SWITZERLAND*

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For information on elements of Switzerland's labor and employment laws not discussed below, see *International Labor and Employment Laws, Volume IIA*.[1]

[1]William L. Keller & Timothy J. Darby, eds., 3d ed. 2008.

I. RESTRICTIVE COVENANTS

A. Governing Legislation

Employment law in Switzerland is based mainly on the following sources, set out in order of their priority:

- The Federal Constitution;
- Public law, particularly the Federal Act on Work in Industry, Crafts and Commerce (Labour Act, LA), and five ordinances issued under the LA regulating work, health and safety conditions;
- Civil law, particularly the Swiss Code of Obligations (CO);
- Collective bargaining agreements, if applicable;
- Individual employment agreements; and
- Usage, custom, doctrine, and case law.

The framework for employment contracts including restrictions is set forth in the CO, which applies to all of Switzerland. However, other laws, such as the Federal Act against Unfair Competition (UCA), also play an important role.

The CO provides a number of restrictions on the extent and enforceability of restrictive covenants, but also provides some statutory restrictive covenants concerning each individual employee. However, the law generally favors employees and makes sure that restrictive covenants do not restrict employees from changing to other employers. This is also in line with the Federal Constitution, which sets forth the principle of unrestricted competition. Only unfair competition is banned.

Switzerland is not party to any treaty or convention that provides specific rules for restrictive covenants in employment agreements.

Generally, the collective bargaining agreements that apply to either specific industries or a specific company do not address restrictive covenants, but rather leave this to individual employment agreements. However, there are sometimes limitations with regard to restrictive covenants.

The CO provides some very general rules. Hence, case law is the most important factor for determining what kind of restrictive

covenants are actually valid and enforceable. For instance, case law exempts some professions from specific restrictive covenants. Most importantly, a general post-contractual noncompetition covenant cannot be imposed on employees working in traditional academic professions (e.g., lawyers, doctors).

A further restriction is provided by the Federal Act on Personnel Recruitment and Posting of Employees. According to this act, an employee employed by an agency who is posted or leased to a company cannot be restricted from working for such company after the end of the employment agreement with the agency.

B. Type and Scope of Restriction

1. Noncompetition

During employment, employees are bound by the duty of loyalty (see II.A. below). Consequently, employees may not compete against their employer. However, the only remedies employers have—if no additional remedies are stipulated in the employment agreement—are to terminate the employment and to claim damages, unless the competitive behavior also qualifies as unfair competition under the UCA or constitutes a criminal offense.

According to Article 340 et al. of the CO, an employee may enter into an obligation towards the employer to refrain from any competitive activity after termination of the employment relationship. A post-termination noncompetition clause is binding only if the employment relationship gives the employee access to customer data, manufacturing secrets, or business secrets, and if the use of such knowledge could significantly damage the employer. The noncompetition clause has to be in written form (noncompetition clauses in general employment conditions are therefore not enforceable) and must be reasonably limited in terms of geographic market, time, and products/services in order to preclude an unreasonable impairment of the employee's economic prospects. The maximum duration of a post-termination noncompetition clause is three years. A judge may limit an excessive prohibition (blue pencil modifications, see IV.H.2. below) against competition, whereas due consideration to the employer's contribution, if any, must be

given. A prohibition of competition lapses if the employer no longer has a significant interest in upholding the prohibition.

Courts have a tendency to limit agreed prohibitions with regard to subject (products, services), place (market), and time, particularly if they are drafted as "catch-all" clauses. Hence, it is very important to draft a noncompete in a way that protects the employer's legitimate business interests, but at the same time allows the employee to continue a career in the market. Generally, a noncompetition clause should cover only the main products or services for which the employee was responsible and only the main geographic markets in which such products and services were sold. Furthermore, a noncompetition period should be only as long as the employer needs to reestablish a customer relationship with a successor of the exiting employee.

Although case law does not openly address this, courts tend to uphold restrictions on managers more than on normal employees. Generally speaking, however, the requirements for the validity of post-contractual noncompetition covenants are not met for most normal employees except for sales personnel that have a direct customer relationship.

The law does not require a consideration for the post-termination noncompetition covenant. However, courts are generally more reluctant to restrict agreed prohibitions where the employee receives consideration.

In the event of a termination of employment by an employer, no noncompetition covenant is possible unless the employer had a legitimate reason to dismiss the employee. Hence, general reasons, such as an economic reason, are not sufficient. It is really necessary that an employee has breached an obligation under the employment agreement.

Further, the remedy of specific performance requires an express written agreement. Without including such a specific enforcement clause, the employer can claim only damages, but not compliance with the noncompetition covenant. In practice, the burden of proof for damages requires real factual evidence of damage, which makes it very difficult for an employer to claim damages. Hence, without an agreed penalty, a noncompetition undertaking is rather toothless. Consequently, it is very important

to define an adequate penalty for breach, and the courts tend to reduce stipulated penalties. Penalties are quite often based on the duration of noncompliance, for example, on a daily, weekly, or monthly basis.

