GETTING THE DEAL THROUGH

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Dispute Resolution

Insolvency litigation looming large

Simon Bushell leads the global interview panel

2019

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Cover: iStock.com/Vladimir Cetinski

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910

ISBN: 978-1-83862-196-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Welcome to GTDT: *Market Intelligence*.

This is the 2019 edition of *Dispute Resolution*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence.

Getting the Deal Through
London
May 2019

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DISPUTE RESOLUTION IN

SWITZERLAND

Antonio Rigozzi is one of Lévy Kaufmann-Kohler'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 Lévy Kaufmann-Kohler 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 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 and Sébastien lead Lévy Kaufmann-Kohler's arbitration and litigation counsel team.

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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? What is the balance between litigation and arbitration?

Antonio Rigozzi and Sébastien Besson: To our knowledge there is no precise 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, such as in the construction industry. This being said, in the past few years we have been involved in cases where the parties 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.

Yet typically, domestic commercial disputes are more often litigated than arbitrated. 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 still are 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 Zurich, Bern, Aargau and St Gallen 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 commercial courts can be challenged directly before the Swiss Supreme Court, with the result that proceedings tend to be faster than average in those particular cases. In addition, thanks perhaps to the Germanic tradition of court-assisted settlement, proceedings before these 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.

For cross-border disputes, arbitration retains its edge over litigation, thanks to, among other factors, the ease of enforcement of the resulting awards under the New York Convention. This is particularly true where the dispute has no connection with the judicial cooperation area covered by the Lugano Convention 2007, to which Switzerland is a party.

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? Does Brexit continue to affect 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 (like the Convention on Contracts for the International Sale of Goods 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, sometimes featuring provisions on joinder or other mechanisms for dealing with multiparty 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.

A further trend we have observed in the past few years is the increase in contracts containing multi-tier dispute resolution clauses, that is, provisions requiring that the parties attempt to resolve their dispute by conciliation or other ADR methods before initiating arbitration or litigation. A 2016 decision by the Swiss Supreme Court defines the criteria for assessing the validity and enforceability of multi-tier dispute resolution clauses under Swiss law, as well as the consequences of a failure to comply with their terms. The decision gives useful guidance on the appropriate drafting of these clauses and on their actual implementation by the parties when a dispute arises.

Turning to the impact of Brexit, as things stand, we obviously perceive significant


Antonio Rigozzi


Sébastien Besson

uncertainty, particularly with regard to the fate of choice of court agreements involving UK-based parties and the recognition and enforcement of the resulting judgments once the United Kingdom leaves the EU regime currently governing these matters. This is likely to have resulted in an increase in the number of recently concluded UK-related contracts providing for arbitration instead of litigation.

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? How is the trend towards 'niche' or specialist litigation firms reflected 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 arrival of a few international firms, which tends to corroborate the attractiveness of the local legal market, in particular in the field of international arbitration. Whether these new entrants will be more successful than their predecessors remains to be seen. The current strategy seems to be for these 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 dispute specialists, or to conclude special, targeted partnerships with Swiss firms.

One recent development affecting dispute lawyers in Switzerland was a decision by our Supreme Court (ATF 143 III 600 of 13 June 2017), which 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. The Supreme Court decision sets out the requirements for more limited contingency fee agreements to be valid and enforceable under Swiss law. According to the Supreme Court, these requirements are:

- that the attorney's agreed base fees must be adequate (that is, sufficient to cover costs and to generate reasonable profits);
- that the agreed success fee must not exceed the overall (unconditional) base fees; and
- 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, to avoid placing undue pressure on the client.

Last, there does seem to be a trend for practitioners, including seasoned, well-known names, to open specialist boutique firms offering litigation or arbitration services. Our own firm, founded by Laurent Lévy, Gabrielle Kaufmann-Kohler and Antonio Rigozzi and specialising in international commercial, investment and sports arbitration and litigation was among the first of its kind in Switzerland, but we have recently been seeing new entrants into this market every year.

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 recent decision on the validity requirements for attorney contingency fee agreements. Another point that has drawn increased attention in the past few years, in view of the legislative initiatives taken in other

"In cases with an international dimension, arbitration is traditionally very popular in Switzerland."

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 confirmed in 2015 (decision 2C_814/2014). That said, contrary to the practice in other places, third-party funding is not yet a common feature of the Swiss litigation market.

Another recurring topic is the availability of collective redress. Class actions, as such, do not exist in the Swiss legal system. Article 89 CCP envisages 'organisation claims', which enable representative associations or other organisations to bring non-monetary claims on behalf of multiple damaged parties. Monetary claims (damages, unjust enrichment or disgorgement of profits) are excluded from such actions. As mentioned below, a legislative proposal is currently being considered that would extend the availability of collective redress in various ways, including by allowing actions for monetary claims.

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 proceedings with an uncertain outcome. 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 year on average. The appeal stages generally take less time. With some variation, proceedings last approximately six months before the cantonal courts (where applicable) and have a similar duration – albeit again with possibly significant variation – before the Supreme Court.

