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List of Abbreviations

Abbreviation	Definition
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
the UK	the United Kingdom of Great Britain and Northern Ireland (the United Kingdom)
DIS Rules	2018 DIS Arbitration Rules (of the German Arbitration Institute)
UK Arbitration Act	Arbitration Act 1996 (of the United Kingdom)
Model Law	UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006

Introduction

In a current fast-developing world, legal entities are consistently growing, developing and innovating on a daily basis. Due to a globalisation, they are now able to internationally evolve into other jurisdictions and offer their cross-border goods and services, whilst not being confined to their national territory. However, this free movement of goods and services also comes with a cost of keeping up and obliging with certain legal requirements of each country into which the legal entity evolves, as well as with some generally accepted norms and principles of an international law.

But when the legal entity grows and expands its portfolio internationally, it is often due to a business deal with another entity or a natural person. In this case, it is very important for the parties at hand to conclude a written agreement governing their business relationship. Otherwise, in case of a verbal agreement or no-agreement at all, things can turn sour very quickly and even a small disintegration between the parties may often lead to a long-term legal dispute. Especially in cases of international disputes, written agreements should be at a core of any legal / business relationship between two (and more) parties, because once they have a falling-out, they should have a clear idea as to the specific dispute resolution method which should then follow – that often being an international arbitration.

Arbitration, as an alternative-dispute resolution, has already existed many centuries ago, long before any courts or judges established the principles of law.¹ Especially nowadays, arbitration is thought to be something new, when it actually already existed during a most ancient society – for example, arbitration was commonly used among Phoenician or Greek traders, or during a time of Marco Polo.² The arbitration was used to resolve any types of controversies based on a principle of self-regulation – when individuals could not resolve their dispute based on a friendly agreement, they turned to a third-person, whom they knew and trusted, so as to obtain a final decision by which they would abide in order to resolve their controversy.³ Nowadays, this core principle of the arbitration still prevails, as a basis of a modern democratic society, since legal entities voluntarily and independently decide to submit

¹ Frank D. Emerson, 'History of Arbitration Practice and Law' (1970) 19(1) *Cleveland State Law Review* <<https://core.ac.uk/download/pdf/216936738.pdf>> accessed 24 June 2022, 155ff (History of Arbitration Practice and Law).

² *ibid.*

³ Nigel Blackaby and others, *Redfern and Hunter on International Arbitration: Student Version* (6th edn, Oxford University Press 2015) 4 (*Redfern and Hunter on International Arbitration: Student Version*).

their dispute/s to the arbitration, in order to ensure that it is resolved by an independent and impartial third-persons.⁴

International arbitration is nowadays the most popular method for resolving cross-border international disputes⁵ and according to an ICC Statistics for 2020, the popularity of the arbitration has been continuously growing in the past few years, whether it being a state-to-state or a commercial dispute.⁶ For example, in 2020, ICC recorded a highest number of new cases under its ICC Arbitration Rules, particularly 929 new filings.⁷ Nowadays, legal entities choose the arbitration, as their alternative-dispute resolution method, for the many advantages that it offers – namely a confidentiality, a preservation of a business relationship/s, an ability to arbitrate within a single forum (reduced financial costs, consistent results, faster resolution of a dispute), a party autonomy (an ability to choose a governing law, an arbitral tribunal, a language of the dispute, etc.) and an enforceability and finality of the arbitral tribunal's decision.⁸

However, in order for the arbitration to be the most effective dispute resolution method for the parties concerned, it is incredibly crucial that a written arbitration agreement, or at least an arbitration clause within a general commercial agreement, is concluded.⁹ Thus, the arbitration agreement is an essential foundation of any arbitrable dispute.¹⁰ Once such agreement is concluded, arbitration helps the parties to overcome many issues, which are “*inherent in other dispute resolution alternatives*”.¹¹ Furthermore, in addition to the arbitration agreements, the effectiveness of the arbitration is also strengthened due to a fact that there are nowadays 170 parties to a United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”).¹² The New York Convention fights a resistance of the national courts to acknowledge decisions of the arbitral tribunals, as any signatory party to the Convention must give effect to the arbitration agreement, as well as enforce and recognize the arbitral awards.¹³ Thus, the arbitration agreements, in conjunction

⁴ History of Arbitration Practice and Law (no 1).

⁵ Gary Born and Wendy Miles, ‘Global Trends in International Arbitration’ (*Wilmer Cutler Pickering Hale and Dorr LLP*) <<https://biblioteca.cejamericas.org/bitstream/handle/2015/812/Global-Trends-in-International-Arbitration.pdf?sequence=1&isAllowed=y>> accessed 24 June 2022 (Global Trends in International Arbitration).

⁶ International Chamber of Commerce, ‘ICC Dispute Resolution Statistics: 2020’ (2021) <<https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/>> accessed 24 June 2022 (ICC Dispute Resolution Statistics: 2020).

⁷ *ibid.*

⁸ Global Trends in International Arbitration (no 5).

⁹ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 72.

¹⁰ *ibid.* 71.

¹¹ Global Trends in International Arbitration (no 5).

¹² ‘The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958: Contracting States’ <<https://www.newyorkconvention.org/countries>> accessed 24 June 2022.

¹³ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 73.

with the New York Convention, ensure that the parties' needs and expectations with regards to a predictability and a flexibility of their arbitration are fulfilled.

As mentioned previously, the arbitration agreement is the foundational basis of every single arbitration.¹⁴ The agreement represents an indispensable consent, which is mandatory for any alternative-dispute resolution process, but is not required in cases of national litigation.¹⁵ Arbitration agreements, in cases of an international commercial arbitration, will be the main focus of this Thesis. The term "international" covering disputes which are not exclusively domestic / national, and which in some way transcend beyond the national boundaries – thus, transnational disputes.¹⁶ Moreover, the term "commercial" covering disputes which have a commercial nature, irrelevant of a fact whether they are contractual or not.¹⁷

But why are arbitration agreements so essential for the parties and their legal dispute? An incomplete and/or ill-drafted arbitration agreements, so-called pathological clauses, can disrupt the smooth process of arbitration and can further result in a series of additional and unwanted disputes¹⁸, ranging from jurisdictional issues to challenges at the stage of enforcing the arbitral awards.¹⁹ Not only do these unnecessary battles result in a more time-consuming disputes, but they also give rise to an extremely higher arbitrable costs. Thus, robbing the parties of the arbitral advantages, which must have been a primarily reason why the parties chose this alternative-dispute resolution method.

Nevertheless, the parties must keep in mind that the arbitration is indeed a private way of resolving a dispute, based on a consensual contractual agreement between the parties themselves.²⁰ Thus, a jurisdiction and a power of the arbitral tribunal, preceding the jurisdiction of national courts, does rely on a valid and a workable arbitration agreement.²¹ The incomplete and/or ill-drafted arbitration agreement may often lead to a scenario that the parties wanted to steer clear of – a national litigation – all of which could be avoided by a well-drafted arbitration agreement. Thus, the parties must realize that the arbitration agreements lay down the rules of

¹⁴ *ibid.* 71.

¹⁵ *ibid.*

¹⁶ *ibid.* 7.

¹⁷ *ibid.* 11.

¹⁸ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 136/137.

¹⁹ *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5.

²⁰ Andrea Marco Steingruber, 'The Mutable and Evolving Concept of "Consent" in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of "Consent"' (2012) Oxford U Comparative L Forum 2 <<https://ouclf.law.ox.ac.uk/the-mutable-and-evolving-concept-of-consent-in-international-arbitration-comparing-rules-laws-treaties-and-types-of-arbitration-for-a-better-understanding-of-the-concept-of/#fn32sym>> accessed 24 June 2022 (The Mutable and Evolving Concept of "Consent" in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of "Consent")

²¹ *ibid.*

play in case of the arbitration, as the alternative-dispute resolution method. And that without such rules, there can be no valid and effective arbitral battlefield – often leaving the parties with an only choice, resolving their dispute through the national litigation.

Conclusively, this Thesis will focus on a general arbitration agreement in the international commercial arbitration, so as to highlight an importance of its complete and well-drafted foundation. More specifically, this Thesis will particularly discuss two legal questions – mandatory contractual requirements and fundamental provisions of the general international commercial arbitration agreement. Moreover, in case of each of these questions, potential legal issues, which may arise if these requirements/provisions are not fulfilled and/or not included will be also analysed. Where possible, a comparison of two different legal systems will be also discussed – Germany, as a civil law country, and the United Kingdom (hereinafter “the UK”), as a common law country.

But it is important to keep one thing in mind – the mandatory contractual requirements and a majority of the fundamental provisions of the general arbitration agreement also relate to an arbitration clause. Particularly because when the arbitration clause is included in a general commercial contract, such contract must also comply with all of the mandatory contractual requirements. And even more, the arbitration clause must also stipulate (ideally) a majority of the fundamental provisions – namely a type of the arbitration, a language of the arbitration, a composition of the arbitral tribunal and lastly, a choice of the applicable law.

Chapter I

Mandatory contractual requirements of the arbitration agreements

In order for the parties to have a workable and a successful arbitration, their arbitration agreement must be valid and legitimate under the rule of law. Therefore, the parties to a dispute must carefully draft their arbitration agreement, so as to ensure that it complies with some mandatory contractual requirements. Only if these requirements are cumulatively fulfilled, can the parties take an advantage of an efficient and effective arbitration.

To properly analyse the legal question imposed by this Thesis, that being the mandatory contractual requirements that must be met in order for an arbitration agreement to be valid and legitimate, different issues must be discussed. The issues being as follows: What are the mandatory contractual requirements of the arbitration agreement? Do all of these requirements apply to every arbitration agreement, regardless of the nature of the dispute at hand? And lastly, are these requirements cumulative, meaning that all of them must be fulfilled in order for the agreement to be valid? Even more, what are the potential legal issues that may arise if any/some of the mandatory contractual requirements are not fulfilled?

The mandatory contractual requirements that must be met in order for the arbitration agreement to be valid and legitimate under the rule of law are as follows:

1. Consent to arbitrate,
2. Capacity to enter into a contractual relationship,
3. Defined legal relationship between the parties,
4. Written evidence of the parties' agreement to arbitrate,
5. Arbitrability of the subject-matter at hand,
6. Validity of the arbitration agreement under its governing law.

1. Consent to arbitrate

Consent, defined as an agreement to arbitrate, has always been a foundational cornerstone of the arbitration.²² The consent to arbitrate is indispensable, as an existence of such consent establishes the very existence of the arbitration, based on a voluntary wish of the parties at hand.²³ More specifically, the consent of the parties delimits a scope of the arbitration agreement, which further defines a jurisdiction and a power of the arbitral tribunal.²⁴ Namely because the consent of the parties represents their free will to structure the arbitration as “*they see fit*”, as held in *Volt Information Sciences, Inc. v Board of Trustees of Stanford University*.²⁵ Therefore, there can be no valid arbitration, without a clearly defined and sufficient consent,²⁶ as supported by article II(1) of the New York Convention, based on which each Contracting State has to recognize the parties’ “*agreement*” to arbitrate.²⁷

When it comes to an international commercial arbitration, the consent to arbitrate is often expressed in two ways.²⁸ Firstly, the consent can be expressed in an arbitration clause, which is a part of a general commercial contract.²⁹ This choice is common before a dispute arises, since such clauses are agreed upon as the part of some general commercial contracts/.³⁰ The arbitration clauses mirror the hopes of the parties that no dispute will arise during their business relationship, but if it does, the dispute will be resolved through the arbitration and not by a national court.³¹ Secondly, the consent to arbitrate may be also given expressly in an agreement to arbitrate³² (submission agreement), which is specifically concluded once the dispute has already arisen.³³ However, the arbitration agreement can be also concluded in addition to the arbitration clause, in order to lay down some further specifics of the upcoming dispute.³⁴

²² *Redfern and Hunter on International Arbitration: Student Version* (no 3) 72.

²³ *ibid.*

²⁴ Andrea M. Steingruber, *Consent in International Arbitration* (OUP Oxford 2012) section 7.01 (*Consent in International Arbitration*).

²⁵ *Volt Information Sciences, Inc. v Board of Trustees of the Leland Stanford Junior University* (1989) 489 U.S. 468 (*Volt Information Sciences, Inc. v Board of Trustees of Stanford University*).

²⁶ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 12.

²⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, art II(1) (New York Convention).

²⁸ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 72.

²⁹ *ibid.* art II(1).

³⁰ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 72.

³¹ *ibid.*

³² New York Convention (no 27) art II(1).

³³ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 72.

³⁴ *ibid.*

Conclusively, in order for the arbitration to be valid and legitimate under a rule of law, it must firstly start with the consensual agreement of the parties to the dispute. However, there are many potential issues which may arise in cases of the consent, including cases where there is no consensual agreement by the parties, when the consent is unclear and/or insufficient or when the dispute concerns a “third-party joinder”. Nevertheless, all of these issues can be prevented, as will be further discussed below.

I. No consent

With regards to the first potential legal issue, concerning the consent to arbitrate, if the parties cannot consensually agree on the arbitration, as their alternative-dispute resolution method, then they simply cannot use this method to resolve their dispute and are required to turn to their often-only choice, and to the least popular method, a national litigation.³⁵ However, the national litigation robs the parties off the many advantages that the arbitration offers (as mentioned in the “Introduction” of this Thesis). Therefore, this potential issue is crystal clear – if the parties do not consensually agree on arbitrating their dispute, then the arbitration simply cannot take place, because arbitration is “*a matter of consent, not coercion*”, as held in *Volt Information Sciences, Inc. v Board of Trustees of Stanford University*.³⁶ After all, arbitrators are just private individuals, not possessing any sovereign powers, and so they cannot arbitrate disputes where the parties have not given them any power and jurisdiction to do so.³⁷

But just because the arbitration is consensual, this does not mean that it is not compulsory.³⁸ This is what makes the international commercial arbitration so popular and effective – if the parties have already given their consent, but one of the parties does not longer wish to arbitrate the dispute or starts the proceedings before a national court, then such court will generally not hear the case and the arbitrators can oblige this person to subordinate to the arbitration agreement at hand.³⁹

³⁵ The Mutable and Evolving Concept of “Consent” in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of “Consent” (no 20).

³⁶ *Volt Information Sciences, Inc. v Board of Trustees of Stanford University* (no 24).

³⁷ Tony Cole and Pietro Ortolani, *Understanding International Arbitration* (1st edn, Routledge 2019) 53/54 (*Understanding International Arbitration*).

³⁸ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 71.

³⁹ *Understanding International Arbitration* (no 37) 53/54.

II. Unclear / ambiguous consent

The consent to arbitrate has an important legal standing, by being a condition “precedent” to an admissible and effective arbitration agreement and its consequential arbitration.⁴⁰ So if the consent is unclear and/or ambiguous, so is the arbitration agreement. As a result, it is necessary to interpret a scope of the arbitration agreement, as is also recognized by the New York Convention⁴¹, so as to figure out the precise scope which is subjected to a doubt – the word “scope” generally including the types of disputes that the parties intended to arbitrate.⁴²

Generally, the arbitration agreement should be broadly worded, so as to include all the types of disputes, controversies, claims and differences that the parties wish to arbitrate.⁴³ The broad wording, which is often used in the arbitration agreements, refers to “*all*” or “*any dispute/controversy/claim/difference*”, which is “*arising out of or relating to or in connection with*”.⁴⁴ Based on this wording, the arbitral tribunal may arbitrate a broad number of factual and legal disputes arising between the parties, which can be grouped into three different categories – contractual disputes, disputes in tort and lastly, statutory disputes.⁴⁵

However, not only should the arbitration agreement be worded in a broad way, but its language should be also clear and express.⁴⁶ Otherwise, there might be a need to interpret the parties’ intentions and the scope of their consent.⁴⁷ As a result, the arbitral tribunal or a national court is entrusted with a task of a gap-filling and an adaptation of the arbitration agreement – this often leads to a more costly and lengthy arbitration – an outcome that the parties wanted to avoid by not choosing a national litigation.⁴⁸

There are different approaches of interpreting the unclear and/or unambiguous consent to arbitrate, generally varying from one jurisdiction to another. When it comes to the UK, its English courts have a very arbitration-friendly approach when it comes to the interpretation of the arbitration agreements.⁴⁹ As held in *Fulham Football Club Ltd v Richards*, it is possible to

⁴⁰ *Consent in International Arbitration* (no 24).

⁴¹ New York Convention (no 27) art V(1)(c).

⁴² *Consent in International Arbitration* (no 24).

⁴³ *ibid.* section 7.06.

⁴⁴ *ibid.* section 7.07.

⁴⁵ *ibid.* section 7.08.

⁴⁶ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 93.

⁴⁷ *ibid.* section 7.01.

⁴⁸ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 93/94.

⁴⁹ *Fulham Football Club Limited v Sir David Richards and The Football Association Premier League Limited* [2011] EWCA Civ 855 (*Fulham Football Club Ltd v Richards*).

arbitrate a majority of commercial disputes.⁵⁰ However, when the need for the interpretation arises, the arbitration agreements should be interpreted in a broad way, so as to include both contractual and non-contractual disputes, as held in a landmark ruling *Fiona Trust & Holding Corporation v Privalov*.⁵¹ As held in the ruling of this case, the interpretation of the arbitration agreement should be based on an assumption that “*the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*” – unless a language of the arbitration agreement makes it clear that some types of the disputes are excluded from the arbitrable scope.⁵² This landmark ruling has created a so-called “*one-stop shop*” adjudication presumption, based on which the parties intend for all types of disputes to be arbitrable before the same tribunal – and this presumption is arising from the parties’ arbitration agreement as well as from their business relationship.⁵³ This was supported by another recent and a rather prominent judgment in *Enka v Chubb*, where it was held that the arbitration agreement should be interpreted “*so that it is valid rather than ineffective*” (known as the validation principle).⁵⁴ Moreover, in another case, *Premium Nafta v Fili*, the judgment of *Fiona Trust & Holding Corporation v Privalov* was confirmed.⁵⁵ In this case, the court confirmed that the arbitration agreement should be interpreted based on the presumption that the parties intended the “*one-stop shop*” adjudication of their dispute – that being the arbitration (irrelevant of a formulation/wording of the agreement itself – whether “*arising from/under/out of/in connection with*”, etc.).⁵⁶ Therefore, as one may see, the English courts have a very liberal and pro-arbitration approach, when the need for the interpretation arises. The end-rule being that nowadays, the English courts will generally favour a very wide interpretation of the arbitration agreements. As further held in *A v B*, the interpretation is generally construed by looking at the provisions of the arbitration agreement as a whole – by doing so, and based on a balance of probabilities, the intentions of the parties and a meaning of the arbitration agreement can be construed.⁵⁷

⁵⁰ *ibid.*

⁵¹ *Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others* [2007] UKHL 40 (*Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others*).

⁵² *ibid.*

⁵³ Eliza Wallace, ‘Framing your arbitration clause: the differing approaches of English and Australian law to interpretation’ (*Thomson Reuters*, 31 May 2019) <<http://arbitrationblog.practicallaw.com/framing-your-arbitration-clause-the-differing-approaches-of-english-and-australian-law-to-interpretation/>> accessed 24 June 2022.

⁵⁴ *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb & Ors* [2020] EWCA Civ 574.

⁵⁵ *Premium Nafta Products Limited and others v Fili Shipping Company Limited and others* [2007] UKHL 40.

⁵⁶ *ibid.*

⁵⁷ *A v B* [2018] EWHC 1370 (Comm).

On the other side, the courts in Germany have a rather similar approach as the English courts. In Germany, there is also a prevailing support of the broad interpretation of the arbitration agreements, so as to ensure that the arbitral tribunal has an “*all-encompassing jurisdiction*”.⁵⁸ Interestingly, the English ruling of *Fiona Trust & Holding Corporation v Privalov* actually follows the approach of the German Federal Court of Justice in its decision dated 27 February 1970.⁵⁹ In this decision, the Federal Court of Justice ruled that it should be presumed that the reasonable parties will wish to have their contractual relationship and their claims decided by the same tribunal.⁶⁰ This decision has started a long-standing arbitration-friendly approach of the German courts, which was once again confirmed in a more recent judgment of the German Federal Court of Justice.⁶¹ In its decision dated 6 February 2020, a low validity threshold of the arbitration agreement was set.⁶² In this case, the parties to the dispute had agreed on an arbitration clause, which stated that the parties will further conclude a separate arbitration agreement in this regard – which they never did.⁶³ Thus, the arbitration clause had to be interpreted so as to figure out its validity.⁶⁴ The Federal Court of Justice ruled that by looking at three specific aspects – general contractual interpretation rules, intentions of the parties, case-by-case facts – the arbitration clause could be interpreted as valid and as excluding the jurisdiction of the state courts.⁶⁵ The Federal Court of Justice further ruled that as long as the parties’ intentions (to exclude the jurisdiction of the state courts) are explicitly clear, then the dispute of the parties is arbitrable – regardless of the fact whether the additional arbitration agreement is concluded or not.⁶⁶ Moreover, the broad interpretation of the arbitration agreement was also discussed in another case of the Frankfurt Higher Regional Court, dated 7 September 2020.⁶⁷ This case concerned a claim for damages and whether such claim is also covered by an arbitration clause, even though a main contract, in which the clause was incorporated, was

⁵⁸ Irene Elser and Susanne Molitoris, ‘The Scope of Arbitration Clauses – Or “All Disputes Arising out of or in Connection with this Contract...”’ (CERHA HEMPEL) <https://www.cerhahempel.com/fileadmin/docs/publications/Welser/Welser-Molitoris_AYIA_2012.pdf> accessed 24 June 2022, 19.

⁵⁹ Peter Schlosser, ‘The Decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof)’ (1990) 6(1) *Arbitration International* <<https://academic.oup.com/arbitration/article-abstract/6/1/79/233917>> accessed 24 June 2022.

⁶⁰ *ibid.*

⁶¹ ‘German court confirms threshold for validity of arbitration agreements’ (*Herbert Smith Freehills*, 9 July 2020) <<https://hsfnotes.com/arbitration/2020/07/09/german-court-confirms-threshold-for-validity-of-arbitration-agreements/>> accessed 24 June 2022.

⁶² *ibid.*

⁶³ *Decision of the Bundesgerichtshof* (2020) I ZB 44/19 (*Decision of the Bundesgerichtshof* I ZB 44/19).

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *Decision of the Oberlandesgericht Frankfurt am Main* (2020) 26 Sch 2/20.

already terminated.⁶⁸ The court interpreted the arbitration clause in question in a very broad way, so as to ensure that it covers not only contractual claims, but also claims in tort.⁶⁹

Although these above-mentioned cases also touch upon the interpretation of the arbitration clauses, the German approach of its broad contractual interpretation applies equally to the arbitration clauses and to the arbitration agreements, as is the case in the UK. Conclusively, as one may see, the issue of the unclear and/or unambiguous consent is rather significant when it comes to a commencement of the arbitration – and this issue can not only prolong the proceedings themselves, but can also result in more significant costs. In such cases, there is a need for the interpretation of the parties' consent and of the arbitration agreement itself. Fortunately for the parties to the arbitration proceedings, the courts in the UK and in Germany have a long-standing pro-arbitration approach when it comes to such interpretation.

