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The New Swiss Financial Market Legislation – New Momentum for ADR?

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On January 1, 2020, the new Financial Services Act (FinSA), introducing new regulations for financial services, and the Financial Institutions Act (FinIA), harmonising the authorisation rules for financial services providers, have entered into force in Switzerland. The acts are aimed at better protecting the interest of clients and avoiding unequal competitive conditions amongst the various categories of financial services providers.

Under the FinIA, managers of assets of occupational benefits schemes, managers of individual client assets as well as trustees are now also being placed under the prudential supervision of the competent authorities. By adopting the FinSA, the Swiss legislator sought to strengthen the position of clients by improving their information rights in various respects. For example, financial services providers are now explicitly required by statutory law to give clients appropriate explanations and advice with regard to the offered products. In addition, the FinSA provides for uniform rules regarding the financial services providers' prospectus duty and their obligation to make available a key information document to their clients.

In the wake of the 2008 financial crisis, it was widely felt that under the former system it was overly burdensome for retail customers to enforce their claims against financial institutions.

One of the objectives of FinSA was, therefore, to strengthen the position of such customers regarding activities of financial services providers. In addition to imposing various obligations on financial services providers with respect to information, organisation and documentation, the preliminary draft of FinSA, therefore, also included various proposals to facilitate the enforcement of investors' claims on a procedural level.

Pursuant to art. 3(e) FinSA, a financial services provider is any person who provides financial services on a professional basis in Switzerland or for clients in Switzerland. Financial services falling within the scope of FinSA are the acquisition or disposal of financial instruments, the receipt and transmission of orders relating to financial instruments, the administration of assets (i.e. portfolio management), the provision of personal recommendations on transactions with financial instruments (i.e. investment advice), and the granting of loans to finance transactions with financial instruments (art. 3(d) FinSA).

Initial Proposals to Facilitate Legal Action Against Financial Institutions

The preliminary draft of FinSA provided for the establishment of a permanent arbitral tribunal that would have the final and binding say on financial services disputes. The preliminary draft further envisaged that bank customers could have their claims arbitrated at low cost or even free of charge. Alternatively, it was proposed that the legal fees of bank customers would be paid from a fund financed by the industry, provided the customers' claims had some prospect of success. However, following heavy criticism in the legislative consultation process, none of these proposals made it into law. It is worth noting, however, that certain cost alleviations for claimant bank customers are currently being considered in the context of a review of the Swiss Civil Procedure Code.

The idea of reversing the burden of proof in the financial services providers' duty of care was also rejected during the legislative consultation process for FinSA. Under this concept, the investor suing the financial institution would no longer have been required to prove a breach of the latter's duties of care. Rather, the onus would have been on the financial institution to prove that it acted in compliance with its duties. The final version of FinSA does no longer make any reference to the concept of reversing the burden of proof.

The preliminary draft of FinSA also proposed a class action and a group settlement procedure. These instruments of collective redress were primarily aimed at ensuring access to justice for bank customers with relatively small claims. The idea was finally also left out of the final version of FinSA. Similar concepts are, however, again being discussed in the context of the ongoing review of the Swiss Civil Procedure Code.

The Only Leftover from Previous Initiatives: Strengthening the Banking Ombudsman

The only proposal included in the preliminary draft of FinSA that was finally enacted, relates to the strengthening of the Banking Ombudsman. The office of the Swiss Banking Association's Ombudsman was established in 1993. Under FinSA, several new Ombudsman's offices will come into operation following approval from the Swiss Federal Department of Finance (art. 77 FinSA). The Banking Ombudsman can be seized in relation to all sorts of disputes relating to the provision of financial services, irrespective of whether the client is private, professional or institutional. FinSA aims to enhance the role of the Banking Ombudsman's system in the financial industry by introducing various further features:

Both FinSA and FinIA provide that all financial services providers are obliged to join one of the approved Ombudsman's offices (art. 77 FinSA and art. 16(1) FinIA). Financial institutions will also be required to fund the Banking Ombudsman's office

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to which they are affiliated (art. 80 FinSA). For this reason, some commentators believe that the Banking Ombudsmen may not be sufficiently independent from the industry. However, Banking Ombudsmen are required to freely assess the cases submitted to them and to process them without receiving any instructions from third parties (art. 75(6) FinSA). In addition, their activities are supervised by the Swiss Federal Department of Finance. Hence, there seem to be adequate measures in place to ensure that Banking Ombudsmen act independently under FinSA.

