GAR Global Arbitration Review

The Guide to Climate Change and Related Disputes - First Edition

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Summary

INTRODUCTION

Recent years have seen significant developments both in corporate governance and in the way related disputes are resolved. On the one hand, environmental, social and governance (ESG) factors are becoming increasingly important in corporate decision-making. This in turn will increase the likelihood of disputes in the years to come, including claims brought against directors and corporations by shareholders and in particular activist shareholders. Recent cases have made the headlines, such as the derivative claim in ClientEarth v. Shell's Board of Directors[2] filed in 2023 (which was however dismissed by the UK High Court), in which the NGO ClientEarth, as a shareholder of Shell, alleged that Shell's directors had breached their duties under the UK Companies Act for failing to adopt and implement an energy transition strategy aligned with the Paris Agreement, as well as the Métamorphose v. TotalEnergies case, in which shareholders claim that TotalEnergies has overvalued its assets by erroneously valuating the future price of carbon and by failing to properly account for its greenhouse gases emissions, leading to the unlawfulness of dividend distributions. On the other hand, more and more jurisdictions are developing legal frameworks facilitating the resolution of corporate governance disputes via arbitration.

Arbitration can serve as a tool to resolve disputes in an efficient manner, provided that the dispute is arbitrable. This raises intriguing questions, which will be analysed in this chapter: can arbitration be an effective means of resolution for corporate governance issues, and if yes, how? And may arbitration and its confidentiality be used by companies as a shield against shareholder activism by rendering the initiation of activist claims less effective or even unattractive?

After setting the framework by defining corporate governance and the potential disputes it entails, this chapter will explore the arbitrability of corporate governance disputes and the advantages arbitration offers as a means of dispute resolution. It will then analyse the foundation of arbitration, specifically the arbitration agreement, and highlight certain procedural aspects and specificities of arbitration proceedings in the context of corporate law disputes.

CORPORATE GOVERNANCE AND POTENTIAL DISPUTES

Corporate governance refers to the framework of rules, practices and procedures through which a company is directed and managed and that aim at safeguarding the sustainable interest of the company.[3] Corporate governance principles are designed to ensure transparency and a healthy balance of management and oversight while preserving decision-making capability and efficiency at the highest level of the company.[4] It encompasses a balancing of the interests not only of the shareholders as the beneficial owners, but also of other stakeholders.[5] ESG, which comprises environmental sustainability, social responsibility and ethical business practices, is a component of corporate governance that the managing and supervisory bodies have to take into account when exercising their respective roles in the company's best interests.[6]

Good corporate governance with relation to climate change requires companies to adopt certain measures, such as integrating climate change considerations into their business strategies and risk management frameworks and reporting climate risks and environmental impact (see, e.g., the G20/OECD Principles of Corporate Governance, the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive

in the EU, or the IFRS S1 – General Requirements for Disclosure of Sustainability-related Financial Information and, more specifically, IFRS S2 – Climate-related Disclosures).[7] These measures assist stakeholders, particularly investors, in understanding a company's climate-related risks and strategies.[8] By means of example, in Abrahams v. Commonwealth Bank of Australia (2017),[9] shareholders of the Commonwealth Bank of Australia sued the Bank for violation of Australia's Corporate Act 2001 because the Bank had, in essence, failed to disclose its business risks related to climate change in its annual report 2016. The shareholders requested a declaration that the Bank had breached Australia's Corporate Act and requested an injunction to stop the Bank from failing to report on climate change-related risks to its business and its response.[10]

Corporate disputes generally are disputes that arise directly or indirectly from the formation, operations and winding up of a company.[11] With regard to the actors involved, corporate disputes can involve shareholders, members of the directing or supervisory boards of the company, the company itself, or any combination thereof.[12] With regard to the subject matter, corporate disputes relate to features of the corporate relationship.[13] Examples include disputes arising out of resolutions of the company's organs, liability claims against directors, disputes arising out of the exclusion of a shareholder from the company, or information or inspection claims by shareholders.[14]

More specifically, corporate governance disputes generally pertain to the board's exercise of its powers and actions, or its failure or refusal to take action.[15] The potential sources of conflict encompass issues related to the business itself (strategic priorities, related-party transactions, company control), board processes (appointment of new directors, defining the board agenda, succession planning) and personalities (the behaviours and attitudes of directors).[16] Specifically with regard to ESG, shareholders may resort to dispute resolution mechanisms in order to compel companies to incorporate climate change considerations into their business decision-making.[17]

ARBITRABILITY OF CORPORATE GOVERNANCE DISPUTES

Before the parties can agree on the use of arbitration, it is necessary to verify whether the subject matter is arbitrable. For example, the New York Convention is only applicable to disputes that are 'capable of settlement by arbitration'

