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MASTER-THESIS

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„Alternative Dispute Resolution Mechanisms in Private Procurement Conflicts in the EU”

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1 Introduction

1.1 Historical Review of Procurement Law

Procurement law has constantly become increasingly important. About ten years ago, many European member states did not have regulations regarding procurement law and each member state individually handled the procurement law. Austria, for example, followed an internal act which stipulated that every time when an authority wanted to acquire contracts of works, supplies or services, it had to conduct a public tender. The tendering procedures followed the rules and guidelines of the ÖNorm A 2050¹.

The situation changed for Austria after accession to the EU in 1995. Since then, the Public Procurement Directive was applicable and had to be implemented in the Austrian legislation. The Procurement Directive replaced the internal act in Austria after accession to the EU. Even though the substantial law of the Public Procurement Directive and the ÖNorm A 2050 have many similarities, there are many differences regarding legal protection. Under the ÖNorm, bypassed bidders had to recourse to national civil courts in order to get justice, which is completely different than the recourse under the Public Procurement Directive. Civil procedure law is not really designed for disputes like these. These disputes are generally very time consuming and also the proofing of a claim is more difficult. At this moment, the Austrian Administrative Court is competent for disputes under the Public Procurement Directive. The legal protection works efficiently compared to the former situation.

1.2 Definition of Public Procurement Law

Procurement law deals with the situation in which a contracting authority wants to acquire certain items and is obliged by law to conduct a specific public tender procedure before the authority is allowed to award the contract to a company.

¹ Austrian Standards Institute, *ÖNORM A 2050 - Vergabe von Aufträgen über Leistungen - Ausschreibung, Angebot, Zuschlag – Verfahrensnorm*, (Published: 2006-11-01).

Not every undertaking falls within the scope of the Public Procurement Directive, only contracting authorities are covered.

Procurement is defined in Article 1 (2) of the Public Procurement Directive² as follows:

Procurement [...] is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

The term 'contracting authority' is defined in Article 2 (1) (1) in the Public Procurement Directive:

[...] 'contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law; [...]

In Austria, the Federal Procurement Act (BVerG)³ implements the Public Procurement Directive into Austrian national law. In the Public Procurement Directive and also in the Federal Procurement Act, there are rules how the review procedure in these special cases is arranged. Unsuccessful tenderers enjoy a special judicial protection in a public tender procedure. The review proceedings are fast-track and rules regarding the burden of proof are organized in a bidder friendly way. In Austria, the Federal Administrative Court is competent for the review procedure. The Federal Procurement Act ensures that not only the bypassed bidders are well protected, but also the contracting authorities, if they have conducted the tendering procedure in a correct and legal way.

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Public Procurement Directive) [2014] OJ L94/65.

³ *Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 2006 – BVerG 2006)*, Federal Law Gazette I 17/2006.

The European Commission published an interpretative communication regarding tendering procedures that do not or only partially fall in the regime and scope of the Public Procurement Directive.⁴ It deals among others with the issue of effective judicial protection.

The Communication is not very clear on its scope. It says in the introduction that the Communication covers 'a wide range of contracts that are not or only partially covered by it (Public Procurement Directive), such as [...]'. Contracts below the thresholds for application of the Public Procurement Directive and service concessions are expressively covered by the Communication, but the list of covered kinds of contracts is not exhaustive. In my view, also the tenders conducted by private undertakings are meant to be covered by the Communication, because only the identity of the contracting party has changed, but not the substantial part of it. National civil courts are competent to adjudicate lawsuits that arise out of such tender procedures.⁵

This interpretative communication says that, even in cases in which the Directive is not applicable, the claimant shall have an effective judicial protection before a national court. This means for Austria that in case the Public Procurement Act is not applicable and Federal Administrative Courts are not competent to adjudicate on the matter, the Austrian bidder is still entitled to judicial protection before an Austrian court. Despite the interpretive communication, it is questionable if the judicial protection is effective in Austria or all other member states, for those sort of actions.

As far as it could be seen, not every member state has effective judicial protection for bidders who ask for a review procedure regarding a public tender. Civil law proceedings, on an average, take much longer than review procedures

⁴ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02 [2006] OJ C 179/2.

⁵ Commission Interpretative Communication OJ C 179/7.

under the Public Procurement Directive. There are significantly more differences for the procedure of the individual member state.

Because of the disadvantages of national civil court proceedings (long duration of the proceedings, etc.), it is important to find out, if other forms of dispute resolution are more suitable to handle the situation and offer a more efficient legal protection for bidders and the contracting party.

1.3 Problem Description

The Public Procurement Directive does not cover private undertakings. The term 'private undertakings' is the opposite of a contracting authority⁶ and, therefore, defined in the negative. This means that they are generally not obliged by EU law to conduct a public tender. Depending on the law of each member state, also private undertakings can be obliged by state law to award a contract through a public tender. The question, if undertakings are obliged by private law to conduct a tender, is still not answered finally in Austria.⁷ Sometimes, also the undertakings themselves decide to voluntarily tender some of their contracts. Private undertakings may determine internally, if and when they want to follow some of these special principles. Nevertheless, the procedural rules of the Federal Procurement Act are not applicable in these cases. In case of a lawsuit resulting from a public tender procedure carried out by a private undertaking, the bypassed bidder (unsuccessful tenderer) has to follow the national civil procedural rules – and not the special rules of the Federal Procurement Act. National civil courts are competent and national civil procedure law applies.

Even if EU law does not oblige private undertakings to conduct a public tender, it welcomes their willingness to do so because a public tender is in line with the four freedoms of the EU and also with EU Competition Law and EU State Aid Law.

⁶ Article 2 (1) (1) Public Procurement Directive.

⁷ Heinz Krejci, *Die Auftragsvergabe durch private Unternehmen* (bauaktuell 2011, magazine 3) 82ff.

The problem that arises in this situation is that national civil court proceedings are not specifically designed for claims that arise out of a public tendering procedure. These national civil procedures can take a long time and, in the worst case, stop the entire project. Long-term procedures may discourage (i) private undertakings to conduct a formal public tender, although they would do it voluntarily and (ii) a bypassed bidder to litigate for his eventual claim. For example in Italy, a civil procedure can take between 5-10 years until the parties get a final and binding decision. In some instances, a bypassed bidder can file a writ in the court – in addition to damage claim actions – for interim measures and stop the whole project. That is not a desirable situation for both, the contracting undertaking and the bidders.

In cases like these, the effective legal protection (as demanded from the European Commission) under private law of a bypassed bidder is doubtful at national level.

1.4 Scope of the Master Thesis

This master thesis deals with the situation, where a private undertaking conducts a public tender in order to award a contract. These private undertakings that fall in the ambit of private law and not of the Public Procurement Directive are not obliged to do so.

In order to increase the willingness of a private undertaking to conduct a public tender before placing an order, it will be assessed in this master thesis if alternative dispute resolution mechanisms are a suitable solution for this situation.

Since in my point of view, litigation before national courts does not constitute an adequate legal protection, this master thesis will examine if alternative dispute resolution mechanisms are useful and desirable for contracting companies. It will examine the advantages and disadvantages in such cases, difficulties in

this context and problems in national civil law procedures and how a private undertaking could avoid these adverse facts.

1.5 Research Questions

The main research question is the following:

Are alternative dispute resolution mechanisms in case of a public tender conducted by private undertakings in the EU advisable and more advantageous than national courts?

The general research question is subdivided into the following sub questions, which will also be answered in this master thesis:

- Are ADR mechanisms more advantageous than litigation for public tender procedures conducted by private undertakings that do not fall in the scope of the Public Procurement Directive?
 - If yes, which mechanism/s is/are the best to deal with the situation?
 - What are the differences between them and which one can be used and which one should be avoided or excluded?
 - Is a combination of different ADR forms possible (multi-tier dispute resolution clauses)?
- How to streamline and create fast-track proceedings in arbitration for public tendering procedure conducted by a private undertaking.

The focus is on arbitration, but also on the question if multi-tier dispute resolution clauses are advisable.

1.6 Case Analysis

At the end of each chapter, the gathered information shall be analysed and applied to the following hypothetical case:

A French investment corporation wants to build its new headquarters in Bologna, Italy. The building is intended to be innovative, modern and futuristic.

It is presumed that this project will be of interest to many constructing firms and architectural offices all over Europe and maybe also firms from all over the world. Because of internal compliance regulations of its group, the French corporation has to tender the construction contract publicly. The corporation is a private company and does not fall in the scope of the Federal Procurement Act of Italy. Only private law is applicable. As a consequence, Federal Administrative Courts or other authorities are not competent for disputes that arise out of this tendering procedure. There can also be no jurisdiction clause, which awards jurisdiction to Federal Administrative Courts. As a consequence, a bidder or the French corporation could only file a lawsuit before national Italian courts.

The French corporation fears that, if a bidder brings an action before an Italian court, the litigation regarding the building project will cause serious delays in the worst case. If a bidder alleges to be bypassed, he will file for interim measures and will ask for a cease and desist order in injunction proceedings. If the French corporation is enjoined from continuing the project, this will put on hold the entire project. In addition, the corporation is uncertain if it will be in a weaker position, if the claimant is of Italian nationality and files a lawsuit before an Italian court against a foreign corporation, like the French investment corporation. Hence, the corporation is considering how to resolve these issues.

The French corporation has different options to deal with these issues:

Option 1: The corporation may decide to simply ignore questions regarding dispute resolution mechanisms at all. The result will be that the parties have to file any lawsuit before a national (probably Italian) court. The risk of delay and mistreatment is significant.

Option 2: The corporation may consider alternative dispute resolution mechanisms, like arbitration, mediation, negotiation, expert determination

and other forms before a dispute arises. The risk of delay and mistreatment can be handled better, if the parties agree on individualised proceedings.

After having analysed the legal background, this case will be dealt with in each chapter. At the end of each chapter, it will be assessed if such an alternative dispute resolution procedure is advisable for public tender procedures conducted by a private undertaking or not. The hypothetical case mentioned above will be used as a basis for this assessment.

2 Alternative Dispute Resolution Mechanisms

2.1 What is ADR?

The general term for resolving disputes without litigation is Alternative Dispute Resolution (ADR).⁸ ADR helps the parties to adopt an individualised suitable procedure in order to resolve the dispute by themselves. ADR is very important in cases, where the disputes are more human than commercial. The means of ADR bring the management of the disputing companies closer to the case than it would be the case in litigation, thus it is seen as a management tool.⁹

Due to the increased costs of litigation in the past, practitioners were looking for alternatives. Not only the lawyers cause high costs, it also intensively consumes the recourses of the management because of long proceedings, preparation and overcrowded court lists.¹⁰

In order to adopt a suitable mechanism and procedure, the parties have to be aware of the different means of ADR, their individual advantages and disadvantages and other possible options.

In case of an international contract, the parties have a wide range of options and forms of dispute resolution mechanisms, on what they can agree in the contract:

- No choice regarding dispute resolution (national procedural law applies; litigation)
- Choice of law clause to opt in one specific jurisdiction (litigation)

⁸ Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (2nd edn, International Arbitration Law Library, Vol 13, Kluwer Law International 2006) 168.

⁹ Carita Wallgren-Lindholm in Gerald H. Pointon, Arnold Ingen-Housz, et al. (eds), *ADR in Business: Practice and Issues across Countries and Cultures I* (Kluwer Law International 2006) 14f.

¹⁰ Alan Redfern, J. Martin Hunter, et al., *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) para. 1.129.

- Alternative Dispute Resolution ¹¹

In the following, the most important forms of ADR are listed:

- Non-binding forms:
 - Negotiation
 - Mediation
 - Conciliation
 - Expert Determination
 - Dispute Review Boards
- Binding form:
 - International Commercial Arbitration
- Multi-tier Dispute Resolution (Hybrid)¹²

In general, negotiation should be used first. It is the best way to resolve a problem without harming the relationship of each company. In addition, the parties are the ones who are closer to the contract and dispute, than anyone else. They are in the best position to find out what a fair settlement is. Negotiation, mediation and conciliation are also considered as the first steps into settling the dispute. If all these instruments are not successful the parties have arbitration and litigation available.¹³

The word “alternative” in ADR is highly debated. ADR is dealing with methods that resolve a problem without using litigation. Some critics say that only arbitration is a real alternative to litigation, because arbitration has similar effects like litigation. An arbitral award is also final and binding. Settlements originated from mediation, conciliation, expert determination and other forms are ‘only’ contractually binding, but not directly enforceable. This is one of the core advantages of arbitration in contrast to other forms of ADR. Mostly the

¹¹ Steven Finizio and Duncan Speller, *A Practitioner’s Guide to International Arbitration* (Thomas Reuters Limited 2010) 14.

¹² Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para. 1.129ff; Steven Finizio and Duncan Speller, *Practitioner’s Guide* 14.

¹³ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para. 1.129f.

term 'alternative' is not regarded as so strict and narrow. Therefore, also other (directly non-binding) methods such as arbitration are included.¹⁴

ADR could be defined as:

Processes aimed at resolution of a difference or a dispute through a voluntary settlement agreement reached with the assistance of (a) third person(s).¹⁵

2.2 Why choosing ADR?

There are many reasons why parties should use ADR for resolving their dispute. The main argument is that litigation is lengthy, complex and costly, but this is not the whole truth.¹⁶

Very often parties do not want to destroy their long-term business relationship through litigation. To ensure that this sensitive relationship will not break off or will be harmed by the dispute, the parties can use alternative dispute resolution mechanisms. The parties could avoid unnecessary difficulties between them and after ADR the parties can continue with carrying out the contract or future projects.¹⁷

Confidentiality plays also a crucial role in business relationships. Companies are always concerned about disclosing internal information. National court proceedings are mostly public and court reporters or listeners can attend the proceedings. Thus, confidentiality is one of the fundamental reasons why undertakings agree on ADR.¹⁸

¹⁴ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para. 1.131.

¹⁵ Carita Wallgren-Lindholm in Gerald H. Pointon, et al., *ADR in Business* 6.

¹⁶ Carita Wallgren-Lindholm in Gerald H. Pointon, et al., *ADR in Business* 20ff.

¹⁷ Carita Wallgren-Lindholm in Gerald H. Pointon, et al., *ADR in Business* 20ff.

¹⁸ Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business: Practice and Issues across Countries and Cultures I*, (Kluwer Law International 2006) 35.

Another reason for ADR is that the parties are the 'lords of the contract' and can, therefore, create their own procedure specified on their individual subject matter.

A general advantage of stipulating dispute resolution provisions in the contract is that the parties know in advance which institution (method) will resolve the dispute. This creates predictability and certainty.¹⁹

The parties can specify the responsible forum as well as the applicable procedure. To avoid jurisdictional challenges, special care should be taken to the wording and phrasing of such clauses. Such challenge procedures are mostly very time consuming, which directly leads to high costs. This can destroy the advantages of ADR and impair the effectiveness of it.²⁰

2.3 Why not choosing ADR?

As explained above, ADR is advantageous in some instances, but also disadvantageous in others. ADR is, under some circumstances, in fact, even not advisable.

The biggest disadvantage is that decisions or settlements of ADR are mostly not enforceable. Only arbitration awards are final and binding and, as a consequence, enforceable. Thus, it is very important to know the contracting party properly in person. It is not advisable to agree on ADR in cases where the other party is known as a person who generally acts in bad faith and is not trustworthy. The neutral third person (mediator, conciliator) obtains and discloses information from the counterparty through ADR procedure. This gathered information could then be used by the claimant for further litigation or arbitration proceedings.²¹

¹⁹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 15.

²⁰ Steven Finizio and Duncan Speller, *Practitioner's Guide* 15.

²¹ Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 38ff.

ADR could also be used to delay the whole case. This can be done easily e.g. by prolonging negotiations, agreeing on false concessions etc. When the relationship between the contracting parties is irreversibly destroyed, it presumably makes no sense to waste time with means of ADR, which will not lead to a settlement. It would be better to use arbitration or litigation right away.²²

Another argument against ADR and for litigation is, if the dispute is a general one and the party wants to have a precedent for further cases, that it is much better to get a binding decision rather than bargaining each dispute individually.²³

It always depends on the individual case if the advantages or disadvantages of ADR or litigation prevail. The contracting parties should take the necessary time to consider in advance which form of dispute resolution they want to choose. Once the dispute has arisen, maybe the parties are no longer able or willing to agree on ADR.

²² Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 38ff.

²³ Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 38ff.

2.4 Forms of ADR

The following chapter will illustrate the characteristics of each ADR form and which of them are useful for public tender procedures conducted by a private undertaking and which form should be avoided in such cases. The focus is on arbitration and the chapter begins with it, because it is the only method (in contrast to litigation) where the parties get a final and binding decision. The chapter will be continued with the differentiation of arbitration to other forms of ADR. At the end of the chapter it will be analysed, if the other forms of ADR should be combined with arbitration due to a multi-tier dispute resolution clause.

2.4.1 Arbitration

2.4.1.1 Definition

There is no common definition of international arbitration. To give a better understanding of the term, there are definitions from different authors cited in the following.

Gary B. Born defines international arbitration as follows:

International arbitration is a means by which international disputes can be definitely resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers.²⁴

You can also define international arbitration as 'two or more parties, faced with a dispute that they cannot resolve for themselves, agreeing that one or more private individuals will resolve it for them by arbitration';²⁵

The famous international law firm Latham & Walkins, which is specialised in arbitration, came up with this definition of arbitration:

²⁴ Gary Born, *International Commercial Arbitration* (Commentary and Materials, 2nd edn, Kluwer Law International 2001) 1.

²⁵ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para. 1.84.

Arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state.²⁶

Arbitration can also be defined '[...] as a private dispute resolution mechanism [...], on the whole, designed to offer the promise of secrecy, affording the participants, under the large umbrella of the party autonomy principle, the power to control who may have knowledge about the matters in controversy and how such matters are finally resolved.'²⁷

Put candidly, Gary B. Born says correctly, 'There are almost as many [...] definitions of international arbitration as there are commentators on the subject.'²⁸

2.4.1.2 Elements and Characteristics of Arbitration

Although the wording of the definitions cited above is not the same, most of the definitions comprise the following core elements:

First, arbitration is consensual.²⁹ Both contracting parties have to agree to arbitrate if a dispute arises out of the contract. They can do it in two ways, either in the contract themselves with an arbitration clause or, if they did not agree on arbitration in advance, the parties can also stipulate it once the dispute arises (*ad hoc* arbitration).³⁰ The agreement to arbitrate defines what kind of disputes falls in the jurisdiction of arbitral tribunal.³¹

²⁶ Latham & Watkins, 'Guide to International Arbitration' (2014) 1 <<http://www.lw.com/news/ia-guide-translated>> accessed 12 February 2015.

²⁷ Ileana M. Smeureanu (ed), *Confidentiality in International Commercial Arbitration, International Arbitration Law Library*, (Vol 22, Kluwer Law International 2011) xv.

²⁸ Gary Born, *International Commercial Arbitration* 1.

²⁹ Gary Born, *International Commercial Arbitration* 1; Steven Finizio and Duncan Speller, *Practitioner's Guide* 4.

³⁰ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 2.02.

³¹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 4f.

Second, the state does not appoint the decision maker (arbitrator) as it is the case with judges. The parties directly or indirectly appoint an arbitrator. They can do it personally or submit the decision to an arbitration institution.³² This constitutes one of the core advantages of arbitration.

Third, the award of the arbitral tribunal is final and binding.³³ The prevailing party can enforce the award with the apparatus of the state respectively the national courts. If a foreign state has signed and ratified the New York Convention³⁴, the prevailing party can also enforce it in that specific state. The enforceability of arbitration awards is one of the decisive factors why arbitration is so successful.

Fourth, arbitration procedures are very flexible compared to litigation procedures.³⁵ It is in the hands of the parties to agree on arbitration and establish their individual procedure that meets their needs in a specific dispute.³⁶

Fifth, because of consensus and flexibility of the parties, they can establish a procedure on a neutral basis. The parties can, for example, agree that the arbitrators shall have a nationality different from those of the parties, or, conversely, that there must be an arbitrator having the nationality of each party, and the *lex fori* (seat of arbitration) is in an independent third country. With these configurations the opportunity of a fair hearing or presenting its case is ensured.³⁷

³² Gary Born, *International Commercial Arbitration* 1; Steven Finizio and Duncan Speller, *Practitioner's Guide* 4.

³³ Gary Born, *International Commercial Arbitration* 1; Steven Finizio and Duncan Speller, *Practitioner's Guide* 4.

³⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958), Federal Law Gazette 200/1961.

³⁵ Gary Born, *International Commercial Arbitration* 1.

³⁶ Steven Finizio and Duncan Speller, *Practitioner's Guide* 2.

³⁷ Steven Finizio and Duncan Speller, *Practitioner's Guide* 5.

2.4.1.3 Arbitrability

Arbitrability deals with the question of what kind of disputes can be resolved by an arbitral tribunal.

Brekoulakis defines arbitrability as follows:

Arbitrability is, [...], a specific condition pertaining to the jurisdictional aspect of arbitration agreements, [...]. Arbitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (contractual requirement).³⁸

The New York Convention³⁹ as well as the UNCITRAL Model Law⁴⁰ also govern this question and both are doing it quite similarly.

Regarding the UNCITRAL Model Law, arbitrability is given when the subject matter of the dispute is capable of settlement by arbitration under the law of this state.⁴¹ Article II of the New York Convention also deals with this and contains various exceptions to the enforceability of written arbitration agreements. The dispute has to be “capable of settlement by arbitration”, if not, it is not enforceable by the convention.⁴²

To find out if an arbitration agreement is valid or not (“capable of settlement by arbitration”), national law has to be individually assessed. In the following, as a matter of illustration, a few examples of how this is regulated in some important jurisdictions are provided, including Austria.

³⁸ Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, (International Arbitration Law Library, Volume 19, Kluwer Law International 2009) 38; see also Julian D. M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) 188ff.

³⁹ New York Convention, 1958.

⁴⁰ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985* (With amendments as adopted in 2006).

⁴¹ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 2.111; UNCITRAL Model Law, Arts 34 (2) (b) (i) and 36 (1) (b) (i).

⁴² Gary Born, *International Commercial Arbitration* 243; New York Convention, Arts II (1) and V(2) (a); see also Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability* 84ff.

Section 582 (1) of the Austrian Code of Civil Procedure says:

‘Any claim involving an economic interest that lies within the jurisdiction of the courts of law can be subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the subject-matter in dispute.’⁴³

Not comprised are ‘claims in family law matters as well as all claims based on contracts that are even only partly subject to the Tenancy Act (“*Mietrechtsgesetz*”) ⁴⁴ or to the Non-Profit Housing Act (“*Wohnungsgemeinnützigkeitsgesetz*”) ⁴⁵, including all disputes regarding the conclusion, existence, termination and legal characterization of such contracts and all claims concerning the condominium property may not be made subject of an arbitration agreement. [...]’⁴⁶

As another example, section 1030 (1) of the German Code of Civil Procedure states how arbitrability is defined for Germany. It says the following:

‘Any claim involving an economic interest (*vermögensrechtlicher Anspruch*) can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.’

Paragraph 2 of Section 1030 defines the boundaries of paragraph 1: ‘An arbitration agreement relating to disputes on the existence of a lease of

⁴³ International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber, *Austrian Arbitration Act*, (Stefan Riegler / Alice Fremuth-Wolf / Martin Platte translated) <<http://www.viac.eu/en/materials/83-recht/gesetze/200-zpo-as-amended-2013#Arbitrability>> accessed 12 February 2015; BGBl Nr 113/1895 amended last time through BGBl I Nr 7/2006 (emphasis added).

⁴⁴ BGBl Nr 520/1981 amended last time through BGBl I Nr 100/2014.

⁴⁵ BGBl Nr 139/1979 amended last time through BGBl I Nr 100/2014.

⁴⁶ Rolf Trittman and Inka Hanefeld, *Arbitration in Germany* 112; International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber, *Austrian Arbitration Act*, (Stefan Riegler / Alice Fremuth-Wolf / Martin Platte translated) <<http://www.viac.eu/en/materials/83-recht/gesetze/200-zpo-as-amended-2013#Arbitrability>> accessed 12 February 2015.

residential accommodation within Germany shall be null and void.⁴⁷

It can be noticed that the wording of the Austrian and German law code regarding arbitrability is almost the same, only the exceptions vary.

E.g., the French Code Civil determines in Article 2059 what kind of subject matters can be resolved by arbitration in France. It says that ‘All persons may agree to arbitration in relation to rights which they are free to dispose of.’ Article 2060 of the French Code Civil defines the limitation of the scope. ‘It is not permissible to submit to arbitration matters of civil status and capacity of individuals, or relating to divorce or judicial separation of spouses or disputes concerning public communities and public establishments and more generally all matters which concern public policy.’⁴⁸

As yet another example, Article 806 of the Italian Code of Civil Procedure defines which disputes can be submitted to an arbitral tribunal:

“The parties may have arbitrators settle the disputes arising between them, excepting those provided for in Article 409 and 442 (regarding labor, social security, and obligatory medical aid disputes), those regarding issues of personal status and marital separation and those disputes that cannot be the subject of a compromise.”⁴⁹

These definitions above could inspire the feeling that the scope of arbitration is very broad and the limitations of it are very narrow. As already mentioned the scope of arbitration (arbitrability) always depends on the state.

The following (non exhaustive) list shall give an overview in which areas of law

⁴⁷ Rolf Trittmann and Inka Hanefeld, *Arbitration in Germany: The Model Law in Practice*, (Karl-Heinz Böckstiegel, Stefan Michael Kröll, et al. (eds), Kluwer Law International 2007) 112; also published at Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS) <http://www.dis-arb.de/de/51/materialien/german-arbitration-law-98-id3> accessed 15 February 2015.

⁴⁸ Jean-Louis Delvolvé, Gerald H. Pointon, et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, (2nd edn, Kluwer Law International 2009) 291f.

⁴⁹ Gary Born, *International Commercial Arbitration* 249.

questions of arbitrability often arise and where special attention should be paid to the question of arbitrability:

- Patents, trade marks, copyright;
- Antitrust and competition laws;
- Securities transactions;
- Insolvency;
- Bribery and corruption;
- Fraud;
- Natural resources, etc.⁵⁰

The scope arbitration is always influenced by political, social or economic policies of each state. Public policy frequently fluctuates, therefore it is not possible to create a precise list of it. In general, matters regarding the statute of an individual and criminal matters (including bankruptcy or insolvency) are not arbitrable.⁵¹

In order to find out if the specific dispute is arbitrable, each individual case has to be assessed by the national law. The difficulty is to find out if a prohibition exists.

Case Analysis:

Public claims, which fall under the scope of the Public Procurement Directive (review procedure), are not capable of settlements and, therefore, are not arbitrable. National authorities are in charge to resolve the dispute. This has to be distinguished from claims that arise out of the awarded contract (damage claims⁵²). Those claims are arbitrable because these are claims that involve an economic interest, as stated in Section 582 (1) of the Austrian Code of Civil Procedures or Section 1030 (1) of the German Code of Civil Procedure.⁵³

⁵⁰ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 2.118-2.143.

⁵¹ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 2.114-2.117.

⁵² Section 337ff and Section 343 of Austrian Federal Procurement Act.

⁵³ Hausmaninger in Fasching/Konecny² § 582 ZPO Rz 7 (published: 30.9.2007, rdb.at).

The French investment corporation does not fall in the application field of the Public Procurement Directive because it is a private (not state owned) company. The case concerns rights which are in free disposal of the parties. A prohibition regarding such disputes cannot be found. That means that not only claims that arise out of the awarded contract (e.g. damage claims) are arbitrable but also claims regarding the awarding of the contract (review procedures).

To summarize this chapter: All disputes regarding public tendering procedure conducted by a private undertaking are arbitrable. The contracting partners are allowed to agree on arbitration either in advance in the contract, before the dispute arises, or afterwards when the dispute has already arisen. Special attention has to be paid to that difficult and crucial question, because it always depends on national law.

2.4.1.4 Advantages of International Commercial Arbitration

2.4.1.4.1 Enforceability

Enforceability is one of the crucial parts when a dispute arises. Obtaining an award has to be differentiated from enforcing it. An award is only useful if it can be enforced in a state where the debtor has assets. If there is no international treaty between the states that recognizes awards from the other state, it makes no sense to litigate or arbitrate. Therefore, it is always essential to think about the problem of enforceability before compiling a contract or at least before filing a lawsuit. In general, arbitral awards can be enforced more easily in another state than national awards obtained by a national court.⁵⁴

New York Convention

The New York Convention⁵⁵ is an international treaty and part of international law. The convention is fundamental for international commercial arbitration.

⁵⁴ Steven Finizio and Duncan Speller, *Practitioner's Guide* 6-8; Gary Born, *International Commercial Arbitration* 7.

⁵⁵ New York Convention, 1958.

149 states signed and joined the New York Convention until 2013.⁵⁶ That constitutes a massive contribution to the effectiveness of international arbitration. It has two main objects, which are the recognition as well as the enforcement of arbitration agreements and of foreign arbitral awards.⁵⁷

The arbitration agreement is based on consensus. Arbitration applies only when the parties have agreed on it and it ends with an arbitral award rendered by an arbitral tribunal.⁵⁸

An arbitral award from one signing state will be recognized in another signing state under the New York Convention. Once an arbitral award is recognized by one state, it is part of the national legal system of that state. This can be very useful when it comes to the question of double proceedings. When the losing party tries to start national court proceedings for the same matter after it has lost the case before an arbitral tribunal, the prevailing party can raise defence of *res judicata* in order to stop that national litigation.⁵⁹

The enforcement of arbitral awards is also ensured by the Convention. If the losing party does not comply with the award, the prevailing party can request for assistance by national courts.⁶⁰

The territorial scope of the NY Convention is defined in Article 1 (1). There it says:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also

⁵⁶ New York Arbitration Convention <<http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>> accessed 13 February 2015.

⁵⁷ International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, (International Council for Commercial Arbitration 2011) 7ff.

⁵⁸ *ICCA's Guide: Handbook* 8f.

⁵⁹ *ICCA's Guide: Handbook* 8f .

⁶⁰ *ICCA's Guide: Handbook* 8f.

apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.⁶¹

It means that the Convention only applies to foreign or international arbitration awards.⁶²

The main idea of the treaty is to unify the standards for enforcing and to unify the limited grounds for refusing. In other words, the New York Convention ensures that an obtained arbitration award in one signatory state is enforceable in all other signatory states.⁶³

Excursus:

The question of enforceability also plays an important role on a European level. In 2004 the EU enacted a Regulation that creates a European enforcement order for uncontested claims.⁶⁴

Another attempt to achieve a high level of enforceability within the EU is the regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁶⁵ This regulation was recently reformed and entered into force on the 15th of January 2015. Especially the sections regarding recognition and enforcement were amended. Article 36 of this regulation stipulates that '[...] a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.' This regulation also deals with the problem of enforcement. Article 39 says that 'a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.'

⁶¹ New York Convention, Art 1 (1).

⁶² Steven Finizio and Duncan Speller, *Practitioner's Guide* 6.

⁶³ *ICCA's Guide: Handbook* 19ff.

⁶⁴ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.

⁶⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1; Steven Finizio and Duncan Speller, *Practitioner's Guide* 7.

These two regulations facilitate the recognition and enforceability of awards greatly but they are limited to awards rendered by national European courts and not by international arbitral tribunals.⁶⁶

Case Analysis:

Regarding enforceability it is obvious that arbitration is in many cases more advantageous than litigation. At the beginning of a public tender procedure the contracting company does not know who is the best bidder, respectively, who will be their future contract partner. For constructing projects like in the assessed case, it is very likely that not all bidders come from the country where the building will be built. Because of globalization and the freedoms of the internal market of the EU, it is likely that companies from neighbouring countries (e.g. Germany, Austria, etc.) or third countries (e.g. United Arab Emirates) will also be interested in the project and will offer their goods and services, especially, when items are tendered that are locally independent, e.g. creation of constructing plans.

