THE DISPUTE RESOLUTION REVIEW

Twelfth Edition

Editor
Damian Taylor

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TWELFTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 32 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, as well as overcoming challenges that life and politics throws up along the way. 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 from those closer to home.

Sitting here in London at the start of 2020, we at least have a better idea of the immediate direction of travel for Brexit. The UK will have left the EU by the time this edition goes to print. The road has been long and twisting and it has thrown up novel problems of when politics and law clash head on. The Supreme Court in the UK – not so long ago having completed its metamorphosis from the old judicial committee of the House of Lords – confirmed that it was the ultimate check against the unlawful exercise of power by the Executive; declaring that Boris Johnson's advice to the Queen to prorogue Parliament was unlawful (see the case summary of *R (on the application of Miller) v. the Prime Minister* in the England and Wales chapter of this edition). Politicians cried foul. There was (and still is) talk of reassessing how Supreme Court judges are selected; talk of political appointments (as in the US) and a fundamental rewriting of the Constitution (except there cannot be, as no one has written it down in the first place). The same judiciary that is often praised for its independence and professional approach was at times along the tortuous road to Brexit branded in the media 'enemies of the people', part of the growing band of 'traitors' who allegedly opposed Brexit – that is despite all the judgments making clear that they were not deciding whether Brexit should happen or on what terms.

Looking back on events, far from the collapse of the Constitution, the year saw a reaffirmation of the constitutional balance of powers and the rule of law. The Supreme Court spoke and was respected. Parliament was recalled and took an October no-deal exit off the table.

But politics perhaps had the final say: an election was called later in the year, the people made their choice, and Mr Johnson's Conservative government was returned with a sufficient majority to 'get Brexit done'.

All this leaves me writing this preface five days before 'Brexit Day', after an exhausting 2019 in which clients have not known whether to plan for the 'May deal', 'No deal', 'Boris's deal', a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour's manifesto. At least we now know at the end of it all that the UK will leave the EU on 31 January 2020.

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That is not to say that everything will be plain sailing from now. The process of disentangling the UK from the EU legal and political framework will be long and complex. Fundamental questions remain. No doubt the Supreme Court will be called on to determine issues that no one had ever thought would need to be asked not so long ago. The transitional deal with the EU expires at the end of the year and the government's position is that it will not be extended. The same questions and uncertainties will surface as the clock ticks down if a deal is not apparent.

Whatever your views on Brexit, this is law in action. It happens every day of the year, but when the stakes are so large and politicised, the scrutiny so intense, it is hard not to see and feel it a little bit more. This edition therefore includes an updated Brexit chapter that charts the progress over the past year and what lies ahead.

There is of course much more to 2019 and beyond than Brexit – especially away from these shores (where it has occupied so much of Parliament's time, to the detriment of other legislative programmes). This 12th 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 can be found in Appendix 1 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.

Damian Taylor
Slaughter and May
London
February 2020

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Chapter 28

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

1 Daniel Eisele and Tamir Livschitz are partners and Anja Vogt is a senior associate in the dispute resolution team of Niederer Kraft Frey AG. The authors wish to sincerely thank Gustaf Heintz, junior associate at Niederer Kraft Frey AG, for his valuable contribution and assistance in the preparation of this chapter.

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 it held that contracts may consist of multiple characteristic (non-monetary) obligations and thus multiple places of performance with each being able to establish jurisdiction (see Section II.i). Furthermore, and for the first time, the Swiss Federal Tribunal found that its previous case law on the extension of an arbitration clause to non-signatory third parties in relation to Article 178 of the Private International Law Act[4] (PILA) was also applicable within the scope of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[5] (the New York Convention) (see Section II.ii). Moreover, the Swiss Federal Tribunal clarified the requirements of the contractual exclusion of the provisions governing Swiss domestic arbitration in favour of the provisions governing Swiss international arbitration (see Section II.iii). Finally, it considered that when an attorney changes law firms the new law firm is required to resign the mandates on which such attorney had worked in the previous law firm and held that 'Chinese walls' did not provide adequate protection against conflicts of interest (see Section II.iv).

i Local jurisdiction in case of multiple characteristic obligations under one contract

In a landmark decision dated 13 March 2019, the Swiss Federal Tribunal ruled that contracts may consist of multiple characteristic (non-monetary) obligations, with each of such obligations being able to establish local jurisdiction at the respective place of performance.

