IR Global - The Future of Professional Services

IR Global was founded in 2010 and has grown to become the largest practice area exclusive network of advisors in just a few years, this incredible success story has seen the network awarded Band 1 status by Chamber & Partners, recommended by Legal 500 and has been featured in publications such as The Financial Times, Lawyer 360 and Practical Law amongst many others.

The group’s founding philosophy was based on bringing the best of the advisory community into a sharing economy; a system, which is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic “professional service firm” model is dying due to it being insular, expensive and slow. In IR Global, forward thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

MULTI-DISCIPLINARY
We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the clients requirements.

NICHE EXPERTISE
In today’s marketplace, both local knowledge and specific practice area / sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

VETTING PROCESS
Criteria is based on both quality of the firm and the character of the individuals within. It’s key that all of our members share a common vision towards mutual success.

PERSONAL CONTACT
The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

CO-OPERATIVE LEADERSHIP
In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups who focus on network development, quality controls and increasing client value.

ETHICAL APPROACH
It is our responsibility to utilise our business network and influence to instigate positive social change. IR founded Sinchi a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities / tribes around the world.

STRATEGIC PARTNERS
Strength comes via our extended network, if we feel a clients need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR or someone else.

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FOREWORD BY EDITOR, NICK YATES

Switzerland – The Innovative Heart of Europe

Switzerland is one of the most highly developed and progressive economies in the world. For many years it has been a byword for stability and security, but it is less well known for its innovation.

Despite the country’s strength in traditional sectors like banking and big pharma, Switzerland also leads the way in innovation; investing heavily in research and development and cultivating new industries such as FinTech, medtech, cybersecurity and robotics.

Figures from the Federal Department of Foreign Affairs (FDFA) show that Swiss gross domestic product (GDP) per capita in 2015 stood at CHF77,943 (EUR73,000), the second highest in the world. The figures also reveal that it spends close to 3 percent of annual GDP on research and development, more than CHF18.5 billion (EUR15 billion) in 2015.

Investment in cutting edge technological development contributes heavily to the Swiss economy’s ability to remain resilient and relevant, but this talent for innovation extends into other areas, which are equally important to Switzerland’s success and its attractiveness as a place to do business.

Progressive Swiss attitudes have contributed to an extremely attractive tax environment, light-touch labour laws, a mature, stable financial system and a highly developed and integrated system of international trade.

The Swiss tax framework is different from other countries in Europe, based as it is on a system of domestic tax competition between autonomous cantons and communes within the Swiss Confederation. The most attractive of its 26 cantons, in tax terms, are international leaders with regard to both corporate taxes and the tax imposed on highly skilled workers. Innovations in the tax arena are ongoing, with a new framework for corporate tax, called TP17, currently being evaluated.

In terms of international trade, Switzerland is not part of the European Union, but does have bilateral trade agreements with every country in Europe. According to the FDFA, around 78 percent of Swiss imports are from the EU, while 43 percent of Swiss exports are destined for EU countries. In total, Switzerland has 41 separate free trade agreements (FTAs), which makes it an attractive base for international investment or expansion.

The innovative spirit of the Swiss people can also be seen in the type of organisations that thrive in Switzerland. More than 99 percent of Swiss firms are small and medium-sized enterprises (SMEs), as defined by 250 employees or less. This drives a real entrepreneurial culture and provides plenty of scope for high-growth investment opportunities.

The labour force that fuels this entrepreneurialism is highly skilled, multicultural and multilingual. According to Switzerland Global Enterprise (an organisation enabling new business in Switzerland), an excellent social security system and low unemployment means labour disputes are rare, enabling labour regulations to be liberal and light-touch.

To confirm this, we can refer to The Global Talent Competitiveness Index compiled by international business school INSEAD. It ranks countries and cities in terms of flexible regulatory and business landscape, employment policies which combine flexibility and social protection, plus external and internal openness and diversity for competitiveness.

In their 2018 study, Switzerland topped the country list, ahead of Singapore, USA and Norway, while Zurich topped the city list, ahead of Stockholm, Oslo and Copenhagen.

This potent mixture of stability and innovation is the hallmark of Switzerland, which should be considered a key global investment destination for internationally-minded corporates. In the following pages, you will hear from a range of legal experts providing interesting detail on a variety of different specialisms, including employment law, competition law, data protection regulations and corporate transactions.

Their thoughts should serve to further highlight the strengths of this vibrant, stable, hi-tech and innovative country at the heart of Europe.

