# The Dispute Resolution Review

Seventh Edition

Editor
Jonathan Cotton

Law Business Research

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This article was first published in The Dispute Resolution Review - Edition 7
(published in February 2015 – editor Jonathan Cotton).

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# THE LAW REVIEWS

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THE RESTRUCTURING REVIEW

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk


ISBN 978-1-909830-37-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ARTHUR COX

ARZINGER LAW OFFICE

ATTIAS & LEVY

AZB & PARTNERS

BAKER & PARTNERS

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

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MOHAMMED AL-GHAMDI LAW FIRM IN ASSOCIATION WITH NORTON ROSE FULBRIGHT US LLP

MOLITOR AVOCATS À LA COUR

MOTIEKA & AUDZEVIČIUS

NIEDERER KRAFT & FREY

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TSMP LAW CORPORATION

ŢUCA ZBÂRCEA & ASOCIAŢII

URÍA MENÉNDEZ

UTEEM CHAMBERS

WOLFF GSTOEHL BRUCKSCHWEIGER ADVOKATURBÜRO

WOLF THEISS RECHTSANWÄLTE GMBH & CO KG

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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# EDITOR'S PREFACE

*The Dispute Resolution Review* covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

*The Dispute Resolution Review* is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it is has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

**Jonathan Cotton**
Slaughter and May
London
February 2015

# Chapter 42

# SWITZERLAND

*Peter Honegger, Daniel Eisele, Tamir Livschitz*[1]

## I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The substantive civil law of Switzerland and its law on civil procedure is regulated at federal law level, whereas the judiciary in Switzerland's 26 cantons is organised by each respective canton on its own. Even though a civil law country, court precedent is of utmost practical significance in Switzerland both in terms of interpretation and development of the law.

The Swiss Code of Civil Procedure[2] (CCP) prescribes the principle of double instance for the judiciary of the cantons, which means that each canton must, besides a court of first instance, establish an appeal instance with full power of review. Decisions of the appeal court may then be appealed to the Swiss Federal Tribunal – the highest court in Switzerland – where the grounds for appeal are ordinarily limited to violations of federal and constitutional law. The proceedings before the Swiss Federal Tribunal are governed by the Federal Act on the Swiss Federal Tribunal.[3]

As an exception to the aforementioned principle of double instance at the cantonal level and deriving from the cantonal power to organise its judiciary (e.g., the functional and subject matter jurisdiction of the courts), the cantons are given the right to establish a specialised court as the sole cantonal instance to hear commercial disputes, whose decision may only be appealed to the Swiss Federal Tribunal. So far only four cantons (Zurich, Bern, St Gallen and Aargau) have made use of this right and have established a specialised commercial court.

1 Peter Honegger and Daniel Eisele are partners and Tamir Livschitz is a senior associate at Niederer Kraft & Frey.

2 Swiss Code of Civil Procedure of 19 December 2008.

3 Federal Act on the Swiss Federal Tribunal of 17 June 2005.

In certain specialised fields of law such as intellectual property, competition and antitrust law, claims against the Swiss government and disputes relating to collective investment schemes, federal law requires the cantons to designate a court of exclusive first instance jurisdiction.

The principle of double instance furthermore does not apply in arbitration matters, be it domestic or international. The sole instance of appeal in domestic arbitration proceedings is the Swiss Federal Tribunal, unless the arbitrating parties explicitly agree on a cantonal court as sole appeals instance. Similarly, in international arbitration proceedings the Swiss Federal Tribunal acts as the sole appeals instance for arbitral awards, unless the possibility to appeal has been excluded by the arbitrating parties, which is, however, only admissible if none of the arbitrating parties is domiciled in Switzerland.

## II THE YEAR IN REVIEW

### i Revised rules for WIPO arbitration

On 1 June 2014 the revision of the arbitration rules of the World Intellectual Property Organisation (WIPO) domiciled in Geneva entered into force. The WIPO arbitration rules have been set up with a particular focus on intellectual property rights disputes. Following the revision of the arbitration rules of the International Chamber of Commerce and the international arbitration rules of the Swiss Chambers' Arbitration Institution in 2012, and the revision of the arbitration rules of the Court of Arbitration for Sport (CAS) in 2013, WIPO, being the fourth major arbitration institution whose rules are used in Switzerland, has now also followed suit and updated its arbitration rules (both for ordinary and expedited proceedings), introducing provisions that have already been included in the recent revisions of other institutional arbitration rules.

The most notable changes concern on the one hand the introduction of an 'emergency arbitrator' mechanism, pursuant to which it will be possible for a party to request interim measures from the WIPO Center either before a WIPO arbitration proceeding has commenced, or after commencement of an arbitration proceeding but before an arbitral tribunal has been constituted. On the other hand, the revision of the arbitration rules now also foresees the possibility to join a third party into the arbitration proceedings. Such a joinder of a third party requires the agreement of the arbitrating parties as well as the third party to be joined. Similarly, the consolidation of several pending proceedings is also made possible in the event that there is a substantial connection between the disputes or if the same disputing parties are involved. A consolidation of proceedings equally requires the consent of all involved parties and the consent of the arbitral tribunals involved that have already been constituted. It remains to be seen to what extent the introduction of the emergency arbitrator and of the multiparty arbitration features will prove to be of practical relevance in WIPO intellectual property disputes arbitration.

### ii Pending payment of security for court costs does not require a halt of proceedings

In a decision of 7 May 2014, the Swiss Federal Tribunal rendered a decision on a question of practical importance relating to security for court costs.

Upon commencement of a state court proceeding, a state court can request the plaintiff to provide security for court costs up to the amount of the presumable future court costs. If the plaintiff fails to provide such security, the court will terminate the court proceedings.

A case was submitted to the Swiss Federal Tribunal for review, where a court had upon receipt of a statement of claim requested the plaintiff to provide security for court costs and in parallel also set the defendant a deadline to submit its statement of defence. The plaintiff failed to provide the security for costs as directed by the court, the proceedings were terminated and payment of the court costs and the costs incurred by the defendant were imposed on the plaintiff.