III. Consent in a “third-party joinder”

In cases of an international commercial arbitration, business deals and transactions are rather complex, since they include a number of different parties based in different jurisdictions.⁷⁰ Based on the ICC Statistics from 2020, a third of the cases that took place during such year involved multiple parties (31%).⁷¹ Therefore, to save resources, the parties agree to arbitrate their dispute/s before a single tribunal, in one set of a legal joined proceedings, in order to save both time and money.⁷² However, the parties must record their express consent, in their arbitration agreement, allowing for the joined proceedings, as laid down, for example, by the UNCITRAL Rules⁷³, the HKIAC Rules⁷⁴ or the LCIA Rules.⁷⁵ Otherwise, when the express consent is absent, and there is a lack of an evidence therein, such consensual issue may prevent the parties from benefiting from the joined proceedings of their legal dispute at hand.

For example, the joined proceedings were deliberated by the Singapore High Court in a recent precedential ruling *CJD v CJE and CJF*.⁷⁶ In this case, the court ruled that just because

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Kate Corby and Zelandar Gray, 'Multi-Party Arbitrations – A Practical Guide' (*Baker & McKenzie*, 30 September 2015) <<https://globalarbitrationnews.com/multi-party-arbitrations-a-practical-guide-20150928/>> accessed 25 June 2022 (Multi-Party Arbitrations – A Practical Guide).

⁷¹ ICC Dispute Resolution Statistics: 2020 (no 6).

⁷² Multi-Party Arbitrations – A Practical Guide (no 70).

⁷³ UNCITRAL Arbitration Rules (15 August 2010) art 17.5 (UNCITRAL Arbitration Rules).

⁷⁴ HKIAC Administered Arbitration Rules (1 November 2018) art 27 (HKIAC Administered Arbitration Rules).

⁷⁵ LCIA Arbitration Rules (1 October 2020) art 22.1(x) (LCIA Arbitration Rules).

⁷⁶ *CJD v CJE and CJF* [2021] SGHC 61 (*CJD v CJE and CJF*).

a third-party signed and consented to a generally-worded multi-party arbitration agreement (based on an institutional arbitration rules), this does not suffice as an express consent of such third-party to join the multi-party arbitration dispute.⁷⁷ The court further argued that the consent of the third-party must be either clear and unambiguous or expressly provided for in writing.⁷⁸ And in addition to this, the consent of one of the parties, already included in the arbitration proceedings, is also necessary.⁷⁹

Generally, as mentioned previously, the party cannot be bound by the arbitration agreement without his/her consent⁸⁰ and the same applies even in cases of the joinder.⁸¹ When it comes to the third-party joinder in Germany, neither the German Arbitration Act⁸² nor its case-law address this potential situation. Nevertheless, the German 2018 DIS Arbitration Rules (hereinafter “DIS Rules”) state, in its article 18.1, that the joinder of the third-party is allowed, as long as the consent of all the parties is given – meaning the consent of the party wishing to join the arbitration as well as the consent of all the parties already participating in the arbitration proceedings.⁸³ However, if the consent is not expressly given in writing, the joinder is only possible once decided so by the arbitral tribunal.⁸⁴

Moreover, the UK follows the same approach as Germany – the third-party joinder is only allowed in cases when the consent of all the parties is given.⁸⁵ The framework for the joined proceedings is, unfortunately, not laid down in the United Kingdom Arbitration Act 1996 (hereinafter “UK Arbitration Act”)⁸⁶ and so the joined proceedings are generally governed by the specific institutional rules chosen by the parties – as is the case in Germany and its DIS Rules. For example, the LCIA rules state that the joinder of the third-party is allowed only when such third-party and an applicant party expressly consent to the joinder in writing.⁸⁷ But more specifically, once the consent of all the parties is given, the joinder is namely allowed in cases of challenge proceedings.⁸⁸ Thus, where it is “*desirable to add the new party*” to either resolve

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ New York Convention (no 27) art II(1).

⁸¹ *CJD v CJE and CJF* (no 76).

⁸² German Arbitration Act 1998 (German Arbitration Act).

⁸³ DIS Arbitration Rules (1 March 2018) art 18.1 (DIS Arbitration Rules).

⁸⁴ *ibid.*

⁸⁵ Marie Berard and Anna Kirkpatrick, ‘Arbitration procedures and practice in the UK (England and Wales): overview’ (*Clifford Chance LLP*, 2015/2016) <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/arbitration-procedures-and-practice-in-the-uk-england-and-wales-overview.pdf>> accessed 25 June 2022.

⁸⁶ The United Kingdom Arbitration Act 1996 (The UK Arbitration Act).

⁸⁷ LCIA Arbitration Rules (no 75) art 22.1(x).

⁸⁸ *The Republic of Uganda v Rift Valley Railways (Uganda) Ltd and Others* [2020] EWHC 3653.

all the matters of a dispute or some specific issue connected to the disputed matter/s, as held in *The Republic of Uganda v Rift Valley Railways Limited*.⁸⁹

Conclusively, as one may see, the joinder of the third-party to the already-existing arbitration proceedings is allowed and supported both by Germany and the UK, but only once the consent of all the parties is given.

IV. Consent in a consolidation

A consolidation is another procedural mechanism which helps to ensure that an arbitration is not only efficient (by saving time and money for the parties at hand), but it also helps to avoid inconsistent multiple judgments undermining a rule of law.⁹⁰ The consolidation allows for multiple arbitration proceedings to be “merged” into one.⁹¹ Traditionally, the consolidation was not really supported⁹², but nowadays, many institutional arbitration rules support such mechanism, including the LCIA Rules⁹³, the HKIAC Rules⁹⁴ or even the ICC Rules⁹⁵.

For the consolidation to take place (as in the cases of a third-party joinder), the parties must give their consent, unless it’s a court-ordered consolidation allowed by a relevant law in certain circumstances.⁹⁶ Without the consent, the consolidation is generally not possible.⁹⁷ Therefore, if a party does not wish to consolidate two or more arbitration proceedings, withholding his/her consent is a rather effective way of avoiding this.⁹⁸ Otherwise, it is also possible to contest an arbitral award, which is a result of the consolidated proceedings, specifically under the NY Convention.⁹⁹

A clear difference may be seen in the laws of Germany and the UK when it comes to the consolidation. Firstly, the German Arbitration Act does not lay down any provisions regarding the consolidated proceedings.¹⁰⁰ The consolidation is, however, possible in cases of

⁸⁹ *ibid.*

⁹⁰ *CME Czech Republic B.V. v The Czech Republic* (2003) in the UNCITRAL Arbitration.; *Ronald S. Lauder v The Czech Republic* (2001) in the UNCITRAL Arbitration.

⁹¹ Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 1845 (*International Commercial Arbitration*).

⁹² *Connecticut General Life Ins. Co. v Unicover Managers, Inc.* [2000] 210 F.3d 771.

⁹³ LCIA Arbitration Rules (no 75) art 22.1.

⁹⁴ HKIAC Administered Arbitration Rules (no 74) art 28.

⁹⁵ ICC Rules of Arbitration (1 January 2021) art 10 (ICC Rules).

⁹⁶ Multi-Party Arbitrations – A Practical Guide (no 70).

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ New York Convention (no 27) art V(c).

¹⁰⁰ German Arbitration Act (no 82).

an institutional arbitration under the DIS Rules.¹⁰¹ An article 8 of the DIS Rules states that when one or more parties request the consolidation, then the DIS can consolidate these arbitrations into one, but only if all the parties to all of the arbitrations give their consent to do so.¹⁰² Moreover, the consolidation is also possible in two other scenarios where the consent plays a rather significant role – the consolidation can firstly take place when it was already agreed on by the parties in their arbitration agreement or secondly, when the parties simultaneously agree to consolidate their proceedings once the arbitration has already started.¹⁰³

In comparison to Germany, the UK Arbitration Act explicitly allows for the consolidation of the arbitration proceedings, but only if this is consented to by all the parties to a dispute.¹⁰⁴ The parties can give their consent either in their arbitration agreement or by choosing an appropriate institutional arbitration rules, for example the LCIA Rules.¹⁰⁵ However, as laid down in the UK Arbitration Act and unless the parties agree otherwise, the arbitral tribunal does not possess a power to order the consolidation by itself.¹⁰⁶ On the other side, when the LCIA Rules are applicable, the arbitral tribunal can decide to consolidate the arbitration proceedings by itself, but only in certain situations – and in conjunction with an approval of the LCIA court and upon an application of any of the parties.¹⁰⁷ To give one example of the consolidation in the UK, in the case *Guidant LLC v Swiss Re International SE & another*, it was ruled that the consolidation of parallel proceedings is not possible without the consent of the parties, since neither the court nor the arbitral tribunal have the power to order the consolidation under the UK Arbitration Act.¹⁰⁸

¹⁰¹ DIS Arbitration Rules (no 83) art 8.

¹⁰² *ibid.*

¹⁰³ Boris Kasolowsky and Carsten Wendler, ‘Commercial Arbitration: Germany’ (*Global Arbitration Review*, 2 May 2022) <<https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/germany>> accessed 25 June 2022 (Commercial Arbitration: Germany).

¹⁰⁴ The UK Arbitration Act (no 86) art 35.

¹⁰⁵ LCIA Arbitration Rules (no 75) art 22A.

¹⁰⁶ The UK Arbitration Act (no 86) art 35.

¹⁰⁷ LCIA Arbitration Rules (no 75) art 22A.

¹⁰⁸ *Guidant LLC v Swiss Re International SE & another* [2016] EWHC 1201 (Comm).

2. Capacity to enter into a contractual relationship

In order to enter into a contractual relationship, the parties must have a legal capacity to do so.¹⁰⁹ Otherwise, if this second requirement of an international commercial arbitration is not fulfilled, then the parties' arbitration agreement cannot be valid – or, if the arbitration proceedings are already advanced, then the arbitral award cannot be recognized and enforced.¹¹⁰ This criterion is known as a subjective arbitrability¹¹¹ and is recognized by the NY Convention¹¹², as well as by the UNCITRAL Model Law on International Commercial Arbitration (hereinafter “Model Law”),¹¹³ and is applicable without any differentiation between a general contract and the arbitration agreement.¹¹⁴ The general rule is that when a party, whether a natural or a legal person, has the legal capacity to enter into the contract, it also has the capacity to enter into the arbitration agreement.¹¹⁵

Lack of the legal capacity – potential issues:

Even though the legal capacity seems to be a crystal-clear arbitral prerequisite, there are still potential issues which may arise. In cases of natural persons, the legal capacity is defined by each and every jurisdiction in its legislation.¹¹⁶ In cases of Germany, the German Civil Code assumes that every person has the contractual capacity, since it only lays down the circumstances when the person is legally incapable.¹¹⁷ Thus, under the German law, the arbitration agreement can be invalid when the person is not yet seven years old and/or is in a “*state of pathological mental disturbance*”, unable to exercise one's free will, unless this state is only temporary.¹¹⁸

When it comes to the UK, there is also the presumption that everyone possesses the contractual capacity unless one of the exceptions applies.¹¹⁹ The exceptions are similar to the

¹⁰⁹ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 81.

¹¹⁰ New York Convention (no 27) art V(1)(a).

¹¹¹ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 85.

¹¹² New York Convention (no 27) art V(1)(a).

¹¹³ UNGA UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985, entered into force 7 July 2006) 15 ILM 701, art 36(1)(a)(i) (UNCITRAL Model Law on International Commercial Arbitration).

¹¹⁴ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 81.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ German Civil Code 2002, sections 104-113 (German Civil Code).

¹¹⁸ *ibid.* section 104.

¹¹⁹ *Hart v O'Connor* [1985] UKPC 1 (*Hart v O'Connor*).

ones in Germany – in cases of minors and a lack of the mental capacity.¹²⁰ Firstly, minors are those under an age of eighteen (a majority age).¹²¹ Secondly, as discussed in *Hart v O'Connor*, mental health issues can affect one's contractual capacity when it can be proven that an individual has no understanding of what he/she is doing and when the other contractual party is aware of such circumstance/s.¹²²

Furthermore, when it comes to the contractual capacity of legal persons (in general), such capacity is governed by a company's constitution and a law of the place where the legal person was incorporated.¹²³ There are two possible scenarios when it can be claimed that the legal person has no contractual capacity and the arbitration agreement is, thus, invalid – either in cases when the legal person conducts an *ultra vires* business or its status of a corporate entity does not allow it to bring a legal action.¹²⁴

As one may see, although the contractual capacity is always presumed in Germany and the UK, there are still some potential issues which may create barriers for the parties and their valid arbitration agreement. Therefore, what happens when a contractual incapacity is claimed and/or proven? If the incapacity is established at a beginning of the arbitration, then the arbitral tribunal should decline its jurisdiction and powers to hear the case, due to the arbitration agreement being void and inoperative.¹²⁵ Moreover, if the incapacity is established throughout the arbitration, then the arbitral award cannot be enforced and recognized by any of the signatories to the NY Convention.¹²⁶ It is important to note that this is applicable even in cases when the party's legal capacity is legitimate under the laws of one country (for example under the laws of the person's country of origin), but not in another country (for example under the laws of the country governing the arbitration agreement).¹²⁷

Nevertheless, in practise, when it comes to the incapacity of natural persons, there is no reported case law concerning a non-enforcement of the arbitral award based on a ground that the person is either mentally or legally (minor) incompetent.¹²⁸ Furthermore, in cases of the incapacity of legal persons, the case law is also very limited because private legal entities, in general, possess a full legal capacity, including an ability to enter into the arbitration

¹²⁰ *ibid.*

¹²¹ The United Kingdom Minors' Contracts Act 1987.

¹²² *Hart v O'Connor* (no 119).

¹²³ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 82.

¹²⁴ *ibid.*

¹²⁵ *ibid.* 81.

¹²⁶ New York Convention (no 27) art V(1)(a).

¹²⁷ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 82.

¹²⁸ UNCITRAL, 'UNCITRAL Secretariat Guide on the Convention and Enforcement of Foreign Arbitral Awards (New York, 1958)' (2016) 136 (UNCITRAL Secretariat Guide on the Convention and Enforcement of Foreign Arbitral Awards).

agreements.¹²⁹ One of the rare examples is a case decided by the Supreme Court of Germany in 1998.¹³⁰ In this case, the private legal entity lacked the legal capacity, under the *ultra vires* doctrine, to enter into a foreign trade transaction and so the arbitral award could not be enforced under the 1961 European Convention¹³¹ (which was rather similar to the current NY Convention).¹³²

3. Defined legal relationship between the parties

As laid down by the NY Convention and the Model Law, in order for an arbitration agreement to be valid, a dispute at hand must arise out of a defined legal relationship between the parties.¹³³ This criterion is one of the two generic arbitration requirements, together with a “writing requirement”, as it is a rather straightforward one – the parties at hand must be in some sort of a legal relationship with each other, as only then can the dispute arise between them – if there is some pre-existing legal relationship and the dispute at hand has a legal connection with the relationship itself.¹³⁴

Nevertheless, the legal relationship may or may not be of a contractual nature.¹³⁵ But it is necessary that the legal relationship can be always “*identified and delimited*”.¹³⁶ A similar conclusion was, for example, reached in a case decided by the German Federal Court of Justice, where the court ruled that if the parties’ agreement states that all future disputes will be resolved by the arbitration, then the agreement at hand must have some specific reference to the parties’ relationship.¹³⁷

Furthermore, since the parties’ defined legal relationship must not be of the contractual nature, it is important to draft the arbitration agreement broadly, so as to ensure that it does not only cover the disputes arising out of the parties’ contract, but also further disputes which could

¹²⁹ Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (1st edn, Cameron May 2008) 623-624 (*Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice*).

¹³⁰ *ibid.*

¹³¹ *Decision of the Bundesgerichtshof* (1998) XXIV Y.B. Comm. Arb. 928.

¹³² *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (no 129).

¹³³ New York Convention (no 27) art II(1).; UNCITRAL Model Law on International Commercial Arbitration (no 113) art 7.1.

¹³⁴ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) 34 (*The Principles and Practice of International Commercial Arbitration*).

¹³⁵ *ibid.*

¹³⁶ ‘Dispute Settlement: International Commercial Arbitration – 5.2 The Arbitration Agreement’ United Nations Conference on Trade and Development (New York and Geneva 2005) UNCTAD/EDM/Misc.232/Add.39.

¹³⁷ *Decision of the Bundesgerichtshof* I ZB 44/19 (no 63).

relate to the contract itself, for example an unfair business practices or a tort law claims.¹³⁸ By doing so, the arbitrable subject-matters, in the particular dispute between the parties, are much broader.¹³⁹ This was the case, for example, in *Kaverit Steel and Crane Ltd v Kone Corporation*.¹⁴⁰ In this case, the Court of Appeal ruled that the parties' legal relationship, deriving from the contract with an incorporated arbitration clause, is wide enough to also encompass the tort law claims (concerning a conspiracy and an induced contract law breaches) – based on a wording of the arbitration clause itself – “*disputes arising out of or in connection with this contract*”.¹⁴¹

Nevertheless, if the parties are not in any sort of the legal relationship with each other, then an outcome of their dispute is rather predictable – the dispute is not arbitrable. Because if the parties are not in the legal relationship with each other, then there simply cannot be any arbitration agreement in place which would define the boundaries of the arbitration's scope and which would give a power and a jurisdiction to a potential arbitral tribunal deciding on the dispute.

4. Written evidence of the parties' agreement to arbitrate

Every arbitration agreement must be in writing in order to be valid.¹⁴² This so-called “writing requirement” is a second generic arbitration criterion, together with the defined legal relationship, which must be always fulfilled by the parties wishing to arbitrate their dispute.¹⁴³ There are two main reasons why the “writing requirement” was put in place, as argued by different scholars.¹⁴⁴ Firstly, the “writing requirement” mirrors a consent of the parties to arbitrate their dispute.¹⁴⁵ And secondly, when the arbitration agreement is in writing, it lays down, and therefore proves, all of the terms and conditions of the agreement itself.¹⁴⁶ As a result of the “writing requirement”, a certainty of the overall arbitration process is ensured.¹⁴⁷

¹³⁸ *The Principles and Practice of International Commercial Arbitration* (no 134).

¹³⁹ *ibid.*

¹⁴⁰ *Kaverit Steel and Crane Ltd. et al. v Kone Corp. et al.* [1992] 87 DLR (4th) 129.

¹⁴¹ *ibid.*

¹⁴² New York Convention (no 27) art II(1).; UNCITRAL Model Law on International Commercial Arbitration (no 113) art 7.1.

¹⁴³ *ibid.*

¹⁴⁴ Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International 2003) 21-23.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

However, what does the “writing” requirement entail? According to the NY Convention, the arbitration agreement is in writing only in so far as it is signed by the parties to the dispute or included in their “*exchange of letters or telegrams*”.¹⁴⁸ Nevertheless, many scholars have criticised this “writing requirement” for not mirroring a current fast-developing word and its modern e-commerce technologies.¹⁴⁹ Nowadays, there is a growing disparity of an application of this “writing requirement” by different nations and as a result, this requirement now generally includes any express proof of the parties’ intention to arbitrate their dispute, as long as there is no room for any doubts.¹⁵⁰ Indeed, this also means, in many countries, that the “writing requirement” is fulfilled even if the arbitration agreement is recorded by an electronic means of a communication, as held in *Chloe Z. Fishing Co v Odyssey Re*¹⁵¹ – thus, solving an issue with regards to the e-commerce technologies, as criticised by different scholars.¹⁵²

When it comes to Germany, its legal system does not take a strict stance with regards to the “writing requirement” (but only in cases of non-consumer contracts).¹⁵³ The German rules regarding the “writing requirement” generally apply only in cases when such requirement does not fulfil the NY Convention requirements and thus, it must be assessed whether the arbitration agreement can be valid and upheld under the German law, as ruled in a case by the Munich Court¹⁵⁴ or as ruled by the Schleswig Court of Appeal in another case.¹⁵⁵ However, there are still some exceptions to this practise, namely an application of a “*more-favorable-right*” principle.¹⁵⁶ Based on this principle, the “writing requirement” of the arbitration agreement should be assessed according to the (German) domestic rules, instead of the NY Convention, as ruled by the German Federal Supreme Court.¹⁵⁷ Conclusively, the “writing requirement” of the arbitration agreements must be analysed on a case-by-case assessment.¹⁵⁸

The German law, in cases of the non-consumer contracts, firstly states that the arbitration agreements are deemed to be in writing when they are either signed by the parties to

¹⁴⁸ New York Convention (no 27) art II(2).

¹⁴⁹ Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 71/72 (*An Introduction to International Arbitration*).

¹⁵⁰ *ibid.*

¹⁵¹ *Chloe Z Fishing Co., Inc., et al. v Odyssey Re (London) Ltd.* [2000] 109 F. Supp. 2d 1236.

¹⁵² *An Introduction to International Arbitration* (no 149).

¹⁵³ German Arbitration Act (no 82) section 1031.

¹⁵⁴ *Decision of the Landgericht München I* (2021) 21 O 8717/20.

¹⁵⁵ *Decision of the Schleswig Court of Appeal* (2000) 16 SchH 5/99.

¹⁵⁶ Dr Wolfgang Kühn, ‘Current Issues on the Application of the New York Convention’ (2008) 25(6) *Journal of International Arbitration* <https://www.heuking.de/fileadmin/DATA/Dokumente/Veroeffentlichungen/2009/0266_New_York_Convention.pdf> accessed 25 June 2022, 743-747 (Current Issues on the Application of the New York Convention).

¹⁵⁷ *ibid.*

¹⁵⁸ UNCITRAL Secretariat Guide on the Convention and Enforcement of Foreign Arbitral Awards (no 128) 51.

the dispute or included in their exchange of “*letters, telefaxes or other means of telecommunication*” – because a proof of the arbitration agreement is necessary and oral agreements do not suffice.¹⁵⁹ An example of the parties’ exchange is also an email, since a list of the “*telecommunication*” is not exhaustive.¹⁶⁰ Nevertheless, this notion of the “exchange” of some written communication is of an utmost importance, as expressly stated by the Frankfurt Court of Appeal.¹⁶¹ This was also confirmed by the Bavarian Higher Regional Court, where the court further ruled that the “writing requirement” is based on a principle of mutuality.¹⁶² But because this particular case concerned some faxed contracts, which were lacking such mutuality of the exchanged written communication, the “writing requirement” was not fulfilled.¹⁶³ Another case when the arbitration agreement was invalid, due to its lack of the mutuality, was decided by the German Rostock Court of Appeal, which refused a recognition of the arbitration agreement because it was confirmed through a unilaterally sent fax.¹⁶⁴

Secondly, under the German law, the arbitration agreements can also fulfil the “writing requirement” even if they are accepted by an implicit consent, as long as no objection is raised in a “*good time*” and as long as the implicit consent is part of a common usage.¹⁶⁵ This was confirmed by the German Federal Court of Justice in one of its cases.¹⁶⁶ In such case, there was no written arbitration agreement which would fulfil the requirements laid down in an article II(2) of the NY Convention.¹⁶⁷ However, the Federal Court of Justice ruled that an exception can be given in this case – the requirement of the written arbitration agreement, signed by both of the parties, can be lifted.¹⁶⁸ The Federal Court of Justice further ruled that although this case concerns a foreign arbitral award, the party to the dispute can rely on the arbitration agreement complying with a less strict “writing requirement” under the German law, also known as the “*more-favorable-right*” principle, that would in normal circumstances only apply to domestic cases – but the party can do so only for purposes of enforcing this foreign arbitral award.¹⁶⁹ Based on this German principle, the arbitration agreement fulfils the “writing requirement”,

¹⁵⁹ Catrice Gayer & Thomas Weimann, ‘Germany’ (*Global Legal Insights*, 2017) <https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1462673_1.pdf> accessed 25 June 2022, 163ff.

