International Arbitration 10x10

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recommendable to choose a state that is a member state of the New York Convention. This is to ensure that the award is also enforceable in other New York Convention signatory states.

In addition, it is recommendable to add some further regulations with respect to the number of arbitrators (usually three), the language of the arbitral proceedings and the applicable substantive law.

Sticking to the aforementioned recommendations avoids creating a so-called pathological arbitration clause, which would be void in the worst case, but would in any case cause delays and unnecessary disputes before the actual arbitration begins. Examples for such pathological clauses are:

1. institution referred to does not exist;
2. naming of specific arbitrator who is unable or unwilling to act;
3. definition of certain qualifications for the arbitrators which cannot be fulfilled;
4. inconsistency in choice of seat of arbitration;
5. unrealistic deadline for the rendering of the award.

As mentioned before, parties who have chosen a particular institution to administer their arbitration are well advised to adopt this institution's model clause to mitigate the risks of a jurisdictional fight. Nonetheless, model clauses are not perfect for each and every situation and should be tailored in certain situations, for example, where the remedies likely to be required are not for monetary compensation (e. g. in company law disputes) and where one party is a state-owned enterprise, a state or a consumer.

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5. INSTITUTIONAL ARBITRATION IS PREFERABLE TO AD HOC ARBITRATION

Once the parties to a contract have agreed on arbitration as the dispute resolution mechanism, the question often arises as to whether they should refer to the rules of a specific arbitration institution (institutional arbitration) or simply leave it with the agreement to arbitrate (*ad hoc* arbitration). The latter means that the arbitration is not administered by an institution.

Referring to the rules of a well-known arbitration institution and consequently agreeing on institutional arbitration is generally preferable. The most important advantage of institutional arbitration is that due to pre-established rules and procedures, it is usually ensured that the arbitral proceedings begin in a timely manner and with administrative assistance from the institution. If necessary, the institution can also assist the parties in nominating a qualified arbitrator. For this purpose, most institutions have a list of potential arbitrators available. An institution's panel of arbitrators usually consists of experts from different regions of the world. This allows the parties to select an arbitrator possessing the necessary skills, experience and expertise to provide for a quick and effective dispute resolution process. Although the parties nominate "their" arbitrator (usually each party one of the three arbitrators, while the chairperson is nominated by the party-nominated arbitrators), it is the institution's decision to actually appoint the tribunal. This is another advantage, since the institution regularly acts as the decision-making body in a potential dispute about the impartiality of one of the arbitrators. A further benefit of institutional arbitration is that the parties and arbitrators can seek assistance and advice from the institutional staff.

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In general, arbitration can only be an option as a dispute resolution mechanism if it provides a final and binding award in the end. However, there is the inherent risk that a mistake made by a tribunal cannot be rectified at a later stage. In order to counterbalance this risk to some extent, some institutional rules (for example Article 34 of the ICC Rules) provide for a scrutiny of the draft award before the final award is issued. However, this is not intended to be a full second review of the merits of the case. Rather, the institution ensures that the award is adequately reasoned and deals with all issues of the proceeding, including interest and costs.

As always in life, where there is light, there is also shadow. The main disadvantages of institutional arbitration are the administrative fees for the services of the institution. These fees are usually higher than state court fees. The follow-

ing example gives a good impression: In Germany, for an amount in dispute of EUR 10 million, state court fees come to about EUR 125,000, whereas fees for arbitration under the rules of the German Arbitration Institute ("DIS") amount to approx. EUR 240,000. Under the ICC Rules, the fees would even amount to roughly EUR 350,000.

Conversely, an *ad hoc* arbitration is not administered by an institution (such as ICC, LCIA, DIS, SCC, etc.). Therefore, the parties have to determine all aspects of the arbitration themselves, without any support by an institution. Provided that the parties follow a cooperative approach, *ad hoc* proceedings have the potential to be more flexible, faster and cheaper than institutional proceedings. The arbitration agreement, whether formulated in the principal agreement as an arbitration clause or as a submission agreement after a dispute has arisen, can simply state that "disputes between the parties will be arbitrated". Furthermore, it is recommendable to specify at least the seat of arbitration because this will determine the procedural laws governing the arbitration and the enforceability of the award (see IV. 8). Should one party refuse to comply with the agreement to arbitrate, the state courts at the seat of arbitration are competent to decide this issues.

A properly structured *ad hoc* arbitration is likely to be more cost-effective because the parties will only have to pay fees for the arbitrators, lawyers or representatives and the costs of conducting the proceedings, rather than paying fees to an arbitral institution. The parties negotiate the arbitrators' fees directly with the arbitrators, which leaves room for price negotiations, whereas in institutional arbitration the arbitrators' fees are determined by the institution. Conducting an *ad hoc* arbitration does not necessarily mean that the parties may not refer to any pre-established rules. The parties to a contract could refer to the rules of an institution or to the UNCITRAL Arbitration Rules, which are tailored to *ad hoc* arbitrations. Referring to the rules of an arbitration institution instead carries risks. For example, almost all rules drawn up by institutional providers refer to specific administration services rendered by the provider – such as appointmenting the members of the tribunal. These rules would have to be amended or excluded. This bears the risk of creating ambiguities or that the parties unintentionally create an institutional process.

