The Securities Litigation Review

Eighth Edition

Editor
William Savitt

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EIGHTH EDITION

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William Savitt

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PREFACE

This eighth edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions such as Switzerland, where private securities litigation is narrowly circumscribed by statute and practice, and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Luxembourg's highly decentralised system of criminal enforcement contrasts with Denmark's Financial Supervisory Authority, a powerful centralised regulator that is primarily responsible for creating and enforcing Denmark's securities rules. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort disrupted by the departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing substantive

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investment rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies – stock exchanges, quasi-governmental organisations, and trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction reported an across-the-board uptick in securities litigation activity – an increase that was further impacted by the covid-19 pandemic that continues to roil society and the global economy. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as a new normal has set in for the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. Class claims are now well established as part of the regulatory landscape in Australia and Canada, and there appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Litigation Review*: to reflect annually where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both convergence and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and the United Kingdom that produced a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work

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with one another in the field of securities regulation, will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions, both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
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Chapter 14

SWITZERLAND

Martin Burkhardt, Dominique Müller, Cyrill Kaeser and Severin Harisberger[1]

I OVERVIEW

i Sources of law

As of 1 January 2020, the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) entered into force. FinSA aims at protecting clients of financial service providers and establishing comparable conditions for the provision of financial services by financial service providers. It also governs the Swiss securities prospectus regime. FinIA regulates the prudential supervision of financial institutions (other than banks and insurance companies), such as managers of collective assets, portfolio managers or trustees.

FinSA includes several rules regarding financial services that were previously included in the Swiss Code of Obligations (CO), such as the provision on prospectus liability. The CO, however, remains an important legal source and contains, in particular, the provisions on agency[2] and tort liability.[3] Furthermore, it sets out the rules with respect to companies limited by shares[4] as well as negotiable securities.[5]

As regards further sources of securities law, the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) governs the conduct of financial market participants in securities and derivatives trading. The Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) contains rules regarding the organisation and supervisory instruments of the Swiss Financial Market Supervisory Authority (FINMA), which is the Swiss government body responsible for financial regulation.

The aforementioned acts are specified in various ordinances issued by the Swiss Federal Council and by FINMA, such as the Financial Services Ordinance (FinSO). FINMA's practice regarding the application of the financial markets regulation plays an important role as well, just as the pertinent jurisprudence of public, civil and criminal courts. In particular, FINMA regularly publishes circulars pertaining to specific aspects of financial market regulation.

1 Martin Burkhardt and Dominique Müller are partners and Cyrill Kaeser and Severin Harisberger are associates at Lenz & Staehelin.

2 Article 394 et seq. CO.

3 Article 41 CO.

4 Article 620 et seq. CO.

5 Article 965 et seq. CO.

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ii Regulatory authorities

FINMA supervises the Swiss financial market, conducts investigations and takes administrative actions under FINMASA to enforce the Swiss financial market regulation. FINMA is also responsible for the approval and licensing of registration bodies[6] and independent prospectus reviewing authorities[7] under FinSA. In contrast, FINMA is not involved in civil securities litigation or in prosecuting violations of the penal provisions of the financial market acts. The former falls within the competence of the civil courts and the latter generally falls within the competence of the Federal Department of Finance[8] or the Office of the Attorney General of Switzerland, which is responsible for the criminal prosecution of insider trading and market manipulation in particular.[9]

iii Common securities claims

Securities litigation is rare in Switzerland. There is little precedent on a number of important issues, given the limited number of cases. Particularly, many areas of the newly implemented FinSA remain untested in court.

As regards civil liability claims, prospectus liability claims constitute the primary type of claim available to investors in the context of offerings and listings of securities and other financial instruments in Switzerland. In the context of client relationships, for example, between an investor and a financial service provider, contractual claims play an important role. Furthermore, a tort claim may be raised if certain conditions are met.

In the context of supervisory measures and penal prosecution, the focus lies on enforcing the obligations laid down in the financial markets acts for financial intermediaries and other market participants, on sanctioning violations of the prospectus regime, and on preventing insider trading and market manipulation. In contrast, Swiss law does not provide for broad anti-fraud provisions in connection with the purchase or sale of securities.

II PRIVATE ENFORCEMENT

i Forms of action

Prospectus liability

Context

As regards securities litigation, the first question is under which circumstances an offeror or issuer of securities may be liable towards investors in the context of offerings and listings of financial instruments due to flawed prospectuses and similar documents.