One of the questions of practical interest addressed by the Swiss Federal Tribunal was whether in cases where an order for security for court costs has not yet been complied with by the plaintiff, the defendant could nevertheless be set a deadline for the submission of its statement of defence and, thus, be compelled to incur costs in relation thereto. The Swiss Federal Tribunal confirmed that civil courts in Switzerland have wide discretion as to how they conduct their court proceedings and that there is no provision in Swiss law that would compel a court to halt proceedings for the time during which an order for payment of court costs has not been complied with.

This decision may have practical consequences for both plaintiffs and defendants. From a plaintiff's perspective this means that when commencing state court proceedings, a plaintiff must be aware that even if it decides subsequently to pull out from the court proceedings by not paying any requested security for court costs, it may nevertheless become liable not only for the court costs accrued up to termination of the proceedings, but also for costs incurred by the counterparty in connection with the proceedings. From a defendant's perspective, the decision means that the defendant will bear the risk of recovering any of its costs incurred in connection with a proceeding, which applies even in cases where, from the very beginning, a plaintiff appears to lack money or willingness to pay the requisite security for court costs. Furthermore, such risk may not be avoided by requesting the court to order the plaintiff to provide security for the defendant's costs (in addition to the court costs security), since – based on the rationale of the Swiss Federal Tribunal decision – also in this regard a court is not prevented from ordering the payment of security for defendant's costs, while in parallel instructing the defendant to prepare and submit its statement of defence (thereby incurring unsecured costs). Thus, an assessment of these practicalities relating to state court proceedings, and the parties' respective financial interests, burdens and risks, continue to be very much dependent on the specific court hearing the case and the exercise of its wide discretion in this regard.

### iii Precautionary taking of evidence should not be regarded as a pretrial discovery tool

The Swiss Federal Tribunal, in November 2013 and April 2014, rendered two interesting decisions relating to the precautionary taking of evidence for the purpose of assessing

a party's prospects of success in a civil proceeding. Such precautionary taking of evidence is provided for in Article 158 of the Swiss Code of Civil Procedure (CCP) and can occur prior to the commencement of legal proceedings.

The Swiss Federal Tribunal has confirmed that a precautionary taking of evidence is available to assess the evidentiary and procedural prospects of success, which in turn should avoid the commencement of proceedings lacking any chance of success. However, a precautionary taking of evidence can only be requested with a view to a concrete material claim, since the interest in the taking of evidence depends on the enforcement of a claim to be proven with that very evidence. Thus, a party wising to request a precautionary taking of evidence will need to plausibly present the existence of facts, based on which the law provides it with a claim, which in turn can be proven by the very piece of evidence whose precautionary taking is requested.

Importantly, the Swiss Federal Tribunal went on to clarify that a precautionary taking of evidence will not be possible in cases where a party does already have evidence, which it will be able to submit in civil proceedings. Neither will a precautionary taking of evidence be permitted where its sole purpose is directed at obtaining additional evidence (e.g., a neutral expert opinion) to question already existing evidence (i.e., other existing opinions capable of being submitted in civil proceedings).

The decisions of the Swiss Federal Tribunal on the precautionary taking of evidence clarify that the tools provided by Article 158 CP must be directed at clearly delineated fact patterns and claims made thereon, and can therefore not be compared with pretrial discovery tools made available to parties particularly in common law jurisdictions. Pre-trial discovery remains, therefore, unavailable in Swiss civil proceedings.

### iv Reminder – arbitrariness of an arbitral award in domestic arbitration qualifies as grounds to vacate an award

On 19 November 2014 the Swiss Federal Tribunal vacated an arbitral award on grounds of arbitrariness. This decision reminds us again that in contrast to arbitral awards rendered by arbitral tribunals seated in Switzerland in international arbitration cases (i.e., where at least one of the parties has its domicile outside Switzerland), arbitral awards between Swiss entities may be set aside on grounds of arbitrariness; this requires that both the motives of the decision and its result are arbitrary.

In the case at hand, an arbitral tribunal had held the termination of a supply contract (the First Contract) between two parties to be invalid, because the terminating party had in parallel concluded a second supply contract (the Second Contract) related to the same subject matter with a third party. Such conduct of double contracting had been deemed by the arbitral tribunal to be contrary to the principle of good faith and the arbitral tribunal had therefore held the terminating party to have been estopped from lawfully terminating the First Contract. Rather than adopting the 60-day notice period set forth in the First Contract, the arbitral tribunal decided to apply the termination provisions that were agreed in a contract between the disputing parties preceding the First Contract (the Preceding Contract), which stipulated a five-year fixed term. As a consequence and in application of this five-year fixed term, the arbitral tribunal held the terminating party liable for the fees accrued until expiration of the fixed term, resulting in fees of $100 million.

The Swiss Federal Tribunal held both the considerations of the arbitral tribunal and the resulting decision to be arbitrary. In particular, the award was held not to include any explanation as to why the termination of contract by a party that had previously breached the contract would qualify as an abuse of rights (as argued in the award). It was further held incomprehensible why, generally, a breach of contract should result in the deprivation of the breaching party's right to terminate the contract it had previously breached. The tribunal noted in this regard that, in fact, a party's formal termination of a contract it had previously been unwilling to perform – as evidenced by the contractual breach – was consistent conduct and could, therefore (and contrary to the arbitral tribunal's conclusion), not be interpreted in and of itself as contradictory behaviour, which in turn would represent an abuse of rights by the terminating party.

Rather than the question of whether or not the specific facts of this particular case indeed warranted the setting aside of the arbitral award on grounds of arbitrariness, the present decision of the Swiss Federal Tribunal is noteworthy since it shows that when it comes to Swiss domestic arbitration, the prospects of an appeal based on grounds of substance (i.e., other than on grounds relating to the constitution or jurisdiction of the arbitral tribunal or on a matter of due process) are better than in the case of Swiss international arbitral awards. The setting aside of Swiss international arbitral awards on grounds of substance is only possible if such grounds qualify as a violation of public policy. In this regard it should be noted that since the coming into force of the Swiss Private International Law Act (PILA)[4] in 1989, to date only one arbitral award has been set aside because of a violation of substantial public policy.

