THE DISPUTE RESOLUTION REVIEW

Eleventh Edition

Editor
Damian Taylor

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ELEVENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 573 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

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Slaughter and May
London
February 2019

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Chapter 32

SWITZERLAND

Daniel Eisele, Tamir Livschitz and Anja Vogt[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The substantive civil law of Switzerland and its law on civil procedure is regulated at federal law level, whereas the judiciary in Switzerland's 26 cantons is organised by each individual canton on its own. Even though a civil law country, court precedent is of utmost practical significance in Switzerland, mostly in terms of interpretation, but occasionally also in terms of 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, Berne, St Gallen and Aargau) have made use of this right and have established a specialised commercial court.

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. Moreover, for disputes relating to patents the Federal Patent Court is competent to hear the case and the proceedings are governed by the Federal Act on the Federal Patent Court.

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

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2 Swiss Code of Civil Procedure of 19 December 2008.

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

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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

In the past year, the Swiss Federal Tribunal has rendered a number of notable decisions. Namely, in a landmark decision the Swiss Federal Tribunal overturned its previous longstanding practice concerning the required legitimate interest for negative declaratory actions in international relations and henceforth allows forum running in Switzerland (see Section II.i). The Swiss Federal Tribunal also found that a waiver of the right to appeal against an arbitral award may also exclude a party from requesting a review of such arbitral award by means of the extraordinary legal remedy of revision as such request could constitute a violation of the principle of *bona fide* (see Section II.ii). The Swiss Federal Tribunal further rendered a decision elaborating on the question of immunity of foreign states in enforcement proceedings in Switzerland (see Section II.iii). Finally, the Swiss Federal Tribunal changed its longstanding case law with regard to the prerequisites for the objective accumulation of claims in a partial action (see Section II.iv).

i Legal interest to request negative declaratory relief: change of case law regarding forum running

The most common method for forum running is an action for negative declaratory relief; in other words, a party threatened with an action for performance pre-empts such action by filing a request for declaratory relief at a court of jurisdiction such party deems advantageous and requests that the claim at issue be declared non-existent. Though a legitimate interest in a proceeding is generally an indispensable prerequisite for litigation in Switzerland, longstanding case law of the Swiss Federal Tribunal required that a particular interest of the requesting party be shown for the admissibility of a request for negative declaratory relief, namely a current, material and legitimate interest in the immediate determination of the legal position. This generally requires that:

a the legal relationship between the parties is uncertain;
b such uncertainty can only be resolved by a court's decision; and
c the requesting party cannot be expected to tolerate such uncertainty any longer as it impedes such party's economic freedom.

In addition, the interests of the counterparty to such request should be taken into account, as such request for declaratory relief may force the counterparty to litigate its case prematurely. In this context, the Swiss Federal Tribunal consistently held that the mere interest of the requesting party to choose a court in a suitable jurisdiction does not qualify as a sufficient legitimate interest to file an action for declaratory relief. In consequence, such restrictive case law largely excluded forum running in Switzerland thus far.

With its landmark decision of 14 March 2018, the Swiss Federal Tribunal took the opportunity to overturn its previous case law with regard to the necessary requirements applicable to actions for negative declaratory relief in international relations. The case decided by the Swiss Federal Tribunal pertained to a dispute between a Swiss group of companies manufacturing watches and a UK-based spare parts wholesaler that distributed spare parts of watches of the Swiss group of companies. Owing to the introduction of a selective

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distribution system, the Swiss group of companies terminated the contractual relationship with the UK entity. In response, the UK entity requested that three subsidiaries of the Swiss group of companies confirm the resumption of delivery, otherwise it would bring an action with the High Court of Justice in London without further notice. The Swiss subsidiaries pre-empted such action by the UK entity and filed an action for declaratory relief with the Commercial Court of the Canton of Berne requesting the court to declare that no obligation to deliver existed. However, in line with the previous consistent case law in Switzerland, the Commercial Court of the Canton of Berne found that the Swiss subsidiaries did not have a sufficient legitimate interest in a declaratory judgment and dismissed their action.

