DISPUTE RESOLUTION IN

SWITZERLAND

Antonio Rigozzi is one of Lévy Kaufmann-Kohler (LKK)'s founding partners and the head of the firm's sports disputes practice. He has extensive experience as both counsel and arbitrator in proceedings conducted under numerous arbitration rules and before the Swiss courts. A recognised sports law expert, Antonio has acted in some of the most high-profile matters before the Court of Arbitration for Sports. He is also a university professor and the author of many works on international sports and commercial dispute resolution, including the well-known book *International Arbitration – Law and Practice in Switzerland* (3rd edition, 2015), with Gabrielle Kaufmann-Kohler.

Sébastien Besson joined LKK as a partner in 2015. He is a well-known international arbitration and litigation practitioner, with particular expertise in arbitration-related court proceedings. Sébastien has advised clients in contentious matters across a vast range of industries, and regularly sits as an arbitrator under all the major arbitration rules. As an academic, he teaches international arbitration and sports law at the postgraduate level and has authored numerous publications on international arbitration and cross-border litigation, including the seminal treatise *Comparative law of international arbitration* (2nd edition, 2007), with Jean-François Poudret.

Together, Antonio Rigozzi and Sébastien Besson lead LKK's arbitration and litigation counsel team.

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"Swiss law continues to be among the preferred choices for international contracts."

GTDT: What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? To what extent are treaty claims increasing?

Antonio Rigozzi and Sébastien Besson: To our knowledge there is no empirical data on the most popular dispute resolution methods in Switzerland, but our experience shows that, consistent with the country's status as a leading international arbitral venue, arbitration remains very popular for cross-border commercial disputes. Traditionally, domestic arbitration is not used as widely as international arbitration, with some notable exceptions (eg, in the construction industry). That said, in the past couple of years we have been involved in cases where the parties had provided for domestic arbitration to resolve disputes that would customarily rather be brought before the local courts, for instance, in agreements concluded in the private banking sector.

As to court litigation, it is important to bear in mind that Switzerland is a federal state composed of 26 jurisdictions (cantons). Although a unified Code of Civil Procedure (CCP) was introduced in 2011, judicial organisation remains a cantonal matter, so that there are still differences among the local jurisdictions. For instance, the cantons of Zurich, Bern, Aargau and St Gallen each have a specialist commercial court, and these are particularly popular with the business community. The commercial courts act as the sole instances hearing disputes coming within their jurisdiction, as an exception to the requirement for a double-instance system at the cantonal level under the CCP. Accordingly, decisions by the Zurich, Bern, Aargau and St Gallen commercial courts can be challenged directly before the Tribunal fédéral (the Swiss Supreme Court), with the result that proceedings tend to be shorter than average in those particular cases. In addition, thanks perhaps to the Germanic tradition of court-assisted settlement, proceedings before the commercial courts tend to yield a higher rate of settlements than before other first instance courts in Switzerland, even though the CCP has now made it mandatory for parties in all cantons to attempt settling their disputes before a conciliation authority prior to commencing litigation before the courts (article 197 et seq. CCP).

As for treaty claims, we note that in the past few years there has been an increase in the applications for annulment (including on jurisdictional grounds) filed with the Swiss Supreme Court against awards rendered in investment arbitrations. The increase in annulment actions against investment arbitration awards may reflect the fact that the number of investor-state arbitrations seated in Switzerland is on the rise. Outside the ICSID system, as well as under the ICSID Additional Facility Rules, parties are free to choose the seat of their arbitration. Switzerland is a popular choice, thanks in particular to its reputation as a neutral venue with a large pool of well-qualified specialists and an efficient court system ready to act in support of arbitration. Still with regard to treaty claims, the published data show that Swiss investors have brought almost 30 such claims to date. A number of those cases are currently pending, both before ICSID tribunals and on an ad hoc basis. On the other hand, the publicly available sources do not list any investment arbitrations initiated against Switzerland so far.

In the wake of the recent Court of Justice of the European Union (CJEU) decision in the *Achmea* case (C-284/16), one cannot rule out an increase in challenges against awards rendered under intra-EU bilateral investment treaties (BITs), including in Switzerland. We wonder in particular whether the Swiss Supreme Court will be seized of requests for the revision of investment awards based on the CJEU's finding that arbitration clauses in intra-EU BITs are incompatible with EU law.

GTDT: Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? Has Brexit affected choice of law and jurisdiction?