(Article II). If that is not the case, the arbitration agreements on such matters do not have to be given effect, and an award rendered in the matter might not be recognised and enforced.[18] Whether subject matter is arbitrable depends on the applicable national law.[19] Furthermore, the arbitration clause itself may restrict the arbitrability of corporate disputes, for example by excluding certain types of proceedings such as summary proceedings.[20]

Generally, while there may be some exceptions regarding certain disputes, in most jurisdiction corporate governance disputes are arbitrable.[21]

By means of example, Swiss law provides that corporate law disputes are generally arbitrable.[22] While the term is not defined, it is generally understood in a very broad sense.[23] Italy[24] and Spain[25] also provide for a set of rules for arbitration of corporate matters in their national laws. German[26] and Austrian[27] courts have established corporate law disputes are generally arbitrable and have set out conditions for the arbitrability of disputes relating to the challenge of resolutions. In the same vein, English courts have also confirmed that corporate matters are generally arbitrable (see, e.g., the Fulham Football Club decision[28]).[29]

US courts have recently adopted a more open approach and have established that corporate disputes are generally arbitrable under the Federal Arbitration Act.[30]

By contrast, Russian courts have found that corporate disputes are non-arbitrable and reserved to the jurisdiction of domestic courts.[31] Following a reform of Russian arbitration laws in 2016 and 2019, it however appears that some corporate disputes involving shareholders should now be arbitrable under certain conditions.[32]

ADVANTAGES OF ARBITRATING CORPORATE GOVERNANCE DISPUTES

Corporate governance disputes can be particularly complex and contentious and involve various ancillary proceedings, including criminal proceedings. Settling corporate disputes by arbitration as opposed to state courts presents various advantages. It is therefore not surprising that in Germany approximately one-third of corporate disputes are settled by arbitration.[33]

One of the most important advantages from a business perspective is the efficiency of arbitral proceedings. Since decisions can generally only be appealed for limited grounds, the parties will have a final decision faster, and possibly in a more cost-effective manner. Therefore, the company's business performance is not negatively impacted for too long. Corporate governance disputes can significantly disrupt a company's business operations. Reaching a timely and effective resolution can therefore be essential. The same applies to disputes involving climate change impacts.

In the same vein, arbitration proceedings are generally confidential. Therefore, disputes are usually less likely to affect the value of the company and to negatively impact the stock market. The confidentiality of the arbitral process may also reduce the likelihood that the information disclosed in the context of the arbitration ends up in the public domain or is used in ancillary proceedings. In particular, this can be of interest to diminish the effects of actions by shareholder activists, which often aim at publicity in order to exert pressure on the company and to raise awareness among the general public. However, while confidentiality is extensive, it may not be absolute, and the remedies in cases of breach may be limited: for example, under Swiss law, affected persons have rights of participation and information (see more on this below).

The fact that arbitration proceedings are generally more flexible and may be tailored to the needs of the users can also be an advantage when a large number of parties is involved, which is likely to be the case in the context of corporate governance disputes.

Moreover, the possibility to choose the arbitrators for a specific dispute may also be an attractive feature for claimants and respondents alike. While it allows the selection of candidates with the required expertise for corporate governance disputes, including experts with specific knowledge of environmental law and climate science when climate change-related disputes are concerned, it also allows respondents in activist actions to select arbitrators known for their conservative stance on the issues at stake. This, in turn, renders the initiation of such actions by activist shareholders less attractive as it may reduce the chances of success.

Another possible advantage of arbitration is that various proceedings related to a same core corporate governance issue may be joined into a single arbitration, provided that they fall under compatible arbitration clauses. For instance, a same underlying corporate governance issue may give rise to a dispute between shareholders on the basis of a shareholders'

agreement containing an arbitration clause, as well as to disputes related to the roles of the shareholders or their representatives within the company, for instance as directors. Joining such disputes into a single arbitration, to the extent possible, may reduce the risk of ancillary or parallel proceedings and highly simplify the resolution of the dispute.

BASIS FOR ARBITRATION: ARBITRATION CLAUSE

CONSENT AS THE CORNERSTONE OF ARBITRATION

In order to settle a dispute by arbitration, an arbitration agreement is required. This raises the issue of consent to the arbitration agreement. Consent is the cornerstone of international arbitration, and the basis for each arbitration.[34]Consent is required because the parties waive their right to have their disputes decided by state courts.[35]For corporate law disputes, this begs the question of whether the different actors may be bound by an arbitration clause, and if yes, how the arbitration clause can be extended to non-signatory parties. To that effect, parties within the corporate structure and parties outside the corporate structure must be distinguished.

