# Switzerland

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The Swiss legal system is based on the civil law tradition in which all laws are codified. However, the legislator may give authority to administrative bodies to release more detailed provisions in ordinances. Depending on the legal area concerned, laws may be released by the Federal Assembly of the Swiss Confederation, the legislative bodies of the cantons, or even the municipalities. Court decisions in Switzerland do not have legislative effect but rather serve to interpret existing statutory law. The

Swiss Code of Obligations ("CO"),[1] which is Part Five of the Swiss Civil Code ("SCC"),[2] serves as the primary legal foundation for matters related to damages.

## A. Compensatory Damages

Swiss tort law is based on the principle that the injured party must bear their own damage unless a legal provision provides for the liability of another person. In this context, Article 41, Paragraph 1 of the Code of Obligations, the general provision for extra-contractual compensation claims stipulates that "any person who unlawfully causes damage to another, willfully or negligently, is obliged to provide compensation." In the case of a breach of a contractual obligation, Article 97, Paragraph 1 of the Code of Obligations sets out the general principle: "An obligor who fails to discharge an obligation at all or as required must make amends for the resulting damage unless he can prove he was not at fault."

Under Swiss law, "damage" is defined as an involuntary decrease in assets, an increase in liabilities or a loss of profit.[3] Damages are determined according to the "difference theory" of the Swiss Federal Court, which calculates damage by comparing the creditor's current asset state with the hypothetical state of the creditor's assets had the damaging event not occurred.[4] Damage in a legal sense only comprises loss which can be measured financially.

A claim for compensation, whether based on an extra-contractual or contractual basis, has a purely compensatory character. However, in cases of homicide or personal injury the court may award the victim or the dependents of the deceased an appropriate sum by way of satisfaction which goes beyond the compensation of financial loss.[5]

## B. Consequential and Incidental Damages (and Exclusions)

The statutory definition of "damage" under Swiss law includes not only direct damages but also incidental and consequential damages. A successful compensation claim requires, in addition to further general requirements of liability (damage, damaging event/breach of contractual obligation, natural causal connection between damage

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[1] Federal Act on the Amendment of the Swiss Civil Code of March 30, 1911 (Part Five: The Code of Obligations), SR 220.

[2] Swiss Civil Code of December 10, 1907, SR 210.

[3] BGE 132 III 321, cons. 2.2.1; 132 III 564, cons. 6.2.

[4] *Id.*

[5] CO art. 47.

and damaging event/breach of contractual obligation, acting at fault, i.e. intent or negligence)[6] an adequate causal connection between the damaging event/breach of the contractual obligation and the damage. According to the Swiss Federal Court, the causal connection is adequate if the cause is capable according to the normal course of events and the experience of life of bringing about or at least favoring an outcome such as the one that has occurred.[7] Entitlement to compensation for consequential and incidental damages depends on whether the damaging event/breach of contractual obligation is considered an adequate cause of the damage according to this theory.

The exclusion of consequential and incidental damages by contract is generally permissible under Swiss contract law even if it represents a limitation compared to what would be owed under the legal concept of causality. However, in accordance with Article 100, Paragraph 1 of the Code of Obligations, such exclusions are void if the damage was caused by intent or gross negligence.

### C. Punitive Damages

Unlike in other jurisdictions and aside from exceptions in labor law, punitive damages do not exist under Swiss law. Damages are solely compensatory, representing the actual damage suffered.

### D. Liquidated Damages

A liquidated damages clause is a contractual agreement specifying an amount that is to be paid as compensation in the event of a certain breach of contract.[8] Even where there is no statutory provision regulating liquidated damages, liquidated damages is a recognized concept in Swiss law. Such clauses simplify the enforcement of any contractual claim for damages since they relieve the creditor from its obligation to prove the actual amount of damage incurred.[9]

A liquidated damages clause must be distinguished from a contractual penalty as defined in

[6] An extra-contractual liability also requires the existence of an unlawful act, meaning the violation of an absolute right (such as physical integrity or property) or, in case of a purely financial loss, violation of a protective provision.

[7] BGE 135 IV 56, cons. 2.1; 129 II 312, cons. 3.3.

[8] Christian Oetiker, Pascal Burgunder, and Selim Keller, *The essentials of Swiss contract law: Contractual Penalties* (no. 4), (May 17, 2023), https://www.lexology.com/library/detail.aspx?g=f9cb73a5-9167-42b2-9246-9aebf79d3f24 (last visited on July 28, 2026).

