



The  
**LEGAL  
500**

**COUNTRY  
COMPARATIVE  
GUIDES 2021**

# The Legal 500 Country Comparative Guides

## Switzerland

# LITIGATION

### Contributing firm

Niederer Kraft Frey AG



#### Valerie Meyer Bahar

Partner | [valerie.meyer@nkf.ch](mailto:valerie.meyer@nkf.ch)

#### Daniel Eisele

Partner | [daniel.eisele@nkf.ch](mailto:daniel.eisele@nkf.ch)

#### Tamir Livschitz

Partner | [tamir.livschitz@nkf.ch](mailto:tamir.livschitz@nkf.ch)

#### Brigitte Knecht

Counsel | [brigitte.knecht@nkf.ch](mailto:brigitte.knecht@nkf.ch)

This country-specific Q&A provides an overview of litigation laws and regulations applicable in Switzerland.

For a full list of jurisdictional Q&As visit [legal500.com/guides](https://legal500.com/guides)

## SWITZERLAND LITIGATION



### 1. What are the main methods of resolving commercial disputes?

In Switzerland, commercial disputes are mainly resolved by the Swiss state courts. Four cantons (Zurich, Aargau, Berne and St Gallen) have established specialised, efficient and highly regarded commercial courts (see questions 3 and 16) which are well known both for their expertise and their high settlement rates.

Arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation. Swiss legislation and court practice are regarded as very arbitration-friendly. As a consequence, Switzerland is among the preferred countries chosen for conducting international commercial arbitration proceedings both with regard to ad hoc arbitration as well as institutional arbitration (for example under the Arbitration Rules of the International Chamber of Commerce or the Arbitration Rules of the Swiss Chambers' Arbitration Institution).

Mediation proceedings have gained some popularity in the recent years. Various institutions, for example the Swiss Chamber of Commercial Mediation, have issued mediation rules. In practice, mediation procedures are nevertheless of minor importance, especially as far as commercial disputes are concerned. Typically, Swiss counsel will attempt to settle a case by means of informal bilateral discussions (without the involvement of a mediator) before formal state court or arbitration proceedings are initiated.

### 2. What are the main procedural rules governing commercial litigation?

Being a civil law country, the main sources of law in Switzerland are written codes and statutes. The most important statute governing civil procedure is the Swiss Code of Civil Procedure of 19 December 2008 (CCP). The CCP contains rules on the local jurisdiction of the courts in domestic matters and comprehensively regulates the course and conduct of court proceedings in civil law

matters in Switzerland. However, certain areas, such as court costs and the subject matter jurisdiction of the courts are subject to cantonal law (see question 3). Moreover, in international matters, further codes and/or multi-national treaties such as the Swiss Private International Law Act of 18 December 1987 (PILA) and the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters concluded in Lugano on 30 October 2007 (Lugano Convention) regulate certain procedural aspects (for example the international and/or local jurisdiction of the courts) within their specific scope of application.

Predominantly, civil and commercial proceedings in Switzerland are at the disposition of the parties, i.e. governed by the principle that it is up to the parties to decide how, when, for how long and to what extent they wish to submit claims as plaintiffs, whether they wish to accept or contest such claims as defendants, or whether they wish to lodge or withdraw appeals. In commercial matters (in contrast to other areas of the law such as for example family law matters), it is generally up to the parties to submit the factual allegations relevant to decide the dispute, and the court may in principle not take into account facts that have not been argued by the parties when assessing the matter. On the other hand, as far as the application of the substantive law is concerned, the principle of *iura novit curia* applies (other than in appeals proceedings before the Swiss Federal Tribunal). This means that the court must apply the law *ex officio* even if the parties have not invoked certain legal provisions or based their claims on a different legal basis (the court must, however, grant the parties the right to be heard on the matter).

The CCP also governs the enforcement of court decisions regarding non-monetary claims. Monetary debt collection matters are governed by the Federal Debt Enforcement and Bankruptcy Act of 11 April 1889 (DEBA), whereas the recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly regulated by the PILA and by bilateral and multilateral treaties to which Switzerland is a party; the most important treaties in this regard are the Lugano

Convention and, with regard to international arbitral awards, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which was ratified by Switzerland and entered into force in 1965.

### 3. What is the structure and organisation of local courts dealing with commercial claims? What is the final court of appeal?

The structure and organisation of local courts dealing with commercial claims is characterised by the fact that Switzerland is a federal state comprised of 26 cantons. Its substantive civil law and its law on civil procedure are regulated at federal law level, whereas the judiciary in Switzerland's 26 cantons is organised by each canton individually (see also question 2).

The CCP prescribes the principle of double instance for the judiciary of the cantons. As a consequence, each canton must establish a court of first instance as well as a court of appeals with full power of review. Decisions of the cantonal appeal court may finally be appealed to the Swiss Federal Tribunal (the highest court of Switzerland). In the proceedings before the Swiss Federal Tribunal, which are governed by the Federal Act on the Swiss Federal Tribunal of 17 June 2015, the grounds for appeal are ordinarily limited to violations of federal and constitutional law. Under very limited circumstances, an appeal to the Swiss Federal Tribunal may also be lodged to challenge a manifestly wrong determination of the facts by the lower instance court.

With regard to commercial matters, the CCP grants the cantons the authority to deviate from the aforementioned principle of double instance by establishing a specialised court as the sole cantonal instance to hear commercial disputes, whose decision may only be appealed to the Swiss Federal Tribunal. To date, four cantons (Zurich, Aargau, Berne and St Gallen) have made use of this right and have established such specialised commercial court (see also questions 1 and 16).

In certain specialised areas of law such as intellectual property, competition and antitrust law, claims against the Swiss government and disputes relating to collective investment schemes, the CCP requires the cantons to designate a court of exclusive first instance jurisdiction. Furthermore, for disputes relating to patents the Federal Patent Court is competent to hear the case and the proceedings are governed by the Federal Act on the Federal Patent Court.