PARTIES WITHIN THE CORPORATE STRUCTURE

In order to bind the parties within the corporate structure, in some legal systems arbitration clauses are generally included in the constitutive document of a company, such as the articles of association or the deed of partnership.[36] Arbitration clauses incorporated in the articles of association or in the deed of partnership are generally valid and enforceable in most legal systems.[37] Such document can also specify who shall be bound by the arbitration clause.[38] In order to ensure legal certainty and to resolve disputes in a unified manner, the arbitration clause should be as broad as possible, thus binding the company, its organs and its members as well as all the shareholders.[39]

By contrast, statutory arbitration clauses will generally not affect disputes between shareholders – for example, disputes arising out of shareholder agreements.[40] The use of compatible arbitration clauses in both shareholder agreements and the articles of association may however increase the chances that certain disputes involving both claims under shareholder agreements and corporate law claims such as directors' liability claims may be resolved in a single arbitration.[41]

When it comes to consent, in many cases, not all the shareholders will have expressly agreed to an arbitration clause contained in the articles of association. Shareholders may abstain from voting or even vote against the arbitration clause, raising the question of the majority required to adopt such arbitration clause. Such required majority may depend on the moment in which the arbitration clause is adopted, that is, when the company is created or at a later stage. Moreover, shareholders might join the company as a shareholder only after the vote has already been held, which raises the question of whether they are bound by the arbitration clause as well.[42] The answers will depend on the applicable law, which may contain specific provisions in this respect.

For example, under Swiss law, it has long been disputed whether an arbitration clause in the articles of association was valid or would lead to an inadmissible obligation for the shareholder.[43]To clarify the legal situation, a new provision has been introduced in the Swiss Code of Obligations (CO) as of 1 January 2023. The new Article 697n CO indeed provides that companies limited by shares, partnerships limited by shares and limited liability companies incorporated in Switzerland can include an arbitration clause in

their articles of association for corporate law disputes. Accordingly, the Swiss Arbitration Centre has adopted the Supplemental Swiss Rules for Corporate Law Disputes for Swiss companies (Swiss Supplemental Rules) with an explanatory note and has provided for a model statutory arbitration clause to be inserted in the articles of association. Unless the articles of association provide otherwise, the arbitration clause binds the company, its organs, the members of the organs and the shareholders (Article 697n(1) CO). To increase publicity, and since new shareholders are bound by the arbitration clause ipso iurewhen buying shares of the company, the commercial registry entry of the company must state that the articles of association of that company contain an arbitration clause.[44]

If the arbitration clause is included in the articles of association at the moment of the creation of the company, all founders have to agree to it (Article 629(1)CO).[45]If it is only introduced subsequently, the general assembly has to accept the motion by qualified majority that is, two-thirds of the votes represented and a majority of the nominal value of the shares represented (Article 704(1)(14)CO).[46]The qualified majority is justified because the parties waive their right of access to state courts.[47]Accordingly, an arbitration clause can be adopted even against the will of minority shareholders, organs and their members. The articles of association may require a larger majority (Article 703(1) and Article 704(2)CO) or even a unanimous vote.[48]

Article 697a CO applies only to companies incorporated in Switzerland.[49] When the articles of association of a non-Swiss company refer to arbitration in Switzerland, the question is which law applies to determine the validity of an arbitration clause. One option could be that the lex incorporationis applies to determine the validity of the arbitration clause.[50]

Like the Swiss Arbitration Centre, the German Arbitration Institute (DIS) developed in 2009 a set of rules for corporate law disputes (Supplementary Rules for Corporate Law Disputes, updated and integrated into the DIS Arbitration Rules as its Annex 5 in 2018). The DIS has also suggested a model arbitration clause for the articles of incorporation. The DIS Supplementary Rules establish a framework tailored to administer disputes within limited liability corporations, by taking into account the requirements elaborated by the German Supreme Court regarding the arbitrability of disputes concerning shareholder resolutions.[51] The Act on Modernisation of the Partnership Law, which entered into force on 1 January 2024,[52] has introduced new requirements for the effectiveness of arbitration clauses for disputes relating to resolutions in commercial partnerships.[53]

PARTIES OUTSIDE THE CORPORATE STRUCTURE

Since persons outside the corporate structure are not a party to the arbitration clause in the articles of association, the question arises whether they can also rely on or can also be bound by such arbitration clause as non-signatories to the arbitration clause – that is, what the scope of the arbitration agreement is.[54] For example, creditors of the company might seek to initiate liability proceedings against directors or may have the right to inspect the accounts pursuant to the applicable law.

By means of illustration, under Swiss law, scholars argue that the answer will depend on whether the third party is a claimant or respondent in the proceedings.[55]If the third party is a claimant, it may be argued that the arbitration agreement in the articles of association constitutes an offer to conclude an arbitration agreement, allowing the third party to choose whether to initiate arbitration or litigation proceedings, and precluding the respondent from being able to raise the jurisdictional objection if the claimant opts for litigation.[56]By contrast,

if the third party is a respondent, it cannot be drawn into an arbitration, unless it consented to it either explicitly (i.e., by a contractual arbitration agreement) or implicitly (i.e., by not objecting to the jurisdiction of the tribunal or by being a de factocorporate body).[57]

PROCEDURAL ASPECTS

Compared to the typical commercial dispute involving a claimant and a respondent, corporate governance disputes present various peculiarities. Corporate governance disputes may involve a variety of parties or at least affected persons, particularly because awards can have an effect erga omnes, thus requiring that specific rights of these stakeholders be protected. The dispute may also imply a 'David versus Goliath' situation, in which one or some shareholders proceed to litigation against a big company, thus raising the question of funding of the proceedings. Furthermore, urgency or the need to protect the interests of the company during the proceedings may require the adoption of interim relief or the initiation of emergency proceedings.