¹⁶⁰ *ibid.*

¹⁶¹ *Decision of the Oberlandesgericht Frankfurt am Main* (2006) 26 Sch 28/05.

¹⁶² *Decision of the Bayerisches Oberstes Landesgericht* (2002) 4 Z Sch 16/02.

¹⁶³ *ibid.*

¹⁶⁴ *Decision of the Oberlandesgericht Rostock* (2001) 1 Sch 03/00.

¹⁶⁵ Current Issues on the Application of the New York Convention (no 156).

¹⁶⁶ *Decision of the Bundesgerichtshof* (2010) III ZB 69/09.

¹⁶⁷ Current Issues on the Application of the New York Convention (no 156).

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

based on the implicit consent, if the agreement is concluded “*in accordance with common usage*” and if a business man, who was provided with a “*sales confirmation*”, remains silent and raises no objection in “*good time*”.¹⁷⁰ The Federal Court of Justice lastly ruled that although the NY Convention should have applied in this case, an international arbitration law supports an application of the national arbitration-friendly provisions – particularly in cases of a recognition and an enforcement of foreign arbitral awards.¹⁷¹

Lastly, according to the German law, the “writing requirement” is also fulfilled if the parties refer to the arbitration agreement which is contained in another document, as long as such document complies with all of the mandatory contractual requirements.¹⁷²

Nevertheless, on the other side, when it comes to the consumer contracts in Germany, the formal requirement is much stricter – the arbitration agreement is deemed to be in writing only if it is signed by all of the parties in person.¹⁷³

Conclusively, as one may see, Germany has an arbitration-friendly approach when it comes to the formal “writing requirement” of the arbitration agreements. On the other side, when it comes to the UK, the “writing requirement” of the arbitration agreements is set out in a section 5 of the UK Arbitration Act.¹⁷⁴ According to this Act, the arbitration agreement fulfils the “writing requirement” when it is either in writing (irrelevant of a fact if it is signed by all of the parties), when the agreement can be proven by an exchange of a written communication or when the agreement is evidenced in writing.¹⁷⁵ The UK Arbitration Act, in addition to these three different requirements, further lays down some other instances when the “writing requirement” is also fulfilled.¹⁷⁶ The “writing requirement” is complied with, for example, when the parties agree orally to arbitrate their dispute but then they refer to some already-written contractual terms or conditions¹⁷⁷ or in cases when one party argues that the arbitration agreement exists and the other party does not deny this.¹⁷⁸ For example, in a case *Mercato Sports Ltd v The Everton Football Club Company Ltd*, football players had a contract with a third-party, and this contract laid down some terms and conditions – also including the arbitration, as a dispute resolution method.¹⁷⁹ Thus, the football players were obliged to resolve

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ The UK Arbitration Act (no 86) section 5.

¹⁷⁵ *ibid.* section 5(2).

¹⁷⁶ *ibid.* section 5.

¹⁷⁷ *ibid.* section 5(3).

¹⁷⁸ *ibid.* section 5(5).

¹⁷⁹ *Mercato Sports (UK) Ltd & Mark McKay. v The Everton Football Club Company Ltd* [2018] EWHC 1567 (Ch).

their disputes through the arbitration, based on their agreement which fulfilled the “writing requirement” of the arbitral validity.¹⁸⁰

To sum up, under the English law, the arbitration agreement is deemed to be in writing as long as it is clear (from the documents / the communication) that the parties intended to incorporate and be bound by such agreement, as held in *Italian Delegation on Wheat Supplies v Certain Exporting Houses*.¹⁸¹ And the means, by which the “writing requirement” is recorded, are irrelevant, as any means suffice.¹⁸² In this case, the UK takes a similar stance towards the “writing requirement” as Germany, by laying down a broad spectre of possible circumstances which fulfil the “writing requirement” of the arbitral validity.¹⁸³ But the UK goes actually beyond the German legislation as it also allows partly oral agreements, which refer to some already-written contractual terms and conditions, to fall within its section 5 of the UK Arbitration Act¹⁸⁴, although this was not always the case, as held in *Jardine Birske v Cathedral Works Organisation*.¹⁸⁵ Even purely oral arbitration agreements can fulfil the “writing requirement” under the common law rules, just not under the UK Arbitration Act and its statutory protection.¹⁸⁶

Nevertheless, it is important to keep in mind that purely oral arbitration agreements are extremely problematic for a number of different reasons. Firstly, any party to the arbitration can revoke a power of an arbitrator, until an arbitral award is issued, as held in *Lord v Lee*.¹⁸⁷ And secondly, if this situation occurs and the arbitrator’s powers are revoked, then the parties’ dispute has to be decided by a national court, as held in *Aughton Ltd v MF Kent Services Ltd*.¹⁸⁸ This will, however, go against the parties’ wishes, who wanted to arbitrate their dispute so as to avoid the disadvantages and burdens that come with the national litigation. And thirdly, if the parties only agreed to arbitrate their dispute orally, and their arbitral award is already issued, this award can only be enforced and recognized by the national court.¹⁸⁹

¹⁸⁰ *ibid.*

¹⁸¹ *Italian Delegation on Wheat Supplies v Certain Exporting Houses* [1925] 22 LI L Rep 673.

¹⁸² The UK Arbitration Act (no 86) section 5(6).

¹⁸³ *ibid.* section 5.

¹⁸⁴ *ibid.* section 5(3).

¹⁸⁵ *Jardine Birske v. Cathedral Works Organisation (Chester) Ltd.* [1996] ADRLN 14.

¹⁸⁶ The UK Arbitration Act (no 86) 81(1)(b).

¹⁸⁷ *Lord v Lee* [1868] LR 3 QB 404.

¹⁸⁸ *Aughton Ltd v MF Kent Services Ltd* [1991] 57 BLR 1.

¹⁸⁹ Justin Williams, Hamish Lal and Richard Hornshaw, ‘Arbitration procedures and practice in the UK (England and Wales): overview’ (*Thomson Reuters – Practical law*, 1 March 2021) <[https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)>](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)>) accessed 25 June 2022 (Arbitration procedures and practice in the UK (England and Wales): overview).

To conclude, when it comes to the “writing requirement” of the arbitration agreements, as the mandatory contractual requirement, both Germany and the UK have a rather arbitration-friendly approach. Their legislations and case-laws provide for a broad spectre of criteria under which the “writing requirement” can be fulfilled, with the UK going even beyond Germany and allowing for oral / partly oral arbitration agreements.¹⁹⁰ This is beneficial to know for the parties wishing to arbitrate their dispute under a law of one of these countries, since in this case, the “writing” prerequisite of the arbitral validity should not really be a procedural burden. However, it is still important for the parties to keep in mind that the most effective and efficient way of agreeing on their arbitration is through the written arbitration agreement, so as to prevent any potential issues stemming from a lack of the written arbitral terms and conditions (and their gaps). Namely because the lack of the written arbitration agreement could potentially result either in an ineffective arbitration or in a dispute which would have to be nationally litigated.

5. Arbitrability of the subject-matter at hand

A principle of arbitrability is another mandatory contractual requirement of the arbitration agreement, which must be always complied with.¹⁹¹ Based on this principle of an objective arbitrability, a subject-matter of a dispute at hand must be capable of being resolved through an arbitration, under a law applicable to the arbitration agreement.¹⁹² Thus, meaning that the subject-matter, which is at a centre of the dispute, must fall within a scope of the arbitral tribunal’s jurisdiction and powers, so as to ensure a validity of the arbitration itself.¹⁹³ As held in *Larsen Oil and Gas Pte v Petroprod Ltd*, it is presumed that ordinarily, any claims and disputes are arbitrable, unless a language of the arbitration agreement makes it clear that some particular matters are excluded from the arbitration – especially if the language of the agreement is not “wide enough”.¹⁹⁴ However, there are still some instances when the subject-matters are not arbitrable and thus, they fall purely within a jurisdiction of the national courts (particularly due to their public policy consequences).¹⁹⁵

The most controversial issue, that lies at the heart of the arbitrability, is how the arbitrability of the subject-matter is actually decided on – according to what law – the law

¹⁹⁰ The UK Arbitration Act (no 86) section 5.

¹⁹¹ New York Convention (no 27) art V(2)(a).; UNCITRAL Model Law on International Commercial Arbitration (no 113) art 34(2)(b)(i) and 36(1)(b)(i).

¹⁹² *ibid.*

¹⁹³ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 80.

¹⁹⁴ *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21.

¹⁹⁵ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 80.

governing a substance or the law governing a procedure of the arbitration?¹⁹⁶ The answer to this question depends on whether the issue of the arbitrability is dealt with before the arbitral tribunal, based on its *Kompetenz-Kompetenz*, or before the national court.¹⁹⁷

When the issue of the arbitrability is decided on by the national court, it is generally accepted that the *lex fori* applies – and it is usually irrelevant whether a situation at hand concerns an enforcement of an arbitral award, a setting-aside of the arbitral award or just purely a situation when one of the parties to the dispute claims that such dispute is non-arbitrable.¹⁹⁸

But the issue of the applicable law is not as crystal-clear when the arbitrability is contemplated by the arbitral tribunal – in this case, the prevailing law is the law applicable to the arbitration agreement¹⁹⁹, but in some instances, the *lex arbitri* is also applied.²⁰⁰ Particularly because the arbitral tribunal is often posed with a difficult question – if it chooses the law governing the arbitration agreement (to deal with the issue of the arbitrability), and then it comes to the enforcement of the arbitral award in another state with a different national law, which states that the subject-matter of the award is not arbitrable (although it is under the law of the arbitration agreement) – and *vice versa* - what can then be done about this situation?²⁰¹ And so in this case, when it comes to the applicable law in cases of the arbitrability, a practise and a decision-making of the arbitral tribunal generally depends on a case-by-case basis.²⁰² But as one may see, the arbitral tribunal is often posed with difficult questions when it comes to the law governing the principle of the arbitrability, namely due to the many legal considerations which it must take into account.²⁰³

It is important to analyse, for purposes of this Thesis, what subject-matters are and are not arbitrable when it comes to Germany and the UK. Firstly, according to the German law, all disputes concerning an economic interest can be arbitrable - thus, the arbitrability goes beyond purely commercial disputes.²⁰⁴ And even if the dispute does not relate to the economic interest,

¹⁹⁶ Bernard Hanotiau, ‘The law applicable to arbitrability’ (2014) 26 Singapore Academy of Law Journal <<https://journalonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/336/Citation/JournalsOnlinePDF>> accessed 25 June 2022, 875.

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.* 874.

¹⁹⁹ *ibid.* 878/879.

²⁰⁰ *ibid.* 881/882.

²⁰¹ *ibid.* 878/879.

²⁰² *ibid.* 878ff.

²⁰³ *ibid.*

²⁰⁴ German Arbitration Act (no 82) section 1030(1).

it can still be arbitrable, as long as the parties are “*entitled*” to reach a settlement with regards to the dispute and its issue/s.²⁰⁵

However, residential lease agreements are not arbitrable, among other matters – whose non-arbitrability is governed by other German statutes – namely involving family law matters, employment law matters, criminal law matters or even matters concerning a law of a succession.²⁰⁶ Moreover, a specific attention must be also paid to claims which revolve around the public policy considerations, such as anti-trust or insolvency claims.²⁰⁷ For example, in a case by the Higher Regional Court of Karlsruhe, the dispute related to the “*rights of an insolvency creditor*” and the court ruled that the insolvency claims are indeed arbitrable.²⁰⁸ Nevertheless, as held by the Higher Regional Court of Berlin, if the subject-matter is non-arbitrable under the German law, or is contrary to its public policy, then the arbitral award shall be analysed at the court’s own initiative and should be neither recognized nor enforced.²⁰⁹

On the other side, when it comes to the UK, its boundaries with regards to the subject-matter arbitrability are much less clear than in the case of Germany. The UK Arbitration Act does not define the arbitrable subject-matters, as it only states that both contractual and non-contractual matters can be resolved by the arbitration.²¹⁰ This broad approach towards the principle of the arbitrability was also confirmed in *Fiona Trust & Holding Corporation v Privalov*.²¹¹ Moreover, in *Aqaba Container Terminal Co v Soletanche Bachy France SAS*, it was further held that even if a dispute, between the parties, concerns some non-arbitrable matters, this does not mean that the dispute as a whole cannot be subjected to the parties’ arbitration agreement.²¹² Therefore, under the law of the UK, the issue of the arbitrability is also decided on a case-by-case basis, as held in *Fulham Football Club Ltd v Richards*, although the English courts have a rather arbitration-friendly approach when it comes to this principle.²¹³ As was further stated in the *Fulham Football Club Ltd v Richards* case, when the English courts decide on the arbitrability of some subject-matter, they must consider whether the matter relates

²⁰⁵ *ibid.* section 1030(2).

²⁰⁶ Commercial Arbitration: Germany (no 103).

²⁰⁷ Judith Sawang, Nicolas Nohlen and Tilmann Hertel, ‘International Arbitration Laws and Regulations Germany 2021-2022’ (20 August 2021) <<https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/germany>> accessed 25 June 2022.

²⁰⁸ *Decision of the Oberlandesgericht Karlsruhe* (2012) 9 Sch 02/09.

²⁰⁹ *Decision of the Kammergericht* (2009) 20 Sch 04/07.

²¹⁰ The UK Arbitration Act (no 86) section 6(1).

²¹¹ *Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others* (no 51).

²¹² *Aqaba Container Terminal (PVT) Co. v Soletanche Bachy France SAS* [2019] EWHC 471 (Comm).

²¹³ *Fulham Football Club Ltd v Richards* (no 49).

to a public interest and thus, cannot be resolved within the boundaries of a “*private contractual process*”.²¹⁴

When it comes to the specific subject-matters, which are generally not arbitrable under the common law, these relate to criminal law matters, family law matters, employment law matters (although contracts only between an employer and an employee can be arbitrable²¹⁵, as held in *Clyde & Co LLP v Krista Bates van Winkelhof*)²¹⁶, consumer disputes under a sum of 5,000 pounds²¹⁷, cases when a state grants some right / protection (such as patents and trademarks) and insolvency proceedings under the Insolvency Act 1986²¹⁸ (this was the case, for example, in *Salford Estates Ltd v Altomart Ltd*²¹⁹). In addition to this, a specific attention must be also paid to the disputes relating to the public interest – in this case, some necessary safeguards must be undertaken, as laid down by the UK Arbitration Act.²²⁰

As held in *Riverrock Securities Limited v International Bank of St Petersburg*, a wording of the arbitration agreement is extremely important, and the words chosen by the parties in their agreement are meaningful, so if the parties want to arbitrate a broad number of disputes between them, then their agreement (specifically its subject-matter) should be construed as broadly as possible.²²¹ And if this is the case, the English court/s can give a “*normal*” meaning to such words and then even some insolvency claims, for example, can be arbitrated.²²² Indeed, as one may see, in cases of the subject-matter arbitrability under the law of the UK, it is rather hard to draw a precise line between the arbitrable and the non-arbitrable matters. Namely because the UK Arbitration Act does not exclude any specific non-arbitrable categories²²³ and so all of the discretion / decision-making is left to the English courts (as was shown by the case-law above).

To conclude, as discussed above, it is important for the parties to only arbitrate a dispute that is actually capable of being resolved through the arbitration. Otherwise, if the parties’ dispute is successfully resolved and an arbitral award is rendered, and only then is it figured out that a subject-matter of the arbitration is not arbitrable under the relevant law, then the arbitral

²¹⁴ *ibid.*

²¹⁵ Adrian Jones and others, ‘England & Wales’ (*Crowell & Moring LLP*, 2019) <<https://www.crowell.com/files/201903-Arbitration-in-England-and-Wales.pdf>> accessed 25 June, 80 (England & Wales).

²¹⁶ *Clyde & Co LLP v Krista Bates van Winkelhof* [2011] EWHC 668 (QB).

²¹⁷ England & Wales (no 215).

²¹⁸ Samantha Rowe and Raeesa Rawal, ‘United Kingdom: International Arbitration’ (*The Legal 500*) <<https://www.legal500.com/guides/chapter/united-kingdom-international-arbitration/>> accessed 25 June 2022.

²¹⁹ *Altomart Ltd v Salford Estates (No.2) Ltd* [2014] EWCA Civ 1408.

²²⁰ The UK Arbitration Act (no 86) section 1(b).

²²¹ *Riverrock Securities Limited v International Bank of St Petersburg* [2020] EWHC 2483 (Comm).

²²² *ibid.*

²²³ The UK Arbitration Act (no 86) section 6(1).

award will be set aside under the NY Convention.²²⁴ Moreover, the national courts in other jurisdictions will also not be obliged to recognize and enforce the set-aside award, since under the NY Convention, they have a legitimate ground to refuse a recognition / enforcement of the arbitral award whose subject matter is not arbitrable under the relevant law.²²⁵ Thus, leaving the parties with an only option – having to resolve their dispute once again, but this time through a national litigation.

Moreover, this same outcome also applies to the arbitral award that is contrary to a public policy of an enforcing state.²²⁶ According to an article V(2) of the NY Convention, not only can the arbitral award be refused the recognition / enforcement due to the non-arbitrability of its subject-matter, but also in cases when the award itself is contrary to the public policy.²²⁷

Conclusively, as one may see, this mandatory contractual requirement of the principle of arbitrability is of an utmost importance since some disputes are just generally not arbitrable – although the practise in Germany and the UK shows a rather wide-ranging and a friendly approach when it comes to the limits and boundaries of the arbitrable subject-matters. However, the parties must still keep in mind that if some non-arbitrable matter will be, nevertheless, arbitrated, this can result in different extensive issues with regards to the award's enforcement and recognition.²²⁸ Thus, not only prolonging the parties' dispute resolution, but also making it much more costly.

²²⁴ New York Convention (no 27) art V(2)(a).

²²⁵ *ibid.* art V(1)(e).

²²⁶ *ibid.* art V(2)(b).

²²⁷ *ibid.* art V(2).

²²⁸ *ibid.*

6. Validity of the arbitration agreement under its governing law

Every arbitration agreement must be also valid under its governing law.²²⁹ This validity, under the applicable governing law, is another mandatory contractual requirement, which must be fulfilled by the parties wishing to arbitrate their dispute.²³⁰ The governing law is generally determined based on a choice of the parties, but this is not always the case.²³¹ And so what happens when the parties' choice of the law is absent from the arbitration agreement? For purposes of this Thesis, this issue will be discussed and analysed in detail in Chapter 2, under a heading "Choice of the applicable law (substantive and procedural)".

7. Conclusion of Chapter I

To conclude, this Chapter I discussed all the mandatory contractual requirements which must be fulfilled by every single arbitration agreement – namely if the parties wish to resolve their dispute through the arbitration, as an alternative-dispute resolution method.²³² These mandatory contractual requirements namely include the consent to arbitrate, the capacity to enter into the contractual relationship, the defined legal relationship between the parties, the written evidence of the parties' agreement to arbitrate in case of a present or a future dispute, the arbitrability of the subject-matter at hand and lastly, the validity of the arbitration agreement under its governing law.²³³

These mandatory contractual requirements are cumulative and apply to every single arbitration agreement, regardless of a nature of the dispute at hand.²³⁴ Therefore, all of these requirements must be fulfilled should the international commercial arbitration take place²³⁵ – because as was shown by this Thesis, if any of the six requirements are not fulfilled, then the arbitration agreement as a whole is invalid and illegitimate under the rule of law.

Furthermore, as one may have seen from this Chapter I, there are many potential legal issues which can arise if any of the mandatory contractual requirements are not fulfilled – as

²²⁹ *ibid.* art V(1)(a).

²³⁰ Jesús Saracho Aguirre, 'Validity of the Arbitration Agreement' (*Jus Mundi*, 25 February 2022) <<https://jusmundi.com/en/document/wiki/en-validity-of-the-arbitration-agreement-ground-to-refuse-recognition-and-enforcement-of-non-icsid-awards>> accessed 25 June 2022.

²³¹ *ibid.*

²³² *Redfern and Hunter on International Arbitration: Student Version* (no 3) 74/75.

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *ibid.*

analysed in this Chapter with regards to each and every one of the requirements. Unfortunately, these potential issues can only result in different procedural burdens for the parties. Thus, the parties should be careful when drafting their arbitration agreement, so as to ensure that it complies with all of the mandatory contractual requirements, as enumerated above, so as to prevent any potential issues from arising and prolonging a resolution of their dispute.

Nevertheless, if the parties are, for some reason, unable to arbitrate their dispute (for example if their dispute is not arbitrable or if their arbitration agreement is invalid and the invalidity cannot be corrected), then their only option left is to resolve their dispute through a national litigation – should they wish to have a binding ruling with regards to their legal issue. However, the parties must keep in mind that the national litigation has many disadvantages, which the parties most likely want to avoid, especially by choosing the arbitration – since all of these disadvantages are absent when arbitrating one’s dispute.²³⁶

First of all, the national litigation is public, and not confidential like the arbitration, and unfortunately, this publicity of the dispute can often damage the parties’ business relationship.²³⁷ Secondly, what often happens throughout the national litigation is that the parties’ different claims are brought before different national courts, and so there is no neutral single forum – as a result, the parties generally face many procedural issues.²³⁸ Thirdly, the national litigation does also not offer any party autonomy, since the parties cannot choose different aspects concerning their litigation, such as the governing law, the language of the proceedings, the seat of their dispute, etc.²³⁹ Fourthly, the national litigation also lasts for a significantly longer period of time than the arbitration, namely due to its many procedural burdens – a possibility of appeals being one of them, whereas the arbitral awards are final.²⁴⁰ Lastly, if the parties nationally litigate their dispute, this does not ensure that a decision of the national court will be enforceable in a foreign country, since the national courts are not obliged to recognize a foreign judgment (based on a doctrine of comity, as held in *Hilton v Guyot*).²⁴¹

Therefore, as one may have seen from this Chapter I, it is indeed essential to fulfil all of the mandatory contractual requirements when concluding the arbitration agreement, so as to ensure its validity and legitimation under the rule of law. Otherwise, many legal issues and procedural burdens may emerge for the parties to the dispute. Furthermore, when it comes to

²³⁶ *ibid.* 28-30.

²³⁷ *ibid.* 124.

²³⁸ *ibid.* 28-30.

²³⁹ *ibid.* 30.

²⁴⁰ *ibid.* 29.

²⁴¹ *Henry Hilton v Gustave Bertin Guyot, et al.* (1895) 159 U.S. 113.

these mandatory contractual requirements, the positions of Germany and the UK are very similar, since both of these countries have a rather arbitration-friendly approach with regards to the arbitration agreements – so as to ensure and support the arbitration of as many disputes as possible.