On appeal, the decision of the Commercial Court of the Canton of Berne was overturned by the Swiss Federal Tribunal. It found that in international relations securing a preferential place of jurisdiction in Switzerland qualifies as a legitimate interest in an action seeking negative declaratory relief. In particular, the Swiss Federal Tribunal acknowledged that the factual interest of conducting a proceeding in one, rather than in another, jurisdiction may be substantial owing to the differences in the applicable procedural rules, the language and the duration of the proceedings as well as the costs thereof. The Swiss Federal Tribunal particularly acknowledged that its restrictive approach with regard to the legal interest in bringing an action for declaratory relief merely prevented forum running within Switzerland, whereas it had no effect on forum running in other jurisdictions. It concluded that in such circumstances parties willing to litigate in Switzerland in international disputes are directly discriminated.

As regards the interests of an alleged creditor not to be forced into legal proceedings prematurely, the Swiss Federal Tribunal found that such interest does not need to be given equal importance in international circumstances where a party is seeking to secure a favourable place of jurisdiction by filing a request for negative declaratory relief. Additionally, the Swiss Federal Tribunal considered that the UK entity itself had threatened to take legal action in the case at hand, and thus indicated that it was prepared to litigate its claims.

In its considerations, the Swiss Federal Tribunal further confirmed that the Lugano Convention does not provide an autonomous definition of the legal interest required to take legal action but that such question is governed by the applicable national law. In this regard, the Swiss Federal Tribunal determined that the procedural *lex fori* is applicable for the determination of the legitimate interest in a negative declaratory judgment, thereby closing a loophole intensely debated in legal doctrine up to such point.

Finally, the Swiss Federal Tribunal considered the concern of abuse of law by means of torpedo actions, namely the filing of a request for negative declaratory relief in a country known for its time consuming court proceedings in order to prevent the submission of an action for performance in another jurisdiction. In this regard, the Swiss Federal Tribunal held that the problem of torpedo actions is caused by the highly differing efficiency of the judicial systems within the scope of the Lugano Convention. It considered that it is, however, not for one country to solve such issue by imposing stricter rules with regard to the required legitimate interests in actions seeking negative declaratory relief. In addition, as the Swiss judicial system is not known for its overly lengthy proceedings, the Swiss Federal Tribunal concluded that there was no substantial risk of Swiss courts being abused for purposes of torpedo actions.

The Swiss Federal Tribunal's change in case law, which aims at preventing the discrimination against parties wishing to litigate in Switzerland and thus creates a level playing field in the international context, is to be welcomed. Considering that in other jurisdictions

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the filing of a request for negative declaratory relief is often granted on more generous terms, parties domiciled in Switzerland particularly, are now given equal procedural opportunities as their foreign counterparties.

ii Valid waiver of right to appeal against an arbitral award may also exclude a party from requesting a review of such arbitral award by means of the extraordinary remedy of revision

In its much-noticed decision of 17 October 2017, the Swiss Federal Tribunal demonstrated the far-reaching consequences of a waiver of the right to appeal against an arbitral award rendered in an international context. Such decision concerned a dispute between Croatia and the largest oil company of Hungary. The parties entered into two agreements resulting in the Hungarian entity assuming control over a formerly state-owned Croatian energy company in 2009. Five years later, Croatia initiated an arbitration proceeding against the Hungarian entity alleging that the two agreements had been procured by payments of bribes to Croatia's former prime minister and were thus null and void. Croatia's claim was dismissed by the arbitral tribunal.

Croatia filed an appeal against the arbitral award with the Swiss Federal Tribunal and requested that the arbitral award be set aside. In the alternative, Croatia requested that the arbitral award be reviewed by the Swiss Federal Tribunal based on the extraordinary legal remedy of revision (as opposed to the ordinary legal remedy of appeal). Both applications were based on the ground that, after the issuance of the arbitral award, Croatia discovered that the arbitrator appointed by Croatia had failed to disclose an alleged conflict of interest. The Hungarian entity requested the dismissal of Croatia's applications owing to waivers of the right to appeal against the arbitral award included in the agreements, which stated that 'there shall be no appeal to any court from awards rendered hereunder'.