The underlying dispute concerned an orally concluded contract between the claimant, a Swiss petrol station operator, and the respondent, a Swiss entity specialised in the construction and maintenance of petrol stations, in relation to the planning, site management and supervision of the construction of a petrol station in the canton of Berne. Shortly before the final acceptance of the newly constructed petrol station, a fire broke out at the construction site. After the building insurance declined coverage for the damages caused by such fire, the claimant filed a damage claim against the respondent with the commercial court of Berne arguing that the respondent had breached its duty to take out a building insurance. The Berne commercial court held that the contract between the parties – consisting of elements of both, a contract for work and services (planning of the construction of the petrol station) as well as of a mandate agreement (supervision of the construction of the petrol station) – was mixed in nature and consisted of multiple characteristic, non-monetary obligations. Since it was the respondent's obligation to supervise the construction on-site in Berne, the Berne commercial court affirmed its local jurisdiction to hear the claimant's claim in an interim decision. Such interim decision was appealed against by the respondent to the Swiss Federal Tribunal.

The Swiss Federal Tribunal elaborated, in a first step, on the contents of Article 31 CCP (i.e., the provision applicable in the case to be decided by the court), as well as of

4 Private International Law Act of 18 December 1987.

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1985.

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Article 113 PILA, which, provides for a similar wording. Both provisions stipulate that the court at the domicile or registered office of the respondent or, alternatively, at the place where the characteristic obligation is to be performed has jurisdiction to hear claims related to contracts. Whether an obligation of a contract qualifies as characteristic is to be decided by taking into account Article 117(3) PILA, which expressly stipulates the characteristic – typically non-monetary – obligation of certain types of contracts. With regard to mandate agreements and contracts for work and services as in the present case, Article 117(3) PILA stipulates that the service to be provided is deemed the characteristic obligation.

In a second step and considering that the contract between the parties consisted of multiple non-monetary obligations of which one alone did not appear to be characteristic without further ado, the Swiss Federal Tribunal considered the different views of Swiss legal scholars and finally agreed with the majority's opinion that a contract could indeed consist of multiple characteristic obligations which in turn provide for a multitude of places of performance.

In conclusion and in confirming the findings of the commercial court, the Swiss Federal Tribunal resolved that the contract between the parties consisted of multiple characteristic obligations and, thus, multiple places of performance each being able to establish local jurisdiction as per Article 31 CCP. As one of such places of performance (i.e., the obligation of site management and supervisions) was located at the place of the petrol station in Berne, the Swiss Federal Tribunal affirmed the local jurisdiction of the Berne commercial court.

In relation to the respondent's argument that the Berne commercial court wrongfully affirmed its jurisdiction taking into account a place of performance of an obligation which was not the subject matter of the dispute, the Swiss Federal Tribunal found that such question needed not be determined in the present case, as the characteristic obligation that was at issue between the parties was also to be performed by the respondent in Berne and, therefore, equally established the local jurisdiction of the Berne commercial court. The Swiss Federal Tribunal acknowledged that certain legal scholars promulgate that, in the event that there are several characteristic obligations, only the one in dispute should be taken into account when determining the place of performance and, thus, the local jurisdiction. However, it stated (obiter) that within the scope of Article 31 CCP (and Article 113 PILA) it was in principle not decisive which obligation was the subject matter of a legal proceeding in question but rather which obligation qualifies as characteristic.

ii Extension of arbitration agreement to non-signatory third parties under the New York Convention

On 17 April 2019, the Swiss Federal Tribunal rendered a decision on the question of whether under Article II(2) New York Convention an arbitration agreement may be extended to a non-signatory third party.

The decision concerned a dispute between a Slovenian and a Swiss company that maintained a distribution relationship over several years. After the Slovenian company initiated state court proceedings against the Swiss company before the commercial court of Aarau requesting payment of an outstanding amount, the latter objected to the commercial court's jurisdiction and raised an arbitration defence based on an arbitration clause included in a written distribution agreement. While the existence of the distribution relationship between the parties per se was not contested, it was disputed whether the Swiss company was a party to a written distribution agreement with the Slovenian company that contained an arbitration clause or whether such distribution agreement had been validly concluded only

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between the Slovenian party and a sister company of the Swiss entity. After the commercial court declined its jurisdiction and referred the parties to arbitration, the Slovenian company appealed against such decision to the Swiss Federal Tribunal.

The Swiss Federal Tribunal dismissed the appeal against the commercial court's decision and found that the commercial court correctly declined its jurisdiction (however, based on improper reasoning). It held that by continuous intervention in the performance of the distribution agreement, the Swiss entity accepted to be bound by the arbitration clause contained in such agreement. The Swiss Federal Tribunal reiterated that it had confirmed the extension of an arbitration agreement to a non-signatory third party by its conduct already on several occasions. Albeit such case law related to Article 178(1) PILA, the Swiss Federal Tribunal held that the formal requirements in Article II(2) New York Convention correspond to those in Article 178(1) PILA and, therefore, it deemed it justified to apply such established case law also in the context of Article II(2) New York Convention. As per its case law in relation to Article 178(1) PILA, the Swiss Federal Tribunal held that the formal requirements of Article II(2) New York Convention, namely that the arbitration agreement is to be 'signed by the parties', apply only to the initial signing of the contract and not to non-signatory third parties.

