Introduction and Basic Principles

International Arbitration
Prof. Dr. Daniel Girsberger, LL.M.

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Nature of International Arbitration

Typical situation

Construction Cpy
Brazil

Subcontractor
USA

Construction Contract + Arbitration Clause

Investor
India

International Arbitration
Nature of International Arbitration

Typical situation

“Any dispute in relation to this contract shall be resolved by arbitration in accordance with the Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution. The seat of the arbitration shall be Zurich.”
International Arbitration

/. Typical Situation

Party 1 (Claimant)

Place of Arbitration

Party 2 (Respondent)

Assets Party 2

Assets Party 3

Party 3 (Resp. 2)
Types of Dispute Resolution

Various types of dispute resolution

Alternative Dispute Resolution
- Mediation
- Conciliation
- Expert determination
- Dispute Review Boards
- etc.

Arbitration

Binding Decision

State Court Proceedings

International Arbitration
## Arbitration vs State Court Proceedings

<table>
<thead>
<tr>
<th>In Common</th>
<th>Differences</th>
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<tbody>
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## Advantages and Disadvantages

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tbody>
<tr>
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</tbody>
</table>
## Arbitral Proceedings

<table>
<thead>
<tr>
<th>Claimant</th>
<th>Arbitral Tribunal</th>
<th>Respondent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Arbitration</td>
<td></td>
<td>Answer to the notice of arbitration</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Formation and constitution of the arbitral tribunal</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Exchange of written arguments</td>
<td></td>
</tr>
<tr>
<td>Statement of claim / [reply]</td>
<td></td>
<td>Statement of defense / [rejoinder]</td>
</tr>
<tr>
<td></td>
<td>Oral hearing (Witness Hearing …)</td>
<td></td>
</tr>
<tr>
<td>Post-hearing brief</td>
<td></td>
<td>Post-hearing brief</td>
</tr>
<tr>
<td></td>
<td><strong>Award</strong></td>
<td></td>
</tr>
<tr>
<td>Recognition and enforcement</td>
<td></td>
<td>Recognition and enforcement</td>
</tr>
</tbody>
</table>
Legal Sources

Domestic vs International

- Constitution
- Civil Procedure Acts / Specific Arbitration Statutes
- Arbitration Agreement / Rules
- „Lex arbitri“

- Treaties
- National (Arbitration) Legislation
- Arbitration Agreement / Rules
Seat of the Arbitral Tribunal

Seat / Place / Venue – Difference?

Seat
• Is the *legal connection* of the arbitration and the parties to the legal jurisdiction

Place / Venue
• The term place is sometimes used to refer to the *physical location* where the arbitration proceedings are held, i.e., the «venue» of the arbitration.
• Regularly: Presumption that place where arbitration is to take place («venue») will constitute its seat.
Determination of the Seat

Relevant factors

Determined by:

1. **Express Agreement**
2. **Implied Agreement**
   - choice of venue or
   - reference to (institutional or ad hoc) rules with default rules, e.g. Art. 18 ICC Rules, Art. 18 UNCITRAL Rules, Art. 16 LCIA Rules
     - Determination by Arbitral Tribunal or
     - Institution
3. **Courts**
Know your lex arbitri!

Considerations

- Legal Framework
- Agreement to arbitrate
- Commencing the arbitration
- Choice of law
- Appointing the tribunal
- Challenges to arbitrators
- Interim relief

- Procedure
- Award
- Costs and interest
- Challenging awards
- Enforcement jurisdiction
- Further considerations

http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/
Important Factor: Influence of State Courts

Key Issues

• Extent and Duration of State Court Interference
• Extent and Duration of Appeals in State Courts
Influence of State Courts

Statutory Framework for Challenge

- Sole competent court
  - e.g. 191(1) Swiss PILA; § 615 Austrian CCP
- Multi-tiered system
  - e.g. F, UK, US, GER
- Grounds for setting aside
  - converging, but still important differences
- Waiver
  - e.g. 192(1) Swiss PILA; 1522 French NCPC; 51 Swedish AA
## Influence of State Courts

### Duration / Success Rate

<table>
<thead>
<tr>
<th></th>
<th>Multi-tiered system (F, UK, US, Ger)</th>
<th>CH</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duration of setting aside proceedings</td>
<td>several years</td>
<td>&lt; 5 months</td>
<td>&lt; 15 months (since revision Swedish Arb. Act)</td>
</tr>
<tr>
<td>Chances of success</td>
<td>UK: ± 10%</td>
<td>7%</td>
<td>&lt; 10%</td>
</tr>
</tbody>
</table>
Types of arbitration

