

Nathalie Lendermann

# Procedure Shopping Through Hybrid Arbitration Agreements

Considerations on party autonomy in  
institutional international arbitration



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*Meinen Eltern*



## Vorwort

Die vorliegende Arbeit wurde im Frühjahr 2016 von der rechtswissenschaftlichen Fakultät der Universität Konstanz als Dissertation angenommen. Änderungen von Schiedsordnungen konnten für die Veröffentlichung bis September 2017 berücksichtigt werden.

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Berlin, Dezember 2017

Nathalie Lendermann





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## List of abbreviations

§ / §§	section / sections
AAA	American Arbitration Association
AAA-ICDR	International Centre of Dispute Resolution of the →AAA
ADCCAC	Abu Dhabi Commercial Conciliation and Arbitration Center
ADR	Alternative Dispute Resolution
AFA	Association française d'arbitrage
AG	Aktiengesellschaft (German stock corporation)
All ER	All England Law Reports
alt.	alternative
Am. Rev. Int'l Arb	American Review of International Arbitration
Am. Univ. Int'l L. Rev.	American University International Law Review
AR	Arrondissementsrechtbank (Dutch regional court)
Arb.	Arbitration; arbitral award / decision
Arb. Int'l	Arbitration International
art.	Article(s)
AS	Amtliche Sammlung (Swiss official legislation reporter)
ASA Bull.	Bulletin de l'Association Suisse de l'Arbitrage
ATF	Arrêts du Tribunal Fédéral / Entscheidungen des Bundesgerichts (official reporter of the →BG)
AUT	Austria
Az.	Aktenzeichen (German for case →no.)
b2b	Business-to-Business
BE	Belgium
BeckRS	Beck-Rechtsprechung (German electronic case reporter at the fee based database <a href="http://beck-online.beck.de">http://beck-online.beck.de</a> )
BG	Bundesgericht / Tribunal Fédéral (Swiss Federal Supreme Court)
BGB	Bürgerliches Gesetzbuch (German civil code)
BGBI.	Bundesgesetzblatt (German Federal Law Gazette)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BöhmsZ	Zeitschrift für internationales Privat- und Strafrecht (founded by Böhm)
Buff. L. Rev.	Buffalo Law Review
Bull.	Bulletin (de la Cour de Cassation) (Bulletin of the →C.Cass.)
BV	Besloten Vennootschap (Dutch limited liability company)
C.Cass.	Cour de cassation (French Supreme Court)

*List of abbreviations*

C.Civ.	Code civil (French civil code)
C.H.	Confoederatio Helvetica / Switzerland
C.L.C.	Civil Law Cases
CA	Court of Appeals / Cour d'appel (appellate court, various jurisdictions)
Can.	Canada
CCI	Chambre de Commerce Internationale →ICC
CCIG	Chamber of Commerce and Industry of Geneva
CCIR	(Court of International Commercial Arbitration attached to the) Chamber of Commerce and Industry of Romania
CE	Conseil d'Etat (highest French administrative court)
CETA	Comprehensive Economic and Trade Agreement / Canada - EU Trade Agreement
Ch.	Court of Chancery (former court of equity of →EW) / Chancery Division (branch of the →EWHC); if used in titles of French publications also: chambre (French for: chamber)
ch.	Chapter
CIETAC	China International Economic and Trade Arbitration Commission
Civ.	Civil (division/chamber)
CJ	Code judiciaire
Colum. L. Rev.	Columbia Law Review
Comm.	Commercial (division/chamber) / (chambre) commerciale
CPC (FR)	Code de Procedure Civile (French Code of Civil Procedure)
CPC (RO)	Cod de procedură civilă (Romanian Code of Civil Procedure)
CPI (FR)	Code de la Propriété Intellectuelle (French Code of Intellectual Property)
Ct. App.	Court of Appeals (appellate court)
DAS	Deutscher Ausschuss für Schiedsgerichtswesen (German Arbitration Committee; predecessor of the → DIS)
DCFR	Draft Common Frame of Reference
DDR	Deutsche Demokratische Republik → GDR
DIFC	Dubai International Financial Centre
DIN	Deutsches Institut für Normung (German Institute for Standardisation)
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Arbitration Institute)
doc.	document(s)
DtZ	Deutsch-Deutsche Rechtszeitschrift (German law journal)
e.g.	for example
e.V.	eingetragener Verein (German registered association)

