Austrian Yearbook on International Arbitration 2016

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Introduction

Since 2007, the Austrian Yearbook on International Arbitration has been a major source of information on current issues in international arbitration.

Published under the guidance of the editors, the Yearbook provides an annual update on key developments in domestic and international arbitration.

The tenth edition addresses current issues discussed in the arbitration community and it mainly reflects topics addressed in the course of the Vienna Arbitration Days 2015 and the *Dreiländer-Konferenz* held in Vienna in 2015.

It includes Peter Rees' keynote speech *"Does Arbitration Deliver"* as well as other authoritative contributions prepared by leading arbitration practitioners and academics. We are particularly proud that the tenth issue of the Yearbook also contains the Bergsten Lecture *"TTIP – Myths and Facts"* delivered by John Beechy in 2015.

Due to the highly efficient work of the authors, the Yearbook also contains the first contribution addressing the new Vienna Mediation Rules 2016 which were adopted in November 2015.

To honour the outstanding contributions of numerous leading arbitrators, academics and practitioners over the past ten years, this tenth edition contains abstracts of all articles published in the Austrian Yearbook to date.

We are grateful for the present contributions from extraordinary arbitration experts from all over the world. We sincerely hope that this "Jubilee Edition" fulfils the expectations of academics and practitioners and serves to further develop international arbitration.

Vienna, January 2016 The Editors

Overview

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The Editors and Authors

John Beechey was President of the ICC International Court of Arbitration from January 2009 until June 2015. In the course of his term of office as President of the Court, he oversaw the introduction of the new ICC Arbitration and Mediation Rules and new Rules for Experts.

He was primarily responsible for the Court's move to new premises and he proposed and implemented the establishment of the new Governing Body, which has the responsibility for long-term strategic planning for the Court. His term of office saw the opening of the Court's operations in New York, the inception of the Jerusalem Arbitration Centre and many changes to the practices of the Court, the principal purpose of which has been to improve the efficiency of the Court and the quality of the service that it offers to its users.

Prior to his term at the ICC, he was founding partner of the Clifford Chance international arbitration practice and one of the first Solicitors to undertake the role of advocate before international arbitration tribunals. His practice included advising Governments, public sector entities, private sector Corporations, employers, contractors and consultants on dispute resolution procedures and in respect of proceedings relating to international commercial contracts and investor-state disputes in all parts of the world.

John Beechey served as both Counsel and Arbitrator whilst in private practice and he continues to be in demand as an arbitrator in both "ad hoc" (including UNCITRAL) arbitrations and institutional arbitrations under the Rules of, inter alia, the EDF, ICC, ICDR/AAA, ICSID, LCIA, PCA, SIAC and the Stockholm Chamber.

He was a member of two major IBA working groups, which produced the Rules on the Taking of Evidence in International Arbitration Proceedings and Guidelines on Conflicts of Interet. He is a former President of the International Arbitration Club.

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Consumers in Arbitration – From a Swiss Perspective*)

Dieter Hofmann/Pascale Koester

I. Introduction

There are hardly any legal limits under Swiss law that would, as a matter of principle, exclude submitting disputes arising out of contracts between a supplier and a consumer[1]) to arbitration. In particular, there are no specific provisions applying to arbitration proceedings in Switzerland that would aim to protect consumers. Consequently, most issues that arise in other jurisdictions as a result of certain limits set to arbitration with regard to consumer disputes are no issue at all under Swiss law. Still, there are certain limits that may apply in a specific case and may put the validity of an arbitration clause in a consumer contract into question. In practice and to date, arbitration clauses are not really used in consumer contracts in Switzerland.[2]) As of recently, the issue of consumers in arbitration is being discussed more often, also in connection with certain legislation projects. Whilst the authors conclude that consumer disputes in Switzerland may be submitted to arbitration as a matter of principle, they doubt that arbitration for consumer matters would in practice be feasible and desirable.

II. Consumer Law in Switzerland – A Brief Overview

A. Development and State of Swiss Consumer Law

It seems fair to say that consumer law and in particular the protection of consumers in Switzerland in general are less developed and not as far reaching as in certain other jurisdictions. It should also be noted that, in contrast to certain other

*) The present article has been written on the basis of a presentation that co-author Dieter Hofmann gave at the "Dreiländer-Konferenz 2015" in Vienna on September 11, 2015.

1) As to terminology: In Switzerland, a consumer is (in German) normally referred to as a *Konsument,* not as a *Verbraucher* as *e.g.* in Germany and Austria.

2) The authors themselves have hardly ever seen an arbitration clause in their everyday life as a consumer vis-à-vis a Swiss supplier, but they realize that the value of this informal survey is somewhat limited as the authors must admit that they do not always read the small print in such contracts.

legal systems, Swiss law does not generally provide different sets of rules of law for transactions involving private individuals on the one hand and for transactions among business people on the other. Specific provisions aiming at protecting consumers were introduced at various occasions and over a number of years. This may be illustrated by the following examples of important milestones in the development of Swiss consumer protection law:

- Against the background of growing concern with regard to contracts providing for payment by instalment *(Abzahlungsgeschäfte),* the Swiss legislator in 1963 prohibited arbitration clauses for such contracts (if the arbitral agreement was concluded before the dispute had arisen).[3]) Similarly, arbitration clauses for collective investment contracts were also prohibited.[4])
- In 1981, the newly introduced Art 31^{sexies} of the Swiss Federal Constitution *(Bundesverfassung der Schweizerischen Eidgenossenschaft)* established a constitutional basis for measures to protect consumers.[5])
- In the context of the envisaged accession of Switzerland to the European Economic Area, the Swiss Government prepared for the Swiss legislation to be aligned with the relevant European law (the so-called "Eurolex" legislation). Even though the Swiss voting population finally rejected the accession in the respective referendum, certain parts of this Eurolex legislation were subsequently introduced, in particular with regard to consumers and in analogy to the guidelines of the European Community (in particular on consumer credit[6]), on package travel[7]), on unfair competition[8]), and on the right of withdrawal from a doorstep selling contract[9])).[10])

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[3]) Schweizerisches Obligationenrecht [OR] [Code of Obligations] March 30, 1911, SR 220, as amended, September 20, 1963, AS 321 (1965), Art 226l (article no longer in force); *see also* Christine Möhler, Konsumentenverträge im schweizerischen Schiedsverfahren mit rechtsvergleichenden Aspekten 28, 235 *et seqq.* (2014).

[4]) Anlagefondgesetz [AFG] [Federal Law on Investment Funds] March 18, 1994, SR 951.31 (law not longer in force), Art 27, para. 2; *see also* Möhler, *supra* note 3, at 241 *et seqq.*

[5]) Corresponds to today's Art 97 of the Federal Constitution, *see* Bundesverfassung [BV] [Constitution] April 18, 1999, SR 101, Art 97, para. 1 ("Der Bund trifft Massnahmen zum Schutz der Konsumentinnen und Konsumenten."; translation: "The Confederation shall take measures to protect consumers."); *see also* Möhler, *supra* note 3, at 30.

