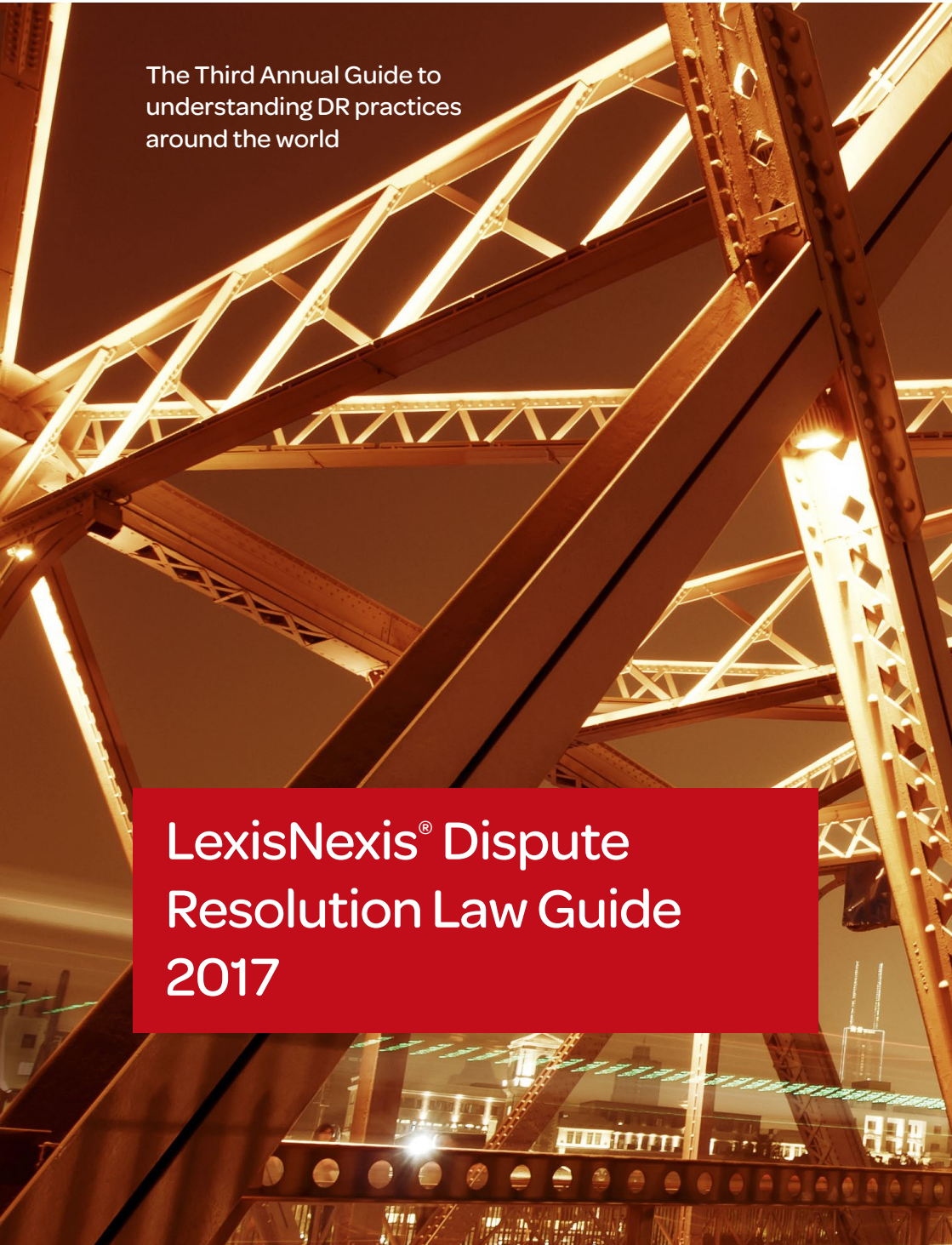
LexisNexis®



The Third Annual Guide to understanding DR practices around the world

LexisNexis® Dispute Resolution Law Guide 2017

Jurisdiction: Switzerland
Firm: Prager Dreifuss
Authors: Dr Urs Feller, Marcel Frey and Michaela Kappeler

1. What is the structure of the court system in respect of civil proceedings?

In Switzerland, civil litigation is usually preceded by a mandatory conciliation phase that generally takes place before the local conciliation authority of the commune in which the defendant resides. In some instances defined by statute, trial parties may approach the court directly (see question 6).

