



International Commercial Arbitration: Economic and legal context, Relevant Players, Procedures

Workshop „Practice of international Arbitration“ - WS 2021/22

Würzburg, 14.10.2021

Prof. Dr. Florian Bien, Maître en Droit (Aix-Marseille III), Universität Würzburg

I. Overview

1. Definition

Arbitration is a method of dispute resolution providing a **final and binding** outcome, which can be **enforced**. If there is a valid **agreement to arbitrate** the **state courts refuse** to hear disputes falling within the scope of that agreement.

I. Overview

2. Other Forms of Dispute Resolution

- Litigation before State Courts
- Alternative dispute Resolution (ADR), including early neutral evaluation, expert opinions, negotiation, conciliation, mediation, and arbitration.
- “multi-tier” clauses, e. g.

“Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.”

I. Overview – cont'd

3. Commercial Arbitration v. Investor-State-Arbitration (Investor-state dispute settlement)

Investor-state-Arbitration is an instrument of public international law.

Many bilateral investment treaties (BITs) or international investment agreements such as the Energy Charter Treaty allow private investors to sue states in which the investor is active (host country) for alleged discriminatory practices.



I. Overview – cont'd

4. Arbitration Clauses

- The arbitration agreement is of paramount importance.
- Often included in the main contract as arbitration clause.
- Doctrine of separability (independence of the underlying contract)
- Submission agreements are agreements to arbitrate made after the dispute has arisen (“post litem natam”).

I. Overview – cont'd

4. Arbitration Clauses

Two effects:

- Baring jurisdiction of the state courts
- Jurisdictional basis for the arbitral tribunal's decision of the dispute

I. Overview – cont'd

4. Arbitration Clauses

Arbitration clauses should contain, as minimum, details of

- the arbitration rules that will govern the proceedings and
- the institution, if any, which is to administer the process;
- the seat, or legal place of the arbitration,
- the number of arbitrators, and
- the language of the arbitration.

I. Overview – cont'd

4. Arbitration clause – cont'd

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the **AIAC Arbitration Rules**.

The **seat of arbitration** shall be Danubia.

The **language** to be used in the arbitral proceedings shall be English.

This contract shall be governed by the **substantive law** of Danubia.

Before referring the dispute to arbitration, the parties shall seek an **amicable settlement** of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.”

(Vis Arbitration Moot 2021/22)



I. Overview – cont'd

5. Legal basis

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
- UNCITRAL-Model Law of 21 June 1985 (revised in 2006)
→ CLOUT Database
- §§ 1025 – 1066 ZPO (10. Buch: Schiedsrichterliches Verfahren)

I. Overview – cont'd

6. Relevant players

- **Parties (claimant, respondent)**
- **Parties' Counsel**
- **Party appointed arbitrators**
- **Presiding arbitrator**
- Administrative Secretary
- **Arbitral Institution**
- **Witnesses**
- Hearing venue
- Translator
- Court Reporter
- Economic, technical, legal experts
- State and international authorities (acting as Amicus curiae)
- **State courts**

II. Pros and cons of Arbitration, esp. in international cases

1. Flexibility of procedure (party autonomy)

Parties to an arbitration may freely choose i. a. the language, the place where hearings will take place, and to a certain extent the procedure to be applied by the arbitral tribunal.

II. Pros and cons of Arbitration, esp. in international cases

2. Special expertise of party nominated arbitrators

Parties to an arbitration may select their arbitrator and thus can appoint lawyers or even economists and engineers with a particular expertise.

II. Pros and cons of Arbitration, esp. in international cases

3. Neutrality of arbitrators in international cases

Often, tribunals will comprise arbitrators of different nationalities and parties will choose a neutral place as seat of the arbitration.

II. Pros and cons of Arbitration, esp. in international cases – contd‘

4. Ease of enforcement of international awards

As of January 2020, 161 countries have ratified the NY Convention (1958). Because of the NY Convention they are obliged to recognise foreign arbitration awards as binding and to enforce them in accordance with its procedural rules.

