STATUS OF PLATFORM WORKERS IN THE SWISS LEGAL SYSTEM

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INTRODUCTION: STATE OF THE ART

In Switzerland as in several other countries, the platform economy has raised the issues of the qualification of the contract between the platform and the service provider, the so-called platform worker, and the status of these platform workers. Although the platforms are organized very differently, they always act as an intermediate, with more or less intensity and guidance. This intermediary position stretches the connection between the worker and his or her customers and therefore weakens the elected status of independent contractor thus enhancing the risk of requalification.[1] The main difficulty encountered in Switzerland comes from the fact that Swiss law does not give a proper definition of an independent contractor.[2] If we consider social insurance laws, the independent is the one whose revenue doesn't come from an activity as an employee; such revenue being otherwise defined as any revenue from a work other than one being achieved through a dependent

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1. Gabriela Riemer-Kafka, *Plattformarbeit oder Andere Formen der Zusammenarbeit: Sind die Abgrenzungskriterien für Selbständige oder für Unselbständige Erwerbstätigkeit Noch Tauglich?* [*Platform Work or Other Forms of Cooperation: Are the Demarcation Criteria Still Suitable for Self-employment or Employment?*], SZS 581, 587-90 (2018); Florence Guillaume, *Le Contrat de Travail International: Règles de Droit International Privé et Plateformes Numériques* [*The International Employment Contract: Rules of Private International Law and Digital Platforms*], *in* LES ASPECTS INTERNATIONAUX DU DROIT DU TRAVAIL 193, 228-30 (Jean-Philippe Dunand & Pascal Mahon eds., 2019).

2. Wolfgang Harder, *Freie Mitarbeiter, Freelancer, Scheinselbständige: Arbeitnehmer, Selbständige oder Beides?* [*Independent, Freelancers, Bogus Self-employed: Employees, Self-employed or Both?*], ArbR. 69, 69-88 (2003).

situation.[3] It is therefore necessary to refer to the dependent activity in order to define the independent. In the same manner, the labor law only applies to employees and therefore only sets the criteria to define them. Some political circles have called for the creation of a specific status, and the question has been addressed by the government in a report.[4] However, at this stage, the definition of an independent contractor still does not exist and the matter can only be brought before the courts to be settled. Moreover, the legal doctrine on the platform economy is still not very developed from a social legislation perspective. However, progress is being made, with research contributions mainly related to the contractual relations associated with platform work and we would like to mention a large-scale compendium of works, recently published, which offers a complete overview of the current reflection, by the main authors of the Swiss doctrine, who have taken an interest in the question of the legal regime for platform workers (with a focus on law, sociology and work psychology).[5]

In this contribution we aim to give to our readers a global overview on the status of platform workers in Switzerland, so we will first synthesize the legal environment in Switzerland (II.) and the state of the jurisprudence regarding platform workers (III.). Then we will present the collective issues (IV.) and the results of the collective bargaining (V.) before concluding on the foreseen trend on this topic (VI.).

THE NATIONAL LEGAL ENVIRONMENT

In order to understand the legal background (B.), we need to outline the characteristics of the Swiss constitutional system, which is a mix between federalism and direct democracy (A.).

Influence of Federalism and Direct Democracy

From an institutional perspective, Switzerland features two characteristics, which influence the frame of our subject: the country's federal structure and the direct democracy at federal and cantonal level. As

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3. LOI FÉDÉRALE SUR L'ASSURANCE-VIEILLESSE ET SURVIVANTS [LAVS] [FEDERAL LAW ON OLD AGE AND SURVIVORS' INSURANCE] Dec. 20, 1946, RS 831.10, art. 9 (Switz.).; LOI FÉDÉRALE SUR LA PARTIE GÉNÉRALE DU DROIT DES ASSURANCES SOCIALES [LPGA] [FEDERAL LAW ON THE GENERAL PART OF SOCIAL INSURANCE LAW] Oct. 6, 2000, RS 830.1 (Switz.); Jean-Philippe Dunand, *Commentaire des articles 10 à 12 LPGA* [*Commentary on Articles 10 to 12 LPGA*], *in* LOI SUR LA PARTIE GÉNÉRALE DES ASSURANCES - COMMENTAIRE [FEDERAL LAW ON THE GENERAL PART OF SOCIAL INSURANCE LAW - COMMENTARY] (Anne-Sylvie Dupont & Margit Moser-Szeless, 2018), para. 7-29.

4. CONSEIL FÉDÉRAL, CONSÉQUENCES DE LA NUMÉRISATION SUR L'EMPLOI ET LES DONDITIONS DE TRAVAIL: OPPORTUNITÉS ET RISQUES [CONSEQUENCES OF DIGITALIZATION ON EMPLOYMENT AND WORKING CONDITIONS: OPPORTUNITIES AND RISKS] (2017), *available at* https://www.newsd.admin.ch/newsd/message/attachments/50255.pdf.

5. JEAN-PHILIPPE DUNAND, PASCAL MAHON & AURÉLIEN WITZIG, LA RÉVOLUTION 4.0 AU TRAVAIL-UNE APPROCHE MULTIDISCIPLINAIRE [THE 4.0 REVOLUTION AT WORK - A MULTIDISCIPLINARY APPROACH] (2019).

regards federalism, the Confederation has been assigned a general competence to legislate on private employment law[6] on the protection of workers[7] and in the field of retirement and social insurances.[8] Whereas the regulation of the professions involved in the platform economy, for example the taxi services or home helps, lies within the competence of the cantons. Therefore, the legal framework may vary from one canton to the other. As regards direct democracy, any legislation either federal or cantonal can be hit by a call for a referendum i.e., subject to a popular vote, which forces the government to systematic consultation processes and compromises and can constitute a hindrance especially when it comes to protecting underrepresented minorities' interests.[9]

Legal background

One of the consequences of the federalism direct democracy and the subsequent need to make compromises is a step-by-step approach of the reforms. The result is that both labor law (1.) and social law (2.) have been established gradually and thus are disseminated in a multitude of laws based on liberalism and built on the concept of insurance.

