Austrian Yearbook on International Arbitration 2016

The Editors
Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser, Gerold Zeiler

The Authors

Wien 2016
MANZ’sche Verlags- und Universitätsbuchhandlung
Verlag C.H. Beck, München
Stämpfli Verlag, Bern
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

Chapter I The Arbitration Agreement and Arbitrability

Dieter Hofmann/Pascale Koester
Consumers in Arbitration – From a Swiss Perspective

Nicolas W. Reithner/Gabriele Ehlich
Consumer Protection in Arbitration Proceedings in Liechtenstein:
Austrian and Liechtenstein Consumer Protection in Arbitration Proceedings –
Differences and Similarities

Michael Swangard/Tamsyn Pickford
Commodity Arbitrations

Chapter II The Arbitrator and the Arbitration Procedure

Peter Rees

Ema Vidak-Gojkovic/Lucy Greenwood/Michael McIlwrath
Puppies or Kittens? How to Better Match Arbitrators to Party Expectations

Catherine A. Rogers
Transparency in Arbitrator Selection

Irene Welser/Alexandra Stoffl
Calderbank Letters and Baseball Arbitratio – Effective Settlement Techniques?

Veit Ohlberger/Jarred Pinkston
Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency,
Cultural Blinders and Misplaced Concerns About Impartiality

Chapter III The Award and the Courts

Markus Schifferl/Venus Valentina Wong
Decisions of the Austrian Supreme Court on Arbitration in 2014 and 2015

Georg Naegeli/Simon Vorburger
When a Party to an International Arbitration Goes Bankrupt: A Swiss Perspective
Chapter IV  Alternative Dispute Resolution
Alice Fremuth-Wolf/Anne-Karin Grill
Ulrike Gantenberg/Gustav Flecke-Giammarco
Dispute Boards Revival: Championing the Use of Dispute Adjudication Boards as a Project Management Tool That Helps to Avoid Disputes

Chapter V  Investment Arbitration
John Beechey
TTIP-Myths and Facts: 2015 Bergsten Lecture, Vienna
Boris Kasolowsky/Amanda Neil
Pre-Award Transparency in Investment Arbitration from the Perspective of Parties and Counsel
Constantin Eschlboeck
Repeal of Domestic Legislative Measures by Means of International Arbitration
N. Jansen Calamita/Ewa Zelazna
Andrea K. Bjorklund
NAFTA Chapter XI’s Contribution to Transparency in Investment Arbitration

Chapter VI  10 Years Austrian Yearbook on International Arbitration
Christian Klausegger/Ruth Mahfoozpour

Annex
Alfred Siwy
Recent Publications on Austrian Arbitration

Index 2007–2016
## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>III</td>
</tr>
<tr>
<td>Overview</td>
<td>V</td>
</tr>
<tr>
<td>The Editors and Authors</td>
<td>XVII</td>
</tr>
<tr>
<td>Chapter I The Arbitration Agreement and Arbitrability</td>
<td>1</td>
</tr>
<tr>
<td>Dieter Hofmann/Pascale Koester</td>
<td></td>
</tr>
<tr>
<td>Consumers in Arbitration – From a Swiss Perspective</td>
<td>3</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>3</td>
</tr>
<tr>
<td>II. Consumer Law in Switzerland – A Brief Overview</td>
<td>3</td>
</tr>
<tr>
<td>A. Development and State of Swiss Consumer Law</td>
<td>3</td>
</tr>
<tr>
<td>B. Definitions of Consumer in Swiss Law</td>
<td>5</td>
</tr>
<tr>
<td>1. No Uniform Definition of Consumer</td>
<td>5</td>
</tr>
<tr>
<td>2. Scope of Application in Practice not Always Clear</td>
<td>7</td>
</tr>
<tr>
<td>III. Arbitrability of Consumer Disputes</td>
<td>7</td>
</tr>
<tr>
<td>A. Definitions of Arbitrability</td>
<td>7</td>
</tr>
<tr>
<td>B. Other Limits to Arbitrability of Consumer Disputes</td>
<td>10</td>
</tr>
<tr>
<td>IV. Agreement to Arbitrate</td>
<td>12</td>
</tr>
<tr>
<td>A. Formal Requirements</td>
<td>12</td>
</tr>
<tr>
<td>B. Substantive Validity pursuant to Swiss Law</td>
<td>13</td>
</tr>
<tr>
<td>C. Arbitration Agreements in General Commercial Conditions</td>
<td>14</td>
</tr>
<tr>
<td>1. Valid Incorporation and Rule of Unusualness</td>
<td>14</td>
</tr>
<tr>
<td>2. Possible Review of Content</td>
<td>16</td>
</tr>
<tr>
<td>V. Practicability Issues: Unilateral Withdrawal from the Arbitration Clause</td>
<td>17</td>
</tr>
<tr>
<td>VI. Recent discussion: FIDLEG</td>
<td>18</td>
</tr>
<tr>
<td>VII. Conclusion</td>
<td>20</td>
</tr>
<tr>
<td>Nicolas W. Reithner/Gabriele Ehlich</td>
<td></td>
</tr>
<tr>
<td>Consumer Protection in Arbitration Proceedings in Liechtenstein</td>
<td>21</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>21</td>
</tr>
<tr>
<td>II. General Overview of Consumer Protection</td>
<td>21</td>
</tr>
<tr>
<td>III. Consumer Protection in Arbitration Law</td>
<td>22</td>
</tr>
<tr>
<td>IV. Consumer Protection in Company Law</td>
<td>23</td>
</tr>
<tr>
<td>A. Is a Legal Entity under Private Law an Entrepreneur or a Consumer?</td>
<td>23</td>
</tr>
<tr>
<td>1. Legal Situation in Austria</td>
<td>23</td>
</tr>
<tr>
<td>2. Legal Situation in Liechtenstein</td>
<td>24</td>
</tr>
<tr>
<td>B. Arbitration Clauses in Statutes and Articles of Association</td>
<td>24</td>
</tr>
<tr>
<td>1. Legal Situation in Austria</td>
<td>25</td>
</tr>
<tr>
<td>2. Legal Situation in Liechtenstein</td>
<td>25</td>
</tr>
<tr>
<td>V. Law Reform in Liechtenstein</td>
<td>26</td>
</tr>
<tr>
<td>A. Consumers</td>
<td>26</td>
</tr>
<tr>
<td>B. Arbitrability of the Supervisory Proceedings for Foundations and Trusts</td>
<td>27</td>
</tr>
</tbody>
</table>
Commodity Arbitrations

I. Introduction ...................................................... 29

II. An Outline of the Leading Commodity Associations ....................... 30
   A. The Grain and Feed Trade Association (GAFTA) ...................... 30
   B. The London Metal Exchange (LME) ................................ 30
   C. The Coffee Trade Federation (CTF) ................................ 31
   D. The Federation of Oils, Seeds and Fats Associations Limited (FOSFA) .... 31
   E. The Federation of Cocoa Commerce (FCC) ............................ 32
   F. The Refined Sugar Association (RSA) and the Sugar Association of London (SAL) .................................................. 32
   G. International Cotton Association (ICA) ................................ 32
   H. The Combined Edible Nut Trade Association (CENTA) .............. 33

III. Commodity Arbitration: Distinguishing Features .......................... 33
   A. Commercial rather than legal tribunals ................................ 33
   B. Curtailed Time Limits for Initiating Arbitration ...................... 35
   C. Multi-tier Arbitrations Incorporating Appeal Procedures ............... 36
   D. The Exclusion of Legal Practitioners From Oral Hearings .............. 39
   E. String Arbitration/One Binding Award ................................ 40
   F. Defaulter Posting .................................................. 43

IV. Current Trends in Commodity Arbitration and Outlook ................... 44

Chapter II The Arbitrator and the Arbitration Procedure .................. 47

Peter Rees

Does Arbitration Deliver? ........................................ 49

I. Introductory Examples .............................................. 49
   A. The Boston Shoe Repairer ............................................ 49
   B. The Dublin Jeweller .................................................. 50

II. The Seven Advantages .............................................. 51
   A. DHL .............................................................. 53
   B. UPS .............................................................. 54
   C. Austrian Postal Service – Österreichische Post AG ................. 54
   D. Royal College of Midwives ......................................... 56

III. Delivery .......................................................... 57
   A. Arbitrator Style and Preferences Questionnaire ..................... 69

Emi Vidak-Gojkovic/Lucy Greenwood/Michael McIlwrath

Puppies or Kittens? How to Better Match Arbitrators to Party Expectations .... 61

