Chapter

Switzerland

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Switzerland got? Are there any rules that govern civil procedure in Switzerland?

The Swiss legal system is based on the civil law tradition. As such, it depends heavily on written codes as a primary source for authoritative statements of law. Accordingly, judicial decisions are of less importance than they are in common law jurisdictions. Even though a line of judicial decisions establishing a particular legal practice does carry substantial weight, the common law rule of binding precedent (*stare decisis*) is not recognised. Traditionally, more weight is given to the writings of legal scholars than in common law countries.

The rules of civil procedure and the organisation of the judiciary are currently governed by the state law of the 26 Swiss cantons. A unification of the various cantonal rules in the new Swiss Rules of Civil Procedure is planned for the year 2010.

1.2 How is the civil court system in Switzerland structured? What are the various levels of appeal and are there any specialist courts?

The organisation of the judiciary differs from canton to canton. In larger cantons, there are several courts of first instance; in smaller, rural cantons, there is usually just one.

All the cantons have established a high court which serves as an appellate court or as a court of first instance for a narrow scope of claims. Four cantons (Zurich, Bern, St. Gallen and Aargau) have a specialised commercial court (*Handelsgericht*) which is part of the cantonal high court and serves as a court of first instance for commercial matters. There are other specialised courts in certain cantons, such as Labour Courts or Landlord and Tenant Law Courts. Three cantons (Zurich, St. Gallen and Appenzell Innerrhoden) have established a court of cassation, which has the power to quash or to reverse the decisions of the inferior courts based on specific grounds for annulment. The Swiss Federal Court is Switzerland's highest court. As an appellate body, it ensures both the correct application of federal substantive law by the cantonal courts and continuity of the legal practice in Switzerland.

The Commercial Court of Zurich is generally regarded as the most appropriate forum in Switzerland to decide international commercial disputes. Since considerable differences may exist between the procedural rules and practices of particular cantons and courts, the explanations below will give a general description of the Swiss judiciary and, where appropriate, will refer in greater detail to civil proceedings in the Canton of Zurich, particularly those of the Commercial Court of Zurich.

1.3 What are the main stages in civil proceedings in Switzerland? What is their underlying timeframe?

Swiss civil proceedings generally consist of three phases:

- The "assertion phase", where the parties present the facts of the case to the court. The parties must plead all relevant facts, submit the documentary evidence and name any other evidence they wish to rely upon.
- The "evidentiary phase", where evidence is taken on the relevant facts that are in dispute and cannot be proved by documentary evidence alone. Typically, the court issues a decision on the facts that need to be proved and designates the party that has the burden of proof. The actual taking of evidence takes place in a subsequent hearing.
- The "post-hearing phase", where the parties have the opportunity to comment on the evidence that has been taken before the court renders a judgment.

Typically, the average duration of commercial civil proceedings before the courts of first instance is between one and two years. This time period can double if one of the parties appeals to higher instance courts. Of course, in complex cases or cases in which, for example, evidence needs to be taken abroad, a given proceeding may take considerably longer.

1.4 What is Switzerland's local judiciary's approach to exclusive jurisdiction clauses?

Both domestic and international Swiss law explicitly allow an agreement on jurisdiction for an existing or potential dispute arising from a particular legal relationship. The parties' choice is restricted only in cases where a specific law or a treaty provides for an exclusive or partly exclusive jurisdiction for certain types of disputes. Unless provided otherwise between the parties, exclusive jurisdiction of the agreed court will be assumed. The Swiss court that has been selected may not decline jurisdiction if one of the parties is domiciled in a Member State of the *Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters* ("*Lugano Convention*"). If not, Swiss courts will still honour a jurisdiction clause if, under the Swiss Act on Private International Law or upon the parties' choice, Swiss law governs the matter in dispute.

1.5 What are the costs of civil court proceedings in Switzerland? Who bears these costs?

Court fees, as well as all other expenses arising from the litigation, including opposing counsel's fees, are borne by the losing party. If a party prevails only in part, the fees and expenses will be divided proportionally between the parties.

The cantons regulate the amount of the court fees and the reimbursement of the winning party by statute. In financial disputes, the fees depend on the amount in dispute. Other factors can have an influence, such as the type of procedure, the complexity of the case and the time spent by the court on the matter.