Labor Law

From the legal perspective, there is no Labor Code in Switzerland. As a result, the rules governing labor are scattered in many different acts from private or public law, the main one being the Code of Obligations dedicated to employment contracts (articles 319–362) and the federal law on Labor in Industry, Craft Industry and Trade[10] and its five enforcement decrees.[11] The Swiss labor system is very liberal. Above all the freedom of contract is predominant, thus the right to terminate the contract is very strong, with almost no possibility to obtain the cancellation of such termination and no right to a reinstatement in case of improper dismissal. There are also no minimum wages set as a rule at the federal level, and no statutory working times. In such a liberal system, collective employment rights play an important role. One third of the employees benefit from more favorable provision set in collective agreements, which improve the workers' protection and rights. Finally, jurisprudence plays a key role, frequently

6. CONSTITUTION FÉDÉRALE [CST.] [CONSTITUTION] Apr. 18, 1999, RS 101, art. 122. (Switz.).
7. *Id*. art. 110.
8. *Id*. art. 112-17.
9. ALEXANDRE BERENSTEIN, PASCAL MAHON & JEAN-PHILIPPE DUNAND, LABOR LAW IN SWITZERLAND 25-30 (3d ed. 2018).
10. LOI FÉDÉRALE SUR LE TRAVAIL DANS L'INDUSTRIE, L'ARTISANAT ET LE COMMERCE [LTR] [FEDERAL LAW ON LABOR IN INDUSTRY, CRAFT INDUSTRY AND TRADE] Mar. 13, 1964, RS 822.11 (Switz.).
11. BERENSTEIN ET AL., *supra* note 9, at 66-76.

complementing legislation in a decisive manner. For instance, Swiss jurisprudence has played an important role in defining the contours of employment contracts with a minimum/maximum duration or on call zero-hour contracts.[12]

Social Insurances

Swiss social insurances for people in activity include mainly a pension system based on three pillars: old age, survivors and federal disability insurance (1st pillar[13]), occupational pension provision (2nd pillar[14]) and individual pension provision (3rd pillar[15]); a disability insurance[16]; an accident insurance[17] managed by an organism called SUVA (Schweizerische Unfallversicherungsanstalt); a decease insurance[18]; unemployment insurance[19]; military and maternity loss of revenue[20] The LPGA Act[21] aims to consolidate all these regimes and guarantees the coherence of the whole system.[22]

The insured income is the basis for calculation of the allowances and pensions allocated by social insurances. This is the revenue earned by the

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12. *Id*.art. 360.

13. LOI FÉDÉRALE SUR L'ASSURANCE-VIEILLESSE ET SURVIVANTS [LAVS] [FEDERAL LAW ON OLD AGE AND SURVIVORS' INSURANCE] Dec. 20, 1946, RS 831.10 (Switz.); RÈGLEMENT SUR L'ASSURANCE-VIEILLESSE ET SURVIVANTS [RAVS] [OLD AGE AND SURVIVORS' INSURANCE REGULATION] Oct. 31, 1947, RS 831.101 (Switz.).

14. LOI FÉDÉRALE SUR LA PRÉVOYANCE PROFESSIONNELLE VIEILLESSE, SURVIVANTS ET INVALIDITÉ [LPP] [FEDERAL LAW ON OCCUPATIONAL RETIREMENT, SURVIVORS' AND DISABILITY PENSION PLANS] Jun. 25, 1982, RS 831.40 (Switz.); ORDONNANCE SUR LA PRÉVOYANCE PROFESSIONNELLE VIEILLESSE, SURVIVANTS ET INVALIDITÉ [OPP 2] [ORDINANCE ON OCCUPATIONAL RETIREMENT, SURVIVORS' AND DISABILITY PENSION SCHEME] Apr. 18, 1984, RS 831.441.1 (Switz.).

15. ORDONNANCE SUR LES DÉDUCTIONS ADMISES FISCALEMENT POUR LES COTISATIONS VERSÉES À DES FORMES RECONNUES DE PRÉVOYANCE [OPP 3] [ORDINANCE ON TAX DEDUCTIBILITY OF CONTRIBUTIONS TO RECOGNIZED FORMS OF PENSION PROVISION] Nov. 13, 1985, RS 831.461.3 (Switz.).

16. LOI FÉDÉRALE SUR L'ASSURANCE-INVALIDITÉ [LAI] [FEDERAL LAW ON DISABILITY INSURANCE] Jun. 19, 1959, RS 831.20 (Switz.).; RÈGLEMENT SUR L'ASSURANCE-INVALIDITÉ [RAI] [DISABILITY INSURANCE REGULATIONS] Jan. 17, 1961, RS 831.201 (Switz.).

17. LOI FÉDÉRALE SUR L'ASSURANCE-ACCIDENTS [LAA] [FEDERAL LAW ON ACCIDENT INSURANCE] Mar. 20, 1981, RS 832.20 (Switz.) ; ORDONNANCE SUR L'ASSURANCE-ACCIDENTS [OLAA] [ORDINANCE ON ACCIDENT INSURANCE] Dec. 20, 1982, RS 832.202 (Switz.).

18. LOI FÉDÉRALE SUR L'ASSURANCE-MALADIE [LAMAL] [FEDERAL LAW ON HEALTH INSURANCE] Mar. 18, 1994, RS 832.10 (Switz.); ORDONNANCE SUR L'ASSURANCE-MALADIE [OAMAL] [HEALTH INSURANCE ORDINANCE] Jun. 27, 1995, RS 832.102 (Switz.).

19. LOI FÉDÉRALE SUR L'ASSURANCE-CHÔMAGE OBLIGATOIRE ET L'INDEMNITÉ EN CAS D'INSOLVABILITÉ [LACI] [FEDERAL LAW ON COMPULSORY UNEMPLOYMENT INSURANCE AND INSOLVENCY COMPENSATION] Jun. 25, 1982, RS 837.0 (Swtiz.); ORDONNANCE SUR L'ASSURANCE-CHÔMAGE OBLIGATOIRE ET L'INDEMNITÉ EN CAS D'INSOLVABILITÉ [OACI] [ORDINANCE ON COMPULSORY UNEMPLOYMENT INSURANCE AND INSOLVENCY COMPENSATION] Aug. 31, 1983, RS 837.02 (Switz.)

20. LOI FÉDÉRALE SUR LES ALLOCATIONS POUR PERTE DE GAIN EN CAS DE SERVICE ET DE MATERNITÉ [LPAG] [FEDERAL LAW ON COMPENSATION FOR LOSS OF EARNINGS IN THE EVENT OF SERVICE AND MATERNITY] Sept. 25, 1952, RS 834.1 (Switz.).

21. LOI FÉDÉRALE SUR LA PARTIE GÉNÉRALE DU DROIT DES ASSURANCES SOCIALES [LPGA] [FEDERAL LAW ON THE GENERAL PART OF SOCIAL INSURANCE LAW] Oct. 6, 2000, RS 830.1 (Switz.)

22. BERENSTEIN ET AL., *supra* note 9, at 40-46.

person also called reference wage for the employees. This reference wage is defined in article 5 LAVS and in article 9 LAVS for the income of the independents. The LAVS plays thus a key role in all social insurances. In practice, the LAVS organisms and the SUVA centralize and coordinate their assessments to ensure consistency in their decisions.

