LUXURY & FASHION

Switzerland

LEXOLOGY
Getting The Deal Through

Consulting editor
Hogan Lovells

Luxury & Fashion

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into the state of the local market; manufacture and distribution; online retail; intellectual property issues; data privacy and security; advertising and marketing; product regulation and consumer protection; M&A and competition; employment and labour issues; and recent trends.

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MARKET SPOTLIGHT

State of the market

What is the current state of the luxury fashion market in your jurisdiction?

The Swiss luxury market is dominated by Richemont Group (Piaget, Cartier, Van Cleef & Arpels, IWC Schaffhausen, Jaeger-LeCoultre, Panerai, Piaget, Vacheron Constantin, Montblanc, dunhill and Chloé), Rolex and Swatch Group (Breguet, Blancpain, Omega, Longines, Swatch, Harry Winston, Tissot). Other privately owned very famous companies are present, especially in the field of watch making, such as Patek Philippe, Audemars Piguet and Chopard. These companies generate most of their turnover abroad. In 2020, the exportation of watch products amounted to 17,000 million Swiss francs, and 7,672 million Swiss francs for jewellery (source: Federal Statistics Office). Because of the covid pandemic since 2020, these figures are lower in 2020 than they were in 2019.

Law stated - 31 December 2021

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

At the beginning of 2017, the Swiss Trademark Protection Act was amended under the 'Swissness' project. Swissness aims at strengthening the protection of the designation 'Switzerland' and the use of the Swiss cross. It lays down clear rules and minimum criteria regarding development, manufacture and origin of raw material for the use of Swiss indications for advertising purposes. It helps to prevent the misuse of the 'Swiss trademark' and to preserve its value in the long term. According to Swissness, to be authorised to use the Swiss trademark, the minimum Swiss value rate for industrial products, including watches, must amount to 60 per cent, including research and development (R&D). For watchmaking and cosmetics, there are even specific ordinances regulating the use of the name Switzerland (the Ordinance of 23 December 1971 regulating the use of the name Switzerland for watches and the Ordinance of 23 November 2016 regulating the use of the name Switzerland for cosmetics).

The usual contractual arrangements for the development, manufacture and supply are R&D, manufacturing and supply agreement. There are no specific legal regulations for such agreements that are, therefore, governed and subject to the general principles set out in the Swiss Code of Obligations (SCO). No specific provisions apply to agreements specifically related to luxury and fashion goods.

Law stated - 31 December 2021

Distribution and agency agreements

What legal framework governs distribution and agency agreements for fashion goods?

There are no specific laws or acts that govern distribution and agency agreements. The agency contract is governed by articles 418a–418v SCO. The distribution contract is instead considered in Switzerland as a sui generis agreement, which is neither expressly governed by the provisions of the SCO nor by any other statute. Therefore, an important role in defining the principles that shall apply to distribution agreements is played by case law; several provisions of the SCO related to the agency agreement are generally applied by analogy to distribution agreements. In this regard, it is worth mentioning that the Swiss Supreme Court has ruled that the mandatory provision of the SCO that grants the agent the right to claim an indemnity for goodwill created until the termination of the agency relationship (article 418u SCO) may

also apply, under certain circumstances, to distribution agreements.

The Swiss Cartel Law Act and the directives issued by the Swiss Cartel Commission may also have an impact on distribution agreements, in particular in connection with possible contractual provisions dealing with exclusivity and pricing arrangements.

Law stated - 31 December 2021

What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

The Swiss market is no different from other international markets in terms of distribution and agency structures. Depending on the size of the luxury fashion company and of the number of goods to be sold in the Swiss market, the strategy may be more focused on agency than on distribution, in particular considering that, in principle, the luxury brand maintains a stronger (direct) control over the activities of the final retailer through an agency structure. Contingent upon the actual need for the luxury fashion company to control the retailer's communication activities, an agency structure that still provides for a direct relationship between fashion company and retailer may still be considered to be the best solution in Switzerland.

In view of the development under the Swiss case law mentioned above with respect to possibly also awarding a claim for goodwill to a distributor upon the termination of the contractual relationship, one of the main legal downsides of an agency agreement versus a distributor agreement is no longer a decisive reason for choosing distribution versus agency. The choice of one or the other agreement will, therefore, depend upon other more business-oriented considerations (eg, whether the risk with respect to the actual sale of the goods will be entirely shifted onto a third party, such as the distributor that buys the goods from the seller to resell them to its direct clients).