However, another important disadvantage of *ad hoc* arbitration is that its effectiveness depends on how willing the parties are to agree on the arbitration procedures at a time when there may already be a dispute. The failure of one or both parties to fully cooperate can ultimately result in a time-consuming recourse to state court, e. g. if the parties cannot agree on the appointment of arbitrators or if an arbitrator is to be replaced because he is biased or delays the proceedings.

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6. CHOOSING A GOOD ARBITRATION INSTITUTION IS IMPORTANT

The previous chapter explained why institutional arbitration is usually preferable to *ad hoc* arbitration. But the decision to conduct administered arbitral proceedings is only the first step. The next step is to choose the right arbitration institution. In view of the very large number of different arbitration institutions, there are a few aspects to consider when making the decision. There are regional, domestic and international institutions. In addition, one can differentiate between institutions that serve a particular trade or industry and other institutions that do not. Most institutions have one thing in common: an individual set of rules and an individual model clause which should be adopted and incorporated into the agreement (see II. 4).

First of all, it is important that the rules of the institution are constantly reviewed and, if necessary, revised and adapted to new developments in international arbitration, since international arbitration is a rapidly changing and developing practice.

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Second, different arbitration institutions have different approaches to costs, which can be an important factor when choosing the institution. Some institutions determine their fees and the arbitrators' fees on the basis of amounts in dispute. Others calculate the fees on the basis of the time spent on the case. It is not possible to say whether one of these approaches is generally more favorable, since it always depends on the complexity of the case and the amount in dispute.

Third, it is important that the institution has highly qualified administrative staff, which is responsible for supporting the arbitral tribunal as well as for administrative tasks. In this respect, it is of utmost importance that the institution is able to administer the proceedings in the determined language.

In most cases, parties turn to one of the few established international arbitration institutions. These institutions are experienced, highly skilled and have proven that they administer and supervise the proceedings very well and almost everywhere in the world. Therefore, leading and established arbitration institutions are more predictable and better assessable than unknown or recently founded institutions. The world's leading and best-known arbitration institution is the International Chamber of Commerce's ("ICC") International Court of Arbitration in Paris, which was established in 1923. The ICC permanently administers a very large number of cases, most of which are international disputes involving parties from all over the world. The ICC provides for a highly qualified, multilingual secretariat, which is under the supervision of the ICC Court of Arbitration. The ICC Court is the administrative body for ICC arbitrations. Two special features

of ICC arbitration are, firstly, the requirement for terms of reference to be drawn up at the outset of the proceedings, and, secondly, the ICC Court's scrutiny of the draft awards. The ICC, which published its revised set of rules in 2021 after the last changes were implemented in 2017, is a perfect example of up-to-dateness.

A very popular Continental European arbitration institution is the Deutsche Institution für Schiedsgerichtsbarkeit e. V. ("DIS") (German Arbitration Institute), which was formed in 1992 by the merger of Deutscher Ausschuss für Schiedsgerichtsbarkeit (German Association of Arbitration) and Deutsches Institut für Schiedsgerichtsbarkeit (German Institute of Arbitration). The DIS Arbitration Rules, in their most recent version effective since March 2018, are available for the resolution of disputes both on a national and international level.

Also worth mentioning is the London Court of International Arbitration ("LCIA"), which was founded in 1892. The LCIA has a relatively small group of administrative staff compared to the ICC, for instance, but its rules are more detailed than those of the ICC. It has a significant international caseload, including cases from Russia and countries of the former Russian confederation.

The American Arbitration Association ("AAA"), which administers a considerable number of "domestic" arbitrations within the United States of America, also administers interstate arbitrations. In order to cope with the increasing number of such arbitrations, the AAA established the International Center for Dispute Resolution ("ICDR") with several offices around the world.

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International arbitration institutions have also come to the fore in Asia. The China International Economic and Trade Arbitration Center ("CIETAC") was established in Beijing in 1956 and has a regional arbitration center in Hong Kong, which was established in 1985. The current CIETAC Arbitration Rules, which came into force in January 2015, constitute a modern set of rules that is consistent with the internationalization of Chinese arbitration practice and procedure.

In 1991, the SIAC was founded in Singapore to provide a dispute resolution center for Asia. Singapore's law on arbitration is based on the Model Law, and the SIAC maintains a list of experienced arbitrators from all parts of the world from which the parties can choose their arbitrator if they so wish. The revised SIAC Arbitration Rules, which came into effect in August 2016, constitute a complete, modern set of rules.

Of course, the list of the aforementioned institutions is not conclusive, and there are many more that could be referred to (such as the Swiss Chambers' Arbitration Institution ("SCAI") with its "Swiss Rules", the Arbitration Institute of the Stockholm Chamber of Commerce with its "SCC Rules"), the Hong Kong International Arbitration Centre with its "HKIAC Rules", or the Vienna International Arbitral Centre (VIAC) with its "Vienna Rules"). In the end, users have to decide which features of an arbitration are most important to them and accordingly choose the arbitration institution.

