

Supplemental Swiss Rules for Corporate Law Disputes

Explanatory Note*

Introduction

The Swiss Rules of International Arbitration (the “**Swiss Rules**”), last revised in 2021,¹ provide for a modern and effective framework for the resolution of commercial disputes.

Arbitration proceedings under the Swiss Rules are administered by the Arbitration Court (the “**Court**”) of the Swiss Arbitration Centre. The Court is assisted in its work by the Secretariat of the Court (the “**Secretariat**”).

As of 1 January 2023, with the latest amendments to the Swiss Code of Obligations (“**CO**”), a new Article 697n CO (the application of which is extended by references in Article 764(2) CO and Article 797a CO) provides that the articles of association of Swiss Companies Limited by Shares pursuant to Articles 620 *et seqq.* CO, Swiss Partnerships Limited by Shares pursuant to Articles 764 *et seqq.* CO, and Swiss Limited Liability Companies pursuant to Articles 772 *et seqq.* CO, may provide that “*corporate law disputes*” be settled by an arbitral tribunal seated in Switzerland, and that, unless the articles of association provide otherwise, the statutory arbitration clause in the articles of association binds the company, the company’s governing bodies, the members of such governing bodies, and the shareholders.

Arbitrations based on such statutory arbitration clauses are, as a matter of law, governed by the provisions on domestic arbitration contained in Part 3 of the Swiss Civil Procedure Code (“**CPC**”), to the express exclusion of the provisions governing international arbitration proceedings in Chapter 12 of the Swiss Private International Law Act (Article 697n(2) CO).

Pursuant to Article 697n CO, the articles of association may regulate the specifics of the arbitration proceedings, in particular by referring to institutional rules of arbitration. In any case, they shall ensure that “*persons who may be directly affected by the legal effects of the arbitral award*” are informed about the commencement and termination of the proceedings and may participate in the appointment of the arbitrators and in the arbitration proceedings as interveners.

The Swiss Rules are suitable to resolve any type of commercial and corporate dispute, including the types of corporate law disputes referred to in Article 697n CO. To account for the specificities of such corporate law disputes, implement statutory requirements and ensure that corporate law disputes can be settled through Swiss Rules arbitration efficiently and effectively, the Swiss Arbitration Centre issues Supplemental Swiss Rules for Corporate Law Disputes (the “**Supplemental Swiss Rules**”), in force as from 1 January 2023. It further proposes a Model Statutory Arbitration Clause adopting the Swiss Rules (including the Supplemental Swiss Rules) that corporate entities may choose to include in their articles of association.

This Explanatory Note provides background and guidance on the use of the Supplemental Swiss Rules.

* This Explanatory Note does not constitute legal advice and shall not be relied on as such. It serves the sole purpose of providing background information and references to selected legal publications. The Swiss Arbitration Centre does not assume responsibility for any views expressed herein or therein.

¹ <https://www.swissarbitration.org/wp-content/uploads/2022/07/Swiss-Rules-2021-EN.pdf>.

Model Statutory Arbitration Clause

The Model Statutory Arbitration Clause may be included in a corporate entity's articles of association. It refers corporate law disputes to arbitration under the Swiss Rules, including the specific provisions governing corporate law disputes contained in the Supplemental Swiss Rules.

The Model Statutory Arbitration Clause contains both recommended content required for a valid statutory arbitration agreement (Provisions 1-3) as well as optional content that corporate entities, depending on their preferences, may wish to include in their statutory arbitration clause (part of Provision 1, Provisions 4-9).

The Model Statutory Arbitration Clause equally fits into the articles of association of Swiss Companies Limited by Shares, Swiss Partnerships Limited by Shares, and Swiss Limited Liability Companies, should any such corporate entity (the "Company") wish to refer its corporate law disputes to arbitration pursuant to Article 697n CO.

- (1) *"Any corporate law dispute, excluding matters subject to summary proceedings pursuant to Article 250(c) of the Swiss Civil Procedure Code [and excluding actions for cancellation of outstanding equity shares according to the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading], shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre in force on the date on which the Notice of Arbitration is submitted in accordance with those Rules."*

This provision of the Model Statutory Arbitration Clause is based on the Model Arbitration Clause contained in the Swiss Rules and has been adapted to account for specificities of "corporate law disputes" pursuant to Article 697n CO.

It uses the same term "corporate law disputes" adopted in Article 697n(1) CO and is meant to apply to any dispute falling within the statutory meaning of that term. The Supplemental Swiss Rules do not define the term "corporate law disputes" to avoid any disparity between the scope of the Model Statutory Arbitration Clause and the law. The Company is free to adapt the Model Statutory Arbitration Clause so that it covers only specific corporate law disputes.²

In the context of Swiss Companies Limited by Shares, disputes said to fall within the scope of "corporate law disputes" pursuant to Article 697n CO include (i) challenges against resolutions of the general meeting (Articles 706, 691(3) and 689f(2) read in conjunction with Article 691(3) CO; Article 106 Swiss Merger Act); (ii) declaratory actions regarding the nullity of resolutions of the general meeting and the board of directors (Articles 706b and 714 CO); (iii) liability actions against members of the governing bodies of the Company (Articles 752 *et seqq.* CO; Article 108 Swiss Merger Act); (iv) actions for the return of benefits (Article 678 CO; these actions are covered at least insofar as they are directed against shareholders, members of the board of directors, and persons involved in the management of the Company and members of the advisory board;³ (v) actions for the dissolution of the Company (Article 736(1) CO); (vi) actions for an appropriate compensation payment following a restructuring (Article 105 Swiss Merger Act); (vii) further actions, including actions of the Company against a shareholder for the performance of the obligation to pay the share capital and actions in connection with transfer restrictions.⁴

