Chapter 20

SWITZERLAND

Matthew T Reiter and Thomas U Reutter[1]

I OVERVIEW

i Sources of law

In Switzerland, there is no single body of law setting out the law of securities. The substantive law regulating securities is codified in the Swiss Code of Obligations (CO).[2] Three sections of the CO are of special relevance when dealing with securities: the provisions on companies limited by shares in Article 620 et seq. CO, dealing with equity securities; the provisions regarding negotiable securities (which may include both equity and debt) in Article 965 et seq. CO; and the provisions regarding debt securities issued as bonds in Article 1156 et seq. CO. The procedure for civil litigation is set out in the Swiss Civil Procedure Code (CPC).[3] In cases involving foreign parties, international private law comes into play, especially the Lugano Convention (LC)[4] (applicable in cases involving parties from most European countries) and the Federal Statute on Private International Law (PIL)[5] (applicable in cases involving parties from non-European countries).

Public securities law and public enforcement are governed by the Federal Act on Financial Markets Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA)[6] and – for securities that are traded on the main Swiss stock exchange, SIX Swiss Exchange Ltd – the Listing Rules and implementing provisions of the SIX Swiss Exchange.[7] The Financial Market Supervision Act (FINMASA)[8] establishes the organisation and sets out the supervisory instruments of the Swiss Financial Market Supervisory Authority (FINMA),

1 Matthew T Reiter and Thomas U Reutter are partners at Bär & Karrer Ltd.

2 The Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (as of 1 January 2017), https://www.admin.ch/opc/en/classified-compilation/19110009/index.html.

3 The Civil Procedure Code of 19 December 2008 (as of 1 January 2017), https://www.admin.ch/opc/en/classified-compilation/20061121/index.html (the English version only reflects the version as of 1 May 2013).

4 The Lugano Convention, which entered into force in Switzerland on 1 January 2011 (as of 8 April 2016), https://www.admin.ch/opc/de/classified-compilation/20082721/201604080000/0.275.12.pdf (German).

5 The Federal Statute on Private International Law of 18 December 1987 (as of 1 January 2017), https://www.admin.ch/opc/de/classified-compilation/19870312/201701010000/291.pdf (in German).

6 Financial Market Infrastructure Act of 19 June 2015 (as of 1 January 2016), https://www.admin.ch/opc/en/classified-compilation/20141779/index.html.

7 https://www.six-exchange-regulation.com/en/home/regulation.html.

8 Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (as of 1 January 2016), https://www.admin.ch/opc/en/classified-compilation/20052624/index.html.

which is the Swiss authority for the supervision of the financial markets. Concerning criminal liability in general, the Swiss Criminal Code (SCC)[9] and the Swiss Criminal Procedural Code (SCP)[10] are of relevance.

ii Regulatory authorities

There is no regulatory authority entrusted with the general supervision of securities transactions in Switzerland. Indeed, in the absence of any criminal act, offerings of securities, whether public offerings or private placements, are still not subject to any regulatory oversight.

FINMA has certain limited power in connection with the enforcement of the requirements under the FMIA, in particular relating to disclosure of major shareholdings, insider trading and market abuse. SIX Exchange Regulation, an independent body of the main Swiss stock exchange, assumes a certain supervisory and enforcement role as a private organisation against its members. In the securities context, SIX Exchange Regulation may act in the event of certain failures to disclose price-sensitive information or of making false and misleading statements to the capital market (the ad hoc rule).

The Federal Department of Finance has the primary responsibility for the prosecution of failures to notify qualified shareholdings. Prosecution authorities are responsible for criminal proceedings under the FMIA and the SCC (see Section III, *infra*).

iii Common security claims

Very few actions for breaches of securities laws are ever brought to court in Switzerland. Lawsuits brought by investors against issuers or banks for prospectus liability are also infrequent but are probably still the most common securities claim in Switzerland. Only a few precedents are available, though. The reasons are not entirely clear but are likely a combination of the following: (1) Swiss investors tend to be relatively unlitigious; (2) there is no class action or similar instrument and therefore there is a risk of high litigation costs; and (3) many investors have entrusted banks or other financial intermediaries with investment decisions and will therefore sue or claim damages first from their agents before invoking prospectus liability claims against issuers or banks involved in securities offerings.

Because of the absence of a regulator with broad power to police securities offerings, the public enforcement of securities claims is limited to certain aspects of the FMIA mainly relating to disclosure of shareholdings, insider trading and market abuse.

9 Swiss Criminal Code of 21 December 1937 (as of 1 January 2017), https://www.admin.ch/opc/en/classified-compilation/19370083/index.html.

10 Swiss Criminal Procedure Code of 5 October 2007 (as of 1 January 2017), https://www.admin.ch/opc/en/classified-compilation/20052319/index.html.