AR & SB: We have not noticed any specific recent trend with regard to choice of law clauses in Switzerland. Choices designating national laws, as opposed to transnational instruments (such as the CISG or the UNIDROIT Principles), remain prevalent in the contracts we deal with. As far as we can see, Swiss law continues to be among the preferred choices for international contracts, together with New York, English and French law.

As to dispute resolution clauses, our general observation is that they tend to become more complex and sophisticated, sometimes featuring provisions on joinder or other mechanisms for


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dealing with multi-party situations. Unilateral option clauses also seem to be on the rise, particularly in contracts concluded in the banking and financial services sector. The adoption of unilateral option clauses may be a risky choice for the parties, given that their validity is not entirely settled in all jurisdictions where the award might have to be enforced.

More generally, the rather complicated clauses that now tend to appear in commercial contracts entail an element of risk as they have not been comprehensively tested in court yet. Simple and established solutions (including, where appropriate, using the model clauses proposed in most sets of arbitration rules) remain the safest choices. To assist parties with specific requirements, the Swiss Chambers Arbitration Institution (SCAI) recently introduced an innovative tool, the 'customisable arbitration clause'. The SCAI website allows users to generate a tailor-made arbitration clause in just a few clicks, by selecting their desired features from a number of options via an online interface. Another recent initiative by the SCAI has been a joint project with the International Distribution Institute (IDI), to create a model (expedited) arbitration clause for international distribution contracts, coupled with a list of specialised arbitrators that is available on the SCAI and IDI websites.

A further trend we have observed in the past few years is the increase in contracts containing multi-tier dispute resolution clauses (ie, provisions requiring that the parties attempt to resolve their dispute by conciliation or other ADR methods before initiating litigation or arbitration). The Swiss Supreme Court rendered an important decision (ATF 142 III 296 of 16 March 2016) on the criteria for assessing the binding character of multi-tier ADR-to-arbitration dispute resolution clauses, and the consequences of a failure to comply with their terms. The decision gives useful guidance on the appropriate drafting of this type of clause. The key takeaway is that if the pre-arbitral steps the parties agreed to were meant to be binding and the claimant elects to skip them, the respondent, subject always to the rules of good faith, may request a stay of the arbitration for the ADR phase to be carried out first.

With regard to Brexit, for the moment we have not noticed any particular consequences in our practice. That said, we anticipate considerable uncertainty with regard to the fate of choice of court agreements and the recognition and enforcement of judgments in civil matters once the UK will have left the EU regime. This might result in an increase in the number of contracts providing for arbitration instead of litigation when UK-based parties are involved.

GTDT: How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?

AR & SB: The Swiss market is a mature one, with sophisticated and competitive players, which may explain why it tends to remain, to a significant extent, within the hands of Swiss law firms. That said, in the past five years or so we have witnessed the implantation of a few international firms, which tends to corroborate the attractiveness of the local legal market, in particular, in the field of international law and dispute resolution arbitration. Whether these new entrants will be

"Third-party funding is not yet a common feature of the Swiss litigation market."

more successful than their predecessors remains to be seen. The current strategy seems to be for incoming firms to open specialised branches in Switzerland, for instance, an office in Geneva – where the World Trade Organization is seated – staffed predominantly with international trade law and disputes specialists, or to conclude special, partnerships with Swiss firms.

A recent development affecting disputes lawyers in our jurisdiction can be found in a decision by the Supreme Court (ATF 143 III 600 of 13 June 2017) that has significantly restricted the ability of attorneys to charge success fees. Agreements in which the only remuneration for counsel is a share in the proceeds of the litigation are statutorily prohibited in Switzerland. The Supreme Court decision sets out the requirements for more limited contingency fee agreements (*pacta de palmario*) to be valid and enforceable under Swiss law. According to the Supreme Court, these requirements are (i) that the attorney's agreed base fees must be adequate (ie, sufficient to cover costs and to generate reasonable profits), (ii) that the agreed success fee must not exceed the overall (unconditional) base fees, and (iii) that the agreement must be entered into either at the beginning of the instruction or after the case has been resolved, but not while the dispute is pending, in order to avoid placing undue pressure on the client. Whether these requirements also apply in Swiss-seated (international) arbitral proceedings is not entirely clear as things stand.

GTDT: What have been the most significant recent court cases and litigation topics in your jurisdiction?

AR & SB: There have not been any recent major novelties in the case law and practice of litigation in recent years.