6 Article 31(1) FinSA.

7 Article 52(1) FinSA.

8 Article 50 (1) FINMASA.

9 Article 156 FMIA.

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The Swiss securities prospectus regime has been reshaped in its entirety by the FinSA. It is based on the EU Prospectus Directive,[10] which must be taken into account when interpreting these provisions.[11] According to the basic rule of Article 35(1) FinSA:

> *Any person in Switzerland who makes a public offer for the acquisition of securities or any person who seeks the admission of securities to trading on a trading platform . . . must first publish a prospectus.*

Article 36 et seq. FinSA provide for a number of exemptions from this requirement to publish a prospectus (e.g., for offers addressed solely at professional investors and for offers addressed at fewer than 500 investors). If a prospectus must be published, it must meet the extensive requirements laid down in the FinSA[12] and the FinSO. As a general rule, the prospectus must contain the information essential for the investor's decision on the issuer and the guarantor and security provider, the securities, and the offer.[13] Before its publication, the prospectus must be submitted to an independent authority for review and approval.[14] This authority shall check whether the prospectus is complete, coherent and comprehensible.[15] According to Article 58 et seq. FinSA, subject to the exemptions laid down in Article 59 FinSA, a key information document containing the information essential for investors to make a well-founded investment decision and a comparison of different financial instruments must be prepared as well if a financial instrument is offered to retail clients.

The statutory basis for prospectus liability claims is Article 69(1) FinSA, according to which:

> *Any person who fails to exercise due care and thereby provides information that is inaccurate, misleading or in violation of statutory requirements in prospectuses, key information documents or similar communications is liable to the acquirer of a financial instrument for the resultant losses.*

In principle, Article 69(1) FinSA perpetuates the former Article 752 CO, which was the basis for prospectus liability claims in connection with equity shares.[16] Therefore, jurisprudence and doctrine regarding the former Article 752 CO generally apply to Article 69(1) FinSA too.

Scope of application

Article 69(1) FinSA applies to all prospectuses, key information documents or similar communications. As regards the term 'similar communications', this encompasses all communications issued to inform potential investors about the legal or economic situation of

10 Message of the Swiss Federal Council regarding the enactment of the FinSA and the FinIA dated 4 November 2015, BBl 2015, pp. 8901 et seq., 8923, and 8970 et seq. The EU Prospectus Directive and the national implementation acts, which were in force when the FinSA was drawn up, have meanwhile been replaced by the EU Prospectus Regulation.

11 See, for example, decision of the Swiss Federal Supreme Court of 26 November 2019, ref. 145 III 451, cons. 4.3.2.

12 Article 40 et seq. FinSA.

13 Article 40(1) FinSA.

14 Article 51 et seq. FinSA.

15 Article 51(1) FinSA.

16 Message of the Swiss Federal Council (fn. 10), p. 8992.

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the issuer of the financial instruments and to shape their investment decision.[17] For example, short prospectuses, advertisements and memoranda might qualify as similar communications.[18] Whether non-written communications are covered as well is controversial.[19]

Consequently, Article 69(1) FinSA covers all prospectuses and key information documents published based on the pertinent statutory obligations.[20] Beyond that, according to case law, Article 69(1) FinSA also covers documents prepared on a voluntary basis (e.g., a prospectus prepared for a non-public offering).[21] It is irrelevant whether these documents are published in connection with an offering or a listing of financial instruments. Moreover, it is irrelevant whether they are published in connection with a primary offering, namely, a public offering of newly issued financial instruments, or a secondary offering, namely, a public offering of existing financial instruments by the rights holder.[22] Similarly, the type of financial instrument these documents refer to is irrelevant, as Article 69(1) FinSA constitutes a uniform basis for civil liability claims connected to flawed prospectuses and similar documents.[23]

Conditions of a prospectus liability claim

First, a prospectus liability claim based on Article 69(1) FinSA requires that the prospectus, key information document or similar communication includes information that is inaccurate, misleading or in violation of statutory requirements. Information is:

a inaccurate if it is not in accordance with the facts from an objective point of view;

b misleading if it omits or suppresses material circumstances, so that the statements made appear in a different light; and

c in violation of statutory requirements if it does not meet the minimum legal requirements for prospectuses laid down in the FinSA and the FinSO.[24] Whether this also covers cases in which no prospectus is published in violation of a statutory obligation is a controversial issue.[25]

Article 69 FinSA includes two reservations:

a Liability for information in summaries is limited to cases where such information is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.[26]

17 Cf. decision of the Swiss Federal Supreme Court of 22 April 1986, ref. 112 II 258, cons. 3a.

18 Dieter Gericke/Georg Schifferle, 'Die Prospekthaftung nach FIDLEG', *GesKR* 2020, p. 190.

19 See, for example, Gericke/Schifferle (fn. 18), p. 190; Till Spillmann/Richard Meyer, 'FIDLEG – Prospektregelung', in: Reutter/Werlen (eds.), *Kapitalmarkttransaktionen X*, Zurich 2016, p. 42.

