Labour Law and ADR in Switzerland – Selected Topics Mediation, Arbitration and Collective Employment Contracts, Arbitrability of Labour Law Claims

Introduction

ADR\(^1\) as a tool for labour law dispute resolution remains controversial in Switzerland as, amongst others, the first federal Swiss Code of Civil Procedure (the “CCP”; of 19 December 2008), came into force only recently on 1 January 2011. Before, domestic civil procedure and ADR were primarily governed by cantonal procedural codes. Domestic arbitration was governed by the inter-cantonal Concordat on Arbitration of 27 March 1969 (the “Concordat”). To some extent civil procedure was also governed by federal procedural laws, i.a. the Federal Supreme Court Act of Switzerland, which is still in force, governing the proceedings before the Federal Supreme Court (the “ATF”);\(^2\) by federal procedural principles, which are still applicable unless they have been codified in the CCP; and by federal substantive laws including procedural provisions – e.g. the Swiss Code of Obligations (the “CO”);\(^3\) including procedural provisions regarding labour law.\(^4\) The CCP replaced the cantonal procedural codes, the Concordat and most of the procedural provisions stipulated in the substantive laws. Finally, it introduced provisions on mediation (Arts 213 et seqq. CCP).

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\(^1\) The term “ADR” encompasses hereinafter any procedure for settling a dispute by means other than litigation, as by arbitration or mediation; see the Black’s Law Dictionary, Tenth Edition, 2014, p. 95.

\(^2\) The Federal Supreme Court Act of 17 June 2005, in force since 1 January 2007, replaced the former Judiciary Organization Act of 16 December 1943. The Swiss Federal Supreme Court is the supreme state court of the Swiss Confederation, a federal republic.

\(^3\) Federal Act on the Amendment of the Swiss Civil Code, Part Five, the Code of Obligations, of 30 March 1911.

\(^4\) E.g. the abrogated Art. 343 CO according to which expedited proceedings for labour claims up to CHF 30,000 were to be provided by the Cantons; encompassing legal aid and \textit{ex officio} procedural powers of the judge.
For ADR in international disputes, the Federal Statute on Private International Law\(^5\) (the “PILS”) was, and still is, primarily applicable.

It is noteworthy that the Swiss legislator, when envisaging the preparatory drafting works on the new CCP, intended to unify the arbitration proceedings for international and domestic disputes, aiming at a *Swiss Code Unique of Arbitration*. However, this has not been accomplished. Instead, the CCP provisions on arbitration have been drafted by taking mainly three sources into account: the 12\(^{th}\) Chapter of the PILS on international arbitration, the Concordat on domestic arbitration and – to a minor extent – the UNCITRAL Model Law on International Commercial Arbitration\(^6\).

The criterion for distinguishing domestic arbitral proceedings from international ones derives from the domicile or the habitual residence of the parties. According to Art. 176 (1) PILS the 12\(^{th}\) Chapter of the PILS applies to international arbitration, if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. According to Art. 353 CCP the CCP provisions on arbitration apply if the arbitral tribunal is based in Switzerland and the Chapter 12\(^{th}\) of the PILS is not applicable; however, the parties also may opt for the PILS, thus excluding the CCP. This opt-in raises further questions, which are highly controversial in doctrine. The impact of the opt-in will not be addressed as it would considerably widen the scope of this paper.

This paper addresses three topics of labour law and ADR, affected by the new CCP and the case law connected thereto: the Mediation, the Arbitration and Collective Employment Contracts, and the Arbitrability of Labour Law Claims, which is highly controversial in domestic disputes.

**Mediation in Swiss Labour Law\(^7\)**

Although the concept of mediation has had a long tradition in Switzerland, be it of formal or informal nature\(^8\), mediation has not been regulated on a federal

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\(^6\) See the Report of the Swiss Federal Council on the CCP-Draft (*die Botschaft*), p. 7391 et seq.

\(^7\) The subsequent paragraphs address domestic relations, whereto the CCP applies, unless stated otherwise.

\(^8\) See the Swiss Rules of Commercial Mediation of the Swiss Chambers’ Arbitration Institution of 2007.
level until only recently, when the CCP came into force. Thus, as the respective CCP provisions have only been in force for 4 years, there is not much experience in federal mediation according to Arts 213 et seqq. CCP (the “Mediation”) as a remedy – notably in labour law.