### 4. How long does it typically take from commencing proceedings to get to trial?

Generally, and subject to a number of exceptions, the initiation of state court civil proceedings in Switzerland must be preceded by a conciliation hearing before the conciliation authority (the so-called Justice of Peace). In practice, these conciliation hearings often prove to be successful in cases with a low value in dispute (the settlement rate can exceed 50 per cent). However, in cases where the amount in dispute is high, settlements are only rarely achieved during the conciliation hearing. Consequently, the CCP allows the parties to consensually waive the holding of such a conciliation hearing and to file the claim directly with the court of first instance if the value in dispute exceeds CHF 100'000. In certain cases, inter alia, if the defendant is domiciled outside Switzerland or if its whereabouts are unknown, a plaintiff may unilaterally waive the holding of a conciliation hearing. Moreover, in cases where the commercial court has jurisdiction (see questions 1 and 3), no conciliation hearing is required and the lawsuit can be filed directly with the commercial court.

In cases where the conciliation hearing is necessary but remains unsuccessful, the conciliation authority will record this fact and grant the plaintiff the authorisation to proceed to the court of first instance. The plaintiff then needs to file its claim with the competent first instance court, generally within a time period of three months. Should a plaintiff let such deadline lapse, it will need to re-start the process by filing a new request for a conciliation hearing as described before.

At the court level, unless the law expressly provides otherwise, the claims must be submitted and handled by the court in application of the rules on ordinary proceedings (the CCP foresees three principal types of proceedings: ordinary, simplified and summary proceedings).

As a matter of principle, ordinary proceedings can be split up into three phases:

- the pleading phase, in which each party is entitled to two complete submissions in order to present and substantiate the factual basis of their claims and defenses and to offer evidence for the alleged facts;
- the evidentiary phase, where the courts hear and review the evidence presented by the parties; and
- the post-hearing phase where the parties may comment on the outcome of the evidence proceedings and the court renders its decision.

In terms of duration, a period of between one and three years can be taken as a benchmark for a full litigation under the ordinary proceedings in the first instance, depending on the complexity of the facts and further depending on whether or not the conduct of an extensive evidentiary procedure is necessary.

### **5. Are hearings held in public and are documents filed at court available to the public? Are there any exceptions?**

As a rule, civil law court hearings in Switzerland are held in public. However, if the public interest or the legitimate interest of a person involved so requires, the court may exclude the public from court hearings. Generally, public interest in commercial cases is rather limited and court hearings are typically not attended by persons other than the representatives of the parties.

The written submissions and evidence filed by the parties are not made available to the public. However, copies of court decisions may be requested by anyone but are generally only made available in anonymised form. Additionally, many higher cantonal and federal courts have, in the recent years, started to publish most of their decisions in anonymised form on their websites.

### **6. What, if any, are the relevant limitation periods?**

From a Swiss law perspective, limitation periods qualify as a matter of substantive law. The limitation periods are mainly governed by the Swiss Code of Obligations of 30 March 1911 (CO). According to the general rule provided in the CO, all claims (including most contractual claims) become time-barred after ten years unless the law provides otherwise. A shorter limitation period of only five years applies to certain types of contractual claims, for example with regard to claims for periodic payments, claims in connection with work carried out by tradesmen and craftsmen, purchases of retail goods, medical treatment, professional services provided by advocates and work performed by employees for their employers.

Claims for damages or satisfaction arising from an injury or death in breach of contract prescribe three years from the date on which the person suffering damage became aware of the damage (relative prescription), but in any event twenty years after the date on which the harmful conduct took place or ceased (absolute prescription).

Tort claims currently become time-barred after three years from the date on which the injured party became aware of the loss/damage and of the identity of the liable party (relative prescription) or at the latest ten years

after the date on which the harmful conduct took place or ceased (absolute prescription). In cases involving bodily injury or the death of a human being, the absolute limitation period is twenty years.

Claims for restitution for unjust enrichment become time-barred three years after the date on which the injured party learned of its claim (relative prescription) and in any event ten years after the date on which the claim first arose (absolute prescription).

### **7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?**

As mentioned under question 4, the initiation of state court civil proceedings must usually be preceded by a conciliation hearing before the conciliation authority if no exception applies or if the parties do not agree to waive this obligation in cases where such waiver is admissible. Apart from that, Swiss law (in contrast to other jurisdictions) does not impose any particular pre-action conduct requirements upon the litigating parties.

If the plaintiff does not comply with the obligation to request a conciliation hearing, the court will declare the claim to be inadmissible. If the plaintiff fails to attend such conciliation hearing, the court will deem the claim to have been withdrawn.

### **8. How are commercial proceedings commenced? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?**

Generally, commercial proceedings in Switzerland are commenced by lodging a request for a conciliation hearing before the conciliation authority or - if this is admissible in the particular case - by directly filing a statement of claim with the competent court (for more details see question 4).

The parties address all their submissions to the competent court, which will serve the opposing party (i.e. service is not made by the parties themselves). According to the CCP, the court must send summonses, orders and decisions to parties domiciled in Switzerland by registered mail or by other means against confirmation of receipt. Service of court documents outside the territory of Switzerland must generally occur by way of judicial assistance unless any bilateral or multilateral treaty ratified by Switzerland provides otherwise.

## 9. How does the court determine whether it has jurisdiction over a claim?

Pursuant to Swiss procedural law, a distinction has to be made between the so-called subject matter jurisdiction and the territorial jurisdiction of the court. While the subject matter jurisdiction is typically subject to mandatory law, the territorial jurisdiction (especially in commercial matters) is often regulated by nonmandatory rules of law only. In the latter case, the places of jurisdiction provided in the applicable statutes may be altered by party agreement (most customarily done by means of including a jurisdiction clause in the contract in question). Alternatively, the plaintiff may also choose to file its claim with a court that does not have territorial jurisdiction (be it on the basis of the law or a jurisdiction clause) and it is then up to the defendant to timely raise a jurisdictional objection. Should it not do so, the defendant will be deemed to have accepted the jurisdiction of the court seized.