NATIONAL JURISPRUDENCE

Jurisprudence covering the platform economy is still in a fledging state in Switzerland. If the qualification of the contract is the main concern for the people at the end of the chain (A.), the platforms are the Eldorado of the globalized economy and the judges must first and foremost manage the international aspects of the qualification (B.). The consequence of the requalification of the contract (C.) is that the worker will fly from entrepreneurship to wage workers, which are two worlds at odds with one another.

Qualification of the Contract

The platform economy triggers two kinds of issues closely intertwined: firstly the qualification of the relationship from a social insurance point of view (1.). Secondly, the qualification of the contract as a service agreement leading to an independent/provider relationship or on the contrary as an employment contract leading to an employer/employee relationship from a labor law perspective (2.). If at first sight, the questions and criteria of answers are relatively similar, different goals are at stake, thus leading to different definitions, and possibly to conflicting arguments. However, these two fields have overall ended up to similar decisions from the authorities and courts until today.

Situation in Social Security Legislation

Social insurance authorities pursue the objective of ensuring an adequate pension scheme for old age, survivors and disability for the greatest number [23] Therefore, when taxing the revenue the authorities must set identical criteria for everyone, regardless of individual needs or the balance of a contractual relationship. They will focus on the revenue of the person and must first and foremost determine if it results from a dependent or an independent gainful activity.[24] To do so they apply two key qualification criteria that we will detail below: entrepreneurial or economic risk and

23. *Cf.* CONSTITUTION FÉDÉRALE [CST.] [CONSTITUTION] Apr. 18, 1999, RS 101, art. 111. (Switz.).
24. Dunand, *supra* note 3.

overdependence on the organization of the work.[25] Consequently, when applying the criteria the courts having jurisdiction under this regulation will focus on the financial question regardless of the contractual relationships or the parties' will. They will consider the circumstances in order to answer the question: who in the end bears the burden of the financial risk?

The first criteria, entrepreneurial or economic risk is subdivided into eight subcriteria: significant investments, employment of personnel, collection risk, ownership of commercial premises, payment of overheads, risk of loss, carrying on the activity in its own name and on its own account and customer acquisition.

The second criteria: entrepreneurial or economic risk can be subdivided in five subcriteria, some of them are more important and some other more controversial. The right to give instructions (very disputed in the platform context), a subordination relationship, integration stages into a work organization, the existence of a personal obligation to perform the tasks, a non-compete clause and attendance obligations when performing the job.

Until now the accident insurance organism, SUVA, has attempted to reclassify the Uber platform at least twice. These first cases were in Zurich[26] but the Lausanne District Labor Court also mentioned another procedure pending in Lausanne.[27] In the 2018 Zurich decision, the authorities aimed to tax Uber Switzerland GmbH as an employer but failed because of a lack of proof in the determination of facts. In the 2019 case, the SUVA taxed Uber B.V. (Netherlands) as the formal employer because Uber B.V. was the real contractual partner. It indeed determines the price, collects the price of the fare and pays it back to the drivers after deducting its commission. SUVA mentions a clear relationship of "organizational work dependence" between drivers and Uber. The consequence is that Uber will also be required to pay the contribution to the LAVS AI[28] and the LPP for its employees if their annual income with Uber exceeds CHF 21,330 per annum. According to the Unia trade union organization, the decision should also serve as a reference for other cases and other cantons because the AVS and SUVA practically coordinate their assessments to ensure consistency in their decisions.

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25. OFFICE FÉDÉRAL DES ASSURANCES SOCIALES [OFAS], DIRECTIVES SUR LE SALAIRE DÉTERMINANT DANS L'AVS, AI ET APG [GUIDELINES ON THE REFERENCE WAGE IN THE AVS, AI AND APG] 2, 19 (2019), *available at* https://sozialversicherungen.admin.ch/fr/d/6944/download.

26. Socialversicherungsgericht des Kantons Zürich [Social Insurance Court of the Canton of Zurich] July 10, 2018 UV.2017.00030 (Switz.); Claudia Badertscher, *Suva Bleibt Dabei: Uber Ist Arbeitgeber* [*Suva Stays with It: Uber is an Employer*], RTS, July 5, 2019, available at https://www.srf.ch/news/schweiz/plattform-oekonomie-suva-bleibt-dabei-uber-ist-arbeitgeber; Philipp Zimmermann, La Suva confirme: Uber est un employeur [Suva Confirms: Uber is an Employer], UNIA, July 5, 2019, available at https://www.unia.ch/fr/medias/communiques/communique/a/16087.

27. Tribunal de prud'hommes de l'arrondissement de Lausanne (Lausanne District Labor Court), May 2, 2019 April 29 2019, n° P317.026539 A. vs. Rasier Operation B.V. (Switz.). One of the authors [Sabrine Magoga-Sabatier] has had direct access to this decision that was rendered behind closed doors.

28. LOI FÉDÉRALE SUR L'ASSURANCE-INVALIDITÉ [LAI] [FEDERAL LAW ON DISABILITY INSURANCE] Jun. 19, 1959, RS, 831.20 (Switz.).

Situation in Labor Law

From a labor law perspective, the jurisdictions must deal with two contradictory principles the freewill of the parties on one side and the fact that the employment agreement is part of semi-mandatory law on the other side. If the employee's interests are involved, the latter overrules the first. It means that the parties are free to contract as they wish as long as the contract is not detrimental to the employee. As a consequence, the courts have the mission and power to interpret the contract based on the joint and genuine intention of the parties, which is a matter of facts. Subsidiarily in case of divergence between the parties, the court will base its interpretation on the principle of trust, which aims to seek their objective will in order to determine the meaning that, according to the good faith principle, each could and should reasonably have given to the other's declarations. When interpreting the contract, the court will consider specific circumstances such as the balance of the negotiation, the understanding of the contract by the signatories.

The qualification of the contract as an employment is a matter of law, which the judge can decide freely without being bound by the qualification of the parties. According to the legal doctrine, there are four qualification criteria, the third one being the most decisive[29] The first is the personal performance that the worker has to provide; therefore, the contract is in principle *intuitu personae*. The duration is the second criteria, which means that the contract does not end with the service. The third is the organizational or subordinate element, by which the worker becomes dependent on the employer. The subordination can be on a timely basis i.e., respecting the working time and schedule, but also on a spatial level i.e., the place agreed for the performance of the service and finally from a hierarchical point of view by agreeing to follow the instructions and to submit to the control of the employer. Timely subordination is the most controversial aspect in the case of platform economy since the workers are free to decide when they want to work but they must follow the instruction of the platform when they are connected. The fourth condition is the salary, which is the material element. When the four criteria are met, the employee will be identified as being under a dependent relationship towards the employer, the contract will be qualified as an employment agreement and the protective semi-mandatory law will apply.

