The Dispute Resolution Review

Sixth Edition

Editor
Jonathan Cotton

Law Business Research

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Editor
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Law Business Research Ltd

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EDITOR'S PREFACE

Building on the previous five editions under the editorship of my partner Richard Clark, I am delighted to have taken on the role of editor from him. *The Dispute Resolution Review* has grown to now cover 54 countries and territories. It is an excellent resource for those, both in-house and in private practice, whose working lives include involvement in disputes in jurisdictions around the world.

The Dispute Resolution Review was first published in 2009 at a time when the global financial crisis was in full swing. Against that background, a feature of some of the prefaces in previous editions has been the effects that the turbulent economic times were having on the world of dispute resolution. Although at the time of writing the worst of the recession that gripped many of the world's economies has passed, challenges and risks remain in many parts of the world.

The significance of recession for disputes lawyers around the world has been mixed. Tougher times tend to generate more and longer-running disputes as businesses scrap for every penny or cent. Business conduct that was entrenched is uncovered and gives rise to major disputes and governmental investigation. As a result of this, dispute resolution lawyers have been busy over the last few years and that seems to be continuing as we now head towards the seventh anniversary of the credit crunch that heralded the global financial crisis. Cases are finally reaching court or settlement in many jurisdictions that have their roots in that crisis or subsequent 'scandals' such as *LIBOR*.

The other effect of tougher times and increased disputes is, rightly, a renewed focus from clients and courts on the speed and cost of resolving those disputes, with the aim of doing things more quickly and for less, particularly in smaller cases. The Jackson Reforms in my home jurisdiction, the United Kingdom, are an example of a system seeking to bring greater rigour and discipline to the process of litigation, with a view to controlling costs. Whether such reforms here and in other countries have the desired effect will have to be assessed in future editions of this valuable publication.

Jonathan Cotton
Slaughter and May
London
February 2014

Chapter 48

SWITZERLAND

Peter Honegger, Daniel Eisele, Tamir Livschitz[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Switzerland is a federal state comprised of 26 cantons. Its substantive civil law and its law on civil procedure is regulated at federal law level, whereas the judiciary in the cantons is organised by each respective canton on its own. Notwithstanding Switzerland being a civil law country, in practice court precedent is of utmost significance both in terms of interpretation and development of the law.

The Swiss Code of Civil Procedure[2] (CCP) prescribes the principle of double instance for the judiciary of the cantons, which means that each canton must, besides a court of first instance, establish an appeal instance with full power of review. Decisions of the appeal court may then be appealed to the Swiss Federal Tribunal – the highest court in Switzerland – where the grounds for appeal are ordinarily limited to violations of federal and constitutional law. The proceedings before the Swiss Federal Tribunal are governed by the Federal Act on the Swiss Federal Tribunal.[3]

As an exception to the aforementioned principle of double instance at the cantonal level and deriving from the cantonal power to organise its judiciary (e.g., the functional and subject matter jurisdiction of the courts), the cantons are given the right to establish a specialised court as the sole cantonal instance to hear commercial disputes, whose decision may only be appealed to the Swiss Federal Tribunal. So far only four cantons (Zurich, Bern, St Gallen and Aargau) have made use of such right and have established a specialised commercial court.

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1 Peter Honegger and Daniel Eisele are partners and Tamir Livschitz is a senior associate at Niederer Kraft & Frey.

2 Swiss Code of Civil Procedure of 19 December 2008.

3 Federal Act on the Swiss Federal Tribunal of 17 June 2005.

Furthermore, in case of claims exceeding 100,000 Swiss francs, the CCP provides disputing parties with a right to agree to forego the lower cantonal instance and have the dispute heard directly by the cantonal appeal instance as the sole cantonal instance. Lastly, in certain specialised fields of law such as intellectual property, competition and antitrust law, claims against the Swiss government and disputes relating to collective investment schemes, federal law requires the cantons to designate a court of exclusive first instance jurisdiction.

The principle of double instance furthermore does not apply in arbitration matters, be it domestic or international. The sole instance of appeal in domestic arbitration proceedings is the Swiss Federal Tribunal, unless the arbitrating parties explicitly agree on a cantonal court as sole appeals instance. Similarly, in international arbitration proceedings the Swiss Federal Tribunal acts as the sole appeals instance for arbitral awards, unless the possibility to appeal has been excluded by the arbitrating parties, which is, however, only admissible if none of the arbitrating parties is domiciled in Switzerland.

II THE YEAR IN REVIEW

i Revised rules for CAS sports arbitrations

On 1 March 2013 the revised arbitration rules of the Court of Arbitration for Sport (CAS) entered into force and apply to all procedures initiated by the CAS from this date. All pending CAS proceedings at that date remain subject to the previous rules, unless the arbitrating parties agree otherwise.

The most notable changes concern on the one hand the introduction of an 'emergency arbitrator' mechanism, pursuant to which it will be possible for a party to request interim measures from the CAS immediately after the notification of a final decision by a sports federation but before filing a formal appeal to the CAS (rule 37). On the other hand the President of the Division is now given explicit powers to choose to appoint a sole arbitrator when the claimant so requests and the respondent fails to pay its share of the deposit on arbitration costs, if the arbitration agreement does not specify the number of arbitrators (rule 40.1 and 50.1). It remains to be seen to what extent in particular the introduction of the emergency arbitrator will prove to be of practical relevance.

ii Freezing of assets located in Switzerland on the basis of foreign judgments and foreign arbitral awards

In a landmark decision of 21 December 2012, the Swiss Federal Tribunal addressed two questions in respect of which there had been significant controversy. It confirmed that a foreign judgment from a non-Lugano Convention state or a foreign arbitral award would constitute valid title for debt collection purposes in Switzerland and as a result thereof would constitute sufficient grounds for a freezing order pertaining to assets located in Switzerland; and it furthermore confirmed that a court was entitled to incidentally review the question of *exequatur* (i.e., the recognisability of a foreign decision or award in Switzerland) in the framework of its review of a motion to freeze assets located in Switzerland.

