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International Arbitration

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I. Introduction

Arbitration is an alternative kind of dispute resolution with the same purpose as state court procedures: to obtain an executable title which can be efficiently enforced with the support of the state where the enforcement shall take place.

Whereas state courts are strictly bound to procedures under their domestic law, arbitration leaves to the parties a larger scope of setting their own rules and gaining control over the appointment of the arbitrators, who replace the "natural judge". In addition, the Parties keep control over the rules under which the arbitrators are to work. Arbitration is said to be less time wasting, but more expensive than state courts. However, chosing arbitration as a method to settle disputes is primarily a matter of contractrual and business strategy, with the final result of even saving costs once the whole setting is properly chosen including the selection of the law firms.

II. Arbitration or State Court?

In many countries, justice is both slow and expensive (e.g. Turkey), sometimes the education of judges is not sufficient to enable them to deal with complicated international cases. In other countries, courts are increasingly experienced with such cases. In some German courts, hearings may be conducted in English, if necessary. Proceedings are speedy enough to compete with arbitration. Under today's conditions, court judgments are easily recognized and enforced in other countries, whereas some countries are still reluctant in the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which most countries in international trade are a party.

On the other hand, arbitration has a number of undisputable advantages. When chosing their arbitrator or panel, the parties have the possibility to rely their decision on skills of the arbitrator, related to knowledge of the relevant law, the specific field and languages. The Parties may decide on the rules to be applied, not only in terms of substantial law, but also in terms of the relevant procedure.

Chosing the appropriate method of dispute settlement is also a matter of strategy. When selecting the place of jurisdiction or arbitration and/or the rules and the institution under which the arbitral proceedings shall be conducted, the Parties have to contemplate the following criteria:

- What are the rules at the place of arbitration? Do they comply with the principles of arbitration?
- Does the law at that place provide for specific remedies against the award?
- Is the institution chosen by the Parties appropriate?
- What kind of case-administration does the institution provide? Do the Parties prefer a strong administration or a liberal administration?
- Will the arbitrators chosen by the Parties be comfortable with the institution?
- What are the costs caused by the specific institution? Are they justified by specific qualities of that institution?
- If the institution is to appoint a sole arbitrator or a chairperson - are the methods of selection transparent, objective and feasible? Or does the institution work with a limited number of arbitrators (list)? If yes, how are these arbitrators selected (Quality? Reputation? Good connections? Does the listing depends on paying a fee?)?
- Does the specific place (location) of arbitration cause more costs than others?
- Does the Party have an idea about the law firm which is to represent the Party, and its costs? Does the law firm have sufficient skills/experience to conduct an international arbitration or litigation?
- Once the clause takes shape, is it likely that the execution of such clause leads to an award which can be enforced in the country where enforcement is most likely needed?

The list can be extended....

These points show that arbitration is not a method just to escape from state jurisdiction or to serve as a technique of compromise with the other Party. An arbitration clause is an important contractual regulation which belongs to the business strategy of the client.

III. AGREEMENT OF THE PARTIES

Arbitration needs a clear agreement between the Parties, which should leave no doubt as to what the Parties wish.

An arbitration clause must make clear that the Parties wish to settle their disputes related to a specific contract or all of their legal agreements by arbitration. Further, it should contain procedures for appointment of the arbitrators, place of arbitration and language. Instead of setting individual rules, the Parties may also insert an arbitration clause directing to one of the arbitration institutions (see below), who provide model clauses and precise explanations as to how to implement them in the contractual relationship. English is the most common language of arbitration; however, most institutions are able to administrate arbitrations in other languages.

Further, in most countries an arbitration clause must be in writing. Therefore it is necessary to know what the state court of the country of enforcements expects from a valid arbitration

clause. A clearly shaped clause integrated in a written agreement signed by both parties has the best chance not to fail.

IV. CHOICE OF LAW

The choice of law, which is to govern a contract, is often made by following considerations such as "where do I feel at home". Such consideration bears more risks than advantages. The agreement on a certain law to be applicable should take into account, whether the law is accessible not only to the parties but also to the judge (arbitrator) and whether one may count on the judge's capability to apply it. A national judge cannot be expected to be able to read and apply foreign legislation. He/she will need expertise, where access may be difficult and bring along the risk of additional high costs.

In arbitration, the Parties have the possibility to chose their Tribunal in a manner that the arbitrators can be expected to be able to read, understand and apply the applicable law. In other words, in such a system the method to resolve disputes can be optimized.

V. PLACE OF ARBITRATION

Parties often wish to choose a "neutral" place of arbitration. However, other than state court jurisdiction, the place of arbitration does not say anything about possible neutrality or partiality. Arbitration is "neutral" by its essence. Neutrality is preserved by the proper choice of the arbitrators. The importance of the place of arbitration depends on substantially different issues.