Competing with a former employer is not prohibited under the UCA. Hence, any action under the UCA against a former employee or the new employer is possible only if such competition is based on unfair means, for example, if the former employee or the new employer uses confidential data or trade secrets or is really copying the business model or the work results of the former employer.

2. Nonsolicitation of Clients and Customers

During employment, the duty of loyalty does not allow employees to start soliciting clients and customers, even if a notice of termination has been issued and the notice period is running.

According to Swiss case law, a specific post-contractual nonsolicitation covenant relating to clients and customers is subject to the same restrictions as a general post-contractual noncompetition covenant. Consequently, such a covenant has to fulfil all requirements outlined in I.B.1. above.

Generally speaking, it is very difficult to prohibit an employee from soliciting any clients and customers of an employer because in most cases the damage potential is not high enough. However, a nonsolicitation of clients covenant is often valid (i) if the employee had access either to them or to their customer data or (ii) if such clients were clients/customers for products and services for which the employee was responsible.

Such a nonsolicitation covenant is valid even for customers and clients that were prior customers or clients of the employee when he or she joined the employer, because they become—from a legal perspective—clients and customers of the employer. However, case law makes a very difficult distinction with regard to the reasons why customers and clients do business with enterprises or organizations. If a client or customer does business with an employer solely because of very specific knowledge or specific capabilities of an individual employee (e.g., lawyers, doctors), then a nonsolicitation covenant can be void. However, it is open whether

such capabilities are actually sufficient with regard to relationship managers in private banks. At least for clients that were already with the relationship manager prior to the employment, there is some supporting case law that would prohibit the employer from restricting employees from taking along such clients when they leave.

3. Nonsolicitation of Employees

During employment, the duty of loyalty does not allow employees to solicit employees. For the time after employment, the question arises whether nonsolicitation covenants are subject to the same restrictions as noncompetition covenants. If this were the case, as argued by some scholars, restrictions would in most cases not be enforceable, because there is no direct competition on the end market for the products and services of the employer. For instance, case law does not allow a restriction on working for a supplier or on soliciting suppliers, because this is not deemed competition with the products of the employer, which, in principle, supports this argument.

However, the majority of scholars are of the opinion that nonsolicitation covenants regarding employees are not subject to the same restrictions as general post-contractual noncompetition covenants because such covenants do not restrict employees in their professional development. This position is also supported by case law. However, the restrictions have to be adequate to protect the employers' legitimate interests because excessive covenants would constitute a breach of employees' personal rights.

Considering this, an employee can be prohibited from soliciting other employees. However, it seems doubtful whether anything other than active solicitation can be prohibited. Entering into employment contracts with people who apply for employment in response to public job advertisements in most cases cannot be prohibited. Furthermore, it is doubtful whether restrictions with regard to employees who did not have direct contact with the former employee can be imposed at all.

The UCA generally allows solicitation of employees as long as the solicitation is not based on unfair means or behavior. One important provision is Article 4 of the UCA, which prohibits the

enticement of an employee to breach his or her employment contract. This is the case where a competitor asks an employee to provide client lists or other confidential information.

4. Confidentiality and Trade Secrets

Article 321a(4) of the CO prohibits employees from disclosing or making use of confidential information or trade secrets. This prohibition remains valid even after the end of employment as long as the employer has a valid interest in the confidentiality of such information.

Confidential information is not defined by the CO. Case law defines such information as information that (i) is known only to a limited group of persons, (ii) is not publicly available and cannot be retrieved by general research, (iii) with regard to which the employer has a legitimate interest in keeping it confidential and (iv) with regard to which a third party can easily recognize that the employer wants to keep it confidential.

The confidentiality of production and business secrets is also protected by Article 162 of the Criminal Act. Furthermore, the espionage of such secrets for foreign governments or organizations or private companies is also subject to criminal sanctions under Article 273 of the Criminal Act. Moreover, professional secrets (e.g., those of lawyers or doctors) are protected by Article 321 of the Criminal Act.

The use of confidential information and trade secrets can also qualify as unfair competition under the UCA, particularly if the information is used by third parties.

Employers often set up specific confidentiality covenants and try to extend the confidential status to a wide range of information. However, courts will apply their own test in order to determine whether or not information is confidential. A listing of categories of information helps to convince courts that the employee was actually aware that the information was very important for the employer. If definitions in employment agreements are too broad, however, this can prove to be counterproductive.

Moreover, confidentiality covenants quite often constitute a hidden noncompetition covenant because they are so strict that employees are prohibited from working in a competing environ-

ment. Therefore, the courts apply the same restriction to such covenants as to noncompetition covenants.