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Member Firms in Switzerland

IR Global Swiss members are located in key cities throughout Switzerland including Geneva, Bern, Zürich, Sion, Zug, Basel and more, consisting of leading legal, accountancy and financial advisers recommended exclusively by practice area thus ensuring that members have the highest quality niche expertise available to them.

Whether it's an incorporation of a company, advising on cryptocurrencies and blockchain, an M&A deal that needs careful management or a complex dispute that needs resolving, our Swiss representatives are on hand to provide you with a high-quality service that suits your every business need.

Member firms featured here retain a global support network across 155+ jurisdictions via their IR Global membership, sharing a common vision of working collaboratively to achieve unrivalled results. Please see the full list of Swiss member firms below and on the IR Global website via bit.ly/2x3MfKm.
Demian Stauber is active as an attorney at law in the fields of intellectual property, information technology and contract law. He litigates disputes in patent and other technology-related matters and counsels innovative small and medium-sized entities in drafting and negotiation of contracts, such as development, supply, license and software agreements. His main areas of interest include engineering and computer sciences, in particular internet of things, e-mobility and blockchain.

Demian was educated at the Universities of Zurich and Bern (MA 2003, PhD 2008, both summa cum laude) and as a Hauser Global Scholar at the New York University (LL.M. in Trade Regulation 2009). Prior to joining Rentsch Partner, Demian worked as a junior associate with a large Swiss law firm (2004), as a law clerk at the Commercial Court of Argovia (2005-2008) and as an attorney with the IP/IT team of another Swiss law firm (2009-2013). He is a lecturer for internet law at the University of Zurich.

The team at Rentsch Partner comprises a specialised group of attorneys at law and patent attorneys, and a number of administrative assistants.

Most law firms in Switzerland separate the fields of registration and administration of industrial property rights on the one hand, and the judicial enforcement of such rights on the other. At Rentsch Partner, this is not the case and the firm’s patent attorneys work together with technology experts as a team.

This collaboration between lawyers and engineers, whose expertise especially covers areas such as mechanical engineering, computer science, chemistry, biotechnology, materials science and electrical engineering, is unique for Switzerland. It allows for the provision of comprehensive interdisciplinary advice on complex legal and technical issues. Apart from representing clients in court, registering industrial property rights (especially trademarks, patents, designs) and giving general legal advice (distribution, publishing and software agreements, franchising, licensing etc.) Rentsch Partner counsels on application strategies, furnishes legal opinions and legal and technical advice.

Rentsch Partner collaborates with other IP lawyers in 120 countries worldwide. The firm is fully capable of representing the interests of its clients abroad. Thus interdisciplinary exchange and integral judgment of factual issues regarding intellectual property may be placed ideally into the service of the client.
Data Protection in Switzerland

Up until a few months ago, most Swiss companies did not pay particular attention to the stringent implementation of data protection measures. This was due to the fact that customer complaints and enforcement actions by authorities were rare.

Recently, however, perception has started to change. This is because many Swiss companies will be affected by the European Data Protection Regulation (GDPR), and the Swiss Parliament’s current revision of the Swiss Data Protection Act (DPA).

- Although the GDPR is a European Union regulation, it also applies to certain companies domiciled outside the European Union. In particular, it applies to Swiss-based companies offering goods or services to, or monitoring the behaviour of, EU residents (so-called data subjects).
- The Swiss DPA is currently under revision. The draft presented to the Swiss Parliament contains many rules resembling the GDPR, which, in fact, served as a source of inspiration for the preparation of the draft. While there will most likely be elements with a ‘Swiss finish’, generally one may expect that compliance with GDPR rules will be an excellent starting point for complying with the Swiss DPA. Conversely, Swiss companies which do not need to be GDPR-compliant because they are outside the scope of its application (see above), cannot sit back and relax, but need to prepare for the new Swiss DPA rules.

Under both the GDPR and the DPA, failure to comply with the rules may lead to significant penalties. Also, current developments, such as the alleged abuse of personal data for interfering in political processes, have awakened the public interest in Switzerland for data privacy and data protection.

DATA PROTECTION POLICY IS A TOP-LEVEL ISSUE

Despite this, many Swiss companies perceive the new data protection legislation as a nuisance. Accordingly, they delegate the implementation of the new rules to either the IT department or some other support unit (such as the legal team, HR or accounting) with little guidance on the companies’ overall policies and approach to data privacy and data protection.

In my view, this is the wrong approach for the following three reasons, which I will discuss in more detail below:

- A company’s overall approach to data privacy and data protection is a strategic question with potentially far-reaching consequences.
- Without backing by top-level management, proper implementation of the legal requirements is impossible.
- The measures required for implementation are not just a burden, they may also present opportunities to enhance business.