20 Article 35(1) FinSA and Article 58(1) FinSA.

21 Decision of the Swiss Federal Supreme Court of 20 May 1994, ref. 120 IV 122, cons. 4d/bb.

22 Gericke/Schifferle (fn. 18), p. 190.

23 Daniel Hunkeler/Georg J. Wohl, 'E-FIDLEG – Höhere Hürden für KMU bei der öffentlichen Kapitalaufnahme?', *GesKR* 2014, p. 498; Spillmann/Meyer (fn. 19), p. 45.

24 Frédéric H. Lenoir, *Prospekthaftung im Zusammenhang mit Going Publics*, Zurich 2004, p. 90 et seq.; Hans Caspar von der Crone, *Aktienrecht, 2nd edition*, Berne 2020, n. 1970.

25 In favour of the application of Article 69(1) FinSA in these cases, for example, Matthias Courvoisier, in: Sester/Braendli/Bartholet/Schiltknecht (eds.), *Finanzmarktaufsicht und Finanzmarktinfrastrukturen*, Zurich 2018, § 27 n. 11; against the application of Article 69(1) FinSA in these cases, for example, Peter Böckli, *Schweizer Aktienrecht, 4th edition*, Zurich 2009, § 18 n. 18.

26 Article 69(2) FinSA.

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b Liability for forward-looking statements is limited to cases where such information was provided or distributed against better knowledge or without reference to the uncertainty regarding future developments.[27]

Furthermore, according to Swiss legal doctrine, no liability due to a violation of statutory requirements may arise if a prospectus is published voluntarily.[28] An open question is whether a defendant may successfully invoke the independent authority's review and approval in his or her defence. One may take the view that due to its formal character, the review and approval procedure does not directly affect the civil court's judgment, but that the court may not lightly decide that a prospectus was incomplete or incoherent if it was approved by the independent authority either.[29]

Secondly, a prospectus liability claim based on Article 69(1) FinSA requires damage, namely, an involuntary reduction of assets.[30] In the context of prospectus liability claims, the relevant damage is the difference between the price actually paid by the investor and the price that he or she would have paid if the prospectus, key information document or similar communication had been drafted correctly. In many cases, the damage cannot be determined exactly but must be estimated. For this purpose, the difference between the market price before and after the incorrectly reproduced information became known may serve as a starting point for calculating the damage.[31]

Thirdly, a plaintiff must show two different causation elements: transaction causation and loss causation. Transaction causation is the causal nexus between the defect in the prospectus, key information document or similar communication and the purchase of the financial instrument, which means that the plaintiff must show that he or she would not have bought the financial instrument, or at least not at that price, had he or she known that the prospectus, etc., contained inaccurate or misleading information or violated statutory requirements. Loss causation means that the alleged defect of the prospectus, etc., must have caused the drop in the value of the financial instrument, not some other material fact or information.[32]

Finally, a prospectus liability claim requires the plaintiff to show that the defendant wilfully or negligently breached his or her duties when preparing the prospectus, key information document or similar communication. In contrast to the former Article 752 CO, Article 69(1) FinSA does not explicitly mention this requirement, which raises the question of whether wilfulness or negligence is still required. The records of the legislative process show that the legislator did not intend to change the prospectus liability regime in this regard and, therefore, that wilfulness or negligence is still required.[33] Negligence presupposes the

27 Article 69(3) FinSA.

28 Dieter Zobl/Stefan Kramer, *Schweizerisches Kapitalmarktrecht*, Zurich 2004, n. 1151.

29 Hunkeler/Wohl (fn. 23), p. 498.

30 See, for example, decision of the Swiss Federal Supreme Court of 25 March 2003, ref. 129 III 331, cons. 2.1.

31 von der Crone (fn. 24), n. 1967.

32 Spillmann/Meyer (fn. 19), p. 43 et seq.

33 Severin Harisberger, *Die Mitwirkung des Emittenten bei Sekundärplatzierungen und gemischten Platzierungen von Aktien im schweizerischen Recht*, Zurich 2021, n. 230.

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violation of the duty of care required in business dealings. Applying this objective standard, an action is considered negligent if a diligent and experienced person in the same situation would have acted differently.[34]

Potential claimants and defendants

The Swiss prospectus liability regime does not differentiate between claims arising out of securities offerings and claims based on secondary-market purchases of securities. Thus, a prospectus liability claim may be raised by the initial purchaser of a financial instrument as well as by a person who has purchased the financial instrument on the secondary market. However, this person must be able to prove that the (flawed) information included in the prospectus, key information document or similar communication has caused his or her investment decision (transaction causation, see above).[35] This may be difficult in particular if there is a significant time gap between the secondary market transaction and the publication of the respective document.[36]

