FINANCIAL SERVICES LITIGATION

Switzerland

LEXOLOGY
Getting The Deal Through

Consulting editor
Stewarts

Financial Services Litigation

Consulting editors

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Stewarts

Quick reference guide enabling side-by-side comparison of local insights into nature of claims; specialist courts and procedures; arbitration, alternative dispute resolution and out-of-court settlements; disclosure, data protection and related case management issues; enforcement and remedies; changes in the regulatory landscape since the financial crisis; and recent trends.

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Switzerland

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NATURE OF CLAIMS

Common causes of action

What are the most common causes of action brought against banks and other financial services providers by their customers?

The most common causes of action between customers and banks (and independent wealth managers) relate to breach of contract, mostly for breach of fiduciary duties. Typical disputes relate to mismanagement of the assets or breach of the duty to inform or a duty of care by the services providers further to losses in investments. The parties will in principle rely on the mandate agreement (article 394 et seq of the Swiss Code of Obligations (SCO)), which applies in most transactions between a financial services provider and its customer.

Since the entry into force of the Financial Services Act (FinSA) – a new bill on financial services which was enacted by the Swiss Parliament on 15 June 2018 and entered into force on 1 January 2020 – there is a statutory cause of action against financial services providers regarding the offering of financial instruments. In the same way, the Federal Act on Financial Institutions (FinIA) governs the requirements for acting as a financial institution and provides for statutory rules on the liability of a financial institution if it delegates the performance of a task. As to the liability of financial institutions and their bodies, the FinIA refers to the provision of the SCO.

More broadly, criminal actions may also be brought for various violations of the FinSA and the FinIA.

Law stated - 13 July 2022

Non-contractual duties

In claims for the mis-selling of financial products, what types of non-contractual duties have been recognised by the court? In particular, is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

Under Swiss law, non-contractual duties are set out in the FinSA.

At present, a transitional law regime is in place. Financial services have until 31 December 2021 to comply with the requirements regarding customer segmentation, technical knowledge, code of conduct and provider organisation. From 1 January 2022, service providers will be fully liable under the obligations governing the offering of financial instruments.

In between, some provisions of the Stock Exchange and Securities Dealers Act (SESDA), which was replaced by the FinSA, may still apply until 1 January 2022.

Under the SESDA, article 11 laid down the main duties of financial services providers when offering financial products for sale. According to that provision, financial services providers owe their customers a duty of information, a duty of care and a duty of fairness (or fidelity). Based on this article, the Swiss Federal Supreme Court acknowledged a dedicated liability ground that can be relied upon directly by investors. The Swiss Federal Supreme Court ruled that article 11 of SESDA grounded a dedicated liability ground that customers could rely on directly. As a consequence, the breach of article 11 of SESDA could trigger the liability of financial services providers against their customers.

Furthermore, article 7 et seq of the FinSA provides for a Code of Conduct imposing duties on financial service providers when providing financial services to retail or professional clients (article 4 cum 20 FinSA). Among these duties, the FinSA provides for a duty to provide information (article 8 et seq of the FinSA), a duty to perform an appropriateness or suitability review for financial services that provide investment advice or portfolio management (article 10 et seq

FinSA), a duty to document and render of account (article 15 et seq FinSA), and a duty of transparency and care in client orders (article 17 et seq FinSA).

These provisions will certainly give rise to new case law.

Law stated - 13 July 2022

Statutory liability regime

In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

Title 3 of the FinSA provides for the rules applicable to the offering of financial instruments. These provisions (article 35 et seq FinSA) now require the publication of a prospectus for all equity and debt securities, including derivatives and structured products, subject to the exceptions expressly provided for in the FinSA.

The FinSA introduced a statutory liability regime, the scope of which is limited to violations of all duties relating to the offering of financial instruments in its article 69, according to which any person who fails to exercise due care and thereby furnishes 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 (article 69 (1) FinSA).

With regard to information in summaries, liability is limited to cases where such information is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus (article 69 (2) FinSA).

With regard to false or misleading information on main prospects , liability is limited to cases where such information was provided or distributed against better knowledge or without reference to the uncertainty regarding future developments (article 69 (3) FinSA).

While this was considered at the time of the enactment of the law, the reversal of the burden of proof was finally waived.