Hence, assets of debtors located in Switzerland may be frozen on the basis of foreign judgments and arbitral awards upon *prima facie* evidence being furnished by creditors in the framework of the freezing proceedings that such judgments or awards are recognisable and enforceable in Switzerland. This means that for instance with respect to foreign arbitral awards not all conditions for the recognition and enforcement of foreign arbitral awards as stipulated in the New York Convention[4] must be met to obtain a freezing order for assets located in Switzerland.

iii No appeal on grounds of lack of impartiality if the arbitrator was appointed by a foreign court

On 10 January 2013 the Swiss Federal Tribunal rendered a much-discussed decision in the long-running dispute between the National Iranian Oil Company (NIOC) and the state of Israel. NIOC commenced arbitration agreements in France based on an arbitration clause included in an agreement dating back to 1968. The arbitration clause contained no connection to France whatsoever (no seat, no applicability of substantive French law) other than that the ICC being designated the body to appoint the chairman of the arbitral tribunal if the two party-appointed arbitrators failed to reach agreement thereon. Israel rejected the commencement of the arbitration proceedings and refused to appoint an arbitrator, following which a French lower court appointed an arbitrator in its stead. Such appointment in turn led to a battle in the French courts ending with a judgment rendered by the French Court of Cassation on 1 February 2005 rejecting Israel's objection to the appointment of an arbitrator in its stead by the French court. In particular, the French Court of Cassation accepted jurisdiction of the French courts to nominate the arbitrator on Israel's behalf, even though the arbitration agreement contained no links to France.

The parties subsequently agreed on Geneva as the place of arbitration. In its statement of defence submitted in the Swiss arbitral proceedings Israel, *inter alia*, again objected to the appointment of an arbitrator in its stead by the French court. Upon rejection of such objection by the arbitral tribunal in a partial award, such award was appealed to the Swiss Federal Tribunal on grounds of improper constitution of the arbitral tribunal. The Swiss Federal Tribunal considered that a French court had appointed the arbitrator appointed in Israel's stead and the latter had challenged such decision – without success – in the highest civil court in France; and that the appointment took place before the seat of the arbitration was set in another country (i.e., Switzerland). While the Swiss Federal Tribunal confirmed that under normal circumstances the decision by which an arbitrator is appointed can be appealed on grounds of improper constitution, the court confirmed that it will not reconsider an arbitrator's appointment effected by a foreign court after the other party sought the assistance of such court when faced with the refusal by its counterparty to appoint an arbitrator.

The decision clarified that, generally, the decision by which an arbitrator is appointed is issued in non-contentious proceedings and therefore does not become

4 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

res judicata, meaning that the arbitrators after their appointment are free to review the question of jurisdiction and the proper composition of the arbitral tribunal. When they do so, such decision may be appealed. However, this situation could not be transposed to a set of facts in which the highest court of a foreign country reviewed the matter exhaustively in separate proceedings and decided the appointment of the arbitrator. Such decision of a foreign court was held not to be subject to appeal to the Swiss Federal Tribunal on grounds of the improper constitution of the arbitral tribunal.

iv No obligation of a Swiss arbitral tribunal to apply mandatory foreign laws

The decision of the Swiss Federal Tribunal rendered on 18 March 2013 concerned the termination of a contract governed by Bulgarian law between a football coach and the Bulgarian Football Federation. The contract contained an ambiguous arbitration clause, where reference was made to the CAS. The football coach first sued the Bulgarian Football Federation for improper termination in Bulgaria on the premise that the arbitration clause was invalid given that employment disputes are not deemed arbitrable in Bulgaria. The Bulgarian court confirmed jurisdiction, however, it declined the claim on the merits since the contractual penalties claimed by the coach were not admissible in Bulgarian law. Thereafter, the coach initiated a second civil procedure in Bulgaria. In parallel, the coach also commenced arbitration proceedings before the CAS to which the Bulgarian Football Federation objected on the grounds of non-arbitrability pursuant to Bulgarian law. The CAS rejected jurisdiction for lack of arbitrability and on the basis of a real risk that a subsequent arbitral award could not be enforced in Bulgaria.

Upon appeal the Swiss Federal Tribunal rejected the CAS's considerations as to the applicability of foreign mandatory laws and the risk of non-enforceability and clarified that mandatory foreign law pertaining to the arbitrability of a dispute may, but need not necessarily be taken into account in an international arbitration seated in Switzerland. It furthermore confirmed that any considerations as to the subsequent enforceability of an arbitral award had no relevance whatsoever on the determination of an arbitral tribunal's jurisdiction (and the preliminary question of arbitrability). The Swiss Federal Tribunal nevertheless went on to confirm the CAS's rejection of jurisdiction on the basis that the Bulgarian football coach by virtue of its own initiation of two civil state court proceedings in Bulgaria had expressed its understanding of the arbitral clause to the effect that he had considered such clause not to be applicable. Against such conduct he could not validly argue the validity of the arbitration clause before the Swiss Federal Tribunal on the basis of an interpretation of such clause in accordance with the principle of reliance.

v Client–attorney dispute as consumer litigation under the Lugano Convention

In a decision of 8 July 2013 – which may be of special interest for attorney–client relationships – the district court of Zurich (i.e., a lower instance court) was seized to resolve a dispute relating to attorneys' fees and had to decide whether or not a party agreement on jurisdiction contained in a service agreement between a Swiss law firm and its German client (an individual) was valid. The German client had premised its

objection on the Lugano Convention,[5] pursuant to which no advance party agreement on jurisdiction is valid in consumer disputes (Article 17). The client had argued that the attorney–client relationship would constitute a consumer dispute within the meaning of the Lugano Convention, since the matter concerned a personal (as opposed to a professional) matter of his and the law firm had directed its commercial or professional activities at Germany (i.e., at German clients) (Article 15).

