

BRIEFING JANUARY 2023

# CORPORATE LAW DISPUTES AND ARBITRATION – THE NEW SUPPLEMENTAL SWISS RULES

On 1 January 2023, the new Art. 697n of the Swiss Code of Obligations („CO“) entered into force, expressly allowing Swiss companies limited by shares (*Aktiengesellschaften*) to include in their articles of association an arbitration clause providing for corporate law disputes to be settled by an arbitral tribunal seated in Switzerland. The arbitration clause can refer to specific institutional rules of arbitration, in particular the Swiss Rules of International Arbitration („Swiss Rules“). For this purpose, the Swiss Arbitration Centre has recently issued the Supplemental Swiss Rules for Corporate Law Disputes („Supplemental Swiss Rules“), which supplement the Swiss Rules and are specifically tailored to corporate law disputes.

This briefing will briefly look back at the current and historic state of affairs, and will then highlight the changes and opportunities arising from the amendment of the CO as well as from the newly issued Supplemental Swiss Rules.

## THE NEW ART. 697N CO

### SITUATION UNTIL 31 DECEMBER 2022

Historically, up until the entry into force of the new Art. 697n CO on 1 January 2023, there was controversy around whether a company limited by shares seated in Switzerland could opt for an arbitration clause for corporate law disputes in its articles of association. This was due to several reasons, the most frequently cited being:

- > debate about whether the inclusion of an arbitration clause in articles of association would amount to an inadmissible burden for the shareholders (see Art. 680 CO),
- > discussion around whether it would inadmissibly limit the shareholder's right to bring an action, thus violating Art. 706b sec. 1 CO, and
- > controversy around whether a resolution of a corporate body such as the general meeting of shareholders could be the basis for an individual's consent to an arbitration clause.

The Federal Supreme Court left the question open (see among other decisions DSC 142 III 220, cons. 3.4.3). As a result, up until the recent revision of the CO, arbitration clauses were rarely found in articles of association of Swiss companies.

## ADVANTAGES OF ARBITRATION

Arbitration offers a number of advantages over state court litigation, which may be of particular interest for companies faced with corporate law disputes:

- > **confidentiality**: in contrast to state court proceedings, the parties to an arbitration can agree on the confidentiality of the proceedings and their content, which may be of particular interest for companies. Most institutional rules provide for confidentiality of the proceedings (e.g., Art. 44 Swiss Rules) including the hearings and the award;
- > **expertise of the arbitral tribunal**: the parties can influence the choice of arbitrators and in particular choose arbitrators with specific qualifications;
- > **efficiency**: the grounds to set aside an arbitral award are very limited, and the award can only be appealed to one instance, i.e., the Swiss Federal Supreme Court. In contrast, state court decisions may be appealed for a variety of reasons and may be subject to more than one level of appeal, which may substantially delay the proceedings. Due to the New York Convention, enforcement of an arbitral award abroad is also simplified in a large number of countries;
- > **flexibility**: the parties are free to agree on the rules of procedure and the modalities of the proceedings together with the arbitral tribunal.

## THE INTRODUCTION OF THE NEW ART. 697N CO

In light of these opportunities, the Swiss legislature wished for corporate law disputes to be uniformly open to arbitration, and therefore sought to bring clarity to the previous debate by introducing the new Art. 697n CO, which entered into force on 1 January 2023. With this new provision, the articles of association of companies limited by shares can provide that corporate law disputes shall be decided by an arbitral tribunal seated in Switzerland.

With the references in Art. 764(2) and the new Art. 797a CO (that entered into effect on 1 January 2023), these principles also apply to Swiss partnerships limited by shares (*Kommanditaktiengesellschaften*) and Swiss limited liability companies (*Gesellschaften mit beschränkter Haftung*).

## THE MODALITIES OF THE ARBITRATION

As outlined in the new Art. 697n CO, the seat of the tribunal must be in Switzerland for these types of disputes. The proceedings are governed by the Swiss domestic arbitration law (Part 3 of the Civil Procedure Code) as the applicable *lex arbitri*. The 12<sup>th</sup> chapter of the Swiss Private International Law Act („PILA“) is explicitly not applicable.

The articles of association may regulate the details of the proceedings, in particular by reference to **specific arbitration rules**. The Swiss Rules with their newly issued Supplemental Swiss Rules are specifically tailored for arbitrations in Switzerland in compliance with the new Art. 697n CO. These are summarised below in more detail.

As to the **subjective scope**, unless otherwise determined in the articles of association, the arbitration clause shall be binding on the company, its governing bodies, the members of the governing bodies and the shareholders. The arbitration clause in articles of associations does not, however, bind the company's creditors.

The articles of association must in any event ensure that persons who may be directly affected by the legal effects of the arbitration are **informed** of the commencement and termination of the proceedings, permitted to participate in the constitution of the arbitral tribunal and also allowed to take part in the proceedings as **interveners** (see the new Art. 697n(3) CO). Compliance with these requirements is accounted for in the new Supplemental Swiss Rules, as outlined further below.