According to the legal doctrine, any violation of its obligations by an issuer shall lead to a quasi-systematic sanction.

Furthermore, the FinSA also provides for criminal liability in cases of violation of the code of conduct (article 89 FinSA providing for a fine not exceeding 100,000 Swiss francs), violation of the regulations on prospectuses and key information documents (article 90 FinSA providing for a fine not exceeding 500,000 Swiss francs) and unauthorised offering of financial instruments (article 91 FinSA providing for a fine not exceeding 500,000 Swiss francs).

The FinIA also provides for a liability regime. Article 68 paragraph 1 FinIA provides that the liability of the financial institutions and their bodies is based on the provisions of the SCO. Where a financial institution delegates performance of a task to a third party, it remains liable for any losses caused by the latter unless it proves that it took the due care required in that party’s selection, instruction and monitoring (article 68 paragraph 2 FinIA). Moreover, the fund management company remains liable for the actions of persons to whom it has delegated tasks in accordance with the FinIA as if it had performed those tasks itself (article 68 paragraph 1 FinIA).

There is also criminal liability in cases of violation of professional confidentiality (article 69 FinIA), of the provisions on protection against confusion (article 70 FinIA) and deception and notification duties and of the record-keeping and reporting duties (article 71 FinIA).

Law stated - 13 July 2022

Duty of good faith

Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

Good faith is not only an explicit duty under the mandate agreement (article 394 et seq of the SCO, which applies in most transactions between a financial services provider and its customer) but also a general principle under Swiss law (article 2 of the Swiss Civil Code (SCC)). According to article 2 of the SCC, anyone must act in good faith in any of its relationships. The main duty of the agent under the mandate agreement is to act in the best interest of the principal. Based on this duty, the agent also owes a duty of fidelity to its principal, which encompasses a duty to act in good faith.

Typical claims that would relate to a breach of good faith would rely on breaches related to the information duty or the duty of care of the agent, or both. Duty of fidelity would also generally be at stake, notably where the service provider was selling to customers its products or products that may have been issued by a third party but for which the provider had a particular interest in (eg, retrocessions).

In recent years, the Swiss Federal Supreme Court has restated in the evolution of its case law that this duty of fidelity was core in the mandate (agency) agreement and proved rather strict in its application. A core step in that evolution was the acknowledgement that the receipt by the service provider of any retrocession was owed to the customer and is, therefore, to be explicitly disclosed and agreed upon by the customer. Absent such consent from the customer, the service provider would be in breach of its fiduciary duties towards its principal, and all the retrocessions perceived are due to the customer.

Furthermore, since the entry into force of the FinSA, the principle of good faith is now expressly part of the duty of care in client orders imposed on financial service providers in article 17 FinSA. This provision is intended to safeguard the interests of customers when their orders are processed by the financial services provider.

The Federal Council regulates how the principle of good faith is upheld, specifically regarding the procedures and systems for processing client orders, in article 20 of the Ordinance on Financial Services (FINSO). In particular, this article provides that financial service providers must have in place processes and systems that safeguard the interests and equal treatment of clients (article 20(1)(b) FINSO).

Law stated - 13 July 2022

Fiduciary duties

In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

A financial institution owes fiduciary duties to its customers in any circumstances where it acts as an agent for the principal (see article 398 of the SCO). This entails that in most situations, those duties will apply. While those duties are at stake and will apply in most – if not all – relationships between the service provider and its customer, the exact scope of those duties may vary depending on the exact role of the provider. By way of example, the duty of care and, in particular, the information duty of a depositary bank will be more limited than that of the bank acting as an adviser of its customer.

Law stated - 13 July 2022

Master agreements

How are standard form master agreements for particular financial transactions treated?

Standard form agreements are common practice in the Swiss banking area. They are admitted and recognised by case law, which has developed several principles to protect the customer. Generally, the attention of the customer must be drawn to any unexpected or unusual provision (which obviously may trigger some difficulties in practice). These atypical clauses (which may have become quite typical but which entail any limitation in the liability of the service provider or encompass any element that may be adversary to the usual position or rights of the customer) would be highlighted (bolded) in the text. The financial institution shall also make sure that any standard documentation (eg, general terms and conditions, waiver form and, obviously, contracts) will be duly signed by the customer.