Finally, the Swiss Federal Tribunal found that the requirements for a binding transfer of rights and obligations to a third party are determined by the applicable substantive law, in the present case Slovenian law, and neither by Article 178 PILA nor Article II(2) New York Convention. It concluded that the question of whether the parties were bound by the arbitration clause in the distribution agreement was therefore a question of substantive law and not related to the formal requirements of the arbitration agreement and held that the Slovenian company had not demonstrated that such an extension of the arbitration clause to a third party would not have taken place under Slovenian law.

iii Requirements for opting out from Swiss domestic arbitration provisions into Swiss international arbitration provisions

In Switzerland, an arbitration is deemed international and governed by the Chapter 12 of the PILA if at least one party to the arbitration agreement had its domicile or habitual residence outside Switzerland at the time of the conclusion of the arbitration agreement. Domestic arbitration in turn is governed by Article 353 et seq. CCP. In any case, parties that are subject to the domestic arbitration provisions of the CCP may choose to exclude such provisions in favour of the international arbitration provisions set forth in the PILA and vice versa.

Contrary to the CCP, the PILA does not provide for an arbitral award to be challenged on the ground of its arbitrariness. Consequently, the main motive for opting out of the CCP provisions in favour of the provisions of the PILA constitutes the limitation of grounds to appeal against an arbitral award before the Swiss Federal Tribunal.

In the case to be decided by the Swiss Federal Tribunal, the parties that were both domiciled in Switzerland at the time of the conclusion of the arbitration agreement submitted their dispute to the Court of Arbitration for Sport (CAS). For such purpose, the parties signed an order of procedure which, inter alia, explicitly stated that any dispute was to be referred to the CAS and that the provisions of the PILA governing international arbitration were to be applied. After a CAS tribunal rendered the award, one of the parties filed an appeal with the Swiss Federal Tribunal challenging the validity of the opting out as agreed in the

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order of procedure and argued that the wording of such order of procedure ('to the exclusion of any other procedural law') failed to explicitly exclude the application of the provisions of the CCP in favour of the PILA.

In its decision of 7 May 2019, the Swiss Federal Tribunal elaborated on the prerequisites for excluding the CCP provision in favour of their international equivalent in the PILA. It summarised that the following prerequisites needed to be fulfilled to validly opt out of the provisions of the CCP into the provisions of the PILA: (1) the provisions of the CPC have to be explicitly excluded by the parties; (2) the exclusive application of the provisions of the PILA has to be explicitly agreed on by the parties; and (3) both of such declarations have to be in writing. In relation to the first prerequisite, the Swiss Federal Tribunal reasoned that any wording used by the parties must exhibit the clear intention of the parties to explicitly exclude the provisions of the CCP. In this regard, it particularly held that the parties are not obliged to specifically cite the provisions the application of which they wish to exclude, but must merely clearly indicate their common will to submit their dispute to the provisions of the PILA. It concluded that in the present case, the wording 'to the exclusion of any other procedural law' included in the order of procedure was sufficiently clear to express the parties' will to exclude the application of the provisions of the CCP.

In addition, the Swiss Federal Tribunal clarified that such an opting out of the provisions of the CCP into the PILA could be agreed upon by the parties at any point during the arbitral proceedings, up until the award is rendered, but did not definitively state whether such a change of the applicable procedural law would also require the approval of the arbitral tribunal, in case the latter has already been constituted.

iv Insufficient protection against conflicts of interests by 'Chinese walls'

In its decision of 14 March 2019, the Swiss Federal Tribunal particularly considered the effectiveness of 'Chinese walls' set up in law firms to avoid problems related to conflicts of interest. The underlying dispute concerned the entity X that was being represented by two attorneys of the Swiss law firm A in a criminal proceeding against a former employee of the entity X. The former employee in turn was represented by the Swiss law firm B. In 2015, when the law firm B was mandated by the former employee, attorney Y was employed by law firm B, and it was undisputed between the parties that attorney Y had access to and became aware of the file concerning the representation of the former employee in the aforementioned criminal proceeding. In early 2017, attorney Y changed from law firm B (i.e., the law firm representing the former employee) to law firm A (i.e., the law firm representing the entity X). In the course of the criminal proceeding, the former employee, who was in the meantime represented by a new attorney, alleged that a conflict of interest existed within the law firm A due to the engagement of attorney Y and requested the competent public prosecutor's office to prohibit the two attorneys from the law firm A from representing the entity X. After the public prosecutor's office dismissed the former employee's request, on appeal, the cantonal criminal appeal court prohibited the two attorneys and all other attorneys working for law firm A from advising or representing the entity X in the criminal proceedings against the former employee. The entity X as well as the two attorneys from the law firm A filed an appeal against such decision with the Swiss Federal Tribunal.

