wenger & vieli
Rechtsanwälte

Published by Financier Worldwide Ltd
©2019 Financier Worldwide Ltd. All rights reserved.
Permission to use this reprint has been granted by the publisher.

ANNUAL REVIEW **Reprint** November 2019

Litigation & alternative dispute resolution

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in litigation & alternative dispute resolution.

Switzerland

URS WEBER-STECHER
Wenger & Vieli Ltd.
Partner
+41 (58) 958 58 58
u.weber@wengervieli.ch

Urs Weber-Stecher is a partner at Wenger & Vieli. His practice is focused on international arbitration. He regularly acts as arbitrator and party representative in international and national arbitrations in a variety of industries and involving complex cases under several jurisdictions and applicable laws.

Q. Are you seeing any recurring themes in commercial disputes in Switzerland? Do any particular industries or sectors seem to be playing host to a significant number of disputes?

WEBER-STECHER: According to recent statistics from the Swiss Chambers Arbitration Institution (SCAI), most of the disputes administered by it stem from the manufacturing or the commodity mining and trading industry, followed by financial services. The main subjects of the disputes administered continue to be the sale of goods, mergers and acquisitions (M&A), joint ventures and service agreements. This corresponds with the International Chamber of Commerce's (ICC's) statistics where construction and engineering account for roughly 23 percent of all cases, with manufacturing being a significant industry as well. Another recurring theme is the issue of corruption, especially in the context of agency contracts.

Q. What is your advice to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?

WEBER-STECHER: Companies should be aware of the different dispute resolution options available to them. Accordingly, parties can benefit from a fast, cost-efficient, neutral, confidential and private adjudication of their disputes. In Swiss legal culture, it is almost taken for granted that, should a dispute arise, parties will first seek an amicable settlement. This might be uncommon in other countries. Hence, where parties have a continuing contractual relationship it may make sense to stipulate in the contract that prior to arbitration there should be a phase during which they try to negotiate and settle a dispute amicably or engage in mediation. The same holds true in bigger projects or in disputes involving large groups of companies. In such cases it may be valuable and cost-efficient to include a multi-tiered dispute resolution clause in the agreements, such as adjudication, conciliation, expert determination or mediation. This may encourage the parties to de-escalate a possible dispute at the earliest possible stage and avoid further costs and losses. However, arbitration clauses, and alternative dispute resolution (ADR) clauses in general, need to be unequivocal or the usual discussions on jurisdiction will arise.

Q. In your experience, are companies in Switzerland more likely to explore alternative dispute resolution (ADR) options before engaging in litigation? Are there any legal or procedural obstacles to a successful ADR process?

WEBER-STECHER: This may depend heavily on the nature of the dispute, as well as the origin of the parties involved. For instance, in a purely domestic setting, parties may prefer state court litigation, whereas in an international setting arbitration may more regularly be chosen as the applicable dispute resolution mechanism. There is even a tendency to foster mixed dispute resolution schemes, such as Arb-Med-Arb procedures, which include a mediation window with a neutral mediator at a point in time where the parties to the dispute are better informed and more willing to attempt an amicable settlement. Regarding any legal or procedural obstacles, Switzerland has proven to be very liberal and ADR-friendly. The Swiss Federal Supreme Court follows a very restrictive approach in intervening in arbitration proceedings, as well as in deciding on challenges of arbitral awards, where the success rate averages about 7 percent.

Q. How would you describe arbitration facilities and processes in Switzerland? To what extent is arbitration becoming the dominant method of resolving international disputes?

WEBER-STECHER: Switzerland has long been recognised as a neutral and arbitration-friendly venue, as well as a traditional civil law country which provides legal certainty and stability. It also continues to be one of the most popular seats for international arbitration. The yearly statistics show that venues in Switzerland are among the top three chosen seats for ICC arbitrations. There are several reasons for this. The country has excellent infrastructure. Zurich and Geneva both maintain international airports offering flights from and to most major cities in the world. Furthermore, both cities have a variety of hotels and other facilities that guarantee ideal conditions for conducting arbitration proceedings. Switzerland also provides a thorough and highly regarded legal education. ICC statistics show that in terms

of the nationality of the arbitrators appointed, Switzerland is consistently the third most frequently chosen nationality.