The court upheld the client's objection on the basis that the intention of a law firm to direct its commercial or professional activity at a foreign country (and potential clients being domiciled in such country) could be reflected by the form and content of a law firm's web page. This includes:

a the country code in the law firm's phone number indicated on the web page;
b directions for foreign clients about how to find the law firm;
c reference to international clientele that the law firm regularly services;
d the web page being available in languages other than the local language;
e the use of currencies other than the local currency; and
f cooperation with foreign law firms indicated on the web page were held to serve as indications of a professional activity being directed at foreign countries (and foreign clients).

While no one of these indications would confirm a professional activity being directed at foreign countries *per se*, the assessment would need to be premised on the overall appearance of the web page and whether or not it is possible to derive from it the firm's intention to attract clients from abroad.

This decision was rendered by a lower instance court in Zurich and it remained unchallenged. The prejudicial effect may, therefore, be of limited nature. From the decision, it can, however, be concluded that forum prorogation clauses in attorney–client agreements may not be considered valid if the clients are natural persons and if the mandate relates to their personal, non-commercial matters. As a consequence, Swiss law firms may in fee arrangement disputes be compelled to seek judicial relief before the competent courts at the domicile of the client, at least when it comes to clients being domiciled in signatory states to the Lugano Convention.

III COURT PROCEDURE

i Overview of court procedure

The main statute governing civil procedure in Switzerland is the CCP. Apart of civil procedure, the CCP equally governs the debt collection proceedings in relation to non-monetary matters as well as domestic arbitration proceedings, unless the arbitrating parties opt out of its application.

5 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters concluded in Lugano on 30 October 2007.

Monetary debt collection matters are governed by the Federal Debt Enforcement and Bankruptcy Act[6] (DEBA), whereas the recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly regulated by the Private International Law Act[7] (PILA) as well as all bilateral and multilateral agreements on this subject matter to which Switzerland is a party, the most practical importance of which certainly applies to the Lugano Convention and the New York Convention, respectively.

Predominantly, civil proceedings in Switzerland are governed by the maxim clarifying that it is up to the parties to decide how, when, 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 the same vein, it is generally up to the parties to submit the factual allegations relevant to decide the dispute and the court when assessing the matter may not take into account facts that have not been argued by the parties. In contrast thereto, certain proceedings – in particular (but not limited to) family law matters – are governed by the maxim that the court has a certain obligation to collect and determine relevant facts to resolve the dispute.

Irrespective of any maxim that may apply, Swiss civil proceedings are governed by the principle of *iura novit curia* (i.e., it is up to the court to apply the substantive law *ex officio* regardless of whether or not a party has invoked certain provisions of law). Put differently, when rendering a decision, a court may base its decision on legal provisions that the parties did not invoke at all.

In proceedings before the Swiss Federal Tribunal acting as the last instance of appeal to review violations of fundamental rights and cantonal or inter-cantonal law; and acting as sole instance of appeal in domestic and international arbitration proceedings, this principle of *iura novit curia* does not apply. Rather these proceedings are governed by the principle that provides that the parties must explicitly point out and demonstrate what provisions of law are violated by the decision they appeal.

In terms of duration, a time period of between three and seven years may be taken as a benchmark for a full litigation appealed through all instances up to the Swiss Federal Tribunal.

ii Procedures and time frame

The three principal types of proceedings foreseen by the CCP are the ordinary, simplified and summary proceedings. Claims must be submitted under the ordinary proceedings unless the law expressly provides otherwise.

Ordinary proceedings can ordinarily be split up into three phases:

a the pleading phase, where the parties must present and substantiate their claims and defences and offer evidence for them;

b the evidentiary phase where the courts hear and review the evidence presented by the parties; and

6 Federal Debt Enforcement and Bankruptcy Act of 11 April 1889.

7 Private International Law Act of 18 December 1987.

c the post-hearing phase where the parties may comment on the outcome of the evidence proceedings and the court will render its decision.

Generally (and subject to a number of exceptions), state court civil proceedings in Switzerland are commenced by lodging a request for a conciliatory hearing, which is ordinarily a prerequisite for the filing of legal action in civil matters before state courts. In practice, the conciliatory hearings only rarely lead to a settlement of the dispute, in particular if the value in dispute is high. Thus, in cases where the value in dispute exceeds 100,000 Swiss francs, the CCP foresees a possibility for the parties to waive the holding of such conciliatory hearing. A plaintiff may furthermore waive the holding of a conciliatory hearing if the defendant is domiciled outside Switzerland or if its whereabouts are unknown. The parties can agree to revert to mediation in lieu of holding a conciliatory hearing. However, should the mediation process fail, the plaintiff will have to request the issuance of a writ permitting them to file the claim from the body that would have held the conciliatory hearing had it not been replaced by the mediation process.

Simplified proceedings govern disputes with a value in dispute not in excess of 30,000 Swiss francs. Additionally, certain actions relating to subject matters such as employment law, tenancy law or data protection law are also to be brought under simplified proceedings.

Simplified proceedings, as ordinary proceedings, are commenced by lodging a request to hold a conciliatory hearing as elaborated above. In the same way as ordinary proceedings, simplified proceedings are complete proceedings (i.e., there is no reduced scope of court review nor do any limitations as to the adduction of evidence apply). Rather, simplified proceedings generally provide for a facilitation of the pleading phase, where, for instance, a proper substantiation of the claim is not necessary, as the court has certain extended interrogation duties with a view to supplement any incomplete facts of the case or adduce adequate evidence. Certain subject matters to be decided by means of the simplified procedure, such as certain tenancy and employment matters, require the court to collect the relevant facts of the dispute. Lastly, in terms of the duration of the proceeding, the court will work towards resolving the dispute during or following the first hearing of the case.