II PRIVATE ENFORCEMENT

i Forms of action

Prospectus liability

The pivotal provision of Swiss substantive law concerning securities litigation is Article 752 CO. This provision governs the liability for the issue prospectus and similar documents and reads as follows:

> *Where information that is inaccurate, misleading or in breach of statutory requirements is given in issue prospectuses or similar statements disseminated when the company is established or on the issue of shares, bonds or other securities, any person involved whether wilfully or through negligence is liable to the acquirers of such securities for the resultant losses.*

The legal nature of prospectus liability is debated in legal doctrine. Some authors qualify Article 752 CO as a contractual liability,[11] others argue that it is a *lex specialis* in relation to Article 41 CO, which governs the liability for torts.[12] Still others argue that Article 752 CO is a form of liability for breach of trust.[13] The qualification is relevant for, *inter alia*, the burden of proof for fault on behalf of the respondent and the determination of damages: fault is presumed in contractual liability but not under tort law. The methods for the calculation of damages differ in tort and contract law.[14] Nevertheless, the Swiss Supreme Court has qualified the liability for the issue prospectus as a liability in tort.[15]

Scope of application

Two requirements must be fulfilled for Article 752 CO to apply. First, there must be an issue of shares, bonds or other securities by a company. This requirement thus covers the creation or increase of equity capital (by issue of shares or participation certificates during the establishment or capital increase of a company limited by shares) or the raising of borrowed capital (by the issue of bonds). The provision generally applies to all kinds of securities that are issued in large amounts. This includes shares, bonds, participation certificates, convertible bonds and convertible option bonds.[16] The applicability extends to initial public offers, fixed price underwritings and – according to Watter – to the offer documents regarding acquisitions.[17] Not covered, however, are 'secondary placements' whereby an investor sells its securities to the public.[18]

---

11 Guhl et al., *Das Schweizerische Obligationenrecht* (Ninth Edition, Zurich, 2000), Section 72 N 6.

12 See, e.g., Müller, Lipp and Plüss, *Der Verwaltungsrat, Ein Handbuch für Theorie und Praxis* (Fourth Edition, Zurich, Basle and Geneva, 2014), p. 355.

13 See Watter, *Basler Kommentar: Art. 530–964 OR* (Honsell, Vogt and Watter (eds.), Fifth Edition, Basle, 2016), Article 752 N 2; and Reutter 'IPO – Ablauf, Struktur, Haftung und Schadloshaltung' in Vol 144, *Kapitalmarkttransaktionen VIII* (Reutter and Werlen (eds.), Zurich, Basle and Geneva: Europa Institut Zürich, 2014), p. 40. Reutter qualifies the legal nature of prospectus liability as a liability for breach in trust, arguing against the blind application of contractual standards.

14 Watter (footnote 13, *supra*), Article 752 N 2; and Reutter (footnote 13, *supra*), p. 38 et seq.

15 BGE 129 III 71 E. 2.5.

16 Watter, (footnote 13, *supra*), Article 752 N 4.

17 Ibid., Article 752 N 3.

18 Reutter (footnote 13, *supra*), p. 41.

Second, an issue prospectus or similar statement must have been prepared, or there must have been a failure to comply with the duty to publish such a prospectus or similar statement. Therefore, Article 752 CO not only applies where a prospectus or similar document was prepared in compliance with a legal obligation to do so, but also where the document was prepared and disseminated voluntarily.[19]

An issue prospectus is a written document created by the issuer to inform potential investors about the intended issue and to invite them to subscribe to the securities.[20] A duty to publish an issue prospectus is established in Article 652a CO and Article 1156 paragraph 1 CO for public offers of new shares and new bonds, respectively. Article 27 paragraph 1 Listing Rules sets out the duty to publish a listing prospectus if the securities are to be listed on SIX Swiss Exchange. In this case, the prospectus must contain significantly more information than under Article 652a CO.[21]

The term 'similar statement' encompasses any information given to potential investors that relates to the issue of the securities and that is used as a means to market the securities and to inform the potential purchaser. Article 752 CO might therefore apply to listing prospectuses (if not identical to the issue prospectus), short prospectuses, advertisements, research reports, presentations, press releases, business reports, interim reports or letters to shareholders.[22] However, there is little case law specifying which type of statements fall under Article 752 CO and the question provokes controversy in legal doctrine. A general characteristic of a similar statement pursuant to Article 752 CO is that it is impossible or unreasonable for the recipient of the statement to verify the given information.[23]

Right to sue and capacity to be sued

Pursuant to the wording of Article 752 CO, anyone who acquires securities has standing to sue. This does not just include the first buyer; any later buyer is also eligible to file a claim if the information in the prospectus was causal for the acquisition of the shares.[24] Controversies exist regarding the legitimacy of claims if the acquirer already resold the securities or otherwise lost their ownership, and regarding the acquisition of already issued securities of the same kind as the ones being subject of a duty to issue a prospectus.[25] The community of creditors according to Article 1164 CO and the company itself cannot act as claimants.[26]

Liability under Article 752 extends to any person involved in the drafting or the dissemination of the prospectus or similar statement. The involvement needs to be of a certain significance to trigger a liability, that is, the person must have had an influence on the contents of the prospectus.[27] These persons can be executives or employees of the issuer

19 Watter (footnote 13, *supra*), Article 752 N 5; Gnos, 'Prospekthaftung/Haftung gegenüber Investoren', *Entwicklungen im Gesellschaftsrecht IX* (Kunz, Jörg and Arter, Bern, 2014), Sections 97, 104 et seq.; Müller, Lipp and Plüss (footnote 12, *supra*), p. 356; and Reutter, (footnote 13, *supra*) p. 41.

