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 Peter Nobel, Katrin Krehan and
 Philipp von Ins (Eds.)

Law and Economics of International Arbitration

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This volume contains the contributions of renowned scholars and practitioners in the field of international arbitration, e.g., Peter Nobel (Switzerland), Richard A. Posner (USA), Henry Peter (Switzerland), Kenneth L. Andrichik (USA), Markus Wirth (Switzerland), André Antunes Soares de Camargo (Brazil), Marco Franchetti (Switzerland), Stephan Netzele (Switzerland), Christian Kirchner (Germany) and Roger Zäch (Switzerland).

Law and Economics of International Arbitration



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Arbitration between banks and clients: Could FINRA be a model?

Marco Franchetti / Philipp von Ins

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I. Introduction

Dispute resolution is a very difficult thing. In the post Lehman Brothers time, it became obvious that there should be a fast and efficient dispute resolution mechanism for retail banking and finance matters. Up to this point, there was no real institutional dispute resolution available in a legal sense. In 1993, the institution of the Banking Ombudsman was established in Switzerland, offering an independent mediator whose services are free of charge. The Ombudsman deals with specific complaints that are raised against banks based in Switzerland¹. The office of the Swiss Banking Ombudsman is supported by the Swiss Banking Ombudsman Foundation, which is established by the Swiss Banking Association. The Board of the Foundation is composed of independent public personalities who together appoint the Ombudsman. Its current president is Annemarie Huber-Hotz, who previously acted as Chancellor of the Swiss Confederation². The Banking Ombudsman is not authorized to render legally binding decisions. He acts only, but importantly, as a mediator. As part of his duties, the Ombudsman also has the task of informing the parties, in an adequate and understandable way, about all the relevant aspects of a given dispute. Many disputes can be resolved by providing adequate and correct information to the parties; this is an especially important task in that customers can (and do) lose the overview of the very complex instruments they are dealing with.

In Switzerland, the state court dispute resolution (SDR) is the only legally binding dispute resolution mechanism available for low-net-worth claims. Unfortunately, the costs of filing a claim under the SDR are often higher than the value of the claim itself, and if the case is lost, there is a good chance that the loser will also have to pay the counterparty's attorney fees. Of course there are arbitration dispute resolution mechanisms like the one of the Swiss Chamber of Commerce under the Swiss Rules. But, these are for small claims, which often arise in connection with disputes between consumers.

The following article will provide an overview of the existing possibilities for dispute resolution and compare the SDR and alternative dispute resolution (ADR) solutions available in Switzerland. It will also examine and compare the dispute resolution mechanisms implemented in the United States by

¹ Portrait of the Banking Ombudsman, to be found on: <http://www.bankingombudsman.ch/en/office-of-the-ombudsman>.

² Portrait of the Banking Ombudsman, to be found on: <http://www.bankingombudsman.ch/en/office-of-the-ombudsman>.

FINRA Inc.³; and, finally, it will draw a conclusion as to whether the FINRA approach could serve as a model for ADR in Switzerland.

II. Main expectations of the customer for alternative dispute resolution

If we focus on possible consumer arbitration cases submitted to the Banking Ombudsman, or better said arbitration between banks and clients, we mainly talk about low-net-worth value cases of up to a value of 100'000 Swiss Francs. You may consider that such cases are not worth filing a claim for. With regard to risk, time and cost generated by filing such a claim, this may be true. But, there is frequently another dimension behind these cases. Often, they involve low profile investors, who have invested part of their savings or of their pension capital. If they lose that capital and do not have access to jurisdiction for whatever reason (perhaps a cost issue⁴, a time issue or lack of knowledge), the loss can have an enormous social impact.

The average low profile investor in Switzerland would like to have access to a dispute resolution mechanism that is characterized by the following aspects:

A. Information

We are living in a world of steady progress, which extends to the banking sector as well. It is not only true that life has become more hectic but also that everything has become more complex. This applies to financial products as well. Today's products are called bonds, EFT⁵, futures, forward contracts, backward contracts, etc. The complexity of these products has reached a level at which the customer can no longer oversee the risk adequately. Information about their risk exposure as well as information about possible dispute settlement mechanisms within reach, including all the implications that are linked to the dispute, may be of great help for the consumer.

Sad but true, a considerable part of the customers have a very limited understanding of the products they buy, or have bought, from financial

³ FINRA is dedicated to investor protection and market integrity through effective and efficient regulation of the securities industry. FINRA is not part of the government. FINRA is an independent, not-for-profit organization authorized by Congress to protect America's investors by making sure the securities industry operates fairly and honestly.

⁴ For a further explanation of the cost issue, please refer to: 2. E. And XIII. B.

⁵ Exchange-traded fund (ETF) (in German: börsengehandelter Fonds) is a fund that is traded on the stock market. ETFs are usually passively managed and not managed by the emitting entity. They are not sold on the stock market and are traded on a secondary market.

institutions. Not only are complex products difficult to understand, but there are also a lot of questions arising out of common transactions such as credit card contracts and mortgage contracts. Thus, the primary task of the Ombudsman is to inform customers, in an adequate and understandable manner, about all the relevant aspects to the dispute. Clear information from a neutral party can resolve many problems and thus curtail the need to file a claim.

B. Amicable settlement and/or binding decision

It is often the case that both parties involved in a dispute do not wish to cross swords in court. A fast and satisfactory solution is usually preferred. For the bank, a dispute frequently leads to reputational damage; for the customer, it leads to the investment of a lot of money to file and pursue a claim with an unknown result. A procedure such as alternative dispute resolution (mediation/arbitration/conciliation) would fulfill the need for a fast and clear settlement of the case. In the end, it is necessary to find a satisfactory solution in the form of a binding agreement or a binding and enforceable award.

C. The importance of procuring a quick decision

Time is in fact money and a decision maker itself. If a customer is not able to meet his commitments because of a long ongoing proceeding, he may face the risk of bankruptcy. Looking back a few years, to the time of the Lehman crisis, there were a lot of people who lost almost all of their net assets; all they were left with was a handful of worthless papers. The procedure in which they claimed for compensation went on over years; in the meantime, many of them were not able to fulfill their commitments as a result of which they were caused to go into bankruptcy. It is important that a dispute is resolved within an adequate time frame; a long-running process can be disadvantageous for the affected party and can affect other commitments. It is common sense that the outcome of a proceeding should not be determined by its duration; however, this is unfortunately what frequently occurs.

D. Lowering the burden of proof for clients / discovery

There is a proverb in Switzerland that describes the problematic around the burden of proof in a good way. “Recht haben und Recht bekommen ist nicht das Gleiche” (possessing a right and getting one’s right are not the same.)”

The Swiss Civil Code states: “Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that.”⁶ But this is easier said than done. In many situations, there is a huge information asymmetry between the parties. And, this asymmetry often plays in favor of the bank. The customer does not know the content of the bank records and has no possibility to access the content of the records.⁷ Regarding the banking sector in Switzerland, there is no exchange agreement for the exchange of documents and evidence. Thus, there is no obligation on the part of the bank, and it cannot be forced to hand out any evidence to the counterparty.