To start with, the Swiss Federal Tribunal held that an appeal against an arbitral award is not admissible if the parties to the arbitration agreement have validly waived the right to appeal against such arbitral award. As per Article 192, Paragraph 1 PILA, a waiver of the right to appeal against an arbitral award is admissible if none of the parties to the arbitration agreement have their domicile, habitual residence or a business establishment in Switzerland. The Swiss Federal Tribunal found that Croatia and the Hungarian entity had validly waived their right to appeal against the arbitral award, and that such waiver, in the absence of any explicit limitation thereto, applies to all grounds for appeal stipulated in Article 190, Paragraph 2 PILA, namely also to the arbitrators' alleged lack of independence and impartiality. In consequence, the Swiss Federal Tribunal declared Croatia's appeal against the arbitral award inadmissible.

The Swiss Federal Tribunal then considered Croatia's request for review of the arbitral award based on the extraordinary legal remedy of revision. In this regard, Croatia argued that Article 192 PILA was not applicable to such extraordinary legal remedy and that according to its wording the waiver of the right to appeal against the arbitral award did not exclude a party's right to request the review of the arbitral award based on the extraordinary remedy of revision. However, emphasising the subsidiary nature of a request for review based on the extraordinary remedy of revision compared to the ordinary appeal against an arbitral award, the Swiss Federal Tribunal expressed reservations as to whether a party that had expressly waived its right to appeal against an arbitral award, including on the ground of the arbitrators' lack of independence and impartiality, could nevertheless request the review of such arbitral award based on the very same ground discovered within the deadline to appeal against the

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arbitral award, albeit by means of the extraordinary remedy of revision. It found that such approach, which would ultimately result in Article 192 PILA becoming a paper rule, would constitute a clear violation of the principle of *bona fide*. In consequence, the Swiss Federal Tribunal declared Croatia's request for review based on the extraordinary remedy of revision inadmissible.

By basing its decision to render the request for review inadmissible on the principle of *bona fide*, the Swiss Federal Tribunal did not expressly address the still unresolved question of whether parties to an arbitration agreement may in general validly waive the right to request a review of an arbitral award based on the extraordinary remedy of revision. However, the decision of the Swiss Federal Tribunal clarifies that a waiver of the right to appeal against an arbitral award will, at least in certain circumstances, also exclude a party from requesting a review of such arbitral award by means of the extraordinary remedy of revision. Whether parties to an arbitration agreement may generally waive the right to request a review of an arbitral award will in all likelihood be determined as part of the partial revision of the PILA. Contrary to the Swiss Federal Tribunal's decision, according to which any form of judicial review of the arbitral award may be excluded under certain circumstances, in the final legislative proposal for the partial revision of Chapter 12 of the PILA (see Section V), the revised Article 192, Paragraph 1 PILA explicitly stipulates that the right to request a review of an arbitral award based on the ground that a criminal proceeding has established that the arbitral award was influenced by criminal conduct may not be waived by the parties to an arbitration agreement.

iii Immunity of foreign states in enforcement proceedings

On 7 September 2018, the Swiss Federal Tribunal rendered a landmark decision with regard to the immunity of foreign states in enforcement proceedings of arbitral awards against state-owned assets located in Switzerland, as well as with regard to the relationship between Swiss procedural law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1985 (the New York Convention), which governs the enforcement of foreign arbitral awards in Switzerland. The case decided by the Swiss Federal Tribunal concerned the enforcement of an arbitral award rendered by an arbitral tribunal with its seat in Paris and particularly the request of a Guernsey entity for an attachment order (freezing order) of real estate property in Switzerland owned by Uzbekistan.