Banking secrets are specially protected by banking laws. Consequently, a breach can result also in sanctions imposed by the supervisory authority. For instance, the supervising authority can even issue industry bans if employees breach the banking secrecy; such bans prohibit employees from continuing to work in the banking industry.

a. Misappropriation, Theft, and Misuse

The qualification of trade secrets is defined by the relevant statute (CO, UCA, Criminal Law, Banking Law, etc.) and varies from statute to statute. Although the definitions are very similar, there are still differences in the qualifications because the purpose of the different laws is not exactly the same. For instance, a trade secret is more narrowly defined in the Criminal Act than in the CO.

Generally, except with regard to immediate injunctive relief, all kinds of evidence are admissible (e.g., computer data, business information, financial information, pricing policies, pricing calculations, witness statements, and expert opinions). With regard to evidence admissible in summary proceedings for immediate injunctive relief, the rules concerning evidence depend on the competent court. However, often only evidence that is readily available can be used. Hence, witnesses will not be heard.

Very often theft can only be evidenced by traces left on computer equipment or in emails. However, monitoring and review of such data are subject to stringent regulations (see I.B.4.c. below).

As outlined above, sanctions under Article 162 of the Criminal Act for a breach of production and trade secrets for the offender's own use or use by a third party can be imprisonment of up to three years or a fine. Consequently, theft alone (without use) may qualify as theft, but not as a breach of Article 162 of the Criminal Act. The definition of production and trade secrets under the Criminal Act is very narrow. In addition to the definition used in the CO, the Criminal Act requires that the production or trade secret play a role in the success of the company and have real market value. A breach of bank secrecy is also a criminal act, based on special legislation.

According to Article 6 of the UCA, a breach of production and trade secrets for the offender's own use or use by a third party also constitutes unfair competition. However, the UCA requires that such production and trade secrets were illegally acquired. Hence, if the employee does not take physical data with him or her, production and trade secrets are not illegally acquired. However, even if information is legally acquired (e.g., the mere knowledge of very important information), the use of it can be a breach of the general rule of unfair competition, under Article 2 of the UCA, if the information is used in a very systematic and unfair way.

b. Doctrine of Inevitable Disclosure[2]

There is no strict doctrine of inevitable disclosure under Swiss law. An employee generally has the right to make use of trained skills and knowledge even if learned in a specific job. Without an express covenant in the employment agreement, an employee has the right to work for a direct competitor and is bound only by the statutory and contractual confidentiality obligations. In court, the former employer always has to show evidence that an employee is actually in breach of his confidentiality obligations, and strict evidence will be required.

c. Employer Monitoring and Employee Privacy Rights

The Working Act prohibits the use of control and monitoring devices for the purpose of monitoring the behavior of employees at the workplace, but allows the use of control and monitoring devices for other purposes, if necessary, provided the health and liberty of the employees is not compromised. For instance, CCTV is allowed in sales shops, but may not be positioned in a way that monitors an employee all the time.

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[2]The doctrine of inevitable disclosure, recognized in some jurisdictions, allows former employers to argue that the court should grant an injunction preventing a former employee from working for a competing employer because that former employee possesses knowledge, confidential information or trade secrets learned at the prior employer that will inevitably be disclosed to the new employer, whether intentionally or inadvertently. See BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY, Finding List of Additional Topics, Additional Topic 53.A.1 (6th ed. 2008).

Generally, the privacy rights of all employees have to be protected. It does not matter whether or not employees are unionized. Central elements are provided for in the Data Protection Act (DPA), and in the Criminal Act, with regard to telephone surveillance, for instance.

Prior to any monitoring, employers should issue a detailed, written acceptable use policy setting out the purposes for which employees may use a specific work tool such as telephone, Internet, or email and the limitations that apply. However, employers have the right to exclude private use of such company devices. A monitoring or search without a policy is in most cases illegal, except in cases where there is a well-founded suspicion of contractual breach or illegal behavior.

Employers are required to use adequate technical security measures, such as firewalls for Internet/emails, to restrict infringements of the acceptable use policy, and keep such security measures technically up to date. Monitoring is not a permissible alternative to reasonable technical security measures, but it may be used to complement them.

Systematic monitoring of an individual employee's compliance (e.g., with regard to Internet use or email) is prohibited. However, the monitoring of Internet/email use, for example, through means that do not identify specific employees is allowed to ensure compliance with the acceptable use policy. Anonymous monitoring can be carried out without informing the employees. Monitoring using pseudonyms, meaning with the possibility of identifying the authors of abusive usage, may not be employed universally and may be used only if the employees have been notified in advance of its potential use.

If anonymous monitoring provides evidence of infringement of the acceptable use policy, then it is acceptable to begin monitoring that can identify the employee who is violating the acceptable-use policy, provided that employees have been notified in advance of the possible use of identity-based monitoring. Notifications concerning identity-based monitoring should be given to employees in writing.

In addition, any monitoring needs to be performed in accordance with a monitoring policy that specifies who is in charge of the monitoring, what is monitored, who will be notified if an

abuse is identified, and what the consequences of such abuse are. It is recommended that this information be disclosed to employees, along with a statement of what action may be taken if the abusive use is believed to be a breach of duty or a criminal act. The most straightforward way to provide this information is to give employees a copy of the monitoring policy.

