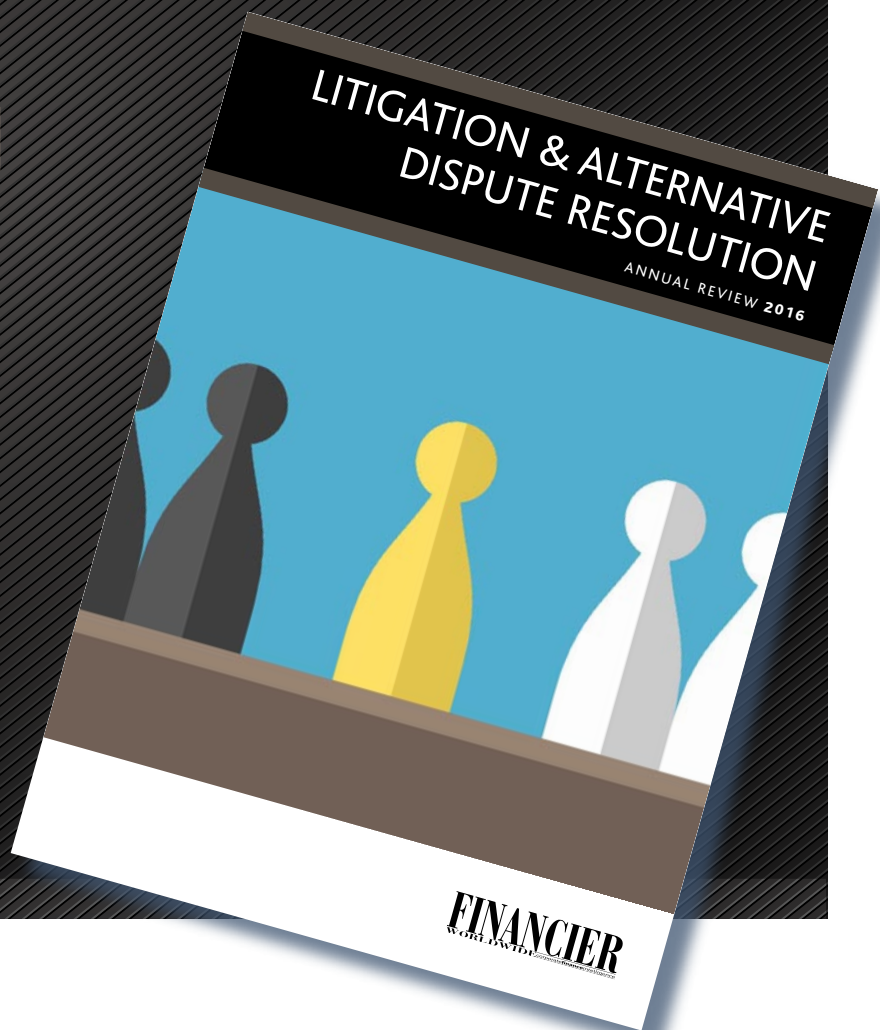


# ANNUAL REVIEW

## LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

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# SWITZERLAND

**URS FELLER**  
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**Q** COULD YOU OUTLINE SOME OF THE CURRENT MARKET CHALLENGES AT THE CENTRE OF COMMERCIAL DISPUTES IN SWITZERLAND?

**FELLER:** Changing consumer trends have influenced some aspects of commercial disputes. We are seeing a rise in commercial rent litigation where tenants are litigating to remain in traditional premises or are at odds with landlords in new malls for reasons such as inappropriate disclosures about their clientele. We are also still seeing bankruptcy related litigation as a consequence of some international insolvencies that have affected Swiss subsidiaries or companies. In banking, the peak of litigation in connection with data transfer to the US Department of Justice seems to have passed, but general banking and insurance litigation is still prevalent.

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**Q** WHAT GENERAL ADVICE CAN YOU OFFER 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:** Setting up a formalised framework requiring parties to deal internally with disputes at an early stage is a sensible means of achieving mutually acceptable solutions, particularly where parties wish to maintain their commercial relations. Additionally, selecting a neutral, yet sophisticated, dispute resolution venue such as Switzerland is advisable. Opting for a law that is known to be liberal, reliable and globally respected, can ensure that disputes are proactively managed. Where parties wish to keep their dispute confidential due to the sensitive nature of their trade, requiring a particularly swift resolution or cannot agree on a venue, opting for arbitration may be advisable. Incorporating a first round of neutral professional mediation can be effective in doing away with matters not yet sufficiently arduous to litigate but where party-conciliation has not rendered a solution. This may assist in breaking down a dispute to the material issues.