The main principles governing the Mediation are: party autonomy, neutrality and multi-partiality, and confidentiality. The Mediation is linked to state court proceedings and does not constitute a stand-alone remedy like arbitration. It is only applicable instead of state conciliation or during state court proceedings (Art. 213 et seq.) The request for Mediation has to be filed jointly by the parties with the state court in order to formally initiate Mediation and waive state conciliation, which usually initiates civil proceedings (Art. 197 CCP). The request must be made in the application for conciliation or during state court proceedings. The state court, on the other hand, may recommend Mediation to the parties at any time. The state court proceedings remain suspended until the request is withdrawn by one of the parties or until the state court is notified of the end of the Mediation (Art. 214 CCP).

It is for the parties to organise and conduct the Mediation. I.a. they have to choose a mediator, set the rules or at least the frame of the Mediation proceedings and sign an agreement with the mediator. The Swiss legislator abstained from setting eligibility conditions for mediators. This field remains at the discretion of the private sector. Consequently, everyone can act as, and under the name of, a mediator as this title lacks legal protection. However, the lack of regulation does rather not affect mediation. For it is primarily mediation associations that secure quality on the market of mediators. They minister the requirements, which have to be met to become and to act as a “certified associations’ mediator”; they provide for exams and set standards, which have to be met in order to be granted with a title of an association. Remarkably, not only

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11 See the Report, supra note 6, p. 7335.
12 See, e.g. a working group of established mediation associations: Koordination Mediation Schweiz. http://www.mediationschweiz.ch/cms/nc/de/home.html [18 December 2014].
13 E.g. the Swiss Bar Association offers a mediator’s certificate for its members: http://mediation.sav-fsa.ch/Mediation.1411.0.html?&L=3&bd_page_type=1&from=default&pu=0&ssid=0 [18 December 2014].
lawyers act as certified mediators. The background of the Swiss mediators can be seen as similar to those of arbitrators: many of them are lawyers indeed, but what is crucial is that most of them have knowledge and experience in both the dispute resolution and in the respective field of the dispute (e.g. banking, tenancy or labour matters), irrespective of whether they are lawyers or not. Finally, there are no provisions governing the fees of mediators; this matter is left to the parties’ autonomy.

Pursuant to Art. 216 CCP, the proceedings are confidential and kept separate from the conciliation authority or the state court. The statements of the parties cannot be used in state court proceedings later on. Hence, a judge acting beforehand as a private mediator, has to abstain from participating in the subsequent state court proceedings. The parties may jointly request that the agreement reached through Mediation be approved by the state court. This is crucial, as an approved agreement has the same effect as a legally binding decision (Art. 217 in conjunction with Art. 241 CCP). The rather formal approach of the Mediation, due to the link to state authorities, is thus then recommended, if the parties wish to obtain an agreement having the same effect as a legally binding decision. The approved agreement will be easier to enforce later on. Notwithstanding, the parties may opt for informal mediation, if it suits them better than the state-linked Mediation. The agreement will be however of mere contractual force lacking eased enforceability.

Unlike in state conciliation (Art. 207 in conjunction with Art. 117 CCP) and in public “conciliation and arbitration proceedings of collective disputes,” the