I. How Uncertainty Over Arbitrator Soft Skills and Procedural Orientation
   Contributes to Dissatisfaction with International Arbitration ............. 61
II. The Current Approach to Arbitrator Selection is Fundamentally Flawed .... 63
III. The Importance of Soft Skills and Knowing the Arbitrator’s Approach
    to Case Management .................................................. 64
IV. The Puppy or Kitten Test: A Proposal for Arbitrators to Declare Their Case
    Management Preferences, If Any ......................................... 67
   A. Arbitrator Style and Preferences Questionnaire ..................... 69
1. Law Applicable to the Effects of an Insolvency on the Validity of an Arbitration Agreement .................................................. 146
2. The Effects of an Insolvency on the Validity of the Arbitration Agreement under Swiss Law .............................................. 147

B. The Effects of an Insolvency on the Capacity of a Party Subject to Insolvency Proceedings .................................................. 147
1. Law Applicable to the Capacity of a Party Subject to Insolvency Proceedings .............................................................. 148
   a) The Swiss Federal Supreme Court’s Approach in the Vivendi Case ................................................................. 148
   b) The Swiss Federal Supreme Court’s New Approach in the Portuguese Case ....................................................... 149
   c) Remaining Issues Under the Swiss Federal Supreme Court’s New Approach ....................................................... 151
2. The Effects of an Insolvency on the Capacity of a Party to an Arbitration Under Swiss Law .................................................. 152

C. The Scope Ratione Personae of the Arbitration Agreement in the Insolvency Context ...................................................... 152
1. Law Applicable to the Scope Ratione Personae of the Arbitration Agreement .......................................................... 152
2. Transfer of the Arbitration Agreement from the Debtor to the Insolvency Estate Under Swiss Law ........................................... 154

D. The Scope Ratione Materiae of the Arbitration Agreement ................................................................................................................. 156
1. Law Applicable to the Scope Ratione Materiae of the Arbitration Agreement .......................................................... 156
2. Types of Insolvency Law Actions Covered by the Scope Ratione Materiae of an Arbitration Agreement .............................................. 157
3. Actions Arising Out of a Swiss Insolvency Covered by an Arbitration Agreement .......................................................... 158

E. Objective Arbitrability of Insolvency Law Actions .................. 159
1. Law Applicable to Objective Arbitrability and Its Standards .............................................................................................. 159
2. Objective Arbitrability of Actions Arising Out of a Swiss Insolvency ................................................................................ 161

F. Suspension of Arbitral Proceedings Upon the Commencement of an Insolvency ................................................................. 163
1. Law Applicable to A Suspension of the Arbitral Proceedings .............................................................................................. 163
2. Standards for a Suspension of the Arbitral Proceeding under the Swiss Lex Arbitri .......................................................... 164
3. Applicability of the Automatic Stay Provision of Swiss Insolvency Law to International Arbitration? .............................................. 164

IV. Enforcement of an Arbitral Award in the Insolvency Context ........................................................................................................ 166
A. Enforcement of an Arbitral Award Against a Party Subject to a Swiss Insolvency Proceeding ..................................................... 166
B. Enforcement of an Arbitral Award Against Assets Located in Switzerland Belonging to a Party Subject to Non-Swiss Insolvency Proceedings ........................................................................................................ 169
C. Enforcement of an Arbitral Award Against Assets Located in Switzerland by the Foreign Trustee .................................................... 170
### Chapter IV Alternative Dispute Resolution

**Alice Fremuth-Wolf/Anne-Karin Grill**  

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
</tr>
<tr>
<td>II. The New Vienna Mediation Rules 2016</td>
</tr>
<tr>
<td>A. General Provisions (Articles 1, 2, 14)</td>
</tr>
<tr>
<td>B. Commencing the Proceedings (Article 3)</td>
</tr>
<tr>
<td>C. Appointment of the Mediator (Article 7)</td>
</tr>
<tr>
<td>D. Costs (Articles 4 and 8)</td>
</tr>
<tr>
<td>1. Registration Fee (Article 4)</td>
</tr>
<tr>
<td>2. Administrative Fees (Article 8 para. 6)</td>
</tr>
<tr>
<td>3. Mediator’s Fees (Article 8 para. 8)</td>
</tr>
<tr>
<td>4. Use of Advance on Costs in Parallel Proceedings</td>
</tr>
<tr>
<td>5. No Double-Charging (Articles 4 para. 3 and 8 para. 10)</td>
</tr>
<tr>
<td>6. Award on Agreed Terms – Arbitrator’s Fees (Article 8 para. 11)</td>
</tr>
<tr>
<td>7. Payment of the Advance on Costs (Article 8 para. 4)</td>
</tr>
<tr>
<td>8. Final Cost Allocation (Article 8 para. 9)</td>
</tr>
<tr>
<td>E. Place and Language of the Proceedings (Articles 5 and 6)</td>
</tr>
<tr>
<td>1. Place of Meetings and Sessions (Article 5)</td>
</tr>
<tr>
<td>2. Language of the Proceedings (Article 6)</td>
</tr>
<tr>
<td>F. Conduct of the Proceedings (Article 9)</td>
</tr>
<tr>
<td>G. Parallel Proceedings (Article 10)</td>
</tr>
<tr>
<td>H. Termination of the Proceedings (Article 11)</td>
</tr>
<tr>
<td>I. Confidentiality, Admissibility of Evidence and Subsequent Party Representation (Article 12)</td>
</tr>
<tr>
<td>J. Disclaimer (Article 13)</td>
</tr>
<tr>
<td>III. Draft NE-Guidelines</td>
</tr>
<tr>
<td>IV. Conclusion</td>
</tr>
</tbody>
</table>

**Ulrike Gantenberg/Gustav Flecke-Giammarco**  
*Dispute Boards Revival: Championing the Use of Dispute Adjudication Boards as a Project Management Tool That Helps to Avoid Disputes*

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
</tr>
<tr>
<td>II. Salient Characteristics of DABs</td>
</tr>
<tr>
<td>III. General Structure of DAB Proceedings</td>
</tr>
<tr>
<td>IV. New ICC Dispute Board Rules</td>
</tr>
<tr>
<td>V. Other Areas in Which DABs Could Become a Useful Practice Tool</td>
</tr>
<tr>
<td>VI. Conclusion</td>
</tr>
</tbody>
</table>

### Chapter V Investment Arbitration

**John Beechey**  
*TTIP-Myths and Facts: 2015 Bergsten Lecture, Vienna*

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. The Myths and the Facts</td>
</tr>
<tr>
<td>A. Myth 1: Arbitration Operates Outside the Legal System</td>
</tr>
</tbody>
</table>
B. Myth 2: Arbitration Constitutes an Undesirable Limit to the Power of Sovereign States to Regulate the Public Interest
C. Myth 3: Arbitration is an Exercise in Secrecy
D. Myth 4: States Never Win
E. Myth 5: Foreign Investors Benefit From Superior Protection
F. Myth 6: Inconsistency
G. Myth 7: Arbitrators are Biased Against States

II. What Next?

III. Postscript

Boris Kasolowsky/Amanda Neil
Pre-Award Transparency in Investment Arbitration from the Perspective of Parties and Counsel

I. Introduction
II. Distinguishing Post-Award Transparency and Pre-Award Transparency
III. The Push Towards Pre-Award Transparency
IV. The Cost of Pre-Award Transparency – The Loss of Efficiency and Effectiveness
   A. Pre-Award Transparency Creates Lengthier, Costlier and More Complex Proceedings
      1. Public Hearings
      2. Amici Curiae
   B. Pre-Award Transparency Makes Dispute Resolution More Difficult
      1. Repoliticization of Disputes
      2. Making Disputes Politically Unsettable
   C. Differing Standards of Pre-Award Transparency Increase Confusion and a Lack of Coherence
V. Conclusion

Constantin Eschlboeck
Repeal of Domestic Legislative Measures by Means of International Arbitration

I. The Problem
II. Specific Performance as the (Only) Appropriate Remedy
IV. The Doctrine of Self-Limitation
V. The Idea of Pacta Sunt Servanda Under the VCLT
VI. Good Faith as the Most Important Principle of Law
VII. Termination
VIII. Material Breach and Impossibility
IX. Fundamental Change of Circumstances
   X. The Fitzmaurice Examples on the Fundamental Change of Circumstances
   XI. The Juridical and Academic Recognition of the Fundamental Change of Circumstances Principle
   XII. Fundamental Change of Circumstances and the Parties' Intention
   XIII. Limits to the Rebus Sic Stantibus Principle
   XIV. Primacy of International Law Over Domestic Law
   XV. State Continuity
   XVI. Conclusion: Pacta Sunt (Et Erunt) Servanda
   XVII. The Real Problem: The Enforcement of an Award "Against Domestic Law"
N. Jansen Calamita/Ewa Zelazna


I. Introduction

II. Normative Arguments Driving Increased Transparency in Investment Treaty Arbitration
   A. Promotion of Good Governance
   B. Business and Human Rights
   C. Legitimacy of Investor-State Arbitration
   D. Regulatory Predictability
   E. Equality and Fairness in Arbitration
   F. State Treaty Development

