PANORAMIC

DISPUTE RESOLUTION

Switzerland

LEXOLOGY

Contents

Dispute Resolution

MISCELLANEOUS

Interesting features

UPDATE AND TRENDS

Recent developments and future reforms

Contributors

Switzerland

BianchiSchwald LLC

Cyrill Süess cyrill.sueess@bianchischwald.ch
Richard Meyer richard.meyer@bianchischwald.ch

LITIGATION

Court system
What is the structure of the civil court system?

In general, there are three court instances in civil proceedings: the regional court (court of first instance), the high court of the respective canton (second instance; competent primarily for appeals) and the Swiss federal supreme court (highest appeal court in Switzerland). In many cases, before the parties can submit their claim to the court of first instance, they must first go through a conciliation proceeding before a special conciliation authority.

Four cantons (Zurich, St. Gallen, Berne and Argovia) provide for a special commercial court which is competent to hear commercial disputes (generally between commercial entities) and, additionally, corporate law disputes. The commercial courts are courts of first instance, and appeals are only possible with the Swiss Federal Supreme Court. Many cantons also have special courts of first instance for labour and tenancy law matters. In those special courts, a part of the court panel consists of industry specialists or representatives of the respective industry associations (eg, tenants' associations, employers' associations) or both.

Apart from those general principles, many details of the court organisation are governed by cantonal statutes and not by federal rules. Depending on the individual case and canton, the court panel can be comprised of one, three or even five judges.

Law stated - 29 Januar 2024

Judges and juries
What is the role of the judge and the jury in civil proceedings?

Switzerland no longer has juries (with one exception being in criminal proceedings in the canton of Ticino).

The judge leads the proceedings and decides on the merits. If the court consists of more than one judge, one judge will be designated to lead the proceedings. The other judges will remain in the background and only get actively involved when it comes to major procedural decisions, interim judgments, the main hearing and the deliberations for the final judgment. In general commercial matters the judges do not have an inquisitorial role, but they question the parties, witnesses and experts based on the parties' allegations and other evidence on the record. There is no cross-examination by the lawyers, but they can request the court to ask a party, witness or expert additional questions. In certain matters, the judge has an inquisitorial role and investigates the facts ex officio.

Law stated - 29 Januar 2024

Limitation issues
What are the time limits for bringing civil claims?

It is important to distinguish between two types of time limits in Swiss law: limitation periods (***Verjährungsfristen***) and forfeiture periods (***Verwirkungsfristen***). While limitation periods are

usually longer, can be suspended by the parties and will only be considered by the court if it is raised by one of the parties, forfeiture periods are in comparison generally very short, cannot be suspended and must be examined by the court ex officio.

The limitation periods To bring civil claims depend on the nature of the claim in question. In general, the limitation period in civil law is 10 years. In exceptional cases, the time limit is 20 years (claims in relation to death or bodily injury). For some claims, however, for example rental claims, the time limit is five years or, in case of tort claims or claims for unjust enrichment specifically, only three years. If criminal law provides for a longer period, this longer period may apply under certain circumstances. Warranty claims based on the sale of moveable goods expire after two years unless the parties agree differently in accordance with the statute.

Law stated - 29 Januar 2024

Pre-action behaviour

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

In general, Swiss civil procedure law does not know mandatory pre-action steps. Neither does Swiss civil procedure law provide for a general pre-trial discovery (disclosure of documents or other evidence).

Document production requests can be based on procedural or, where applicable, substantive Swiss law. For example, the client can demand – based on Swiss substantive law - an account of the executed mandate from the principal. In such a case it may make sense to first file a claim only for documents/information before filing a main claim for damages. However, both claims (document production and main claim) can also be filed together.

Document production based on procedural rules can in general only be sought during a pending civil procedure. In some cases, it may also be possible to have the court to preserve evidence in a summary proceeding and ahead of the main proceeding (eg, if a witness is terminally ill or repair of a damaged item is required for safety reasons).

Law stated - 29 Januar 2024

Starting proceedings

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

Most civil proceedings are commenced by filing a claim with the competent conciliation authority. The latter will then send the claim to the defendant and invite the parties to a conciliation hearing. In case the parties do not settle, the conciliation authority will issue the claimant the authorisation to proceed to the court. The claimant then usually has three months' time to submit their claim with the court of first instance. The latter will send the statement of claim to the defendant and set a deadline for submitting a statement of defence. Consequently, the parties are served by the court and this is not the parties'

task (although in some cantons lawyers habitually send a copy of their submission to the opposing counsel).

