, CPC).

Furthermore, different insolvency procedures apply depending on whether the debtor is a natural person or a legal entity.

Law stated - 11 August 2023

Class actions

Are any of the considerations different for class actions, multiparty or group litigations?

Swiss law does not recognise typical class actions. Associations and other organisations of national or regional importance that are authorised 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. However, they may only request the court to prohibit an imminent violation, put an end to an ongoing violation or establish the unlawful character of a violation (article 89, CPC), whereas they cannot claim damage compensation.

A legislative proposal is currently being deliberated in the Swiss Parliament, which aims at providing for the possibility of collective redress in Switzerland. On the one hand, the reform provides for a strengthening of the existing association claim by allowing associations to claim a violation of any civil right (instead of only a violation of a personality right, as is the case today).

In addition, associations shall in future also be able to bring an action in their own name, but on behalf of the affected parties, provided that the latter have previously authorised it or have joined the action after it has been admitted.

Finally, the proposal also provides for the possibility of a group settlement. If approved and declared binding by the court, the group settlement binds all affected persons who have joined the association claim.

Law stated - 11 August 2023

Third-party funding

What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

According to the case law of the Swiss Federal Supreme Court, third-party litigation funding is permissible, provided that the funder acts independently from the client's counsel. The client's counsel must further comply with professional

duties and be able to act in the client's sole interest. They cannot take instructions directly from the third-party funder.

Law stated - 11 August 2023

Contingency fee arrangements

Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

Swiss law narrowly limits the options for lawyers to agree to a success-based compensation. Lawyers are prohibited from agreeing on compensation that depends solely on the outcome of the proceedings (*pactum de quota litis*) in order to ensure the lawyers' independence.

However, according to Swiss case law, it is permissible to agree on a success component in addition to the usual fee (*pactum de palmario*). The fee component, which is independent of the outcome of the litigation, must at least cover the lawyers' costs and include a reasonable profit margin.

In addition, the success-dependent fee component must not outweigh the amount of the success-independent fee component. Finally, such an agreement must be made at the outset of the mandate.

Law stated - 11 August 2023

THE CLAIM

Launching claims

How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

In Switzerland, court proceedings must, in principle, be preceded by a conciliation hearing before a conciliation authority aimed at settling the matter (article 197, Civil Procedure Code (CPC)).

The application for conciliation must identify the parties and include the prayers for relief and provide a brief description of the subject matter in dispute (article 202, CPC).

There are several exceptions where a prior conciliation hearing is not necessary (article 198 et seq, CPC). In these cases, or following an unsuccessful conciliation hearing, claims are launched by filing a written statement of claim (article 220, CPC).

The statement of claim must contain the following:

- the prayers for relief;
- the allegation of fact; and
- a list of evidence offered.

Written pleadings usually begin with a formal section addressing the admissibility requirements, followed by a section on the factual allegations and the corresponding evidence, and finally, there is a section on the law. The length of the pleadings depends greatly on the individual circumstances of the case. There is no statutory limit to the pages of briefs.

Law stated - 11 August 2023

Serving claims on foreign parties

How are claims served on foreign parties?

Generally, service is effected by the court in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965.

Other bilateral treaties may apply depending on the country in which service is to be effected. In cases where no convention or treaty is applicable, actions are served by the court through diplomatic channels.

Law stated - 11 August 2023

Key causes of action

What are the key causes of action that typically arise in commercial litigation?

Key causes of action in commercial litigation are claims for contractual performance (payment of money or specific performance) as well as breach of contract or tort law. Furthermore, claims based on property law are also frequent.

Law stated - 11 August 2023

Claim amendments

Under what circumstances can amendments to claims be made?

According to article 227, CPC, a claim can be amended if the new or amended claim is subject to the same type of procedure and (1) a factual connection exists between the new or amended claim and the original claim or (2) if the opposing party consents to the amendment of the statement of claim.

In principle, claims may be amended up to a party's second written submission or, in the absence of a second pleading, up to a party's first pleading at the main hearing. Afterwards, an amendment of the claim is only admissible if the amended claim is based on new facts (article 230, CPC).

A reduction of the claim is permissible at any time before the final judgment. Furthermore, reliance on new or other legal grounds is not considered an amendment of the claim and is thus also admissible at any time prior to the final judgment.

Law stated - 11 August 2023

Remedies

What remedies are available to a claimant in your jurisdiction?