STRATEGIC APPROACH TO DATA PROTECTION

Firstly, a company needs to determine which overall approach is adequate and feasible in its particular business and in light of the general strategic positioning of the company. For this assessment, consider whether the company’s reputation (e.g. ‘best-in-class’, ‘trustworthy’, ‘innovative’ etc.) may impact on how the company treats data. This applies both to personal data, which is the subject of the data protection laws, and also other data, which may well be a valuable and vulnerable asset. For instance, if a company relies on the trust of its customers, then perfect transparency and higher security standards than mandated by the law may be appropriate. If a company holds itself out as innovative, then inventive concepts around ensuring data privacy and protection may be the way to go. If implementation of GDPR and DPA compliance are delegated to some support units, they will usually simply seek to implement the minimum required standards to comply with the law, without considering such strategic aspects.

BACKING BY TOP-LEVEL MANAGEMENT

The GDPR and the DPA contain numerous provisions requiring cumbersome and time-consuming analysis and implementation measures. To make things worse, most departments of a company usually need to be involved to achieve proper documentation and process management. Accordingly, delegating to a single business unit without empowering it to seek substantial and timely assistance from other parts of the business will lead to failure.

OPPORTUNITIES

Compliance with current data protection legislation requires thorough understanding of a company’s business processes and meticulous documentation of data obtained, data flows, access, storage, and security measures etc. An open-minded approach in the analysis of these elements provides, in turn, a great opportunity to reconsider and improve such processes and mechanisms and to ultimately achieve progress.
Oliver Kaufmann specialises in national and international distribution systems, in particular antitrust and competition law issues and regulatory matters. He regularly advises corporate clients on all market levels in a variety of sectors, including pharmaceuticals and medical devices, retail and wholesale markets for consumer goods, clothing, food, consumer electronics, tools, press/publishing and motor vehicles.

Oliver’s main practice areas are antitrust and competition law, including merger control, distribution law and healthcare and pharmaceuticals law. Other notable practice areas include data protection law and selected areas of criminal law. Oliver represents his clients before civil and administrative authorities and courts, in both contentious and non-contentious matters.

Oliver is a co-founder and manager of a series of events for young talents and professionals in the area of competition and antitrust law and antitrust economics. He also frequently publishes and lectures on various topics in the area of his expertise.

Oliver graduated from the University of Zurich in 2005 (Master of Law), and he received his doctoral degree/PhD in the area of Swiss antitrust and competition law in 2014. Oliver was admitted to the Zurich Bar in 2010. He writes and negotiates in German and English. Oliver also speaks and understands French.

Streichenberg Rechtsanwälte | Streichenberg Attorneys at Law is a team of highly committed lawyers, each with their own special practice area, ranging from distribution law, antitrust and competition law, healthcare and pharmaceuticals law, IP/IT and data protection law to criminal law, in particular regarding white collar crimes. Streichenberg’s lawyers are among the best in their field.
Current Developments in Swiss Competition Law

The application of the Swiss Cartel Act to international distribution systems is already part of the day-to-day business of the Swiss competition authorities. The recent practice of the Swiss Federal Supreme Court regarding hard core restraints further exacerbates this far-reaching practice.

Switzerland is an interesting sales market for brand manufacturers, since the standard of living and levels of purchasing power are high, the infrastructure is well developed, the political system stable and the courts efficient. However, Switzerland is neither a member of the EU or the EEA. In connection with EEA standard agreements in international distribution, it must therefore be noted that Swiss competition law deviates from European competition law in certain aspects, despite a large degree of congruence.

The recent case law of the Swiss Federal Supreme Court (FSC) in two cases concerning international distribution, has led to a more restrictive approach to the hardcore restraints of competition.

MORE RESTRICTIVE APPROACH TO HARDCORE RESTRAINTS

In its ruling in the GABA case of 28 June 2016 (BGE 143 II 297; export ban on the sale of toothpaste), the FSC established new rules for competition agreements that differ substantially from the previous assessment grid.

- First, the FSC ruled that, in the case of hardcore restraints, the ‘significance’ of the agreement required for inadmissibility must be assessed without reference to a market. Market shares or sales figures are therefore no longer a factor in the assessment. Hardcore restraints are per se ‘significant’.
- Second, according to the court, it suffices that such agreement affects competition only potentially. It is therefore not necessary for an agreement to have any effect on a market. A contractual restraint does not even have to be actually implemented.

