Supplemental Swiss Rules for Trust, Estate and Foundation Disputes

Explanatory Note*

Introduction

The Swiss Rules of International Arbitration (the **"Swiss Rules"**), last revised in 2021,[1] provide a modern and effective framework for the resolution of 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"**).

Most cases administered by the Court have traditionally been commercial disputes, involving two or more legal entities. However, the Court also has a history of administering disputes between individuals, including private-wealth disputes related to trusts, estates or foundations. In those cases, the heirs or beneficiaries agreed to arbitrate their disputes under the Swiss Rules.

As of 1 January 2021, the Swiss Civil Procedure Code (**"CPC"**) and Chapter 12 of the Swiss Private International Law Act (**"PILA"**), which govern domestic and international arbitration in Switzerland respectively, expressly provide that their provisions apply *mutatis mutandis* to arbitration clauses contained in *unilateral legal instruments* or articles of association (Article 178(4) of the PILA and Article 358(2) of the CPC).

These provisions confirm that arbitration clauses contained in unilateral instruments regulating trust,[2] estate and foundation matters (**"Unilateral Arbitration Clauses"**) are valid as a matter of Swiss law, provided that they stipulate a seat of arbitration in Switzerland. A testator may thus include an arbitration clause in the testator's testamentary disposition, thereby requiring that any disputes arising therefrom, whether between heirs, legatees, and/or an executor, be referred to arbitration. Likewise, Swiss arbitration law permits the inclusion of Unilateral Arbitration Clauses in trust and foundation deeds. Although trusts are not a legal construct provided for under Swiss law, Switzerland recognizes foreign trusts, having ratified the Hague Convention on the Law Applicable to Trusts and their Recognition on 1 July 2007.

Many disputes related to trusts, estates and foundations (**"TEF Disputes"**) are amenable to resolution through arbitration. TEF Disputes include those arising between heirs regarding the division of an estate; heirs and legatees arising out of a will, including regarding its validity; the spouse and children of a decedent, including relating to the applicable matrimonial regime if relevant to the estate dispute; or between the heirs and the executor and between beneficiaries of a foundation and the foundation's board. Similarly, TEF Disputes may include internal disputes arising out of or in connection with a trust, as defined in the trust instrument, including those between or among trustees; trustees and protectors; beneficiaries; or between trustees and/or protectors and beneficiaries. TEF Disputes are not limited to disputes arising out of unilateral legal instruments: disputes between parties to an inheritance contract also qualify as TEF Disputes. TEF Disputes do not, however, include disputes arising between heirs or trustees, on the one hand, and third parties, on the other, as the jurisdiction conferred by the Unilateral Arbitration Clause (or

---

* 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/2024/09/Swiss-Arbitration-Centre_International-Swiss-Rules-2021-EN.pdf.

2 In some trust jurisdictions, legal instruments regulating trusts are considered bilateral legal arrangements or quasi-contractual relationships between settlor and trustee. Such legal instruments are also included by the term Unilateral Arbitration Clauses.

arbitration clauses contained in inheritance contracts and the like) will generally not extend to such third parties.[3]

Resolving TEF Disputes by arbitration is not only possible, but may also have advantages. For instance, where the testator had assets and spent time in several jurisdictions, or where the heirs have their habitual residence or domicile in different jurisdictions, providing for the resolution of disputes by arbitration allows greater certainty and predictability and avoids lengthy and costly jurisdictional battles and/or parallel court proceedings in different jurisdictions unknown to (some of) the heirs. The latter point is of particular relevance where a decedent had assets in the EU, given that the European Succession Regulation (EU) No 650/2012 (Brussels IV) allows for parallel court proceedings where a decedent with his or her last habitual residence outside the EU had assets within the EU (cf. Articles 4 et seq.).

Arbitration also allows the parties to tailor the proceedings to meet their specific needs. This applies not only to the procedure itself, but also – and importantly – to the selection of arbitrators having the requisite skills and experience to adjudicate their dispute, such as expertise in (international) inheritance or trust law or specific language skills. Arbitration also allows the parties to agree on the confidentiality of the proceedings, a feature that may be of particular interest when significant assets or persons of public interest are involved.

