Securities Litigation

Contributing editors
Antony Ryan and Philippe Z Selendy

2019

GETTING THE DEAL THROUGH

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Securities Litigation 2019

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Preface

Securities Litigation 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Securities Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece, Korea and Nigeria.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Antony Ryan of Cravath, Swaine & Moore LLP and Philippe Selendy of Selendy & Gay PLLC for their continued assistance with this volume.

London
February 2019

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Switzerland

Harold Frey, Patrick Schleiffer and Patrick Schärli

Lenz & Staehelin

1 Describe the nature and extent of securities litigation in your jurisdiction.

Securities litigation is rare in Switzerland. The few cases that were brought in the past couple of years almost exclusively focused on prospectus liability claims, meaning claims based on false or misleading statements or omissions in prospectuses used for the purpose of issuing new equity or debt securities. Given the limited number of securities litigation cases, there is only little precedent on a number of important issues.

Regulators are not involved in civil securities litigation. Rather, they take administrative enforcement actions or conduct criminal investigations with respect to certain aspects of securities law, such as insider trading, market manipulation, or the disclosure of significant shareholdings.

2 What are the types of securities claim available to investors?

Owing to the lack of a large body of securities fraud case law, and given the fact that Swiss law does not provide for broad anti-fraud provisions in connection with the purchase or sale of securities, the following discussion of Swiss securities litigation will focus on prospectus liability claims.

Unlike in other jurisdictions, Swiss law does not yet require – in fact does not even provide for the possibility – to have offering documents for shares (and similar equity securities) and bonds reviewed by a government agency (see, however, the Update and trends). Thus, prospectus liability is the primary means by which Swiss law ensures compliance with the prospectus requirements in the context of equity or debt offerings. Listing prospectuses are, however, subject to review and approval by the SIX Swiss Exchange, the most important stock exchange in Switzerland. Furthermore, offering documents for collective investment schemes (such as interests in investment funds) are subject to regulatory approval if the collective investment scheme is organised under Swiss law or, in case of a foreign fund, if the fund targets retail investors in Switzerland.

Articles 752 and 1156(3) of the Swiss Code of Obligations (CO) form the statutory basis for prospectus liability claims. The liability rules interplay with the statutorily prescribed minimum content for issue prospectuses in article 652a CO (equity securities) and article 1156 CO (bonds), respectively.

3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

The Swiss civil law prospectus rules directly apply only to an issue and public offering of new shares or new bonds. However, any later purchaser of such securities also has standing to bring a prospectus liability suit. As noted below (see questions 9 and 13), a secondary-market purchaser may, however, be faced with certain difficulties in establishing a sufficient causal link. This is particularly true if there is a significant time gap between the secondary-market transaction and the initial issue and public offering.

Moreover, Swiss law does not provide for a prospectus requirement in the context of secondary placements of securities. In practice, however, prospective buyers in a secondary placement would want to see some kind of documentation, such as a placing memorandum, or even a fully fledged prospectus. Additionally, a secondary placement might also include the listing of existing shares on a stock exchange, which will require the preparation of a listing prospectus. Accordingly, a voluntary prospectus or a similar offering document is often prepared in connection with secondary placements. The prevailing view is that false or misleading information in these voluntarily prepared documents are actionable and can form the basis for a prospectus liability claim.

4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

The Swiss prospectus requirements only apply to public offerings of securities. There is no requirement to prepare a prospectus in the context of privately issued securities. However, it is the prevailing view that the prospectus liability rules not only apply to mandatorily prepared prospectuses but also to prospectuses prepared on a voluntary basis. In addition, prospectus liability also applies to 'similar statements', that is, other documents that are used to market and offer securities to investors. Accordingly, when a voluntary prospectus (or similar statements) was prepared in the context of a private offering of securities, the prospectus liability rules would equally apply to these private offering materials.

5 What are the elements of the main types of securities claim?

The statutory basis for a prospectus liability claim is provided in articles 752 and 1156(3) CO (this is a federal law that leaves no room for additional cantonal or state law). Such a claim can be brought against any person who was involved in the preparation of a prospectus or similar statements, which contain inaccurate, misleading or omitted information or are in breach of statutory requirements. A liability claim can be brought for both wilful and negligent conduct.