As a result, vertical agreements regarding resale prices or territory are now to be regarded as significant restraints on competition, solely on account of their content. For example, it doesn’t matter whether the export ban contained in an EEA distribution agreement actually had an effect on Swiss markets. Subject to a justification on grounds of economic efficiency, such agreements are therefore always inadmissible.

The decision not to examine the effects of an agreement is controversial and raises the question of the scope of application of Swiss competition law. It should be noted that the FSC has set forth rules that are stricter than European competition law. Whereas no market reference is required under Swiss competition law and the mere possibility of the effects of an agreement is sufficient for its inadmissibility, the effects of an agreement in European antitrust law must be direct, substantial and reasonably foreseeable.

In its decision in the BMW case of 24 October 2017 (export ban on new vehicles to countries outside the EEA; BGer 2C_63/2016), the FSC specified the extraterritorial extension of the Swiss Cartel Act.

The court made it clear that vertical agreements without reference to Switzerland would not fall within the scope of Swiss competition law. The court specifically argued that, for example, an agreement between two American companies not to supply products to Canada was not covered by Swiss competition law. However, restrictions imposed abroad with potential effects on Swiss markets would be covered, with no requirement for a minimum intensity of these potential effects.

The example of the FSC therefore does not change the far-reaching interpretation of the scope of application. The waiver of the requirement for a minimum intensity means, in essence, that a general export ban in an American distribution network is covered by the Swiss Cartel Act, since this potentially affects Swiss customers – irrespective of whether Swiss customers order products from these US companies at all.

Excessive as it may be, this practice of the Swiss Federal Supreme Court, especially as regards the application of the Swiss Cartel Act in an international context, will not change for the foreseeable future. In its recent ruling in the Altimum case of 18 May 2018 (resale price maintenance for mountaineering equipment), the FSC just expressly confirmed the above case law, albeit in a purely Swiss context.

PRACTICAL EFFECTS

In any case, the Swiss Competition Commission (Comco) is willing to take action against manufacturers abroad - for example, in addition to BMW, recently against Elfare (Australian signal flares) or back in 2013 against US motorcycle manufacturer Harley-Davidson. The Harley-Davidson case in particular is remarkable, since Comco was of the opinion at the time that there was no illegal restraint on competition – for the marginal effects of the American export ban on Swiss markets. Since such export bans are hardcore restraints, this would have to be assessed differently under the new rules.

Hence, it is of interest how the new rules of the FSC will affect the practice of Comco regarding various clauses in distribution contracts.

In case of recommended resale prices, for example, Comco maintains that these may be regarded as vertical price agreements, specifically in the case of incentives to comply with, or exerted pressure on dealers. Under these circumstances, and under the new rules, it no longer matters whether the recommended prices are actually implemented.

In case of online trading, Comco interprets automatic redirections, or the request for a credit card address within the contract area, as potentially restricting passive sales. Such contractual requirements are therefore also covered in principle by the new assessment grid of the FSC.

Like the European Commission, Comco intends to focus its future practice on cross-border online trade. Manufacturers and distributors abroad, with reference to Switzerland, are therefore well advised to take the stricter rules of Swiss competition law into account when setting up their distribution systems.
As a business lawyer and an international industry executive, Balthasar Wicki has gained a wealth of experience in dealing with phases of growth, conflict and change. He also has a great deal of practical management expertise and specialist technical knowledge. Entrepreneurs and companies value his in-depth approach to business management, his ability to understand complex economic issues, his readiness to take responsibility and his willingness to support others.

After his admittance to the Bar in 1993, Balthasar worked with Hilti Group as a Corporate Legal Counsel and then took on managerial positions in market development at various large industrial companies in India, China and South-East Asia. When he returned from Asia in 2003, he was responsible for the successful repositioning of a major Swiss NGO/NPO and then, as CEO and co-investor (private equity financed), led a global industrial company through an existential crisis. He returned to work as an attorney in the field of company and commercial law in 2008.

Currently, Balthasar advises a large number of domestic and foreign SMEs, entrepreneurs and investors on corporate law and structuring issues primarily in the technology sector, but also in traditional industries. He also manages major restructuring and insolvency mandates in the international corporate environment and is responsible for complex negotiating mandates.

As a business mediator and a board member, Balthasar is able to put his management experience to good use, especially in cross-cultural situations (India, China, South-East Asia, etc.).

Balthasar writes and negotiates in German, English and French, and he speaks and understands Italian.

The experts at Wicki Attorneys-at-Law offer entrepreneurs and companies their extensive knowledge and experience for a new way to access company law during phases of growth, conflicts and change.