In this field, the matter was recently adjudicated by a court decision[30], against which Uber has most probably appealed. According to the Lausanne

29. Gabriel Aubert, *Commentaire des art. 319-362 CO* [*Comment of Articles 319-362 Code of Obligations*], *in* COMMENTAIRE ROMAND, CODE DES OBLIGATIONS I (Luc Thévenoz & Franz Werro eds., 2012) art. 1-24; RÉMY WYLER & BORIS HEINZER, DROIT DU TRAVAIL [LABOR LAW] 1, 19-22 (3d ed. 2019); Jean-Philippe Dunand, *Commentaire de l'article 319 CO* [*Commentary on Article 319 CO*], *in* COMMENTAIRE DU CONTRAT DE TRAVAIL, at para. 3-46 (Jean-Philippe Dunand & Pascal Mahon eds., 2013).

30. Lausanne District Labor Court (2019).

District Labor Court, which acknowledged its competence, when applying the four criteria Rasier Operation B.V. (Netherlands) must be considered as an employer and the service agreement qualifies as an employment agreement. The worker's independence was denied specifically from a timely perspective but also from the hierarchical point of view and thus the subordinate element was met together with the three other criteria. This decision leads us to analyze another important aspect of the platform economy: applicable law and the choice of forum court with regard to the international environment of the platforms.

International Aspects of the Qualification of the Contract Ruled by Swiss Courts

Generally speaking, platforms such as Uber are fully proficient with forum shopping and use the international aspects of corporate law in order to have their seat and place of jurisdiction in tax-efficient countries at their most convenience. If we take Uber for example, the service agreement applicable to the drivers located in Switzerland is governed by Dutch law, either with Uber B.V. for UberX and UberBlack or with Rasier for UberPOP, both being Dutch companies.[31] The contract also includes an arbitration clause in case of litigation.

Hence, there is an international situation i.e., a containing one or more cross-border element, in our case the place of business of the parties or their residence, if the contract is entered into between a driver established in Switzerland and Uber B.V. one of the Dutch subsidiaries of Uber. Consequently, the international private rules apply in order to assess the competence of the courts, the applicable law and the validity of an arbitration clause.

Contrary to the situation of the criteria of qualification, which are very similar, the international aspects of the qualification have very different impacts whether we consider the situation in labor law (1.) or in social security legislation (2.). In this section, we base our analysis mainly on a detailed study on the international aspects of the employment agreement in the specific context of the platform economy.[32]

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31. Kurt Pärli, *Gutachten «Arbeits- und Sozialversicherungsrechtliche Fragen bei Uber Taxifahrer/innen»* [*Legal Opinion Labor and Social Security Law Issues with Uber Taxi Drivers*], Bern/Basel 3, 13, July 10, 2016, *available at* https://www.unia.ch/uploads/tx_news/2016-08-29-Gutachten-Arbeitsrecht-Sozialversicherungsrecht-Uber-Taxifahrer-innen-Professor-Kurt-Pärli.pdf.

32. Guillaume, *supra* note 1, at 193-257.

Situation in Labor Law

There are three different aspects of the qualification in labor law: the validity of the forum clause by which the parties elect the place of jurisdiction (a.), the choice of the applicable law (b.) and the arbitration clause (c.).[33]

Forum Clause

From a labor law perspective, the impact of international aspects is very complex. The reasoning of the judges as confirmed by the Uber case in Lausanne[34] takes place according to the following steps. In order to acknowledge its competence, the court has first to ascertain the real parties of the contract (either Uber B.V. or Uber Switzerland) in order to decide if there is an international situation. If the Court considers that the real employer of the drivers is Uber Switzerland, the cross-border condition is not met, and Swiss law must apply. If on the contrary Uber B.V. is the real employer, international laws apply. In a second step, the judges must determine the nature of the contract to assess the validity of the arbitration and choice of applicable law clause.

This matter is called a fact of dual relevance: both the competence of the court and the issue of the litigation depend on the qualification of the contract. Thus, the judges must assess the facts the moment they check their competence regardless of any applicable foreign law. The taking of evidence happens during the examination on the merits of the dispute, which explains why a Swiss court could dispose of the case despite Dutch law being agreed upon together with an arbitration clause in case of litigation.

International applicable laws are either the Lugano Convention[35] if the one or both parties are located in a signatory country[36] (which is the case of the Netherlands and Switzerland in our example) or otherwise Switzerland's Federal Code on Private International Law[37]; in the event of a conflict, the former prevails.[38]

The qualification of the contract is all the more important because the Lugano Convention provides specific competence rules for employment

33. BERENSTEIN ET AL., *supra* note 9, at 76-78.

34. Lausanne District Labor Court (2019).

35. CONVENTION CONCERNANT LA COMPÉTENCE JUDICIAIRE, LA RECONNAISSANCE ET L'EXÉCUTION DES DÉCISIONS EN MATIÈRE CIVILE ET COMMERCIALE [CL] [CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS] Oct. 30, 2017, RS 0.275.12 (Switz.).

36. *Id*. art. 18 ¶ 2, art. 23.

37. LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RS 291 (Switz.).

38. Guillaume, *supra* note 1, at 193-257; Luca Cirigliano, *Numérisation du Point de vue des Syndicats : une Chance et un Défi à Relever* [*Digitization From the Trade Union Perspective: An Opportunity and a Challenge*], *in* LA RÉVOLUTION 4.0 AU TRAVAIL - UNE APPROCHE MULTIDISCIPLINAIRE [THE 4.0 REVOLUTION AT WORK - A MULTIDISCIPLINARY APPROACH] 257, 264-68 (Jean-Philippe Dunand, Pascal Mahon & Aurélien Witzig eds., 2019).

agreements in order to facilitate the employee's access to justice.[39] For example, when the claim is brought against an employer, the Lugano Convention will apply if the employer's company has either its corporate office or its principal place of business or even a branch office or a representative office (article 18 § 2 LC) in one of the signatories' countries. It means that an office without legal personality is sufficient as long as the worker's claim is related to this office. In consequence, in our example the worker can legally proceed in Switzerland if he-she were hired in Switzerland even if the employer's head office is in a non-signatory country. If the employer's head office is located in one of the signatories' countries, the worker can also proceed in Switzerland because it is the place where the work is done i.e., if the characteristic performance is done in a signatory country (article 19 § 2 let. a LC). When the employer initiates the claim against the worker, the Lugano Convention provides that the competent courts are those of the worker's domicile if such domicile is located in a signatory country (article 20 LC) even if the country of the employer were a non-signatory country. Inside such country, the LDIP applies to specify the exact place of competence (Canton).

By contrast, if the contract is a service agreement, the independent worker must act according to article 2 par. 1, 5 par. 1 and 23 LC there is neither a protection regarding the competence nor regarding forum and applicable law clauses. Nevertheless, there is often very few possibilities of negotiation of such clause by the platform worker.

