

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

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SWITZERLAND

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Switzerland would be described as a civil code jurisdiction.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

The method of adjudication before state courts in Switzerland is adversarial, with some minor exceptions where there are also inquisitorial elements (generally speaking not relevant in commercial matters).

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

In Switzerland, the organization of the courts of first and second instance in civil matters is governed by the law of the cantons (states). The organization, qualification and method of appointment or election therefore differ to some extent from canton to canton. In any case, there are no juries in Switzerland. In the canton of Zurich, for example, judges are normally elected, be it by the people (district court judges) or by the cantonal parliament (judges at the Superior Court and the Commercial Court). Nowadays judges are normally legally trained judges in the sense that they have obtained a law degree from a university and in most cases also obtained bar admission.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

Again, the organization of the courts differs to some degree from canton to canton. In essence, there are specialized courts in the fields of labour and tenancy, and certain cantons (such as the cantons of Zurich, Berne, Argovia and Saint Gall) have specialized commercial courts that basically handle all disputes between commercial entities.

5. Is arbitration an option and when? If so, what rules are typically used?

Switzerland is an arbitration friendly country and is actually one of the top venues for international arbitration worldwide. In international arbitrations with venue in Switzerland, most often the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) and Rules of the Swiss Chambers' Arbitration Institution ("Swiss Rules") are used. In domestic matters, arbitration certainly is an option to many parties, but it seems fair to say that most domestic disputes are still dealt with before state courts. The "Swiss Rules" which were developed for international arbitration are often used in domestic disputes as well (see www.swissarbitration.org for further information, including arbitration clauses).

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6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Swiss courts will always respect a valid arbitration agreement and will not interfere. On the contrary, they will give any support to arbitral proceedings which may be required.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

Mediation proper is not mandatory in Switzerland. However, in order to file an action with the court, the claimant generally first needs to file a request for reconciliation with a so called justice of peace (who is often a lay person). The justice of peace attempts to facilitate a settlement between the parties. There are certain cases where no reconciliation proceeding is required, in particular in cases where a commercial court has jurisdiction. The parties may use mediation in place of a reconciliation request. It is fair to say that in commercial matters, mediation in Switzerland is not often used, which may be a consequence of the above mentioned reconciliation procedure before the justice of peace and the fact that courts in Switzerland generally attempt to facilitate a settlement between the parties which is, of course, not mediation proper but aims at a similar goal.

8. What is the process for pre-hearing fact discovery (if any)?

There is no pre-hearing fact discovery in the sense of discovery as in the United States. Switzerland is a “no discovery” jurisdiction. Under the Swiss Federal Civil Procedure Code (“CPC”, which came into force in 2011 and replaced the 26 Cantonal Civil Procedure Codes that were in force previously), there is a possibility for a claimant to attempt to take specific evidence before instituting ordinary proceedings, if certain conditions are met, but the threshold is rather high, and it is also possible to request certain information based on the Swiss Data Protection Act. However, there is nothing that would be even remotely comparable to United States style discovery.

In order to understand the following answers to the issues raised, it is important to note that Swiss civil procedure is quite different from United States procedure: As already mentioned, there is no discovery as such. Rather, a claimant files his action and all documentary evidence that he believes supports his case. Likewise, the respondent together with his answer to the statement of claim files those documents that he believes support his case. Swiss civil proceedings essentially consist of two phases: First, the allegation phase (oral or written pleadings, and filing of documentary evidence by each party), and secondly the taking of evidence phase. It is possible for a party to apply to the court to order the counterparty to disclose and file certain specific documents, if they are relevant and necessary for the outcome of the case. However, such documents must be clearly specified (no fishing expeditions, no request for broad categories of documents but rather, for example, disclosure of the letter sent by Mr X to Mr Y on or around 11 May 20. with regard to the issue of malperformance of a certain machine).

(a) *Are there provisions for mandatory document disclosures?*

No (see above).

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(b) Is there provision for oral examinations of the parties or others?