A degree of legal uncertainty nonetheless remains regarding possible limits to arbitral jurisdiction and the enforceability of awards in TEF Disputes, in particular when based on Unilateral Arbitration Clauses. This may be the case, for instance, with regard to heirs benefitting from statutory entitlements, i.e. heirs that are entitled to a minimum share of an estate. In Switzerland, such heirs are generally considered as bound by Unilateral Arbitration Clauses found in wills only if they consent to the application of such clauses. Arbitral jurisdiction may also be impaired in international cases involving real estate, as some jurisdictions provide for the exclusive jurisdiction of the courts of the state where the real estate assets are located. Equally, in some jurisdictions, it is not possible to oust the jurisdiction of supervisory or trust courts by way of arbitration. The existence and scope of such limitations will depend on the jurisdictions involved. Accordingly, parties wishing to include Unilateral Arbitration Clauses in their legal instruments and/or arbitration clauses in their contracts are advised to consider the applicable law and the arbitration law in all of the relevant or potentially relevant jurisdictions in order to identify factors that might pose a problem at a later stage, including on enforcement, such as (i) any limitations on the arbitrability of TEF Disputes or the jurisdiction of arbitral tribunals, for instance in cases involving real estate assets; (ii) any requirements as to the form of an arbitration clause in a will; (iii) the validity and/or binding effect of a Unilateral Arbitration Clause in a will or similar deed, in particular vis-à-vis heirs benefitting from statutory entitlements; (iv) possible limitations to the free selection of the applicable substantive law; (v) whether the relevant jurisdiction is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**"New York Convention"**); and (vi) whether TEF Disputes qualify as commercial disputes under the New York Convention.

The Swiss Rules in their current form already extend to arbitrations arising out of Unilateral Arbitration Clauses. However, to account for the specificities of TEF Disputes and ensure that TEF Disputes can be settled under the Swiss Rules even more efficiently and effectively, the Swiss Arbitration Centre has issued the Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (the **"Supplemental Swiss TEF Rules"** or the **"TEF Rules"**), in force as from 1 July 2025. The TEF Rules comprise a short set of provisions that are designed to supplement the Swiss Rules and tailor the arbitration proceedings specifically to TEF Disputes. The TEF Rules are accompanied by a series of Model Arbitration Clauses that can be directly incorporated into wills, trust and foundation deeds, or inheritance contracts. When drafting the TEF Rules, the Swiss Arbitration Centre consulted trust specialists across several jurisdictions, including Bermuda, the BVI, Guernsey, Jersey, Liechtenstein, Singapore, the UK, and Switzerland.

The present Explanatory Note provides background and guidance on the use of the TEF Rules.

---

[3] Non-signatories of the Unilateral Arbitration Clause such as heirs or beneficiaries of foundations or trusts, even if they are putative/disputed heirs or beneficiaries, are not considered to be third parties.

Model Arbitration Clauses for Trust, Estate and Foundation Disputes (the "TEF Disputes")

Drafting arbitration clauses for TEF Disputes requires special care. There is no "one size fits all" solution and consideration must be given to the specific legal instrument into which the arbitration clause will be incorporated, as well as the relevant requirements pertaining to the binding effect of an arbitration clause and the form of such clause.

Moreover, while the Model Arbitration Clauses set out below cover the essential elements of an arbitration clause, parties may wish to include additional content. For example, heirs in estate disputes may not have the means to finance the proceedings. Therefore, a testator may wish to include language granting the executor of the will the power to pay the deposit for the costs of the arbitration in relation to the will, whether in full or in part, on behalf of one or more heirs. Parties may also wish to further expand on the already existing confidentiality provision contained in Article 44 of the Swiss Rules.

(1) **Model Arbitration Clause in a Last Will** (by the testator before death):

The below model clause may be included in last wills by the testator.

Any dispute, controversy, or claim arising out of, or in relation to the above last will shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration including the Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (TEF Rules) in force on the date when the Notice of Arbitration is submitted in accordance with those Rules. The number of arbitrators shall be ... ("one", "three", "one or three"). The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country). The arbitral proceedings shall be conducted in ... (insert desired language).

(2) **Model Arbitration Clause in an Inheritance Contract** (among the heirs, after the death of the deceased):

The below model clause may be included in an agreement among heirs after the death of the deceased.[4]

Any dispute, controversy, or claim arising out of, or in relation to the estate of ... (insert decedent: first name, name, birth date, date of death, citizenship, address) shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration including the Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (TEF Rules) in force on the date when the Notice of Arbitration is submitted in accordance with those Rules. The number of arbitrators shall be ... ("one", "three", "one or three"). The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country). The arbitral proceedings shall be conducted in ... (insert desired language).

(3) **Model Arbitration Clause in an Inheritance Contract** (among the heirs, before the death of the deceased):

The below model clause may be included in inheritance contracts among the heirs before the death of the deceased.

Any dispute, controversy, or claim arising out of, or in relation to the above inheritance contract of ... (insert testator(s): first name, name, birth date, citizenship, address) or the inheritance contract dated (insert date): first name, name, birth date, citizenship, address) shall be resolved by arbitration in accordance the Swiss Rules of International Arbitration including the Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (TEF Rules) in force on the date when the Notice of Arbitration is submitted in accordance with those Rules. The number of arbitrators shall be ... ("one", "three", "one or three"). The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country). The arbitral proceedings shall be conducted in ... (insert desired language).