Under the CPC, three different types of remedies are available as follows:

- action for performance (article 84, CPC),
- action to modify a legal relationship (ie, seek the creation, modification or dissolution of a specific right or legal relationship) (article 87, CPC); and
- action for a declaratory judgment (article 88, CPC).

Law stated - 11 August 2023

Recoverable damages

What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Under Swiss law, recoverable damage includes actual damage and loss of profit. By contrast, punitive damage is, in principle, alien to Swiss law. In general, Swiss courts take a rather strict approach to proving the existence of damage.

Where it is not possible to quantify the damage in advance, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage (article 42(2), Swiss Code of Obligations).

Law stated - 11 August 2023

RESPONDING TO THE CLAIM

Early steps available

What steps are open to a defendant in the early part of a case?

A defendant may – or in certain cases must, in order not to lose a defence – take the following steps in the initial phase of the proceedings:

- raise procedural objections such as lack of jurisdiction, lis pendens, res judicata, etc (cf list article 59, Civil Procedure Code (CPC));
- request security for party costs (article 99, CPC) or for damages resulting from interim measures (article 264-265 CPC, article 273, Debt Enforcement and Bankruptcy Act (DEBA));
- raise a counterclaim (article 224, CPC);
- request that the proceedings be limited to certain issues (article 125, CPC); and
- request the dismissal of the action on substantive grounds.

If the defendant believes that a third party is liable in whole or in part, it may issue a third-party notice (article 78, CPC) or file a third-party action (article 81, CPC).

Law stated - 11 August 2023

Defence structure

How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

The court will serve the defendant with the statement of claim and, at the same time, usually set a deadline for filing a written statement of defence (article 222(1), CPC).

The time limit for the statement of defence will be set by the court (ie, it is not statutorily predetermined). The court will set the time limit at its discretion, considering the nature of the proceedings, the size of the statement of claim and the complexity of the individual case. In larger commercial cases, the time limit will usually not be less than 30 days. The time limit may be extended upon a reasoned request.

Law stated - 11 August 2023

Changing defence

Under what circumstances may a defendant change a defence at a later stage in the proceedings?

A defendant may change a defence under the same conditions as a claimant may amend its claim (article 227, CPC). Thus, a defence may, in principle, be amended up to a party's second written submission or, in the absence of a second pleading, up to a party's first pleading at the main hearing. Afterwards, an amendment of the defence is only admissible if the amended claim is based on new facts (article 230, CPC).

Reliance on new or other legal bases is not considered an amendment of defence and is accordingly also admissible at any time before the final judgment.

Law stated - 11 August 2023

Sharing liability

How can a defendant establish the passing on or sharing of liability?

The defendant can give a notice to a third party if, in the event of being unsuccessful, it might have a claim or be subject to a claim by said third party. The notified third party may intervene in favour of the notifying principal party or proceed in place of the notifying principal party, with the consent of the latter (article 79, CPC). The effect of a third-party notice is that a decision unfavourable to the principal party is, in general, also binding on the notified third party (article 80 cum 77, CPC).

In addition, the defendant also has the option of filing a third-party action (ie, to file within the framework of the main proceedings an action against a third party against whom it believes it will have a claim if it is unsuccessful in the main proceedings (article 81, CPC)). The notified third party may not bring a further third-party action.

Law stated - 11 August 2023

Avoiding trial

How can a defendant avoid trial?

The defendant can avoid trial by accepting the claim or entering into a settlement with the claimant. The acceptance of the claim or settlement submitted to the court has the same effect as a binding decision (article 241, CPC).

Swiss law does not recognise institutions such as a 'motion to dismiss' or a motion for 'summary judgment', as is customary in certain common law jurisdictions. The defendant can, however, raise numerous defences, which may lead to an early dismissal of the claim (such as a plea of lack of jurisdiction). The defendant can also request that the proceedings are limited to certain issues (article 125(a), CPC).

Law stated - 11 August 2023

Case of no defence

What happens in the case of a no-show or if no defence is offered?

A party is considered in default if it fails to accomplish a procedural act within the set time limit or does not appear when summoned. As a general rule, Swiss law provides that, in such situations, the proceedings will continue without

the omitted act (article 147, CPC).

An exception applies to the statement of defence, for which the law provides that a grace period must be set if it is not filed in time. If this statement of defence is also not submitted within the grace period, then the court will directly render its final decision provided it is in a position to do so. Otherwise, it will summon the parties to the main hearing (article 223, CPC).