Q. In your experience, what steps should companies take at the outset of a commercial agreement to manage disputes that may arise in the future? Is enough attention paid to dispute resolution clauses in commercial agreements, for example?

WEBER-STECHER: In general, there is no 'one size fits all' solution and many factors must be considered when drafting a dispute resolution clause. During this drafting process, close attention should be paid to allow the parties to tailor the clause to their individual needs. As such, companies might want to consider the different dispute resolution or ADR mechanisms available to them, as well as the options they offer individually. For instance, in an arbitration clause, parties should consider the *lex arbitri* at the seat of arbitration, a set of arbitration rules for a specific institution, as well as the law applicable to the merits. In the contract itself, companies should endeavour to define the mutual rights and obligations in such a manner that, in the event of a dispute, an arbitral tribunal will be in an optimal position to assess the relevant facts and apply the law in a correct and efficient manner. For some disputes, it might make sense to agree on the number of arbitrators or to add specific requirements or qualifications for eligibility as an arbitrator, such as technical or legal expertise and experience in a field. If the parties come from different cultural or legal backgrounds, they might also want to agree on the arbitrators' nationality and language.

Q. To what extent can companies avoid disputes by being more diligent in their dealings with potential business partners?

WEBER-STECHER: This may depend on the nature of the business relationship or the industry where specific customs may need to be observed. In general, mutual trust and respect, good communication and shared goals are always a good foundation to avoid or at least facilitate disputes. A dispute may be a consequence of a lack of communication and misunderstanding regarding the terms of the relationship. Pursuing an action out of a dispute resolution clause may be a consequence of an inadequate incentive structure which fails to ensure that the contractual terms are being adhered to. Companies should try to foster business relationships and deals that align mutual interests and discourage non-compliance with the contractual terms. If a dispute arises, companies should opt for an approach that is as solution oriented as possible and should always be open to negotiation. Likewise, any dispute resolution procedure should be as flexible as possible and consider the specific needs of the parties in each case.

Q. How important are external advisers to help companies navigate their way through a commercial conflict?

WEBER-STECHER: At the outset of a commercial conflict, discussions are often led by individuals with no real experience of resolving disputes. Even in-house lawyers might not be familiar with different types of ADR mechanisms, even if they think they are good negotiators themselves. An external adviser with

> *"If a dispute arises, companies should opt for an approach that is as solution oriented as possible and should always be open to negotiation."*

broad experience in dispute resolution may be essential to understand, explain and provide guidance about the nuts and bolts not only of commercial disputes in general, but also the specifics of an industry or the type of dispute resolution mechanism chosen. He or she may be able to liaise with the opposing side, their counsel, institutions and arbitrators to facilitate a smooth exchange and negotiate an efficient conflict resolution. On the other hand, it may be equally essential for an external adviser to be able to closely cooperate with an in-house counsel in order to understand the background or the concrete nature of a dispute and to devise the best and most suitable way of resolving the conflict. ■

www.wengervieli.ch

wenger & vieli
Rechtsanwälte

Wenger & Vieli Ltd. is a law firm with offices in Zurich and Zug. For more than 40 years, the firm has been advising its national and international clients primarily in all areas of business and tax law. Providing counsel on a personal level and having small teams attend to its clients allows the firm to respond quickly and individually to clients' needs. Wenger & Vieli Ltd. advises its clients in a productive, goal-oriented and efficient manner.

URS WEBER-STECHER
Partner
+41 (58) 958 58 58
u.weber@wengervieli.ch

FLAVIO PETER
Senior Associate
+41 (58) 958 58 58
f.peter@wengervieli.ch

KATIA RENER
Associate
+41 (58) 958 58 58
k.rener@wengervieli.ch