In principle, Switzerland has a three-tiered court system in private law matters: a district court acting as a court of first instance, a court of appeal or high court in the second instance and the Federal Supreme Court as the highest body of appeal. Further, there are specialised first instance courts such as labour courts or courts dealing with rental matters. Four cantons (Zurich, St. Gallen, Aargau and Berne) have set up commercial courts. Judgments by these commercial courts, which constitute sections of the local high courts, can be appealed only to the Federal Supreme Court.

2. What is the role of the judge in civil proceedings?

The judge in Swiss civil proceedings has a case management role. The judge thus directs the proceedings and issues the required procedural rulings. As a rule, it is the parties' (and their lawyers') obligation to present the facts to the judge. In all proceedings, the judge has the duty to enquire of his/her own accord, if a party's submission is unclear, contradictory, ambiguous or manifestly incomplete. The degree to which this needs to be done depends on the area of law and whether an attorney represents the party or not. The duty to inquire is substantially lower when parties have chosen professional representation.

However, in some areas of law, the judge has the duty to establish the facts of his/her own accord (i.e. in family law cases with regard to child matters).

In Switzerland, the judges apply the law ex officio. The court deals with claims by either not entering into the matter and not considering the merits or by making a decision on the merits itself and adjudicating the matter.

3. Are court hearings open to the public? Are court documents accessible to the public?

The majority of civil law proceedings and the delivery of judgments are open to the public, unless public interests or the legitimate interests of the parties involved are overriding and require the proceedings to be held in camera. Conciliation hearings as well as judicial settlement hearings are not open to the public.

Copies of judgments by the courts, usually in an anonymised version, may be requested by the public and are often published online, e.g. judgments of the Federal Supreme Court (www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm). However, all submissions by the parties, including the exhibits, are not open to the public. Compared to proceedings in common law jurisdictions, a higher degree of confidentiality is maintained.

The courts' deliberations are usually confidential. The parties are not privy to the discussion of the judges.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Only attorneys registered with one of the cantonal attorney registers have the right to appear in Swiss courts. Once registered, they may conduct proceedings on behalf of their clients. In order to register, the candidate attorney must pass a cantonal bar exam. Attorneys registered with an EU/EFTA attorney register also have the right to appear in a Swiss court on a temporary basis. European legal professionals registered with a cantonal register may appear in court on a permanent basis, provided they make use of their original European professional title. They can even register with a cantonal attorney register after either passing an exam or having worked actually and regularly as an attorney in Switzerland for three years.

5. What are the limitation periods for commencing civil claims?

Limitation periods are governed by substantive civil law. The general statutory limitation period for contractual claims is 10 years if the law does not provide otherwise (e.g. five years for periodic payments). Tort claims and claims for unjust enrichment become time-barred after one year. However, if a tort claim is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the tort claim. Usually, the courts observe limitation periods only if pleaded by the parties.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

If a conciliation hearing is required by law, the parties have to attend this hearing first. In certain instances, the Civil Procedure Code does away with the requirement of a prior conciliation hearing, i.e. in summary proceedings, some actions in connection with debt enforcement, and if a single cantonal instance is competent to hear a matter, such as a commercial court. If the value of the dispute is CHF 100,000 or more, the parties can mutually agree to waive the preceding conciliation hearing. Furthermore, the claimant may waive conciliation and commence direct proceedings in court if the defendant's registered office or domicile is abroad or if the defendant's residence is unknown.

If a conciliation hearing is necessary, a party domiciled outside the canton or abroad is exempt from appearing in person and may send a representative.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

Conciliation hearings, if required by law, should take place within two months of receipt of the claimant's application by the conciliation authority. If no agreement is reached during the conciliation hearing, the conciliation authority grants authorisation, usually to the claimant, to approach the first instance court. The claimant is then entitled to file the action and bring the matter to trial within three months. The claimant is of course free to submit the statement of claim earlier to speed up proceedings. After three months, the authorisation lapses. Nonetheless, this does not mean that the matter may not be brought to court eventually (no res iudicata effect). However, a claimant is required to recommence conciliation proceedings.