Law stated - 11 August 2023

Claiming security

Can a defendant claim security for costs? If so, what form of security can be provided?

Provided no multi- or bilateral treaty prevails, which would preclude the claiming of security for costs (in particular, the Hague Convention on Civil Procedure of 1 March 1954), the claimant shall provide security for party costs upon request of the defendant, if the defendant can prove that the claimant (article 99, CPC):

- has no residence or registered office in Switzerland;
- appears to be insolvent (eg, if bankruptcy proceedings were opened);
- owes court costs from prior proceedings; or
- if, for other reasons, there seems to be a considerable risk that the party compensation will not be paid.

The security may be provided in cash or in the form of a guarantee from a bank with a branch in Switzerland or from an insurance company authorised to operate in Switzerland (article 100(1), CPC). By failure to provide the security for costs timely, the court declares the action as not admissible and dismisses it (article 101, CPC).

Law stated - 11 August 2023

PROGRESSING THE CASE

Typical procedural steps

What is the typical sequence of procedural steps in commercial litigation in this country?

The typical sequence of procedural steps in first-instance proceedings is the following:

- request for conciliation, followed by a conciliation hearing, if this is mandatory (it is worth noting that in disputes before a commercial court, no prior conciliation procedure takes place);
- written statement of claim;
- written statement of defence;
- a second round of briefs (reply and rejoinder);
- main hearing, on the occasion of which the court will usually hear witnesses and take evidence and the parties will give their oral pleadings; and
- decision.

The court may, at any time, summon the parties to a court-led settlement hearing (article 226, Civil Procedure Code (CPC)).

In proceedings before the Zurich Commercial Court, it is customary for the parties to be summoned to such a settlement hearing after the first exchange of written submissions, at the beginning of which the court will present its

preliminary assessment of the case.

Law stated - 11 August 2023

Bringing in additional parties

Can additional parties be brought into a case after commencement?

Yes, under Swiss law, additional parties can be involved in or intervene in proceedings. The principal forms of addition of third parties are the following:

- principal intervention (article 73, CPC): any person who claims to have a better right in the object of dispute may bring a claim directly against both parties;
- accessory intervention (article 74, CPC): any person who shows a credible legal interest in having a pending dispute decided in favour of one of the parties may intervene;
- third-party notice (article 78, CPC): a party may notify a third party of the dispute if, in the event of being unsuccessful, they might take recourse against or be subject to recourse by a third party; and
- third-party action (article 81, CPC): a party may apply to the court for permission to bring a possible action for recourse against a third party in the main proceedings in the event of a decision that is unfavourable on the main claim.

Additionally, in order to simplify the proceedings, the court may order the joinder of separately filed actions (article 125(c), CPC).

Law stated - 11 August 2023

Consolidating proceedings

Can proceedings be consolidated or split?

In order to simplify the proceedings, the court may order the separation of jointly filed actions or order the joinder of separately filed actions. The court may also limit the proceedings to certain issues or prayers for relief and separate the counterclaim from the main proceedings (article 125, CPC).

Law stated - 11 August 2023

Court decision making

How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

Unless the law provides otherwise, the burden of proof lies with the person who derives a right from an alleged fact (article 8 of the Swiss Civil Code). In general, strict proof is required wherever Swiss law does not provide otherwise, meaning that the court must be convinced of the truth of the alleged fact and must not have any or only minor doubts as to its existence.

The court forms its opinion based on its free assessment of the evidence taken (article 157, CPC). Article 168 of the CPC provides an exhaustive list of admissible evidence. This includes, inter alia, physical records, testimony and expert opinions by court-appointed experts.

Law stated - 11 August 2023

How does a court decide what judgments, remedies and orders it will issue?

Unless otherwise provided by law, a court may, in principle, not award a party anything more or different from what that party has requested, nor less than what the opposing party has acknowledged (article 58, CPC).

Law stated - 11 August 2023

Evidence

How is witness, documentary and expert evidence dealt with?

Under Swiss law, witnesses are examined by the court. There is no cross-examination as customary in common law jurisdictions. Counsel for the opposing side may only ask supplementary questions. Contacts between the counsel and potential witnesses are only permissible under limited circumstances.

Written witness statements are alien to Swiss law. In their respective submissions, the parties must indicate which allegation can be substantiated by witness testimony.