6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

Under Swiss law, materiality is the standard for determining whether a statement in a prospectus or similar statements by a defendant are actionable. The incorrect, misleading or omitted information must be material in the context of the issue of the securities.

7 What is the standard for determining whether a defendant has a culpable state of mind?

Prospectus liability claims, like tort liability claims in general, can be brought against persons who acted wilfully or negligently. Thus, it is not sufficient to simply allege that a prospectus contains inaccurate or misleading statements or omitted a material fact. Rather, the plaintiff must show that the defendant wilfully or negligently breached his or her duties when preparing the prospectus or a similar statement. In the context of a prospectus liability claim, negligence presupposes the 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.

8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

To successfully bring a prospectus liability claim, a plaintiff has to show two different causation elements, loss causation (see question 9) and transaction causation. Transaction causation means the causation between the violation of the duty of care and the purchase of the

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securities. More specifically, a plaintiff has to show that he or she would not have bought the securities, or at least not at that price, had he or she known that the prospectus contained inaccurate or misleading information, or omitted information. 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 Supreme Court held that with respect to the causation requirement, a lesser standard of proof applies, namely that of preponderant probability.

With regard to the fraud on the market doctrine, the Swiss Supreme Court noted that a buyer of securities in the secondary market could assume that the price of a security reflects the information available in the issue prospectus, and thus, such a buyer does not have to show that he actually read the prospectus when making his investment decision. This presupposes, of course, that the secondary market for the specific security is in fact an efficient market, meaning that prices will adjust immediately to newly available public information.

As regards establishing transaction causation in the context of a secondary market transaction, we note the following: as a general rule, an individual who purchased shares in the secondary market may bring a prospectus liability suit. However, such individual will be faced with difficulties in successfully showing a causal link between the offering documents and his or her decision to invest. In particular, causation seems less likely in instances where a substantial time period between the offering and the secondary market purchase has elapsed.

9 Is proof of causation required? How is causation established?

In addition to the transaction causation, a plaintiff also has to show loss causation, meaning that the alleged misconduct caused the damage. Under Swiss law, a plaintiff has to show both actual cause and proximate cause. As described in question 8, establishing causation is subject to a lesser standard of proof, namely that of preponderant probability.

10 What elements present special issues in the securities litigation context?

Other than mentioned above, there are no elements that in practice present special issues in a securities litigation context. That being said, however, owing to the limited case law available in the field of securities litigation, various issues are untested and not settled by Supreme Court precedence.

11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

The relevant limitation period for prospectus liability claims is defined in article 760 CO, which provides for both a relative and an absolute limitation period. A claim for damages becomes time-barred five years after the date on which the injured party learned of the loss and of the person liable. In any event, a claim becomes time-barred 10 years after the date of the act that caused the loss. Where the loss was caused by a criminal act (eg, fraudulent actions), for which criminal law provides for a longer time limit, such longer time limit also applies to the related civil claims.

The limitation period is interrupted if the defendant acknowledges the claim (eg, by making partial payments or providing security), if the claimant initiates debt enforcement proceedings or brings a claim before a court or arbitral tribunal.

12 What defences present special issues in the securities litigation context?

Defences primarily focus on the materiality of incorrect, misleading, or omitted information. A materiality defence typically aims at showing that the defective statement was either not the cause for the investor's decisions to purchase the securities (transaction causation) or not the cause for the damage (loss causation). Further, where a plaintiff purchased securities in a secondary market, and where such plaintiff relied on the fact that the securities price reflects the information contained in the prospectus, it should be possible for a defendant to show that the secondary market in question was not efficient. However, there is no precedent for such a defence.

As regards the underwriter's due diligence defences, see question 18.

13 What remedies are available? What is the measure of damages?

The principal remedy is (actual) damages. In the context of a prospectus liability claim, damages are generally understood as the difference between the purchase price of the securities and the market price of such securities after a correcting statement has been communicated to the public. However, this price difference is only the starting point for the damages calculation. Other circumstances (eg, general economic outlook, most recent performance of the issuer and its industry) could have contributed to a lower market price, and such other circumstances need to be taken into account when determining the damages that were caused by the misconduct.