20 Watter (footnote 13, *supra*), Article 752 N 5.

21 See Article 27 Listing Rules, which refers to the different schemes applicable for the issuance of securities on SIX Swiss Exchange, and Reutter (footnote 13, *supra*), p. 37 et seq.

22 Watter (footnote 13, *supra*), Article 752 N 14.

23 See Watter (footnote 13, *supra*), Article 752 N 14, with reference to the decision of the Cantonal Court of St. Gallen II, dated 19 December 1986, in: SJZ 1989, p. 50 et seq.

24 BGE 131 III 306, E. 2.1; and Watter (footnote 13, *supra*), Article 752 N 6.

25 Watter (footnote 13, *supra*), Article 752 N 7 et seq.

26 Ibid., Article 752 N 9, 9a.

27 Reutter (footnote 13, *supra*), p. 43 et seq.

or the leading issuing bank, or advisers of the issuer, issuing bank or rating agencies, such as lawyers, tax advisers and environmental advisers. Persons who disseminate the prospectus or similar document can be a consortium bank, financial institutions and other persons who are involved in the distribution of the prospectus.[28] Further, it is possible to file a claim against the issuer of the security.[29]

Heads of claim under Article 752 CO

Violation of duty

A violation of the duties under Article 752 CO occurs if the information in the issue prospectus or similar document is either inaccurate, misleading or in breach of a statutory duty.

Information is inaccurate if the prospectus or the similar document does not objectively state the facts, for example, by stating that a company is stable and high-yielded even though there are doubts about its solvency.[30] Forecasts are inaccurate if they are not based on concrete facts and probabilities or if they are mere assumptions.[31]

Information is deemed misleading if the facts stated in the document are not themselves wrong, but if material facts or circumstances were concealed or suppressed. Generally, information is deemed misleading if there is no clear and sufficient disclosure of relevant risks. A general warning or disclaimer is of course insufficient; all risks that may occur must be clearly stated in the prospectus. Moreover, information is misleading if it lacks transparency or is ambiguous.[32]

Information is in breach of statutory requirements if there is a duty to prepare an issue prospectus (see Articles 652a, 1156 CO and Article 27 Listing Rules) and this duty is violated by not issuing a prospectus or issuing an incomplete prospectus.[33]

The relevant point in time is when the prospectus or similar document is published. It is debated in doctrine whether and to what extent there is a duty to update the information given in the prospectus. Several authors advocate that a duty to update the prospectus or similar document exists until the expiry of the subscription period.[34]

Harm

A further requirement for liability pursuant to Article 752 CO is the existence of harm. See Section II.iv, below, regarding the calculation of damages.

Causation

The causation requirement must be satisfied in two respects: there must be a causal link between the violation of Article 752 CO and the damages, and between the violation of Article 752 CO and the acquisition of the securities in question.[35] With regard to the latter, the claimant must prove that he or she relied on false or incorrect information in the issue prospectus, and that he or she would have not purchased the securities – or would have done

28 Watter (footnote 13, *supra*), Article 752 N 10.
29 Ibid., Article 752 N 12.
30 Ibid., Article 752 N 16.
31 Ibid., Article 752 N 19.
32 Ibid., Article 752 N 17.
33 See ibid., Article 752 N 18, with further references.
34 Ibid., Article 752 N 20.
35 Ibid., Article 752 N 26.

so at a lesser price – were he or she in possession of the full and correct information.[36] Since it is usually not possible to prove causation with absolute certainty, a less strict standard of evidence applies (preponderant probability rather than strict proof).[37]

For the requirement of causality to be fulfilled, actual and legal proximate cause need to be given.[38] Actual cause is determined with the *conditio sine qua non-test* (the 'but-for' test). If the basis for liability is an omission – namely, the failure to prepare an issue prospectus or the failure to disclose certain information – one must first determine whether a duty to act exists. An omission is a cause in fact if compliance with this duty would have prevented the damages, respectively if it would have influenced the decision to acquire the securities. According to the standard formula used by the Swiss Federal Supreme Court, legal or proximate cause is defined as a cause that in the ordinary course of things and according to general life experience, is suited to cause the damage in question, such that the cause in question can be regarded as having substantially increased the risk of occurrence of the damage in question.[39]

Fault

Liability under Article 752 CO requires fault on behalf of the liable party. A negligent violation of the duties under Article 752 CO suffices to trigger liability. The term negligence presupposes that a duty of care was breached.[40] The standard applied is an objective one; negligence is deemed to have occurred if a reasonable person could have foreseen the occurrence of the damage.[41]

The due diligence defence, which has its roots in US law, gives the underwriting bank a possibility to exclude its liability. Under Swiss law it serves as a proof of exculpation and is therefore, treated under the fault requirement.[42] In BGE 129 III 71, E. 2.6 et seq., the Federal Supreme Court held that an underwriting bank must, when preparing an issue prospectus, verify the information it receives from the issuer, as far as is reasonable. In this case, the Court held that the bank had no reason to doubt the information given to it by lawyers and auditors of the issuer.