If the bidders are from a EU member state or the assets of the bidder are located within the boundaries of the EU, enforceability of national court awards is unproblematic. The EU enacted regulations that deal with this situation.

The New York Convention is more helpful if the bidder is not a European company or does not have assets within the EU. The problem is that you never know at the beginning of a public procurement procedure where the assets of the bidders are situated.

Considering only enforceability and assessing it isolated from other aspects, it is recommended to agree on arbitration, especially if it is not foreseeable for the contracting company (French investment corporation) which companies are potential bidders and interested in the contract.

⁶⁶ Article 1 (2) (d) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

2.4.1.4.2 Appointment of Arbitrators

A main difference between arbitration and litigation is that the parties appoint the arbitrators, the government appoints judges.⁶⁷ In Austria, it is the President of the Republic who appoints the judges.

Article 10 of the UNCITRAL Model Law determines that it is up to the parties how many arbitrators they want to appoint to resolve their dispute. They can choose e.g. one, three or more arbitrators. If it is a smaller dispute, the parties will presumably choose one arbitrator. They will agree on three arbitrators, if they want to get sure that more than one professional has contributed his opinion to the dispute in order to find a professional solution. An even number of arbitrators is also possible, but not advisable. It can be more costly and also become complicated to coordinate a lot of busy businessmen. Another problem arises when both arbitrators or sides of arbitrators are disunited and have no majority.⁶⁸

The parties either define characteristics of the future arbitrator or mention a specific person. They can agree on that point in the arbitration agreement or once the dispute has arisen. The former is more recommendable because when the parties are one step before filing a lawsuit, the practice shows that they will not be in the right mood to agree on anything.⁶⁹

In litigation, the parties have no power or influence regarding the appointment of their judge. The appointment of the arbitrator falls in the sphere of the parties, therefore they can agree who they want to have as their arbitrator. That means that they can choose a person with special knowledge about specific disputes. If the dispute will be about complex and sophisticated legal questions, the parties will be well-advised to appoint a lawyer with special knowledge in that specific law field as an arbitrator. In case of a technical dispute, it can be better

⁶⁷ Julian D. M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 223.

⁶⁸ Julian D. M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* 224ff.

⁶⁹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 9.

to take a technician as an arbitrator. It is not ensured that the judge in litigation has the same experience and special knowledge as an arbitrator who is freely appointed by the parties.⁷⁰

It is crucial for the outcome of the dispute to find the right person for a dispute. Not every person comes to the same conclusion as another does. Thus, they should think about the question of a suitable arbitrator very carefully.⁷¹

Case analysis:

Appointing an (independent) arbitrator will be preferable in the case of the French investment company (contracting party) and also for foreign bidders.

If one party is a foreign company or a big multinational corporation and the counterparty is a small local firm, it is reasonable that the multinational corporation has doubts that it will be treated equally like the other party. The local court could be biased, partisan or parochial, but there are many other reasons why companies could tend to agree on arbitration, e.g. when national courts are lacking resources or experience to resolve such disputes. In cases like these, the parties should agree on arbitration and are able to appoint an arbitrator of trust. On the other hand, there is also a chance that the appointed arbitrator is in some way biased because of feeling responsible to the appointing party or other influences.⁷²

If a local company with local employees files a lawsuit before a district court in Italy because of a breach of the tender procedure, it is likely that the local judge will have more sympathy for the small local Italian construction company than for the multinational French investment corporation, even if the judge wants to act independently with all his efforts.

⁷⁰ Steven Finizio and Duncan Speller, *Practitioner's Guide* 8; Julian D. M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* 231.

⁷¹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 9.

⁷² Gary Born, *International Commercial Arbitration* 6.

Another argument pro arbitration is that procurement law is a very complex and sophisticated interdisciplinary field of law, even more if it does not fall in the scope of the Federal Procurement Act.

Hence, it is advisable to use arbitration as a dispute resolution mechanism in context of the decision-making bodies, because of two reasons. First, the problem of biased decision makers is resolved, when the parties appoint independent arbitrators (especially when they are from abroad with different nationalities). Second, when the arbitrators are lawyers who are well experienced in public and private procurement law the problem of lack of knowledge is also not apparent or likely.

2.4.1.4.3 Arbitration Procedure

2.4.1.4.3.1 Flexibility by Adopting the Procedure

A fundamental distinction of arbitration and litigation is that parties in arbitration are flexible and free to adopt a suitable procedure for their dispute. Disputing parties enjoy autonomy at most of the procedural stages. International arbitration institutions as well as national law provide a framework regarding the procedure of an arbitration dispute. The framework of arbitration institutions is, as contrasted to national law, not obligatory. The parties are free to opt out of negative rules. Because of procedural autonomy, the parties enjoy flexibility and can agree on custom-made procedures. They are only limited to the extent that both parties are treated fairly by the procedural rules.⁷³

There are many forms how such procedures can be implemented, e.g. fast track procedure, where time is the important item or streamlined dispute resolution procedure (see chapter 3 for further detail). The range on what the parties can agree is very wide. If it is suitable for the type of dispute, the parties can agree on specific shorter timetables or how long each party has time for

⁷³ Steven Finizio and Duncan Speller, *Practitioner's Guide* 9f; Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.73, 1.95; Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, (4th edn, Kluwer Law International 2013) 103ff.

submission or hearings. Another option is to adopt a clause that requires that the award will be rendered within a specific time period.⁷⁴

The parties could use the following clause in the tender contract to agree on fast track proceedings:

The arbitrators shall conclude the arbitration no later than [...] days from the date that the claimant's statement of claim is received by the arbitrators. Unless the parties otherwise agree, a single hearing (lasting no more than [...] days) shall be conducted commencing no later than [...] days from the date that the claimant's statement of claim is received by the arbitrators. If the arbitrators determine that the interests of justice so require, they may extend the dates for the hearing and/or for conclusion of the arbitration by up to a total of [...] days.⁷⁵

Problems can occur when the parties stipulated too short or unrealistic deadlines. If this is the case, the validity of the arbitration award or the arbitration agreement can be challenged. In order to avoid this adverse situation, the parties should give the arbitrators discretion for situations like these. Then the arbitrators could exceed the time limits from the contract.⁷⁶

The following clause is more recommendable in my point of view and should be used:

The Parties mutually desire and intend that, barring exceptional and unforeseen circumstances, the final award of any arbitration under this Article [X] shall be made [...] days from the appointment of the [sole arbitrator] [presiding arbitrator]. The Parties may extend this time limit by written agreement. The arbitral tribunal may extend this time limit in its discretion if it considers that the interest of justice so requires. The arbitral tribunal shall use its best efforts to issue the final award within

⁷⁴ Steven Finizio and Duncan Speller, *Practitioner's Guide* 9f; Gary Born, *International Arbitration: Law and Practice*, (Kluwer Law International 2012) 12f; Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 6.01-6.26.

⁷⁵ Gary Born, *International Arbitration and Forum Selection Agreements* 103.

⁷⁶ Gary Born, *International Arbitration and Forum Selection Agreements* 103.

such time period. The arbitral tribunal's failure to make a final award within this time limit shall not be a basis for refusing to comply with or for challenging or resisting enforcement of any such award.⁷⁷

There are some arbitral institutions that adopted rules regarding fast-track arbitration procedures, e.g. SCC, Swiss Chambers of Commerce, WIPO, etc. The ICC published a guidance to save time and unnecessary costs (see Chapter 3).⁷⁸ Even though they are very attractive for undertakings, there is just a little practical experience with this kind of procedures.⁷⁹

Because arbitration proceedings are not referring to national procedural law, the parties can also agree on how document production shall be carried out in a dispute. The possibility of a flexible conducted dispute procedure shows how high the contrast to national court proceedings is.⁸⁰ In many European member states it is the case that the claimant has to prove the damage. It depends on the state if there also exists a change of the burden of proof. Generally speaking, it will be very hard for the bidder to prove that he had the best or lowest offer without having the offers of the other bidders, especially when the time for objection to the award decision is limited. To bring the evidence that the claimant had a better offer than his competitors, the bypassed bidder (claimant) needs the offers of the bidders.

How the procedure is adopted and later on conducted has a great effect on costs and efficiency. Hence, it is crucial that the parties think about this point in advance in very much detail. It has to be mentioned that the parties can only use the flexibility if both of them agree on it. This flexibility is not carried out by one party unilaterally, they have to do that with consensus.⁸¹

⁷⁷ Gary Born, *International Arbitration and Forum Selection Agreements* 103f.

⁷⁸ ICC International Chamber of Commerce, *ICC Commission Report, Controlling Time and Costs in Arbitration* (International Chamber of Commerce 2012).

⁷⁹ Gary Born, *International Arbitration and Forum Selection Agreements* 104.

⁸⁰ Steven Finizio and Duncan Speller, *Practitioner's Guide* 9f; Gary Born, *Law and Practice* 12f; Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 6.01-6.26.

⁸¹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 11.

2.4.1.4.3.2 Efficiency and Costs of the Procedure

The point of efficiency and costs goes hand in hand with the flexibility of the procedure. Some economic studies have shown that rules of cost shifting have a significant impact on the questions of what kind of claims are sued.⁸²

It is in the responsibility of the parties to adopt a suitable procedure for a possible dispute. Depending on the size of the dispute, national court proceedings are rarely cheap or fast. The challenge is to adopt a procedure that ensures that the parties can present their case but just to a necessary extent in order to safeguard a cost effective dispute procedure.⁸³

Each company that acts on the (international) market is concerned that everything goes well. On the off chance that something goes wrong and disputes arise, parties should care about the future proceedings because they have a massive impact on costs and the reputation of the company.⁸⁴

The parties have several ways how to adopt a cost effective and suitable procedure. They can agree to limit the scope of evidence or on a streamlined procedure. This saves time and money and plays an important role where the value of the dispute does not justify an extensive procedure or where the case is urgent and parties need to get a final and binding decision in a proper time. In a smaller case, time for presenting the case will be shorter than in a complex one.⁸⁵

Some critics say that the total costs of arbitration increased in the past enormously. Even so, the costs for the tribunal or the institution are still a small percentage compared to the counsels' fees.⁸⁶

⁸² Jeff Waincymer, *Procedure and Evidence in International Arbitration*, (Kluwer Law International 2012) 1190ff; see also Richard A. Posner, *Law and Legal Theory in England and America* (New York: Clarendon Press, 1996), 70-73.

⁸³ Steven Finizio and Duncan Speller, *Practitioner's Guide* 11.

⁸⁴ Steven Finizio and Duncan Speller, *Practitioner's Guide* 11.

⁸⁵ Steven Finizio and Duncan Speller, *Practitioner's Guide* 12; Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.94f.

⁸⁶ Jeff Waincymer, *Procedure and Evidence in International Arbitration* 1191f.

Different states have different procedural rules, also regarding cost shifting. In Austria or other jurisdictions the loser has to pay the procedural costs (loser-principle). In some jurisdictions it is usual that even the winning party has to pay their own lawyers and fees for court procedure. Whilst other jurisdictions which neither follow the winner-principle nor the loser-principle, adopt rules that lie somewhere in between. The costs can be split up in different categories and types and distributed to the parties.⁸⁷ Arbitration becomes more interesting for states where cost shifting is not so common, such as in the U.S.A, where every party affords their own costs.⁸⁸

As mentioned above, it is in the responsibility of the parties to adopt a suitable procedure for a specific dispute, which might arise in the future.

Nevertheless also international commercial arbitration can take a lot of time if one party challenges the arbitrators, jurisdictional disputes arise or in case of procedural mishaps. In cases like these, the arbitration procedure then can require between 18 and 36 months until the parties get a final and binding decision.⁸⁹

On the overall balance, arbitration will be quicker and cheaper than litigation proceedings before a national court in most cases because the grounds and stages of appeal are limited.⁹⁰

Case Analysis:

In some aspects, review proceedings of public tender procedures are different to traditional procedures differential.

For parties of a public tender – especially for the contracting party of a construction project – it is crucial to find out which company had the best or

⁸⁷ Jeff Waincymer, *Procedure and Evidence in International Arbitration* 1190ff.

⁸⁸ Steven Finizio and Duncan Speller, *Practitioner's Guide* 12.

⁸⁹ Gary Born, *Law and Practice* 14.

⁹⁰ Gary Born, *Law and Practice* 14.

lowest bid in order to award a contract. In addition to that, it is very important to prevent any delays. If a bidder is convinced he had the best or lowest offer and that the contracting party had bypassed him, the bypassed bidder will presumably file a lawsuit. If he also asks national courts or the arbitral tribunal for interim measures, the contracting party will be in big trouble regarding time plans. Therefore, it is essential to have fast proceedings in order to keep the construction project going.

The parties should agree on expedited fast track proceedings that are based on the principles of the review procedure of EU Public Procurement Directive or similar to it. These review proceedings represent a fair balance between the contracting party and bidders. The time for entering an objection to the award decision should be limited to a few days or just a few weeks after receiving the award decision. If the bidder did not object the decision, the right to sue shall be precluded. This instrument is in line with the Public Procurement Directive and would support the contracting party enormously.

A further instrument to save procedure time is to limit the time of presenting the case. Limitations are legitimate but not boundless. The bidder still has to have the chance and possibility to present his case to a certain extent.⁹¹

Regarding document production, the parties should agree on it and how they want to arrange it. Many variations are conceivable. This part will be intricate because none of the bidder wants to disclose their own calculations to their competitors. A fair solution would be that the claimant has to bring the prima facie evidence and the contracting party (French investment corporation) has to bring the evidence to the contrary.

As stated above, the parties are flexible in adopting a suitable arbitration procedure as long as both parties are treated fairly.⁹² If the contracting party – in our case the French investment corporation – has a strong market and

⁹¹ Art 34 (2) (ii) UNCITRAL Model Law, Art V (1) (b) New York Convention.

⁹² Art 18 UNCITRAL Model Law.

negotiation power, it will try to force the bidders to agree on a short deadline for objection and limit the time to present the case, but not on rules regarding document production or others that are not advantageous to it. In my assessment, this would constitute an unfair treatment and would be illegal.

The opportunity to use the alternative dispute resolution method of expert determination could be a suitable solution for this problem (see chapter 2.4.3.4f).

2.4.1.4.4 Final and Binding Arbitral Award

An award rendered by an arbitral tribunal is final, binding and therefore enforceable. The appellate review of arbitral awards depends on national law and is limited to a few specific grounds. The main grounds of appeal are jurisdictional issues, procedural fairness or public policy.⁹³

The following list shall give an overview of the most common grounds for challenging an arbitral award:

- Arbitration agreement invalid; no capacity (e.g., UNCITRAL Model Law, Art. 34(2)(a)(i));
- Party denied opportunity to present case (e.g., UNCITRAL Model Law, Art. 34(2)(a)(ii));
- Award deals with matters outside scope of submission to arbitration (e.g., UNCITRAL Model Law, Art. 34(2)(a)(iii));
- Composition of arbitral tribunal or arbitral procedures not in accordance with parties' agreement (e.g., UNCITRAL Model Law, Art. 34(2)(a)(iv));
- Disputes/Claims were non-arbitrable (e.g., UNCITRAL Model Law, Art. 34(2)(b)(i));
- Award violates public policy (e.g., UNCITRAL Model Law, Art. 34(2)(b)(ii));
- Arbitral tribunal lacked independence or impartiality;
- Arbitrators' decision seriously wrong on merits;

⁹³ Art 34 UNCITRAL Model Law.