III. Developments Relating to Transparency in Treaty-based Arbitration
   A. Dispute Settlement Transparency Provisions in Investment Treaties
   B. The Treatment of Transparency in Arbitral Rules

IV. The UNCITRAL Rules on Transparency
   A. Public Access to Documents and Hearings
   B. Exceptions to Public Access to Documents and Hearings under Art 7
   C. Participation by Third Persons and Non-disputing Parties to the Treaty
   D. UNCITRAL Rules on Transparency – Application

V. The Mauritius Convention

VI. Conclusion

Andrea K. Bjorklund

NAFTA Chapter XI's Contribution to Transparency in Investment Arbitration

I. Transparency Generally
   A. Substantive Transparency
   B. Procedural Transparency
   C. The Question of Amicus Curiae

II. Transparency Under NAFTA
   A. Access to Information Laws
   B. NAFTA Transparency Prior to Clarification
   C. Clarification Re Procedural Transparency
   D. NAFTA and Amicus Curiae Participation

III. Some Consequences of Transparency
   A. Settlement
   B. Complexity and Cost
   C. Contribution to the Development of the Law
   D. "Issue" and Other Conflicts

IV. Conclusion
Table of Contents

Chapter VI  10 Years Austrian Yearbook of International Arbitration  ............ 311

Christian Klausegger/Ruth Mahfoozpour
10 Years Austrian Yearbook on International Arbitration: Abstracts 2007–2016 .... 313

I. The Arbitration Agreement and Arbitrability ................................. 313
II. The Arbitrator and the Arbitration Proceeding ............................... 322
III. The Award and the Courts ..................................................... 340
IV. Alternative Dispute Resolution ................................................. 348
V. Investment Arbitration .......................................................... 350
VI. Arbitration and Crime ......................................................... 355
VII. Issues Specific to Arbitration in Europe .................................... 356

Annex ................................................................. 359

Alfred Siwy
Recent Publications ................................................................. 361

Index 2007–2016 ................................................................. 369
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 Interest. He is a former President of the International Arbitration Club.

**Contact:** John Beechey
T: +44 (0) 7785 700 171
E: john.beechey@beecheyarbitration.com
Andrea K. Bjorklund is the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. She is an adviser to the American Law Institute’s project on restating the U.S. law of international commercial arbitration. She is also a member of the Advisory Board of the Investment Treaty Forum of the British Institute for International and Comparative Law. Professor Bjorklund is the inaugural ICSID Scholar-in-Residence. She is on the panel of arbitrators of the International Center for Dispute Resolution of the American Arbitration Association. Professor Bjorklund is widely published in investment law and dispute resolution and transnational contracts.

Prior to entering the academy she was an attorney-adviser on the NAFTA arbitration team in the Office of the Legal Adviser of the U.S. Department of State. Professor Bjorklund has a J.D. from Yale Law School, an M.A. in French Studies from New York University, and a B.A. (with High Honors) in History and French from the University of Nebraska, Lincoln.

Contact: McGill University Faculty of Law
3644 rue Peel, QC H3A 1W9 Montreal, United States
T: +1 514 398 5372
E: andrea.bjorklund@mcgill.ca
www.mcgill.ca/law/about/profs/bjorklund-andrea
N. Jansen Calamita is Senior Research Fellow and Director of the Investment Treaty Forum at the British Institute of International and Comparative Law. He has previously held posts at the University of Birmingham, the Faculty of Law at the University of Oxford, and George Mason University. He is a sometime visiting fellow of Mansfield College, Oxford, and the University of Vienna.

Prior to entering academics, Mr. Calamita served in the Office of the Legal Adviser in the U.S Department of State (International Claims and Investment Disputes Division) and as a member of the UNCITRAL Secretariat. He began his career in private practice in New York. He holds a Juris Doctor magna cum laude (Boston) and a Bachelor of Civil Law (Oxford). He continues to advise governments on matters relating to the law of foreign investment and international dispute resolution issues.

Mr. Calamita’s research is in general public international law, the international law of investment, and international dispute settlement. He is a Consultant Expert to the United Nations Conference on Trade and Development and a member of the editorial board of the Yearbook of International Law and Policy (Oxford University Press).

Contact: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP,
United Kingdom
T: +44 (0)20 7862 5151
E: n.j.calamita@biicl.org
www.biicl.org
Gabriele Ehlich is an associate with Advocatur Seeger, Frick & Partner AG in 2014. She studied law at the University of Vienna School of Law where she graduated in 2011. Prior to joining Advocatur Seeger, Frick & Partner AG, she worked as a law clerk for the Higher Regional Court of Vienna, Austria, and was as an associate in a leading Austrian law firm in Vienna, Austria, where she gained extensive experience in the field of commercial real estate. During her studies, she already had a strong focus on alternative dispute resolution and arbitration.

Contact: Advocatur Seeger, Frick & Partner AG  
Kirchstrasse 6, FL-9490 Vaduz  
T: +423 265 22 22  
E: Gabriele.Ehlich@sflex.li  
www.sflex.li
Constantin Eschlboeck is a dispute resolution practitioner in Vienna. Before founding his law firm Eschlboeck Dispute Resolution in Summer 2012 he practised with the dispute resolution departments of various international law firms.

Constantin Eschlboeck is the Vice Chairman of the Forum for International Conciliation and Arbitration in Oxford, UK (www.ficacic.com), a Fellow of the Chartered Institute of Arbitrators, a Member of the Dispute Board Federation and Certified EFFAS Financial Analyst. He is also a member of the ethics council of the Vienna Bar.

Contact: Eschlboeck Dispute Resolution
Biberstraße 22, A-1010 Vienna, Austria
T: +43 1 512 92 74
E: constantin.eschlboeck@disputes.at
www.disputes.at
www.ficacic.com
Gustav Flecke-Giammarco is a senior associate at Heuking Kühn Lüer Wojtek, an independent law firm with about 300 lawyers. Heuking Kühn Lüer Wojtek is one of the major independent German law firms with offices in Berlin, Brussels, Chemnitz, Cologne, Düsseldorf, Frankfurt am Main, Hamburg, Munich, Stuttgart and Zurich. The law firm has a full-service approach including, in particular, general corporate and commercial, M&A and international arbitration. Mr. Flecke-Giammarco’s areas of practice are dispute resolution (litigation and international arbitration), corporate and M&A. He acts as counsel and arbitrator in international arbitration proceedings (ad hoc, DIS, ICC, VIAC, SCC, etc.) particularly on post-M&A, corporate/licence and construction disputes and as counsel in DAB proceedings regarding turn-key and energy projects. Before joining Heuking Kühn Lüer Wojtek, Mr. Flecke-Giammarco worked as Counsel at the ICC International Court of Arbitration in Paris. During this time at the ICC, he supervised more than 850 arbitrations, including several investment treaty and emergency arbitrator cases and was involved in the review of some 450 awards as part of the ICC Court’s scrutiny process. As a qualified German lawyer with experience of working in France and Italy, Gustav Flecke-Giammarco is particularly dedicated to international work. Besides German, he speaks English, Italian and French fluently.

He is a frequent speaker on issues of international arbitration and international private law at international events and conferences. He regularly publishes on arbitration and corporate issues and is a member of several arbitration organisations. He is a member of the editorial board of the Journal of International Arbitration and a Member of the ICC Commission on Arbitration and ADR.

Contact: Heuking Kühn Lüer Wojtek
Georg-Glock-Straße 4, D-40474 Düsseldorf, Germany
T: +49 211 600 550 71
E: g.flecke@heuking.de
www.heuking.de
Alice A. Fremuth-Wolf is Deputy-Secretary General of the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) in Vienna since January 2012. Having studied law at University of Vienna (Mag. iur. in 1995 and Dr. iur. in 2002) and at the London School of Economics and Political Science (LL.M. in 1998), Alice Fremuth-Wolf served as an assistant at the Institute of Civil Procedural Law at the Law Faculty of Vienna University and worked as an associate with Wolf Theiss (Vienna) and Baker & McKenzie (Vienna) before opening her own law firm in 2004. She has acted as arbitrator and partyrepresentative in international commercial arbitration proceedings in English and German and is also a trained mediator.

Alice Fremuth-Wolf has authored articles and books on arbitration and wrote her doctoral thesis on the assignment of arbitration agreements. She was a lecturer at the Law Faculty of Vienna University, coaching the team of Vienna University for the annual Willem C. Vis International Arbitration Moot from 2004–2009.

Besides being a founding member of the Young Austrian Arbitration Practitioners (YAAP), a sub-group of the Austrian Arbitration Association, she is member of several international arbitration associations.

