

Arbitration law: the Swiss Arbitration Centre introduces Supplemental Swiss Rules for corporate law disputes

On the occasion of the enactment of the new Article 697n of the Swiss Code of Obligations ("CO") allowing for the incorporation of an arbitration clause in the articles of association of certain types of Swiss companies, the Swiss Arbitration Centre has issued Supplemental Swiss Rules for corporate law disputes (the "Supplemental Swiss Rules"), which concretise and adapt the Swiss Rules of Arbitration (the "Swiss Rules") for the administration and conduct of such arbitration proceedings.

Published: 21 December 2022

Updated: 24 July 2023

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Background

As of 1 January 2023, a new Article 697n CO allows companies limited by shares, partnerships limited by shares and limited liability companies incorporated in Switzerland to include an arbitration clause in their articles of association for "corporate law disputes". The articles of association may also govern the specificities of the arbitration proceedings, such as the modalities of notification of the arbitration, the participation of third parties in the proceedings, the constitution of the arbitral tribunal as well as the granting of interim measures. In any case, the articles of association must ensure that "persons who may be directly affected by the legal effects of the arbitral award" be informed about the commencement and termination of the proceedings and have the possibility to participate in the appointment of the arbitrators and in the arbitration proceedings as interveners.

Arbitrations based on statutory arbitration clauses within the meaning of Article 697n CO must have their seat in Switzerland and are necessarily governed by the provisions on domestic arbitration contained in Part 3 of the Swiss Civil Procedure Code, to the express exclusion of the provisions governing international arbitration proceedings in Chapter 12 of the Swiss Private International Law Act.

In order to supplement the Swiss Rules for the administration and conduct of arbitration proceedings concerning corporate law disputes, the Swiss Arbitration Centre has issued Supplemental Swiss Rules and has accompanied them with an Explanatory Note, which provides background and guidance regarding the use of these rules.

The content of the Supplemental Swiss Rules can be summarised as follows:

Model Statutory Arbitration Clause

Based on the model arbitration clause of the Swiss Rules, the Supplemental Swiss Rules propose a model statutory arbitration clause, which can be included in the articles of association of legal entities wishing to submit their corporate law disputes to arbitration under the Swiss Rules, including the specific provisions of the Supplemental Swiss Rules. The model statutory arbitration clause contains both recommended content required for a valid statutory arbitration agreement (including provisions on the scope of application of the statutory arbitration clause, the seat of the arbitration and the language of the arbitration) and optional content that corporate entities may wish to include depending on their preferences (such as provisions on the default method for appointing arbitrators, the costs of the arbitration or the exclusion of interim relief under Article 43 of the Swiss Rules).

Scope of application of the Supplemental Swiss Rules for corporate law disputes

In order to ensure consistency with the terminology of the CO, the Supplemental Swiss Rules do not define the notion of "corporate law disputes", but use it as specified in Article 697n CO.

The Supplemental Swiss Rules apply to statutory arbitration clauses incorporated in the articles of association of Swiss companies limited by shares, Swiss partnerships limited by shares and Swiss limited liability companies. Other entities, such as associations and cooperatives, may also use them by expressly stating in their statutory arbitration clause that the Supplemental Swiss Rules shall govern corporate law disputes. The Supplemental Swiss Rules do not apply to arbitration proceedings based on arbitration clauses of a contractual nature, unless the arbitration clause explicitly provides otherwise.

Participation of persons affected by the arbitral award

Some corporate law disputes may involve a large number of actors and have legal effect on persons other than the claimant and the defendant. The Supplemental Swiss Rules enable third parties to be involved in the arbitration proceedings in different ways. One of the main aims of the Supplemental Swiss Rules is to implement Article 697n (3) CO, which requires persons who may be directly affected by the legal effects of the arbitral award ("Affected Persons") to be informed

of the commencement and termination of arbitration proceedings affecting them. The Supplemental Swiss Rules provide that the beginning of arbitration proceedings must be notified to the Affected Persons within a short time period, so as to allow them to efficiently exercise their right to be involved in the proceedings. This ensures the efficient administration of the arbitration proceedings, despite the participation of multiple parties.

The constitution of the arbitral tribunal is governed by Articles 10 and 11 of the Swiss Rules. Persons who are able to demonstrate on a prima facie basis that they are Affected Persons do not have the right to designate an arbitrator, but may submit comments on the appointment of the arbitral tribunal. The exercise by an Affected Person of its right to comment on the appointment of the members of the arbitral tribunal does not result in multi-party proceedings under the Swiss Rules as the Affected Person does not automatically become a party to the proceedings as a result of such exercise.

The Supplemental Swiss Rules refer to Article 6(4) of the Swiss Rules regarding the participation of third persons in the arbitration proceedings. In particular, the arbitral tribunal has to ensure that Affected Persons be able to properly exercise their rights.

Finally, upon request, the arbitral tribunal informs Affected Persons who are not (yet) parties to the arbitration proceedings. It may also, at its discretion, grant access to certain information concerning the arbitration proceedings to enable Affected Persons to make an informed decision and potentially a substantiated request for participation.

Interim measures and emergency relief

Effective interim relief may be of particular concern in relation to corporate law disputes. The Supplemental Swiss Rules contain provisions that adapt the rules on interim and emergency relief under the Swiss Rules to the particularities of corporate law disputes. In particular, the arbitral tribunal or the emergency arbitrator may, at its discretion, defer its decision or refrain from rendering any decision on the merits of a request for interim measures if a parallel request is pending before a judicial authority, irrespective of whether that request was made before or after the request to the arbitral tribunal. The Supplemental Swiss Rules thus embody the broad discretion of arbitrators in dealing with requests for interim measures granted to them under the Swiss Rules.

A further step towards the modernisation of Swiss corporate law

The reform that will come into force on 1 January 2023 is an important step in the modernisation of Swiss corporate law. With the introduction of the virtual general assembly, the capital range, the possibility to set the share capital in foreign currencies and other innovations, Swiss companies will have a modern legal framework at their disposal, thus benefitting from greater flexibility. The possibility to incorporate in the articles of association the settlement of corporate law disputes by way of arbitration is a further step towards modernising Swiss corporate law: it allows parties to submit their corporate dispute to specialized arbitrators, while simultaneously benefiting from the confidentiality and expediency associated with arbitration proceedings. With the introduction of the Supplemental Swiss Rules, the Swiss Arbitration Centre provides its users with a procedural framework favorable to the administration and conduct of such arbitration proceedings.



Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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