14 What is required to plead the claim adequately and proceed past the initial pleading?

Under Swiss civil procedure rules, a plaintiff must substantiate the allegations in his or her complaint (detailed statement of claim). Unlike in other jurisdictions, such as the US, Swiss civil procedure rules do not allow for initial unsubstantiated (notice) pleadings followed by extensive discovery. Conversely, there is no specific (or heightened) standard for pleading any particular type of securities claim in Swiss civil proceedings.

15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

Under Swiss rules of civil procedure, the handling of the case, including any procedural directions is in the hand of the court. Whether or not a case gets narrowed down to individual issues in an early stage of the proceedings is entirely within the discretion of the court. The parties themselves have some limited options to proactively narrow the scope of proceedings early on. For example, a defendant may ask the court to limit the proceedings to certain procedural requirements (such as jurisdiction, no pending case in a different jurisdiction, or no preclusion based on res iudicata). While a defendant may request the court to bifurcate certain issues relating to the merits of the case (eg, to deal with issues relating to liability in principle at a first stage and then with quantum, if at all, at a second stage only), such requests are rarely granted in practice; courts generally avoid bifurcating proceedings (apart from the issues of jurisdiction or statute of limitations).

16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

Article 55 CO provides for the employer's liability. Pursuant to this rule, an employer is liable for the loss or damage caused by his or her employees or ancillary staff in the performance of their work duties unless the employer proves that he or she took all due care to avoid a loss or damage of this type or that the loss or damage would have occurred even if all due care had been taken.

17 What are the special issues in your jurisdiction with respect to securities claims against directors?

To the extent that directors were involved in the preparation of a prospectus or a similar statement, they may be liable under the prospectus liability rules.

Additionally, article 754 CO provides for a statutory basis for claims against the directors and the management of a company. More specifically, article 754 CO states that directors and all other persons engaged in the management or the liquidation of the company are liable both to the company and the individual shareholders for any losses or damages arising from a wilful or negligent breach of their duties. Shareholders can sue either on behalf of the company (derivative suit), or in their own right. We note, however, that a shareholder who decides to bring an action in his or her own right, will be limited to claiming damages that directly result from the director's breach of duties. In most cases, however, a shareholder's damages will be indirect damages only (ie, shares are worth less because the company is worth less).

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18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?

A prospectus liability claim can be brought against any person who was involved in the preparation or the dissemination of the prospectus, provided, however, the involved person was in position to contribute to the content of the prospectus.

The lead managers of the banking syndicate are heavily involved in the preparation of the prospectus, and accordingly, a prospectus liability claim can be brought against these banks. An underwriter may, however, try to establish a due diligence defence, as an underwriter may rely on advice from other advisers (including the issuer's auditors and advisers). Specifically, an underwriter does generally not need to independently verify information and advice it received from its advisers and experts, and a duty to verify only exists in cases where there are red flags that the underwriter should have been aware of. However, the underwriter may only invoke the due diligence defence if it carefully selected and instructed the advisers. Furthermore, the due diligence defence is not available in matters for which underwriters are the experts (eg, proper project organisation, business due diligence).

Other members of the banking syndicate are generally only required to perform plausibility checks. Accordingly, they would be liable if they had been in a position to recognise the incorrect, misleading or omitted information, and influence the preparation of these documents. Absent extraordinary circumstances, a member of the banking syndicate who was not involved in the preparation of the prospectus (or similar statements) will most likely be able to rely on the judgment of the lead managers.

19 What are the special issues in your jurisdiction with respect to securities claims against auditors?

To the extent that the auditors were involved in the preparation or the verification of the content of a prospectus, they can be made liable under the prospectus liability rules. In particular, auditors could face liability for incorrect, misleading or omitted financial information.

Additionally, article 755 CO provides for a separate statutory basis for liability claims against auditors. Specifically, article 755 CO states that all persons engaged in auditing the annual and consolidated accounts, the company's incorporation, a capital increase or a capital reduction, are liable both to the company and the individual shareholders for losses arising from any wilful or negligent breach of the auditors' duties. Similar to the situation with regard to directors' liability (see question 17), shareholders can sue either on behalf of the company, or in their own right. Again, we note that a shareholder who decides to bring an action in his or her own right will be limited to claiming damages that directly result from the auditor's breach of duties. In most cases, however, a shareholder's damage is indirect damage (the shares are worth less because the company is worth less).