Statute of limitations

The claim for damages against a person held liable under Article 752 CO becomes time-barred five years after the date on which the injured party learned of the losses and of the person liable for it (relative time limit), but in any event 10 years after the date of the act that caused the losses (absolute time limit). Where the action stems from a criminal act for which criminal law provides for a longer statute of limitations, the latter also applies to the civil claim.[43]

36 BGE 132 III 718, E. 2.1. and E. 3.2.

37 Ibid., E. 3.2.1.

38 Ibid., E. 2.1.

39 See, e.g., BGE 123 III 110, E. 3(a).

40 BGE 129 III 71, E. 2.4.

41 Watter (footnote 13, *supra*), Article 752 N 29.

42 Reutter (footnote 13, *supra*), p. 57.

43 Article 760 para. 1 and 2 CO.

Burden of proof

Pursuant to the general rule of Article 8 of the Swiss Civil Code (CC), the claimant bears the burden of proof for all of the requirements for liability under Article 752 CO, including fault.[44] However, commentators who do not regard Article 752 CO as a liability in tort argue that the claimant – as in contract law[45] – should not have to bear the burden of proof for the fault requirement.[46]

ii Procedure

In domestic cases, a claimant can file a prospectus-liability action either with the court at the domicile or registered office of the respondent, or at the court at the registered office of the company issuing the securities.[47] In the cantons where there is a commercial court,[48] that court has subject-matter jurisdiction if the case concerns the commercial activity of at least one party (which requirement will always be fulfilled with regard to Article 752 CO), the decision is subject to an objection in civil matters (amount in dispute of at least 30,000 Swiss francs), and the parties are registered in the Swiss Commercial Register or in an equivalent foreign registry. If only the respondent is registered in a commercial registry, but all the other conditions are met, the claimant may choose between the commercial court and the ordinary courts.[49]

In most cases, court proceedings are preceded by mandatory conciliation proceedings.[50] No conciliation proceedings take place where a commercial court has jurisdiction. The parties may agree to waive conciliation proceedings in disputes with a value in dispute of at least 100,000 Swiss francs, and the claimant may unilaterally waive conciliation proceedings if the respondent is domiciled abroad.[51] Conciliation proceedings are initiated by a short written application for conciliation.[52] An oral hearing, at which the parties must appear in person, is held within two months[53] and if no settlement is concluded, the claimant is granted authorisation to proceed with court proceedings within three months from the authorisation being issued.[54]

In cases with an amount in dispute not exceeding 30,000 Swiss francs, simplified proceedings apply.[55] If the amount is greater, ordinary proceedings pursuant to Article 219 et seq. CPC apply. Ordinary proceedings usually consist of two exchanges of written submissions, followed by the main hearing, the taking of evidence and the parties' closing

44 BGE 129 III 71, E. 2.5.

45 See Article 97 CO.

46 Watter (footnote 13, *supra*), Article 752 N 33.

47 Article 40 CPC.

48 There are commercial courts in the following cantons: Aargau, Bern, St Gallen, Zurich.

49 Article 6 paragraphs 2 and 3 CPC.

50 See Article 197 et seq. CPC.

51 Article 198 lit. f and Article 199 CPC.

52 Article 202 CPC.

53 Article 203 et seq. CPC.

54 Article 209 CPC.

55 See Article 243 et seq. CPC. In simplified proceedings, the claim may be filed orally, the costs are lower and the court shall cause the parties to complete inadequate submissions and to designate the evidence by asking the appropriate questions (Article 247 paragraph 1 CPC).

submissions.[56] The parties may jointly agree to dispense with the main hearing,[57] which is often done in practice. Judgments by the courts of first instance are subject to appeal to the cantonal appellate courts.[58] The judgments of the cantonal appellate courts and of the (cantonal) commercial courts are subject to appeal to the Federal Supreme Court.[59] In principle, the Federal Supreme Court only reviews issues of law.[60]

Class actions are not available in Switzerland. However, several claimants with similar or identical claims may file an action jointly,[61] or the courts may join separately filed actions in one proceeding to simplify the proceedings.[62] In addition, there is the possibility of a group action by an association or organisation of national or regional importance according to Article 89 CPC. The possibility to file a group action must be authorised by the articles of association of the organisation. The available remedies are, however, limited to requesting the court to prohibit an imminent violation or to end an ongoing violation, or – more importantly in this context – to establish the unlawful character of a violation, if the latter continues to have a disturbing effect. No damages or other compensation can be granted. In other words, investors who have suffered a loss must file individual actions to obtain damages payments if no settlement can be negotiated based on the outcome of the group action.