As to the **objective scope** of the arbitration, the arbitration clause may specify one or more types of corporate law disputes that are subject to arbitration. In the absence of a specification, the general term „corporate law disputes“ can be taken to refer to, amongst others:

- > actions requesting rescission or a declaration of nullity of resolutions of the shareholders' meeting (Arts. 706, 691(3) and 689f(2) in connection with Art. 691(3) CO; Art. 706b CO) or a declaration of nullity of decisions of the board of directors (Art. 714 CO);
- > actions to enforce capital protection provisions (action for restitution, Art. 678 CO; action for payment of share capital, Art. 680 CO);

- > liability actions against board members (Art. 753 et seqq. CO); or
- > actions for the dissolution of the company (Art. 736 CO).

Excluded from the objective scope are matters that are not considered arbitrable because the parties are not free to dispose of them or which are not deemed to qualify as „disputes“ but rather as one-party proceedings (which are subject to the „*freiwillige Gerichtsbarkeit*“ of the state courts“).

A company’s choice of an arbitration clause in the articles of association will be evident from the **entry in the commercial register** (Art. 45(1)(u), Art. 68(1)(v), and Art. 73(1)(v) of the Ordinance on the Commercial Register [HRegV], as in force from 1 January 2023). As for details of the practice of the commercial registries regarding arbitration clauses previously contained in the articles of association, we refer to the note of the Federal Office for the Commercial Register in Reprax 4/2022, pp. 151 et seqq., fact sheet 7.

## THE NEW SUPPLEMENTAL SWISS RULES FOR CORPORATE LAW DISPUTES

To account for the specifics of the new Art. 697n CO, the Swiss Arbitration Centre has adopted the Supplemental Swiss Rules<sup>1</sup>, which also entered into force on 1 January 2023.

They apply only to disputes based on a statutory arbitration clause contained in articles of associations pursuant to Art. 697n CO, and not to contractual arbitration clauses (unless such contractual arbitration clauses provide otherwise). It is, however, not necessary for the statutory arbitration clause to refer specifically to the Supplemental Swiss Rules; a reference to the Swiss Rules is sufficient for the Supplemental Swiss Rules to apply.

The Supplemental Swiss Rules contain a proposed **model statutory arbitration clause** which adopts the Swiss Rules, including the Supplemental Swiss Rules. The model clause explicitly excludes corporate law disputes subject to summary proceedings pursuant to Art. 250(c) Swiss Civil Procedure (“CPC”), which would otherwise be included, as state

courts can in such cases order enforcement measures, as opposed to an arbitral tribunal. Examples of such summary proceedings include an action for information and inspection by a shareholder (Art. 697b CO), an action for the appointment of a special auditor (Art. 697c CO) or the action for the convocation of a general meeting (Art. 699(5)CO).

With its optional content, which a corporate entity may include depending on its preferences, the model clause provides amongst others that the arbitrator(s) be appointed by the Swiss Arbitration Centre, rather than by the parties. If all arbitrators are appointed by the arbitration institution, the requirement of the new Art. 697n(3) CO, according to which affected persons may participate in the appointment of the arbitrators, is deemed to be fulfilled. It is then not necessary to include such affected persons in the appointment process as foreseen in Art. 3(2) and Art. 3(3) Supplemental Rules. Regarding costs, the optional part of the model clause includes proposals which a company may choose for reasons of corporate governance that allow the arbitral tribunal in its discretion to request the entire cost deposit from the company, to advance legal costs relating to the arbitration to claimant who is a shareholder and/or to order the company to pay the costs of the arbitration at the request of claimant who is a shareholder.

The Supplemental Rules contain in total six articles. They fulfil the requirements and implement the principles of Art. 697n(3) CO by providing that:

- > individuals potentially affected by the award, including the company itself (if it is not already a party), must be notified in a timely manner of the commencement and later also about the termination of the proceedings;
- > such individuals may comment on the appointment of the arbitral tribunal;
- > these individuals may also be involved in the proceedings;
- > the tribunal shall inform such individuals of the course of the arbitration proceedings on request and may grant access to the file; and
- > the tribunal has broad discretion in dealing with interim relief, and may actually refrain from rendering such relief where it considers it appropriate that a state court that has been seized with a request decides first.

<sup>1</sup> [https://www.swissarbitration.org/wp-content/uploads/2022/11/Supplemental-Swiss\\_Rules\\_for\\_Corporate\\_Law\\_Disputes\\_EN.pdf](https://www.swissarbitration.org/wp-content/uploads/2022/11/Supplemental-Swiss_Rules_for_Corporate_Law_Disputes_EN.pdf)



The Swiss Arbitration Centre has issued a useful Explanatory Note<sup>2</sup> providing guidance on the use of the Supplemental Swiss Rules.

## CONCLUSION

The new Art. 697n CO and the accompanying new Supplemental Swiss Rules provide a solid framework for arbitrating corporate law disputes.

Our arbitration and corporate law experts will be glad to provide guidance relating to this new option to include arbitration clauses in articles of associations.

<sup>2</sup> [https://www.swissarbitration.org/wp-content/uploads/2022/11/Explanatory\\_Note\\_EN.pdf](https://www.swissarbitration.org/wp-content/uploads/2022/11/Explanatory_Note_EN.pdf)

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