7. MULTI-TIER CLAUSES – ARBITRATION MIGHT ONLY BE THE LAST RESORT

Multi-tier clauses are contract clauses that provide for at least two consecutive stages of dispute resolution mechanisms for disputes arising out of or in connection with the respective contract. Such clauses are also called escalation clauses or step clauses. By incorporating such clauses in an agreement, the parties intend to conduct arbitral proceedings as a last resort. The parties agree that before submitting the dispute to an arbitral tribunal, they must first try to find an amicable solution, *i. e.* to de-escalate the dispute. The parties are free to choose the procedures. Multi-tier clauses can include waiting periods, negotiations between corporate representatives, conciliation, mediation, or mini-trials. Some multi-tier clauses even include a referral to an expert or a third party for a non-binding opinion. In most multi-tier clauses, the parties agree to first attempt to resolve their dispute by negotiation (sometimes with escalation to more senior corporate representatives), followed by mediation, with arbitration only being permitted after these non-binding means of dispute resolution have failed.

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Multi-tier clauses can contribute significantly to the time and cost efficiency of the dispute resolution process. If the amicable resolution is successful, the parties will not have to go through the more time-consuming and expensive process of arbitration. Needless to say that, on the other hand, multi-tier clauses can also have a delaying effect if the settlement negotiations fail.

The main question is whether or not multi-tier clauses and the commitment to finding an amicable solution in the first place are binding and enforceable. This is also essential for the question of whether or not the parties can be in breach of the agreement if they either fail to find an amicable solution or if they initiate arbitration proceedings despite the multi-tier agreement. In this regard, the wording of the clause is decisive. Clauses like "The parties agree to negotiate before initiating arbitration proceedings" cause problems due to their vagueness and lack of certainty about the scope of the negotiations.

It would be very difficult for a court or tribunal to decide on the basis of such a vague wording on a breach of this multi-tier clause. Such a clause does not provide for objective criteria to decide whether the parties are in compliance or breach of the provision. Although there are some differences in the way national courts around the world deal with the question of whether multi-tier clauses are enforceable, it is highly recommendable to draft precise multi-tier agreements

that provide for a procedural framework and time limits as well as the respective obligations of the parties.

In order to avoid any doubt as to whether a stage of dispute resolution has been "performed" as agreed, it is recommendable to define clear deadlines or notification requirements. In any case, is not advisable to include the requirement that the parties may only proceed to the next stage of the dispute resolution escalation by mutual agreement.

A well drafted multi-tier clause may read as follows:

> [First Tier] Any dispute arising out of or in connection with this contract shall be settled through negotiations between the parties.
>
> [Second Tier] If subsequent to a written notice of one party a dispute cannot be settled through negotiations as provided for in subsection 1 within four weeks or any longer period agreed upon by the parties, then either party must refer the dispute to mediation according to the Mediation Rules of the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e. V., "DIS").
>
> [Third Tier] If the mediator notifies both parties or one party notifies the other party in writing that the mediation initiated pursuant to subsection 2 has failed, each party may refer the dispute to arbitration according to the Rules of Arbitration of the German Arbitration Institute. The dispute shall be decided by three arbitrators. The seat of arbitration shall be […]. The language of the arbitration shall be […].

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8. COMPLEX TRANSACTIONS REQUIRE COMPLEX PRECAUTIONS – MULTI-CONTRACT AND MULTI-PARTY SITUATIONS

Not every commercial transaction or contract is executed by just two parties. There may be one contract but more than two parties ("multi-party"), a number of contracts between the same parties ("multi-contract"), or a number of contracts with different parties (multi-party, multi-contract). The parties' consent is the fundamental keystone of international arbitration and is therefore always required for the conduct of arbitral proceedings. It is embodied in the arbitration agreement between the parties, which determines the tribunal's jurisdiction and powers.

As a consequence of the consensual element of international arbitration, an arbitration agreement only binds the parties to the agreement, but not others. This is the basic rule. However, there are cases where the arbitration agreement might also bind (and benefit) third parties.

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There are various ways to achieve such third-party effects: first, by operation of the "group of companies" doctrine; second, by operation of general rules of private law (e.g. succession); or third, by way of joinder or intervention under certain circumstances.

The group of companies doctrine states that the benefits and duties arising from an arbitration agreement may, under certain circumstances, be extended to other members of the same group of companies. The Dow Chemical case has been invoked as the leading authority on the group of companies doctrine. In this case, a claim was successfully brought before an ICC tribunal not only by the companies that had signed the relevant agreements, but also by their parent company, a US corporation, and a French subsidiary of the same group. However, there are also tribunals and courts that reject the group of companies doctrine. In the Netherlands, for example, an award binding non-signatory affiliates was annulled. Also Swiss and English courts have refused to accept that a third party be bound by an arbitration agreement merely because it has a commercial relationship with one of the parties. In light of the Dow Chemical case and the aforementioned court decisions, it is clear that there is only very limited scope for applying the group of companies doctrine. Only if (a) the non-signatory actively participated in the conclusion of the contract containing the arbitration agreement, and (b)