Wicki Partners Attorneys-at-Law have a great deal of expertise in business management, are available to support and advise, and adopt an approach based on a wealth of practical experience. The preservation of entrepreneurial freedom, a long-term perspective and the creation of robust solutions are their guiding principles in consulting and crisis management. This practical, understated and in-depth approach offers entrepreneurs, executives and companies the security they require during the turmoil and changes caused by rapid growth and times of crisis.

The firm assists and supports national and international companies with any issues they may have on corporate development, transactions (M&A), contract negotiations, company restructuring measures and succession planning. As mediators, they can also offer support in crisis situations, such as internal conflicts or liquidity problems.
Pearl Diving – Transactional practice in Switzerland

There are more than 581,000 enterprises in Switzerland, of which 99 percent are small and medium-sized businesses employing close to 70 percent of all employees.

Leaving the one man micro-companies to one side, there are still more than 250,000 legal entities. Roughly 70 percent of those will change ownership in the next decade, due to economic reasons or generational change relating to the owners.

The transactional practice in Switzerland is, thus, very much a typical middle market activity where value is not an absolute figure, but rather is defined by the transactional structure and the future integration plans of the acquirer.

Often, we deal with targets that are not at the peak of their value. We regularly deal with businesses that have a problematic balance sheet or a reduced ability to continue as a going concern, or, when acting for buy-side clients, targets without a dependable liability history.

Under the liberal Swiss legal framework, a company must undergo an ordinary statutory audit if it exceeds two of the following three criteria:

- CHF20 million balance sheet
- CHF40 million yearly turnover
- 250 full-time employees

As a result, we are often presented with audit reports based on a limited audit only, which are not solid enough to pass a thorough due diligence. However, despite the difficulties hidden in the balance sheet which, typically, show the traces of a family managing the business over several generations, such businesses have a solid operational core. They usually have highly knowledgeable employees, a well-established brand in their respective market and an admirable customer following.

Indeed, apart from the traces of their past in their balance sheet, and their reduced ability as a going concern, they are often the true hidden treasure every investor is looking for. The Swiss legal system offers powerful instruments in such constellations.

Recently, we supported one of the top Swiss winery companies in the acquisition of the largest winery business in the northern part of Switzerland (yes, there is wine in Switzerland!). Family-owned in the second generation, the target company had a systemic importance in its geographic area, where it acquired and processed most of the grapes locally produced along the vineyards of the Rhine valley.

The company had a balance sheet of ever-growing complexity with an uncomfortably high number of (mostly subordinate) loans from friends and family. They had also lost a recent fraud case with rather shocking dimensions. We discouraged our client to sign the share deal which they had already agreed to, and, instead, together with the family foundation which controlled the shares, structured a ‘pre-pack carve-out deal’ based on the recently revised Swiss restructuring law and the Swiss Mergers Act.

Initially, we led the target into a non-published, silent provisional debt-restructuring moratorium, overseen by the local court and a court-appointed administrator (nominated by us). We were able to keep the company afloat by funding the target through preferential loans, thus, even with the current state of the balance sheet, there was a very limited credit risk for our client.

We created the required time for drafting and negotiating the carve-out transaction, based on a surgically drafted asset-transfer agreement, which required approvals by numerous authorities and by the court. Once all approvals were granted, in a coordinated action by the court, the commercial register and our own communication advisors, the debt-restructuring moratorium was published and, in the very same moment, the restructuring transaction closed and was disclosed.

Thus, our client could take over a healthy NewCo containing the operational balance sheet of the target. The historic family financing and all the risks associated with the fraud case remained in the OldCo, which will be liquidated by means of a composition agreement in the coming months.

The above case demonstrates some important aspects of the corporate legal environment in Switzerland. The Swiss legal system is very liberal, permits creative, expedient transactions, and allows direct contact with authorities and courts. This ensures that technically challenging transactions can be orchestrated quickly, with very low transactional risks, even in complex, unclear situations.
Hilary von Arx finished her studies at the University of Zurich in 2007 and was admitted to the Bar in 2012. She is an expert in corporate and commercial litigation where she specialises in shareholder (and comparable) disputes, contractual claims, and employment law disputes. She has a profound knowledge of corporate, contract and civil law, which benefits her not only in litigation but also in advising her clients in non-contentious matters. Hilary has working experience in Switzerland and the United States.

Before joining Wicki Partners, Hilary was working as Legal Counsel for an international industrial company where she focused on corporate legal matters, national and international contract law, employment law as well as data privacy and antitrust compliance. Prior to her job as Legal Counsel, Hilary worked for a law firm in Zurich where she specialised in civil and contract litigation as well as business immigration law.