The Model Statutory Arbitration Clause does not include in its scope matters subject to summary proceedings pursuant to Article 250(c) CPC. These are matters that result in a decision on the merits following summary proceedings before a state court, which the state court has the power to combine with enforcement measures if need be. In case of a Swiss Company Limited by Shares, these include matters such as (i) an action for the dismissal or appointment of a liquidator (Article 741(2) CO); (ii) an action of a shareholder for information and inspection (Article 697b CO); (iii) an action for measures in case of defects in the organisation of the Company (Article 731b CO);⁵ (iv) an action for the appointment of a special auditor (Article 697c CO); (v) an action for the convocation of a general meeting and requests regarding the agenda of the same (Article 699(5) CO); (vi) an action for the cancellation of securities (Article 981 CO); (vii) an action of a member of the board of directors for

2 HANS-UELI VOGT/VALENTINA HIRSIGER-MEIER/THOMAS HOFER, Statutarische Schiedsklauseln (2019), at paragraph 133.

3 By contrast, at least according to some commentators an action directed against an affiliated person is generally not considered to be covered; see VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraph 151.

4 See, e.g., VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraphs 118 *et seqq.*

5 See decision of the Swiss Federal Supreme Court 138 III 166 consideration 3 regarding the applicability of the summary proceedings to all proceedings based on Article 731b CO.

information and inspection (Article 715a CO);⁶ and (viii) further actions.⁷ The rationale for excluding such matters from the jurisdiction of an arbitral tribunal acting pursuant to the Model Statutory Arbitration Clause is that arbitral tribunals, as opposed to state courts, arguably do not have the power to enforce their own orders. Furthermore, arbitral tribunals cannot render binding decisions against third parties not bound by the arbitration agreement, such as the operator of the commercial registry. With a view to ensuring the efficacy of such decisions, it thus appears advisable to carve them out from arbitral jurisdiction in favor of the jurisdiction of the state courts. The exclusion of matters subject to summary proceedings according to the CPC is not mandatory so long as the dispute is arbitrable. If a company does not wish to implement this exemption, it may leave out the pertinent part of the Model Statutory Arbitration Clause and instead provide for specific safeguards, such as special deadlines, in its statutory arbitration clause, taking into account that the requirements of Article 697n(3) CO is said to apply also to such summary proceedings.⁸

The language in brackets (“*and excluding actions for cancellation of outstanding equity shares according to the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading*”) refers to “squeeze out” actions pursuant to the Financial Market Infrastructure Act, which will be relevant only for a fraction of companies.

- (2) *“The seat of the arbitration shall be ... (name of the company seat/other city in Switzerland).”*

Pursuant to Article 697n(1) CO, the seat of an arbitration concerning a corporate law dispute must be in Switzerland. This provision ensures compliance with this requirement by determining the seat of the arbitration pursuant to Article 17 of the Swiss Rules and Article 355 CPC to be at the Swiss company seat or any other city in Switzerland.

- (3) *“The arbitration proceedings shall be conducted in ... (insert desired language).”*

This provision serves to determine the language of the arbitration pursuant to Article 18 of the Swiss Rules.

- (4) *“The number of arbitrators shall be ... (“one”, “three”, “one or three”).”*

This provision determines the number of arbitrators. If the statutory arbitration clause does not include this provision, Article 9(1) of the Swiss Rules will apply, according to which the Court decides whether to refer the case to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances. Leaving the decision to the Court pursuant to Article 9(1) of the Swiss Rules may provide greater flexibility depending on the amount in dispute and the complexity of each individual corporate law dispute.

- (5) *“The Arbitration Court of the Swiss Arbitration Centre shall appoint the ... (arbitrator) / (arbitrators and designate the presiding arbitrator).”*

This provision deviates from the default rule of Article 10 and Article 11 of the Swiss Rules pursuant to which the parties jointly nominate a sole arbitrator or, in case of a three-member tribunal, each party designates one arbitrator, unless the parties have agreed otherwise. The Company, when adopting a statutory arbitration clause, may instead opt to have the Court appoint all arbitrator(s). It can do so by including this provision in its statutory arbitration clause.

If all arbitrators are appointed by the institution rather than by the parties, the requirement of Article 697n(3) CO pursuant to which the statutory arbitration clause must ensure that persons who may be directly affected by the legal effects of the arbitral award may participate in the appointment of the arbitrators is said to be deemed fulfilled.⁹ Therefore, if the statutory arbitration clause includes this provision, pursuant to Article 3(1) of the Supplemental Swiss Rules, Articles 3(2) and (3) of the Supplemental Swiss Rules must not be applied.

- (6) *“The company and the members of the company's governing bodies shall submit all disputes falling under the present arbitration clause to arbitration and shall object to the jurisdiction of the state courts over such disputes to the extent that any actions relating to such disputes are initiated before them.”*

6 See decision of the Swiss Federal Supreme Court 144 III 100 consideration 5.

7 Such further actions are listed, e.g., in VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at footnote 362 on page 79.

8 VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraph 134.

9 VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraphs 247 and 251.

This provision contains an express obligation of the Company and the members of the Company's governing bodies to submit all disputes falling under the statutory arbitration clause to arbitration and to object to the jurisdiction of the state courts over such disputes to the extent that any actions relating to such disputes are initiated before them. The Company may choose to include such a provision to ensure uniformity of the legal process (in favour of arbitration) and thereby guaranteeing the fulfilment of the information obligations according to Article 697n(3) CO towards persons who may be directly affected by the legal effects of the arbitral award.