EC	EU, Council
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ed(s).	editor(s)
ed.	Edition
EGBGB	Einführungsgesetz zum (Introductory Act to the) →BGB
EGGVG	Einführungsgesetz zum Gerichtsverfassungsgesetz (Introductory Act to the German Law of the Organisation of the Judiciary)
ELR	Entertainment Law Review
Em. J. Int'l Disp. Res.	Emory Journal of International Dispute Resolution
ES	España / Spain
EU	European Union
Eur. Ct. HR	European Court of Human Rights
EW	England and Wales
EWCA	→EW Court of Appeals
EWHC	→EW High Court
EWPC	→EW Patents County Court
F. App'x	Federal Appendix
F. Supp.	Federal Supplement
F.2d	Federal Reporter Second
F.3d	Federal Reporter Third
FAA	Federal Arbitration Act
Far East. Econ. Rev.	Far Eastern Economic Review
FETAC	Foreign Economic and Trade Arbitration Commission (predecessor of →CIETAC)
FIDIC	Fédération Internationale des Ingénieurs Conseils / International Federation of Consulting Engineers
FR	France
FTAC	Foreign Trade Arbitration Commission (predecessor of →FETAC and →CIETAC)
GDR	German Democratic Republic →DDR
Gen. Ass. Res.	General Assembly Resolution
GER	Germany
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil
H.S.G.	Handelsrechtliche Schiedsgerichts-Praxis (German reporter for commercial arbitral awards→RKS)
Harv. L. Rev.	Harvard Law Review

*List of abbreviations*

HCCI	Hungarian Chamber of Commerce and Industry
HKCIAC	Hong Kong International Arbitration Centre
HL	House of Lords
Hz.	Hangzhou, China
i.e.	id est (that is / that means)
I.L.M.	International Law Materials
IAA	International Arbitration Act
IACHR	Inter-American Convention on Human Rights
IBA	International Bar Association
ibid.	Ibidem (at the same place)
ICAC	International Court of Arbitration attached to the Chamber of Commerce and Industry of the Russian Federation
ICAI	International Federation of Commercial Arbitration Institutions
ICC	International Chamber of Commerce
ICC Bull.	Bulletin of the →ICC Court
ICC Court	International Court of Arbitration of the →ICC
ICCA	International Council for Commercial Arbitration
ICCPR	International Covenant on Civil and Political Rights
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
idem	the same / by the same author
IHK	Industrie- und Handelskammer (German regional chamber of commerce and industry)
ILA	International Law Association
IN	India
Int'l Arb. L. Rev.	International Arbitration Law Review
IP	Intellectual and/or industrial property
IPC	Intermediate People's Court
IPRax	Praxis der Internationalen Privat und Verfahrensrechts
IPRG (C.H.)	Bundesgesetz über das internationale Privatrecht / Loi fédérale sur le droit international privé (Swiss Act on Private International Law)
ITA	Institute for Transnational Arbitration
J. Int'l Arb.	Journal of International Arbitration
J. L. Econ. & Pol.	Journal of Law, Economics & Policy
J.D.I.	Journal du Droit International (Clunet)
JAC	Jerusalem Arbitration Centre
JIPL	Journal of Intellectual Property Law



JORF	Journal officiel de la République Française
juris	German fee based electronic database available at <a href="http://www.juris.de/jportal/index.jsp">www.juris.de/jportal/index.jsp</a>
JZ	Juristenzeitung
KG (C.H.)	Kantonsgericht (Cantonal court)
KG (GER)	Kammergericht (Higher regional court, Berlin)
L. & Soc. Rev.	Law & Society Review
LCIA	London Court of International Arbitration
LEXIS	Online law database of the company LexisNexis
LG	Landgericht (German regional court)
LJ	Lord Justice
LLC	Limited Liability Company
Lloyd's Rep.	Lloyd's Law Reports
LLP	Limited Liability Partnership
LMCLQ	Lloyd's Maritime and Comparative Law Quarterly
LMK	Kommentierte BGH-Rechtsprechung Lindenmaier-Möhring / Beck Fachdienst Zivilrecht LMK (German case reporter)
Lond. Rev. Int'l L.	London Review of International Law
LP	Limited Partnership
n.	note
n. d.	no date
N.Y.	New York
NAFTA	North American Free Trade Agreement
NJOZ	Neue Juristische Online-Zeitschrift (German online law journal)
NJW	Neue Juristische Wochenzeitschrift (German law journal)
NJWE-WettbR	Neue Juristische Wochenzeitschrift - Entscheidungsdienst Wettbewerbsrecht (German online reporter of decisions on competition and unfair competition law)
no.	number
NV	Naamloze Vennootschap (Dutch stock corporation)
O.J.	Official Journal of the European Union
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (higher regional court in →GER or →AUT)
ONCA	Ontario Court of Appeal (Decisions)
p. / pp.	page / pages
P.R.C.	People's Republic of China
Pace L. Rev.	Pace Law Review
para.	paragraph(s)

