

The 2023 Supplemental Swiss Rules for Corporate Law Disputes

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International commercial arbitration – Domestic commercial arbitration – Swiss Rules – Supplemental Swiss Rules for corporate law disputes – Statutory arbitration clauses – Corporate law disputes – Swiss joint stock companies – Swiss limited liability companies – Swiss partnerships limited by shares

Summary

Statutory arbitration clauses for the settlement of corporate law disputes are now expressly allowed under the newly introduced Swiss corporate law. Such clauses must comply with specific procedural requirements in favor of persons who may be directly affected by the legal effects of the arbitral award. In order to comply with those requirements and to ensure that corporate law disputes can be settled efficiently and effectively, the Swiss Arbitration Centre has issued the Supplemental Swiss Rules for Corporate Law Disputes, in force as from 1 January 2023. This paper proposes a few comments on the legal basis for statutory arbitration clauses and such supplemental rules, in particular how they address the legal requirements for the validity of the statutory arbitration clauses and for the proceedings based on such clauses. Furthermore, this paper discusses the impact of the bankruptcy of a Swiss joint stock company on the statutory arbitration clause provided for in its articles of association in case of a liability claim brought by creditors against members of the corporate bodies.

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I. Introduction

With the entry into force on 1 January 2023 of the new Article 697n of the Swiss Code of Obligations (the “**CO**”), the settlement of corporate law disputes by arbitration based on arbitration clauses inserted in the articles of association of Swiss joint stock companies, partnerships limited by shares and limited liability companies (statutory arbitration clauses) is expressly allowed. That new provision provides for specific procedural requirements in favor of persons who may be directly affected by the legal effects of the arbitral award (the “**Affected Persons**”).

In order to comply with those requirements and to ensure that corporate law disputes can be settled efficiently and effectively, the Swiss Arbitration Centre issued the Supplemental Swiss Rules for Corporate Law Disputes (the “**Supplemental Swiss Rules**”). They entered into force on 1 January 2023 as well. The Swiss Arbitration Centre also proposes a model statutory arbitration clause providing for the Supplemental Swiss Rules (the “**Model Clause**”).

An explanatory note accompanies the Supplemental Swiss Rules and the Model Clause (the “**Explanatory Note**”). The Explanatory Note has been drafted with the view of clarifying the Supplemental Swiss Rules and the Model Clause; it does not express the opinion of the Arbitration Court of the Swiss Arbitration Centre (the “**Court**”). It is not intended to freeze interpretation of the Supplemental Swiss Rules.¹ Those documents are available on the Swiss Arbitration Centre’s website.²

This paper proposes a few comments on the legal basis, i.e. the newly introduced Article 697n CO (I) and the Supplemental Swiss Rules, in particular how they address the requirements set forth by that provision for the validity of the statutory arbitration clauses and for proceedings based on such clauses (II). This paper continues by discussing the impact of the bankruptcy of a Swiss joint stock company on a statutory arbitration clause in case of a liability claim brought by creditors against members of the corporate bodies (III).

¹ Explanatory Note, p. 1.

² <[swissarbitration.org/centre/arbitration/arbitration-rules/](https://www.swissarbitration.org/centre/arbitration/arbitration-rules/)>.

II. The Legal Basis for Statutory Arbitration Clauses (Article 697n CO)

A. Scope of Application

Relevant Companies

Swiss joint stock companies pursuant to Articles 620 *et seq.* CO (“Ltd”; “*sociétés anonymes*”; “*Aktiengesellschaften*”), partnerships limited by shares pursuant to Articles 764 *et seq.* CO (“*sociétés en commandite par actions*”; “*Kommanditaktiengesellschaften*”) and limited liability companies pursuant to Articles 772 *et seq.* (“LLC”; “*sociétés à responsabilité limitée*”; “*Gesellschaften mit beschränkter Haftung*”) may submit corporate law disputes to arbitration by inserting an arbitration clause in their respective articles of association. The relevant legal basis is Article 697n CO which directly applies to Swiss joint stock companies and by reference pursuant to Articles 764(2) and 797a CO for partnerships limited by shares and limited liability companies, respectively.³

Article 697n CO does not apply to Swiss cooperatives, associations⁴, or foreign companies⁵. For Swiss cooperatives and associations, arbitration for their corporate disputes was possible before the enactment of Article 697n CO and obviously continue to be so after such enactment.⁶

