

Arbitration Agreement

International Commercial Arbitration and International Sales Law

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Arbitration agreement: definition, effects

- an **agreement in writing** under which the parties undertake to submit to arbitration **all or any differences** which **have arisen or which may arise** between them in respect of a **defined legal relationship**, whether contractual or not, concerning a **subject matter capable of settlement** by arbitration

positive

negative

Negative effects: objection in court

Art. II(3) NYC:

The court ... when seized of an action in a matter in respect of which the parties have made an AA, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Art. 16(2) ML:

A plea that the AT does not have jurisdiction shall be raised not later than the submission of the statement of defence.

Objection on the basis of AA

European Convention:

pleas based on the fact that the AA was either non-existent or null and void or had lapsed shall be made not later than the delivery of its statement of claim or defence relating to the substance of the dispute

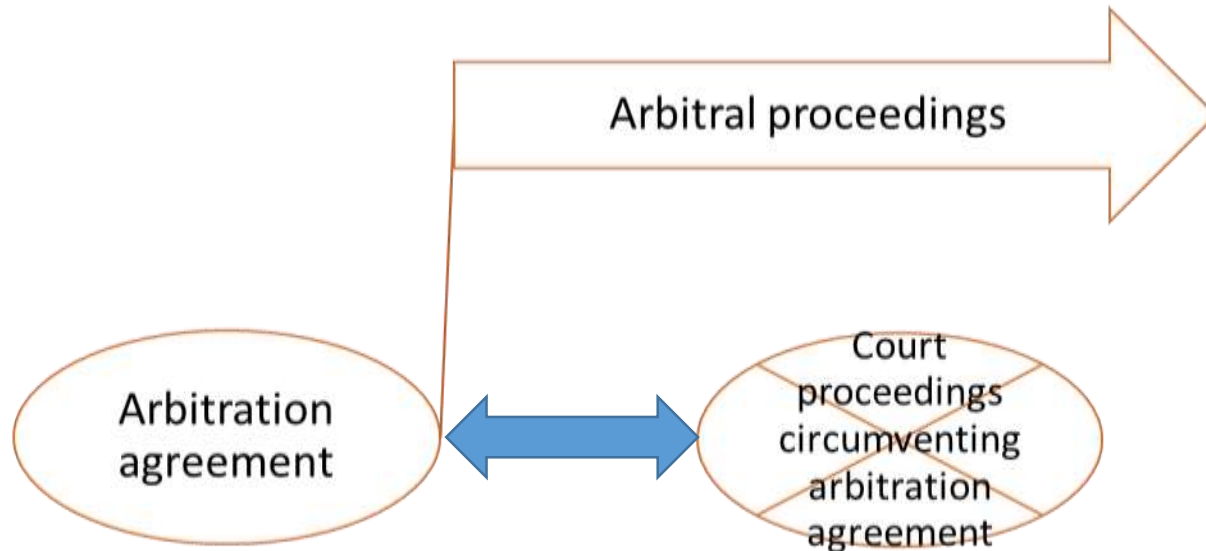
Otherwise: a waiver of AA!

ZPO §1031:

by an appearance in the hearing before the AT on the merits of the case.

A party may raise an objection **prior to the beginning of the oral hearings.**

Competence-competence



- Initially: an exclusive right of AT
- Now: arbitration proceedings may be initiated or continued notwithstanding a court ruling and an arbitration award may be handed down.

In Germany: proceedings on **(in)admissibility of arbitration** only before the AT is constituted!

Arbitration agreement: types

Depending on a form:

- arbitration agreement (in a strict sense) (hereinafter AA)
- arbitration clause (hereinafter AC)
- mutatis mutandis – other forms

Depending on the time of conclusion:

- arbitration clause or arbitration agreement, concluded before any dispute arise
- submission agreement (compromis)

Depending on a combination of different DSM:

- only arbitration
- alternative (optional) clauses: arbitration or a (specific) court
- multi-layer clauses: med + arb, arb + med + arb

Arbitration clause: separability

AC is **separate** from the contract and it **survives** the termination of the main contract.

Model Law: *The AT may rule on its own jurisdiction, including any objections with respect to the existence or validity of the AA. For that purpose, an AC which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*

ZPO: *The AT may decide on its own competence, and in this context also regarding the existence or the validity of the AA. In this context, an AC is to be treated as an agreement independent of the other provisions of the agreement.*

Arbitration clause: separability

Invalidity of a main contract does not (by itself) mean invalidity of AC

Invalidity of AC does not (by itself) mean invalidity of a main contract

Arbitration agreement: requirements

- **Subject matter**
- **Form**
- **Legal capacity of the parties to arbitration agreement (subjective arbitrability)**
- **A defined legal relationship**
- **Validity under the applicable law or lex arbitri**
- **(Objective) Arbitrability of a dispute**

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International conventions

NYC:

AC or AA signed by the parties or contained in an exchange of letters or telegrams

Most-favorable principle Art. VII

European Convention:

AC or AA signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, *in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws*

UNCITRAL Model law

1985:

- a document signed by the parties, or in an exchange of letters, telex, telegrams, or other forms of telecommunication which provide a **record** of the agreement, or
- in an **exchange** of statements of claim and defence (not objected)
- by reference in a contract

UNCITRAL Model law

2006: Art. 7 Option I:

- its content is **recorded** in any form;
- by an electronic communication if the information contained therein is ... **useable for subsequent reference**;
- in an **exchange** of statements of claim and defence (not objected)
- by **reference**

2006: Art. 7 Option II:

- **no written requirement**

Seat in Germany: §§1031, 1066 ZPO

ZPO = Model Law 1985, but also:

- in an **exchange of any document**, not only statements of claim and defence (not objected)
- by **reference**

Customer is a party:

- written document signed by the parties in their own hands (no fascimile) or in electronic form under §126a BGB.
- if not certified by a notary, shall be a separate AA (no AC)!

These requirements do not apply to the AC in articles of incorporation of a legal entity (Satzung) or last wills

Defect of form

- can be remedied by silence (no timely objection)
- when not remedied (e.g. when Respondent is in default):

the AAIs not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made under Art. V (1)(a) NYC

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Legal capacity of the parties (subjective arbitrability)

NYC: the capacity of a person to enter into an AA is governed by the “law applicable to them” = personal law

European Convention: “legal persons of public law”

- **Holders of a right to relief**
- **General successors, assignors, agents**
- **Members of group of companies, beneficiaries**

If the parties are lacking capacity a requesting party can ask the court

- at the beginning of arbitration: to stop the arbitration Art. II (3) NYC
- after the award has been rendered: to refuse recognition and enforcement Art. V(1)(a) NYC.

Legal capacity of the parties (subjective arbitrability) in Germany

Beneficiaries of the contract to the benefit of the third parties

Restrictions:

- AA does not bind a guarantor
- For financial services: both parties shall be merchants or legal persons of public law

Sec. 37h of the German Securities Trading Act, Sec. 1822 No. 12 of the German Civil Code and Sec. 160 Abs. 2 No. 3 of the German Insolvency Code

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Scope and types of disputes

Contractual or contractual and tortious?

- “All disputes (arising) under this contract”
- “All disputes arising out of this contract”
- “All disputes arising out of or in connection to this contract”
- in relation to, in respect of, with regard to

Set-off, counterclaim

If the award deals with an issue not falling under the scope of AA, the recognition and enforcement may be refused Art. VI(1)(c) NYC.

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Objective arbitrability

Typically non-arbitrable:

IP rights, antitrust and competition, securities, insolvency (bankruptcy), cases involving bribery (corruption), fraud

Arbitrability is to be assessed under the laws:

- governing AA,
- of the seat,
- place of enforcement.

If the parties conclude an AA regarding a matter not capable of settlement by arbitration, the award will be set aside §1059 II (a) or refused recognition and enforcement Art. V(2)(b) NYC.

Objective arbitrability in Germany

Arbitrable:

- monetary disputes (*vermögensrechtliche Ansprüche*)
- other disputes that can be the subject of a settlement (when the parties can validly conclude a settlement)
- employment disputes only in accordance with the Labor Court Act

Non-arbitrable:

divorce, child custody matters, issues of family status, criminal law matters, the existence of residential leases and certain issues concerning the land title register and the company register. IP disputes?

Provisions of AA

Essential

- Arbitration
- Binding
- Scope
- Ad hoc or institutional

Important

- Number of arbitrators
- Seat
- Governing law

Useful

- Appointment of arbitrators, filling vacancies
- Default clause
- Language
- Interim measures
- Confidentiality

- In case of dispute, the parties undertake to submit to arbitration but in case of litigation the [court] shall have exclusive jurisdiction
- In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce.
- All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between both parties.
- Any and all disputes arising under the arrangements contemplated hereunder will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the [...]

Other defects

- **“Inoperable”**: time limits
- **“Incapable of being performed”**: too high requirements to arbitrators
- Can be cured by AT (depends on a country):
 - seat... (other useful, meaningful provisions)
 - mistake in naming arbitral institutions or arbitration rules

English version: in Singapore **“in accordance with the then prevailing Rules of the International Arbitration”**

Chinese version: **“at the Singapore International Arbitration Institution”**

Legal Nature of Arbitration

Theories:

- contract
 - arbitration agreement and award = contract on arbitration.
 - equity arbitration (Ex Aequo Et Bono)
- procedural (jurisdictional)
 - arbitration agreement is a procedural agreement, award = judgement
- hybrid (sui generis)
 - arbitration agreement is a substantive contract by its origin and procedural agreement by its effects
- autonomous (delocalization)
 - arbitration = “transnational system of justice”