A prospectus liability claim may be brought against any person who furnishes information that is inaccurate, misleading or in violation of statutory requirements. This means that, in contrast to the regime under the former Article 752 CO, a claim may no longer be brought against a person who merely contributes to the drawing up and the distribution of a prospectus, key information document or similar communication (such as, regularly, lawyers). In contrast, persons who are directly involved in the furnishing of the faulty information and are able to influence the material content of the prospectus, etc., are still liable under Article 69(1) FinSA.[37] Which persons meet this threshold must be determined on a case-by-case basis. Typically, the issuer of the respective financial instruments is a potential defendant.[38]

Contractual claims

With respect to client relationships, most of the agreements between an investor and a financial service provider are governed by the rules for simple agency agreements pursuant to Article 394 et seq. CO.[39] This is the case for various types of contracts, such as contracts by which an investor merely seeks access to trading platforms through a financial service provider (e.g., execution only relationships), contracts regarding investment advice, and contracts by which an investor has his or her assets managed by a financial service provider.[40]

Inter alia, an investor may file a claim for damages against a financial service provider if investment advice was not rendered diligently or if assets were managed against the investor's

34 Ingeborg Schwenzer/Christiana Fountoulakis, *Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th edition*, Berne 2020, p. 163.

35 Decision of the Swiss Federal Supreme Court of 9 November 2004, ref. 131 III 306, cons. 2.1; decision of the Swiss Federal Supreme Court of 28 August 2006, ref. 132 III 715, cons. 3.2.1.

36 Gericke/Schifferle (fn. 18), p. 191.

37 Harisberger (fn. 33), n. 233.

38 Gericke/Schifferle (fn. 18), p. 191 et seq.

39 Thomas Jutzi/Fabian Eisenberger, 'Das Verhältnis von Aufsichts- und Privatrecht im Finanzmarktrecht', *AJP* 2019, p. 19.

40 David Jost, *Der Anlegerschutz im Finanzdienstleistungsgeschäft,* Zurich 2018, p. 31.

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interest. Such claims would be based on Article 97(1) CO in connection with Article 398(2) CO. Liability under these provisions presupposes that the following requirements are met: breach of contract, loss, causation and fault.[41]

First, a party breaches a simple agency agreement if it violates the duty of care or the obligation of loyalty according to Article 398(2) CO. With respect to the duty of care, standards have been established, for example, in the Portfolio Management Guidelines issued by the Swiss Bankers Association.[42] Although these guidelines represent self-regulating measures primarily addressing banks, they constitute a market standard to which other financial service providers are also held.[43]

FinSA introduced a code of conduct for financial service providers in Article 7 et seq.. The question has been raised as to whether these provisions merely constitute public law or whether they could also influence the contractual obligations of a financial service provider, particularly the duty of care. According to the legislative materials, the FinSA constitutes public law. It has, however, an indirect effect on the civil law.[44] This means that a violation of its provisions may not constitute a direct basis to raise a civil claim; however, a court may use these provisions to specify the contractual obligations of the financial service provider.[45] The extent of this indirect effect, however, is unknown and must be determined by courts on a case-by-case basis, which leads to legal uncertainties.[46]

Second, the loss will be calculated by comparing the client's actual financial situation with the financial situation, as it would have been if the financial service provider had not violated his or her duty of care.

Third, the investor must show a sufficient causal nexus between the financial service provider's breach of the simple agency agreement and the investor's loss. This requires adequate causality, meaning that the investor must show that, according to the ordinary course of events and general experience of life, the breach is likely to cause a loss with the investor.[47]

Finally, the financial services provider must have acted wilfully or negligently when breaching the agreement.[48]

Tort claims

Article 41(1) CO governs the compensation for damage in situations where the parties were not necessarily bound by a contract prior to a harmful event.[49] Liability under Article 41(1) CO presupposes that the following requirements are met: loss, causation, fault and the existence of an unlawful act.[50]

41 Claire Huguenin, *Obligationenrecht Allgemeiner und Besonderer Teil, 3rd edition*, Zurich 2019, p. 1085.

42 The current version of the Portfolio Management Guidelines is published on the website of the Swiss Bankers Association: https://www.swissbanking.org/en/services/library/guidelines?set_language=en.

43 Christoph Winzeler, 'Vermögensverwaltung durch Banken: Aktuelles zu Regulierung und Selbstregulierung', *SZW* 2006, p. 428.

44 Message of the Swiss Federal Council (fn. 10), p. 8921; Sandro Abegglen/Thierry Luterbacher, 'Das Verhältnis der FIDLEG-Verhaltensregeln zum Privatrecht', *ZSR* 2020, p. 224.