In general, courts in Switzerland have the capacity to handle their caseload. Nevertheless, in recent years court proceedings have tended to take longer than before. Reasons for this are manifold and include difficulties to close open job positions as well as an increase in case numbers and complexity of the proceedings.

Law stated - 29 Januar 2024

Timetable

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

An ordinary proceeding before the court of first instance can take from two years up to five years from the filing of the claim until the judgment is handed down, depending primarily on the duration of the taking of evidence. Summary proceedings tend to take less time and urgent, ex parte interim measures can be sought within days.

The proceeding usually starts with a first exchange of briefs (statement of claim and statement of defence). Depending on the court and the case, a second exchange of briefs and/or an intermediary hearing can be held. The latter can be used to hold settlement talks or to hear witnesses or both. After the second exchange of briefs, the parties will be summoned to the main hearing, which starts with the parties' pleadings. Thereafter, the court will hear the witnesses and take other evidence. The hearing can be adjourned as necessary. At the end, the parties hold their final pleadings primarily focused on assessing the results of the taking of evidence and allocating these results to their allegations. After that, the court will start the deliberations on the judgment and draft the reasoning, which can take between a few weeks up to months.

Law stated - 29 Januar 2024

Case management

Can the parties control the procedure and the timetable?

The parties only have limited influence on the procedure and the timetable, as the judge is leading the procedural aspects of the case (case management). The parties can, however, ask for the postponement of deadlines or reply to each other's submission or both, thus prolonging the proceeding. On the other hand, the parties can also skip parts of the proceeding, for example the main hearing, upon mutual request.

Law stated - 29 Januar 2024

Evidence – documents

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

During the proceeding, the parties can file a request for document production with the court regarding the evidence in the hands of the counterparty or third parties. However, such a document must be designated precisely and be relevant for the subject matter, as Swiss law does not allow fishing expeditions. The duty to produce documents can be limited, namely due to confidentiality obligations (eg, attorney-client privilege) or higher interests (protection of trade secrets).

There is no general rule explicitly requiring the preservation of documents during the proceeding except for the general document retention obligation based on accounting and tax laws. However, the destruction of documents that could serve as evidence will be taken into account by the court when assessing the evidence and the court is likely to assume that the destroyed evidence would have proven the allegations in question. Depending on the specific circumstances, the destruction of documents can further constitute a criminal offense.

Law stated - 29 Januar 2024

Evidence – privilege

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

The correspondence of a party or a third person with an admitted attorney is privileged. The advice from an in-house lawyer is currently not privileged, however, the Swiss procedure law will be revised by 1 January 2025 to also include a privilege for in-house lawyers under certain conditions, namely if the in-house legal department is led by a qualified lawyer and the activity in question would be considered profession-specific for a lawyer (ie, legal advice).

Law stated - 29 Januar 2024

Evidence – pretrial

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

The exchange of written evidence (eg, expert opinions or documents) prior to trial is not mandatory but might be done in order to facilitate settlement talks. Witness testimonies (that are written) and affidavits prepared in advance are not provided for by the Swiss Civil Procedure Code. However, in practice there are certain proceedings, for example, where witnesses are not heard and a written statement might be used instead, but their admissibility and evidentiary value is disputed.

Lawyers are only allowed to speak with witnesses prior to trial and under very strict conditions. The preparation of a witness for their testimony is prohibited.

Law stated - 29 Januar 2024

Evidence – trial

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

In general, parties and witnesses are questioned personally at the main hearing. If witnesses have been heard abroad (by request of the court), the minutes of the witness hearing will be taken into account. Experts provide their opinion primarily in written form. Upon request by the court, they must, however, testify in person. The court may also conduct an inspection on site (for example on a property) to better understand the factual circumstances and to get a first-hand experience. Administrative authorities can provide written information, and the court may ask private entities (eg, a bank) to also provide written information in case a witness hearing is not necessary.

Law stated - 29 Januar 2024

Interim remedies

What interim remedies are available?

In general, there is no limitation as to the content of an interim remedy. It can be any court order that is suitable for averting the impending disadvantage, for example:

- an asset freeze;
- a general prohibition to do something;
- an order to remedy an unlawful situation;
- an instruction to a registration authority or a third party;
- a benefit in kind; or
- where provided for by law, a cash payment.

As a general principle, it is, however, not allowed to anticipate the judgment with the interim measure sought, which is why provisional orders requiring performance (ie, duty to perform a cash payment or a service) are only possible under very restrictive conditions. In general, it is also possible to ask for interim relief if the main proceeding takes place outside of Switzerland. Search orders are a discovery tool and generally not part of Swiss civil procedures, but rather criminal proceedings.