1.6 Are there any particular rules about funding litigation in Switzerland? Are there any contingency/conditional fee arrangements? Are there rules on security for costs?

The federal law governing the bar allows Swiss attorneys and their clients to negotiate fee arrangements to a certain degree. While no contingency fee arrangements with attorneys are allowed, the arrangement of an incentive payment is now considered permissible, as long as the hourly fee at least covers the costs for the attorney.

According to a recent decision of the Swiss Federal Court, it is, in principle, permissible to finance litigation through a third party, such as a financial institution. The third party funding the litigation commits to covering the costs as they arise. In return, it is promised a contingent fee.

The issue of security for costs is governed by cantonal procedural rules, as well as by multilateral treaties - such as the *Hague Convention of 1954 on Civil Procedure* and the *Hague Convention of 1980 on International Access to Justice* - and by bilateral treaties. The cantonal provisions vary greatly: while some generally request security for costs, the majority do so only if specific prerequisites are given. According to the Civil Procedure Code of the Canton of Zurich, claimants (and counterclaimants) must put down a deposit for court fees and the opposing party's legal fees if, e.g., the claimant is not domiciled in Switzerland, or if the claimant's solvency is at risk. The international treaties ensure that parties who are nationals, or are domiciled in, a Member State are not discriminated against residents of another Member State with respect to access to justice, including security for costs and court fees.

2 Before Commencing Proceedings

2.1 Are there any pre-action procedures in place in Switzerland? What is their scope?

Typically, the Swiss codes of civil procedure provide for a (state) conciliation proceeding, mainly before a justice of the peace. While participation is often mandatory, there are numerous exceptions.

According to the Civil Procedure Code of the Canton of Zurich, for instance, there is an important exception with regard to international matters: conciliation proceedings are not available when the jurisdiction of the court is based on the *Lugano Convention.*

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In Switzerland, limitation periods are a matter of substantive law.

As a general rule, the limitation period for civil law claims is ten years; if such claims concern periodic payments or certain types of services, they will be time-barred after five years. This general rule applies to all claims for which Swiss civil law does not provide otherwise. Important exceptions are tort claims and claims based on unjust enrichment, which become time-barred one year after the aggrieved party obtained knowledge of the damage or, in any case, ten years after the harmful event has occurred. For claims arising out of a contract, the statute of limitations starts running upon the maturity of the claim. Limitation is interrupted and will restart when an action is filed. Limitation must be pled by motion.

Notably, certain claims for alteration of a legal right or status will be forfeited after a considerably shorter period of time (*Verwirkungfrist*), e.g., a claim for annulment of a resolution taken at a shareholder meeting (2 months after the meeting). For these specific claims, as opposed to the general rules on the statute of limitation set out above, the limitation period will not be interrupted when an action is filed and forfeiture of these claims will be observed ex officio. For any such claim, the limitation period is explicitly indicated in the applicable laws.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Switzerland? What various means of service are there? What is the deemed date of service? How is service effected outside Switzerland? Is there a preferred method of service of foreign proceedings in Switzerland?

Civil proceedings are commenced by the claimant submitting a detailed, usually written, statement of claim to the court. It is the court which serves the statement of claim upon the defendant, usually by mail, sometimes through a clerk. The service of judicial documents is completed when the addressee - or an authorized person in his stead - actually receives the documents. If the recipient deliberately impedes service of documents, service is considered complete as per the date of such action.

The serving of judicial documents outside Switzerland is effected pursuant to the corresponding rules of service applicable in the country where service is sought. Between Member States of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ("*1965 Hague Convention*"), the rules as set out in the Convention apply. According to the Convention, the service of process to and from a foreign country is provided by a Central Authority. In Switzerland, there are cantonal Central Authorities, usually the cantonal high court, and, for federal matters, the Federal Department for Justice and Police. In addition to the Convention, bilateral agreements may apply.

3.2 Are any pre-action interim remedies available in Switzerland? How do you apply for them? What are the main criteria for obtaining these?