45 Alexander Vogel/Christoph Heiz/Reto Luthiger, *FIDLEG FINIG: Kommentar*, Zurich 2020, Article 7 FinSA n. 4.

46 Jutzi/Eisenberger (fn. 39), p. 14; Vogel/Heiz/Luthiger (fn. 45), n. 4.

47 Wolfgang Wiegand, *Basler Kommentar Obligationenrecht I*, Basel 2020, Article 97 n. 41.

48 David Oser/Rolf H. Weber, *Basler Kommentar Obligationenrecht I*, Basel 2020, Article 398 n. 30a.

49 Schwenzer/Fountoulakis (fn. 34), p. 388.

50 Schwenzer/Fountoulakis (fn. 34), p. 393.

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With respect to the latter, in the context of purely monetary damage, an unlawful act requires that the defendant violated a provision that prohibits a certain behaviour to prevent the occurrence of such financial losses.[51] In the context of FinSA, the question of whether the code of conduct rules[52] constitute such provisions is controversial.[53] This issue has not yet been settled by the Swiss Federal Supreme Court.

ii Procedure

The jurisdiction for civil liability claims, such as prospectus liability claims, lies with the civil courts. Generally, the claim must be filed with the court at the respondent's domicile or registered office.[54] In cantons with a special commercial court, the commercial court may have subject-matter jurisdiction.[55] In principle, court proceedings are preceded by mandatory conciliation proceedings.[56] The first instance court's decision may be appealed to the cantonal appellate court.[57] The cantonal appellate court's decision may then be appealed to the Swiss Federal Supreme Court.[58] A special commercial court's decision may only be appealed directly to the Swiss Federal Supreme Court. Notably, the Swiss Federal Supreme Court primarily reviews legal issues.[59]

Generally, the burden of proof for the conditions of a civil liability claim lies with the plaintiff. In the case of a prospectus liability claim, he or she must show and substantiate that:

a the prospectus, key information document or similar communication included information that is inaccurate, misleading, or in violation of statutory requirements;
b he or she has suffered damage;
c transaction causation and loss causation are given; and
d the defendant acted wilfully or negligently.

Under Swiss law, there is no legal presumption that causation between the defect of the prospectus and the investment decision is given in the sense of the 'fraud on the market' doctrine.[60] However, proof of causation does not require strict proof, which is the applicable standard with respect to the other elements of a prospectus liability claim. Rather, the Swiss Federal Supreme Court held that a lower standard of proof applies with respect to the causation requirement, namely that of preponderant probability.[61] Moreover, an investor purchasing financial instruments on the secondary market must not prove that he or she has read the prospectus, etc., when making his or her investment decision. Instead, he or she may

51 Schwenzer/Fountoulakis (fn. 34), p. 402.
52 Article 7 et seq. FinSA.
53 Abegglen/Luterbacher (fn. 44), p. 224; Jutzi/Eisenberger (fn. 39), p. 19; Vogel/Heiz/Luthiger (fn. 45), n. 5.
54 Article 10(1) of the Swiss Civil Procedure Code (CPC).
55 Article 6(2) CPC.
56 Article 197 CPC.
57 Article 308(1) CPC.
58 Article 72 of the Federal Statute concerning the Federal Supreme Court (SCS).
59 Article 95 et seq. SCS.
60 Message of the Swiss Federal Council (fn. 10), p. 8993.
61 Decision of the Swiss Federal Supreme Court of 28 August 2006, ref. 132 III 715, cons. 3.2.1-3.2.3.

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assume that the price reflects the information available in the prospectus.[62] Furthermore, Swiss law does not provide for a legal presumption of wilfulness or negligence (although the legislator considered implementing such a presumption when drawing up the FinSA).[63]

There is no specific (or heightened) standard for pleading any particular type of securities claim in Swiss civil proceedings. Under Swiss civil procedure rules, the plaintiff must substantiate his or her allegations in a detailed statement of claim. Swiss law does not provide for initial unsubstantiated (notice) pleading followed by extensive discovery. Generally, the options for discovery are rather limited. In disputes of a commercial nature, many Swiss courts summon the parties to a hearing after the first exchange of particulars at which the judge will be trying to get the parties to settle the matter.

The costs of civil proceedings are generally allocated to the unsuccessful party based on the outcome of the case and include the court fees and party costs (attorneys' fees), which are determined based on cantonal tariffs depending on the amount in dispute and the complexity of the case.[64] In principle, litigation funding by third parties is admissible in Switzerland, but it is not very common. Swiss law does not allow for litigation lawyers to act solely on a contingency fee.

Possibilities for collective proceedings are limited in Swiss civil procedure. Most notably, Swiss law does not provide for class actions. However, pursuant to the CPC, parties may join their claims and appear jointly in a trial (as plaintiff or defendant, respectively) when their case is based on similar factual circumstances or legal grounds. While the concept of joinder may have some advantages for plaintiffs who wish to coordinate their actions, it is not particularly suited for litigation involving large groups of plaintiffs. It lacks many of the features of proper class actions. For example, it does not provide for mandatory joint representation. Moreover, every single claim needs to be pleaded and adjudicated separately. That includes, in particular, issues relating to causality and damages, which will be addressed individually (with potentially different results).

