Setting the Ground for Corporate Arbitration in Switzerland: Swiss Parliament Approves New Rules for Arbitration of Corporate Law Disputes

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Richard G. Allemann (University of Zurich, Faculty of Law)

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One of the spillovers from arbitration's popularity for the resolution of commercial disputes has been a steady increase in the use of arbitration provisions in corporate governance documents such as articles of association ("AoA") or bylaws. Global public companies such as Royal Dutch Shell plc, Kone Oyj or Petrobras SA are prominent examples of this trend. As a result, arbitration has become an important means for the resolution of corporate disputes in various jurisdictions. In Germany, for instance, as much as one third of all arbitrations seated in the country are estimated to concern corporate disputes brought under arbitration clauses contained in AoA.[fn]*See* Duve/Wimalasena, Arbitration of Corporate Law Disputes in Germany, in: Nacimiento/Kroell (eds.), Arbitration in Germany, 2nd ed. 2015, at 929.[/fn] Surveys in Italy, where more than half of all corporations have an arbitration clause in their AoA, have produced similar results.[fn]*See* Camera Arbitrale di Milano, Statistiche Arbitrato 2019, at 5.[/fn]

In Switzerland, by contrast, corporate arbitration has played a marginal role so far. But this is likely to change. On June 19 and 26, 2020 the Swiss parliament approved a new statutory framework for the arbitration of corporate disputes based on arbitration clauses set forth in companies' AoA. The new rules, which will come into effect in 2021 or early 2022, are scattered across two major legislative amendments: one to the Swiss arbitration laws – the Private International Law Act ("PILA") and the Code of Civil Procedure ("CPC") – and the other to the Code of Obligations ("CO")'s sections on corporate law dealing with Swiss stock corporations and limited liability companies. This post briefly outlines the key features of the new framework.

Introducing Articles of Association as a Non-Contractual Basis of Arbitration

One of the major innovations of the new rules is the recognition of corporations' AoA as a non-contractual basis of arbitral jurisdiction. Previously, the Swiss Federal Supreme Court had repeatedly failed to provide guidance on the legal nature, validity and scope of arbitration clauses in AoA. Consequently, it had remained unclear if unanimous consent in writing from all shareholders and members of corporate bodies was required for such a clause to become valid – thus constituting a multilateral arbitration agreement of a contractual nature, "hidden" in the AoA – or whether it was subject only to the requirements of the applicable corporate law, with the requisite majority of shareholder votes sufficing to compel all shareholders and corporate bodies to arbitration.

The new statutory provisions have now partly solved this conundrum by characterizing AoA as a non-contractual, corporate form of party autonomy on which arbitral jurisdiction can be based. Accordingly, they specify that the PILA's and the CPC's rules on (contractual) arbitration agreements shall not apply directly but only "by analogy" to arbitration clauses in AoA (articles 178(4) PILA and 358(2) CPC). While the exact meaning of this application "by analogy" remains to be determined, its more salient implications are briefly addressed below.

Applicable *Lex Arbitri*

An important deviation from the regime governing contractual arbitration agreements concerns the connecting factors defining the PILA's and the CPC's respective fields of application. In Switzerland, an arbitration is normally considered "international" and therefore governed by the PILA if, at the time of the conclusion of the arbitration agreement, at least one of the parties to such agreement had its domicile, seat or place of business outside Switzerland (article 176(1) PILA). Otherwise, the arbitration qualifies as "domestic" and is therefore subject to the provisions of the CPC (article 353(1) CPC).

For arbitration clauses in the AoA of Swiss stock corporations and limited liability companies, the new rules now expressly derogate from this rule by stipulating that the arbitration shall always be governed by the CPC, regardless of any international dimension resulting from, *e.g.*, a shareholder's domicile or the corporation's effective seat of management located outside Switzerland (article 697n(2) CO). According to the Swiss Federal Council's explanatory report, the arbitration is considered "domestic" because the company is governed by Swiss law, a rationale that appears to designate the company's place of incorporation as the only relevant connecting factor. Although a corresponding rule for corporations incorporated outside Switzerland is lacking, logically it follows that arbitration arising from arbitration clauses in such corporations' AoA likely would qualify as "international" and be, therefore, subject to the PILA.

