

Swiss disputes set to fly

“Clients are less interested in maintaining commercial relationships; they’re interested in cash.” Fuelled by litigation funding, Swiss disputes may sky-rocket



The reality is that when the world is in chaos, disputes lawyers tend to do very well,” says Domitille Baizeau, co-managing partner of LALIVE in Geneva. “We’ve noted that, as the world economic situation worsens, clients are less interested in maintaining commercial relationships; they’re interested in cash. They still need to be able to pay their bills however, so law firms may have to be more flexible with their fee structures, as we can be.”

If 2023 is a year in which recession makes an unwelcome return to parts of Europe, accelerated by international chaos, then a rise in legal disputes is inevitable. A perfect litigious storm is further guaranteed by the continued fallout from the

Russia-Ukraine conflict: increased borrowing and energy costs, high inflation and a fall in consumer spending will make lenders more cautious, ultimately leading to a significant uptick in insolvencies as debt problems that emerged during the Covid-19 pandemic finally crystallise.

Despite the inherent strength of its domestic economy, Switzerland is not immune from the problems of its larger eurozone neighbours, as evidenced by the expectations of Swiss law firms.

Insolvent restructurings coming our way’

“There will be some insolvent restructurings coming our way,” says Daniel Daeniker, senior partner of Homburger. His view is echoed by Thierry Calame,

▲ Federal Supreme Court in Lausanne, Switzerland

co-managing partner of Lenz & Staehelin. “Our restructuring and insolvency people expect there will be more work,” he says. “It’s surprising that there hasn’t been more out of the pandemic. There are some insolvencies and restructurings they’re involved in, but it’s not yet developed as expected.”

So far, the same applies to commercial litigation. Christian Oetiker, managing partner of VISCHER, notes: “During the global financial crisis, people were much more aggressive in litigating. Because of Covid, people’s attitudes have changed. But this may soon change again: the risk of a recession is now much higher than ever before and disputes work may be increasing.”



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Beyond local difficulties, Switzerland has long been a preferred jurisdiction for resolving international disputes. Caroline Clemetson, partner at Schellenberg Wittmer explains why.

"People like Switzerland for dispute resolution, it's calm and has many competences," she says. "The political and economic situation is always very stable. You can rely on the judicial system: very steady and trustworthy, competent, very experienced and independent judges who will never decide cases for political reasons. Alternative dispute resolution is also well recognized in Switzerland for the same reasons as dispute resolution: steady, calm, competent people."

Supply issue disputes

The disputes practice at Lenz has already been very active, according to Calame. "We've noticed a huge increase where our clients, especially in the energy sector, have been involved in long term contracts with supply problems under the agreement," he says. "Typically, many such agreements provide for arbitration in Switzerland. Our litigation and arbitration practice has been extremely busy in relation to disputes concerning these supply issues."

Lenz wants to grow their dispute resolution (DR) capacity further. "One strategic goal is to increase dispute resolution, which is thriving," says Calame. "We aim to have more DR partners: we have some excellent people in the pipeline. It's good to have a mix of activities, because we can see that arbitration and litigation are going really well."

Notwithstanding the quality of its courts, Switzerland's undoubted forté in resolving disputes lies in arbitration. For instance, Geneva and Zurich are among the most frequently



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chosen seats in ICC arbitrations, according to the most recent study by London's Queen Mary University. Leading the overall list, London, Singapore, Hong Kong, Paris and Geneva rank as the top five for the most preferred seats, while ICC, SIAC, HKIAC, LCIA and CIETAC are identified as the top five arbitral institutions.

"The problem for litigation work is that Switzerland is a fairly small country, so the pie is smaller than in arbitration," explains Baizeau. "A selling point of Switzerland: Swiss law is often chosen because of neutrality and because Swiss contract law provides parties with maximum autonomy and control over their contract," adds Calame.

'More people want arbitration'

"More and more people want to do arbitration rather than

the usual disputes if they can – it's more private," notes Clemetson. "Many arbitrators come from Switzerland and many arbitrations happen here." Calame anticipates that the current difficulties will generate more. "We expect – because our clients have huge investments – to be involved in multiple arbitrations," he says.

No surprise, perhaps, when the value of disputes in international arbitration over the past decade has grown at least 7% faster than the global growth rate to exceed \$2 trillion. Published information about arbitration awards and other details is often scarce. But in October 2022, the Swiss Supreme Court rejected Russia's attempt to overturn a \$5 billion arbitral award to Yukos Capital. It was yet another defeat for Russia in the battle over Yukos, after the Swiss Federal Supreme Court had upheld the \$5 billion arbitral award in favour of investors in the now defunct energy company.

At over 100 lawyers, LALIVE is by far the largest Swiss firm dedicated exclusively to disputes. "We were the first to focus primarily on dispute resolution, long before any other boutique firms opened up in this field; our 63-strong arbitration group is now one of the biggest such practices of any firm worldwide," says Baizeau. "We have always had a mix of investment and commercial arbitration work – in terms of turnover, about half-half." In commercial arbitration, she points to a rise in post-M&A services, supply agreement disputes, and termination of distribution agreements.

Inevitably, the Ukraine conflict has triggered significant pre-arbitration work for investor claims against Russia. "Even if the process is so long that some of the large investors may not even see the money in the lifetime of their representatives,

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Number of full-time arbitration lawyers in the LALIVE London office

there is an interest in pursuing these claims,” says Baizeau. “We’ve been advising investors in the energy sector in particular on how to bring such claims. We already do work for Ukrainian entities, as a result of the annexation of Crimea, with investment treaty cases against Russia, and related award challenges before the Swiss courts. Some partners are also involved with international initiatives to consider how to use frozen Russian assets, by putting them into a fund to use for reparations/compensation.”

Global competition

Baizeau distinguishes between the work done by the firm in Switzerland and the international work they do in different arbitration seats, most notably London. “Our Swiss competitors are Bär &



“ More and more people want to do arbitration

*Caroline Clemetson, partner,
Schellenberg Wittmer*

Karrer, NKF, Schellenberg, Lenz, and Homburger,” she says. “Schellenberg is real competition in arbitration for Swiss work and we often have them on the opposite side of high-profile award setting aside applications.”

Internationally, she identifies a different list. “Our main competitors are firms like Three Crowns, and the international arbitration teams of the large global firms in that we often pitch to the same clients,” says Baizeau. “We also appear against these firms and the likes of Shearman & Sterling, White & Case, Dechert, Clifford Chance, Debevoise, A&O, and Quinn Emanuel.

LALIVE opened in London in 2018 to establish “a permanent common law foothold”, she explains and the office now has 20 full-time arbitration lawyers.

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"A third of our London team is composed of pure English lawyers," says Baizeau. "The rest are a mix of American, Latin American and French lawyers, who are fully integrated in the entire group – this gives us a competitive edge. Every lawyer in London works on matters opened in Geneva and Zurich and many of our Geneva and Zurich lawyers also work on matters opened in London."

"Our competitors like to describe us as Swiss because it serves their purpose. Or to say "this is a Swiss firm with a London representative office", but in fact we operate on a global basis as a fully integrated firm – and much of our work has no connection to Switzerland."

As elsewhere, third-party funding now occupies a pivotal role in determining



whether an action will fly in Switzerland. According to Clemetson, "Litigation funders are very active and ready to fund litigation; there will probably be lots of disputes relating to contracts and sanctions."

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Baizeau echoes the sentiment, but with a qualification: "Litigation funders are very active at present, but Russia is much more difficult for them because of the long time-frame for enforcement and recovery."

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