Summary proceedings are fast-track proceedings. No holding of a conciliatory hearing is necessary. The main characteristics of summary proceedings are that the parties may not avail themselves of all otherwise available means of claim and defence. In particular, the means of evidence admitted are significantly restricted, while the standard of proof is reduced (generally to a standard of 'reasonable certainty').

Legal actions such as motions for interim relief (preliminary measures or injunctions) and claims where the facts are undisputed or immediately provable and where the law is clear are to be brought in summary proceedings. Furthermore, the DEBA foresees the applicability of summary proceedings to certain debt collection and bankruptcy proceedings. To benefit from such fast-track proceeding, the party seeking to collect the outstanding monetary debt must have proper title certifying such debt. Depending on the nature of the title, the debtor will in the course of the fast-track proceeding be able to raise certain defences, which, if upheld, will require the claimant to initiate the ordinary or simplified state court proceedings in civil matters.

The above DEBA fast-track proceeding for monetary debt collection matters also applies to the enforcement of monetary debts certified by domestic and foreign state court judgments as well as to domestic and foreign arbitral awards (where, with regard to foreign judgments and arbitral awards, the provisions of international agreements and treaties, such as the Lugano Convention or the New York Convention, are additionally taken into account).

iii Service out of the jurisdiction

Summons, orders and decisions from Swiss courts are served to parties domiciled in Switzerland by registered mail or by other means against confirmation of receipt.

Barring any bilateral or multilateral agreement ratified by Switzerland providing otherwise, service of court documents out of Switzerland must occur by way of judicial assistance only.

Apart from bilateral agreements, Switzerland takes part in two international treaties on the subject matter. Switzerland is a signatory state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, pursuant to which service of legal documents occurs via a central authority appointed in each Member State, which in Switzerland are the respective cantonal high courts. The legality of service is then assessed based on the law of the jurisdiction where service is effected.

Furthermore, Switzerland is party to the Hague Convention on Civil Procedure of 1 March 1954, pursuant to which a foreign court wishing to serve documents out of the jurisdiction must use diplomatic channels (i.e., the documents must be served to the consular representation in Switzerland, which then approaches the Swiss Federal Department of Justice to ensure service on the party domiciled in Switzerland). Complaints to foreign courts against persons domiciled in Switzerland must also be translated into one of the official languages of Switzerland.

A Swiss court may require a party domiciled abroad to appoint a process agent in Switzerland for the purposes of a civil proceeding. If the foreign party fails to do so, service may be effected by the court by way of public announcement, generally by way of publication in the cantonal official gazette.

iv Enforcement of foreign judgments

Barring any bilateral or multilateral agreement that may apply, the general rules regarding the enforcement of foreign judgments in Switzerland are regulated in the PILA. To enforce a foreign judgment under the PILA, a party must submit to the enforcing court a complete and authenticated copy of the decision; a confirmation that no ordinary appeal is available anymore against the decision; and in case of a default judgment, official documentation evidencing that the defendant has been duly summoned and has been given the chance to enter a defence.

For a foreign judgment to be recognised under the PILA, the party seeking enforcement must, in particular, demonstrate the competence of the foreign court having rendered the decision. The party objecting to the recognition and enforcement is entitled to a hearing and to adduce evidence. This notwithstanding, interim relief such as freezing

orders or attachments are available in the enforcement proceedings for the party seeking recognition and enforcement to protect its legitimate interests.

With regard to European judgments, Switzerland is a signatory state of the Lugano Convention, whose provisions apply to the recognition and enforcement of judgments in civil and commercial matters rendered in another signatory state of the Lugano Convention.

Compared to the enforcement regime foreseen by the PILA, the Lugano Convention provides facilitations both in terms of the conditions for recognition and enforcement as well as in terms of the applicable procedure. As regards the conditions to be met for recognition and enforcement of a foreign judgment, under the Lugano Convention the enforcing court is, in particular, not permitted to verify whether the foreign court, having rendered the decision, was competent to do so in the first place. A party seeking to enforce a foreign judgment must provide the court with the original or an authenticated copy of the judgment and a certificate rendered in accordance with the provision of the Lugano Convention confirming the enforceability of the decision. Notably, no evidence as to due process standards having been met must be adduced. In terms of procedure, the enforcing court must decide on the enforcement request in an ex parte procedure (i.e., without hearing the party against which enforcement is sought). The latter will only be heard in the appeals stage should it appeal the *ex parte* enforcement decision.

v Civil assistance to foreign courts

In recent years, assistance to foreign courts has shifted more and more into public view, not least because of certain attempts of foreign courts to order parties domiciled in Switzerland to directly collect and surrender information and documentation to the foreign court other than via the official channels foreseen by international law.

In Switzerland, it may be a criminal offence pursuant to Articles 271 (unlawful activities on behalf of a foreign state) and 273 (industrial espionage) of the Swiss Criminal Code – and possibly also a violation of further obligations relating to professional secrecy and data protection laws – to collect or surrender (or assist to do so) information and documentation to a foreign court pursuant to a foreign order not effected via the requisite judicial assistance channels as foreseen by international law. Thus, compliance by a party with such foreign court order (or for that matter with any order of a foreign authority) may lead to criminal sanctions. Barring any bilateral or multilateral agreement to the contrary, any information, documentation or other kind of assistance pertaining to matters located within Switzerland that a foreign court may require must be obtained by way of judicial assistance only.

The service of documents from a foreign court into Switzerland and the taking of evidence by a foreign court in Switzerland must occur in line with international treaties ratified by Switzerland. In relation thereto, Switzerland has ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, the Hague Convention on Civil Procedure of 1 March 1954 and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970.

Under the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970, the requesting state must transmit its request to the central authority of Switzerland (at cantonal level), which will forward such request to the Swiss Federal Department of Justice and Police together with its recommendation about whether or not it supports such request. The taking of evidence will be effected by the cantonal authorities at the domicile of the person. It is, however, noteworthy that Switzerland has made a reservation under this treaty as regards common law pretrial discovery of document requests.