- (7) *"The arbitral tribunal may, at the request of a claimant who is a shareholder of the company, order the company to pay the costs of the arbitration provided that, based on the facts and the applicable law, the claimant had reasonable cause to file the action and provided that the action does not conflict with predominant interests of the company."*

Pursuant to Article 40 of the Swiss Rules, the costs of the arbitration shall in principle be borne by the unsuccessful party. For reasons of corporate governance, the Company may choose to include this provision, which deviates from Article 40 of the Swiss Rules by allowing the arbitral tribunal to impose the costs of the arbitration on the Company in justified cases. The rule grants the arbitral tribunal discretion as to the appropriate circumstances in which to impose costs on the Company, including ruling on its own jurisdiction to do so (Article 23(1) of the Swiss Rules), and may, e.g., apply in cases of liability claims or claims for return of profit distribution against the Company.

- (8) *"The arbitral tribunal may order the company to pay any deposit of costs pursuant to Article 41 of the Swiss Rules and to advance the costs reasonably incurred or estimated to be incurred by a claimant who is a shareholder of the company for legal representation and legal assistance."*

As with Provision 7, the Company may choose for reasons of corporate governance to include this provision, which applies to the deposits ordered by the arbitral tribunal pursuant to Article 41 of the Swiss Rules, but not to the Registration Fee or the Provisional Deposit requested by the Secretariat pursuant to Article 1.4 of Appendix B to the Swiss Rules, as well as to reasonable costs of a shareholder for legal representation and assistance. The Company is free to limit the application of this provision to either the deposits or the costs, or to certain types of costs.

- (9) *"All notifications regarding the commencement and the termination of the arbitration proceedings shall be delivered pursuant to and in the form provided for in the Supplemental Swiss Rules for Corporate Law Disputes. In addition, delivery shall be made via postal service and e-mail to all serviceable addresses and authorized recipients that have been provided by shareholders of the company for this purpose."*

This provision may facilitate performance of the obligation to inform about the commencement and termination of the arbitration proceedings according to Article 697n(3) CO. The form of the notifications required by Article 697n(3) CO is addressed in Article 2(4) of the Supplemental Swiss Rules. This (optional) clause highlights that the pertinent rules may be found there and, in addition, gives shareholders the right to indicate to the Company a special address with regard to notifications regarding arbitration proceedings.

- (10) *"The emergency relief proceedings pursuant to Article 43 of the Swiss Rules shall not apply."*

Article 43 of the Swiss Rules provides for the possibility of emergency relief proceedings by which a party requiring urgent interim measures pursuant to Article 29 of the Swiss Rules before the arbitral tribunal is constituted may apply for emergency relief by an emergency arbitrator. Such proceedings do not result in a final decision on the merits of the dispute, but rather potentially in the ordering of interim measures for a limited duration, measures which may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal. Any measure granted by the emergency arbitrator ceases to be binding on the parties either upon the termination of the emergency relief proceedings pursuant to Article 43(3) of the Swiss Rules if no Notice of Arbitration is filed within 10 days of the application for emergency relief, upon the termination of the arbitration proceedings, or upon the making of a final award, unless the arbitral tribunal expressly decides otherwise in the final award.

Absent an agreement by the parties to the contrary, it is generally accepted that parties to an arbitration agreement referring to the Swiss Rules may seek interim relief either from an emergency arbitrator pursuant to Article 43 of the Swiss Rules or any competent judicial authority (see Article 29(5) of the Swiss Rules, which applies by reference in Article 43(1) of the Swiss Rules also to emergency arbitrator proceedings).

In multi-party settings, these concurrent jurisdictions may lead to a situation in which parallel requests for interim measures are pending before different decision makers, potentially giving rise to difficult questions regarding the priority of decision making or the binding effect of prior decisions, or even result in conflicting decisions.

Emergency relief proceedings pursuant to Article 43 of the Swiss Rules may also raise concerns regarding compliance with Article 697n(3) CO in case such provision were found to be applicable also to proceedings resulting in a decision on interim measures rather than a final decision on the merits of the dispute.

To avoid these issues, the Company may wish to exclude the application of the emergency relief proceedings pursuant to Article 43 of the Swiss Rules in the statutory arbitration clause.

The Supplemental Swiss Rules for Corporate Law Disputes

SCOPE OF APPLICATION

Article 1

“1. The Supplemental Swiss Rules for Corporate Law Disputes (the “Supplemental Swiss Rules”) shall apply to corporate law disputes pertaining to Swiss Companies Limited by Shares pursuant to Articles 620 et seqq., Swiss Partnerships Limited by Shares pursuant to Articles 764 et seqq., and Swiss Limited Liability Companies pursuant to Articles 772 et seqq. of the Swiss Code of Obligations.”

This provision defines the scope of application of these Supplemental Swiss Rules and clarifies that both the Swiss Rules and the Supplemental Swiss Rules apply to “*corporate law disputes*”. It was a conscious decision not to define the term “*corporate law disputes*” in the Supplemental Swiss Rules, but to defer to the meaning of the term pursuant to Article 697n CO to ensure consistency with the statutory term.