In the event of a breach of privacy rights, the employee's possibilities of recourse depend on the kind of infringement. In the event of a breach of the Working Act and/or labor laws, the employee may refuse to work until the situation is remedied. Furthermore, in the event of a breach of the Working Act, the authorities may start administrative and criminal proceedings against the employer and the responsible persons if informed by the employee. A breach of the Data Protection Act can also lead to administrative and criminal proceedings against the employer and the responsible persons.

II. EXISTENCE OF A DUTY OUTSIDE OF AN EXPRESS COVENANT

A. Duty of Loyalty (During and Post Employment)

The fiduciary duty is determined by the law applicable to the employment. Under Swiss law, Article 321a of the CO sets forth that employees must in good faith protect their employers' legitimate interests. Legal scholars and case law base a general duty of loyalty of employees towards employers on that provision. There is no additional consideration required for this duty.

The extent of loyalty is strictly limited to the employment relationship, which means there must be a direct link to the employment relationship. Generally, the extent of the duty of loyalty largely depends on the position of the employee. Hence, high-level employees are subject to quite a strong duty of loyalty, while the duty of low-level employees is not very strict. In each case, the employers' interests are weighed against the employees' interests.

The constraints of the duty of loyalty loosen after the termination of employment and gradually decrease with time. The

length of the post-contractual duty depends on the obligation in question and the facts of the individual case.

Case law has established the following types of duties:

- Compliance with law (e.g., no active or passive bribery);
- Nonsolicitation of employees, customers, and providers during employment;
- Avoidance and disclosure of conflict of interests;
- No preparation of competing activity (although if employment is under notice of termination, the employee may do so if the employer's market position is not threatened);
- Nondisparagement of employer (although an employee can have legitimate interests in criticizing his or her employer, even in public);
- Obligation not to interfere with the good relationship with labor unions and generally the good working environment;
- Obligation not to work for any third party during employment;
- Obligation to inform the employer of illegal behavior within the organization and/or noncompliance with laws and regulations (although employees are not under the obligation to disclose the name of involved working colleagues unless there is a risk of immediate potential damage for the employer); and
- Support in emergency situations (e.g., change of working hours and place).

The remedies open to employers are the general employment remedies. Hence, employers may terminate employment or claim damages. The enforcement of the duty of loyalty is also possible, for instance, in the event of competition or breach of confidentiality. According to case law, it is possible to provide for penalties in employment agreements for the breach of the duty of loyalty, but such penalties need to be proportionate. Under Swiss law, there is no claim for liquidated damages.

The courts at the place of work or residence of the defendant have jurisdiction. Because there is no harmonized procedural law in Switzerland, the applicable rules can vary from court to court (see below).

B. Fiduciary Duty (During and Post Employment)

From a Swiss perspective, the duty of loyalty and the fiduciary duty cover the same aspects, and the law does not make a distinction between the two.

III. LEAVE AND NOTICE REQUIREMENTS

A. Rules on Garden or Similar Leave[3]

The minimum length of the notice period applicable to individual employment is set forth in the CO and depends on the length of service. However, the parties may reduce the notice period to not less than one month, subject to any longer periods set forth in collective bargaining agreements.

Generally, employers are obligated to let employees work unless there is a clear agreement to the contrary in their employment agreements. Hence, a full release from duties during employment can constitute a breach of obligation by the employer. Once notice of termination of employment has been issued, case law permits release from duties (garden leave), subject to the employee's personal rights. For instance, a very long garden leave can be a breach of the personal rights.

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[3]Garden leave is a term that refers to an employer requiring an employee who has given notice or has been terminated to depart the workplace while continuing to pay the employee during the applicable notice period. In some countries and industries the practice also may involve the use of lengthier notice periods than customary or specified by law, if permissible. The continuation of the employment relationship during a period of garden leave means that the employee remains bound by the employment contract and the duties thereunder. The employer's intent is to minimize the amount of up-to-date and/or important information that the employee might bring to a competitor by excluding the employee from the workplace during the notice period while at the same time forestalling the employee from working for another competitor during the notice period, which in many countries would constitute a violation of the employee's duty of loyalty. Garden leave also has the benefit to employers of preventing the employee from being an unproductive or disruptive presence in the workplace. It can also prevent access by the employee to the employer's confidential information and clients during the period of leave. *See* BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY, Finding List of Additional Topics, Additional Topic 52.41.1 (6th ed. 2008); M. SCOTT MCDONALD & JACQUELINE JOHNSON LICHTY, DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE 373–83 (2009).

There is much dispute about what duties remain in force during garden leave. However, it is generally accepted that the duty of loyalty continues to apply to an employee on garden leave. If the employer does not state otherwise in the notification of garden leave, the employee is entitled to start a new job (subject to noncompetition covenants).