According to consistent case law, the enforceability of a claim against a foreign state requires that the claim derives from such foreign state's conduct as a holder of private rights (*acta iure gestionis*) as opposed to conduct deriving from the foreign state's sovereign authority (*acta iure imperii*). In addition, the claim to be enforced must have a sufficient domestic nexus to the territory of Switzerland. Such nexus is affirmed if:

a the legal relationship from which the claim is derived was established in Switzerland;
b the place of performance is in Switzerland; or
c if the foreign state has at least taken action that would establish a place of performance in Switzerland.

The mere fact that a foreign state owns assets in Switzerland does not, however, suffice to affirm the enforceability against assets of foreign states located in Switzerland.

Given that in the case at hand the claim to be enforced was based on an arbitral award, the Swiss Federal Tribunal had to examine whether the aforementioned prerequisites, and particularly the requirement of a sufficient domestic nexus of the claim to be enforced,

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also apply within the area of application of the New York Convention. In its appeal, the Guernsey entity particularly argued that the New York Convention in its Article V contains an exhaustive list of grounds based on which the recognition and enforcement of an arbitral award may be refused and that state sovereignty, and thus the requirements with regard to the enforceability of a claim against a foreign state as set forth by the case law of the Swiss Federal Tribunal, is not included in such list. The Swiss Federal Tribunal, however, found that the New York Convention does not prevent Swiss procedural law from applying restrictions in terms of enforcement proceedings against foreign states' assets located in Switzerland, and held that the prerequisites in this regard also apply in Swiss enforcement proceedings governed by the New York Convention.

In consequence, the Swiss Federal Tribunal considered whether or not in the present case the claim to be enforced against Uzbekistan was based on a non-sovereign act and whether or not such claim has a sufficient nexus to Switzerland. In summary, the Swiss Federal Tribunal found that in the present case the claim for which enforcement was being sought did not have a sufficient link to Switzerland and that, thus, no enforcement against such assets of Uzbekistan in Switzerland was possible.

iv Objective accumulation of claims in case of partial actions – change of practice

In a recent decision rendered on 17 September 2018, the Swiss Federal Tribunal changed its current practice with regard to the procedural requirements for partial claims in case of objective accumulation of claims.

The case decided by the Swiss Federal Tribunal concerned a liability action brought against three directors of a company limited by shares before the Commercial Court of the Canton of Aargau. By means of a partial claim and subject to the submission of subsequent claims, the plaintiff requested that the directors be ordered to pay damages in the amount of 3 million Swiss francs. However, the Commercial Court of the Canton of Aargau held that the plaintiff brought six claims for damages based on various separate breaches of duty on the part of the directors. It concluded that the total damages amounted to approximately 6 million Swiss francs. The Commercial Court of Aargau determined that such partial claims that are based on various factual circumstances are to be qualified as an objective accumulation of claims. In consequence, and in line with the then relevant case law of the Swiss Federal Tribunal, the Commercial Court of the Canton of Aargau held that such objective accumulation of partial claims requires that the statement of claim explicitly states in what order or to what extent the court must examine such each claim. Given that the plaintiff did not comply with this obligation, the Commercial Court of the Canton of Aargau dismissed the claim. The plaintiff lodged an appeal against the decision of the Commercial Court of the Canton of Aargau with the Swiss Federal Tribunal.

The Swiss Federal Tribunal elaborated on its previous case law regarding the distinction between claims based on single as opposed to multiple facts, as well as the difficulties this involves and particularly acknowledged the criticism raised in the legal doctrine pertaining to its current practice. It admitted that the determination as to whether claims submitted are based on one or more factual circumstances was highly problematic as it requires a legal assessment and thus entails considerable uncertainty in particular for the plaintiff.

Consequently, the Swiss Federal Tribunal stated that such obligation imposed on the plaintiff to specify in what order or to what extent each individual claim must be examined was not sustainable. Henceforth, a plaintiff is thus only required to present its individual (partial) claims conclusively and in accordance with the general requirements of substantiation

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allowing the court to assess the merits of each (partial) claim. If these requirements are met, the action is deemed admissible and it is in principle at the discretion of the court to determine in which order it examines the various claims.