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

**FELLER:** ADR mechanisms such as mediation are slowly gaining ground in commercial spheres. Although Switzerland has a strong tradition of mediation in the form of settlement proposals by state conciliation authorities, ombuds organisations and court conducted settlement hearings, commercial disputes have, until recently, not frequently been the subject of mediation efforts. Large corporates are, however, increasingly including mediation in their dispute resolution armoury for its efficiency and longer lasting appeasement affect. However, since most Swiss courts are very reliable and commercially oriented, the offer of mediation has not driven significant numbers of commercial disputes away from state courts, in particular where cases are viable for adjudication by one of the four cantonal commercial courts with their extensive expertise in dealing with, settling and deciding large commercial disputes.

**Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN SWITZERLAND? ARE LOCAL COURTS SUPPORTIVE OF THE PROCESS?**

**FELLER:** Switzerland has been a world-class arbitration centre for many years. The country has a long tradition of arbitration with the Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich having established the Swiss Chambers' Arbitration Institution which offers highly specialised arbitration services and has its own arbitration rules in 13 languages – the so-called 'Swiss Rules'. Furthermore, Swiss legal professionals are internationally renowned in the field of arbitration. Switzerland has many experienced arbitrators and experts as well as multilingual legal counsel. An openness and ability to accept views from different legal and cultural backgrounds is inherent in Swiss society and reflected in its laws. The jurisprudence of the Federal Tribunal is supportive of arbitration, giving it extra strength. Geographically, Switzerland is conveniently placed to provide access to international arbitration parties.



**“Including multi-tiered dispute resolution mechanisms suing has the potential to settle potential disputes at an early stage.”**

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**Q** WHAT KINDS OF SITUATIONS OR CIRCUMSTANCES MIGHT LEAD COMPANIES TO PURSUE LITIGATION INSTEAD OF ARBITRATION?

**FELLER:** In Switzerland, or if a dispute can be made subject to Swiss state litigation, parties often choose to submit their case to such a court where they, firstly, seek to have their dispute resolved by state measures for cost reasons which are, in Switzerland, usually less expensive than those incurred in international arbitration. Further, where the dispute can be brought before a commercial court, this is frequently done, as these courts have a strong record of brokering settlements between the parties in short periods of time – less than six months from the start of trial for the Commercial Court of the Canton of Zurich.

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**Q** WHAT PRACTICAL CHALLENGES NEED TO BE DEALT WITH WHEN UNDERTAKING COMPLEX INTERNATIONAL, MULTIJURISDICTIONAL DISPUTES IN SWITZERLAND?

**FELLER:** International disputes often involve the application of foreign law. Contracts that are not subject to Swiss law but brought before a Swiss court will thus oblige the party that derives rights from the contract to demonstrate the applicability, meaning and extent of the foreign law to the Swiss court. This may be challenging both materially, as the Swiss judge may not be familiar with certain legal concepts from other jurisdictions, but also from a practical point of view, as organising translations of statutes, scholarly opinions and leading cases may be time consuming and costly. Another factor to account for is the coordinative work that needs to be managed, liaising between in-house and local counsel abroad and the court in Switzerland. This will include defining a joint strategy, obtaining evidence from overseas as well as drafting submissions within short time frames in several countries.

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**Q WHAT CONSIDERATIONS SHOULD COMPANIES MAKE WHEN DRAFTING A DISPUTE RESOLUTION CLAUSE IN THEIR COMMERCIAL CONTRACTS TO ADDRESS THE POSSIBILITY OF FUTURE DISPUTES?**

**FELLER:** Using unambiguous standardised clauses, arbitration settings in particular, in the procedure regarding dispute resolution is helpful. Such clauses should always address where a dispute shall be resolved and which material law will be applicable to the dispute. If arbitration is sought, we recommend defining how the procedure is to be commenced, who may appoint arbitrators and how many, who shall choose the chairman and by which procedural rules the proceedings shall be governed. Addressing these issues in advance limits time lost when commencing the procedure and enables parties to focus their energy on resolving the actual matter at stake. Including multi-tiered dispute resolution mechanisms requiring parties to conciliate before suing has the potential to settle potential disputes at an early stage.

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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. Dr 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, commercial tenancy relations as well as administrative and judicial assistance. Other areas of expertise include insolvency, restructuring and asset recovery. He is vice-chair of the executive committee of the International Bar Association's litigation section.



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