B. Rules on Compensation

During garden leave, employees retain all contractual entitlements to remuneration, including pension entitlements. Hence, the base salary and variable salary must be paid. The calculation of variable salary during garden leave is quite often difficult, due to the lack of provisions in employment agreements or compensation programs. For instance, an employee may be entitled to on-target variable pay. However, if the employee was always over target in the past, he or she may be entitled to be paid on the basis of past performance.

The only exception to the above rules is a fully discretionary bonus to which there is no entitlement during garden leave.

Under Swiss employment law, it is disputed whether new income generated by an employee during garden leave results in a reduction of the compensation to be paid by the employer, particularly if the employee did not agree to the garden leave. Consequently, it is very important for the employer to set out the conditions applicable to the garden leave (including salary reduction) when issuing the notification of garden leave.

Without the agreement of the employee, it is not possible to make payments subject to compliance with a noncompetition or nonsolicitation covenant.

C. Rules on Equity Forfeiture and Clawback Provisions, Breach by Employees, and the Employee Choice Doctrine[4]

Generally speaking, the forfeiture of vested equity rights and clawback provisions resulting in the forfeiture of vested equity

[4]In the United States, New York's common law "employee choice" doctrine allows employers to argue that a forfeiture-for-competition clause should not be scrutinized by the courts. The doctrine posits that an employee who voluntarily terminated

rights are not enforceable because this would result in the repayment of compensation. However, it is generally accepted that the vesting of equity rights can be made subject to conditions, such as the following:

- No notice of termination has been issued;
- Compliance with contractual obligations; and
- Fulfillment of performance criteria.

Although not yet tested in court, it should be feasible to make the vesting of equity rights during garden leave conditional on compliance with a restrictive covenant.

However, it always needs to be considered that any vesting condition may not be enforceable if the grant of equity is qualified as variable salary instead of a discretionary bonus. The qualification depends on a number of criteria, such as percentage of total compensation, frequency of grants, position of employee, granting entity, etc. Hence, it is very important to consider the overall compensation structure to assess whether a vesting condition can be enforced or not.

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his or her employment and who received nonvested deferred compensation conditioned on not competing with the employer that conferred such benefits, has the choice either of a) preserving those benefits by refraining from competition or of b) automatically forfeiting the compensation by engaging in such competition. According to this doctrine, the employee's decision to compete constitutes an automatic waiver of the right to the compensation without the necessity for judicial review as to reasonableness or other limits on enforceability. BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE BY STATE SURVEY, "New York," questions 3 and 8 (6th ed. 2008); M. SCOTT MCDONALD & JAQUELINE JOHNSON LICHTY, DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE 328, 329 (2009). This kind of clause should be distinguished from a clawback clause, which specifies that the employee must return to the employer financial benefits such as stock options that were granted subject to employee compliance with a noncompete agreement. M. SCOTT MCDONALD & JAQUELINE JOHNSON LICHTY, DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE, 345–56 (2009).

IV. LITIGATING RESTRICTIVE COVENANTS

A. Procedural Issues in Litigation

1. Jurisdiction (Power of the Forum to Adjudicate the Case)

To date, the court organization and procedural rules are largely within the competence of the 26 cantons; hence, the court systems and rules vary substantially from canton to canton. As of January 1, 2011, the Federal Act on Civil Cases and Procedures (ZPO) enters into force, setting some standards for greater uniformity. However, the ZPO only sets out general rules within which the cantons can define their court system and the applicable procedural rules.

Under the ZPO, the courts at the place where the employee normally worked or at the residence of the defendant are generally competent for employment disputes. Injunctive relief has to be sought at the same courts.

For proceedings under the UCA, special rules may apply unless such action is part of an employment claim.

2. Choice of Forum (Arbitration vs. Court and Which Court)

In employment matters Swiss law does not allow the choice of arbitration as an alternative to the jurisdiction of the courts.

The choice of forum prior to a dispute is very limited. According to the Lugano Convention, if applicable (i.e., where the other country whose law is involved is a signatory along with Switzerland), the choice of forum is not possible, and the courts in the country in which the employee normally performs the work have jurisdiction. If the employee performs his or her work in more than one country, the courts in the country in which the employee is employed are competent.

If the Lugano Convention is not applicable (e.g., the United States is not a signatory to the Convention), Swiss international private law determines the forum. Consequently, the courts in the country in which the employee normally performs the work are competent. However, contrary to the Lugano Convention, the choice of forum is possible, provided it does not constitute an abuse of rights

In many parts of Switzerland, special employment courts handle employment cases. However, outside urban centers employment matters are commonly dealt with by the same courts as other civil matters.

3. Venue (Geographical Location)[5]

In addition to locations noted under IV.A.2. Jurisdiction above, the employee can initiate an action in the courts at the place of Swiss residence or where the employee normally lives.

4. Choice of Law

In employment issues, the choice of applicable law is very limited and even not possible if both the employee and the employer reside in Switzerland and the work is performed in Switzerland. According to Swiss international private law, employment agreements are subject to the law of the country in which the employees normally perform the work. If an employee habitually works in more than one country, the employment agreement is subject to the law of the country in which the employer has its registered office.