Given the mandatory nature of the subject matter jurisdiction, the court will examine its subject matter jurisdiction *ex officio* based on the applicable (cantonal) statutes. The territorial jurisdiction of the court on the other hand will only be further examined in cases where it is (exceptionally) subject to a mandatory rule of law or in cases where the opposing party objects to the territorial jurisdiction of the court. The rules on territorial jurisdiction of Swiss courts are specified in the CCP as far as domestic cases are concerned. In international matters, the international civil procedural law rules apply (i.e. the PILA and/or international treaties on jurisdiction ratified by Switzerland, most importantly the Lugano Convention). The aforementioned sets of rules also describe the formal requirements that agreements on jurisdiction have to satisfy in order to be valid.

## 10. How does the court determine what law will apply to the claims?

As already mentioned under question 2, the court (other than the Swiss Federal Tribunal in appeals proceedings) must apply the law *ex officio* (principle of *iura novit curia*).

In purely domestic cases, Swiss law applies to the merits of the claims. Following the civil law tradition, Swiss law is mainly subject to statutory rules of law. In practice, court precedent, even though it is not considered to be an actual source of law, is nevertheless of utmost significance, mostly in terms of interpretation but occasionally also in terms of development of the law.

In international cases, the court must first determine

whether Swiss or foreign law applies to the merits of the claim. If no specific legislation (especially international treaties taking precedence over the PILA) is pertinent, a Swiss court will determine the applicable law based on the conflict of law rules provided for in the PILA. The PILA (or applicable specific legislation, if any) also specifies whether, to what extent and under what conditions the parties may enter into an agreement regulating the law applicable to their legal relationship. Such choice of law clauses are typically provided for in international commercial contracts and are generally enforceable. Although parties are in principle free to choose any foreign law to govern their contracts, it would appear most logical and certainly most practical to choose Swiss law if the proceedings are meant to be brought before a Swiss court (for example if a jurisdiction clause in the same contract provides that Swiss courts shall have jurisdiction to decide claims arising out of such contract). In certain areas, a choice of law clause declaring Swiss substantive law applicable may refer to a different set of rules than the court would apply in a purely domestic case. This is for example the case for contracts dealing with the sale of goods: While the court would apply the Swiss Code of Obligations in a purely domestic case, a choice of law clause declaring Swiss law applicable may lead to the application of the Vienna Convention on the International Sale of Goods (CISG) in an international context. This is so because the CISG is deemed part of Swiss law. One therefore often sees that in choice of law clauses providing for the application of Swiss law the application of the CISG is expressly excluded so as to ensure that “genuinely” domestic Swiss law applies.

If the Swiss courts have to apply foreign law, either because the parties have chosen a foreign law or because the conflict of law rules in the PILA or other pertinent legislation declare a foreign law applicable, the court shall establish the content of the foreign law *ex officio*. It may, however, request the parties' assistance to do so and, in case of pecuniary claims, the court may even impose the burden to prove the content of the foreign law upon the parties. If the content of the foreign law cannot be established in such cases, the court may apply Swiss law. Moreover, the court would not apply the foreign law to the extent that it would lead to a result contrary to Swiss public policy (*ordre public*). Under certain (restrictive) circumstances, mandatory Swiss or foreign provisions may be applicable and take precedence over the law designated by the PILA or by agreement of the parties.

## 11. In what circumstances, if any, can claims be disposed of without a full trial?

Court proceedings may be terminated without review of

the merits in cases where certain procedural requirements (such as the jurisdiction of the court or the advance payment of court costs) are not met.

Moreover, court proceedings are terminated without a review of the merits if the plaintiff withdraws its claim, if the defendant acknowledges the claim or if the parties enter into a settlement agreement with regard to the pending proceedings. Pursuant to the CCP, the termination of court proceedings in these cases has in principle *res iudicata* effect preventing the plaintiff from filing an action on the same subject matter against the same counterparty in the future.

Finally, court proceedings are written off if the legal action becomes moot (for example if the object in dispute is destroyed definitively or if the defendant satisfies the requested claim in the course of the proceedings).

## 12. What, if any, are the main types of interim remedies available?

Pursuant to Swiss law, a difference is to be made between interim measures aiming at securing monetary claims and interim measures aiming at the protection of non-monetary claims. The former are regulated by the Federal Debt Enforcement and Bankruptcy Act of 11 April 1889 (DEBA); the latter are subject to the CCP.

Under the CCP, upon motion of a party a court can order interim measures if the applicant shows credibly that a right to which it is entitled has been violated or a violation is imminent and that such violation threatens to cause not easily reparable harm. In addition, the applicant must show urgency and the interim measure to be ordered must be proportionate.

The court may order any measure that is suitable to prevent the imminent harm (e.g. an injunction, an order to remedy an unlawful situation, an order to a third party [including to governmental authorities], performances in kind, or the payment of money in the cases provided by the law).

The court may make the interim measure conditional on the payment of security by the applicant if it is anticipated that the measures may cause loss or damage to the opposing party.

In cases of high urgency, issuance of interim measures may be requested on an *ex parte* basis. If interim measures are issued by the court *ex parte*, the court will subsequently summon the parties to a hearing or it will set a deadline to the opposing party to comment on the ordered measure in writing. Thereafter the interim

measure will be confirmed or lifted.

A request for interim measures may be filed at any time, i.e. before or after the proceedings on the merits were filed. The request will be handled in summary proceedings. If a request for interim measures is filed prior to commencing the legal action on the merits, the court will set a deadline to the applicant to prosecute its action (i.e. to file the legal action on the merits). Failure to do so will result in the lifting of the interim measure.

The protection of monetary claims is regulated by the DEBA. Pursuant to the DEBA, a creditor may request a freezing order regarding assets located in Switzerland in order to secure a due debt that is not secured by a pledge, if (i) the debtor has no fixed domicile, (ii) the debtor, with an intention to avoid the fulfilment of its obligations, removes assets, flees or prepares to flee, (iii) the debtor is in transit, or belongs to the category of persons who visit fairs and markets for claims that by their nature must be fulfilled immediately; (iv) the debtor is not domiciled in Switzerland and no other grounds for ordering the freezing order are applicable but the claim has a sufficient nexus with Switzerland or is based on a recognition of debt (issued in writing); (v) if the creditor has a certificate of shortfall against the debtor; and (vi) if the creditor has a definitive title (for example a court judgment ordering the payment) against the debtor confirming the latter's monetary debt towards the creditor.