Under Swiss civil procedure law, two forms of interim remedies are available:

- Interlocutory injunctions. The requirements necessary for the granting of a preliminary injunction differ according to the applicable cantonal or federal law. Typically, the petitioner must prove on a *prima facie*-basis that in the absence of an injunction he would suffer irreparable harm and that he is likely to prevail on the merits.
- Attachment of assets (freezing order). Among other grounds, an attachment of assets in Switzerland can be requested

where the debtor has his domicile outside Switzerland. The creditor needs to convince the court that, *prima facie*: (1) he has a claim; (2) the claim either has a sufficient link with Switzerland or is evidenced by a signed acknowledgment of debt, or is based on an enforceable court judgment; and (3) there are assets situated in Switzerland that belong to the debtor.

Attachment of assets is also available as a securing means during recognition and enforcement proceedings under the *Lugano Convention*.

Interim remedies can also be requested in support of foreign proceedings.

3.3 What are the main elements of the claimant's pleadings?

In Switzerland, a claimant must:

- plead all relevant facts;
- submit the available documentary evidence and identify any other evidence claimant wishes to rely upon; and
- state the relief sought, including interest.

3.4 Can the pleadings be amended? If so, are there any restrictions?

According to the cantonal civil procedure codes in Switzerland, the amendment of pleadings in a pending suit is either barred or admissible only under restricted conditions.

Before the Zurich courts, an amended or additional claim can be raised if the new claim is closely connected to the original claim. The court can reject an amendment of the claim if the amendment would prejudice the legal position of the defendant or unduly delay the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In Switzerland, a statement of defence must:

- state which factual allegations made in the statement of claim are being denied by the defendant;
- submit the documentary evidence the defendant has in hand and name other evidence the defendant wishes to rely upon; and
- state the motion sought.

The defendant can file a counterclaim with the same court, provided that there is a factual connection between the claim and the counterclaim, that the court is competent to deal with the counterclaim, and that the same procedure applies to both claims. For euro-international disputes, the *Lugano Convention* requires that the claim be based on the same contract or facts. Before Zurich and other cantonal courts, a counterclaim must be raised in the statement of defence at the latest. However, in some cantons it must be raised as early as in the conciliation proceedings.

A defence of set-off is available under Swiss law. In proceedings before Zurich courts, it should be raised in the rejoinder or, in oral proceedings, in a party's last pleading at the latest; otherwise, it will be treated as an amendment of the pleadings (see Part I, question 3.4 above).

4.2 What is the time-limit within which the statement of defence has to be served?

The time limit within which the statement of defence must be filed depends on the applicable cantonal civil procedure code. Normally, before Zurich courts, the statement of defence must be filed within 20 days of the service of the claim; upon request, the court may extend this time limit.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

A party can give a 'notice of litigation' (*Streitverkündung*, *dénonciation d'instance*) to a third person in order to obtain support during a proceeding. If the party subsequently loses, the holdings of the decision will have an effect on the third party if the third party was obliged to support the notifying party due to its legal relationship or according to good faith. In most cantons, the third party's liability will be determined in a subsequent suit.

Some cantonal codes of civil procedure that are influenced by French law provide for an 'action on a guarantee' (*action en garantie*). Here, the third party itself becomes a party in the main proceeding.

4.4 What happens if the defendant does not defend the claim?

Under the Zurich Civil Procedure Code, as a rule, the court will assume an admission of the claimant's allegations by the defendant and will issue a default judgment. However, the court may ask a claimant to prove his allegations if it has serious doubts as to their correctness.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction in the statement of defence, which can be restricted to the challenge of jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Under all cantonal laws, joinder is available; this enables the simultaneous treatment of the claims of several parties in one proceeding. It is necessary for the claims to have a common question of fact or law of substantial importance, and that the same type of proceedings be applicable to them.

Furthermore, a third party may join ongoing proceedings in support of either claimant or defendant if it has a legal interest that one of them prevails (*Nebenintervention*).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Claims which are closely connected in factual or legal aspects can be consolidated, even if they are pending in different courts. A court will do so on its own motion if it considers consolidation necessary in order to avoid contradictory judgments. Alternatively,

the court can order a stay of one of the claims pending determination of the other claim.

5.3 Do you have split trials/bifurcation of proceedings?

The Swiss courts have the discretion to split trials and to bifurcate proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Switzerland? How are cases allocated?