The question thus arises of how to deal with the peculiarities of corporate governance disputes, and whether there are specific provisions regulating these peculiarities. These issues are addressed in this chapter.

It is possible to regulate the proceedings primarily by the articles of association. For example, the model statutory arbitration clause of the Swiss Arbitration Centre also includes provisions relating to, among other things, the number and appointment of the arbitrators, the costs and emergency or interim relief. Similarly, the DIS has also provided a model arbitration clause for articles of incorporation. In practice, parties generally merely refer to a set of arbitration rules, and the arbitral tribunal will have to apply these rules in a manner adapted to the specificities of the case.

RIGHTS OF PARTICIPATION AND INFORMATION OF AFFECTED PARTIES

Corporate governance disputes and related proceedings generally affect various actors. For example, if a resolution of the general assembly is successfully annulled, this will affect all the shareholders.[58] In the same vein, proceedings against the company concerning its existence or dissolution will also affect several players.[59]

Therefore, the question arises of what kind of procedural rights the various actors affected by an award with erga omnes effect are entitled to in order for their constitutional right to be heard to be preserved. Such procedural rights entail rights to be informed or to participate in the proceedings. Their extent will again depend on the applicable law and on the applicable arbitration rules.

Under the Swiss Supplemental Rules, affected persons are granted various rights of information. For example, in implementation of Article 697n(3) CO:

> [w]ithin five days of the commencement of any arbitration proceedings, the Company shall take appropriate steps to notify persons who may be directly affected by the legal effects of the arbitral award (the "Affected Persons") of the commencement of the arbitration proceedings. The Company shall notify the shareholders in particular, but without limitation, of the commencement of arbitration proceedings against the Company concerning the existence of the Company, the validity or legality of the resolutions of its bodies,

> the dissolution of the Company, or the determination of an appropriate compensation payment following a restructuring (Article 2(1)).

The short time limit aims to give the affected person enough time to make use of their participation rights.[60] The time limit of five days is very short where the company is the respondent, and Swiss companies that have included arbitration clauses in their articles of association are well-advised to have processes in place to ensure a timely notification in the case of the initiation of an arbitration.[61] Pursuant to Article 2(5) of the Swiss Supplemental Rules, the notification shall 'outline in a concise manner the relief or remedy sought and the essential facts and background upon which the action is based'. This will allow the affected persons to decide whether they want to take part in the arbitration proceedings.[62] The company can also publicise the notification.[63] In that case, the requirements regarding its content are lower.[64]

In the same vein, the affected persons, including all the shareholders, need to be notified of 'the form of the termination of the arbitration proceedings', and the notification needs to contain a brief statement about the outcome of the case (Article 2(7) Swiss Supplemental Rules). In light of this publicity, statutory arbitration clauses are probably better suited for companies with a small shareholding structure, start-ups, family businesses or joint ventures.[65]

Affected persons can also submit comments regarding the constitution of the arbitral tribunal, unless the arbitration clause provides for the appointment of the arbitrators by the Arbitration Court of the Swiss Arbitration Centre (Court). (Article 3(1) Swiss Supplemental Rules). Within 30 days following the commencement of the arbitration proceedings, persons or entities who establish on a prima facie basis that they may be an affected person can submit comments with regard to the appointment of the arbitral tribunal (e.g., the requirements as to the qualification of the arbitrators and the number of arbitrators) to the Court (Article 3(2) Swiss Supplemental Rules).[66] Furthermore, the Court shall inform persons at their request of each procedural step for the appointment of arbitrators, provided that they can establish, on a prima facie basis, that they may be affected persons, and the affected persons may submit objections concerning the designated arbitrator (Article 3(3) Swiss Supplemental Rules).

Moreover, affected persons can also request or be requested by a party to participate in the arbitration proceedings in a capacity other than an additional party (Article 4 Swiss Supplemental Rules in conjunction with Article 6(4) Swiss Rules).

The DIS Supplementary Rules contain similar provisions, allowing the transmission of the request to 'concerned others' and their invitation to join the proceedings either as a party or as an intervenor (Article 2 to 4) as well as the continuous information of the progress of the arbitration of concerned others who have not joined the proceedings (Article 5). The DIS Supplementary Rules also regulate the extension of an award to concerned others (Article 11).