As Switzerland is not among those markets where luxury brand awareness has to be developed and since Switzerland is not a very large marketplace that requires a significant number of points of sale, several luxury brands (especially those of a higher level) tend more to operate through directly operated points of sale without the intervention of distributors.

Law stated - 31 December 2021

Import and export

Do any special import and export rules and restrictions apply to fashion goods?

General import and export rules apply to the luxury and fashion industry. The exportation of goods, common objects and cosmetic products intended for export must be accompanied by the relevant export documents. The goods must also be registered with the cantonal authorities. Usual objects and cosmetic products that may present a health risk are prohibited from export. As for the importation, imported foodstuffs and common objects must meet the requirements of Swiss legislation. In addition to these general rules, the following can be pointed out.

There is a ban on export of luxury goods to the Democratic People's Republic of Korea and to Syria.

In Switzerland, trade in rough diamonds is only allowed with states participating in a certification scheme whose purpose is to prevent 'conflict diamonds' from entering the legal markets, in particular, rough diamonds from areas controlled by rebel groups, particularly in Africa. Therefore the import, export, entry into and exit from customs warehouses of rough diamonds are authorised only if they are accompanied by a forgery-proof certificate.

Since 1972, a free trade agreement has been in place between Switzerland and the EU (at that time EEC) that facilitate the exchange of goods, including fashion and luxury, between the two trading partners.

More remarkably, Switzerland is the only European country that benefits from a free trade agreement with China since July 2014. This agreement is of particular interest for the luxury industry in general.

Law stated - 31 December 2021

Corporate social responsibility and sustainability

What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Even if the need for companies to behave in compliance with the principles of corporate social responsibility and sustainability (CSR) is now generally recognised in Switzerland, how to regulate and standardise such behaviour remains an open and sensitive issue. The position of the Swiss Federal Council is that CSR should primarily be implemented spontaneously by companies. To be CSR compliant, companies should in principle have structures that enable the promotion of such CSR objectives. The creation of a CSR committee within the board of directors is a solution now frequently used for this purpose by Swiss companies. It is also now generally accepted that companies should adopt internal guidelines to enhance CSR-compliant behaviour. The solution that has been developed in practice is the implementation of a 'code of good conduct'. The content of such codes varies according to the specific issues that companies may be facing. In Switzerland, socially responsible companies – or those that claim to be socially responsible – are encouraged to fully and transparently publish data regarding their impact on the environment and the social community.

Even in the absence of legally binding requirements, there are many reasons for companies to engage in voluntary and spontaneous CSR practices. CSR is currently a very popular topic, and has acquired significant importance in recent years. Companies are therefore increasingly expected to behave in a socially responsible manner. No specific CSR principles or requirements apply to luxury fashion companies, but given the increased importance that good reputation has, in particular, for those companies, compliance with the principles of CSR will become more and more important.

Law stated - 31 December 2021

What occupational health and safety laws should fashion companies be aware of across their supply chains?

Swiss law does not foresee occupational health and safety laws that companies should be aware of across their supply chains. Swiss companies are, therefore, not subject to any legal duty to verify compliance with any rules by the companies to which they turn for the supply of materials or finished products.

In the meantime, 'control duties' are only proposed to companies in the form of recommendations. An example of this is the Swiss National Action Plan 2020–2023 of 15 January 2020, which contains a series of incentives and recommendations for the sustainable development of companies from an economic, social and environmental point of view.

With respect to the activities performed in Switzerland, there are no specific occupational health and safety laws that apply specifically to fashion companies, but, as all other companies that are in the business of manufacturing goods, fashion companies must abide by all those rules aiming at protecting employees in connection with many different aspects of their activity. Most of the occupational health and safety requirements that apply in Switzerland (and, in particular, the principles thereof) are included in the provisions of the SCO governing individual employment contracts and in the provisions of the Labour Act.

Law stated - 31 December 2021

ONLINE RETAIL

Launch

What legal framework governs the launch of an online fashion marketplace or store?