The procedure for the taking of evidence required under the Hague Convention on Civil Procedure of 1 March 1954, while not identical, is fairly similar to the procedure required under the Hague Convention on the Taking of Evidence Abroad in Civil And Commercial Matters of 18 March 1970. Since the latter replaces the former, a requesting state being signatory to both treaties will have to submit its request under the procedure foreseen by the Hague Convention on the Taking of Evidence Abroad in Civil And Commercial Matters of 18 March 1970.

Generally speaking, the Swiss authorities have in recent years proven to be very amenable to judicial assistance requests from foreign authorities.

vi Representation in proceedings

As a rule, a representation in proceedings is always permitted in Switzerland. Exceptions to such rule may apply in conciliatory hearings and certain family law proceedings where the parties must appear in person. That said, Swiss law does not require a party to be represented in court proceedings, unless such party is deemed incapable of conducting the proceeding in which case the court will require such party to arrange for legal representation.

Other than in civil and criminal matters before the Swiss Federal Tribunal legal representation of a party in court proceedings needs not be, but ordinarily is, taken over by a lawyer. A person wishing to professionally represent parties in court proceedings must be qualified to practice in Switzerland.

Apart from the duty to protect their clients' interests and their duty of care, Swiss attorneys are subject to confidentiality and professional secrecy obligations, a violation of which constitutes a criminal law offence.

vii Access to court files

As a rule, civil law court proceedings in Switzerland are public. However, public interest in commercial cases is normally very limited. If the public interest or the protected interests of a person are directly affected, a court may exclude the public from proceedings. Since commercial disputes, in particular those with an international component, tend to be complex, the parties generally submit their pleas in writing. While written submissions in civil proceedings are not made available to the public, copies of judgments may be requested by anyone. In such cases the judgments are generally made available in anonymised form only.

viii Class actions

Swiss civil law procedure does not permit class actions. Thus, typically, claims must be brought by individual claimants. However, a number of procedural tools under the CCP allow for multiple parties in civil law proceedings to act jointly, be it on the plaintiffs' or the defendants' side.

Under certain circumstances a group of plaintiffs must lodge their claims or be sued jointly (a 'mandatory joinder of parties'). Generally speaking this will be the case if the relationship between the members of the group is of a kind that does not allow for differing decisions as to the individual members of the group. Also, if rights or duties of multiple parties stem from similar circumstances or legal grounds, Swiss law allows for such multiple parties to lodge their claims jointly. However, and in contrast to a mandatory joinder of parties set up, the joint action is made available as an option rather than as a mandatory requirement.

Depending on whether or not the plaintiffs are required by law to proceed together, the effect of the plaintiffs' legal actions on the other joint parties varies. In case of a mandatory joinder of parties, all procedural measures taken by one of the parties are, as a rule, effective for all other joint parties. Furthermore, if in case of a mandatory joinder of parties not all parties are made part of the legal action, the plaintiff(s) or the defendant(s) may lack standing, which will lead to the dismissal of a claim. In contrast, in case of a voluntary joinder of parties, each of the joint parties may act independently, a judgment rendered will only bind the parties having joined the proceedings as voluntary joint parties and the judgment may vary as to each individual of the joint parties.

As a further kind of group action, Swiss law permits associations and organisations of national or regional importance to file claims on behalf of their members, if their statutes authorise them to so protect the interests of their members, which is predominantly limited to remedial action for violations of their members' personality rights. Actions seeking monetary relief are, however, excluded and need to be pursued individually by the person or persons concerned.

While the above reflects the current situation in Switzerland with respect to class actions, currently there are political discussions intended to introducing some sort of class action into Swiss law, albeit not in the form of US-style class action.

ix Litigation funding

Litigation in Switzerland is usually funded by the litigating party itself. Ordinarily, the prevailing party may recover its legal costs. However, depending on the canton where litigation is conducted, the cost amount that may be recovered does not equal the actual legal fees paid.

If a party cannot afford the costs of the proceedings or legal representation in such proceedings, a party may apply for free proceedings and to be provided with legal representation, the costs of which will be covered by the state.

The funding of litigation by third parties is, in principle, admissible, albeit so far not very popular. As with all contractual relationships, the contractual terms of a funding agreement must be in line with Swiss mores and must in particular not constitute profiteering in accordance with Article 157 of the Swiss Criminal Code (sanctioning, *inter alia*, the exploitation of a person in need). Furthermore, the funding by a third party

must not cause any conflict of interest on the level of the attorney–client relationship (i.e., notwithstanding any third-party funding, the lawyer must still be instructed by the litigating party and will owe its contractual duties (including its duty of care) in relation to the litigant only).

One should note that while the client and its attorney are free to agree on the remuneration for the legal services rendered, in contentious matters the professional rules of attorney conduct do not allow for contingency fees. While legal services are, therefore, generally charged on an hourly basis, even in contentious matters it is admissible to agree on reduced hourly rates and provide for an additional success fee if the reduced hourly rates agreed cover the attorney's costs (plus an adequate mark-up) at least.

IV LEGAL PRACTICE

i Conflicts of interest

Pursuant to the Federal Lawyers' Act[8] Swiss attorneys are subject to a special fiduciary duty in relation to their clients, pursuant to which any real conflict of interest – as opposed to the mere appearance of a conflict of interest – must be avoided between the lawyer's clients and persons with whom the lawyer has private or professional contact. If a conflict of interest arises in the course of the provision of legal services, the attorney affected must, in principle, terminate the provision of services. In certain instances, the professional rules of conduct even prohibit a lawyer from accepting a mandate in the first place.

Conflicts of interest may in particular arise in three instances:

a if an attorney has personal interests contradicting the client's interests;

b if the lawyer represents two or more clients with contradicting interests; or

c if a lawyer acts against a former client.