She is a lecturer at Vienna University for international arbitration and coached the Vienna team for the annual Willem C. Vis International Moot from 2004–2009.

Contact: International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber
Wiedner Hauptstraße 63, A-1045 Vienna, P.O.Box 319, Austria
T: +43 (0)5 90 900-4400
E: alice.fremuth-wolf@viac.eu
www.viac.eu
Ulrike Gantenberg is a partner of Heuking Kühn Lüer Wojtek, an independent law firm with about 300 lawyers. Heuking Kühn Lüer Wojtek is one of the major independent German law firms with offices in Berlin, Brussels, Chemnitz, Cologne, Düsseldorf, Frankfurt am Main, Hamburg, Munich, Stuttgart and Zurich. The law firm has a full-service approach including, in particular, general corporate and commercial, M&A and international arbitration. Ulrike Gantenberg’s areas of practice are dispute resolution (litigation and international arbitration), corporate and M&A. She is one of the leading partners of the firm’s dispute resolution practice. She acts as counsel and arbitrator (sole arbitrator, chair and co-arbitrator) in international arbitration proceedings (ad hoc, DIS, ICC, VIAC, SCC, LCIA etc) particularly on post-M&A, corporate/licence and construction disputes, and as counsel in DAB proceedings regarding turn-key and energy projects. Ulrike Gantenberg has advised German and international clients in large numbers of M&A transactions, inter alia, relating to energy, telecommunication, automotive and service industries. As a qualified German lawyer with experience of working in France, Ulrike Gantenberg is particularly dedicated to international work. Besides German, she speaks English and French fluently.

She is a frequent speaker on issues of international arbitration and international private law at international events and conferences. She regularly publishes on arbitration and corporate issues and is a member of several arbitration organisations. She is a member of the board of directors of the German Institution of Arbitration (DIS) and chair of the working group for alternative dispute resolution of the German Bar Association (DAV).

Contact: Heuking Kühn Lüer Wojtek
Georg-Glock-Straße 4, D-40474 Düsseldorf, Germany
T: +49 211 600 55-208
E: u.gantenberg@heuking.de
www.heuking.de
Lucy Greenwood is a qualified solicitor in England and Wales and an accredited Foreign Legal Consultant in Texas with Norton Rose Fulbright. She has over fifteen years of experience in international arbitration and has served as counsel in cases under the major institutional arbitration rules, in relation to matters as diverse as oil and gas, electricity generation, joint ventures, exploration and development, motor-racing and telecommunications. Lucy received her BA, Law, Trinity Hall from Cambridge University in 1994, in 1995 completed a Legal Practice Course, College of Law, Chester; and in 1996 received her MA in Law, Trinity Hall from Cambridge University. Lucy became qualified in 1998 as Solicitor in England and Wales, in 2008 as a Foreign Legal Consultant through the State Bar of Texas and in 2011 was appointed a Fellow of the Chartered Institute of Arbitrators. She is a member of the faculty for the Chartered Institute of Arbitrator’s Fellowship training and a member of the ICDR Panel of Arbitrators. Lucy published a study of gender diversity: “Getting a Better Balance on International Arbitration Tribunals” in Arbitration International in 2012, which was nominated for an OGEMID award later that year, she subsequently published “Is the Balance Getting Better? An Update on Gender Diversity in International Arbitration?” in Arbitration International in 2015.

Contact: Norton Rose Fulbright US LLP
Fulbright Tower, 1301 McKinney Suite 5100,
TX-77010-3095 Houston, USA
T: +1 713 651 5308
E: lucy.greenwood@nortonrosefulbright.com
www.nortonrosefulbright.com
Anne-Karin Grill is a partner with schoenherr and a member of the Austrian Bar. She specializes in international dispute resolution and ADR. Anne-Karin Grill advises clients in both commercial litigation and arbitration proceedings. Also, she regularly serves as (sole) arbitrator in multi-jurisdictional arbitrations conducted under the VIAC, ICC and LCIA rules and acts as a CEDR accredited mediator in international commercial disputes. She earned her law degree (Mag. iur., 2001) from the University of Vienna and holds a Masters Degree from Georgetown University (M.A. in International Security Studies, Fulbright Fellow, 2004). Anne-Karin Grill serves as a lecturer at the University of Vienna and is a regular speaker on dispute resolution topics. She is also the author of number of publications on the subject. Anne-Karin Grill speaks German, English, French and Swedish.

Contact: Schönerr Rechtsanwaelte
Schottenring 19, A-1010 Vienna, Austria
T: +43 1 534 37 50144
E: ak.grill@schoenherr.eu
www.schoenherr.eu
Dieter A. Hofmann is a partner at Walder Wyss Ltd and heads the firm’s Litigation & Arbitration Team. Dieter Hofmann has more than 15 years of experience as counsel and arbitrator in international commercial arbitrations, under a variety of arbitration rules, including ICC, Swiss Chambers’ Arbitration Institution (Swiss Rules), UNCITRAL, etc. and in ad hoc proceedings. He also represents clients in court, in particular before the Commercial Court of Zurich, and often acts in matters related to arbitration, in particular with regard to interim relief from state courts, enforcement and challenge of arbitral awards.

He has considerable experience in complex disputes arising from joint venture and shareholders’ agreements, engineering and construction projects, post M&A disputes etc.

He is Chair of the Zurich Bar’s Litigation Practice Group and has presented papers at major international conferences and published on litigation and arbitration in Switzerland and abroad.

Dieter Hofmann obtained a law degree from Zurich University (lic. iur. 1991). He has worked as a District Court law clerk in Zurich and as an attorney with major law firms in Zurich and in London.

Dieter Hofmann is admitted to the Zurich and Swiss Bar (1994), and in 1999, he was also admitted as a Solicitor of the Supreme Court of England and Wales (not practising).

Contact: Walder Wyss Ltd.
Seefeldstrasse 123, P.O. Box 1236, CH-8034 Zürich, Switzerland
T: +41 58 658 58 58
E: dieter.hofmann@walderwyss.com
www.walderwyss.com
Boris Kasolowsky is a Partner in Freshfields Bruckhaus Deringer’s international arbitration group and leads the firm’s litigation and international arbitration practice in Germany, Austria and the CEE region. He is based in Frankfurt, having previously practised in Freshfields’ London and Vienna offices. His arbitration experience includes numerous ad hoc, DIS, ICC, ICSID, LCIA, Vienna Rules and UNCITRAL arbitrations. He also represents clients in cross-border, international litigation matters, including in the English High Court and the German courts.

Boris Kasolowsky regularly appears as counsel and sits as arbitrator in commercial arbitrations concerning long-term supply agreements, M&A transactions, infrastructure and oil and gas projects. He also represents and advises governments and commercial entities in relation to disputes under relevant bilateral and multilateral investment treaties, including under the Energy Charter Treaty.

Boris Kasolowsky holds a law degree from Oxford University (Christ Church College), a master’s degree from the School of Oriental and African Studies, London University, and a doctorate from Hamburg University. He is qualified as a solicitor (England and Wales) and German Rechtsanwalt. He speaks English, German, French and Arabic.

Contact: Freshfields Bruckhaus Deringer LLP
Bockenheimer Anlage 44, D-60322 Frankfurt am Main, Germany
T: +49 69 27 30 8-844
E: boris.kasolowsky@freshfields.com
www.freshfields.com
Christian Klausegger is a partner of Binder Grösswang Rechtsanwälte since 1997 and heads Binder Grösswang’s dispute resolution group.

He has more than 15 years experience as counsel in international arbitration proceedings, both in institutional proceedings under the VIAC, ICC and UNCITRAL rules and in ad-hoc-arbitration proceedings. Christian Klausegger regularly represents before Austrian courts in matters relating to arbitration, including the challenge and enforcement of arbitral awards.

Christian Klausegger is a member of the Austrian exam board for judges and a member of the board of the Austrian Arbitration Association (ArbAut). He publishes regularly on international litigation and arbitration.

He holds a doctorate in law (1987) and a degree in economics (1987), both from the University Vienna and was admitted to the Austrian Bar in 1992.

Contact: Binder Grösswang Rechtsanwälte GmbH
Sterngasse 13, A-1010 Vienna, Austria
T: +43 1 534 80-320
E: klausegger@bindergroesswang.at
www.bindergroesswang.at
Peter Klein is partner of Petsch Frosch Klein Arturo Rechtsanwälte with offices in Vienna and Milan. He has considerable experience in the field of mergers & acquisitions transactions (including share and asset acquisitions), joint ventures, and civil and commercial law in general.

Peter Klein has been involved in many international and domestic arbitrations either as co-arbitrator, sole arbitrator, chairman of arbitral tribunals or party counsel including proceedings under various rules (such as Vienna Rules, ICC, UNCITRAL and Milan Chamber of Commerce arbitration rules). Many of his transactions are with Italian and Austrian companies and clients having business relations with Austria and Italy.