II. Pros and cons of Arbitration, esp. in international cases – contd‘

5. Confidentiality

Contrary to State court proceedings hearings before an arbitral tribunal are normally not public.

Parties can agree not only that the hearing and evidence be kept confidential, but also that they (and the arbitrators) will not disclose any information about the arbitration.

Nevertheless, the confidentiality of proceedings against witnesses can be enforced less securely.

II. Pros and cons of Arbitration, esp. in international cases – contd'

6. Duration

- Most arbitration rules do not allow for the award to be challenged (only one instance instead of three in many states).
- Awards are capable of being appealed to state courts only in very limited circumstances.
- On the other hand, the constitution of the tribunal can also take a lot of time and arbitrators are not always available.
- State courts might handle routine cases very quickly.

II. Pros and cons of Arbitration, esp. in international cases – contd‘

7. Costs

- In the absence of a second and third instance (as in the case of state court litigation) arbitration can be faster and cheaper.
- The rate of fees for the arbitrators and the institution (if any) varies from one institution to another. They are usually calculated by reference to the value of the dispute. It is higher than the fees to be paid to state courts (if any). Parties will also need to pay for the hearing venue.
- The costs for party counsel and experts are also often higher compared to state court litigation.

III. The importance of the choice of the seat of the arbitration

In order to give the arbitration a “nationality”, parties to an arbitration should specify the seat of the arbitration.

They typically specify a city, for example, Stuttgart, London or Paris.

The choice of the seat has an impact, i. a.

- on the legislative framework that applies to the arbitration procedure,
- the involvement of the local state courts during arbitration (→ next slides),
- the competent states courts for an annulment action.

NB 1: According to certain authors arbitration can neither be connected to a particular state nor be thought to assume a given nationality as arbitration is solely based on a contract between the parties.

NB 2: The seat of arbitration can be different from the place where hearings take place or where the arbitral tribunal meets for deliberations.

IV. Support of the State Courts of the Seat of Arbitration

National Arbitration normally gives powers to the courts of the seat in relation to certain aspects of the arbitration

a. Consitution of the Arbitral Tribunal

- (1) Appointment of Arbitrators (e. g. § 1035 III 1, IV ZPO)
- (2) Correction of the composition of the arbitral tribunal (§ 1034 II 1 ZPO)
- (3) Challenge of Arbitrators (§ 1037 III 1 ZPO)
- (4) Replacement of (inactive) arbitrators (§ 1038 I 2 ZPO)
- (5) Legal action for payment of the advance on costs to the arbitral tribunal

IV. Support of the State Courts of the Seat of Arbitration – cont'd

b. Taking of Evidence (§ 1050 ZPO)

- (1) Hearing of or even coercive measures against witnesses and experts
- (2) Taking of evidence abroad (State courts can request legal assistance for the arbitral tribunal)
- (3) Forcing the production of documents
- (4) Gathering information from the authorities
- (5) Reference for a preliminary ruling from the ECJ

IV. Support of the State Courts of the Seat of Arbitration – cont'd

c. Enforcement of Arbitral Awards (→ Dr. Hauser 's talk)

Recognition and enforcement of domestic and foreign arbitral awards
(§1060 resp. § 1061 ZPO)

United Nations Convention on the Recognition and Enforcement of Foreign
Arbitral Awards, 10 June 1958 („New York Convention“)

d. Interim relief (§ 1041 ZPO), subject to party agreement

V. Control of Arbitral Awards by State Courts

- State Court may not exercise the role of a Court of Appeal
- Prohibition of a „révision au fond“
- Limitation of the control to violations of public policy

a. Annulment procedure:

Limited to national awards, § 1059 ZPO

b. Recognition of arbitral awards (§§ 1060, 1061 ZPO)

Also possible for foreign awards and binding only in the state in which the award was declared enforceable.