The latter case is in particular likely to cause a conflict of interests if the matter in relation to which the lawyer is to act against the former client concerns matters and knowledge the lawyer was exposed to during his or her past representation of the former client.

The obligation to avoid conflicts of interests applies equally to different attorneys of the same law firm. In this respect, the different attorneys of a law firm are regarded as one and the same lawyer.

In contentious matters, it is thus prohibited for different lawyers of the same firm to represent clients with conflicting interests, notwithstanding any Chinese walls that may be in place. In non-contentious matters, however, the representation of clients with conflicting interests is admissible if all parties involved consent. In practice, this can be observed for instance when a law firm represents multiple clients in auctions related to acquisitions or also when multiple clients (as creditors) are represented by one and the same law firm in bankruptcy proceedings.

A representation of several clients with aligned interests is admissible, be it in contentious or non-contentious matters.

8 The Federal Lawyers' Act of 23 June 2000.

ii Money laundering

For financial intermediaries, there are verification obligations as to the identity of the contracting counterparty, the ultimate beneficial owner and the reasons behind the commercial transactions such contractual counterparty engages in pursuant to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector.[9] The same Act furthermore subjects financial intermediaries to reporting duties in relation to funds reasonably suspected to be linked to acts of a criminal organisation or money laundering; a crime sanctioned with imprisonment in excess of three years; funds at the disposal of a criminal organisation; or funds financing terrorism.

Lawyers are exempted from the above reporting duty to the extent that their activity is subject to professional secrecy, which will generally apply to legal advice, however, not services as board directors or escrow agents (unless linked to the provision of legal services).

iii Data protection

The Swiss Data Protection Act (DPA) applies to and restricts the processing of personal data. Provided that it allows for identification, data relating to both private persons and legal entities (data subjects) are covered by the term personal data.

Various general principles must always be adhered to when processing personal data. For instance, the data subject must at least implicitly agree to such processing and therefore be informed or otherwise be aware of the data being collected and processed as well as of such activities' purpose. Any processing must ensure data accuracy, be made in good faith and not be excessive. In addition, adequate technical and organisational protection measures are required to prevent unauthorised access to the data.

Particular restrictions apply to the international transfer of personal data. A transfer from Switzerland to countries with a level of data protection that is deemed inadequate such as, for example, the United States, is only possible if one of the exceptions provided for in the DPA is met. An exception may include the specific consent of the data subject, the implementation of contractual clauses ensuring that data protection is safeguarded, the overriding public interests, or the necessity with regard to the exercise or enforcement of legal claims before courts. Data transfers within the same group of companies (i.e., from a Swiss affiliate to a foreign affiliate) are correspondingly restricted in that they require implementation of specific data protection rules. EU countries are considered to have an adequate level of data protection, so disclosure is not further limited than the transfer within Switzerland.

Sensitive data (i.e., relating to religion, political views, health, race, criminal records, etc.) and personality profiles are also subject to enhanced legal protection under the DPA, which may, for example, include certain duties of registration with the Federal Data Protection and Information Commissioner (FDPIC).

A person whose data is processed in a way that unlawfully infringes its privacy can sue for correction or deletion of the data, prohibition of disclosure, and damages.

9 The Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector of 10 October 1997.

Accordingly, for most claims based on DPA breaches, the civil judge is competent. There are, however, a few exceptional constellations constituting criminal liability, such as failure to fulfil registration duties.

Many very helpful summaries, sample contracts and guidelines, including various topics like international data transfer, lists of countries with adequate and inadequate levels of data protection, processing of employee data, outsourcing of operations and pertaining personal data to service providers, etc. may be found on the FDPIC's website (www.edoeb.admin.ch/datenschutz/index.html?lang=en).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Pursuant to Article 321 of the Swiss Criminal Code and Article 13 of the Federal Lawyer's Act any lawyer admitted to the bar (or otherwise authorised by law to represent clients before the courts) and who works in independent practice is subject to a duty of professional secrecy. A lawyer subject to professional secrecy obligations may (or normally has to) invoke legal privilege when it comes to the giving of testimony or the production of documents falling within the scope of the professional secrecy obligations.

The scope of such secrecy obligations is rather broad and includes everything conveyed to a lawyer in connection with the (prospective) attorney–client relationship. Most notably, this also includes the attorney's own assessments, proposals, memoranda and information he gathers, learns or which otherwise comes to his attention in the course of performing his mandate. While it is of no relevance from whom the lawyer learned the information, only information in the lawyer's possession as part of his core business is protected. This notably excludes any information a lawyer learns as a private person or in a non-legal capacity, such as business advice.

No protection is granted where the business aspects prevail over the legal aspects, such as in the case of a lawyer serving as a board member or asset manager.

Corporate in-house counsel are not subject to a duty of professional secrecy, since they are in particular thought to lack the 'independent practice' characteristic required for the applicability of the professional secrecy obligations as per Article 321 of the Swiss Criminal Code. Consequently, to date no legal privilege applies to corporate in-house counsel, notwithstanding any attempts in the past to pass amending legislation.

From a procedural perspective, the CCP duly defers to the legal privilege of attorneys. Neither must lawyers' correspondence be produced in civil proceedings, irrespective of whether or not such correspondence is in the possession of the lawyer, the litigating party or any third party. Nor can a lawyer be compelled to testify, as he may legitimately invoke legal privilege, if the testimony would violate his secrecy obligations under Article 321 of the Swiss Criminal Code. However, legal privilege may not be invoked as a blanket defence. Rather it must be claimed for each specific piece of information in question and will be considered on a case-by-case basis.

ii Production of documents

Contrary to other – predominantly common law – jurisdictions, the CCP does not impose any obligations on the litigating parties in terms of pre-action conduct. Hence,

litigating parties in Switzerland are not subject to a litigation hold. A litigation hold may, however, apply in arbitration proceedings, in particular if the parties have agreed on the application of the newly promulgated IBA Guidelines on Party Representation in International Arbitration.