(4) **Model Arbitration Clause in a Trust Deed:**

In contrast to other model clauses, the below model clause for inclusion in trust deeds is drafted as an agreement

---

[4] The model clause may be used as a standalone agreement or be included as a clause in an inheritance contract also containing other substantive or procedural agreements among the heirs.

between the original parties to the trust instrument to ensure that not only the settlor and the trustee, but also the protector and any persons benefitting from the trust are bound by the arbitration clause. This is intended to ensure that any beneficiary claiming or accepting a benefit, interest or right under the trust, shall be deemed to have agreed to the provisions of the arbitration clause and will be bound by its terms.

When including an arbitration clause in a trust deed or when amending such clause later on, in addition to addressing the general requirements for such Unilateral Arbitration Clause, a party may wish to consider whether, and if so how, to restrict the trustee's rights to seek directions from a competent state court. This is a matter not addressed in the TEF Rules or the model arbitration clauses that must be considered on a case-by-case basis, depending on the law governing the trust.

Any dispute, controversy or claim arising out of or in relation to this Trust [as defined in the trust instrument], including regarding the validity of its establishment shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration including the Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (TEF Rules) in force on the date when the Notice of Arbitration is submitted in accordance with those Rules. The settlor, the original trustee(s) and the original [protector(s)] [other original power-holder(s)] hereby agree to the provisions of this arbitration clause, and each successor trustee and [protector] [other powerholder], by acting or agreeing to act under the Trust, also agrees, or shall be deemed to have agreed, to the provisions of this arbitration clause. A beneficiary submits to this arbitration clause by accepting any benefit, interest or right from the trust. The trustee can require the beneficiary to confirm this in writing. Refusal of confirmation is deemed to be a waiver of the benefit, interest or right. The number of arbitrators shall be ... ("one", "three", "one or three"). The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country). Upon request, the arbitral tribunal can move its seat to the seat of the trust if this is necessary for the validity of the arbitral award for the trust under trust law. The arbitral proceedings shall be conducted in ... (insert desired language).

(5) **Model Arbitration Clause in the Statutes of a Foundation:**

The below model clause may be included in the statutes of a foundation.

Any dispute, controversy or claim between the foundation, its bodies, the founder or beneficiaries in connection with this foundation shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration including the Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (TEF Rules) in force on the date on which the Notice of Arbitration is submitted in accordance with those Rules. This includes disputes over the existence of specific designated beneficiaries or classes of beneficiaries and the extent of any entitlement, the rules for determination of the beneficiaries, the validity, invalidity, change or dissolution of the foundation, challenges to resolutions and supervisory measures. A beneficiary submits to this arbitration clause by accepting any benefit, interest or right from the foundation. The foundation can require the beneficiary to confirm this in writing. Refusal of confirmation is deemed to be a waiver of the benefit, interest or right. The number of arbitrators shall be ... ("one", "three", "one or three"). The seat of the arbitration shall be ... (name of city in Switzerland, unless the parties agree on a city in another country). The arbitral proceedings shall be conducted in ... (insert desired language).

Model Arbitration Clauses for Trust, Estate and Foundation Disputes (the "TEF Rules")

SCOPE OF APPLICATION

Article 1(1)

"The Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (the "Supplemental Swiss TEF Rules", or the "TEF Rules") apply to all arbitration proceedings initiated pursuant to an arbitration clause providing for arbitration pursuant to the Swiss Rules of International Arbitration (the "Swiss Rules") where such arbitration clause is contained in a unilateral legal instrument regulating trust, estate or foundation matters (the "Unilateral Arbitration Clause")."

Article 1(1) defines the scope of application of the Supplemental Swiss TEF Rules. It was a deliberate decision not to define "trust, estate, and foundation disputes", but instead to define the scope of application of the rules by reference to the three specific circumstances in which they will apply.

The first circumstance is where the relevant arbitration clause provides for arbitration under the Swiss Rules, without specifically referring to the TEF Rules, but where the arbitration clause is a Unilateral Arbitration Clause, i.e. an arbitration clause "contained in a unilateral legal instrument regulating trust, estate or foundation matters". This includes wills, trust and foundation deeds, and potentially other instruments. No detailed definition or exhaustive list of such instruments is included so as not to unnecessarily limit the scope of application of the TEF Rules.

Where a Unilateral Arbitration Clause refers to arbitration under the Swiss Rules, the TEF Rules apply automatically and regardless of the scope or subject-matter of the dispute.

This requires the parties, the Court and the arbitral tribunal to consider whether the arbitration clause on which the arbitration is based is a Unilateral Arbitration Clause. In case of doubt, it may be prudent to assume that it is a Unilateral Arbitration Clause and that, therefore, the TEF Rules apply.