Ratione Personae

Unless provided otherwise in the articles of association of the relevant company, a statutory arbitration clause within the meaning of Article 697n CO binds the company, the company’s governing bodies, the members of the governing bodies, the shareholders, and the holder of non-voting shares.⁷ The scope *ratione personae* may be limited, but not extended.⁸

More particularly, the statutory arbitration clause is binding upon the shareholders or partners who joined the shareholding or partnership after the introduction of such clause; it is also binding upon the minority shareholders

³ VOGT Hans-Ueli/HIRSIGER-MEIER Valentina/HOFER Thomas, Statutarische Schiedsklauseln nach dem Entwurf für ein neues Aktienrecht, Zurich 2019, N. 43 *et seq.*

⁴ VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 53.

⁵ CATZEFLIS Boris/SCHRAMM Dorothee, in: ASA Bulletin 3/2021, pp. 778 *et seq.*, p. 783.

⁶ FF 2017 494; CATZEFLIS/SCHRAMM (fn. 5), p. 783; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 54.

⁷ Art. 656a(2) CO; Peter BÖCKLI, Schweizer Aktienrecht, Zurich 2022, §14 N. 349; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 149.

⁸ BÖCKLI (fn. 7), §14 N. 54.

or partners who have opposed its adoption.⁹ Founders and *de facto* governing bodies who can be held liable on the basis of Articles 753 *et seq.* CO will also be bound.¹⁰

The statutory arbitration clause will however not be binding upon third parties, such as the company’s creditors or the commercial registers.¹¹

Ratione Materiae

According to Article 697n CO, the “corporate law disputes” may be submitted to arbitration. Article 697n CO includes the same terms “corporate law disputes” (“*différends relevant du droit des sociétés*”; “*gesellschaftsrechtliche Streitigkeiten*”) as those included in Article 151(1) of the Swiss Private International Law Act (“PILA”).¹² Those terms encompass all disputes relating to the existence of the company¹³ and more generally all legal actions based on corporate law.¹⁴ For instance, with regard to Swiss joint stock companies:¹⁵

- The liability claims against the members of the corporate bodies (Articles 752 *et seq.* CO; Article 108 of the Swiss Merger Act).
- The claims for the return of unduly received benefits (Article 678 CO).
- The claims of the shareholders for information or inspection of company records (Article 697b CO).
- The challenges against the resolutions of the general meeting (Articles 706, 691(3) and 689f(2) CO; Article 106 of the Swiss Merger Act).

⁹ CATZEFLIS/SCHRAMM (fn. 5), pp. 782 and 786; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 148.

¹⁰ ALLEMANN Richard G., Statutarische Schiedsklauseln in der Aktienrechtsrevision, in: GesKR 2018/3, pp. 339 *et seq.*, pp. 349; CATZEFLIS/SCHRAMM (fn. 5), p. 782; BÖCKLI (fn. 7), §14 N. 349; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 150.

¹¹ ALLEMANN (fn. 10), p. 349; CATZEFLIS/SCHRAMM (fn. 5), p. 782; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 124, 154 and 157.

¹² FF 2017 494 *et seq.*

¹³ FF 1983 I 426.

¹⁴ BÖCKLI (fn. 7), §14 N. 340; CATZEFLIS/SCHRAMM (fn. 5), p. 781; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 115. Cf. GUILLAUME Florence, in: BUCHER Andreas (edit.), Commentaire Romand, Loi sur le droit international privé, Convention de Lugano, Bâle 2011, Art. 151 LDIP N. 3.

¹⁵ FF 2017 495; Explanatory Note, p. 2; ALLEMANN Richard G., Setting the Ground for Corporate Arbitration in Switzerland: Swiss Parliament Approves New Rules for Arbitration of Corporate Law Disputes, in: Kluwer Arbitration Blog 17 August 2020 (<arbitrationblog.kluwerarbitration.com>); BÖCKLI (fn. 7), §14 N. 341 and 345; CATZEFLIS/SCHRAMM (fn. 5), p. 781; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 118 *et seq.*

- The claims for a declaration of invalidity of the resolutions of the general meeting of the shareholders or the board of directors (Articles 706b and 714 CO).
- The claims for the dissolution of the company (Article 736(1) no. 4 CO).
- The actions for an appropriate compensation payment following a restructuring (Article 105 of the Swiss Merger Act).
- The actions for cancellation of outstanding equity securities in squeeze-out mergers (Article 137 Financial Market Infrastructure Act).
- The actions of the Company against a shareholder for the performance of the obligation to pay the share capital.
- The actions in connection with transfer restrictions.