## III COURT PROCEDURE

### i Overview of court procedure

The main statute governing civil procedure in Switzerland is the CCP. Besides civil procedure, the CCP equally governs debt collection proceedings in relation to non-monetary matters as well as domestic arbitration proceedings, unless the arbitrating parties opt out of its application.

Monetary debt collection matters are governed by the Federal Debt Enforcement and Bankruptcy Act[5] (DEBA), whereas the recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly regulated by the PILA as well as all bilateral and multilateral agreements on this subject matter to which Switzerland is a party, the most practical importance of which certainly applies to the Lugano Convention and the New York Convention, respectively.

Predominantly, civil proceedings in Switzerland are governed by the maxim clarifying that it is up to the parties to decide how, when, how long and to what extent they wish to submit claims as plaintiffs, whether they wish to accept or contest such claims as defendants, or whether they wish to lodge or withdraw appeals. In the same vein, it is generally up to the parties to submit the factual allegations relevant to decide

4 Private International Law Act of 18 December 1987.

5 Federal Debt Enforcement and Bankruptcy Act of 11 April 1889.

the dispute and the court when assessing the matter may not take into account facts that have not been argued by the parties. In contrast thereto, certain proceedings – in particular (but not limited to) family law matters – are governed by the maxim that the court has a certain obligation to collect and determine relevant facts to resolve the dispute.

Irrespective of any maxim that may apply, Swiss civil proceedings are governed by the principle of *iura novit curia* (i.e., it is up to the court to apply the substantive law *ex officio* regardless of whether or not a party has invoked certain provisions of law). Put differently, when rendering a decision, a court may base its decision on legal provisions that the parties did not invoke at all.

In proceedings before the Swiss Federal Tribunal acting as the last instance of appeal to review violations of fundamental rights and cantonal or inter-cantonal law; and acting as sole instance of appeal in domestic and international arbitration proceedings, this principle of *iura novit curia* does not apply. Rather these proceedings are governed by a principle requiring the parties to point out explicitly and demonstrate what provisions of law are violated by the decision they appeal.

In terms of duration, a period of between three and seven years may be taken as a benchmark for a full litigation appealed through all instances up to the Swiss Federal Tribunal.

### ii Procedures and time frames

The three principal types of proceedings foreseen by the CCP are the ordinary, simplified and summary proceedings. Claims must be submitted under the ordinary proceedings unless the law expressly provides otherwise.

Ordinary proceedings can generally be split up into three phases:

*a* the pleading phase, where the parties must present and substantiate their claims and defences and offer evidence for them;

*b* the evidentiary phase where the courts hear and review the evidence presented by the parties; and

*c* the post-hearing phase where the parties may comment on the outcome of the evidence proceedings and the court renders its decision.

Generally (and subject to a number of exceptions), state court civil proceedings in Switzerland are commenced by lodging a request for a conciliatory hearing, which is ordinarily a prerequisite for the filing of legal action in civil matters before state courts. In practice, the conciliatory hearings only rarely lead to a settlement of the dispute, in particular if the value in dispute is high. Thus, in cases where the value in dispute exceeds 100,000 Swiss francs, the CCP foresees a possibility for the parties to waive the holding of such a conciliatory hearing. A plaintiff may furthermore waive the holding of a conciliatory hearing if the defendant is domiciled outside Switzerland or if its whereabouts are unknown. The parties can agree to revert to mediation in lieu of holding a conciliatory hearing. However, should the mediation process fail, the plaintiff will have to request the issuance of a writ permitting them to file the claim from the body that would have held the conciliatory hearing had it not been replaced by the mediation process.

Simplified proceedings govern disputes with a value in dispute not in excess of 30,000 Swiss francs. Additionally, certain actions relating to subject matters such as employment law, tenancy law or data protection law are also to be brought under simplified proceedings.

Simplified proceedings, like ordinary proceedings, are commenced by lodging a request to hold a conciliatory hearing as elaborated above. In the same way as ordinary proceedings, simplified proceedings are complete proceedings (i.e., there is no reduced scope of court review nor do any limitations as to the adduction of evidence apply). Rather, simplified proceedings generally provide for a facilitation of the pleading phase, where, for instance, a proper substantiation of the claim is not necessary, as the court has certain extended interrogation duties with a view to supplement any incomplete facts of the case or adduce adequate evidence. Certain subject matters to be decided by means of the simplified procedure, such as certain tenancy and employment matters, require the court to collect the relevant facts of the dispute. Lastly, in terms of the duration of the proceeding, the court will work towards resolving the dispute during or following the first hearing of the case.

Summary proceedings are fast-track proceedings. No holding of a conciliatory hearing is necessary. The main characteristics of summary proceedings are that the parties may not avail themselves of all otherwise available means of claim and defence. In particular, the means of evidence admitted are significantly restricted, while the standard of proof is reduced (generally to a standard of 'reasonable certainty).

Legal actions such as motions for interim relief (preliminary measures or injunctions) and claims where the facts are undisputed or immediately provable and where the law is clear are to be brought in summary proceedings. Furthermore, the DEBA foresees the applicability of summary proceedings to certain debt collection and bankruptcy proceedings. To benefit from such a fast-track proceeding, the party seeking to collect the outstanding monetary debt must have proper title certifying such debt. Depending on the nature of the title, the debtor will in the course of the fast-track proceeding be able to raise certain defences, which, if upheld, will require the claimant to initiate the ordinary or simplified state court proceedings in civil matters.

The above DEBA fast-track proceeding for monetary debt collection matters also applies to the enforcement of monetary debts certified by domestic and foreign state court judgments as well as to domestic and foreign arbitral awards (where, with regard to foreign judgments and arbitral awards, the provisions of international agreements and treaties, such as the Lugano Convention or the New York Convention, are additionally taken into account).