On the other hand, the TEF Rules do not automatically apply when the relevant arbitration clause or agreement referring to the Swiss Rules (the "Arbitration Agreement") is not a Unilateral Arbitration Clause, even if the relevant instrument, such as an inheritance contract, or the resulting dispute qualifies as a TEF Dispute. This follows from the fact that the TEF Rules do not define what qualifies as a "trust, estate, and foundation dispute" and also ensures that parties to multilateral contracts and arbitration agreements retain the right to apply the Swiss Rules without the application of the TEF Rules. As further explained below, parties are free to submit their disputes to arbitration pursuant to the TEF Rules by specifically referring to them in their Arbitration Agreement or by subsequently agreeing on their application.

It bears emphasising that neither the Swiss Rules nor the TEF Rules contain provisions governing the formal or substantive validity of Unilateral Arbitration Clauses, nor could they replace any mandatory provisions of law governing this issue. If Unilateral Arbitration Clauses are not valid under the applicable law or if the relevant dispute is not arbitrable, then this invalidity or non-arbitrability cannot be avoided by subjecting the dispute to the Swiss Rules or the TEF Rules. These are matters for the drafter of the Unilateral Arbitration Clause to consider in each given case, together with the question of whether any (frequently stricter) provisions concerning the substantive validity of wills also apply to the arbitration clauses they contain.

Notably, if the seat of the arbitration is in Switzerland, this issue does not appear to arise in view of the current wording of Article 178 PILA (applicable to international arbitrations) and Article 358 CPC (applicable to domestic arbitrations). Indeed, although not yet confirmed by the Swiss Federal Supreme Court, the wording of these provisions confirms not only the formal, but also the substantive validity of Unilateral Arbitration Clauses, without the need to consider any provisions of the substantive law applicable to wills, trusts or foundations.[5]

Unilateral Arbitration Clauses, by definition, give rise to questions as to their subjective scope, i.e. regarding who, apart from any persons expressly mentioned in or benefitting from a will or other unilateral instrument – such as named heirs, executors, legatees, beneficiaries of a foundation or trust – are bound by the relevant clause. For instance, under Swiss inheritance law, it is not yet settled whether legal heirs who were excluded by the testator in the testator's will are nonetheless bound by the arbitration clause contained in it should they wish to initiate proceedings

---

[5] BK-IPRG-Gabriel/Landbrecht, Art. 178, para. 568; para. 46; B. Berger / F. Kellerhals, International and Domestic Arbitration in Switzerland, Bern 2021, para. 470; M. Stacher, Testamentarische Schiedsklauseln, AJP 2022, p. 876-885, p. 879; B. Lautenschlager / R. Pawlik, Testamentarische Schiedsklauseln – (beschränkte) Auswirkungen der IPRG-Revision, Successio - Zeitschrift für Erbrecht, 2023, p. 103-114, para. 17.

to enforce their rights, with significant commentators being against it.[6]

Ultimately, these questions will be for the arbitral tribunal or court seized (e.g., upon the challenge or enforcement of the award) to determine in accordance with the relevant arbitration law and/or the substantive law, and there remains uncertainties in many jurisdictions, including in Switzerland.

When deciding to include a Unilateral Arbitration Clause, parties should thus consider whether to specifically identify who is to be bound by the clause, for instance by including a reference to heirs in all degrees per stirpes or to substitute heirs, to ensure that they will indeed be bound by the clause.

This approach is particularly important in the case of trusts, where trust instruments are frequently signed not only by the settlor of the trust, but also by the trustee and, where applicable, the protector.

"The TEF Rules shall also apply where the Arbitration Agreement or a Unilateral Arbitration Clause provides for arbitration pursuant to the TEF Rules or the Introductory Rules of the Swiss Association for Arbitration in Inheritance Matters ("Schweizerischer Verein Schiedsgerichtsbarkeit in Erbsachen") ..."

The second circumstance in which the TEF Rules will apply is where the Arbitration Agreement or a Unilateral Arbitration Clause specifically refers to them or to a predecessor set of rules developed by the Swiss Association for Arbitration in Inheritance Matters ("SVSiE"), namely the *Introductory Rules of the Swiss Association for Arbitration in Inheritance Matters* (the "SVSiE Rules").