In the case of disputes regarding legal claims between clients and financial service providers, the parties may seek to solve a dispute by an ombudsman in mediation proceedings.[65] Such proceedings are free of charge for the investor and confidential, meaning that statements made by any party and correspondence between the parties and the ombudsman may not be used in subsequent civil proceedings.[66] Filing a mediation request with an ombudsman does not rule out civil action and does not prevent it from being initiated.[67] The plaintiff may unilaterally waive conciliation proceedings under the CPC after bringing proceedings before an ombudsman.[68] In turn, the ombudsman terminates proceedings once a conciliation authority, a state court, a court of arbitration or an administrative authority begins dealing with the case.[69]

62 Decision of the Swiss Federal Supreme Court of 28 August 2006, ref. 132 III 715, cons. 3.2.1; Message of the Swiss Federal Council (fn. 10), p. 8993.
63 Gericke/Schifferle (fn. 18), p. 195.
64 Article 95(1) CPC; Article 105(2) CPC; Article 106 CPC.
65 Article 74 et seq. FinSA.
66 Article 75(1) FinSA.
67 Article 76(1) FinSA.
68 Article 76(2) FinSA.
69 Article 76(3) FinSA.

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In criminal proceedings, persons who suffered harm from violations of criminal provisions may bring civil claims based on the offence as private claimants.[70] The criminal court decides on pending civil claims if it is in a position to make such a decision.[71] In certain cases, the criminal court may refer the civil claim to the civil courts, for example, when the private claimant fails to justify or quantify the claim sufficiently.[72] Private claimants may benefit from such proceedings, as they are substantially relieved from the burdens of civil proceedings, in particular the burden of assertion, substantiation, and presentation of evidence.[73]

iii Settlements

As regards settlements, the parties may enter into a settlement in court (before which the proceedings are pending) or they may notify the court of a settlement. In these cases, the court takes the settlement on record and it will be deemed a court-recorded settlement. To the extent that the settlement disposes of all issues that form the subject matter in dispute, the court will terminate the proceedings on that basis. By doing so, the court will, in principle, allocate the costs of proceedings following any agreement by the parties in the settlement agreement or otherwise communicated to the court. Such a court-recorded settlement has the same effect as a binding judgment with respect to the issues addressed in the settlement between the parties (*res iudicata*). Alternatively, the parties may reach an out-of-court settlement that is not communicated to the court, in which case the parties may have the proceedings discontinued.

III PUBLIC ENFORCEMENT

i Forms of action

In the area of public enforcement of securities laws, some of the most relevant provisions relate to violations of the prospectus regime, insider trading and market manipulation. Breaches of the pertinent provisions may result in administrative measures or criminal sanctions.

Violations of the prospectus regime

Article 90 FinSA provides for penal sanctions for violations of the FinSA's provisions regarding prospectuses and key information documents. According to Article 90(1) FinSA, a person who intentionally provides false information or omits material facts in the prospectus or key information document or who fails to publish the prospectus or the key information document by the beginning of the public offer at the latest is liable to prosecution. According to Article 90(2) FinSA, a person who intentionally fails to make the key information document available prior to subscription or conclusion of the contract is also liable to prosecution.

70 Article 122(1) Swiss Criminal Procedure Code (CrimPC).

71 Article 126(1) CrimPC.

72 Article 126(2) CrimPC.

73 Annette Dolge, *Basler Kommentar Strafprozessordnung/Jugendstrafprozessordnung*, Basel 2014, Article 122 CrimPC n. 39.

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According to Article 92 FinSA, these provisions do not apply to persons supervised by FINMA and persons working for them. If such persons violate the prospectus regime, they may be subject to supervisory measures taken by FINMA instead.[74]

Insider trading

Insider trading is the subject of supervisory provisions and penal provisions. As regards supervisory law, Article 142(1) FMIA prohibits any person from exploiting information that they know or should know is insider information by trading securities admitted to trading on a trading venue in Switzerland, from disclosing such information to others, and from exploiting such information by making recommendations regarding securities admitted to trading on a trading venue in Switzerland to others. Article 154 FMIA prohibits insider trading on a criminal law level. Article 2 letter j FMIA defines insider information as confidential information whose disclosure would significantly affect the prices of securities admitted to trading on a Swiss trading venue. To determine whether this is the case, Swiss courts apply the 'reasonable investor test'.[75]

Thus, the prevention of insider trading generally is a matter of public enforcement. Whether insider trading may also be the basis of a tort claim according to Article 41 CO (see above) and, consequently, be a matter of private enforcement is a controversial issue.[76]

Market manipulation

Market manipulation is also the subject of supervisory provisions and penal provisions. As regards supervisory law, Article 143(1) FMIA prohibits any person from publicly disseminating information and from carrying out transactions or purchase or sale orders that he or she knows or should know give false or misleading signals regarding the supply, demand or price of securities admitted to trading on a trading venue in Switzerland. Article 155 FMIA prohibits market manipulation on a criminal law level. The scope of application of the penal provisions is rather narrow and covers wash sales and matched orders only.[77]