The principle of fee-shifting applies; the court generally allocates the procedural costs to the unsuccessful party in accordance with the outcome of the case.[63] The procedural costs consist of court costs – including fees for the conciliation proceedings, the decision and the taking of evidence – and party costs, namely, reimbursement for necessary outlays, costs for professional representation and, in justified, cases, reasonable compensation for personal efforts, if a party is not professionally represented.[64] The court fee and compensation for legal representation are determined based on cantonal tariffs, which take into account the amount in dispute and the complexity of the case.[65]

iii Settlements

Settlements regarding a violation of Article 752 CO are possible at any time, be it out of court or in court. The parties are bound by a valid out-of-court settlement as by any other private contract and can enforce their rights under the settlement by means of litigation.[66]

Settlements in conciliation proceedings or in court are not only regarded as private law contracts but as surrogate court decisions,[67] that is, they are enforceable and have *res iudicata* effect.[68]

56 See Article 220-232 CPC.
57 Article 233 CPC.
58 Article 308 et seq. CPC.
59 Article 72 et seq. of the Federal Statute concerning the Federal Supreme Court (SCS).
60 See Article 95-98 SCS.
61 Voluntary joinder, see Article 71 CPC.
62 Article 125 lit. c CPC.
63 Article 106 CPC.
64 Article 95 CPC.
65 See Article 96 CPC.
66 Sutter-Somm *Schweizerisches Zivilprozessrecht* (Third Edition, Zurich, Basle, Geneva, 2017), p. 303.
67 Articles 208 and 241 CPC.
68 Sutter-Somm, (footnote 66, *supra*) p. 303 et seq.

iv Damages and remedies

According to the 'theory of difference', which is well established under Swiss law, damages are calculated by comparing the aggrieved party's actual financial position with the financial position it would have been in if the damaging event had not occurred.[69] In cases of liability under Article 752 CO, the damages usually occur only after the unlawful conduct, when the inadequacy of the information given in the issue prospectus or similar document becomes publicly known.[70] Therefore, to assess the damages, the investors' actual financial position needs to be compared with the financial position the investor would have been in had the information in the issue prospectus been correct.

This raises the question of whether the investor would have purchased the securities on the basis of a correct issue prospectus. According to certain authors who argue that the liability for issue prospectus is of contractual nature, if the answer is no, the investor should be allowed to request that the purchase be unwound.[71] In our view, however, this is not the appropriate remedy. Alternatively, or if the investor would have purchased the shares if the issue prospectus or similar document had been correct, the damages equal the difference between the current market price and the hypothetical purchase price of the securities had the issue prospectus or similar document been correct.[72] In practice, this amount may be determined by calculating the difference between the historic purchase price of the security and the market price after the inadequacy of the information given in the issue prospectus or similar document became known. General market developments that have occurred in the intervening time need to be factored out when taking this approach. Where an efficient market for the securities in question exists, the amount of damages is indicated by the price drop after the inadequacy of the information in the issue prospectus or similar document becomes known.[73]

Further remedies may be available based on other legal grounds. For example, a rescission of the sales contract may be possible based on fundamental error pursuant to Article 23 CO, or based on a breach of warranty pursuant to Article 205 CO.[74] A damages claim might possibly be raised based on the general provision governing liability for breaches of contract,[75] or – in rare instances – on the principle of *culpa in contrahendo* or based on (general) tort law.[76] Finally, liability might be found under the provision governing the liability of founder members, members of the board of directors and other persons involved in the establishing of a company, based on Article 754 CO, the general provision governing directors' liability.[77]

69 Schwenzer, *Schweizerisches Obligationenrecht, Allgemeiner Teil* (Seventh Edition, Berne, 2016), N 14.03.

70 Reutter (footnote 13, *supra*), p. 49, with further references.

71 For an overview of the different approaches in the doctrine, see ibid. (et seq.), with reference to Watter (footnote 13, *supra*), Article 752 N 23.

72 Reutter (footnote 13, *supra*), p. 49.

73 See Watter (footnote 13, *supra*), Article 752 N 22.

74 Article 197 et seq. CO does not relate to the value of the company in a purchase of shares. Therefore, one can only file a claim if the parties explicitly agreed on warranties, see BGE 107 II 419.

75 Article 97 CO.

76 Watter (footnote 13, *supra*), Article 752 N 39a.

77 Article 753 CO, see also Watter (footnote 13, *supra*), Article 752 N 38 and 39.

III PUBLIC ENFORCEMENT

i Forms of action

As of yet, there is no regulatory authority policing securities offerings in Switzerland. Nor is there an authority vetting prospectuses for public offerings. Thus, there is currently no regulator who could bring an enforcement action, damages claim, claim for disgorgement or similar action, or impose penalties for securities fraud or prospectus liability generally. However, under the FMIA enforcement actions may be conducted and fines may be imposed for offences related to securities transactions. These relate in particular to disclosure of major shareholdings, insider trading and market abuse.

In cases where securities are to be listed on SIX Swiss Exchange, there is a separate set of rules enacted and supervised by SIX Exchange Regulation, the supervisory body of the main Swiss stock exchange. The rule-making by SIX Swiss Exchange is derived from the FMIA. In fact, the FMIA delegates the power and the duty to enact rules for issuers and participants of a Swiss stock exchange to the relevant stock exchange.[78] However, SIX Swiss Exchange is not a public regulatory authority and only has limited enforcement power. For example, it may not bring an action or enforce claims for securities fraud or prospectus liability. Nor can it impose penalties for false, misleading or incomplete prospectuses. However, it can issue fines against issuers for failures to disclose price-sensitive information or for disclosing misleading information in certain instances (breach of ad hoc publicity requirement).