The SVSiE was founded in 2012 to provide a suitable framework for arbitration in estate matters. To this end, the SVSiE developed new rules for estate disputes. The SVSiE Rules consisted of the then-current version of the Swiss Rules together with a few introductory provisions. The SVSiE also developed certain model arbitration clauses. The proceedings under the SVSiE Rules were administered by the board of the SVSiE acting as the court of arbitration and by the secretariat of the SVSiE. With the entry into force of the TEF Rules, the SVSiE Rules are obsolete and the SVSiE has thus been dissolved. Article 1(1) of the TEF Rules clarifies that arbitrations initiated under an Arbitration Agreement or a Unilateral Arbitration Clause referring to the SVSiE Rules will be administered by the Swiss Arbitration Centre pursuant to the TEF Rules.

"... or where agreed by the parties."

Finally, the third circumstance in which the TEF Rules will apply is where the parties to the arbitration expressly agree to submit their dispute to arbitration pursuant to the TEF Rules, regardless of whether an Arbitration Agreement between them already exists and/or whether its terms would have resulted in the application of the TEF Rules.

Article 1(2)

"The TEF Rules supplement the Swiss Rules. To the extent the TEF Rules do not specifically regulate a matter, the provisions of the Swiss Rules shall apply. Wherever the provisions of the Swiss Rules defer to an agreement between the parties, this shall be interpreted, in the case of a Unilateral Arbitration Clause, as referring to any instructions contained within such clause or the corresponding legal instrument."

This provision clarifies that the TEF Rules must be read together with the Swiss Rules; wherever the TEF Rules are silent, the provisions of the Swiss Rules apply.

It further clarifies that, wherever the provisions of the Swiss Rules defer to an agreement between the parties, this deference must also extend to any instructions reflected in the Unilateral Arbitration Clause. For example, the Swiss Rules provide for the number of arbitrators, the seat of arbitration, and the language(s) of the proceedings, but only to the extent that these matters have not been agreed by the parties.[7] However, a Unilateral Arbitration Clause by definition does not contain any agreement between parties but only the unilateral instructions of its author(s). Therefore, deference should be given to these instructions in relation to procedural matters. In this context, the

---

6 B. Lautenschlager/R. Pawlik, Testamentarische Schiedsklauseln – (beschränkte) Auswirkungen der IPRG-Revision, Successio - Zeitschrift für Erbrecht, 2023, p. 103-114, paras. 30 et seqq.; BK-IPRG-Gabriel/Landbrecht, Art. 178, paras. 580 et seqq.; BSK-IPRG-Gränicher, Art. 178, paras. 101 et seq.

7 Swiss Rules, Articles 9, 17 and 18.

"author" of the Unilateral Arbitration Clause includes the testator of a will, the settlor(s) or, if applicable, the trustee of a trust or the founder(s) of a foundation.

The TEF Rules do not address the extent to which the parties to the arbitration may subsequently deviate from the instructions of the author of a Unilateral Arbitration Clause, for instance regarding the seat of arbitration or the number of arbitrators. Whether or not such amendments can be validly and effectively made will have to be determined on a case-by-case basis by the Court or the arbitral tribunal, depending on the issue.

Article 1(3)

"This version of the TEF Rules, in force as from 1 July 2025, shall apply to all arbitration proceedings falling within the scope defined in Article 1(1) and in which the Notice of Arbitration is submitted on or after that date, unless otherwise agreed by the parties or provided by the Unilateral Arbitration Clause or the Arbitration Agreement."

This provision corresponds to Article 1(2) of the Swiss Rules. It confirms that, in principle, the current version of the TEF Rules will apply to arbitrations commenced on or after 1 July 2025.

INFORMATION, NOTIFICATION AND REPRESENTATION OF ENTITLED PERSONS

Article 2(1)

"*Subject to the express provisions in the Unilateral Arbitration Clause, the parties shall be responsible for ensuring that all entities or persons, born or unborn, whose rights or entitlements might be affected by their dispute ("Entitled Persons") are named as parties to the arbitration or otherwise informed thereof and given the opportunity to have their interests represented in accordance with any applicable rules of mandatory law or the unilateral legal instrument."*

This provision clarifies that the parties are responsible for ensuring that all entities or persons, born or unborn, whose rights or entitlements might be affected by the dispute and that are not parties to the arbitration ("Entitled Persons") are informed of, and given the opportunity to have their interests represented in, arbitration proceedings initiated pursuant to the TEF Rules in accordance with any applicable provisions of mandatory law.

While it lies within the discretion of the parties to determine who they wish to involve in the arbitration proceedings, TEF Disputes can have a direct – and often significant – impact on the rights and entitlements of entities or persons that the parties might not have involved. The interests of these Entitled Persons require protection. Moreover, there are circumstances in which persons whose rights or entitlements might be affected are unable to participate themselves in the arbitration, e.g. because they are unborn, minors, or otherwise lack capacity to act. It is important that these persons or entities are heard through an appropriate representative appointed for that purpose, as required by the applicable substantive law. For this reason, namely to ensure that the interests of Entitled Persons are represented, many jurisdictions have provisions requiring mandatory joinder of certain parties in estate proceedings.