The freezing of assets constitutes an instrument that allows the creditor to secure the enforcement of its claim. To that end, certain assets of the debtor are provisionally seized. For the debtor, the seizure of assets is quite drastic. Therefore, the freezing of assets will only be ordered under the strict conditions mentioned above. In its request, the creditor must mention and substantiate as far as possible the grounds for the freezing order, the debt to be secured, the asset to be seized as well as its location. Moreover, the creditor must make credible that the legal requirements to order the freezing of assets are fulfilled.

In practice, parties commonly request freezing orders for assets located in Switzerland that belong to debtors that are not domiciled in Switzerland, or, alternatively, based on a court judgment ordering payment. The other grounds set out above for the issuance of freezing orders are only rarely invoked, because they are difficult to prove.

Typically, freezing orders are initially granted on an *ex parte* basis, following which the debtor is given the possibility to raise its objections by filing an appeal with the court within 10 days. If a creditor has obtained a freezing order before having initiated enforcement

proceedings or before having filed a legal action on the merits, it must do so within 10 days from notification of the freezing order (burden to prosecute). Failure to do so will result in the freezing order being lifted.

### **13. After a claim has been commenced, what written documents must (or can) the parties submit and what is the usual timetable?**

As a matter of principle, ordinary proceedings can be split up into three phases:

- the pleading phase, where the parties must present and substantiate the factual basis of their claims and defenses and offer evidence for them; in this phase, each party is entitled to two complete submissions, at least one of which will typically be in writing. In cases with a high value in dispute, both rounds of submissions are often in writing. The parties are entitled to an oral hearing before the court to plead their case (even in cases where two sets of written exchanges have previously taken place). Such right may, however, be waived by the parties, something that one can observe to happen in practice from time to time;
- the evidentiary phase, where the courts hear and review the evidence presented by the parties (at the court's discretion this phase may or may not take place at the same time as the oral hearing mentioned in regard to the pleading phase); and
- the post-hearing phase where the parties may comment on the outcome of the evidence proceedings (either orally or by way of written submissions) and the court renders its decision.

Moreover, the courts may schedule additional hearings (so-called 'instruction hearings') at their discretion at any stage of the proceedings. Since normally the main purpose of such instruction hearings is to broker a settlement between the parties, the court will typically hold an instruction hearing after the first exchange of written submissions.

In the pleading phase, apart from documents that may be formally required (such as the authorisation from the Justice of Peace to proceed where applicable, see question 4, or power of attorneys where the parties are represented by attorneys) the parties must attach to their written statements all evidence available in the form of physical records. The parties must also list all

further evidence to be heard (for example witnesses), commissioned (for example expert opinions) or examined (for example inspections) by the court in the evidentiary phase. Expert opinions that have been commissioned by a litigating party outside the court proceedings (party obtained expert opinions) are not considered to have the same probative value as court-ordered expert opinions. While the parties may attach party obtained expert opinions to their statements, the court will usually regard them as mere (albeit somewhat qualified) party allegations (also see question 16 on this topic). With regard to witnesses, it is usually deemed crucial that the court hearing the case obtains a personal impression of the witness in order to assess its credibility. This is why, at least as far as ordinary proceedings are concerned, it is not common (and may even be unadvisable) to introduce (pre-prepared) written witness statements into evidence rather than requesting the court to hear such witness personally in the evidentiary phase (also see question 15 on this topic). In this regard, one should also note that, in contrast to other jurisdictions, in Switzerland legal counsel is neither permitted to assist a witness in drafting a written witness statement, nor to prepare a witness in connection with the latter's examination in court.

The timetable and duration of first-instance proceedings depend on several factors and especially on how the court decides to organise the specific proceedings at hand (for example, whether there will be one or more instruction hearings, whether there will be only one round of written submissions and an oral hearing afterwards or two rounds of written submissions with an additional oral hearing). Also, the quantity and type of evidence submitted by the parties has an impact on the duration of the evidentiary phase. This being said, in proceedings that are held mostly in writing (which is often the case in commercial disputes with a high value in dispute) the court will usually grant each party a time-period of approximately 2-3 months to prepare their respective statements, then schedule an oral hearing and examine the evidence before issuing its judgment. Altogether, a period of between one and three years can be taken as a benchmark for a full litigation conducted in ordinary proceedings in the first instance, depending on the complexity of the facts and further depending on whether or not there is a need to conduct an extensive evidentiary procedure.

### **14. What, if any, are the rules for disclosure of documents? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?**

Pursuant to the CCP, in state court litigation, the litigant

parties as well as third parties may be obliged to produce physical records under certain circumstances. Generally, the first requirement is that one litigant party requests the production of a specific document, which is in the possession of the counterparty or a third party as evidence for a particular factual statement.

The court may then order the counterparty or third party to produce the document. Refusal to obey a court's production order is only legitimate on the basis of a statutory refusal right (i.e., legal privilege, incrimination of a party of close proximity). The consequences of an unjustified refusal to comply with the court's production order, however, are different depending on the addressee of the order. While the court may enforce the production order against third parties with coercive means, the unjustified refusal of a party to the dispute will be taken into account by the court when appraising the evidence (and may in practice result in negative inferences being made by the court).

In practice, court orders regarding the production of documents are rather hard to obtain in state court litigation. Based on case law, the documents to be produced must be described with sufficient specificity and their significance and appropriateness to prove disputed factual allegations must be shown. Attempts to extract a wide array of unspecified or only very vaguely specified information ('fishing expeditions') will generally be dismissed by Swiss courts. Furthermore, the information requested must be shown to be in the possession or under the control of the party to whom the production request is directed. Thus, requests for the production of documents will ordinarily only be successful if the requesting party has concrete knowledge about the existence of a specific document (not necessarily, however, about its content), which, in practice, often proves to be a major impediment.

Further to the described general duty to produce documents based on the CCP, substantive law may provide for information and document production duties in specific areas of law which may be enforced independently by legal action.

