



# ICLG

The International Comparative Legal Guide to:

## Shipping Law 2018

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A practical cross-border insight into shipping law

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# Switzerland

ThomannFischer

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## 1 Marine Casualty

### 1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

#### (i) Collision

Switzerland has ratified the following conventions:

- The International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels of 23 September 1910.
- The International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision and the International Convention for the Unification of certain Rules relating to Penal Jurisdiction in matters of Collision or other Incidents of Navigation, both of 10 May 1952.
- The Convention on the International Regulations for Preventing Collisions at Sea of 20 October 1972.

#### (ii) Pollution

Switzerland has ratified the following conventions:

- The International Convention for the Prevention of Pollution of the Sea by Oil of 12 May 1954.
- The International Convention for the Prevention of Pollution from Ships of 2 November 1973, including its 1978 Protocol.
- International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of 29 November 1969 including its 1973 Protocol.
- The International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 including its 1976 and 1992 Protocols.
- The International Convention on Civil Liability for Bunker Oil Pollution Damage of 23 March 2001.
- The International Convention on the Control of Harmful Anti-fouling Systems on Ships of 5 October 2001.
- The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 27 November 1992.

#### (iii) Salvage / general average

Switzerland has ratified the following conventions:

- The Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea of 23 September 1910.

- The International Convention on Salvage of 28 April 1989.

There are no rules on who may carry out salvage operations and there is no mandatory form.

#### (iv) Wreck removal

Switzerland has ratified the Nairobi International Convention on the Removal of Wrecks of 18 May 2007.

#### (v) Limitation of liability

Switzerland has ratified the Convention on Limitation of Liability for Maritime Claims of 19 November 1976.

#### (vi) The limitation fund

Art. 48 through 62 of the Ordinance on the Swiss Shipping Act provides for detailed rules regarding the establishment of a limitation fund.

General remark regarding all the above conventions: Under Swiss Law, international treaties are directly applicable, if they are self-executing. There is therefore no need for special legislation incorporating such treaties. Nevertheless, Arts. 48, 49, 120 and 121 of the Swiss Shipping Act explicitly refer to the above conventions.

### 1.2 What are the authorities' powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

Under the Ordinance on the Safety Investigation of Transport Incidents (OSITI; SR 742.161) the Swiss Transport Safety Investigation Board STSB will carry out an investigation on the technical, operational, human and systematic causes in the event of an incident involving a ship under Swiss flag. Shipping incidents abroad will only be investigated if they take place in international waters. An incident is defined pursuant to Art. 94 par. 1 no. 7 of the United Nations Convention on the Law of the Sea. The goal of the investigation is to avoid similar incidents in the future, but the report will not opine on fault or the legal responsibility. The STSB has comprehensive powers and can take all measures necessary to conduct the investigation.

If a criminal act is committed on board of a ship flying the Swiss flag, the authorities of the canton of Basel-Stadt, i.e. the prosecutor's office of Basel, shall be in charge of leading the criminal investigation (Art. 15 of the Swiss Shipping Act). The prosecutor's powers are laid out in the Swiss Criminal Procedure Code.

The STSB and the prosecutors coordinate their efforts and are under a duty to disclose their documents and findings respectively.

## 2 Cargo Claims

### 2.1 What are the international conventions and national laws relevant to marine cargo claims?

Switzerland has ratified the Hague-Visby-Rules. In Art. 101, the Swiss Shipping Act explicitly refers to the Hague-Visby-Rules.

Switzerland has signed, but not ratified, the Rotterdam Rules. The Hamburg Rules have not been signed.

### 2.2 What are the key principles applicable to cargo claims brought against the carrier?

All the principles as established in the Hague-Visby-Rules apply, i.e. the presumed liability except for the excepted perils, the exclusion of liability for nautical error and fire and the limitation of liability. The limitations apply not only to contractual claims, but also if claims are based on tort (Art. 105 of the Swiss Shipping Act). The bill of lading determines the rights that any lawful holder of such bill of lading may assert against the carrier, whereas the charterparty remains decisive for the legal relation between the carrier and the shipper (Art. 115 of the Swiss Shipping Act).

### 2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

The Swiss Shipping Act, just like German law, distinguishes between the shipper and the so-called *Ablader* (Art. 106 of the Swiss Shipping Act). The *Ablader* is the party who, on behalf of the shipper, actually delivers the goods to the ship. This can be the shipper himself or e.g. a forwarder or agent acting on behalf of the carrier. The *Ablader* is liable towards the carrier for any damages caused by misdeclaration of cargo, regardless of fault.

The *Ablader* or the contractual shipper, if he is the one delivering the cargo, will also be liable to other shippers who have cargo aboard and sustain damages. However, and contrary to the *Ablader's* liability toward the carrier, the *Ablader* will only become liable towards other shippers if they succeed in establishing the *Ablader's* fault.