VI. Legal Framework – Overview:

- **National Level:** Arbitration Act (e. g. §§ 1025 ff. ZPO = 10. Buch der ZPO)
- **International Level:** Multilateral Agreements, esp. New York Convention on the Enforcement of Arbitral Awards (1958)
- **Party Autonomy**

VI. Legal framework – cont'd

1. National Arbitration Acts, e. g.

- §§ 1025 ff. ZPO = 10. Buch der ZPO
- Art. 1442 ff. Code de procedure civile
- English Arbitration Act 1996
- *Danubia's Arbitration Act = UNCITRAL Model Law*

... often based on the UNCITRAL Model Law on International Commercial Arbitration (“**UNCITRAL Model Law**”).

... give the parties **flexibility** on many aspects such as the number of arbitrators, their appointment, the procedures to adopt, while providing (1) a set of **default rules** for aspects where agreement is lacking and (2) and a set of fundamental elements from which the parties cannot depart by agreement (**ius cogens**), e. g. fairness of the proceedings.

VI. Legal framework – cont'd

2. Party Autonomy, esp.

- Institutional Arbitration Rules
- IBA Rules on the Taking of Evidence
- *ad hoc* agreements (arbitration clause)
- Discretion of the arbitrators



the global voice of
the legal profession

VI. Legal framework – cont'd

3. Digression: Americanisation of International Arbitration?

- Pre-trial discovery (proliferation of electronically stored information)
- heavy reliance on oral evidence (i. a. cross examination)
- Common law styled international arbitral tribunals give little direction as to which aspects of the case they consider relevant and on what particular issues the parties should elaborate.
- Dissenting opinions (→ Escher's talk)

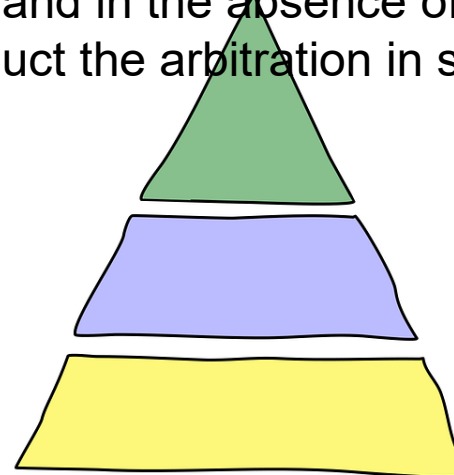
VI. Legal framework – cont'd

4. Hierarchy of the norms

Section 1042 ZPO - General rules of procedure

(3) Otherwise, subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.

(4) Failing an agreement by the parties, and in the absence of provisions in this Book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. [...]



VI. Legal framework – cont'd

4. Hierarchy of the norms – cont'd

Article 21 DIS-Rules 2018

21.2: The Rules shall apply to the proceedings before the arbitral tribunal except to the extent that the parties have agreed otherwise.

21.3: When the Rules are silent as to the procedure to be applied in the proceedings before the arbitral tribunal, such procedure shall be determined by agreement of the parties, in the absence of which the arbitral tribunal in its discretion shall decide upon the procedure, after consultation with the parties.

21.4: The arbitral tribunal shall apply all mandatory provisions of the arbitration law applicable at the seat of the pending arbitration.

VI. Legal framework – cont'd

4. Hierarchy of the norms – cont'd

- Mandatory provisions of the national Arbitration Act
- *ad hoc* agreements (arbitration clause)
- Institutional Arbitration Rules
- Discretion of the arbitrators

VI. Legal framework – cont'd

4. Hierarchy of the norms – cont'd

Example:

Parties want that DIS Rules apply and want that their dispute is decided by two arbitrators.

Art. 10.1. der DIS-VerfO:

„The parties may agree that the arbitral tribunal shall be comprised of a sole arbitrator, of three arbitrators, or of any other odd number of arbitrator.“

§ 1034 ZPO:

“(1) The parties may agree on the number of arbitral judges. Absent such agreement, the number of arbitral judges shall be three.”

VII. Institutional Arbitration versus Ad hoc Arbitration

1. Institutional Arbitration

Many Institutions in the world offer to parties the administration of their arbitration proceedings.

They propose their own (institutional) rules which are designed to set out a comprehensive set of default rules governing the arbitral proceedings from beginning to end.