As mentioned above, there is no discovery in Switzerland, neither with regard to documents nor would there be depositions in the United States style. Witnesses would be heard only in a court hearing (before all sitting judges or a delegation of the court). It is the judge who asks questions to the witness based on the allegations made by the parties in their briefs, not the parties or their counsel. Counsel may be given the opportunity to ask additional questions to the witness, but always under the control of the court (depending on the court and the judge, the court will request counsel to formulate his question, the judge would then consider it and if he deems the question appropriate, ask the question himself to the witness, sometimes this procedure is simplified in the sense that a judge may allow counsel to ask the questions directly, but still under strict supervision of the judge who may interfere at any time). There is therefore no cross-examination as in the United States. Moreover, it seems fair to say that Swiss courts tend to rely rather on documentary evidence, in particular documentary evidence that stems from the time in question and not so much on witnesses. In the Zurich Commercial Court for example, it is rather rare that witnesses would be heard. If witnesses are heard, then the testimony is normally kept rather limited.

(c) Are there limits on the length of oral examinations?

No, but if an oral examination takes place at all it usually is rather short.

(d) Are witness statements or summaries to be provided before the hearing?

There are no witness statements proper. However, in their pleadings, the parties have to state in great detail (in a “substantiated” manner) what a witness is expected to give evidence on.

9. What is the process for pre-hearing expert disclosure (if any)?

Again, as there is no discovery as in the United States and the procedure differs greatly, there is no pre-hearing expert disclosure as in the United States. Parties may file written expert reports, but they do not qualify as means of evidence and have the same legal standing as the parties’ allegations. In order to qualify as a means of evidence proper, the expert must be appointed and instructed by the court. The parties may request in their briefs that such expert shall be appointed by the court. It remains in the court’s discretion whether an appointment of an expert is feasible or not.

(a) Are expert reports or written summaries required to be exchanged?

The parties are free to file along with their written pleadings one or more expert reports. If they file such a report, a copy is given to the counterparty by the court. The parties are, however, not required to file expert reports. In most cases, the parties request an expert opinion to be obtained by the court at a later stage in the proceedings.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

No.

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(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

No.

10. Are there other notable discovery rules?

No.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

There is no pre-hearing conference as such. However, the court may at any time hold a hearing, in particular to facilitate a settlement between the parties.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

The parties may request the court to deal with certain issues that could potentially decide the case altogether, for example with regard to whether the claim brought is time-barred or not. Moreover, a claimant may choose a special (swifter) summary procedure if he believes he has a “clear case”. The threshold for a “clear case” that would allow the court to render a judgment in such summary proceedings (in essence, full decision based on documentary evidence filed) is high and only a small fraction of the cases meet the threshold.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

As set out above, the normal sequence of proceedings in civil matters before Swiss courts is that the parties first plead their case, and that there is thereafter the taking of evidence procedure. The court will only take the evidence it deems relevant. Expert reports filed by the parties do not qualify as means of evidence, they merely rank on the same level as the parties’ allegations in their pleadings.

14. What is the standard for admissibility of expert evidence?

The parties may file expert reports along with their briefs, but these party appointed expert reports do not qualify as means of evidence. They merely rank on the same level as the parties’ allegations in their pleadings. It is for the court to appoint an expert, based on a request by one party or by both parties, and the court will only do so if it considers such expert evidence relevant.

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15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Yes, the court may appoint its own experts and this is actually the only expert evidence that would qualify as a means of evidence. However, the court usually only does so if requested by one or both parties. The court will only appoint an expert if it considers it relevant.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Yes, privilege essentially is protected (“attorney secrecy”). As there is no discovery in Switzerland, privilege generally triggers less issues. In-house counsel may not invoke the privilege related to the attorney secrecy. Settlement discussions between counsel are to be kept confidential (normally put under a “no prejudice” proviso).

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

As pointed out above (see question 8), there is no discovery in Switzerland, and privilege is essentially protected (see question 16). The CPC provides for rules regarding the disclosure of information one of the parties qualifies as business secrets.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

The court will decide on such issues.

19. Briefly describe the trial process?

In Swiss civil proceedings, there is not really a “trial” as in the United States. In particular in more complex commercial cases, pleadings are done by way of written brief, and documentary evidence is filed along with such briefs. The parties and the courts primarily rely on documentary evidence, and witnesses generally have much less importance than in the United States. Hearings with oral pleadings are possible.

(a) Are there opening submissions, in what form and of what length?

No.

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(b) *What is the order of presentation of witnesses?*

It is for the court to decide in which order it wishes to hear witnesses, if any.