III COURT PROCEDURE

i Overview of court procedure

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

Monetary debt collection matters are governed by the Federal Debt Enforcement and Bankruptcy Act (DEBA), whereas the recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly regulated by the PILA as well as all relevant bilateral and multilateral agreements to which Switzerland is a party; the most important of these are the Lugano Convention and the New York Convention, respectively.

Predominantly, civil proceedings in Switzerland are governed by the principle that it is up to the parties to decide how, when, for how long and to what extent they wish to submit claims as plaintiffs, whether they wish to accept or contest such claims as defendants, or whether they wish to lodge or withdraw appeals. In 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 principle that the court has a certain obligation to collect and determine relevant facts to resolve the dispute.

Irrespective of any principle 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. Of course, it goes without saying that the court would do so only after having heard the parties.

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

In terms of duration, a 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, depending on the court seized, the nature of the proceedings and whether or not an extensive procedure of taking of evidence is required.

ii Procedures and time frames

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

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Ordinary proceedings can generally be split up into three phases:

a the pleading phase, where the parties must present and substantiate the factual basis of 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

c the post-hearing phase where the parties may comment on the outcome of the evidence proceedings and the court renders 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 settlement rate for such conciliatory hearings can exceed 50 per cent (e.g., in the city of Zurich the conciliation authorities settled 64.5 per cent of the cases in 2017). However, in particular if the value in dispute is high, conciliatory hearings only rarely lead to a settlement of the dispute. Consequently, in cases where the value in dispute exceeds 100,000 Swiss francs, the CCP foresees a possibility for the parties to consensually waive the holding of such a conciliatory hearing. A plaintiff may furthermore waive the holding of a conciliatory hearing if, among other things, 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. In this respect, for multiple reasons not many parties have in the past opted for mediation instead of a conciliatory hearing. Nonetheless, it appears that mediation as such is gaining more and more attention including in commercial disputes.

Simplified proceedings govern disputes with a value in dispute not in excess of 30,000 Swiss francs. Additionally, certain actions relating to very specific issues such as gender equality, aspects of tenancy law or data protection law are also to be brought under simplified proceedings irrespective of their value in dispute.

Simplified proceedings, like 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 adducing evidence apply). Rather, simplified proceedings generally provide for a facilitation of the pleading phase, where, for instance, the court supports the parties in their substantiation of the claim based on extended interrogation duties and with a view to supplement any incomplete facts of the case or to adduce adequate evidence. In addition, certain 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 proceedings, 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, in principle, 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,

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are to be brought in summary proceedings. Furthermore, the CCP foresees the applicability of summary proceedings to certain specific proceedings, such as particular debt collection and bankruptcy proceedings or proceedings under Swiss company law (e.g., proceedings regarding special audits).

The DEBA fast-track proceedings for monetary debt collection matters addressed above also apply 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 Class actions

Swiss civil law procedure does not permit class actions. Thus, typically, claims must be brought by individual plaintiffs. 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, 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 ('simple [or voluntary] joinder of parties').

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 the 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 the case of a mandatory joinder of parties not all parties are made part of the legal action, the plaintiffs or the defendants may lack standing, which will lead to the dismissal of a claim. In contrast, in the case of a voluntary joinder of parties, each of the joint parties may act independently, and 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 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.

Although the above reflects the current situation in Switzerland with respect to class actions, political efforts are under way to improve the tools for collective legal protection; in particular, in the areas of consumer protection, personality rights and data protection. However, the Federal Council, Switzerland's executive branch, decided not to include a previously discussed Swiss-style class action in the new Financial Services Act, which would have facilitated investors' access to courts in financial matters. Instead, the Federal Council

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indicated that the introduction of general group settlement proceedings, as well as the extension of the above-mentioned group action, will be suggested as part of future revisions of the CCP in the coming years.