It is for the parties to the dispute to identify any Entitled Persons and ensure that their interests are represented in accordance with mandatory law, not for the Swiss Arbitration Centre or the arbitral tribunal. While it is customary for certain legal instruments, such as trust deeds, to include mechanisms precisely for this purpose, in the absence of any such mechanisms it is for the parties to devise and agree on them.

Similarly, it is for the parties to decide whether unborn, minors, or Entitled Persons otherwise lacking capacity to act need to be represented before they are notified of the initiation of the proceedings.

Article 2(2)a-b

"In addition to the items identified in Article 3(3) of the Swiss Rules, the Notice of Arbitration shall, where appropriate, include the following:

(a) a list of all Entitled Persons, together with a brief description of their relationship to the relevant legal instrument, the parties and the dispute, including, where applicable and available, their names, addresses, telephone numbers, and e-mail addresses and those of their representatives; and

(b) an indication of any such Entitled Persons that might require the appointment of a legal representative, together with a concrete proposal setting forth the steps to be undertaken by the parties for the appointment of such legal representative."

Article 2(2) supplements Article 3(3) of the Swiss Rules and provides greater clarity regarding how the parties – here the Claimant – are to comply with the obligation set forth in Article 2(1).

Specifically, it provides that – in addition to the information required by Article 3(3) of the Swiss Rules – the Claimant in the Notice of Arbitration must do the following:

a) The Claimant must provide a list of all Entitled Persons, together with certain additional information, including an explanation of their relationship to the relevant matter and contact details, where relevant and available. This information allows the Secretariat to notify Entitled Persons of the initiation of the proceedings and thus provide them with an opportunity to have their interests represented.

b) The Claimant must identify any such Entitled Persons who might require the appointment of a legal representative, together with a concrete proposal on the steps to be taken by the parties for the appointment of such legal representative(s). This ensures that the necessary steps to safeguard the right to be heard of all Entitled Persons are identified and discussed among the parties. While the Court notifies all Entitled Persons, including those that might require the appointment of a legal representative, it has no responsibility regarding, or involvement in, the appointment of legal representatives.

The TEF Rules do not address the consequences of non-compliance with the provisions of Article 2(2). This will be a matter for the arbitral tribunal or a court to determine, whether in the arbitration proceedings themselves or in any related court proceedings, including proceedings for interim measures or enforcement of the arbitral award.

Article 2(3)

"In addition to the items set forth in Article 4(1) of Swiss Rules, the Answer to the Notice of Arbitration shall, where appropriate, include the Respondent's comments on the information provided in the Notice of Arbitration pursuant to Article 2(2) above."

Like Article 2(2) with respect to the Claimant, Article 2(3) addresses the additional information that the Respondent is to provide with its Answer to the Notice of Arbitration pursuant to Article 4(1) of the Swiss Rules to meet the responsibility stipulated in Article 2(1) of the TEF Rules.

Article 2(3) requires the Respondent to comment on the list of Entitled Persons and of those that might require the appointment of a representative. The purpose is to supplement these lists, where appropriate, and ensure that all parties are equally responsible to identify all Entitled Persons.

Article 2(4)

"The Secretariat shall notify the Notice of Arbitration and Answer to the Notice of Arbitration together with any exhibits to the Entitled Persons identified by the parties."

This provision clarifies that the Secretariat will not only notify the Notice of Arbitration and the Answer to the Notice of Arbitration to the parties, but also to any Entitled Persons identified by them pursuant to Articles 2(2) and 2(3).

The manner in which the Secretariat notifies Entitled Persons of the Notice of Arbitration and Answer to the Notice of Arbitration is governed by Article 3(6) and Article 4(3) of the Swiss Rules.

Entitled Persons wishing to participate in the arbitration proceedings as an additional party may avail themselves of Article 6(1) of the Swiss Rules by filing a Notice of Claim. Alternatively, should they wish to participate in a capacity other than as an additional party, they may apply to do so pursuant to Article 6(4) of the Swiss Rules. As explained below, Entitled Persons not wishing to participate in the proceedings shall nevertheless be entitled to comment on the appointment of the arbitral tribunal (Article 3(2)).

The TEF Rules do not foresee the Secretariat making any further notifications to Entitled Persons beyond the notification of the Notice of Arbitration and Answer to the Notice of Arbitration. Should Entitled Persons submit a Notice of Claim pursuant to Article 6(1) or an application to participate in another capacity pursuant to Article 6(4) of the Swiss Rules, their further involvement in the proceedings will be dictated by these respective roles. Practical information relevant for parties and arbitrators relating to the application of Article 6(4) Swiss Rules can be found in the Swiss Rules of International Arbitration Practice Note (see paras. 68 et seq.). Where Entitled Persons choose not to participate in the proceedings, as a general rule and subject to Article 3(2), they no longer receive any notifications

with respect to the proceedings from the Secretariat. Should the parties at any stage consider that further notification would be appropriate, it is incumbent upon them to undertake such notification or make a specific application to the Secretariat in this regard.