Hilary writes and negotiates in German and English and speaks and understands French.

The experts at Wicki Attorneys-at-Law offer entrepreneurs and companies their extensive knowledge and experience for a new way to access company law during phases of growth, conflicts and change.

Wicki Partners Attorneys-at-Law have a great deal of expertise in business management, are available to support and advise, and adopt an approach based on a wealth of practical experience. The preservation of entrepreneurial freedom, a long-term perspective and the creation of robust solutions are our guiding principles in consulting and crisis management. This practical, understated and in-depth approach offers entrepreneurs, executives and companies the security they require during the turmoil and changes caused by rapid growth and times of crisis.

The firm assists and supports national and international companies with any issues they may have on corporate development, transactions (M&A), contract negotiations, company restructuring measures and succession planning. As mediators, they can also offer support in crisis situations, such as internal conflicts or liquidity problems.
Employment Law in Switzerland

The main source of labour law in Switzerland is the federal legislation which is supplemented by federal ordinances, collective agreements, and standard contracts. The private employment contract, which I will talk about in this article, is governed by Arts. 319–362 of the Swiss Code of Obligations (CO).

CONCLUSION OF A WORK CONTRACT

An employment contract under Swiss law can be concluded by implication, and does not require any special form. It is even considered to be concluded if the employer takes on work which, according to the circumstances, can only be expected to be paid (Art. 320 CO). If a contract is not held in writing, the minimum requirements of the CO are fully applicable. In any case, the employer is obligated to confirm certain key points of the employment contract to the employee (Art. 330b CO).

I personally deem it judicious to conclude an employment contract in writing. The contract should include the term (fixed or permanent), a precise job description, the date of commencement, the weekly working hours, duration of the probation period and gross monthly salary (or the calculation bases for variable salary). It should also specify whether a salary is payable twelve or thirteen times a year, conditions for bonus payments, the number of vacation days, and data privacy clauses.

Furthermore, depending on the position of the employee, confidentiality and non-compete clauses should be included as well as intellectual property (IP) ownership clauses.

TERMINATION OF A WORK CONTRACT

Employment contracts may be terminated:

• within the agreed notice period or (if agreement is missing) in accordance with Art. 335b or 335c CO) at the initiative of either of the parties;

• for cause without notice at the initiative of either of the parties;

• by agreement.

In most cases, one of the contracting parties terminates the contract in compliance with the period of notice. It is in the nature of things that a termination of the employment contract by the employer leads to problems more often than vice versa. There are certain periods during which the employer may not terminate the employment contract, for example during pregnancy, in the event of illness (for a limited period of time) or during military service. A dismissal issued during such a period is void.

If the employer terminates within the ordinary period of dismissal, the contract is deemed terminated at the end of the notice period. Higher level employees are often offered immediate termination at the same time as they are dismissed. As an alternative, if they do not agree with the immediate termination, they are released from their duties until the contract expires. It is precisely these practices that repeatedly lead to legal headaches:

• Insufficiently thought-out release instructions can lead to employers being confronted with claims for financial compensation of overtime and remaining holidays after termination of the contract, despite the employee not working during the period of notice.

• If a court decides that the employee did not give his consent to a termination agreement voluntarily and without pressure from the employer, it may deem the agreement as an inadmissible circumvention of the mandatory protection against dismissal. Therefore, both termination contracts and negotiations with employees should be well prepared.

The employer must bear in mind that the employee is entitled to a reason for the termination, since the employee may believe that the dismissal is a wrongful dismissal. The termination would be determined as a wrongful dismissal if, for example, it was motivated by personal reasons, or the fact that a worker had exercised his/her constitutional rights. The party liable for the wrongful dismissal in a termination scenario would be required to pay compensation. The compensation is decided by the court and may not exceed an amount of six months’ salary.

Under Swiss law, there is no possibility of recourse to a job. A dismissal is valid and can only lead to damage claims, except for dismissals which are issued during lock-up periods (Art. 336c CO).

POTENTIAL PITFALLS TO BE AWARE OF

Even though many of the questions that may arise are regulated by law, there are many traps, especially in labour law, which are problematic. The following is a list of some potential pitfalls:

• Non-domestic employees may require work and residence permits. In particular non-EU persons must meet certain requirements in order to obtain a work and residence permit in Switzerland.

• Subsidiary joint liability of the board members for social security contributions (and tax debts).