Peter Klein was admitted to the Vienna Bar in 1993 and holds a Doctor of Laws (Dr. iur.) degree from the University of Vienna (1985).

Contact: Petsch Frosch Klein Arturo Rechtsanwälte
Esslinggasse 5, A-1010 Vienna, Austria
T: +43 1 586 21 80
Corso di Porta Romana 46, I-20122 Milan, Italy
T: +39 2 58 32 82 62
E: peter.klein@pfka.eu
www.pfka.eu
Florian Kremslehner has been a partner at Dorda Bruggner Jordis since 1992 and leads the firm’s arbitration and litigation department. He is a graduate of the University of Vienna and was admitted to the Austrian Bar in 1990.

Florian Kremslehner has 20 years of experience in dispute resolution, advising clients in civil and criminal litigations as well as in international arbitrations. He also has extensive experience as arbitrator and counsel in institutional and adhoc arbitrations (ICC, UNCITRAL, Vienna Rules). Florian Kremslehner’s present practice as an arbitrator and party counsel covers all areas of commercial law, with a focus on telecom and investment disputes. His advocacy skills are complemented by many years of experience in banking and finance transactions.

Florian Kremslehner has a reputation for advising financial institutions in asset recovery and corporate liability cases. He advises a wide range of banking and industry clients, governments and international organisations and insurance companies.

Contact: Dorda Brugger Jordis Rechtsanwälte GmbH
Universitätsring 10, A-1010 Vienna, Austria
T: +43 1 533 47 95-18
E: florian.kremslehner@dbj.at
www.dbj.at
**Pascale Koester** is a junior lawyer (currently taking the final part of the bar exam) in the Litigation & Arbitration Team of Walder Wyss Ltd in Zurich. She graduated from the University of Berne (Master of Law 2013, Bachelor of Law 2011) with a specialization in European and international law. During her studies, she repeatedly acted as a coach of the Vienna Moot Court teams of the University of Bern (2011 to 2014).

**Contact:** Walder Wyss Ltd.
Seefeldstrasse 123, P.O. Box 1236, CH-8034 Zürich, Switzerland
T: +41 58 658 58 58
E: pascale.koester@walderwyss.com
www.walderwyss.com
Ruth Mahfoozpour has studied law at the University of Vienna. She has gained professional experience while working with international law firms in Austria and at the foreign trade office of the Austrian Chamber of Commerce in Strasbourg. Ms. Mahfoozpour has also worked at the University of Vienna (Department of Civil Procedure), where she is currently enrolled for her PhD studies.

Contact: Binder Grösswang Rechtsanwälte GmbH
Sterngasse 13, A-1010 Vienna, Austria
T: +43 1 534 80
E: mahfoozpour@bindergroesswang.at
www.bindergroesswang.at
Michael McIlwrath is Global Chief Litigation Counsel for GE Oil & Gas, a global division of the General Electric Company in Florence, Italy. Michael is co-author, with John Savage, of *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International 2010), as well as a contributing editor to the Kluwer Arbitration Blog. Michael is a member of the board of directors (and past chairman) of the International Mediation Institute (IMImediation.org), a non-profit based in the Netherlands that promotes quality, transparency, and ethics in mediation, and he is currently chair of the Global Organizing Committee for the Global Pound Conference Series 2016, a multi-city global conference held under the auspices of IMI to create a dialogue among stakeholders over the future of civil justice. Michael was also the host of *International Dispute Negotiation*, a podcast of the International Institute for Conflict Prevention and Resolution, featuring leading professionals and cutting-edge topics in dispute resolution (recipient of the CEDR Award for Innovation in ADR).

**Contact:** GE Infrastructure Oil & Gas  
Via Felice Matteucci 2, I-50127 Firenze, Italy  
T: +39 0554 238 445  
E: michael.mcilwrath@np.ge.com
Georg Naegeli is a member of Homburger’s Litigation/Arbitration practice team. He knows how judges think because he served as one for ten years. In 2000, he joined Homburger’s litigation and arbitration practice team. He now represents clients in commercial disputes before state courts and in international arbitrations. Georg Naegeli has various assignments as chair or member of institutional and ad hoc arbitral tribunals. In addition, he is a member of Homburger’s Restructuring/Insolvency working group and advises clients on, and represents them in, insolvency and restructuring proceedings. From 2008–2012, Georg Naegeli was a member of the Court of Cassation of Zurich.

Georg Naegeli has published several articles on topics relating to international arbitration, jurisdiction, insolvency and enforcement. He is a co-author of commentaries on the Swiss Code of Civil Procedure, the Convention of Lugano and the Swiss Act on the Place of Jurisdiction in Civil Matters.

Contact: Homburger AG
Prime Tower, Hardstrasse 201, CH-8005 Zurich, Switzerland
T: +41 432 221 000
E: georg.naegeli@homburger.ch
www.homburger.ch
Amanda Neil is an associate in the Vienna office of Freshfields Bruckhaus Deringer. She is a member of the international arbitration and finance practice groups and specialises in international arbitration, with a specific focus on financial, corporate and commercial matters. She also acts in energy, major projects and telecommunications matters. Amanda advises international clients in arbitration proceedings and acts as administrative secretary to arbitral tribunals in both institutional and ad hoc proceedings.

Amanda was born in Sydney, Australia. She holds a law degree, with honours, and an arts degree, majoring in German, both from the University of Sydney. Before joining Freshfields Bruckhaus Deringer, she worked at a major Australian law firm and, prior to that, at Freshfields’ London office. She is qualified as a solicitor in New Youth Wales, Australia and England and Wales.

Amanda speaks English and German.

Contact: Freshfields Bruckhaus Deringer LLP
Seilergasse 16, A-1010 Vienna, Austria
T: +43 1 515 15 693
E: amanda.neil@freshfields.com
www.freshfields.com
Veit Öhlberger is a partner at Dorda Brugger Jordis. He specializes in international arbitration, trade and distribution, M&A/corporate law and legal aspects of doing business in China. He heads the firm's China Desk. His arbitration experience includes working under the ICC, UNCITRAL, CIETAC and the Vienna Rules in a wide range of commercial disputes, with a particular focus on sale, supply, agency, distribution, franchise, post-M&A and joint venture disputes.

Veit Öhlberger holds a Master's degree (Mag.iur.) and a Ph.D. (Dr.iur.) from the University of Vienna Law School and is also a graduate of the University of Oxford (Lincoln College), where he obtained a Master in European and Comparative Law (M.Jur.). He undertook additional legal studies at the London School of Economics and at the Renmin University of China.

Veit Öhlberger is Secretary of the International Arbitration Commission of the Union Internationale des Avocats (UIA) and an active member of the Young Austrian Arbitration Practitioners (YAAP), the ICC Young Arbitrators Forum (ICC YAC) and the Austrian-Chinese Legal Association. He publishes regularly on international arbitration and is a frequent speaker at conferences and seminars.

Contact: Dorda Brugger Jordis Rechtsanwälte GmbH
Universitätsring 10, A-1010 Vienna, Austria
T: +43 1 533 47 95 19
E: veit.oehlberger@dbj.at
www.dbj.at
Alexander Petsche is a partner of Baker & McKenzie Diwok Hermann Petsche Rechtsanwälte LLP & Co KG and heads its Litigation and Arbitration department in Vienna. He specializes in arbitration and compliance.

Alexander Petsche acts as party representative in arbitral proceedings under various rules and in *adhoc* arbitrations. Furthermore, he is regularly appointed as arbitrator in *adhoc* and institutional arbitrations. He also represents parties before Austrian courts in matters relating to arbitration, including the challenge and enforcement of arbitral awards. In addition, he regularly acts as accredited business mediator. He is a member of the Board of the International Arbitral Centre of the Austrian Federal Chamber of Commerce and President of the Austrian Arbitration Association.

He studied Law at the Universities of Vienna and Paris, and studied Business Administration at the University of Economics, Vienna, and the Lyon Graduate School of Business. He holds a doctorate in both disciplines. In 1995/96 he completed post-graduate studies at the College of Europe in Bruges.

Alexander Petsche publishes regularly on international litigation and arbitration and has written more than 100 publications on various business law topics. He is co-editor and co-author of “Austria: Arbitration Law and Practice” (Juris Publishing 2007). He is a member of the ICC Commission on Arbitration and lectures Professional Dispute Resolution at the Vienna University of Business Administration and Economics. He is member of the Austrian and Czech Bar.