Unlike the European Union, which has issued and adopted specific directives and regulations applicable to e-commerce, Swiss law does not foresee any special regulation in this area. If the customer is domiciled in Switzerland and the internet provider is also based in Switzerland, the contractual relationship is governed by Swiss law. In general, this relationship takes the legal form of a sales contract governed by the principles set forth in the Swiss Code of Obligations (SCO).

It is important to underline that the SCO (and in general Swiss law) does not foresee a withdrawal right for customers who buy fashion goods online. Therefore, unless the seller has explicitly included a withdrawal right within its terms and conditions of sale, the buyer may not withdraw from an online sale agreement.

Additionally, online sales performed in Switzerland are also governed by the Unfair Competition Act (UCA), the Law on Consumer Information and the Act on Data Protection.

Law stated - 31 December 2021

Sourcing and distribution

How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

Selling through an online website may constitute an infringement of an agency or distribution agreement. In fact, in Switzerland it is common to have exclusivity clauses within the agency and distribution agreements, which may provide for territorial or customer exclusivity.

As a result of the aforesaid it is important, before launching an e-commerce website, to verify the existence in the relevant agency or distribution agreement of that type of clause and proceed accordingly.

Law stated - 31 December 2021

Terms and conditions

What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

When drafting terms and condition regarding online sales attention shall be paid to articles 3 and 8 UCA.

Article 3, paragraph 1 let. s UCA aims at rebalancing in favour of the consumer its lack of knowledge by means of a legal pre-contractual duty imposed on the seller. This article defines what information has to be provided by the operator of e-commerce. Article 3, paragraph 1 let. s UCA provides that entities offering goods, works or services online act unfairly if they do not (1) clearly indicate their complete identity and contact information and the different technical steps leading to the conclusion of a contract, (2) provide appropriate technical tools to identify and correct input errors before sending an order and (3) immediately confirm the customer's order by email.

Articles 8 UCA restricts the freedom of the sellers in the drafting of the general terms and conditions of sale with the aim of better protecting online consumers. The rule provides, in particular, that the terms and condition cannot be

construed in a way that creates an unjustified imbalance between the parties' rights and obligations.

When drafting online terms and conditions attention should, therefore, be paid to the aforesaid principles.

Law stated - 31 December 2021

Tax

Are online sales taxed differently than sales in retail stores in your jurisdiction?

In Switzerland online sales are taxed no differently than sales in retail stores. They are all subjected to VAT. The current rates are 7.7 per cent for standard-rated goods and services and 2.5 per cent for reduced-rated goods (such as books).

Law stated - 31 December 2021

INTELLECTUAL PROPERTY

Design protection

Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Design rights, copyrights and trademark rights may apply to fashion designs.

Design rights protect shape and patterns, provided they are new and original. Both 2D and 3D shapes can be protected. A registration with the Swiss Intellectual Property Institute is required for the design to be protected. The protection is granted for a maximum of 25 years.

Copyright protects artworks, including works of applied arts (utilitarian objects). It can, therefore, apply to a fashion design as long as it is a work of art, a creation of the mind, literary or artistic, that has an individual character. Works of art are automatically protected by copyrights upon creation. There is no need for a registration. The protection is granted for a maximum of 70 years following the death of the creator.

Some elements of design can be registered as trademarks of the company provided they are not shapes that constitute the nature of the goods themselves, or shapes of the goods or their packaging that are technically necessary. Trademarks must be registered with the Swiss Intellectual Property Institute to be protected. They are protected for an initial period of 10 years, which is renewable an unlimited number of times as long as the extension fees are paid. Trademarks must be used in relation to the registered products or services to remain protected. If trademarks are not used for an uninterrupted period of five years, they are no longer protected.

Rules of unfair competition law may also be used to protect fashion designs in the case of parasitism and slavish copy by a competitor.

IP and unfair competition rights can overlap.

Swiss law does not provides for specific rules regarding the ownership of commissioned works, save for the patent and design made by the worker in the course of his or her work for the employer and in the performance of his or her contractual obligations. Therefore, including in the agreement (employment agreement, services agreement, mandate agreement) a clear and specific provision regarding ownership of the commissioned works is recommended.

Law stated - 31 December 2021

What difficulties arise in obtaining IP protection for fashion goods?

Ideas and concepts are not protected by Swiss law. A specific marketing concept, fidelity programme or other innovative ideas that a fashion or luxury company may have developed cannot be protected. They can, therefore, be used by competitors within the limits of the unfair competition rules (parasitism and slavish copy).