In state court litigation, a court may during the procedure order the parties of the dispute or third parties to produce documents and may even enforce such orders with coercive means. Refusal to obey a court's production order is only possible on the basis of a statutory refusal right (i.e., legal privilege, incrimination of a party of close proximity).

In practice, the production of documents in state court litigation has been shown to be of limited value. In particular, parties engaging in 'fishing expeditions' in an attempt to extract a wide array of unspecified or only very vaguely specified information will generally not be entertained by Swiss courts. While there are no statutory requirements to be met for the production of documents, based on case law the documents to be produced must be described with sufficient specificity and their significance and appropriateness to prove factual allegations being in dispute must be shown. 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.

Given such rather stringent prerequisites, in practice it is not an easy task to obtain an order for the production of documents. A request for the production of documents will ordinarily require the requesting party to have concrete knowledge about the existence of a specific document (not necessarily, however, about its content), which in many instances proves to be the main obstacle for successful production requests.

If the type of information one seeks to obtain relates to own personal data or information connected therewith, the owner of such data may be able to obtain such data based on data protection regulation. In international arbitration proceedings in Switzerland the standard adopted for the production of documents will generally be in line with the IBA Guidelines for the Taking of Evidence in International Arbitration.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In Switzerland arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation. Mediation proceedings have gained some popularity, but remain, however, of minor practical importance.

ii Arbitration

Traditionally, Switzerland is seen as one of the traditional and most popular places for international arbitration proceedings. Pursuant to ICC statistics, Switzerland is the most popular country for institutional arbitration proceedings conducted under the auspices of the International Chamber of Commerce. This status has been obtained and is maintained largely thanks to the arbitration-friendly and very liberal approach adopted by Swiss legislation and the extensive court practice when it comes to international arbitration.

The procedural rules – the *lex arbitri* – applicable to international arbitration proceedings seated in Switzerland are set out in the PILA (in particular chapter 12).

These rules together with the case law of the Swiss Federal Tribunal in particular ensure the following.

The rules contain a broad definition of what matters are deemed arbitrable. They extend to proprietary matters, which notably include proprietary matters pertaining to disputes in employment, antitrust and non-competition, family law, shareholder and real estate matters.

The procedural rules ensure a wide party discretion to agree on procedural rules to govern the arbitral proceeding, such discretion being limited by the core principles pertaining to a fair proceeding and public policy only.

The rules give protection from unwarranted interference by both domestic state courts and foreign courts. This supports the efficiency and independence of an arbitration proceeding seated in Switzerland; on the one hand, Swiss legislation expressly excludes the application of rules on *lis pendens* to Swiss arbitration proceedings, as a result of which any parallel proceedings initiated outside Switzerland will not be able to interfere with Swiss arbitration proceedings. On the other hand, protection from unwarranted interference is also ensured by settled case law granting arbitral tribunals seated in Switzerland a preference over domestic state courts to review the validity of an arbitration agreement and thus the arbitral tribunal's competence to hear a case (also referred to as the negative effect of *Kompetenz-Kompetenz*).

Furthermore, the rules ensure a readily available support of arbitration proceedings by domestic state courts when it comes to the ordering of interim relief requested by arbitrating parties or when it comes to the enforcement of interim relief ordered by arbitral tribunals.

The rules constitute a straightforward and rather expedient appeals procedure, where arbitral awards in international arbitration can be appealed to one instance only, the Swiss Federal Tribunal. The grounds for appeal are restricted to:

a the arbitral tribunal having been constituted improperly or an arbitrator lacking impartiality and independence;

b questions of jurisdiction;

c the arbitral tribunal deciding *ultra* or *extra petita* (i.e., beyond a matter, on a request not made by the parties, or failing to decide on a request made by the parties);

d matters pertaining to due process, the right to be heard and equal treatment; and

e grounds of public policy.

In hearing appeals, the Swiss Federal Tribunal has shown great reluctance to interfere with arbitral awards. Statistically, the chances of success are around 10 per cent for appeals relating to jurisdiction, and around 6.5 per cent for all appeals on other grounds. In particular, since the entering into force of the PILA in 1989, only two awards were set aside on the grounds of public policy (albeit fairly recently), once due to a violation of the res judicata principle and once in a case where a professional footballer was banned from football for life, *inter alia*, as a means to enforce a monetary debt owed to his former club. Ordinarily, appeals decisions can be expected to be rendered within six to eight months from lodging the appeal.

In arbitration proceedings where all arbitrating parties are domiciled outside Switzerland, the parties are given the option to altogether waive the possibility of appeal

to the Swiss Federal Tribunal. In contrast, parties are equally given the option to opt out of the application of the PILA and to agree that the rules for domestic arbitration set forth in the CCP shall apply. In such case, the grounds for appeal to the Swiss Federal Tribunal (unless the parties have agreed on a cantonal court to act as sole appeals instance in lieu of the Swiss Federal Tribunal) are slightly broadened and in particular include the arbitrariness of a decision, an apparent wrongful application of the law or a wrongful determination of the facts.

Most institutional arbitration proceedings seated in Switzerland are governed by the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (www.swiss-arbitration.ch) and the Rules of Arbitration of the International Chambers of Commerce (ICC). In sports matters, the majority of arbitration proceedings are conducted under the rules of the CAS in Lausanne. All three institutions have recently issued revised sets of rules, the revised Swiss Rules on International Arbitration having come into force on 1 June 2012, the revised ICC Rules on 1 January 2012 and the revised CAS Code on 1 March 2013. Furthermore, in intellectual property matters, Switzerland is the seat of a considerable number of arbitration proceedings conducted under the rules of the World Intellectual Property Organization in Geneva.