The carrier will not be liable for shippers' damages in the event of misrepresentation (Art. 106 of the Swiss Shipping Act).

## 3 Passenger Claims

### 3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

Switzerland has ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974 including its 1976 Protocol. Art. 118 of the Swiss Shipping Act explicitly refers to the Athens Convention. The provisions of this convention, including the provisions on limitation of liability therefore govern maritime passenger claims.

## 4 Arrest and Security

### 4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

Switzerland has ratified the 1952 Arrest Convention but is not a signatory to the 1999 Arrest Convention.

Switzerland is a landlocked country and therefore seagoing vessels will, apart perhaps from yachts and similar small vessels on the Rhine, never be in the jurisdiction of Swiss courts/authorities. As a consequence, Swiss courts/authorities will never have the opportunity to arrest a seagoing vessel.

### 4.2 Is it possible for a bunker supplier (whether physical and/or contractual) to arrest a vessel for a claim relating to bunkers supplied by them to that vessel?

Due to Switzerland being a landlocked country, this point is mute.

### 4.3 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

Due to Switzerland being a landlocked country, this point is mute as far as ship arrests are concerned.

However, it is conceivable that cargo liens may be exercised based on, and under the conditions set out in, the general provisions of Swiss national law on arrests.

### 4.4 In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking.

As mentioned above, ship arrests will never be carried out in Switzerland. In the case of arrest on cargo (see above), courts would accept the following securities: a bank guarantee; a cash deposit with the competent court; or any other asset replacing the arrested goods, if such assets, in the view of the court, provide an adequate security to the creditor.

## 5 Evidence

### 5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

Under Swiss civil procedural rules, the range of admissible means of evidence is limited to witness testimonies, documents, visual inspections, expert opinions, written testimony and parties' statements (Art. 168 of the Swiss Civil Procedure Code). All these means of evidence only qualify as evidence if they are given upon instruction by the court or at least in the course of a court proceeding. Pre-trial Affidavits, prepared witness statements or expert opinions prepared by a party are therefore not admissible as evidence in court.

If a party is able to establish that evidence may be jeopardised, that party may apply to the competent court for provisional securing of evidence. The court may then, even if no procedure on the merits is pending, hear witnesses, get a preliminary expert opinion or take other appropriate measures to secure physical evidence (Art. 158 of the Swiss Civil Procedure Code).

The Civil Court of Basel-Stadt is the competent court for all tort claims based on incidents that take place on a ship flying the Swiss flag. The same court is competent for any other civil claim which has its legal basis in the Swiss Shipping Act, i.e., among others, all claims relating to ownership, mortgages, liens, charterparties and crewing contracts (Art. 14 of the Swiss Shipping Act).

## 5.2 What are the general disclosure obligations in court proceedings?

Under Swiss civil procedural law there is no pre-trial discovery. Hence, with no proceeding pending and in the absence of a court order based on Art. 158 of the Swiss Civil Procedure Code (see above) no party is obliged in any way to provide, disclose or secure evidence.

Once a matter is pending, every party to the proceeding and also third parties who are not involved in the proceedings are under a duty to cooperate which, *inter alia*, includes the duty to disclose documents and to give accurate witness statements.

A party to a proceeding is exempt from the described duty to cooperate, if this may give reason to a criminal investigation against that party (*nemo tenetur* rule) or reason to a civil liability against that party or if that party is subject to a professional secrecy as described in Art. 321 of the Swiss Criminal Code (e.g. attorneys, notaries, patent attorneys, auditors subject to a duty of confidentiality under the Code of Obligations, doctors, and others, including auxiliaries to any of the foregoing persons).

Third parties are exempt from the described duty to cooperate if there are certain family relationships to one of the parties as described in the Swiss Civil Procedure Code.

## 6 Procedure

### 6.1 Describe the typical procedure and timescale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution.

- General Remarks:
  - There are no courts in Switzerland who specialise in shipping or maritime issues. Any such issues will therefore be dealt with by the ordinary civil courts.
  - The concept of an action *in rem* is not known to Swiss law. An arrest under Swiss law is therefore rather a freezing injunction, i.e. merely a possibility to secure assets. The claim itself (i.e. the proceeding on the merits) will, on the other hand, always have to be directed against the debtor.
- i) National Courts: Due to Switzerland being a landlocked country, there will never be a maritime lien enforced in Switzerland. The procedure described hereinafter does therefore *not* refer to maritime liens, but instead refers to the general arrest, which may, for example, be exercised on maritime cargo if the conditions as set out in Swiss law are met.