In addition, IP rights protection does not apply to technical features. As long as a feature is required by technical needs, it cannot be protected by IP rights, belongs to the public domain and is freely available to competitors.

Trademark protection has the advantage of being unlimited in time. Therefore, luxury and fashion companies often try to register as trademarks what they call 'luxury icons' or 'fashion icons'. They are of the view that, over time, luxury or fashion icons become a symbol of the brands in themselves. When a fashion or luxury design becomes an icon, there is no need to affix the brand on the goods for the fashion or luxury company brand to be recognised. The mere design is sufficient. The registration of these icons as trademarks, however, faces some difficulties. According to the Swiss Trademark Act, shapes that constitute the nature of the goods themselves or shapes of the goods or their packaging that are technically necessary are excluded from the trademark protection. It remains, therefore, difficult for luxury and fashion companies to register as 3D trademarks the shape of goods that have become icons and have acquired a distinctive function.

Law stated - 31 December 2021

Brand protection

How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are usually protected in Switzerland by the Swiss trademark registration filed with the Swiss Intellectual Property Institute. The registration is valid for an initial period of 10 years from the date the application was filed, renewable an unlimited number of times as long as the application for extension of protection and payment of fees are made in due time. Brands that are registered as trademark in third party country and that are deemed as 'well-known trademarks' are protected in Switzerland regardless of whether the brand is also registered as a Swiss trademark. It can, however, be difficult to prove that a brand is 'well known', so that it is recommended that even 'well-known' brands be registered as Swiss trademarks.

When the brand is identical to the company name, it is also possible to make use of the rules applicable to the protection of company names to seek judicial protection.

Further protection with respect to IP rights may be obtained through the provisions of the Unfair Competition Act (UCA).

Law stated - 31 December 2021

Licensing

What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Any kind of IP right, registered (trademarks, designs, patents) or unregistered (copyrights), may be licensed in Switzerland. The licence may be exclusive or non-exclusive, royalty-free or subject to royalties, with the right to sub-licence or not. Licences over registered IP rights (trademarks, designs or patents) may be registered with the Swiss Intellectual Property Institute. In such a case, they are enforceable against a bona fide acquirer of the licensed rights. It is recommended for the licensee to contractually agree with the licensor on the registration of the licence. It is also recommended that IP licence agreements for luxury and fashion products contain specific and clear provisions

regarding the quality of the products, the excluded products, if any, the quality control, the supply and distribution chain, promotion and advertising channel, the IP rights maintenance and enforcement, the effects of expiration or termination, such as clearance of non-cancellable orders and clearance sales of the current stock of products.

Law stated - 31 December 2021

Enforcement

What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Switzerland law offers several enforcement options.

Registered IP rights can be enforced with the Swiss Intellectual Property Institute to object to a registration of counterfeiting, similar or identical rights. The decision of the Swiss Intellectual Property Institute is subject to a procedure of two instances before judicial authorities.

Disputes in connection with, registered or unregistered, IP rights, including disputes concerning the nullity, ownership, licensing, transfer and violation of such rights may be lodged with the competent sole cantonal instance whose judgment will only be subject to recourse with the Swiss Supreme Court. Preliminary injunctions may be granted within a few days or even hours in emergency situations.

Finally, upon notification by the right holder of the IP rights (trademarks, designs, patents and copyrights), the Customs Office is entitled to withhold goods if it has reasonable grounds to suspect that such goods unlawfully breach a third-party's IP rights. The Customs Office shall withhold the goods for a maximum of 10 working days from the time of notification by the rightholder, so that the rightholder can obtain preliminary measures from a court.

Law stated - 31 December 2021

DATA PRIVACY AND SECURITY

Legislation

What data privacy and security laws are most relevant to fashion and luxury companies?

The most relevant data privacy and security law that is applicable in Switzerland is the Act on Data Protection of 19 June 1992 (ADP). It has been revised to align Swiss rules to the European General Data Protection Rules (GDPR), and the revised act should come into force in the course of 2022.

Luxury and fashion companies offering products and services to EU residents are also subject to the GDPR.