- Award procured by fraud; etc.⁹⁴

Issues of facts or law are typically not part of an appellate review proceeding. Depending on the state, reconsidering of factual and legal matters can also be allowed, even though it is not the norm.⁹⁵

Receiving a final and binding decision at the first stage is one of the essential advantages of arbitration. The permission to review the award regarding issues on facts or law would undermine the legal characteristics and elements of arbitration.⁹⁶

National litigation proceedings have several stages of appeal, which has the effect that these proceedings can take many years until the parties get a final, binding and enforceable court decision. In some cases, it is too late when the parties get an award years after the dispute has arisen. This could discourage potential claimants to file a lawsuit.⁹⁷ The European Commission said in a Communication regarding the Public Procurement Directive that cases, which do not fall within the scope of the directive, shall also have an efficient judicial protection.⁹⁸ If potential claimants fear that the proceedings could probably take too long and the award is almost useless after years, the judicial protection could be slightly inefficient. This constitutes a big advantage of arbitration in contrast to litigation.

On the other hand, a final decision in a short time is not always an advantage. The parties have no chance to appeal the case if the arbitrators rendered a wrong decision. Even if the parties cannot appeal the arbitral award, anecdotal

⁹⁴ Gary Born, *Law and Practice* 312.

⁹⁵ see also Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 10.28ff.

⁹⁶ Steven Finizio and Duncan Speller, *Practitioner's Guide* 13; Gary Born, *Law and Practice* 4.

⁹⁷ Steven Finizio and Duncan Speller, *Practitioner's Guide* 13.

⁹⁸ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02 [2006] OJ C 179/5.

and empirical surveys have shown that companies prefer the finality and efficiency of arbitration.⁹⁹

Because grounds of appeal are limited, it is very likely that proceedings before an arbitral tribunal are cheaper and faster than before national courts.¹⁰⁰

Case Analysis:

Arbitration is more favourable than national court proceedings when time is an important factor of the project. This is the case when the French investment corporation wants to build their new headquarters in the near future. Thus the corporation is well advised to use arbitration for resolving the dispute. Nevertheless the French company as well as the bidders have to bear in mind that an arbitral award is final and binding and cannot be appealed.

2.4.1.4.5 Confidentiality

Confidentiality is one of the major advantages of arbitration and can be the deciding reason to agree on it. As Bühring-Uhle noted, neutrality and enforceability are the important features and reasons why parties decide to use international commercial arbitration.¹⁰¹ Confidentiality is only granted because of the neutral proceedings. Most international businesses prefer private and confidential proceedings in case of a dispute.¹⁰²

Concerning confidentiality Gary Born noted the following:

‘(...) confidentiality of the arbitral proceedings serves to centralize the parties’ dispute in a single forum and to facilitate an objective, efficient and commercially-sensible resolution of the dispute, while also limiting disclosure of the parties’ confidences to the press, public, competitors and others.’¹⁰³

⁹⁹ Gary Born, *Law and Practice* 12.

¹⁰⁰ Steven Finizio and Duncan Speller, *Practitioner’s Guide* 13.

¹⁰¹ Christian Bühring-Uhle, *Arbitration and Mediation* 136 cited from International Arbitration Law Library, *Confidentiality in International Commercial Arbitration*, (Vol 22, Kluwer Law International 2011) xiv f.

¹⁰² Gary Born, *Law and Practice* 15.

¹⁰³ Gary Born, *International Commercial Arbitration* 2781.

International arbitration is not open to the public and more confidential compared to national court proceedings.¹⁰⁴ In public (national court) proceedings, everyone is allowed to attend the whole procedure, with just a few limitations. Competitors of the parties or the press could participate in the proceedings and use the gathered information to their own advantage.¹⁰⁵

Depending on the state and the case also national court procedures can be private. Even though the case requires privacy of the national court procedure, the counterparty could reveal information to the public, if the court did not ban that either (confidentiality).¹⁰⁶

Confidentiality has to be distinguished from privacy. Privacy means that only the parties are allowed to attend the proceedings in contrast to confidentiality that means the obligation not to disclose information concerning the arbitration.¹⁰⁷ In general, arbitration hearings are not intended for the public. Listeners and the press are excluded. It is also prohibited to submit information to the press or disclose the award.¹⁰⁸

Nevertheless it is the duty of the parties to stipulate on confidentiality. Only in minor cases it is accepted that confidentiality is part of the agreement to arbitrate.¹⁰⁹ Special care should be taken of the drafting of such clauses. Some jurisdictions or institutional arbitration rules contain rules regarding confidentiality. Parties can rely on that rules.¹¹⁰

¹⁰⁴ Gary Born, *Law and Practice* 194.

¹⁰⁵ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.94f; Steven Finizio and Duncan Speller, *Practitioner's Guide* 13; Gary Born, *Law and Practice* 194.

¹⁰⁶ Steven Finizio and Duncan Speller, *Practitioner's Guide* 13.

¹⁰⁷ Gary Born, *Law and Practice* 194.

¹⁰⁸ Latham & Watkins, 'Guide to International Arbitration' (2014) 1 <<http://www.lw.com/news/ia-guide-translated>> accessed 12 February 2015.

¹⁰⁹ Ileana M. Smeureanu (ed), *Confidentiality* xvii.

¹¹⁰ Gary Born, *Law and Practice* 15; Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 2.176.

Many model clauses exist regarding confidentiality. The following cited model clause from Paul Rieland is recommendable, because it is concise but also formulated broadly:

Except as may be required by law, neither party nor its representatives nor a witness nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.¹¹¹

Case Analysis:

Confidentiality is important for every company. Every business entity wants to control which information becomes public and which remains confidential and private. They want to keep their business plans, strategies, contracts, financial results or other information secret.¹¹² Especially stock corporations are endeavoured to keep bad information out of the press. The news that someone is suing a big corporation has an enormous impact on stock prices.

In national litigation procedures, the parties have no influence or control over confidentiality. In particular civil law procedures are rarely closed to the public. Confidentiality also varies from state to state.

The problem is when a contracting company awards a contract by a public tender, it does not know who the bidders will be and where they come from. The risk of a lawsuit in several jurisdictions is apparent. The risk of disclosing secret information is even higher in these situations.

To handle this problem, the contracting company and the bidders could agree on choice of law clauses or jurisdiction agreement, when they do not want to use ADR. If they find a jurisdiction where confidentiality is in their interest, perhaps other provisions are detrimental for the parties. On the other hand, arbitration procedures are free and flexible and the parties can adopt almost every part of the procedure including confidentiality. They do not need to find

¹¹¹ Ileana M. Smeureanu (ed), *Confidentiality* x.

¹¹² Ileana M. Smeureanu (ed), *Confidentiality* xv.

jurisdictions with satisfactory rules. In arbitration, parties do not have to exchange advantages like fast proceedings against confidentiality or others. They can have all of them, if they agree. Hence, regarding confidentiality, arbitration is definitely advisable.

2.4.1.5 Disadvantages of International Commercial Arbitration

International arbitration has many advantages compared to national litigation before national courts. On the other hand, the arbitration coin has another side and many authors criticise arbitration. The negative effects will be discussed hereinafter.

2.4.1.5.1 Costs of International Arbitration

Among others, costs of arbitration are linked to the duration of the proceeding. In the past, the idea was to render an award within 60 days from the date of signature of the terms of reference. Because of the speed of the proceedings, the costs could be kept down. The goal of a 60 days' procedure is nowadays out of reach. The average time to get a final award in international arbitration is between 12-24 months.¹¹³

As the duration of the procedure increased, the costs increased as well. There are many reasons why costs exploded. One is that the parties have to pay the fees and expenses of the arbitrator. In general, the more important and bigger the dispute, the higher these fees, which are substantial. In addition to the fees of the arbitrator, the parties also have to pay for the arbitration institution, if they decided to submit the dispute to one. In addition to that, the parties also have to pay for the legal advisors as well as for expert reports and so on and mostly in advance. Another cost factor is renting of meeting and hearing rooms. In litigation the parties have courtrooms at disposal. This advantage of litigation is not the case for arbitration.¹¹⁴

¹¹³ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.100.

¹¹⁴ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.100.

All these costs are substantial in a major arbitration case. Nevertheless, the costs of arbitration are in general not less than costs for litigation proceedings of first instance. As already mentioned, the big difference between those two forms of dispute resolution is that arbitration awards are final and binding at the first stage. Grounds of appeal are limited in arbitration.¹¹⁵ In national litigation, there are several stages of appeal depending on the jurisdiction. Because of the one-stop-shop effect, arbitration will be cheaper than litigation at the end of the day. Appeal proceedings are very time consuming and thus costly for the parties.¹¹⁶

Case Analysis:

Costs of arbitration can be seen as an advantage or a disadvantage. Some critics argue that arbitration is dearer, others say exactly the opposite. The truth is that it always depends on the dispute.

In some cases costs for arbitration can be higher than for litigation. How much a procedure will cost depends on the adopted rules. If the parties agreed on fast track proceedings and on time limitation regarding presenting the case, the duration of the proceedings are shorter than normal arbitration and in general much shorter than litigation proceedings, where a shortening of the procedure is impossible, at least in most jurisdictions.

Nevertheless, it should not be forgotten that the arbitration award is generally enforceable and grounds for appeal are limited. Therefore, it can be true that the arbitration procedure is more expensive than litigation, but only compared to litigation procedure at the first instance. The costs increase, if it comes to appeal procedures in litigation. As mentioned above, the counsels' fees are a big proportion of the total costs. Even though it makes no difference for the costs, if a counsel charges fees for arbitration or litigation¹¹⁷. The only difference

¹¹⁵ Gary Born, *Law and Practice* 312; Art 34 UNCITRAL Model Law.

¹¹⁶ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.101.

¹¹⁷ This is under the assumption that the parties have agreed on hourly rates as compensation and not payment under mandatory minimum fee calculation such as *RATG (Rechtsanwaltstarifgesetz)* in Austria.

is that the arbitration procedure will be finished more quickly than the litigation procedure.

It has to be mentioned too that high costs are also an advantage for the party which has more economic power. A poor party could possibly stop the dispute resolution procedure if costs explode and the party can no longer afford them.

Thus, it is important to keep the costs low in order to ensure the effective legal protection. When the parties agree on streamlined or fast track procedure, the costs of arbitration in a dispute between the French investment corporation (contracting party) and bidders could presumably be lower than they would be the case in litigation.

2.4.1.5.2 Delay of Arbitration Proceedings

Delays can occur at every stage of arbitration, but especially at the beginning and at the end of it. At the commencement stage of an arbitration dispute, an arbitral tribunal is still not established. It is up to the parties to appoint arbitrators or to the arbitration institution to do that. All the other things like hiring a hearing and meeting room, coordination of all participants, etc. have to be organized privately and not by a national institution like in litigation.¹¹⁸ A further cause of delay can be jurisdictional actions and objections of the respondent. He will presumably object to jurisdiction of arbitration, because it is very likely that he will prefer litigation before a national court of his home country, residence or his place of business rather than arbitration in a foreign country. Not always, but mostly, the claimant will have more interest in neutral proceeding before an international arbitral tribunal.¹¹⁹

Another ground for delay at the end of arbitration can be, when the arbitrators need a long time to render their award. The range goes from a month to a year or more, contingent on the workload of the arbitrators. The reason can be that

¹¹⁸ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.103f.

¹¹⁹ See also Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.121.

the arbitrator is also appointed as an arbitrator in several other cases or if he may act as counsel or university professor, too.¹²⁰

On the other hand, there is also no directly enforceable deadline for judges, within which time range they have to render the award. Therefore, it cannot really be seen as a disadvantage.

In general, the award of the arbitral tribunal is final and binding and asking for appeal on the merits is not permitted. Similar to litigation proceedings, one party is always aggrieved by the award and wants to challenge it. Hence, it can be the case that the losing party tries to challenge the award based on grounds like biased arbitrator, no fair trial etc. Even if the proceedings are groundless, it takes precious time and costs money.

Case Analysis:

Even if some losing parties try to challenge the award – although the grounds are limited – they will not be successful if the challenge is not justified. Hence, the prevailing party does not really have to fear such proceedings. The only negative effect is that it takes time. If everything was well conducted and based on law, also the losing party will accept the award in order to save money for unnecessary and unsuccessful challenge procedures. The challenge of the award is really expensive as regards court fees.

Parties who agree on arbitration and on arbitrators are well advised to appoint their arbitrator with care when time is an important factor (which is obviously always the case). It is great to have an arbitrator who is well educated and has lots of experience in this kind of dispute, but in many cases experts like this are very busy and in great demand. Thus, it can be problematic to coordinate with such an arbitrator and also rendering the award could take much longer compared to another arbitrator. It is up to the parties to decide if time or experience of the arbitrator plays a bigger role. A compromise somewhere

¹²⁰ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.103.

between will probably be desirable. Even if busy arbitrators need more time to render the award, also judges generally need longer to decide the case.

To avoid a prolonging of the decision making process, the parties can agree on time limits with this regard.

2.4.1.5.3 Multi-party Arbitration Procedures

The usual case is that a dispute consists of two parties, one claimant on one side and one respondent on the other side. In such constellations arbitration works properly.

It gets more problematic if there is more than one party on each side. The question of who appoints the arbitrator for one side arises. In the *Dutco*¹²¹ case this problem became serious. Under the former ICC Arbitration Rules¹²², the consortium had to agree consensually on one arbitrator. The problem in this case was that the consortium had different interests and agreed on an arbitrator very reluctantly. This obligation to agree on one arbitrator was contested by the parties of the consortium. Meanwhile this rule has changed.¹²³

The *Dutco* Case shows what problems can arise in a multi-party arbitration in contrast to litigation. It is very likely that there are also other problems that are still not discovered. The more complex the case, the higher the risk of complications.¹²⁴ The history of arbitration is not as long as it is of litigation. Hence, it will take time to establish a well-organized arbitration procedure. The counterargument to that will be that arbitration becomes more and more rigid and is overruled (judicialisation).

¹²¹ Fench Cass. Civ. 1ere, 7 January 1992 Bull. Civ. 1 (*BKMI and Siemens v Dutco* 1992).

¹²² ICC International Chamber of Commerce, *Arbitration Rules, Mediation Rules* (International Chamber of Commerce 2013).

¹²³ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.105ff.

¹²⁴ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.105ff.

Case Analysis:

If the parties agreed on arbitration for disputes regarding a tendering procedure, they will have to deal with the classic constellation of a dispute in most of the cases. The bypassed bidder as the claimant is on one side and the contracting party as the respondent is on the other side, although other constellations are possible. If the contracting party and one of the bidders act collusively, both could possibly form one side as respondents. Many other variations are feasible, like two bidder claim to be the best bidder. Usually many companies participate in a public tendering procedure, the contracting party who is awarding the contract and the bidders who are interested in getting the deal.

In my opinion, it is very important to agree on arbitration for all disputes that arise out of the tendering procedure, irrespective of who the claimant and respondent are. The idea of arbitration is to submit a dispute to a neutral tribunal that renders an award in a short period of time. If the parties do not agree on all disputes that arise out of the contract, they take the risk of parallel proceedings before the national court of each bidder in different states.

The following situation could appear: A bypassed bidder files a lawsuit for damages and for awarding the contract before an arbitral tribunal. The same bidder also wants to sue another bidder in order to stop collusive interventions and to stop him carrying out the contract. If such disputes are not covered by the arbitration agreement, the bypassed bidder has to sue the other bidder before a national court. The contracting company could be intervenient in the second lawsuit before the national court. Such actions could stop the whole building project.

To avoid this adverse situation and unnecessary complications, the parties should agree to submit all future disputes to arbitration that arise out of this multi-party dispute.

Another rather likely situation is brought about where two undertakings claim to be the best bidder. If this is the case, they should agree in advance that other claimants have to join the first and form a multi-party in the arbitration proceedings. The arbitral tribunal should inform all bidders about the proceedings and if the other bidders feel overlooked but do not join the procedure of the first claimant, their right to file an action against the contracting party will preclude. Due to that model, the parties ensure a fast proceeding and avoid parallel proceedings.

2.4.1.5.4 Final and Binding Arbitration Award

As already mentioned as an advantage, arbitral awards are final and binding after the first and last stage. This could also be seen as a disadvantage because the losing party has almost no possibility to challenge the award if the arbitrators wrongly decided the case.