The legal requirements of Article 697n(3) CO apply to statutory arbitration clauses in the articles of association of Swiss Companies Limited by Shares, Swiss Partnerships Limited by Shares (by reference in Article 764(2) CO) and Swiss Limited Liability Companies (by reference in Article 797a CO). The Supplemental Swiss Rules have been drafted to meet the requirements of Article 697n(3) CO. Therefore, they apply to the aforementioned types of companies to which Article 697n(3) CO is applicable.

The Supplemental Swiss Rules do not automatically apply to corporate law disputes within associations and cooperatives, although such entities may ensure their applicability by expressly declaring in their statutory arbitration clause that corporate law disputes shall be governed by the Supplemental Swiss Rules. The Supplemental Swiss Rules also do not apply to Swiss Simple Partnerships pursuant to Articles 530 et seqq. CO, Swiss General Partnerships pursuant to Articles 552 et seqq. CO or Swiss Limited Partnerships pursuant to Articles 594 et seqq. CO.

“2. The Supplemental Swiss Rules shall apply to arbitration proceedings initiated pursuant to a statutory arbitration clause contained in the articles of association of a corporate entity (the “Company”).”

This provision clarifies that the Supplemental Swiss Rules apply only to disputes based on statutory arbitration clauses pursuant to Article 697n CO, not to arbitration proceedings based on arbitration clauses of a contractual nature, unless such arbitration clause provides otherwise.

Contractual arbitration clauses remain possible in the context of corporate law disputes within Swiss Companies Limited by Shares, Swiss Partnerships Limited by Shares and Swiss Limited Liability Companies after the entry into force of Article 697n CO, including in articles of association.¹⁰

This requires the parties and the Court as well as the arbitral tribunal to consider whether the arbitration clause on which the arbitration is based is of a corporate law or a contractual nature. When in doubt, it may be prudent to assume that it is of a corporate law nature and that, therefore, the requirements of Article 697n(3) CO and the Supplemental Swiss Rules apply.

“3. The Supplemental Swiss Rules supplement the Swiss Rules of International Arbitration (the “Swiss Rules”) and apply wherever the arbitration clause refers to the Swiss Rules. To the extent the Supplemental Swiss Rules do not specifically regulate a matter, the provisions of the Swiss Rules shall apply.”

This provision clarifies that the Supplemental Swiss Rules must be read together with the Swiss Rules and that there is no need to specifically refer to the Supplemental Swiss Rules in the statutory arbitration clause. It is sufficient for the statutory arbitration clause to refer to the Swiss Rules. The provision is to be read in conjunction with Article 1(2), which provides that the Supplemental Swiss Rules apply only to arbitration proceedings based on statutory arbitration clauses.

“4. This version of the Supplemental Swiss Rules, in force as from 1 January 2023, shall apply to all arbitration proceedings in which the Notice of Arbitration is submitted on or after that date, unless the parties have agreed otherwise.”

This provision corresponds to Article 1(2) of the Swiss Rules.

¹⁰ See VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraphs 72 and 99 et seq.

INFORMATION REGARDING THE COMMENCEMENT AND TERMINATION OF ARBITRATION PROCEEDINGS

Article 2

“1. Within 5 days of the commencement of any arbitration proceedings, the Company shall take appropriate steps to notify persons who may be directly affected by the legal effects of the arbitral award (the “Affected Persons”) of the commencement of the arbitration proceedings. The Company shall notify the shareholders in particular, but without limitation, of the commencement of arbitration proceedings against the Company concerning the existence of the Company, the validity or legality of the resolutions of its bodies, the dissolution of the Company, or the determination of an appropriate compensation payment following a restructuring.”

This provision implements Article 697n(3) CO, which requires that persons who may be directly affected by the legal effects of the arbitral award (“Affected Persons”) are informed of the commencement of the arbitration proceedings.

Only certain corporate law disputes can lead to an arbitral award having such legal effect (i.e., legal force, constitutive effect or enforceability [*Rechtskraft, Gestaltungswirkung oder Vollstreckbarkeit*¹¹]) towards persons other than the Claimant and the Respondent, and the Company’s obligation to notify applies only in the case of such disputes. This will generally be the case for proceedings against the Company concerning the existence of the Company, the validity or legality of the resolutions of its governing bodies, the dissolution of the Company, or the determination of an appropriate compensation payment following a restructuring. Specifically, in the context of Swiss Companies Limited by Shares, actions that are said to trigger an obligation to notify include (but may not be limited to): (i) challenges against resolutions of the general meeting (Article 706 CO; Article 691(3) and Article 689f(2) in conjunction with Article 691(3) CO, Article 106 Swiss Merger Act); (ii) declaratory actions regarding the nullity of resolutions of the general meeting and the board of directors (Article 706b and Article 714 CO); (iii) actions for dissolution of the Company (Article 736(1)(4) CO); (iv) actions for an appropriate compensation payment following a restructuring (Article 105 Swiss Merger Act).¹²

The notification must be given within a short time because it is this notification that enables an Affected Person to make effective use of its participation rights. Pursuant to Article 3(2) of the Swiss Rules, arbitration proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Secretariat. The Company is required to take appropriate steps pursuant to this provision within 5 days of that date. Where the Company is named as the Respondent in the Notice of Arbitration or is not named as a party to the Notice of Arbitration and is thus notified of the Notice of Arbitration (and possibly only becomes aware of its existence) in accordance with Article 2(3) of the Supplemental Swiss Rules read in conjunction with Article 3(6) of the Swiss Rules, the Company will have little time to comply with its obligations under this provision and is thus well advised to put processes in place to ensure that it can comply with its obligation to take appropriate steps pursuant to this provision within a very short time.