### iii Class actions

Swiss civil law procedure does not permit class actions. Thus, typically, claims must be brought by individual claimants. However, a number of procedural tools under the CCP allow for multiple parties in civil law proceedings to act jointly, be it on the plaintiffs' or the defendants' side.

Under certain circumstances a group of plaintiffs must lodge their claims or be sued jointly (a 'mandatory joinder of parties'). Generally speaking this will be the case if the relationship between the members of the group is of a kind that does not

allow for differing decisions as to the individual members of the group. Also, if rights or duties of multiple parties stem from similar circumstances or legal grounds, Swiss law allows for such multiple parties to lodge their claims jointly. However, and in contrast to a mandatory joinder of parties set up, the joint action is made available as an option rather than as a mandatory requirement.

Depending on whether or not the plaintiffs are required by law to proceed together, the effect of the plaintiffs' legal actions on the other joint parties varies. In the case of a mandatory joinder of parties, all procedural measures taken by one of the parties are, as a rule, effective for all other joint parties. Furthermore, if in the case of a mandatory joinder of parties not all parties are made part of the legal action, the plaintiffs or the defendants may lack standing, which will lead to the dismissal of a claim. In contrast, in the case of a voluntary joinder of parties, each of the joint parties may act independently, a judgment rendered will only bind the parties having joined the proceedings as voluntary joint parties and the judgment may vary as to each individual of the joint parties.

As a further kind of group action, Swiss law permits associations and organisations of national or regional importance to file claims on behalf of their members, if their statutes authorise them to so protect the interests of their members, which is predominantly limited to remedial action for violations of their members' personality rights. Actions seeking monetary relief are, however, excluded and need to be pursued individually by the person or persons concerned.

While the above reflects the current situation in Switzerland with respect to class actions, political efforts are under way to improve the tools for collective legal protection, in particular in the areas of consumer protection, finance and capital markets, personality rights and data protection. The introduction of some sort of class action into Swiss law is being considered, albeit not in the form of US-style class action. The coming into force of any such changes, if adopted politically at all, will presumably take considerable time.

### iv Representation in proceedings

As a rule, a representation in proceedings is always permitted in Switzerland. Exceptions to this rule may apply in conciliatory hearings and certain family law proceedings where the parties must appear in person. That said, Swiss law does not require a party to be represented in court proceedings, unless such a party is deemed incapable of conducting the proceeding in which case the court will require such a party to arrange for legal representation.

Other than in civil and criminal matters before the Swiss Federal Tribunal legal representation of a party in court proceedings needs not be, but ordinarily is, taken over by a lawyer. A person wishing to professionally represent parties in court proceedings must be qualified to practise in Switzerland.

Apart from the duty to protect their clients' interests and their duty of care, Swiss attorneys are subject to confidentiality and professional secrecy obligations, a violation of which constitutes a criminal law offence.

### v Service out of the jurisdiction

Summons, orders and decisions from Swiss courts are served to parties domiciled in Switzerland by registered mail or by other means against confirmation of receipt.

Barring any bilateral or multilateral agreement ratified by Switzerland providing otherwise, service of court documents out of Switzerland must occur by way of judicial assistance only.

Apart from bilateral agreements, Switzerland takes part in two international treaties on the subject matter. Switzerland is a signatory state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, pursuant to which service of legal documents occurs via a central authority appointed in each Member State, which in Switzerland are the respective cantonal high courts. The legality of service is then assessed based on the law of the jurisdiction where service is effected.

Furthermore, Switzerland is party to the Hague Convention on Civil Procedure of 1 March 1954, pursuant to which a foreign court wishing to serve documents out of the jurisdiction must use diplomatic channels (i.e., the documents must be served to the consular representation in Switzerland, which then approaches the Swiss Federal Department of Justice to ensure service on the party domiciled in Switzerland). Complaints to foreign courts against persons domiciled in Switzerland must also be translated into one of the official languages of Switzerland.

A Swiss court may require a party domiciled abroad to appoint a process agent in Switzerland for the purposes of a civil proceeding. If the foreign party fails to do so, service may be effected by the court by way of public announcement, generally by way of publication in the cantonal official gazette.

### vi Enforcement of foreign judgments

Barring any bilateral or multilateral agreement that may apply, the general rules regarding the enforcement of foreign judgments in Switzerland are regulated in the PILA. To enforce a foreign judgment under the PILA, a party must submit to the enforcing court a complete and authenticated copy of the decision; a confirmation that no ordinary appeal is available any more against the decision; and in the case of a default judgment, official documentation evidencing that the defendant has been duly summoned and has been given the chance to enter a defence.

For a foreign judgment to be recognised under the PILA, the party seeking enforcement must, in particular, demonstrate the competence of the foreign court having rendered the decision. The party objecting to the recognition and enforcement is entitled to a hearing and to adduce evidence. This notwithstanding, interim relief such as freezing orders or attachments are available in the enforcement proceedings for the party seeking recognition and enforcement to protect its legitimate interests.

With regard to European judgments, Switzerland is a signatory state of the Lugano Convention, whose provisions apply to the recognition and enforcement of judgments in civil and commercial matters rendered in another signatory state of the Lugano Convention.

Compared with the enforcement regime foreseen by the PILA, the Lugano Convention provides facilitations both in terms of the conditions for recognition and

enforcement as well as in terms of the applicable procedure. As regards the conditions to be met for recognition and enforcement of a foreign judgment, under the Lugano Convention the enforcing court is, in particular, not permitted to verify whether the foreign court, having rendered the decision, was competent to do so in the first place. A party seeking to enforce a foreign judgment must provide the court with the original or an authenticated copy of the judgment and a certificate rendered in accordance with the provision of the Lugano Convention confirming the enforceability of the decision. Notably, no evidence as to due process standards having been met must be adduced. In addition, provisional measures issued by a signatory state of the Lugano Convention (other than *ex parte* decisions) may be enforceable in Switzerland (in contrast to provisional measures issued by another state, which pursuant to the PILA are not enforceable in Switzerland). In terms of procedure, the enforcing court must decide on the enforcement request in an *ex parte* procedure (i.e., without hearing the party against which enforcement is sought). The latter will only be heard in the appeals stage should it appeal the *ex parte* enforcement decision.

