Market Intelligence

DISPUTE RESOLUTION 2020

Global interview panel led by Simon Bushell of Seladore Legal

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: Shutterstock.com/WillyBarton

ISBN: 978-1-83862-415-6

Printed and distributed by Encompass Print Solutions

Dispute Resolution 2020

Switzerland

Antonio Rigozzi is one of Lévy Kaufmann-Kohler's founding partners and 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 Sport. 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.

1 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?

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. That 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, domestic commercial disputes are still more often litigated than arbitrated. Switzerland is a federal state composed of 26 jurisdictions (cantons). Although a unified Federal Code of Civil Procedure (CCP) was introduced in 2011, judicial organisation remains a cantonal matter, so there are still differences among local jurisdictions. For instance, the cantons of Zurich, Bern, Aargau and St Gallen each have a specialised 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 – an exception to the requirement for a double instance system at the cantonal level under the CCP. Accordingly, decisions issued 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, perhaps thanks 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.


Antonio Rigozzi


Sébastien Besson

2 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?

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 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.

Although this is not, strictly speaking, a matter relating to the choice of applicable law, we expect that as a result of the covid-19 pandemic, parties will seek to make the language employed in the usual boilerplate clauses on force majeure, impossibility and *clausula rebus sic stantibus* more detailed and specific.

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 parties, given that their validity is not entirely settled in all jurisdictions where the award may 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 are not likely to have been 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) has 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.

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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, with the transition period now under way, we obviously perceive significant uncertainty, particularly with regard to the fate of legacy choice of court agreements involving UK-based parties and the recognition and enforcement of the resulting judgments once the UK 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. That being said, change may be kept to a minimum if the UK is able to accede to the Lugano Convention by the end of the transition period. Earlier this year, Switzerland (along with Norway and Iceland) issued a statement of support in favour of the UK's intention to accede to the Convention.

3 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?

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 dispute resolution. 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) that are staffed predominantly with international trade law and disputes specialists, or to conclude special, targeted partnerships with Swiss firms.

One development in recent years affecting disputes lawyers in Switzerland was a decision by the Swiss 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

"There does seem to be a trend for practitioners to open specialist boutique firms offering litigation or arbitration services."

statutorily prohibited. The Swiss Supreme Court decision sets out the requirements for more limited contingency fee agreements to be valid and enforceable under Swiss law. According to the Swiss 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);
- the agreed success fee must not exceed the overall (unconditional) base fees; and
- 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 in recent times, we have been seeing new entrants into this market every year.

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

There have not been major novelties in the case law and practice of litigation in recent years.

We have already mentioned the Swiss Supreme Court's decision on the validity requirements for attorney contingency fee agreements. Another point that has drawn increased attention, 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 Swiss Supreme Court in a 2004 ruling (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.

One significant ruling in international matters was adopted by the Swiss Supreme Court in March 2018 (decision 4A_417/2017). The Court held that it is admissible for a party to file a negative declaratory action in Switzerland in cases where the counterparty has threatened to initiate an action for performance abroad (ie, in a forum running context). Relaxing its earlier case law, the Swiss Supreme Court recognised that parties may have a legitimate interest in securing access to a preferred forum in these situations.

5 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?

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 those 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-an-a-half years 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 Swiss Supreme Court.

Although, as mentioned, we have had a unified federal Code of Civil Procedure since 2011, 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 must be made upfront. In response to calls for reform in this regard, the Swiss Federal Council (the executive branch of the government) adopted, in February 2020, a legislative 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 and 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 (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.

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

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 cantonal codes of procedure.

In 2018, the Swiss government adopted a draft bill carrying limited revisions to this otherwise successful piece of federal legislation. The final bill was issued in February 2020. Taking into account the comments received on the 2018 draft bill, the government's 2020 CCP bill proposes to reduce cost barriers in civil proceedings by capping the advances of costs to be paid by applicants to half of the prospective court fees (as opposed to the full amount of the prospective fees under the current regime) and by providing that court costs will only be offset against the advance on costs if the advance was paid by the party that is to bear the costs (as opposed to the current regime, where actual costs are always offset against the advance on costs) – thus shifting the cost collection risk from the winning party to the state.