Contact: Baker & McKenzie Diwok Hermann Petsche Rechtsanwälte LLP & Co KG
Schottenring 25, A-1010 Vienna, Austria
T: +43 1 242 50
E: alexander.petsche@bakermckenzie.com
www.bakermckenzie.com
Tamsyn Pickford is a Senior Associate at Clyde & Co. She has worked with a number of hard and soft commodity companies and traders, advising particularly on trade disputes. Her experience includes claims relating to trade contracts, sale of goods and commodities, charterparties and bills of lading and trade finance documentation.

Tamsyn has significant experience of High Court proceedings and complex arbitration work, particularly within the spheres of the LME, LMAA, LCIA and ICC. Most of her work is of a cross border nature, with clients based in a large number of different jurisdictions.

Contact: Clyde & Co
St Botolph Building, 138 Houndsditch, UK-EC3A 7AR London, United Kingdom
T: +44 20 7876 4476
E: tamsyn.pickford@clydeco.com
www.clydeco.com
Jarred Pinkston is Of Counsel at Dorda Brugger Jordis and his practice focuses on international dispute resolution across a wide range of industries and jurisdictions. As an American lawyer based in Vienna, he has been navigating the intersection of common and civil law for most of his career.

Jarred Pinkston has studied at the University of Missouri (B.S., B.A., and B.A.), Brooklyn Law school (J.D.), University of Vienna, Bucerius Law School in Hamburg, and Karl-Franzens University in Graz. He is admitted to practice law in New York, New Jersey and England/Wales.

Contact: Dorda Brugger Jordis Rechtsanwaelte GmbH
Universitaetsring 10, A-1010 Vienna, Austria
T: +43 1 533 47 95-62
E: jarred.pinkston@dbj.at
www.dbj.at
Nikolaus Pitkowitz is founding partner and head of dispute resolution at Graf & Pitkowitz, Vienna. He holds law degrees from University of Vienna (JD and PhD) and University of Sankt Gallen, Switzerland (MBL) and is also qualified and certified as a Mediator.

Dr. Pitkowitz has been practising law since 1985. His practice, which has always been very international with a strong focus on CEE, initially mainly comprised transactional work in the fields of Real Estate and M&A and soon expanded to international dispute resolution. Nikolaus Pitkowitz is considered one of the preeminent Austrian dispute resolution practitioners. He acted as counsel and arbitrator in a multitude of international arbitrations, including several high profile disputes most notably as counsel in the largest ever pending Austrian arbitration (a multibillion telecom dispute). Dr. Pitkowitz is Vice-President of VIAC (Vienna International Arbitral Centre). He is arbitrator and panel member of several arbitration institutions including ICC, ICDR, SIAC, CIETAC, HKIAC, KCAB and KLRCA. Dr. Pitkowitz is further a Fellow of the Chartered Institute of Arbitrators (FCIArb), Vice-chair of the International Arbitration Committee of the Section of International law of the American Bar Association (ABA) and past Co-chair of the Mediation Techniques Committee of the International Bar Association (IBA).

Nikolaus Pitkowitz frequently speaks at seminars and is author of numerous publications on international dispute resolution as well as CEE related themes. Among others he is author on the leading treatise on setting aside arbitral awards under Austrian law. Dr. Pitkowitz is a co-editor of the Austrian Yearbook on International Arbitration and co-organiser of the Vienna Arbitration Days.

Contact: Graf & Pitkowitz
Stadiongasse 2, A-1010 Vienna, Austria
T: +43 1 401 17-0
E: pitkowitz@gpp.at
www.gpp.at
Jenny W. T. Power specializes in international commercial arbitration. The primary focus of her practice is the representation of clients as counsel in international arbitration including those conducted under the auspices of the ICC and the Vienna International Arbitral Centre (VIAC) as well as in ad hoc proceedings. She also acts as arbitrator and as counsel in complex mediation proceedings.

Jenny Power is resident in the firm’s Vienna office. She joined the firm in 1988 and speaks English and German. Jenny Power holds a J.D. (juris doctor) degree from the University of Miami School of Law and is a member of the Florida and American Bar Associations.

Jenny Power is the co-author of *Austrian Business Law*. She has also published *The Austrian Arbitration Act – A Practitioner’s Guide to Sections 577–618 of the Austrian Code of Civil Procedure* and is co-author of *Costs in International Arbitration – A Central Eastern and Southern Eastern European Perspective*. She is a co-editor of the Austrian Yearbook on International Arbitration.

Contact: Freshfields Bruckhaus Deringer LLP
Seilergasse 16, A-1010 Vienna, Austria
T: +43 1 515 15-210
E: jenny.power@freshfields.com
www.freshfields.com
Peter Rees QC is an arbitrator, mediator and counsel based at 39 Essex Chambers. He specialises in international commercial arbitration and litigation and is widely recognised as one of the leading disputes lawyers in the world. He has been recommended as a leading expert in commercial arbitration and litigation by, amongst others, the Euromoney Guides to the World’s Leading Litigation Lawyers and Experts in Commercial Arbitration and in the Legal Business Report on Legal Experts as an Expert in Arbitration, Commercial Litigation and Construction and in the Chambers “Leaders in their Field” as an expert in construction.

Peter is a Member of the Court of the London Court of International Arbitration, Chair of the ICC UK Nominations Sub-Committee, a Member of the Board of the International Institute for Conflict Prevention and Resolution, a Member of the Board of Trustees of the Chartered Institute of Arbitrators, and a Member of the International Advisory Board of the Vienna International Arbitration Centre.

Contact: Peter Rees QC 39 Essex Street, UK-WC2R 3AT London, United Kingdom T: +44 20 7634 9030 E: peter.rees@39essex.com
Nicolas W. Reithner has been a lawyer since 1999 and in 2003 became a partner in a Liechtenstein law firm before joining the Advocatur Seeger, Frick & Partner AG in 2013. He regularly takes on complex national and international civil and white collar crime cases before courts and arbitration tribunals.

He is a co-author of the first guide to the Liechtenstein Arbitration Rules and member of the Board of the Liechtenstein Arbitration Association. Nicolas Reithner is a Lecturer at the University of Lucerne on off-shore, finance and the Liechtenstein tax system and regularly publishes on a wide range of topics.

He holds a Law Diploma in Legal Studies (Cardiff, 1998), a Business Management Degree (University of Innsbruck, 2000), a qualification as Solicitor of England and Wales (2011) and was admitted to the Liechtenstein Bar in 2001 and the Austrian Bar in 2005. He is also a Liechtenstein trust expert and professional trustee since 2004.

Contact: Advocatur Seeger, Frick & Partner AG
Kirchstrasse 6, FL-9490 Vaduz, Liechtenstein
T: +42 3 265 22 22
E: Nicolas.Reithner@sfplex.li
www.sfplex.li
Catherine A. Rogers is a Professor of Law and the Paul & Marjorie Price Faculty Scholar at Penn State Law, and the Professor of Ethics, Regulation, and the Rule of Law at Queen Mary, University of London, where she Co-Director of the Institute on Ethics and Regulation. Professor Rogers is a Reporter for the American Law Institute’s Restatement of the U.S. Law (Third) of International Commercial Arbitration, and a co-chair, together with William W. “Rusty” Park, of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration. Professor Rogers is a Member of the Court of Arbitration for the Jerusalem Arbitration Center appointed by the ICC Palestine, and a member of the Board of Directors of the International Judicial Academy.

Professor Rogers is the founder and Executive Director of Arbitrator Intelligence, a non-profit initiative that aims at increasing transparency, equal access to information and accountability in the arbitrator selection process. She is also regularly engaged in capacity-building activities to promote arbitration and the rule of law in developing and emerging economies.

Her books include Ethics in International Arbitration (Oxford University Press 2014) and The Future of Investment Arbitration (editor, with Roger Alford) (Oxford University Press 2009).

Contact: Paul & Marjorie Price Faculty Scholar, Penn State Law
324 Katz Building, State College, Pennsylvania 16801, USA
T: +1 814 321 7300/+1 814 863 3513
F: +1 814 865 9042
E: car36@psu.edu
www.arbitratorintelligence.org/
Markus Schifferl, born 1977, is a partner of zeiler:partners Attorneys at Law. His principal areas of practice include international arbitration and corporate/commercial litigation.

He has acted as arbitrator, counsel and secretary to the arbitral tribunal in more than 30 arbitrations, among others under the ICC, UNCITRAL and Vienna Rules. Markus regularly acts as party representative in corporate and commercial proceedings before Austrian courts.

Markus received his legal education at the University of Graz (Mag. iur. 2002), Sciences-Po Paris, University College London (LL.M in Dispute Resolution 2004) and the University of Vienna (Dr. iur. 2006).

Markus is fluent in German (native) and English and has a basic knowledge of French.

Contact: Torggler Rechtsanwälte GmbH
Universitätsring 10/5, A-1010 Vienna, Austria
T: +43 1 532 31 70-73
E: m.schifferl@torggler.at
www.torggler.at
Alfred Siwy is a partner of zeiler.partners Rechtsanwälte GmbH since 2014. He focuses on international commercial arbitration and litigation and investment arbitration. Alfred Siwy frequently acts as counsel and arbitrator under the ICC, Vienna and UNCITRAL Rules.