**15. How is witness evidence dealt with in commercial litigation (and, in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?**

As mentioned under question 13, witness statements are generally given orally and during court proceedings rather than in the form of (pre-prepared) written witness

statements. Even though the CCP does not per se forbid the introduction of written witness statements, they are very rarely used in practice (also because of the applicable limitations that do not permit legal counsel to either assist in the preparation of written witness statements, nor to prepare witnesses for oral examination in court). In certain types of procedures (for example summary proceedings for obtaining interim relief), however, evidence must primarily be offered in the form of documents and as a consequence, in practice, written witness statements are sometimes introduced into evidence in such procedures (but – again – without the involvement whatsoever of legal counsel). As already mentioned, the probative value of written witness statements is generally considered to be rather low; which, apart from the possibility that the witness had been influenced by the interested party to make the statement, also stems from the fact that the witness signing such document does not, contrary to the witness that is formally examined by the court, face potential criminal charges if the statement proves to be untrue.

Apart from that, the court may obtain information in writing from official authorities or from private persons if the formal examination of a witness seems unnecessary. This might for example be the case if the employer of a party is asked by the court to confirm the income of the employee in writing.

In case a witness is summoned by the court to provide oral witness testimony, after being cautioned by the court to tell the truth, the witness will be asked questions directly by the court with regard to its personal details, its personal relationship with the parties as well as other circumstances which may be relevant to the credibility of its testimony and finally, regarding the facts of the case as observed by the witness. The parties may request that the court ask additional questions to the witness and may only themselves address additional questions directly to the witness after having obtained the permission of the court to do so. In that sense, there is only a very limited possibility of cross-examination in Swiss state court proceedings.

**16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?**

Expert opinions are usually required if the matter raises complex questions of fact in specific fields such as technology and science. Thus, the expert will typically be asked to refrain from commenting on questions of a legal nature (which are for the court to decide) and to

render its opinion on the disputed facts only (an exception may apply, where the content of foreign law needs to be established).

The expert will usually be appointed by the court upon request of a party that intends to prove the adequacy of an alleged fact. Alternatively, an expert may also be appointed ex officio by the court. The expert is chosen and instructed by the court, but the parties have the right to comment in advance on the person that shall be appointed as expert and on the questions that shall be submitted to such expert.

The court appointed expert has to be independent and impartial (the same grounds for recusal that apply to judges and judicial officers also apply to court-appointed experts). He is obliged to render a truthful, complete, clearly formulated and adequately reasoned expert opinion within the time limit set by the court. The court will advise the expert that the submission of a false opinion and the violation of official secrecy by the expert are punishable criminal offenses.

Once the expert opinion is submitted by the expert (such expert opinion may, as per order of the court, either be presented orally at a hearing or in the form of a written expert opinion), the court shall give the parties the opportunity to ask for explanations or to submit additional questions. Even though they are not legally binding for the court, the courts tend to attribute a high probative value to court-ordered expert opinions.

Especially in proceedings before specialised courts (such as the commercial courts, see questions 1 and 3), the panel of judges will be composed of judges with a legal background on the one hand and with industry experts on the other hand. The court (or at least one of the judges deciding the case) thus may deem that it has sufficient own expertise to assess the adequacy of a fact of technical or scientific nature and that the appointment of an additional expert is therefore unnecessary. If the court relies on the special expertise of one of its members, it must inform the parties accordingly, so that they may comment on such course of action.

Court-ordered expert opinions in the described sense are the only expert opinions recognized by the CPP as a true means of evidence. Apart from that, the parties are of course at liberty to mandate (additional) experts on a private basis outside the court proceedings (party-obtained expert opinion). The parties may then attach and refer to such party-obtained expert opinions in their briefs filed with the court. However, as already mentioned in question 13, such expert opinions obtained by the parties themselves are not considered to have actual probative value but will usually be regarded as mere (albeit somewhat enhanced) party allegations by

the court. This has been criticised by practitioners and legal scholars who argue that it is not necessary to exclude party obtained expert opinions from the accepted means of evidence since the court must assess the evidence freely and may – while doing so – take into consideration the fact that the expert was mandated and paid by the submitting party. In a draft regarding the revision of the CCP, the Swiss government now proposes to amend the CCP as to explicitly recognize privately obtained expert opinions as a form of documentary evidence. This revision process is still ongoing, and we cannot predict whether such changes will come into effect.

### **17. Can final and interim decisions be appealed? If so, to which court(s) and within what timescale?**

As mentioned under question 3, the CCP prescribes the principle of double instance for the judiciary of the cantons. As a consequence, each canton must establish a court of first instance as well as an appellate court (typically called ‘High Court’) with full power of review.

As to the possibilities for challenging decisions of the cantonal courts of first instance, the CCP provides for two legal remedies: The ‘appeal’ allowing for a full review of the decision on the grounds of incorrect application of the law as well as an incorrect establishment of the facts by the first instance court and the ‘objection’ which only allows for a less extensive review of the decision as far as the establishment of the facts by the first instance court is concerned (i.e. only obviously incorrect establishment of the facts is a valid grounds for an objection); moreover, further restrictions apply according to the type of decision that shall be challenged.

In financial disputes, the appeal is available against final and interim decisions as well as decisions on interim measures of the court of first instance if the amount in dispute is at least CHF 10'000. Therefore, in large commercial disputes, judgments rendered by a district court can usually be appealed to the cantonal appeal instance with the possibility of a further appeal to the Swiss Federal Tribunal (access to the Swiss Federal Tribunal is usually granted if the value in dispute is at least CHF 30'000). Judgments of a commercial court (as the sole cantonal instance; see question 3) may only be appealed to the Swiss Federal Tribunal. In terms of time scale, an appeal must usually be filed within 30 days in ordinary proceedings, and within 10 days in summary proceedings, from notification of the decision to be appealed.

The objection is the legal remedy available with regard to final and interim decisions as well as decisions on interim measures of the court of first instance in cases where the value of the dispute is smaller than CHF 10'000. Moreover, regardless of the amount in dispute, the objection is the legal remedy in order to complain against undue delay and to object to other types of decisions and procedural rulings of the first instance court. In the latter case, the objection is only available if the law so provides or if there is a threat that the decision/ruling threatens to cause not easily reparable harm. The time limit for filing an objection is usually 30 days from notification of the decision to be challenged. In summary proceedings or in case of an objection against procedural rulings the time limit is 10 days.