Thus, the prevention of market manipulation generally is a matter of public enforcement. Whether market manipulation may also be the basis of a tort claim according to Article 41 CO (see above) and, consequently, be a matter of private enforcement is a controversial issue.[78]

ii Procedure

With respect to the administrative measures mentioned above, FINMA may initiate enforcement proceedings. These proceedings are governed by the Federal Act on Administrative Procedure.[79] In the case of violations of the prospectus regime according to Article 90 FinSA, penal proceedings may be initiated against the offender by the Federal Department of Finance in application of the Federal Act on Administrative Criminal Law.[80] In contrast, the Office

74 AB 2016 S 1172.

75 Decision of the Swiss Federal Supreme Court of 7 August 2019, ref. 145 IV 407, cons. 3.4.1.

76 Cf. Rolf Sethe/ Lukas Fahrländer, in: Sethe/Favre/Hess/Kramer/Schott (eds.), *Kommentar zum Finanzmarktinfrastrukturgesetz FinfraG*, Zurich 2017, Article 154 n. 184, with references.

77 Decision of the Swiss Federal Supreme Court of 24 November 2006, ref. 6S.156/2006, cons. 2.

78 Cf. Marc Hanslin, *Markt- und Kursmanipulation*, Zurich 2017, n. 583, with references.

79 Article 53 FINMASA.

80 Article 50(1) FINMASA.

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of the Attorney General of Switzerland is competent for the prosecution of violations of the penal provisions regarding insider trading and market manipulation. In these cases, the procedure is governed by the CrimPC.[81]

iii Settlements

Swiss law does not provide for a settlement procedure involving FINMA. In practice, however, FINMA may be amenable to discussing a resolution by which satisfactory corrective action is taken, be it with or without a formal order issued by FINMA.

There is limited room for settlements in criminal proceedings. Prior to being charged before the penal court, the accused may request the prosecutor to conduct an accelerated procedure provided the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims, and only if the prosecutor requests a sentence of not more than five years of custody.[82]

iv Sentencing and liability

Article 29 et seq. FINMASA provide FINMA with various supervisory instruments. FINMA may, for example, collect required information and documents, order appropriate measures to restore compliance with the law, issue a declaratory ruling or publish final rulings. In cases of serious violations of supervisory provisions, FINMA may prohibit responsible persons from practising a profession for up to five years or confiscate any profit that a supervised person or entity or a responsible person in a management position has made due to the violation.

As regards criminal provisions, a fine of up to 500,000 Swiss francs may be imposed on a person violating the prospectus regime according to Article 90(1) FinSA and a fine of up to 100,000 Swiss francs in case of violations of Article 90(2) FinSA. Insider trading according to Article 154 FMIA and market manipulation according to Article 155 FMIA may result in a monetary penalty or imprisonment for up to three years. If the profit exceeds 1 million Swiss francs, the duration of imprisonment may be up to five years.

IV CROSS-BORDER ISSUES

In the field of international litigation, the jurisdiction of Swiss courts is determined in particular by the Federal Act on Private International Law (PILA) and the Lugano Convention (LC). The PILA also includes Switzerland's conflict of law rules.

As regards prospectus liability claims, the PILA, unlike the LC, provides for specific rules regarding jurisdiction. According to Article 151(3) PILA, the court at the Swiss place where the securities have been issued has mandatory jurisdiction over prospectus liability claims. To the extent that Swiss jurisdiction over a prospectus liability claim is established, the relevant conflict of law rule of Article 156 PILA states that either the law applicable to the issuer or the law of the state where the securities were issued applies. A plaintiff may choose between these two laws. This means that in the case of a foreign issuer that publicly issues securities in Switzerland, Swiss prospectus liability law may apply to an investor's claim.

81 Article 156(1) FMIA; Article 1 CrimPC; Wolfgang Wohlers/Sonja Pflaum, *Basler Kommentar Finanzmarktaufsichtsgesetz/Finanzmarktinfrastrukturgesetz*, Basel 2018, Article 156 FMIA n. 8.