[6]) Bundesgesetz über Konsumkredit [KKG] [Federal Act on Consumer Credit] March 23, 2001, SR 221.214.1, *available at* www.admin.ch/opc/de/classified-compilation/20010555/index.html (German).

[7]) Bundesgesetz über Pauschalreisen [Federal Act on Package Travel] June 18, 1993, SR 944.3, *available at* www.admin.ch/opc/en/classified-compilation/19930203/index.html (English) and www.admin.ch/opc/de/classified-compilation/19930203/index.html (German).

[8]) Bundesgesetz gegen den unlauteren Wettbewerb [UWG] [Competition Act] December 19, 1986, *available at* www.admin.ch/opc/de/classified-compilation/19860391/index.html (German).

[9]) Schweizerisches Obligationenrecht [OR] [Code of Obligations] March 30, 1911, SR 220, Art 40a-40f, *see* Schweizerisches Obligationenrecht [OR] [Code of Obligations] March 30, 1911, SR 220, Art 40b ("Der Kunde kann seinen Antrag zum Vertragsabschluss oder seine Annahmeerklärung widerrufen, wenn ihm das Angebot gemacht wurde: a) an seinem

- The Swiss Federal Constitution stipulated from early on (then Art 59, no longer in force) that a contract clause that derogates jurisdiction from the domicile of the defendant in case of "personal claims" was void. In this context, the Swiss Federal Supreme Court *(Bundesgericht)* did not easily assume a waiver of the jurisdiction at the defendant's domicile, in particular in case of individuals unacquainted with business and the law.[11])
- In the light of the above-mentioned old Art 59 Federal Constitution, the Swiss Federal Supreme Court also developed its so-called "typographische Rechtsprechung", *i.e.,* case law requiring jurisdiction clauses in general commercial conditions to be placed in the relevant document in a clearly visible manner and to be typographically emphasized.[12])
- In addition, specific provisions with regard to jurisdiction over consumer matters, both in international[13]) as well as in domestic[14]) cases were introduced.

It follows from the above (non-exhaustive) list that consumer issues were only given sporadic attention in Swiss law and that there is to date no comprehensive regulation of such matters.

B. Definitions of Consumer in Swiss Law

1. No Uniform Definition of Consumer

There is, tellingly, no general and uniform definition of "consumer" in Swiss law. Rather, the definitions vary to some extent from act to act. Furthermore, it is

Arbeitsplatz, in Wohnräumen oder in deren unmittelbaren Umgebung; b) in öffentlichen Verkehrsmitteln oder auf öffentlichen Strassen und Plätzen; c) an einer Werbeveranstaltung, die mit einer Ausflugsfahrt oder einem ähnlichen Anlass verbunden war."; translation: "A customer may revoke his offer to enter into a contract or his acceptance of such an offer if the transaction was proposed: a) at his place of work, on residential premises or in their immediate vicinity; b) on public transport or on a public thoroughfare; c) during a promotional event held in connection with an excursion or similar event.").

[10]) Möhler, *supra* note 3, at 31 *et seqq*.

[11]) Essentially corresponds to today's Art 30, Bundesverfassung [BV] [Constitution] April 18, 1999, SR 101, Art 30, para. 1 ("Jede Person, gegen die eine Zivilklage erhoben wird, hat Anspruch darauf, dass die Sache vom Gericht des Wohnsitzes beurteilt wird. Das Gesetz kann einen anderen Gerichtsstand vorsehen."; translation: "Unless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside."); *see also* Möhler, *supra* note 3, at 32.

[12]) Möhler, *supra* note 3, at 32.

[13]) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 114.

[14]) First introduced in 2000 before the enactment of the Swiss Civil Procedure Code (CPC), *see* Gerichtsstandsgesetz [GestG] [Act on Jurisdiction in Civil Matters] March 24, 2000 (act no longer in force), Art 22; *see* today's Art 32 CPC, Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 32.

not yet clarified whether the notion of "consumer" or "consumer contract" should be construed broadly or narrowly.[15]) However, it is quite clear in Swiss law – in contrast to other jurisdictions – that only an individual and not a legal entity may be considered to be a consumer.[16])

Whilst the definitions of consumer vary, they are similar. The legal definition used in Art 120 Private International Law Act (PILA)[17]) may thus serve as an example here; it reads as follows: "Contracts for a performance relating to normal consumption which is intended for a consumer's or for his family's personal use and not connected with his professional or commercial activities […]". It follows from this definition that consumer contracts relate to goods or services for so-called "normal consumption" *(üblicher Verbrauch)*.[18]) Whether goods or services are for normal consumption or not is usually determined by the type and purpose of the contractual transaction at hand as well as by the value of the subject matter of the contract. Extraordinary, one-off acquisitions or luxury goods do not fall within the scope of normal consumption.[19]) It is being discussed what an adequate upper-limit in terms of value would be, *e.g.* the ceiling value for consumer claims provided for in the Swiss Civil Procedure Code (CPC), *i.e.* CHF 30.000[20]) or the scope of application of the consumer credit act,[21]) *i.e.* loans of up to CHF 80.000.[22]) However, with regard to normal consumption, the circumstances of a specific case may also matter. Moreover, consumer contracts are for a private purpose, *i.e.* they relate to personal or family needs.[23])

It should be noted that the definition of consumer (and thus the application of a consumer protection provision) generally is independent of whether a spe-

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[15]) Möhler, *supra* note 3, at 71.

[16]) Anton K. Schnyder & Andrea Doss, Art 120 IPRG, *in* Handkommentar zum Schweizer Privatrecht: Internationales Privatrecht at 5 (Andreas Furrer et al. eds., 2nd ed. 2012); Max Keller & Jolanta Kren Kostkiewicz, Art 120 IPRG, *in* Zürcher Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) 27 (Daniel Girsberger et al. eds., 2nd ed. 2004); *see also* Federal Council Message concerning the Private International Law Act, Botschaft zum Bundesgesetz über das internationale Privatrecht, BBL IV 414 (1983) ("Beim Konsumenten handelt es sich um eine natürliche Person"; translation: "The consumer is a natural person.").

[17]) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 120 ("Verträge über Leistungen des üblichen Verbrauchs, die für den persönlichen oder familiären Gebrauch des Konsumenten bestimmt sind und nicht im Zusammenhang mit der beruflichen oder gewerblichen Tätigkeit des Konsumenten stehen, […].").

[18]) Alexander Brunner, Art 120 IPRG, *in* Basler Kommentar International Privatrecht 21 (Heinrich Honsell et al. eds., 3rd ed. 2013); Schnyder & Doss, *supra* note 16, at 7.

[19]) Brunner, *supra* note 18, at 24; Schnyder & Doss, *supra* note 16, at 7.

[20]) Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 243, para. 1.