Law stated - 29 Januar 2024

Remedies

What substantive remedies are available?

The remedy is based on the content of the material claim in question. Most claims are monetary claims for payment of a certain amount of money. In general, for every due payment interest can be sought in case the debtor is at default with the payment. Punitive damages are not present in Swiss law.

Courts can also order a party to actively do something (repair a defective device, leave a building or issue a statement, for example), refrain from doing something or tolerate certain

acts of another party. In other words, a judgment does not always have to provide for a monetary payment.

Law stated - 29 Januar 2024

Enforcement
What means of enforcement are available?

In case of a monetary claim, the debt enforcement agency is competent for the enforcement and will confiscate assets of the debtor, sell them (usually via public auction) and pay the creditors off. In the other cases (obligation to do something, refrain from something or tolerate something), the court can order a substitute performance or that any infringement of the obligation is criminally punishable or leads to a penalty payment. The court can also order the physical removal of movable objects or the eviction of a property by force, with the help of the police, for example.

Law stated - 29 Januar 2024

Public access
Are court hearings held in public? Are court documents available to the public?

In general, court hearings and oral judgment announcements are public. The cantonal law decides whether the deliberations on the judgment are also public. The public may be excluded in whole or in part if the public interest or the legitimate interest of a person involved so requires. Family law matters are always inaccessible to the public. In general, the court must publish its judgments, however, due to the privacy rights of the parties involved, the decisions are anonymised. Third parties have no right to inspect court files, except under narrow conditions, for example for scientific research.

Law stated - 29 Januar 2024

Costs
Does the court have power to order costs?

The court has the power to order costs. In almost all cases the courts demand an advance on costs in the full amount of the estimated court costs from the plaintiff. This practice will be changed by an amendment to the current statute that will enter into force on 1 January 2025. Based on the new legislation, courts can, in general, only demand an advance in the amount of half of the estimated costs. This measure shall ease the financial burden for claimants.

In general, the amount in dispute is decisive for the court costs, but also the complexity and length of the proceeding have an influence. The allocation of court costs is regulated by federal law while the amount of court costs is a matter of cantonal law. Therefore, each canton has its own schedule of court costs, which can vary substantially.

If the plaintiff is, inter alia, not resident or domiciled in Switzerland, appears insolvent or owes legal costs from previous proceedings, the claimant must provide security for the defendant's party compensation at the request of defendant. This obligation may be removed by international treaties.

Law stated - 29 Januar 2024

Funding arrangements

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

No win, no fee agreements between attorneys and clients, in other words pure success fees, are forbidden. Attorneys shall remain independent from their claimant and assess the success chances of each case independently. However, it is possible to agree on a success fee in addition to the ordinary lawyer's fee under certain, restrictive conditions.

Third-party litigation funding is generally allowed, and such professional financiers are also allowed to take a share of any proceeds of the claim. However, the client's attorney must remain independent from the litigation financier. In recent years, a few players have established themselves on the Swiss market.

Law stated - 29 Januar 2024

Insurance

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

Yes, legal expenses insurance is available in Switzerland and rather common. Private individuals can, for example, insure their legal expenses in labour law or tenancy law disputes or regarding officers' and directors' liability claims.

Law stated - 29 Januar 2024

Class action

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

Under the current law, it is possible under certain conditions to join parties on either the claimant's or defendant's side or to assign claims to a party or both, so that this party can raise all the claims in one proceeding. However, the Swiss Civil Procedure Code is not designed for a large number of plaintiffs and/or defendants and has no special procedure for mass damages. Swiss civil procedure law does not provide for class actions so far (except for the action of an association, which is however used against violations of the personality of the association's members, not for monetary compensation). In recent years there have

been initiatives to reform Swiss law by implementing new rules for collective redress. One initiative, which proposes group settlement procedures and group actions also for monetary compensation, is still in the making in the parliament.

Law stated - 29 Januar 2024

Appeal

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

In general, the parties can appeal judgments from the court of first instance to the higher court of the canton and thereafter, as a last instance, to the Swiss Federal Supreme Court. They can either argue that the court misapprehended the facts or did not apply the law correctly. In general, the range of admissible complaints is smaller the higher the level of the court. The depth of the examination depends on the procedure and type of appeal in question. As an additional remedy, the parties can also request a revision of a judgment in extraordinary cases.