The burden of proof rule is an eminent dogma in any country with a civil law tradition and represents a high hurdle for the customer to underline his claim.

In the cases in which the law does not provide for an exception in favor of the client, the abovementioned asymmetry should be taken into consideration. Otherwise, federal guidelines for a discovery procedure that both parties have to comply with should be setup. Another possibility would be to establish an obligation for the banking sector to keep an accurate record of customer relations and to disclose all the facts listed in the record. A fourth suggestion could be to adjust the level of proof the claiming party has to fulfill.

E. Costs should be kept low

Last but not least are the costs of the proceeding. The duty to pay these costs upfront can prevent a consumer from filing a claim, which results “de facto” in a loss of his rights. In a modern society, no one should be prevented from being able to demand his right. Of course, there is a provision of “Legal Aid” in the Swiss Civil Procedure Code; but, entitlement is subject to conditions:

A person is entitled to legal aid if:

- a. he or she does not have sufficient financial resources; and*
- b. his or her case does not seem devoid of any chances of success⁸.*

The criteria of lack of financial resources is fulfilled when the claimant has no assets and has to cover the expenses to conduct the trial with money designated to cover basic needs⁹. Moreover the person that requests legal aid

⁶ Art. 8 of the Swiss Civil Code (CC), SR 210, as of December 1907.

⁷ For a further explanation of the problem, see FCJ 4A_455/2012; and EMMENEGGER/THÉVENOZ, Schweizerischen Bankenprivatrecht 2012-2013, SZW 4/2013, p 328.

⁸ Art 117 of the Civil Procedure Code (CPC), SR 272 as of 19. December 2008.

⁹ SUTTER-SOMM/HASENBÖHLER/LEUENBERGER, Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), Art. 117, N 4 ff; see also BGE 124 I 1, E 2a.

has to pay back the costs of the procedure if he loses the trial. So, it can easily be seen that legal aid is not an instrument that solves the problem of customers having insufficient funds. A low-cost procedure, in whatever form, would be especially helpful for low net-worth-cases. 55%¹⁰ of the cases concern claims of less than 10'000 CHF and 77% lower than 50'000 CHF.

III. What is currently available in Switzerland?

A. The Swiss Banking Ombudsman

In the late summer of 1991, a working group of the Swiss Bankers Association (also called Swiss Banking) came together to discuss whether the introduction of a Swiss Banking Ombudsman (an institution mostly known in the public sector) would be worthwhile.

The working group came to the conclusion that the institution of a Banking Ombudsman, analogous to the one already existing in the insurance sector, would achieve a great deal. Therefore, the General Assembly of the Swiss Banking Association agreed to alter the statutes of the association to allow for the creation of a new foundation that conducts the duties of the Banking Ombudsman¹¹. The General Assembly of the Banking Association explained that the concept of the Ombudsman should be tailor made, so that the customers can address their needs, concerns and conflicting opinions to a neutral and independent organization.

Neutrality and independence were always the main focus of the discussion. The working group was convinced that these characteristics are the key to gaining the public trust.

The Swiss Banking Ombudsman is the only institutional ADR instance in Switzerland; he or she deals with specific complaints raised against banks based in Switzerland. The primary objective of the Banking Ombudsman is to settle disputes between banks and clients. Thus, parties may bring their dispute to an Ombudsman instead of filing a claim at the court.

¹⁰ See Annual Report of the Banking Ombudsman 2013, to be published in July 2014.

¹¹ Press conference of September 8th 1992: §3 lit. g: „durch die Schaffung eines neutralen, unabhängigen Ombudsmann, der den Kunden der Mitgliedinstitutionen als Informations- und BVermittlungsstelle ohne Rechtsprechungskompetenz dient.“

B. Arbitration at the Swiss Chamber of Commerce

The Swiss Chamber of Commerce provides an arbitration forum. In contrast to the ad-hoc arbitration, the forum is an institutionalized arbitration forum with a standing secretary domiciled in Basel. The forum is intended to provide international arbitration as well as domestic arbitration.

C. State courts

The more traditional and ordinary way for parties to settle a dispute is to file a claim in a state court. Although this is the more conventional and common way to settle a dispute, there are some problems associated with it, which indicate that it's not always the best way to resolve a dispute. This point will be elucidated on the next pages.

IV. The Banking Ombudsman: The reason for the institution

The Banking Ombudsman was founded in 1992 and became operational in 1993. Opinion polls at the time showed that banks as a whole appeared too powerful and inapproachable for customers. There was not only the might of the banking sector but also the helplessness of the customer. The banking sector became more and more complex. The products they sold did not hold the promises they made. And for the average bank client, it became almost impossible to understand the complex products purchased.

Thus, besides the mediation function of the Banking Ombudsman, the function of providing information came into view. Many disputes could only be resolved by providing the customer with adequate information. This was interpreted as fulfilling a need for banking clients to be able to address their questions and complaints to an independent authority. The crucial thing is, and was, the independence of the institution. Thus, it is essential that the Banking Ombudsman is not seen as a dispute resolution body of the banking lobby.

To cope with this, a working group – set up by the Swiss Bankers Association – proposed the establishment of a mediation office, which was then approved by the general assembly of the Swiss Bankers Association in 1992. Hence, the independent and neutral institution of a Banking Ombudsman was established. The Banking Ombudsman's duty is to provide information and conciliation to

both financial entities and customers. The Ombudsman currently takes care of approximately 1800-2200 cases per year.

In addition to the above described functions, the Ombudsman runs a central claims office for dormant assets. Persons suspecting that there are assets in an unknown bank in Switzerland that they are entitled to can ask the Central Claims Office of the Swiss Banking Ombudsman to consult the databank regarding all dormant customer relationships (savings books; accounts, including numbered and pseudonym accounts; custody accounts; safe-deposit boxes) with Swiss banks in accordance with the relevant guidelines issued by the Swiss Bankers Association.

V. The institution Swiss Banking Ombudsman

A. Organization of the Banking Ombudsman

1. Election of the Board

The Swiss Bankers Association Foundation is subject to the Swiss Civil Code, Article 80 et seq. The board members are independent personalities consisting mainly of people independent of the banking industry and coming in particular from the worlds of science, law and consumer protection.¹²

The Swiss Banking Ombudsman Foundation is also organized in accordance with the Swiss Civil Code provisions regarding the creation of a foundation¹³ and subject to federal supervision (Federal Department of Home Affairs FDHA). When a foundation is established, endowed assets are separated from the donor and addressed to fulfill a certain purpose (in this case, the above described purpose). This two stage structure gives the Banking Ombudsman the needed independence towards the banking industry.

2. Election of the Banking Ombudsman

The board elects the Banking Ombudsman, who maintains his office for a period of five years. This rather long period of office is set in order to ensure the independence of the Banking Ombudsman's decision making.

¹² Article 7 of the Foundation Chart of the Swiss Banking Ombudsman.

¹³ Foundation in the sense of art. 80 ff CC; "A foundation is established by the endowment of assets for a particular purpose."