Challenging the award may only be permissible, when the arbitral award is seriously wrong on the merits, but this is not always the case.¹²⁵ Generally, there is a trend away from judicial review proceedings regarding the merits of the decision. There is also no provision in the UNICITRAL Model Law that deals with this ground of challenge. Some jurisdictions provide the possibility to apply for such judicial review proceedings but they are limited to cases where egregious legal errors have to be corrected, e.g. England, Ireland, China, Australia, USA etc. Factual errors are not covered by such procedures.¹²⁶

When the parties agree to arbitrate, they know that grounds of challenging are limited. In fact, this is frequently the reason why they agree on it. Therefore, the losing party also has to accept the decision, even if it is aggrieved. The option to challenge the award still exists for substantial legal mistaken decisions. That means that the parties are protected against arbitrariness.

¹²⁵ Gary Born, *Law and Practice* 312.

¹²⁶ Gary Born, *Law and Practice* 328f.

2.4.1.5.5 Conflicting Awards in Arbitration

There is no case law system in international commercial arbitration like in common law jurisdictions. That means that an award rendered by a tribunal, where the case had similar facts or issues does not bind other arbitral tribunals. If a former case is known, the award can have a persuasive effect but not a binding effect.¹²⁷

This includes the effect that the decisions in arbitration are not or only partially foreseeable. This will presumably irritate parties from common law countries. In contrast, in civil law countries, decisions from the national supreme court have also no binding effect on other courts. Nevertheless, supreme court decisions are useful to find out how the court presumably will decide, even if it is not bound by former decisions.

2.4.1.5.6 Judicialisation

In the past, some critics noted that international commercial arbitration became very similar to litigation. This mutation is called *judicialisation*. At the early stage of arbitration, it was a rudimentary and simple system to resolve disputes. The procedure of international arbitration was not overloaded by a massive amount of rules. The parties submitted the dispute to a mutual friend or a professional who had special knowledge and was able to render a satisfactory award for the dispute.¹²⁸

Nowadays the arbitrator has to follow many rules of international arbitration institutions, which could somehow destruct the idea of an informal, quick and individualized dispute resolution mechanism. Arbitration became big and therefore a minimum standard of provisions are necessary to deal with big cases.¹²⁹

¹²⁷ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.113.

¹²⁸ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.115ff, see also David, *Arbitration in International Trade* (Economica, 1985) 29.

¹²⁹ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.115ff.

From my point of view the critics are just partially right. In comparison to national codes of civil procedure, arbitration is not in the least as extensive as they are. It also establishes its rules from case to case, like it happened in the *Dutco* Dispute. The prior ICC rules did not deal with multi party disputes in detail right from the beginning. The ICC found out that it is essential for international disputes to have legal certainty and, therefore, adopted provisions that solve such problems of multi-party disputes.

To sum it up, judicialisation takes place in international arbitration but in an adequate way and form. A minimum amount of rules are indispensable in order to ensure a smooth process.

2.4.1.6 Summary of the Pros and Cons of International Commercial Arbitration

The advantages and disadvantages of international commercial arbitration were intensively discussed and there is a tendency in favour of arbitration for resolving international commercial disputes.¹³⁰

If arbitration is preferable compared to litigation before national courts depends on the individual case. Litigation before a national court can be better for purely domestic disputes. If the claimant and the respondent are from the same country it can be easier for the parties to use the dispute resolution mechanism of litigation.¹³¹

When there is an international relationship between the parties, it is very likely that English is used as the business language, hence the contract, emails etc will be in English. In case of a dispute before a national court, all the documents have to be translated into the local language. This is very costly, time consuming and errors through translation cannot be precluded.¹³²

¹³⁰ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.120f.

¹³¹ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.121f.

¹³² Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.121f.

In international disputes at least one party is from another state and foreign to the local court. It can also be the case that both parties are from different states. It is not desired by the parties to have lawyers from other jurisdictions, who are not familiar to them.¹³³

Sometimes the parties can have the feeling – even if it is not right – that local courts are over-challenged by international commercial disputes and their lack of knowledge. Maybe local judiciary does not have the recourses needed for huge proceedings and it would take too much time until the parties get a final and binding decision.¹³⁴

The barrier to initiate litigation proceedings before a national court will be even higher if the counterparty is a state entity or the state. Although the state does not interfere in the procedure, the national judge could be somehow biased and could feel liable to the state to whom he owes his appointment.¹³⁵

Case Analysis:

Which instrument of dispute resolution is more desirable for the parties, depends on the individual case.

Analysing the hypothetical case of the French investment corporation, international commercial arbitration will be better for both parties, especially for the contracting party. The contracting party does not have to fear litigation before a foreign national court if the parties have agreed on arbitration. The parties have a neutral tribunal that tries to resolve the dispute without any commitments to one single party. Because of the speciality of a public tender procedure, individual arrangements should be taken by the parties to deal with such disputes properly.

¹³³ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.121f.

¹³⁴ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.121f.

¹³⁵ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.123.

Time is one of the most decisive factors in tendering procedures and litigation with a long duration has an adverse effect on the international project. If the parties agree on fast-track or streamlined procedures, they can save valuable time. These arrangements are only possible in arbitration. Litigation procedures are generalised and can take many years.

To sum up the main points, the pros of international commercial arbitration such as neutrality, enforceability and flexibility outweigh the cons. Arbitration is preferable to litigation in cases like this.

Landau summarized it in the following famous statement regarding arbitration vs litigation:

Although there are many reasons why parties might prefer international arbitration to national courts as a system of dispute resolution, the truth is that in many areas of international commercial activity, international arbitration is the only viable option or as once famously put, 'the only game in town'. National courts may be considered unfamiliar, inexperienced, unreliable, inefficient, partial, amenable to pressure, or simply hostile. The larger and more significant the transaction in question, the less appropriate, or more risky, a national court may be. And so, where a third country's courts cannot be agreed upon, international arbitration becomes an essential mechanism actively to avoid a particular national court.¹³⁶

¹³⁶ Landau, 'Arbitral Lifelines: the Protection of Jurisdiction by Arbitrators' in *International Arbitration 2006: Back to Basics?* ICC Congress (2007) 282-287 cited from Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.125.

2.4.2 Other Forms of Dispute Resolution

It is indispensable for contracting parties to be aware of the different forms of dispute resolution mechanisms in order to clarify which mechanism fits best for their project and possible future disputes. Each has specific advantages and disadvantages.

The advantages and disadvantages of arbitration have been explained in the previous chapter and applied to the initial case of the French investment corporation. The aim of the following part is (i) to assess what the differences between arbitration and other forms of ADR are and (ii) to find out if a combination of the different forms is advisable for public tenders that are conducted by private undertakings (multi-tier dispute resolution clauses). The initial case of the French investment corporation, which wants to conduct a public tender procedure, will be assessed at the end of each chapter.

2.4.2.1 Litigation

Wallgren-Lindholm defined jurisdiction as 'the entitlement of an institution [...] to confirm, change or otherwise affect the legal rights of those subject to its competence in such a way that the outcome (the judgment [...]) becomes enforceable through a process of execution. [...] a judgment rendered by a national court is (subject to any right of appeal) immediately enforceable with the assistance of a public officer who, upon the winning party's request, will be obliged to use the appropriate method of execution available to him under the national law of the place of execution.'¹³⁷

The similarity of arbitration and litigation is that the parties get a final and binding decision with both mechanisms. Because of finality both litigation and arbitration awards are in general enforceable. Another parallelism is that a

¹³⁷ Carita Wallgren-Lindholm in Gerald H. Pointon, et al., *ADR in Business* 6.

neutral decision maker renders the decision and each party can present their case and arguments.¹³⁸

Even if in both mechanisms the decision makers are neutral, the way of appointment is diverging. In arbitration, the arbitrator is a private individual person who is appointed by the parties. In litigation, the government of the state appoints the judge. Arbitration is established by national law, which also sets the limits of the scope of arbitration (arbitrability) and limits the power of the arbitrators in that state.¹³⁹

The main feature of arbitration is that it is not a resolution mechanism within the state apparatus. Litigation is not as attractive as arbitration especially for international parties, where the arbitrators are totally neutral and not accountable or liable to the appointing state. To avoid this adverse effect, parties from different states often agree on ADR methods or arbitration as a sign of compromise.¹⁴⁰

Case Analysis:

As explained in the previous chapter, it is much better for the French investment corporation to agree with all the bidders on arbitration rather than on litigation. The advantages of arbitration outweigh the advantages of litigation in such cases. Of course, it is also preferable for the bidder because the intention of a typical bidder is to get the contract and carrying out the contract as fast as possible. Long court proceedings cost a lot of time and money (see case analysis of arbitration).

2.4.3 Arbitration vs other Forms of Alternative Dispute Resolution

The following chapter outlines the main differences of arbitration and other existing forms and methods of ADR. After the explanation of each method, the assessment of the initial case will take place.

¹³⁸ Steven Finizio and Duncan Speller, *Practitioner's Guide* 16.

¹³⁹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 16.

¹⁴⁰ Steven Finizio and Duncan Speller, *Practitioner's Guide* 16.

2.4.3.1 Negotiation

Negotiation is one of the possibilities that can be used by companies to resolve their dispute. Generally, the parties should start resolving the dispute with the method of negotiation, if available and useful. Only the parties are involved in the dispute resolution mechanism. They come together and try to find a fair and suitable solution that is satisfying for both sides. Third persons are usually not involved.

There are many different definitions of negotiations. The following is to be highlighted:

‘[...] negotiation shall be defined as any communication between two or more actors directed at achieving a joint decision.’¹⁴¹

Two elements can be found in this definition. The first is communication. This term is wider and broader than ‘discussion’ because non-verbal communication is also included. The second element is ‘joint decision’. It shall illustrate the “meeting of the minds” of both sides.¹⁴²

Negotiation can be divided into two kinds. The first is a distributive negotiation. It means that two parties negotiate only about a specific price or value and every side tries to get as much as possible. The parties only care about the price. Business relationship and other factors do not matter.¹⁴³

The second form is called integrative negotiation. It means that both sides cooperate with each other in order to create the highest possible output for both sides and to get a big piece of the cake. At the end of the negotiations, the parties have to agree on a compromise. In this variation business relationship

¹⁴¹ Christian Bühring-Uhle, *Arbitration and Mediation* 135.

¹⁴² Christian Bühring-Uhle, *Arbitration and Mediation* 135.

¹⁴³ Harvard Business Essentials, *Negotiation* (Harvard Business School Press) 4f; see also Christian Bühring-Uhle, *Arbitration and Mediation* 137f.

and reputation play a decisive role and therefore also the style of negotiation changes slightly.¹⁴⁴

Negotiation settlements are not final and binding, which means they are not directly enforceable. They are only contractually binding. If one party does not apply the rules of the settlement, the other party has to start proceedings before a national court or an arbitral tribunal to get an enforceable award.

2.4.3.2 Mediation

Mediation forms the core part of ADR. In my view, the rule of Gary B. Born also applies to the number of definitions of mediation.¹⁴⁵ There are as many definitions as commentators on the topic.

It can be defined as follows:

‘Mediation is the non-binding intervention by an impartial third party who helps the disputants negotiate an agreement.’¹⁴⁶

Another definition comes from the ICC:

‘Mediation [...] is a flexible procedure aimed at achieving a negotiated settlement with the help of a neutral facilitator.’¹⁴⁷

When a dispute arises and the parties are no longer able to handle it on their own (negotiation), they appoint an independent third person as a mediator. He will listen to each party and hold separate meetings in order to facilitate a suitable solution. The mediator acts like a moderator of the other party and represents their view to the other side. The main idea is not to adhere to the wording of the contract or to laws, it should be left out and the parties should try

¹⁴⁴ Harvard Business Essentials, *Negotiation* 5f; see also Christian Bühring-Uhle, *Arbitration and Mediation* 137f.

¹⁴⁵ Gary Born, *International Commercial Arbitration* 1.

¹⁴⁶ Christian Bühring-Uhle, *Arbitration and Mediation* 175.

¹⁴⁷ ICC, *Arbitration Rules, Mediation Rules*, 1.

to illustrate their real interest.¹⁴⁸ This tactic helps the parties to find a suitable solution out of the courtroom. Of course, mediation is only reasonable and useful, if the parties have a negotiation range that overlaps with each other. Mediation makes no sense when both parties cannot agree on anything even though both sides have offered the biggest compromise they can do.

The decisive differentiation of mediation in contrast to arbitration is that mediation settlements have no binding effect like arbitral awards. The role of the mediator also diverges from that of the arbitrator. The task of the mediator is to facilitate and to structure the negotiations of the parties in order to agree on a settlement. Important is that the mediator is not entitled to offer solutions to the parties. This process of finding a solution has to be done by the parties. The mediator has just a guiding role in this context. The settlement is based on consent of the parties rather than an award, which is forced upon the parties by the arbitrator.¹⁴⁹

The (mediation) settlements have not a final and binding effect and are therefore not enforceable. In fact this can be an advantage and also a disadvantage.

Because the settlement is not directly enforceable, the parties do not have to agree on specific procedures for mediation. This can be very useful because it is not always easy to define a procedure for a future dispute in advance. Sometimes it is easier and faster for companies with a constant business relationship to find a solution without strict rules.¹⁵⁰

The negative effect is that mediation causes an unnecessary delay and higher costs if the parties could not agree on a compromise. It is up to the parties to

¹⁴⁸ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.133; see also Donaldson, 'ADR' (1992) 58 JCI Arb 102.

¹⁴⁹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 16; see also Christian Bühring-Uhle, *Arbitration and Mediation* 175f.

¹⁵⁰ Steven Finizio and Duncan Speller, *Practitioner's Guide* 17.

assess the possible disputes carefully and deliberately if mediation is a realistic solution for it or not.¹⁵¹

2.4.3.3 Conciliation

Article 1 paragraph 3 of the UNICITRAL Model Law on International Commercial Conciliation (2002) defines conciliation as follows:

‘[...] “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.’¹⁵²

Mediation and conciliation are often seen as interchangeable. In fact they are not the same. The responsibilities of a conciliator are broader than those of a mediator. However, the two forms have merged in many disputes.¹⁵³

As mentioned above the mediator just moderates (‘helps’) between the two parties in order to bring them together so that they can find a suitable solution for their problem. On the other hand, a conciliator imposes a solution to the dispute and draws and proposes the terms of a settlement agreement. In the eyes of the neutral conciliator, this proposal is a fair and representative settlement.¹⁵⁴

¹⁵¹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 17.

¹⁵² United Nations, *UNICITRAL Model Law on International Commercial Conciliation* (Guide to Enactment and Use 2002, United Nations, 2004) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 23. February 2015.

¹⁵³ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.134.

¹⁵⁴ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.134; United Nations, *UNICITRAL Model Law on International Commercial Conciliation* 10 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 23. February 2015.

The parties can agree that all the submitted information to the conciliator shall be kept and treated as confidential. The conciliator can disclose information if the law requires it or the conciliator wants to give the other party the chance to explain their side of the submitted information.¹⁵⁵

Settlements based on UNICTRAL ML of Conciliation should be easily and quickly enforceable. If such expedited enforcement procedure is guaranteed depends on each state and the domestic law. At the end of Art 14 of the ML, it says that 'the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement'. This paragraph shows that the purpose of the ML is not to discourage enacting States from imposing requirements on the form.¹⁵⁶

Case Analysis regarding negotiation, mediation and conciliation:

In order to know which method can be used, it has to be assessed which disputes can possibly arise out of a public tender procedure conducted by a private undertaking. In this context, very specific and just a few claims are likely:

1. Claim for awarding the contract
2. Compensation claims

In most of the cases a bypassed bidder who had the best offer will want to get the contract. Under some circumstances also damage payments from the contracting party to the bypassed bidder are conceivable.

If the bidder claims for awarding the contract (1. claim), there is no room and no possibility of a compromise between the contracting party (French investment corporation) and the bypassed bidder. Thus, negotiation and mediation are not

¹⁵⁵ United Nations, *UNICTRAL Model Law on International Commercial Conciliation* Article 9 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 23. February 2015.