In March 2018, the Federal Council initiated the consultation process for the revision of the CCP and particularly suggested two major amendments with regard to collective legal protection aiming at facilitating actions for damages for large groups through the existing mechanism of group actions through associations or other organisations that protect collective interests as well as by introducing a new group settlement procedure. Though, as per the current legislation, associations and other organisations protecting collective interests may solely bring non-monetary actions, the suggested amendment proposes to also allow for reparatory actions, such as actions for damages and restitution of profits. In addition, the new settlement procedure proposed by the Federal Council allows for associations and organisations that protect collective interests to enter into settlement with a damaging party, which, following the approval of such settlement by the competent court, will be declared binding for all injured persons. The legislative procedure was initiated by the Federal Council by means of these proposed amendments and it is not yet foreseeable if and to what extent these proposals will ultimately be adopted. The amendment procedure of the CCP is expected to take several years.

iv Representation in proceedings

As a rule, a representation in proceedings is always permitted in Switzerland. Exceptions to this 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 a party is deemed incapable of acting in the proceedings, in which case the court will require such a 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. However, a person wishing to professionally represent parties in court proceedings must be qualified to practise 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.

v Service out of the jurisdiction

Summonses, 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 is party to two international treaties on this 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 is the responsibility of the respective cantonal high courts. The legality of service is then assessed based on the law of the jurisdiction where service is effected.

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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 civil proceedings. 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.

vi 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 further ordinary appeal is available against the decision; and in the 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, is 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 with the enforcement regime foreseen by the PILA, the Lugano Convention provides facilitations both in terms of the conditions for recognition and enforcement and 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 addition, provisional measures issued by a signatory state of the Lugano Convention (other than *ex parte* decisions) may be enforceable in Switzerland (in contrast to provisional measures issued by another state, which pursuant to the PILA are not enforceable in Switzerland). 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.

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vii 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 in doing 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 a 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 a request to the Swiss Federal Department of Justice and Police together with its recommendation about whether or not it supports such a request. However, the request may also be sent to the Swiss Federal Department of Justice and Police, which will then forward such request to the central authority (at cantonal level). 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, although 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, the Swiss authorities have in recent years proven to be very amenable to judicial assistance requests from foreign authorities.

viii 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

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commercial disputes, in particular those with an international component, tend to be complex, the parties generally submit their pleas in writing. Although 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. Additionally, many higher cantonal and federal courts have, in recent years, started to publish most of their judgments in anonymised form on their websites.

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 (the difference, depending on the canton, may be quite substantial).

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 not very popular. Nevertheless, the Swiss Federal Supreme Court confirmed said admissibility and even held that an attorney might have a duty to inform his or her client about the possibility of litigation funding. However, 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). The attorney, therefore, cannot at the same time represent the client and be an employee of such third party.

Although the client and its attorney are generally free to agree on the remuneration for the legal services rendered, in contentious matters the professional rules of attorney conduct do not allow for pure contingency fees. In contentious matters, legal services are, therefore, generally charged on an hourly basis. It is, however, in principle, admissible to agree on reduced hourly rates and provide for an additional success fee. The inadmissibility of pure contingency fee arrangements in litigation may be a major reason why litigation funding in Switzerland has not gained popularity thus far.

IV LEGAL PRACTICE

i Conflicts of interest

Pursuant to the Freedom of Movement for Lawyers Act, 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 its involvement. In certain instances, the professional rules of conduct even prohibit a lawyer from accepting a mandate in the first place.

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Conflicts of interest may in particular arise in three instances:

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

b if an attorney represents two or more clients with contradicting interests; or

c if an attorney acts against a former client.

The latter case is particularly likely to cause a conflict of interest 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 where 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.

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 a contractual counterparty engages in pursuant to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector.[4] 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, they are not exempt in relation to 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, in some cases, 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

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

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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 criteria for one of the exceptions provided for in the DPA are met. An exception may include the specific consent of the data subject, the implementation of contractual clauses ensuring that data protection is safeguarded, overriding public interest 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 data transferred within Switzerland.

Sensitive data (i.e., relating to religion, political views, health, race, criminal records) and personality profiles are also subject to enhanced legal protection under the DPA, which may, for example, include the requirement of an explicit consent to the collection and the processing where such consent is required and 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. Accordingly, for most claims based on DPA breaches, civil judges are competent. There are, however, a few exceptional circumstances 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.[5]

In practice, although not Swiss law, compliance with the GDPR in data protection matters will be important for Swiss domiciled entities with a nexus to Europe.