Chapter II

Fundamental provisions of the arbitration agreements

There are certain fundamental provisions that should be covered and discussed by every single arbitration agreement, because without such provisions, the agreement itself is essentially incomplete and poorly-drafted. Therefore, when drafting the arbitration agreement, the parties to a dispute must not only comply with some mandatory contractual requirements, but they should also ensure that their agreement lays down certain fundamental provisions. Only then can the parties take an advantage of an efficient and effective arbitration.

In order to properly analyse this second legal question imposed by this Thesis, that being the fundamental provisions that should be laid down by every arbitration agreement, different issues must be discussed. The issues being as follows: What are the fundamental provisions that should be laid down and discussed by every arbitration agreement? Are these provisions cumulative? And even more, what are the potential legal issues that may arise if any/some of the fundamental provisions are not included in the arbitration agreement?

The fundamental provisions that should be laid down by every arbitration agreement, in order for such agreement to be complete and well-drafted include, but are not limited to:

1. Multi-tiered clause,
2. Type of the arbitration,
3. Language of the arbitration,
4. Choice of the applicable law (substantive and procedural),
5. A composition of the arbitral tribunal,
6. Confidentiality.

1. Multi-tiered clause/s (“ADR-clause/s”)

Nowadays, multi-tiered clauses have become an increasingly popular and attractive method of resolving disputes.²⁴² They have started evolving in the United States in the late 1970s, and later on became very popular in Europe, during the beginning of the 1990s.²⁴³

The multi-tiered clauses are essentially an amicable alternative to arbitration.²⁴⁴ These clauses provide for an escalating sequence of different informal dispute resolution methods, which are chosen and which should be, thus, followed by the parties.²⁴⁵ And only if such methods fail, can the parties commence an arbitration, as their last resort.²⁴⁶ These clauses can be fundamental for the parties, since they can provide for a friendly and an informal resolution of their dispute, without a need to turn to a formal and a hostile environment, which the arbitration itself can often be.²⁴⁷

Nevertheless, although the multi-tiered clauses have many advantages, there are also some risks that come with them.²⁴⁸ These clauses are generally included in an agreement without any specific discussion or attention to detail with regards to their content.²⁴⁹ Thus, many of such clauses are often poorly drafted and as a result, they can be ineffective and unenforceable.²⁵⁰ Nowadays, there are many opposing views with regards to the multi-tiered clauses.²⁵¹ Some scholars argue that negotiation and mediation, even if established by a well-drafted multi-tiered clause, is always unenforceable due to its “*consensual and non-determinative*” nature.²⁵² On the other side, other scholars argue that negotiation and mediation

²⁴² Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study* (Cambridge University Press 2021) 294 (*Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study*).

²⁴³ Didem Kayali, ‘Enforceability of Multi-Tiered Dispute Resolution Clauses’ (2010) 27(6) *Journal of International Arbitration* <<https://kluwerlawonline-com.uaccess.univie.ac.at/api/Product/CitationPDFURL?file=Journals%5CJOIA%5CJOIA2010033.pdf>> accessed 26 June 2022, 551 (Enforceability of Multi-Tiered Dispute Resolution Clauses).

²⁴⁴ *Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study* (no 242) 295.

²⁴⁵ *ibid.* 294.

²⁴⁶ Detlev Kühner, ‘The fate of multi-tiered arbitration clauses – welcome clarification of the consequences of a lack of compliance with multi-tiered arbitration clauses in Germany and France’ (*BMH Avocats*, February 2017) <<https://bmhavocats.com/assets/uploads/2017/02/V-AN-Welcome-clarification-of-the-consequences-of-a-lack-of-compliance-with-multi-tiered-arbitration-clauses-in-Germany-and-in-France-by-Detlev-Kühner-28-février-2017.pdf>> accessed 26 June 2022 (The fate of multi-tiered arbitration clauses – welcome clarification of the consequences of a lack of compliance with multi-tiered arbitration clauses in Germany and France).

²⁴⁷ Enforceability of Multi-Tiered Dispute Resolution Clauses (no 243) 553.

²⁴⁸ *ibid.*

²⁴⁹ *ibid.* 552.

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

²⁵² *ibid.*

can be still binding on the parties to the dispute, if the multi-tiered clause is written in such a way that its binding nature is clear.²⁵³ This was the case, for example, in *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others*, where mediation was part of a multi-tiered clause, but such clause was not enforceable, because the clause was vague and did not cover some key provisions – even though the parties’ intentions to be bound by such clause, at the time of entering into such agreement, were clear and recognized by the court.²⁵⁴ Therefore, the way that the multi-tiered clause is written is immensely important, because if the wording of such clause is unclear and does not provide for a certainty with regards to the intentions of the parties, then such clause can only bring out more problems, instead of resolving them.²⁵⁵

So what issues may arise if the multi-tiered clauses are incompletely and/or incorrectly drafted? As mentioned previously, the ADR-methods are generally unenforceable, and thus ineffective, if they are laid down by poorly and inconsistently drafted clauses, without any attention to their importance and detail.²⁵⁶ In such case, the parties cannot be forced and obliged to follow the ADR-methods and as a result, have to turn to arbitration, as their last step in the sequence of many other.²⁵⁷ And even more, issues concerning the ADR-methods also bring about additional disputes with regards to the enforceability and legitimation of the multi-tiered clause – which is neither wanted nor needed by the parties who already have another dispute at their plate.²⁵⁸

Both courts and arbitral tribunals have different views in different jurisdictions when it comes to the nature of the multi-tiered clauses and whether they are binding/mandatory or not.²⁵⁹ But the general view is that the parties decide if the multi-tiered clause should or should not be binding – based on their drafting and wording of such clause.²⁶⁰ The usage of words such as “may” (*ICC Case No. 10256*)²⁶¹ or “however” (*ICC Case No. 4229*)²⁶² mean that the parties

²⁵³ *ibid.*

²⁵⁴ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* [2012] EWCA Civ 638 (*Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others*).

²⁵⁵ Enforceability of Multi-Tiered Dispute Resolution Clauses (no 243) 552.

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ Dyalá Jiménez Figueres, ‘Multi-Tiered Dispute Resolution Clauses in ICC Arbitration: Introduction and Commentary’ (2003) 14(1) ICC International Court of Arbitration Bulletin <<https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawMulti-Tiered-Dispute-Resolution-Clauses-in-ICC-Arbitration-intro-and-comment.pdf>> accessed 26 June 2022, 71/72 (Multi-Tiered Dispute Resolution Clauses in ICC Arbitration: Introduction and Commentary).

²⁶⁰ *ibid.* 72.

²⁶¹ *Interim Award in ICC Case No. 10256* (2000).

²⁶² *Interim Award in ICC Case No. 4229* (1985).

see their ADR-methods as optional and thus, they can submit their dispute to arbitration whenever they like.²⁶³ What makes the ADR-methods as optional is the vagueness of the clause's wording.²⁶⁴ On the other side, the usage of obligatory words, such as “*shall*” (*ICC Case No. 9984*)²⁶⁵, makes the clause itself binding on the parties, who have to first undergo through the different ADR-methods and only if they are unsuccessful, and the parties showed their effort throughout such methods, can the dispute at hand be arbitrated.²⁶⁶

However, when it comes to the dispute of non-compliance and/or unenforceability of the multi-tiered clause, parties, who generally do not want to comply with such clause, argue that this issue relates to a jurisdiction of the arbitral tribunal – and if the arbitral tribunal does not have the jurisdiction, this issue must be left to the national courts.²⁶⁷ The view of many scholars and leading authorities of international commercial arbitration, including a prominent Gary Born, is that conditions precedent, when it comes to arbitration, are not a jurisdictional matters, but rather matters that should be resolved by arbitrators.²⁶⁸

The same approach can be found in Germany, where multi-tiered clauses are becoming more and more popular.²⁶⁹ The German Federal Court of Justice ruled, in two of its cases, that the issue of non-compliance with the multi-tiered clause is a matter of an arbitral admissibility and not a matter of the tribunal's jurisdiction.²⁷⁰ Therefore, if such issue arises, the arbitral tribunal has indeed the jurisdiction to rule on such matter.²⁷¹ As a result, if the multi-tiered clause is not complied with, the jurisdiction of the tribunal as well as its decision regarding this matter cannot be used as a ground for challenging and setting aside of the arbitral award.²⁷²

Furthermore, the UK follows this same approach. As held in *Republic of Sierra Leone v SL Mining Ltd*, non-compliance with the multi-tiered clause is a question of the arbitral admissibility and not a question of the arbitral tribunal's jurisdiction.²⁷³ Thus, in this case, the

²⁶³ Multi-Tiered Dispute Resolution Clauses in ICC Arbitration: Introduction and Commentary (no 259) 72.

²⁶⁴ *ibid.*

²⁶⁵ *Preliminary Award in ICC Case No. 9984* (1999).

²⁶⁶ Multi-Tiered Dispute Resolution Clauses in ICC Arbitration: Introduction and Commentary (no 259) 72.

²⁶⁷ The fate of multi-tiered arbitration clauses – welcome clarification of the consequences of a lack of compliance with multi-tiered arbitration clauses in Germany and France (no 246).

²⁶⁸ *International Commercial Arbitration* (no 91).

²⁶⁹ Jochen Lehmann and Markus Andrees, ‘Litigation & Dispute Resolution Laws and Regulations 2021: Germany’ (*Global Legal Insights*, 2021) <<https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/germany>> accessed 26 June 2022.

²⁷⁰ *Decision of the Bundesgerichtshof* (2016) I ZB 50/15.; *Decision of the Bundesgerichtshof* (2016) I ZB 1/15.

²⁷¹ *ibid.*

²⁷² *ibid.*

²⁷³ *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm).

arbitral award also could not be challenged based on the lack of arbitral tribunal's jurisdiction (laid down by a section 67 of the UK Arbitration Act).²⁷⁴

To sum up, the multi-tiered clauses are becoming more and more common in the arbitration, since they provide for a more cost-effective and a time-effective solution for the parties and their dispute.²⁷⁵ However, it is important that the parties comply with such clause, once it becomes part of their arbitration agreement and once their dispute arises.²⁷⁶ Even if many countries have a friendly approach when it comes to upholding the arbitration agreements, the arbitral tribunals still have a wide discretion of staying the proceedings and/or imposing many sanctions on the parties not complying with the multi-tiered clause, as a condition precedent to the arbitration agreement.²⁷⁷ As discussed above, the pro-arbitration approach can not only be seen in Germany and the UK, but also in other countries where the arbitration is a common alternative-dispute resolution method.²⁷⁸ The principle that the non-compliance with the multi-tiered clause is a question of the arbitral admissibility and not a question of the tribunal's jurisdiction was also further confirmed, for example by the Singapore Court of Appeal in *BBA v BAZ*²⁷⁹ and *BTN v BTP*²⁸⁰, or even by the United States Supreme Court in *BG Group v Republic of Argentina*.²⁸¹ Conclusively, the multi-tiered clauses can bring many advantages for the parties to the dispute, but only if the contract, within which they are included, is drafted carefully in a “*sufficiently clear and certain*” way, as held in *Emirates Trading Agency LLC v Prime Mineral Export*.²⁸² Otherwise, if the wording is uncertain, such clauses may not be enforceable and the parties cannot be obliged to comply with them, resulting in a fruitless alternative-dispute resolution method/s.²⁸³

²⁷⁴ *ibid.*

²⁷⁵ Enforceability of Multi-Tiered Dispute Resolution Clauses (no 243) 552.

²⁷⁶ *ibid.* 551.

²⁷⁷ *ibid.* 561.

²⁷⁸ *ibid.* 551/569.

²⁷⁹ *BAZ v BBA and others and other matters* [2018] SGHC 275.

²⁸⁰ *BTN and another v BTP and another* [2020] SGCA 105.

²⁸¹ *BG Group PLC v Republic of Argentina* (2014) 134 S. Ct. 1198.

²⁸² *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm).

²⁸³ Enforceability of Multi-Tiered Dispute Resolution Clauses (no 243) 552.

2. Type of the arbitration

If the parties include a multi-tiered clause in their arbitration agreement, and the parties' efforts to resolve their dispute based on such clause are unsuccessful, then the arbitration has to be commenced, as the parties' last resort.²⁸⁴ However, before the commencement of arbitration, the parties must firstly choose the type of arbitration that they wish to proceed with.²⁸⁵ The reason for this is rather simple – every arbitration is subjected to some procedural rules which govern the arbitration proceedings themselves.²⁸⁶ These rules govern, for example, a composition of the arbitral tribunal or how the written proceedings and the hearings themselves should be conducted.²⁸⁷ And these procedural rules are determined on the basis of the type of the chosen arbitration – if the parties choose an *ad hoc* arbitration, then they can choose and decide themselves on the procedural rules which they prefer, but if they choose an institutional arbitration, then such institution has its own rules of procedure which must be strictly followed by the parties.²⁸⁸

Nevertheless, each of these types of the arbitration may create some potential issues and disadvantages for the parties to the dispute, which the parties should beware of when drafting their arbitration agreement.²⁸⁹ Otherwise, these issues can affect an overall success of their arbitration.

The *ad hoc* arbitration is the type of arbitration that is “*tailor-made*” for the parties at hand.²⁹⁰ Meaning that the parties can shape all of the procedural aspects of their arbitration by choosing a specific procedural law that meets and fulfils their needs, wishes and intentions.²⁹¹ Nowadays, the most common procedural rules are the UNCITRAL Arbitration Rules, since the parties generally prefer that such rules are not based on any specific arbitral institution²⁹², but are rather derived from the United Nation itself.²⁹³

²⁸⁴ *ibid.* 551.

²⁸⁵ Ulrich G. Schroeter, ‘Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases’ (2017) 10(2) Contemporary Asia Arbitration Journal 141 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085554> accessed 26 June 2022, 144 (Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases).

²⁸⁶ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 42.

²⁸⁷ *ibid.*

²⁸⁸ *ibid.* 42/47.

²⁸⁹ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285).

²⁹⁰ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 43.

²⁹¹ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285) 147-148.

²⁹² *Redfern and Hunter on International Arbitration: Student Version* (no 3) 43.

²⁹³ UNCITRAL Model Law on International Commercial Arbitration (no 113).

However, the success of the *ad hoc* arbitration depends purely on a cooperation of the parties and their lawyers.²⁹⁴ Otherwise, if the cooperation between the parties is unsuccessful and/or one of the parties wishes to delay/prevent the arbitration proceedings, he/she can always do so by not complying with different arbitral procedural rules.²⁹⁵ This can be achieved namely by rejecting to appoint an arbitral tribunal – and if this is the case, then the non-existence of the arbitral tribunal results in a pointless arbitration agreement, since there are no arbitrators that could oblige the unwilling party to comply with the arbitration, as the contractually chosen dispute resolution method.²⁹⁶ Even if both of the parties wish to proceed with the arbitration in order to resolve their dispute, another potential issue may arise when it comes to the necessary procedural aspects that the parties must mutually discuss and agree on.²⁹⁷ These are, for example, a place of the arbitration or a language which should be used by the parties, their lawyers and by the arbitrators – as will be discussed later on in this Thesis. Thus, the cooperation of the parties is not only necessary when it comes to the commencement of their arbitration, but also when it comes to its composition – particularly because of the parties' enormous autonomy when it comes to the arbitration.²⁹⁸

Conclusively, as one may see, there is a rather significant potential issue which may occur when it comes to the *ad hoc* arbitration – that being the lack of the cooperation between the parties and as a result, the arbitration being unsuccessful.²⁹⁹ It is important for the parties to the dispute to keep one thing in mind, particularly when the dispute arises between them. That is the fact that the parties chose the arbitration themselves, by putting in place their arbitration agreement, in order to prevent a resolution of their dispute through a national litigation as well as to avoid all the negative aspects that come with it, which were mentioned in the Conclusion of Chapter I. Therefore, the advice for the parties would be to always cooperate and allow for the commencement of their arbitration, regardless of the fact that they have chosen the *ad hoc* arbitration and there may be no arbitral tribunal to oblige them to arbitrate their dispute.³⁰⁰ Otherwise, what is the point of the arbitration agreement, whose aim was to make the dispute as easily resolved as possible, if it only ends in further conflicts and procedural burdens?

²⁹⁴ Redfern and Hunter on International Arbitration: Student Version (no 3) 43.

²⁹⁵ *ibid.*

²⁹⁶ *ibid.*

²⁹⁷ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285) 148-149.

²⁹⁸ *ibid.* 143.

²⁹⁹ Redfern and Hunter on International Arbitration: Student Version (no 3) 43-44.

³⁰⁰ *ibid.*

Furthermore, based on the institutional arbitration, the parties administer their dispute by choosing a specific arbitral institution and its own procedural rules.³⁰¹ Therefore, the arbitral institution provides for a so-called procedural “*rulebook*” which must be strictly followed by the parties.³⁰² When it comes to the potential issues which may arise with regards to the institutional arbitration, they are of a less significance as in the case of the *ad hoc* arbitration. Because if the parties choose the institutional arbitration, they agree that the arbitral tribunal will be established by the arbitral institution and as a result, the parties cannot prevent the creation of such tribunal which can, in return, oblige and compel the parties to cooperate with the arbitration proceedings.³⁰³ Thus, the parties’ ability to delay/prevent the commencement of the arbitration is not really possible, as is the case in the *ad hoc* arbitration. Nevertheless, there are not really any issues when it comes to the institutional arbitration, rather only a few disadvantages that come with it – such as high administrative fees for the assistance of the arbitral institution, many procedural steps that the parties have to comply with (and which can lead to delayed and longer proceedings), as well as unrealistic time frames set out by the arbitral institution/tribunal, that the parties are obliged to follow.³⁰⁴

When it comes to the institutional arbitration in Germany, the most-known arbitral institution is the German Institution of Arbitration (DIS).³⁰⁵ According to the latest DIS Statistics, there were, in total, 165 DIS proceedings in 2020, whereas the year before, the number of DIS proceedings was a bit lower, that being 151.³⁰⁶ Nevertheless, there are also other qualified permanent institutions, such as the “Hamburg freundschaftliche Arbitrage”, which became a permanent arbitral institution upon a qualification by the German Federal Supreme Court – based on the institution’s usage of its own arbitration rules.³⁰⁷

Furthermore, in the UK, the most-known known arbitral institution is the London Court of International Arbitration (LCIA).³⁰⁸ In comparison to DIS, the LCIA statistics show a higher

³⁰¹ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285) 145.

³⁰² Redfern and Hunter on International Arbitration: Student Version (no 3) 45.

³⁰³ *ibid.*

³⁰⁴ *ibid.* 46.

³⁰⁵ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285) 158.

³⁰⁶ ‘DIS: Archive’ (German Arbitration Institute) <<https://www.disarb.org/en/about-us/our-work-in-numbers/archive>> accessed 26 June 2022.

³⁰⁷ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285) 164.

³⁰⁸ Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases (no 285) 157.

usage of this arbitral institution.³⁰⁹ In 2018, there were 317 arbitrations under the guidance of LCIA, in 2019 the number was 395 and in 2020, there was a significant increase in the LCIA's usage as there were 444 arbitrated disputes.³¹⁰

However, even though these arbitral institutions from Germany and the UK are commonly used by the parties on a yearly-basis, their usage cannot be compared with the usage of other, much famous, arbitral institutions. Such as the International Chamber of Commerce, which is the leading arbitral institution in the European Union.³¹¹ For example, in 2020, the ICC dealt with 946 cases³¹², which is indeed a much higher number than the amount of recorded cases by DIS and LCIA.³¹³

To conclude, the arbitration proceedings cannot be commenced unless the parties choose the type of the arbitration that they wish to proceed with – either the *ad hoc* or the institutional arbitration.³¹⁴ As one may have seen, there are some potential issues which may arise when it comes to the *ad hoc* arbitration. Nevertheless, this type of the arbitration can be specifically tailored to the parties' needs and wishes with regards to their dispute resolution.³¹⁵ On the other side, although there are not really any potential issues with regards to the institutional arbitration, there are still some disadvantages that come with it. However, this type of the arbitration ensures that even if one of the parties is not willing to cooperate when it comes to the dispute resolution, such party can be forced to comply, due to the certain existence of the arbitral tribunal, established by the arbitral institution.³¹⁶

Therefore, it is important for the parties, before the commencement of their proceedings, to weight both types of the arbitration so as to choose the type that fits their intentions, needs and wishes the most – depending on the specifics of each case.

³⁰⁹ 'LCIA: Reports' (*London Court of International Arbitration*) <<https://www.lcia.org/lcia/reports.aspx>> accessed 26 June 2022.

³¹⁰ *ibid.*

³¹¹ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 49.

³¹² ICC Dispute Resolution Statistics: 2020 (no 6).

³¹³ 'The International Arbitration Statistics Report' (*The Business Disputes Register*) <<https://www.disputesregister.org/advice/international-arbitration-statistics-report>> accessed 26 June 2022.

³¹⁴ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 42.

³¹⁵ *ibid.* 43.

³¹⁶ *ibid.* 45.

3. Language of the arbitration

International arbitration, which is at the centre of this Thesis, has a difficult role of settling disputes where different linguistic and cultural environments are at stake.³¹⁷ And it is important to note that an official language of a state, where the proceedings are happening, does not determine the language of the arbitration itself – although this is actually the case of national courts.³¹⁸ Therefore, it is immensely important for the parties to expressly choose the language governing their arbitration proceedings, so as to ensure a smoothness of their dispute resolution process.³¹⁹ The appropriate language of the proceedings does not only ensure an equality and a due process rights for the parties, but it is also decisive when composing an arbitral tribunal and when interacting, if necessary, with national courts.³²⁰

Based on a principle of a party autonomy, the parties themselves should expressly agree, in their arbitration agreement, on the language of their proceedings.³²¹ Many arbitral institutions and their rules support the autonomy of the parties and their free designation of the applicable language – as is the case for the ICC Rules³²² or the UNCITRAL Rules.³²³ The parties should take an advantage of their autonomy and should cooperate and choose the applicable language that suits both of their linguistic and cultural needs.³²⁴ Especially because the arbitration is a consensual process, and so if the parties cannot even agree on the language applicable to their dispute resolution, it is then highly unlikely that they will successfully resolve their legal issues at hand.³²⁵ Even more, the parties should keep in mind that they chose arbitration, as their preferred dispute resolution method, so as to exploit the main advantages of the arbitration, whilst avoiding the many disadvantages that are at stake when litigating before a national

³¹⁷ Fernando Dias Simoes, 'The Language of International Arbitration' (2017) 35(1) Conflict Resolution Quarterly <<https://heinonline-org.uaccess.univie.ac.at/HOL/Page?handle=hein.journals/cfltrq35&id=88&collection=journals&index=>> accessed 26 June 2022, 89 (The Language of International Arbitration).

³¹⁸ Tarek El Ghadban, 'Language of the Proceedings' (*Jus Mundi*, 18 May 2022) <<https://jusmundi.com/en/document/wiki/en-language-of-the-proceedings>> accessed 26 June 2022 (Language of the Proceedings).

³¹⁹ Redfern and Hunter on International Arbitration: Student Version (no 3) 100.