Depending on the national legislation, arbitration may therefore give more extensive, or in any event more clearly defined, participation rights to the shareholders than litigation.[67]

COSTS OF THE ARBITRATION

The costs for arbitration proceedings may deter a party from initiating a dispute. This can particularly be the case when an individual shareholder intends to initiate a dispute against a big company with substantially higher financial means.

In order to ensure the shareholders' rights and to comply with corporate governance policies, it is possible to provide for specific regulations in the articles of association to facilitate access to justice for the parties.[68] Provisions can relate to the allocation of the costs in the award in departing from the costs follow the event principle,[69] thus making arbitration more attractive for the less wealthy party by reducing the risks in the event of an unsuccessful outcome.[70] Moreover, the provisions can relate to the payment of a deposit or even to an advance of the costs for legal representation and assistance of the opposing party, thereby facilitating the right of access to justice of the less wealthy party, which would otherwise have to advance half of the arbitration costs and the fees for its legal representation.[71]

By way of illustration, the model statutory arbitration clause of the Swiss Arbitration Centre provides for a regulation in which the arbitral tribunal can decide to allocate the costs of the proceedings initiated by a shareholder to the company regardless of the outcome of the procedure, provided that 'based on the facts and the applicable law, the claimant had reasonable cause to file the action and provided that the action does not conflict with predominant interests of the company'.[72]Examples cited by the Explanatory Note for such an allocation are liability claims or claims for return of profit distribution against the company.[73]

Moreover, pursuant to paragraph 8 of the model statutory arbitration clause of the Swiss Arbitration Centre, the arbitral tribunal may also order the company to pay any deposit of costs (compare with Article 41 of the Swiss Rules), and to also advance the costs 'reasonably incurred or estimated to be incurred by a claimant who is a shareholder of the company for legal representation and legal assistance'.

INTERIM RELIEF AND EMERGENCY ARBITRATION

Shareholders or other actors may want to request interim relief measures to preserve their rights by maintaining the status quo and preventing harm, or protect the interests of the parties involved until a final decision is made.[74] Prior to the constitution of the arbitral tribunal, they may request such interim measures by way of emergency arbitration.[75] For example, interim measures may be required to preserve the status quo after a resolution has been adopted that the shareholders have challenged. The question then is whether the court or the arbitral tribunal has jurisdiction to issue interim measures. This will generally depend on the law applicable to the arbitral proceedings.[76]

For example, the Swiss Supplemental Rules provide for a concurrent jurisdiction of both state courts and the arbitral tribunal. Specifically, the arbitral tribunal may, at its discretion and regardless of whether it was seized before or after a state court, 'refrain from deciding or defer its decision if it deems it more appropriate for a judicial authority before which a parallel request is pending to decide first' (Article 6(1) of the Swiss Supplemental Rules). Such will generally be the case when the tribunal deems the measure potentially ordered by the state courts to be more efficient or effective, or both.[77]This provision, which applies mutatis mutandisto the emergency arbitrator (Article 6(2) Swiss Supplemental Rules), aims at mitigating risks of parallel requests relating to the same, comparable or conflicting interim relief before different authorities.[78]

CONCLUSION AND OUTLOOK

In conclusion, arbitration can be a useful tool to settle corporate governance disputes, providing advantages in terms of confidentiality, flexibility and efficiency. To ensure that arbitration is possible, it is necessary to ascertain whether a dispute is arbitrable and whether the arbitration clause is valid. National laws and arbitration rules increasingly facilitate the settlement of corporate law disputes by way of arbitration by providing for provisions tailored to the specificities of these disputes.

Looking ahead, the ongoing developments in ESG regulations and the increasing importance of sustainability in corporate strategies are likely to contribute to the further development of corporate governance. As climate change continues to be a critical global issue, arbitration could play a significant role in resolving disputes related to environmental responsibilities and corporate governance. The flexibility and specialist decision-making provided by arbitration, combined with increasingly arbitration-friendly regulations, make arbitral proceedings well suited for climate change disputes, which often involve complex and technical issues. On the other hand, the confidentiality of commercial arbitration raises interesting questions, as there is a public interest in ensuring that disputes related to obligations of companies and their directors in a context of global climate action are transparent and in line with political objectives.

ENDNOTES

[1] Micha Bühler is a partner, Chloé Terrapon is a managing associate and Francesca Borio is a senior associate at Walder Wyss.

[2] UK High Court, Client Earth v. Shell PLC[2023] EWHC 1897 (Ch) (24 July 2023).

[3] See, e.g., UK Corporate Governance Code, January 2024, p. 3; Swiss Code of Best Practice for Corporate Governance 2023, p. 6; German Corporate Governance Code as amended on 28 April 2022, p. 2.

[4] See, e.g., UK Corporate Governance Code January 2024, p. 3; Swiss Code of Best Practice for Corporate Governance 2023, p. 6; German Corporate Governance Code, 2022, p. 2.