The Swiss Federal Tribunal recalled its previous case law in relation to the 'cardinal rule' of the legal profession (i.e., the statutory duty of an attorney to avoid any conflict of interest). It noted that the purpose of such duty was first and foremost to protect the interests of the client and, moreover, to help to ensure the proper functioning of the administration of

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justice. It then reiterated that according to its case law, the inability of an attorney to represent someone also extends to such attorney's partners in the same law firm and, accordingly, an attorney's personal conflict of interest extends to the partnership of law firms or offices in their entirety and, thus, to all the attorneys working in this partnership of law firms or offices. It held that this applies irrespective of the status of the attorney (partner or employee) and the difficulties encountered by law firms of a certain size in complying with the requirements arising from the rules of the legal profession.

After pointing out the different views in scholarly writing on how to deal with conflicts of interest that arise in connection with the change of employed attorneys from one law firm to another, the Swiss Federal Tribunal agreed with the majority opinion and held that if conflicts of interest arose due to the engagement of an attorney, the new law firm ought to resign the affected mandate(s). Particularly, the Swiss Federal Tribunal refused to hear the argument put forward by the appellants that the law firm A had adopted internal rules and measures (i.e., 'Chinese walls') to prevent access by attorney Y to the file concerning the former employee. It held that such barriers were generally unsuitable to prevent the problems that arise in connection with conflicts of interest, in particular because they cannot prevent all exchanges (e.g., oral exchanges) between the attorneys of the same law firm. In addition, the Swiss Federal Tribunal expressed its doubts that the declared intention of the law firm A to not involve attorney Y in any affected matter provided the necessary guarantees for protection against conflicts of interest. It stressed that the former employee who had disclosed confidential information to the law firm B was exposed to a risk that such information could be used against him and, furthermore, that he was unable to verify whether the law firm A and/or the employed attorneys complied with their professional obligations. While the Swiss Federal Tribunal acknowledged that its decision could have consequences for the scope of reviews and/or restrictions on the employment of lawyers, it deemed such restrictions justified by the importance of the prohibition of conflicts of interest.

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

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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.

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

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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, 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

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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 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.

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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.

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.

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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.

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

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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 or 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 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

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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.

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 (see Section II.iv, above). 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.

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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.[6] 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 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

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

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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.[7]

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 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.

7 https://www.edoeb.admin.ch/edoeb/en/home/data-protection.html.

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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 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.

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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);

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 sports-related 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

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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[8] 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.

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;

8 https://www.swissarbitration.org.

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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, and the possibility to make submissions to the Swiss Federal Tribunal in English. 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. The Swiss Parliament adopted the bill in January 2019 which entered into force on 1 March 2019. The second step concerns the complete revision of the DPA and will be addressed on a separate basis. The final vote in the Swiss Parliament on the completely revised DPA is not expected before the end of 2020.

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 25 years of professional experience, Daniel Eisele has represented clients in more than 300 disputes involving parties and projects from more than 50 countries and on all five continents. 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.

Daniel Eisele won the *Client Choice ILO Award* in 2014, 2015, 2016, 2018 and 2020 for the litigation category in Switzerland. *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 a Leading Individual in Switzerland. *Benchmark Litigation Europe* considers him a Dispute Resolution Star.

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TAMIR LIVSCHITZ

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Tamir Livschitz is a partner in the dispute resolution team of Niederer Kraft Frey.

Tamir Livschitz is an expert in litigation and arbitration with a particular focus on cross-border disputes in the financial, commodities, construction and sports industries. Tamir has extensive experience representing clients in white-collar crime matters both in respect of internal investigations and in investigations conducted by Swiss and non-Swiss authorities. In addition, Tamir regularly advises clients in contractual matters and negotiations, in particular in connection with sale and purchase, distribution, agency, supply and manufacturing agreements in a variety of sectors as well as in sports-related matters.

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

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 a senior 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 has been 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 has also worked as a foreign associate at the London offices of a large US firm. 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 International Association of Young Lawyers.

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