The Lugano Convention also allows the parties to choose another place of jurisdiction but there are strict rules to abide by.[40] The clause must be written in the agreement or possibly in some general terms and conditions and an electronic transmission is valid if the other party doesn't object.[41] The parties must have reached a clear agreement, and the content of the clause must also be clearly set. Most importantly in case of an employment agreement if the clause is set before the litigation arises it can only enlarge the choices open to the worker compared to those provided in the Lugano Convention. Therefore, such clause cannot prohibit the competence rules of the Lugano Convention. On the contrary if the parties agree to such a clause after the beginning of their litigation, they can choose any place of jurisdiction. If the conditions are not met, the clause will be null and void. Reversely if the clause is valid, it will not be affected by a defect of the contract because the two issues are considered as separate agreements.[42]

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39. CONVENTION CONCERNANT LA COMPÉTENCE JUDICIAIRE, LA RECONNAISSANCE ET L'EXÉCUTION DES DÉCISIONS EN MATIÈRE CIVILE ET COMMERCIALE [CL] [CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS] Oct. 30, 2017, RS 0.275.12, art. 18–21. (Switz.).

40. *Id*. art. 23.

41. Guillaume, *supra* note 1, at 244.

42. CONVENTION CONCERNANT LA COMPÉTENCE JUDICIAIRE, LA RECONNAISSANCE ET L'EXÉCUTION DES DÉCISIONS EN MATIÈRE CIVILE ET COMMERCIALE [CL] [CONVENTION ON JURISDICTION

In our example from the Uber case, the clause was agreed before the litigation started and the understanding of the clause was challenged by the judges because the driver was not fully conversant with French language. Although an English translation of the contract was handed over to him, it was not part of the contract. For these reasons the forum clause could not prevent the worker to act in Switzerland.

When there is an international situation but the parties are not from one of the signatories' countries of the Lugano Convention, the LDIP applies[43] The similarities with the Lugano Convention are the following. 1) There are specific competence provisions protective of the employees: the Swiss jurisdictions are competent when the worker has his or her usual residence, his or her domicile, his or her principal place of work in Switzerland; if these conditions lead to jurisdictions in two different cantons, the worker can choose the canton[44] 2) The parties can provide for another jurisdiction under certain conditions: among others a written clause but not necessarily signed, a specific existing litigation or future litigation in relation with a specific legal relationship.[45]

Applicable Law

The qualification of the contract also is of the utmost importance in the field of the applicable law. Should the court assert that the contract is in fact an employment agreement it must determine the law applicable to the contract according to article 121 LDIP, whether there is or not a specific choice of law clause agreed upon by the parties.

In the absence of an election of law within an employment agreement, Swiss law applies if the principal place of work is in Switzerland. The law of the country of the employer may apply only when the place of work cannot be established and if there is a link between this country and the work relationship, for example if it is the place of the office that hired the worker[46] If the court concludes that the foreign law applies, the Swiss jurisdictions must enforce it unless it contravenes to a mandatory Swiss law, to the Swiss public policy or if the foreign law leads to a result in contradiction with such public policy.

Nevertheless, the parties can also agree to apply another law. According to article 121 al. 3 LDIP such law must be either the law of the usual worker's

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AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS] Oct. 30, 2017, RS 0.275.12, art. 21. (Switz.).

43. LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RS 291, art. 5, 112-13 (Switz.).

44. *Id*. art. 115.

45. *Id*. art. 5.

46. *Id*. art. 121 al. 2;Bundesgericht [BGer] [Federal Supreme Court], Apr. 7, 1995, Arrêt du Tribunal fédéral Suisse [ATF] 121 III 246 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Jan. 27, 1992, 118 II 79 (Switz.).

place of residence or the law of the employer's business office or legal domicile. To be valid, such clause must not necessarily be written, it can be express or tacit (article 116 al. 2 LDIP) and can be accepted with a click together with the general terms and conditions of the platform. The fact that the contract is not equally negotiated or not at all negotiated should not be relevant with regard to the validity of this clause.[47] Here the worker is only protected to the extent of compulsory Swiss law being part of the international public order, which is narrower than mandatory Swiss laws.[48] For instance, the federal law on Labor in Industry, Craft Industry and Trade and certain parts of the code of obligations apply when the place of work is in Switzerland even if the foreign law is valid.[49] In our example, the Lausanne District Labor Court following the same reasoning concluded that the Swiss law should apply despite the election of Dutch law. So the validity of the arbitration clause had to be assessed through this lens.

Arbitration Clause

As mentioned before the validity of the arbitration clause is subject to restriction if the contract is an employment agreement. Indeed, Swiss law provides in article 341 CO[50] that for the period of the employment relationship and for one month after its end, the employee may not waive claims arising from mandatory provisions of law or the mandatory provisions of a collective employment contract. Articles 361 and 362 CO list the rights giving rise to mandatory claims. They mainly include salaries, paid holidays, indemnities … Before the aforementioned delay the waiver of these claims, and so the agreed arbitration clause would therefore be null and void.[51] The Lausanne District Labor Court came to the same conclusion regarding Uber.[52]

On the contrary, if the contract is a service agreement the LDIP and the Lugano Convention allow arbitration and the forum in the State of residence of the platform.[53] The Federal Council notes in this respect that the platforms have created new categories of workers, who needs a protection and for whom the liberal framework of the LDIP can lead to inappropriate solutions

47. Guillaume, *supra* note 1, at 222. However, the court considered this point in the Uber case; *cf.* Lausanne District Labor Court, (2019).

48. LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, RS 291, art. 18-19 (Switz.).

49. Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2012, 138 III 750 § 2.5 (Switz.) (regarding art. 342 al. 2 CO).

50. CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, RS 220, art. 341.

51. Tribunal fédéral [TF] [Federal Supreme Court] Apr. 17, 2013, 4A_515/2012 § 4.2; Bundesgericht [BGer] [Federal Supreme Court] Jun. 28, 2010, 136 III 467 § 4.6.a; PATRICIA DIETSCHY-MARTENET, LES CONFLITS DE TRAVAIL EN PROCÉDURE CIVILE SUISSE [LABOR DISPUTES IN SWISS CIVIL PROCEDURE] 1, 123-24 (2011).

52. Lausanne District Labor Court, 2019.

53. Guillaume, *supra* note 1, at 244-48.

with regard to access to justice and that adaptations of the LDIP could be necessary in the near future.[54]

To conclude on the international aspects of labor law issues regarding the platform economy the qualification of the contract e.g., employment or service agreement is a key question since freewill and contractual freedom of the parties must be abided by as long as they are not in contradiction with the protective laws to employment agreements.[55] As there is no definition of what an employment agreement is in private international law, Swiss courts will apply the Swiss qualification criteria when assessing their competence.

