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


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 June1985 (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 extend 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 – cont’d

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. Constitution 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)


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. Anulment 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)
- **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


… 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) 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
VI. Legal framework – cont’d

3. Disgression: 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 cooperation between the parties.

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

1. ICSID – International Centre for Settlement of Investment Disputes (Weltbank)
2. ICC – International Chamber of Commerce (Paris) – Internationaler Schiedsgerichtshof der Internationalen Handelskammer
3. DIS – Deutsche Institution für Schiedsgerichtsbarkeit
4. SCC – Arbitration Institut of the Stockholm Chamber of Commerce – Schiedsgerichtsinstitut der Stockholmer Handelskammer
5. LCIA – London Court of International Arbitration
6. AAA – American Arbitration Association
7. CIETAC – China International Economic and Trade Commission
8. HKIAC – Hong Kong International Arbitration Center
Important Arbitration Institutions

1. ICSID – International Centre for Settlement of Investment Disputes (World Bank)
3. DIS – Deutsche Institution für Schiedsgerichtsbarkeit
4. SCC – Arbitration Institute of the Stockholm Chamber of Commerce – Schiedsgerichtsinstitut der Stockholmer Handelskammer
5. LCIA – London Court of International Arbitration
6. AAA – American Arbitration Association
7. CIETAC – China International Economic and Trade Commission
8. HKIAC – Hong Kong International Arbitration Center
HKIAC for Belt and Road Disputes

Play Video
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