3. Competency and responsibility of Board and Ombudsman

The Foundation Board Appoints the Ombudsman for a 5 year term. It issues rules of procedure for the Ombudsman's office and passes any resolutions required to determine the scope of the Ombudsman's duties and competence. All rules and amendments thereto must be approved by the regulator. The Board also approves the fee schedule.

The Ombudsman runs his office independently. He has the final word in all matters of advocacy, rulings and proposed solutions. The Ombudsman's decisions are not subject to review by the Foundation Board.

4. Financing of the Banking Ombudsman

The expenses of the banking Ombudsman are covered by the assets donated to the foundation of the Ombudsman by the Swiss Banking Association. The Swiss Banking Association covers the expenses of the banking Ombudsman on the basis of an annually drawn up budget. The money is collected from the member banks of the Swiss Bankers Association; 97% of the Swiss banks are members.

B. Independence and neutrality

Independence is not only of importance for an attorney; in any instance involving advising instructing or mediating in a dispute settlement, both independence and neutrality are vitally important for all participants. (This is why the legal form of the foundation has been chosen.) Pursuant to the Swiss definition, the foundation is a legally independent and personified special type of asset with its own legal personality and predefined purpose¹⁴. The Banking Ombudsman foundation is a functional foundation¹⁵, which means that the supply with capital is not limited in the endowment act; moreover, the founding members inject capital every year (according to the budget) in order to run the foundation. The described structure gives the Ombudsman the appropriate level of independence. In this way, the Banking Ombudsman corresponds with art. 3 of the founding charter.¹⁶

¹⁴ GRÜNIGER HAROLD, BSK-ZGB 1, Art 80, N 1 ff.

¹⁵ GRÜNIGER HAROLD, BSK-ZGB 1, Art 80, N 3 ff.

¹⁶ Art. 3 of the founding charter of the Swiss Banking Ombudsman: „The purpose of the Foundation is to provide bank customers with an Ombudsman, a neutral and independent source of information and intermediary that does not issue binding legal judgments. The Ombudsman acts throughout Switzerland.”

C. Independence according to the European standards

On 30th March 1998, the European Commission issued a Recommendation¹⁷ on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. A new Directive was issued on 21st May 2013¹⁸ with the goal of achieving a legal implementation of the standards for ADR in consumer disputes by the 9th July 2015. This Directive elaborates much more detailed requirements and contains clear guidelines regarding the establishment of an ADR; it also designates the minimum requirements needed for an ADR institution to be independent and to issue binding awards. Another important aim of the 2013 Directive is to the establishment of an online platform to inform the customers about the possibilities of ADR.

1. The Recommendations in general

The experience gained by several Member States shows that alternative mechanisms for the out-of-court settlement of consumer disputes - provided certain essential principles are respected - have had good results, both for consumers and firms, by reducing the cost of settling consumer disputes and the duration of the procedure. Thus, the decision-making body's impartiality and objectivity are essential for safeguarding the protection of consumer rights and for strengthening consumer confidence in alternative mechanisms for resolving consumer disputes. A body can only be impartial if, in exercising its functions, it is not subject to pressures that might sway its decision; therefore, its independence must be guaranteed without implying the need for guarantees that are as strict as those designed to ensure the independence of judges in the judicial system. When a decision is taken by an individual, the decision-maker's impartiality can only be assured if he can demonstrate that he possesses the necessary independence and qualifications and that he works in an environment that allows him to decide on an autonomous basis. This requires the person to be granted a mandate of sufficient duration, in the course of which he cannot be relieved of his duties without just cause.

In accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right that knows no exceptions. Since Community Law guarantees the free movement of goods and services in the

¹⁷ 98/257/EC: Commission Recommendations of 30. March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

¹⁸ 2013/11/EU: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

common market, it is a corollary of those freedoms that operators, including consumers, must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State. Out-of-court procedures cannot be designed to replace court procedures; therefore, the use of the out-of-court alternative may not prevent the parties from exercising their right of access to the judicial system¹⁹.

One can see that the main concerns of the Recommendation are independence and the transparency; these are elaborated upon below:

2. Principle of independence

The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions.

When a decision is taken by an individual, this independence is particularly guaranteed by the following measures:

- the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function;
- the person appointed is granted a period of office of sufficient duration to ensure the independence of his action and shall not be relieved of his duties without just cause; and
- if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned.

When a decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be supported by giving equal representation to consumers and professionals or by complying with the criteria set out above²⁰.

In the new directive 2013/11/EU the criteria for independence, expertise and impartiality are described as follows: Member States shall ensure that the

¹⁹ 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, p 3 et seq. and article 1 of the Directive 2013/11/EU.

²⁰ 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, p. 3 et seq.

natural persons in charge of ADR possess the necessary expertise and are independent and impartial. This shall be guaranteed by ensuring that such persons:

- (a) possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of law;
- (b) are appointed for a term of office of sufficient duration to ensure the independence of their actions, and are not liable to be relieved from their duties without just cause;
- (c) are not subject to any instructions from either party or their representatives;
- (d) are remunerated in a way that is not linked to the outcome of the procedure;
- (e) without undue delay disclose to the ADR entity any circumstances that may, or may be seen to, affect their independence and impartiality or give rise to a conflict of interest with either party to the dispute they are asked to resolve. The obligation to disclose such circumstances shall be a continuing obligation throughout the ADR procedure. It shall not apply where the ADR entity comprises only one natural person²¹.

Thus, the manner of funding is not a criteria for independence, provided the organization has a separate and secure budget, which is sufficient to fulfill their task. It is even possible, according to the directive, that a mediator is designed or remunerated exclusively by a party to the litigation²². However, this should be an exception and the additional requirements for independence stated in article 6.3 of the directive should be met in any case. It should be stressed here that the Swiss Banking Ombudsman is neither appointed nor remunerated by the industry. The necessary budget is decided every year by the Ombudsman Foundation. Based on that decision, the Swiss Bankers Association collects the necessary amount from among its members. Neither the board of the Banking Ombudsman Foundation nor the Ombudsman himself knows about individual contributions.

²¹ Article 6 of the directive.

²² Article 2a of the directive.

VI. Governing rules

A. The Banking Ombudsman does not issue binding legal judgments

According to art. 3 of the Founding Charter of the Swiss Banking Ombudsman, the Banking Ombudsman intermediates and informs, but he does not issue binding legal judgments²³. Here, it must be recalled that the Banking Ombudsman was established according to a private initiative; although, the Banking Ombudsman is subject to state supervision by the Swiss Department of Home Affairs. The Ombudsman has no legal force, but it is a recognized institution for ADR in Switzerland. Moreover, the Ombudsman is quite successful.