[21]) Bundesgesetz über Konsumkredit [KKG] [Federal Act on Consumer Credit] March 23, 2001, SR 221.214.1, Art 7, para. 1, lit. e.

[22]) Möhler, *supra* note 3, at 47.

[23]) Möhler, *supra* note 3, at 48 *et seqq.*

cific individual in a given case actually is in need or appears worthy of being protected or not.[24])

2. Scope of Application in Practice not Always Clear

Given that the definitions vary and that the terms used in the definitions are not very specific, there may be some uncertainty in practice as to whether a specific contract actually falls within the scope of the provision in question. There is normally no issue with regard to the more "typical" consumer contracts such as doorstep selling or travel packages.[25]) It is also quite established that employment contracts do not qualify as consumer contracts. However, uncertainty still exists and issues arise as to whether mandate agreements and insurance contracts qualify as consumer matters or not. Moreover, the qualification of agreements on financial services is still disputed; in this regard, the views vary from making all such agreements subject to consumer provisions to applying such provisions only to certain financial services contracts, but not to investment agreements and asset management (arguing that these agreements would not relate to consumption but rather to an investment or to asset maintenance).[26])

III. Arbitrability of Consumer Disputes

A. Definitions of Arbitrability

The parties have great autonomy to submit their dispoutes to arbitration, provided the claims at stake are arbitrable.[27])

The notion of arbitrability *ratione materiae* defines whether the claim in dispute is capable of settlement by arbitration.[28]) In Switzerland, a distinction is made between international and domestic arbitration which are each governed by separate sets of statutory provisions (dual system[29])) and which also use different definitions of arbitrability.[30]) International arbitration is governed by Chapter 12 of the PILA, which applies if the arbitral tribunal has its seat in Switzerland and if at least one of the parties was, at the time the arbitration agreement was concluded, neither domiciled nor habitually resident in Switzerland (Art 176 para. 1 PILA).

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[24]) Möhler, *supra* note 3, at 45.

[25]) For typical consumer contracts *see* Brunner, *supra* note 18, at 24 *et seqq.*

[26]) Möhler, *supra* note 3, 59.

[27]) Susanna Gut, *Schiedsgerichtsbarkeit: Eine Streitbelegungsmethode für Anlegerstreitigkeiten, in* Schweizer Schriften zum Finanzmarktrecht 62 (Dieter Zubi & Rolf H. Weber et al. eds., vol 116, 2014).

[28]) Bernhard Berger & Franz Kellerhals, International and Domestic Arbitration in Switzerland at 389 (3rd ed. 2014).

[29]) Berger & Kellerhals, *supra* note 28, at 70.

[30]) Tarkan Göksu, Schiedsgerichtsbarkeit at 347 (2014).

With regard to international arbitration, it is quite clear that consumer contracts and disputes arising therefrom are arbitrable.[31]) With regard to domestic arbitration, it seems fair to conclude that the result is the same, but there is some more room for argument.[32])

In international arbitration, a claim must be of a financial nature, *i.e.* have a value in money, in order to be arbitrable (Art 177 para. 1 PILA[33])).[34]) By this open and far-reaching definition, the Swiss legislator wanted to grant broad access to international arbitration.[35]) Claims arising out of consumer contracts normally involve a value in money so that the requirement of Art 177 para. 1 PILA is generally met.[36]) Art 177, para. 1 PILA is a directly applicable substantive provision of private international law. The arbitrability is therefore solely determined by this rule (*i.e.* the *lex arbitri*) without taking into account the possibly more restrictive *lex causae*[37]) or mandatory provisions in Swiss law, such as consumer protecting provisions.[38])

A purely "Swiss dispute" however, *i.e.* involving only parties domiciled in Switzerland, normally qualifies as domestic arbitration and is governed by the CPC. Under the CPC and its relevant Art 354,[39]) a claim has to be "freely dispos-

[31]) Berger & Kellerhals, *supra* note 28, at 247 *et seqq.*

[32]) Berger & Kellerhals, *supra* note 28, at 257; Göksu, *supra* note 30, at 374.

[33]) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 177, para. 1 ("Gegenstand eines Schiedsverfahrens kann jeder vermögensrechtliche Anspruch sein."; translation: "Every pecuniary claim may be the subject of arbitration.").

[34]) Stefanie Pfisterer, Art 354 ZPO, *in* Berner Kommentar zum schweizerischen Privatrecht: Schweizerische Zivilprozessordnung at 32 (Hausheer Heinz & Walter Hans Peter eds., 2014); Adrian Staehelin et al., Zivilprozessrecht (2nd ed. 2013) 598 at 14; Göksu, *supra* note 30, at 378 *et seqq.*

[35]) Berger & Kellerhals, *supra* note 28, at 207; Göksu, *supra* note 30, at 380; Gut, *supra* note 27, at 67; Bundesgericht [BGer] [Federal Supreme Court] June 23, 1992, 118, Entscheidungen des Schweizerischen Bundesgerichts [BGE], II 355.

[36]) Möhler, *supra* note 3, at 227.

[37]) *See* Bundesgericht [BGer] [Federal Supreme Court] April 28, 1992, BGE 118 II 196 ("L'arbitrabilité d'une cause en matière internationale est traitée à l'art 177 LDIP qui constitue une règle matérielle de droit international privé […]. Elle est, en conséquence, régie par la lex arbitrii sans égard aux dispositions peut-être plus strictes de la lex causae ou de la loi nationale des parties, ce qui peut entraîner des conséquences quant à la reconnaissance à l'étranger d'une sentence rendue en Suisse."; translation: "Arbitrability of an international matter in dispute is dealt with in PILA, Art 177 which constitutes a substantive rule of private international law […]. Therefore, arbitrability is governed by the lex arbitri, without regard to the possible stricter rules of the lex causae or of the national laws of the parties, which can have consequences for the recognition and enforcement of an award rendered in Switzerland abroad."); *see also* Berger & Kellerhals, *supra* note 28, at 208 *et seq.*; Möhler, *supra* note 3, at 202.

[38]) Möhler, *supra* note 3, at 270.

