

ALTERNATIVE DISPUTE RESOLUTION

Following on with our special focus on Alternative Dispute Resolution, here *Lawyer Monthly* speaks to Urs Boller LL.M., MCI Arb, a senior associate in Meyerlustenberger Lachenal's dispute resolution department. He has in-depth experience in state court litigation as well as in alternative forms of dispute resolution. Meyerlustenberger Lachenal is one of Switzerland's leading law firms with offices in Zurich, Geneva, Zug and Lausanne.

How has the Swiss ADR landscape altered since you were admitted to the Bar in 2007? How have the trends shifted?

A milestone in Swiss legal history was the entering into force of the new Federal Civil Procedure Code (CPC) in 2011, which replaced the former cantonal codes. In the new CPC, mediation was for the first time expressly recognised by the legislator as a form of alternative dispute resolution. Instead of going through the mandatory conciliation proceedings before bringing an action in court, the parties may now alternatively opt for mediation. Furthermore, when court proceedings have already been brought, the proceedings may at any time be stayed in order to allow the parties to conduct mediation, be it upon request of the parties themselves, or upon recommendation of the court. In case a settlement is reached by mediation, the parties may have their settlement agreement approved by the court, in which case the agreement has the same effects as a binding and enforceable judgment.

Do you agree with reports that mediation will grow in popularity over the next year or so?

Court-assisted settlements have been popular in Switzerland for many years. In particular, commercial courts call the parties for a settlement hearing after the first exchange of briefs. In such hearing the judge provides the parties with his preliminary view on the dispute and the chances and risks of each side. About two thirds of the court cases are settled at this early stage of the proceedings. While in other jurisdictions the providing of a preliminary view by a judge would hardly be conceivable as the judge would be regarded as prejudiced, this is common practise in Switzerland, and parties are often keen to hear the judge's opinion about their case.

Where we see and expect a further increase in the use of mediation are international commercial disputes. Large companies want to cut their expenses for court and arbitration proceedings. Furthermore, they want to have a quick solution

of a dispute, very often in view of the fact that they want to continue to do business with the party with which they are in dispute. Therefore, a quick and reasonable settlement is much better than a (slightly) better result after years of costly proceedings.

Switzerland is said to be one of the leading jurisdictions for arbitration. How do you explain this success?

Switzerland has always shown a very positive attitude towards arbitration. State courts tend to be very liberal with respect to upholding arbitration agreements, and challenges of arbitral awards are rarely successful. This provides the parties with the required certainty that their agreement to have their dispute settled outside the ordinary courts will be respected.

Do you generally advise clients to provide for arbitration in their agreements?

The recommendation we give our clients depends on several factors, such as the nationality of the parties, the applicable law, the desire for confidentiality, the potential complexity of a dispute, the financial interests at stake, the position of the counter party, just to name a few. While there are certain constellations which are best dealt with by providing for arbitration, there are others where we favour the jurisdiction of the state courts.

Do you recognise a preference of your clients with respect to a certain method of dispute resolution?

What we have observed in the recent past is that clients more and more adopt a critical attitude with respect to arbitration as a dispute resolution mechanism, due to the substantial costs that such proceedings may cause. Different from state court proceedings where the rules are set in stone and the proceedings are being administered by the court in an authoritative way, arbitration involves much more counsel work. While this provides the parties with a greater degree of participation and self-determination, the down-side of it is that it obviously drives the costs.

How do you help your clients to keep control over the costs in arbitration?

One of the benefits of arbitration is that the parties can to some degree create their own set of rules that govern the proceedings. Limiting the number of written submissions, define a date after which no new documents may be filed and/or no new factual allegations may be raised, having the case decided based on documentary evidence only, having a sole arbitrator instead of a three member tribunal, and keeping short deadlines are only some of the techniques that can positively influence the length – and thus the costs – of the proceedings. Yet, it is sometimes difficult to motivate the parties to implement such measures, as the parties fear that thereby they are no longer able to argue their case in the best possible way. **LM**



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