We have already mentioned the Supreme Court's decision of last year on the validity requirements for attorney contingency fee agreements. Another point that has drawn increased attention in the past couple of years, in view of the legislative initiatives taken in other jurisdictions, is the question of the availability of third-party funding in litigation. Third-party funding is permitted in Switzerland, as held by the Supreme Court in a 2004 decision (ATF 121 I 223), which the Court recently confirmed (Decision 2C_814/2014, of 22 January 2015). That said, contrary to the practice elsewhere, third-party funding is not yet a common feature of the Swiss litigation market.

GTDT: What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

AR & SB: Again without being in a position to produce empirical data in support of this statement, we find that Swiss companies tend to be less litigious than in other jurisdictions, and the same can be said of members of the Swiss Bar.

As everywhere else, clients are keen to avoid costly, lengthy and uncertain proceedings. The duration of court proceedings in Switzerland is generally not excessive – in commercial cases, parties can expect a first instance decision within one and a half years on average. The appeal stages generally take less time: with variations, proceedings last approximately six months before the cantonal courts (where applicable), and have a similar duration – albeit again with possibly significant variations – before the Supreme Court.

Although, as mentioned, since 2011 we have a unified Federal Code of Civil Procedure, the tariffs for court fees are still regulated at the cantonal level, meaning that there can be significant differences in the costs of litigation from one canton to the next. Moreover, plaintiffs are expected to pay court fees in advance, at the outset of the proceedings, and may also be required to post security for their opponent's legal costs, increasing significantly the disbursements that have to be made upfront. In response to calls for reform in this regard, and as we explain in more detail later, the Swiss Federal Council (the executive branch of government) has recently adopted a draft bill that caps the amount of court costs to be paid in advance.

As mentioned, in cases with an international dimension, arbitration is traditionally very popular in Switzerland. The confidentiality and flexibility of arbitral proceedings, the availability of skilled specialist counsel and arbitrators, as well as the limited scope for recourse against awards under Chapter 12 of the Private International Law Act (Chapter 12 PILA; the statute governing international arbitration in Switzerland), are all

THE INSIDE TRACK

What is the most interesting dispute you have worked on recently and why?

An ongoing multi-jurisdictional case against a major Swiss Bank. We are assisting the client on complex jurisdictional questions, as well as trust and banking law issues. The case is intellectually stimulating because it involves transactions spanning across common law and civil law systems, which gives rise to interesting legal questions and requires the ability to tackle issues from different angles.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

Having now become used to the document production process in arbitration, we must say we would not mind seeing more of it (or at least its positive features, such as increased proactivity and the streamlined request, order and production process) in Swiss domestic proceedings.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

We still see pathological dispute resolution clauses relatively frequently. While our Supreme Court often manages to 'save' such clauses, poor drafting can be a costly gamble. Seek assistance as from the negotiation and drafting stage.

When a dispute arises, immediately obtain professional advice. Swiss law, like all other legal systems, has deadlines and time bar issues, some being very short.

Finally, think ahead. Consider what is likely to happen, what may or should be done, when and where, depending on the outcome, in particular for enforcement purposes. In complex cross-border cases, put an action plan in place from day one.

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factors that may make arbitration a preferable and (depending on the duration of the proceedings) not necessarily costlier alternative to litigation for international disputes. In closing, it is also worth mentioning here that debt-collection proceedings (governed by the Debt Enforcement and Bankruptcy Act), which can be initiated on the basis of a contract, judgment or arbitral award, are particularly fast and efficient in Switzerland.

GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

AR & SB: The entry into force of the unified CCP in 2011 was an important step in simplifying and streamlining court proceedings across the country, as these used to be governed by different cantonal rules.

The Swiss government has now (March 2018) just opened the public consultation process on a new draft bill introducing selective adjustments to the CCP, including provisions aimed at facilitating access to justice by capping the court fees to be paid upfront by the plaintiff to only half of the total prospective amount, and expanding the scope for collective redress and class actions, both ratione materiae and ratione personae. The draft bill further envisages extending attorney–client privilege, which currently only covers registered attorneys, to in-house counsel – the intent being, here, to put Swiss companies on an equal footing with their foreign counterparts in international disputes. After the consultation phase, the government will prepare a final bill taking into account the comments received from stakeholders, and submit the bill to Parliament for its own review. As yet, it is difficult to anticipate when this legislative process will be completed; however, observers anticipate that the final bill should be submitted to Parliament by 2019.