Parties can refer to these institutional rules. They can also adapt them as far as legally permissible.

The involvement of the institution can be useful where a party is refusing to co-operate in the arbitral process.

IV. Institutional Arbitration versus Ad hoc Arbitration

1. Institutional Arbitration – contd‘

The institutions charge the parties fees for the administration of the award.

The rules of the Institutions may differ in certain aspects, e. g.

- Review of the award as practiced by the ICC („Scrutiny“)
- LCIA-rules mention cross-examination (Art. 20.8: „[witnesses] may be questioned by each of the parties.”), ICC and DIS rules do not.
- Costs
- Availability of fast track arbitration etc.

IV. Institutional Arbitration versus Ad hoc Arbitration – cont'd

1. Institutional Arbitration – cont'd

Important Arbitration Institutions

- 1. ICSID** – International Centre for Settlement of Investment Disputes
- 2. ICC** – International Court of Arbitration of the ICC (International Chamber of Commerce, Paris)
- 3. DIS** – Deutsche Institution für Schiedsgerichtsbarkeit (Bonn)/German Arbitration Institution
- 4. SCC** - Arbitration Institut of the Stockholm Chamber of Commerce
- 5. LCIA** – London Court of International Arbitration
- 6. AAA** – American Arbitration Association's International Centre for Dispute Resolution ("Triple A")
- 7. CIETAC** – China International Economic and Trade Commission
- 8. HKIAC** - Hong Kong International Arbitration Center

IV. Institutional Arbitration versus Ad hoc Arbitration – cont'd

2. *Ad hoc* arbitration

Ad hoc arbitration is conducted under rules adopted for the purpose of the specific arbitration, without the involvement of an arbitral institution.

The parties have to design all the arbitral rules themselves or have to leave the rules to the discretion of the arbitrators. Both can find inspiration in the UNCITRAL Rules.

Ad hoc arbitration lacks the support of an institution in case problems arise. The procedure depends for its full effectiveness on a spirit of co-operation between the parties.

NB: Certain jurisdictions, such as China, only recognise institutional arbitration.

Important Arbitration Institutions



ICSID

International Centre for
Settlement of Investment Disputes
WORLD BANK GROUP

English

Search this site



ABOUT



SERVICES



PROCESS



CASES



ARBITRATORS



ICSID DOCUMENTS



RESOURCES



News

October 09, 2018

Rule Amendent Video Series Part Two: Addressing Time and Cost

October 05, 2018

ICSID Offices Closed on October 8, 2018

October 03, 2018

Rule Amendent Video Series Part One: Introducing the Proposed Changes to the ICSID Rules

September 28, 2018

ICSID Member States Discuss Proposed Rule Amendments

Convention and Rules



Featured

Upcoming events

October 15, 2018 - October 21, 2018 (Hong Kong)
Investment Law & Investor-State Mediation Training

October 15, 2018 (Hong Kong)

Arbitration under the ICSID Convention Current and Future Developments

October 19, 2018 (Seoul)

ISDS Seminar 2018

October 25, 2018 (Online and Washington, D.C.)

Young ICSID Book Launch Series: Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration

Important Arbitration In



ICSID

ABOUT

SchiedsVZ
Zeitschrift für Schiedsverfahren

ICC

International Chamber of Commerce
The world's business organisation

News

October 09, 2018

Rule Amendent Video Series Part Two: Addressing Time and Cost

October 05, 2018

ICSID Offices Closed on October 8, 2018

October 03, 2018

Rule Amendent Video Series Part One: Introducing the Proposed Changes to the ICSID Rules

September 28, 2018

ICSID Member States Discuss Proposed Rule Amendments

INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CENTRE FOR ARBITRATION
ARBITRATION WORKING GROUP

Jesse Fry
Simon Greenberg
Francesca Mazza

THE SECRETARIAT'S GUIDE TO ICC ARBITRATION

A Practical Commentary on the 2012 ICC Rules of Arbitration
from the Secretariat of the ICC International Court of Arbitration

With the assistance of Benjamin Moss

Foreword by John Borchers
Preface by Peter Wolsch

SchiedsVZ
Zeitschrift für Schiedsverfahren

Young ICSID Book Launch Series: Contemporary and
Emerging Issues on the Law of Damages and Valuation in
International Investment Arbitration

THE SECRETARIAT'S GUIDE TO ICC ARBITRATION

EFFICIENT DISPUTE RESOLUTION FOR A STRONG
ECONOMY. IN SWEDEN AND GLOBALLY.