B. Evidence

Under the Swiss principle of Banking Secrecy, privacy is statutorily enforced, with Swiss law strictly limiting any information shared with third parties, including tax authorities, foreign governments or even Swiss authorities, except when requested by a Swiss judge's subpoena. However, banking is not strictly anonymous since Swiss banking law requires all Swiss bank accounts, including numbered bank accounts, to be linked to an identified individual. This same law only permits a bank to share information with others in cases of severe criminal acts, such as identifying a terrorist's bank account or tax fraud, but not for simple non-reporting of taxable income²⁴. Strict compliance with the principle of the Banking Secrecy sometimes makes it difficult to exchange documents with a bank because Banking Secrecy has to be respected. The bank could be sued for an illegal exchange of documents. In order to supply the Banking Ombudsman with the necessary documentation, the customer has to sign a relinquishment of Banking Secrecy (art. 40 para. 4 SBA²⁵) so that the bank can share the documentation and information about the customer's account as well as the transaction related to the claim²⁶. The Banking

²³ Art. 3 of the founding charter of the Swiss Banking Ombudsman: „The purpose of the Foundation is to provide bank customers with an Ombudsman, a neutral and independent source of information”.

²⁴ GLASER THOMASONE, *Amtshilfe und Bankgeheimnis; Insbesondere im Bereich der Banken-, und Anlagefonds- und Börsenaufsicht Zürich* 1997, p 97.

²⁵ Swiss Bank Act, of 8. November 1934, SR 952.0.

²⁶ See art. 3 para. 2, Powers and duties of the Ombudsman, Conflict of Interest Rules for the Ombudsman's Office (Code of Conduct), found on: <http://www.bankenombudsman.ch/wp-content/uploads/2013/07/Verhaltenskodex-EN.pdf>.

Ombudsman is then entitled to gather information from the bank and to look into the bank's records. Nevertheless, the Ombudsman is also thereby obliged to keep the information secret²⁷. In common law countries, there is a trial discovery procedure that is well known. There is no corresponding procedure in Switzerland. We will come back to this topic later on.

C. Acting as a mediator

Besides informing and advising the customers, one of the main tasks of the Banking Ombudsman is to help settle a dispute by mediating between the parties²⁸. Most of the cases that are submitted to the Banking Ombudsman can be solved by merely providing the parties with accurate information. The remaining cases are resolved by a carefully conducted mediation. As long as the Banking Ombudsman has no power to issue legal judgments, mediation is the most successful way to settle a case without filing a claim with the state court.

VII. Goals of mediation

A. Avoiding lengthy and costly litigation

The main goal of the mediation conducted by the Banking Ombudsman is to avoid lengthy and costly proceedings in front of the state courts. As already mentioned²⁹, state court litigation is quite costly and the claimant has to pay the proceeding costs upfront³⁰. As there can be several instances (depending on the claims value, two to three³¹), a state court proceeding can be quite lengthy.

In contrast, and indicative of how efficient a proceeding with the Banking Ombudsman can be, statistics show that the Banking Ombudsman was able to

²⁷ See art. 10 (Duty of discretion and confidentiality), Conflict of Interest Rules for the Ombudsman's Office (Code of Conduct), to found on: <http://www.bankenombudsman.ch/wp-content/uploads/2013/07/Verhaltenskodex-EN.pdf>.

²⁸ See art. 3 para. 1, Powers and duties of the Ombudsman, Conflict of Interest Rules for the Ombudsman's Office (Code of Conduct), to found on: <http://www.bankenombudsman.ch/wp-content/uploads/2013/07/Verhaltenskodex-EN.pdf>, last visit 30.10.2013.

²⁹ Hereto refer to XIII. C.

³⁰ See also BERGER/KELLERHALS, § 3, N 149 ff.

³¹ Art. 74 para. 1 Code of the federal tribunal (FTA), SR 173.110, as of 17 of Jul. 1995: Access to the tribunal is granted for claims with a value above 30'000 CHF.

solve most of the disputes filed in 2012 (96%) in less than six months³². With the idea of entering into mediation instead of filing a claim with the state court, lengthy proceedings can be avoided in many cases.

B. Restoring the customer's confidence

One of the main tasks of the Banking Ombudsman, from our point of view, is to serve as a link between the finance industry and the customer. In the public perception, the banking sector is well organized and has endless legal powers. When customers start to feel powerless in relation to the banking industry, trust begins to fade. It is at this point that the important function of the Banking Ombudsman kicks in by creating a link to the industry: Bringing the (upset) customer and the financial entity to a round table, the Ombudsman makes it possible for them to negotiate at arm's length and to find a solution, thereby restoring trust and confidence in the financial industry.

VIII. Limits of the Ombudssystem

Due to the requirements of neutrality and independence, the Banking Ombudsman is not able to influence banking policy. A customer can file a complaint about legal issues but not about policy issues. Thus, clients cannot approach the Banking Ombudsman with complaints regarding credit evaluation decisions, termination of customer relationships³³ or the magnitude of individual commissions and fees. Providing answers to abstract business and/or legal questions is also not permitted, or better said not within the scope of the Ombudsman's work³⁴. Any claim that is filed with the Ombudsman has to have a direct link to a particular case. As explained, the Banking Ombudsman is a dispute settlement body without the power to issue a binding decision. He is not a counselor for either the customer or the bank; his main focus is the fair treatment of customers.

Actually, the lack of power to issue a final and binding decision is also an advantage. Moreover, the rules for conducting the mediation process are not as

³² Annual Report of the Banking Ombudsman, page 17, found at: <http://www.bankenombudsman.ch/wp-content/uploads/2013/06/Jahresbericht_2012_DE.pdf>, last visit 30.10.2013.

³³ In connection with the dispute about the US-Tax-Program, some banks tended to terminate the customer relation in order to get rid of the risk of coming within the scope of an IRS investigation. These were cases where the Banking Ombudsman stepped in because the bank was not acting in accordance with the principle of good faith.

³⁴ See Article 2.2 of the Rules of Procedure for the Swiss Banking Ombudsman.

strict as those applied in a court proceeding. These factors give the Ombudsman greater independence and freedom to find a creative solution with the parties in the mediation process.

IX. Arbitration at the Swiss Chamber of Commerce

A. Procedure

Arbitrations conducted at the Swiss Chamber of Commerce are conducted according to the Swiss Rules which, generally speaking, involve two procedures: There is a normal procedure and a fast track procedure. The fast track procedure is designed for cases with lower values at stake, including a shorter procedure and a minimized procedure of taking evidence. The normal procedure is for cases with high values at stake and involves extensive (evidentiary) discovery procedures.

The Swiss Rules, which are formalized, provide for a procedure that fits to all sorts of claims. This procedure is quite flexible; it is not customized for the banking sector as is the case with the FINRA procedure. In contrast to the FINRA rules, the Swiss Rules do not contain specific rules on taking evidence in the (very sensitive) field of banking and finance. Instead, the exchange of documents is based on the commitment of the parties. If the parties do not comply with a request for the exchange information and documents, the arbitration tribunal has to rely on the state court judge (called “juge, d’appuis”³⁵).

B. Dimension of the procedure

The rules require a formalized procedure for all kinds of claims. The forum and the respective structure that is provided by the Swiss Chamber of Commerce is not a low cost procedure as such. It is designed for high value claims of an international dimension. (This is illustrated by a sample calculation on the following page.)

³⁵ BERGER/KELLERHALS, § 19, N 1154 ff.