Article 2(5)

"To the extent that Entitled Persons are neither identified by the parties nor invoke their right to participate in the proceedings, the arbitral tribunal may ask the Secretariat to notify the Notice of Arbitration and Answer to the Notice of Arbitration together with any exhibits to such Entitled Persons."

This provision clarifies that the arbitral tribunal may request the Secretariat to notify Entitled Persons of the Notice of Arbitration and Answer to the Notice, including any exhibits, even when the parties have not identified them and such Entitled Persons have not invoked their right to participate in the arbitration. When making such an application, the arbitral tribunal should have regard to the applicable substantive law.

Article 2(6)

"The confidentiality obligations applicable to the parties pursuant to Article 44(1) of the Swiss Rules apply equally to Entitled Persons."

This provision clarifies that Entitled Persons (and their representatives) – even if they do not ultimately become parties to the arbitration – are bound by the confidentiality obligations of Article 44 of the Swiss Rules.

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 Unilateral Arbitration Clause or Arbitration Agreement provides for the appointment of the arbitrator(s) by the Court."

This provision confirms the general principle that Articles 10 and 11 of the Swiss Rules also apply to the appointment of the arbitral tribunal in proceedings administered under the TEF Rules. However, this general principle is subject to the special provisions contained in Articles 3(2) and 3(3). These provisions ensure that, unless the relevant Unilateral Arbitration Clause or Arbitration Agreement provides that all arbitrators will be appointed by the Court, any Entitled Persons should be heard on matters relating to the appointment of the arbitral tribunal.

Article 3(2)

"Where Entitled Persons have been identified, the Court shall fix a time limit within which they may submit comments on the appointment of the arbitral tribunal. The Court shall inform the Entitled Persons who so request of each procedural step in the appointment of arbitrators. Following the designation of each arbitrator and prior to the arbitrator's confirmation by the Court, the Entitled 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, the Entitled 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 the Entitled Persons its pertinent correspondence with the parties and the arbitrators. The Court shall take into account any comments and objections by Entitled Persons 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 the Entitled Persons who submitted written comments or objections. The Court may, on its own initiative, make available to the Entitled Persons any information that it deems relevant."

This provision ensures that Entitled Persons are heard on matters relating to the appointment of the arbitral tribunal, even in cases in which they choose not to file a Notice of Claim or otherwise participate in the proceedings pursuant to Article 6(4) of the Swiss Rules. The matters on which they may have to be invited to comment include the number of arbitrators (unless defined in the Unilateral Arbitration Clause or the Arbitration Agreement); the appointment procedure – in particular for a sole arbitrator or presiding arbitrator; the arbitrators' qualifications; the names of the arbitrators designated by the parties; and any disclosures made by prospective arbitrators. The timeline fixed by the Court should be reasonable and will normally not exceed 30 days.

In principle, the Court will provide information to Entitled Persons only upon receipt of a specific request, be it for information about the status of the appointment procedure or for the pertinent correspondence. An Entitled

Person may request both at the same time in a single request. However, receiving information about the status of the appointment procedure based on a first, initial request, does not entail automatic receipt of the pertinent correspondence. To receive the latter, a specific second request is required. When submitting that second request, the Entitled Person may refer to the initial request and to any Court decision in response.

The TEF Rules do not provide for, and the Court will not set, a time limit within which the Entitled Persons should submit reasoned written comments or objections regarding designated arbitrators. The TEF Rules simply provide that such comments or objections shall be submitted prior to the confirmation of the arbitrator in question. In practice, given also the time limit provided for in Articles 10 and 11 of the Swiss Rules by application of Article 3(1), the Court will allow sufficient time for the Entitled Persons to submit comments or objections before confirming arbitrators, taking into account all relevant circumstances, 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. Entitled Persons who 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 this provision swiftly upon being informed of the designation of an arbitrator.

In case of disclosure, Entitled Persons may provide their 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 Entitled Persons when confirming the arbitrators pursuant to Article 8(1) of the Swiss Rules. In particular, the Court may, at its discretion, refuse to confirm arbitrators based on such comments or objections. 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 limited right of Entitled Persons to the Court's pertinent correspondence with the parties and the arbitrators pursuant to Article 3(2) means that the Court is not required to disclose its internal files. However, the provision of correspondence is not restricted to disclosures made by the arbitrators but may include additional relevant correspondence, including with the parties.