### vii Civil assistance to foreign courts

In recent years, assistance to foreign courts has shifted more and more into public view, not least because of certain attempts of foreign courts to order parties domiciled in Switzerland to directly collect and surrender information and documentation to the foreign court other than via the official channels foreseen by international law.

In Switzerland, it may be a criminal offence pursuant to Articles 271 (unlawful activities on behalf of a foreign state) and 273 (industrial espionage) of the Swiss Criminal Code – and possibly also a violation of further obligations relating to professional secrecy and data protection laws – to collect or surrender (or assist to do so) information and documentation to a foreign court pursuant to a foreign order not effected via the requisite judicial assistance channels as foreseen by international law. Thus, compliance by a party with such a foreign court order (or for that matter with any order of a foreign authority) may lead to criminal sanctions. Barring any bilateral or multilateral agreement to the contrary, any information, documentation or other kind of assistance pertaining to matters located within Switzerland that a foreign court may require must be obtained by way of judicial assistance only.

The service of documents from a foreign court into Switzerland and the taking of evidence by a foreign court in Switzerland must occur in line with international treaties ratified by Switzerland. In relation thereto, Switzerland has ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, the Hague Convention on Civil Procedure of 1 March 1954 and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970.

Under the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970, the requesting state must transmit its request to the central authority of Switzerland (at cantonal level), which will forward such a request to the Swiss Federal Department of Justice and Police together with its recommendation about whether or not it supports such a request. The taking of evidence will be effected by the cantonal authorities at the domicile of the person. It is, however, noteworthy that

Switzerland has made a reservation under this treaty as regards common law pretrial discovery of document requests.

The procedure for the taking of evidence required under the Hague Convention on Civil Procedure of 1 March 1954, while not identical, is fairly similar to the procedure required under the Hague Convention on the Taking of Evidence Abroad in Civil And Commercial Matters of 18 March 1970. Since the latter replaces the former, a requesting state being signatory to both treaties will have to submit its request under the procedure foreseen by the Hague Convention on the Taking of Evidence Abroad in Civil And Commercial Matters of 18 March 1970.

Generally speaking, the Swiss authorities have in recent years proven to be very amenable to judicial assistance requests from foreign authorities.

### viii Access to court files

As a rule, civil law court proceedings in Switzerland are public. However, public interest in commercial cases is normally very limited. If the public interest or the protected interests of a person are directly affected, a court may exclude the public from proceedings. Since commercial disputes, in particular those with an international component, tend to be complex, the parties generally submit their pleas in writing. While written submissions in civil proceedings are not made available to the public, copies of judgments may be requested by anyone. In such cases the judgments are generally made available in anonymised form only.

### ix Litigation funding

Litigation in Switzerland is usually funded by the litigating party itself. Ordinarily, the prevailing party may recover its legal costs. However, depending on the canton where litigation is conducted, the cost amount that may be recovered does not equal the actual legal fees paid (the difference, depending on the canton, may be quite substantial).

If a party cannot afford the costs of the proceedings or legal representation in such proceedings, a party may apply for free proceedings and to be provided with legal representation, the costs of which will be covered by the state.

The funding of litigation by third parties is, in principle, admissible, albeit not very popular. As with all contractual relationships, the contractual terms of a funding agreement must be in line with Swiss mores and must in particular not constitute profiteering in accordance with Article 157 of the Swiss Criminal Code (sanctioning, *inter alia*, the exploitation of a person in need). Furthermore, the funding by a third party must not cause any conflict of interest on the level of the attorney–client relationship (i.e., notwithstanding any third-party funding, the lawyer must still be instructed by the litigating party and will owe its contractual duties (including its duty of care) in relation to the litigant only).

One should note that while the client and its attorney are generally free to agree on the remuneration for the legal services rendered, in contentious matters the professional rules of attorney conduct do not allow for pure contingency fees. In contentious matters, legal services are, therefore, generally charged on an hourly basis. It is, however, admissible to agree on reduced hourly rates and provide for an additional success fee if the reduced hourly rates agreed cover the attorney's costs (plus an adequate markup)

at least. The inadmissibility of pure contingency fee arrangements in litigation may be a major reason why litigation funding in Switzerland has not gained popularity thus far.

## IV LEGAL PRACTICE

### i Conflicts of interest

Pursuant to the Federal Lawyers' Act[6] Swiss attorneys are subject to a special fiduciary duty in relation to their clients, pursuant to which any real conflict of interest – as opposed to the mere appearance of a conflict of interest – must be avoided between the lawyer's clients and persons with whom the lawyer has private or professional contact. If a conflict of interest arises in the course of the provision of legal services, the attorney affected must, in principle, terminate its involvement. In certain instances, the professional rules of conduct even prohibit a lawyer from accepting a mandate in the first place.

Conflicts of interest may in particular arise in three instances:

*a* if an attorney has personal interests contradicting the client's interests;

*b* if the lawyer represents two or more clients with contradicting interests; or

*c* if a lawyer acts against a former client.

The latter case is in particular likely to cause a conflict of interests if the matter in relation to which the lawyer is to act against the former client concerns matters and knowledge the lawyer was exposed to during his or her past representation of the former client.

The obligation to avoid conflicts of interests applies equally to different attorneys of the same law firm. In this respect, the different attorneys of a law firm are regarded as one and the same lawyer.

In contentious matters, it is thus prohibited for different lawyers of the same firm to represent clients with conflicting interests, notwithstanding any Chinese walls that may be in place. In non-contentious matters, however, the representation of clients with conflicting interests is admissible if all parties involved consent. In practice, this can be observed for instance when a law firm represents multiple clients in auctions related to acquisitions or also when multiple clients (as creditors) are represented by one and the same law firm in bankruptcy proceedings.