Law stated - 31 December 2021

Compliance challenges

What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Swiss luxury and fashion companies must comply both with ADP and the GDPR. Indeed, almost all of them offer goods and services to EU customers. It is, therefore, not sufficient for Swiss luxury and fashion companies to comply with the rules ADP.

In the case of a breach, luxury and fashion companies may have to pay a fine worth up to 4 per cent of the annual

worldwide turnover, or €20 million, whichever is the greater. They will in addition suffer reputation damage, the extent of which is difficult to estimate but which could be considerable for an industry that relies on quality.

To remain attractive and up to date, luxury and fashion companies must resort to innovative technologies and online marketing, which present particular risks with regard to personal data protection.

Law stated - 31 December 2021

Innovative technologies

What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

The use of innovative technologies for marketing purposes leads to the processing of a considerable amount of personal data. The use of innovative technologies must therefore comply with data protection law, that is to say ADP, but also in most of cases the GDPR. Among the essential rules to be complied with, there is the obligation for personal data processing to rely on a legal basis (legitimate interest or consent of the data subject) and to be limited to what is necessary for the intended purpose, and the right of the data subject to be completely informed about the data processing. The information will generally be provided through a privacy policy. Luxury and fashion companies should ensure that the privacy policy is in all respects up to date and considers the last innovative technologies used (contact detail, description of processing activities). Companies should also make sure that personal data are deleted when they are no longer needed and that competent persons within the company are in charge of dealing with data protection matters.

In addition, the use of innovative technologies is likely to result in a higher risk of breaches of relevant provisions on data protection. Luxury and fashion companies that intend to use innovative technologies should, prior to the processing, carry out an assessment of the impact of such new technologies on the protection of personal data. An assessment of impact is for the time being not required by the ADP. It is, however, highly recommended that Swiss luxury and fashion companies carry out such an assessment since, as most of them are in any event subject to the GDPR and since such an assessment is a useful way for companies to evaluate their risk of a security breach.

Law stated - 31 December 2021

Content personalisation and targeted advertising

What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

Targeted advertising and personalisation of online content is a growing practice in all areas and, in particular, in the field of the luxury and fashion industry. Luxury and fashion companies are indeed seeking to adjust their advertising to the needs and interests of each customer and to offer a unique and personalised experience to their clients, mainly to differentiate themselves from their competitors. Targeted advertising and personalisation of online content, however, involve the processing of personal data and in particular the profiling of the data subjects. Data protection rules are a limiting factor in that respect.

Law stated - 31 December 2021

ADVERTISING AND MARKETING

Law and regulation

What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The Unfair Competition Act of 19 December 1986 (UCA) aims at ensuring fair and undistorted competition. Luxury and fashion companies must therefore abide by the relevant rules of the UCA. Pursuant to the provisions of the UCA, it is in particular forbidden to:

- disparage competitors, their products or services by inaccurate, misleading or unnecessarily hurtful allegations;
- take actions that are likely to cause confusion with the goods of competitors;
- make inaccurate, misleading, unnecessarily hurtful or parasitic comparisons between companies, products or prices;
- send mass advertising that is not directly related to the information requested without requiring the prior consent of customers, correctly mentioning the issuer or informing the customers of their right to object free of charge and easily; and
- mislead customers about the quality of products.

Obligations (or prohibitions) set out in the UCA can be enforced by injured competitors, customers or competition watchdogs. When prices are mentioned in an advertisement, the indication must comply with the rules of the Swiss Price Indication Ordinance dated 11 December 1978.

A self-regulation body, the Swiss Commission for Loyalty (in commercial communications) prescribes guideline regarding fair marketing communication and provide for a dispute settlement procedure in case a commercial communication is considered to be unfair.

Specific rules apply to advertising and marketing for alcoholic drinks. As far as advertising of tobacco products is concerned, broadcast on television and radio is prohibited.

Finally, on television or radio, the advertisement must be separated from the editorial programme and reported as an ‘advertisement’. Product placement is prohibited during children’s programmes and religious broadcast. Additional rules regulate the advertising time and programme advertising breaks.

Law stated - 31 December 2021

Online marketing and social media

What particular rules and regulations govern online marketing activities and how are such rules enforced?

In Switzerland, no specific rules or regulations govern online marketing activities. Legal requirements of the UCA apply. The general principle is the following: online marketing must not be misleading. Besides, specific rules regarding the advertisement of alcoholic drinks must be followed.