Article 8 of the Unfair Competition Act (UCA) sets forth a general principle applying in contracts with the customer. According to that provision, anyone is deemed to act unfairly (and is, therefore, subject to the sanctions set forth under the UCA) where, in a manner contrary to good faith, it uses general terms and conditions that create a considerable and unjustifiable imbalance between contractual rights and obligations to the disadvantage of consumers.

When reviewing any disputed clause, which generally boils down to an interpretation of the same, the judge shall apply the general principles of contractual interpretation, including the *contra stipulatorem* principle.

Law stated - 13 July 2022

Limiting liability

Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

Financial institutions can limit their liability to some extent, which they generally do. However, Swiss law does not allow them to waive their entire liability.

Under article 100(1) of the SCO, which is a mandatory provision, liability cannot be excluded for fraudulent intent or gross negligence. The Swiss Supreme Court also held that article 100(2) of the SCO applies in the banking industry. According to that provision, the court has the discretion to disregard any limitation of liability for minor negligence clause that would have been entered into by anticipation.

In financial services, article 399 of the SCO is also of core relevance. According to that provision, an agent remains liable for any act performed by a third party in the delegation of its duties. The agent's liability can, however, be limited to its sole duty of care in selecting the third party provided that the investor or customer agreed on the delegation (which is generally included in the general business terms and conditions).

Law stated - 13 July 2022

Freedom to contact

What other restrictions apply to the freedom of financial institutions to contract?

Freedom of contract is a general principle that is at the very core of the Swiss law of obligations.

The main limit to such freedom lies in the excessive undertaking set forth in article 27 of the SCC. In practice, however, this is not of much relevance in the financial services industry. The same is true in respect of penalty clauses. Such clauses are subject to specific requirements under Swiss law, but they are rarely used in contracts between financial institutions and customers (except possibly in credit or mortgage agreements where the penalty would generally correspond to the damage incurred by the financial institution in cases of early termination).

Law stated - 13 July 2022

Litigation remedies

What remedies are available in financial services litigation?

Most types of remedies would be available under Swiss law, such as specific performance, rescission, damages and injunctive or declaratory relief. In financial services litigation, however, the most common remedy remains claims for damages. Under Swiss law, compensation can only be sought for actually incurred damages. Punitive damages are not available. Future or hypothetical damages cannot be indemnified either.

The claimant must ensure to seek payment of damages in the currency applying to the claim. Failure to seek a relief in the accurate currency would entail the claim being dismissed, irrespective of any damages having effectively been suffered.

Law stated - 13 July 2022

Limitation defences

Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

Time limitation is a delicate issue under Swiss law, especially in the field of financial services. This is mainly because, as with other contractual relationships, financial services generally encompass steady actions from one party or the other (eg, successive transfers or orders to buy or sell financial products). Also, the contractual relationship may last when there is no longer any deposit, be it on cash accounts or the client’s portfolio.

They are two notable precedents that paved the way for important claims in that field. First, the Swiss Federal Supreme Court held that the statute of limitation for the claim for restitution of money unduly transferred to the bank does not start running as long as the account relationship still exists. In other words, the statute of limitation does not commence upon the – disputed – transfer of assets out of the customer’s account.

Finally, in recent years, the industry underwent a revolution, known as the retrocessions saga. The landmark Swiss Federal Supreme Court case of 2006 confirmed and further specified since then that any retrocession perceived by a bank from fund providers or other distributors of financial products acquired on behalf of a client was owed to the customer. This decision also applied retroactively, but it was debated for some years which limitation period was to apply to those claims, that is, five or 10 years. In a further landmark case, the Swiss Federal Supreme Court held that this claim for reimbursement of retrocessions would only be time-barred after 10 years, thereby choosing the longer limitation period, which is the same duration that applies to contractual claims between a financial institution and its customer.

Law stated - 13 July 2022

PROCEDURE

Specialist courts

Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

The organisation of Swiss courts differs from one canton to the other since it is a cantonal prerogative to organise its judiciary, exclusive of the Swiss Federal Supreme Court, which is the highest court in Switzerland, ruling as the last and final instance further to, generally, two cantonal instances.

The Canton of Zurich has established a commercial court that rules on banking matters at the cantonal level. However, in the Canton of Geneva, as in most other cantons, there is no dedicated court for financial services or general commercial matters. The judges are, therefore, not specialists in financial matters, but they are usually experienced in these kinds of disputes in Geneva and Zurich, where most banks are seated and, therefore, where most financial disputes take place.