[5] Swiss Code of Best Practice for Corporate Governance 2023, p. 6; German Corporate Governance Code, 2022, p. 2.

[6] Swiss Code of Best Practice for Corporate Governance 2023, p. 6; German Corporate Governance Code, 2022, p. 2; OECD (2022), Climate Change and Corporate Governance, Corporate Governance, OECD Publishing, Paris, p. 3.

[7] OECD (2022), Climate Change and Corporate Governance, Corporate Governance, OECD Publishing, Paris, p. 3.

[8] OECD (2022), Climate Change and Corporate Governance, Corporate Governance, OECD Publishing, Paris, p. 3.

[9] Federal Court of Australia, Case Number VID879/2017.

[10] For a more detailed analysis, see Moritz Keller/Sunny Kapoor/Jacqueline Momah, 'Climate Change Litigation: The Types of Disputes, the Legal Challenges and the Role of Arbitration', in Jörg Risse/Guenter Pickrahn et al. (eds), SchiedsVZ 2022, Volume 20 Issue 1, pp. 13–20, p. 16.

[11] Massimo Benedettelli, 'International Arbitration of Corporate Disputes: A Workable Balance Between Two Dimensions of Party Autonomy', in Jean Engelmayer Kalicki/Mohamed Abdel Raouf (eds), ICCA Congress Series No. 20 (Sydney 2018): Evolution and Adaptation: The Future of International Arbitration, pp. 985–1,009, p. 985.

[12] Rui Manuel Pereira Dias, Chapter 22: 'Corporate Disputes Arbitration', in André Pereira da Fonseca/Dário Manuel Lentz de Moura Vicente et al. (eds), International Arbitration in Portugal, Kluwer Law International 2020, pp. 449–458, p. 449.

[13] Pereira Dias (op. cit.), p. 449.

[14] Benedettelli (op. cit.), p. 986.

[15] Boardroom Disputes: How to Manage the Good, Weather the Bad, and Prevent the Ugly, Washington, D.C.: World Bank Group, available at http://documents.worldbank.org/curated/en/768081486008917225/Boardroom-disputes-how-to-manage-the-good-weather-the-bad-and-prevent-the-Ugly, p. 6.

[16] Boardroom Disputes: How to Manage the Good, Weather the Bad, and Prevent the Ugly, Washington, D.C.: World Bank Group, available at http://documents.worldbank.org/curated/en/768081486008917225/Boardroom-disputes-how-to-manage-the-good-weather-the-bad-and-prevent-the-Ugly, p. 6.

[17] OECD (2022), Climate Change and Corporate Governance, Corporate Governance, OECD Publishing, Paris, p. 8.

[18] Gary B Born, International Commercial Arbitration, 3rd edition, § 6.01.

[19] Nigel Blackaby/Constantine Partasides with Alan Redfern/Martin Hunter, Redfern and Hunter on International Arbitration, 7th edition, Oxford/New York 2023, paragraph 2.32.

[20] This is the case for the model statutory arbitration clause suggested by the Swiss Arbitration Centre (paragraph 1), which excludes 'matters subject to summary proceedings pursuant to Article 250(c) of the Swiss Civil Procedure Code', thereby reserving these proceedings exclusively for state courts.

[21] Blackaby/Partasides with Redfern/Hunter (op. cit.), paragraph 2.168; Born (op. cit.), § 6.04 K; for exceptions concerning arbitrability in various jurisdictions and examples of conditions that must be met for a corporate dispute to be submitted to arbitration see Benedettelli (op. cit.), pp. 991 et seqq.

[22] See, e.g., Article 697n CO of the Swiss Code of Obligations.

[23] Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 547; Florentin Weibel/Nater Dallafior, 'Statutarische Schiedsklauseln – Echte Game Changer? Die Ergänzende Schiedsordnung zu den Swiss Rules des Swiss Arbitration Centre', in Daniel Daeniker/Frank Gerhard et al. (eds), GesKR 2023, pp. 34-47, p. 36.

[24] Article 838bis to 838quinques of the Italian Code for Civil Procedure, for disputes arising between the shareholders or between the shareholders and the company concerning disposable rights relating to the company relationship.

[25] Articles 11bis and 11ter of the Spanish Arbitration Act (Ley 60/2003 dated 23 December 2003), as amended by the law dated 20 May 2011; see also the Informe sobre el Arbitraje

Societario en España by the Comisión para el estudio del arbitraje societario del Club Español del Arbitraje.

