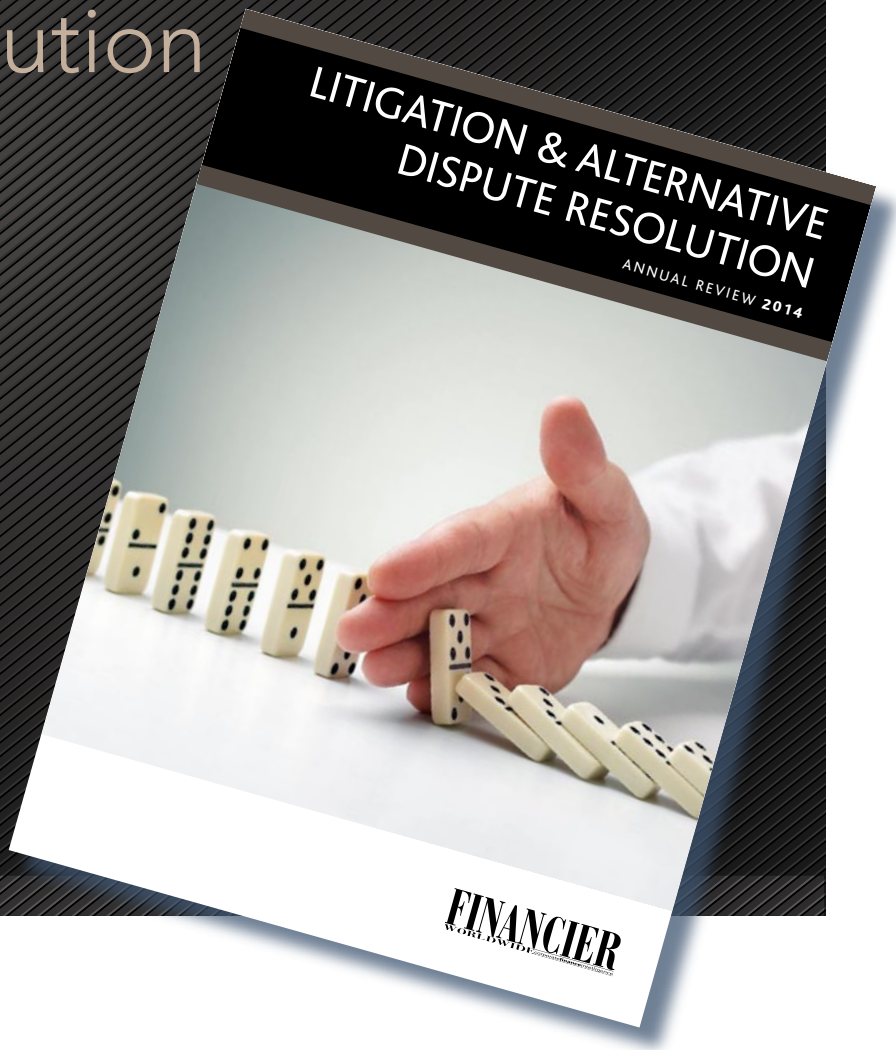
ANNUAL REVIEW

Litigation & Alternative Dispute Resolution



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SWITZERLAND

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Q COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN SWITZERLAND? ARE YOU SEEING ANY RECURRING THEMES?

FELLER: We are still seeing a lot of bankruptcy related litigation. Owing to the fact that Switzerland is a country of choice for many international holding companies as well as the location of subsidiaries of large conglomerates, insolvencies in other countries inevitably have repercussions in Switzerland. Where several jurisdictions are involved, international bankruptcies can lead to contentious legal issues regarding jurisdictional authority. Just recently, the Swiss Supreme Court had to decide whether the decision of a foreign court can be recognised in Swiss bankruptcy proceedings. Although the effects of bankruptcy law are in general limited to its own jurisdiction, further developments toward a more international approach are not excluded. Other recurring market challenges are the hurdles faced by potential litigants wishing to recover kick-backs from banks. Frequently, claimants are financially not in a position to exhaust procedural means to obtain a final verdict despite their cases being good. A new proposal by the federal government to improve legal instruments for collective redress may alleviate this unsatisfactory situation.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF MEDIATION, ARBITRATION, LITIGATION AND OTHER METHODS?

FELLER: We believe that putting measures in place ensuring that one can obtain a neutral yet sophisticated venue for a potential future dispute is a good start. Switzerland satisfies both of these prerequisites. Including a jurisdiction clause in agreements making Switzerland the forum for a dispute in an international setting is often a helpful step. Combined with a sound choice of law clause, such as Swiss or English law which are well established and have transparent and set jurisprudence, companies are well prepared for the event of a dispute. We tend to advise corporates to trust the local Swiss courts unless there are specific reasons to choose arbitration which, although being confidential and flexible, is invariably more expensive and often less

predictable. Mediation is gaining in popularity as a first step but is not always suited to international commercial disputes.