There is no particular allocation system - a claimant is expected to submit the claim with the competent court that has jurisdiction over the parties and over the subject matter. If a court decides that it lacks jurisdiction over the parties or over the subject matter, it will either set a deadline within which the claimant can request a transfer to the competent court (which is the practice of Zurich courts), or dismiss the case without prejudice. In cases where claims pending at separate courts have a common question of fact or law of substantial importance, they can be transmitted to the court first seized (see Part I, question 5.2 above).

Internally, a court will allocate the cases among the judges based on a mechanism that is not disclosed to the parties.

6.2 Do the courts in Switzerland have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

As soon as a case becomes pending, it is the court which has the duty to actively manage the whole process and to conclude it in an efficient way; only three cantons (Geneva, Vaud and Ticino) require the parties to be proactive.

Pending an action, a party can ask for interim measures or file procedural motions, e.g., application for legal aid or preservation of evidence. The requirements for interim measures to be granted during a trial correspond to the requirements prior to trial (see Part I, question 3.2 above).

The costs for interim measures are usually allocated at the end of the proceedings depending on whether and to what extent a party's request has been granted or dismissed (see Part I, question 1.5 above).

6.3 What sanctions are the courts in Switzerland empowered to impose on a party that disobeys the court's orders or directions?

Failure to obey a procedural order or direction of the court will result in procedural disadvantages, such as adverse inferences taken by the court or the rendering of a default judgment. The court is also free to consider the parties' behaviour during trial in its evaluation of evidence.

6.4 Do the courts in Switzerland have the power to strike out part of a statement of case? If so, in what circumstances?

If the procedural requirements to bring an action are met, the court has the duty to hear the factual and legal arguments and to take the pertinent evidence offered in the case. However, if a claim is obviously without merit, a court may dismiss the claim without having taken evidence on the facts.

6.5 Can the civil courts in Switzerland enter summary judgment?

Unlike under common law, where parties make their pleadings and evidence is taken during one big trial, civil law lawsuits proceed with an assertion phase and an evidentiary phase (see Part I, question 1.3 above). After the parties' pleadings, the Swiss courts can - based on the factual arguments raised and the documents submitted as evidence - decide that no material issues of fact remain to be proven, that the evidence offered is irrelevant, or they can anticipate the evaluation of evidence and subsequently enter a judgment.

For certain kinds of disputes (e.g. certain family disputes, interim measures, etc.), procedural laws provide for summary proceedings which, predominantly, rely on documentary evidence.

6.6 Do the courts in Switzerland have any powers to discontinue or stay the proceedings? If so, in what circumstances?

If the court decides that the procedural requirements are satisfied and therefore takes on the case, it is no longer in the position to discontinue proceedings, but must render a judgment on the merits.

As a consequence of its case management powers (see Part I, question 6.2 above), a court may stay the proceedings if it decides - upon one of the parties' or its own motion - that this would be appropriate, because, for example, the decision in the case is dependent on the outcome of another case or in cases of settlement negotiations.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Switzerland? Are there any classes of documents that do not require disclosure?

There is no general pre-trial disclosure rule in the procedural codes of Switzerland. Basically, the parties determine the facts and the evidence to be presented to the court in their briefs. If a document referred to is in the possession of the other party, this party may, on request, be ordered by the court to produce it. Only in cases where the evidence might later be unobtainable or where the other party, under substantive laws, has a legal duty to produce certain documents (as is the case with agents vis-à-vis their principals or with keepers of accounting books), it is possible to make a pre-trial request for the production of these specific documents. In criminal proceedings, the aggrieved party may gain access to the documents obtained by the investigation authorities and may use them in a subsequent civil proceeding.

7.2 What are the rules on privilege in civil proceedings in Switzerland?

Privilege rights in Switzerland protect individuals such as family members of a party and certain professionals - among others, attorneys, bankers, notaries, auditors and journalists - from giving testimony and from complying with a request for the production of documents in their possession; however, the procedural codes may vary on the scope of the privilege. Unlike under *common law*, only the person who is bound to keep certain information secret can claim the privilege, i.e. the attorney, but not the client. Accordingly, correspondence and work products received from an attorney, but in the possession of the client, can be disclosed. Currently, in-house

lawyers or attorneys acting in a business capacity, such as fiduciaries, may not invoke the legal profession privilege. However, there are ongoing discussions about the extension of the privilege to in-house counsel.