A representation of several clients with aligned interests is admissible, be it in contentious or non-contentious matters.

### ii Money laundering

For financial intermediaries, there are verification obligations as to the identity of the contracting counterparty, the ultimate beneficial owner and the reasons behind the commercial transactions such a contractual counterparty engages in pursuant to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial

6 The Federal Lawyers' Act of 23 June 2000.

Sector.[7] The same Act furthermore subjects financial intermediaries to reporting duties in relation to funds reasonably suspected to be linked to acts of a criminal organisation or money laundering; a crime sanctioned with imprisonment in excess of three years; funds at the disposal of a criminal organisation; or funds financing terrorism.

Lawyers are exempted from the above reporting duty to the extent that their activity is subject to professional secrecy, which will generally apply to legal advice, however, not services as board directors or escrow agents (unless linked to the provision of legal services).

### iii Data protection

The Swiss Data Protection Act (DPA) applies to and restricts the processing of personal data. Provided that it allows for identification, data relating to both private persons and legal entities (data subjects) are covered by the term personal data.

Various general principles must always be adhered to when processing personal data. For instance, the data subject must at least implicitly agree to such processing and therefore be informed or otherwise be aware of the data being collected and processed as well as of such activities' purpose. Any processing must ensure data accuracy, be made in good faith and not be excessive. In addition, adequate technical and organisational protection measures are required to prevent unauthorised access to the data.

Particular restrictions apply to the international transfer of personal data. A transfer from Switzerland to countries with a level of data protection that is deemed inadequate such as, for example, the United States, is only possible if one of the exceptions provided for in the DPA is met. An exception may include the specific consent of the data subject, the implementation of contractual clauses ensuring that data protection is safeguarded, the overriding public interests, or the necessity with regard to the exercise or enforcement of legal claims before courts. Data transfers within the same group of companies (i.e., from a Swiss affiliate to a foreign affiliate) are correspondingly restricted in that they require implementation of specific data protection rules. EU countries are considered to have an adequate level of data protection, so disclosure is not further limited than the transfer within Switzerland.

Sensitive data (i.e., relating to religion, political views, health, race, criminal records, etc.) and personality profiles are also subject to enhanced legal protection under the DPA, which may, for example, include certain duties of registration with the Federal Data Protection and Information Commissioner (FDPIC).

A person whose data is processed in a way that unlawfully infringes its privacy can sue for correction or deletion of the data, prohibition of disclosure, and damages. Accordingly, for most claims based on DPA breaches, the civil judge is competent. There are, however, a few exceptional constellations constituting criminal liability, such as failure to fulfil registration duties.

Many very helpful summaries, sample contracts and guidelines, including various topics like international data transfer, lists of countries with adequate and inadequate

7 The Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector of 10 October 1997.

levels of data protection, processing of employee data, outsourcing of operations and pertaining personal data to service providers, etc. may be found on the FDPIC's website (www.edoeb.admin.ch/datenschutz/index.html?lang=en).

## V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

### i Privilege

Pursuant to Article 321 of the Swiss Criminal Code and Article 13 of the Federal Lawyer's Act any lawyer admitted to the bar (or otherwise authorised by law to represent clients before the courts) and who works in independent practice is subject to a duty of professional secrecy. A lawyer subject to professional secrecy obligations may (or normally has to) invoke legal privilege when it comes to the giving of testimony or the production of documents falling within the scope of the professional secrecy obligations.

The scope of such secrecy obligations is rather broad and includes everything conveyed to a lawyer in connection with the (prospective) attorney–client relationship. Most notably, this also includes the attorney's own assessments, proposals, memoranda and information he gathers, learns or which otherwise comes to his attention in the course of performing his mandate. While it is of no relevance from whom the lawyer learned the information, only information in the lawyer's possession as part of his core business is protected. This notably excludes any information a lawyer learns as a private person or in a non-legal capacity, such as business advice.

No protection is granted where the business aspects prevail over the legal aspects, such as in the case of a lawyer serving as a board member or asset manager.

Corporate in-house counsel are not subject to a duty of professional secrecy, since they are in particular thought to lack the 'independent practice' characteristic required for the applicability of the professional secrecy obligations as per Article 321 of the Swiss Criminal Code. Consequently, to date no legal privilege applies to corporate in-house counsel.

From a procedural perspective, the CCP duly defers to the legal privilege of attorneys. Neither must lawyers' correspondence be produced in civil proceedings, irrespective of whether or not such correspondence is in the possession of the lawyer, the litigating party or any third party. Nor can a lawyer be compelled to testify, as he may legitimately invoke legal privilege, if the testimony would violate his secrecy obligations under Article 321 of the Swiss Criminal Code. However, legal privilege may not be invoked as a blanket defence. Rather it must be claimed for each specific piece of information in question and will be considered on a case-by-case basis.

### ii Production of documents

Contrary to other – predominantly common law – jurisdictions, the CCP does not impose any obligations on the litigating parties in terms of pre-action conduct. Hence, litigating parties in Switzerland are not subject to a litigation hold. This should, however, not be misunderstood as permission to destroy evidence. Such conduct could result in adverse inferences by a court assessing the case.

In state court litigation, a court may during the procedure order the parties of the dispute or third parties to produce documents and may even enforce such orders with

coercive means. Refusal to obey a court's production order is only possible on the basis of a statutory refusal right (i.e., legal privilege, incrimination of a party of close proximity).

In practice, the production of documents in state court litigation has been shown to be of limited value. In particular, parties engaging in 'fishing expeditions' in an attempt to extract a wide array of unspecified or only very vaguely specified information will generally not be entertained by Swiss courts. Based on case law the documents to be produced must be described with sufficient specificity and their significance and appropriateness to prove factual allegations being in dispute must be shown. Furthermore, the information requested must be shown to be in the possession or under the control of the party to whom the production request is directed.