• An employers’ obligation to record the daily working hours of their employees (incl. exact break times). Employees who have a high degree of autonomy in the performance of their work, who set their own working hours, and earn more than CHF 120,000 p.a. may waive this right in writing.

• Entitlement of the employee to receive a copy of all personal data included in their personnel file.

• Entitlement of the employee to not only receive a confirmation of work, but a detailed benevolent and truthful reference letter.

• When salaries consist of fixed and variable components, the employee may be entitled (depending on the ratio) to the payment of an average wage in the event of (vacation) absences.
Dr. Hans Kuhn
Partner, Zulauf Partner

Hans Kuhn is a partner with Zulauf Partners in Zurich (Switzerland). He specialises in banking and financial market law with a focus on FinTech law. He has also extensive experience in securities law and payment and secured transactions.

Before joining private practice, he served as chief legal counsel for Swiss National Bank, Switzerland’s central bank, for more than 13 years. He served as a member of national and international expert groups on matters such as bank resolution, derivatives and netting legislation. He played a leading role in the national and international securities law reforms, acting as chairperson of the national expert group preparing the Swiss Federal Intermediated Securities Act and the Diplomatic Conference which adopted the Geneva Securities Convention.

A graduate of the University of Zurich in 1993, Hans Kuhn was admitted to the bar in Switzerland in 1995. In 1998 he received his doctorate summa cum laude from University of Zurich. He holds an LLM-Degree from Tulane University School of Law (New Orleans, 2001).

Zulauf Partners is a Zurich based law firm, advising and representing private and business clients in all aspects of Swiss business law. Core competencies include media and communications law, Swiss and European banking and financial market law; aviation law and aircraft financing, financing and secured transactions, intellectual property (trademark and copyright law), and data protection law.

Media Law International has ranked Zulauf Partners among the leading Swiss media law firms.
Light-touch regulation encourages Fintech ecosystem

The Swiss parliament is currently finalising the legislative framework for what is commonly called a Fintech or banking licence light.

The new regime, which is expected to become effective in 2019, is aimed at simplifying crowdfunding and payment processing services and other business models that include the acceptance of funds from the public and are therefore currently governed by banking regulation. The effective date of the new regulation will also signal the launch of a number of challenger banks in Switzerland.

The Fintech licence will apply to any deposit-taking institution if deposits do not exceed a total of 100 million Swiss francs. This threshold may be exceeded if the protection of depositors is ensured with ‘special arrangements’, like, for example, an insurance or a higher capital charge. A second requirement for the Fintech licence to apply, is that the institution shall not ‘invest the deposits nor pay interest.’ While the prohibition to pay interest is relatively straightforward, the exclusion of investments raises more difficult issues.

It can be inferred from the legislation, that the legislator wants to prevent Fintechs from engaging in term transformation or from taking on major credit, liquidity, or interest risks without being properly capitalised. This does not mean, however, that a Fintech operating under this licence will be permitted to hold funds exclusively on a deposit account.

Regulatory requirements applicable to Fintechs operating under a Fintech license are considerably less burdensome than those for banks. Fintechs are still required to be adequately organised, have proper risk management and effective internal controls and have a management and a board meeting fit and proper requirements. Fintechs will have to dispose of adequate capital the amount of which will be determined by an ordinance to be adopted by the Federal Council; the minimum capital required will probably be 10 million Swiss francs. The accounting standards to be complied with by Fintechs will be determined by general corporate law, not the more demanding banking law standards or international accounting standards. Last, but not least, Fintechs will not be covered by deposit insurance. Of course, Fintechs do have to comply with anti-money laundering regulations including know-your-customer duties.

Both with relation to its scope and the duties and obligations under the Fintech licence, much will depend on the exact wording of the ordinance to be adopted by the Federal Council. This ordinance is currently being prepared and is expected to be released for public consultation after the final vote of parliament. While the parliament has expressed a clear wish to create more freedom for Fintechs to test new business models, the government as well as FINMA, the financial sector supervisory authority, are obviously concerned about the risk of the current regulatory system being undermined by start-ups subject to a considerably lighter regulatory regime. Moreover, incumbents are voicing increasing concerns about an uneven playing field. It is therefore perfectly possible that the Federal Council ordinance or the supervisory practice applied by FINMA will undo much of the new liberties parliament intended to vest with innovative new players in the financial sector.