Disputes concerning contracts entered by the company¹⁶ or between the shareholders¹⁷ are not corporate law disputes. According to commentators, the corporate law disputes do not include non-contentious matters¹⁸ such as actions in case of deficiencies in the company's organization (Article 731b CO)¹⁹ or to cancel lost securities (Article 971 CO)²⁰, and matters involving the commercial register²¹ such as the action to reinstate a legal entity that was struck from the commercial register (Article 935 CO).

If the corporate disputes may result in a final award which may impact the interest of a person who is among those listed in Article 697n CO, then the requirements of that provision apply.²² Article 2(1) Supplemental Swiss Rules sets forth a non-exhaustive list of those disputes, i.e. those pertaining to the existence of the company, the validity or legality of the resolutions of its bodies, the dissolution of the company, and the determination of an appropriate compensation payment following a restructuring.

¹⁶ ALLEMAN (fn. 10), p. 347; BÖCKLI (fn. 7), §14 N. 343; CATZEFLIS/SCHRAMM (fn. 5), p. 781; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 124 and 130.

¹⁷ FF 2017 495; ALLEMANN (fn. 10), p. 347; BÖCKLI (fn. 7), §14 N. 343; CATZEFLIS/SCHRAMM (fn. 5), p. 782; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 123.

¹⁸ ALLEMAN (fn. 10), pp. 343 and 347; BÖCKLI (fn. 7), §14 N. 345; CATZEFLIS/SCHRAMM (fn. 5), p. 781.

¹⁹ ALLEMANN (fn. 10), p. 343; BÖCKLI (fn. 7), §14 N. 346; CATZEFLIS/SCHRAMM (fn. 5), p. 781. Cf. PETER Henry/CAVADINI Francesca, in: TERCIER Pierre/AMSTUTZ Marc/TRIGO TRINDADE Rita (edit.), *Commentaire romand, Code des obligations II*, 2nd ed., Basel 2017, Art. 731b CO N. 6e. *Contra*: VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 118.

²⁰ BÖCKLI (fn. 7), §14 N. 346.

²¹ ALLEMANN (fn. 15); CATZEFLIS/SCHRAMM (fn. 5), p. 781.

²² Explanatory Note, p. 7; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 215.

The statutory arbitration clause may limit its material scope (*ratione materiae*).²³ In that regard, the Model Clause provides the option to exclude from its scope the summary proceedings provided for in Article 250(c) CPC²⁴, as well as the squeeze-out actions pursuant to the Financial Market Infrastructure Act.²⁵

B. Procedure

Lex Arbitri

According to Article 697n CO, the Part 3 CPC shall govern the arbitral procedure of arbitrations based on statutory arbitration clauses within the meaning of that provision.²⁶ Therefore, Chapter 12 PILA does not apply, even if foreign elements are present such as a foreign shareholder for instance. The opting out of the CPC in favor of Chapter 12 PILA pursuant to Article 353(2) CPC is not available.²⁷

Arbitral Procedure

The arbitral procedure may be determined directly in the articles of association or by reference to a set of arbitration rules such as the Swiss Rules.²⁸ Hence, statutory arbitration clauses may provide for *ad hoc* or institutional arbitration.²⁹ The Supplemental Swiss Rules apply wherever a statutory arbitration clause refers to the Swiss Rules of International Arbitration (the “**Swiss Rules**”).³⁰

Specific Procedural Requirements

The articles of association shall provide (either directly or by reference to a set of arbitration rules) that the Affected Persons are informed of the commencement and completion of the arbitration proceedings and that they

²³ FF 2017 495; ALLEMAN (fn. 10), p. 347; BÖCKLI (fn. 7), §14 N. 347; CATZEFLIS/SCHRAMM (fn. 5), p. 782.

²⁴ See BÖCKLI (fn. 7), §14 N. 342, who is in favor of excluding summary proceedings from the scope of statutory arbitration clauses.

²⁵ Explanatory Note, p. 2.

²⁶ Article 697n(2) CO.