³²⁰ The Language of International Arbitration (no 317).

³²¹ *ibid.* 95.

³²² ICC Rules (no 95) art 20.

³²³ UNCITRAL Arbitration Rules (no 73) art 17.1.

³²⁴ The Language of International Arbitration (no 317) 93.

³²⁵ Valentina Faenza, 'The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?' (*Kluwer Arbitration Blog*, 6 May 2014) <<http://arbitrationblog.kluwerarbitration.com/2014/05/06/the-choice-of-the-language-of-the-proceedings-an-underestimated-aspect-of-the-arbitration/>> accessed 26 June 2022 (The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?).

court.³²⁶ Thus, not agreeing on the applicable language of the arbitration goes against a logic of choosing this dispute resolution method in the first place, as a purely consensual process.

Nevertheless, when drafting the arbitration agreement and deciding on the language applicable to the arbitration proceedings, the parties should keep in mind two potential issues which may potentially occur – but which can be easily prevented by the parties themselves. Those issues being when, firstly, there is no explicit determination of the language of the arbitration and secondly, when the arbitration documents / submissions are drafted in a vague language.

No explicit determination of the language:

Firstly, what happens if there is no explicit determination of the applicable language of the arbitration? In such case, it is generally up to the arbitral tribunal to decide on the applicable language.³²⁷ Some institutional arbitration rules provide the tribunals with a guidance as to how such language should be chosen (such as the ICC Rules)³²⁸, whilst other rules remain silent on this issue (such as the UNCITRAL Rules)³²⁹. Based on the principle of *Kompetenz-Kompetenz*, the arbitral tribunal can either determine the language of the proceedings based on an implicit choice of the parties (if there is any)³³⁰ or it can decide itself on the applicable law, either based on its discretion or based on the default institutional rules (if applicable).³³¹ However, the language of the arbitration proceedings is generally determined on a case-by-case basis, based on the particular facts of each case³³² – in addition to that, the arbitral tribunal should, particularly, consider the language/s of the parties at hand, as held in *ICC Case No. 7862*.³³³ But the rule still stands that to avoid any procedural burdens and delays in a dispute resolution process, the parties themselves should expressly agree on the language of their proceedings –

³²⁶ *ibid.*

³²⁷ Language of the Proceedings (no 318).

³²⁸ ICC Rules (no 95) art 20.

³²⁹ UNCITRAL Arbitration Rules (no 73).

³³⁰ The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration? (no 325).

³³¹ John J Buckley Jr, 'Language and Due Process in International Arbitration' (*Expert Guides: Commercial Arbitration*)

<https://www.wc.com/portaresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRVPMQiLsSwaZCm83!/document.name=/Euromoney_Language%20and%20Due%20Process%20in%20Internaional%20Arbitration_November%202017.PDF> accessed 26 June 2022.

³³² *ibid.*

³³³ *Arbitral Award in ICC Case No. 7862* (1997).

especially if they choose the arbitration, as the dispute resolution process which is characterised by its consensual nature.³³⁴

This same approach is also supported by Germany. Based on a section 1045 of the German Code of Civil Procedure, the parties are autonomous in choosing the applicable language/s governing their arbitration.³³⁵ This was also confirmed by the Berlin Court of Appeal in its case-law.³³⁶ However, if the parties cannot agree on the applicable language, or if their choice is simply missing, then the choice of the language is up to the arbitral tribunal.³³⁷ And even though the arbitral tribunal has the *Kompetenz-Kompetenz*, there are some aspects which the tribunal must always consider when choosing the applicable language – particularly the interests of both of the parties, a language of a contract between the parties or even a correspondence which took place between the parties prior to their contract-signing.³³⁸

On the other side, the UK follows the same approach as Germany when it comes to the language of the arbitration. Under the UK Arbitration Act, particularly a section 34, the parties' autonomy is recognised, since the parties have a right to agree on “*any matter*”.³³⁹ Thus, also including the language of their dispute.³⁴⁰ In the absence of the parties' choice, the arbitral tribunal has a discretion to decide on all of the matters concerning a procedure and an evidence, including the language of the arbitration.³⁴¹

Conclusively, it is necessary for the parties to expressly agree on the language governing their arbitration. And secondly, it is advisable that the parties choose the language that meets both of their needs, so as to avoid any practical, legal and cultural obstacles.³⁴² In cases of an international commercial arbitration, English is considered to be a *lingua franca*³⁴³ - for example, in 2020, the ICC awarded 80% of its awards only in English, although it is an institution based in France.³⁴⁴

³³⁴ Redfern and Hunter on International Arbitration: Student Version (no 3) 72.

³³⁵ German Code of Civil Procedure (2005) section 1045 (German Code of Civil Procedure).

³³⁶ Decision of the Kammergericht (2016) 20 SchH 1/16.

³³⁷ German Code of Civil Procedure (no 335).

³³⁸ Jiri Jaeger and Michael Zavodsky, 'The language of the proceedings in arbitration' (*Bird & Bird*) <https://www.twobirds.com/-/media/pdfs/germany/42290195_1.pdf> accessed 26 June 2022.

³³⁹ The UK Arbitration Act (no 86) section 34.

³⁴⁰ *ibid.*

³⁴¹ *ibid.*

³⁴² The Language of International Arbitration (no 317).

³⁴³ Ilias Bantekas, 'Language Selection in International Commercial Arbitration' (2020) 36(1) Ohio State Journal on Dispute Resolution <https://heinonline-org.uaccess.univie.ac.at/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ohjdpr36&men_hide=false&men_tab=toc&kind=&page=127> accessed 26 June 2022, 150 (Language Selection in International Commercial Arbitration).

³⁴⁴ ICC Dispute Resolution Statistics: 2020 (no 6).

But most importantly, the parties must keep in mind that they simultaneously agreed on the arbitration, as their preferred dispute resolution method. And because the arbitration is indeed a purely consensual process, its success depends solely on the parties' cooperation³⁴⁵ – and if the parties cannot even agree on the language governing their arbitration proceedings, then that leaves a very little room for an efficient and effective resolution of their dispute.

Vague language of the arbitration:

In cases of the language governing the parties' arbitration, there is another potential issue that may arise. More specifically, what happens when the parties choose the applicable language of their arbitration, but they choose it without a proper consideration (namely if one of the parties cannot fully comprehend and understand the language)? And as a result of such actions, their arbitration documents / submissions are drafted in a vague way and a need for an interpretation occurs – affecting the efficiency and effectiveness of their arbitration proceedings?

In this case, an arbitral tribunal (or a national court) is given an important role of a contractual interpretation, with an aim of figuring out the parties' intentions with regards to the different aspects of their arbitration (both substantive and procedural).³⁴⁶ The contractual interpretation, however, depends to a large extent on the law governing the arbitration agreement.³⁴⁷ Therefore, for purposes of this Thesis, the contractual interpretation in cases of Germany and the UK will be looked at – particularly in cases of a vague language of the arbitration agreements. However, as one will see, a significant difference appears in cases of the contractual interpretation with regards to these two jurisdictions – Germany, as a civil law country, prefers a subjective interpretation, whereas the UK, as a common law country, prefers an objective interpretation.³⁴⁸

The contractual interpretation in Germany is a two-step process.³⁴⁹ Therefore, if the parties choose the German law, as the law of their arbitration agreement, then they must obey

³⁴⁵ Redfern and Hunter on International Arbitration: Student Version (no 3) 72.

³⁴⁶ S. I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* (Oxford University Press 2013) 169 (*Class, Mass, and Collective Arbitration in National and International Law*).

³⁴⁷ *ibid.* 171.

³⁴⁸ Stefan Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' (2007) University of Oxford Faculty of Law Legal Studies Research Paper Series 7/2007 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=984074> accessed 26 June 2022, 3 (Interpretation of Contracts: Concluding Comparative Observations).

³⁴⁹ Wolfgang Breyer and others, 'What do the words mean: Different approaches to the interpretation of contracts' <<https://lclalliance.com/wp-content/uploads/2020/12/Breyer-1-Different-approaches-to-the-interpretation-of->

this two-step process when interpreting their arbitration agreement.³⁵⁰ Firstly, under the law of Germany, the arbitral tribunal must look at the real intentions of the parties, instead of analysing the “*literal meaning*” of the words used in their arbitration agreement.³⁵¹ By doing so, the arbitral tribunal must determine whether the parties’ real intentions, with regards to a meaning of their contractual provision/s, are aligned into one common ground, as held in *BMT Marine and Offshore Survey Ltd v Lloyd Werft Bremerhaven GmbH*.³⁵² As further held by the Federal Supreme Court of Germany, if the parties’ real intentions are indeed aligned, then such intentions will determine the meaning of the contractual provision/s and there is no need to “*regard to anything else*”.³⁵³ But depending on the particular case, the arbitral tribunal may also consider commercial practice and good faith requirements, if necessary for a further gap-filling.³⁵⁴ This first step of the contractual interpretation is defined as subjective.³⁵⁵

However, if the arbitral tribunal cannot find the real and common intention/s of the parties, then the contractual provisions must be objectively interpreted.³⁵⁶ In this case, the arbitral tribunal should review all of the available evidence so as to figure out the meaning of the contractual provision/s – the evidence including, for example, a pre-contractual communication, a purpose of the parties’ contract and its wording as well as the commercial interests of the parties.³⁵⁷

Conclusively, when it comes to Germany and the contractual interpretation, the first step is to always determine the meaning of the contractual provisions, specifically by looking at the subjective intent/s of the parties at hand.³⁵⁸ And if this is not possible, only then should the arbitral tribunal rely on the objective approach.³⁵⁹ These principles of the German contractual interpretation are indeed general and can, therefore, not only apply to contracts as such, but also to the arbitration agreements, when governed by the law of Germany.³⁶⁰

The same can be said for the UK – the English courts have many precedents when it comes to the contractual interpretation, which do not only apply to the general contracts, but

contracts-.pdf> accessed 26 June 2022 (What do the words mean: Different approaches to the interpretation of contracts).

³⁵⁰ *ibid.*

³⁵¹ German Civil Code (no 117) 133.

³⁵² *BMT Marine and Offshore Survey Ltd v Lloyd Werft Bremerhaven GmbH* [2011] EWHC 32 (Comm) (*BMT Marine and Offshore Survey Ltd v Lloyd Werft Bremerhaven GmbH*).

³⁵³ *Decision of the Bundesgerichtshof* (1983) IVa ZR 80/82.

³⁵⁴ German Civil Code (no 117) 157.

³⁵⁵ Interpretation of Contracts: Concluding Comparative Observations (no 348) 5.

³⁵⁶ *ibid.* 3.

³⁵⁷ *BMT Marine and Offshore Survey Ltd v Lloyd Werft Bremerhaven GmbH* (no 352).

³⁵⁸ *ibid.*

³⁵⁹ *ibid.*

³⁶⁰ What do the words mean: Different approaches to the interpretation of contracts (no 349).

can be also used when interpreting the vague provisions of the arbitration agreements.³⁶¹ As mentioned above, the English courts interpret the contractual provisions objectively.³⁶² Based on this objective interpretation, the contractual provisions should be generally interpreted by giving the words their “*natural and ordinary meaning*”³⁶³ – thus, by looking at the exact language used in the contract or in the arbitration agreement, rather than by going outside the “four corners” rule.³⁶⁴

However, during the late 20th century, the contractual interpretation under the English law has started developing a more liberal approach, with a significant ruling in *Investors Compensation Scheme v West Bromwich Building Society*.³⁶⁵ In this case, and in many other following, the court moved away from a traditional approach of a literal interpretation and argued that if the contractual language seems incorrect, then the parties should not be attributed an intention that they simply cannot have.³⁶⁶ The contractual provisions should be rather determined by analysing the meaning that they convey to a reasonable person, in connection with a background and a context information available to such person at the time of the contract.³⁶⁷ This ruling was also supported by *Chartbrook Ltd v Persimmon Homes Ltd*.³⁶⁸ Moreover, the literal approach towards the objective interpretation was further expanded by a court in *Wood v Capita Insurance*, where it was held that to determine the meaning of the contractual provisions, the court should also consider a business common sense of the parties at hand - particularly in commercial cases, inclusive of an international commercial arbitration.³⁶⁹

However, it is important to note that even if the more liberal approach towards the objective interpretation (of vague contractual provisions) has been generally proven under the law of the UK, the position of the courts still depends on a case-by-case analysis. There are still cases where the vague contractual provisions are interpreted according to the strict objective approach, such as in *Arnold v Britton*, where the court held that even though the business

³⁶¹ *ibid.*

³⁶² *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28 (*Investors Compensation Scheme v West Bromwich Building Society*).

³⁶³ *ibid.*

³⁶⁴ Julian Clark and Reema Shour, ‘English case law that is of global significance’ (*International Bar Association*, 23 April 2021) <<https://www.ibanet.org/article/37BB1552-850D-4AE8-8944-194FCE56C52C>> accessed 28 June 2022.

³⁶⁵ What do the words mean: Different approaches to the interpretation of contracts (no 349).

³⁶⁶ *Investors Compensation Scheme v West Bromwich Building Society* (no 362).

³⁶⁷ *ibid.*

³⁶⁸ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

³⁶⁹ *Wood v Capita Insurance Services Limited* [2017] UKSC 24.

common sense of the parties is indeed important, the actual and exact language, used in the contract (or in the arbitration agreement), must not be undermined.³⁷⁰

To conclude, when comparing the jurisdictions of Germany and the UK, one can see that the German law is much more flexible and liberal when it comes to the interpretation of the vague / unclear arbitration agreements. More specifically, when it comes to the interpretation under the German law, the court will interpret the agreement by looking at the subjective intentions of the parties at hand – and only if this is not possible will the court rely on the objective interpretation.³⁷¹ On the other hand, in case of the arbitration agreement governed under the law of the UK, the general approach of the courts is to interpret the arbitration agreement objectively – particularly by analysing the exact wording used in the agreement.³⁷² However, as one could see above, this objective approach, under the law of the UK, has lately been much more flexible.³⁷³

Conclusion:

The parties wishing to arbitrate their dispute should keep in mind, once drafting their arbitration agreement, that the wording and the language chosen by them is indeed extremely important and should not be underestimated. Because if they draft their arbitration agreement poorly, then a further dispute may arise between them with regards to the interpretation of the vague and unclear contractual provisions – the same applies if the parties choose the language that they cannot fully understand and such a lack of the knowledge will be also mirrored in the chosen wording of their arbitration agreement. And in case of these potential situations, the arbitration agreement will be interpreted according to its governing law³⁷⁴ – whether the contractual interpretation will be subjective and liberal, as is the case under the German law, or whether the interpretation will be stricter and objective, as is the case under the law of the UK.³⁷⁵

At the end, these above-mentioned potential issues can be easily prevented by the parties if they, firstly, choose a logical language governing their arbitration (that all of the parties fully understand / comprehend). And secondly, if the parties draft their arbitration agreement in a

³⁷⁰ *Arnold v Britton and others* [2015] UKSC 36.

³⁷¹ *BMT Marine and Offshore Survey Ltd v Lloyd Werft Bremerhaven GmbH* (no 352).

³⁷² What do the words mean: Different approaches to the interpretation of contracts (no 349).

³⁷³ *Investors Compensation Scheme v West Bromwich Building Society* (no 362).

³⁷⁴ *Class, Mass, and Collective Arbitration in National and International Law* (no 346).

³⁷⁵ What do the words mean: Different approaches to the interpretation of contracts (no 349).

detailed way, whilst paying attention to the wording chosen by them. The parties should namely keep in mind that the arbitration is a consensual process and that the parties have a procedural autonomy, which should be used to its advantage and not misused even before the proceedings themselves start.³⁷⁶

4. Choice of the applicable law

The law governing the arbitration agreement:

The importance of choosing a law governing the arbitration agreement is extremely underestimated.³⁷⁷ Parties to a dispute, once drafting their arbitration agreement, rarely choose the law applicable to their arbitration agreement.³⁷⁸ Conclusively, giving rise to different complexities as well as to lengthier and more costly proceedings – which the parties must be prepared to bear, as a result of their underestimation.³⁷⁹

But why is the choice of the law governing the arbitration agreement so necessary? Isn't it possible for the parties to simply assume that the law governing their commercial contract will be also applied to their arbitration agreement, once a dispute arises?³⁸⁰

The law governing the arbitration agreement determines a number of matters in relation to the agreement itself, namely a validity, interpretation, formation, termination as well as any assignment and waiver of rights under such agreement.³⁸¹

Traditionally, it was argued that the law governing the contract is also the same as the law governing the arbitration agreement and that these two may rarely vary, as held, for example, in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.³⁸² However, based on a principle of a separability, the arbitration agreement is separate from the contract with which it is associated³⁸³, and this principle is also recognized by different international rules of

³⁷⁶ The Language of International Arbitration (no 317) 95.

³⁷⁷ Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (1st edn, Informa Law from Routledge 2017) 5 (*Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes*).

³⁷⁸ *ibid.*

³⁷⁹ *ibid.*

³⁸⁰ *ibid.* 6/7.

³⁸¹ Amanda Nunes Sampaio, 'The law governing the arbitration agreement: Why we need it and how to deal with it' (*International Bar Association*) <<https://www.ibanet.org/article/699fd751-0bd4-4a15-bf84-e2542a8219c9>> accessed 1 July 2022.

³⁸² *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and others* [1993] 2 WLR 262 (HL).

³⁸³ Gary B. Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 Singapore Academy of Law Journal <<https://heinonline->

the arbitration, such as the Model Law.³⁸⁴ However, it was argued in different cases that the principle of the separability does not mean that the contract and the arbitration agreement are two completely separate documents, as held in *Hussman Ltd v Development*.³⁸⁵ As further argued in *BCY v BCZ*, the arbitration agreement should be only separate from the main contract in cases when a validity of the arbitration agreement is at stake – therefore, when the main contract is invalid, the arbitration agreement must be considered to be a separate document, from the contract itself, in order to ensure its validity and effectiveness.³⁸⁶ Although the principle of the separability is not absolute, it is now well-established that such principle still provides for a possibility of two different laws governing the main contract and the arbitration agreement, as held in *Sulamérica Cia Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*.³⁸⁷ Furthermore, as was also ruled in an *ICC Case No. 3572*, the arbitration agreement can be governed by a law different than the law governing the contract itself³⁸⁸ – although it does not mean that the law of the contract and the law of the arbitration agreement must always differ, as held in *ICC Case No. 4131*.³⁸⁹ However, the case-law practise shows that it is common for the law of the arbitration agreement to be different from the law of the main contract, as was demonstrated, for example, in an *ICC Case No. 1507*³⁹⁰ or in a significant ruling *Sulamérica Cia Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*.³⁹¹

Moreover, the parties generally include an express choice of the law governing their commercial contract.³⁹² But this is rarely the case when it comes to the arbitration agreements, which are often silent with regards to its applicable law.³⁹³ But why is that? As mentioned above, the law of the arbitration agreement can and may differ from the contract itself and therefore, it is important that the parties expressly choose a law governing their arbitration agreement and that they do not just assume that the law of their contract will automatically

org.uaccess.univie.ac.at/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/sacj26&men_hide=false&men_tab=toc&kind=&page=815> accessed 1 July 2022, 818 (The Law Governing International Arbitration Agreements: An International Perspective).

³⁸⁴ UNCITRAL Model Law on International Commercial Arbitration (no 113) art 16(1).

³⁸⁵ *Hussmann (Europe) Ltd v Al Ameen Development & Trade Company & others* [2000] EWHC 210 (Comm).

³⁸⁶ *BCY v BCZ* [2016] SGHC 249 (*BCY v BCZ*).

³⁸⁷ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

³⁸⁸ *Final Award in ICC Case No. 3572* (1989).

³⁸⁹ *Interim Award in ICC Case No. 4131* (1984).

³⁹⁰ *Final Award in ICC Case No. 1507* (1970).

³⁹¹ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

³⁹² Andrew Pullinger and Sean McGuiness, 'Determining the law of an arbitration agreement: the *Sulamérica* test in practice' (DLA Piper, 27 March 2013) <https://www.dlapiper.com/en/us/insights/publications/2013/03/determining-the-law-of-an-arbitration-agreement-___/> accessed 1 July 2022.

³⁹³ *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (no 377).

apply to their arbitration agreement, once their dispute arises.³⁹⁴ Otherwise, if the parties underestimate this issue when drafting their arbitration agreement, the lack of the express choice of the law governing their arbitration agreement will result in further complexities.³⁹⁵ In such a situation, and in order to figure out what law should govern the arbitration agreement, the choice of law rules will be applied to resolve this issue – generally by the arbitral tribunal, based on its *Kompetenz-Kompetenz* and based on international commercial arbitration rules³⁹⁶, such as article 28(2) of the Model Law.³⁹⁷ However, the need for the choice of law rules may result in an application of a law that the parties wanted to avoid in the first place.³⁹⁸

So what choice of law rules are applied in the absence of the express choice of the law governing the arbitration agreement? For purposes of discussing how the law governing the arbitration agreement should be established, in the absence of the express choice, no specific distinction between civil law and common law will be addressed.³⁹⁹ Because in case of a missing applicable law of the arbitration agreement, this issue must be resolved from an international perspective – as also argued by many scholars, namely Gary Born.⁴⁰⁰ As will be discussed below, the international commercial arbitration practise also supports this view.⁴⁰¹ If there is no expressly chosen law governing the arbitration agreement, then the arbitral tribunal must look at the international case law practise with regards to this issue, in order to see how other tribunals decide on the law governing the arbitration agreement, when the parties have not done so.⁴⁰² However, some smaller comparisons between the law of the UK and Germany will be demonstrated.

Furthermore, although it is advisable to always provide for the express choice of the law governing the arbitration agreement⁴⁰³, the case law concerning the lack of such choice is rather extensive and clear – luckily for the parties who have underestimated this matter. The most predominant case is the above-mentioned *Sulamérica Cia Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*.⁴⁰⁴ In this case, the court provided for a three-stage test when determining the law governing the arbitration agreement, in the absence of the parties’

³⁹⁴ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

³⁹⁵ *ibid.*

³⁹⁶ *ibid.*

³⁹⁷ UNCITRAL Model Law on International Commercial Arbitration (no 113) art 28(2).

³⁹⁸ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

³⁹⁹ The Law Governing International Arbitration Agreements: An International Perspective (no 383) 816.

⁴⁰⁰ *ibid.*

⁴⁰¹ *ibid.*

⁴⁰² *ibid.* 816-817.

⁴⁰³ *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (no 377).