Financial services providers, as opposed to bank customers, are further obliged under FinSA to participate in proceedings initiated against them before the Banking Ombudsman (art. 78 FinSA). This obligation includes the duty to appear before the Banking Ombudsman and to file comments on the matter within the applicable time frames. Under FinSA, the proceedings before the Banking Ombudsman continue to be of conciliatory nature only. The Banking Ombudsman is not equipped with any decision-making power, but is expected to submit non-binding draft proposals for an amicable settlement of the parties' disputes.

This objective is in line with the purpose behind the largely mandatory conciliation proceedings before the Justice of Peace (cf. art. 197 et seqq. of the Swiss Civil Procedure Code). Under FinSA, the claimant party may, therefore, choose not to initiate conciliation proceedings if it has gone through the process before the Banking Ombudsman (art. 76(2) FinSA). In this context, it should be noted that, contrary to what is the case with the filing of a conciliation request (cf. art. 135(2) of the Swiss Code of Obligations), the initiation of proceedings before the Banking Ombudsman does *not* interrupt the statute of limitation.

The strengthening of the Banking Ombudsman may help to further promote that office as an effective and cost-efficient dispute resolution body in the financial industry. This would reduce the case load of the Swiss state courts.

New Momentum for Arbitration in the Financial Industry?

The same effect would be achieved if financial disputes were more frequently referred to arbitration instead of state court litigation. For certain types of financial disputes, arbitral proceedings may, indeed, offer significant benefits.

Banks and their clients tend to prefer not to disclose their business relationship, or to see their disputes being followed by the public. The confidentiality of arbitral proceedings may address these concerns. The flexibility of the arbitration process is a further advantage. It includes the possibility for the parties to appoint arbitrators with sector-specific expertise or to select the language of the arbitration. Finally, the facilitated enforceability of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is often regarded as another key advantage of arbitration in cross-border banking disputes.

Although the establishment of a permanent arbitral tribunal was rejected by the Swiss legislator, FinSA nevertheless repeatedly refers to the competence of state courts *or* arbitral tribunals for the resolution of financial disputes (cf. arts. 75(4)(d), 76(3), 87(3) FinSA). The financial services provider's duty under FinSA to categorise its customers into private, professional and institutional clients (art. 4 FinSA) seems to further facilitate the systematic inclusion of arbitration clauses into contracts concluded with certain types of bank customers. It remains to be seen whether these features of FinSA will lead to banks considering arbitration more frequently as an alternative to state court litigation.

In March 2019, views on this topic were exchanged at the Zurich conference "Arbitrating financial disputes - are there tangible benefits?" which was co-organised by CMS and the Swiss Chambers' Arbitration Institution (SCAI). In-house counsel attending the conference considered it rather unlikely that FinSA alone would add significant momentum to the use of arbitration in the financial industry. However, various participants pointed out that raising awareness of the tangible benefits of arbitration in the field of (cross-border) financial disputes would probably have such an effect.

Indeed, according to the 2018 International Arbitration Survey, recently published by the Queen Mary University of London, amongst financial institutions the interest in arbitration now appears to be higher than ever - 56% of respondents expressed the view that the use of international arbitration for cross-border financial disputes would increase in the years to come.

Outlook

Given its few and modest modifications, FinSA will not revolutionize the dispute resolution regime currently in place in Switzerland. Rather, it is to be expected that Swiss banks and their customers will continue to appreciate the efficient and high quality services provided by the (commercial) state courts.

This preference may be further reinforced with the contemplated introduction of a Zurich International Commercial Court. The project has been launched by members of the Zurich bar, and it aims to establish an adjudicative body composed of experts familiar with the particularities of international trade in different industries. In addition, the intention is that proceedings before the Zurich International Commercial Court would be conducted in English.

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Against this background, it is unlikely that alternative dispute resolution will meaningfully compete with Swiss state court litigation in the financial industry in the near future. However, in certain cases, alternative approaches may better accommodate the needs of the parties. If awareness of such benefits is raised, alternatives to state court litigation will most likely gain further ground as viable niche offerings for the resolution of financial disputes in Switzerland.

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