However, Swiss international private law allows the choice between the law of the country in which the employer has its registered office or in which the employee has his or her permanent residence or where the employee normally lives.

See also the discussion under IV.A.5. Conflicts of Law below.

5. Conflicts of Law

As noted in IV.A.4. above, according to Swiss international private law, employment agreements are subject to the law of the country in which the employees normally perform the work. If an employee habitually works in more than one country, the employment agreement is subject to the law of the country in which the employer has its registered office.

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[5]The choice of location of a branch of a court within a country.

6. Necessary Parties

Generally speaking, any action based on employment law can only be directed against the (former) employee. In case of a potential infringement of the UCA or the Criminal Act, action can also be taken against the new employer or the officers of a new employer. It is also possible to issue a third-party notice to a new employer of the employee, making the judgment binding upon the new employer, which can be advantageous in case of later proceedings against the new employer.

If the defendant does not formally accede to the proceedings if validly served by the court with the writ of summons, then a judgment is possible even if the defendant remains absent.

7. Statute of Limitations

The CO provides for a five-year statute of limitations for claims resulting from an employment relationship.

B. Pre-litigation and Privacy Issues

During the pre-litigation phase it is very important to consider data protection and privacy issues. For instance, the review of employee data, in particular emails, is subject to the limitations set forth by the Data Protection Act. Hence, in each individual case it needs to be determined whether such data can be reviewed and whether an approval by the responsible court is needed.

Further, investigations and observations are per se a breach of the privacy of an employee, and a breach of data protection and privacy laws may result in evidence being declared inadmissible. Consequently, it needs to be determined at the outset whether the suspicion against an employee is sufficient to allow a thorough investigation or observation.

C. Declaratory Relief Actions; Counterclaims

1. Declaratory Relief Actions

In the case of restrictive covenants there are no proceedings similar to a U.S. declaratory relief action. However, a party can limit a dispute to a specific question, for instance, the validity of

a restrictive covenant, if such party can demonstrate a sufficient legal interest. However, there is still the rule that the action for performance is the main form of action and that a limited action is the exception for which a party must demonstrate a legal interest. Hence, such "declaratory relief actions" are not very common.

2. Counterclaims

Counterclaims are possible. In the case of international disputes there must be a sufficient factual correlation between the two claims so that Swiss jurisdiction is applicable to the counterclaim.

Further, the court in which the main claim is heard must also have jurisdiction to hear the counterclaim. Consequently, in the case of special employment courts it is often not possible to bring in counterclaims that are not based on the employment relationship.

D. Temporary or Preliminary Relief

1. Temporary Restraining Orders (TROs)[6]

Switzerland provides for the equivalent of a temporary restraining order within the system for preliminary injunctions discussed below: in an emergency, the court can issue a preliminary injunction without hearing the defendant first.

2. Preliminary Injunctions

As outlined above, as of January 1, 2011, the ZPO enters into force. However, the ZPO only sets out general rules within which the cantons can define their court system and the applicable procedures rules, including the ones on temporary or preliminary relief.

Injunctions and preliminary injunctions are both possible prior to the main court proceedings or during the court proceedings. For a preliminary injunction a plaintiff has to convince the responsible court of the following:

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[6]A temporary restraining order is the term used in the United States and a number of other common law jurisdictions for an emergency ex parte injunction that the plaintiff obtains for a limited period to prevent irreparable harm, pending a hearing with the defendant represented.

- The restrictive convent is legal and enforceable;
- The defendant is in breach of the restrictive covenant; and
- The breach results in a disadvantage to the plaintiff that cannot be remedied easily with the final award (irreparable harm).

There is no strict evidence required, but the plaintiff has to provide evidence that makes the fulfillment of the above conditions very likely.

Generally, courts are very reluctant to issue injunctions in the event of alleged breaches of noncompetition covenants, because this requires the former employee to leave a new position and to breach his new employment contract. Hence, except in very clear cases with a substantial damage potential for the former employer, injunctive relief is denied.

Injunctive relief can be made subject to the provision of security for the disadvantages to be suffered by the defendant. Consequently, it can be very costly for the plaintiff if, for instance, an amount equivalent to the potential loss in salary for the term of the main proceedings has to be provided as security, particularly when executive managers with large salaries are involved.

Injunctions are not issued for an unlimited time. Preliminary injunctions are made subject to the filing of ordinary lawsuits within a short deadline. Injunctions during the main proceedings are then issued for a limited time specified by the competent court, but can be issued for the entire term of the proceedings.