Nowadays, more and more luxury and fashion companies use influencers to promote their goods and products. For the sake of clarity, influencers are individuals who share content on social media and become so popular that they have many followers. They use their popularity to promote goods and services of third parties in exchange for compensation. While the traditional mainstream media must abide by legal rules and professional standards regarding

the publication of advertising, strict application of these rules has become more and more difficult with the rise of influencers.

In particular, under Swiss law, influencers have no obligation to declare that their publications are made in the context of a paid partnership. According to experts in the law, the absence of such a declaration may, however, constitute a breach of the UCA. Indeed, according to article 2 UCA, any behaviour or commercial conduct that is misleading or otherwise breaches the principle of good faith, and which has an impact on the relationship between competitors or between suppliers and consumers, is unfair and unlawful. On this basis, advertising must be distinguished from editorial content (separation principle) and be made visible as such (identification principle). The authors are of the view that these two principles do not only apply to traditional media and journalists, but also to individuals and companies that advertise on social media. Therefore, if a publication on social media has a commercial or promotional purpose and breaches the principle of separation or the principle of identification (or both) due to missing or insufficient identification, it may be considered as an unfair behaviour according to article 2 UCA. In addition, depending on the content of an influencer's publication, the application of article 3 § 1 let. b UCA cannot be excluded. The purpose of this provision is to prevent misleading or inaccurate statements about oneself or one's business relations, among others. An undeclared advertising sponsor could fall within the scope of this provision.

Therefore, despite the lack of legal requirements, the overwhelming view is that influencers also should identify products or services displayed as advertisements when published against payment. Companies that are willing to use influencers should, therefore, make sure that publication by influencers abides by the principle of separation between private and commercial content. They should also take care regarding the reputation and image of the selected influencers to avoid associating their own image with influencers who may have published racist, anti-Semitic or other unlawful content.

Law stated - 31 December 2021

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

What product safety rules and standards apply to luxury and fashion goods?

The Product Safety Act governs product safety. On the one hand, it regulates the product safety and the placing of products on the market for commercial or professional purposes, and, on the other hand, it contributes to the elimination of technical barriers to trade by aligning legal standards with the rules of Switzerland’s main trading partner, the European Union. With the Product Safety Act, Switzerland has transposed Directive 2001/95/EC on general product safety into Swiss law.

The Act on Foodstuffs and Utility Articles contains safety rules, in particular regarding cosmetics and candles, which luxury and fashion companies should abide by.

Law stated - 31 December 2021

Product liability

What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

There is no specific rule for product liability for luxury and fashion goods. Liability for such goods is, therefore, governed by the Product Liability Act, which protects the consumer against damage or injury caused by defective products. It enables the consumer to be compensated by the manufacturer of the defective product. Product liability cannot be excluded by contract. In the case of material damages, a deduction of 900 Swiss francs must be borne by

the injured consumer. Product liability claims are subject to a limitation period of three years after the injured consumer had, or should have had, knowledge of the damage and in any case 10 years following the defective product's release.

In addition to the provision of the Product Liability Act, the consumer is also entitled to take legal action against a manufacturer on the basis of tort law. In such a case, the burden of proof of the fault of the manufacturer falls on the injured consumer.

Law stated - 31 December 2021

M&A AND COMPETITION ISSUES

M&A and joint ventures

Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

No specific rules apply with respect to M&A transactions in the luxury fashion industry that should be considered. The same applies with respect to joint venture transactions. No local ownership requirements exist under Swiss law. Similarly to what would apply in these kinds of transactions in other jurisdictions, special consideration and attention should be given to questions related to the IP involved in the transaction (eg, make sure that the IP is owned by the target company and not by the target company's designers; and avoid naming the joint venture with the brand of one of the parties entering into the joint venture arrangement).

Law stated - 31 December 2021

Competition

What competition law provisions are particularly relevant for the luxury and fashion industry?

Generally, market practices in Switzerland are governed by the Federal Act on Cartels (Cartel Act), the Federal Act on Price Supervision and the Federal Act against Unfair Competition.

Swiss competition law is applicable on an effects-based approach in the sense that an undertaking does not need to be present on the Swiss market to be subject to competition law. Its behaviours simply need to have effect on the Swiss market.