[26] Christian Duve/Philip Wimalasena, 'Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration of Corporate Law Disputes in Germany', in Patricia Nacimiento/Stefan M Kröll/Karl-Heinz Böckstiegel (eds), Arbitration in Germany: The Model Law in Practice, 2nd edition, Alphen aan den Rijn 2015, pp. 927–961, paragraph 9; German Supreme Court, Judgment of 23 September 2021, I ZB 13/21; German Supreme Court, Judgment of 6 April 2017, I ZB 23/16; German Supreme Court, Judgment of 6 April 2009, II ZR 255/08; German Supreme Court, Judgment of 29 March 1996, II ZR 124/95. For an overview of the decisions Schiedsfähigkeit I to IV, see Jochem Reichert/Jakob Groh: 'Die Schiedsbarkeit von Beschlussmängelstreitigkeiten: Der „Vierteiler" des BGH und seine Auswirkungen auf die Gestaltungspraxis nach Inkrafttreten des MoPeG' (ZPG 2023, 121); Sebastian Mock, 'Schiedsvereinbarungen für Beschlussmängelstreitigkeiten bei Personengesellschaften im bisherigen und neuen Recht – Zugleich Besprechung von BGH v. 23.9.2021 – I ZB 13/21', in Jörg Risse/Guenter Pickrahn et al. (eds), SchiedsVZ 2022, Volume 20 Issue 2, pp. 56–61; Tobias Glienke/Tosca Hohm, 'Die Schiedsfähigkeits-Rechtsprechung des BGH – Eine (Never) Ending Story?', in Jörg Risse/Guenter Pickrahn et al. (eds), SchiedsVZ 2022, Volume 20 Issue 4, pp. 189–198; see also Born (op. cit.), § 6.04 K and Benedettelli (op cit.), p. 992 for more references.

[27] See e.g., most recently, Austrian Oberster Gerichtshof, 23 June 2020, No. 18 OCg 1/20a-3 and for further references Born (op. cit.), § 6.04 K; see regarding the conditions for the arbitrability of disputes involving the challenge of a resolution: Austrian Oberster Gerichtshof, 22 October 2010, No. 7 OB 103/10p; Nikolaus Pitkowitz, 'Chapter I: The Arbitration Agreement and Arbitrability, The Arbitrability of Corporate Disputes under Austrian Law – Still Open Questions?', in Christian Klausegger/Peter Klein et al. (eds), Austrian Yearbook on International Arbitration, Volume 2014, pp. 31–49.

[28] Court of Appeal of England and Wales, Fulham Football Club (1987) Ltd v. Sir David Richards [2011] EWCA Civ 855 (21 July 2011); for more information, see Boris Kasolowsky/Roopa Mathews, 'The Arbitrability of Corporate Disputes after Fulham Football Club v. Richards: A Decade On', in Maxi Scherer (ed), Journal of International Arbitration 2022, Volume 39 Issue 2, pp. 263–276.

[29] Blackaby/Partasides with Redfern/Hunter (op. cit.), paragraph 2.168.

[30] For more references regarding the developments under US law, see Born (op. cit.), § 6.04 K.

[31] Maximov v. Novolipetsky Metallurgicheskiy Kombinat, Ruling of the Supreme Arbitrazh Court, VAS-15384/11 (30 January 2012).

[32] For a more detailed analysis, see Blackaby/Partasides with Redfern/Hunter (op. cit.), paragraph 2.171.

[33] Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 546 with further references.

[34] Blackaby/Partasides with Redfern/Hunter (op. cit.), paragraph 2.01; Julian DM Lew/Loukas A Mistelis/Stefan Kröll, Comparative International Commercial Arbitration, New York/The Hague 2003, paragraph 6-1.

[35] Swiss Federal Supreme Court, DFSC 128 III 50 (16 October 2001), consid 2c)aa.

[36] Born (op. cit.), § 10.07 with further references.

[37] Born (op. cit.), § 10.07 with further references.

[38] See, for Swiss law, Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 547.

[39] See, e.g., the recommendation in the Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 547.

[40] See, e.g., Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 547.

[41] Boris Catzeflis/Dorothee Schramm, Statutory Arbitration Clauses of Swiss Companies, in Matthias Scherer (ed), ASA Bulletin 2021, Volume 39 Issue 4, pp. 778-790, pp. 789 et seq.

[42] It is generally accepted that new shareholders or partners, because of their status as a shareholder or partner, respectively, are eo ipso bound by the arbitration clause in the constitutive document of the company or partnership deed (Born (op. cit.), § 10.07).

[43] See Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 546 and the references cited therein.

[44] Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 547; Article 45(u) of the Swiss Ordinance on the Commercial Register (HRegV).

[45] Basel Commentary, Hans-Ueli Vogt, 6th edition, Basel 2024, Article 697n paragraph 27.

[46] Basel Commentary, Hans-Ueli Vogt, 6th edition, Basel 2024, Article 697n paragraph 27.

[47] Federal Council Dispatch to the amendment of the Swiss Code of Obligations of 23 November 2016, Federal Gazette 2017, p. 548.

[48] Basel Commentary, Hans-Ueli Vogt, 6th edition, Basel 2024, Article 697n paragraph 27.