⁴⁰⁴ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

choice.⁴⁰⁵ The three-stage test is as follows. Firstly, if there is an express choice of the law governing the arbitration agreement, then this choice shall prevail.⁴⁰⁶ Based on the principle of party autonomy, the arbitral tribunal must respect the law chosen by the parties⁴⁰⁷ – as supported by *National Thermal Power v Singer*⁴⁰⁸ or by *Aastha v Thaicom*.⁴⁰⁹

However, if there is no express choice of the law governing the arbitration agreement and its substance (as is usually the case), then the arbitral tribunal must analyse whether there is an implied choice of the law (governing the arbitration agreement) by the parties to the dispute.⁴¹⁰ The implied choice of the law is determined by looking at the intentions of the parties as well as by analysing different facts and circumstances of the case at hand.⁴¹¹ In the *Sulamérica* case, the arbitral tribunal ruled that (based on this second stage of the test) if the parties have expressly agreed on the law governing their commercial contract, then they have impliedly chosen this law to also govern their arbitration agreement (unless there are “*powerful factors*” stating otherwise) – because the express choice of the law governing the contract is an indication of the parties’ intentions with regards to their arbitration agreement.⁴¹² As further held in an *ICC Case No. 6840*, it is “*reasonable and natural*” for the same law to apply to the main contract as well as to the arbitration agreement.⁴¹³ This second stage of the test was supported and relied on in many other cases – where the arbitral tribunals also found that the express choice of the law governing the contract is an implied choice of the law governing the arbitration agreement – for example in *BCY v BCZ*⁴¹⁴, *Arsanovia Ltd & Others v Cruz City*⁴¹⁵, *Sonatrach Petroleum v Ferrell Int*⁴¹⁶ or in *Leibinger v Stryker Trauma GmbH*.⁴¹⁷ However, it cannot be assumed that the parties impliedly chose the law governing their contract to also govern their arbitration agreement if the law of such contract would invalidate the arbitration agreement itself.⁴¹⁸ Because under a validation principle, as held in *Sulamérica*, the parties should only choose the law which will ensure that their arbitration agreement is valid and

⁴⁰⁵ *ibid.*

⁴⁰⁶ *ibid.*

⁴⁰⁷ *ibid.*

⁴⁰⁸ *National Thermal Power Corporation v Singer Company and others* [1992] INSC 146.

⁴⁰⁹ *Aastha Broadcasting Network Ltd v Thaicom Public Company Ltd* [2011] INDLHC 3674.

⁴¹⁰ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

⁴¹¹ *ibid.*

⁴¹² *ibid.*

⁴¹³ *Final Award in ICC Case No. 6840* (1991).

⁴¹⁴ *BCY v BCZ* (no 386).

⁴¹⁵ *Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

⁴¹⁶ *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd* [2002] 1 All ER (Comm) 627.

⁴¹⁷ *Leibinger & Anor v Stryker Trauma GmbH* [2006] EWHC 690 (Comm).

⁴¹⁸ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

effective.⁴¹⁹ And in this present case of *Sulamérica*, the main contract was governed by a Brazilian law, which would invalidate the arbitration agreement and so such law could not have been impliedly chosen by the parties to the dispute.⁴²⁰ As a result of this, the court had to look at the third-stage of its test for determining the law governing the arbitration agreement.⁴²¹

Therefore, what happens when the parties neither expressly nor impliedly choose the law governing their arbitration agreement or they choose the law which will invalidate their agreement?⁴²² In this case, the arbitration agreement will be governed by the law with which it has the “*closest and most real connection*”.⁴²³ The court in *Sulamérica* argued that this is generally the law of the seat of the arbitration – thus, in the present case, the seat of the arbitration was London and so an English law was determined to be the law governing the arbitration agreement.⁴²⁴ This was also confirmed in *Habas Sinai v VSC*, where it was held that the law of the seat is the law with which the arbitration agreement has the “*closest and most real connection*”, especially when there is no express or implied choice of the applicable law (to the arbitration agreement) by the parties to the dispute.⁴²⁵ The exact same reasoning was also concluded in *C v D*.⁴²⁶ Even more, this approach is also supported by the NY Convention, in its Article V(1)(a), which states that if the parties’ choice with regards to the law governing their arbitration agreement is absent, then the agreement should be governed by the law of the seat.⁴²⁷

Conclusively, based on the *Sulamérica* judgment, the arbitral tribunals have a clear and certain three-stage test which they can rely on when determining the law governing the arbitration agreement.⁴²⁸ The law of the arbitration agreement can be either determined by the parties’ express choice, implied choice or lastly, according to a legal system with which the arbitration agreement has the “*closest and most real connection*”.⁴²⁹

However, it is extremely important to see how other tribunals have interpreted this test, particularly with regards to its second stage – the parties’ implied choice of the law governing the arbitration agreement. When it comes to this second stage of the test, as held in *Sulamérica*, the starting point of the parties’ implied choice is the law of the main contract, which is also

⁴¹⁹ *ibid.*

⁴²⁰ *ibid.*

⁴²¹ *ibid.*

⁴²² *ibid.*

⁴²³ *ibid.*

⁴²⁴ *ibid.*

⁴²⁵ *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm).

⁴²⁶ *C v D* [2007] EWCA Civ 1282.

⁴²⁷ New York Convention (no 27) art V(1)(a).

⁴²⁸ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

⁴²⁹ *ibid.*

presumed to apply to the arbitration agreement – the intentions of the parties are for the same law to govern both the contract and the arbitration agreement.⁴³⁰ Namely because even though the principle of the separability applies, the contract and the arbitration agreement are not separate for “*all purposes*”.⁴³¹ On the other side, there are case-laws with an opposing view with regards to the parties’ implied choice – specifically the case *FirstLink v GT Payment*.⁴³² In this case, it was argued that a starting point of the parties’ implied choice should be the law of the seat, because the parties intend for their contract and their arbitration agreement to be governed by two different laws – namely because the contract and the arbitration agreement are two separate documents.⁴³³ This same conclusion was also held in an *ICC Case No. 11265*⁴³⁴ and in another case *XL Insurance Ltd v Owens Corning*.⁴³⁵

Even when the arbitral tribunal decides on the law governing the arbitration agreement, by applying the *Sulamérica* test, it is still necessary to analyse whether the now-chosen law of the arbitration agreement also complies with the validation principle.⁴³⁶ As mentioned above and as held in the *Sulamérica* ruling, only the law which will give a valid effect to the parties’ arbitration agreement should be chosen, either by the parties or by the arbitral tribunal.⁴³⁷ This was also supported in an *ICC Case No. 11869*, where it was argued that the parties’ intentions to arbitrate must be given effect to, and this can be only achieved by choosing a valid law of the arbitration agreement.⁴³⁸ Moreover, the validation principle was used even before that, particularly in *Hamlyn & Co v Talisker Distillery*, where the arbitration agreement was governed by the English law, instead of the law of Scotland which would invalidate the agreement itself.⁴³⁹ However, until a recent ruling in *Enka v Chubb*, the principle of the validation was not expressly recognized by the English courts.⁴⁴⁰

As was shown above, the prominent ruling and its three-stage test, established in the *Sulamérica* judgment in 2012⁴⁴¹, has been followed by many other cases. But recently, in 2020, the *Sulamérica* three-stage test was re-affirmed by another prominent judgment in *Enka v*

⁴³⁰ *ibid.*

⁴³¹ *ibid.*

⁴³² *FirstLink Investments Corporation Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12.

⁴³³ *ibid.*

⁴³⁴ *Arbitral Award in ICC Case No. 11265* (2003).

⁴³⁵ *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd’s Rep. 500.

⁴³⁶ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

⁴³⁷ *ibid.*

⁴³⁸ *Arbitral Award in ICC Case No. 11869* (2011).

⁴³⁹ *Hamlyn & Co v Talisker Distillery and others* [1894] UKHL 642.

⁴⁴⁰ *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 (*Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb*).

⁴⁴¹ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

Chubb.⁴⁴² The court in this case stated that if there is no express choice of the law governing the arbitration agreement, then the express choice of the law governing the main contract should be seen as the parties' implied choice of the law governing the arbitration agreement – irrelevant of the fact that the arbitration seat is in another country (and thus, governed by another legal system).⁴⁴³ This implied choice of the law by the parties could be only inapplicable if such law would render the arbitration agreement invalid.⁴⁴⁴ Moreover, if the parties have neither expressly nor impliedly agreed on the law governing their arbitration agreement (as well as on the law governing their contract), then only the law with the “*closest and most real connection*” to the arbitration can apply, which is generally the law of the arbitration seat.⁴⁴⁵

Furthermore, the three-stage test established in *Sulamérica* and later re-affirmed in *Enka v Chubb* was very recently, once again, confirmed in another significant case *Kabab-Ji SAL v Kout Food Group* in 2021.⁴⁴⁶ This ruling re-affirmed the three-stage test of *Sulamérica* for determining the law governing the arbitration agreement and went even beyond by re-affirming this test and its application even when it arises during an enforcement of an arbitral award.⁴⁴⁷ Moreover, this ruling further highlighted an importance of choosing the law governing the main contract, the law governing the arbitration agreement as well as the place of the arbitration seat – namely where the law of the contract and the law of the seat are different.⁴⁴⁸ Otherwise, if the parties underestimate these contract-drafting aspects, there is a risk of a pro-longed dispute resolution as well as a risk of an inconsistent judgment, especially if the parties are in a disagreement with regards to the applicable law/s.⁴⁴⁹ And as one could have seen, there is no consistent international approach with regards to this issue, as arbitral tribunals and even courts interpret the *Sulamérica* test on a case-by-case basis.⁴⁵⁰

The above-mentioned case-law with regards to determining the law governing the arbitration agreement was established (primarily) under the jurisdiction of the UK. Although there is no consistent international approach as to the determination of the law governing the arbitration agreement⁴⁵¹, many other jurisdictions follow the approach of the UK – as demonstrated above. When it comes to Germany, its law is silent with regards to this issue and

⁴⁴² *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* (no 440).

⁴⁴³ *ibid.*

⁴⁴⁴ *ibid.*

⁴⁴⁵ *ibid.*

⁴⁴⁶ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 (*Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*).

⁴⁴⁷ *ibid.*

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.*

⁴⁵⁰ The Law Governing International Arbitration Agreements: An International Perspective (no 383) 818.

⁴⁵¹ *ibid.*

there is also no unanimous approach on how to resolve it.⁴⁵² Some German courts argue that the law of the main contract also governs the arbitration agreement, as ruled by the German Federal Court of Justice in its case-law.⁴⁵³ While other German courts tend to focus more on the law of the seat when deciding on the law of the arbitration agreement.⁴⁵⁴ However, more recently, the German Federal Court of Justice has ruled on this issue, creating a significant precedent for other German courts to follow.⁴⁵⁵ Based on this case, the German Federal Court of Justice has re-affirmed the *Sulamérica* three-stage test – if there is no express or implied choice of the law governing the arbitration agreement, then the law of the arbitration seat governs the agreement itself, based on the article V(1)(a) of the NY Convention.⁴⁵⁶ Unfortunately, the court did not analyse whether the express choice of the law governing the contract is also the implied choice of the law governing the arbitration agreement – namely because in the present case, the law of the main contract (Dutch law) was invalid.⁴⁵⁷ Although this particular case focuses more on the law of the seat when choosing the law governing the arbitration agreement, rather than on the law of the contract (as is the case in the UK), this precedent of this German Federal Court of Justice is still, to a significantly large extent, based on the three-stage test of *Sulamérica*.⁴⁵⁸

To conclude, the issue of the law governing the arbitration agreement is rather extensive and could be discussed even beyond the arguments mentioned above. However, for purposes of this Thesis, only the most significant case-law was addressed. But the most important point of that should be taken from the above-mentioned analysis is that the parties to a dispute should realize that it is not only advisable, but also extremely necessary, to expressly decide on the law governing their arbitration agreement. Otherwise, the parties risk a possibility of different jurisdictional challenges, either concerning their substantive issues or with regards to the enforcement of their arbitral award – if this issue arises later on in the dispute.⁴⁵⁹ But if the

⁴⁵² Jan K Schaefer, ‘Country Report on Local Requirements for the Extension of an Arbitration Clause to, and Enforcement of an Arbitral Award against, a Non-signatory’ (*IBA Arbitration Committee*, January 2021) <<https://www.ibanet.org/MediaHandler?id=AE3EE5B5-AAFB-4457-9517-2F42EC282757>> accessed 1 July 2022.

⁴⁵³ *Decision of the Bundesgerichtshof* (2005) VIII ZR 284/04.; *Decision of the Bundesgerichtshof* (2010) XI ZR 349/08.

⁴⁵⁴ *Decision of the Bundesgerichtshof* (1984) III ZR 206/82.

⁴⁵⁵ *Decision of the Bundesgerichtshof* (2020) I ZR 245/19.

⁴⁵⁶ *ibid.*

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.*

⁴⁵⁹ Hoi Seng Victor Leong and Jun Hong Tan, ‘The Law Governing Arbitration Agreements: *BCY v BCZ* and Beyond’ (2018) 30 Singapore Academy of Law Journal <https://heinonline-org.uaccess.univie.ac.at/HOL/Page?collection=journals&handle=hein.journals/saclj30&id=75&men_tab=srchresults> accessed 1 July 2022, 70.

parties underestimate this matter, and they do not choose the law governing their arbitration agreement, then they must realize that their dispute resolution process will be significantly prolonged and also much more expensive. Luckily for them, the case-law on this matter is, nowadays, clear and certain – thanks to the most significant cases *Sulamérica v Enesa*⁴⁶⁰, followed by *Enka v Chubb*⁴⁶¹ and *Kabab-Ji SAL v Kout Food Group*.⁴⁶²

The law governing the procedure of the arbitration:

If the parties want to avoid any potential issues when it comes to the laws governing their dispute resolution process, it is necessary that they do not only choose the law governing their commercial contract and the law governing their arbitration agreement, but also the law governing a procedure of their arbitration. The procedural law is, however, a bit complex, as it can consist of three different laws – the law of the seat, the arbitral procedural law and the arbitration rules.⁴⁶³

First of all, the law of the seat will be analysed. The seat of the arbitration is a legal concept, rather than a geographical one, and should not be confused with a venue of the arbitration – although the venue of the hearings can be positioned in the seat of the arbitration.⁴⁶⁴ Most importantly, the seat is a “legal home” of the arbitration⁴⁶⁵, whereas the venue is the actual physical location of any arbitration hearings, as held in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*⁴⁶⁶ or even in *PT Garuda Indonesia v Birgen Air*.⁴⁶⁷

First and foremost, the seat of the arbitration, and its corresponding national law, determine a *lex arbitri* – a general legal framework for the arbitration, based on a country chosen as its seat,⁴⁶⁸ which governs the external matters of the arbitration itself – for example an objective arbitrability.⁴⁶⁹ Each country has its own *lex arbitri*⁴⁷⁰, and as discussed throughout

⁴⁶⁰ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

⁴⁶¹ *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* (no 440).

⁴⁶² *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* (no 446).

⁴⁶³ Simon Greenberg, Christopher Kee and J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 58 (*International Commercial Arbitration: An Asia-Pacific Perspective*).

⁴⁶⁴ *ibid.* 56.; UNCITRAL Model Law on International Commercial Arbitration (no 113) art 20(2).

⁴⁶⁵ David Hesse, ‘The Seat of Arbitration is Important. It’s That Simple.’ (*Kluwer Arbitration Blog*, 10 June 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/>> accessed 1 July 2022.

⁴⁶⁶ *Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep. 116 (*Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru*).

⁴⁶⁷ *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393.

⁴⁶⁸ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463).

⁴⁶⁹ *ibid.* 60.

⁴⁷⁰ *ibid.* 58.

this Thesis, the UK has the English Arbitration Act⁴⁷¹, whereas Germany has the German Arbitration Act.⁴⁷²

Another law governing the procedure of the parties' arbitration can be the arbitral procedural law.⁴⁷³ The arbitral procedural law particularly governs the internal matters of the arbitration, for example the mandatory rules determining how the arbitration should be conducted.⁴⁷⁴ Although the *lex arbitri* and the arbitral procedural law are rarely separated and distinguished, there are some prevailing arguments indicating that these two should be separate.⁴⁷⁵ As argued, for example, by Redfern and Hunter, the *lex arbitri* is “*much more than a purely procedural law*”, because it establishes the nationality of the arbitration itself.⁴⁷⁶ This distinction between the *lex arbitri* and the arbitral procedural law was also discussed, for example, in *Union of India v McDonnell Douglas*.⁴⁷⁷

Lastly, the third law governing the procedure of the parties' arbitration is based on the arbitration rules.⁴⁷⁸ In this case, the parties must choose the type of their arbitration⁴⁷⁹, as was discussed above, under the heading “Type of the arbitration”. If the parties choose the institutional arbitration, then its institutional rules will specifically govern how the arbitration should be conducted, and if the parties choose the *ad hoc* arbitration, then they must choose themselves the rules governing the specifics of their arbitration⁴⁸⁰ – in this case, the UNCITRAL Arbitration Rules are the most popular and prominent.⁴⁸¹

Conclusively, there can be three different procedural laws for a simple reason – in addition to the arbitration rules, the parties can choose an arbitral procedural law which is different than the *lex arbitri*.⁴⁸² But the parties are advised against doing so, and when drafting their arbitration agreement, they should only choose two laws governing the procedure of their arbitration – the law of the seat (in which case the *lex arbitri* and the arbitral procedural law should be the same) and then the arbitration rules.⁴⁸³ Although this decision is up to the parties,

⁴⁷¹ The UK Arbitration Act (no 86).

⁴⁷² German Arbitration Act (no 82).

⁴⁷³ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 59.

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid.* 60.

⁴⁷⁶ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 175.

⁴⁷⁷ *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep. 48 (*Union of India v McDonnell Douglas Corporation*).

⁴⁷⁸ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 63.

⁴⁷⁹ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 42.

⁴⁸⁰ *ibid.*

⁴⁸¹ ‘Laws Applicable to an International Arbitration’ (*Aceris Law LLC*, 6 February 2021) <<https://www.acerislaw.com/laws-applicable-to-an-international-arbitration/>> accessed 1 July 2022.

⁴⁸² *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 60.

⁴⁸³ *ibid.* 60/61.

as held in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*⁴⁸⁴, the many “difficulties and complexities” that may arise as a result of this choice (to choose three different procedural laws) will only prolong the parties’ dispute resolution process, as held in *Union of India v McDonnell Douglas Corporation*.⁴⁸⁵

Therefore, if the parties are advised to only choose the law of the seat and the arbitration rules to govern the procedure of their arbitration, how should these laws be decided on? As mentioned above, the arbitration rules are either decided on by the arbitral institution, which is chosen by the parties, or by the parties themselves in case of the *ad hoc* arbitration.⁴⁸⁶

However, how should the parties agree on the seat and its corresponding national law? Generally, the parties have a freedom when it comes to choosing the seat of their arbitration and this freedom is laid down by many arbitration rules.⁴⁸⁷ Exceptions to this right are rather rare, but nevertheless, they still exist (for example, if the parties choose arbitration rules of Bangladesh, then such rules state that the seat of the arbitration must be only in Bangladesh).⁴⁸⁸ Indeed, it is always preferable to choose the seat expressly in the arbitration agreement, but the parties can also do so later on.⁴⁸⁹ However, if the parties do not agree on the seat at all, then it is up to the arbitral tribunal, the arbitral institution or even up to the court to decide on this issue⁴⁹⁰, generally by considering the chosen arbitration rules.⁴⁹¹ In this case, however, the parties must keep in mind that by not choosing their preferred seat of the arbitration, they might end up with a seat that they wanted to avoid in the first place.⁴⁹²

To conclude, when drafting the arbitration agreement, the parties should not only choose the law governing their contract and their arbitration agreement, but also the laws governing the procedure of their arbitration. As mentioned above, there can be three different procedural laws⁴⁹³, but the parties should preferably stick to two – the law of the seat and the arbitration rules.⁴⁹⁴

⁴⁸⁴ *Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros del Peru* (no 466).

⁴⁸⁵ *Union of India v McDonnell Douglas Corporation* (no 477).

⁴⁸⁶ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 42.

⁴⁸⁷ LCIA Arbitration Rules (no 75) art 16.; ICC Rules (no 95) art 14.

⁴⁸⁸ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 80.

⁴⁸⁹ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 80.

⁴⁹⁰ *ibid.* 81.

⁴⁹¹ Milica Savić, ‘Seat of Arbitration’ (*Jus Mundi*, 8 February 2022) <<https://jusmundi.com/en/document/wiki/en-seat-of-arbitration>> accessed 1 July 2022 (Seat of Arbitration).

⁴⁹² *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm) (*The Federal Republic of Nigeria v Process & Industrial Developments Ltd*).

⁴⁹³ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 58.

⁴⁹⁴ *ibid.* 60-63.

Moreover, when deciding on the law of the seat, the parties should pay a lot of attention to their choice. Because not only can the law of the seat determine the *lex arbitri* and the arbitral procedural law, but it also governs an enforcement, recognition and challenge of an arbitral award⁴⁹⁵, as well as a level of a national judicial intervention, as held in *Atlas Power v National Transmission*.⁴⁹⁶ Therefore, the parties should specifically consider whether the seat of their arbitration is a party to the NY Convention, whether it is neutral (no connection with a jurisdiction of the parties or with a dispute at hand), what level of interference and knowledge does a judicial system have (in the seat of the arbitration) and lastly, what is the reputation of such seat.⁴⁹⁷ But all in all, regardless of the seat that the parties choose, it is rather advisable to always provide for the express choice of the seat of the arbitration (in the arbitration agreement), so as to avoid any potential issues connected to the lack of such choice (such as having a seat of the arbitration that they parties wanted to steer clear of in the first place), as was also demonstrated in *The Federal Republic of Nigeria v Process & Industrial Developments Ltd*.⁴⁹⁸

Conclusively, when it comes to a comparison of the UK and Germany, although Germany is sometimes chosen by the parties as the seat of their arbitration (namely Frankfurt, Hamburg, Dusseldorf, Munich, Stuttgart and Berlin)⁴⁹⁹, the most popular seats for international commercial arbitration include London, followed by Singapore, Honk Kong, Paris and many others.⁵⁰⁰

⁴⁹⁵ Seat of Arbitration (no 491).

⁴⁹⁶ *Atlas Power v National Transmission and Despatch Company Ltd* [2018] EWHC 1052.

⁴⁹⁷ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463) 80-82.; Jane Parsons, 'Safety first: choosing a seat of arbitration' (*Thomson Reuters*, 24 January 2018) <<http://arbitrationblog.practicallaw.com/safety-first-choosing-a-seat-of-arbitration/>> accessed 1 July 2022.

⁴⁹⁸ *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* (no 492).

⁴⁹⁹ Patricia Nacimiento, Thoman Weimann and Mathias Wittinghofer, 'A View from Germany: Is Germany on its Way to Becoming a True Arbitration Powerhouse?' (*Herbert Smith Freehills*, 1 February 2017) <<https://www.herbertsmithfreehills.com/latest-thinking/a-view-from-germany-is-germany-on-its-way-to-becoming-a-true-arbitration-powerhouse>> accessed 1 July 2022.

⁵⁰⁰ '2021 International Arbitration Survey – Adapting Arbitration to a Changing World' (*Aceris Law LLC*, 27 December 2021) <<https://www.acerislaw.com/2021-international-arbitration-survey-adapting-arbitration-to-a-changing-world>> accessed 1 July 2022.

5. A composition of the arbitral tribunal

Another fundamental provision, that should be covered by every arbitration agreement, is a composition of an arbitral tribunal – most importantly a number of arbitrators deciding on the case.⁵⁰¹ But the parties can also include in their arbitration agreement, if they prefer so, a procedure for an appointment of the arbitrators as well as an expertise which the arbitrators should possess.⁵⁰² But even in this case, there are some potential issues which may arise for the parties to the arbitration – which will be analysed from a perspective of the UK and Germany, for purposes of this Thesis.