Law stated - 29 Januar 2024

Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The most important treaty on the recognition and enforcement of foreign judgments is the Lugano Convention between the European Union, Denmark, Iceland, Norway and Switzerland. The requirement for the recognition and enforcement of judgments from these countries under the Lugano Convention are rather liberal. The Swiss judge is generally not allowed to reassess the judgment on the merits.

If a judgment stems from a country without a treaty, the recognition is regulated by the Swiss Federal Act on Private International Law. The recognition and enforcement of foreign judgments usually happens incidentally during the enforcement proceeding.

Law stated - 29 Januar 2024

Foreign proceedings

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

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

Based on the different Hague Conventions on international legal assistance in civil matters, Swiss courts have the possibility to request foreign courts to assist them in the taking of evidence and with the service of court documents. A Swiss court can for example ask a

foreign court, based on the applicable Hague Convention, to summon and question a witness for the Swiss proceeding.

Law stated - 29 Januar 2024

ARBITRATION

UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The UNCITRAL Model Law serves as a reference point for the Swiss arbitration law, which, however, remains more liberal and thus provides for an independent, user-friendly regulation.

Law stated - 29 Januar 2024

Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing or in another form that allows proof by text. The signature of the parties is not required. Arbitration agreements concluded via email are also formally valid. The text must be physically reproducible, in other words it must be possible to print it out or save it permanently.

Law stated - 29 Januar 2024

Choice of arbitrator

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

Unless the parties have agreed otherwise, the arbitration tribunal shall consist of three members, with the parties each appointing one member. The members shall unanimously elect a president.

A party may challenge a member of the arbitral tribunal whom it has appointed or in whose appointment it has participated only for reasons of which it has become aware after the appointment, despite having exercised due diligence.

Law stated - 29 Januar 2024

Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

In most cases, arbitration institutions provide lists with experts that can be chosen and proposed by the parties as arbitrators. In Switzerland, there is also the Swiss Arbitration Association, which unites the arbitration experts in Switzerland. As the Swiss arbitration market has become more and more professionalised, it is generally not a problem to find a suitable expert arbitrator with the necessary legal and industry knowledge for the case at hand.

Law stated - 29 Januar 2024

Arbitral procedure

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

The parties may draw up the arbitration rules themselves or reference an existing set of arbitration rules; they may also declare a procedural law of their choice to be applicable. If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules. Apart from that, the Swiss international arbitration law only contains the most essential procedural rules, like, for example, the equal treatment of the parties and the right to be heard.

Law stated - 29 Januar 2024

Court intervention

On what grounds can the court intervene during an arbitration?

The court can, for example, intervene if a party does not voluntarily submit to an interim measure ordered by the arbitral tribunal. The arbitral tribunal or a party may request the intervention of the state court, which shall apply its own law. Other main scenarios for an intervention of state courts are the appointment or removal of arbitrators or the taking of evidence.

Law stated - 29 Januar 2024

Interim relief

Do arbitrators have powers to grant interim relief?

Unless the parties have agreed otherwise, the arbitral tribunal may order preliminary or protective measures at the request of one of the parties. If the party concerned does not voluntarily submit to the measure ordered, the arbitral tribunal or a party may request the assistance of the state court.

Law stated - 29 Januar 2024

Award

When and in what form must the award be delivered?

In international arbitration, the decision shall be made in accordance with the procedure and form agreed by the parties. In the absence of such an agreement, the decision shall be made by majority vote or, if there is no majority, by the chairperson of the arbitration tribunal. The decision must be made in writing, be dated, signed and must state the reasons. In case of domestic arbitration, the rules are more detailed.

Law stated - 29 Januar 2024

Appeal

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

In general, international arbitration awards are final. The only court of appeal is the Swiss Federal Supreme Court, which reviews the arbitral award only on limited grounds, namely:

- whether the arbitral tribunal was composed improperly;
- whether the arbitral tribunal has wrongly declared itself to be competent or incompetent;
- whether the arbitral tribunal has ruled on issues that were not submitted to it or left legal claims unadjudicated;
- whether the principle of equal treatment of the parties or the principle of the right to be heard has been violated; or
- whether the decision is incompatible with public policy.

Apart from that, a party may request the revision of an arbitral award (also with the Swiss Federal Supreme Court), which has only been granted once in decades. The revision is also only possible for very limited reasons.

If none of the parties has its domicile, habitual residence or registered office in Switzerland, they may, by a declaration in the arbitration agreement or in a subsequent agreement, exclude appeals against arbitral decisions in whole or in part. The latter is not possible regarding a revision if the outcome of the arbitration was influenced by a crime.