Parties (including the corporate bodies of legal entities) are not questioned as witnesses but by way of a party testimony.

Generally, there is a strong emphasis on documentary evidence over oral evidence. The possibility of requesting the production of documents from the opposing party or third parties exists only within very narrow limits under Swiss law.

Law stated - 11 August 2023

How does the court deal with large volumes of commercial or technical evidence?

In Switzerland, submissions, including enclosures, are usually still filed in paper form, although electronic submissions are possible under certain conditions. In a case with large volumes of enclosures, it is, however, not uncommon for the court to request an electronic version of the enclosures (eg, by way of submission of a USB stick) in addition to the paper submission.

The court may commission an expert report at the request of a party or ex officio. In cases involving technical issues, such court-ordered expert opinions are quite common.

Law stated - 11 August 2023

Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Provided that the formal requirements are met, witnesses who have their domicile in Switzerland can be obliged to testify by means of legal assistance in front of a Swiss court on behalf of proceedings pending before a foreign court.

The taking of evidence is either regulated by bi- or multilateral treaties, in particular, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 and the Hague Convention relating to Civil Procedure of 1 March 1954 or, if none of these applies, the Swiss courts will apply the Hague Convention relating to Civil Procedure by default (article 11(a), Private International Law Act (PILA)).

Currently, prior authorisation is required from the Swiss Federal Office of Justice if a witness is to be questioned in Switzerland in the context of foreign civil proceedings by means of a telephone or video conference. A legislative proposal is currently being deliberated in the Swiss Parliament, which aims to change this, and to allow questioning of witnesses by telephone or videoconference without prior authorisation, provided that certain criteria are met.

According to article 271 of the Swiss Criminal Code (SPC), it is a criminal offence to carry out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official. According to Swiss understanding, this also includes the taking of evidence in civil proceedings, which is why it is considered a criminal offence to take evidence for a foreign proceeding on the territory of Switzerland without complying with the formal channels.

Law stated - 11 August 2023

How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

The judge shall freely assess the witness and documentary evidence (article 157, CPC). The judge conducts the questioning of the witness. There is no cross-examination, as is customary in common law jurisdictions. Counsel for the opposing side may ask the judge to admit supplementary questions.

If the opposing party questions the authenticity of a document, the party invoking this document must prove its authenticity (article 178, CPC).

Law stated - 11 August 2023

Time frame

How long do the proceedings typically last, and in what circumstances can they be expedited?

The duration of proceedings will naturally depend on the particular circumstances of the case. Typically, the average duration of civil disputes in commercial matters is between one and two years for the proceedings before the court of first instance. Appeal proceedings are considerably faster and usually take less than a year. In cases where the Commercial Court has jurisdiction, only one appeal is available, namely to the Swiss Federal Supreme Court.

Law stated - 11 August 2023

Gaining an advantage

What other steps can a party take during proceedings to achieve tactical advantage in a case?

Tactics to achieve advantages in proceedings usually depend on a party's role and the specifics of the case. For example, it may be advisable for the claimant to file a partial claim in order to limit its cost exposure or to freeze assets before initiating proceedings. For the defendant, on the other hand, it may be advisable to accept part of the claim, file a counterclaim or try to delay the proceedings by raising various procedural objections.

Law stated - 11 August 2023

Impact of third-party funding

If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Third-party funding can enable a party to litigate a case that it otherwise could not afford. In this respect, it should be noted that court costs in Switzerland are rather moderate in international comparison. Exceptions may apply in cases with a high amount in dispute depending on the applicable cantonal tariff.

Law stated - 11 August 2023

Impact of technology

What impact is technology having on complex commercial litigation in your jurisdiction?

Litigation proceedings are still mainly paper-based, although electronic filing in civil courts was introduced over a decade ago.

Within the framework of the emergency decrees issued in the wake of the Covid-19 pandemic, it was temporarily possible to conduct hearings and examinations by video conference. The corresponding emergency ordinance ceased to apply on 1 January 2023.

A revision of the Swiss Civil Procedural Code, which is expected to enter into force on 1 January 2025, will introduce the possibility of conducting proceedings via video conference. This will also apply to the examination of witnesses, the questioning of parties, the statement of parties and the rendering of expert opinions.

Law stated - 11 August 2023

Parallel proceedings

How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

In parallel proceedings, a request can be made to suspend the proceedings. The court will stay the proceedings if it considers it appropriate, particularly if the decision depends on the outcome of other proceedings (article 126, CPC).