He obtained his law degrees from the University of Vienna (Master’s degree 2003, doctorate 2011) and King’s College London (LL.M. 2006).

Contact: zeiler.partners Rechtsanwälte GmbH
Stubenbastei 2, A-1010 Vienna, Austria
T: +43 1 8901087-84
E: alfred.siwy@zeiler.partners
www.zeiler.partners
**Alexandra Stoffl** is an Associate at CHSH Cerha Hempel Spiegelfeld Hlawati, Partnerschaft von Rechtsanwälten, and a part of the dispute resolution team. Her focus is on international arbitration, litigation and compliance. Despite her young age, she has already acted as counsel in international arbitration cases under the ICC, the VIAC and UNCITRAL Rules as well as in ad hoc arbitrations. Alexandra Stoffl studied Law and Political Sciences at the University of Vienna and at Macquarie University, Sydney. Before becoming an Associate at CHSH, she was a University Assistant at the Institute for Political Science at the University of Vienna, performing scientific research primarily on constitutional law issues. She speaks German, English, Spanish and French.

**Contact:**

CHSH Cerha Hempel Spiegelfeld Hlawati
Partnerschaft von Rechtsanwälten
Parkring 2, A-1010 Vienna, Austria
T: +43 1 514 35 121
E: alexandra.stoffl@chsh.com
www.chsh.com
Michael Swangard is a Partner at Clyde & Co and a recognised international disputes and arbitration specialist.

With a focus on international trade he specialises in international dispute resolution governed by arbitration bodies including ICSID, UNCITRAL, LCIA, and ICC as well as trade association tribunals such as GAFTA, FOSFA, CTF, LME, SAL and RSA. He has considerable experience advising on arbitrations across Eastern Europe including Austria, Russia and Ukraine.

In addition to arbitration work, Michael advises clients on disputes before the English High Court and in the context of private mediations. His remit also covers advising on international sanction regimes as well as issues arising out of the OECD bribery and corruption convention.


Contact: Clyde & Co
St Botolph Building, 138 Houndsditch,
UK- EC3A 7AR London, United Kingdom
T: +44 20 7876 4708
E: michael.swangard@clydeco.com
www.clydeco.com
Ema Vidak-Gojkovic works as an associate with Baker & McKenzie LLP, Vienna. She holds an LL.M. degree from Harvard Law School, as well as a Master’s Degree in Law from the University of Zagreb. Ms. Vidak has practiced and was trained in both civil and common law jurisdictions. She is a dual-qualified lawyer in New York and Croatia.

Ms. Vidak focuses on international arbitration and mediation. Her practice is concentrated on disputes related to the ex Yugoslav countries, including before the local arbitration institutions. Ms. Vidak’s recent experience includes ICSID arbitrations of foreign investors against an ex Yugoslav country.

Ms. Vidak works as an external lecturer for mediation and negotiation at the University of Vienna. She is an active member of ArbitralWomen and International Mediation Institute’s YMI section. She also serves as a delegate at the UNCITRAL Working Group II (Arbitration and Conciliation) for Florence International Mediation Chamber (FIMC).

Contact: Baker & McKenzie Diwok Hermann Petsche Rechtsanwälte LLP & Co. KG Schottenring 25, A-1010 Vienna, Austria T: +43 1 2 42 50 251, +43 664 6 06 46 251 E: Vidak-Gojkovic@bakermckenzie.com www.bakermckenzie.com
Simon Vorburger, Senior Associate at Homburger, acts as counsel in international commercial arbitrations and advises and represents clients with respect to investment treaty claims as well as cross-border litigation. Moreover, he is a member of Homburger’s Restructuring | Insolvency working group. He is admitted to practice in both Switzerland and in New York and holds a law degree and PhD from the University of Zurich and an LLM from New York University School of Law. Prior to joining Homburger, Simon Vorburger was a Visiting Researcher at Harvard Law School and a Visiting Scholar at the Columbia University Law School Center for International Commercial and Investment Arbitration, where he also contributed to the drafting of the American Law Institute’s US Restatement on International Commercial Arbitration. Simon Vorburger regularly publishes and speaks on topics related to arbitration.

Contact: Homburger AG
Prime Tower, Hardstrasse 201, CH-8005 Zurich, Switzerland
T: +41 432 221 000
E: simon.vorburger@homburger.ch
www.homburger.ch
Irene Welser, is partner at CHSH Cerha Hempel Spiegelfeld Hlawati, Partnerschaft von Rechtsanwälten, heads the Contentious Business Department of the firm, a team of 20 lawyers. She is very active in national and international arbitration, and sits as an arbitrator and as parties’ representative. As of 2015, she is the first female board member of the Vienna International Arbitral Centre. Irene is also a passionate litigator and advises domestic and international clients in commercial and civil law. She has very extremely busy during the past years as chairman or arbitrator in ICC, Vienna Rules, UNCITRAL and other ad-hoc arbitrations. Construction and building law, liability law, M&A disputes, contract law, aviation law, energy law and oil and gas disputes are key areas of her practice. She is also general counsel to corporate clients and so combines her litigation and arbitration skills with a firm understanding of how to avoid or settle disputes.

Irene Welser was admitted to the Vienna Bar in 1992. She holds a Doctor’s degree and in 2003 became the youngest Honorary Professor at the University of Vienna, lecturing in business and civil law. She frequently speaks at seminars and conferences and has been co-organising the Vienna Arbitration Days. Her first main publication, Warranties in Contracts on Works and Services (1989), has become a standard text in this field. She is co-editor of the Austrian Yearbook on International Arbitration and author and co-author of several further books and publications dealing with contract law, warranty and liability questions as well as arbitration issues, and has published more than 80 articles in Austrian and International law magazines. She is an examiner for the Bar Exam at the Vienna Bar and an IBA member. She is on the list of arbitrators of the VIAC and is also member of ASA, LCIA, Arbitral Women and is member of the board of the Chinese European Legal Association. The last years have seen her lecturing on international arbitration in Istanbul, in California, in Hong-Kong, Beijing, Seoul and Tokyo, in Brussels, in Romania, in Slovakia and at the Düsseldorf Arbitration School as well as in the LL.M Programme International Dispute Resolution of Danube University Krems.

Irene Welser speaks German, English, French and Italian.

Contact: CHSH Cerha Hempel Spiegelfeld Hlawati Partnerschaft von Rechtsanwälten Parkring 2, A-1010 Vienna, Austria T: +43 1 514 35-121 E: irene.welser@chsh.com www.chsh.com
Venus Valentina Wong is an attorney-at-law with Torggler Rechtsanwälte specialising in international arbitration and international litigation with a focus on China-related matters. She has served as counsel, arbitrator (sole arbitrator, party-appointed arbitrator and chairperson) and administrative secretary in more than 50 cases in institutional and ad hoc arbitral proceedings (ICC, VIAC, LCIA, Swiss Rules, CCIR, CAS, UNCITRAL).

Valentina Wong studied law and sinology in Vienna, Amsterdam and Taipei. She worked as a university assistant at the Institute of Austrian and European Public Law of the Vienna University of Economics and Business. After her court practice, Valentina Wong joined a boutique law firm in Vienna focusing on international dispute resolution in 2004. She was admitted to the Vienna Bar in 2007 and has been working with Torggler Rechtsanwälte since 2012.

Valentina Wong completed internships with CIETAC in Beijing and with the ICC International Court of Arbitration in Paris. She is a regular speaker at international conferences and author of numerous publications on various topics including Chinese law and sports law as well as official translator of several institutional arbitration rules (VIAC, CIETAC, LAC). Valentina Wong was the YIAG Regional Representative for Central and Eastern Europe in 2010/2011 and has been a member of the YAAP Advisory Board since 2008. Her working languages are German, English, Chinese (Mandarin and Cantonese) and French.

Contact: Torggler Rechtsanwälte GmbH
Universitätsring 10/5, A-1010 Vienna, Austria
T: +43 1 532 31 70
E: v.wong@torggler.at
www.torggler.at
Gerold Zeiler’s practice focuses on International Commercial Arbitration, Investment Arbitration and International Litigation. He regularly sits as arbitrator and acts as counsel of parties in both ad hoc arbitration proceedings as well as administered arbitration proceedings, including proceedings under the VIAC, ICC, UNCITRAL and ICSID Rules.

Gerold Zeiler is a partner of zeiler.partners Rechtsanwälte GmbH. He obtained his doctorate in law from the University of Vienna (1996). He is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and a member of the ICC Commission on Arbitration.