Law stated - 13 July 2022

Procedural rules

Do any specific procedural rules apply to financial services litigation?

There is no specific procedural rule that applies to financial services litigation. These disputes are subject to the same general procedural rules as any other disputes.

The Financial Services Act (FinSA), however, entails a few additional procedural provisions, mainly to urge the parties to refer to mediation (see article 74 et seq FinSA).

Law stated - 13 July 2022

Arbitration

May parties agree to submit financial services disputes to arbitration?

Under the Swiss Arbitration Act, which is set forth under Chapter 12 of the Swiss Private International Law Act (PILA), any dispute that is patrimonial can be subject to arbitration (article 177 PILA). An arbitration agreement, however, must be validly entered into and be made in writing by the parties (article 178 PILA).

From a formal standpoint, any financial services disputes may be related to arbitration. However, despite Switzerland being well known as an international arbitration hub, such disputes are rarely subject to arbitration in practice.

So far, the Swiss banking industry has not demonstrated any significant interest in arbitration. The first FinSA bill provided for specific arbitration mechanisms, but these were rejected by the industry during the consultation process. Although enthusiasm has so far proven quite limited, this may change in the future.

Law stated - 13 July 2022

Out-of-court settlements

Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

There is no such duty in Switzerland to refer to mediation before litigation. However, the new Swiss Civil Procedure Code (SCPC) that entered into force in 2011 requires that any claim be first submitted to conciliation. In short, the first step to file a claim before a Swiss court is to file a request for conciliation, which will be attempted by the court (article 197 SCPC). This step is the first action in the proceedings and already creates the lis pendens.

Besides this, the customer may also refer the dispute to the Swiss banking ombudsman. The latter acts as a mediator in banking disputes and can be used before starting any litigation. However, this is not compulsory. The services of the ombudsman are free of charge. He or she will make a proposal to the parties, who are free to accept or decline it. Their rights to then file the claim before courts remain entirely unaffected.

Law stated - 13 July 2022

Pre-action considerations

Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

There is no such requirement by statute. However, any specific mechanisms may be agreed upon contractually by the parties. Should this be the case, the parties shall then comply with them before formally starting litigation, although there is so far only limited case law on the compulsory nature of those mechanisms.

Law stated - 13 July 2022

Unilateral jurisdiction clauses

Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral jurisdiction clauses are generally admitted under Swiss law provided that they have been validly entered into. However, consumer protection regulation may limit such freedom. In particular, the Lugano Convention (LC), applying before the Swiss courts when one of the parties is residing in a member state (which is always the case when one of the litigants is a Swiss financial institution), would limit such freedom as the customer would still be entitled to bring the claim in a jurisdiction commanded by article 16 of the LC, irrespective of the jurisdiction clause agreed upon in the contract. Indeed, article 17 of the LC prevents any derogating choice of law made before the dispute.

Law stated - 13 July 2022

DISCLOSURE

Disclosure obligations

What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

Swiss law does not encompass any disclosure in the sense known in common law jurisdictions. There is, therefore, no broad or fishing disclosure that can be applied in Swiss proceedings. However, this does not mean that no disclosure can be achieved at all. Indeed, the parties still have some procedural means to request specific documents from the opposing or third parties. This request must, however, be made in a timely manner and must be very specific. The requesting party will then have to be in a position to describe precisely the type of document that is sought, most likely its date, and must establish that the document:

- exists;
- is in the hands of the required party; and
- is necessary or relevant to the outcome of the case.

Concerning financial services disputes, banking secrecy (article 47 of the Banking Act (BA)), is of particular relevance.

It is, however, not a rampart that would prevent any disclosure of any document by a bank. First, banking secrecy cannot be opposed in criminal proceedings, which supersedes the duty to keep secret any banking information related to the client. Any breach of such duty under article 47 of the BA is a criminal offence.

In civil proceedings, banking secrecy can be invoked as grounds for refusal to give testimony or to provide information or documents. Such grounds shall, however, only be deemed legitimate provided that the secret holder can render likely that the interest in keeping the secret shall prevail over the interest in the establishment of the truth (article 163 (2) of the Swiss Civil Procedural Code (SCPC)). Absent such prevailing interest, the required party shall have no legitimate grounds to refuse to collaborate and shall then give evidence. In practice, it is very unlikely that keeping the secret shall prevail on the establishment of truth, and such a defence is, therefore, rarely admitted.