Q TO WHAT EXTENT ARE COMPANIES IN YOUR REGION LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION?

FELLER: Alternative dispute resolution mechanisms are regularly sought by big commercial entities in international disputes. Arbitration is still the preferred method in such instances. But suing before state courts is a viable option in Switzerland, with courts having a sound understanding of commercial issues and with four cantons having specialised commercial courts that have reasonably quick proceedings. ADR is also slowly gaining ground. This might also be because of the longstanding tradition of settlements by the courts. Judges try to settle most cases at an early stage. Some courts boast very high settlement rates, such as the Commercial Court of the Canton of Zurich that manages to settle an impressive 70 percent of cases within six months of filing. The prevalence of ADR is difficult to gauge since parties usually agree to keep proceedings confidential. However, mediations administered by the ICC International Centre for ADR pursuant to the ICC Mediation Rules seem to be on the increase by the ICC's own account.

Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?

FELLER: Switzerland can pride itself on outstanding arbitration facilities. The country looks back over a long tradition of arbitration. The Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich have established the Swiss Chambers' Arbitration Institution that offers highly specialised arbitration services and has its own arbitration rules in 13 languages – the Swiss Rules. Furthermore, Switzerland's pool of legal professionals is internationally renowned in the field of arbitration and offers many experienced

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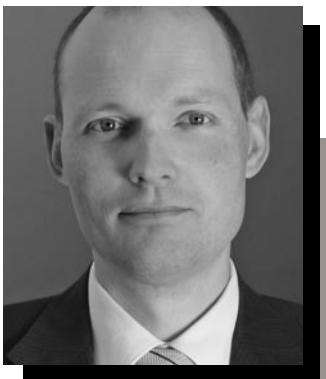
arbitrators and experts as well as multilingual legal counsel. Together with the strong body of law on procedural issues by the Federal Tribunal strengthening arbitration, and obvious logistical advantages such as its central location in Europe and the international acceptance of Swiss arbitration awards, Switzerland is a first choice for arbitration. Swiss court support for arbitration is well known, with courts respecting arbitration agreements and enforcing awards.

Q WHAT PRACTICAL ISSUES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTI JURISDICTIONAL DISPUTES IN SWITZERLAND? ARE SUCH CASES TRADITIONALLY PROBLEMATIC, OR ARE THERE MECHANISMS IN PLACE TO EASE THE PROCESS?

FELLER: I believe the challenges are no different here in Switzerland than they are in other parts of the world – perhaps with the difference that Switzerland and Swiss courts in particular are not new to the complexities that such cases may bring. The language proficiency of participants may pose an obstacle, although most Swiss counsel in large commercially oriented law firms these days are fluent in English. Challenges may arise in connection with evidence, in particular with regard to the location and retrieveability of such evidence. Privilege with regard to certain documents may play a role, since Switzerland has strong laws on the protection of correspondence with legal counsel or materials covered by business secrets. Obtaining witness testimony may prove difficult where such witnesses are resident overseas, since as a rule Swiss courts do not accept written testimony which is not the case in arbitration. Mechanisms that can ease the process can range from retaining English speaking counsel and, where arbitration is sought, English speaking arbitrators which limits the logistical obstacles with regard to communication. In addition, good recordkeeping and clear communication before a dispute erupts is beneficial for later proceedings.

Q WHAT LEGAL AND CONTRACTUAL CONSIDERATIONS SHOULD COMPANIES MAKE TO ADDRESS THE POSSIBILITY OF ENCOUNTERING FUTURE DISPUTES IN THEIR COMMERCIAL ACTIVITIES? WHAT ISSUES SHOULD BE COVERED IN AN EFFECTIVE DISPUTE RESOLUTION CLAUSE?

FELLER: Good contracts make for good cooperation. Nevertheless, disputes cannot always be avoided and not all eventualities can or should be considered in an agreement. However, including an unambiguous clause on the procedure regarding dispute resolution is helpful. This should include where the dispute resolution shall take place and which material law shall apply. If arbitration is preferred, it is recommended to settle how the procedure is to be commenced, who may appoint arbitrators and how many, who shall chose the chairman and reasons to oppose the choice and by which procedural rules the process shall be governed. Addressing these issues in advance can limit the trouble when a problem is encountered and enables parties to focus their energy on resolving the actual matter at stake.



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Urs Feller is head of Prager Dreifuss' litigation and arbitration group. This team acts for international and domestic clients in a variety of disputes before courts and administrative authorities in Switzerland as well as before international arbitration tribunals. Mr Feller has vast experience in all forms of dispute resolution, including mediation. He regularly advises clients on contractual and commercial disputes, in particular relating to banking, insurance, compliance as well as administrative and judicial assistance. Other areas of expertise include insolvency, restructuring and asset recovery. He is a member of the executive committee of the International Bar Association's litigation section.