C. Adequacy for low net worth value cases

Due to this formalism, there is no real advantage compared to the state court. The average turnover time of a Swiss Rule case is between 12-18 months. Such a time window is far too large for consumer arbitration in low net worth cases. On the other hand, the fact that an award is final and binding (as there is usually no second instance of appeal)³⁶ in proceedings under the Swiss Rules can be advantageous.

D. Cost example for a case conducted under the Swiss Rules

4'500 CHF	registration fee (fix, independent from the claim value)
+ 10'000-30'000 CH	arbitrator's fee (depending on complexity)
+~ 5'000 CHF	<u>administrative costs</u>
~ 19'500-35'000 CHF	total costs of the settlement

Turnover time approx. 10-18 month

X. State Court dispute settlement

The state court is the traditional forum for solving a dispute. But, there are some questions as to whether the traditional way is always the best one.

The average amount of time it takes for a claim to be resolved in a Swiss state court is around one year per instance. According to art. 98 CPC, the claimant has to pay anticipated procedural costs upfront. Also, if requested by the counterparty, the claimant has to pay anticipated costs for the representation of the counterparty upfront. This can lead to a situation where a party will refrain from filing a case at the outset based on financial grounds. In fact, this situation was apparent in the post Lehman crisis time. Another problematic factor arises in connection with the complexity of financial products. Although issuers may have a good overview of such products, consumers and state court judges have difficulties with obtaining such an overview and with understanding the complexities of the materials. Thus, a question arises as to whether or not a state court has the technical (as opposed to the judicial) competence to deal with the sometimes extremely technical matters that may arise in these cases.

³⁶ See also art. 190 PILA.

XI. Comparison with the system in the USA: The FINRA approach

A. What is FINRA?

In the United States, the Financial Industry Regulatory Authority, Inc. (FINRA), which is the successor of the National Association of Securities Dealers, Inc. (NASD), is a self-regulatory, non-governmental organization that performs financial regulation of member brokerage firms and exchange markets. It is itself subject to the regulation of the US Securities and Exchange Commission (SEC), the independent government agency which acts as the ultimate regulator of the securities industry (including FINRA).

FINRA is the largest independent regulator for all securities firms doing business in the United States. Its mission is to protect investors by making sure the United States securities industry operates fairly and honestly. All told, FINRA oversees about 4,250 brokerage firms, about 162,155 branch offices and approximately 629,525 registered securities representatives³⁷.

FINRA has approximately 3,400 employees and operates from Washington DC, and New York, NY, with 20 regional offices around the country³⁸.

FINRA offers regulatory oversight over all securities firms that do business with the public; plus those offering professional training, testing, and licensing of registered persons, arbitration and mediation, market regulation (by contract for the New York Stock Exchange, the NASDAQ Stock Market, Inc., the American Stock Exchange LLC, and the International Securities Exchange, LLC); as well as industry utilities, such as Trade Reporting Facilities and other over-the-counter operations.

FINRA was formed by a consolidation of the Member Regulation, Enforcement and Arbitration Operations of the New York Stock Exchange, NYSE Regulation, Inc., and NASD. The merger was approved by the SEC on July 26, 2007³⁹.

³⁷ See: <<http://www.finra.org/Newsroom/NewsReleases/2007/p036329>>; <<http://www.finra.org/Newsroom/Statistics/>>.

³⁸ See: <<http://www.finra.org/AboutFINRA/>>.

³⁹ JOHNSON, CARRIE. "SEC Approves One Watchdog For Brokers Big and Small". The Washington Post. July 27, 2007. Page 2. Retrieved October 21, 2008.

B. About the proceeding

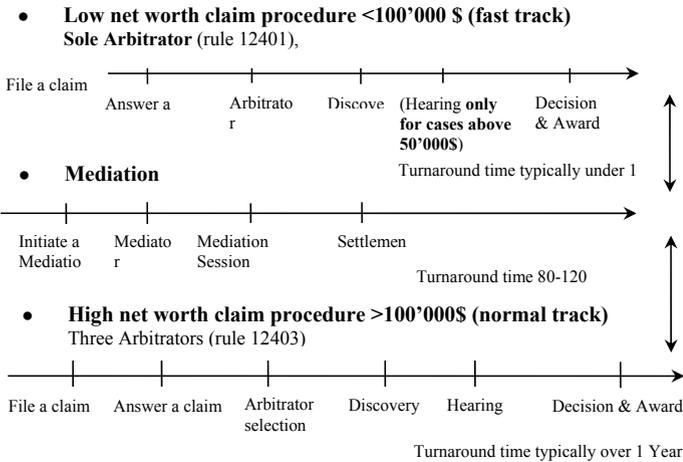
If a client files a claim with the FINRA, the agency opens a case, for which the customer is obliged to pay a proceeding fee⁴⁰; the proceeding fee covers the whole procedure, which means that arbitrator fees are covered by FINRA. This stands in contrast to the Swiss Rule procedure wherein each party has to cover the expenses for the arbitrators, a factor that can result in unpredictable procedural costs. The average turnover time of a FINRA proceeding is about 8-12 months. It is thus a fast, reliable and predictable procedure.

The key to arbitration is the arbitration clause or the arbitration contract. In Switzerland, as in all European, as well as many other countries, access to state court is seen as a basic human right. If a party is willing to waive that fundamental right in order to bring a claim to arbitration, there must be an explicit contract allowing for this.

Domestic dispute resolution arbitration is generally not well known in Switzerland. Broker contracts, for example, do not have arbitration clauses. In contrast, ADR is widely known in the US, with 95% of the broker contracts and the majority of labor contracts containing an arbitration clause opting for a FINRA arbitration or labor arbitration.

⁴⁰ For details about the fee, see: <<http://www.finra.org/ArbitrationAndMediation/Arbitration/Fees/EstimateCost/P124656>>; see also FINRA rule No. 12900.

Overview over a typical FINRA procedure



C. Comparison between Arbitration and Mediation (FINRA Approach)

Arbitration

Adjunction
 Arbitrators control the outcome
 Final and binding decision by the arbitrators
 Extensive discovery is often required
 Arbitrator evaluates the facts and renders an award
 Parties present case, testify under oath
 Process is formal
 Evidentiary hearings; attorneys control party participation
 Decision based on facts, evidence and law
 Results in win/lose award-relationships are often lost

Mediation

Expedited negotiation
 Parties control the outcome
 Settlement only with party approval
 Exchange of information is voluntary
 Mediator helps the parties to define and understand the issues and each sides
 Parties vent feelings, engage in problem solving
 Process is informal
 Joint and private meetings between individual parties and their counsel
 Outcome based on needs of parties
 Result is mutually satisfactory; relations may be maintained

More expensive than mediation,
but less expensive than traditional
litigation

Costs are generally low

Private

Private and very confidential

XII. Current development in Switzerland

A. The Swiss Financial Services Act (FFSA)

The Swiss authorities are considering the promulgation of a new financial act known as the Swiss Financial Services ACT (FFSA), which has the purpose of customer protection.⁴¹

During the financial crisis, it became obvious, that client protection was inadequate for certain financial services and products. The problem extended across all sectors (banking services, insurance services, advisory services, etc.). It also became apparent that the vastly different regulatory levels adversely affected market access, as well as the integrity and competitiveness of Switzerland's financial centre. For reasons of equal treatment and competitive neutrality, situations needed to be avoided whereby similar financial products would be subject to different requirements within Switzerland depending on the financial service provider in question⁴². Factors such as these resulted in the development of various national and supranational initiatives addressing this inadequacy. In Switzerland, the situation has been analyzed by FINMA, which has already proposed a package of measures designed to improve client protection in a distribution report (October 2010); more recently, a position paper was issued, which was based on this report (February 2012)⁴³.