The taking of evidence on Swiss soil is also subject to blocking statutes. Typically, when documents are sought from a bank located on Swiss soil, any request to provide evidence in foreign proceedings, in which the bank is not a party, shall be made through the mutual assistance channel. Any request that would be directed by a party or its representative directly on Swiss soil without relying on the official channel would constitute a criminal offence under Swiss law (article 271 of the Swiss Civil Code). As a consequence, anyone who takes any step, serving a Swiss-based entity or individual on Swiss soil with any disclosure request, will be exposed to prosecution and criminal sanctions under Swiss law.

Any transfer of data must also comply with data protection regulations, which may, therefore, prevent the transfer of data related to employees or clients.

Law stated - 13 July 2022

Protecting confidentiality

Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

When the client is a party to the proceedings, it should generally not be in a position to oppose any disclosure of documents related to itself.

When disclosure is required in respect of third parties to the proceedings, the bank can rely on banking secrecy and use the grounds set forth under article 163 (2) of the SCPC to refuse to disclose that information. A ground for refusal is unlikely to be admitted unless it can be easily demonstrated that this information would be irrelevant to the outcome of the case.

Law stated - 13 July 2022

Disclosure of personal data

May private parties request disclosure of personal data held by financial services institutions?

The parties can request the disclosure of their personal data at any time, even outside any court litigation. This has been confirmed by the Swiss Federal Supreme Court on various occasions, and article 8 of the Data Protection Action now also grounds a further means for customers to get access to information related to their files. This provision is a new course of action to gather information by the customer, which before relied only on the duty to account that the agent owed its principal under article 400 of the Swiss Code of Obligations.

Law stated - 13 July 2022

Data protection

What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

Full disclosure is unknown as such under Swiss law. For this reason, there is no reliance on electronic disclosure in Swiss proceedings as there are no discovery proceedings. As a consequence, the developments that occurred in the common law jurisdictions in respect of the admissibility of e-disclosure and the modalities to perform it have not occurred in Switzerland, where such issues are moot.

Law stated - 13 July 2022

INTERACTION WITH REGULATORY REGIME

Authority powers

What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

The main regulatory authority in Switzerland is the Swiss Financial Market Supervisory Authority (FINMA), whose main task is to supervise financial institutions, banks, insurance companies, stock exchanges, securities dealers and collective investment schemes. FINMA is, therefore, also in charge of enforcement proceedings against the supervised entities when regulatory breaches are suspected. To perform its duties, FINMA is empowered with various tools and can notably:

- request that information be provided;
- open formal proceedings against the supervised entities;
- appoint an independent and suitably qualified person to investigate circumstances under review; and
- issue sanctions against the supervised entities if the breaches are confirmed.

Although FINMA leads and conducts its enforcement proceedings, it does not bring civil proceedings before the civil court but may report any suspicion of criminal offences to the Public Prosecutor’s Office. The public prosecutor is then entitled to investigate and prosecute any criminal offence. Administrative enforcement investigated by FINMA and a criminal investigation by the Public Prosecutor’s Office can be conducted in parallel.

Law stated - 13 July 2022

Disclosure restrictions on communications

Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

Mutual assistance between administrative and criminal authorities is acknowledged in the Swiss regulations. As a consequence, any communication and documents transferred from the financial institutions to the regulator are not strictly privileged as such as the regulator may provide it to the Public Prosecutor’s Office. The Swiss Federal Supreme Court also ruled that any internal investigation conducted by the financial institution, absent any formal enforcement proceedings, was also to be disclosed to the public prosecutor by the financial institution itself upon request of the criminal authorities, without the entity being in a position to rely on any privilege in respect of such a report. The outcome is highly criticised among Swiss scholars.

Finally, privilege fully applies to private parties. While an investor can report breaches to the regulator, it will not be given any status in the enforcement proceedings and, therefore, will not be granted any access to the regulator's investigation file (unlike in criminal proceedings, should the investor be a private plaintiff). Consequently, a report to the regulator cannot be used as a tactic by a claimant to gather information on the financial institution.