If no conciliation hearing is required by law, the matter is brought directly to trial by lodging a submission to the court of first instance, e.g. the district court or the commercial court.

8. Are parties required to disclose relevant documents to other parties and the court?

This obligation is narrow under Swiss civil procedure law and is not comparable to the

disclosure required in proceedings in common law jurisdictions. In principle, trial parties and third parties have a statutory duty to co-operate with the court in the taking of evidence. The production of evidence is either ordered by the court or the parties can produce documents in their possession with their legal brief. A request to the court by a party to order the other party to disclose evidence such as documents will be granted only if the evidence sought is required to prove facts that are legally relevant and the claim has been substantially motivated by the requesting party and the evidence requested (e.g. a specific document) is sufficiently identified. As a rule, each party is well advised to rely on the evidence in their hands rather than hoping to find evidence in the hands of the counterparty.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

A party may refuse to co-operate where the taking of evidence would expose a close associate, such as a direct relative or a spouse, to criminal prosecution or civil liability. Furthermore, co-operation may be refused if the disclosure would constitute a breach of professional confidentiality (e.g. attorney-client privilege). Under Swiss law there is no attorney-client privilege for in-house counsels, although patent attorneys working as in-house counsels do enjoy the attorney-client privilege.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

As a rule, no evidence is exchanged prior to the trial, neither in written form nor orally. However, Swiss law knows the instrument of precautionary taking of evidence by the court before a matter is actually pending. This is possible if either the law grants the right to do so or the applicant shows credibly that the evidence is at risk or that it has a legitimate interest. If successfully pleaded, a party can obtain certain critical evidence that it can use to determine whether it wants to risk proceedings.

There is no comparable right to cross-examine a witness as in common law jurisdictions. Nevertheless, each party is allowed to put additional questions to a witness through the judge after the judge's initial interrogation. The court's examination of a witness is usually thorough.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

There are no specific rules governing the appointment of experts by the parties. The findings of party-appointed experts are considered by the court as party allegations and the court is free to assess their evidentiary value. If the court believes that expert knowledge is required, it can obtain an opinion from one or more experts, either of its own accord or if requested by a party. Court-appointed experts are considered experts with an added evidentiary weight as they are subject to similarly strict objectivity requirements and recusal grounds as judges and judicial officers.

The expert must tell the truth. There are criminal consequences for perjury by an expert witness and with regard to breach of official secrecy. The expert must submit his/her opinion within the set deadline. The court instructs the expert and submits the relevant questions to the expert. The court gives the parties the opportunity to respond to the proposed questions put to the expert and may invite them to suggest amendments or additional questions. The expert submits his/her opinion in writing or presents it orally. If necessary, an expert can also be summoned to the hearing. The parties have the opportunity to ask for explanations and to put additional questions to the expert.

12. What interim remedies are available before trial?

Interim remedies available before trial are general interim measures, attachment orders under the Debt Enforcement and Bankruptcy Act ('DEBA') and protective letters.

For non-monetary claims, the types of general interim measures available to parties are not limited by law. Rather, the parties are free to request and the court is at liberty to order whatever measure is required. This can be in the form of a mandatory or prohibitory interim injunction, such as an order to a bank to freeze certain assets or a cease and desist order. Further options include orders to take on record entries in a public register, orders to perform or rectify something or orders forbidding the disposing of an object.

If the opposing party provides appropriate security, the court can refrain from ordering an interim measure. If the principal action is not yet pending when an interim measure is requested, the court sets a deadline within which the applicant must file their principal action (no conciliation hearing required), failing which the interim measure lapses automatically. The court can issue the interim measure subject to the payment of security by the applicant if it is anticipated that the measures could cause loss or damage to the opposing party.

In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated by the other party if it became aware of the application, the court can order the interim measure immediately in ex parte proceedings with a first hearing after the measure has been put in place.