Classically, undertakings are concerned by the application of the Cartel Act when they enter into agreements that can be either vertical agreements or horizontal agreements, aiming at or causing a restriction of competition. Concerted practices are also subject to competition law, should they have the purpose or the same effect.

The Cartel Act also prohibits the abuse of a dominant position, including collective dominance and set forth a pre-merger control procedure.

Swiss competition law is very much inspired by EU competition law even though certain Swiss specificities shall be taken into account with regard to its enforcement.

The enforcement body is the Swiss Competition Commission (ComCo) and its Secretariat, which are endowed with a broad decision-making and investigative powers vis-à-vis market players that it uses on its own initiative or based on complaints. When investigating potential violations of the Cartel Act, the ComCo is empowered, for example, to conduct dawn raids.

A notice of the ComCo concerning the assessment of vertical agreements (CommVert), published on 28 June 2010 and revised on 22 May 2017, as well as guidelines inspired by the European Union Guidelines, with legal and economic conditions specific to Switzerland, must be taken into account.

As far as the luxury industry is concerned, it can thus be anticipated that the Coty case will have some impact on Swiss practice in the near future. It is noteworthy, however, that in the Gaba case (BGE 143 II 297) the Federal Supreme Court refused to apply an EU regulation on technology transfer agreements under Swiss law.

According to the law, agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful. In particular, agreements between actual or potential competitors (horizontal agreements) are presumed to lead to the elimination of effective competition if they directly or indirectly fix prices, limit the quantities of goods or services to be produced, purchased or supplied or allocate markets geographically or according to trading partners.

In addition, the elimination of effective competition is also presumed in the case of agreements between undertakings at different levels of the production and distribution chain (vertical agreements) regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted (passive sales).

In relation to vertical price agreements, it is noteworthy that recently the Federal Supreme Court issued a decision (BGE 147 II 72) according to which Pfizer 's non-binding resale price recommendations constituted an unlawful concerted practice that eliminated effective price competition in an unjustified manner. Although this decision was met with a number of criticisms, it must be taken into account by manufacturers and resellers active in the Swiss luxury market.

As the level of prices in Switzerland is in general higher than in surrounding countries, the Swiss Competition Authority is particularly sensitive to agreements that aim at restricting parallel imports from outside Switzerland.

Like many jurisdictions, Switzerland has a leniency programme according to which an undertaking providing information to the authorities that allows the opening of an investigation can be exempted from a fine (which can amount up to 10 per cent of the Swiss turnover over the past three years).

Last but not least, Switzerland and the EU as concluded an agreement regarding the exchange of information between the EU Commission and Swiss Competition Authority. This agreement is a second-generation agreement as under certain conditions it allows the exchange of information without the consent of the parties concerned.

Law stated - 31 December 2021

EMPLOYMENT AND LABOUR

Managing employment relationships

What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

The relationship between workers and luxury and fashion companies is usually an employment agreement governed by the employment rules of the Swiss Code of Obligations (SCO).

Companies may, however, choose to use freelancers instead to avoid the application of rules for protection against dismissal, protection in the case of no wrongful absence of the worker or the payment of social security charges. Companies should, however, be mindful that freelancers are genuinely and effectively self-employed persons. A self-employed person is a person who works in his or her own name and on his or her own account, who is independent in his or her work and assumes the economic risk himself or herself. A freelancer should, for example, be authorised to work for other companies. Several criteria apply to distinguish a genuine self-employed person from an employee (the worker finances major investments, acts in his or her own name and on his or her behalf, has his or her own business premises, bears the overheads and the risk of loss, staff occupancy, freely determines the terms of work, is not subject to the orders of others, is on an equal footing with the client, sets its own working hours, executes mandates for several

principals). If the freelancer is not a genuine self-employed person, despite the terms of the agreement between the freelancer and the company, the relationship may be requalified as employment agreement. The company would, therefore, have to pay the social security contributions for the freelancer and may even be fined if it does not comply with this obligation.

Under Swiss law, successive limited-term employment agreements are prohibited if the conclusion of limited-term agreements is not justified by objective grounds. The conclusion of successive limited-term employment agreements with no objective grounds is deemed to be abusive and the agreement is assimilated to an indefinite-term employment agreement.

When employing interns, the company should make sure that they are reasonably remunerated having regard to their training, experience and duties.