The 2005 Supreme Court Act is also currently under review, with a draft bill envisaging measures to keep the Court's workload under control and to ensure that the federal judges' dockets remain devoted to the more important matters, including those which raise issues of principle. This, however, should not affect the current regime with regard to civil litigation and arbitration matters. With regard to the Supreme Court's role as the court of supervisory jurisdiction vis-à-vis Swiss-seated international arbitrations, it is worth noting that the current draft bill on the revision of Chapter 12 PILA, which we discuss below, envisages the possibility for parties to submit briefs in English before the Court.

GTDT: What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

AR & SB: We have no major shifts or new trends to report here. We would perhaps note that, at least based on our experience, there is now a tendency by the parties to raise more procedural incidents in the course of international arbitrations. For

instance, challenges against arbitrators have become more frequent. They are generally resolved swiftly, particularly in institutional arbitration.

At the same time, we have also noted an increased emphasis on speed and cost-effectiveness, both by the parties and the institutions. The latest available SCAI statistics show that more arbitrations are now conducted under its special rules for expedited proceedings than used to be the case in the previous years. The most recent International Chamber of Commerce statistics confirm that Switzerland remains a very popular seat for international arbitrations, with Geneva and Zurich being second only to Paris as the preferred venues overall. Lausanne, Lugano, and Basel, in particular, are also well-established arbitral seats in Switzerland.

GTDT: What are the most significant recent developments in arbitration in your jurisdiction?

AR & SB: The unified CCP that came into force in 2011 also reformed domestic arbitration in Switzerland, which is now governed by Part 3 of that Code. CCP Part 3 is generally seen as an innovative and effective piece of legislation.

Meanwhile, there were parliamentary motions calling for selected amendments and updates to Chapter 12 PILA, which, although it remains a remarkably modern international arbitration law, is now more than 30 years old. As a result, the Swiss Government decided to embark on a 'light touch revision' (or toilettage) of Chapter 12. Last year, it issued a first draft bill, which had been prepared with the assistance of a group of expert practitioners and academics, and submitted it to public consultations. The Federal Justice Department is currently examining the comments received during the consultation period to prepare the final bill, which should be submitted to parliamentary review in the course of this year.

From the start, the declared purpose of Chapter 12's toilettage has been to consolidate Switzerland's attractiveness as a place for international arbitration, by codifying the Supreme Court's case law rendered since the entry into force of the PILA, and updating or clarifying Chapter 12's text where necessary, while also carefully preserving its simple structure and succinct, reader-friendly style, without disturbing its core underlying principles, in particular party autonomy and flexibility. Accordingly, when eventually adopted, the revised text of Chapter 12 should not be expected to fundamentally change the practice of international arbitration in Switzerland.

Hence, the legal environment for arbitration remains stable in Switzerland. This is also evidenced by the statistics on the outcome of applications for the annulment of awards, which have shown remarkably steady figures, with low success ratios, for several years in a row.

GTDT: How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

AR & SB: In our experience, ADR generally has not (yet) taken off significantly in Switzerland as an alternative to litigation and arbitration in commercial disputes. Mediation is well developed in family law matters, where it is statutorily foreseen as a method to resolve divorce and child custody disputes. That said, the SCAI has long offered state of the art mediation services, and is currently revising its 2007 Mediation Rules. Other Swiss-based institutions have recently updated their mediation rules, such as the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center and the Court of Arbitration for Sport. WIPO also has a set of Expert Determination Rules, which are particularly well suited for technical disputes. We do not think that any specific commercial sector is particularly keen to use, or averse to, ADR. The relatively limited use of ADR techniques to resolve commercial disputes in Switzerland seems to be more the result of a lack of awareness of their availability and efficiency, rather than a deliberate choice of the parties.

Nevertheless, beyond the mandatory conciliation proceedings we referred to in response to question 1 above, litigants in civil and commercial matters should be aware that they may ask the Swiss courts to stay the judicial proceedings at any time to allow them to pursue a mediated settlement (article 214(2) and (3) CCP). If the mediation is successful, the parties may also ask the court to ratify their mediated settlement. In that case, the settlement agreement will acquire the same status as a binding judgment of the court (article 217 CCP).

The draft Convention and draft amended Model Law on international settlement agreements resulting from mediation that should be adopted by UNCITRAL later this year may play an important role in boosting recourse to mediation and other ADR techniques for resolving international disputes in the future.