An aspect of the new Fintech regime which may be even more problematic is the obvious orientation towards very specific business models, i.e. crowdfunding and payment services. While it is true that a regulatory regime for payment service providers is long overdue, Fintechs are doing business in many other fields of financial services, including in the credit, investment, and advisory business. There they will have to continue to either comply with excessively burdensome and innovation-stifling regulations, or design their business model in such a way that they can avoid regulation. None of these approaches is really desirable.
Diego Benz studied law at the University in Zurich and was admitted to the bar as an Attorney at Law and Notary of the Canton of Zug in 2005. He has extensive experience in practising corporate and commercial law, inheritance law and contract law. Diego also gained profound knowledge in the area of finance and accounting at the University of Lucerne (CAS).

One of the most exciting professional experiences for Diego was recently being part of the team that successfully completed the very first incorporation of a Swiss limited company (in German: Aktiengesellschaft) via a blockchain and becoming a member of the board of directors of Drakkensberg Ltd. Drakkensberg Ltd is mainly active in the blockchain and digitalisation area.

Diego is member of the Joint Chamber of Commerce Switzerland – CIS, the British Swiss Chamber of Commerce – BSCC and the Crypto Valley Association.
Switzerland’s Thriving Blockchain Community

There has been significant blockchain-related activity in Switzerland during the last six months, the majority of which has been centred on the ‘Crypto Valley’ in the canton of Zug. Switzerland’s blockchain and crypto heart.

Below is a summary of the key developments;

• Foundation Ethereum: The legendary Foundation Ethereum was established on 9 July 2014 in Zug.

• Crypto Valley Association: The Crypto Valley Association, founded in January 2017, of which I am a member, is an independent, government-supported association established to take full advantage of Switzerland’s strengths to build the world’s leading blockchain and cryptographic technologies ecosystem.

• Incorporation / capital increase with cryptocurrencies: Since 4 September 2017 incorporations of, and capital increases in, companies can be made with cryptocurrencies by way of contribution in kind. The very first incorporation of a Swiss limited company (LTD) with paid-in capital in form of Bitcoins was registered on 25 September 2017 in the Canton of Zug.

• Commercial Register Zug accepts Bitcoin and Ether as instruments of payment: From 2 November 2017, any fees due to the Commercial Register Zug can be settled with Bitcoin and Ether.

• FINMA issues further guidelines with respect to ICOs in Switzerland: On 16 February 2018, the Swiss Financial Market Supervisory Authority (FINMA) issued further guidelines with respect to ICOs in Switzerland. In these guidelines, FINMA provided market participants with information on how it will deal with enquiries regarding the supervisory and regulatory framework for ICOs. The guidelines also specify the information required by FINMA to process enquiries from market participants, and also set out the principles on which FINMA will respond to them.

• Drakensberg AG - registration of a company on blockchain in less than two hours: On 9 April 2018, Proxeus, IBM Switzerland and further partners, including our law firm, successfully registered a Swiss start-up entirely on Blockchain in a “fraction” of the time traditionally required. The Drakensberg Ltd case showed how the normal process with the entrepreneur, lawyer, bank, notary and commercial register can be turned into a digital workflow by using existing IT systems in the bank and commercial registry together with the Hyperledger Blockchain and a smart contract. The process will massively speed up company registration, facilitate the drafting of legal documents and consolidate the various parties in a most effective way.

The Swiss Blockchain Task Force recently published its White Paper, to be found on blockchaintaskforce.ch.

WHY INVEST IN THE CRYPTO VALLEY?

Located in Zug in the heart of Switzerland, Crypto Valley is uniquely positioned to make the most of the decentralised Swiss political system and its matchless business environment. Zug offers a robust platform for global growth due to its pro-business philosophy and the openness and easy accessibility of its local government. Zug’s low-tax, business-friendly environment and fantastic quality of life have attracted many of the world’s leading companies, creating an international, cosmopolitan culture, and easy access to powerful global networks.

WHY INVEST IN SWITZERLAND?

Switzerland is perfect for the blockchain community, offering many advantages, not limited to neutrality, decentralisation, stability, predictability, and responsiveness to its citizens. It also has direct democracy, a strong privacy culture, sound policies and economic strength with a strong currency.

Switzerland is ranked number one in the world for competitiveness and productivity, has world-leading infrastructure and a secure and predictable legal framework. The education system is also of a high quality, with many top-ranked educational institutions.

The country is home to a rapidly developing blockchain industry and to hundreds of multinational corporations, as well as a leading global financial hub. Switzerland’s business environment is matchless; and the Swiss financial market regulator, FINMA, encourages self-regulation rather than onerous top-down regulation. Finally, Switzerland is home to three of the world’s top ten cities for quality of life and is top-ranked for infrastructure, safety, healthcare, education, life expectancy and work/life balance.