²⁷ FF 2017 495; ALLEMANN (fn. 10), p. 342; CATZEFLIS/SCHRAMM (fn. 5), p. 783; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 169.

²⁸ Article 697n(3) CO.

²⁹ CATZEFLIS/SCHRAMM (fn. 5), p. 787.

³⁰ Article 1(3) Supplemental Swiss Rules.

may participate in the constitution of the arbitral tribunal, as well as in the proceedings as interveners.³¹

The Supplemental Swiss Rules have implemented those requirements of information and participation rights.³²

III. Arbitrations Governed by the Supplemental Swiss Rules

A. Model Clause

The Supplemental Swiss Rules apply to arbitral procedures of arbitrations based on statutory arbitration clause that refer to the Swiss Rules.³³

The Model Clause is a proposal of statutory arbitration clause, which may be included in the articles of association of companies as such. It contains both recommended content required for a valid statutory arbitration agreement and optional content.

The recommend content does not differ from the content applicable to arbitration agreement in general.

The optional content is commented in the Explanatory Note. In short, the options are the following: (i) the exclusion of the summary proceedings pursuant to Article 250(c) CPC and squeeze-out actions pursuant to the Financial Market Infrastructure Act from the scope *ratione materiae* of the statutory arbitration clause; (ii) the appointment by the Court of the entire arbitral tribunal and, as applicable, the designation of the chair by the Court; (iii) the obligation for the company and the members of its governing bodies to submit all disputes falling under the statutory arbitration clause to arbitration, and to object to the jurisdiction of state courts over such disputes; (iv) the possibility for the arbitral tribunal, at the request of a claimant who is a shareholder of the company, to order the company to pay the arbitration costs, provided the action is reasonable and does not conflict with company's predominant interests; (v) the possibility for the arbitral tribunal to order the company to pay any deposit of costs and to advance the costs reasonably incurred or estimate to be incurred by a claimant who is a shareholder of the company for legal representation and legal assistance; (vi) the possibility for the shareholders to receive notifications regarding the commencement and the

³¹ Article 697n(3) CO; ALLEMANN (fn. 10), pp. 352 *et seq.*; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 223 *et seq.*

³² Articles 2 to 5 Supplemental Swiss Rules.

³³ Article 1(3) Supplemental Swiss Rules.

termination of the arbitration proceedings to a serviceable address and to appoint an authorized recipient for such notification; and (vii) the exclusion of the emergency arbitration proceedings pursuant to Article 43 Swiss Rules.

B. The Supplemental Swiss Rules

The Information Rights

The Commencement of the Arbitration Proceedings

Pursuant to Article 697n CO, the Affected Persons are entitled to be informed of the commencement of the arbitration proceedings.

Article 2(1) Supplemental Swiss Rules implements this entitlement. It provides that the company shall take the appropriate steps to notify the Affected Persons within five days of the commencement of the arbitration proceedings. Such commencement is deemed to be on the date on which the notice of arbitration is received by the Secretariat of the Court (the “**Secretariat**”) in accordance with Article 3(2) Swiss Rules.

The duty to notify is borne by the company. However, the company may not be a party to the arbitration proceedings. In such a case, the Supplemental Swiss Rules direct the Secretariat to notify the company of the notice of arbitration when it notifies the notice of arbitration to the respondent in accordance with Article 3(6) Swiss Rules.³⁴ For this purpose, Article 2(2) Supplemental Swiss Rules provides that, in addition to the items set out in Article 3 Swiss Rules, the notice of arbitration shall include the names, addresses, telephone numbers, and email addresses of the company and, where applicable, of its representatives.

The notification shall be delivered in the form provided for in the articles of association for notifications by the company to its shareholders (which may be, e.g., letter, fax or email) and, where applicable, in accordance with any special provision in the articles of association concerning such notification.³⁵ Persons other than shareholders may be notified by other appropriate means.³⁶

³⁴ Article 2(3) Supplemental Swiss Rules.

³⁵ The Model Clause provides the option to stipulate that “[a]ll 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.”

³⁶ Article 2(4) Supplemental Swiss Rules.