E. Litigation Discovery

1. General

In Switzerland, the taking of evidence is a judicial and thus sovereign function executed by domestic courts and not by the parties. Accordingly, Switzerland views the taking of evidence for foreign proceedings—regardless of whether the foreign procedural code puts the collection of evidence into the hands of the parties—as constituting acts for a foreign state, which if they occur within the territory of Switzerland violate Swiss sovereignty unless undertaken by a competent Swiss court or authorized by

the competent Swiss authorities. Article 271 of the Criminal Act thus specifically penalizes the taking of evidence by foreign officials and attorneys for a foreign proceeding or any action taken by a person located in Switzerland to comply with an order issued by a foreign court by producing documents or electronic archives located in Switzerland without involving the competent Swiss authorities. Taking evidence without the necessary authorization is subject to a penalty of imprisonment of up to three years or a monetary fine up to CHF 1,080,000. Article 271 of the Criminal Act cannot be avoided, for example, by transferring the evidence located in Switzerland to a place outside Switzerland for the purpose of complying with a foreign country's order, since aiding and abetting are already penalized.

Switzerland does not recognize any "voluntary" production of documents if there is indeed a duty to provide such documents under a foreign procedural law, and the documents are intended for use in a foreign proceeding. To avoid any risk, the party requested to produce documents should insist on the documents being requested by means of mutual legal assistance.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, dated 18 March 1970 (Convention), attempts to reconcile the differences among the various national pre-trial discovery rules. The Convention, which has been ratified by Switzerland and 42 other countries including the United States, permits the taking of evidence by means of "letters of request," which seek the taking of evidence and are submitted by a judicial authority in one treaty country to the relevant central authority in another treaty country. Switzerland generally accepts letters of request in connection with pre-trial discovery, but it has exercised its right under Article 23 of the Convention to limit the circumstances in which it will execute such letters for the purpose of obtaining pre-trial discovery of documents as known in common law countries. Accordingly, letters of request will, among other things, not be executed if the request has no direct and necessary link with the proceedings in question, if the request requires a person to indicate what documents are in his or her possession, or if it requires a person to produce documents other than those specifically mentioned in the request. The purpose of these limitations is

to exclude requests for a general search for documents commonly known as a "fishing expedition."

Information will be provided to foreign courts only to the same extent as a similar request in a Swiss civil proceeding. According to the Swiss Federal Supreme Court, a Letter of Request must clearly establish, in sufficient detail, the link between the evidence requested and the issues in dispute. When drafting a letter of request, one must pay special attention to the fact that if disclosure of some of the information sought by the letter of request is not permitted under Swiss law, the letter of request will be executed partially (the so-called blue-pencil approach discussed in IV.H.2. below) only if the letter of request as a whole is not deficient.

2. Duty to Preserve and Orders to Produce Documents

Apart from a general good-faith duty in proceedings, parties do not have a duty to preserve potentially relevant data whenever litigation or regulatory investigations and proceedings are reasonably anticipated. Exceptions exist where the law specifically provides for the retention of documents or where the competent authority has ordered the preservation of evidence. This said, companies registered in the commercial registry are subject to a statutory retention period of 10 years, during which they must retain their annual financial reports, books, and business correspondence either in hard copy or in electronic form. The Swiss lawmakers have acknowledged that such business documents are an important source of information for both civil claimants and administrative bodies.

Accordingly, a court or administrative authority can order such documents to be provided in a form readable without any aids, thus in paper form or their native electronic format with the company providing the necessary hardware, software, and even personnel to make the data readable.

F. Other Pre-Trial Matters

There are no other noteworthy pre-trial matters.

G. Burden of Proof

The burden of proof is on the employer. Consequently, when initiating court action there should be sufficient evidence for, or at least sufficient knowledge of, the underlying facts that allow the case to be argued in detail. Furthermore, it has to be considered that once action is initiated, the defendant knows of it and—quite often—begins setting up the documents (e.g., a new employment contract) in a way not conflicting with the restrictive covenant, which then makes it difficult to argue the case due to the lack of other evidence. Quite often, job descriptions used in new employment contracts do not correspond with the actual work performed. Hence, it is important to collect sufficient evidence before initiating any legal action.

Generally speaking, any action based on employment law can be directed only against the (former) employee. In the event of a potential infringement of the UCA or the Criminal Act, action can also be taken against the new employer or the officers of a new employer.

Based on the facts of the case and the contractual agreements, an employer will need to decide whether to try to obtain injunctive relief, specific performance, damages, and/or the payment of an agreed penalty.

H. Final Remedies

Final remedies available in ordinary proceedings include the following:

- payment of a penalty (if provided for in the restrictive covenant);
- award of damages (but no punitive damages);
- issuance of a court order to comply with the restrictive covenant (the breach of the court order is sanctioned by fine and/or imprisonment in case of noncompliance or a penalty); and
- issuance of a court order to hand over certain documents and/or materials (e.g., documents relating to trade secrets, and client lists).

Court fees are to be paid by the losing party. Such party also has to pay an indemnity for the legal fees to the winning party, which is calculated on the basis of the value of the claim but in most cases does not cover the actual legal fees.

