The Dispute Resolution Review

Ninth Edition

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Damian Taylor

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EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 40 jurisdictions. I am delighted to take over as editor of this work from Jonathan Cotton of Slaughter and May, and would like to thank him for his valuable contribution to its development over his tenure as editor.

The Dispute Resolution Review 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.

This ninth 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.

I first began working on this publication in 2008 as a contributor during the early stages of the global financial crisis. At that point, there was much uncertainty about how the then financial world order would change and what that meant for disputes practices. Many predicted a surge in disputes as companies tightened their belts and fought more keenly over diminishing assets. Certainly, in my home jurisdiction – England and Wales – the commercial courts have been extremely busy. Since then we have seen green shoots of recovery followed by new crises both within the eurozone and globally, such as the more recent sharp fall in oil prices and consequential increase in disputes in the energy sector.

2016 may be seen as yet another benchmark year. Two major events have shaken investor confidence and are likely to have an impact on the legal profession for years to come. The UK's vote to leave the EU has created considerable uncertainty in the region, and Donald Trump's election as the US president is likely to affect the global international community. The special Brexit chapter in this edition explores some of the key issues that will form part of the UK–EU negotiations likely to commence this year. A top priority for disputes lawyers

in the region will be whether there will continue to be mutual recognition of judgments across Europe. How will this affect London as a popular global centre for dispute resolution? No one knows the answer to these issues, but what is certain is that clients and practitioners across the globe are likely to continue to face novel and challenging problems. *The Dispute Resolution Review* aims to shine a light on where to find the answer.

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 629 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
January 2017

Chapter 36

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

1 Daniel Eisele and Tamir Livschitz are partners and Anja Vogt is an associate at Niederer Kraft & Frey.

2 Swiss Code of Civil Procedure of 19 December 2008.

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

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 Tribunal acts as the sole appeals instance for arbitral awards, unless the possibility to appeal has been excluded by the arbitrating parties, which is, however, only admissible if none of the arbitrating parties is domiciled in Switzerland.

II THE YEAR IN REVIEW

i Jurisdiction of arbitral tribunal based on arbitration clause in an unsigned agreement

In a decision of 18 February 2016, the Swiss Federal Tribunal had, *inter alia*, the opportunity to clarify whether parties can be bound to arbitration on the basis of an arbitration clause contained in a draft agreement that had not (yet) been signed by the parties.

In the case submitted to the Swiss Federal Tribunal for review, two parties, an Iranian steel producer and a Cypriot entity specialised in trading and distribution of metals entered into negotiations for the conclusion of a sales contract in 2012. In May 2012, the Cypriot entity sent a *pro forma* invoice to the Iranian company for the sale of 5,000 tons of steel in the amount of €2.7 million, which was signed by the latter. Two days later, the parties signed a 'Sales Contract for Payment by Draft' to formalise the aforementioned transaction. In connection with the *pro forma* invoice of May 2012, the Cypriot entity sent a final invoice to the Iranian company in July 2012, which remained, however, unpaid. Also in May 2012, representatives of both parties engaged in an email correspondence exchanging various draft versions of a frame agreement. Clause 14 of this draft frame agreement stipulated that any dispute shall be resolved by arbitration pursuant to the Swiss Rules of International Arbitration of the Swiss Chamber of Commerce with the seat of the arbitration to be in Lugano, Switzerland. While the representative of the Iranian company modified Clause 14 in its reply to the first draft of the frame agreement changing the governing rules of the arbitration to ICC France and the seat of the arbitration to be in Paris, the representative of the Cypriot entity insisted on the initial version of Clause 14. Subsequently, the parties exchanged further draft versions of the frame agreement; however, Clause 14 in its first version as drafted by the Cypriot entity was not changed any more. The frame agreement was never signed by the parties. A year later, the Cypriot entity initiated arbitration proceedings under the Swiss Rules of International Arbitration based on Clause 14 of the unsigned frame agreement demanding, *inter alia*, payment of €2.3 million as well as damages for loss of profit. After the Iranian company had claimed that the arbitral tribunal lacked jurisdiction, the arbitrator upheld the arbitral tribunal's jurisdiction in a partial award on jurisdiction. Subsequently, the Iranian company appealed the award to the Swiss Federal Tribunal.

