

# SWITZERLAND

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# Switzerland

## Part I: CONTRACTUAL – NO OFFICE IN THE TARGET COUNTRY

### A. Direct Sale:

#### A.1. Without written agreement – general terms

1. *What are the formalities a foreign seller must complete in your jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers? Are these conditions enforceable towards non-commercial parties?*

#### Vienna Convention

If seller and buyer are domiciled in different countries which in turn are contracting states to the United Nation Convention for the International Sale of Goods (“Vienna Convention”), the provisions of the Vienna Convention may be applicable on the contemplated sale and purchase transaction. Further, should rules of private international law lead to Swiss law to govern an international sale and purchase transaction, again the provisions of the Vienna Convention might apply, even if none of the parties has its place of business or its domicile in one of the contracting states.

Under the provisions of the Vienna Convention an offer is deemed to be valid, if it is sufficiently specified and if the intention arises from the offer that the offeror will be bound by its offer in case of its acceptance by the offeree. An offer is considered to be sufficiently specified if it clearly indicates the goods to be sold and if the quantity and price of the goods to be sold are either explicitly or implicitly determinable by the offer. The sale and purchase agreement based on the offer made becomes effective on the offeror’s receipt of the offeree’s acceptance.

#### Switzerland’s Federal Code on Private International Law

The Swiss Code on Private International Law (“PIL”) among others provides for the laws applicable on an international legal issue (always in the absence of any international treaty or convention).

If pursuant to the PIL rules substantive Swiss law is applicable without further reference to the Vienna Convention, a sale and

purchase agreement is deemed to have been validly concluded if the goods to be sold and the purchase price have been agreed upon; no written form is required, however recommended (which in case of a dispute and a subsequent court proceedings significantly eases the burden of proof of the claiming party being obliged to submit the relevant facts).

The purchase price is considered to be sufficiently specified if the determination of such price may be derived from the circumstances.

Unless otherwise agreed upon or provided by commercial practice, the seller and the buyer are obliged to discharge their obligations simultaneously *quid pro quo*.

Where the parties have agreed on the essential terms (goods and price), the sale and purchase agreement is binding on both parties, even if the parties have made reservations on secondary terms. In the event of a failure to reach agreement on such secondary terms, the sale and purchase agreement remains binding and the judge is to determine the secondary terms in due consideration of the nature of the contemplated sale and purchase transaction.

The aforementioned principles hold also true for non-commercial parties.

## A.2. With a written agreement

2. *What are the clauses a foreign seller should integrate into a written sales agreement (or into its general terms and conditions) and the reasons why?*

The following answers only consider Swiss Law, without further reference to international treaties or conventions, if applicable.

- a) Retention of title: *Is this provided in your jurisdiction? What are the conditions to make it enforceable towards local purchasers and third parties?*

Yes, the institution of the retention of title is provided for under Swiss law.

Reservation of ownership in respect of chattel transferred to the acquirer is effective only if entered in the official register kept by the debt collection office at the owner's current domicile. However, reservation of ownership in livestock trading is not permitted.

A good sold and transferred under reservation of ownership may be reclaimed by the owner only on condition of reimbursement of any payments made by the acquirer (e.g. certain installment payments) after deduction of an appropriate rental charge and compensation for wear and tear.

- b) Interest and penalty clause: Are these clauses enforceable in your jurisdiction? Can they be reduced or annulled? What are the consequences if this clause is not integrated into the agreement? What is the legal rate in your jurisdiction?

Yes, interest and penalty clauses are enforceable in Switzerland.

#### Penalty clause

Under the principle of the freedom of contract, a penalty clause needs to be explicitly agreed upon by the parties involved; there is no presumption of law in favor of penalties forming part of the parties' contractual relationship.

No penalties may be claimed if its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed upon between the parties, if contractual performance has become impossible through circumstances beyond the debtor's control.

At its discretion, a court may reduce penalties that it considers excessive.

#### Interest clauses

In the following differentiation is being made between a contractual interest clause and a default interest clause.

#### Contractual interest clause

Where an obligation involves the payment of interest and the rate is not set by contract, law or commercial practice, interest at a rate of 5% p.a. is payable (art. 73 Code of Obligations, "CO").

The parties are free to fix any interest rate to the extent not exceeding 15 % p.a.