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 must) 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 gathered, learned or that otherwise comes to his or her attention in the course of performing his or her mandate. Although it is of no relevance from whom the lawyer learned the

5 www.edoeb.admin.ch/datenschutz/index.html?lang=en.

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information, only information in the lawyer's possession as part of his or her 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' characteristics required for the applicability of the professional secrecy obligations pursuant to Article 321 of the Swiss Criminal Code. Consequently, to date no legal privilege applies to corporate in-house counsel.

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 or she may legitimately invoke legal privilege, if the testimony would violate 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, basically, 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. This should, however, not be misunderstood as permission to destroy evidence. Such conduct could result in adverse inferences by a court assessing the case. Moreover, the CCP provides for specific rules based on which a party may request the court to take evidence before initiating ordinary court proceedings (precautionary taking of evidence), in particular if such party shows that the evidence is at risk.

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. 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 on the basis

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of data protection regulations. 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 are yet to have a major practical impact.

ii Arbitration

Switzerland is seen as one of the traditional and most popular places for international arbitration proceedings. Thanks to the arbitration-friendly and very liberal approach adopted in Swiss legislation and the extensive court practice when it comes to international arbitration, Switzerland is one of the preferred countries for institutional arbitration proceedings conducted under the auspices of the International Chamber of Commerce.

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, as well as intellectual property law.

The procedural rules ensure a wide party discretion to agree on procedural rules to govern the arbitral proceedings, such a discretion being limited by the core principles pertaining to fair proceedings 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 arbitration proceedings 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 competence-competence).

Furthermore, the rules ensure a readily available support for 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 provide 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);

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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 vary from around 10 per cent for appeals relating to jurisdiction to around 7 per cent for appeals on all other grounds. In particular, since the entering into force of the PILA in 1989, only two awards have been set aside on the grounds of public policy; once because of a violation of the *res judicata* principle (formal public policy) 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 (substantive public policy). 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. Parties may also replace the PILA and agree that the rules for domestic arbitration set forth in the CCP shall apply. In such a 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[6] and the Rules of Arbitration of the International Chambers of Commerce. In sports matters, the majority of arbitration proceedings are conducted under the rules of the Court of Arbitration for Sport (CAS) in Lausanne, whereas many intellectual property disputes are conducted under the arbitration rules of the World Intellectual Property Organization (WIPO) 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; the parties are given the opportunity to opt out and choose their arbitral proceedings to be governed by the PILA instead.

iii Mediation

As already mentioned above, the CCP provides for a set of rules based on which the parties can opt for mediation instead of the often mandatory conciliatory hearing. Various institutions have issued mediation rules such as the Swiss Chamber of Commercial Mediation, the WIPO 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 because of the fact that Swiss counsel normally attempt to bilaterally settle a case (without the involvement of a mediator) before formal proceedings are initiated.

6 www.swiss-arbitration.ch.

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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 a case the competent court is generally bound by the factual findings contained in the expert report, unless such findings prove to be incomplete, incomprehensible or incoherent.

VII OUTLOOK AND CONCLUSIONS

A partial revision of Chapter 12 of the PILA regulating international arbitration in Switzerland is in preparation. The partial revision is directed at:

a implementing and converting into law the developments in international arbitration since the PILA entered into force back in 1989 driven by the case law of the Swiss Federal Tribunal;

b strengthening the party autonomy; and

c making the provisions of Chapter 12 of the PILA more user-friendly.

The revised draft Chapter 12 of the PILA includes, *inter alia*, new codified provisions on the revision, rectification, explanation and correction of awards, the possibility to make submissions to the Swiss Federal Tribunal in English and a relaxation of the form requirements regarding the conclusion of the arbitration agreement. The consultation on the preliminary draft bill of the revised Chapter 12 of the PILA was concluded in May 2017. On 24 October 2018, after having taken into account the comments submitted in the course of the consultation process, the Swiss Federal Council submitted the official message on the revision of Chapter 12 of the PILA, together with the final legislative proposal to the Swiss parliament for approval.