To start with, the Swiss Federal Tribunal elaborated the principle of severability of the arbitration clause that is explicitly stipulated in Article 178 paragraph 3 of the Swiss Private

International Law Act (PILA)[4] and provides for the arbitration agreement not to be contested on the grounds that the main contract is not valid. However, it added that the wording of said provision is too broad in the sense that it incorrectly states that the invalidity of the main contract cannot have any influence on the validity of the arbitration clause. It continued by describing circumstances of the theory of 'identity of defect', in which the arbitration clause nonetheless shares a common destiny with the main agreement; for example, if a contracting party lacks the capacity to conclude a contract or the agent lacks the power to represent a party. The Swiss Federal Tribunal stated that, in principle, if the main contract is not concluded by mutual expression of intent by the parties, then neither is the dispute resolution clause or any other clause contained in the main contract. Nevertheless, under particular additional circumstances, the arbitration clause may still be valid even before the main agreement had been concluded. By way of example, the Swiss Federal Tribunal stated that such circumstances could be given if:

a in the past, the parties have concluded various contracts containing the same arbitration clauses;

b the parties have an objective interest to submit themselves to arbitration, irrespective of whether the main agreement has been concluded or not (e.g., neutrality of forum, choice of an international language, confidentiality, etc.); or

c if the exchange of draft agreements manifest their intention to conclude an agreement on arbitration, as was the case in the present case.

In addition, the Swiss Federal Tribunal discussed if the parties to an arbitration agreement may agree on stricter validity requirements of form for the arbitration agreement than the requirements stipulated in Article 178 paragraph 1 of PILA, which, strictly speaking, does not require the signature of the parties. Even though the Swiss Federal Tribunal has left this question unanswered, as it was not raised by the Iranian company as a grounds for appeal, the reasoning of the Swiss Federal Tribunal suggests that such agreement on validity requirements of form ought to be regarded as admissible.

Finally, and with regard to the argument of the Iranian company that the present dispute did not fall within the ambit of the arbitration clause in the draft frame agreement, the Swiss Federal Tribunal referred to the group-of-contracts theory elaborating that if there is a material nexus between several contracts but only one of the contracts contains a dispute resolution clause, it is – in the absence of an explicit rule stipulating otherwise – reasonable to presume that the parties intended to submit the other contracts to said dispute resolution clause as well.

The Swiss Federal Tribunal concluded that the arbitrator had soundly applied the severability principle in the present case. In addition, the argument that such interpretation of the severability principle would create legal uncertainty was rejected. The Swiss Federal Tribunal noted that the Iranian company merely ought to have explicitly stated in its first email that it did not consider itself bound by the arbitration clause in any case prior to the signing of the frame agreement, or have crossed out the arbitration clause in the draft frame agreement, if it did not intend to submit itself to arbitration.

The decision of the Swiss Federal Tribunal is of great practical importance – particularly as the exchange of draft agreements by email correspondence is no exception when

4 Private International Law Act of 18 December 1987.

negotiating contracts. In addition, the Swiss Federal Tribunal has once more emphasised the arbitration-friendly and liberal approach of Swiss court practice favouring arbitration over state court litigation, at least where the seat of the arbitration is agreed to be in Switzerland.

ii No remedies against the appointment of an arbitrator by a state court

The Swiss Federal Tribunal confirmed and elaborated its practice with regard to appellant remedies against the appointment of arbitrators by the state court at the place of arbitration for both, international arbitration governed by the PILA and domestic arbitration governed by the CCP. As a rule, the parties (or one of the parties) may seize the state court at the place of the arbitration to appoint an arbitrator in lieu of a party that has failed to designate its arbitrator – whether in the arbitration agreement (e.g., directly or by reference to institutional rules of arbitration or by providing for an alternative mechanism or authority to appoint the arbitrators) or thereafter.

