Cross-border disputes in the 2020s

For many companies international arbitration is the prime choice

By Arne Fuchs, LL.M. (GWU), and Pauline Walde

Entering the 2020s, many companies across industry sectors find themselves with international operations, either at the core of their day-to-day business or in the context of mergers and acquisitions. This is a direct result of the steady globalization witnessed over the preceding decades: international operations are no longer reserved for large, multi-billion conglomerates.

With this increase in international operations, the importance of a neutral and efficient mechanism for the resolution of international disputes has likewise increased. For many companies, international arbitration is the prime choice – a trend which is also reflected in the statistics of major arbitral institutions. In 2019, 851 new cases were filed under the Arbitration Rules of the International Chamber of Commerce (ICC) alone. This corresponds to an increase of 10% compared to previous years. Other arbitral institutions such as the German Arbitration Institute (DIS), the London Court of International Arbitration (LCIA) or the Hong Kong International Arbitration Centre (HKIAC) have seen similar increases in their caseloads.

As Brexit becomes (economic and legal) reality and Europe drifts further apart, this trend will likely continue.

Key advantages of international arbitration

International enforceability

The arbitral process does not just provide a neutral forum for the resolution of disputes; one of its key advantages compared to national courts is the almost universal enforceability of arbitral awards. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 162 Contracting States have agreed to recognize and enforce arbitral awards resulting from international arbitrations in other Contracting States without re-examining the arbitral tribunal's decision on the merits. Recognition and enforcement of an award can only be refused for narrowly defined reasons concerning fundamental errors in the conduct of the arbitration, for instance violations of the right to be heard. An equivalent instrument does not exist for judgments rendered by national courts (outside the European Union) meaning it can be very difficult and costly, if not impossible, to enforce judgments of national courts abroad.

In order to avoid pitfalls and make the best possible use of the advantages of arbitration, arbitration clauses must be drafted very carefully.

Flexibility to tailor the arbitral process to the specific needs of every case

Party autonomy is one of the cornerstones of international arbitration. With few restrictions, the parties enjoy vast flexibility to tailor the arbitral procedure to fit their needs. This means that the parties can choose the most suitable procedural language in which to conduct the arbitration as well as the number of written submissions and the respective deadlines for filing them. The parties can also make use of modern technological aids, the use of which would in many cases be inconceivable before national courts. For example, it is not uncommon for written submissions to be exchanged exclusively electronically to save costs and time, →

for hyperlinks to be implemented to assist the arbitral tribunal in navigating complex files and lengthy documents, or for tele- and videoconferencing to be used for procedural "meetings".

The parties can also influence the composition of the arbitral tribunal, both with regard to the number of arbitrators and their professional qualifications. For example, delegating the decision-making power to a sole arbitrator rather than a three-arbitrator panel may help to reduce costs and speed up the process. And while all arbitrators must, of course, be independent and impartial, factors such as language skills, financial and mathematical expertise or cultural and technical understanding of an arbitrator can have a significant impact on the proceedings. The corresponding decisions should therefore be carefully considered and discussed with experienced counsel.

Ad hoc v. institutional arbitration

Another important consideration for parties is whether to opt for ad hoc or institutional arbitration.

Institutional arbitration offers a procedural framework through the rules of the chosen arbitral institution. The arbitral institution also provides administrative support to the arbitral tribunal and the parties to ensure that the proceedings run as smoothly as possible. Over the past few decades, a number of trustworthy and very professional institutions have established themselves as major players. These include the aforementioned ICC, DIS, LCIA and HKIAC, but also the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), the Swiss Chambers' Arbitration Institution (SCAI), the Vienna International Arbitral Centre (VIAC) or the American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR).

While some of these institutions have branches around the world and operate as globally as their users, others have a strong regional focus. The HKIAC, for example, is particularly well suited to administering disputes related to mainland China. Specific arrangements exist to ensure the effective enforcement of arbitral awards in mainland China and, most recently, another arrangement entered into force facilitating interim measures concerning mainland China.

In contrast, ad hoc proceedings are entirely managed by the arbitral tribunal, subject only to certain very basic procedural provisions under the laws of the state in which the arbitration is seated. These provisions concern issues such as arbitrability or form requirements for arbitration agreements and they apply to institutional and ad hoc arbitrations alike. The UNCITRAL Model Law on International Commercial Arbitration provides a model that many states have adopted (with some minor modifications) to ensure uniformity in this regard and be attractive to foreign users of arbitration. In Germany, the relevant provisions can be found in the tenth book of the Code of Civil Procedure (Zivilprozessordnung, ZPO). These rules are generally not mandatory (except for fundamental ones such as the right to be heard) and only apply if the parties have not agreed otherwise.

Because even minor oversights in setting up an ad hoc procedure can cause considerable delays and additional costs, it is advisable for companies to choose the rules of established arbitral institutions and enjoy their support in the process. All arbitral institutions offer model clauses that can be included in contracts to make this choice effective. However, companies have to be cautious: they should not blindly include a model clause in their contract or amend it without the further advice of an arbitration expert. While it only takes an experienced practitioner a short amount of time to select a suitable institution and adapt the arbitration clause as needed, errors in this regard can have disastrous consequences and could even render the entire clause pathological.

International Commercial Courts – a viable alternative to arbitration?

From Paris and Amsterdam to Dubai and Singapore – in recent years, a new genre of courts has emerged worldwide: international commercial courts. With these specialized courts within the domestic court system, states are trying to make their judicial systems more attractive for cross-border disputes. One of the main drivers for this competition is 2020's impending Brexit. States are not just competing for banking business but also for international disputes. In Germany, both Frankfurt and Hamburg created international commercial courts in 2018. Even the European Union is thinking about setting up a European Commercial Court.

These courts are typically advertised as being staffed with specialized judges, as being predictable and, of course, more accessible to foreigners with English as the main procedural language. While all of these are good improvements compared to ordinary domestic courts, interna- →

tional commercial courts remain part of the domestic court system of the host state (and potentially the home state of the other party). Advantages such as the international enforceability of arbitral awards (also outside of the European Union) and the flexibility offered by international arbitration, including with regard to the protection of sensitive information, prevail for the resolution of international commercial disputes.

Conclusion

In a globalized, post-Brexit world where international disputes beyond the borders of the European Union are inevitable for many companies, arbitration with its many facets and possibilities offers a unique dispute resolution mechanism. In order to avoid pitfalls and make the best possible use of the advantages of arbitration, arbitration clauses must be drafted very carefully. It is highly recommendable to consult an arbitration expert at an early stage, if possible, when the respective contracts are being drafted. Such consultations come at a minimal cost but will allow for optimized strategic planning and avoid many problems (and costs) should a dispute subsequently arise. <–

Arne Fuchs, LL.M. (GWU)
Rechtsanwalt, Partner, Global Co-Chair International Arbitration & Dispute Resolution, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, Frankfurt am Main

afuchs@mwe.com

Pauline Walde
Avocate à la Cour, Associate, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, Frankfurt am Main

pwalde@mwe.com

www.mwe.com