*List of abbreviations*

PSI	Public Sector Information
pt.	part
QB	Queen's Bench (division)
R.P.C.	Reports of Patent Cases
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht - The Rabel Journal of Comparative and International Private Law
Rep.	Report(s)
Rev.	Review / Revue
Rev. Arb.	Revue de l'Arbitrage (French arbitration journal)
Rev. crit. DIP	Revue critique de droit international privé
Rev. Esp. Arb.	Revista de la Corte Española de Arbitraje
RG	Reichsgericht (Supreme Court of the German Reich)
RIDA	Revue Internationale du Droit d'Auteur
RIW	Recht der Internationalen Wirtschaft
RKS	Rechtsprechung Kaufmännischer Schiedsgerichte (German reporter for commercial arbitral awards →H.S.G.)
Rn.	Randnummer (German for numbered paragraph; →para.)
RO	Romania
S.Ct.	(Reporter of the) Supreme Court of the United States
S.D.N.Y.	Southern District of New York
SA	Société anonyme (French stock corporation)
SCC	Stockholm Chamber of Commerce
SCCAM	Swiss Chambers of Commerce Court of Arbitration and Mediation
SCCIETAC	South China International Economic and Trade Arbitration Commission, other name for →SCIA
SchiedsVZ	Zeitschrift für Schiedsverfahren (German arbitration journal)
SCIA	Shenzhen Court of International Arbitration
sent.	sentence
sess.	session
SG	Singapore
SGCA	Singapore Court of Appeals
SGHC	Singapore High Court
SHIAC	Shanghai International Arbitration Centre
SIAC	Singapore International Arbitration Centre
SIETAC	Shanghai International Economic and Trade Arbitration Commission, other name for →SHIAC
SLA	Softwood Lumber Agreement
SpA	Società per Azioni (Italian stock corporation)

SPC	Supreme People's Court
Stockh. Int'l Arb. Rev.	Stockholm International Arbitration Review
TCC	Technology and Construction Court (branch of the →EWHC)
TdC	Tribunal de Conflits (French court competent to solve conflicts of jurisdiction between administrative and ordinary courts)
Tenn.	Tennessee
TGI	Tribunal de Grande Instance (French court of first instance)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U.S.	United States (Reports)
U.S. Dist LEXIS	Online reporter of →US district court cases maintained by →LEXIS
U.S.C.	United States Code
U.S.S.R.	Union of Soviet Socialist Republics
UAE	United Arab Emirates
UCP 500	Uniform Customs and Practice for Documentary Credits, previous, 5th version (industry standards for letters of credit, adopted by the →ICC)
UK	United Kingdom
UNCITRAL YB	Yearbook of the United Nations Commission on International Trade Law (→UNCITRAL)
UNCTRAL	United Nations Commission on International Trade Law
UNSW L.J.	University of New South Wales Law Journal
UNTS	United Nations Treaty Series
URG (C.H.)	Urheberrechtsgesetz (Swiss law on author's and neighbouring rights)
UrhG (GER)	Urheberrechtsgesetz (German law on author's and neighbouring rights)
US	United States
UWG (GER)	Gesetz gegen den unlauteren Wettbewerb (German act against unfair competition)
v.	versus
V.U.W L. Rev.	Victoria University of Wellington Law Review
Vand. J. Trans'l L.	Vanderbilt Journal of Transnational Law
VFS	Vereinigung zur Förderung der Schiedsgerichtsbarkeit (German Association for the Promotion of Arbitration, predecessor of the → DIS)
Virg. L. Rev.	Virginia Law Review
W.D. Tenn.	Western District of Tennessee
WAMR	World Arbitration & Mediation Review

*List of abbreviations*

WIPO	World Intellectual Property Organization
WTO	World Trade Organization
YB	Yearbook
YB Arb. Med.	Yearbook on Arbitration and Mediation
YB ECHR	Yearbook of the European Commission of Human Rights
YCA	Yearbook of Commercial Arbitration
ZCC	Zurich Chamber of Commerce
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (German journal of business and insolvency law)
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
ZZP	Zeitschrift für Zivilprozess (German journal of civil procedure)