Institutional – Ad hoc Arbitration

- Institutional Arbitration: e.g. ICC
- Ad hoc Arbitration
Arbitration Institutions Worldwide

Examples

AAA/ICDR
ICSID
CAM-CCCBC
See below
CRCICA
KIAC
AFSA / ASA
CIETAC
HKIAC
KLRCA
SIAC
ACICA
JCAA

International Arbitration
Arbitration Institutions in Europe

Examples

- ICC
- SCAI
- DIS
- SCC
- VIAC
- CEPANI
- NAI
- CAS
- CAM
- LCIA
Survey on Success Factors for Institutions

Main influence on the choice of institution

- Reputation and recognition of the seat: 65%
- Law governing the substance of the dispute: 42%
- Particularities of the contract/type of dispute (likely to arise): 33%
- Personal connection with the seat: 28%
- Corporate policy, standard terms and conditions: 28%
- Imposed by the counterparty: 17%
- Other: 12%
- Recommendation of external counsel: 11%

Source: White & Case, Queen Mary University of London, 2015 International Arbitration Survey
Institutions in Europe

Most Popular Type

Arbitral type and institutions most frequently used

- 38% Ad Hoc
- 25% ICC
- 16% AAA
- 8% LCIA
- 5% LMAA
- 4% SCC
- 4% Other

CIARB costs in International Arbitration Survey 2011, Courtesy of ICC, Gustav Flecke-Giammarco
## Costs

### Comparison

**Comparison of Arbitration Costs**

*Arbitration Costs Compared: the Sequel, 2013 Global Arbitration Review 8, Issue 1*

*Amount in dispute: US $ 100,000*

<table>
<thead>
<tr>
<th>Centre</th>
<th>One arbitrator (average) fee + administrative costs</th>
<th>Three arbitrators (average) fee + administrative costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Swiss Chambers</td>
<td>US $ 13,000</td>
<td>US $ 25,000</td>
</tr>
<tr>
<td>ICC</td>
<td>US $ 15,425</td>
<td>US $ 35,544</td>
</tr>
<tr>
<td>SCC</td>
<td>US $ 12,805</td>
<td>US $ 23,349</td>
</tr>
<tr>
<td>SIAC</td>
<td>US $ 10,781</td>
<td>US $ 26,901</td>
</tr>
<tr>
<td>CIETAC</td>
<td>US $ 5,600</td>
<td>US $ 5,600</td>
</tr>
</tbody>
</table>
## Comparison of Arbitration Costs

**Amount in dispute: US $ 100 million**

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<th>One arbitrator (average) fee + administrative costs</th>
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</thead>
<tbody>
<tr>
<td>Swiss Chambers</td>
<td>US $ 383.555</td>
<td>US $ 863.888</td>
</tr>
<tr>
<td>ICC</td>
<td>US $ 313.799</td>
<td>US $ 742.966</td>
</tr>
<tr>
<td>SCC</td>
<td>US $ 231.387</td>
<td>US $ 443.266</td>
</tr>
<tr>
<td>SIAC</td>
<td>US $ 239.536</td>
<td>US $ 637.812</td>
</tr>
<tr>
<td>CIETAC</td>
<td>US $ 542.300</td>
<td>US $ 542.300</td>
</tr>
</tbody>
</table>
Costs Allocation

ICC Arbitration Statistics

- Legal and other costs: 82%
- ICC administrative expenses: 2%
- Fees and Expenses of Arbitrators: 16%

International Arbitration

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Development

ICC Arbitration Statistics

New arbitrations filed

Number of arbitrations filed

<table>
<thead>
<tr>
<th>Year</th>
<th>Count</th>
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</thead>
<tbody>
<tr>
<td>1960</td>
<td>50</td>
</tr>
<tr>
<td>1970</td>
<td>100</td>
</tr>
<tr>
<td>1980</td>
<td>150</td>
</tr>
<tr>
<td>1990</td>
<td>200</td>
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<td>2000</td>
<td>300</td>
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<td>2010</td>
<td>400</td>
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<tr>
<td>2012</td>
<td>450</td>
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<tr>
<td>2013</td>
<td>400</td>
</tr>
<tr>
<td>2014</td>
<td>450</td>
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</tbody>
</table>
Development