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14 E.g. the list of mediators of the Swiss Chamber of Commercial Mediation, the section French Switzerland: http://www.skwm.ch/index-de.php?frameset=22 [18 December 2014].
15 The provision does not address how – or to which extent – to disclose information vis-à-vis the other party.
16 See Gloor/Umbricht, supra note 10, N 5.
17 Be it in Switzerland according to Art. 80 of the Swiss Debt Enforcement and Bankruptcy Law of 11 April 1889; or abroad according to respective treaties, e.g. the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2010 (the “Lugano Convention”), or respective national private international laws.
18 E.g. the Federal Act on Factory Work of 18 June 1914 (Bundesgesetz betreffend die Arbeit in den Fabriken vom 18. Juni 1914). See also the Cantonal Act on the Zurich Office of Conciliation in collective disputes of 16 May 1943 (Gesetz über das kantonale Einigungsamt vom 16. Mai 1943), according to which public conciliation and arbitration proceedings can be chosen by the parties. The costs are then born by the state – to some
parties have to bear the costs of Mediation (Art. 218 CCP) – i.e. also in labour law disputes. Cantons may enact legal aid but most have not\textsuperscript{19}. According to the Swiss legislator and scholars, legal aid is not provided by the CCP for two reasons: to part Mediation from state conciliation and because the Mediation proceedings should be mastered by the parties\textsuperscript{20}. It is true that the lack of legal aid reflects the principle of party autonomy governing mediation. Paradoxically, the absence of legal aid might discourage the weaker party to exercise this autonomy. As the costs of Mediation are rather high particularly for low values disputes\textsuperscript{21}, notably the employee might not afford mediation unless other parties, e.g. the employees’ association, bear them. However, the standing in might cause further complicacies\textsuperscript{22}. The lack of legal aid, which has been criticized by scholars\textsuperscript{23}, might thus impede Mediation as the prime remedy for labour law disputes.

A further – practical – obstacle to Mediation forms the effective state conciliation. Conciliation not only provides legal aid but is also widely known, recognized and respected\textsuperscript{24}. For the reasons mentioned, formal Mediation is rather a true alternative to state court proceedings for some – but not for all – labour law disputes. It suits rather parties of equal strength, unless social partners are involved backing the employee.

\textsuperscript{20} The Report, \textit{supra} note 6, p. 7336 et seq.; See also Gloor/Umbricht, CCP Commentary on Art. 218, \textit{supra} note 10, N 3.
\textsuperscript{21} E.g. the Swiss forum of mediation: http://www.mediationsforum.ch/Mediation/Kosten-der-Mediation/Streitwert-von-Fr-10000.29.html [18 December 2014].
\textsuperscript{22} See generally Gloor/Umbricht, \textit{supra} note 20.
\textsuperscript{23} \textit{See id.}
\textsuperscript{24} Cf. the data for settled labour law disputes in conciliation in the Canton of Zurich in 2013, p. 84: http://www.gerichte-zh.ch/fileadmin/user_upload/Dokumente/obergericht/Rechenschaftsberichte/Rechenschafts-bericht_2013.pdf [18 December 2014].
Arbitration and Collective Employment Contracts

1. Regarding the Contracting Parties

According to Art. 356 CO, a collective employment contract (the “CEC”) is a contract whereby employers or employers’ associations and employees’ associations (“the contracting parties”) jointly lay down clauses governing the conclusion, nature and termination of employment relationships between the employers and individual employees (“the participating parties”). Thus, the CEC addresses two levels of relations. While the relationship between the contracting parties can be figuratively seen as the “upper level”, the relationship between the participating parties, i.e. the individual employment contract, can be seen as the “lower level” deriving from the upper level.

Between the contracting parties, the CEC constitutes a regular contractual relationship under the law of obligations. Hence, their disputes are fully arbitrable and they are entirely (and contractually) bound by an arbitration clause, if such is enclosed in the CEC.

It is common in Swiss collective employment relationships to resolve disputes arising between the contracting parties by arbitration. The “social partners” prefer to avoid state courts in order not to affect their relations on the long run. Hence, the contracting parties opt for ad hoc or institutional arbitration (private arbitration) or the Cantonal Office of Conciliation (public arbitration).

2. Regarding the Individual Employment Contract (the Participating Parties)

Pursuant to Art. 356 and seq. CO, the CEC is by law directly/normatively applicable to the participating parties and their individual employment contracts.

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25 The subsequent paragraphs address domestic labour law disputes, unless stated otherwise.


27 Johnson Wilcke/Wildhaber, supra note 26, pp. 651 et seqq; e.g. ATF 4A_622/2014 of 28 November 2014.

28 E.g. ATF 4A_622/2014 of 28 November 2014; see generally Aubert supra note 18, p. 11 et seq.; see generally Staehelin, A., supra note 18, pp. 391 et seqq.