A person injured by a criminal offence may, as a private claimant, assert civil claims against the offender arising as a result of the criminal offence in the criminal proceedings (article 122, SPC). The public prosecutor's office will, in such cases, be obliged to gather the evidence necessary for the assessment of the civil claims, provided this does not significantly expand or delay the criminal proceedings. It may make the gathering of evidence, which primarily serves to further the civil claim, conditional on an advance payment by the private claimant to cover costs.

The assertion of civil claims in criminal proceedings can be advantageous, in particular, as one benefits from extensive fact-finding and evidence-gathering (eg, through house raids and seizures), which would not be available in civil proceedings. On the other hand, one is dependent on the prosecuting authorities as far as the course of the proceedings is concerned (especially in terms of timing).

Law stated - 11 August 2023

TRIAL

Trial conduct

How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

In complex commercial disputes, two sets of written submissions are usually exchanged before the main hearing. At the main hearing, the parties present their positions again orally, followed, if necessary, by the taking of evidence (eg, examination of witnesses). Afterwards, the parties provide their closing statements.

The court may at any time conduct instruction hearings to discuss the matter in dispute on a without prejudice basis or to attempt to reach a settlement (article 226, Civil Procedure Code (CPC)). The duration of the main hearing will depend on several circumstances, such as the number of witnesses or other evidence taken (eg, expert opinion). In most cases, it is dealt with in one day but, in exceptional cases, it might take up to several days.

Law stated - 11 August 2023

Use of juries

Are jury trials the norm, and can they be denied?

There are no jury trials in civil matters in Switzerland.

Law stated - 11 August 2023

Confidentiality

How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

The parties' submissions and the evidence submitted are, in general, not publicly accessible. In contrast, hearings are, in principle, held in public.

However, there are exceptions to this rule. First, hearings are not public in conciliation proceedings and family law matters. Furthermore, the court may, in other cases, order that the hearing be held in closed session, provided that a private or public interest so requires (article 54, CPC).

The publication of decisions of the cantonal courts depends on cantonal law. The trend is for decisions of higher cantonal courts to be made accessible online in anonymised form. The judgments of the Swiss Federal Supreme Court are publicly accessible (in anonymised form) on the website of the court.

Law stated - 11 August 2023

Media interest

How is media interest dealt with? Is the media ever ordered not to report on certain information?

Most cantonal authorities offer media accreditation to journalists who wish to cover public hearings; however, sound and image recordings are usually prohibited in the courtrooms. The court shall take appropriate measures to ensure that taking evidence does not infringe on the legitimate interests of any parties or a third party, such as business secrets (article 156, CPC). Moreover, parties may seek an injunction against the media if they fear a violation of their personality rights.

Proving claims

How are monetary claims valued and proved?

In Swiss civil procedure, there is a strong emphasis on documentary evidence over oral testimony. As a result, monetary claims are usually valued and proven by means of documentary evidence. The party claiming damage compensation must substantiate in detail and prove the elements which allow for the quantification of the damage. Failure to properly substantiate the damage might result in a dismissal of the whole claim. In addition, the court may, at the request of a party or ex officio, order an expert opinion (article 183, CPC).

Pursuant to article 125 of the CPC, the court can limit the proceedings to individual issues or prayers for relief and thus, for example, first decide on the defendant's liability and only later on the quantum. However, such a bifurcation of the quantum is, unlike in arbitration proceedings, not frequently applied in Swiss civil procedure.

Law stated - 11 August 2023

POST-TRIAL

Costs

How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

At the outset of the proceedings, the court will usually ask for an advance on costs from the claimant for all expected court costs. A revision of the Civil Procedure Code (CPC), which is expected to enter into force on 1 January 2025, will introduce a rule according to which courts can only demand a maximum of half of the expected court costs as an advance payment from the claimant.

Generally, the losing party has to bear the court costs. Furthermore, it must pay the winning party compensation for its legal costs. The court costs and party compensation are governed by cantonal tariffs based on the amount in dispute.

The structure of a decision usually begins with the procedural history and the facts of the case being summarised, followed by the reasoning of the court and, at the end, the operative part.

The length of the judgments might vary from a few pages to more than a hundred, depending on the complexity of the proceedings, whether the proceedings are dismissed due to a lack of a procedural requirement or whether the case is decided on the merits. Judgments issued by the Swiss Federal Supreme Court are usually rather succinct.