A creditor seeking an arrest will have to apply to the competent judge to issue an arrest deed. The judge will do so, if the creditor credibly establishes that he has a claim against the owner of the goods, that there is good cause for issuing an arrest order and the goods to be arrested belong to the debtor. The judge will normally decide on the spot, without hearing the other party. The *arrest order* will be issued with no delay (usually on the same day) and the Debt Enforcement Office will be instructed to secure the assets. Once this is done, the debtor will be informed about the arrest and the *arrest deed* will be issued.

Now the debtor has the possibility to object. If he does so, the parties will be summoned to court where the court will decide, still based on *prima facie* evidence, whether the arrest will be upheld.

If the arrest is confirmed or if the debtor does not even object in the first place, the creditor is under an obligation to initiate the enforcement of his alleged claim within 10 days, either by commencing an enforcement procedure or by initiating a civil action against the debtor.

- ii) Courts of Arbitration: Courts of arbitration may, depending on the applicable arbitration rules, grant interim reliefs. However, if the party concerned does not comply, the court of arbitration has no power whatsoever to enforce the interim relief. The Court of Arbitration would in this case have to apply to the competent judge to enforce the arbitral interim relief.
- iii) Mediation plays no significant role in the enforcement of claims. In any case, a mediator has no power whatsoever to grant interim reliefs or to arrest goods.

### 6.2 Highlight any notable pros and cons related to your jurisdiction that any potential party should bear in mind.

Pro: Swiss courts are generally of rather high quality and the average amount of time necessary to obtain a judgment on the merits is, compared to an international standard, rather reasonable. As a very general rule it may be expected that a first-instance proceeding on the merits of a case will take approx. one year. Of course, this is just a very rough rule of thumb and the specifics of a case may shorten this period down or prolong it.

Con: procedural costs in Switzerland are high, compared to other jurisdictions.

## 7 Foreign Judgments and Awards

### 7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

Switzerland is party to various international treaties governing the recognition and enforcement of foreign judgments, the most important one being the so-called Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007), which is basically the equivalent of the Brussels I Regulation of 2001 (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Furthermore, several bilateral treaties are in place which deal with recognition and enforcement in civil and commercial matters.

If no international or bilateral treaty applies, the provisions of the Swiss Federal Act on Private International Law (PILA) would apply. Therefore, and slightly simplified, it can be said, that European judgments will be recognised according to the Lugano Convention whereas most other judgments have to meet the requirements as set out in the PILA. The main principles of these two systems are laid out below:

**Lugano Convention:** the Lugano Convention provides for a system of automatic recognition of foreign judgments, i.e. there will be no review on the merits, no review of jurisdictional issues and in general no decision by a Swiss judge is required to render the foreign judgment effective. However, if the enforceability is disputed, then any party may apply for a court order confirming the enforceability in Switzerland. To this end a special form as defined in Art. 54 of the Lugano Convention, has to be filed by which the foreign court confirms enforceability of the judgment. The recognition and enforceability in Switzerland will only be denied in very exceptional circumstances as defined in Art. 34 and 35 LugC. The circumstances referred to in these articles mostly represent the material or procedural public order.

**PILA:** contrary to the system of the Lugano Convention, the PILA does not automatically recognise foreign judgments. In order to have a judgment recognised in Switzerland, a respective application has to be submitted with the competent court. The court will then examine whether the foreign court had sufficient jurisdiction to render a judgment on the merits. If jurisdiction of the foreign court is established, then the defendant may still argue that the judgment is incompatible with the Swiss public order or that he did not receive proper notice on the foreign proceeding, that fundamental procedural rights had been violated or that the same dispute has already been decided upon. Apart from these points, the merits of the case will not be reviewed.

## 7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

**Arbitration:** Switzerland is signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. The provisions of the Convention therefore apply.

## 8 Updates and Developments

### 8.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

As described above, foreign judgments are in principle recognised and enforceable in Switzerland. This does, however, not answer the question whether judicial sales of ships will also be recognised. Whilst this was a difficult issue in the past, the authorities have now signalled that a foreign judicial sale generally speaking will be recognised in Switzerland, and therefore constitutes a valid legal title to a ship and will enable the new owner to amend the ship registry.

Switzerland was planning to introduce the possibility for cantons to introduce tonnage tax systems. This tool was skipped from the current tax reform package, but the project is still being dealt with in the federal administration and may be re-introduced in the near future. If such a regime would indeed be introduced, this would make the Swiss flag more attractive for shipping companies.



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ThomannFischer is a commercial law firm based in Basel, Switzerland and was established in 1998. Stephan Erbe and Dr. Christian Hochstrasser deal with transport, logistic and maritime law matters, making ThomannFischer one of the leading firms in this field in Switzerland. Besides dealing with transport matters, ThomannFischer also has a strong IP practice and generally advises clients in all fields of commercial law, such as real estate and construction, tax, labour law for employers and others. ThomannFischer also offers all notarial services.

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