A further appeal to the Swiss Federal Tribunal against the decision of the higher cantonal court is usually admissible if the value in dispute exceeds CHF 30'000. Where the value in dispute is lower, the case might still be brought before the Swiss Federal Tribunal under special circumstances (e.g. if there is a fundamental legal question that needs to be clarified by the Swiss Federal Tribunal or in case of a breach of constitutional rights). An appeal to the Swiss Federal Tribunal must be filed within 30 days from notification of the appeal's instance decision; with regard to certain claims, however, a shorter deadline may apply.

## **18. What are the rules governing enforcement of foreign judgments?**

The recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly governed by the PILA as well as by the applicable bilateral and multilateral treaties to which Switzerland is a party; the most important of these are the Lugano Convention (with regard to judgments in civil and commercial matters rendered by a signatory state of the Lugano Convention) and the New York Convention (with regard to foreign arbitral awards).

Pursuant to the PILA, a foreign judgment is recognised in Switzerland if (i) the court or public authority who rendered the decision had jurisdiction, (ii) if no further legal remedies are available against the decision or the decision is final, and (iii) if there are no grounds for non-recognition (especially the incompatibility of the decision with Swiss substantive or procedural public policy [ordre public]).

Under the PILA, a petition for the recognition or enforcement of a foreign decision must be submitted to the enforcing court accompanied by a complete and authenticated copy of the decision and a confirmation

that no further ordinary legal remedies are available against the decision. In case of a default judgment, official documentation evidencing that the defendant has been duly summoned and has been given the opportunity to enter a defence must be joined to the petition. The party opposing the recognition and enforcement is entitled to a hearing.

Under the Lugano Convention, the conditions for the recognition and the enforcement of judgments as well as the applicable procedure are simplified. In particular, the enforcing court is not permitted to verify whether the foreign court who rendered the decision had jurisdiction to do so. A party seeking recognition or enforcement of a judgment must provide the court with the original or an authenticated copy of the judgment and with a certificate issued (using the standard form provided in the annex of the Lugano Convention) by the court or competent authority of the state where the judgment was rendered. No further evidence as to the due process standards of the proceedings in which the decision was rendered must be joined to the petition. Upon completion of these formalities by the applicant party, the enforcing court must declare the judgment enforceable *ex parte* without first hearing the party against whom the enforcement is sought. The latter has the possibility to appeal the decision affirming the recognition or enforcement and will only be heard at this (later) stage.

## **19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side?**

As regards the allocation of costs between the parties, Switzerland follows the 'loser-pays rule'. Thus, generally, court costs are charged to the losing party and the latter has to bear the party costs of the prevailing party. However, the amount of the party costs that may be recovered from the unsuccessful party will be calculated based on the laws of the canton where the litigation took place and may be lower than the actual legal fees incurred by the prevailing party (as a matter of fact, the difference may be quite substantial). Moreover, the CCP provides for the possibility of the court to deviate from the general principles of cost allocation and to allocate the costs at its own discretion under certain circumstances (for example if the party that lost was forced to litigate in good faith). Besides that, unnecessary costs will be charged to the party that caused them.

## 20. What, if any, are the collective redress (e.g. class action) mechanisms?

Swiss civil law procedure does not permit US-style class actions; unlike other European countries who have introduced new tailor-made group action devices into their legal systems in the course of the recent decades, Swiss lawmakers have for a relatively long time not accepted the necessity to add new types of collective redress mechanisms (as compared to the traditional possibilities or requirements to introduce actions jointly which will be described below) into Swiss civil procedure law. In the last few years, however, a rethinking has taken place and, accordingly, the Swiss government has taken a first attempt to introduce new collective redress mechanisms in the field of financial services. However, after having been heavily criticised in the lawmaking process, the project was later abandoned. In 2018, the Swiss government took a fresh start by issuing a pre-draft regarding the revision of the CCP providing inter alia for new collective redress mechanisms in order to expand and improve the possibilities for obtaining collective relief in Switzerland. However, the project has recently suffered a certain setback. Because the proposed new forms for obtaining collective redress were heavily disputed during the evaluation phase of the pre-draft, the Swiss government has decided to split off the collective redress part and to move along with the general amendments proposed for the CCP only. The issue of improving collective redress will be dealt with separately in the future. Thus, since the revision process with regard to introducing new forms of collective redress is still at its beginning, it cannot be predicted, at this time, whether the revision will be put into effect in the future and in what form (if at all).

According to the law actually in force, claims must typically be brought by individual plaintiffs. However, a number of procedural tools under the CCP require or allow for multiple parties in civil law proceedings to act jointly, be it on the plaintiffs' or on the defendants' side.

In case of a so-called 'mandatory joinder of parties', the claim must be jointly brought by or directed against a group of persons. Whether or not the group members are forced to act or must be sued jointly is a question of the applicable substantive law. In general, this will be the case where the group members have a legal relationship that does not allow for differing decisions as to the individual members of the group. If the action is not jointly lodged by or directed against all members of the mandatory joinder of parties, the plaintiffs or defendants may lack standing, leading to the dismissal of the claim.

The so-called 'simple' or 'voluntary joinder of parties'

allows (i) multiple plaintiffs to bring their claims against one defendant jointly or (ii) a plaintiff to sue several defendants jointly. In contrast to the mandatory joinder of parties, the voluntary joinder merely is an optional way to proceed in cases where the claims relate to rights or duties resulting from similar circumstances or legal grounds. The advantage of this way to proceed pertains to procedural economy, especially with regard to evidentiary proceedings (i.e. evidence relevant with regard to all joint parties must only be reviewed once by the court). However, the claims remain independent from each other and the court must decide each case separately. Unlike the mandatory joinder, each of the voluntarily joint parties may act independently during the proceedings and the judgments rendered by the court may vary as to each individual of the joint parties.

As a further kind of group action, Swiss law permits an association or organisation of national or regional importance whose statutes authorise it to protect the interests of a particular group of individuals to file a claim in its own name but to the benefit of said group of individuals (so-called 'Verbandsklage'). The associations' right to bring such legal action is limited to claims regarding the personality rights of the affected group members on the one hand, and to non-monetary relief on the other hand. Thus, the association may request that the court prohibits or puts an end to an (imminent) violation or establishes the unlawful character of a violation in a declaratory judgment. Actions seeking monetary relief are excluded and need to be pursued individually by the affected person or persons.