HOW MUCH DOES IT COST?

Use the calculator to estimate
the costs in an SCC case.



MODEL CLAUSES

The SCC offers tailored model
clauses available in several
different languages.



LEGAL RESOURCES

SCC Practice, Legislation,
Conventions, Court Decisions
and the Swedish Arbitration
Portal.



INVESTMENT DISPUTES

The SCC is the second largest
institution in the world for the
administration of investor-state
disputes.

News

4 OCTOBER

Stockholm initiative for green investments celebrated in New York

On September 28, the winners of the global innovation contest Stockholm

[Rule Amendment Video Series Part One: Introducing the Proposed Changes to the ICSID Rules](#)

September 28, 2018

[ICSID Member States Discuss Proposed Rule Amendments](#)

Events

11
OCT

Rome: Arbitration seminar in conjunction with the IBA annual conference

Mannheimer Swartling, together with the SCC and the Milan Chamber of Arbitration, cordially invite you to a breakfast event in

[Young ICSID Book Launch Series: Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration](#)

Log In

Online Filing



About

Arbitration

ADR Services

Membership

Events

YIAG

Search site...



125
YEAR ANNIVERSARY



James Spigelman QC

LCIA Perspectives

London Arbitration after BREXIT

Read more...

News

The LCIA updates its FAQs
5th October 2018

Events

YIAG TechArb and ArbTech - London
A panel discussion on the issues specific to the arb...

Useful Links

LCIA Arbitration Rules
Effective

8. HKIAC - Hong Kong International Arbitration Centre

Log In

Online Filing

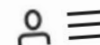


My Account

About

Register

File or Access Your Case



中国国际经济贸易仲裁委员会
CHINA INTERNATIONAL ECONOMIC AND
TRADE ARBITRATION COMMISSION

News

MORE



The Opening Ceremony of CIETAC European Arbitration... [2018-09-29]

Vice Chairman of CCPIT Lu Pengqi visited VIAC [2018-09-29]

Declaration on 2018 CIETAC Global Arbitrators Foru... [2018-09-29]

The Welcome Dinner of the First CIETAC Global Arbi... [2018-09-23]



Application



Domain Name



Rules



Online Arbitration



Fee Calculator



CIETAC Publication

Home

About Us Rules Guide Arbitrators Multi-Service News Activities

Please enter the content you want to

中国仲裁的国际品牌

International Brand of Chinese Arbitration

国际仲裁的中国经验

Chinese Experience of International Arbitration

Notice Model Clauses Video Hot Topic Upcoming

Decision of the China Council for the Promotion of International Trade (China Chamber of International Commerce) on the Reorganization of the China International Economic and Trade Arbitration Commission South China Sub-Commission and China International Economic and Trade Arbitration Commission Shanghai Sub-Commission (PDF Download)

Log In

Online Filing



Belt & Road | Events | Facilities & Services | News | HK45 | Users' Council | About Us | Contact Us

简体 | 繁體



Arbitration | Mediation | Domain Name Disputes | Adjudication



香港國際仲裁中心
Hong Kong International
Arbitration Centre

HKIAC for Belt and Road Disputes



Play Video

BELT and ROAD

Mediation

Belt and Road
Resource Centre

File Domain
Name
Complaints



Thank you for your attention!

Prof. Dr. Florian Bien

Lehrstuhl für globales Wirtschaftsrecht,
internationale Schiedsgerichtsbarkeit und
Bürgerliches Recht, Universität Würzburg

bien@jura.uni-wuerzburg.de