Compared to the extensive international arbitration practice, domestic arbitration in Switzerland is of less relevance. The procedural rules applicable to it are set forth in the CCP, while the parties are given the opportunity to opt out and choose their arbitral proceedings to be governed by the PILA instead.

iii Mediation

In the past few years, mediation has become slightly more popular also in commercial disputes. Various institutions have issued mediation rules such as the Swiss Chamber of Commercial Mediation, the World Intellectual Property Organization domiciled in Geneva and the CAS. Among other providers, the Swiss Chamber of Commercial Mediation also offers a wide variety of mediation courses and, hence, there is a considerable number of Swiss practitioners with special expertise in mediation techniques. In practice, mediation procedures are nevertheless of minor importance in Switzerland mainly due to the fact that Swiss counsel normally attempt to bilaterally settle a case (without the involvement of a mediator) before formal proceedings are initiated.

iv Other forms of alternative dispute resolution

Other forms of dispute resolution used in Switzerland are expert determinations, which are often contractually agreed, for instance with regard to purchase price determinations in M&A transactions or in relation to real estate matters. The local chambers of commerce or industry institutions readily offer their services to appoint experts in various fields of expertise if so desired by the parties.

Furthermore, within civil court proceedings the CCP permits the parties to agree on an expert report to determine certain disputed facts. In such case the competent court is generally bound by the factual findings contained in the expert report, unless such findings prove to be obviously erroneous.

VII OUTLOOK & CONCLUSIONS

The Swiss parliament mandated the Swiss government to prepare a bill that will moderately revise the entire chapter 12 of the PILA regulating international arbitration in Switzerland. The objective of this reform is to introduce selected improvements and update certain provisions in line with the extensive case law developed by the Swiss Federal Tribunal since the entering into force of the PILA back in 1989. The overall form, its simplicity and reader-friendly style of Chapter 12 of the PILA should be kept unchanged. The revision is not expected to be completed within the next few years.

In relation to another procedural law aspect, the Swiss Federal Council in July 2013 released a report pursuant to which the tools for collective legal protection ought to be improved, in particular in the areas of consumer protection, finance and capital markets, personality rights and data protection. As part of such improvement, the report suggests, *inter alia*, the introduction of the procedural tool of opt-in class action or a class settlement procedure. No revision is expected to enter into force in 2014 or 2015.

Generally, no major procedural changes in the field of state court litigation or arbitration are expected in Switzerland in the next few years. Benefiting from a long-standing, liberal free-market tradition, Swiss law continues to remain highly attractive as governing law for both Swiss-related and purely foreign business transactions. Due to the strong international nexus of Swiss law, Switzerland will continue to be a thriving jurisdiction and a central place for international arbitration on a worldwide scale.

Appendix 1

ABOUT THE AUTHORS

PETER HONEGGER

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Peter Honegger specialises in litigation, arbitration and other dispute resolution matters, in particular in the areas of banking, finance, regulatory as well as mergers and acquisitions.

Particular areas of emphasis involve complex civil procedures, local and international arbitration, transnational litigation, foreign governmental investigations, enforcement and other regulatory proceedings initiated by Financial Markets Supervisory Authority FINMA or other authorities. His litigation practice encompasses various types of complex litigation, including securities, post-mergers and acquisitions, insurance and other commercial litigation.

Peter has particularly a long standing practice of advising companies and individuals with respect to Swiss secrecy laws and the taking of evidence located in Switzerland for use in US proceedings. In the late 90s, Peter acted as secretary to the Board of Trustees (Messrs. Paul Volcker, Israel Singer, René Rhinow) supervising the Claims Resolution Tribunal for dormant accounts in Switzerland with respect to victims of Nazi persecution.

Peter Honegger is mentioned by *Chambers Global*, *Chambers Europe*, *Legal 500* and *Who's Who Legal*.

DANIEL EISELE

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Daniel Eisele is a partner in the dispute resolution team of Niederer Kraft & Frey. He is specialised in large and complex litigation and arbitration proceedings.

Having almost 20 years of professional experience, Daniel Eisele has represented clients in more than 200 arbitration, court and other proceedings. These procedures concern all types of industries, namely banking, finance, construction, oil, telecommunication, commerce and sports and mostly relate to commercial contracts

(e.g., purchase, work, delivery, production, licensing, construction, M&A, equity, marketing, television). He has special expertise in the field of sports.

Daniel Eisele has acted as counsel in many national and international proceedings that were conducted pursuant to the Swiss Rules, the ICC Rules or the TAS/CAS Rules. He has also been involved in civil, administrative and criminal proceedings in most Cantons of Switzerland and has advised clients in many foreign procedures. He regularly represents clients before the Swiss Federal Court in Lausanne and before other Swiss federal courts and authorities.

Chambers Global and *Chambers Europe* both rank Daniel Eisele as a leading lawyer for dispute resolution in Switzerland. They state that he is 'determined and target oriented'. *Legal 500* mentions Daniel Eisele as litigation lawyer who is 'very experienced, extremely dedicated and convincing, with an entrepreneurial approach and business orientation'.

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Tamir is a senior associate in the dispute resolution team of Niederer Kraft & Frey.

His practice covers a wide range of civil litigation with special emphasis on *ad hoc* and institutional commercial arbitration proceedings. Tamir is particularly well-versed in complex international arbitration disputes, where Tamir has predominantly been advising corporate clients from CIS countries. Tamir regularly represents clients in sports-related arbitration proceedings before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.

Recent practice includes, in particular, cases in the construction, commodity, real estate, sports, finance and pharmaceutical industries.

Before joining Niederer Kraft & Frey, Tamir practised at one of the leading law firms in Tel Aviv, Israel. Tamir is fluent in six languages and is admitted to practise in Switzerland, Israel and in the state of New York. He has a masters degree in law from the New York University School of Law as well as an Advanced Professional Certificate in Law and Business from the NYU Leonard N. Stern School of Business.

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