29 Subject to arbitrability is given, cf. infra.
However, these provisions do not explicitly list procedural matters. Therefore, whether an arbitration clause stipulated in the CEC applies directly by normative force to the individual employment relationship remains controversial. In any event, such a clause may still be contractually binding (see infra). But at first, two arguments favouring the normative binding force are presented:

First, according to Art. 1 (2) of the Federal Act on the Declaration of the Universal Application of Collective Employments Contracts ("FCEC"), provisions of the CEC, which are normatively applicable according to Art. 357 CO, may be declared universally applicable by the respective authority – i.e. applicable to all employees of the respective industrial sector, and thus, also to non-members of associations. However, according to Art. 1 (3) FCEC provisions on redress by arbitral tribunals may not be declared universally binding. Hence, considering Art. 1 (2) and construing Art. 1 (3) and FCEC, the vetoing of the normative force of the CEC arbitration clause could be construed as a revoking. The vetoing is then reasoned if in general the CEC arbitration clauses normatively bind the participating parties.

Second, the contracting parties/associations protect and execute the rights of their members. This representation weakens the rationale for applying the principle of protecting the weaker party. If the association consents to a CEC that contains an arbitration clause explicitly addressing individual employment contracts, it executes the rights of its members and binds them by its actions, similar to an agent – however, the binding force derives rather from the laws on associations and the rights and obligations of the association’s members. Even if the normative force of the CEC arbitration clause is to be denied, it might still affect the participating parties. The clause may be of contractual binding effect to the individual employment contract if the latter contains an explicit reference to the CEC arbitration clause. Furthermore, due to Art. 358 CCP and recent

30 The High Court of the Canton of Zurich, Decision of 15 December 1989, in ZR 89/1990, p. 171; Johnson Wilcke/Wildhaber, supra note 26, pp. 640 et seqq.; Aubert, supra note 18, p. 9 et seq.
32 See Aubert, supra note 18, p. 9 et seq; see also the High Court of the Canton of Zurich, Decision of 15 December 1989, in ZR 89/1990, p. 172.
33 The High Court of the Canton of Zurich, supra note 30, pp. 171 et seqq.
34 I.e. not an independent arbitration clause in the contract.
35 In order to meet the prerequisite of the formal validity of the arbitration clause (Art.
case law the requirements as to form and consent are met and the CEC arbitration clause presumably binding, if the contract contains only a global reference. However, unusual clauses, the existence of which has not been made explicit to an unsophisticated party, are generally excluded from the global acceptance. As arbitration agreements have to be rather deemed as not common for most of the individual employment relations – except for top level executives and top level athletes – they are, thus, unusual. Hence, it could be argued that at least common contracts have to contain explicit references to the CEC arbitration clause, whereas for selected “top level” contracts global reference might suffice.

Said so, a further objection in favour of global reference has to be raised: even members of employees’ associations could be deemed as not unsophisticated, as their rights are protected and executed by their associations (see supra). Hence, there is no ground for additional protection. A global reference in the individual contract to the CEC arbitration clause, which was negotiated by the association, could be considered as sufficient and binding. In any event, to dispel any doubts regarding the validity of an arbitration agreement, the contract itself should contain an explicit arbitration clause.

3. Excursus on Interim Measures

A step forward in domestic arbitration was taken by enabling the arbitral tribunals to grant interim measures. Pursuant to Art. 374 CCP, the ordinary (358 CCP), the arbitration agreement between the individual employee and the individual employer must be done in writing or in any other form allowing it to be evidenced by text. The CEC arbitration clause to which there is no reference in an individual employment contract is therefore insufficient; see Johnson Wilcke/Wildhaber, supra note 26, p. 641.

E.g. ATF 133 III 235, consideration 4.3.2.3, regarding international arbitration; arbitration clauses are often contained in general provisions or in articles of associations.


E.g. the labour law related ATF 4A_398/2013 of 10 January 2014, consideration A. et seq.; and the sports law related ATF 4A_246/2011 of 7 November 2011, consideration 2.2.2. – see notably the ATF’s goodwill to accept formal validity of arbitration agreements in sport matters.

See the High Court of the Canton of Zurich, supra note 30, p. 173.