#### Default interest clause

A debtor in default of a payment is obliged by law to a default interest rate of 5% p.a. even where a lower rate of interest was stipulated in a contractual interest clause. Where

an agreement provides for an interest rate higher than 5% p.a. such higher rate will be applicable and enforceable during the whole term of the default period. If there is no agreement on the applicable default interest rate even an interest rate higher than the rate provided for by law may be claimed, if in commercial dealings the normal bank discount rate at the place of payment is higher than 5% p.a.

- c) *Applicable law and competent jurisdiction: Are these clauses enforceable in your jurisdiction? What are the consequences if this clause is not integrated into the agreement?*

Clauses on the law governing a contract and on the place of jurisdiction are enforceable in Switzerland.

#### Applicable law

Pursuant to art. 116 (1) PIL a sale and purchase contract shall be governed firstly by the law chosen by the parties.

In the absence of a choice of law, the contract shall be governed by the laws of the country with which it is most closely connected. It is presumed that the closest connection exists with the country in which the party who has to perform the characteristic obligation is resident or where such party has its place of business. The characteristic obligation in a sale and purchase transaction is with the seller.

#### Competent jurisdiction

Notwithstanding any international treaties or conventions which eventually apply, art. 5 PIL provides that the parties may agree on a court for either an existing or a future dispute on pecuniary claims arising from a specific legal relationship. As a rule, the court so agreed upon by the parties shall have exclusive jurisdiction.

The consumer may not waive in advance the venue at his domicile or place of habitual residence.

If the parties have not chosen a competent jurisdiction either the Swiss court at the defendant's domicile or, in the absence of a domicile, the Swiss court at the place of the habitual residence of the defendant shall have jurisdiction on civil actions deriving from a contractual relationship.

If the characteristic obligation of a contract is to be performed in Switzerland, an action may also be brought before the Swiss court at the place where the obligation is to be performed.

## B. Commercial Intermediaries:

3. *What types of commercial intermediaries do exist in your jurisdiction?*

- The broker
- The agent
- The commission agent
- The agent under a distribution agreement

4. *What legislation does apply in your jurisdiction with regard to the above mentioned types of commercial intermediaries?*

- Broker

The brokerage contract is an agreement whereby the broker is granted a mandate to provide against compensation an opportunity to conclude a contract or to act as an intermediary thereto. The brokerage contract is governed by the articles 412 et seq.CO.

- Agent

An agent is a person who undertakes to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf and for their account without entering into an employment relationship with them. The commercial agency contract is governed by the articles 418a et seq. CO.

- Commission agent

A buying or selling commission agent is a person who, in return for a commission, buys or sells chattel or securities in his own name but for the account of the principal. The commission contract is governed by the articles 425 et seq. CO.

- Agent under a distribution agreement

Under Swiss law the distribution agreement is an innominate contract, hence neither provided for nor ruled in the CO. Doctrine and jurisprudence have however developed some rules applicable on distribution agreements. In view of the practical importance of distribution agreements and the status of an agent under a distribution agreement as well as in view of distribution agreements lacking statutory rules, it is advisable to enter into detailed written agreements on the

rights and duties of principal and agent. Further, according to Swiss antitrust law non-competition provisions may under certain conditions void the agreement.

## **PART II: BRANCH – OFFICE IN THE TARGET COUNTRY BUT NO LEGAL PERSON:**

5. *In your jurisdictions what are the differences between starting up a branch and starting up of a company (subsidiary)?*

A branch of a foreign company has no independent legal personality. The branch constitutes however a place of jurisdiction and a place for enforcement measures regarding liabilities that concerns the business of the branch. In general the foreign company is liable for debts and obligations of the branch.

On the contrary, a subsidiary has its own legal personality. It is fully liable for its own obligations.

Both, the branch and the subsidiary have to be registered in the commercial registry.

6. *What formalities must be fulfilled for opening a branch?*

For opening a branch the foreign company must apply for registration of the branch at the commercial registry.

Mainly, the following documents and information have to be provided: proof of existence of the foreign company (extract from the commercial registry, articles of association etc.), amount of the share capital of the foreign company, certificate of incorporation of the branch (duly legalized with apostille), statement of the purpose of the branch, names and nationality of the representatives of the branch. All documents must be translated into the language of the competent commercial registry (German, French or Italian).