(c) *Who conducts examination and in what order?*

It is for the court to examine the witnesses and the experts. Counsel for the parties may be given an opportunity by the court to ask additional questions, but always under supervision and limited by the court.

(d) *What is the process for closing submissions?*

The parties may comment on the result of the taking of evidence, be it orally or in writing. The parties may further elaborate on legal questions related to the case.

20. Please identify any other notable trial procedures.

Not applicable.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

The general rule is that the party that wishes to derive a claim from a fact bears the burden of proof with regard to that fact. In essence, therefore, the claimant bears the burden of proof of liability including the proof of causation and the proof of damages and quantum.

The standard of proof does in general not vary between categories like causation, damages etc.

In ordinary court proceedings the standard of proof is met when the judge does no longer have reasonable doubt whether a fact occurred or not.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

In civil matters in Switzerland, only compensatory damage may be recovered. Interest may be recovered based on the specifics of the case (for example interest for delayed payment). There are no punitive damages in Switzerland.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Not applicable (see Question 22).

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24. Are there time limits for bringing claims? Responding to claims? Please describe.

There are certain limits to be respected for bringing claims which may be based on substantive law (e.g. statute of limitations) or based on procedural law (in certain types of proceedings). In cases where the claimant has to go through the reconciliation procedure before the justice of peace, and no settlement can be reached, the justice of peace will, at the request of the claimant, issue a so called permission to sue to the claimant which is valid for three months. However, if the three months period has lapsed and the claimant has not filed an action with the court, the claimant may simply institute a further reconciliation proceeding before the justice of peace and would not be precluded from claiming just because he missed the three months deadline (unless, of course, he missed the prescription period or similar time limit). Once court proceedings have commenced it is the court that determines the timetable and sets deadlines for the parties to file their written briefs, etc.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

Jurisdiction is given if an international treaty, in particular the so called Lugano Convention, (the equivalent to the Brussel's I Regulation) between Switzerland and the member states of the European Union or Swiss procedural law provide for jurisdiction. The two main grounds for jurisdiction are a jurisdiction agreement between the parties (normally a jurisdiction clause in a contract) or jurisdiction of the court at the place of the defendant. Depending on the matter and the applicable international treaty or procedural law, other grounds for jurisdictions may apply, for example at the place of performance etc. If jurisdiction based on the above mentioned rules is given, there is no room for a defendant to claim that there would be a more convenient forum somewhere else.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

It is possible for a defendant to bring other potentially responsible parties into the proceeding. A party to proceedings may file an action against a third party for claims it believes it would have (if it loses against the main counter-party) in the same proceedings. To give an example: A sues B for claims out of malfunction of a machine, B would, should A be successful, like to take recourse against C from whom B bought relevant parts of the machine. B may file its action against C in the proceedings pending between A and B if the prerequisites for doing so are met.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

In Switzerland, the "loser pays" principle applies. The losing party has to bear the court costs and to pay a compensation for legal fees to the winning party. Both the court costs as well as the compensation of legal fees are determined by the court, usually in accordance with a tariff that normally depends on the amount at stake.

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28. Are contingency fees allowed?

No, contingency fees are not allowed in Switzerland. It is possible to agree on a success fee element in the sense that counsel will get a top up on his fee in case of success, but it is required that the fee that is payable in any case (regardless of the outcome) must at least cover any and all costs of counsel and must also contain some profit element.

29. Is third party funding of claims permitted? Under what circumstances?

Third party funding is permitted. As long as the party to the proceedings is directly funded by a third party no limits apply. Third party funding might however interfere with the independency rule for counsel mandated to represent their client's interest. In this case the rules of professional conduct might prohibit counsel from entering into a correspondingly funded client relationship.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

The Swiss legal system does not provide for class actions or collective redress. Multi-party actions, however, are allowed (i.e. several claimants with identical or similar claims may join together and file one action). Such multi-party actions do not come with the special benefits to plaintiffs a class action system usually offers.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Generally speaking, consumer associations or other representative organizations do not have standing to sue as claimants (apart from claims directly concerning themselves, i.e. claims out of a contract to which the organization itself is a party).