⁴¹ In German FIDLEG, see also the hearing report: <<http://www.sif.admin.ch/dokumentation/00509/00510/00622/00624/00817/index.html?lang=de>>, last visit 31.10.2013; see further, Federal Department of Finance (FDF), State Secretariat for International Financial Matters (SIF), <http://www.sif.admin.ch/dokumentation/00509/00510/00622/00624/00817/index.html?lang=en>, page 6 of the hearing report.

⁴² Page 6 of the hearing report.

⁴³ See also: <http://www.sif.admin.ch/dokumentation/00509/00510/00622/00624/00817/index.html?lang=de>, page 6 of the hearing report.

B. Current status and planned steps

On March 28th, 2012, the Federal Council instructed the Federal Department of Finance, with the assistance of the Federal Office of Justice (within the Federal Department of Justice and Police) and FINMA, to commence work on a project to prepare the legal basis for the new act and to submit a consultation draft to the Federal Council.

The Steering Group for the Federal Financial Services Act project published its hearing report on February 18th, 2013, showing the possible strategic directions of the planned regulatory project.

A draft Bill is expected for consultation in late Spring 2014 and should be submitted to the Parliament at the end of 2014.

C. Revolutionary content in the Hearing Report of a possible FFSA

It is worthwhile to have a closer look at the provisions foreseen in the draft of the FFSA, which contain some innovative key points.

There is no introduction of arbitration in the banking sector inherent in the FFSA. As things stand, the Act would set out cross-sector rules of conduct for all financial service providers and minimum requirements for the training of client advisers and agents in the areas of rules of conduct and expertise. Furthermore, the Act would set out rules for product documentation and possibly prospectus requirements for financial products. Other items that would be covered by the FFSA include the obligation to participate in the system of the Ombudsman whether you are member of Swiss Banking or not and measures to facilitate the enforcement of claims at the civil court level. Finally, the Act would contain provisions on the cross border business of foreign financial service providers in Switzerland. The introduction of the new regulations will also involve an adjustment of existing financial market legislation. In particular, all provisions for which cross-sector regulation is to be developed will be transferred from sector-specific decrees to the new law for all financial industries, which is not the case today.

Strict cross sector regulation (as an example) would include rules of conduct, such as those covered by the corresponding provisions of Article 11 of the Federal Act on Stock Exchanges and Securities Trading (SESTA) and Article 20 of the Collective Investment Schemes Act (CISA). In addition, the introduction of formal prospectus requirements under financial market

legislation would also entail an adjustment to the prospectus guidelines set out in the Swiss Code of Obligations.

Burden of Proof: A huge problem for Switzerland with regard to the practice of trial discovery is the bank customer confidentiality, as well as the confidentiality of customer data itself. For a customer, it is almost impossible to gather the necessary information from the financial entity. A solution that is provided under the FFSA is to reverse the burden of proof.

In Switzerland, the burden of proof lies with the claimant, as designated in art. 8 of the Civil Code. Therein, the claimant is obliged to underline his case with the required evidence to prove his entitlement. The reversal of the burden of proof is rarely seen, but it does exist (statutorily) in some fields, e.g., labor law, under certain circumstances. Such reversal puts the defendant, usually the bank, in an uncomfortable situation as it is suddenly given the arduous task of proving that the entitlements are unfounded.

The banking sector views the reversal of the burden of proof as a violation of the fundamental principle of law. Moreover, the banking sector finds that the obligation to carry the cost of the proceeding is unjustified.

According to the current situation, the costs for the claims have to be carried by the claimant. Another new aspect of the FFSA is the principle that proceeding costs should be carried by the financial institution that faces the claim. This new aspect will probably result in substantial resistance from the industry.

Point 9.2 of the proposal of the Financial Services Act, provides for giving the Ombudsman decisive power. Previous experiences with the Ombudsman system have shown that it has the effect of resolving disputes in many cases, even though the opinion is not binding.

D. Position of Swiss Banking towards Arbitration Tribunal

Discussions took place at Swiss Banking to create a possible Arbitration Tribunal. However, up to now, no decision has been taken in this regard, although some options were discussed.

1. Requirement of Independence

A question arises as to whether the independence of a possible arbitral tribunal would be sufficient under the scope of art. 6 para. 1 European Convention of

Human Rights, and art. 14 of the UN Convention on Civil and Political Rights (UN Treaty). In fact, in order for a tribunal to be able to render a final and binding award, it would not only have to comply with the requirements of the European Convention of Human Rights and the UN Convention on Civil and Political Rights but also with Swiss Federal Constitution. In cases where an institution establishes and operates a tribunal, it is likely to be seen as independent and thus in compliance with these requirements. However, if such compliance were lacking, the award could be appealed to a normal court; the latter would diminish all the benefits of an arbitration tribunal.

2. The founding body

To achieve the required independence, the founding body of the possible tribunal, SwissBanking, would have to establish a foundation, which is the agency that administrates the Forum and sets up the rules under which the arbitration tribunal is run⁴⁴. A similar setup can be seen in the US where the FINRA, a private entity, is running the arbitration forum.

3. Role of the Banking Ombudsman

The Banking Ombudsman is a very valuable instance for dispute settlements in the banking sector. If a dispute is settled by an Ombudsman, the procedure is quicker and less expensive than if it is brought to an arbitration tribunal. Moreover, the SwissBanking idea for an arbitration tribunal does not involve Mediation as such. Thus, having the Ombudsman alongside the arbitration tribunal has its benefits: if instituted, it would offer an efficient (dual) method for the settlement of disputes. The Banking Ombudsman also provides “a first instance,” rather than a “last resort”, to settle the dispute amicably⁴⁵.

4. Professional competence of an arbitration tribunal

There is little question that a state court of first instance is competent for matrimonial law, company law, public law and so on, even where it has to decide on very specific and technical matters. However, this does not carry over to the field of finance; state courts lack a sufficiently broad and in depth knowledge in many facets of the finance field. Indeed, the financial industry can be characterized as uniquely complex in that the full magnitude of certain products cannot be grasped, not even by the issuer. This is where the Banking

⁴⁴ «NZZ am Sonntag» vom 13.10.2013, Seite 35.

⁴⁵ «NZZ am Sonntag» vom 13.10.2013, Seite 36.

Ombudsman and his staff, as professionals, play an important role, providing for a team of lawyers and people from the banking industry that have many years of experience in the field. If there is a similar staff configuration of the arbitration tribunal, an additional advantage of arbitrating a given matter is that the decisional quality of the tribunal may be improved. Another idea of SwissBanking is that there could be a national comprehensive customer care centre for the (whole) banking sector. A nationwide customer care centre could be a first step for centralizing the solving of customer related problems on a national, professional and (to a certain extent) independent level.