The judgments of the Swiss Federal Supreme Court are publicly accessible (in anonymised form) on the website of the court. The publication of decisions of the lower courts depends on cantonal law. The trend is for decisions of higher cantonal courts to be made accessible online in anonymised form.

Law stated - 11 August 2023

Appeals

When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

First-instance judgments can generally be appealed to the higher cantonal court and then to the Swiss Federal Supreme Court. In cases where the commercial court has jurisdiction, only one appeal is available, namely to the Swiss

Federal Supreme Court. The scope for appeal to the Federal Supreme Court is generally limited to a review of the correct application of the law.

Minimum thresholds regarding the amount in dispute are applicable. Generally speaking, the amount in dispute must be of 10,000 Swiss francs or more to be appealed before the cantonal higher court, whereas the threshold is 30,000 Swiss francs for appeals before the Swiss Federal Supreme Court.

While the duration of appeal proceedings before the higher cantonal courts generally varies between six and 12 months, appeal proceedings before the Swiss Federal Supreme Court, on average, take between six and nine months.

Law stated - 11 August 2023

Enforceability

How enforceable internationally are judgments from the courts in your jurisdiction?

Switzerland is a party to the Lugano Convention and therefore participates in the simplified enforcement regime that applies in most European countries.

Law stated - 11 August 2023

How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The enforcement of foreign judgments in Switzerland is primarily governed by multilateral or bilateral conventions, particularly the Lugano Convention. Where no such convention applies, enforcement is governed by the Swiss Private International Law Act.

Law stated - 11 August 2023

OTHER CONSIDERATIONS

Interesting features

Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Some cantons (ie, Zurich, Berne, St Gallen and Aargau) have a commercial court specialised in resolving commercial disputes. These courts are composed of both legally trained professional judges and expert judges (ie, judges with experience in the respective area of dispute). Therefore, these commercial courts combine both legal and technical knowledge. The commercial court acts as the sole cantonal instance, with the consequence that its decisions can only be appealed to the Swiss Federal Supreme Court.

Law stated - 11 August 2023

Jurisdictional disadvantages

Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

It can be challenging for claimants to prove their claim due to the rather high standards of proof and the absence of pre-trial discovery.

The fact that the courts regularly require the claimant to advance the expected court fees at the outset of the proceedings can be an obstacle, particularly in cases with high amounts in dispute. This obstacle is set to be reduced with the revision of the Civil Procedure Code (CPC), which is expected to enter into force on 1 January 2025, in that courts will henceforth only be able to demand up to half of the expected court costs as an advance payment on court fees.

Law stated - 11 August 2023

Special considerations

Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Although civil procedure is, in principle, governed uniformly throughout Switzerland by the CPC, regional differences still exist, as certain areas (such as the court organisation) are reserved to cantonal law. In particular, the language of the proceedings (and thus also the question as to which documents must be translated) depends on the official language of the respective canton.

Furthermore, the court costs may vary considerably depending on the canton, as some cantonal cost tariffs provide for a cap above a certain amount in dispute, while others do not.

Law stated - 11 August 2023

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 17 March 2023, the Swiss Parliament approved a partial revision of the Civil Procedure Code (CPC), expected to enter into force on 1 January 2025. Among other things, the revision provides for a reduction of the amount of court fees to be advanced by the claimant, the introduction of an in-house privilege in civil proceedings and a legal framework for cantons to create international commercial courts that can handle cases in English.

Law stated - 11 August 2023

Jurisdictions

	Australia	Holding Redlich
	Bermuda	MJM Barristers & Attorneys
	Brazil	Arruda Alvim, Aragão, Lins & Sato Advogados
	Bulgaria	Kinkin & Partners
	China	Jincheng Tongda & Neal
	Cyprus	Karamanolis & Karamanolis LLC
	Denmark	Lund Elmer Sandager
	Ghana	Ferociter
	Gibraltar	Signature Litigation
	India	Chadha & Co
	Indonesia	SSEK Law Firm
	Japan	Miura & Partners
	Lithuania	Triniti Jurex
	Luxembourg	Brucher Thieltgen & Partners
	Mexico	OLIVARES
	Nigeria	ÁLEX
	Switzerland	Bär & Karrer
	Thailand	Duensing Kippen
	United Arab Emirates	Horizons & Co Law Firm
	United Kingdom - England & Wales	Seladore Legal
	USA	Vinson & Elkins LLP