Given such rather stringent prerequisites, in practice it is not an easy task to obtain an order for the production of documents. A request for the production of documents will ordinarily require the requesting party to have concrete knowledge about the existence of a specific document (not necessarily, however, about its content), which in many instances proves to be the main obstacle for successful production requests.

If the type of information one seeks to obtain relates to own personal data or information connected therewith, the owner of such data may be able to obtain such data based on data protection regulation. In international arbitration proceedings in Switzerland the standard adopted for the production of documents will generally be in line with the IBA Guidelines for the Taking of Evidence in International Arbitration.

## VI ALTERNATIVES TO LITIGATION

### i Overview of alternatives to litigation

In Switzerland arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation. Mediation proceedings have gained some popularity, but are yet to have a major practical impact.

### ii Arbitration

Switzerland is seen as one of the traditional and most popular places for international arbitration proceedings. Thanks to the arbitration-friendly and very liberal approach adopted in Swiss legislation and the extensive court practice when it comes to international arbitration, Switzerland is one of the preferred countries for institutional arbitration proceedings conducted under the auspices of the International Chamber of Commerce.

The procedural rules – the *lex arbitri* – applicable to international arbitration proceedings seated in Switzerland are set out in the PILA (in particular chapter 12). These rules together with the case law of the Swiss Federal Tribunal in particular ensure the following.

The rules contain a broad definition of what matters are deemed arbitrable. They extend to proprietary matters, which notably include proprietary matters pertaining to disputes in employment, antitrust and non-competition, family law, shareholder and real estate matters, as well as intellectual property law.

The procedural rules ensure a wide party discretion to agree on procedural rules to govern the arbitral proceeding, such a discretion being limited by the core principles pertaining to a fair proceeding and public policy only.

The rules give protection from unwarranted interference by both domestic state courts and foreign courts. This supports the efficiency and independence of an arbitration proceeding seated in Switzerland; on the one hand, Swiss legislation expressly excludes the application of rules on *lis pendens* to Swiss arbitration proceedings, as a result of which any parallel proceedings initiated outside Switzerland will not be able to interfere with Swiss arbitration proceedings. On the other hand, protection from unwarranted interference is also ensured by settled case law granting arbitral tribunals seated in Switzerland a preference over domestic state courts to review the validity of an arbitration agreement and thus the arbitral tribunal's competence to hear a case (also referred to as the negative effect of *Kompetenz-Kompetenz*).

Furthermore, the rules ensure a readily available support of arbitration proceedings by domestic state courts when it comes to the ordering of interim relief requested by arbitrating parties or when it comes to the enforcement of interim relief ordered by arbitral tribunals.

The rules constitute a straightforward and rather expedient appeals procedure, where arbitral awards in international arbitration can be appealed to one instance only, the Swiss Federal Tribunal. The grounds for appeal are restricted to:

*a* the arbitral tribunal having been constituted improperly or an arbitrator lacking impartiality and independence;

*b* questions of jurisdiction;

*c* the arbitral tribunal deciding *ultra* or *extra petita* (i.e., beyond a matter, on a request not made by the parties, or failing to decide on a request made by the parties);

*d* matters pertaining to due process, the right to be heard and equal treatment; and

*e* grounds of public policy.

In hearing appeals, the Swiss Federal Tribunal has shown great reluctance to interfere with arbitral awards. Statistically, the chances of success vary from around 10 per cent for appeals relating to jurisdiction to around 7 per cent for all appeals on other grounds. In particular, since the entering into force of the PILA in 1989, only two awards have been set aside on the grounds of public policy, once because of a violation of the *res judicata* principle (formal public policy) and once in a case where a professional footballer was banned from football for life, *inter alia*, as a means to enforce a monetary debt owed to his former club (substantive public policy). Ordinarily, appeals decisions can be expected to be rendered within six to eight months from lodging the appeal.

In arbitration proceedings where all arbitrating parties are domiciled outside Switzerland, the parties are given the option to altogether waive the possibility of appeal to the Swiss Federal Tribunal. Parties may also replace the PILA and agree that the rules for domestic arbitration set forth in the CCP shall apply. In such a case, the grounds for appeal to the Swiss Federal Tribunal (unless the parties have agreed on a cantonal court to act as sole appeals instance in lieu of the Swiss Federal Tribunal) are slightly broadened and in particular include the arbitrariness of a decision, an apparent wrongful application of the law or a wrongful determination of the facts.

Most institutional arbitration proceedings seated in Switzerland are governed by the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (www.swiss-arbitration.ch) and the Rules of Arbitration of the International

Chambers of Commerce (ICC). In sports matters, the majority of arbitration proceedings are conducted under the rules of the CAS in Lausanne, while many intellectual property disputes are conducted under the arbitration rules of the WIPO in Geneva.

Compared to the extensive international arbitration practice, domestic arbitration in Switzerland is of less relevance. The procedural rules applicable to it are set forth in the CCP, while the parties are given the opportunity to opt out and choose their arbitral proceedings to be governed by the PILA instead.

### iii Mediation

In the past few years, mediation has become slightly more popular also in commercial disputes. Various institutions have issued mediation rules such as the Swiss Chamber of Commercial Mediation, the WIPO domiciled in Geneva and the CAS. Among other providers, the Swiss Chamber of Commercial Mediation also offers a wide variety of mediation courses and, hence, there is a considerable number of Swiss practitioners with special expertise in mediation techniques. In practice, mediation procedures are nevertheless of minor importance in Switzerland mainly because of the fact that Swiss counsel normally attempt to bilaterally settle a case (without the involvement of a mediator) before formal proceedings are initiated.

### iv Other forms of alternative dispute resolution

Other forms of dispute resolution used in Switzerland are expert determinations, which are often contractually agreed, for instance with regard to purchase price determinations in M&A transactions or in relation to real estate matters. The local chambers of commerce or industry institutions readily offer their services to appoint experts in various fields of expertise if so desired by the parties.

Furthermore, within civil court proceedings the CCP permits the parties to agree on an expert report to determine certain disputed facts. In such a case the competent court is generally bound by the factual findings contained in the expert report, unless such findings prove to be obviously erroneous.