Safeguarding claims for monetary claims must take the form of an attachment order under the DEBA. A disposal or transfer of the assets of the debtor is prohibited by such an order until the creditor's claim has been determined in debt collection proceedings. The applicant may be held to post security for potential damages from an unwarranted attachment. If the creditor has not already commenced debt enforcement proceedings or filed a court action, the creditor must do so within 10 days of service of the attachment order. If the debtor files an objection, the creditor must either apply for the objection to be set aside or file a court action to have the creditor's claim confirmed within 10 days of service of the objection.

A protective letter can be filed by any person who has reason to believe that an ex parte application for an interim measure, an attachment order under the DEBA or any other measure against that person may become pending. This person can set out their position in such a letter. The party applying for the ex parte interim measure is only served with this letter if it actually initiates the relevant proceedings. Such a letter becomes ineffective six months after it has been filed. The aim of such a letter is to prevent the court from adopting an ex parte interim measure solely on the arguments of the applicant.

13. What does an applicant need to establish in order to succeed in such interim applications?

With regard to interim measures, the applicant must credibly show that a right to which the applicant is entitled has been violated or that a violation is immediately anticipated and, additionally, that the violation threatens to cause not easily reparable harm to the applicant. When applying for ex parte interim measures, the applicant must furthermore establish that there is special urgency by showing why it is necessary to adopt an interim measure without hearing the other party.

For an attachment order to be successful under the DEBA, a creditor has to show that it has a mature claim against the debtor and that there exists one of the statutory grounds for attaching assets. Further, the creditor needs to plausibly demonstrate the existence of assets and their

location. The DEBA provides for the following six grounds for the attaching of assets:

(a) if the debtor has no fixed domicile;

(b) if the debtor is concealing assets, absconding or making preparations to abscond so as to evade the fulfilment of the debtor's obligations;

(c) if the debtor is travelling through Switzerland or conducts business on trade fairs, for claims which must be fulfilled at once;

(d) if the debtor does not live in Switzerland and no other ground for attachment is fulfilled, provided that the claim has sufficient connection with Switzerland or is based on a recognition of debt;

(e) if the creditor holds a provisional or definitive certificate of shortfall against the debtor; or

(f) if the creditor holds a definitive title to set aside the objection in enforcement proceedings.

14. What remedies are available at trial?

General interim remedies and attachment orders may also be requested during the trial phase. The same rules apply as for remedies before the trial phase (see questions 12).

15. What are the principal methods of enforcement of judgment?

The method of enforcement of domestic judgments depends on whether a monetary or non-monetary judgment is at stake (for the enforcement of foreign judgments, see question 22). In instances of monetary judgments, the issuing of a payment order by the local debt collection office has to be requested. Such a payment order can be objected to by the debtor. A creditor can request the setting aside of this objection in court by reference to the enforceable judgment (or award) obtained.

The enforcement court also decides on the enforcement of non-monetary judgments. The enforceability is examined ex officio, and the opposing party can file its comments. The question of whether a judgment is enforceable is decided either as a preliminary question in the pending proceedings (incidentally) or separately (exequatur).

16. Are successful parties generally awarded their costs? How are costs calculated?

As a rule, costs are borne by the unsuccessful party. If no party succeeds fully with its claims, the costs are apportioned in accordance with the outcome of the case. Usually, the court decides on the costs in its final decision.

The claimant is obliged to make a reasonable deposit in the amount of the likely court fees at the beginning of the proceedings. In the final judgment, the court's fees are set off against the advances paid by the parties. Any balance is collected from the person liable to pay, i.e. the unsuccessful party. The unsuccessful party has to reimburse the other party for its advances and must pay the party costs awarded. Note in conclusion that the risk of insolvency of a counterparty is borne largely by the other party.

Unless a treaty (such as the Hague Convention of 1954 on Civil Procedure) provides otherwise, a defendant can also apply for the court to order that the claimant provide security for its party costs if the other party: has no residence or registered office in Switzerland; appears to be insolvent; owes costs from prior proceedings; or if for other reasons there seems to be a considerable risk that the awarded party costs will not be paid.