United Kingdom:

When it comes to the UK and a composition of the arbitral tribunal, the parties have a freedom to agree on a number of arbitrators, their expertise and also on a procedure for their appointment.⁵⁰³ The only requirement is that the number of arbitrators should not be even.⁵⁰⁴ However, there are also some general requirements that the arbitrators must comply with – specifically, the arbitrators must act both fairly and impartially in their decision-making.⁵⁰⁵

But there are some potential issues that may arise when it comes to the composition of the arbitral tribunal – and if kept in mind by the parties to the dispute, some of these issues can be prevented by them.

Firstly, what happens if the parties cannot agree on the number of arbitrators? In the absence of the parties' agreement, there should be only one arbitrator.⁵⁰⁶ And the appointment of this arbitration is either up to an arbitral institution (in cases of an institution arbitration)⁵⁰⁷ or up to a national court (in cases of an *ad hoc* arbitration)⁵⁰⁸ – the same also applies when the parties cannot agree on the procedure for the appointment of arbitrators.⁵⁰⁹

⁵⁰¹ Redfern and Hunter on International Arbitration: Student Version (no 3) 233/234.

⁵⁰² *ibid.*

⁵⁰³ The UK Arbitration Act (no 86) art 15.

⁵⁰⁴ *ibid.*

⁵⁰⁵ *ibid.* art 24.

⁵⁰⁶ *ibid.* art 15.

⁵⁰⁷ *ibid.* art 16-18.; Oliver Marsden and Rory McLeod, 'Commercial Arbitration: United Kingdom – England & Wales' (*Global Arbitration Review*, 2 May 2022) <<https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/united-kingdom#494BB52A5E2F50797BD43981C11BCCA398A60A50>> accessed 1 July 2022.

⁵⁰⁸ The UK Arbitration Act (no 86) art 18.

⁵⁰⁹ *ibid.*

Secondly, what happens if one of the arbitrators does not act fairly and/or impartially? In this case, the arbitrator can be removed either by the arbitral institution or by the national court – if a recourse to the arbitral institution was unsuccessful.⁵¹⁰ The lack of an impartiality, as a ground for removing the arbitrator, was discussed in different English law cases. As held in *A and others v B and another*, when deciding on the arbitrator’s lack of impartiality, it is important to analyse whether a “*fair-minded and informed observer*”, having considered all the facts, would also agree that the arbitrator and/or the arbitral tribunal is “*biased*”.⁵¹¹ This test was further confirmed by numerous cases, for example in *Halliburton Company v Chubb Bermuda Insurance Ltd*⁵¹² or even in *Sierra Fishing Company & Ors v Farran & Ors*.⁵¹³

And lastly, even if the arbitrator acts fairly and impartially, can he/she still be removed based on some other ground/s for challenge? This is indeed possible, because as held in *Halliburton Co v Chubb Bermuda Insurance Ltd* in 2018, every arbitrator is legally obliged to disclose any facts and circumstances which could make it seem that he/she is biased, unless the parties agree otherwise.⁵¹⁴ And if the arbitrator does not disclose this information, he/she can be removed from the arbitral tribunal.⁵¹⁵ This conclusion was further supported in 2020 in the *Halliburton Co v Chubb Bermuda Insurance Ltd* case, where the court held that this disclosure obligation applies to all the facts and circumstances which will or which can lead to a possibility of the arbitrator’s bias.⁵¹⁶ Under the law of the UK, this disclosure obligation is indeed rather important because it can prevent the challenge of the arbitrator, as held in *Almazeedi v Penner and another*.⁵¹⁷

Moreover, under the UK Arbitration Act, there are also some other possible grounds for the challenge of the arbitrators.⁵¹⁸ These include a lack of the arbitrator’s qualifications (as required by the parties), a lack of a physical or a mental capacity of the arbitrator or the arbitrator’s inability to properly and/or reasonably conduct the arbitration.⁵¹⁹

To conclude, as seen above, there are some potential issues which may arise when it comes to the parties’ composition of the arbitral tribunal. But some of these issues can be prevented by the parties if they expressly agree, in their arbitration agreement, on the number

⁵¹⁰ *ibid.* art 24.2.

⁵¹¹ *A and others v B and another* [2011] EWHC 2345 (Comm).

⁵¹² *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (*Halliburton Company v Chubb Bermuda Insurance Ltd*).

⁵¹³ *Sierra Fishing Company & Ors v Farran & Ors* [2015] EWHC 140 (Comm).

⁵¹⁴ *ibid.*

⁵¹⁵ *ibid.*

⁵¹⁶ *Halliburton Company v Chubb Bermuda Insurance Ltd* (no 512).

⁵¹⁷ *Almazeedi v Penner and another* [2018] UKPC 3.

⁵¹⁸ The UK Arbitration Act (no 86) art 24.1

⁵¹⁹ *ibid.*

of arbitrators, their required expertise and the procedure for their appointment.⁵²⁰ Moreover, further issues can arise if the arbitrators do not comply with some general requirements laid down by the UK Arbitration Act⁵²¹ and the English case-law. Although these issues cannot be generally prevented by the parties, the challenge and removal of the arbitrators is very rare in the UK.⁵²²

Germany:

Under a German Code of Civil Procedure, the parties have the same freedom, as in the UK, when it comes to the composition of the arbitral tribunal.⁵²³ The parties can agree on the number of arbitrators⁵²⁴, their expertise⁵²⁵ as well as on the procedure for their appointment.⁵²⁶ Moreover, there are also some general requirements that the arbitrators must comply with. Firstly, if a person is formally appointed as a national judge under the law of Germany, then he/she cannot also act as an arbitrator.⁵²⁷ And secondly, every arbitrator must act impartially and independently.⁵²⁸

However, as is the case in the UK, there are also some potential issues that may arise when it comes to the composition of the arbitral tribunal under the law of Germany. But even in this case, the parties can prevent some of these issues from arising.

Firstly, what happens if the parties cannot agree on the number of arbitrators? In this case, the number of arbitrators should be three.⁵²⁹ And if the parties cannot agree on the appointment of the arbitrators, then there should be only one single arbitrator.⁵³⁰ Moreover, when such issues arise, the arbitrator/s should be appointed by a national court⁵³¹ – and the same also applies when the parties cannot agree on the procedure for the appointment of arbitrators.⁵³²

Secondly, what happens if one of the arbitrators does not act impartially and/or independently? In this case, if some circumstances exist, which create “*justifiable doubts*” with

⁵²⁰ *ibid.* arts 15, 16 and 24.

⁵²¹ The UK Arbitration Act (no 86).

⁵²² Arbitration procedures and practice in the UK (England and Wales): overview (no 189).

⁵²³ German Code of Civil Procedure (no 335).

⁵²⁴ *ibid.* section 1034(1).

⁵²⁵ Commercial Arbitration: Germany (no 103).

⁵²⁶ German Code of Civil Procedure (no 335) section 1035(1).

⁵²⁷ German Judiciary Act (1972) section 40(1) (German Judiciary Act).

⁵²⁸ German Code of Civil Procedure (no 335) section 1036(2).

⁵²⁹ *ibid.* section 1034(1).

⁵³⁰ *ibid.* section 1035(3).

⁵³¹ *ibid.*

⁵³² *ibid.* section 1035.

regards to the arbitrator's impartiality and/or independence⁵³³, then the arbitrator can be removed either by the arbitral tribunal or by the national court.⁵³⁴

And lastly, even if the arbitrator acts impartially and independently, can he/she still be removed based on some other ground/s for challenge? As is the case in the UK, there are also some other grounds for the challenge of the arbitrators when it comes to Germany. More specifically, the arbitrator can be removed if he/she does not possess the expertise required by the parties (in the arbitration agreement)⁵³⁵ or, as held by a court in Frankfurt, if the arbitrator did not disclose some circumstances which could make it seem that he/she is biased and thus, not independent.⁵³⁶

To conclude, there are still some potential issues which may arise when it comes to the composition of the arbitral tribunal under the law of Germany. Some of these issues can be prevented by the parties if they expressly agree, in their arbitration agreement, on the number of arbitrators, their required expertise and the procedure for their appointment – same as in the UK.⁵³⁷ However, further issues can arise if the arbitrators do not comply with some general requirements laid down by the German Code of Civil Procedure⁵³⁸ and the German Judiciary Act.⁵³⁹ But the general rule stands as in the case of the UK – the parties cannot really prevent these issues from happening.

6. Confidentiality

The last fundamental provision, that the parties should include in their arbitration agreement, concerns the principle of confidentiality.⁵⁴⁰ Arbitration is generally confidential and such confidentiality is considered to be one of the most significant advantages of international commercial arbitration.⁵⁴¹ Based on the principle of confidentiality, parties to the arbitration cannot disclose to third-parties (non-participants) any information related to the arbitration proceedings themselves – subject to some exceptions.⁵⁴²

⁵³³ *ibid.* section 1036.

⁵³⁴ *ibid.* section 1037.

⁵³⁵ *ibid.* section 1036.

⁵³⁶ Commercial Arbitration: Germany (no 103).

⁵³⁷ *ibid.*; German Code of Civil Procedure (no 335) sections 1034/1035.

⁵³⁸ German Code of Civil Procedure (no 335).

⁵³⁹ German Judiciary Act (no 527).

⁵⁴⁰ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 124.

⁵⁴¹ *ibid.*

⁵⁴² Shaurya Upadhyay, 'Confidentiality' (*Jus Mundi*, 4 May 2022) <<https://jusmundi.com/en/document/wiki/en-confidentiality>> accessed 2 July 2022.; *Dolling-Baker v Merret* [1990] 1 WLR 1205 (*Dolling-Baker v Merret*).

However, the principle of confidentiality is not so crystal clear since it is not a universally accepted principle.⁵⁴³ This lack of the universal approach was confirmed by different courts in different jurisdictions.⁵⁴⁴ For example, an Australian court, in its case *Esso and others v Plowman and others*, ruled that the arbitration is not confidential unless expressly agreed on by the parties to the dispute.⁵⁴⁵ Another court in Sweden further supported this argument by ruling that the confidentiality cannot be implied, as held in *A.I. Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*.⁵⁴⁶

Therefore, since the principle of confidentiality is not an expressly (and universally) recognized principle, it can create paramount issues for the parties to the dispute – especially if the parties rely on the confidentiality, as an implied principle, and then an arbitral tribunal or a court finds that such implication of the confidentiality is not applicable in the case at hand.⁵⁴⁷ But what can be done by the parties if they want to ensure that their arbitration is indeed confidential? And even more, if they want to prevent any potential issues arising as a result of their assumption that the arbitration is confidential based on some general (implied) principle?

Recognition of the principle of confidentiality under a national law:

Firstly, if the parties want to ensure that their arbitration is confidential, then they can choose a national law, governing their arbitration agreement, that recognizes the principle of confidentiality.⁵⁴⁸ In this case, the parties must be careful because the recognition of the principle of confidentiality varies per jurisdiction.⁵⁴⁹ For purposes of this Thesis, the jurisdictions of the UK and Germany will be looked at.

When it comes to the UK, its Arbitration Act 1996 does not recognize the principle of confidentiality.⁵⁵⁰ However, according to a case-law of the UK, an implied principle of confidentiality exists.⁵⁵¹ One of the first cases, that laid down the implied duty of

⁵⁴³ Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International BV 2012) XVI-XVII (*Confidentiality in International Commercial Arbitration*).

⁵⁴⁴ *ibid.*

⁵⁴⁵ *Esso Australia Resources Ltd and others v The Honourable Sidney James Plowman and others* (1995) 128 ALR 391.

⁵⁴⁶ *A.I. Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd (Bulbank)* (2000) T1881-99.

⁵⁴⁷ *Confidentiality in International Commercial Arbitration* (no 543).

⁵⁴⁸ *ibid.* 22.

⁵⁴⁹ *ibid.*

⁵⁵⁰ Robert W Wachter, Grace Yoon and Han Ah Lee, 'Confidentiality in International IP Arbitration' (*Global Arbitration Review*, 9 February 2021) <<https://globalarbitrationreview.com/guide/the-guide-ip-arbitration/first-edition/article/confidentiality-in-international-ip-arbitration#footnote-068>> accessed 2 July 2022 (*Confidentiality in International IP Arbitration*).

⁵⁵¹ *Dolling-Baker v Merret* (no 542).

confidentiality, was *Dolling-Baker v Merret*, where the court held that the implied duty of confidentiality is inherent in “the nature of arbitration itself”⁵⁵², as was further confirmed in *Hassneh Insurance Co of Israel v. Stuart J Mew*⁵⁵³ or in *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc.*⁵⁵⁴

Nevertheless, it is important to note that under the law of the UK, the implied principle of confidentiality is not absolute, as held in *Ali Shipping Corp v Shipyard Trogir*.⁵⁵⁵ There are some exceptions when the confidentiality can be breached, particularly in cases of a leave / an order of a national court, in cases of a consent by the parties to the dispute and even in cases when a disclosure of some confidential information is necessary for a protection of a public or a legitimate interest.⁵⁵⁶ For example, the public interest, in case of a confidential arbitration, was at stake in a case *CDE v NOP*.⁵⁵⁷ In this case, the arbitration related to a fraud of a well-known company and the question was whether an arbitral award should be made public for reasons of a public interest – but the court ruled against this and uphold the principle of confidentiality, which is overriding when it comes to a nature of the arbitration itself.⁵⁵⁸

As one may see, the position of English courts is quite clear and certain when it comes to the issue of confidentiality – under the law of the UK, the principle of confidentiality is implied, with some exceptions depending on a case-by-case basis.⁵⁵⁹ However, there are still some courts with an opposing view/s with regards to the implied confidentiality. For example, in *City of Moscow v Bankers Trust*, the court held that the arbitral awards should not be confidential if they can be made public without disclosing any sensitive or confidential information.⁵⁶⁰

On the other side, when it comes to Germany, its position towards the principle of confidentiality is much less clear and certain than the position of the UK. The German Arbitration Act does also not recognize the principle of confidentiality.⁵⁶¹ Therefore, if the parties want to arbitrate their dispute confidentially, then they must either expressly agree on

⁵⁵² *ibid.*

⁵⁵³ *Hassneh Insurance Co of Israel v. Stuart J Mew* [1993] 2 Lloyd’s Rep. 243.

⁵⁵⁴ *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc* [2008] 5 MLJ 254.

⁵⁵⁵ *Ali Shipping Corp v Shipyard Trogir* [1991] 1 WLR 314.

⁵⁵⁶ *ibid.*

⁵⁵⁷ *CDE v NOP* [2021] EWCA Civ 1908.

⁵⁵⁸ *ibid.*

⁵⁵⁹ *Dolling-Baker v Merret* (no 542).

⁵⁶⁰ *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314.

⁵⁶¹ *ibid.*

the confidentiality (and its extent) in their arbitration agreement or they must conduct their arbitration under the arbitration rules which do recognize the principle of confidentiality.⁵⁶²

Moreover, the German Arbitration Act does also not provide for any specific exceptions of the principle of confidentiality – particularly because the principle of confidentiality, and its recognition, is considered on a case-by-case basis.⁵⁶³

Recognition of the principle of confidentiality under arbitration rules:

Secondly, if the parties want to ensure that their arbitration is kept confidential, they can also do so by arbitrating their dispute under the arbitration rules which do recognize the principle of confidentiality.⁵⁶⁴ However, in this case, the parties must be careful when choosing the specific arbitration rules, because some of them are more specific when it comes to the confidentiality, while others are not.⁵⁶⁵

If the parties want to expressly ensure that their arbitration is confidential, then the LCIA Rules are one of the most preferred (and common) options – because under the LCIA Rules, both arbitrators and parties are obliged to maintain the confidentiality with regards to the arbitration at hand.⁵⁶⁶ The same is also recognized under the German DIS Arbitration rules.⁵⁶⁷

On the other side, according to the ICC Rules, only arbitrators and other staff of the arbitral tribunal must comply with the principle of confidentiality – not the parties.⁵⁶⁸ Even more, the UNCITRAL Model Law is also silent with regards to the confidentiality of the parties (and of the arbitral tribunal)⁵⁶⁹, although it provides for an implied confidentiality of arbitral awards.⁵⁷⁰

⁵⁶² Commercial Arbitration: Germany (no 103).

⁵⁶³ *ibid.*

⁵⁶⁴ *Confidentiality in International Commercial Arbitration* (no 543) 17/18.

⁵⁶⁵ *ibid.*

⁵⁶⁶ LCIA Arbitration Rules (no 75) art 30.

⁵⁶⁷ DIS Arbitration Rules (no 83) art 44.

⁵⁶⁸ ICC Rules (no 95) art 22.

⁵⁶⁹ Confidentiality in International IP Arbitration (no 550).

⁵⁷⁰ UNCITRAL Model Law on International Commercial Arbitration (no 113) art 34.5.

Recognition of the principle of confidentiality in a contractual document:

Thirdly and lastly, the parties can also expressly agree on the confidentiality of their arbitration in a contractual document – either before or after its commencement.⁵⁷¹ They can either include a confidentiality provision in their main commercial contract, which is generally also said to extend to the arbitration to which the contract relates.⁵⁷² Moreover, they can also specifically agree on the confidentiality of their arbitration in their arbitration agreement or even in a completely separate document, created only for a purpose of recognizing this duty of confidentiality.⁵⁷³

In this case, the parties have a freedom to agree on the extent of their confidentiality – what type of information do they want to keep as confidential and to whom does this confidentiality apply.⁵⁷⁴ This is generally decided based on the wording used – whether the parties have used a narrower or a broader language.⁵⁷⁵

Nevertheless, this is definitely the most-advisable and the safest option of recognizing the confidentiality of the arbitration, since the recognition is expressly provided for in a contractual document – as a result, providing the parties with an unambiguous protection when it comes to a secrecy and a privacy of their dispute resolution process.⁵⁷⁶

Conclusion:

To conclude, the principle of confidentiality is a rather unsettled issue, even nowadays.⁵⁷⁷ Particularly because the real dimensions of the confidentiality and its application are unclear to many.⁵⁷⁸ Generally, the parties just simply assume that their arbitration is confidential.⁵⁷⁹ However, this can create many controversies and complexities – for example, if the parties assume that their arbitration is confidential, which it is not at the end, and so as a result there is a leakage with regards to an existence of their dispute, which can either damage

⁵⁷¹ *Confidentiality in International Commercial Arbitration* (no 543) 9/10.

⁵⁷² *ibid.*

⁵⁷³ *ibid.*

⁵⁷⁴ *ibid.* 13/14.

⁵⁷⁵ *ibid.*

⁵⁷⁶ *ibid.* 9/10.

⁵⁷⁷ *ibid.* XVI-XVII.

⁵⁷⁸ *ibid.*

⁵⁷⁹ *ibid.*

the business relationship of the parties at hand or it can also result in a leakage of some business / trade secret (in addition to many other problems).⁵⁸⁰

Therefore, if the parties want to ensure that their dispute resolution process (and any information related to it) is private and secret, then they should expressly agree on the confidentiality of their arbitration – most preferably in a contractual document.⁵⁸¹ Additionally, the parties can also ensure the confidentiality of their arbitration either by choosing a national law, governing their arbitration agreement, which explicitly recognizes such confidentiality⁵⁸², or by choosing some arbitration rules, governing their arbitration, which recognize the same.⁵⁸³ However, the confidentiality can be also ensured by a mixture of the above, but the easiest and the safest option is to provide for the express (contractual) recognition of the principle of confidentiality.

7. Conclusion of Chapter II

To conclude, this Chapter II has analysed and discussed all the fundamental provisions that should be covered by every arbitration agreement.⁵⁸⁴ Especially if the parties want to ensure that their arbitration agreement is complete and well-drafted. The fundamental provisions that should be laid down in every arbitration agreement include, but are not limited to, a multi-tiered clause, type of the arbitration, language of the arbitration, choice of the applicable law (substantive and procedural), a composition of the arbitral tribunal and lastly, confidentiality.⁵⁸⁵

However, these provisions are not cumulative⁵⁸⁶ – in comparison to the mandatory contractual requirements discussed in Chapter I.⁵⁸⁷ Thus, it is not mandatory that all of these provisions are included in every arbitration agreement⁵⁸⁸, although it is extremely advisable in order to ensure that the arbitration is fully effective, workable and also protected under the rule of law.

Moreover, as was demonstrated throughout this Chapter II, there are many potential legal issues which can arise if any of these fundamental provisions are missing in the arbitration

⁵⁸⁰ *ibid.*

⁵⁸¹ *ibid.* 9/10.

⁵⁸² *ibid.* 22.

⁵⁸³ *ibid.* 17/18.

⁵⁸⁴ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 97-100.

⁵⁸⁵ *ibid.*

⁵⁸⁶ *ibid.*

⁵⁸⁷ *ibid.* 74/75.

⁵⁸⁸ *ibid.* 97-100.

agreement. This Chapter has specifically discussed every fundamental provision and the potential legal issues which can arise if such provision is missing in the agreement. But all in all, the lack of any of these fundamental provisions, in the arbitration agreement, particularly results in procedural burdens for the parties to the dispute – by not only prolonging the dispute resolution process, but also by increasing its costs.

Therefore, the parties should be careful and mindful when drafting their arbitration agreement, in order to ensure that it not only complies with all the mandatory contractual requirements⁵⁸⁹, as mentioned in Chapter I, but that it also includes all of the fundamental provisions.⁵⁹⁰ This way, the parties can arbitrate their dispute effectively and efficiently, without a need to use the national litigation, which they must have wanted to avoid in the first place.

⁵⁸⁹ *ibid.* 74/75.

⁵⁹⁰ *ibid.* 97-100.

Conclusion

“When will mankind be convinced and agree to settle their difficulties by arbitration?”

– Benjamin Franklin⁵⁹¹

The arbitration agreement is an indispensable foundation of every international commercial arbitration.⁵⁹² Without the valid arbitration agreement, an efficient and effective arbitration is not realistic, but only a myth. Particularly because the international commercial arbitration is a consensual process and based on such consent, a jurisdiction and a power of the arbitral tribunal is derived.⁵⁹³ And without the arbitral tribunal, there can be no arbitration, can it?

Therefore, it is crucial and extremely important that the parties, when drafting their international commercial arbitration agreement, ensure that their agreement cumulatively fulfils the mandatory contractual requirements.⁵⁹⁴ If these requirements are not fulfilled, then the parties cannot arbitrate their dispute and as a result, can only turn to a national litigation – if they want to have a binding ruling with regards to their legal dispute. But in addition to this, the parties must also draft their international commercial arbitration agreement carefully, by including certain fundamental provisions.⁵⁹⁵ These provisions protect the parties when arbitrating their dispute and also ensure that further potential issues do not arise later on throughout the ongoing arbitration proceedings.

This Thesis specifically focused on and discussed two legal questions. The first legal question being the mandatory contractual requirements, of the international commercial arbitration agreement, that must be met in order for the agreement to be valid and legitimate under the rule of law. However, what are these mandatory contractual requirements? Why must they be cumulatively fulfilled by every single arbitration agreement? And what happens if any of these requirements are not fulfilled? As was shown by this Thesis, these mandatory contractual requirements include a consent to arbitrate, a capacity to enter into a contractual

⁵⁹¹ Letter from Benjamin Franklin to Mary Hewson (27 January 1783).