The question arises whether such appropriate means include a publication in the Swiss Official Gazette of Commerce.³⁷

The notification of the commencement of arbitration proceedings shall contain sufficient information for the Affected Persons to decide as to whether or not to exercise their participation rights, and to be able to exercise such rights.³⁸ It shall thus outline the relief or remedy sought and the essential facts and background upon which the action is based, and contain the contact details of the Secretariat as set forth in Appendix A to the Swiss Rules.³⁹ If the notification is made public (such as if it is published in the Swiss Official Gazette of Commerce), one may argue that the publication may be shorter.⁴⁰

The Course of the Arbitration Proceedings

The persons who on a *prima facie* basis establish that they are Affected Persons may request, during pending arbitration proceedings, that the Secretariat provide them with the names of the members of the arbitral tribunal and the contact details of the chair. Before granting such request, the Secretariat shall consult with the arbitral tribunal, which may consult with the parties to the arbitration proceedings. For the purpose of that consultation, the Secretariat should be allowed to communicate to the arbitral tribunal the name and contact details of the requesting person, and not only if and when the request of that person is granted as the wording of Article 5(1) might seem to imply.

Further, the Affected Persons may request the arbitral tribunal to inform them of the course of the arbitration proceedings. The arbitral tribunal shall assess whether the requesting person is (not only on a *prima facie* basis) an Affected Person and is as such entitled to receive the requested information.⁴¹ The arbitral tribunal shall notify the parties of such request, and may consult with them before granting the request. The arbitral tribunal has broad discretion in deciding the scope of information that shall be provided to the Affected Persons who requested information, and may grant them access to all or parts of the file.⁴²

The test for the extent of the information to be provided is whether it is required for the requesting Affected Person to assess whether it should exercise

³⁷ In the event that the dispute relates to the cancellation of outstanding equity securities in a squeeze-out merger, a publication in the Swiss Official Gazette of Commerce is required pursuant to Article 121(2) of the Financial Market Infrastructure Ordinance.

³⁸ VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 239, 243 and 259.

³⁹ Article 2(5) Supplemental Swiss Rules.

⁴⁰ *Ibid.*

⁴¹ Explanatory Note, p. 12.

⁴² Article 5(2) Supplemental Swiss Rules; Explanatory Note, p. 12.

its rights to participate in the arbitration proceedings in accordance with Article 697n(3) CO and Article 4 Supplemental Swiss Rules. The arbitral tribunal should thus balance *inter alia* the intention of the Affected Persons to request to participate in the arbitration proceedings, the relevance of the information to be communicated for such party's decision to participate or not against the confidentiality of the arbitral tribunal pursuant to Article 44 Swiss Rules.⁴³

The Completion of the Arbitration Proceedings

The second information right granted by Article 697n CO to the Affected Persons is the right to be informed of the completion of the arbitration proceedings. In this respect, the information duty pertaining to the commencement of the arbitration (Articles 2(1) and 2(4) Supplemental Swiss Rules) shall apply *mutatis mutandis* where the arbitration proceedings are terminated.⁴⁴

Accordingly, the relevant company shall take appropriate steps to notify the Affected Persons within five days of the completion of the arbitration proceedings, i.e. the issuance of the final award or the termination of the arbitration proceedings for any other reason.⁴⁵

As for its commencement, the notification of the completion of the arbitration shall be delivered to the shareholders in accordance with the articles of association and by other appropriate means to persons other than shareholders.⁴⁶

The notification 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.⁴⁷

The Participation Rights

The Right to Participate in the Appointment of the Arbitral Tribunal

According to Article 697n(3) CO, the Affected Persons are entitled to participate in the appointment of the arbitral tribunal. Article 3 Supplemental Swiss Rules implements this entitlement.

⁴³ Cf. Explanatory Note, p. 12.

⁴⁴ Article 2(6) Supplemental Swiss Rules.

⁴⁵ Article 2(1) Supplemental Swiss Rules.

⁴⁶ Article 2(4) Supplemental Swiss Rules. See also fn. 35. In the event of cancellation of outstanding equity securities in a squeeze-out merger, a publication of the cancellation in the Swiss Official Gazette of Commerce and by other adequate means is required pursuant to Article 121(4) of the Financial Market Infrastructure Ordinance.

⁴⁷ Article 2(7) Supplemental Swiss Rules.