[39]) Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 354 ("Gegenstand eines Schiedsverfahrens kann jeder Anspruch sein, über den die Parteien frei verfügen können"; translation: "Any claim over which the par-

able" *(frei verfügbar)* to be arbitrable.[40]) In contrast to Art 177, para. 1 PILA, Art 354 CPC partly references to substantive law.[41]) In domestic arbitration, foreign law usually is not relevant.[42]) Under Swiss law, a claim is at a party's free disposal if it may validly deal with the claim by way of waiver, settlement agreement or admission.[43]) This is usually the case for claims that have a value in money.[44]) As long as the arbitrability is not explicitly excluded by law, any claim in money may, therefore, be brought before an arbitral tribunal.[45]) Disputes involving an economically weaker party are not generally excluded from settlement by arbitration, as there is no such provision in Swiss law.[46]) Even where, in the interest of protecting the weaker party in private law, specific mandatory provisions apply that seem to limit the free disposal of a claim, the arbitrability of such claim is not *per se* excluded: This is because the relevant question is whether a party is even prevented from validly waiving its rights after they have come into existence (and not whether a provision limits a party's ability to waive its potential future rights in advance). If this is the case, the claim is not at a party's free disposal in the sense of Art 354 CPC and may not be submitted to arbitration. This follows from a leading case decision of the Swiss Federal Supreme Court in a dispute involving an employment contract containing an arbitration clause. The Court held that as, pursuant to Art 341, para. 1 CO, an employee may not validly waive any rights he may have under mandatory provisions of Swiss employment law, neither during the term of the employment nor up to one month after its termination, rights of such kind are not at the party's free disposal in terms of the CO and, therefore, not arbitrable.[47]) However, no such provision[48]) exists for consumer matters, so that consumer claims are generally at a party's free disposal, *i.e.* arbitrable in domestic arbitration.[49])

It follows from the above that the two definitions used under the PILA (for international arbitrations) and under the CPC (for domestic arbitrations) are

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ties may freely dispose may be the object of an arbitration agreement "); Pfisterer, *supra* note 34, Art 354 at 13.

[40]) Gut, *supra* note 27, at 65 *et seqq.;* Urs Weber-Stecher, Art 354 ZPO, *in* Basler Kommentar Schweizerische Zivilprozessordnung at 6 *et seqq.* (Karl Spühler et al. eds., 2nd ed. 2013); Staehelin et al., *supra* note 34, 597 at 12; Göksu, *supra* note 30, at 357 *et seqq.*

[41]) Möhler, *supra* note 3, at 203.

[42]) However, under certain circumstances, the question of whether a claim is at a party's free disposal might have to be answered by applying foreign law; *see* Möhler, *supra* note 3, at 203.

[43]) Göksu, *supra* note 30, at 357 *et seqq.*; Bundesgericht [BGer] [Federal Supreme Court] July 11, 1945, BGE 71 II 180; Möhler, *supra* note 3, at 213 *et seqq.*

[44]) Weber-Stecher, *supra* note 40, at 8 *et seqq.*

[45]) Göksu, *supra* note 30, at 364.

[46]) Göksu, *supra* note 30, at 374; Weber-Stecher, *supra* note 40, at 25.

[47]) Bundesgericht [BGer] [Federal Supreme Court] June 28, 2010, BGE 136 III 473; see also Berger & Kellerhals, *supra* note 28, at 207; Göksu, *supra* note 30, at 375.

[48]) *I.e.,* similar to Art 341, para. 100 for employment contracts, *see* Schweizerisches Obligationenrecht [OR] [Code of Obligations] March 30, 1911, SR 220, Art 341, para. 1.

[49]) Möhler, *supra* note 3, at 394.

quite similar. However, they are not identical:[50]) Not every freely disposable claim has also a value in money. Therefore, certain claims might be considered arbitrable in a domestic arbitration, whereas in an international context, access to arbitration might be denied for lack of arbitrability.[51]) On the other hand, claims that are not freely disposable and therefore not arbitrable in domestic arbitration, such as certain employment claims, might be made subject to arbitration in an international context.[52])

In sum, under Swiss law, claims arising out of consumer contracts qualify as arbitrable, both in international arbitration under the PILA as well as in domestic arbitration under the CPC.

B. Other Limits to Arbitrability of Consumer Disputes?

Apart from the legal definition(s) of arbitrability as such, there are other legal provisions that might be considered as limiting the possibility to submit a claim to arbitration.[53]) However, under Swiss law, they would not normally affect the arbitrability of consumer claims:

- Mandatory provisions of Swiss law do *per se,* as set out above, not limit the arbitrability of consumer claims. In domestic arbitration, the mere mandatory nature of a provision would not suffice to exclude arbitrability; rather, a specific provision similar to Art 341 para. 1 CO for employment contracts (excluding a valid waiver for a certain period even once the relevant claim has come into existence) would be necessary to this end, and there is no such provision with regard to consumer claims under Swiss law. Furthermore in international arbitration, arbitrability is solely defined by Art 177, para. 1 PILA. Mandatory provisions are thus not to be considered (except where public policy would be affected, *see* immediately below).
- Public policy might limit the arbitrability of a case. In international arbitration in Switzerland public policy is often considered to be the only limit to Art 177, para. 1 PILA and its open definition.[54]) Yet, the Swiss Federal Supreme Court has to date never denied arbitrability because of an incompatibility with public policy.[55])
- The principle of good faith and more particularly, the prohibition of an abuse of law may also be considered to limit arbitrability. In the context of arbitration with economically weaker parties, an arbitration clause might be

[50]) Göksu, *supra* note 30, at 347; Möhler, *supra* note 3, at 200 *et seqq.*

[51]) *E.g.* if the accession to a cultural association is at stake; *see* Göksu, *supra* note 30, at 381.

[52]) Göksu, *supra* note 30, at 381.

[53]) Möhler, *supra* note 3, at 248 *et seqq.*; Weber-Stecher, *supra* note 40, at 11 *et seqq.*

[54]) Göksu, *supra* note 30, at 382.

[55]) Berger & Kellerhals, *supra* note 28, at 268; Möhler, *supra* note 3, at 366 *et seqq.*

qualified as abusive, if the arbitral proceedings are shaped in a way that makes it impossible for the economically weaker party to pursue its rights.[56])

- Also the mandatory places of jurisdiction stipulated in the CPC[57]) as well as in the PILA[58]) for consumer matters might raise doubts as to whether consumer disputes are arbitrable. However, provisions providing for mandatory places of jurisdiction do not exclude arbitration. In domestic arbitration, this is clear in light of the development of the law, in particular as Art 354 CPC – in contrast to the old law – does not require any longer that there is no mandatory state court jurisdiction (rather, it suffices if the claim is at the party's free disposal, *supra*).[59]) Mandatory places of jurisdiction as provided for in the CPC do thus not prevent the relevant matters to be submitted to arbitration.[60]) In international arbitration, the clearly prevailing view is that mandatory places of jurisdiction as provided for in the Lugano Convention and the PILA (and also the limitation to choose a forum pursuant to Art 5, para. 2 PILA[61])) do not affect the arbitrability of a claim.[62]) Whilst a con-

[56]) Göksu, *supra* note 30, at 374; Weber-Stecher, *supra* note 40, N 25.

[57]) Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 32, para. 1 ("Bei Streitigkeiten aus Konsumentenverträgen ist zuständig: a) für Klagen der Konsumentin oder des Konsumenten: das Gericht am Wohnsitz oder Sitz einer der Parteien; b) für Klagen der Anbieterin oder des Anbieters: das Gericht am Wohnsitz der beklagten Partei."; translation: "The following court has jurisdiction in disputes concerning consumer contracts: a) for actions brought by the consumer: the court at the domicile or registered office of one of the parties; b) for actions brought by the supplier: the court at the domicile of the defendant.").