The qualification of Uber's service agreement has been the subject of several legal opinions, including the one from Kurt PÄRLI[56] and one from Bettina Kahil-Wolff.[57] The two authors agree that distinguishing whether the drivers are employed and self-employed is no easy thing. It depends on the weighing of the usual criteria. It comes as no surprise that the legal opinion requested by the unions concludes that the drivers are employees (the Pärli legal opinion), while that requested by Uber concludes that they are self-employed (the Kahil-Wolff legal opinion). As already mentioned the Lausanne District Labor Court qualified the contract as an employment agreement and followed all these steps; referring themselves to the decision of the Court of Justice of the European Union given the economic dependence and judges of Lausanne were of the opinion that the freedom of organization of the Uber drivers was almost nonexistent. They denied the validity of the arbitration clause and the application of Dutch law and considered the redundancy as null according to Swiss law. Nevertheless, this decision is not final and should be taken with caution.

Situation in Social Security Legislation

Contrary to labor law, international aspects have very little influence on social insurances. First of all, the Lugano Convention excludes from its competence social security matters. Then, from the social insurance authorities' perspective, the arbitration clause and choice of applicable law by the parties are irrelevant. The authorities declare themselves competent *per se*. To this end, they consider the revenue and thus the place where the service, which generated such revenue, was rendered. Consequently, they

54. CONSEIL FÉDÉRAL, *supra* note 3, at 62-64.
55. Guillaume, *supra* note 1, at 243.
56. Pärli, *supra* note 31.
57. Bettina Kahil-Wolff, *Avis juridique sur le statut des chauffeurs utilisant les applications Uber en Suisse au regard de la législation sur l'assurance-vieillesse et survivants (AVS). Expertise à l'attention de Uber Switzerland GmbH* [*Legal Opinion on the Status of Drivers Using Uber Applications in Switzerland with Regard to the Legislation on Old Age and Survivors' Insurance (AVS). Expertise for Uber Switzerland GmbH*], *in* LE DROIT SOCIAL NUMÉRIQUE 209, 247-86 (Bettina Kahil-Wolff Hummer & Johan Juge eds., 2018).

hold themselves competent of their own motion if this place is located in their area of jurisdiction (Canton) in Switzerland. If they qualify the activity as a reference wage, as defined by the LAVS, they must identify the employer. According to the Zurich authorities in charge of the Uber case in 2019, the SUVA, the place of the activity was Zurich and the employer was Uber B.V. (Netherlands).[58] The employer is the company, which specifies and controls the essential circumstances of the journeys (price, route, behavior, evaluation) and therefore establishes a relationship of dependency in terms of work organization between the drivers and the service commissioner, which is Uber B.V.—this decision will most probably be appealed—.

However, the fact that the qualification from the social insurance point of view depends on national authorities can pose significant problems in terms of coordination of European social security rules. First of all, if the platform worker is active in several countries, the competent authority, namely the one of the worker's country of residence, must qualify the nature of the activity not only with regard to its own rules but also with regard to the legislation applicable in the other States. Secondly, the existing discrepancies may lead to disagreements between the different states causing an extension of the time necessary to determine the legislation finally applicable: a period of uncertainty that can be detrimental to the worker, in terms of finance, insurance coverage and treatment.[59]

Consequences of a Requalification of the Contract

The requalification of the contract by the court has substantial financial consequences for the worker during the contract but also regarding its terminations (2.) Such a requalification also has consequences on the validity of the termination itself (1.).

Validity of the Termination of the Contract

Except for the abuse of rights, the freewill of the parties usually rule out the termination of a service agreement, whereas a redundancy must abide by the delays and conditions of the code of obligations, which may vary whether the termination is regular or if there is a cause of extraordinary termination. If we consider the platform Uber for example, the service agreement of Uber B.V. provides a possible termination without cause by both parties within seven days.[60]

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58. SUVA (2019).

59. Anne-Sylvie Dupont, *Les Règles Européennes de Coordination des Régimes de Sécurité Sociale à l'épreuve des Nouvelles Formes de Travail* [*European Rules for the Coordination of Social Security Systems in the Face of New Forms of Work*], in LES ASPECTS INTERNATIONAUX DU DROIT DU TRAVAIL 292, 292-322 (Jean-Philippe Dunand & Pascal Mahon eds., 2019).

60. Thomas Gächter& Michael E. Meier, *Sozialversicherungsrechtliche Qualifikation von Uber-Fahrern Rechtsgutachten zuhanden der Unia Bern* [*Social Security Qualifications of Uber-drivers, Legal*

Concerning the delays and the conditions of the termination of an employment agreement, according to the code of obligations a notice period of seven days during the probation period and from one to three months afterwards depending on the total duration of the employment agreement must be respected.[61] The termination can also be immediate if there is a good cause, meaning a serious breach by the employees of its obligations to such extent that the trustful relationship between the parties is definitely broken and the employer can legitimately consider that the employee could not restore it.[62] The proof of the good cause belongs to the employer. Except under specific circumstances, the employer may only notify an immediate termination within two to three days after the breach. A lack of notification in due time tends to prove the absence of good cause and a wrongful procedure. Finally, the termination is unlawful if it occurs "at an inopportune juncture" or for an inappropriate reason, i.e., when the law protects the employee for one of the reasons listed in the article 336-336c CO.[63]

In our example, Uber had terminated the contract of the Uber driver because a few customers had given bad rates concerning his driving abilities lowering his average rating. After notifying the driver on his smartphone, Uber had applied the contractual notice period of seven days and deactivated the driver's application. In his action, the driver has questioned the validity of the cause of termination the delay as well as the validity of the notification itself. According to the Lausanne District Labor Court despite the fact that the complaint of the customer was serious because they concerned the driving abilities of the driver and thus the customers' security, the termination for good cause was not justified because the warnings sent by Uber were not immediately followed by a termination. Thus, Uber had not proved that the termination was the consequence of an irreversible loss of trust with the employee. Although Uber had respected the contractual notice period, the court considered the termination as unjustified and unfair because it had requalified the contract as an employment agreement. Therefore, in the absence of a good cause for immediate termination Uber should have respected the legal notice period.

Financial Consequences

In Switzerland, there is no possible reintegration after a wrongful dismissal. Nevertheless the employee is entitled to claim for his salary until the proper end of the contract, as well as an indemnity of maximum six

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Opinions for the Attention of Unia Bern], UNIA UNIA 1, 30 (July 5, 2018), *available at* https://www.unia.ch/fileadmin/user_upload/News/2018/2018-07-05_Gaechter_Meier_Gutachten_Uber_Fahrer.pdf.

61. CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, RS 220, art. 335a-35c.

62. *Id*. art. 337.