A consultation on the complete revision of the DPA was initiated at the end of December 2016. The objective of such revision is to strengthen the protection of personal data, as well as to adapt Swiss data protection legislation to the revised Convention 108 for the Protection of Individuals with Regard to the Processing of Personal Data of the European Council and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016. On 15 September 2017, the Swiss Federal Council approved the proposal concerning the complete revision of the DPA. In September 2018, the Swiss parliament took the decision to, in a first step, adapt certain data protection rules in criminal law to the EU Directive 2016/680, which is part of the Schengen acquis, whereas the complete revision of the DPA will be addressed on a separate basis, in a second step. The Swiss parliament intends to conclude the parliamentary debate on the complete revision by the end of the year 2019.

In addition, after the completion of the consultation of the partial revision of the Federal Act on the Swiss Federal Tribunal in February 2016, the Swiss Federal Council mandated the Swiss Federal Department of Justice and Police in September 2017 to formulate the proposal concerning such partial revision. In summary, the partial revision aims to strengthen the Swiss Federal Tribunal by expanding the possibility of admissible appeals to the Swiss Federal Tribunal in connection with disputes that relate to a legal issue of fundamental importance,

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while at the same time unburden the Swiss Federal Tribunal of less important cases. At its meeting in June 2018, the Swiss Federal Council adopted an official message on the partial revision of the Federal Act on the Swiss Federal Tribunal and submitted the final legislative proposal to the Swiss parliament for approval.

Other than that, 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. Because of 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.

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Appendix 1

ABOUT THE AUTHORS

DANIEL EISELE

Niederer Kraft Frey

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

Having more than 20 years of professional experience, Daniel Eisele has represented clients in more than 250 arbitration, court and other proceedings. These procedures concern all types of industries, namely banking, finance, construction, oil, telecommunications, commerce and sports, and mostly relate to commercial contracts (e.g., purchase, work, delivery, production, licensing, construction, M&A, equity, marketing and television). He has special expertise in the field of sports.

Daniel Eisele has acted as counsel in many national and international proceedings 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 litigation and arbitration counsel in Switzerland. They state that he is 'determined and target oriented'. *The Legal 500* ranks Daniel Eisele as one of eight leading litigation lawyers in Switzerland. Daniel Eisele won the Client Choice ILO Award in 2014, 2015, 2016 and 2018 for the litigation category in Switzerland.

TAMIR LIVSCHITZ

Niederer Kraft Frey

Tamir Livschitz is a partner 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 he has predominantly advised corporate clients from Europe, CIS countries and Asia. Tamir regularly represents clients in sports-related arbitration proceedings before the Court of Arbitration for Sport in Lausanne, Switzerland, and also sits as an arbitrator in ICC and DIS proceedings.

Recent practice includes, in particular, cases in the construction, commodity, real estate, sports, finance and pharmaceutical industries. *Chambers Global* and *Chambers Europe* both rank Tamir as a leading lawyer for dispute resolution in Switzerland. In addition, Tamir is

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listed as one out of three next generation litigation lawyers in Switzerland by *The Legal 500* and *Who's Who Legal: Arbitration* lists Tamir as a future leader in arbitration.

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 master's 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.

ANJA VOGT

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Anja Vogt is an associate in the dispute resolution team of Niederer Kraft Frey. Anja's practice focuses on commercial litigation and arbitration as well as internal investigations. She regularly represents clients of various industry sectors in commercial litigation and arbitration proceedings as well as in administrative, criminal and other proceedings. Furthermore, Anja advises clients in the fields of contract, commercial and employment law. Anja is recognised by *The Legal 500* as a recommended lawyer in litigation.

Before joining Niederer Kraft Frey, Anja worked at a law firm in Zurich. She is a member of the Zurich, the Swiss and International Bar Associations, as well as a member of the Swiss Arbitration Association and the Association International des Jeunes Avocats.

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