The cantons set the tariffs for the costs (both court fees and party costs). These are usually based on the amount in dispute and may be altered based on the complexity of a case. The Federal Supreme Court has its own tariffs, also based on the amount in dispute. Similarly, for DEBA proceedings, a federal ordinance governs the fees applicable.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

A final first instance judgment may either be appealed (Berufung) or be subject to an objection (Beschwerde) and brought before the second instance cantonal court. An appeal is admissible if the value of the claim is at least CHF 10,000. It is not admissible against decisions of the enforcement court and with regard to some matters under the DEBA (such as attachment orders). An incorrect application of the law or an incorrect establishment of the facts may constitute grounds for review. If a judgment is not eligible for appeal, an objection is admissible. The grounds for an objection are narrower and limited to an incorrect application of the law and a manifestly incorrect establishment of the facts.

Second instance judgments as well as judgments by single cantonal instances (such as commercial courts) can be brought before the Federal Supreme Court if the amount in dispute is higher than CHF 30,000 (with some exceptions such as rental disputes). The grounds for an appeal for civil matters to the Federal Supreme Court are narrow. Usually, only breaches of federal law and/or a manifestly incorrect establishment of the facts may be pleaded.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency fee arrangements are not permitted under Swiss law. However, conditional fee arrangements are permitted under specific circumstances, one of which being that the lawyer's base fee covers his/her actual costs and also allows a modest earning.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party funding is becoming more popular and is permitted as long as the lawyer acts independently from the third-party funder. Furthermore, the lawyer is not allowed to participate in the funding. Nevertheless, funders are allowed to share in the proceeds awarded.

20. May parties obtain insurance to cover their legal costs?

Insurance for litigation costs is available and is increasingly popular.

21. May litigants bring class actions? If so, what rules apply to class actions?

Typical class actions are not available in Switzerland. However, associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals are allowed to bring an action in their own name for a violation of the personality of the members of such group. Organisations, such as environmental protection organisations, are, in limited cases, also allowed to bring an action in their own name based on special laws.

The Swiss Parliament has referred a motion to the Federal Government to revise the current system of collective redress and to introduce class actions. In July 2013, the Federal Council issued a report on possible improvements. Whether the motion will be transposed into law remains to be seen (see also question 26).

Currently, in instances of class action-type scenarios, it is sometimes possible to launch a test case during which some core elements of fact and/or the law can be decided. Other cases with a similar fact pattern are then stayed by the court based on an application by the respective claimant for a suspension. Once the test case is decided, the identical elements in

the subsequent cases do not need to be litigated from scratch.

Mandatory joinders are given if two or more persons are in a legal relationship that calls for one single decision with effect for all of them. In this case, they must jointly appear as claimants or be sued as joint defendants. Voluntary joinders are possible if two or more persons whose rights and duties result from similar circumstances or legal grounds and if the same type of procedure is applicable.

22. What are the procedures for the recognition and enforcement of foreign judgments?

The Civil Procedure Code governs the recognition and enforcement of judgments, as long as the Swiss Federal Act on Private International Law ('PILA') or an international treaty (such as the Lugano Convention) does not take precedence. The PILA is only applicable if there is no international treaty. The recognition procedure itself is summary in nature and governed by the rules of the Civil Procedure Code.

There are two different ways of enforcing a foreign judgment. Regular enforcement proceedings for judgements by a Lugano Convention signatory state are governed by the Lugano Convention itself. Other state judgements are enforced pursuant to the rules of the PILA. Monetary judgments can be enforced by means of ordinary debt collection proceedings (see question 15). Debt collection proceedings can either be commenced straight away or one can also initiate regular enforcement proceedings first and start ordinary debt collection proceedings after receiving an enforceable judgment. Against a judgment granting enforceability, an objection can be filed (see question 17).

Under Swiss law foreign ex parte decisions cannot be enforced for lack of adherence to the right to be heard, nor can declaratory judgments since there are no actual enforcement steps that can be ordered.

23. What are the main forms of alternative dispute resolution?

Alternative dispute resolution, other than arbitration in international commercial disputes, is currently of only limited significance in Switzerland.