¹⁵⁶ United Nations, *UNICTRAL Model Law on International Commercial Conciliation* Article 14, 55 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 23. February 2015.

a real option as an alternative dispute resolution mechanism because a negotiation or mediation settlement is based on a compromise of the parties, which is not possible in this case. There is just one option for claims like this, get all (the contract) or nothing. The same takes effect in the case of conciliation. Mediation and Conciliation are very similar and the only difference is that the conciliator has the right and obligation to propose a fair settlement, which is a compromise between the two sides. Again, there is no room for a compromise when one bidder claims for awarding the contract. Hence, neither mediation nor conciliation is a conceivable option.

On the other hand, when the parties want to regulate the procedure of disputes regarding any damage claims (2. claim), negotiation and mediation could be a convenient option. Here is room for bargaining in contrast to the first claim of awarding the contract.

If the parties agree on negotiation or mediation regarding damage claims arising out of a public tender procedure, they should not forget to regulate the next step. As already mentioned, negotiation or mediation settlements are not binding and if the parties do not carry out the settlement or do not even reach the stage of signing a settlement, they have to arrange the further steps. If the parties have agreed on mediation regarding the claim of awarding the contract, they should also agree on arbitration if mediation does not work out for the damage claims. This strategy is advisable because as a consequence the parties avoid different procedures in different states. The same applies for conciliation.

If mediation or conciliation is better for disputes regarding damage claims arising out of a public tender, depends on the parties. When they deem and believe that they do not need a proposal of a fair settlement by a third person, they will go for mediation (or negotiation). Then, they are more flexible and independent of finding a suitable settlement. If the parties are not sure if they can handle this on their own and want to get some kind of support by drawing

the terms of the settlement, they should opt for conciliation. When both parties are in a long-term business relationship, they should take negotiation or mediation as their dispute resolution mechanism because the consensual element is stronger rather in mediation than in conciliation.

To conclude this case analysis, the parties of the public tendering procedure should decide to use arbitration for claims of awarding the contract. A multi-tier clause for the claim of awarding the contract or for damage claims arising out of such procedures could be beneficial (for further detail see chapter 2.4.3.5.). Mediation and also conciliation for the first instance could secure a healthy business relationship between the parties and furthermore could save time if it works properly. The parties should also be prepared for the worst case. If mediation fails and the on-going business relationship cannot be rescued, the parties should agree on arbitration in advance to save precious time and money in order to avoid national court proceedings in different states under different substantial laws.

2.4.3.4 Expert Determination

Expert determination means that two parties submit a dispute to a reliable third person that is an expert for the disputed question, in order to give an answer to the disputed problem. The parties have to think carefully which disputed question they want to refer to an expert and which not.¹⁵⁷ Expert determination can have different effects on different jurisdictions. Hence, the enforcement of expert determination is more problematic than international commercial arbitration. Nevertheless, the means of expert determination is becoming very popular.¹⁵⁸

An expert does not resolve the whole dispute. The parties refer just one or some specific questions to the expert, which can be just one part of a big

¹⁵⁷ Steven Finizio and Duncan Speller, *Practitioner's Guide* 17; Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 37 see also Ali Yesilirmak, in Ismael Esin and Ali Yesilirmak (eds), *Arbitration in Turkey*, (Kluwer Law International 2015) 26ff.

¹⁵⁸ Steven Finizio and Duncan Speller, *Practitioner's Guide* 17; Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 37.

dispute. In general, the question will be either a discrete or technical question. Examples for such questions are a dispute regarding the valuation of an asset, where special market knowledge is needed. It is also very common to use expert determination in the construction industry. The advantage of that mechanism is that the parties get a rather quick answer to their disputed question from a professional.¹⁵⁹

Expert determination is also important for other industries such as energy, insurance, information science and company mergers and acquisitions, etc. It was used as an ADR method among others in the Channel Tunnel Project, Boston Highway Project, Hong Kong Airport Project and the Bosphorus Rail Tunnel Project.¹⁶⁰

Arbitration can be delimited from expert determination. The arbitral tribunals have to answer many questions regarding legal and factual issues, which comprise the whole case. In addition to the wider scope of arbitration, arbitral awards are final and binding, which is not the case for expert determination.¹⁶¹ They are only binding until they are contested in court or the arbitral tribunal.

The following clause can be used to submit a disputed question to experts:

We, the undersigned parties, hereby agree to submit to expert determination [in accordance with the WIPO Expert Determination Rules] the following matter:

[brief description of the matter referred to expert determination]

¹⁵⁹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 17; Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 37.

¹⁶⁰ Ali Yesilirmak, in Ismael Esin and Ali Yesilirmak (eds), *Arbitration in Turkey* 26ff.

¹⁶¹ Steven Finizio and Duncan Speller, *Practitioner's Guide* 17.

The language to be used in the expert determination shall be [specify language]. The expert shall resolve the dispute within [...] days after either party requested in writing.¹⁶²

Case Analysis:

There are two ways how a public tender procedure could be arranged and conducted.

First option, the contracting party decides to award the contract to the bidder with the lowest offer, which means to the lowest price. Second option, the contracting party has to decide at the beginning of the tender under which criteria the contract will be awarded. The bidder whose offer fulfils these criteria the best receives the contract.

If the contracting company decides to use the first option (lowest bidder principle) for conducting the tender, it is very easy for the contracting party to extract the lowest offer from the others, because the awarding company simply has to compare the prices.

In the second variation, it is not so easy to find the best bidder, as it is the case if you look for the 'lowest bid'. The contracting company has to assess all the offers, which one has the highest level of conformity to the awarding criteria.

The main dispute, which arises out of a public tender procedure, is about the question of who had the best offer ('best bidder'). It is very likely that one or more bidders claim that their offer was the best and therefore the contract should be awarded to them. They are the so-called bypassed bidders.

When a contracting company wants to use the first option, expert determination is not very advantageous and advisable because experts are not needed for

¹⁶² *WIPO Model Clause Expert Determination Existing Disputes English*, Public Source Materials, <<http://www.wipo.int/amc/en/clauses/#19>> accessed 05 March 2015.

cases like this. You do not have to be an expert to find out who the lowest bid had. Furthermore they would just cause a delay until the parties get a final and binding decision from an arbitral tribunal or a national court.

The situation changes, if the parties arrange and conduct the public tender procedure with the principle of best bidder. The risk that the contracting company makes a mistake in the assessment of the bids is much higher in option two than for procedures which are conducted like the first option. Typically such tender procedures contain several criteria and the contracting company uses calculation schemes to evaluate each point. Nevertheless mistakes can occur in the assessment.

Expert determination is very advisable for public tender procedures that follow the best bidder principle. If a bidder has evidence that he had fulfilled the awarding criteria the best, he can submit the case to an expert. The big advantage with expert determination is that the parties can appoint for example a procurement law lawyer or someone who has gained extensive practical experience with such disputes and procedures, as an expert to assess the case and the evaluation of the contracting company.

The problem of confidentiality can also be resolved by using expert determination, because the claimant does not necessarily get access to the bids (offers) of other bidders. Special arrangements regarding the procedure have to be taken.

Even if the decision of the expert is not directly enforceable, it will have a huge influence on the further acting of the claimant (bypassed bidder). If the expert comes to the conclusion that the contracting party assessed the bids correctly, the bypassed bidder will presumably stop at this point and will not file for arbitration. To avoid procedures of national courts, the parties should agree on a multi-tier clause. That means that the parties stipulate that the first stage of dispute resolution is expert determination and the next stage is arbitration.

Arbitral tribunals then have only jurisdiction, if the claimant used expert determination for the first instance. This configuration of a multi-tier clause can save valuable time and money. The claimant and the respondent get a decision from a neutral expert in a flexible procedure within a short period of time.

2.4.3.4.1 Dispute Review Boards / Panel of Experts

Using experts for disputes became very popular in the past, especially for huge international construction projects. The parties of such projects agreed to submit any dispute that arose out of this project to a panel of experts, which consists of more than one expert.¹⁶³

In the Channel Tunnel project, any dispute had to be submitted to a panel of experts before they were allowed to forward it to an arbitral tribunal as the next instance. In the Hong Kong Airport project the participating constructors on it and also on a step-by-step plan with four stages before jurisdiction of arbitration was fulfilled. First the disputed question had to be answered by the engineer himself. If the claimant was not satisfied with the decision of the engineer, he had to start mediation proceedings. This was followed by adjudication and finally the claimant could submit the case to arbitration.¹⁶⁴

In general, the higher the stake and the more complex the case or project is, the more complex are the stages of “appeal”.

‘Panels of Experts’ or also called ‘Dispute Review Boards’ are variations from the classic forms, especially from expert determination. This variation constitutes part of ADR. Once the parties have agreed on their individual

¹⁶³ International Bar Association, *IBA Guidelines for Drafting International Arbitration Clauses* (International Bar Association 2010) 30; Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.145.

¹⁶⁴ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.145; Jean-Claude Goldsmith, Arnold Ingen-Housz, et al., *ADR in Business* 43f; Ali Yesilirmak, in Ismael Esin and Ali Yesilirmak (eds), *Arbitration in Turkey* 26ff.

Dispute Review Board, they are obliged to follow their created rules and steps until they agree to disagree.¹⁶⁵

2.4.3.5 Advisability of Multi-tier Dispute Resolution Clauses

Multi-tier dispute resolution clause means that the parties stipulate to use a mixture of different ADR means for a specified dispute that arises out of the contract.¹⁶⁶

Multi-tier dispute resolution clauses appear in practice more and more frequently, especially in the United States of America and in some European and Asian states.¹⁶⁷ The multi-tier clause stipulates the steps of a future dispute resolution procedure. One possible example can be that the first step is negotiation, the second step conciliation and the third step is arbitration. These provisions are also called 'hybrid dispute resolution clauses'.¹⁶⁸

A careful drafting is essential for multi-tier dispute resolution clauses in order to avoid unnecessary delays and jurisdictional problems. Three things should be regulated in the ADR provision to prevent those negative effects.

First, the parties should make explicit arrangements regarding time limits. It has to be specified after which period of time the parties can resort their dispute to the next stage of ADR. This ensures that the parties cannot abusively cause a delay without any limits. The time limit or the trigger event shall be defined clearly in a way that they are indisputable.¹⁶⁹

¹⁶⁵ Alan Redfern, J. Martin Hunter, et al., *International Arbitration* para 1.146.

¹⁶⁶ Steven Finizio and Duncan Speller, *Practitioner's Guide* 18.

¹⁶⁷ Gary Born, *International Arbitration and Forum Selection Agreements* 100ff.

¹⁶⁸ Rolf Trittmann and Inka Hanefeld, *Arbitration in Germany* 87f; Steven Finizio and Duncan Speller, *Practitioner's Guide* 18.

¹⁶⁹ *IBA Guidelines for Drafting International Arbitration Clauses* 31.

Second, the multi-tier dispute resolution clause should avoid the trap of rendering arbitration permissive, not mandatory. Special attention should be paid to the different meanings of the words like 'may' and 'shall'.¹⁷⁰

Third, the clause should explicitly define the scope of each means. It is very important to define the dispute for each stage with identical terms. The clause shall regulate which disputes have to be resolved by which ADR mechanism. The term "disputes" in the clause should also cover counterclaims in order to avoid different claims in different states. It is very important to draft the scope of multi-tier clauses carefully in order to avoid conflicts.¹⁷¹

Problems could appear in respect to multi-tier dispute resolution mechanisms when it comes to enforcement. Some national courts stated that such clauses do not fall in the scope of the NY Convention, because it is not an agreement that stipulates to submit disputes to arbitration (as it is required in the NY Convention).¹⁷²

Case Analysis:

The case of the French investment corporation which wants to conduct a public tender procedure for a building/construction project starts a step before. Even though the initial case is quite similar to the Channel Tunnel or the Hong Kong Airport Project, the initial assessed case is located prior on the timeline, because public tendering procedures appear before carrying out the project.

Timing and deadlines are always important, but even more in a major and complex constructing project, because of the snowball effect. If something causes a delay in the basement of the building, everything else is not in time. One ground could be a bidder that files a lawsuit including interim measures before a national court with several stages of appeal. To avoid this adverse

¹⁷⁰ IBA Guidelines for Drafting International Arbitration Clauses 31.

¹⁷¹ IBA Guidelines for Drafting International Arbitration Clauses 31; Rolf Trittman and Inka Hanefeld, *Arbitration in Germany* 87f; Steven Finizio and Duncan Speller, *Practitioner's Guide* 18; Gary Born, *International Arbitration and Forum Selection Agreements* 100ff.

¹⁷² Gary Born, *International Arbitration and Forum Selection Agreements* 102f.

situation, it is recommendable to create an individualised procedure that handles the dispute appropriately.

It is the responsibility of the parties to establish such an individualised procedure. In the Hong Kong Airport project they agreed to submit the dispute to the engineer to render a first decision. This mechanism can also be useful for disputes of a public tender procedure, because it makes sense to ask first the contracting company to review the case and the awarding decision. This saves time if the contracting company assessed the case wrongly and the bypassed bidder is indeed the best bidder. If the contracting party comes to the same decision as the first time, the bidder who is aggrieved should have the possibility to appeal this decision by other alternative dispute resolution boards.

The individual dispute resolution procedure has to be adapted to the possible claims. Therefore, it has to be analysed which claims can possibly arise out of a public tender procedure. Two main claims can be found:

- a) Compensation (damage claims)
- b) Awarding the contract

Ad a) Claim for compensation (damage claims):

The multi-tier dispute resolution clause for damage claims can be created as follows:

The parties should agree on the amount of used ADR forms. This depends on how big and complex the project is. It is important that the parties feel comfortable with it.

As mentioned above, negotiation, mediation and conciliation are suitable mechanisms for such claims. The parties can combine the methods or agree on only one of them. Expert determination is in my opinion not very efficient for damage claims. Hence, this stage should be cut out of the procedure. The next instance could be either litigation or arbitration. As already explained

international commercial arbitration is preferable because of its advantageous rather than litigation, although both mechanisms are possible.

The following structure summarizes the recommended stages of appeal for compensation claims arising out of a public tender procedure:

1. Negotiation and/or
2. Mediation and/or
3. Conciliation and/or
4. Arbitration (Litigation)

The following clause can be used in the tender contract for this kind of claim:

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination ('Dispute'), shall be resolved in accordance with the procedures specified below, which shall be the sole and exclusive procedures for the resolution of any such Dispute. Not included are claims of awarding the contract.

(A) Negotiation

The parties shall endeavour to resolve any Dispute amicably by negotiation between executives who have authority to settle the Dispute [and who are at a higher level of management than the persons with direct responsibility for administration or performance of this agreement].

(B) Mediation/Conciliation

Any Dispute not resolved by negotiation in accordance with paragraph (A) within [...] days after either party requested in writing negotiation under paragraph (A), or within such other period as the parties may agree in writing, shall be settled amicably by mediation [conciliation] under the [designated set of mediation/conciliation rules].

(C) Arbitration

Any Dispute not resolved by mediation [conciliation] in accordance with

paragraph (B) within [...] days after appointment of the mediator/conciliator, or within such other period as the parties may agree in writing, shall be finally settled under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules. The place of arbitration shall be [...]. The language of arbitration shall be [...].

[All communications during the negotiation and mediation/conciliation pursuant to paragraphs (A) and (B) are confidential and shall be treated as made in the course of compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]¹⁷³

Ad b) Claim for awarding the contract:

The methods of negotiation, mediation and conciliation are only efficient for damage claims, but not for the claim of awarding the contract. Thus, these methods can be left out.

The first stage should be the reassessment and decision by the contracting party. It should consider the suggested facts and evidence of the bypassed bidder in the decision. If the contracting company comes to the same decision as before, the bypassed bidder should have other stages at his disposal. The dispute procedure should be continued with the ADR mechanism of expert determination. The bypassed bidder receives a decision by an independent expert. He can reassess the decision of the contracting party on a neutral basis. If the parties want to ensure the credibility of the decision, they can also agree on a board of experts. After that stage, they can introduce arbitration (or litigation). Even though it is possible to agree on litigation (and forum selection), it is not recommendable in cases like this, especially because of time pressure and the importance of neutrality.