Where Article 3(2) does not apply pursuant to Article 3(1) because the Unilateral Arbitration Clause or Arbitration Agreement provides for the appointment of the arbitrator(s) by the Court, the Court may, in exceptional circumstances and at its discretion, nonetheless accept comments from Entitled Persons deemed appropriate.

Depending on the circumstances, the Court may, on its own initiative, inform all Entitled Persons who have inquired about the status of the procedure for any appointment or disclosure made, and provide them with the pertinent correspondence, even in the absence of specific requests. The final sentence of Article 3(2) empowers the Court to provide Entitled Persons, on its own initiative, with any information it considers relevant.

Entitled Persons merely exercising their right to comment on the appointment of the arbitral tribunal pursuant to Article 3(2) do not become a party to the arbitration.

Article 3(3)

"Where not all Entitled Persons are legally represented or where it appears appropriate in the circumstances, the Court may appoint some or all of the arbitrators, and, if applicable, shall appoint the presiding arbitrator."

This provision applies to situations in which the Court is empowered to appoint some or all of the arbitrators, including, where applicable, the presiding arbitrator, particularly when not all Entitled Persons are legally represented or in the light of other circumstances which the Court considers makes it appropriate. This provision is intended to safeguard the integrity of the arbitration proceedings and to prevent situations in which some Entitled Persons had no opportunity to comment on the appointment of the arbitral tribunal, for instance, when Entitled Persons were identified but could not be located.

APPLICABLE SUBSTANTIVE LAW IN ESTATE MATTERS

Article 4

"Article 35 of the Swiss Rules shall not apply to estate matters."

In line with the principle of party autonomy in commercial transactions, Article 35(1) of the Swiss Rules provides that

the arbitral tribunal shall decide the case by applying the rules agreed by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection. Article 35(2) further provides that the arbitral tribunal may decide a case ex aequo et bono or as amiable compositeur where authorized by the parties to do so.

The principle of party autonomy underlying Article 35(1) of the Swiss Rules gives rise to some tension in estate law matters where policy considerations frequently play a role.

Many jurisdictions – including Switzerland – have conflict-of-law rules specifically tailored to estate law matters, which, among other things, restrict the ability of the decedent or, subsequently, the heirs to choose the law applicable to issues arising from the estate. Under Swiss law, the choice of law made in a will constitutes a conflict-of-law reference that must be observed ex officio, even if the heirs wish to apply a different law. The testator, in turn, is not entirely free to choose any law to govern the estate: under Swiss conflict-of-law rules in international estate matters, testators may choose only between Swiss law and the law of their nationality. However, if the testator is a Swiss citizen, Swiss law (including its forced heirship provisions) must be applied (Article 91(1) of the PILA).

The Swiss Federal Supreme Court has yet to address how these restrictions interact with Swiss arbitration law, which allows the parties to determine autonomously the applicable substantive law in arbitration proceedings, with no limitation on their choices. This includes, for example, the question of whether the substantive conflict-of-law rules applicable to estate matters take precedence over those of the arbitration law or whether the provisions on applicable substantive law in the arbitration law also extend to estate arbitration.

This tension is exacerbated by the risk that an arbitration clause could be used to circumvent the mandatory provisions of estate law that would otherwise apply. For example, it may be problematic if testators could circumvent mandatory estate laws of their last domicile by selecting an arbitral seat that allows them to freely choose the applicable substantive law. Such a scenario could undermine the policies underlying the legal regime at the testator's (last) domicile, potentially raising public policy concerns and issues with the enforcement of the award.

Article 35 of the Swiss Rules does not account for the specificities of estate matters and thus fails to provide an appropriate choice of law rule for estate arbitrations. To address this issue, Article 4(1) explicitly excludes estate matters from the scope of Article 35 of the Swiss Rules. Importantly, because these concerns do not extend to trust or foundation matters, Article 35 does apply to arbitrations governed by the TEF Rules when they concern trust and foundation matters.

Testators should include a choice-of-law clause in their wills and/or inheritance contracts and make sure such clause is valid. Generally, first, a choice-of-law clause must be compatible with the conflict-of-law rules applicable to estate matters at the last domicile of the decedent; and second, the choice of such rules of law must not be abusive.

If no choice of law has been made, or if the arbitral tribunal concludes that the chosen law shall not apply, the arbitral tribunal will determine the applicable substantive law pursuant to the conflict-of-law rules governing estate matters at the last domicile of the deceased.

The application of the relevant conflict-of-law rules may require the arbitral tribunal to consider two separate sets of law. For instance, this could occur if the arbitration involves not only the estate of the deceased but also the division of matrimonial property upon death, and the conflict-of-law analysis leads to different laws being applicable to these distinct issues.