Even though the parties to the arbitration proceedings are not under an obligation to name Affected Persons, claimants may wish to take steps to ensure that the Company is able to notify Affected Persons, such as naming such persons in the Notice of Arbitration.

“2. Where the Company is not a party to the arbitration proceedings, in addition to the items identified in Article 3 of the Swiss Rules, the Notice of Arbitration shall include the names, addresses, telephone numbers, and e-mail addresses of the Company and, where applicable, of its representatives.”

This provision supplements Article 3(3) of the Swiss Rules. It enables the Secretariat to notify the Notice of Arbitration to the Company according to Article 2(3) where the Company is not a party to the arbitration proceedings and ensures that the Company is able to take appropriate steps to notify the commencement of the arbitration proceedings pursuant to Articles 2(1) and 2(4).

“3. Where the Company is not named as a party to the arbitration proceedings, when notifying the Notice of Arbitration pursuant to Article 3(6) of the Swiss Rules, the Secretariat shall also notify the Notice of Arbitration to the Company.”

This provision supplements Article 3(6) of the Swiss Rules. It ensures that the Company is informed about the commencement of arbitration proceedings under a statutory arbitration clause even if it is not named in the Notice of Arbitration as a party to the arbitration proceedings. This enables the Company to comply with its obligation to take appropriate steps to notify the commencement of the arbitration proceedings pursuant to Articles 2(1) and 2(4).

¹¹ See VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraph 215; decision of the Swiss Supreme Court 142 III 629 consideration 2.3.6.

¹² See VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraph 217.

“4. When directed at a shareholder, the notification pursuant to Article 2(1) shall be delivered in the form provided for in the articles of association for notifications by the Company to its shareholders and, where applicable, in accordance with any special provision in the articles of association concerning such notification. Persons other than shareholders may be notified by other appropriate means including publication in the Swiss Official Gazette of Commerce.”

The special provisions in the articles of association to which reference is made in Article 2(4) are those provisions referred to in the second sentence of Provision 9 of the Model Statutory Arbitration Clause. In principle, notification should be made in the form provided for in the articles of association for notifications by the Company to its shareholders (e.g., letter, e-mail, fax or other means of communication). Considering that there might be non-shareholders who qualify as Affected Persons, the Company should be able to use other means of communication to ensure that such persons can be contacted even if it is not possible to address them in the same form as the shareholders. In particular, the Company should be able to publish the notification in the Swiss Official Gazette of Commerce if need be. As this affects the confidentiality of the arbitration proceedings, the Company should only do so where necessary.

“5. The notification pursuant to Article 2(1) shall outline in a concise manner the relief or remedy sought and the essential facts and background upon which the action is based. It shall contain the contact details of the Secretariat as set forth in Appendix A to the Swiss Rules. If the notification is made public, e.g., if it is published in the Swiss Official Gazette of Commerce, the publicized version of the notification may be shortened to provide the contact details along with a brief summary of the legal requests and essential facts.”

This provision is based on the rules regarding *ad hoc* publicity contained in the SIX Swiss Exchange Listing Rules. The announcement according to this paragraph shall correspond to an *ad hoc* announcement: The subject matter of the action shall be specified in keywords so that Affected Persons are able to decide whether to participate in the arbitration proceedings. If the notification is publicized, the requirements are lower than the requirements defined in the context of *ad hoc* publicity.¹³

Providing the contact details of the Secretariat enables Affected Persons to obtain information in relation to their decision whether to participate in the arbitration proceedings.

“6. Articles 2(1) and 2(4) shall apply mutatis mutandis where the arbitration proceedings are terminated.”

“7. The notification pursuant to Article 2(6) shall refer to the notification regarding the initiation of the arbitration proceedings, indicate the form of the termination of the arbitration proceedings, and contain a brief statement about the outcome of the case.”

These provisions implement Article 697n(3) CO, which requires that Affected Persons are informed of the termination of the arbitration proceedings. They clarify that the notification of the termination is to be done in the same form as the notification of the commencement and provide guidance as to the scope of the termination information.

APPOINTMENT OF THE ARBITRAL TRIBUNAL

Article 3

“1. The appointment of the arbitral tribunal shall be governed by Articles 10 and 11 of the Swiss Rules, subject to the following special provisions, which however shall not apply if the arbitration clause provides for the appointment of the arbitrators by the Court.”

Pursuant to Articles 10 and 11 of the Swiss Rules, the Claimant and the Respondent designate arbitrators, unless the statutory arbitration clause provides otherwise. In the case of a sole arbitrator, the Claimant and the Respondent shall jointly designate the sole arbitrator within thirty days from the date on which the Notice of Arbitration has been received by the Respondent (Article 10(1) of the Swiss Rules). In the case of a three-member arbitral tribunal, the Claimant and the Respondent shall each designate one arbitrator within the time limit set by the Court or in the statutory arbitration clause (Article 11(1) and 11(2) of the Swiss Rules).