A concept already known in international arbitration, see Art. 183 PILS.
court or, unless the parties have otherwise agreed, the arbitral tribunal may alternatively order interim measures\textsuperscript{42}. Thus, if e.g. labour unions are announcing a strike, the employers’ association may seek relief by interim measures with the arbitral tribunal to prohibit the strike. Under this provision it is controversial whether or not a waiver of the jurisdiction of state courts is admissible\textsuperscript{43}. Subsequent, arguments in favour of such a waiver are presented.

The principle of party autonomy, which governs the Swiss civil substantive law and (derived from it) to a certain extent the civil procedure – \textit{cf. ne procedat iudex ex officio} –, argues strongly for the admissibility of a waiver\textsuperscript{44}. If the parties truly wish to resolve their disputes solely by arbitration, their autonomy should be respected. Moreover, arbitration is a legitimate alternative to state courts, provided and admitted by the state, and arbitral tribunals exercise functions of state authority\textsuperscript{45}. Further, arbitral tribunals guarantee the access to the courts equally to the state courts and according to Art. 29a of the Swiss Constitution and – \textit{mutatis mutandis} – Art. 6 (1) ECHR\textsuperscript{46}.

Thus, arbitration should only be denied if explicitly so stipulated by the legislator or if the access to the courts may not be guaranteed by arbitration\textsuperscript{47}. In other cases arbitration should be encouraged, notably by favourable interpretation, which respects the parties’ autonomy and their consent to submit

\begin{itemize}
\item \textsuperscript{42} See generally Boog/Stark-Trauber, CCP Commentary on Art. 374, in: Hausheer/Walter (eds.), Berner Kommentar ZPO-III, Berne 2014, N 111.
\item \textsuperscript{43} See Haas/Donchi, International Sports Law and Jurisprudence of The CAS, Berne 2014, pp. 94 et seqq.
\item \textsuperscript{44} The High Court of Canton of Berne, Decision of 19 April 2012, consideration III.2.e.; accord Guldener, Schweizerisches Zivilprozessrecht, Zurich 1979, p. 148; see generally Oberhammer, P., CCP Commentary on Arts 55 and 58, in: Oberhammer/Haas/Domej (eds.), Kurzkommentar zur ZPO, 2nd ed., Basel 2014, N 3 et seqq. and N 1 et seqq. respectively; See also Berger/Kellerhals, \textit{supra} note 9, N 11.
\item \textsuperscript{45} Guldener, \textit{supra} note 44, p. 596.
\item \textsuperscript{46} See the High Court of Canton of Berne, \textit{supra} note 44, consideration III.2.e.; see also Boog/Stark-Trauber, \textit{supra} note 42, N 94; see generally Besson, Arbitration and Human Rights, ASA Bulletin; Kluwer Law International 2006, Volume 24 Issue 3, pp. 395 – 416, p. 415 and \textit{passim}.
\item \textsuperscript{47} See generally regarding the guarantee of the access to the courts/\textit{Rechtsweggarantie} as a fundamental right according to Art. 29a of the Swiss Constitution and Art. 6 (1) ECHR: Kley, the Swiss Constitution Commentary on Art. 29a, in: Ehrenzeller/Schindler/Schweizer/Vallender (eds.), Die Schweizerische Bundesverfassung, 3\textsuperscript{rd} ed., Zurich/St.Gallen 2014, N 4 et seqq., N 44; see also the High Court of the Canton of Zurich, \textit{supra} note 30, p. 174; accord Guldener, \textit{supra} note 44, p. 614 note 108.
\end{itemize}
to arbitration. Indeed, the ATF is already respecting the parties’ autonomy when construing (semi-)pathological arbitration agreements – an arbitration friendly interpretation leading *nota bene* to the exclusion of the jurisdiction of state courts\(^{48}\).

The guarantee of the access to the courts might be, however, violated if a party lacks the financial means to arbitrate – due to the lack of legal aid in arbitration\(^{49}\). The right to legal aid derives from the guarantee of the access to the courts, which also applies to arbitration (Arts 29a and 122 of the Swiss Constitution)\(^{50}\). Hence, the arbitration agreement should be deemed as incapable of being performed\(^{51}\) if it was doubtful that the employee will be in funds to conduct it\(^{52}\). Furthermore, the pathological agreement might still be healed if it were deemed only as incapable of being performed rather than being null and void – if the parties truly wish so. Hence, the entitled party might resign on important ground or fulfil the arbitration agreement\(^{53}\); accordingly the state court may deny, or the arbitral tribunal accept, its jurisdiction.