[58]) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 114, para. 1 ("Für die Klagen eines Konsumenten aus einem Vertrag, der den Voraussetzungen von Artikel 120 Absatz 1 entspricht, sind nach Wahl des Konsumenten die schweizerischen Gerichte zuständig: a) am Wohnsitz oder am gewöhnlichen Aufenthalt des Konsumenten, […]"; translation; "The Swiss court a) at the consumer's domicile or ordinary residence […] over actions by a consumer based upon a contract meeting the requirements on Art 120, paragraph 1."); and Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 114, para. 2 ("Der Konsument kann nicht zum voraus auf den Gerichtsstand an seinem Wohnsitz oder an seinem gewöhnlichen Aufenthalt verzichten"; translation: "The consumer may not waive jurisdiction in advance at his domicile or at his ordinary residence").

[59]) *See* Konkordat über die Schiedsgerichtsbarkeit [KSG] [Concordat on Arbitration] March 27, 1969 (concordat no longer in force), Art 5 ("Gegenstand eines Schiedsverfahrens kann jeder Anspruch sein, welcher der freien Verfügung der Parteien unterliegt, sofern nicht ein staatliches Gericht nach einer zwingenden Gesetzesbestimmung in der Sache ausschliesslich zuständig ist."; translation: "Any claim over which the parties may freely dispose may be the object of an arbitration agreement, provided that no mandatory legal provision declares that the courts have exclusive jurisdiction"); *see also* Berger & Kellerhals, *supra* note 28, at 254 *et seqq.*; Göksu, *supra* note 30, at 384.; Weber-Stecher, *supra* note 40, at 13.

[60]) Göksu, *supra* note 30, at 385; Gut, *supra* note 27, at 66; Möhler, *supra* note 3, at 275 *et seqq.*; Staehelin et al., *supra* note 34, 597 at 13; Weber-Stecher, *supra* note 40, at 13.

[61]) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 5, para. 2 ("Die Gerichtsstandsvereinbarung ist unwirksam, wenn einer Partei ein Gerichtsstand des schweizerischen Rechts missbräuchlich

sumer in state court litigation may not validly agree to waive jurisdiction at his place of domicile and he may not validly proceed to the merits if sued elsewhere, the mandatory places of jurisdiction have no effect with regard to the arbitrability of consumer disputes.[63])

- Of course, it may well be that an arbitral award rendered in Switzerland runs the risk of being unenforceable in another jurisdiction because the claim at hand is not considered to be arbitrable or to be in contradiction to mandatory provisions of law in that jurisdiction, but such issues do not affect or limit arbitrability from a Swiss point of view.[64])

IV. Agreement to Arbitrate

There is, of course, and also in case of consumer claims, no arbitration unless there is a valid agreement to arbitrate. In order to be valid, the arbitration agreement has to meet formal as well as substantive requirements.

A. Formal Requirements

In general, there are no particular requirements as to the form of arbitral agreements specifically for consumer contracts.[65])

With regard to the general formal requirements of an arbitration agreement, Swiss law distinguishes between international (Art 178 para. 1 PILA[66])) and domestic (Art 358 CPC[67])) arbitration (dual system, *see also supra* Part III/A). How-

entzogen wird."; translation: "The jurisdiction agreement shall be without effect if it abusively denies a party access to a court under Swiss law.").

[62]) Göksu, *supra* note 30, et 386; Möhler, *supra* note 3, at 328 *et seqq.*

[63]) Möhler, *supra* note 3, at 272 *et seqq.*; Pfisterer, *supra* note 34, Art 354 at 22; Ramon Mabillard & Robert Briner, Art 177 IPRG, *in* Basler Kommentar Internationales Privatrecht at 12 (Heinrich Honsell et al. eds, 3rd ed. 2013); Weber-Stecher, *supra* note 40, at 14, 27.

[64]) Göksu, *supra* note 30, at 388.

[65]) Möhler, *supra* note 3, at 427.

[66]) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act] December 18, 1987, SR 291, Art 178, para. 1 ("Die Schiedsvereinbarung hat schriftlich, durch Telegramm, Telex, Telefax oder in einer anderen Form der Übermittlung zu erfolgen, die den Nachweis der Vereinbarung durch Text ermöglicht"; translation: "The arbitration agreement must be concluded in writing, by telegram, telex or telefax or other means of communication which allow proof of the agreement by text."); *see also* Berger & Kellerhals, *supra* note 28, para. 420 *et seqq.*; Dieter Gränicher, Art 178 IPRG, *in* Basler Kommentar Internationales Privatrecht at 1 *et seqq.* (Heinrich Honsell et al. eds., 3rd ed. 2013).

[67]) Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 358 ("Die Schiedsvereinbarung hat schriftlich oder in einer anderen Form zu erfolgen, die den Nachweis durch Text ermöglicht."; translation: "The arbitration agreement must be done in writing or in any other form allowing it to be evidenced by text."); *see also* Berger & Kellerhals, *supra* note 28, at 434 *et seqq.*

ever, the relevant provisions are of almost the same tenor and essentially only require that the agreement to arbitrate can be established by text.[68]) The signature of the parties is not required.[69]) Consequently, an arbitration agreement may be validly concluded online by a simple mouse-click.[70])

Accordingly, the formal threshold to conclude an arbitration agreement is relatively low and fails to protect legally unexperienced consumers. Still, consent to arbitration has to be given and to be proven by text.[71]) In the context of consumer matters, the consent to arbitration might not always be that obvious, in particular where general commercial conditions are involved (*infra* Part IV/C). However, one needs to bear in mind that defects in form can be cured by waiver of the right to rely on such defects, *e.g.* if the consumer fails to claim lack of jurisdiction when responding on the merits to a claim brought against him (so-called "unconditional appearance").[72])

B. Substantive Validity Pursuant to Swiss Law[73])

Under Swiss law, freedom of contract is the guiding principle when it comes to the possible content of an arbitration clause (since it is considered a contract[74])). Accordingly, the parties may establish the content of such an agreement at their discretion, however only within the limits of the law. In this sense, mandatory rules of law, public policy, *bonos mores* and fundamental personal rights have to be respected.

As outlined above, under Swiss law, there are only a few isolated, rather specific provisions that are applicable in consumer matters. None of them thus has an impact on the question of whether the content of an arbitration clause is valid or

[68]) Göksu, *supra* note 30, at 547 *et seqq.*; Staehelin et al., *supra* note 34, 599 at 18.

[69]) Berger & Kellerhals, *supra* note 28, at 422; Gränicher, *supra* note 66, at 15; Möhler, *supra* note 3, at 421; Marco Stacher, *Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz* at 72 (2015).

[70]) Möhler, *supra* note 3, at 428.

[71]) Möhler, *supra* note 3, at 428.

[72]) Berger & Kellerhals, *supra* note 28, at 600; Möhler, *supra* note 3, at 421.