[49] Basel Commentary, Hans-Ueli Vogt, 6th edition, Basel 2024, Article 697n paragraph 14.

[50] Richard G Allemann, Setting the Ground for Corporate Arbitration in Switzerland, in Kluwer Arbitration Blog, 17 August 2020; Richard G Allemann, 'Statutarische Schiedsklauseln in der Aktienrechtsrevision', in Daniel Daeniker/Frank Gerhard (eds), GesKR 2018, pp. 339–354, p. 341; Daniel Girsberger/Nathalie Voser, International Arbitration: Comparative and Swiss Perspectives, 5th edition, Baden Baden/Zurich/Geneva 2024, paragraph 441.

[51] Duve/Wimalasena (op. cit.), paragraphs 34 et seqq.; Benedettelli (op. cit.), footnote 11.

[52] Gesetz zur Modernisierung des Personengesellschaftsrechts (Personengesellschaftsrechtsmodernisierungsgesetz – MoPeG).

[53] See in more detail Glienke/Hohm (op. cit.), pp. 197 et seq.; Mock (op. cit.), pp. 59 et seqq.

[54] Born (op. cit.), § 10.01 E.

[55] Weibel/Dallafior (op. cit.), pp. 39 et seq. with further references; Alec Ray/Fabienne Bretscher/Yasmine Fulena/Nhu-Hoang Tran Thang, 'Arbitration of Corporate Disputes in

Switzerland', in Alexandre Vagenheim/Maria Eugenia Piacquadio/Roopa Matthews (eds), The Future of Swiss Arbitration, 2023, paragraph 32.

[56] Swiss Federal Supreme Court, DFSC 136 III 107 (8 December 2009), consid. 2.5; Marco Stacher/Sophie Püschel-Arnold, Schiedsklauseln in 'den Statuten von Schweizer Aktiengesellschaften und GmbH', in Jean-Luc Chenaux/Susan Emmenegger et al. (eds), SZW 2023, pp. 515–527, p. 518; Weibel/Dallafior (op. cit.), p. 40; Ray/Bretscher/Fulena/Tran Thang (op. cit.), paragraph 33.

[57] Weibel/Dallafior (op. cit.), p. 40; Ray/Bretscher/Fulena/Tran Thang (op. cit.), paragraph 32.

[58] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 7.

[59] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 7.

[60] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 7.

[61] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 7.

[62] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 8.

[63] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 8; Hans-Ueli Vogt/Valentina Hirsiger-Meier/Thomas Hofer, 'Statutarische Schiedsklauseln, nach dem Entwurf für ein neues Aktienrecht', in Peter Forstmoser/Jean Nicolas Druey (eds), SzA – Schriften zum Aktienrecht 2019, pp. 133–155, paragraph 233.

[64] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 8 Vogt/Hirsiger-Meier/Hofer (op. cit.), paragraph 239; Stacher/Püschel-Arnold (op. cit.), p. 523.

[65] Lorenz Raess, 'Statutory Arbitration Clauses and the Supplemental Swiss Rules for Corporate Law Disputes in Switzerland', in Maxi Scherer (ed), Journal of International Arbitration 2024, Volume 41 Issue 2, pp. 139–154, p. 153; Weibel/Dallafior (op. cit.), p. 44.

[66] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 9.

[67] See, e.g., for the situation under Swiss law, Weibel/Dallafior (op. cit.), p. 43; see, e.g., by contrast, regarding the protection of shareholders relating to the challenge of a resolution under German law, Sebastian Mock (op. cit.), p. 60.

[68] Model statutory arbitration clause of the Swiss Arbitration Centre, paragraphs 7 and 8; Weibel/Dallafior (op. cit.), p. 46.

[69] Mohamed S Abdel Wahab, Costs in International Arbitration: Navigating Through the Devil's Sea, in Jean Engelmayer Kalicki/Mohamed Abdel Raouf (eds), ICCA Congress Series No. 20 (Sydney 2018): Evolution and Adaptation: The Future of International Arbitration, pp. 465–503, pp. 489 et seq.

[70] Model statutory arbitration clause of the Swiss Arbitration Centre, paragraph 7; Weibel/Dallafior (op. cit.), p. 46.

[71] Model statutory arbitration clause of the Swiss Arbitration Centre, paragraph 8; Weibel/Dallafior (op. cit.), p. 46; see, e.g., Article 43(1) UNCITRAL Rules; Article 37(2) ICC Rules; Article 41(1) Swiss Rules; Article 35.2 and 35.3 DIS Rules.

[72] Model statutory arbitration clause of the Swiss Arbitration Centre, paragraph 7.

[73] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 4.

[74] Born (op. cit.), § 17.01.

[75] Born (op. cit.), § 17.02 A 4.

[76] Born (op. cit.), § 17.02 A 3.

[77] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 13.

[78] Explanatory Note of the Supplemental Swiss Rules for Corporate Law Disputes, p. 12.

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