The Swiss Federal Tribunal explicitly stated that, contrary to a negative decision of the state court on the appointment of an arbitrator (i.e., if the state court rejects the appointment of an arbitrator), the appointment of an arbitrator by the state court may not be appealed to the Swiss Federal Tribunal. Furthermore, it clarified that such 'positive' decision on the appointment of an arbitrator does not constitute an interim decision in a formal sense and may, thus, also not be appealed against indirectly together with the arbitral award. However, the Swiss Federal Tribunal admits as an exception that the appointment of an arbitrator by a state court may be appealed if, together with the appointment of the arbitrator, a party is challenging the appointed arbitrator.

iii No declaration of enforceability of a US court's decision due to undue summons

The Swiss Federal Tribunal rejected an appeal against a decision of a cantonal court not to recognise and thus not to declare, a decision of the Bankruptcy Court of the District of Columbia enforceable on the basis of a violation of the procedural public policy of Switzerland. As the decision by the Bankruptcy Court of the District of Columbia was rendered in the absence of the respondents, the Swiss Federal Tribunal particularly had to establish whether the respondents had been duly summoned in accordance with the PILA. It held that, according to Swiss law, the requirements of a due summons are not satisfied by merely duly notifying the defendant about a hearing as was the case with an order entering default and setting hearing on *ex parte* proof of damages in the case at hand. Rather, the Federal Tribunal observed that the respondents need to be duly served the document instituting the proceedings in accordance with the laws of the country in which the respondent is domiciled, whereby the respondent is notified that proceedings have been initiated. The burden of proof rests upon the applicant, who has to produce a certificate indicating that the respondent has been duly notified in a timely manner.

In the case at hand, the Swiss Federal Tribunal found that the first document instituting the proceedings that ought to have been duly delivered to the respondents was a motion for sanctions and not the order that was subsequently issued, which set the hearing date. However, the appellant was not able to provide a certificate confirming that the respondents had been duly served with the motion for sanctions. In particular, the Swiss Federal Tribunal did not accept the argument, brought forward by the appellant, that both the order setting the hearing date as well as the decision of the Bankruptcy Court of the District of Columbia confirmed that the motion on sanctions had been duly served in accordance with the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil

or Commercial Matters. The Swiss Federal Tribunal reiterated that, in the case at hand, proper notification would need to be evidenced pursuant to the requirements of the PILA (i.e., by means of a corresponding certificate). As a consequence, the Swiss Federal Tribunal rejected the appellant's request for recognition and execution of the decision rendered by the Bankruptcy Court of the District of Columbia.

iv Suspension of arbitration proceedings if parties have not completed the agreed mandatory pre-arbitration conciliation proceedings

In an appeal upheld by the Swiss Federal Tribunal regarding international arbitration, two entities, X and Y, entered into two association agreements to search for and exploit oil deposits in two areas of a certain, not disclosed, territory. Both of the agreements contained an identical dispute resolution clause stipulating that any dispute on the interpretation or the execution of the agreements between the parties shall first of all be referred to an attempt at conciliation pursuant to the Alternative Dispute Resolution (ADR) Rules of the International Chamber of Commerce. Only a dispute between the parties that cannot be resolved by way of conciliation shall be resolved by arbitration in accordance with the UNCITRAL arbitration rules. After a dispute arose, Y filed a request for mediation with the ICC International Centre for ADR. After it appeared impossible to conduct a first discussion in a conference call or at an actual meeting between the parties and the appointed mediator, Y sent a request for arbitration to X and stated, with regard to both X and the mediator, that the conciliation proceedings had failed. Such statement was contested by X. The mediator informed the parties that, unless a discussion in accordance with the ARD Rules was conducted, the ICC International Centre for ADR could not be notified about the closure of the conciliation proceeding. After Y had reiterated its intention to withdraw its request for mediation and did not pay its share of the deposit for such proceeding, the ICC International Centre for ADR declared the conciliation proceedings to be terminated. In the course of the subsequent arbitration proceedings, X immediately raised an objection of lack of jurisdiction of the arbitral tribunal due to the fact that the conciliation proceedings were still pending. Subsequently, the arbitral tribunal confirmed its jurisdiction in a preliminary award on jurisdiction. X filed an appeal against the aforementioned arbitral award with the Swiss Federal Tribunal, requesting the annulment of the award and a declaratory statement as to the lack of jurisdiction *ratione temporis*.