63. WYLER ET AL., *supra* note 29, at 501-531, 571-604; BERETSTEIN ET AL. *supra* note 9, at 152-53.

months' salary, the payment of the mandatory legal holidays and the reimbursement of its expenses (car expenses, smartphones, etc. because the employer must provide the necessary work tools). The employer must pay social contributions—such as LAVS but not LPP because the contract does not exist anymore—on such indemnities and salaries.[64]

There are also other financial consequences regarding social insurances' rights and contributions. Concretely, during the contract the coverage of the independents under a service agreement is worse than the employees'.[65] Social insurances are more expensive because as an economic entity, the independent worker is solely responsible for the payment of his social contributions, which are therefore more expensive than they are for employees to whom the principle of parity in the contributions provided in articles 112 and 113 of the Federal Constitution applies. This principle of parity implies that the employer must pay half of the social contributions. Therefore, as an employee, the worker only contributes at half the rate, the other half being charged to the employer[66] Therefore, the newly requalified employee can obtain the reimbursement of the part of the contributions that he or she paid in excess. On its side, as a requalified employer, the platform may be sentenced to pay all unpaid social contributions both for itself and for its employees: LAVS, LAI, LPP if the annual earnings with this platform are above the minimum CHF 21,330 but also LACI and LAPG. It is important to note, though, that the two previously mentioned procedures are independent from one another. Therefore, the employer who is sentenced should on his turn bring an action against the employee for unlawful enrichment within one year of the aforementioned judgment under the conditions provided in articles 62 and 67 CO. To avoid such risk, the parties could agree, according to the freedom of contract, that the remuneration should be understood has net and includes both parties' social contribution in case the agreement should be qualified as an employment agreement.

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64. For more information regarding dismissals, see WYLER ET AL., *supra* note 29, at 604-617; BERENSTEIN et al., *supra* note 9, at 153-57.

65. Indeed, the range of the coverage is less complete for the independent worker than it is for employees. The law has left numerous social insurances optional for the independents. If there is no proper difference between employees and independents for AVS, AI and LAPG, the insurance against accidents, loss of revenue in case of accident or maternity are not mandatory. It is the same for occupational benefit according to articles 4, 44 and 45 LPP. This means concretely that even if the independents chose to be insured, the insurance conditions would be ruled by private insurance law and not by the federal social insurance laws with consequence that they would probably have less favorable conditions than the employees'. Last but not least, all the insurances are always related to the activity, with no guarantee that such activity goes on indefinitely and the independents can't be insured against unemployment. For more information, see SABRINE MAGOGA-SABATIER, UNIVERSITY OF NEUCHÂTEL, L'UBÉRISATION DU TRAVAIL, NOUVELLE FORME D'ENTREPRENEURIAT OU PRÉCARISATION : QUELLE RECONNAISSANCE POUR LES NOUVEAUX INDÉPENDANTS? [THE UBERIZATION OF WORK, A NEW FORM OF ENTREPRENEURSHIP OR PRECARIOUSNESS: WHAT RECOGNITION FOR THE NEW SELF-EMPLOYED?] 1, 8-18 (2019), *available at* https://libra.unine.ch/Publications/38903.

66. Stéphanie Perrenoud, *Salariés ou Indépendants : Quid en cas D'incapacité de Travail? [Employees or Self-employed: What Happens in the Event of Incapacity for Work?], in* LE DROIT SOCIAL NUMÉRIQUE 25, 39-42 (Bettina Kahil-Wolff Hummer & Johan Juge eds., 2018).

However, such a clause can only be valid under exceptional circumstances, where it is clear that the parties would not try to deviate from the legal system of parity.[67] To our knowledge, this case has not arisen yet in the platform economy. In our case, it is most likely that the competent AVS compensation fund takes charge of the matter because the requalification automatically leads to a qualification of reference wages under the LAVS. The driver has introduced a separate action to the SUVA, but Uber also filed an appeal, which is still pending.

COLLECTIVE DISPUTES

In this section, we aim to give an overview on the trade union perspective on issues related to platform work (A.) and more specifically on the case of the bike messengers, which was a first in several aspects (B.).

Union Demands

Up to now, the platforms have not been the subject of any real collective disputes. Nevertheless, the unions follow developments with apprehension. The 16-member Swiss Trade Union Federation has compiled a file on digitalization, which contains several claims.[68] Among others they call for a tighter enforcement of legal provisions in the field of social security. They fight against undeclared work in the digital field. They claim for a full recording and payment of the working time and the filling of legislative gaps in the field of teleworking. They would like to guarantee union rights, and especially the right of unions to contact platform workers and eventually a better protection against dismissal for older workers, taking account of seniority, etc.[69]

The Case of Bike Messengers

A specific dispute concerned bike couriers working for the platform Notime, a small start-up operating in various cities in German-speaking Switzerland. In September 2017, 4,000 Notime riders demanded employment contracts, the implementation of a Standard Employment Contract [70], and the payment of social security contributions arrears.

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67. ATF November 17, 1981, 107 II 430 §. 4 and BGer July 17, 2001, 127 III 449 § 3a-f.

68. DANIEL LAMPART, UNION SYNDICALE SUISSE (USS), LA NUMÉRISATION DOIT SERVIR AUX SALARIÉ-E-S, ANALYSE ET MESURES REQUISES [DIGITALIZATION MUST SERVE EMPLOYEES: ANALYSIS AND MEASURES REQUIRED] 2017, *available at*https://www.uss.ch/fileadmin/user_upload/171002_Lampart_Numerisation_def.pdf.

69. *See also* Cirigliano, *supra* note 38, at 275-77.

70. CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, RS 220, art. 359-60f, these contracts are mandatory, they are binding on all companies of the economic branch, when there is no collective bargaining agreement. The companies may only derogate from them in favor of the employee. They provide for mandatory minimum wages and allow avoidance of wage-underbid practices.

Demands regarding individual employment agreement were successful to a certain extent. After having initially considered them as (bogus) self-employed i.e., refusing to pay social security contributions for them, the company was forced to accept that they were rather employees as of October 2017 or 1 January 2018 —under pressure from the unions and the social security authorities and a certain collective pressure from the riders themselves (with high media visibility)—. The consequence was that the platform proposed employment contracts to the riders and had to pay social contributions for them.

What remained disputed, however, was the payment of arrears from previous years (social security contributions, paid leave, compensation for the use of private equipment, etc.). Success was also relative, as the new employment contracts are on call (zero-hour) contracts. The company insisted on a new probation period and put pressure on the bikers to renounce to all their demands regarding previous years. The bikers also abandoned their request of a Standard Employment Contract because they planned to have it concluded by Unia and the platform was absolutely against working with this trade union organization.

Thus by sticking together, the riders managed, at least in part, to have their demands met. In March 2018, Notime was taken over by Poste, the Swiss public postal service, with the latter taking a 51% stake in the startup's capital. In our opinion, this proves to a certain extent that the platform economy cannot work without the finances of the so-called brick and mortar businesses when they must implement traditional form of employment.