20 In what circumstances does your jurisdiction allow collective proceedings?

Possibilities for collective proceedings are limited in Swiss civil proceedings. Most notably, Swiss law does not provide for class actions. The limited options for collective proceedings available to Swiss litigants are joinder of parties, and group actions. For the reasons explained below, these tools are of limited practical relevance in the context of securities litigation.

Joinder of parties

Pursuant to the Swiss Code of Civil Procedure (CCP) 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 (eg, only one evidentiary proceeding, reduced costs and avoidance of conflicting judgments), it is not particularly suited for litigation involving large groups of plaintiffs; it lacks many of the features and advantages of (common law type of) class actions. For example, the rules relating to the joinder of parties do not provide for mandatory joint representation (plaintiffs may choose to do so, but they do not have to). Further, while the CCP does provide for the possibility to bring all the joined claims in the jurisdiction of one single court, this rule does not establish mandatory and exclusive jurisdiction for all claims that are based on the same facts.

Group actions

In limited instances, Swiss law allows for groups to file joint action. Such group actions are, however, not a particularly useful tool in the context of securities litigation. For example, the CCP extends the right to file group actions only to associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals. Further, such organisations may bring an action only for a violation of personality rights of the members of such group, and the group may not sue for damages.

21 In collective proceedings, are claims opt-in or opt-out?

Swiss law does not provide for collective proceedings such as class actions. Where investor-plaintiffs decide to join forces (see 'joinder of parties' in question 20), each investor has to individually decide whether or not he or she wants to participate in such a suit.

As a consequence, there is no issue estoppel and any investor who was not a party to the proceedings would be able to bring his or her lawsuit at a later stage before any Swiss court that has jurisdiction; Swiss law follows the principle of res iudicata, according to which only the parties to the proceedings are bound to the judgment (hence, for an estoppel there must be identities of the parties and identity of the issues).

22 Can damages be determined on a class-wide basis, or must damages be assessed individually?

Where several parties have joined their actions (see question 20), each single claim still needs to be pleaded and adjudicated separately. That includes in particular issues relating to causality and damages, which will be assessed individually (with potentially different results).

23 What is the involvement of the court in collective proceedings?

Since Swiss law does not provide for class actions, there are no class certifications.

As regards settlements, the parties may notify the court (before which the proceedings are pending) of a settlement. In this case, 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 judicata). Alternatively, the parties may reach an out-of-court settlement that would not be communicated to the court and the plaintiff may withdraw or the defendant may acknowledge the claims on that basis.

24 What role do regulators, professional bodies, and other third parties play in collective proceedings?

Regulators do not use civil liability actions as enforcement tools. Rather, they use their own administrative and criminal law tools to enforce securities law (see 'Update and trends' with respect to proposed future criminal law sanctions). Accordingly, regulators do not play a role in civil proceedings. As for the potential roles of other third parties, see the description of group actions in question 20.

25 What options are available for plaintiffs to obtain funding for their claims?

In Switzerland, attorneys' fees are generally charged on the basis of time spent. The specific fee arrangements are a matter between the parties and their lawyers subject to certain limits provided by professional and ethical rules; these rules would, for example, not allow contingency fee arrangements (and success fee arrangements within limits only).

The winning party has to reimburse the attorneys' fees to the opposing party pursuant to a statutory tariff (see question 26).

In principle, litigation funding by third parties is admissible in Switzerland, although not yet very common (litigation funding may, however, become more relevant in the future given its increased popularity in other jurisdictions).

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Update and trends

The Swiss parliament adopted a new Financial Services Act (FinSA) on 15 June 2018.

It is currently expected that the FinSA and its implementing ordinances will enter into force on 1 January 2020.

The FinSA will introduce uniform prospectus rules that generally shall apply to all securities offered publicly into or in Switzerland or admitted to trading on a trading platform in Switzerland. The obligation to prepare a prospectus under the FinSA will be triggered by any public offering, be it primary or secondary. Similar to the EU Prospectus Regulation, the FinSA will provide for a number of exemptions from the requirement to prepare a prospectus.

The prospectus rules also provide for an ex ante review and approval process by an independent authority. In addition, the prospectus liability rules that are currently included in the Swiss Code of Obligations will be transferred to the FinSA. Furthermore, under the FinSA, the intentional disclosure of incorrect information and omission of material information in a prospectus or a basic information sheet will be subject to criminal sanctions. In addition, the intentional offering of financial instruments to retail investors without the required basic information sheet will be subject to criminal sanctions.