[73]) In order to assess the substantive validity of an arbitration agreement, the law applicable has to be determined first. In the scope of application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [NYC], Art V para. 1 lit. a NYC is relevant to that question. In the scope of application of the PILA the law applicable is determined by Art 178, para. 2 PILA. For domestic arbitrations, the CPC does not contain any such conflict of law provisions, as the question is solely governed by Swiss substantive law; for details *see also* Gränicher, *supra* note 66, at 24 *et seqq.*; Möhler, *supra* note 3, at 493 *et seqq.*; Stacher, *supra* note 69, at 77 *et seqq.* The present section only addresses the substantive validity under substantive Swiss law.

[74]) Staehelin et al., *supra* note 34, 600 at 19; Bundesgericht [BGer] [Federal Supreme Court] March 15, 1990, BGF. 116 Ia 57; Bundesgericht [BGer] [Federal Supreme Court] July 3, 1984, BGE 110 Ia 108; Bundesgericht [BGer] [Federal Supreme Court] January 25, 1977, BGE 103 II 76.

not.[75]) However other, more general provisions are applicable and might affect the substantive validity of an arbitration clause in a specific case: *e.g.* the provisions regarding the lack of will (general contract law, CO) and the notion of arbitrability (*supra* Part III) have to be considered. Furthermore, the question arises whether in consumer disputes arbitration clauses might be considered abusive and therefore invalid if certain circumstances are given (*see also supra* Part III). With regard to arbitration clauses contained in general commercial conditions, this legal consequence is explicitly stipulated in Art 8 Competition Act (*infra* Part IV/C). In contrast, if an arbitration clause is individually negotiated and hence not part of general commercial conditions, the issue of whether a clause is abusive is subject to Art 2 Civil Code[76]) (*Schweizerisches Zivilgesetzbuch* – Civil Code). The Swiss Federal Supreme Court generally is rather restrained in declaring agreements to be abusive. According to scholars, an arbitration clause might still be abusive, *i.e.* invalid, if the consumer is *de facto* precluded from enforcing his claims (in analogy to the case law in employment matters).[77])

C. Arbitration Agreements in General Commercial Conditions

1. Valid Incorporation and Rule of Unusualness

In commercial reality, arbitral agreements with consumers would not normally be negotiated individually but included in general commercial conditions. The arbitration clause is then not contained in the contract itself but in a different document which the parties incorporate by reference. In such a case, both formal and substantive aspects have to be respected in order for the general conditions and the arbitration clause to take effect *vis-à-vis* the consumer.

With regard to form, Art 178 PILA or Art 358 CPC apply, *i.e.* the arbitration agreement has to be evidenced by text (*see also supra* Part IV/A). The general conditions (containing the arbitration agreement) have to be validly incorporated into the agreement of the parties (so-called validity check – *Geltungskontrolle*), either explicitly by signing the conditions, by reference in the main contract or implicitly if a common usage exists (such as *e.g.* in bank and insurance matters).[78])

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[75]) Möhler, *supra* note 3, at 527.

[76]) Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] December 10, 1907, SR 210, Art 2, para. 1 ("Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln."; translation: "Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations."); Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] December 10, 1907, SR 210, Art 2, para. 2 ("Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz."; translation: "The manifest abuse of a right is not protected by law.").

[77]) Weber-Stecher, *supra* note 40, at 14, 27.

[78]) Ahmet Kut, Art 1 OR, *in* Handkommentar zum Schweizer Privatrecht: Obligationenrecht: allgemeine Bestimmungen at 56 (Andrea Furrer & Anton K. Schnyder eds., 2nd ed. 2012).

Yet, for the arbitration agreement to be incorporated in the contract, a specific reference to the arbitration clause itself is not necessary.[79])

Furthermore, the commercial conditions have to be made available, *i.e.* the consumer has to be able to take notice of the conditions' content, although it is not required that he obtains actual knowledge of it (so-called global acceptance – *Globalübernahme*).[80]) If general commercial conditions are only incorporated by reference in the main contract, the presumption is that the consumer has not taken account of the content even though he had the possibility to do so.[81]) In other words, the consumer accepted the general commercial conditions without actually reading them, *i.e.* mostly without noticing or understanding the significance of the arbitration clause contained therein. If this is the case, the so-called unusualness rule *(Ungewöhnlichkeitsregel)* applies, but only if there is a weaker, unexperienced party, *i.e.* in typical business-to-consumer relationships.[82]) Under this rule, it has to be assessed whether a specific provision of the general conditions might seem unusual from the consumer's individual point of view[83]), *i.e.* if said clause is "surprising" under the principle of good faith and fair dealing in business. Should a clause prove to be unusual when applying this test, it is excluded from global acceptance.[84])

In this context, it is being argued that the determination of whether a consumer had to expect an arbitral agreement in general commercial conditions should be different depending on whether the business transaction was of a purely domestic nature (*i.e.* only within Switzerland) or whether it was an international (cross-border) transaction. This is against the background that it is being argued that doing business internationally, on a cross-border level, would require a cer-

[79]) Bundesgericht [BGer] [Federal Supreme Court] February 7, 2001, 4P.230/2000 ("Gemäss Art. 178 Abs. 1 IPRG hat die Schiedsvereinbarung schriftlich, durch Telegramm, Telex, Telefax oder in einer anderen Form der Übermittlung zu erfolgen, die den Nachweis der Vereinbarung durch Text ermöglicht. Dieser Nachweis erfordert nicht, dass die Schiedsklausel in den von den Parteien ausgetauschten Vertragsdokumenten selbst enthalten ist. Vielmehr genügt zum Nachweis der Schiedsklausel durch Text, dass in solchen Dokumenten darauf verwiesen wird. Der Verweis braucht die Schiedsklausel nicht ausdrücklich zu nennen, sondern kann auch als Globalverweis ein Dokument einbeziehen, welches eine solche Klausel enthält"; translation: "Pursuant to PILA, Art. 178 (1) an arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by text. This requirement does not mean that the arbitration clause must be contained in the contractual document exchanged by the parties. Instead, an arbitration agreement is sufficiently evidenced by text if reference is made to it in such documents. The reference does not need to mention the arbitration clause expressly, but may instead, as a global reference, simply incorporate a document that contains such a clause.").

[80]) Kut, *supra* note 78, at 52.

[81]) Kut, *supra* note 78, at 52.

[82]) Berger & Kellerhals, *supra* note 28, N 460.

[83]) Kut, *supra* note 78, at 53; Bundesgericht [BGer] [Federal Supreme Court] May 4, 2006, 4C.427/2005; Bundesgericht [BGer] [Federal Supreme Court] August 5, 1993, BGE 119 II 443.