First, based on the interpretation of the dispute resolution clauses in the agreements between X and Y, the Swiss Federal Tribunal qualified the obligation set out therein to attempt conciliation proceedings before arbitration proceedings are initiated as binding. Secondly, it found that, on the basis of the ADR Rules, Y did not discharge the obligation to conduct conciliation proceedings pursuant to the ADR Rules before initiating arbitration proceedings.

Finally, the Swiss Federal Tribunal addressed the controversial question as to how a breach of an agreement to mediate before commencing arbitration should be sanctioned. The Swiss Federal Tribunal noted that the imposition of damages would not be satisfactory as such sanction would come too late and it would be difficult, if not impossible, to quantify the damages arising. As a consequence, the Federal Tribunal only deemed sanctions of procedural nature appropriate in the case at hand. However, the Swiss Federal Tribunal did not consider it to be an adequate solution to declare the action inadmissible or to reject it – particularly because the decision may lead to a rise in costs and extension of the dispute resolution proceedings, as the arbitration proceedings would probably have to start all over again. The

Swiss Federal Tribunal concluded that the arbitration proceedings ought to be suspended while an appropriate time limit for the completion of conciliation proceedings should be set by the arbitral tribunal.

v Agreement on jurisdiction with regard to the plaintiff's choice between the commercial court and the ordinary court is inadmissible before a dispute arises

In another case submitted to the Swiss Federal Tribunal for review, two entities registered in the commercial register, the general contractor X and principal Y, entered into a general contractor agreement on the planning and construction of three apartment buildings. In Clause 17.8 of the general contractor agreement, X and Y agreed on the commercial court of Zurich having exclusive jurisdiction. After condominium ownership on the three apartment buildings was established by Y, the condominium units were sold to the appellants. Any claims for warranty of quality and for any defects were assigned to the buyers of the condominium units in the respective sales agreements. After defects in the facades of all three apartment buildings had been detected, the condominium owners filed a claim against the general contractor X with the ordinary court, as well as with the commercial court of Zurich for payment of the substitute performance to eliminate the deficiencies. While both, the commercial court of Zurich and the ordinary court denied their subject-matter jurisdiction, the High Court of the Canton of Zurich found the ordinary court to be the competent court in the matter. The general contractor X appealed the decision of the High Court of the Canton of Zurich to the Swiss Federal Tribunal.

The general contractor X argued that, according to the case law of the Swiss Federal Tribunal, an agreement on subject-matter jurisdiction was admissible before the dispute had arisen if the law provided the plaintiff with a choice between competent courts. The Swiss Federal Tribunal rejected this argument and clarified that the relevant choice in the present case as stipulated in the CCP provides for a unilateral option of a plaintiff not registered in the Swiss commercial register. Namely, in the event that only the defendant is registered in the Swiss commercial register or in an equivalent foreign register, but all other conditions to submit the case to the commercial court are met, the plaintiff not registered in the Swiss commercial register may choose between the commercial court and the ordinary court in terms of subject-matter jurisdiction (and only in one of the four cantons that have thus far used their powers to establish a commercial court). Consequently, the Swiss Federal Tribunal determined that an agreement on jurisdiction with regard to the plaintiff's choice between subject-matter jurisdiction of the commercial court and the ordinary court is not admissible before the dispute has arisen, as such an agreement would deprive the plaintiff of a benefit the Swiss legislator had explicitly provided.

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[5] 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 the ordinary proceedings 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

5 Private International Law Act of 18 December 1987.

settlement rate for such conciliatory hearings can exceed 50 per cent (e.g., in the city of Zurich the conciliation authorities settled 64 per cent of the cases in 2015). 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, it is worth noting that 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 speaking this will be the case if the relationship between the members of the group is of a kind that does not allow for differing decisions as to the individual members of the group. Also, if rights or duties of multiple parties stem from similar circumstances or legal grounds, Swiss law allows for such multiple parties to lodge their claims jointly. However, and in contrast to a mandatory joinder of parties set up, the joint action is made available as an option rather than as a mandatory requirement ('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.

While 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.

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.

For a foreign judgment to be recognised under the PILA, the party seeking enforcement must, in particular, demonstrate the competence of the foreign court having rendered the decision. The party objecting to the recognition and enforcement is entitled to a hearing and to adduce evidence. This notwithstanding, interim relief such as freezing orders or attachments are available in the enforcement proceedings for the party seeking recognition and enforcement to protect its legitimate interests.