26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

Costs are, in principle, allocated to the unsuccessful party based on the outcome of the case. Costs include the court fees and party costs (attorneys' fees). The court fees and the compensation for attorney fees are determined based on cantonal (state) tariffs. These tariffs take into account the amount in dispute and the complexity of the case.

When bringing a suit, the plaintiff usually has to advance the court cost. Further, in certain circumstances, a defendant could request that the plaintiff provides security for party costs. In particular, a defendant may request security when the plaintiff has no residence or registered office in Switzerland (subject to international treaties that dispense the residents of the member states from the duty to provide a security) or when there is a considerable risk that the plaintiff will not be able to pay the party costs if he or she is unsuccessful.

A special cost regime applies in cases where investors in an open-ended investment fund appointed a representative to bring the action (see question 27). In such a case, absent a court ruling to the contrary, the costs of the representation are borne by the fund itself.

27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

In Switzerland, investors can invest in both foreign and domestic funds. The regulatory requirements for obtaining marketing approval depend on the type of investors targeted. Specifically, marketing funds, foreign or domestic, to retail investors requires the approval of the Swiss Financial Market Supervisory Authority. Failure to comply with the regulatory requirements can result in administrative enforcement proceedings, civil liability and criminal liability. In particular, article 145 of the Swiss Collective Investment Schemes Act (CISA) states that a person that fails to comply with his or her duties under the CISA (eg, registration of and obtaining regulatory approval for products, preparing and distributing the required marketing document) may be held liable for losses resulting from such failure to comply with the rules of the CISA. Such an action may be brought against any person involved in the establishment, management, asset management, marketing, auditing or liquidation of an investment fund.

In cases of actions for the benefit of a Swiss open-ended investment fund (ie, contractual fund and investment company with variable capital (SICAV)), investors may request that the court appoints a representative that litigates on behalf of the investment fund. If such a representative files an action for damages for the benefit of the open-ended investment fund, the individual investors are precluded from filing an individual suit in their own names.

Finally, with respect to investment funds, Swiss rules of civil procedure provide for a mandatory jurisdiction of the court at the registered office of the concerned licence holder (eg, management company, representative of the fund) for actions brought by investors or the representative of the investors.

28 Are there special issues in your country in the structured finance context?

Usually, structured finance products and the respective vehicles are organised under non-Swiss law, and accordingly, investor claims and remedies are as a rule governed by foreign law. In recent years, there have been a handful of Swiss securitisation transactions. More specifically, auto lease asset-backed securitisation and credit card asset-backed securitisation transactions have used Swiss special purpose vehicles (SPVs). Asset-backed securities can be listed on the SIX Swiss Exchange on the basis of a listing prospectus. Alternatively, asset-backed securities may also be publicly offered (without a listing) in Switzerland on the basis of an issue prospectus. In either case, if the listing or issue prospectus of asset-backed securities contains incorrect or misleading information or omits required information, investors may bring a prospectus liability action under Swiss law against the issuer and any other person involved in the preparation of the prospectus.

If a structured finance transaction leads to the public issuance of debt securities by a Swiss issuer (eg, a Swiss SPV), the holders of such debt securities, as a matter of mandatory Swiss law, form a 'community of bondholders', irrespective of the law governing the relevant debt securities. The existence of a community of bondholders generally does not prevent individual bondholders from independently exercising their rights against the issuer, unless a contrary resolution has been passed by a meeting of the bondholders, or rights have been transferred to a duly appointed representative of the bondholders.

29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

In an international context, the jurisdiction of Swiss courts is determined based on the rules of the Lugano Convention and the Swiss Private International Law Act (PILA), respectively. Generally speaking, the Lugano Convention applies to cross-border situations involving residents of countries that are signatories to the Lugano Convention (that is, the European Union, Iceland, Norway and Switzerland). In all other situations, the PILA will be applicable.

The Lugano Convention does not provide for a special jurisdiction for prospectus liability claims. Accordingly, the general principles of the Lugano Convention apply. According to these general principles, the courts at the place where the harmful event occurred have jurisdiction for tort claims, such as prospectus liability. Accordingly, a foreign investor could bring a suit at the Swiss place of issue.