ICC Arbitration Statistics

<table>
<thead>
<tr>
<th>Cases and awards</th>
<th>2014</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requests for arbitration filed with ICC Court</td>
<td>791</td>
<td>561</td>
</tr>
<tr>
<td>Awards rendered</td>
<td>459</td>
<td>345</td>
</tr>
<tr>
<td>Place of Arbitration (no. of countries)</td>
<td>57</td>
<td>49</td>
</tr>
<tr>
<td>Number of parties (from no. of countries)</td>
<td>2.222 (140)</td>
<td>1.682 (116)</td>
</tr>
<tr>
<td>Cases with amount of dispute under 1 Mio USD</td>
<td>23.5%</td>
<td>58.8%</td>
</tr>
</tbody>
</table>

Origin of Parties

ICC Arbitration Statistics

Origin of Parties 2013

- North & West Europe: 1682 parties (116 countries)
- Central & Eastern Europe: 2222 parties (140 countries)
- North Africa:
- Sub-Saharan Africa:
- North America:
- Latin America & Caribbean:
- Central & West Asia:
- South & East Asia:

Origin of Arbitrators

ICC Arbitration Statistics

- **2003**
  - 988 arbitrators
  - 69 countries

- **2013**
  - 1329 arbitrators
  - 86 countries

Economic Sectors

ICC Arbitration Statistics

[Bar chart showing various economic sectors with percentages]
Institutional arbitration

Swiss Chambers’ Arbitration Institution


Chambers of Commerce and Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel, Zurich
## Development in Switzerland

### Swiss Chambers’ Arbitration Statistics

<table>
<thead>
<tr>
<th>Cases and awards</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases submitted</td>
<td>106</td>
<td>100</td>
</tr>
<tr>
<td>Sole Arbitrator</td>
<td>58%</td>
<td>54%</td>
</tr>
<tr>
<td>Three Arbitrators</td>
<td>34%</td>
<td>28%</td>
</tr>
<tr>
<td>Unspecified</td>
<td>8%</td>
<td>18%</td>
</tr>
<tr>
<td>Domestic / Foreign Parties</td>
<td>30% / 70%</td>
<td></td>
</tr>
</tbody>
</table>

Source: https://www.swissarbitration.org/sa/en/
Composition of Tribunals under SCAI

Swiss Chambers’ Arbitration Statistics 2015

Number of arbitrators:
- Sole arbitrator: 54%
- Three member tribunal: 28%
- Not specified: 18%
Procedures under SCAI

Swiss Chambers’ Arbitration Statistics 2015

- Normal: 43%
- Expedited: 36%
- Emergency Relief: 3%
- Not specified: 18%
Sports arbitration

Court of Arbitration for Sports (CAS)

Court of Arbitration for Sport (CAS)
based in Lausanne, Switzerland
http://www.tas-cas.org
CAS Code (revised as of 3.2013)
Leading institution in sports arbitration
## Development in sports arbitration

### CAS Arbitration Statistics

<table>
<thead>
<tr>
<th>Cases and awards</th>
<th>2013</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requests for arbitration</td>
<td>407</td>
<td>107</td>
</tr>
<tr>
<td>Requests for arbitration leading to an award</td>
<td>92</td>
<td>82</td>
</tr>
<tr>
<td>Advisory opinions</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Procedures terminated with a decision other than award</td>
<td>15</td>
<td>18</td>
</tr>
<tr>
<td>Cases withdrawn</td>
<td>70</td>
<td>8</td>
</tr>
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## Procedure in sports arbitration

### CAS Arbitration Statistics

<table>
<thead>
<tr>
<th>Procedures</th>
<th>2013</th>
<th>2003</th>
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</thead>
<tbody>
<tr>
<td>Ordinary procedures</td>
<td>58</td>
<td>61</td>
</tr>
<tr>
<td>Appeals procedures</td>
<td>349</td>
<td>46</td>
</tr>
<tr>
<td>Consultation procedures</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Ad hoc procedures</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Applicable Law

ICC Arbitration Statistics

Conclusion

3 Aspects

1. Importance of selecting seat

2. Importance of selecting institution (or ad hoc)

3. Importance of selecting applicable law / rules of law / ex aequo et bono / amiable compositeur