Article 3 Supplemental Swiss Rules thus brings special provisions complementing Articles 10 and 11 Swiss Rules, which remain otherwise applicable. Those special provisions do not apply if the statutory arbitration clause provides that the entire arbitral tribunal is appointed by the Court.⁴⁸

According to those special provisions, the persons who on a *prima facie* basis establish that they may be Affected Persons have the following rights:

- The right to submit comments on the appointment of the arbitral tribunal (such as for instance on the number of arbitrators and the requirements as to their qualifications⁴⁹) to the Court for a period of 30 days following the date on which the notice of arbitration is received by the Secretariat.⁵⁰ This is however not a right to designate the arbitrator(s), and the rules governing appointment of the arbitral tribunal in multi-party proceedings do not apply in the event that there is only two parties and *prima facie* Affected Persons.⁵¹
- The right to request the Court to inform them of each procedural step for the appointment of the arbitrator(s).⁵²
- The right to submit, prior to the arbitrator’s confirmation by the Court, reasoned written comments or objections concerning the appointment of each designated arbitrator to the Court.⁵³ The Court does not have to set a deadline for such comments or objections to be submitted, but the Court shall allow for sufficient time, considering the relevant circumstances. The potentially Affected Persons should submit their comments or objections swiftly.⁵⁴ Such comments and objections shall be taken into account by the Court when confirming the arbitrator(s) in accordance with Article 8(1) Swiss Rules, and the Court has to provide these persons with a copy of the confirmation of the arbitrator(s).⁵⁵
- In case of any disclosure by any designated or confirmed arbitrator, the right to submit reasoned written comments or objections within

⁴⁸ Article 3(1) Supplemental Swiss Rules. The Model Clause provides the option to stipulate that “[t]he Arbitration Court of the Swiss Arbitration Centre shall appoint the ... (arbitrator) / (arbitrators and designate the presiding arbitrator).”

⁴⁹ Explanatory Note, p. 9.

⁵⁰ Article 3(2) Supplemental Swiss Rules; Article 3(2) Swiss Rules.

⁵¹ Explanatory Note, pp. 8 *et seq.*

⁵² Article 3(3) Supplemental Swiss Rules.

⁵³ Article 3(3) Supplemental Swiss Rules.

⁵⁴ Explanatory Note, p. 10.

⁵⁵ Article 3(3) Supplemental Swiss Rules.

the same time limit as that applicable to the parties to the arbitration proceedings for their comments. For this purpose, the Court shall, upon express request,⁵⁶ provide such persons with its relevant correspondence with the parties and the arbitrator(s).⁵⁷ The Court shall take into account such comments and objections when confirming the arbitrator(s) in accordance with Article 8(1) Swiss Rules, and the Court shall provide these persons with a copy of the confirmation of the arbitrator(s).⁵⁸

If Article 3(3) Supplemental Swiss Rules does not apply (i.e. when the statutory arbitration clause does provide for the appointment of the arbitral tribunal by the Court), the rights set forth in the three last indents do not apply either. However, the Court may in exceptional circumstances and at its discretion accept comments from persons who can demonstrate on a *prima facie* basis that they are Affected Persons within the same time limits.⁵⁹

The Court may, on its own initiative, make the information it deems relevant available to the persons who have established on a *prima facie* basis that they may be Affected Persons.⁶⁰

The Right to Participate in the Arbitration Proceedings

According to Article 697n(3) CO, a person who may be directly affected by the legal effect of the arbitral award is entitled to participate as intervener in the arbitration proceedings. Article 4 Supplemental Swiss Rules implements that entitlement.

Such participation is already possible further to Article 6(4) Swiss Rules. Article 4 Supplemental Rules thus basically refers to that provision.

Pursuant to Article 6(4) Swiss Rules, where a third person requests or is requested by a party to participate in ongoing arbitration proceedings in a capacity other than an additional party, the arbitral tribunal, after consulting with all parties and the third person, shall decide on whether to permit such participation and on its modalities. In doing so, it shall consider all relevant circumstances, in particular the potential legal effects of the arbitral award on the respective third person.⁶¹

⁵⁶ Explanatory Note, p. 9.

⁵⁷ Article 3(3) Supplemental Swiss Rules.

⁵⁸ *Ibid.*

⁵⁹ Explanatory Note, p. 9.

⁶⁰ Article 3(3) Supplemental Swiss Rules.

⁶¹ Article 4 Supplemental Swiss Rules; Explanatory Note, p. 11.