¹⁷³ based on *IBA Guidelines for Drafting International Arbitration Clauses* 33.

The following structure summarizes the recommended stages of appeal for the claim of awarding the contract that arise out of a public tender procedure:

1. Reassessment & decision by the contracting company and/or
2. Expert Determination (Board) and/or
3. Arbitration

The following clause can be used in the tender contract for this kind of claim:

Any disputes regarding the awarding of the contract that arises out of or in connection with this agreement, shall be resolved in accordance with the procedures specified below, which shall be the sole and exclusive procedures for the resolution of any such Dispute.

(A) Reassessment & Decision by the Contracting Company

The bidder shall submit the dispute regarding the awarding of the contract first to the contracting company. The contracting company reassesses the offer of the submitting bidder and considers the evidences and arguments that were brought forward by the bidder. The contracting company has to render a decision within [...] days after the bidder has submitted the dispute.

(B) Expert Determination (Board)

Disputes regarding the awarding of the contract not resolved by Reassessment & Decision by the Contracting Company within paragraph (A) within [...] days after submitting the dispute to the Contracting Company, or within such other period as the parties may agree in writing, shall be settled by expert determination [board]. The parties appoint one expert by consensus. [The Expert Determination Board consists of three independent experts. Each party appoints one expert. The two appointed experts appoint a third independent expert as a chairman.] The Expert [Determination Board] has to render his [its] decision within [...] days.

(C) Arbitration

Disputes regarding the awarding of the contract not resolved by Expert Determination [Board] in accordance with paragraph (B) within [...] days after appointment of the expert[s], or within such other period as the parties may agree in writing, shall be finally settled under the [designated set of arbitration rules] by [one or three] arbitrator[s] appointed in accordance with the said Rules. The place of arbitration shall be [...]. The language of arbitration shall be [...].

[All communications during the negotiation and mediation/conciliation pursuant to paragraphs (A) and (B) are confidential and shall be treated as made in the course of compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]¹⁷⁴

¹⁷⁴ based on *IBA Guidelines for Drafting International Arbitration Clauses* 33.

3 Case Study: ICC Arbitration Rules

In the last chapter, it will be assessed from a practitioner's point of view, how an arbitration procedure for a public tender conducted by a private undertaking can be established and determined under the ICC Arbitration Rules.

Generally, the parties refer their contract (dispute) in the arbitration agreement to a specific arbitration institution or arbitration rules. Such rules regulate many things but not everything and at least not always in very much detail. Most of the provisions are optional, that means that the parties can provide otherwise.¹⁷⁵ Therefore, it is indispensable for the parties to think about how they presumably want to resolve their potential future dispute. It is advisable to do that at the drafting stage of the contract, because once the dispute has arisen, the parties will struggle to agree on anything.

Two core parts have to be defined in the agreement. First they should agree on a specific framework of arbitration rules, such as UNCITRAL Arbitration Rules or the ICC Arbitration Rules.

After an intensive review of both of them, it can be noted that there are no provisions in both rules that run contrary to the object of an arbitration procedure for a dispute of a public tender. Nevertheless, the provided rules are too general. Hence, they have to be modified for such special procedures in order to reach the goal of a fast and cheap proceeding.

3.1 Individualised Procedure for Arbitration regarding Disputes of Public Tendering Procedure conducted by Private Undertaking

Lowering time and money for the proceedings before arbitral tribunals is always the big aim of the parties. Long and complicated proceedings, unfocused

¹⁷⁵ Rolf Trittman and Inka Hanefeld, *Arbitration in Germany* 85.

requests for disclosure of documents, unnecessary witnesses and expert evidence are the cause why proceedings prolong.¹⁷⁶

Hence, the following points should be considered as a checklist for drafting the arbitration agreements and arranging the procedural plan individualized for arbitration in public tendering procedures conducted by private undertakings that fall not in the scope of the Public Procurement Directive. There are also other possibilities to shorten the process but are not suitable for this special dispute. The following list is focused especially on disputes arising out of the case previously assessed.

3.1.1 Pre stage: Drafting of the Agreement to Arbitrate

1. “Keep it short and simple”

The scope of arbitration shall be defined very clearly in order to avoid delays through unnecessary disputes regarding jurisdiction.

It is recommendable to use model clauses for submitting disputes to an arbitration institution. The ICC formulated their clause as follows:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.¹⁷⁷

Even though this clause is very clear it is not recommended for disputes that arise out of a public tender conducted by a private undertaking, because it does not distinguish between the claim of awarding the contract and compensation claims (see therefore chapter 2.4.3.5).

In every case but especially in an international one, it is very important that the parties make clear that counterclaims are included in the word “all

¹⁷⁶ ICC Commission Report, *Controlling Time and Costs in Arbitration* 6.

¹⁷⁷ ICC, *Arbitration Rules, Mediation Rules* 68.

disputes". Special care of drafting should be taken if the parties wish to modify the model clause.¹⁷⁸

2. Number of Arbitrators

The parties are allowed to agree on one or three arbitrators. The parties will agree on a three-member tribunal, if the value of the contract is very high or the dispute rather complex. If it is a smaller dispute, also a sole arbitrator will be satisfactory and cheaper as well. The parties should agree on a specific sole arbitrator in advance when drafting the contract. Once the dispute has arisen, it will be almost impossible to agree on a sole arbitrator. Another option is to delegate that task to the arbitration institution. Both variations are thinkable. It is definitely not recommendable to agree on a sole arbitrator who will be selected and appointed by the parties jointly after the dispute has arisen.¹⁷⁹

3. Language

The parties should also agree on the language of arbitration proceedings in advance otherwise the arbitral tribunal would determine it (Article 20 ICC Arbitration Rules). This could lead to an unwanted situation of the parties. In general, the parties should use the same language as they have used for the contract. Therewith, the parties save time and money for translation. In addition, translation errors can be avoided. Agreeing on two or more languages is unadvisable. The parties should agree on the common language if it is possible.¹⁸⁰

4. Fast-track procedures

Article 38 (1) ICC Arbitration Rules¹⁸¹ empowers the parties to shorten the time limits in the procedure. This makes sense for disputes where an enforceable award is needed in a short period of time, like in the initial case

¹⁷⁸ ICC Commission Report, *Controlling Time and Costs in Arbitration* 6.

¹⁷⁹ ICC Commission Report, *Controlling Time and Costs in Arbitration* 6.

¹⁸⁰ ICC Commission Report, *Controlling Time and Costs in Arbitration* 6ff.

¹⁸¹ ICC, *Arbitration Rules, Mediation Rules*.

of a public tendering procedure conducted by a private undertaking. Even though the parties have this right of limiting the time, paragraph 2 of Article 38 restricts paragraph 1 and says, 'the Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 38 (1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.'

Fast-track procedures are in line with the idea that arbitration is a quick and cheap procedure. Although the problem is that the parties do normally not know what kind of specific dispute will arise out of the contract and struggle therefore with setting time limits in advance.¹⁸² This is not the case for disputes arising out of a public tender procedure. The main claims of the bypassed bidder are the award of the contract or compensation. Thus, the parties can foresee what disputes can arise and arrange a suitable procedure for it.

5. Time limits for the arbitrator

Parties can also agree on a specific timeframe until the arbitrators have to render the final and binding award. Jurisdictional and enforcement problems can appear when the time limit was set too short.¹⁸³ The arbitrators under the ICC Arbitration Rules can prolong such short limits if necessary.

3.1.2 Commencement of the Arbitration Procedure

1. Counsel

Two things are crucial for the choice of a counsel. First, he has to be well experienced in international commercial arbitration as such and also in the substantial law of the dispute. Second, availability of the counsel. He will not be able to handle the case within a short time if he is overloaded with other

¹⁸² ICC Commission Report, *Controlling Time and Costs in Arbitration* 6.

¹⁸³ ICC Commission Report, *Controlling Time and Costs in Arbitration* 7.

mandates and clients.¹⁸⁴ The challenge consists of choosing a wise but also an available council as your representative.

2. Arbitrator

a) Number of Arbitrators (see 3.1.1.2)

b) Time & Knowledge

Not only the amount of arbitrators is important to save time and money. Special care should also be taken of the fact that the arbitrator has to have experience with such disputes and has to be available, too. It is the same problem as with counsels. If the arbitrator is too busy (because he is well known) and, therefore, incapable of arranging meetings and hearings within short intervals, the proceedings will be delayed.¹⁸⁵

c) Objections

The parties should always be aware of the fact that it is better to appoint totally independent arbitrators for the matter of time. If the other party has serious doubts of the impartiality and independence of arbitrator, they will object to him. Challenge procedures will follow after the award that delay the whole process.

3. Request & Answer for Arbitration

It is up to both parties to avoid unnecessary delays. The claimant shall ensure that his request for arbitration covers all mandatory points required by Article 4 (3) (a) – (h) ICC Arbitration Rules. The same applies to the respondent, his answer should also include all the required information (Article 5 (1) (a) – (f)) ICC Arbitration Rules.¹⁸⁶

Even though a full statement of the case is not obligatory, it has a significant influence on the case management of arbitration. Arrangements by the

¹⁸⁴ ICC Commission Report, *Controlling Time and Costs in Arbitration* 7.

¹⁸⁵ ICC Commission Report, *Controlling Time and Costs in Arbitration* 7f.

¹⁸⁶ ICC Commission Report, *Controlling Time and Costs in Arbitration* 8.

parties as well as by the arbitral tribunal regarding the procedure can be more easily when all participants are fully aware of the dispute. Therewith, unnecessary repetitions can be avoided and, in addition, the arbitral tribunal can determine it as illegal.¹⁸⁷

3.1.3 Framework of the Arbitration Procedure

1. Terms and Reference

a) Empowering the President for Procedural Orders

If the parties have agreed on a three member tribunal, they can empower the chairman to decide certain procedural orders alone. Therewith, unnecessary consolidations and votes are circumvented.¹⁸⁸

b) Physical Attendance

Another possibility is to stipulate that physical meetings are not required. Other forms of communication like telephone or videoconferences replace the physical attendance. This is beneficial regarding time and costs, because it saves travel costs and it will be easier to find a time slot of hours for meetings than to find days or a full week to meet.¹⁸⁹

2. Meeting for Case Management

a) Timing

It is also in the responsibility of the parties to structure the meetings as short as possible. In best case, they combine the signing of the terms of reference with the case management meeting or at least shortly after. To avoid a delay of the case management meeting, the parties should prepare proposals regarding case management. The ICC provides special case management techniques in order to agree on an appropriate procedure.¹⁹⁰

¹⁸⁷ ICC Commission Report, *Controlling Time and Costs in Arbitration* 8ff.

¹⁸⁸ ICC Commission Report, *Controlling Time and Costs in Arbitration* 9.

¹⁸⁹ ICC Commission Report, *Controlling Time and Costs in Arbitration* 9.

¹⁹⁰ ICC Commission Report, *Controlling Time and Costs in Arbitration* 9f.

b) Attendance of the Parties

It is allowed under Article 24 (4) of the ICC Rules that the parties are represented by their counsels. In some cases it is even better to ask for attendance of the clients in order to agree upon suitable case management rules. Mostly, the parties themselves know the facts of the case the best, this could be a big contribution.¹⁹¹ Another advantage of the attendance of the parties is that the counsels could immediately deliberate with their clients. Maybe the parties also agree on ADR mechanisms and stop the procedure before the arbitral tribunal.

3. Timetable

a) Compliance

Once the parties have agreed on a specific procedural timetable, they should also follow and comply with it to save valuable time. Each party should inform the arbitral tribunal immediately if something disturbs the timetable.¹⁹²

b) Hearing

If hearings are not necessary to decide the case, they should be cut out.¹⁹³ This is the case for public procurement claims. The bypassed bidder and the contracting party could send their documents to the arbitral tribunal. The bidder submits his offer and the contracting party the offer of the bidder who has got the award decision. A decision based only on documents is possible and saves a lot of time.¹⁹⁴

c) Informing involved People

The parties should inform all involved people about the deadlines of the timetable as soon as possible, e.g. employees that have to provide and prepare information and documents for the dispute, and also the

¹⁹¹ ICC Commission Report, *Controlling Time and Costs in Arbitration* 10.

¹⁹² ICC Commission Report, *Controlling Time and Costs in Arbitration* 10.

¹⁹³ ICC Commission Report, *Controlling Time and Costs in Arbitration* 10.

¹⁹⁴ ICC Commission Report, *Controlling Time and Costs in Arbitration* 10f.

witnesses about the hearing dates in time, etc. A smooth process is thereby secured.¹⁹⁵

4. Settlement

The arbitral tribunal can also inform the parties during the proceedings that they can settle their dispute also through negotiation or other means of ADR. Therefore, the tribunal can also suspend the procedure for a specific period of time.¹⁹⁶

As already mentioned, settlement is only thinkable for the compensation claims of the bidder, because there is space for negotiation and a compromise. This is less likely the case for claims regarding the award of the contract.

3.1.4 Procedure

1. Submission

It is indispensable to agree on the form, content, length and the number of submissions. Especially the last point is essential. The longer the submissions, the more time it takes and unneeded arguments are brought forward which only cause confusion. If the length and number of submissions is shortened, the parties will focus on their main arguments, this prevents repetition.¹⁹⁷

Sequential or simultaneous delivery is also a form to save time but it should be avoided as much as possible. Both parties cannot work sufficiently if they deliver their submission without consideration and replying to the arguments of the counterparty. It can be compared with the situation of a discussion between two people who discuss their topic in separate rooms, which is then a monolog and no longer a discussion.¹⁹⁸

¹⁹⁵ ICC Commission Report, *Controlling Time and Costs in Arbitration* 11.

¹⁹⁶ ICC Commission Report, *Controlling Time and Costs in Arbitration* 11.

¹⁹⁷ ICC Commission Report, *Controlling Time and Costs in Arbitration* 11ff.

¹⁹⁸ ICC Commission Report, *Controlling Time and Costs in Arbitration* 11.

2. Documents

Producing documents is always a delicate topic. The parties should consider that each request for documents takes a lot of time. Two things could narrow this problem down. The number of requests could be limited or only requests are permitted if the documents are relevant material in regard to the outcome of the case. Requests for documents with a subsidiary content should be cut out.¹⁹⁹

Parties should only submit documents and correspondence to the arbitral tribunal if they are relevant for the case and the decision. Not every requested document from the other party should be forwarded to the arbitrators.²⁰⁰

All necessary documents should be distributed in electronic form. Many options are available for it, such as electronic data rooms.²⁰¹

3. Witnesses

The number of witnesses (statements) should be limited to those whose evidence is required on key issues where they are indispensable.²⁰² For the initial cases, the examination of witnesses can be waived because the bids (offer) are the main evidence. Even though witness statements are indispensable in some cases, such as in cases of collusion.

4. Experts

If the parties have agreed on professionals as arbitrators, the number of experts can be limited. If the arbitral tribunal has special knowledge in procurement law, experts are not needed. They should only be permitted in exceptional circumstances.

¹⁹⁹ ICC Commission Report, *Controlling Time and Costs in Arbitration* 12.

²⁰⁰ ICC Commission Report, *Controlling Time and Costs in Arbitration* 12.

²⁰¹ ICC Commission Report, *Controlling Time and Costs in Arbitration* 12.

²⁰² ICC Commission Report, *Controlling Time and Costs in Arbitration* 13.

5. Hearings

Parties can waive hearings if the dispute is about awarding the contract. Mostly a document-based procedure can also be sufficient. If the parties feel uncomfortable with that, they can streamline the hearings in order to save time and costs. The parties should choose oral hearings when the dispute is about compensation claims.

The following points have to be considered in order to streamline the oral hearings:

- Limiting the number and length of hearings
- Location of hearings (place of arbitration is not always preferable)
- Telephone / video conferences
- Cut-off date for evidence
- Identifying core documents
- Timetable and agenda²⁰³

3.1.5 Post Procedure Stage

1. Allocation of Costs

Article 37 (5) of the ICC Arbitration Rules states that the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.’