Pursuant to Articles 3(2) and 3(3) of the Supplemental Swiss Rules, Affected Persons may submit comments on the appointment of the arbitral tribunal. However, in accordance with Article 697n CO, they have no right to designate

¹³ See VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraph 239.

an arbitrator themselves. The right to provide comments and objections regarding the appointment of the arbitral tribunal pursuant to Articles 3(2) and 3(3) of the Supplemental Swiss Rules are said to be sufficient to comply with the requirements of Article 697n(3) CO.¹⁴

Special attention should be paid to multi-party proceedings, for instance where multiple Claimants file a joint claim and/or multiple Respondents are jointly sued. Moreover, multi-party proceedings may result from cases of joinder or intervention pursuant to Article 6(1) of the Swiss Rules or where several proceedings initiated separately are consolidated into one arbitration pursuant to Article 7(1) of the Swiss Rules. An Affected Person exercising its right to comment on the appointment of the arbitral tribunal pursuant to Article 3(2) of these Supplemental Swiss Rules does not result in multi-party proceedings under the Swiss Rules as the exercise of this right does not render the Affected Person a party to the proceedings. In multi-party proceedings, unless the parties have agreed upon another procedure for the constitution of the arbitral tribunal, the Court sets a time limit for the Claimant and for the Respondent (or group of parties) to each designate an arbitrator (Article 11(4) of the Swiss Rules). Where a party or group of parties fails to designate an arbitrator in multi-party proceedings, the Court may appoint some or all of the arbitrators, and shall designate the presiding arbitrator (Article 11(5) of the Swiss Rules).

The provision also clarifies that Articles 3(2) and 3(3) must not be applied where the statutory arbitration clause provides that all arbitrators shall be appointed by the Court.

“2. For a period of 30 days following the commencement of the arbitration proceedings pursuant to Article 3(2) of the Swiss Rules, persons who on a prima facie basis establish that they may be Affected Persons may submit comments on the appointment of the arbitral tribunal to the Court.”

This provision implements Article 697n(3) CO insofar as it requires that persons who can demonstrate to the Court on a *prima facie* basis that they are Affected Persons are able to participate in the appointment of the arbitrators by providing comments related to the appointment of the arbitral tribunal. Comments made in accordance with this provision may for instance relate to the number of arbitrators and requirements as to their qualifications.

Where this provision does not apply according to Article 3(1), the Court may in exceptional circumstances and at its discretion accept comments from persons who can demonstrate to the Court on a *prima facie* basis that they are Affected Persons within the same time limit, if the Court so deems appropriate.

“3. The Court shall inform persons who so request and on a prima facie basis establish that they may be Affected Persons of each procedural step for the appointment of arbitrators. Following the designation of each arbitrator and prior to the arbitrator’s confirmation by the Court, persons who on a prima facie basis establish that they may be Affected Persons may submit reasoned written comments or objections concerning the appointment of the designated arbitrator to the Court. In case of any disclosure by any designated or confirmed arbitrator, persons who on a prima facie basis establish that they may be Affected Persons may submit reasoned written comments or objections within the same time limit within which the parties to the arbitration proceedings may comment. For these purposes, the Court shall, upon request, provide to such persons its pertinent correspondence with the parties and the arbitrators. The Court shall take such comments and objections into account when confirming the respective arbitrator in accordance with Article 8(1) of the Swiss Rules. The Court shall transmit a copy of its confirmation to persons having submitted such written comments or objections. The Court may, on its own initiative, make the information it deems relevant available to those persons who on a prima facie basis have established that they may be Affected Persons.”

The right to be informed about the procedure leading to the appointment of the arbitral tribunal and the right to access the respective files provided for in this provision enable Affected Persons to comment on designated arbitrators and any disclosures made by arbitrators prior to and after their confirmation.

This right and the corresponding duty of the Court to provide pertinent information qualify the principle of confidentiality provided for in Article 44 of the Swiss Rules.

In principle, the Court will provide information only upon request: The information about the course of the appointment procedure according to the first sentence and the pertinent correspondence referenced in the fourth sentence will only be provided to persons who expressly request such information. In other words, a person who has requested and received information about the appointment procedure according to the first sentence will not automatically receive the pertinent correspondence according to the fourth sentence, a corresponding specific

¹⁴ See VOGT/HIRSIGER-MEIER/HOFER (footnote 2), at paragraphs 243 et seqq., particularly at paragraph 255.

request is required. However, a person who has already on a *prima facie* basis established that it may be an Affected Person must not do so again when submitting a second request; instead, that person may refer to the initial request and the Court's decision, as the case may be, to comply with such request and provide information about the appointment procedure. A person who on a *prima facie* basis establishes that it may be an Affected Person may also request information about the course of the appointment procedure according to the first sentence as well as the pertinent correspondence according to the fourth sentence at the same time in a single request.

The Supplemental Swiss Rules do not provide for, and the Court will not set, a deadline within which reasoned written comments or objections regarding designated arbitrators are to be submitted. Instead, the Supplemental Swiss Rules provide that such comments or objections shall be submitted prior to the confirmation of the arbitrator in question. In practice, also taking into consideration the time limit provided for in Article 3(1), the Court will allow for sufficient time for potentially Affected Persons to submit comments or objections before confirming arbitrators, taking relevant circumstances into account, including the notification of the commencement of the arbitration proceedings pursuant to Article 2(1) and the general duty pursuant to Article 16(1) of the Swiss Rules to contribute to the efficient conduct of the proceedings and to avoid unnecessary delays. In any case, persons believing themselves to be Affected Persons and who may wish to participate in the constitution of the arbitral tribunal pursuant to Article 3(3) are encouraged to make any request and/or provide any comments or objections under such provision swiftly upon being informed of the designation of an arbitrator.

In the case of any disclosure, the potentially Affected Person may provide its reasoned written comments or objections within the same time limit set by the Secretariat for the parties to the arbitration proceedings to comment pursuant to Article 12(2) of the Swiss Rules.