The SCO contains a specific provision regarding the invention and design made by the employee in the course of his or her work for the employer and in performance of his or her contractual obligations. Such inventions or designs belong to the employer. In addition, by written agreement, the employer may reserve the right to acquire inventions and designs produced by the employee in the course of his or her work for the employer, but not in performance of his or her contractual obligations. There is no equivalent provision for copyrights in the SCO. Luxury and fashion companies should, therefore, address in the employment contract the issue of the ownership of copyrighted works made by employees in the course of their work for the employer.

Law stated - 31 December 2021

Trade unions

Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

The legal provisions of the SCO regarding employment relationship may be completed by collective agreements applicable for certain sectors of industries, including retail sectors and watchmaking industry. A collective agreement is an agreement between employers or associations of employers and associations of employees (unions), the purpose of which is to regulate working conditions and the relationship between the parties to the agreement. A collective agreement traditionally contains provisions on the entering into effect, content and termination of the individual employment contract, provisions on the rights and obligations of the contracting parties and provisions on the implementation and enforcement of the collective agreement. The normative provisions become part of the individual employment contract when the collective agreement takes effect. They automatically apply to employees who are members of one of the contracting associations provided that the employer participates in the collective agreement. Employers participating in a collective agreement generally also apply the provisions of the collective agreement to employees who are not members of an employee association. The scope of a collective agreement may be extended at the request of all contracting parties. The effect of extending the scope is to make a collective agreement applicable to all employers and all employees in an economic branch or profession, including those who do not belong to any employe' organisation.

Works councils must be involved in some procedures regarding the employer. In particular, in the case of collective dismissal or transfer of business, there is an obligation for the employer to consult with the work council if there is one in the company.

Law stated - 31 December 2021

Immigration

Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Different rules and conditions apply, with respect to the access to the Swiss labour market, to EU-member citizens and non-EU member citizens.

In light of the existing bilateral agreements between Switzerland and the EU, EU citizens are, as a matter of principle, entitled to work and reside in Switzerland. With respect to EU citizens who will continue to reside in another country and will enter into Switzerland only to perform a working activity (commuters or seconded workers), those employees will mandatorily have to benefit from the working and pay conditions prescribed by the Swiss federal acts, Federal Council ordinances, generally applicable collective employment contracts or standard contracts stipulating a mandatory minimum salary.

The access to the Swiss labour market for non-EU citizens is more complicated, as no right exists for non-EU citizens to obtain a work permit. Quotas are foreseen with respect to work permits for non-EU citizens and as a result thereof, such working permits are, in principle, granted only to highly qualified workers. In the application procedure, which generally takes several months, the immigration authorities check, inter alia (and may ask to provide evidence in connection thereto), whether any workers with the same or similar skills can be found in the Swiss or EU labour market for the position for which the application has been filed. No such evidence is generally required if the application is filed with respect to a company's top managers.

Law stated - 31 December 2021

UPDATE AND TRENDS

Trends and developments

What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

The development of digitalisation and social media presents new challenges for luxury and fashion industry. While traditional media and advertising are losing prominence to the benefit of social media, luxury and fashion industry must adapt and use this new channel solicited by the younger generations. Companies must, however, ensure that they comply with increasingly complex data protection rules, unfair competition, consumer protections rules and rules applicable to advertising.

Besides, with digitalisation and social media, damage to the image of luxury and fashion companies is often substantial as information and news, even fake news, spread dramatically fast. Yet a high-quality image is essential for luxury and fashion companies.

Therefore, while digitalisation presents an opportunity, particularly in terms of marketing, this tool must be mastered by luxury and fashion companies to avoid considerable damage.

Law stated - 31 December 2021

Jurisdictions

Canada	McCarthy Tétrault LLP
China	Jingtian & Gongcheng
France	Hogan Lovells
Germany	Hogan Lovells
Hong Kong	Hogan Lovells
Italy	Hogan Lovells
Luxembourg	Arendt & Medernach
Mexico	Creel García-Cuéllar Aiza y Enriquez SC
Netherlands	Bird & Bird LLP
Russia	Borenius Attorneys Ltd
Spain	Hogan Lovells
Switzerland	Kellerhals Carrard
Taiwan	Formosa Transnational Attorneys at Law
United Kingdom	Hogan Lovells
USA	Hogan Lovells