The arbitral tribunal will have to determine the procedural position of the Affected Persons participating as third persons. For this purpose, it may resort to the distinction between ordinary interveners (“*intervention accessoire*”; “*Nebenintervention*”) and qualified interveners (“*intervention principale*”; “*Hauptintervention*”) which applies in proceedings before Swiss state courts within the meaning of Articles 73 *et seq.* CPC.⁶²

As a general rule, the arbitral tribunal should grant a person who would be classified as a qualified intervener in proceedings before a Swiss state court under the CPC a procedural position that allows that person to exercise its procedural rights independently from the main parties and to conduct the proceedings in an independent manner.⁶³

Instead of participating as third persons, Affected Persons may request to participate as additional parties by submitting a notice of claim against an existing party (intervention) pursuant to Article 6(1) Swiss Rules or commence separate arbitration proceedings and request consolidation to the Court in accordance with Article 7 Swiss Rules. The Affected Persons may be requested to participate as additional parties in the event that a claim is made against them by a party (joinder) pursuant to Article 6(1) Swiss Rules.

Further, the arbitral tribunal shall ensure that Affected Persons are properly able to exercise their rights and shall take appropriate measures to ensure the orderly and expeditious conduct of the proceedings.⁶⁴ This may arguably include the arbitral tribunal’s power to instruct interveners to form groups and to appoint a common representative.⁶⁵

Interim Measures and Emergency Relief

According to Article 29(1) Swiss Rules, the parties may request the arbitral tribunal to grant any interim measures it deems necessary or appropriate. They may also request a state court to do so since, by submitting their dispute to arbitration under the Swiss 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 state court.⁶⁶ A party may therefore choose between

⁶² Explanatory Note, p. 11. Cf. ALLEMANN (fn. 10), p. 353.

⁶³ Explanatory Note, p. 11; VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 273. In the event that the dispute relates to the cancellation of outstanding equity securities in a squeeze-out merger, the participants shall be granted the right to exercise their procedural rights independently from the defending company pursuant to Article 121(3) of the Financial Market Infrastructure Ordinance.

⁶⁴ Article 4 Supplemental Swiss Rules.

⁶⁵ Explanatory Note, p. 11.

⁶⁶ Article 29(5) Swiss Rules.

filing a request for interim measures with the arbitral tribunal or with a competent state court.⁶⁷

Since interim reliefs in the context of corporate law disputes frequently involve enforcement against a party or entity which is not bound by the statutory arbitration clause, the party may prefer to turn to state courts, which have *imperium*.

Article 6(1) Supplemental Swiss Rules grants the arbitral tribunal the power to make that choice for the parties. More particularly, such provision authorizes an arbitral tribunal seized with a request for interim measure pursuant to Article 29 Swiss Rules, to leave it to decide to a state court before which a parallel request is pending. Such possibility is left to the arbitral tribunal's discretion. The arbitral tribunal has such discretion even if the request before the state court is posterior to that pending in the arbitration. This discretion left to the arbitral tribunal is meant to ensure the effectiveness of interim measures, in particular to mitigate the risk of conflicting interim measures or the risk that a state court declines jurisdiction to rule on a request for interim measures for the only reason that the same request is pending before an arbitral tribunal. The emergency arbitrator pursuant to Article 43 Swiss Rules enjoys the same discretion.⁶⁸

IV. Statutory Arbitration Clause and Claims of Creditors Against the Members of the Corporate Bodies During Bankruptcy Proceedings

As said above, unless provided otherwise in the articles of association, the statutory arbitration clauses within the meaning of Article 697n CO are binding upon the company and the members of the corporate bodies. As also said above, the corporate law disputes encompass liability claims against the members of the corporate bodies.

A question of interest is whether claims of creditors against the directors of a bankrupt company for the damage incurred by the same company (Article 757(2) CO or following an assignment pursuant to Article 260 of the Debt

⁶⁷ Explanatory Note, p. 12.

⁶⁸ Article 6(2) Supplemental Swiss Rules. For note, the Model Clause provides the option to stipulate that “[t]he emergency relief proceedings pursuant to Article 43 Swiss Rules shall not apply.”

Enforcement and Bankruptcy Act (the “DEBA”)) may be resolved by arbitration based on a statutory arbitration clause.⁶⁹

According to the *Theorie der Prozessstandschaft*, the creditors asserting such liability claims, are not asserting their own claims against the directors, but company’s claims.⁷⁰ According to that theory, the defendants may raise against the creditors the objections which they have against the company.⁷¹ It would thus be logical that the defendants could raise the *exceptio arbitri* related to the statutory arbitration clause which would be included in the company’s articles of association.

