SWITZERLAND: An Introduction to Litigation

Statutory Arbitration Clauses Under the New Swiss Corporate Law

Introduction

On 1 January 2023 the revised Swiss corporate law enters into force. From a litigation perspective, a key element of the revision is the newly adopted article 697n of the revised Swiss Code of Obligations ("revCO"), which expressly allows Swiss corporations (and by reference also limited partnerships and limited liability companies) to include arbitration clauses in their articles of association. The Swiss legislator hereby puts an end to a long-term dispute concerning the general admissibility of statutory arbitration clauses. While in the past the admissibility of such clauses was predominantly uncontested among arbitration practitioners, some corporate law scholars argued that statutory arbitration clauses may, if at all, only be legal binding upon the consent of all shareholders involved. This situation has led practitioners to be cautious and to rather advise against the use of arbitration clauses in a company's articles of association. The entry into force of the new law is set to provide legal certainty with regard to the general admissibility of statutory arbitration clauses.

Scope of application

Text According to the new law, Swiss corporations may provide in their articles of associations that corporate law disputes shall be settled by an arbitral tribunal with its seat in Switzerland. A resolution of the general meeting of shareholders requires a majority of 2/3 for the introduction of an arbitration clause. Unless the articles of association restrict the objective scope of the arbitration clause on specific disputes, the statutory clause covers all disputes under company law. As is stated in the Federal Council's Message on the Draft, the scope of application thus, inter alia, includes:

• challenges against resolutions and actions for nullity of resolutions of the shareholders' meeting (art. 706 and art. 706b revCO);

• actions for dissolution (art. 736 para. 4 revCO);

• actions for (subsequent) contribution of share capital (art. 634b revCO);

• actions for the return of benefits (art. 678 revCO); or

• liability and responsibility actions (art. 752 et seq. revCO).

With regard to the subjective scope of application, statutory arbitration clauses are binding for (i) the company; (ii) the company’s governing bodies; (iii) the members of the governing bodies, as well as (iv) the shareholders, unless the articles of association provide otherwise. That said, the companies are also free to exclude certain groups of persons from the jurisdiction of the arbitral tribunal in their articles of association or, for instance, to provide for arbitration only for disputes between the company and its corporate bodies. For clarity, arbitration clauses in the articles of association are not binding on persons not subject to the articles of association (ie, creditors of the company) and to disputes arising from shareholders' agreements, which of course does not hinder the parties from also adopting arbitration clauses in such agreements.

Procedure

Arbitration clauses included in the articles of association may only provide for an arbitral tribunal with its seat in Switzerland (art. 697n para. 1 revCO) but the articles of association can specify the rules of procedure, in particular by referring to institutional arbitration rules. In any event, they shall ensure that individuals who may be directly affected by the legal effects of the award are informed of the initiation and termination of the proceedings and may participate in the proceedings when the arbitral tribunal is appointed by means of procedural intervention (art. 697n para. 3 revCO).

Another special feature of the revised law is that the rules on domestic arbitration enshrined in the Third Part of the Swiss Civil Procedure Code ("CPC") apply as mandatory rules (art. 697n para. 2 revCO). This amendment is thus likely to considerably expand the practical significance of the rules for domestic arbitration. Unlike for contractual arbitration clauses, there is no option for the parties (even if domiciled outside of Switzerland) to opt out from the applicability of the Third Part of the CPC and to instead declare Chapter 12 of the Swiss Private International Law Act to be applicable. Under the CPC, the grounds for setting aside an arbitral award are somewhat broader, as it is also possible to challenge the arbitral award for arbitrariness (ie, in cases of obvious violations of the law). Moreover, the CPC rules do not allow for a waiver of legal remedies.

Model Clause by the Swiss Arbitration Centre

To accommodate some relevant aspects of corporate law disputes, the Swiss Arbitration Centre ("SAC") has issued Supplemental Swiss Rules for Corporate Law Disputes (the “Supplemental Swiss Rules”). These rules implement statutory requirements of the new law and ensure that corporate law disputes can be efficiently settled through Swiss Rules arbitration. SAC has further drafted a Model Statutory Arbitration Clause ("Model Clause") adopting the Swiss Rules for corporate disputes. Most companies are likely to favour the Model Clause provided by the SAC. The wording of the clause is as follows:

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.

2. The seat of the arbitration shall be … (name of the company seat/other city in Switzerland).

3. The arbitration proceedings shall be conducted in … (insert desired language).

It must be noted that the Model Clause excludes matters subject to summary proceedings pursuant to art. 250(c) CPC from the scope of application. Unlike the arbitral tribunal, the state court has the power to (directly) combine the judgment with enforcement measures, which in these matters can be of significant practical relevance. In addition, SAC provides for selected optional amendments to the Model Clause. For instance, the articles of association may specify the number of arbitrators, the arbitrators' appointment procedure, the modalities regarding the payment of the advance of costs by the company or the statutory notification requirements towards persons who may be directly affected by the legal effects of the award.

Outlook

In its Message on the Draft the Swiss Federal Council emphasises that by implementing statutory arbitration clauses,

disputes may possibly be resolved more efficiently and with fewer options for appeal than in state court proceedings. In addition, the parties involved are more flexible in selecting their own procedural rules and proceedings may be conducted by party-appointed arbitrators with expert knowledge in the field at stake. An additional advantage is the worldwide enforceability of the award. Lastly, arbitration leads to a rather private dispute resolution with a confidential award being issued. While for domestic small and medium-sized companies, state-court litigation may still be the preferred choice, the new law certainly provides for an interesting option for companies engaging in international business and seeking to have sensitive information (ie, proprietary technology or trade secrets) kept private and confidential.

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