One notable exception are claims based on the Act against Unfair Competition. Claims based on this act are considered to be civil claims, but, they may be brought to court by consumer associations (and in certain circumstances also by governmental bodies). This possibility, however, is rarely used by such organization and we are unaware of any relevant litigation in this context that took place during the last few years.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

The time frame to get a final and binding decision varies considerably from court to court. On average, a full civil proceeding (a written brief for each party and one hearing in which parties plead their case or two rounds of written briefs for each party and a final hearing) usually takes from 1 to 2 years.

Cases dealt with by the Commercial Court in Zurich will usually be completed by way of settlement and within some 6 to 9 months. If no settlement is reached, the court will normally render a judgement within some 1 to 2 years in total.

The length of the proceedings normally depends on the complexity of a case, if witnesses and/or experts are to be heard or not, if the case requires service of court orders etc. outside of Switzerland, if taking of evidence outside of Switzerland via

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international legal assistance (Hague Convention on the Taking of Evidence Abroad) is necessary and also on the workload of the judge in charge of the file.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

In general, there are two appeal instances: From the district court (court of first instance) to the cantonal superior court, and from there to the Swiss Federal Supreme Court. The appeal to the superior court provides for full scrutiny (both as to facts and as to law), whilst the appeal to the Federal Supreme Court essentially only allows for a scrutiny of law; the Federal Supreme Court is basically bound to the facts as established by the superior court.

A judgement of a Commercial Court (in the cantons of Zurich, Berne, Argovia and St. Gall) may only be appealed against before Federal Supreme Court (with limited scope as set out above).

In general, there is no appeal against a procedural order. Appeals against interlocutory orders are possible.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Whereas electronic briefs nowadays may be validly filed with the court (albeit subject to certain specific rules and technical requirements), there is no set of rules that would allow or govern an electronic trial or appeal.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

Pleading is done orally or by way of written brief. Whether or not the use of graphics, computer animations, power point etc. is permissible is decided by the court on a case by case assessment.

In general, appeals are dealt with by way of written briefs so that there would be no hearings.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

There is no solicitor/barrister distinction. All Swiss qualified attorneys may represent parties before all courts. Similarly, there is no distinction between trial phase or pre-trial procedures with regard to counsel.

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37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Yes, Swiss substantive law provides for a regime taking into account contributory negligence. Contributory negligence may reduce the compensation claim.

As to a multitude of tortfeasors Swiss substantive law sets forth joint and several liability in case several parties were involved in causing the damage at stake: Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party. The court determines at its discretion whether and to what extent they have a claim of recourse against each other.

Where two or more persons are liable for the same loss or damage based on different legal grounds, whether under tort law, contract law or by statute, the provision governing recourse among persons who jointly caused damage is applicable *mutatis mutandis*. Compensation, as a rule, is to be paid first by those who are liable in tort and lastly by those who are deemed liable by statutory provision without being at fault or in breach of contractual obligation.

38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?

The Hague Convention on the Service Abroad of Judicial Documents must be followed. To serve foreign court documents within Switzerland without following the Hague Convention would even constitute a criminal offence. There are certain exemptions with regard to certain countries (not with regard to the United States) where service may be validly effected by post.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Yes, there are rules that prohibit export of relevant documents from Switzerland for purposes of litigation abroad.

In essence, evidence in Switzerland in connection with foreign proceedings may only be taken in accordance with the Hague Convention on the Taking of Evidence Abroad. Taking evidence outside of the Hague Convention procedure may even constitute a criminal offense in Switzerland. Switzerland provides for a number of blocking statute provisions; in addition, the Swiss Banking Secrecy may play a role as well.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

None.

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41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

The requirement for a claimant to pay an advance in the likely amount of the court costs (which depend on the amount at stake) in practice often works as a deterrent to potential claimants; the same goes to some extent for the “loser pays” principle.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

There is discussion going on as to whether Switzerland should introduce collective redress mechanisms or not. Whilst a few years ago, in its report explaining the new Civil Procedure Code (which entered into effect in 2011), the government held that such mechanism were “alien to Swiss law”, a recent draft act for financial services provided for certain collective redress mechanisms which met quite some criticism. Potentially over the years, certain collective redress mechanisms are likely to be introduced, but they will certainly not reflect all features of collective redress in the United States. The discussion is on-going.