Unlike the Lugano Convention, the PILA does provide for separate rules regarding the jurisdiction over prospectus liability claims. Article 151(3) PILA gives the court at the Swiss place of issue mandatory jurisdiction over prospectus liability claims in case of a public issuance of equity or debt securities in Switzerland.

30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

As a general rule, the Swiss prospectus liability rules apply to Swiss issuers of securities. However, to the extent a Swiss court has jurisdiction over a prospectus liability claim (see question 29), the relevant conflict of law rules of article 156 PILA state that either the law applicable to the issuer or the law at the place of issue of the securities applies to prospectus liability claims. A plaintiff may choose which of these two laws applies. Accordingly, in the case of a foreign issuer that publicly issues securities in Switzerland, Swiss prospectus liability law may apply to an investor's claim.

31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

One must distinguish between identical claims that are pending between the same parties in different jurisdictions and between claims in different jurisdictions that are related but not necessarily pending between the same parties.

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As regards identical claims between the same parties, under the Lugano Convention the Swiss court shall stay the proceedings in the event an action concerning the same subject matter is already pending in a court of another member state. If the jurisdiction of this foreign court is established, the Swiss court shall decline to hear the case. Under the PILA, the Swiss court may stay the proceedings in such situation only if it can be expected that the foreign court will render a decision within a reasonable period of time and that such decision will be recognisable in Switzerland according to the rules of the PILA (see question 32). Unless the requirements of the PILA are met, a Swiss court in principle would proceed irrespective of a pending claim in a foreign jurisdiction.

As regards related claims, under the Lugano Convention the Swiss court may stay the proceedings if it has been seised with the matter after a related action was made pending in the court of another member state. Actions are considered related within the meaning of the Lugano Convention actions if they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. If related proceedings are pending in a first instance court of a member state of the Lugano Convention, any court (other than the one first seised) may decline its jurisdiction in favour of the court first seised. The PILA does not provide for a similar procedure in case of related claims. However, under the CCP a Swiss court may stay the proceedings if appropriate, in particular if its decision depends on the outcome of other proceedings. Depending on the particular circumstances of the case, a Swiss court may deal with multiple securities claims in different jurisdictions on this basis.

32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?

The enforcement of foreign judgments is governed by the Lugano Convention (or similar bilateral agreements) and the PILA. Under the Lugano Convention, a foreign judgment from a member state to the Convention is declared enforceable at the request of a party. Besides a number of formal requirements, a foreign judgment is declared enforceable without further review, in particular without a review of the merits of the case. Only on appeal, a defendant may raise the limited grounds for a refusal of enforcement of the foreign judgment. Among other things, a defendant may claim that the recognition and enforcement of a foreign judgment would be contrary to Swiss public policy.

Under the PILA, however, a foreign judgment will only be recognised and declared enforceable if the following conditions are met:

- the foreign court had jurisdiction pursuant to the rules of the PILA;
- the foreign judgment is final;
- the foreign judgment is not contrary to Swiss public policy;
- the defendant was properly served or has accepted the foreign court's jurisdiction;
- the foreign proceedings did not violate basic principles of Swiss law, including the defendant's right to be heard; and
- the claim was not first brought before or decided by a Swiss court or by a third-country court, a judgment of which could be recognised in Switzerland.

The recognition and enforcement of arbitral awards are governed by the rules of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

In Switzerland, arbitration is a particularly well established form of dispute resolution. In addition, many other forms of alternative dispute resolution are available, including mediation, conciliation or expert determination.

Apart from other typical advantages of arbitration as compared with litigation (including speed and efficiency to obtain final resolution of the case, enforcement of arbitral awards in other jurisdictions and confidentiality), a key advantage is the flexibility the parties enjoy in determining their own proceedings. In the context of securities claim, that procedural flexibility may be a particular advantage for a plaintiff who depends on (expert) witness evidence to present and prove certain aspects of his or her case (eg, on causality and quantum). The Swiss Rules of International Arbitration (administered by the Swiss Chambers' Arbitration Institution) take a particularly liberal approach to multi-party arbitration.

In Switzerland, securities claims are perfectly arbitrable. Subject matter jurisdiction, however, requires that the relevant parties consented to arbitration in writing. Under current market practice in Switzerland, the terms and conditions for equity or debt offerings in Switzerland do not provide for arbitration.

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