TRADE UNIONS AND COLLECTIVE BARGAINING

Another side of the collective issues concerns the conclusion of collective agreement (A.), which the legal doctrine considers as the most urgent priority not only on the national level but also for the ILO (B.).

Examples of Collective Bargaining and the Conclusion of Collective Agreements

In this domain also, developments in the field of bike couriers are the most interesting. In February 2019, a first collective agreement "for bike couriers and city courier services" was signed between Syndicom, the Swiss media and communications union, and its counterpart, the employer association Swissmessengerlogistic (SML). This agreement, which came into effect on May 1, 2019, and is hailed as a "world first" provides for a minimum wage, supplementary remuneration for the nights and Sundays deliveries,

proper work schedules, sickness and other social benefits such as paternity leave.[71]

However, it only covers some 600 riders and does not cover the main operators in the sector. Indeed, paradoxically Notime is not covered; neither is Uber Eats, Uber's meal delivery service, which started operations in several regions of Switzerland, especially in the French-speaking part of the country.

The Swiss National Tripartite Commission on ILO Matters

An in-depth discussion has taken place within this Commission responsible for liaising between the Swiss Confederation and the ILO. It commissioned a study on the future of social dialogue and tripartism in the context of the digitalization of the economy.[72]

The study's authors came to the conclusion that it was crucial to strengthen the social partnership and the coverage of collective agreement by maintaining and promoting collective bargaining at sectoral level. At the same time, it aimed to ease the inclusion of "self-employed workers" and atypical employers in the scope of collective agreements.

These discussions ended with a declaration signed on October 18, 2018, by the Minister of Economy, the representatives of the unions and the employer's organizations, as well as the ILO Director-General.[73]

CONCLUSION

In Switzerland, the legal debates on the social impacts of the digitalization of the economy relate mainly to contractual relationships in the platform economy, the consequences of the use of robots for labor law, and on fundamental labor rights in the context of the fourth Industrial Revolution. Certain institutional features of Switzerland and specifically the division of competences between the Swiss Confederation and the cantons, as well as the major use made of direct democracy, add to the complexity of the debate.

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71. SWISSMESSENGERLOGISTIC [EMPLOYER ASSOCIATION] & SYNDICOM, GESAMTARBEITSVERTRAG VELOKURIERE UND URBANE KURIERDIENSTLEISTUNGEN [COLLECTIVE EMPLOYMENT CONTRACT; BICYCLE COURIERS AND URBAN COURIER SERVICES] (Feb. 4, 2019), *available at* https://syndicom.ch/fileadmin/user_upload/Web/Website/Branchen/Logistik/Velokurier/190204_Rede_HUKoehli_d.pdf.

72. *See* ANNE MEIER, KURT PÄRLI & ZOÉ SEILER, LE FUTUR DU DIALOGUE SOCIAL ET DU TRIPARTISME DANS LE CONTEXTE DE LA DIGITALISATION DE L'ÉCONOMIE : ÉTUDE ÉTABLIE SUR MANDAT DE LA COMMISSION NATIONALE TRIPARTITE POUR LES AFFAIRES DE L'OIT [THE FUTURE OF SOCIAL DIALOGUE AND TRIPARTISM IN THE DONTEXT OF THE DIGITALIZATION OF THE ECONOMY: A STUDY COMMISSIONED BY THE NATIONAL TRIPARTITE COMMISSION FOR ILO AFFAIRS] (2018), *available at* https://www.isdc.ch/media/1600/23-dialogue_social_digitalisation_final_fr.pdf.

73. JUSTICE SOCIALE ET TRAVAIL DÉCENT, TRIPARTITE DECLARATION ON THE FUTURE OF WORK AND SOCIAL PARTNERSHIP IN SWITZERLAND IN THE DIGITAL BUSINESS AGE (2019), *available at* https://www.newsd.admin.ch/newsd/message/attachments/54060.pdf.

With regard to the platform economy, the first court rulings relate to administrative law and to social security law. Whether a worker is classified as being employed or self-employed is of decisive importance, determining membership of social insurance, the type of protection or the status with respect to the payment of contributions.

As it stands, there seems to be a trend towards qualifying the relationship as an employment relationship, but the Swiss Federal Court has not yet had the occasion to rule in this matter. The criteria for qualifying the employment contract have always evolved over time and will continue to adapt to the need of protection of the workers, which is the foundation of the labor law. The Federal Court now uses the notion of "subordination relationship" in such a broad sense that it encompasses economic dependence or integration into the economic structure of an enterprise. So the chances of extending the qualification in employment contracts to new forms of employment are real and already apprehended by case law[74] We will see whether it will be definitively confirmed or not for platform workers. Some authors also support a more global approach, that would cover all workers regardless of their status. According to them, labor law should apply to any person who performs a service on behalf of another person in a way that places him or her under the economic dependence of the latter, whether or not he or she holds a formal employment contract.[75]

For these authors, a new solution in the field of dependent work necessarily requires a greater emphasis on fundamental rights, including collective bargaining. The intensification of trade union representation is the only way to ensure the emergence of representing the interests of each economic actor, in a competitive globalized free trade context.[76] To date, there have been no real collective disputes in Switzerland, though the USS has put forward a set of demands pertaining to digitalization, including a call for the monitoring of digital work and greater protection for the workers concerned. Moreover, a first collective agreement has been signed between Syndicom and Swissmessengerlogistic, though it does not cover all companies in the sector. Whatever the case, politicians and social partners are becoming increasingly aware of the need to strengthen the social partnership and the rate of workers covered by collective agreements and to do more to integrate "self-employed" and atypical workers in their scope. As in other countries, discussions also relate to the relevance of establishing a new intermediary status between an employee and a self-employed worker.

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74. Aurélien Witzig, *L'ubérisation du Monde du Travail : Réponses Juridiques à une évolution économique* [*The Uberization of the World of Work: Legal Responses to Economic Change*], 135 RDS 457, 463-66 (2016).)

75. WITZIG 291-312 (2019), MAGOGA-SABATIER, *supra* note 65, at 67-72.

76. Aurélien Witzig, *Ressorts Méconnus du Droit du Travail Suisse* [*Unrecognized Areas of Swiss labor Law*], *in* REGARDS CROISÉS SUR LE DROIT DU TRAVAIL : *LIBER AMICORUM* POUR GABRIEL AUBERT [CROSS-VIEW ON LABOR LAW: LIBER AMICORUM FOR GABRIEL AUBERT] 347, 358 (Remy Wyler, Anne Meier & Sylvain Marchand eds., 2015).

The government seems, however, to be exercising caution, analyzing developments carefully before making any changes to the legislation.