The following provides an overview of the substantive provisions the breach of which may cause an enforcement by a regulatory authority under the FMIA, the Swiss Penal Code or by the SIX Exchange Regulation under its Listing Rules.

FMIA

The abuse of price-sensitive confidential information is a punishable offence under administrative and criminal law rules on insider trading.[79] Under administrative law any person who knows or should know that information constitutes insider information acts unlawfully if it: (1) exploits such information to acquire or dispose of securities admitted for trading on a stock exchange or on a similar platform in Switzerland or if it uses financial instruments derived from such securities; (2) communicates such information to another person; or (3) exploits such information to make a recommendation to another person to acquire, dispose of or use financial instruments regarding any securities covered by (1). A similar, albeit more restrictive provision, has been enacted in the FMIA as a criminal offence.

Swiss administrative and criminal law also contains provisions on market manipulation.[80] Market manipulation as an administrative offence applies to an individual who (1) spreads false or misleading information or (2) executes fictitious transactions knowing, at least constructively, that such information provides an incorrect or misleading signal with respect to the offer, the demand or the price of securities admitted to trading on a Swiss stock exchange or similar. The FMIA also includes a criminal provision on market manipulation, the scope of which is, however, rather narrow.

Swiss law provides specific exemptions for the above-mentioned offences of insider trading and market manipulation ('safe harbours').

78 Article 35 FMIA.

79 Article 142 and 154 FMIA.

80 Articles 143 and 155 FMIA.

The failure to notify qualified shareholdings[81] or the breach of the obligation to make an offer in a Swiss issuer with at least one class of securities listed on a Swiss stock exchange or in a non-Swiss issuer with a primary listing on a Swiss stock exchange with of at least one class of securities are subject to penalties under the FMIA.

SCC

Several criminal provisions might be applicable in the context of securities law. However, only one provision is of particular relevance in this overview: it is a criminal offence for any person to make a false or an incomplete material statement in public announcements or reports addressed to the shareholders of a company if such a statement may induce another person to harmfully dispose of assets.[82]

Listing Rules

Companies listed at the SIX Swiss Exchange are required to notify potentially price-sensitive information that has arisen in its sphere of activity.[83] Price-sensitive facts are facts that are capable of triggering a significant change in market prices. The issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact. However, a postponement is allowed if certain conditions are met.[84]

ii Procedure

Administrative procedures under the FMIA are conducted by FINMA. The Federal Department of Finance has the primary responsibility for the prosecution of the failure to notify qualified shareholdings and for the breach of the obligation to make an offer in a Swiss issuer with at least one class of securities listed on a Swiss stock exchange or in a non-Swiss issuer with a primary listing on a Swiss stock exchange of at least one class of securities. However, if the Federal Department of Finance is of the view that the requirements for a crime to have been committed are met, the file will be handed over to prosecution authorities. Prosecution authorities are also competent for other criminal procedures under the FMIA and the SCC.

The Exchange Regulation of the SIX Swiss Exchange, which is an independent body within SIX Swiss Exchange is competent to investigate and conduct sanction proceedings.[85]

In each procedure, defendants will have the right to be heard before the competent authority. In addition, all procedures provide the right to appeal against the decree of the competent authority.

81 According to Article 120 FMIA, a notification duty is triggered if a party, as a result of the purchase or sale of securities for its own account, either, directly, indirectly or acting in concert with third parties, exceeds, falls below or reaches a threshold (3, 5, 10, 15, 20, 25, 33 1/3, 50 and 66 2/3 per cent) of voting rights, whether exercisable or not, in a Swiss issuer with at least one class of securities listed on a Swiss stock exchange or a non-Swiss issuer with a primary listing on a Swiss stock exchange of at least one class of securities.

82 Article 152 SCC.

83 Article 53 Listing Rules.

84 Article 54 Listing Rules.

85 Article 1 of the Rules of Procedure of 1 January 2016, https://www.six-exchange-regulation.com/dam/downloads/regulation/admission-manual/procedure-rules/12_01-RP_en.pdf.

iii Settlements

Criminal authorities and Federal Department of Finance

Swiss law does not provide explicitly the possibility to settle a claim with the Federal Department of Finance. However, criminal authorities and the Federal Department of Finance may abstain from criminal proceedings under the FMIA and from imposing a sanction under certain circumstances[86] if the offender makes reasonable efforts to compensate the injury and these are deemed by the competent authorities as adequate to compensate for the crime committed. In general, the offender pays a certain amount either to the authorities or makes a donation to a charity organisation.

FINMA

Swiss law does not know a settlement procedure for proceedings with FINMA. However, a supervised person or entity that has breached the law may avoid the issuing of a declaratory ruling by FINMA if it restores compliance with the law (if the circumstances allow a restoration). FINMA is authorised to publish a declaratory ruling if a supervised person or entity has seriously breached supervisory rules and no remedial action is required to be ordered. Consequently, if the person or entity in question, has already restored compliance with the law, FINMA no longer has reason to issue a declaratory ruling.