Validity of the Arbitration Clause Governed by Corporate Law Principles

Arbitration has traditionally derived its legitimacy from a contract requiring mutual consent to arbitrate, the arbitration agreement. Under the new rules, however, arbitration clauses in AoA are characterized as an expression of party autonomy in its corporate law dimension: freedom of association or corporate autonomy to choose the appropriate mechanism for the resolution of internal corporate disputes. Whether and to what extent such autonomy exists within AoA and under which conditions such arbitration clauses can be held to be substantively valid must be determined according to the applicable corporate law.

- In Swiss stock corporations and limited liability companies, the adoption of an arbitration clause requires an amendment to the AoA by way of resolution of the general meeting of shareholders. Under the new rules,

such resolution must be passed by a supermajority vote, requiring two-thirds of votes and the majority of the nominal value of shares represented (article 704(1)(12) CO). Only if the arbitration clause is adopted already at the time of the company's incorporation, unanimous consent from all founding shareholders is required. Thus, the new rules also clarify that arbitration clauses are not beyond the statutory limitations imposed on the content of Swiss corporations' AoA, another issue that had previously remained controversial.

- As to non-Swiss corporations, the question arises of whether the *in favorem validitatis* conflict of laws rule for arbitration agreements (article 178(2) PILA) will also apply to arbitration clauses in AoA. This rule provides for an alternative application of the law chosen specifically for the arbitration clause, the law governing the subject-matter of the dispute – here the law under which the company was incorporated (*lex incorporationis*) – or Swiss law. In this regard, several commentators have argued for a substitution of the *in favorem validitatis* rule by a direct application of the *lex incorporationis*. This recommendation appears convincing, as an arbitration clause in AoA arguably enjoys a lesser degree of autonomy than an arbitration clause stipulated in a contract. Rather, its validity inextricably depends on the corporation's fate and will regularly require prior approval or certification by a public incorporating authority applying its own corporate law.

By the same token, the application "by analogy" of the *lex arbitri* mandates a derogation from the PILA's and CPC's requirements of form, providing that the arbitration agreement be made in writing or by another means allowing it to be evidenced by a text (articles 178(1) PILA and 358(1) CPC). The formal validity of arbitration clauses in AoA should be subject to the rules of the *lex incorporationis* governing amendments to the AoA instead. In Swiss corporations, *e.g.*, shareholder resolutions on an amendment of the AoA require notarization and subsequent registration in the commercial register. Institutional arbitration rules referred to in the arbitration clause need not be notarized in full, as long as the arbitration clause contains a clear reference to such rules (article 697n(3) CO).

Scope of the Arbitration Clause and Arbitrability *Ratione Materiae*

The subject-matter scope of an arbitration clause in AoA must be determined by way of interpretation, following the principles developed for the construction of AoA under the *lex incorporationis*, which may deviate from those governing the interpretation of contracts. For Swiss stock corporations and limited liability companies, the new rules provide that all disputes arising out of corporate law can be submitted to arbitration (article 697n(1) CO), including, *e.g.*:

- direct or derivative actions against members of the corporation's governing bodies, in particular directors and executive officers, for breach of fiduciary duties;
- actions to set aside shareholder resolutions passed by the corporation's general meeting of shareholders;
- actions for the enforcement of shareholders' or directors' rights of information;
- actions against members of the corporation's governing bodies for the restitution of company funds; and
- actions for the dissolution of the corporation.

The new rules also resolve some of the uncertainties surrounding the arbitrability of corporate disputes. With regard to Swiss corporations, many commentators previously considered actions to set aside shareholder resolutions non-arbitrable. These actions cannot be freely disposed over, as required by article 354 CPC, because they have a preclusive effect against all shareholders of the company (*erga omnes*). However, as the new statutory provisions specifically include procedural rules for such actions, safeguarding shareholders' rights of information about and participation in the arbitration proceedings (article 697n(3) CO), it is likely that such actions will now become arbitrable. By contrast, other proceedings of Swiss corporate law, in particular those involving the public commercial register authorities, will likely remain subject to the exclusive jurisdiction of state courts. As to corporate disputes arising in non-Swiss corporations, which are subject to the PILA's test requiring only that the dispute be of financial interest (article 177(1) PILA), arbitrability will rarely pose problems, as virtually all corporate disputes have a financial component.