7.3 What are the rules in Switzerland with respect to disclosure by third parties?

In the absence of any legal privilege, third parties have the duty to testify if summoned by the court as witnesses. They may be ordered by the court to produce specific documents in their possession; in practice, such orders are quite rare. Non-compliance may be sanctioned (by fine or even detention) by the court.

7.4 What is the court's role in disclosure in civil proceedings in Switzerland?

Only the court can order the appearance of a witness or - upon request of one of the parties - the production of a specific document.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Switzerland?

No. However, if a party or a third party claims that the production of certain documents would jeopardise a business secret, virtually all procedural codes provide protective measures. The Zurich Civil Procedure Code allows protective measures - such as restricted access to the documents or the redaction of sensitive parts - whenever there is a legitimate interest on the part of a party or third party to do so.

8 Evidence

8.1 What are the basic rules of evidence in Switzerland?

There is no pre-trial discovery in Swiss civil procedure.

The parties determine the facts and the evidence to be presented to the court in their briefs. As a general rule, each party carries the burden of proving those facts upon which its claim or defence is based. The court is free in the evaluation of evidence.

According to the Zurich Civil Procedure Code, the court informs the parties after the exchange of briefs which contested facts it considers to be relevant for the decision of the dispute and which party has the burden of proof. Subsequently, the parties are required to identify the evidence they intend to rely upon to prove the facts for which they have the burden of proof. The court will then issue a decree designating the evidence it has admitted.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Swiss procedural codes provide for the following kinds of evidence:

- witness evidence;
- expert evidence;
- documentary evidence;
- inspection by court;
- parties' testimony; and
- parties' oath (for certain cantons only; not available under the Zurich Civil Procedure Code).

Expert witnesses are appointed and questioned by the court if the taking of evidence requires special knowledge that the court does not have. Parties may oppose the appointment of a certain expert and ask additional questions; however, there is no cross-examination.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Fact witnesses are proposed by the parties in their briefs, but are ordered to appear and are questioned by the court. Parties may ask additional questions, but there is no cross-examination. The witness must appear in person before the court and give oral testimony. Accordingly, witness statements or depositions are generally not admitted as evidence. If a witness does not appear, the court may order fines or detention.

8.4 What is the court's role in the parties' provision of evidence in civil proceedings in Switzerland?

The court does not facilitate a party's efforts to obtain evidence from the counterparty or a third party; orders by the court to produce specific documents are rare. The court decides which evidence that has been offered it will admit. The court also appoints expert witnesses. During a witness or expert witness hearing, the court is in charge of questioning.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Switzerland empowered to issue and in what circumstances?

The court can issue procedural orders which have the purpose of managing the proceedings. In addition, the court has the power to issue judgments on the merits. These include judgments for damages, judgments for specific performance, declaratory judgments, cease-and-desist orders, as well as judgments changing a legal right or status, and partial judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Damages are strictly compensatory. Accordingly, rulings are limited to the amount of damages actually suffered. Punitive damages are not available.

On monetary claims, a statutory interest rate of 5 percent p.a. applies, unless the parties have agreed on a different interest rate. Interest is generally owed from the date of default. The party claiming interest must explicitly state this together with the relief sought.

The losing party bears the costs. The amount of the court fees and the reimbursement of the winning party are regulated by statute (see Part I, question 1.5 above).

9.3 How can a domestic/foreign judgment be enforced?

Domestic monetary judgments are enforced in an expedited procedure according to the Federal Debt Collection and Bankruptcy Act.

Non-monetary judgments are enforced according to the applicable procedural code. A party's refusal to comply with a judgment is considered contempt of court and is punishable.

The recognition and enforcement of foreign judgments is governed by the *Federal Act on International Private Law of 1987* ("*IPLA*"), multilateral and bilateral treaties, especially the *Lugano Convention*, and the above mentioned domestic procedural rules:

- In relation to Member States of the *Lugano Convention*, a judgment rendered in a Member State will, upon motion by the interested party, be recognised by the competent Swiss court without a review of the substance unless certain specific, very limited, circumstances exist, such as a flagrant violation of due process or of Swiss public policy.
- Under the IPLA, a foreign judgment will generally be recognised if the judgment was rendered by a competent court, if the decision is final and if the recognition does not violate fundamental principles of Swiss law.