## VII OUTLOOK AND CONCLUSIONS

Currently, a reform of the entire Chapter 12 of the PILA regulating international arbitration in Switzerland is in preparation with the objective of introducing selected improvements and updating certain provisions in line with the extensive case law developed by the Swiss Federal Tribunal since the entering into force of the PILA back in 1989. The overall form, simplicity and reader-friendly style of Chapter 12 of the PILA is likely to remain unchanged. Completion of the revision and its coming into force will presumably take considerable time.

On 10 January 2015 Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will enter into force, being a recast of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Amendments introduced by the recast concern, for instance, the personal and

subject-matter jurisdiction, forum prorogation and provisional measures. The Lugano Convention, which is a parallel convention to Council Regulation (EC) No. 44/2001, not only provides for the applicability of provisions identical with those of Council Regulation (EC) No. 44/2011 between the European Union on the one hand and Switzerland (which is not a member of the EU), Norway and Iceland on the other hand. Its protocol No. 2 also ensures a parallelism in the interpretation of provisions of Council Regulation (EC) No. 44/2001 and the Lugano Convention by the European Court of Justice and the Swiss Federal Tribunal.

To date, it is not clear whether the Lugano Convention will be amended and adapted to the changes promulgated in EC Regulation No. 1215/2012. Once EC Regulation No. 1215/2012 comes into force, time will show the practical implications and impact of any discrepancies with the Lugano Convention on the system of parallelism that has applied to date between the Member States of the European Union, Switzerland, Norway and Iceland in terms of recognition and enforcement of judgments in civil and commercial matters.

In addition, currently concrete efforts are under way to improve the tools for collective legal protection in the area of finance and capital markets. Any new legislation, if and when adopted, is presently not expected to enter into force before 2018.

Other than that, no major procedural changes in the field of state court litigation or arbitration are expected in Switzerland in the next few years. Benefiting from a long-standing, liberal free-market tradition, Swiss law continues to remain highly attractive as governing law for both Swiss-related and purely foreign business transactions. Because of the strong international nexus of Swiss law, Switzerland will continue to be a thriving jurisdiction and a central place for international arbitration on a worldwide scale.

# Appendix 1

# ABOUT THE AUTHORS

**PETER HONEGGER**

*Niederer Kraft & Frey*

Peter Honegger specialises in litigation, arbitration and other dispute resolution matters, in particular in the areas of banking, finance, regulatory matters and mergers and acquisitions.

Particular areas of emphasis involve complex civil procedures, local and international arbitration, transnational litigation, foreign governmental investigations, enforcement and other regulatory proceedings initiated by the Swiss Financial Market Supervisory Authority or other authorities. His litigation practice encompasses various types of complex litigation, including securities, post-mergers and acquisitions, insurance and other commercial litigation.

Peter has particularly long-standing experience of advising companies and individuals with respect to Swiss secrecy laws and the taking of evidence located in Switzerland for use in US proceedings. In the late 90s, Peter acted as secretary to the Board of Trustees (Messrs. Paul Volcker, Israel Singer, René Rhinow) supervising the Claims Resolution Tribunal for dormant accounts in Switzerland with respect to victims of Nazi persecution.

Peter Honegger is mentioned by *Chambers Global*, *Chambers Europe*, *The Legal 500* and *Who's Who Legal*.

**DANIEL EISELE**

*Niederer Kraft & Frey*

Daniel Eisele is a partner in the dispute resolution team of Niederer Kraft & Frey. He is specialised in large and complex litigation and arbitration proceedings.

Having almost 20 years of professional experience, Daniel Eisele has represented clients in more than 200 arbitration, court and other proceedings. These procedures concern all types of industries, namely banking, finance, construction, oil,

telecommunications, commerce and sports and mostly relate to commercial contracts (e.g., purchase, work, delivery, production, licensing, construction, M&A, equity, marketing and television). He has special expertise in the field of sports.

Daniel Eisele has acted as counsel in many national and international proceedings conducted pursuant to the Swiss Rules, the ICC Rules or the TAS/CAS Rules. He has also been involved in civil, administrative and criminal proceedings in most cantons of Switzerland and has advised clients in many foreign procedures. He regularly represents clients before the Swiss Federal Court in Lausanne and before other Swiss federal courts and authorities.

*Chambers Global* and *Chambers Europe* both rank Daniel Eisele as a leading lawyer for litigation and arbitration counsel in Switzerland. They state that he is 'determined and target oriented'. *The Legal 500* mentions Daniel Eisele as a litigation lawyer who is 'very experienced, extremely dedicated and convincing, with an entrepreneurial approach and business orientation'. Daniel Eisele won the Client Choice Award in 2014 and 2015 for the litigation category in Switzerland and is listed as leading litigator by *Who's Who Legal* and *Best Lawyers*.

**TAMIR LIVSCHITZ**

*Niederer Kraft & Frey*

Tamir is a senior associate in the dispute resolution team at Niederer Kraft & Frey.

His practice covers a wide range of civil litigation with special emphasis on *ad hoc* and institutional commercial arbitration proceedings. Tamir is particularly well-versed in complex international arbitration disputes, where he has predominantly advised corporate clients from CIS countries. Tamir regularly represents clients in sports-related arbitration proceedings before the Court of Arbitration for Sport in Lausanne, Switzerland, and also sits as an arbitrator in ICC proceedings.

Recent practice includes, in particular, cases in the construction, commodity, real estate, sports, finance and pharmaceutical industries. *Chambers Global* and *Chambers Europe* both rank Tamir as a leading lawyer for dispute resolution in Switzerland.

Before joining Niederer Kraft & Frey, Tamir practised at one of the leading law firms in Tel Aviv, Israel. Tamir is fluent in six languages and is admitted to practise in Switzerland, Israel and in the state of New York. He has a master's degree in law from the New York University School of Law as well as an Advanced Professional Certificate in Law and Business from the NYU Leonard N Stern School of Business.

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