As mentioned above, political efforts are under way to improve the tools for collective legal protection. In its pre-draft regarding the revision of the CCP, the Swiss Federal Council proposed two major amendments with regard to collective legal protection aiming at facilitating actions for damages for large groups through the existing mechanism of actions brought by associations as well as by introducing a new group settlement procedure. In contrast to the current situation, the suggested amendment of the action brought by an association would allow the association to introduce reparatory actions, such as actions for damages and restitution of profits. However, unlike the US-style class action, the association would only be allowed to claim monetary relief after having been authorised by the individual group members to do so (opt-in mechanism). In addition, the pre-draft regarding the revision of the CCP provides for new settlement procedures for group settlements. However, as mentioned above, it is not yet foreseeable if and in what form these proposals will ultimately be adopted.

## 21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings?

In regards to the consolidation of proceedings by the court, the CCP provides for the possibility of the court to order the joinder of separately filed actions in order to simplify the proceedings. Such court-ordered joinder is generally only permissible if both actions are within the scope of the court's subject matter jurisdiction and if the actions are to be handled in the same type of procedure. If the cases are factually connected but pending before different courts, the court subsequently seized may transfer the case to the court seized first if the latter agrees to take over the case. The court taking over the case may then order the joinder of the actions. It is disputed among Swiss scholars whether such transfer of actions is also permissible in cases where the court that will take over the case would normally have no territorial jurisdiction over the case.

With regard to the mechanisms for joining third parties to ongoing proceedings, the following instruments exist:

A person claiming to have a better right in the object of a pending dispute between litigating third parties may bring a claim directly against the litigating third parties in the court in which the dispute is pending (so-called 'principal intervention'). The court may then either suspend the proceedings until the case of the principal intervenor is finally adjudicated or join the two cases.

Moreover, any person who shows a credible legal interest in having a pending dispute decided in favour of one of the litigating third parties may submit an intervention application to the court in order to intervene as an accessory party in support of the party it would like to prevail in the ongoing proceedings (so-called 'accessory intervention'). Upon receipt of an intervention application, the court will grant the litigating third parties the possibility to comment on the application and will allow the accessory intervention if the intervening party can credibly argue a sufficient legal interest for the intervention. Such interest may for example be affirmed if the intervening party is subject to redress by the one litigating third party it intends to support should such party lose the case. The intervenor is limited to procedural acts in support of the one litigating third party it wishes to support; procedural acts of the intervenor that would be detrimental to such party would be disregarded by the court. Moreover, the intervenor may only carry out procedural acts that are still permitted in the actual stage of the proceedings. If the one litigating third party in support of which the intervention is made loses the case notwithstanding the

support of the intervenor, the intervention will deploy its effects in case of future proceedings between the former intervenor and the formerly supported litigating third party (so-called 'intervention effect'): unfavorable results of the former main proceedings are also effective against the former intervenor unless it was prevented by the acts or omissions of the supported litigating third party to make use of offensive or defensive measures or if the supported litigating third party has failed wilfully or through gross negligence to make use of offensive or defensive measures of which the intervenor was not aware.

Pursuant to the case law of the Swiss Federal Tribunal, although not expressly provided in the CCP, another type of intervention is permissible if the main dispute will result in a judgment that directly affects the legal position of the intervenor. In this case, the intervention primarily serves to preserve the intervenor's right to be heard and the intervenor is therefore not limited to procedural acts in support of the litigating third party.

Furthermore, a party to ongoing court proceedings may notify a third party of the dispute if in case of being unsuccessful it intends to take redress against that third party or is subject to redress of that third party (so-called third party notification). The third party may then (i) intervene in the main proceedings by way of accessory intervention without having to prove an additional legal interest other than the third party notification it received, or (ii) proceed in place of the notifying party if the latter consents thereto, or (iii) remain passive and await the result of the main proceedings without participating. In any event, in case the judgment of the main proceedings is detrimental to the notifying party, such judgment would deploy the intervention effect (described above) in future proceedings between the notifying party and the notified party.

As an alternative to a simple third party notification, the notifying party may also file a so-called third party action. In this case, the notifying party directly files the claims to which it would be entitled if it loses the main proceedings with the court that is dealing with the main action.

## 22. Are third parties allowed to fund litigation? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

Unless the parties have insurance coverage for legal expenses, the parties must generally fund the litigation by themselves (as regards the allocation of costs

between the parties, see question 19). In Switzerland, the lawyers' fees are governed by the individual engagement agreement between the attorney and its client. The lawyers' fees may not, however, be entirely based on a contingency fee.

If a party does not have sufficient financial resources to afford the costs of the proceedings or for its legal representation in such proceedings, it may apply for legal aid. If legal aid is granted, the party may be exempted from court costs and the costs of its representation may be covered by the state. However, the party must reimburse the legal aid received as soon as it is in a position to do so.

Pursuant to the case law of the Swiss Federal Tribunal, litigation funding by third parties is admissible in principle. However, the Swiss Federal Tribunal has also developed certain restrictive criteria that must be observed when entering into a funding agreement. Thus, the contractual terms of a funding agreement must be in line with Swiss mores and must in particular not constitute profiteering in the sense of Article 157 of the Swiss Criminal Code (sanctioning, inter alia, the exploitation of a person in need). Moreover, the funding by a third party must not cause any conflict of interest with regard to the attorney-client relationship. Therefore, the attorney handling the case may not be an employee of the third party funder. Moreover, the attorney must still be instructed by the litigating party and owes its contractual duties, including its duty of care, to the litigant only.

### **23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction (and in particular, have the courts adopted remote hearings and have there been any procedural delays)?**

In Switzerland, the Swiss Federal Council based on its authority to enact emergency law, has relatively early set out certain rules with regard to court proceedings during the Corona crisis.

The Swiss Federal Council stressed that a functioning judicial system is essential in a constitutional state. Therefore, the Swiss Federal Council held that also during the Corona crisis it was indispensable that disputes that cannot be resolved amicably can be decided by the courts within reasonable time. Thus, emergency law based interventions regarding the judicial system were only enacted sparingly.