This is likely due to the active approach taken by Swiss judges to find a suitable settlement solution during the course of the court proceedings. Following the exchange of the statement of claim and the statement of defence, the court frequently makes a preliminary assessment of the matter and approaches the parties in an instruction hearing during which it provides a first-hand view of the procedural strengths and weaknesses of the parties' stances. It then sets out a well-reasoned proposal what a settlement could look like and encourages the parties to conclude a settlement agreement during the instruction hearing. Frequently, parties agree to conclude a judicial settlement under such circumstances. Such instruction hearings may be ordered at any time during the proceedings. Parties can also ask the court to stay proceedings in order for them to negotiate a settlement agreement inter partes.

The Civil Procedure Code contains some provisions on mediation. If all the parties so request, the pre-trial conciliation proceedings can be replaced by mediation. The court can also recommend mediation to the parties during the proceedings or the parties may make a joint request for mediation. The parties themselves are responsible for organising and conducting mediation and also bear the costs for mediation. The parties can request that an agreement reached through mediation be approved by the court. Such an approved agreement has the same effect as a state court decision. A court cannot approve a mediation agreement if the parties agree on mediation without pending proceedings in the matter.

As mentioned in questions 1 and 6, a conciliation hearing before a local conciliation authority is usually required before trial. A

substantial number of small cases is settled at this stage.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The following are the main alternative dispute resolution organisations in Switzerland:

(a) Swiss Chambers' Arbitration Institution: they have adopted the Swiss Rules of Commercial Mediation (www.swissarbitration.org/files/50/Mediation%20Rules/English%20mediation_20-06-2016_web-version_englisch.pdf);

(b) WIPO Arbitration and Mediation Center (www.wipo.int/amc/en);

(c) Swiss Chamber of Commercial Mediation (SCCM; www.skwm.ch);

(d) Swiss Association of Mediators (SDM-FSM; www.swiss-mediators.org).

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Litigants are not required to attempt alternative dispute resolution in the course of litigation. The court can only recommend mediation to the parties during the proceedings.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

Some of the limitation periods are being considered as to whether to be amended (see question 5).

The Lugano Convention is the equivalent to the Brussels I Regulation (Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation). As Switzerland is not a member of the European Union, only the Lugano Convention, and not the Brussels I Regulation, is applicable. The European Union has enacted the revised Brussels Ia Regulation (Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Despite the amendments, there are currently no initiatives to adapt the Lugano Convention to the revised Brussels Ia Regulation.

As noted in question 21, the Federal Government has been asked by the Parliament to revise the rules on collective redress. The Federal Government has not yet suggested amendments, but has stated that there will be proposals in the first half of 2017. Presently, it is open what solutions the Federal Government will propose.

The Federal Government is currently also reviewing the Swiss Federal Act on International Private Law with regard to the framework for international arbitration with the aim of maintaining the attractiveness of Switzerland as a place for international arbitration.

The Swiss Federal Act on Private International Law is also being reviewed with regard to the provisions on inheritance law. The reason is the European Union Regulation on Inheritance Matters (Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession). The goal is to ensure the compatibility of Swiss and foreign competences and also to allow a better coordination with foreign proceedings.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

Switzerland is known for its neutrality, consistent and high-quality jurisprudence and large pool of multi-lingual legal practitioners. These are some of the reasons why Switzerland is a destination of choice for arbitration. In addition, the Swiss state court system is highly

efficient and effective when compared to other countries. Court-initiated settlements are widespread. The commercial courts are especially known for conducting proceedings efficiently and with a high settlement rate and are open to foreign litigants (see also question 23). Recent figures show that about two-thirds of the cases pending at the Commercial Court of the Canton of Zurich are settled with the assistance of the court within a period of six months following the submission of the statement of claim.

About the Authors:

Dr Urs Feller
Partner, Prager Dreifuss

E: urs.feller@prager-dreifuss.com

Marcel Frey
Counsel, Prager Dreifuss

E: marcel.frey@prager-dreifuss.com

Michaela Kappeler
Associate, Prager Dreifuss

E: michaela.kappeler@prager-dreifuss.com

W: www.prager-dreifuss.com

A: Prager Dreifuss Ltd, Mühlebachstrasse 6, CH-8008 Zurich, Switzerland

T: +41 44 254 55 55

F: +41 44 254 55 99