The waiver of the jurisdiction of the state courts to grant interim measures must be done in writing to meet the prerequisite of Art. 358 CCP. Additionally, it should be explicitly stated in the arbitration clause that only arbitral tribunals may grant interim measures. By doing so disputes on whether or not the waiver of state courts encompasses also the exclusive jurisdiction of the arbitral tribunal to grant interim measures might be avoided. However, if there is no explicit reference, and the true intention of the parties cannot

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\(^{48}\) ATF 138 III 29, p. 36, consideration 2.2.3 and the concept of *utility*; Pfisterer/Schnyder, *supra* note 38, p. 24.

\(^{49}\) See ATF 4A_178/2014 of 11 June 2014, consideration 3.2., regarding the German cyclist Sinkewitz.


\(^{51}\) Inoperative or incapable of being performed but not null and void, e.g. Art. II 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

\(^{52}\) See ATF 2C_513/2012 of 11 December 2012, consideration 3.1; ATF 120 Ia 171. p. 174, consideration 2a; see also Besson, *supra* note 46, p. 406.

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be established by other means, the arbitration clause must be interpreted according to the principle of good faith. The consent to an arbitration clause referring to a set of applicable arbitration rules might indicate such a waiver if the rules exclude not only the jurisdiction of state courts but state the exclusive jurisdiction of the arbitral tribunal for interim measures.

Arbitrability of International Labour Disputes

Arbitrability of international disputes is governed by Art. 177 (1) PILS: “Any dispute of financial interest may be the subject of arbitration.” The criterion of economic interest was chosen by the Swiss legislator to open the access to international arbitration in Switzerland. It is broadly interpreted (e.g. claims relating issuance of a work certificate) and ensures arbitrability of most labour law claims. Contrary the respective provision regarding Swiss domestic disputes, it is not decisive whether the parties may freely dispose of their claims. A claim is arbitrable, if it is of financial value for the parties. Art. 177 PILS is a substantive law provision (lex arbitri), not a conflict-of-law provision. Foreign labour laws, be it of mandatory or non-mandatory nature, are not applicable and will not be taken into account unless the Swiss international public policy is affected. Public policy is interpreted very narrowly and its violations are only reluctantly admitted by the ATF. The 12th Chapter of PILS on Arbitration might be revised in the next years as the revision of the

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54 ATF 140 III 134, consideration 3.2; the concept of tatsächlicher Wille and Vertrauensprinzip.
57 According to ATF the so called “international” or “universal” public policy has to be applied from a Swiss perspective; see also Mabillard/Briner, supra note 56, N 18b.
58 ATF 4A 388/2012 of 18 March 2013; see also ATF 4A_320/2009 of 2 June 2010 (the first ATF decision regarding the football player Matuzalem) and the landmark decision regarding substantive ordre public violation ATF 138 III 322 (the second ATF decision regarding the football player Matuzalem), concerning the breach of the employment contract by the athlete vs. his former club and employer FC Shakhtar Donetsk; see also Berger/Kellerhals, supra note 9, N 257.
59 Pfisterer/Schnyder, supra note 38, pp. 137 et seqq.
PILS has just started. However, the wide scope of the criterion of arbitrability – a success – will rather not be changed.

**Arbitrability of Domestic Labour Disputes**

Arbitrability of domestic disputes is governed by Art. 354 CCP: “Any claim over which the parties may freely dispose may be the object of an arbitration agreement”. This provision also governs the arbitrability of labour law claims as no specific labour law provision on arbitrability has been enacted. To start with: Labour law claims are generally considered as arbitrable under Swiss law. However, this general arbitrability may be subjected to limitations, as according to the Swiss legislator, “freely dispose” has to be interpreted in view of substantive law (*lex causae*). According to former case law on the Art. 5 of the abrogated Concordat, which also included the criterion of “freely dispose”, Art. 341 CO has to be applied in order to assess arbitrability of labour claims. This provision specifies that the employee may not waive claims arising from mandatory provisions for the period of the employment relationship and for one month after its end. Therefore, according to this case law, claims arising from mandatory labour law provisions cannot be waived, thus, are not freely disposable, thus not arbitrable – for the aforesaid period. Subsequent arbitration agreements are however admissible. Whether or not this case law is also applicable under Art. 354 CCP was recently left open by the ATF.