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

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

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

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. While written submissions in civil proceedings are not made available to the public, copies of judgments may be requested by anyone. In such cases the judgments are generally made available in anonymised form only. 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, in a recent decision, 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.

One should note that while 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, admissible to agree on reduced hourly rates and provide for an additional success fee if the reduced hourly rates agreed cover the attorney's costs (plus an adequate profit margin) at least. 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 Federal Lawyers' Act[6] 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. In non-contentious matters, however, the representation of clients with conflicting interests is admissible if all parties involved consent. In practice, this can be observed for instance when a law firm represents multiple clients in auctions related to acquisitions or also when multiple clients (as creditors) are represented by one and the same law firm in bankruptcy proceedings.

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

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

6 The Federal Lawyers' Act of 23 June 2000.

commercial transactions such a contractual counterparty engages in pursuant to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector.[7] 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, etc.) 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.

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

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.[8]

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

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

The scope of such secrecy obligations is rather broad and includes everything conveyed to a lawyer in connection with the (prospective) attorney–client relationship. Most notably, this also includes the attorney's own assessments, proposals, memoranda and information gathered, learned or which otherwise comes to his or her attention in the course of performing his or her mandate. While it is of no relevance from whom the lawyer learned the information, only information in the lawyer's possession as part of his 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, basically, not impose any obligations on the litigating parties in terms of pre-action conduct. Hence, litigating parties in Switzerland are not subject to a litigation hold. This should, however, not be misunderstood as permission to destroy evidence. Such conduct could result in adverse

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

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.

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 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[9] and the Rules of Arbitration of the International Chambers of Commerce (ICC). In sports matters, the majority of arbitration proceedings are conducted under the rules of the CAS in Lausanne, while many intellectual property disputes are conducted under the arbitration rules of the 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, while 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 reform of Chapter 12 of the PILA regulating international arbitration in Switzerland is in preparation with the objective of introducing selected improvements and updating certain provisions in line with the extensive case law developed by the Swiss Federal Tribunal since the PILA entered into force back in 1989. The consultation on the revised Chapter 12 of the PILA is expected to open at the beginning of 2017.

On 10 January 2015 Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into force; this is a recast of Council

9 www.swiss-arbitration.ch.

Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Amendments introduced by the recast concern, for instance, personal and subject-matter jurisdiction, forum prorogation and provisional measures. The Lugano Convention, which is a parallel convention to Council Regulation (EC) No. 44/2001, provides for the applicability of provisions identical with those of Council Regulation (EC) No. 44/2011 between the European Union on the one hand and Switzerland (which is not a member of the EU), Norway and Iceland on the other. Its Protocol No. 2 also ensures a parallelism in the interpretation of provisions of Council Regulation (EC) No. 44/2001 and the Lugano Convention by the European Court of Justice and the Swiss Federal Tribunal. Whether the Lugano Convention will be amended and adapted to the changes promulgated in EC Regulation No. 1215/2015 remains unclear. The Standing Committee under Article 4 of Protocol No. 2 to the Lugano Convention has not made any recommendations on the possible amendment of the Lugano Convention so far.

In addition, 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. The revised DPA is expected to enter into force in 2018.

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.

Appendix 1

ABOUT THE AUTHORS

DANIEL EISELE

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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 almost 20 years of professional experience, Daniel Eisele has represented clients in more than 200 arbitration, court and other proceedings. These procedures concern all types of industries, namely banking, finance, construction, oil, 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* mentions Daniel Eisele as a litigation lawyer who is 'very experienced, extremely dedicated and convincing, with an entrepreneurial approach and business orientation'. Daniel Eisele won the Client Choice Award in 2014 and 2015 for the litigation category in Switzerland and is listed as leading litigator by *Who's Who Legal* and *Best Lawyers*.

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.

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.

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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. Furthermore, she advises clients in the fields of contract, commercial and employment law.

Before joining Niederer Kraft & Frey, Anja worked at a law firm in Zurich. She is a member of the Zurich, Swiss and International Bar Association.

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