⁵⁹² *Redfern and Hunter on International Arbitration: Student Version* (no 3) 71.

⁵⁹³ *Consent in International Arbitration* (no 24).

⁵⁹⁴ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 74/75.

⁵⁹⁵ *ibid.* 97-100.

relationship, a defined legal relationship between the parties, a written evidence of the parties' agreement to arbitrate, an arbitrability of the subject-matter at hand and lastly, a validity of the arbitration agreement under its governing law.⁵⁹⁶ Each and every one of these mandatory contractual requirements plays a significant role in ensuring that the arbitration agreement is valid and legitimate under the rule of law – and that the arbitration itself can, thus, take place. But why is that?

The first mandatory contractual requirement is the consent to arbitrate, which is a cornerstone of the arbitration itself.⁵⁹⁷ As mentioned previously, the arbitration is a consensual dispute resolution method⁵⁹⁸, and so the parties cannot effectively and efficiently arbitrate their dispute unless they expressly, clearly and unambiguously give their consent to do so. Especially because the parties' consent represents their free will and voluntariness to arbitrate, which is indispensable for the arbitration to take place⁵⁹⁹, as is recognized by different legal international instruments, such as the NY Convention.⁶⁰⁰ However, there are also some potential issues which may arise when it comes to the parties' consent to arbitrate – particularly when it comes to the consent in a third-party joinder and in a consolidation. But even these issues can be prevented, as discussed in this Thesis.

The parties, entering into the arbitration agreement, must also have a legal and a contractual capacity to do so, as the second mandatory contractual requirement.⁶⁰¹ Otherwise, if the parties cannot enter into the arbitration agreement, because they are legally (and thus contractually) not allowed to do so, how can the arbitration take place? The simple answer is that it cannot and although the legal and the contractual capacity of a natural and a legal person is generally presumed (specifically in the UK⁶⁰² and Germany⁶⁰³), it is important that the parties keep in mind that there are still some potential grounds of a contractual incapacity. And if such incapacity is proven on later in the arbitration, then the arbitration agreement will be declared as invalid and so will the arbitral award.⁶⁰⁴

Thirdly, if the parties want to arbitrate their dispute, then they must be in a defined legal relationship with each other.⁶⁰⁵ This third mandatory contractual requirement is a pretty

⁵⁹⁶ *ibid.* 74/75.

⁵⁹⁷ *ibid.* 72.

⁵⁹⁸ *ibid.*

⁵⁹⁹ *ibid.*

⁶⁰⁰ New York Convention (no 27) art II(1).

⁶⁰¹ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 81.

⁶⁰² *Hart v O'Connor* (no 119).

⁶⁰³ German Civil Code (no 117) sections 104-113.

⁶⁰⁴ New York Convention (no 27) art V(1)(a).

⁶⁰⁵ *ibid.* art II(1).

straightforward one – the parties can arbitrate their dispute only if they have some pre-existing legal and defined relationship with each other and their dispute at hand has some sort of a legal connection with the relationship itself.⁶⁰⁶

Fourthly, in order for the arbitration to take place, the parties must conclude their arbitration agreement in writing.⁶⁰⁷ Especially because this “writing requirement” represents a consensual evidence of the parties’ willingness to arbitrate their dispute, and also provides for a certainty of the overall arbitration process.⁶⁰⁸ All in all, this fourth mandatory contractual requirement is also rather straightforward and nowadays, many countries (specifically the UK and Germany) interpret this “writing requirement” extensively, so as to provide for a broad spectre of criteria under which this requirement is fulfilled.⁶⁰⁹ For example, by allowing a partly oral arbitration agreement to fulfil the “writing requirement”, as is the case in the UK.⁶¹⁰

Moreover, if the parties want to resolve their dispute through the arbitration, then they must also comply with the principle of arbitrability, as the fifth mandatory contractual requirement.⁶¹¹ Based on the principle of arbitrability, a subject-matter of the dispute at hand must be capable of being resolved through the arbitration, under a law applicable to the arbitration agreement.⁶¹² Only then is the arbitration agreement valid, if the concerned subject-matter is within the jurisdiction and the power of the arbitral tribunal and can be, thus, decided on.⁶¹³ Otherwise, if this is not the case, and the subject-matter is not arbitrable under the law applicable to the arbitration agreement, the parties must resolve their dispute before the national court.⁶¹⁴ However, it is important for the parties to keep in mind that if they do not consider the arbitrability of their dispute before a commencement of the arbitration, then their arbitration agreement can be later on declared as invalid and so can the arbitral award.⁶¹⁵

Lastly, the parties’ arbitration agreement must comply with one further (sixth) mandatory contractual requirement – according to which the arbitration agreement must be valid under its governing law.⁶¹⁶ In this case, it is extremely important that the parties expressly choose the law governing their arbitration agreement.⁶¹⁷ Generally, the parties only expressly

⁶⁰⁶ *The Principles and Practice of International Commercial Arbitration* (no 134).

⁶⁰⁷ New York Convention (no 27) art II(1).

⁶⁰⁸ *International Commercial Arbitration: Important Contemporary Questions* (no 143).

⁶⁰⁹ The UK Arbitration Act (no 86) section 5.; German Arbitration Act (no 82) section 1031.

⁶¹⁰ The UK Arbitration Act (no 86) section 5(3).

⁶¹¹ New York Convention (no 27) art V(2)(a).

⁶¹² *Redfern and Hunter on International Arbitration: Student Version* (no 3) 80.

⁶¹³ *ibid.*

⁶¹⁴ *ibid.*

⁶¹⁵ New York Convention (no 27) art V(2)(a).

⁶¹⁶ *ibid.* art V(1)(a).

⁶¹⁷ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

agree on the law governing their commercial contract and then assume that such law will also govern their arbitration agreement.⁶¹⁸ However, this approach is not correct, as discussed in this Thesis, because the parties may encounter many legal issues if the express choice of the law governing their arbitration agreement is absent.⁶¹⁹

To sum up, as one may see, there are six different mandatory contractual requirements of the international commercial arbitration agreement. These requirements are indeed cumulative and thus, all of them must be fulfilled and complied with – because if the arbitration agreement does not comply with one of these requirements, then the agreement cannot be valid and legitimate under the rule of law.⁶²⁰ And as a result of such invalidity, the arbitration itself cannot even begin with. Therefore, the parties, wishing to arbitrate their dispute, should be very careful when drafting their arbitration agreement and should ideally seek a legal help in doing so – in order to ensure that all of these six mandatory contractual requirements are fulfilled, so that their arbitration agreement is valid/legitimate and the parties can then proceed to effectively and efficiently arbitrate their dispute. By doing so, the parties can also steer clear of the national litigation, which has many disadvantages that are, fortunately, absent when it comes to the arbitration.⁶²¹

Furthermore, as mentioned above, this Thesis also discussed a second legal question when it comes to the international commercial arbitration agreement – that being the fundamental provisions that should be laid down by every single arbitration agreement. Because, as was repeated numerously throughout this Thesis, not only must the arbitration agreement comply with the mandatory contractual requirements⁶²², but it should also lay down certain fundamental provisions.⁶²³ The parties can ensure, by including these fundamental provisions in their arbitration agreement, that all the necessary and essential aspects, with regards to their arbitration, are already agreed on in their agreement before the commencement of the dispute resolution process. This way, the parties are contractually protected and the potential legal issues, with regards to a scope of their arbitration agreement, are prevented from arising later on throughout the proceedings. But what are these fundamental provisions that should be covered by every arbitration agreement? And what happens if any of these provisions are not included in the agreement? As was shown by this Thesis, the fundamental provisions

⁶¹⁸ *ibid.*

⁶¹⁹ *ibid.*

⁶²⁰ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 74/75.

⁶²¹ *ibid.* 28-30.

⁶²² *ibid.* 74/75.

⁶²³ *ibid.* 97-100.

include a multi-tiered clause, a type of the arbitration, a language of the arbitration, a choice of the applicable law (substantive and procedural), a composition of the arbitral tribunal and lastly, a confidentiality.⁶²⁴

All of these provisions are considered to be fundamental for one single reason – without these provisions, the arbitration agreement is not complete, since it does not provide for all the necessary and essential aspects of the arbitration itself. And as a result, many potential legal issues may arise later on, throughout the arbitration, particularly with regards to its scope. By including all of these provisions, the parties can prevent these issues from arising and can “only” focus on resolving their dispute, without any additional burdens. Therefore, each and every one of these fundamental provisions plays a significant role in the efficiency and effectiveness of the arbitration itself.

The first fundamental provision, which can be very beneficial for the parties arbitrating their dispute, is the multi-tiered clause.⁶²⁵ By including the multi-tiered clause into their arbitration agreement, the parties can stipulate that in case of a legal dispute arising between them, they will firstly try to resolve it amicably, through a sequence of different informal dispute resolution methods, for example a mediation or a negotiation.⁶²⁶ And only if these amicable methods fail, will the parties turn to the arbitration, as their last resort.⁶²⁷ This provision can be rather fundamental for the parties, since it can provide for a friendly and an informal resolution of their dispute, without a need to turn to a formal and an often-confrontational environment of the arbitration. However, in this case, the parties must be careful how they draft their multi-tiered clause, because if its nature is uncertain, then such clause can be non-binding and unenforceable.⁶²⁸ Thus, only leading to further legal issues for the parties at hand, instead of resolving them.⁶²⁹

Secondly, another fundamental provision, that should be included in every arbitration agreement, is the type of the arbitration itself.⁶³⁰ It is important that the parties agree on the type of the arbitration in their agreement, prior to the commencement of the proceedings – and for a very simple reason.⁶³¹ Every arbitration is governed by some procedural rules.⁶³² And these

⁶²⁴ *ibid.*

⁶²⁵ *Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study* (no 242) 294-295.

⁶²⁶ *ibid.*

⁶²⁷ *ibid.*

⁶²⁸ *Enforceability of Multi-Tiered Dispute Resolution Clauses* (no 243) 552.

⁶²⁹ *ibid.*

⁶³⁰ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 98.

⁶³¹ *Ad Hoc or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases* (no 285).

⁶³² *Redfern and Hunter on International Arbitration: Student Version* (no 3) 42.

rules are chosen based on the type of the arbitration itself – if the parties choose an institutional arbitration, such institution has its own rules which will govern the procedure and which must be strictly followed by the parties, but if the parties choose an *ad hoc* arbitration, then they must agree themselves on the procedural rules which they prefer.⁶³³ There are certain advantages and disadvantages when it comes to each of these types of the arbitration, so it is generally up to a preference of the parties – depending on their intentions, needs and wishes with regards to their dispute resolution process. But all in all, it is immensely important that the parties always make a choice with regards to the type of their arbitration, regardless of what it is.

Thirdly, the parties should also agree on the language of their arbitration, as another fundamental provision of the arbitration agreement.⁶³⁴ Generally, a preferred language of the international commercial arbitration is English.⁶³⁵ However, it is important that the parties choose the language that both of them can fully understand and comprehend.⁶³⁶ Although a choice of the language of the arbitration seems crystal clear, this is not always the case. Sometimes the parties either provide for no choice of the language of the arbitration or they choose the language which one of them cannot fully understand – and this can result in an unclear and vague usage of the words in the arbitration documents / submissions. And as a result, the arbitral tribunal must decide on the applicable language⁶³⁷ and it might also need to interpret these unclear / vague documents / submissions – and this can only create further procedural burdens for the parties to the dispute.⁶³⁸

Fourthly, one of the most fundamental provisions of every arbitration agreement is the choice of the applicable law – both the law governing the arbitration agreement and the law governing the procedure of the arbitration. Unfortunately, an importance of the law governing the arbitration agreement is very underestimated⁶³⁹ and the parties often assume that once they choose a law governing their commercial contract, this law will also apply to the arbitration agreement itself.⁶⁴⁰ However, as discussed in this Thesis, this approach is not correct. Generally, as a result of a lack of the law governing the arbitration agreement, it is up to the arbitral tribunal to make a final choice.⁶⁴¹ But in this case, the parties must keep in mind that the choice of the arbitral tribunal can result in an application of the law that the parties wanted to avoid in the

⁶³³ *ibid.* 42/47.

⁶³⁴ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 100.

⁶³⁵ Language Selection in International Commercial Arbitration (no 343).

⁶³⁶ The Language of International Arbitration (no 317) 93.

⁶³⁷ Language of the Proceedings (no 318).

⁶³⁸ *Class, Mass, and Collective Arbitration in National and International Law* (no 346).

⁶³⁹ *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (no 377).

⁶⁴⁰ *Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others* (no 254).

⁶⁴¹ *ibid.*

first place.⁶⁴² And the same goes for the choice of the applicable law governing the procedure of the arbitration. In this case, such choice is a bit more problematic, since there can be three different laws of the procedure – the law of the seat, the arbitral procedural law and the arbitration rules.⁶⁴³ Nevertheless, when it comes to the parties' arbitration agreement and the applicable law governing the procedure of their arbitration, the parties should preferably only stick to the law of the seat and the arbitration rules – in addition to the law governing the arbitration agreement.⁶⁴⁴ And in order to avoid any potential legal issues from arising, they should expressly agree on all of these laws (in their arbitration agreement).

Furthermore, the parties should also agree on the composition of their arbitral tribunal, as another fundamental provision of the arbitration agreement.⁶⁴⁵ In this case, the parties should agree on the number of arbitrators comprising their tribunal, on their preferred expertise as well as on the procedure for their appointment.⁶⁴⁶ In the absence of the parties' choice, there are default rules (under each jurisdiction) which deal with these aspects.⁶⁴⁷ Nevertheless, it is always better if the parties expressly agree on the composition of their arbitral tribunal, so as to ensure that it meets their needs and wishes.

Lastly, the parties should also include, in their arbitration agreement, the confidentiality provision, which is also very fundamental.⁶⁴⁸ Although the arbitration is generally confidential⁶⁴⁹, it is always better to provide for an express recognition of this principle.⁶⁵⁰ Especially if the parties want some certainty with regards to a secrecy and a privacy of their proceedings, for whatever reason it may be. The confidentiality can be provided for in different ways, whether it be under the national law, under the applicable arbitration rules or in the contractual document (which is the most preferred and the safest way).⁶⁵¹ Otherwise, if the parties do not expressly provide for the confidentiality provision in their arbitration agreement, and only rely on this principle impliedly, it is possible that the confidentiality will not be recognized.⁶⁵² Especially since the confidentiality is not a universally accepted principle and its application depends on the jurisdiction concerned.⁶⁵³

⁶⁴² *ibid.*

⁶⁴³ *International Commercial Arbitration: An Asia-Pacific Perspective* (no 463).

⁶⁴⁴ *ibid.* 60-63.

⁶⁴⁵ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 233/234.

⁶⁴⁶ *ibid.*

⁶⁴⁷ The UK Arbitration Act (no 86).; German Code of Civil Procedure (no 335).

⁶⁴⁸ *Redfern and Hunter on International Arbitration: Student Version* (no 3) 124.

⁶⁴⁹ *ibid.*

⁶⁵⁰ *Confidentiality in International Commercial Arbitration* (no 543).

⁶⁵¹ *ibid.* Chapter 1.

⁶⁵² *ibid.* XVI-XVII.

⁶⁵³ *ibid.*

To sum up the fundamental provisions, there are six different provisions which should be included in every international commercial arbitration agreement. Although these fundamental provisions are not cumulative⁶⁵⁴, it is very advisable that the parties expressly include all of them in their arbitration agreement. By doing so, the parties can ensure that the most important aspects, with regards to the scope of their arbitration, are already agreed on before the commencement of the proceedings – for reasons of effectiveness and efficiency. And sometimes, if any of these provisions are missing in the arbitration agreement, the parties may have real difficulties agreeing on them later on throughout their arbitration proceedings – particularly due to their differing opinions.

To conclude this Thesis, the parties should realize that if they consensually choose the arbitration, as their preferred dispute resolution method, then they should do everything in their powers to make sure that it is successful – rather than to create potential barriers for themselves. This can be easily achieved if the parties ensure that their international commercial arbitration agreement cumulatively complies with the mandatory contractual requirements and also lays down all of the fundamental provisions (that should be covered by every single arbitration agreement). The parties must keep in mind that the arbitration agreement is a foundational cornerstone of the arbitration itself and therefore, they should not use it as a sword, but rather as a shield.

⁶⁵⁴ Redfern and Hunter on International Arbitration: Student Version (no 3) 97-100.

Annexes

Abstract:

Nowadays, arbitration is the most popular method for resolving international commercial disputes. Parties choose the arbitration, as their alternative-dispute resolution method, voluntarily and independently for the many advantages that it offers. However, if the parties want their arbitration to be effective and efficient, it is incredibly crucial that a written arbitration agreement, or at least an arbitration clause within a general business agreement, is concluded.

Arbitration agreement is an essential foundation of every single arbitration. But why is that? Incomplete and/or ill-drafted arbitration agreements can disrupt the smooth process of arbitration and can result in more time-consuming disputes, with an extremely higher arbitrable costs. Moreover, the parties must also keep in mind that arbitration is a private way of resolving a dispute, based on a consensual contractual agreement between the parties themselves. Therefore, a jurisdiction and a power of the arbitral tribunal derives from the valid arbitration agreement itself.⁶⁵⁵ Incomplete and/or ill-drafted arbitration agreement may often lead to a scenario that the parties wanted to steer clear of – a public litigation – all of which could be avoided by a carefully drafted arbitration agreement.

To sum up, this Thesis focuses on arbitration agreements in the international commercial arbitration, so as to highlight the importance of their well-drafted foundation. More specifically, this Thesis discusses two main legal topics – mandatory contractual requirements and fundamental provisions of a general international commercial arbitration agreement. Furthermore, in case of each of these topics, potential legal issues, which may arise if these requirements/provisions are not fulfilled and/or not drafted correctly (or not at all), will be also analysed. Where possible, a comparison of two different legal orders is discussed – Germany, as a civil law country, and the United Kingdom, as a common law country.

Firstly, this Thesis discusses the mandatory contractual requirements that every arbitration agreement must comply with, in order for the agreement to be valid and legitimate under the rule of law. These mandatory contractual requirements are cumulative and include a consent to arbitrate, a capacity to enter into a contractual relationship, a defined legal

⁶⁵⁵ The Mutable and Evolving Concept of “Consent” in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of “Consent” (no 20).

relationship between the parties, a written evidence of the parties' agreement to arbitrate, an arbitrability of the subject-matter at hand and lastly, a validity of the arbitration agreement under its governing law.

And secondly, this Thesis further discusses the fundamental provisions that should be included in every arbitration agreement. Although these provisions are not cumulative, it is extremely advisable that they are incorporated by the parties into their arbitration agreement. These provisions include a multi-tiered clause, a type of the arbitration, a language of the arbitration, a choice of the applicable law (substantive and procedural), a composition of the arbitral tribunal and lastly, a confidentiality.

Zusammenfassung:

Heutzutage ist das Schiedsverfahren die beliebteste Methode zur Beilegung internationaler Handelsstreitigkeiten. Die Parteien entscheiden sich aufgrund der vielen Vorteile, die das Schiedsverfahren bietet, freiwillig und unabhängig für diese Methode der alternativen Streitbeilegung. Wenn die Parteien ein schnelles und effizientes Schiedsverfahren wollen, ist es jedoch sehr wichtig, dass eine schriftliche Schiedsvereinbarung oder wenigstens eine Schiedsklausel in den allgemeinen Geschäftsvereinbarungen geschlossen wird.

Die Schiedsvereinbarung ist die Grundlage eines jeden Schiedsverfahrens. Aber warum ist das so? Unvollständige und/oder schlecht ausgearbeitete Schiedsvereinbarungen können den Prozess des Schiedsverfahrens stören und zu zeitaufwendigen Streitigkeiten und damit einhergehend zu deutlich höheren Kosten führen. Weiterhin müssen die Parteien bedenken, dass das Schiedsverfahren ein vertraulicher Weg zur Beilegung einer Streitigkeit ist, der auf einer einvernehmlichen vertraglichen Vereinbarung zwischen den Parteien selbst beruht. Die Zuständigkeit und die Befugnisse der Schiedsgerichtsbarkeit ergeben sich daher aus der wirksamen Schiedsvereinbarung selbst.⁶⁵⁶ Unvollständige und/oder schlecht ausgearbeitete Schiedsvereinbarungen führen oft zu seinem Szenario, das die Parteien nicht wünschen, nämlich zu einer öffentlichen Verhandlung, was durch eine sorgfältig ausgearbeitete Schiedsvereinbarung vermieden werden könnte.

Zusammenfassend konzentriert sich diese Arbeit auf Schiedsvereinbarungen in internationalen Handelsstreitigkeiten und soll insbesondere die besondere Bedeutung gut ausgearbeiteter Schiedsvereinbarungen darstellen. Genauer gesagt diskutiert diese Arbeit zwei Hauptthemen – zwingende vertragliche Anforderungen sowie grundlegende Bestimmungen einer Schiedsvereinbarung für internationale Handelsstreitigkeiten. Darüber hinaus sollen bei jedem dieser Themen potentielle Rechtsprobleme analysiert werden, die sich ergeben könnten, wenn diese Anforderungen nicht erfüllt und/oder unkorrekt umgesetzt werden. Wo möglich, wird ein Vergleich zwischen zwei verschiedenen Rechtssystemen dargestellt – dem deutschen Rechtssystem, das dem Rechtskreis des Civil Law angehört sowie dem Rechtssystem des Vereinigten Königreichs, das dem Rechtskreis des Common Law angehört.

Erstens diskutiert diese Arbeit die zwingenden vertraglichen Anforderungen, die jede Schiedsvereinbarung erfüllen muss, damit sie rechtlich wirksam und legitim ist. Diese vertraglichen Anforderungen müssen kumulativ vorliegen und enthalten die Zustimmung zum

⁶⁵⁶ *ibid.*

Schiedsverfahren, die Fähigkeit zur Eingehung einer vertraglichen Beziehung, eine definierte rechtliche Beziehung zwischen den Parteien, einen schriftlichen Nachweis über die Schiedsvereinbarung, die Schiedsfähigkeit des betreffenden Gegenstandes und zuletzt die rechtliche Wirksamkeit der Schiedsvereinbarung unter dem jeweils geltenden Recht.

Zweitens diskutiert diese Arbeit die grundlegenden Bestimmungen, die jede Schiedsvereinbarung enthalten sollte. Auch wenn diese Bestimmungen nicht kumulativ vorliegen müssen, ist es extrem ratsam, dass diese von den Parteien in die Schiedsvereinbarung aufgenommen werden. Diese Bestimmungen enthalten eine “multi-tiered clause“ (d.h. eine Klausel, welche die anzuwendenden Methoden der alternativen Streitbeilegung sowie deren Rangfolge festlegt), die Art des Schiedsverfahrens, die Sprache des Schiedsverfahrens, das anzuwendende Recht (materiell und prozessual), die Zusammensetzung des Schiedsgerichts und zuletzt eine Vertraulichkeitserklärung.

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