The Court will consider comments or objections received from potentially Affected Persons when confirming the arbitrators pursuant to Article 8(1) of the Swiss Rules. In particular, the Court may, at its discretion, refuse confirmation of arbitrators on the basis of such comments or objections, taking into account Articles 367/368 CPC. If the Court chooses to do so, it may, pursuant to Article 8(2) of the Swiss Rules, either set a time limit for the party or parties whose designee it has refused to confirm to designate another arbitrator or, in exceptional circumstances, make the appointment itself.

The limitation of the information rights to the Court's pertinent correspondence with the parties and the arbitrators according to the fourth sentence means that the Court need not disclose its internal files. At the same time, the provision of correspondence is not limited to disclosures made by the arbitrators but may include further relevant correspondence, including with the parties.

Where this provision does not apply according to Article 3(1), the Court may in exceptional circumstances and at its discretion accept comments from persons who can demonstrate to the Court on a *prima facie* basis that they are Affected Persons within the same time limits, if the Court so deems appropriate.

Depending on the circumstances, the Court may wish to inform all persons who have (successfully) inquired about the status of the appointment procedure (according to the first sentence) of any appointment or disclosure made and provide them with the pertinent correspondence (according to the fourth sentence) on its own initiative and at its discretion even without multiple individual requests by potential Affected Persons. In such cases, the last sentence empowers the Court to make the information it deems relevant available to potential Affected Persons on its own initiative.

PARTICIPATION OF THIRD PERSONS

Corporate law disputes pursuant to Article 697n CO may result in the participation of third persons in arbitration proceedings in various forms, particularly due to the rights of Affected Persons pursuant to Article 697n(3) CO.

Articles 6(1) and 7(1) of the Swiss Rules already contain elaborate provisions on the admission of additional parties to existing arbitration proceedings and the consolidation of parallel arbitration proceedings, respectively. Based on these provisions in the Swiss Rules, persons not (initially) named as parties to arbitration proceedings concerning a corporate law dispute wishing to participate in the arbitration proceedings as claimants may, e.g. submit a notice of claim pursuant to Article 6(1) of the Swiss Rules, or they may initiate separate arbitration proceedings and seek consolidation pursuant to Article 7 of the Swiss Rules, provided the requirements are met. Additional persons may also be joined as additional parties pursuant to Article 6 of the Swiss Rules.

In the case of a joinder or intervention before the appointment of the arbitrators, the additional party may participate in the arbitrator appointment process pursuant to Article 3 of the Supplemental Swiss Rules, including the reference there to Articles 10 and 11 of the Swiss Rules (and Article 11(4) of the Swiss Rules concerning multiparty proceedings in particular). The same applies to the parties to multiple arbitration proceedings in case of a consolidation of such proceedings if no arbitrators have been confirmed. Where the Court decides to consolidate proceedings in which one or more arbitrators have been confirmed by the Court, Article 7(3) of the Swiss Rules applies.

Article 4

“Third persons may participate in the arbitration proceedings pursuant to Article 6(4) of the Swiss Rules. In deciding on whether to permit such participation, the arbitral tribunal shall in particular take into account the potential legal effects of the arbitral award on the respective third person. The arbitral tribunal shall ensure that Affected Persons are properly able to exercise their rights. The arbitral tribunal shall take appropriate measures to ensure the orderly and expeditious conduct of the proceedings.”

Pursuant to the Article 6(4) of the Swiss Rules, a third person may request or be requested by a party to participate in the arbitration proceedings in a capacity other than an additional party. In such a case, the arbitral tribunal, after consulting with all parties and the third person, shall decide on whether to permit such participation and on its modalities, taking into account all relevant circumstances. *E.g.*, Article 6(4) of the Swiss Rules allows for the participation of third persons in arbitration proceedings under the Swiss Rules as interveners.

This provision of the Supplemental Swiss Rules expressly confirms that Article 6(4) of the Swiss Rules also applies to corporate law disputes subject to the Supplemental Swiss Rules.

The provision further ensures compliance with Article 697n(3) CO in cases where persons who may be legally affected by the arbitral award are not (additional) parties to the arbitration proceedings but may nevertheless wish to participate in the arbitration proceedings. Pursuant to Article 697n(3) CO, the arbitral tribunal must ensure that such Affected Persons have the possibility to participate as interveners. In such cases, the arbitral tribunal will among other things have to determine the procedural position of the Affected Person. It will thereby consider the legal effects the arbitral award might have on the Affected Person seeking participation. The arbitral tribunal may apply the distinction between ordinary interveners and qualified interveners in proceedings before Swiss state courts based on the CPC and on the respective jurisprudence of the Swiss Federal Supreme Court. In cases involving corporate law disputes, shareholders in particular may be classified as qualified interveners, although this will depend on the nature of the action. As a general rule, the arbitral tribunal should grant a person who would be classified as a qualified intervener in proceedings before a state court under the CPC a procedural position that allow that person to exercise its procedural rights independently from the main parties and to conduct the proceedings in an independent manner. In doing so, the arbitral tribunal may seek guidance from the Swiss Federal Supreme Court’s decision 142 III 629 and other related case law, as well from any future case law concerning Article 697n(3) CO.

Interveners generally join the arbitration proceedings as they stand; they do not have a right for certain procedural steps or acts to be repeated. In exceptional cases, the arbitral tribunal may nevertheless order that certain procedural steps or acts be repeated or allow participating persons to comment on such acts.