The foregoing leads to the following question: What would the picture of an ideal arbitration tribunal for customer disputes look like? The next part of this article will draw an outline.

XIII. Outline of a possible arbitration tribunal

A. How to get from litigation to arbitration

The competence of an arbitration tribunal is based on a valid contract or arbitration clause between the parties⁴⁶. In Swiss Law, the content of the arbitration contract or arbitration clause is not defined⁴⁷. But, the New York Convention⁴⁸ provides an international minimum standard that all arbitration clauses have to comply with in order to be enforceable worldwide:

“Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration⁴⁹.”

Thus, at a minimum, the content (*or the essentialia negotii*) of the arbitration clause includes⁵⁰:

- Denegation of the state court;
- appointment of an arbitration tribunal; and

⁴⁶ BERGER/KELLERHALS, § 5, N 260.

⁴⁷ Chapter 12 of the PILA.

⁴⁸ Convention on the recognition and enforcement of foreign arbitral awards, United Nations conference on international commercial arbitration, as of 1958.

⁴⁹ Art. 2 para. 1 NYC.

⁵⁰ BERGER/KELLERHALS, § 5, N 275 f.

- identification of the claim that should be settled by the tribunal.

Additional items may also be designated, such as the following⁵¹:

- How the arbitrators are appointed;
- where the seat of the tribunal is located; and
- the role of the *juge d'appui* to appoint the tribunal and the arbitrators.

The arbitration clause, or better said the arbitration contract, can be drawn and signed in advance, or it can be part of a contract prior to the dispute. The clause or contract would be equally valid if concluded after a dispute has come up between the parties. The additional agreements, beside the essential parts of the arbitration clause, can be left out if the designated arbitration tribunal is an institutional forum because an institutional tribunal has a set of standard rules that make the predefinition redundant.

In our opinion, the arbitration tribunal should be an opt-in instrument for the customer, but an obligation for the financial entity. Thus, in the end, the customer has the choice of whether to go to either an arbitration tribunal or a state court.

B. Cost effectiveness through professionalism

A tribunal that is composed of industry professionals has a much better knowledge of the financial sector than a regional court that is competent in the first instance.

Due to professionalism and a customized structure for claims, especially those related to consumer-bank disputes, a cost effective way to resolve disputes should be established.

To achieve this, there should be a two track dispute resolution. We will come back to this later on in more detail.

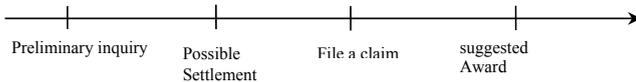
The SwissBanking arbitration forum should be open not only to domestic cases but also to international cases. This would lead to a number of benefits for the banking sector. Finally, the arbitration tribunal should be able to render

⁵¹ BERGER/KELLERHALS, § 5, N 277 ff; see also BGE 129 III 675.

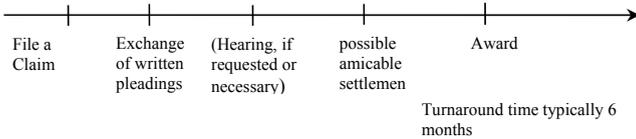
final and binding awards that can be enforced under the New York Convention⁵² worldwide.

C. Possible outline of a procedure for a Swiss Customer Arbitration Tribunal

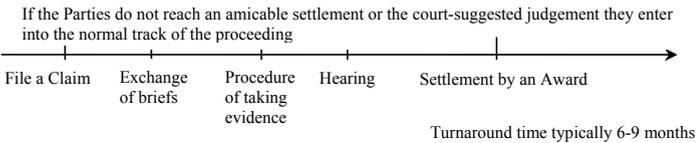
- **Mediation (Swiss Banking Ombudsman):**



- **Fast track (Arbitration, for claims under a certain threshold):**



- **Normal track (Arbitration, for claims above the threshold):**



1. Mediation with the Swiss Banking Ombudsman

As a first step, there should be a dialogue with the bank⁵³. If that dialogue fails (i.e., no solution is found), then the customer should be allowed to file a complaint with the Ombudsman. Based on the information and documents produced by the parties, the Ombudsman mediates between them. If the mediation does not bring a solution, the Ombudsman suggests an award. It is then up to the parties to accept the award or to file with the arbitration tribunal.

The applicable procedure for the arbitration tribunal is determined by the value of the claim.

⁵² Convention on the recognition and enforcement of foreign arbitral awards, United Nations conference on international commercial arbitration, as of 1958.

⁵³ See also Art. 5(4) of the Directive 2013/11/EU.

2. Fast track procedure

The fast track procedure is designed to achieve a quick decision in low net worth cases up to a certain threshold (for example 50'000 CHF). In the fast track procedure, the usual procedural rights should be limited. The exchange of briefs should be restricted to only one exchange in order to not prolong the procedure; this should be followed by a hearing, which again offers the possibility for an amicable settlement. If the case is not settled amicably, a binding award is issued. We can also imagine giving the Arbitrator the power to decide without hearings.

3. Normal track procedure

A normal track procedure can be requested by the parties for cases that are above the threshold of the fast track procedure. The normal track procedure is different in that it offers the possibility of a second exchange of briefs and a procedure for taking evidence. This is provided in order to cover complicated high net worth cases, which may require additional necessary evidence.

D. Advantages for the customer

In order to give even low net worth customers the possibility to exercise their rights, it is important to keep costs low, or even to offer proceedings that are free of charge.

The possibilities of having a quick and clear decision as well as a high profile settlement body are among the key advantages of arbitration.

This institution has a long and ongoing tradition in Swiss law. Its benefit lies in the fact that if a settlement is achieved during mediation, a mutually satisfactory relationship can, in most cases, be maintained.

Execution: The New York Convention, with 149 signatory states, is the most successful international contract ever established. The Convention allows arbitration awards to be enforced worldwide (practically as domestic awards). This renders a far greater advantage when compared to a state court decision.

E. Advantages for the banking sector

With the Lugano Convention⁵⁴, in force since 2011 (and the corresponding contract in the European Union EUGVVO),⁵⁵ customers may file a claim in their home country and to enforce the award in Switzerland. Filing a judicial claim is always expensive: The losing party must carry not only the proceeding costs but also the representation costs of the counter party. Even if a party is successful, not all the representation costs will be covered. In most cases, there would be far less of such costs for the parties if the claim was brought before an institutional arbitration tribunal; moreover, the parties would additionally benefit from having a hearing before persons well versed in specialized financial matters.

F. General problems linked to arbitration

The arbitration clause is generally either integrated in the main contract, or it is an independent contract that can be concluded between the parties when a dispute has arisen. To have access to arbitration, such clause or contract must be signed by both parties. It is a fact that arbitration is not well known in public in Switzerland. Thus, there is a need to provide information to customers so that they will be willing to sign such a clause or contract.

A lack of knowledge about arbitration appears to be a serious problem. To quote a Swiss saying, “people don’t eat what they don’t know”. A lack of knowledge or a general skepticism about the arbitration institution should be dealt with by an information campaign.