[84]) Kut, *supra* note 78, at 53.

tain business experience and expertise.[85]) However, this presumption would certainly not apply in case of business done over the internet, because here it is often not easy for a consumer to detect with whom he actually contracts.[86])

Against the background that arbitration agreements in consumer contracts would still appear to be rather rare in Switzerland (*supra* Part I), it seems fair to say that an arbitration clause contained in general commercial conditions would not be unlikely to be qualified as unusual, *i.e.* to be surprising for the consumer and therefore declared null and void.[87]) In order to avoid the above mentioned surprise effect, it is being advocated that consumers that are unexperienced in business and legal matters should be fully informed in advance of the meaning, the effects and the consequences of an arbitration clause.[88]) Yet, how this should be implemented in practice is not quite clear. Explanations contained in general commercial conditions would probably not suffice to remove the surprise effect, as the consumer usually refrains from reading the conditions. And extensive "educational work" in this regard would not really fit into today's reality of typical consumer business and its small-scale, swift transactions which do usually not include contractual negotiations or similar communication (in particular in case of business over the internet).

It follows from the above that there is some risk that an arbitration clause contained in general commercial conditions would be found to be surprising for the consumer and thus, in accordance with the rule of unusualness, held invalid.

2. Possible Review of Content

With regard to the substance of general commercial conditions, there is to date no general scrutiny *(Inhaltskontrolle)* undertaken by the courts under Swiss law. However, the prevailing view amongst scholars is that general commercial conditions do not only have to respect mandatory rules of law but that their content should also be subject to review by the courts.[89]) Moreover, the Swiss Federal Supreme Court actually exercises some kind of a concealed scrutiny of the content by extensively applying the above mentioned unusualness rule.[90])

On July 1, 2012, a newly worded Art 8 Competition Act[91]) was introduced. This was to counter the use of abusive general commercial conditions. Said provi-

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[85]) Daniel Girsberger, Art 357 ZPO, *in* Basler Kommentar Schweizerische Zivilprozessordnung at 28 (Karl Spühler et al. eds., 2nd ed. 2013); Wenger & Müller, Art 17 IPRG, *in* Basler Kommentar Internationales Privatrecht at 61 (Heinrich Honsell et al. eds, 3rd ed. 2013).

[86]) Girsberger, *supra,* at 28.

[87]) Pfisterer, *supra* note 34, at 37; Felix Dasser, Art 358 ZPO, *in* Kurzkommentar zur Schweizerischen Zivilprozessordnung at 9 (Paul Oberhammer et al. eds., 2nd ed. 2013).

[88]) If the consumer is informed about the arbitration clause, the clause may not qualify as unusual, *see* Bundesgericht [BGer] [Federal Supreme Court] February 2, 2011, 4P.230/2000; Girsberger, *supra,* at 28; Pfisterer, *supra* note 87, Art 357 at 37.

[89]) Kut, *supra* note 78, at 62.

[90]) Kut, *supra* note 78, at 63.

[91]) Bundesgesetz gegen den unlauteren Wettbewerb [UWG] [Competition Act] De-

sion is to some extent based on the Council Directive 93/13/EEC on unfair terms in consumer contracts dated April 5, 1993.[92]) Art 8 Competition Act applies only to consumers, but it does itself not define what a consumer is.

In short, Art 8 Competition Act prohibits conditions which work to the disadvantage of the consumer and which would establish a substantial and unjustified imbalance between rights and duties of the parties, thereby infringing the principle of good faith. Whilst it seems quite clear that an arbitral agreement as such would not constitute an improper imbalance, it is questionable what impact Art 8 Competition Act would have with regard to parties that have no business experience, in cases where the amount at stake is very low, and the seat of the arbitral tribunal is far away and difficult to get to. However, so far no decision has been rendered by the Swiss Federal Supreme Court answering this question.

V. Practicability Issues: Unilateral Withdrawal from the Arbitration Clause

Regardless of whether consumer matters are considered arbitrable and whether an arbitration agreement may be validly concluded between the parties to a dispute, problems may arise when it comes to the practicability of such a clause.

Arbitration proceedings are costly and often far from affordable for the average consumer wishing to enforce his rights.[93])

In contrast to state court proceedings, the consumer will, as a matter of principle, not receive any financial aid if he does not have the means to pay for arbitration.[94]) This is expressly set out in Art 380 CPC[95]) with regard to domestic arbitration, but it also applies to international arbitration and arbitration in general. There are exceptions that were recently introduced, such as in Court of Arbitra-

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cember 19, 1986, Art 8 ("Unlauter handelt insbesondere, wer allgemeine Geschäftsbedingungen verwendet, die in Treu und Glauben verletzender Weise zum Nachteil der Konsumentinnen und Konsumenten ein erhebliches und ungerechtfertigtes Missverhältnis zwischen den vertraglichen Rechten und den vertraglichen Pflichten vorsehen."; translation: "Shall be deemed to have committed an act of unfair competition, anyone who, in particular, makes use of general terms and conditions that, to the detriment of consumers, contrary to the requirement of good faith provide for a significant and unjustified imbalance between contractual rights and contractual obligations").

[92]) *Available at* eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=DE (English).

[93]) Möhler, *supra* note 3, at 619.

[94]) Möhler, *supra* note 3, at 620.

[95]) Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 380 ("Die unentgeltliche Rechtspflege ist ausgeschlossen."; translation: "Legal aid is excluded."); *see also* Marco Stacher, Art 380 ZPO, *in* Berner Kommentar zum schweizerischen Privatrecht: Schweizerische Zivilprozessordnung at 1 *et seqq.* (Hausheer Heinz & Walter Hans Peter eds., 2014).

tion for Sport (CAS) proceedings[96]), but they do not change what applies in general. This may result in a *de facto* impossibility for the consumer to pursue his rights for lack of financial means.

In such a case, the consumer must have the right to free himself of an arbitration agreement for good cause, to ensure that he can exercise his right of access to justice (as guaranteed *e.g.* by Art 6, para. 1 of the European Convention on Human Rights).[97]) In this way, valid arbitration agreements may be set aside and the respective cases may be brought before state courts.

In order to avoid these problems, it is beeing discussed amongst scholars whether and how legal aid or similar financial relief should be made available for arbitration proceedings. However, this would raise the issue of who should bring up the funds. In this context it is often pointed out that the parties submit to arbitration on a voluntary basis and therefore renounce the advantages of state court proceedings, such as the possibility to receive legal aid.[98]) Yet, in light of the generally weaker position of a consumer, it may be doubtful whether such decision is truly voluntary. A pragmatic way out of this situation may be that the supplier has to advance the costs for the proceedings as well as for counsel for the consumer until a final decision is rendered.[99]) However, this would only work if the supplier is willing to do this, which he may not be in case he is the respondent to the consumer's claim; the supplier will then only have little cause to help funding the consumer's claim against himself.[100])

As long as these issues are not solved, arbitration in consumer matters may often fail due to inoperability of the arbitration clause.

VI. Recent discussion: FIDLEG

The Swiss government had recently presented a draft of a new act on financial services (*Finanzdienstleistungsgesetz* – Federal Financial Services Act FinSA) that was to govern the relationship between financial intermediaries and their clients for financial products.[101]) The draft particularly aimed at strengthening the

[96]) *See* www.tas-cas.org/en/index.html.