SIX Swiss Exchange

The SIX Exchange Regulation may terminate sanction proceedings by entering into an agreement. Agreements are permissible in simple cases or if they would allow the public to be informed more rapidly or more fully than would be the case with sanction proceedings concluded in the regular manner. A settlement must be published or, as a minimum, public notification must state the regulatory area in question, the key facts on the matter, the content of the agreement and the identities of the parties.[87]

iv Sentencing and liability

FMIA and SCC

For both administrative offences of abuse of price-sensitive information and market abuse (see Section III.i, *supra*) the Swiss Financial Market Supervisory Authority FINMA may issue a declaratory ruling, publish the supervisory ruling or disgorge any profit.[88]

For a criminal abuse of price-sensitive information or market abuse (see Section III.i, *supra*) the FMIA provides penalties of up to three years' imprisonment or a fine.[89] The FMIA also provides for a fine of up to 10 million Swiss francs (in cases of negligence, 100,000 Swiss francs) for failure to observe certain disclosure obligations.[90]

If there are sufficient indications that a person did not meet its obligations to notify, FINMA can, until the obligation to notify has been cleared or, as appropriate, met: (1)

86 *Inter alia*, if the interest of the public for prosecution is limited.

87 Article 2.10 paragraphs 1, 2 and 4 Rules of Procedure.

88 Article 145 FMIA in connection with Articles 32, 34 and 35 FINMASA.

89 Article 154 and 155 FMIA, respectively.

90 See Article 151 FMIA.

suspend the voting rights and associated rights of this person; and (2) forbid this person directly and indirectly or acting in concert with third parties to acquire securities or purchase or sale rights relating to securities in the offeree company.[91]

SIX Swiss Exchange

The Listing Rules provide for several measures and sanctions the SIX Swiss Exchange can impose. As one measure, the SIX Swiss Exchange can suspend the trading of securities temporarily on its own initiative if unusual circumstances, specifically the breach of important disclosure obligations by the issuer, indicate that such a suspension is advisable.[92]

Moreover, sanctions may be imposed for the breach of ad hoc publicity rules in the event that an issuer, guarantor or recognised representative[93] commits a breach of the Listing Rules, or in the event that they do not ensure compliance with these rules and regulations.[94] The possible sanctions (which can be imposed cumulatively) are (1) a reprimand; (2) a fine of up to 1 million Swiss francs (in cases of negligence) or 10 million Swiss francs (in cases of wrongful intent); (3) suspension of trading; (4) delisting or reallocation to a different regulatory standard; (5) exclusion from further listings and (6) withdrawal of recognition. The competent body takes into consideration, in particular, the severity of the breach and the degree of fault when determining the sanction. When setting the level of fines, the competent body considers the impact of the sanction on the party concerned.[95]

IV CROSS-BORDER ISSUES

i Private enforcement

In international cases, especially where a company issues securities in a foreign country, or sells the securities to foreign investors, questions of international private law arise. As regards jurisdiction in such situations, the LC and the PIL come into play (see Section I.i, *supra*).

Under the LC there is no special provision governing jurisdiction in claims relating to prospectus liability.[96] Therefore, jurisdiction needs to be determined based on the general provisions of the LC, whereby the applicability of the respective provisions depends on the qualification of the legal nature of the claim. According to the constant practice of the European Court of Justice the qualification of the legal nature has to be undertaken autonomously, and not with regard to the *lex fori* or *lex causae*.[97] According to doctrine, the liability for issue prospectuses might be qualified as tort claim falling under Article 5(3) LC.[98] This would give the courts at the place where the harmful event occurs or might occur – and

91 Article 144 FMIA.

92 Article 57 Listing Rules.

93 Listing applications have to be filed by a recognised representative who has sufficient knowledge of the product described in the listing application, Swiss company and stock exchange law, and of the Listing Rules (Article 43 Listing Rules).

94 Article 60 Listing Rules.

95 Article 61 paragraphs 1 and 2 Listing Rules.

96 Eberhard and Von Planta, *Internationales Privatrecht* (Honsell et al. (eds.) Third Edition, Basle, 2013), Article 151 IPL N 14.

97 With references to the case law: Hofmann and Kunz, *Basler Kommentar, Lugano Übereinkommen* (Oetiker and Weibel (eds.), Second Edition, Basle, 2016), Article 5 N 61 et seq.

98 Ibid., Article 5 N 476; see also EUCJ *Kolassa* of 28 January 2015, C-375/13, Section 44.

thus the place of issue – jurisdiction. Bachmann argues that jurisdiction should be given at the place of registration of securities;[99] however, there is no general requirement to register securities in Switzerland. Depending on the circumstances, mandatory provisions of the LC applying to contracts with consumers[100] might even come into play.[101]

Where the PIL is applicable, Article 151 paragraph 3 PIL explicitly grants the courts at the place of issue of the securities mandatory jurisdiction to adjudicate claims for liability for issue prospectuses.

Article 156 PIL applies with regard to conflict-of-law issues. According to this provision, either the law that is applicable to the issuing company or the law at the place of issue of the securities applies to claims for liability for the issue prospectus or similar documents. The claimant may choose which law applies.[102]

ii Public enforcement

In public enforcement matters, cross-border issues usually relate to a breach of the FMIA by a foreign individual or entity. The FMIA is applicable for transactions in securities on a Swiss stock exchange irrespective of where the breach is committed. Hence, FINMA may request administrative assistance from foreign authorities responsible for financial market supervision.[103]

The SCC is applicable to each person who commits a crime in Switzerland.[104] The competence to ask foreign authorities for administrative assistance depends whether or not an international treaty is applicable.