Courts tend to limit agreed contractual covenants, in particular noncompetition undertakings (blue-pencil modifications as discussed in IV.H.2. below). The limitations can be in regard to subject (products, services), place (market), and time. Courts will limit undertakings to the extent the limitation is not necessary to protect the interests of the employer and restricts the professional development of the employee in an undue way. For instance, the noncompetition should only cover the main products or services the employee was responsible for and only the main geographic markets to which such products and services were sold. Further, the noncompetition should be only as long as the employer needs to re-establish a customer relationship with a successor of the leaving employee. In regard to the amount for penalties, the case law provides some guidelines that are based on length of employment and the position of the employee. For nonmanagers it is very difficult to be granted more than three to six months of compensation as a penalty, while top managers may be granted a penalty in excess of one year's worth of compensation.

I. Enforcement of Domestic Rulings

Domestic court decisions are enforced throughout Switzerland. Court decisions that provide for a payment obligation (e.g., payment of damages or a penalty) can be enforced via the standard debt enforcement proceedings. In such proceedings, the domestic court decision is binding and the case will not be reheard.

Where the court decisions provide for an obligation that is not a payment obligation, the parties can apply for enforcement with the court. If enforcement has not already been applied for in the main proceeding, the court may set forth a sanction for the noncompliance (e.g., in the form of a penalty or the threat of criminal sanction (imprisonment, fine)). In the case of the latter, the noncompliance is a criminal act that ultimately results in criminal proceedings to be initiated by the party protected by the court order.

J. Appeal

Switzerland has 26 different cantonal procedural statutes; hence the appeal possibilities within the cantons vary quite substantially. As of January 1, 2011, the Federal Act on Civil Cases and Procedures (ZPO) enters into force. However, the ZPO only sets out general rules within which the cantons can define their court system and the applicable procedural rules.

Generally, there is a cantonal appeal possibility in cases where the value of the claim exceeds CHF 10,000. In the case of claims in excess of CHF 100,000, the claimant may opt directly for the higher cantonal court, in which case there are no cantonal appeal possibilities. Generally, the breach of law as well as the wrong assessment of facts can be claimed. However, new evidence may only be brought into the proceedings in case such evidence was not available before and the respective party did not have the possibility to obtain such evidence before. The appeal court may issue a new decision or send the case back to the lower court for reassessment.

Generally, a court decision may not become enforceable during the appeal. However, the appeal court can decide otherwise or grant an injunction for the time of the appeal.

In case the value of the claim exceeds CHF 15,000, both parties may appeal to the Swiss Federal Court (*Bundesgericht*) against the final cantonal decision. The Swiss Federal Court will only check the correct application of federal law (and employment law is federal law) and in case of temporary or preliminary injunctions only the breach of constitutional rights. As a general rule, new evidence cannot be brought into the proceedings and the Swiss Federal Court will only correct obvious mistakes in the assessment of the evidence. The Swiss Federal Court may issue a new decision or send the case back to the cantonal court for reassessment.

In addition to the main appeal there are limited appeal possibilities.

Generally, both cantonal and federal appeals are very lengthy and costly and it may take years until a final decision is issued.

K. Enforcement of Foreign Judgments

The enforcement of foreign judgments is governed by the Swiss Federal Act on Private International Law (SIPL) and the EC/EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention).

Under the general rules of the SIPL, a foreign judgment is enforced in Switzerland if the following major conditions are fulfilled:

- the court issuing the decision is responsible to hear the case according to the rules of the SIPL;
- in case the court decision is final and no appeal possibilities under the foreign laws exist;
- the defendant has been correctly summoned to the proceedings;
- there has been no substantial breach of basic procedural rules as provided for by Swiss law;
- proceedings in regard to the same matter have first been initiated in Switzerland or a Swiss or foreign court decision that is enforceable in Switzerland was issued first; and
- Swiss public order has not been breached.

The merits of the case itself are not reviewable by Swiss courts. Punitive damages may be considered a breach of the Swiss public order.

The enforcement of judgments from member countries of the Lugano Convention is subject to the following major conditions:

- Swiss public order has not been breached;
- the defendant has been correctly summoned to the proceedings or has accepted the proceedings;
- the decision is not contrary to a decision of the Swiss court between the same parties;
- the decision is not contrary to a decision of a nonmember state between the same parties in regard to the same matter which is enforceable in Switzerland; and

- no major procedural provisions of the Lugano Convention have been breached.

The merits of the case cannot be reviewed by the Swiss courts. In contrast to the SIPL it is also possible to enforce preliminary injunctions under the Lugano Convention.

V. INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

As mentioned previously, Article 4 of the UCA prohibits the incitement of an employee to breach an employment contract. For instance, Article 3 of the UCA can be breached if a competitor asks an employee to provide client lists or other confidential information. Moreover, if the new employer actually knows of the restrictive covenant and actively helps the employee to breach the covenant—for example, by agreeing to bear the legal expenses required to defend the breach in court or by indemnifying the employee for the payment of an agreed penalty—it may even be possible that the prohibition has already been breached because such action clearly supports the employee in breaching the restrictive covenant.