The arbitration process should be so attractive that consumers engage in the arbitration proceeding instead of filing a claim in a state court.

Finding competent arbitrators is one thing; finding eligible arbitrators is yet another thing. FINRA, for example, has a closed list of arbitrators to choose from. An arbitrator with experience in law and arbitration as well as one who has insight into the information and know-how of the banking sector would be most valuable here.

⁵⁴ Übereinkommen über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, SR 0.275.12, as of 30th October 2007.

⁵⁵ Verordnung des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen.

G. Differences between a Swiss model and the FINRA model

1. Freedom to submit a case to arbitration

Including an arbitration clause in a consumer contract is uncommon in Switzerland; in some other countries, it is even forbidden. In Switzerland, with the liberal attitude towards arbitration, it is not even a problem to submit to arbitration by reference in the terms and conditions⁵⁶.

2. The freedom of to set up an arbitral framework

Generally speaking, the common law system allows for more leeway with regard to arbitral rule making than the civil law system. In Switzerland, the CCP and the PILA⁵⁷ foresee an instance of appeal in case of a violation of fundamental rights. Thus, if a procedure leading to an arbitral award has fundamental defects, it is possible to appeal the decision. It is also possible to appeal an arbitral award under the US-American model; however, judges are generally reluctant to reverse an arbitrator's fact finding and, in most cases, will only interfere on a finding of arbitral malfeasance⁵⁸.

3. Local forums throughout the country

Switzerland is not a huge country, but we have the tradition of the seat of residence forum. A centralized arbitration forum contravenes this tradition. FINRA has chosen to have a distributed organization, present in 73 locations throughout the US. Such a structure is also desirable for Switzerland.

XIV. What Switzerland can learn from the FINRA-model

The FINRA-Model knows two different procedures. One is a fast track (or simplified) procedure; the other one is a normal track procedure⁵⁹. The fast track procedure is usually conducted with a single arbitrator for claims of up to a value of 50'000 USD⁶⁰. If the amount is between 50'000 and 100'000

⁵⁶ See also page 20, "How to come to arbitration".

⁵⁷ CCP for domestic arbitration, and the PILA for international commercial arbitration.

⁵⁸ Ed Brunet, J.D., *Arbitration Law in America: A Critical Assessment*, Cambridge University Press, 2006, p.14.

⁵⁹ As mentioned on page 19.

⁶⁰ Rule 12401 seq. of the FINRA rules, to be found on: <http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4096&record_id=5174>, last visit 07.11.2013.

USD⁶¹, the simplified procedure is voluntary. That means one is free to opt out of the normal procedure and go along with the simplified procedure. Claims of 100'000 USD upwards are made pursuant to the normal procedure with three arbitrators; this is obligatory⁶². This manner of offering two different mandatory procedures, depending on the claim value, would also work well in a Swiss arbitration tribunal. The monetary threshold could be adjusted to fit the Swiss needs.

Another advantage of the FINRA-Model is the turnover time. The average time for a claim to be settled in the USA is around 12-14 months⁶³. A quick turnaround time is essential, especially for low net worth consumer disputes. Very often, there is a lot at stake for small investors because of their tight financial framework.

A big issue in all proceedings, especially in arbitration proceedings, is the burden of proof. There is a huge asymmetry of information between the parties. A Swiss bank has the possibility of withholding evidence by arguing that it must comply with banking secrecy laws. The situation in the USA is quite different: Here there are no comparable banking secrecy laws and, in addition, FINRA has issued a "Discovery Guideline" that obligates all parties to hand over a number of listed documents in connection with the case.

The requirement of an exchange of documents in Switzerland is a significant problem. Arbitration is a private institution that is based on a consensual contract; an arbitration tribunal lacks the power to enforce an order to exchange documents⁶⁴. Thus, where a party refuses to comply with the procedure, the arbitration tribunal, or better said the requesting party, has only the option of securing the assistance of a state judge ("juge d'appuis") at the seat of the arbitration tribunal⁶⁵. In case of a renitent party, the state judge can be called upon for help to assist the arbitration tribunal⁶⁶. However, the state court is the only instance that is competent to force certain behavior with legal compulsion. Thus, there is a grave need for a consistent set of rules and guidelines that govern proceedings such as discovery or exchange of documents.

⁶¹ Rule 12401 lit. B of the FINRA rules; to be found on: <http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4096&record_id=5174>.

⁶² Rule 12401 lit. C of the FINRA rules, to be found on: <http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4096&record_id=5174>.

⁶³ According to the FINRA dispute resolution statistics: <<http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/>>.

⁶⁴ BERGER/KELLERHALS, § 20, N 1242 seq.

⁶⁵ Art. 184 PILA.

⁶⁶ BERGER/KELLERHALS, § 20, N 1242 seq.

Last but not least, there is the cost issue. The costs of a proceeding should be predictable. In a FINRA arbitration, there are fixed costs for the proceedings, which depend on the value of the given claim:

Filing cost table of FINRA⁶⁷

<u>Amount of Claim</u> (exclusive of interest and expenses)	<u>Filing Fee</u>
\$.01 to \$1,000	\$50
\$1,000.01 to \$2,500	\$75
\$2,500.01 to \$5,000	\$175
\$5,000.01 to \$10,000	\$325
\$10,000.01 to \$25,000	\$425
\$25,000.01 to \$50,000	\$600
\$50,000.01 to \$100,000	\$975
\$100,000.01 to \$500,000	\$1,425
\$500,000.01 to \$1 million	\$1,575
Over \$ 1 million	\$1,800
Non-Monetary/Not Specified	\$1,250

The FINRA arbitration foresees quite an inexpensive procedure that is affordable for every client.

A future arbitration procedure in Switzerland should be equally inexpensive. SwissBanking has indicated that it favors such a model. In our opinion, the procedure should not be free, because that could stimulate an abuse of the institution and result in frivolous claims. The FINRA-Model offers a fair and well-balanced fee assessment.

⁶⁷ Rule 12900 of the FINRA rules, to be found on: <http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4096&record_id=5174>.

XV. Conclusion

The foregoing demonstrates the potential for and the advantages of establishing a specialized arbitration tribunal in Switzerland, in particular for banking customers and the banking sector in general. It makes clear that customers would particularly profit from an arbitration procedure that is fast, reliable and affordable, in contrast to “normal arbitration” or state court trials. Many of the above mentioned favorable aspects of the FINRA-Model could be easily implemented into the Swiss system and would certainly offer substantial improvements, in particular in the area of efficiency. The two track procedure, for e.g., with the distinction as to the claims value could easily be adjusted and utilized in Switzerland. Also other favorable aspects of the FINRA-Model would be advantageous; and, they could easily be adapted so that they are in conformity with the Swiss system. Even in the absence of an Arbitration Tribunal, the two tracks procedure as proposed above could be implemented at the state court level. What is essential is, that binding decisions are issued at low cost in a reasonable deadline with regard to low value claims. The time is ripe for the realization of new possibilities and the taking of further and important steps forward in this field.