7. *Why would you rather advise a foreign seller to set up a branch and not a company in your country, or vice versa?*

Branches ensure a cost-effective representation of the foreign company. They are easily and less costly to be setup and closed.

The foreign company remains liable for the debts of its branch. Therefore, it may be advantageous to have a separate legal entity in the form of a subsidiary.

As disadvantage of a branch must be noted that customers and

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contract partners may prefer dealing with a subsidiary that is a separate legal entity.

8. *Is a branch authorized to act before the court, to engage people?*

The foreign company as employer can engage employees for the branch. The party before the court is the foreign company. The establishment of the branch constitutes a place of jurisdiction in Switzerland.

9. *What is the liability of the legal representative of the branch?*

The legal representative of the branch has the liability as a director of the company.

10. *Is there an automatic liability of the head office for the operations or acts of the branch?*

The head office is liable for obligations of its branch.

11. *Which language will the documents be in?*

All documents required by law must be submitted in German (German part of Switzerland), French (French part of Switzerland) or Italian (Italian part of Switzerland).

Documents in other languages must be translated.

12. *What are the accounting requirements for a branch?*

The branch will have its own financial statements.

### **PART III: SUBSIDIARY – LEGAL PERSON (SEPARATE LEGAL LOCAL ENTITY) IN THE TARGET COUNTRY**

13. *What are the advantages of establishing a subsidiary compared to establishing a branch?*

As the subsidiary is an independent legal entity it is liable for its own obligations. The major advantage of a subsidiary consists in the fact that a subsidiary is considered as a local firm which may create more confidence.

14. *Can you present the main characteristics of the company forms existing under your jurisdiction in the following schedule:*

Company form	Aktiengesellschaft (Stock Corporation)	GmbH (Limited Liability Company)
Limited liability	Yes	Yes
Free transferability of the shares	Yes	Yes (written agreement is sufficient; the articles of incorporation may provide restrictions)
Fixed or variable capital	Fixed capital	Fixed capital
Minimum capital	CHF 100'000.00 (of which CHF 50'000.00 have to paid in)	CHF 20'000.00
Number of founders	1	1
Notarial deed	No	No
Representation	at least one Swiss resident	at least one Swiss resident

15. Which of the company forms is used most frequently in your jurisdiction?

Aktiengesellschaft (Stock Corporation)

16. Which company form is used most frequently in case of small or family business?

GmbH (Limited Liability Company)

17. What are the main formalities a foreign company has to comply with in order to establish a subsidiary (filial/filiale)?

The formalities to comply with depend on the legal form of the company. Basically, in order to establish a subsidiary the following formalities have to be complied with:

- articles of incorporation (notarial deed for AG and/or GmbH);
- statutes;
- deposit of the minimum capital (AG and GmbH);
- registration with the commercial registry;
- publication in the Swiss Official Gazette (SHAB).

18. What are the costs of establishing a subsidiary in your jurisdiction?

The costs of establishing a subsidiary depend on the capital of the company (AG or GmbH). For companies with the minimum capital

requirements the accumulated costs will start at approximately CHF 2'000.00 (GmbH) respectively CHF 3'500.00 (AG).

19. How long does it take to establish a subsidiary in Switzerland?  
The establishment of a GmbH and/or a AG can be generally managed within some days, once all necessary documents are finalized.
20. Is there specific legislation with regard to the liabilities of the founders and the directors of the most used company form?  
There is specific legislation (in the Swiss Code of Obligation) regarding the liabilities of the founders and the directors of an AG or a GmbH, if they are acting with intent negligently.

## **PART IV – MISCELLANEOUS**

### **A. Real estate**

#### **A.1. Purchase of a real estate**

21. *Who do you turn to in order to close a valid purchase agreement?*

A contract for the sale of immovable property is only valid if done as an official act. The cantons regulate the manner how the official act has to be on their territory. Furthermore, the acquisition of land ownership must be recorded in the land register.

22. *What are the costs related to the purchase agreement?*

The costs related to the purchase of a real estate are notarial fees, land register fees and taxes (depending on the real estate's value and the competent canton).

23. *Is there in your jurisdiction legislation that can slow down the purchase process (e.g. environmental legislation requiring preliminary soil examinations)*

Specific cases may slow down the purchase process.