82 Article 358 CrimPC.

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As regards most other civil and commercial matters, the LC governs the jurisdiction with regard to parties domiciled in LC Member States. Generally, a plaintiff may file a claim with the court where the defendant is domiciled.[83] A special jurisdiction is granted at the place of performance if a claim refers to contractual matters.[84] Further, in tort matters, a special jurisdiction is granted at the place where the harmful event occurs or might occur.[85] The PILA sets out the rules of jurisdiction for disputes involving parties that are not domiciled in Member States of the LC. Similar to the LC, if no other special jurisdiction is provided, a plaintiff may file a claim at the defendant's domicile.[86] A special jurisdiction is granted at the place of performance[87] or where the harmful action or a result of such action occurred.[88]

Under the PILA, the applicable law is determined depending on the legal nature and qualification of a claim. In contractual matters, the law with the strongest connection to the contract applies.[89] Typically, this is the law of the place where the characteristic contractual obligation is performed.[90] If a claim is based on tort, the law of the place where both parties have their habitual residence applies.[91] Otherwise, the law of the place where the harmful action was taken or the place of its impact may apply.[92]

V YEAR IN REVIEW

i FinSA and FinIA developments in 2020 and 2021

Several important steps were taken to implement the new provisions of the FinSA and the FinIA after they entered into force on 1 January 2020.

First, the Federal Department of Finance recognised nine ombudsmen organisations to carry out mediatory proceedings according to Article 74 et seq. FinSA.[93] Existing financial service providers were obliged to join one of these ombudsmen organisations until mid-2020.[94] One of the recognised ombudsmen organisations is the Swiss Chambers' Arbitration Institution (SCAI), one of Switzerland's leading arbitration institutions. SCAI has published the 'Rules of Mediation Procedure for Financial Services Disputes', which lay down the proceedings for mediation cases under FinSA. According to these rules, SCAI's secretariat will direct the parties to an ombudsperson having sufficient knowledge of the relevant financial industry after the request for mediation has been submitted.[95]

83 Article 2(1) LC.
84 Article 5(1)(a) LC.
85 Article 5(3) LC.
86 Article 2 PILA.
87 Article 113 PILA.
88 Article 129 PILA.
89 Article 117(1) PILA.
90 Article 117(2) PILA.
91 Article 133(1) PILA.
92 Article 133(2) PILA.
93 Article 84(1) FinSA; a list of recognised ombudsmen is published on the website of the Federal Department of Finance: https://www.efd.admin.ch/efd/en/home/the-fdf/ombudsman-finsa.html.
94 Article 95(3) FinSA.
95 See SCAI's website: https://www.swissarbitration.org/Ombuds-FIN.

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Furthermore, on 1 June 2020, FINMA authorised two independent authorities responsible for reviewing and approving prospectuses.[96] These two authorities are SIX Exchange Regulation AG and BX Swiss AG, which are entities affiliated to the two Swiss stock exchanges. As of 1 December 2020, each prospectus must be approved by one of these authorities before publication.

In addition, FINMA authorised several supervisory organisations responsible for supervising asset managers and trustees as well as several registration bodies responsible for keeping registers of client advisers of financial service providers who are not subject to FINMA's supervision. As a result, the institutional framework required by the FinSA and the FinIA is largely established.

In January 2021, the regulations implementing FinSA and FinIA came into force. FINMA also updated existing FINMA ordinances (e.g., the Collective Investment Schemes Ordinance) and a number of circulars.

ii Case law and public enforcement

As regards recent case law, the Swiss Federal Supreme Court upheld a judgment of the Zurich Commercial Court concerning prospectus liability in the life sciences environment.[97] While the courts have assessed the case under Article 752 CO, the decision is interesting as the existing jurisprudence and doctrine regarding Article 752 CO will still be relevant under Article 69(1) FinSA. Although the plaintiffs succeeded in proving that the defendants had prepared prospectus-like notices, some of which were erroneous or incomplete and thus misleading, the courts ultimately dismissed the action. The main reason for this was that the plaintiffs were not able to prove that they would have completely refrained from investing if they had received correct information.

As regards public enforcement, in 2021 FINMA conducted 163 investigations regarding insider trading and 28 investigations regarding market manipulation.[98]

VI OUTLOOK AND CONCLUSIONS

As highlighted above, securities litigation is rare in Switzerland. To our knowledge, there has yet to be a prospectus liability case under Article 69 FinSA. Similarly, there has been no conviction under the new criminal provision regarding violations of the prospectus regime according to Article 90 FinSA. The question arises as to whether criminal prosecution due to a violation of the prospectus regime would encourage a wide variety of investors to take civil actions against the involved persons, potentially resulting in numerous proceedings. Moreover, it will be interesting to see whether prospectus liability claims will be raised in connection with recent matters involving Swiss financial institutions. Another highly interesting issue is the new code of conduct for financial service providers in Article 7 et seq. FinSA and its potential effects on the contractual obligations of a financial service provider. These effects will have to be defined by courts on a case-by-case-basis.

96 Article 52(1) FinSA; a list of authorised independent prospectus reviewing authorities is published on the website of FINMA: https://www.finma.ch/en/authorisation/fidleg-und-finig/informationen-zum-fidleg/.

97 Decision of the Swiss Federal Supreme Court of 24 June 2021, ref. 4A_24/2021.

98 See FINMA's website: https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/.

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