[97]) Bundesgericht [BGer] [Federal Supreme Court] June 11, 2014, 4A_178/2014; Dasser, *supra,* at 3; Georg von Segesser, *Inoperability of Arbitration Agreements due to Lack of Funds?: Revisiting Legal Aid in International Arbitration,* Kluwer Arbitration Blog (January 17, 2015), *available at* kluwerarbitrationblog.com/blog/2015/01/17/inoperability-of-arbitration-agreements-due-to-lack-of-funds-revisiting-legal-aid-in-international-arbitration/; Berger & Kellerhals, *supra* note 28, at 633; Möhler, *supra* note 3, at 619 *et seq.*; Stacher, *supra* note 69, at 95; Staehelin et al., *supra* note 34, 597 at 13.

[98]) Von Segesser, *supra* note 97.

[99]) Möhler, *supra* note 3, at 622; Von Segesser, *supra* note 97.

[100]) Möhler, *supra* note 3, at 623; Von Segesser, *supra* note 97.

[101]) Finanzdienstleistungsgesetz [FIDLEG] [Federal Financial Services Act FinSA], draft, *available at* www.news.admin.ch/NSBSubscriber/message/attachments/36522.pdf (English); www.news.admin.ch/NSBSubscriber/message/attachments/35437.pdf (German).

protection of consumers in the financial services sector, in particular by improvements concerning private actions in the event of misconduct by financial services providers. Apart from improving the ombudsman service, the introduction of a court of arbitration or a fund for litigation costs were envisaged.[102])

In the explanatory report[103]), the government had stated that it would be preferable to have one single instance to decide on claims of consumers in the financial sector, as this would lead to a final decision more quickly and thereby achieve peace under the law *(Rechtsfrieden)* in a relatively short time frame.[104]) The plan was to have fair, simple and swift proceedings.[105]) For this purpose, the financial services providers would have had to create a specialized arbitral institution for the resolution of disputes with their customers (financed by the financial services providers as well as state funds). The customer (consumer) would have had – once the dispute had arisen – the right to choose between a state court and an arbitral tribunal.[106]) The costs for the consumer would have been moderate or the proceedings would have been free.[107])

The proposal to introduce arbitration in consumer matters in the financial sector was discussed amongst scholars and in the press at the time. Yet, the reactions overall were rather sceptical or negative. With regard to the idea of arbitra-

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[102]) *See* short summary on the official website of the State Secretariat for International Financial Matters, *available at* www.sif.admin.ch/sif/en/home/dokumentation/finweb/regulierungsprojekte/finanzdienstleistungsgesetz–fidleg-.html (German).

[103]) *Available at* www.news.admin.ch/NSBSubscriber/message/attachments/35423.pdf (German).

[104]) Lukas Wyss, *Mehrparteienverfahren und kollektiver Rechtsschutz vor Zivilgerichten in der Schweiz: Bestandesaufnahme und Ausblick, in* JUSLETTER at 70 (February, 16 2015), *available at* http://www.jusletter.ch at.

[105]) Finanzdienstleistungsgesetz [FIDLEG] [Federal Financial Services Act FinSA], draft, Art 86 para. 2 (Variant A) ("Das Verfahren ist in einer Schiedsordnung zu regeln. Diese muss ein faires, einfaches und rasches Verfahren sowie die Wahrung des rechtlichen Gehörs sicherstellen"; translation: "The procedure shall be laid down in a set of rules of arbitration. These must ensure fair, straightforward and prompt proceedings, and ensure the right to a fair hearing.").

[106]) Finanzdienstleistungsgesetz [FIDLEG] [Federal Financial Services Act FinSA], draft, Art 85 para. 2 (Variant A) ("Sie informieren ihre Kundinnen und Kunden vor Eingehung einer Geschäftsbeziehung, vor einem erstmaligen Vertragsschluss sowie auf Anfrage hin jederzeit über die Möglichkeit, im Streitfall wahlweise ein Schiedsgericht nach Absatz 1 oder den Zivilrichter anzurufen."; translation: "They shall inform their clients, before entering into a business relationship, before signing a contract for the first time and at any time upon request, about the possibility of applying to either a court of arbitration in accordance with paragraph 1 or the civil court judge in the event of a dispute.").

[107]) Finanzdienstleistungsgesetz [FIDLEG] [Federal Financial Services Act FinSA], draft, Art 86 para. 3 (Variant A) ("Das Verfahren muss für die Privatkundin oder den Privatkunden kostengünstig oder kostenlos sein. Ausgenommen sind Verfahren, die offensichtlich missbräuchlich oder in einer bereits behandelten Sache eingeleitet wurden"; translation: "The proceedings must be inexpensive or free of charge to the retail client. Where clients initiate proceedings that are obviously an abuse of process or which were already initiated in a previous case, a charge may be made.").

tion as such, the issue of confidentiality was perceived, *inter alia,* as problematic[108]): Confidentiality is one of the main features of arbitration. What is considered a great benefit in business-to-business proceedings is however a disadvantage when it comes to disputes involving consumers, as transparency is seen as being key to ensure their protection. Also, confidentiality may be seen as affecting the development of the law *(Rechtsfortbildung)* and certainty of the law *(Rechtssicherheit)*. Furthermore, the usual complexity of arbitration proceedings was also perceived as a disadvantage for the consumer.[109])

The proposal to introduce arbitration for consumer disputes in the financial sector will not be further pursued for the time being.

VII. Conclusion

There are hardly any legal limits under Swiss law that would, as a matter of principle, exclude submitting disputes arising out of contracts between a supplier and a consumer to arbitration. However, there are certain limits that may apply in a specific case and may put the validity of an arbitration clause into question, in particular if contained in general commercial conditions. Moreover, there a number of practical issues that put the use of arbitration for consumer disputes into doubt.

Arbitration and consumer disputes have quite different features: Arbitration normally deals with disputes involving a substantial amount at stake among business parties on a more or less level playing field that are attracted by the flexibility of the procedure and its confidentiality. All these features are in stark contrast to consumer disputes, where there normally is an imbalance between the parties and the amounts at stake are small, and where there is no real a need for flexibility, and where confidentiality is not an advantage, but rather gives rise to concerns. However, when some changes are made, in particular to level the financial position of the consumer, arbitration can be tailored to work for consumer disputes, but it would be quite a peculiar type of arbitration.

Thus, whilst the authors conclude that consumer disputes in Switzerland may be submitted to arbitration as a matter of principle, they doubt that arbitration for consumer matters would in practice be feasible and desirable.

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[108]) Domenic Oliver Brand, *Anspruchsdurchsetzung in B2C-Finanzdienstleistungsstreitigkeiten, in* Aktuelle Juristische Praxis at 86 *et seqq.* (Ivo Schwander ed., 2015). Franca Contratto, *Alternative Streitbeilegung im Finanzsektor, in* Aktuelle Juristische Praxis at 244 (Ivo Schwander ed., 2014).

[109]) Wyss, *supra,* at 92 *et seqq.*