There is no time limit for a request for participation pursuant to Article 6(4) of the Swiss Rules. However, Affected Persons wishing to participate in the appointment process of the arbitrators must do this either pursuant to and within the (time) limits of Article 3(2) and 3(3) of the Supplemental Swiss Rules or as main parties by either asserting a claim against an existing party by submitting a notice of claim according to Article 6(1) of the Swiss Rules.

Since corporate law disputes may involve numerous parties to the arbitration proceedings as well as Affected Persons pursuant to Article 697n(3) CO, proceedings involving corporate law disputes may pose a special challenge to the arbitral tribunal’s management of the arbitration proceedings. They may, for instance, involve a number of non-party interveners participating in the proceedings. In combination with Article 16(1) of the Swiss Rules, the last sentence of this provision requires the arbitral tribunal to take appropriate measures to ensure the orderly and expeditious conduct of the arbitration proceedings notwithstanding the potential complexity of corporate law disputes. Arbitral tribunals might, *e.g.*, consider ordering interveners to form groups and to appoint a common representative if they believe that the applicable law so permits.

INFORMATION REGARDING THE COURSE OF THE ARBITRATION PROCEEDINGS

Article 5

“1. The Secretariat shall, upon request, communicate the names of the members of the arbitral tribunal and the contact details of the presiding arbitrator of the arbitral tribunal before which the arbitration proceedings are pending to persons who on a prima facie basis establish that they are Affected Persons. Before granting such request, the Secretariat shall consult with the arbitral tribunal, which may consult with the parties to the arbitration proceedings. The Secretariat shall provide the contact details of the persons whose request it has granted to the arbitral tribunal.”

This provision enables Affected Persons who are not (yet) a party to or otherwise participating in the arbitration proceedings to obtain information regarding the course of the arbitration proceedings pursuant to Article 5(2) of the Supplemental Swiss Rules.

“2. The arbitral tribunal shall, upon request, inform Affected Persons of the course of the arbitration proceedings and, in its discretion, may grant such persons access to parts of the file. The arbitral tribunal shall notify the parties thereof. Before granting such request, the arbitral tribunal may consult with the parties.”

This provision enables Affected Persons who are not (yet) a party to or otherwise participating in the arbitration proceedings to make an informed decision and potentially a substantiated request for participation pursuant to Article 4. Persons who do not demonstrate any intention of making a request for participation in any form will not receive detailed information; instead, the arbitral tribunal will generally inform such persons only of the status of the arbitration proceedings, e.g., by simply informing them when the award will likely be issued.

The arbitral tribunal has broad discretion when deciding on the scope of information that shall be provided upon a request for information under this provision.

This provision and the respective duty/possibility of the arbitral tribunal to provide information qualifies the principle of confidentiality provided for in Article 44 of the Swiss Rules.

Information under this provision is only provided upon a specific request. If a person has already been provided information according to Article 3(3), that does not mean that that person will automatically receive further information under this provision as well. This provision in fact applies a higher standard than Article 3(3): Whereas Article 3(3) requires that the third person demonstrate on a *prima facie* basis to be an Affected Person, under this provision the arbitral tribunal must assess whether the person making the request is an Affected Person and is as such entitled to receive the requested information.

INTERIM MEASURES AND EMERGENCY RELIEF

Article 6

“1. When seized with a request for interim measures pursuant to Article 29 of the Swiss Rules, the arbitral tribunal may, at its discretion, refrain from deciding or defer its decision if it deems it more appropriate for a judicial authority before which a parallel request is pending to decide first, even if the request before that judicial authority was made later.”

Effective interim relief may be of particular concern in relation to corporate law disputes. Pursuant to Article 29(1) of the Swiss Rules, at the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate. Pursuant to Article 29(3) of the Swiss Rules, in exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard. Article 29(5) of the Swiss Rules clarifies that by submitting their dispute to arbitration under these Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority, and that a request for interim measures addressed by any party to a judicial authority shall not be deemed to be incompatible with the Arbitration Agreement, or to constitute a waiver of that agreement. This system allows parties in need of interim measures to choose whether to address their request to the arbitral tribunal or a competent judicial authority. A party may, for example wish to address a judicial authority if the requested interim measure is to be combined with immediate enforcement measures, or is directed against a party not bound by the statutory arbitration clause. At the same time, the system creates a risk of parallel requests for the same, comparable or conflicting interim relief before different decision makers. In such cases, general rules of *lis pendens* and *res judicata* are said not to apply to interim relief.

To mitigate this potential risk, and in particular the risk that a judicial authority seized with a request for interim measures after the arbitral tribunal would decline jurisdiction to rule on the relevant request because of the request pending before the arbitral tribunal, this provision clarifies that the arbitral tribunal 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. Situations in which the arbitral tribunal may make use of its discretion under this provision are where it considers that the relief potentially ordered by the judicial authority may be more efficient and/or effective.

“2. The same applies mutatis mutandis to the emergency arbitrator pursuant to Article 43 of the Swiss Rules.”

This provision clarifies that the emergency arbitrator acting pursuant to Article 43 of the Swiss Rules has the same discretion to refrain from deciding or to defer his or her decision if he or she deems it more appropriate for a judicial authority before which a concurrent request is pending to decide first, even if the request before that judicial authority was made later. This provision may be relevant insofar as a statutory arbitration clause does not exclude the emergency arbitrator proceedings altogether. The emergency arbitrator will be guided by similar considerations as the arbitral tribunal in exercising his or her discretion, also considering the early stages of the dispute during which applications for emergency arbitrator proceedings can be made pursuant to Article 43 of the Swiss Rules.