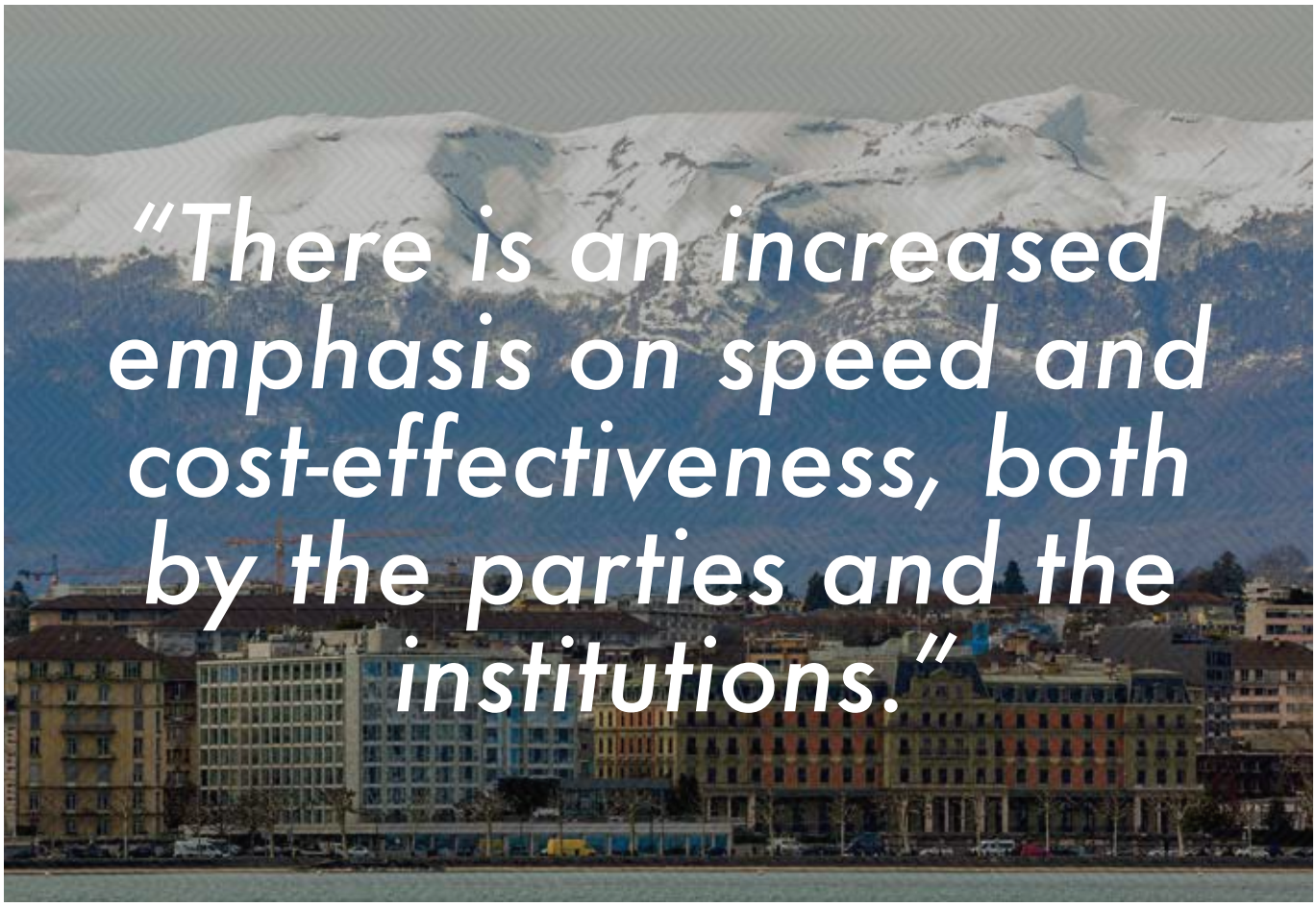
Although, as mentioned, since 2011 we have a unified Federal Code of Civil Procedure, the tariffs for court fees are still regulated at the cantonal level, meaning that there remain differences in the costs of litigation from one canton to the next. Overall, court fees remain reasonable in Switzerland. However, plaintiffs are expected to pay them 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 below, 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 factors that may make arbitration a preferable and (depending on the duration of the proceedings) not necessarily costlier alternative to litigation for international disputes.

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.

In March 2018, the Swiss government 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 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, discussion



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and, possibly, adoption. 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 in 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 that 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. However, 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, there is an increased emphasis on speed and cost-effectiveness, both by the parties and the institutions. Indeed, 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.

We have also observed 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 well be a reflection of the fact that the number of investor-state arbitrations seated in Switzerland is on the rise.

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.

THE INSIDE TRACK

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

A dispute over alleged rights of heirs against, among others, the partners in a financial institution. The case is interesting because it raises a variety of fundamental questions of private law and jurisdiction.

Describe the approach adopted by the courts in your jurisdiction towards contractual interpretation: are the courts faithful to the actual words used, or do they seek to attribute a meaning that they believe the parties actually intended?

In short, the wording of the parties' agreement is paramount. Only if it is established that the wording does not reflect the parties' intentions, will the courts resort to other methods of interpretation to ascertain the parties' mutual understanding.

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 seek 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 well in advance.

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With respect to international arbitration, as mentioned in last year's edition of *Market Intelligence: Dispute Resolution*, a legislative process is under way for a 'touch up and update' of Chapter 12 PILA. In October 2018, after a period of public consultation, the Swiss Federal Council issued the final text of its bill, which is currently before parliament for review and should be adopted in the near future.

From the start, the declared purpose of Chapter 12's touch up 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, and without disturbing its core underlying principles, in particular party autonomy and flexibility. Accordingly, when eventually adopted, the revised text of Chapter 12 will not bring fundamental changes 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) significantly taken off 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. That said, a recent trend in Switzerland is the emergence of 'collaborative law'. Attorneys can follow the formal training required to implement this innovative ADR technique, which brings together the parties, their counsel and,

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where appropriate, third parties, to actively seek a concerted solution to a dispute.

In addition, aside from the mandatory conciliation proceedings we referred to 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).

It will be interesting to see whether UNCITRAL's newly adopted convention on international settlement agreements resulting from mediation will boost recourse to ADR techniques for resolving international disputes in the future.

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ISBN: 978-1-83862-196-4