9.4 What are the rules of appeal against a judgment of a civil court of Switzerland?

In principle, the Swiss judiciary system offers two levels of appeal:

- Cantonal appeals: The cantonal rules with regard to appeals differ considerably and can provide no, or as many as two, cantonal appeal instances (see Part I, question 1.2 above). Generally, a threshold amount in dispute is required. The function of the cantonal appeal is primarily to ascertain whether the lower court has correctly applied the procedural and the substantive law. Incidentally, the factual basis of the lower court's decision can also be re-examined. The right to bring new allegations of facts and evidence varies under the different procedural codes.
- Federal appeal: The Swiss Federal Court decides appeals on issues of federal or constitutional law. As a rule, the minimum amount in dispute is CHF 30,000. The Court, however, will deal with cases below this threshold if a question of law is of "fundamental significance". An appeal must be filed within 30 days of the service of the preceding judgment. The scope of re-examination is limited to questions of law. An exception exists if the finding of facts by the lower instances was obviously incorrect or in violation of the law.

The decisions of the Commercial Court of Zurich can be challenged either with the Zurich Court of Cassation and/or the Swiss Federal Court. The Court of Cassation has the power to quash or to reverse the decisions of the inferior courts if a violation of due process has occurred or, should an appeal to the Federal Court not be available, an incorrect application of evident substantive law. The appeal must be filed within 30 days of the service of the judgment of the Commercial Court.

II. DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of dispute resolution are available and frequently used in Switzerland? Arbitration/Mediation/Tribunals/Ombudsman? (Please provide a brief overview of each available method.)

Due to Switzerland's proverbial neutrality, arbitration proceedings have traditionally been and still are frequently used to resolve domestic and, in particular, international matters. Swiss tribunals and courts are known to respect arbitration agreements and the parties' choice of procedure. Arbitral tribunals decide on their own jurisdiction irrespective of parallel proceedings pending before state courts or other tribunals. If necessary and requested, the state court at the place of arbitration has jurisdiction to grant judicial assistance, such as injunctions and the taking of evidence. The grounds for appeals against arbitration awards are limited to a few basic procedural guarantees and to alleged violations of the *ordre public*. Switzerland is a member of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958* ("*New York Convention*").

Mediation, ombudsmen offices and similar conciliation proceedings are increasingly available in Switzerland. So far, most of these institutions are based on private initiative.

1.2 What are the laws or rules governing the different methods of dispute resolution?

International arbitration is governed by Chapter 12 of the *Federal Act on International Private Law of 1987* ("*IPLA*"). The provisions apply to arbitral tribunals having their seat in Switzerland, if at least one of the parties did not have residency in Switzerland at the time when the arbitration agreement was entered into. Chapter 12 IPLA is an arbitration-friendly *lex arbitri*, which recognises and respects the arbitration rules of the arbitral institution chosen by the parties. Domestic arbitration is governed by the *Intercantonal Concordat on Arbitration of 1969* ("*Concordat*").

There is no Swiss Federal law governing conciliation or mediation proceedings. Only the canton of Geneva has adopted a law on civil mediation. However, private institutions have established their own guidelines and ethical codes on conciliatory proceedings.

1.3 Are there any areas of law in Switzerland that cannot use arbitration/mediation/tribunals/Ombudsman as a means of dispute resolution?

Subject to the *ordre public*, any pecuniary claim may be the subject of international arbitration. In mediation and domestic arbitration, any claim that parties may freely dispose of can be mediated and/or arbitrated, unless a state court has mandatory jurisdiction, as is the case in employment and consumer law matters. Mediation proceedings are also regularly used in family law disputes insofar as the dispute relates to financial matters. In the cantons of Zurich, Geneva and Fribourg, (state) mediation with regard to criminal offences, such as minor offences against property, is available.

2 Dispute Resolution Institutions

2.1 What are the major dispute resolution institutions in Switzerland?

In commercial arbitration, the *Swiss Chambers of Commerce* (www.swissarbitration.ch) are the most widely known Swiss dispute resolution institutions; they have adopted unified rules of arbitration (*Swiss Rules of International Arbitration*) and provide arbitration services. In addition, certain international Chambers of Commerce domiciled in Switzerland provide their own arbitration rules and services, including the *Swiss-American* and the *German-Swiss* Chambers of Commerce. In addition, arbitration proceedings in Switzerland are frequently conducted under the rules of international arbitration institutions, such as the *International Chamber of Commerce* (*ICC*) in Paris, the *London Court of International Arbitration* (*LCIA*), the *Stockholm Chamber of Commerce* (*SCC*) and others.