That means the arbitral tribunal has discretion regarding costs, if one party failed to comply with the procedural timetable, had excessive document requests, cross-examination, unreasonable number of requests of document production etc. The arbitral tribunal should expressively inform the parties how it will allocate the costs in the award at the end of the proceedings in order to create foreseeability.²⁰⁴

²⁰³ ICC Commission Report, *Controlling Time and Costs in Arbitration* 13ff.

²⁰⁴ ICC Commission Report, *Controlling Time and Costs in Arbitration* 15.

2. Time limits for the arbitrator

As already mentioned, the parties should agree on a specific timeframe until when the arbitrators have to render the final and binding award. If the limits are too short, the arbitral tribunal has discretion and can extend these limits if necessary pursuant to Article 38 (2) ICC Arbitration Rules²⁰⁵

3.1.6 Summary

Arbitral proceedings can be adapted, as it is necessary and efficient for the specific dispute. Litigation procedures before a national court are rigid compared to arbitration. Such modifications of fast track or streamlined procedures, as mentioned above, are usually not permitted. If a quick final and binding decision is needed, the parties of a dispute should use and profit from the possibilities of arbitration. The described points show how flexible arbitration can be, especially the ICC Arbitration Rules. The arbitration procedure should be adapted, as required for the specific dispute, e.g. document based procedure without oral hearings for claims regarding the award of the contract and streamlined and shortened oral hearing procedures for compensation claims arising out of such a contract of public tendering procedure.

²⁰⁵ ICC Commission Report, *Controlling Time and Costs in Arbitration* 7.

4 Conclusion

Within the last 20 years, procurement law has changed enormously in Austria as well as in many other European member states. Before the access to the EU, Austria used the ÖNorm A 2050 for all public tenders of the state. The judicial protection was before national civil courts and not very efficient.

The problem of an efficient legal protection is now resolved when the contracting party is an authority, because of the Public Procurement Directive (implemented by Federal Procurement Act) under which efficient review procedures are applicable. However, the situation has not change for disputes that arise out of a public tendering procedure conducted by a private (not state owned) company. Those disputes still have to be brought before a national civil court.

The problem is the following: Private undertakings are (at least in Austria) not or only under specific (limited) circumstances obliged to conduct a public tender. Even if they are not obliged to conduct it, the EU welcomes it, if a company follows the rules voluntarily because it is in line with the internal market, EU competition law as well as with EU state aid law. The idea is to have a free flow of goods and services at a competitive price with innovative features. Nevertheless, the European Union did not cover private undertakings in the Public Procurement Directive and enact also no other directive or regulation regarding this topic, either.

The big question now is, why should a private undertaking conduct a public tender procedure, when they are not obliged by EU law and not by national law either, and have these big procedural disadvantages. Claims could arise out of the public tender procedure, which would hinder the project, because national civil courts need a long time until a final and binding decision is rendered.

The answer lies in the following two reasons. First, the chance to get a better offer, to a lower price is much higher when the awarding undertaking conducts a public tender procedure than if it just asks some individual undertaking for offers. Second, sometimes they are obliged by the parent company to do so (compliance rules).

The problem of the ineffective legal protection by the national civil courts, such as long proceeding period, rigid and inflexible procedure, etc., has to be solved in order to increase the willingness of private undertakings to voluntarily conduct a public tender procedure.

The EU Commission said that the judicial protection also has to be ensured for contracts that do not fall in the scope of the Public Procurement Directive.²⁰⁶ In my point of view, for the time being, this judicial protection is not or only partially given in Austria and the EU. National court proceedings are not designed for such special disputes. They are ineffective and slow compared to the review proceedings that are based on the Public Procurement Directive. There is also no justification, why a review procedure for a public tender conducted by a private undertaking, should take longer than the review procedure for public tender conducted by an authority. Only the awarding party changed, which does not justify the differentiation in the procedure.

This phenomenon can be recognized all over Europa. As far as I can see, there are no efforts from the EU legislator to resolve these problems in the near future. Therefore, a suitable solution has to be created to handle the problem. This master thesis deals with that issue and ADR mechanisms have been assessed.

²⁰⁶ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02 [2006] OJ C 179/2.

The following part gives the answers to my research questions:

First question: Are ADR mechanisms more advantageous than litigation for public tender procedures conducted by private undertakings that do not fall in the scope of the Public Procurement Directive?

The ADR form of arbitration is in my view a real and good option for disputes of a public tender procedure conducted by a private undertaking. It has advantages as well as disadvantages, but the former outnumber the latter. The most important advantages can be summarized and highlighted:

- **Enforceability:** Arbitral awards are enforceable in about 150 states if that state has joined the New York Convention. Any decision is useless if it is not enforceable in the state where the respondent has (all) his assets. The EU enacted regulations that solve this problem on a European level, but only for judgments of national courts. Problems arise when the respondent has just a branch in Europe, but the rest of the assets of the corporation is from abroad. The New York Convention captures this problem in arbitration properly.
- **Neutrality:** In international commercial arbitration, the parties do not have to fear that the decision making body is biased, partisan or parochial. It is up to the parties to appoint an arbitrator (depending on how they arranged it in the arbitration agreement) and to agree on the *lex arbitri*. These mentioned fears are groundless, if the proceedings are accomplished in a neutral state with neutral decision makers.
- **Flexibility:** The parties are flexible in adopting a suitable procedure for their dispute in international commercial arbitration. They can agree on fast-track or streamlined procedures and have big influence on the case management. This flexibility (if used in good faith) automatically leads to an efficient and custom-made procedure that saves valuable time and money for both disputing parties (see chapter 3 for further details).

- Confidentiality: The parties do not have to worry about disclosing confidential information, because the public (listeners, press, etc.) is excluded from the whole proceedings. That means that no one else than the parties are allowed to attend the procedure (oral hearings, etc.). The term confidentiality additionally covers the problem of disclosing information by the other party. Both parties are not allowed to make any content of the dispute public (if they agreed upon).

Three sub questions:

- Which mechanism/s is/are the best to deal with the situation?
- What are the differences between them and which one can be used and which one should be avoided or excluded?
- Is a combination of different ADR forms possible (multi-tier dispute resolution clauses)?

It should not be forgotten that arbitration is not the only ADR mechanism. There are also other forms such as negotiation, mediation, conciliation, expert determination, dispute review boards and hybrids. Each of them has advantages and disadvantages and it always depends on the individual case and dispute if they should be used or not. The main difference between the different forms is that only arbitration is binding and enforceable. All other forms are only binding on a contractual basis, but do not constitute a writ of execution.

Multi-tier dispute resolution clauses become more and more popular, especially in the construction industry (as it is the case for the initially assessed case). The term means that there is a step-by-step plan how and by whom the dispute can be resolved (successive competence/jurisdiction).

Two kinds of disputes are likely to arise out of a public procurement case (conducted by a private undertaking):

- a. Claim for awarding the contract
- b. Claim for damages / compensation

Multi-tier clauses have to be adjusted and adapted to the individual claim/dispute. From my point of view, the parties should agree on the following procedural steps.

Ad a.: Claim for awarding the contract

1. Reassessment & decision by the contracting company and/or
2. Expert Determination (Board) and/or
3. Arbitration

The reassessment of the offers by the contracting party is indispensable in such disputes. Maybe the contracting party has overlooked some aspects in the offers. The bypassed bidder can argue why he believes that he was the best-bidder and the contracting company can consider these arguments in the review procedure as a first instance. Valuable time and money can be saved if the bidder was right and the contracting company could correct its decision, rather than having tedious proceedings before a national court or arbitral tribunal. The next stage is expert determination and it can also be very effective because specialists, who are well experienced in that field, can render the decision within a shorter period of time. If the dispute could not be settled with these first two stages, arbitration is still available as a last consequence.

Ad b.: Claim for damages / compensation

1. Negotiation and/or
2. Mediation and/or
3. Conciliation and/or
4. Arbitration (Litigation)

Not every mechanism has to be used for resolving the dispute. This will depend on the size and complexity of the disputed question. The bigger the stake, the higher is the number of stages to resolve the issue. The parties should agree on a reduction of stages, such as conciliation and arbitration, when time plays a

decisive role and the business relationship between both parties is irreversibly destroyed.

Recommendable multi-tier dispute resolution clauses, which can be used for claims regarding the awarding of the contract or for compensation claims, can be found in chapter 2.4.3.5.

Last but not least, it also has to be noted that the parties have to take special care of the question of defining the dispute. If the parties agree on ADR mechanisms for resolving their disputes, it is crucial that they make clear that the term dispute covers also counterclaims. If those counterclaims are not covered by the arbitration clause, most advantages of ADR, especially of arbitration disappear.

Another sub question was:

- How to streamline and create fast-track proceedings in arbitration for public tendering procedure conducted by a private undertaking.

Chapter 3 deals with the structure of the arbitral proceedings in more detail. It especially analyses the case of a public tender conducted by a private undertaking. Many variations are possible, such as time limits, limiting the amount of submissions, waive oral hearings and meetings, etc. The flexibility of arbitration proceedings permits that the parties can agree on fast proceedings and create a custom-made procedure which handles the dispute properly. This constitutes a main advantage of arbitration in contrast to litigation, where the procedure is rather rigid and long.

Research question:

Are alternative dispute resolution mechanisms in case of a public tender conducted by private undertakings in the EU advisable and more advantageous than national courts?

To conclude, the following answer can be given to the main research question:

ADR mechanisms are advisable for such disputes. As explained above, potential negative aspects and lacks of the legal protection by state courts can be reduced and rectified by ADR (especially by international commercial arbitration and multi-tier dispute resolution clauses). The advantages of ADR outweigh the disadvantages. To go one step further, the disadvantages are even neglectable in this specific circumstance when they are compared to the advantages. The result is that the parties are able to compile their own custom-made procedure, which leads to an effective legal protection that in addition saves time and money.

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Abstract (English)

Contracting authorities²⁰⁷ are obliged by the Public Procurement Directive (in Austria implemented by the Public Procurement Act²⁰⁸) to conduct a public tender if they want to award a public contract of works, supplies or services. If private undertakings are also obliged to conduct a tender by private law depends on the jurisdiction of each member state. This question is still not finally answered in Austria.²⁰⁹

Nevertheless, private undertakings face a lot of procedural problems if they decide to voluntarily tender contracts. National civil procedure law applies which is not designed for such procedures and therefore, has many disadvantages compared to the review proceedings of the Public Procurement Directive, such as long duration until the parties get a final and binding decision.

In cases like these, the effective legal protection (as demanded from the European Commission²¹⁰) of a bypassed bidder is doubtful under national private law. That is not a desirable situation for both, the contracting undertaking and the bidders. In my point of view litigation before national courts does not constitute an adequate legal protection.

Hence, this master thesis examines if alternative dispute resolution mechanisms are useful and desirable for contracting companies. It examines the advantages and disadvantages in such cases, difficulties in this context and problems in national civil law procedures and how a private undertaking could avoid these adverse facts.

²⁰⁷ Article 2 (1) (1) Public Procurement Directive.

²⁰⁸ *Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 2006 – BVergG 2006)*, Federal Law Gazette I 17/2006.

²⁰⁹ Heinz Krejci, *Die Auftragsvergabe durch private Unternehmen* (bauaktuell 2011, magazine 3) 82ff.

²¹⁰ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02 [2006] OJ C 179/2.

The main research question was the following:

Are alternative dispute resolution mechanisms in case of a public tender conducted by private undertakings in the EU advisable and more advantageous than national courts?

The following answer can be given to the main research question:

ADR mechanisms are advisable for such disputes. As explained in the master thesis, potential negative aspects and lacks of the legal protection by state courts can be reduced and rectified by ADR (especially by international commercial arbitration and multi-tier dispute resolution clauses). The advantages of ADR overweight the disadvantages. To go one step further, the disadvantages are even neglectable in this specific circumstance when they are compared to the advantages. The result is, that the parties are able to compile their own custom-made procedure, which leads to an effective legal protection that in addition saves time and money.

Abstract (German)

Öffentliche Auftraggeber²¹¹ sind aufgrund des Bundesvergabegesetzes verpflichtet, für bestimmte Aufträge (Bauaufträge, Lieferaufträge, Dienstleistungsaufträge, Baukonzessionsverträge) ein Ausschreibungsverfahren durchzuführen. Nicht öffentliche (private) Unternehmen hingegen unterliegen nicht dem Regime des Bundesvergabegesetzes²¹² und sind deshalb nicht oder nur teilweise nach Privatrecht verpflichtet, ein Ausschreibungsverfahren durchzuführen. Diese Frage ist für Österreich noch nicht abschließend geklärt.²¹³

Sollten nicht-öffentliche Auftraggeber trotzdem ausschreiben – sei es freiwillig, sei es aufgrund einer gesetzlichen Verpflichtung –, kommt nationales Privat- und Zivilprozessrecht zur Anwendung. Zivilprozesse haben im Vergleich zu Nachprüfungsverfahren nach dem BVergG wesentliche Nachteile, wie zB lange Verfahrensdauer, bis die Parteien ein rechtskräftiges und vollstreckbares Urteil erhalten.

Die Europäische Kommission fordert in einer ihrer Mitteilungen, dass auch für Verträge, die nicht dem BVergG unterliegen, ein effektiver Rechtsschutz gewährleistet sein muss. Dies ist mE nicht oder nur teilweise gegeben, da nationale zivilprozessrechtliche Regelungen sehr unflexibel und deshalb für ein Nachprüfungsverfahren ungeeignet sind.

Aus diesem Grund beschäftigt sich diese Master Thesis mit der Frage, ob alternative Streitbeilegungsmethoden verglichen mit nationalen Zivilprozessen nützlich und eventuell auch vorteilhafter sind. Es wird auf die Vor- und Nachteile der alternativen Streitbeilegungsmethoden für Ausschreibungen von nicht-

²¹¹ Article 2 (1) (1) Public Procurement Directive.

²¹² *Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 2006 – BVergG 2006)*, Federal Law Gazette I 17/2006.

²¹³ Heinz Krejci, *Die Auftragsvergabe durch private Unternehmen* (bauaktuell 2011, magazine 3) 82ff.

öffentlichen Auftraggebern in der EU eingegangen, deren Schwierigkeiten in diesem Zusammenhang dargestellt, Probleme auf zivilrechtlicher Ebene aufgezeigt und anschließend Lösungen für diese Fragen geboten.

Die Forschungsfrage lautet wie folgt:

Sind alternative Streitbeilegungsmethoden für Fälle der öffentlichen Ausschreibung durch nicht-öffentliche Auftraggeber in der EU ratsam bzw vorteilhafter als die Streitbeilegung durch nationale Gerichte?

Die Antwort auf die Forschungsfrage lautet wie folgt:

Alternative Streitbeilegungsmethoden sind mE ratsam und vorteilhafter für Streitigkeiten aus Ausschreibungsfahren von nicht-öffentlichen Auftraggebern. Wie in der Master Thesis ausgeführt, sind nationale Zivilprozesse für solche Verfahren nicht adäquat und somit ist der effektive Rechtsschutz nicht erfüllt. Durch alternative Streitbeilegungsmethoden – im Speziellen durch internationale Schiedsgerichtsbarkeit und sogenannten Multi-tier Dispute Resolution Klauseln – können die Nachteile von Zivilverfahren reduziert und korrigiert werden. Die Vorteile der alternativen Streitbeilegungsmethoden überwiegen gegenüber den Nachteilen. Man könnte sogar sagen, dass die Nachteile für diese Art von Ausschreibungen kaum zum Tragen kommen und deshalb vernachlässigbar sind.

Im Ergebnis kann festgehalten werden, dass die Parteien durch alternative Streitbeilegungsmethoden in der Lage sind, ein individualisiertes Verfahren zu vereinbaren, welches für den Streitfall optimal geeignet ist, Zeit und Ressourcen spart und somit einen effektiven Rechtsschutz gewährleistet.

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