Scope of the Arbitration Clause *Ratione Personae*

As with the substantive validity, the personal scope of arbitration clauses in AoA is now determined pursuant to principles of the *lex incorporationis* regarding the binding effect of AoA. For Swiss stock corporations and limited liability companies, the new statutory framework provides as a default rule that an arbitration clause in AoA shall be binding on the company, its shareholders and its governing bodies such as directors, executive officers or auditors (article 697n(1) CO). Once the arbitration clause has been validly inserted into the corporation's AoA, it will become binding on all present and future shareholders, as well as members of the company's governing bodies from the time they acquire stock or assume their office. Consequently, minority shareholders who either voted against the resolution for the adoption of an arbitration clause or who did not attend the respective general meeting are deemed bound by such clause regardless of the lack of individual consent on their side. The same holds for members of the corporation's governing bodies who as such have no voting rights. By contrast, third parties such as the company's creditors or the commercial register authorities cannot be bound by an arbitration clause in a corporation's AoA.

A remaining uncertainty concerns whether the broad statutory definition of the personal scope of application is compatible with article 6(1) of the European Convention of Human Rights ("ECHR"), which in the context of arbitration requires an express individual waiver of the right to trial before a state-sponsored court. In *Suda v. Czech Republic*, which concerned the review of compensation offered to minority shareholders in a squeeze-out merger, the European Court of Human Rights held that legislation allowing majority shareholders to opt for arbitration without minority shareholders' consent violated article 6(1) ECHR. Commentators in Switzerland were quick to distinguish the new statutory framework from the mandatory arbitration regime in *Suda*, emphasizing that the latter was based on a contractual arbitration agreement and that article 6(1) ECHR would allow for a more liberal solution in a corporate law context.[fn]*See* the overview in Allemann, Statutarische Schiedsklauseln in der Aktienrechtsrevision, in: 13(3) Swiss Review of Corporate and Capital Markets Law 339 (2018), at 347.[/fn] Specifically, many have argued that shareholders and members of the corporation's governing bodies must be deemed to consent to arbitration by retaining their shareholdings or office in the aftermath of a shareholder resolution adopting an arbitration clause. This rationale was also relied on by the European Court of Justice in *Powell Duffryn plc v. Wolfgang Petereit* with regard to a jurisdiction clause in AoA under the Brussels I Regulation.

Recognition and Enforcement of Arbitral Awards in Corporate Disputes

Once an arbitral tribunal seated in Switzerland has rendered an award in a cross-border corporate dispute, the question invariably arises of whether such award can be enforced outside Switzerland under the New York Convention ("NYC") and, in particular, if an arbitration clause in AoA qualifies as an "agreement in writing" (articles V(1)(a) and II(2) NYC). Although courts in many jurisdictions have taken a rather lenient stance on the NYC's requirements of form with regard to non-signatories, it remains to be seen if the term "agreement" is sufficiently broad to encompass non-contractual expressions of party autonomy. While the discussion will likely revolve around arguments similar to the ones offered in the context of article 6(1) ECHR, the *favor recognitionis* principle underlying the NYC would certainly speak in favor of a liberal and broad interpretation.

Outlook

The new statutory provisions on the arbitration of corporate disputes clear up many of the uncertainties that have so far befogged the arbitration of corporate disputes. Switzerland thus enables corporations, shareholders, directors and officers to enjoy the benefits of arbitration for the resolution of disputes arising from internal corporate affairs and, thereby, further enhances its attractiveness as a seat of arbitration. Moreover, the new statutory rules have already sparked innovation on the institutional front. The Swiss Chambers' Arbitration Institution is currently preparing a supplement to the Swiss Rules of International Arbitration specifically designed for corporate disputes. The draft supplementary rules are currently undergoing internal consultations and will likely be published in 2021.