In Switzerland, the time limits in court proceedings as well as enforcement proceedings usually stand still

(so-called court/enforcement holidays) for a period of seven days before and after Easter Sunday (exceptions apply for certain types of proceedings, e.g. criminal proceedings or urgent proceedings). In its "Regulation on the suspension of time limits in civil and administrative proceedings for the maintenance of justice in relation to coronavirus (COVID-19)" and the "Regulation on the legal standstill pursuant to Article 62 of the Federal Act on Debt Collection and Bankruptcy", the Swiss Federal Council exceptionally extended the duration of the court/enforcement holidays which began approximately two weeks earlier in 2020. However, the Swiss Federal Council explicitly refrained from taking more far-reaching measures (as for example a general standstill of legal time limits) in order to prevent a complete standstill of the judicial system.

In view of the court/enforcement holidays ending on 19 April 2020, the Swiss Federal Council on 16 April 2020 enacted the "Regulation on measures in the field of justice and procedural law relating to coronavirus". In this emergency law based regulation, selective and temporally limited adaptations of the procedural laws in force were set into force in order to maintain a functionable court system after 19 April 2020. As a rule, the Regulation provides that all courts and other judicial authorities shall continue pending proceedings according to the applicable procedural rules and, especially, that they shall also conduct court hearings. Of course, the recommendations of the Swiss Federal Office of Public Health regarding hygiene and social distancing (so-called FOPH-recommendations) have to be respected in regard to all procedural steps (cf. article 1 of the Regulation). In addition, the Regulation provides for the possibility to conduct court hearings or questionings with the use of video conferencing services if the parties agree to it or if there are important reasons for it (e.g. urgent cases).

The emergency ordinance of 19 April 2020 was valid until end of September 2020 and has by then been prolonged and partially amended. Pursuant to the amended regulation, the use of videoconferencing services in hearings and for questionings is only possible under stricter conditions. In principle, the consent of the parties is required. Apart from that, the use of videoconferencing services is only permissible upon request of a party, a legal representative or a court member if they are in need of special protection due to his/her particular vulnerability to the coronavirus and if there are no important reasons against it. Furthermore, videoconferencing services may be used for hearings in cases of special urgency.

### **24. What, in your opinion, is the main**

### **advantage and the main disadvantage of litigating international commercial disputes?**

Swiss courts are considered to be independent and efficient, and Swiss judges usually have profound judicial expertise. Especially the commercial courts are very well reputed both on a national and an international level. Important advantages of the specialised commercial courts are the speed of the proceedings due to them being single-instance courts on the cantonal level and their extensive expertise in commercial matters (see questions 1, 3 and 16). The costs of court proceedings may generally be predicted quite accurately since they are calculated on the basis of the value in dispute and based on the applicable statutory provisions. Moreover, Switzerland provides for a network of highly qualified attorneys who are specialised in the competent representation of national and international clients in commercial disputes.

In our opinion, with regard to international commercial disputes, the fact that it is at present impossible to conduct proceedings in English before Swiss courts is one of the major disadvantages, because the translation tasks often generate substantial (and often unnecessary) expenditures, noting however that courts in larger cities (such as Zurich) nowadays tend to accept the filing of exhibits – not however briefs – in the English language. At the moment, efforts are being made in Zurich and in Geneva to create specialised courts for international commercial disputes before which the proceedings could be conducted in English. However, at this time, it is not predictable by when one might expect the introduction of such specialised courts in Switzerland.

### **25. What, in your opinion, is the most likely growth area for disputes for the next five years?**

In our opinion, the distributed ledger technology (DLT) and blockchain technology are potentially the most promising developments in digitalisation. Pursuant to a report of the Swiss Federal Council, Switzerland currently is one of the leading locations in the area of DLT and blockchain, especially but not limited to the financial sector. According to the report, Switzerland is making efforts to maintain and even expand this status.

Accordingly, a potential increase of disputes in this context appears probable.

### **26. What, in your opinion, will be the impact of technology on commercial litigation in the next five years?**

Over the last years, most cantons have introduced the possibility of electronic communication with the courts via accredited, confidential platforms. In practice, however, this option does not seem to be used very widely. We expect that in the next years, growing experience with the new options (and a noticeable growing tendency of law offices and courts to switch to an electronic filing system) will lead to an increase of electronic communication between the courts and the parties. Given the very limited scope of (pre-trial) discovery and document production available in Swiss court litigation, we believe that the impact of artificial intelligence programs in Swiss state court litigation will be significantly lower than what can be expected in other (particularly common law) jurisdictions.

### **27. What, if any, will be the long-term impact of the COVID-19 pandemic on commercial litigation in your jurisdiction?**

The Covid-19 pandemic led to an increase of legal uncertainties, disputes and litigation in numerous fields of law such as rental, insurance and labour law. Because of the shortage of certain products and raw materials during the Covid-19 pandemic, especially companies active in the sales or the production area have faced difficulties to timely fulfil (long-term) delivery obligations. Consequently, there has also been an increase of disputes and litigation related to legal instruments allowing to alter or to end contractual obligations such as impossibility and force majeure, including the question, whether the Covid-19 outbreak even qualifies as an event of force majeure. In the long term, we expect that the companies will revisit and adapt their contracts in order to properly deal with the legal uncertainties and difficulties faced during the Covid-19 pandemic. Up to now, we have furthermore seen an increase of bankruptcy law related proceedings as a result of losses suffered during the pandemic and it is to be expected that this development will continue for some time.

## Contributors

**Valerie Meyer Bahar**  
Partner

[valerie.meyer@nkf.ch](mailto:valerie.meyer@nkf.ch)



**Daniel Eisele**  
Partner

[daniel.eisele@nkf.ch](mailto:daniel.eisele@nkf.ch)



**Tamir Livschitz**  
Partner

[tamir.livschitz@nkf.ch](mailto:tamir.livschitz@nkf.ch)



**Brigitte Knecht**  
Counsel

[brigitte.knecht@nkf.ch](mailto:brigitte.knecht@nkf.ch)