- In general, the purchase of a real estate by persons abroad is restricted. The purchaser needs an authorisation from the competent authority. But citizen of EU member countries which have domicile in Switzerland need no authorisation.
- The purchase of agricultural land or industry is subject to permission also. The permission shall be granted if no reasons of refusal exist. One reason of refusal is, when the purchaser

does not farm the agricultural land or industry by himself.

A.2. Rent of a real estate:

24. In your jurisdiction is there imperative law with regard to the rent of offices, industrial real estate or commercial real estate? Can you give a summary of the major stipulations of these regulations?

In Switzerland, there are basically no differences between residential and commercial leases. But the following regulations apply only to commercial leases:

- The lessee of a commercial lease may transfer the contract to a third party when the lessor agrees.
- The lessor of a commercial lease has a special right on retention.

25. *Are there any formalities to fulfil in order to enforce the lease agreement towards third parties?*

In general only the lessee and the lessor are bound to the lease contract. If the rented real estate is being sold to a third party the lease contract stays in effect.

The lease agreement can be registered in the land register. The effect of such registration is that every future owner must allow the property to be used in accordance with the lease contract.

A.3. Environmental issues:

26. *For what types of activities is an environmental permit required?*

In order to prevent environmental damages, many projects in combination with emission (air pollution, noise, radiation), bodies of water, soil and organism are subject to permission.

27. *Can you describe briefly this procedure? How much time will this procedure normally take?*

The enforcement of the law is primarily the responsibility of the canton in which the project is planned. Therefore varies the procedure in order to obtain the necessary permission from canton to canton.

A.4. Employment:

28. *Are there any specific regulations with regard to outsourcing of employees?*

Outsourcing of employees is legally permissible.

Where the employer transfers the company or a part thereof to a third party, he must inform the organisation that represents the employees or, where there is none, the employees themselves of the reason for the transfer and its legal, economic and social consequences for the employees.

Where the transferred relationship is governed by a collective employment contract, the acquirer is obliged to abide by it for one year unless it expires or is terminated sooner.

29. *Applicable legislation according to the type of employment (differences between employment by local company or by head office for the local branch)*

It does not make any difference if an employee is hired by a branch office or by a subsidiary.

30. *Legal engagement and dismissal requirements and formalities*

In general the individual employment contract is not subject to any specific formal requirement and can be concluded orally. Some specific contracts (e.g. apprenticeship contract) and regulations (e.g. change of notice period, agreement of a prohibition of competition) are valid only if they are done in writing.

If there is no circumstance which renders the continuation of the employment relationship in good faith unconscionable for the employee, the dismissal must take into account a notice-period. The longer the engagement lasts the longer the notice-period becomes. The employer needs no special reasons to terminate the employment relationship, but he must state his reasons in writing if the employee so requests.

If the dismissal is abusive compensation must be paid.

31. *Social security regulations*

The legal provisions are quite complex and grant a high level of social protection in case of illness, unemployment, etc. Both employer and employee contribute to the social security payments.

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who we are



# Eurojuris International

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Eurojuris is now the leading network of law firms in Europe and worldwide with over 600 member firms and approximately 5000 lawyers. In addition Eurojuris can, through its correspondent firms, provide access to local firms in many other countries throughout the world. Members and correspondents are always well established medium sized independent law firms satisfying the Eurojuris criteria.

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Eurojuris IBG members aim to provide a Partner level service to clients and, through close co-operation with European colleagues, to provide a consistent and seamless service.

Eurojuris IBG aims to offer a uniform presentation and mutual legal education schemes with common practices and to develop common services for the clients of member firms.

As more and more businesses find that improved communication and access opens the way to more international trade, the need for legal representation throughout a number of jurisdictions becomes essential. Eurojuris IBG provides access to expert local knowledge through a lawyer in the jurisdiction of the client's head office.

The members of Eurojuris IBG maintain close levels of co-operation and knowledge of each other's firms. This is achieved not only via the usual media of email, fax and telephone, but also through regular meetings, some of which take place in the offices of the member firms to enable members to understand the way in which they can better serve their client's needs.

The members of Eurojuris IBG fulfill very strict criteria: they are business minded, they work with business clients across Europe and overseas, they all work in the English language and have some knowledge of other European languages. Importantly they are equipped with the most up to date information technology systems and maintain substantial Professional Indemnity Insurance.

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