SIX Exchange Regulation may only bring enforcement against members, namely, issuers listed on SIX Swiss Exchange. Cross-border enforcement is usually not a problem because issuers have committed to adhere to the Listing Rules and non-compliance could have serious consequences for investor relations.

V OUTLOOK AND CONCLUSIONS

It must be concluded that liability for issue prospectus is very ineffective with regard to private enforcement. Plaintiffs might often fail in their claims because of the high standards of causality required.[105] However, the enactment of new legislation in this respect is a possibility.

The Swiss government (the Federal Council) has commenced the consultation period for two new laws: the Federal Financial Services Act (FinSA) and the Financial Institutions

99 Bachmann, 'Die internationale Zuständigkeit für Klagen wegen fehlerhafter Kapitalmarktinformationen', *Praxis des Internationalen Privat- und Verfahrensrechts* (Henrich et al. (eds.), 2007), pp. 79 and 82.

100 According to the main legal doctrine private investors are regarded as consumers under Article 15(1)(c) LC, see Gehri in *Basler Kommentar, Lugano Übereinkommen* (footnote 98, *supra*), Article 15 N 17.

101 This is the case if the nature of the liability is contractual and if consumers are involved, see Article 15(1)(c) LC and Article 16 LC. In EUCJ *Kolassa* of 28 January 2015 (footnote 99, *supra*), Section 35, the EUCJ adopted the view that while a private investor could benefit from the preferential forum for consumers in contractual matters, the forum does not apply to a claim based on the liability for the issue prospectuses if there is no direct contractual relationship between the investor and the issuer or such other party as the claim is brought against.

102 BGE 129 III 71 E. 2.2; and Müller, Lipp and Plüss (footnote 12, *supra*), p. 357.

103 Article 42 FINMASA.

104 Article 3 SCC.

105 See Section II.i, *supra*.

Act (FinIA). The proposed acts would replace major portions of the previous regulations and create uniform competitive conditions for financial intermediaries and improve client protection.

The Swiss parliament has been debating the legislative drafts since their publication by the Federal Council in November 2015. On 14 December 2016, the Council of States (upper house) approved the legislative drafts proposed by the Federal Council, subject to certain amendments and clarifications. The National Council (lower house) will debate the legislative drafts presumably during its autumn 2017 session. Both laws should enter into force in 2018, at the earliest.

One of the proposed provisions in the FinSA concerns prospectuses. The FinSA introduces uniform prospectus requirements for all securities that are publicly offered or traded on a trading platform.[106] While under the current legislation the issue prospectus does not have to be reviewed, unlike in the European Union and in the United States, the FinSA requires a review of the prospectus by a FINMA-approved authority with regard to completeness, coherence and comprehensibility.[107]

In addition, the breach of prospectus requirements stipulated by FinSA and the failure to state material information in a prospectus are intended to constitute a crime under the FinSA.[108]

BÄR & KARRER LTD

Brandschenkestrasse 90
8027 Zurich
Switzerland
Tel: +41 58 261 50 00
Fax: +41 58 261 50 01
matthew.reiter @baerkarrer.ch
thomas.reutter@baerkarrer.ch
www.baerkarrer.ch

MATTHEW T REITER

Bär & Karrer Ltd

Matthew Reiter heads Bär & Karrer's litigation practice. He specialises in litigation and arbitration and has extensive experience in a wide range of state court and administrative proceedings (including criminal investigations, white-collar crimes, enforcement proceedings and international judicial assistance) but focuses on the resolution of large domestic and international commercial disputes.

106 Article 37 et seq. E-FinSA.

107 Article 53 Paragraph 1 E-FinSA.

108 Article 119 E-FinSA.

Matthew Reiter has successfully represented clients in numerous domestic and international arbitrations, both in *ad hoc* and institutional proceedings (primarily ICC, ZCC/Swiss Rules), especially relating to joint ventures and shareholders' agreements, large construction contracts, M&A transactions and supply agreements.

Clients of Matthew Reiter include individuals as well as listed and non-listed domestic and foreign companies from various sectors (such as the banking and services industry as well as the pharmaceutical, chemical, energy, automotive, aviation and construction industries).

The Legal 500 2012 recommends Matthew Reiter in dispute resolution matters.

THOMAS U REUTTER

Bär & Karrer Ltd

Thomas U Reutter specialises in capital market and M&A transactions mainly of listed companies. He is regularly retained by issuers and underwriters to advise on IPOs, rights issues, convertible bonds, hybrid capital issues and other capital market transactions. Furthermore, he frequently represents corporate clients in takeover offers and mergers of SIX-listed companies as well as in private M&A transactions. In addition, Thomas U Reutter advises listed companies on corporate and regulatory matters.

He is co-editor of *CapLaw* (*Swiss Capital Markets Law*), author of numerous articles within his fields of specialisation and a frequent speaker at seminars and conferences.