Where the Parties do not agree on the procedure they wish to be observed by the Arbitral Tribunal, the local procedure law enters the game. The only important issue in this respect is the possibility to challenge an award. If the local law allows an "appeal", the meaning of arbitration is deteriorated. In such case, the Parties must make clear in their arbitration clause that they wish to have a "final" award, which cannot be challenged by appeal. If the local law allows an application of "setting aside", the Parties may exclude this in their arbitration clause. In some countries (i.e. at some places of arbitration) this makes sense, because the state courts, when handling the application, interfere with the arbitration as if the application was an appeal. In Switzerland, the Federal Court is very restrictive: only in cases where the award violates most important principles of justice, the Court sets aside an award. For this reason, the overwhelming majority of judgments of the Swiss Federal Court confirms arbitral awards. In other countries, the concept of public order is not as strictly limitated. Although our law office feels quite firm when a Party urges us to put a clause providing Istanbul as a place of arbitration, our law office often prefers an arbitration clause where the place of arbitration is a Swiss or German city.

VI. ARBITRATION INSTITUTION

Arbitration as a method of "private" dispute resolution may cause problems when Parties and arbitrators try to set the rules for the proceedings. Arbitration without the support of institutions, the so-called "ad-hoc arbitration", often leads to internal disputes not only on the rules but also on the fees.

Therefore, it may be advisable to choose an institution which provides not only its own rules but administrative support, too. When a Party wishes to have "Paris" as the place of arbitration, it often confuses the place of arbitration (France) with the International Chamber of Commerce

(ICC), which is seated in Paris and provides both rules and support. Cases filed at that institution are administrated by the ICC Court of Arbitration, which is not a court in the proper sense.

Under the ICC Rules, Parties can arbitrate anywhere. Many cases between international Parties are arbitrated in Switzerland under the Rules and administration of the ICC, though Switzerland has institutionalized arbitration with rules of its own (see below).

The "German Institution of Arbitration" (DIS) is effectively seating in Bonn and Berlin, but is a neutral institution providing support and rules for international arbitration.

The difference between the ICC and the DIS consists in the support. Whereas the so-called "ICC Court of Arbitration" and its Secretariat use to interfere very far into the work of the arbitrators, the DIS administration is more restrained.

The London Court of International Arbitration, which is not a Court in its proper sense but an institution, resembles to institutions such as ICC, DIS or many others. It prefers working with "Chartered Arbitrators" who are "certified" for qualification achieved by experience and education.

In Switzerland the Chambers of Commerce have unified the Swiss system under the Swiss Rules.

The Vienna International Arbitral Center is the Austrian counterpart of the DIS.

Before making the choice of a specific institution, the Parties should have a look at the Rules of that institution, the practice of its administration and, of course, the costs. Because one of the advantages of an arbitration institution is that the rules contain regulations on the costs. ICC also takes care of the payments to be made by the Parties, DIS has followed this system recently.

There are many other institutions around the world (Stockholm, Helsinki, Edinburgh, Istanbul, Singapore, Hongkong, Dubai, Milano etc.).

In our practice, the most common institutions are the DIS, ICC and VIAC. We often recommend the DIS and the Istanbul Arbitration Centre.

VII. Rules of Arbitration

Arbitral Tribunals have to apply the law, including the procedure law, at the place of arbitration. Many countries have adopted the UN Model Law on International Arbitration or similar regulations in their national civil procedure codes. Parties who make a certain choice of the place of arbitration should have some idea about the legal setting in that country.

The rules provided by the arbitration institutions are made to facilitate the work of the arbitrators. By following the small texts of such rules, arbitrators will have a guide through the main principles of procedure and ensure that their award will be enforced in the most countries of our world.

VIII. Proceedings

Arbitration proceedings must observe international rule of law principles. This entails – simply spoken – that Parties and Arbitrators must be in permanent communication. The right to be heard must be respected. Therefore, oral hearings and submission and evaluation of evidence

by means of documents, witness examination and expert reports are indispensable elements of arbitration proceedings.

However, most of the modern arbitration rules provide expedited procedures. Such procedures must be agreed by the Parties either expressly or by their consent to the relevant rules for arbitration. Such accelerated proceedings provide time limits, such as for the rendering of an award within six months after the constitution of the tribunal or similar.

IX. Enforcement of Awards

International arbitral awards are enforced in more or less the same way as foreign judgments. In countries, which have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (most of the countries in the world have ratified this convention), an arbitral award is considered as a foreign judgment. If the award complies with the most eminent principles of the rule of law, such as the right to be heard, compliance with the applications of the Parties, compliance with principles of jurisdiction etc., it must be enforced in the country. The compliance with such rules is examined by a national court, who either denies enforcement if the principles are violated or issues a title, which is the basis for the activities of the national execution offices. However, recognition of foreign awards may turn into a tricky issue if the country where enforcement is to be effected requires certain formalities which are not in line with international practice, or if defendant is a State entity. In Turkey, recognition uses to take time.

X. Our Law Firm in Arbitration

Our law firm, in the person of Attorney at Law Prof. Dr. Christian Rumpf, provides experienced services in international arbitration both as counsel, expert and arbitrator. Most of our cases were related to Turkey, including cases of Turkish companies against the Turkish State or conflicts between German, American or other enterprises on the one hand and Turkish enterprises on the other hand, in the fields of telecommunication, energy, construction and commercial activities. Our international expertise and skills in foreign languages are also feasible for most common cases in litigation under jurisdictions both in common and continental law.