## Introduction

Worldwide, arbitration has become an established means to solve international commercial disputes.<sup>1</sup> Although it is difficult to quantify the significance of arbitration in comparison to state court litigation precisely,<sup>2</sup> there is agreement that arbitral tribunals decide a vast majority of international commercial disputes and that the impact of arbitration has grown in the process of globalisation.<sup>3</sup> It was even found that the cases published in official reports of the highest state courts become trivial and bourgeois in consequence of the development of arbitration.<sup>4</sup> In any case, commercial courts faced a sharp decline in case numbers in recent years while the business of international arbitration institutions keeps growing.<sup>5</sup> For the development of arbitration law and practice, arbitration institutions are key factors,<sup>6</sup> always striving to best serve parties' needs associated with the growing complexity and urgency of international business disputes.<sup>7</sup>

Confidentiality, international enforceability of the award,<sup>8</sup> the trust placed in the expert knowledge and neutrality of the selected arbitrators and

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- 1 Blackaby et al., *Redfern and Hunter*, para. 1.01.
  - 2 Arbitration awards are usually not published and proceedings often confidential. Consequence is a lack of statistical data (*see generally* Drahozal and Naimark, *Towards a Science of International Arbitration*; Coe, »From Anecdote to Data«; *see also* Hoffmann, *Kammern für internationale Handelssachen*, 32–39, summarising some statistical reports but regretting numbers to be not much more reliable than estimates; *see also* by the same author: »Schiedsgerichte als Gewinner der Globalisierung?«).
  - 3 *E.g.* Schütze, *Institutionelle Schiedsgerichtsbarkeit: Kommentar*, V; Schwab, Walter, and Baumbach, *Schiedsgerichtsbarkeit*, 345–46.
  - 4 Aden, *Internationale Handelsschiedsgerichtsbarkeit*, chap. 1, para. 7.
  - 5 Hoffmann, *Kammern für internationale Handelssachen*, 39 (with further references).
  - 6 *Cf.* Gottwald, *Internationale Schiedsgerichtsbarkeit*, 45, para. 24 (assuming that institutional arbitrations outweigh ad hoc arbitrations in number).
  - 7 An aim, which motivates some institutions to frequently update their rules, which is why not all editorial changes to institutional rules made within the last year can be fully reflected herein (*see infra* at p. 50, n. 122).
  - 8 Internationally, the widespread ratification of the New York Convention may make it easier to enforce a foreign arbitration award than a foreign state court judgment.

supposedly quick and possibly cost efficient proceedings<sup>9</sup> are some of the reasons named for the popularity of arbitration. Continued reluctance to allow another than a jurisdiction's official language in state court proceedings also contributes to the competitive advantage of arbitration.<sup>10</sup> A no less decisive factor is the liberty of the parties to structure and tailor the procedure followed in arbitration as they please.<sup>11</sup>

### §1 Problem identification and delimitation

When analysing extent and boundaries of the liberty to shape arbitral proceedings, it is crucial to differentiate between institutional and ad hoc arbitration. Ad hoc arbitral tribunals are constituted when a dispute arises. In principle,<sup>12</sup> they determine the procedure at their own discretion in cooperation with the parties. Equally, in institutional arbitration, the arbitral tribunal is usually set up only once a dispute has emerged. In addition, however, a permanent body exists - the institution - which assists the arbitration.<sup>13</sup> Such institutions commonly provide their own sets of pre-drafted rules for the constitution of the arbitral tribunal, the procedure and the rendering of the award.

This thesis intends to answer the question to what extent the choice of institutional arbitration in general and the choice of a specific arbitral institution in particular limits the parties' freedom to determine arbitral

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9 Time and costs might be saved due to limited levels of review, but high fees for arbitrators and institutional fees make arbitration not usually the cheapest option (on this assumption, *see e.g.* Schwab, Walter, and Baumbach, *Schiedsgerichtsbarkeit*, 5, with further references).

10 *But see* Hau, »Fremdsprachengebrauch«, 58–60 (on a legislative project to introduce English as an optional language before German commercial courts).

11 Poudret and Besson, *Comparative Law of International Arbitration*, para. 522; Blackaby et al., *Redfern and Hunter*, para. 1.95; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, para. 1.11, 1.16; Schwab, Walter, and Baumbach, *Schiedsgerichtsbarkeit*, 5.

12 Ad hoc arbitrations may also follow the UNCITRAL Rules (2010). The question whether ad hoc arbitration can follow institutional rules will be considered *infra* at pp. 151-156 (§7C.IV).

13 For elements relevant to define institutional arbitration, *see infra* at pp. 127-134 (§7A).