Law stated - 13 July 2022

Private claims

May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Since the entry into force of article 69 of the Financial Services Act (FinSA), an investor who acquires a product based on incorrect, misleading or inaccurate information or information that does not comply with the legal requirement may claim the resultant loss. This article is indeed deemed pure private law.

For the surplus, private parties cannot bring court claims against financial institutions directly for regulatory breaches. The civil court would not have jurisdiction to hear such a claim. Further, a private party would have no standing to sue in such a claim. However, a private party may report a regulatory breach to the regulator. The role of the private party would, moreover, be limited to that initial reporting. It would then have no further role in the enforcement proceedings against the supervising authority and would, in particular, not become a party to the investigation proceedings.

Law stated - 13 July 2022

In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

No, the regulator is under no such duty to disclose any ongoing or past investigation against a supervised entity. It is only under specific circumstances that FINMA may decide to report on a specific ongoing investigation should a particular public interest command for such information to be disclosed. In particular, FINMA publishes a warning list of the entities and individuals that may be carrying out unauthorised services while not being supervised by FINMA.

Law stated - 13 July 2022

Enforcement

Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

Generally, the review is conducted by FINMA or a delegated investigating expert appointed by it. Outside any initiated formal enforcement proceedings, it may, however, be the case that some review may have been undertaken already by private parties; in particular, by the institution itself. In these cases, FINMA is likely to request to review the investigation and may use the outcome of the same. The financial institution and FINMA may agree on a specific review to be conducted by private parties, be it the institution itself or an appointed expert or investigator. In those cases, FINMA will then assess the outcome of the conducted review and then decide whether formal enforcement proceedings will be started.

Law stated - 13 July 2022

Changes to the landscape

Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

The main changes in the landscape lie in the increasing and constantly evolving regulations. Compliance duties have extensively increased, too. In Switzerland, the entire regulation of financial services has been completely reviewed and restructured in two new bills that entered into force on 1 January 2020, FinSA and the Financial Institutions Act, the main purpose of which is to strengthen investor and customer protection.

Law stated - 13 July 2022

Complaints procedure

Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

There is no duty for any party to first attempt any out-of-court settlement process before starting litigation. However, mediation is urged, and specific regulation in this respect is specifically outlined in article 74 et seq FinSA, but will remain an option and will not become compulsory.

There is no dedicated complaint procedure that a party may or must consider before starting court proceedings. However, a private party may first seek the services of the Swiss Banking Ombudsman to attempt to solve the dispute outside of court.

Law stated - 13 July 2022

Recovery of assets

Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

Under Swiss law, there is a specific depositor protection mechanism for clients of banks and securities dealers. This is a three-tiered system to protect clients' deposits to the best possible extent. As a first step, upon the bankruptcy of a financial institution, clients' cash deposits will be immediately reimbursed to clients up to 100,000 Swiss francs per client, provided that the institution has sufficient liquid assets (first tier). In the absence of sufficient liquid assets, the amount to the above-mentioned limit will be paid out by the depositor protection scheme (second tier). Also, when a financial institution is declared bankrupt, additional deposits up to 100,000 Swiss francs are treated preferentially and secured to provide extra protection. Those deposits are ranked under the second creditor class and are, therefore, paid out before the claims of third-class creditors (third tier).

The deposits over the above thresholds do not qualify for any dedicated protection and will, therefore, be recovered through usual bankruptcy proceedings as liquidation dividends if possible.

Finally, unlike deposits, custody assets (eg, shares and fund units) belong to the client and are, therefore, distracted from the bankruptcy estate to be transferred back to the client. The value of the investor's portfolio is irrelevant to assess its benefits under the depositor protection scheme, which applies on top for cash deposits.

Law stated - 13 July 2022

UPDATE AND TRENDS

Challenges and trends

What are the principal challenges currently facing the financial services litigation landscape in 2022? What trends are apparent in the nature and extent of financial services litigation? Are there any other noteworthy features that are specific to financial services litigation in your jurisdiction?

There are no major updates planned other than the transitional period regarding the deployment of the effects of the Financial Services Act and the Federal Act on Financial Institutions.

Law stated - 13 July 2022

Jurisdictions

Australia	Gilbert + Tobin
Greece	Souriadakis Tsibris
Hong Kong	RPC
South Korea	Kim & Chang
Switzerland	Bär & Karrer
United Kingdom	Stewarts