In addition to his arbitration and litigation practice, Gerold Zeiler is the author of numerous articles and books on international litigation and arbitration, including Pre-emptive Remedies in International Litigation (Internationales Sicherungsverfahren, 1996), The Brussels and Lugano Convention (Die Übereinkommen von Brüssel und Lugano, 1997, co-editor), Arbitration in the Infrastructure Sector (Schiedsverfahren im Infrastrukturbereich, in: Liberalisierung österrei-


Contact: zeiler.partners Rechtsanwälte GmbH
Stubenbastei 2, A-1010 Vienna, Austria
T: +43 1 890 1087 80
E: gerold.zeiler@zeiler.partners
www.zeiler.partners
Ewa Zelazna is a doctoral candidate at the University of Leicester. In her doctoral thesis entitled: “The EU’s International Investment Policy after the Treaty of Lisbon. A Legal Analysis of the Development Opportunities” Ewa evaluates the impact that the implementation of the EU’s international investment policy is likely to have on the EU’s internal market and the process of EU integration. She is also interested in recent developments in international investment law, in particular in the area of treaty-based investor-State arbitration.

Ewa works as a Graduate Teaching Assistant in Land Law at the University of Leicester, where she also coordinates activities of Leicester Legal Research Forum. Ewa has an LLM (distinction) in International Commercial Law (2012) and a degree in Economic and Law (2010), both from the University of Leicester.

Contact: University of Leicester
University Road, UK-LE1 7RH Leicester, United Kingdom
T: +44 0116 252 7318
E: ewa.zelazna@le.ac.uk
www.le.ac.uk
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 consumer¹) 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 jurisdictions

¹) 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.

²) 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.

The authors themselves have hardly ever seen an arbitration clause in their everyday life as a consumer vis-a-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 installment (Abzahlungsgeschäfte), the Swiss legislator in 1963 prohibited arbitration clauses for such contracts (if the arbitral agreement was concluded before the dispute had arisen). Similarly, arbitration clauses for collective investment contracts were also prohibited.

- In 1981, the newly introduced Art 31sexies of the Swiss Federal Constitution (Bundesverfassung der Schweizerischen Eidgenossenschaft) established a constitutional basis for measures to protect consumers.

- 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, on package travel, on unfair competition, and on the right of withdrawal from a doorstep selling contract).
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

\(^{10}\) 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.


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-

\(^{(15)}\) Moehler, supra note 3, at 71.


\(^{(19)}\) Moehler, supra note 3, at 24; Schnyder & Doss, supra note 16, at 7.


\(^{(22)}\) Moehler, supra note 3, at 47.

\(^{(23)}\) Moehler, supra note 3, at 48 et seqq.
pecific individual in a given case actually is in need or appears worthy of being pro-
tected 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 disputes 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 system29)) 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).

24) Mohler, supra note 3, at 45.
25) For typical consumer contracts see Brunner, supra note 18, at 24 et seqq.
26) Mohler, supra note 3, 59.
29) Berger & Kellerhals, supra note 28, at 70.
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 \textit{lex arbitri}) without taking into account the possibly more restrictive \textit{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-
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 provision48) 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...
quite similar. However, they are not identical. 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. 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.

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. 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. Yet, the Swiss Federal Supreme Court has to date never denied arbitrability because of an incompatibility with public policy.

- 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.
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.\textsuperscript{56})

- Also the mandatory places of jurisdiction stipulated in the CPC\textsuperscript{57) as well as in the PILA\textsuperscript{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, \textit{supra}).\textsuperscript{59}) Mandatory places of jurisdiction as provided for in the CPC do thus not prevent the relevant matters to be submitted to arbitration.\textsuperscript{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\textsuperscript{61}) do not affect the arbitrability of a claim.\textsuperscript{62}) Whilst a con-

\textsuperscript{56} Göksu, \textit{supra} note 30, at 374; Weber-Stecher, \textit{supra} note 40, N 25.

\textsuperscript{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.”).

\textsuperscript{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”).

\textsuperscript{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, \textit{supra} note 28, at 254 \textit{et seq}; Göksu, \textit{supra} note 30, at 384; Weber-Stecher, \textit{supra} note 40, at 13.

\textsuperscript{60} Göksu, \textit{supra} note 30, at 385; Gut, \textit{supra} note 27, at 66; Möhler, \textit{supra} note 3, at 275 \textit{et seq}; Staehelin et al., \textit{supra} note 34, 597 at 13; Weber-Stecher, \textit{supra} note 40, at 13.

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.\textsuperscript{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 ma-
datory provisions of law in that jurisdiction, but such issues do not affect or
limit arbitrability from a Swiss point of view.\textsuperscript{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 agree-
ment 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.\textsuperscript{65})

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

\textsuperscript{62}) Göksu, supra note 30, et 386; Möhler, supra note 3, at 328 et seqq.

\textsuperscript{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., 3\textsuperscript{rd} ed. 2013); Weber-Stecher, supra note 40, at 14, 27.

\textsuperscript{64}) Göksu, supra note 30, at 388.

\textsuperscript{65}) Möhler, supra note 3, at 427.

\textsuperscript{66}) Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International
Law Act] December 18, 1987, SR 291, Art 178, para. 1 (“Die Schiedsvereinbarung hat schrift-
llich, durch Telegramm, Telex, Telefax oder in einer anderen Form der Übermittlung zu erfol-
gen, die den Nachweis der Vereinbarung durch Text ermöglicht”; translation: “The arbitra-
tion 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 Intern-
ationales Privatrecht at 1 et seqq. (Heinrich Honsell et al. eds., 3\textsuperscript{rd} ed. 2013).

\textsuperscript{67}) Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] Decem-
ber 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 re-
quire that the agreement to arbitrate can be established by text.\textsuperscript{68}) The signature of
the parties is not required.\textsuperscript{69}) Consequently, an arbitration agreement may be val-
idly concluded online by a simple mouse-click.\textsuperscript{70})

Accordingly, the formal threshold to conclude an arbitration agreement is
relatively low and fails to protect legally inexperienced consumers. Still, consent
to arbitration has to be given and to be proven by text.\textsuperscript{71}) In the context of con-
sumer matters, the consent to arbitration might not always be that obvious, in
particular where general commercial conditions are involved (\textit{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, \textit{e.g.} if the consumer fails to claim lack of jurisdic-
tion when responding on the merits to a claim brought against him (so-called
“unconditional appearance”).\textsuperscript{72})

\section*{B. Substantive Validity Pursuant to Swiss Law\textsuperscript{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 con-
tract\textsuperscript{74}). Accordingly, the parties may establish the content of such an agree-
ment at their discretion, however only within the limits of the law. In this sense,
mandatory rules of law, public policy, \textit{bonos mores} and fundamental personal
rights have to be respected.

As outlined above, under Swiss law, there are only a few isolated, rather spe-
cific 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
not. 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 Code76) (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)

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 offensible 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.

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, 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.\(^{83}\)

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.


\(^{84}\) Kut, * supra* note 78, at 53.
tain business experience and expertise.\footnote{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).} 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.\footnote{Girsberger, supra, at 28.} 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, \textit{i.e.} to be surprising for the consumer and therefore declared null and void.\footnote{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).} 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.\footnote{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, 4P230/2000; Girsberger, supra, at 28; Pfisterer, supra note 87, Art 357 at 37.} 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.

\section*{2. Possible Review of Content}

With regard to the substance of general commercial conditions, there is to date no general scrutiny (\textit{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.\footnote{Kut, supra note 78, at 62.} 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.\footnote{Kut, supra note 78, at 63.}

On July 1, 2012, a newly worded Art 8 Competition Act\footnote{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.\footnote{Available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013&from=DE (English).} 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.\footnote{Möhler, supra note 3, at 619.}

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.\footnote{Möhler, supra note 3, at 620.} This is expressly set out in Art 380 CPC\footnote{Schweizerische Zivilprozessordnung [ZPO] [Swiss Civil Procedure Code] December 19, 2008, SR 272, Art 380 (“Die unentgeltliche Rechtspflege ist ausgeschlossen.”); 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).} 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-
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 being 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

---


98) Von Segesser, *supra* note 97.


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.\footnote{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).}

In the explanatory report\footnote{103) Available at www.news.admin.ch/NSBSubscriber/message/attachments/35423.pdf (German).}, 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.\footnote{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.}
The plan was to have fair, simple and swift proceedings.\footnote{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.”).}

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-

\footnote{106) Finanzdienstleistungsgesetz [FIDLEG] [Federal Financial Services Act FinSA], draft, Art 85 para. 2 (Variant A) (“Sie informieren ihre Kundinnen und Kunden vor Ein- gehung 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.”).}

\footnote{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\textsuperscript{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.\textsuperscript{109}

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

\section*{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.


\textsuperscript{109} Wyss, supra, at 92 et seqq.