[9] CLAIRE HUGUENIN, OBLIGATIONENRECHT, ALLGEMEINER UND BESONDERER TEIL (3rd ed., 2019).

Article 160 of the Code of Obligations. Unlike a contractual penalty, liquidated damages have no punitive but a purely compensatory function and require the existence of actual damages. Determining between a contractual penalty or liquidated damages requires a review of the contract.[10]

**E. Pre- and Post-Judgment Interest**

In the context of pecuniary debts, Article 104, Paragraph 1 of the Code of Obligations provides that "a debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract." For default interest to accrue, the debtor must be in default with its payment of the amount owed. This occurs when the amount of money owed is due for payment and the creditor sends the debtor a reminder and clearly requests the debtor to pay the sum of money.[11]

Another type of interest under Swiss case law is the so-called "interest on damage" which is part of the loss suffered and therefore of the actual damage.[12] This interest rate is usually also 5 % and accrues – in contrast to the default interest – automatically from the damaging event until the date of full payment. Such interest is intended to place the injured party in the same position as if their claim had been satisfied on the day the damage occurred.[13]

Both types of interest serve essentially the same functional purpose—to compensate for the disadvantage that the capital cannot be used. The Swiss Federal Court has decided that these two categories of interest cannot be claimed cumulatively, meaning that it is not permissible to award additional default interest from the date of judgment on the interest accrued up to the date of judgment. Damage interest is replaced by default interest from the date of the judgment.[14]

**F. Attorney's Fees**

Under Swiss law, attorney's fees are part of the procedural costs according to Article 95 of the Code of Civil Procedure.[15] At all stages of a Swiss civil proceeding, the principles of cost allocation according to Article 106 apply, meaning that the unsuccessful party is liable for the costs, including the attorney's fees of the successful party. If no party is entirely successful, the costs are allocated in accordance with the outcome of the case.

[10] Oetiker, Burgundy, and Keller, *supra* note 8.
[11] BGE 130 III 591, cons. 3.
[12] BGE 131 III 12, cons. 9.1.
[13] BGE 130 III 591, cons. 4.
[14] BGE 131 III 12, cons. 9.
[15] Swiss Civil Procedure Code of December 19, 2008, SR 272.

However, there are some exemptions found in Article 107, Paragraph 1, where the court may diverge from the general principles of cost allocation and allocate the costs at its own discretion. This applies particularly where:

- an action has been upheld in principle but not for the full amount claimed, and the amount of the award was determined at the court's decision or if the claim was difficult to quantify;
- a party was forced to litigate in good faith;
- family law proceedings or proceedings related to registered partnership;
- the proceedings are dismissed as groundless and the law does not provide otherwise; or
- there are other extraordinary circumstances that would result in an allocation according to the outcome of the case being inequitable.

Indemnity for costs is subject to cantonal regulations and, therefore, the respective amounts may vary between different cantons. Compensation for these costs is limited to reasonable and necessary costs (or what is considered as such), often based on tariff frameworks. That often results in only a (small) part of actual costs being indemnified. The difference between the actual costs incurred and the compensation awarded cannot be claimed as damages.

In contrast, according to the Federal Court, pre-litigation attorney's fees can be considered a component of damages under liability law. This is only the case if they were justified, necessary, and reasonable to enforce the respective claim for damages.[16]

### G. Reliance Damages

In Swiss law, the term "reliance damages" generally refers to the liability for breach of trust that has been created.[17] Reliance damages serve as a basis for compensation claims when there is no contractual liability and tortious liability does not offer sufficient protection under liability law, although such protection appears appropriate in

[16] BGE 117 III 394, cons. 3a.
[17] BGE 133 III 449, cons. 5.4.2.

the specific situation.[18] The concept of reliance damages–derived from the legal requirement of good faith found in Article 2 of the Civil Code–has been introduced in Swiss case law with the Swiss Federal Court's decision when it held a parent company liable for statements it made to the business partners of its subsidiary (the so-called *Swissair* decision).[19] In addition to the general requirements for damages, an award of reliance damages requires in particular:

- a *special legal relationship* between the injured and the injuring party that goes beyond mere coincidental contact. This relationship is characterized by a level of trust in the behavior of the other party, however, without already constituting a contract;[20] and
- *good faith* of the injured party and *breach of trust* that causes (naturally and adequately) the damage.[21]

[18] BGE 133 II 449, cons. 4.1.
[19] BGE 120 II 331.
[20] BGE 134 III 390, cons. 4.3.2; BGE 120 II 331; cons. 5a.