Be it as it may, this former case law has been criticised by leading doctrine and, indeed, cannot be supported. First, under the scope of the Art. 341 CO state court settlements of even mandatory claims have been considered as admissible by the ATF, thus may be deemed as freely disposable. Second,

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62 ATF 136 III 467, consideration 4.

63 ATF 4A_398/2013 of 10 January 2014, the claim has apparently been brought with the ICC Court of Arbitration after the termination of the contract.

64 ATF 4A_515/2012 of 17 April 2013; not addressed in ATF 4A_398/2013 of 10 January 2014.

as not all labour claims are declared mandatory by the CO, only some of the claims may be declared as not arbitrable. Thus, a split of legal actions may loom (parallel arbitral and state court proceedings) – this legal uncertainty is unsustainable\textsuperscript{66}. Third, unduly restricting arbitrability is in breach of the Swiss esprit considering arbitration a legitimate alternative to state courts and respecting the autonomy of the parties\textsuperscript{67}.

**Conclusion**

Mediation has been regulated – or “outlined” – for the first time only recently. The legislator has deliberately chosen to cautiously proceed when enacting Arts 213 et seqq. CCP, as both the informal mediation and the state conciliation have been effective tools for dispute resolution. The latter providing certain discretion to the judge and the former leaving the resolution of the dispute to the sole discretion of the parties. Hence, the legislator decided to cede the Mediation to a far extent to the autonomy of the parties. An advantage of Mediation consists in the right of the parties to request the judge to approve the agreement, which thereupon holds the same effect as a legally binding decision. This counters threats of commencing entirely new proceedings, if a settlement is not upheld. However, in labour law disputes, Mediation might be not a true alternative to state proceedings, notably to the conciliation, due to the lack of legal aid. Whether or not the legislator will revise the articles on Mediation remains to be seen. The envisaged UN Convention on the Recognition and Enforcement of Mediated Settlement Agreements, which was recently proposed and discussed at the 47th Session of the United Nations Commission on International Trade Law, may serve as a reference in discussions on the Mediation.

Collective employment disputes are solved by arbitration, notably if only the social partners, i.e. the contracting parties (associations or employers), are involved. Whether a CEC arbitration clause directly binds the participating parties (the individual employment contract) is controversial. Be it as it may, the contract can still submit the participating parties to arbitration by an explicit, in some cases a global, reference to the CEC arbitration clause. Labour law claims are generally arbitrable under Swiss laws. This is true to a far extent in international disputes, as the decisive *lex arbitri* criterion of “financial inter-

\textsuperscript{66} See ATF 140 III 134 consideration 3.3.4.

\textsuperscript{67} See *supra Excursus*.
est” enables arbitrability of most labour law claims. Unfortunately, in domestic disputes, the scope of the criterion of “freely dispose” remains uncertain. However, it is doubtful that the former case law regarding the criterion of “freely dispose” and Art. 341 CO will be upheld under the new provision of Art. 354 CCP. The validity of the former interpretation has been explicitly left open in a recent ATF decision. It has also been categorically dismissed by the aforementioned leading doctrine – with good reasons, for it contravenes Swiss arbitration principles.

**Abstract**

The article presents matters of contemporary Labour Law and Alternative Dispute Resolution (ADR) in Switzerland, regulated – or “outlined” – for the first time only recently. Amongst main things the study refers to such matters as: arbitration and collective employment contracts, mediation, and arbitrability of international and domestic labour disputes. These are presented thoroughly and compared with conclusions, and future options.

**Keywords**: Switzerland, Labour Law, arbitration, mediation, Alternative Dispute Resolution (ADR), collective employment contracts, Labour Law claims

**Słowa kluczowe**: Szwajcaria, Prawo Pracy, arbitrażu, mediacje, alternatywne metody rozwiązywania sporów (ADR), zbiorowe umowy o pracę, roszczenia Prawo Pracy