In domestic arbitration, the parties can agree by express declaration in the arbitration agreement or in a subsequent agreement that the arbitral award may be appealed to the cantonal court having jurisdiction. The cantonal court takes a final decision. The right to appeal cannot be waived in advance.

Law stated - 29 Januar 2024

Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The proceeding for the enforcement of foreign arbitration awards in Switzerland is the same as for judgments from foreign state courts. The recognition and enforcement is usually sought incidentally during the enforcement proceeding. The conditions for the

recognition and enforcement are laid down in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Domestic arbitral awards are enforced in the same proceeding as state court decisions.

Law stated - 29 Januar 2024

Costs
Can a successful party recover its costs?

Cost issues are primarily governed by the procedural law the parties chose. In general, it must be distinguished between the costs of the tribunal (arbitrators' fees and expenses, expert costs, infrastructure costs etc) and the party compensation (lawyer fees, fees and compensation paid to experts, travel and accommodation expenses etc). In its award or in a separate award on costs, the arbitration tribunal also decides on the amount and distribution of the costs of the arbitration tribunal and the compensation of the parties. If the claimant appears to be insolvent, the arbitral tribunal may, at the request of the defendant, order that the latter's presumed party compensation be secured.

Law stated - 29 Januar 2024

ALTERNATIVE DISPUTE RESOLUTION

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

The Swiss civil procedure code requires in many cases that parties first submit their lawsuit to a conciliation authority. Only in case the conciliation hearing is unsuccessful are they allowed to file their lawsuit with the court of first instance. In addition, the courts regularly conduct off the records settlement talks where the court provides a first preliminary assessment of the case. As a result, a substantial share of lawsuits are settled without going through a complete court procedure, and the parties are encouraged to settle the dispute at a comparably early stage. Apart from the mandatory conciliation proceedings, mediation is also used on a voluntary basis in Switzerland, particularly in family or estate law matters.

Law stated - 29 Januar 2024

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

Apart from the mandatory conciliation proceedings ahead of most civil proceedings, the court cannot compel the parties to participate in an ADR process during an already pending proceeding, but it can recommend mediation to the parties. Apart from that, the parties can jointly request mediation instead of a conciliation procedure or at any time during an already

pending court proceeding. In the first option, the conciliation is replaced by the mediation and in the latter option, the court proceedings are suspended during the mediation.

Law stated - 29 Januar 2024

MISCELLANEOUS

Interesting features

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

The unified Swiss civil procedure code is only just over 10 years old. Prior to that, each canton had its own civil procedure rules. Many courts still stick to their old habits and rules, which is why there are still many differences in the handling of cases. Switzerland has four official languages (German, French, Italian and Romansh). Depending on where the court proceeding takes place, the parties (and the court) must therefore use the language of that area. English is not an official court language, however, with the reform of the Swiss Civil Procedure Code effective as of 1 January 2025, cantons can provide for proceedings in English in international commercial disputes as well as for certain procedures before state courts in connection with international arbitration. In these procedures, the parties can also file briefs in English with the Federal Supreme Court. Finally, it is worth mentioning that in a few courts of first instance in more rural areas layman without legal education are still employed as judges. These judges are usually assisted by court clerks with a law degree.

Law stated - 29 Januar 2024

UPDATE AND TRENDS

Recent developments and future reforms

What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for dispute resolution reform? When will any reforms take effect?

In March 2023 the Swiss parliament passed a reform of the Swiss Civil Procedure Code, which will come into force on 1 January 2025. It encompasses several improvements adapting the learnings from the first decade of application of the new unified Swiss Civil Procedure Code (which was introduced in 2011). To name a few examples: (1) there will be a new possibility for the cantons to set up a specialised international commercial court; (2) courts shall only be allowed to demand a maximum of half of the estimated court costs as an advance on costs (as a general rule, with exceptions); (3) cantonal law may now also provide that the parties to an international commercial dispute choose English as the language of the proceeding; (4) the correspondence with inhouse-lawyers will, under certain conditions, be privileged; and (5) private expert opinions will no longer be regarded as party assertions, they will qualify as documentary evidence.

Apart from that, the Swiss federal council proposed an expansion of the possibilities for collective redress, which is still in preparation in the respective parliamentary commission.

Finally, Swiss parliament decided to accede to the Hague Convention on Choice of Court Agreements dated 30 June 2005. The Convention governs the jurisdiction of courts in international commercial disputes in case the parties agreed on a venue and the cross-border recognition and enforcement of such court judgments. The Convention currently applies in the EU, Ukraine, Mexico, Singapore, Montenegro and the United Kingdom.

Law stated - 29 Januar 2024