### H. Unjust Enrichment Damages

In Swiss law, unjust enrichment is enshrined in Article 62, Paragraph 1 of the Code of Obligations, which states that "a person who has enriched himself without just cause at the expense of another is obliged to make restitution." This legal provision forms the basis for restoring legally unjustified transfers of assets. For instance, this is the case when someone fulfills an existing contract in whole or in part, and the contract (legal basis) subsequently ceases to exist.

### I. Unique Remedies (for example, Plaintiff-Favorable Prejudgment Remedy Statutes)

Swiss civil procedure law provides some features which may assist damaged parties in bringing their claims. For example, Swiss civil court proceedings allow the precautionary taking of evidence. Normally, evidence is taken in accordance with the parties' submissions.[22] However, under certain circumstances, Article 158 of the Code of Civil Procedure grants the applicant the right to request the court to collect evidence independently of any court proceeding ("at any time"). This

[21] UELI SOMMER, VERTRAUENSHAFTUNG, ANSTOSSE ZUR NEUKONZEPTION DES HAFTPFLICHT- UND OBLIGATIONENRECHTS', 1035 (AJP 2006).
[22] *See* CPC art. 231 ("After the party submissions, the court takes the evidence.").

includes the request of a precautionary expert opinion.[23] The precautionary taking of evidence aims at clarifying the chances of success in litigation at an early stage, thereby avoiding futile litigation.[24]

Plaintiffs may also simplify a proceeding by filing a "partial action" in accordance with Article 86 of the Code of Civil Procedure, which allows a party to claim only a portion of the damage. By limiting the amount in dispute to 30,000 Swiss francs, the claimant can utilize the "simplified proceeding" in accordance with Article 243, Paragraph 1,[25] which offers strategic benefits over the "ordinary proceeding" particularly due to the reduced financial and litigation risks and the simplified process.[26] A dispute amount of 30,000 Swiss francs still permits an appeal to the Federal Court,[27] However, the defendant can counter a partial action by filing a negative declaratory judgment for the entire amount. If this counterclaim exceeds 30,000 Swiss francs, both the main claim and the counterclaim must be dealt together in the ordinary proceeding, thereby increasing the litigation burden and significantly elevating the litigation risk.

Another unique feature of the Swiss system is the qualification of private expert opinions in Swiss civil proceedings. Previously, private expert opinions are only considered as assertions by the parties, rather than formal evidence.[28] However, with the recent revision of the CPC effective from January 1, 2025, these opinions will be qualified as physical records in accordance with Article 177 and, be elevated to the status of admissible evidence.[29] They will be subject to the court's free assessment of evidence under Article 157, marking a significant shift in their role within the legal framework.

## J. Public Policy Prohibitions

Swiss contract law is based on the freedom of contract, meaning that anyone is free to conclude a contract on any content with any partner.[30] However, this principle is subject to certain restrictions. In particular, according to Article 20, Paragraph 1 of the Code of Obligations, "a contract is void if its

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[23] BGE 140 III 16.
[24] BGE 143 III 113 cons. 4.4.1; 140 III 16, cons. 2.2.1.
[25] *See* CPC art. 243 para. 1 ("Simplified proceedings apply in financial disputes with a value in dispute not exceeding 30,000 francs.").
[26] The ordinary proceeding is found at CPC art. 219 *et seq*.
[27] *See* Swiss Federal Court Act of June 17, 2005, SR 173.110, art. 71.
[28] BGE 141 III 433 cons. 2.6.
[29] Dispatch of the Federal Council on the Amendment of the Swiss Code of Civil Procedure of February 26, 2020, p. 2752.
[30] BGE 129 III 35, cons. 6.1.

terms are impossible, unlawful or immoral." A contract is deemed impossible under this provision if it is objectively impossible to fulfill from the outset, meaning the impossibility existed at the time the contract was concluded, and "unlawful" refers to the violation of mandatory provisions of Swiss law.[31] A contract is considered "immoral" if it violates the general sense of decency or the ethical principles and values inherent in the overall legal order.[32]

In accordance with Article 27, Paragraph 2 of the Civil Code, "no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals." Based on this provision, freedom to contract is also limited by the prohibition of excessive bonding, which is the case when concluding a "perpetual" purchase and supply contract.[33]

[31] BGE 133 III 61, cons. 3.2.1.
[32] BGE 123 III 101, cons. 2; 136 III 474, cons. 3.
[33] BGE 114 II 159, cons. 2b.