In addition, recognising Switzerland's status as a hub for international dispute resolution, the 2020 CCP bill establishes a legal framework allowing cantons to create international commercial courts. Two such projects are currently under way in Geneva and Zurich and could, thus, benefit from the new regime. To further facilitate access to the Swiss courts for international litigants, the 2020 CCP bill enables cantons to provide, upon joint request by the parties, for English to be the language of the proceedings. A further noteworthy change introduced by the bill is that it

proposes to extend attorney–client privilege to in-house legal departments, which at present are not covered. This would level the playing field for Swiss companies vis-à-vis opponents in jurisdictions with broader privilege regimes. The bill will be subject to parliamentary review as the next step in the legislative process.

The provisions governing limitation periods in the Code of Obligations have also been revised, with the new limitation periods applying as from 1 January 2020. While the general limitation period for contract claims remains 10 years from the date of maturity, where the case involves human death or bodily injury, the period has now been extended to 20 years. In addition, the 'relative' limitation period for tort and unjust enrichment claims has been extended from one to three years from the date the aggrieved party becomes aware of the harm. In absolute terms, these claims are, as before, time-barred 10 years after the harmful event has occurred.

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"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."

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

There has been an increased emphasis on speed and cost-effectiveness, both by the parties and the institutions. Indeed, the SCAI's statistics have shown that more arbitrations are now conducted under its special rules for expedited proceedings than used to be the case in the previous years.

Statistics from the International Chamber of Commerce have also confirmed that Switzerland remains a very popular seat for international arbitration, with Geneva and Zurich being second only to Paris as the preferred venue overall. Lausanne, Lugano and Basel, in particular, are other 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.

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

The unified CCP that came into force in 2011 reformed domestic arbitration in Switzerland, which is now governed by Part 3 of that Code.

With respect to international arbitration, a legislative process is under way for a 'touch-up and update' of Chapter 12 of the PILA. In October 2018, after a period of public consultation, the Swiss Federal Council issued the final text of its bill, which is currently being debated in Parliament. As things stand, it is anticipated that the new provisions will be enacted by the end of 2020 and will come into force in 2021.

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 Swiss Supreme Court's case law rendered since the entry into force of the PILA (in 1989) and updating or clarifying Chapter 12's text where necessary. At the same time, the proposed revisions seek to preserve Chapter 12's simple structure and succinct, reader-friendly style, and to avoid disturbing its core underlying principles, in particular party autonomy and flexibility.

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.

As far as practice is concerned, one significant development that has been spurred by the travel restrictions and social distancing measures implemented in response to the covid-19 pandemic is the increased recourse to videoconferencing, not only to hold procedural sessions and meetings (as was already relatively common pre-pandemic) but also to conduct evidentiary hearings. This is most likely a development that is here to stay, even once the holding of in-person hearings is again permitted. The realisation that even evidentiary hearings (which, pre-pandemic, would almost always be held in person, often in spite of the long-distance travel and high costs involved) may effectively be conducted remotely could usher in definitive change and a 'new normal way' of doing things in this respect. Switzerland's legal framework can accommodate the virtual conduct of arbitration proceedings. Arbitral institutions may have to refine or adopt appropriate rules and guidelines, and arbitrators, counsel and parties as well as other participants in the process will all need to be proficient in the use the relevant technologies.

9 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?

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 its Mediation Rules were revised in 2019.

Other Swiss-based institutions have updated their mediation rules in recent years, such as the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) 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, where appropriate, third parties, to actively seek a concerted solution to a dispute.

Aside from the mandatory conciliation proceedings mentioned previously, 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. 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.

It will be interesting to see whether the UNCITRAL Convention on International Settlement Agreements Resulting from Mediation (which has been signed by more than 45 states but ratified by only three so far) will boost recourse to ADR techniques for resolving international disputes in the future.

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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 the Supreme Court often manages to 'save' those 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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ISBN 978-1-83862-415-6