Most Swiss arbitration practitioners are members of the *Swiss Arbitration Association* (ASA; www.arbitration-ch.org), a private non-profit organisation of more than 1,000 Swiss and non-Swiss members committed to promoting commercial arbitration.

In mediation, there are private institutions such as the *Swiss Chamber on Commercial Mediation*, the *Swiss Mediation Association* and the *Swiss Lawyers Association*. In certain areas, such as banking, insurance and travel contracts, there are designated ombudsmen offices.

2.2 Do any of the mentioned dispute resolution mechanisms provide binding and enforceable solutions?

Switzerland is a Member State of the *New York Convention*. The enforcement of arbitration awards is a matter of routine in Switzerland.

Solutions reached in (private) conciliation and mediation proceedings are treated as extrajudicial settlement agreements. They have a contractually binding effect, but cannot be directly enforced (see also Part II, question 3.2 below).

3 Trends & Developments

3.1 Are there any trends in the use of the different dispute resolution methods?

There is a growing trend to evaluate litigation versus arbitration. In domestic disputes, specialised courts such as the Commercial Court of Zurich often provide high-quality decisions at lower costs than arbitration; a panel consists of two High Court judges and three Commercial Court judges, the latter with specialised expertise in the relevant business sector. On the other hand, arbitral tribunals provide for confidentiality, for the possibility to select the arbitrators, to conduct proceedings in any desired language, for restricted appeals and for a more widespread international enforcement. While arbitration proceedings have become increasingly complex and longer in duration, their use is still growing and is often the only alternative in larger international projects.

While the desire of the international business community to resolve disputes by means of mediation is significant, the successful use of mediation is not yet frequent. The fact that mediation does not result in an enforceable award is often an obstacle to a final resolution of a disputed matter (as to future developments, see below, question 3.2).

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those dispute resolution methods in Switzerland?

The draft bill of the new Swiss Federal Rules of Civil Procedure, which is scheduled to come into effect in 2010 (see Part I, question 1.1 above), includes a provision according to which parties may choose between (state) conciliatory proceedings and (private) mediation. Furthermore, the parties will be entitled to request that the court suspend ongoing proceedings and allow mediation. If the parties reach a settlement in mediation they may jointly apply that such settlement be approved by the court. An approved settlement will have the effect of an enforceable judgment.

With regard to mediation clauses and so-called "multi-tier" arbitration clauses (mediation followed by arbitration) particular issues may arise, such as the effect of the proceedings on the suspension of statutory limitation periods, issues of *lis pendence* and issues of jurisdiction (at what point may the arbitral tribunal admit the claim: before, during or after the mediation? As of when is a mediation deemed to have failed?). In a recent decision, the Swiss Federal Supreme Court dealt with the issue of non-compliance with a clause providing for mediation/conciliation. However, most of the controversial questions remained unresolved since the Court found that the clause did not provide for a binding obligation to mediate. The Court's decision was based on the fact that the clause lacked any indication as to the period in which mediation would have to be initiated or terminated and expressly stated that pending negotiations should not impede the start of arbitral proceedings.

There is also some debate on the degree of confidentiality in cases where parties did not explicitly provide for confidentiality in their mediation or arbitration agreements or by reference to institutional dispute resolution rules containing provisions on confidentiality. Apart from the procedural rules of the canton of Geneva (obliging mediators to respect confidentiality), there are no statutory rules in Switzerland that explicitly deal with confidentiality in alternative dispute resolution mechanisms. Rules on confidentiality are, however, included in the *Swiss Rules of International Arbitration*, which are the institutional arbitration rules of the *Swiss Chambers of Commerce*.

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Schellenberg Wittmer is one of the leading business law firms in Switzerland with two major offices in Zurich and Geneva offering the expertise and specialisation of more than 100 lawyers. Its core practice areas are dispute resolution, corporate/M&A, banking and finance including capital markets, private capital & estate planning, and taxation. It has developed further specialised areas of practice complementary to its core activities.

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