The Swiss Supreme Court does not share that view. It applies the *Theorie des einheitlichen Anspruchs der Gläubigergesamtheit*. According to that theory, in case of bankruptcy, company’s claims are replaced by claims of its creditors (“*communauté des créanciers*”; “*Gläubigergesamtheit*”).⁷² As a result, the defendants are no longer entitled to raise the objections which they had against the company (nor against an individual or a particular group of creditors only). They may only raise the objection against company’s creditors as a whole.⁷³

In its decision ATF 136 III 107, the Swiss Supreme Court specifically dealt with a liability claim brought by a shareholder and a creditor of a bankrupt company, articles of which included a statutory arbitration clause. The creditor relied on an assumption of claim as per Article 260 DEBA. The Swiss Supreme Court recalled that the defending members of the corporate bodies cannot raise all objections which they have against the creditor and the company, but only those which they have against the creditors as a whole.⁷⁴ Since these creditors have no influence on the content of the articles of association, the Swiss

⁶⁹ That question was raised – and answered along the same lines as in the present paper – by Prof. Dr. Edgar PHILIPPIN during a conference held by ASA’s *Groupe Vaudois* on 1 February 2023.

⁷⁰ CORBOZ Bernard/AUBRY GIRARDIN Florence, in: *Commentaire romand* (fn. 19), Art. 757 CO N. 12; GERICKE Dieter/WALLER Stefan, in: WATTER Rolf/VOGT Hans-Ueli (edit.) *Basler Kommentar, Obligationenrecht II*, 6th ed., Basel 2023, Art. 757 OR N. 10.

⁷¹ CORBOZ/AUBRY GIRARDIN (fn. 70), Art. 757 CO N. 12; GERICKE/WALLER (fn. 70), Art. 757 OR N. 11.

⁷² Decision of the Swiss Supreme Court ATF 117 II 432, reason 1, b), gg); CORBOZ/AUBRY GIRARDIN (fn. 70), Art. 757 CO N. 13 et seq.; GERICKE/WALLER (fn. 70), Art. 757 OR N. 12 et seq.

⁷³ Decision of the Swiss Supreme Court ATF 117 II 432, reason 1, b), gg); CORBOZ/AUBRY GIRARDIN (fn. 70), Art. 757 CO N. 22; GERICKE/WALLER (fn. 70), Art. 757 OR N. 14; VOGT/HIRSIGER-MEIERS/HOFER (fn. 3), N. 155.

⁷⁴ Decision of the Swiss Supreme Court ATF 136 III 107, reason 2.5.1.

Supreme Court found that such creditors were not bound by the statutory arbitration clause, excluding therefore the *exceptio arbitri*.⁷⁵

The nature of the liability claims against the members of the corporate bodies during bankruptcy proceedings has not changed with the entry into force of the new corporate law; it remains a claim of the creditors. Hence, the entry into force of Article 697n CO should arguably not render moot the decision reached in ATF 136 III 107 under the former law. However, certain take the opposite view.⁷⁶

Therefore, according to the Swiss Supreme Court in the above-referenced decision, the statutory arbitration clause does not extend to a liability claim which would be brought by a creditor of the company for the damage incurred by that company against a director of that same company when the latter has been declared bankrupt.

Of course, this conclusion does not prevent the creditor and the defendant from agreeing on arbitration for their specific dispute after such dispute has arisen (“*compromis arbitral*”; “*Schiedsvertrag*”).

V. Conclusion

Article 697n CO *cum* the Supplemental Swiss Rules should provide the corporate law disputes with an efficient dispute resolution mechanism, with the arbitration features that seem to be most relevant for such kind of disputes:

- The celerity of the proceedings.
- Their confidentiality.
- The specialization of arbitrators in corporate law and more generally in business law.
- The availability of arbitrators which enables the parties to complete the examination of the witnesses in one single hearing of several consecutive days, whereas the state courts often have no choice but to call for several short hearings over a long period of time.

⁷⁵ Decision of the Swiss Supreme Court ATF 136 III 107, reason 2.5.2.

⁷⁶ *Pro*: VOGT/HIRSIGER-MEIER/HOFER (fn. 3), N. 155 *et seq.* *Contra*: BÖCKLI (fn. 7), §14 N. 351 *et seq.*