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BRIEF INTRODUCTION
TO THE DRAFTING OF ARBITRATION CLAUSES

Arbitration clauses are considered to be "midnight clauses", i.e. clauses which parties come upon only late in their contract negotiations. After exhausting negotiations such clauses are often considered to be mere standard clauses and therefore are not paid much attention to.

In fact arbitration clauses belong to the most important contract clauses at all. Because only carefully drafted clauses will cater for an effective enforcement system of the rights and obligations under the contract, about which the parties had negotiated so intensively. This is especially true for international contracts, for which civil judgments of state courts will often not be recognized and declared enforceable by foreign state courts. There are only a few bilateral or multilateral enforcement treaties outside the European Union. In contrast approx. 150 states have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The following introduction shall provide you with a first idea about the drafting of arbitration clauses. Pls. bear in mind that this introduction is of a general nature only and will not consider your specific situation. An arbitration clause may moreover have to be supplemented in certain regards as the individual case may be. Therefore this introduction cannot replace specific advice.

1. ARBITRATION CLAUSE
First of all it needs to be agreed that a dispute shall be decided by arbitration only, which shall be binding on both parties, and to the exclusion of proceedings before civil courts.

2. ARBITRATION RULES
Arbitration proceedings can be conducted on the basis of certain rules, e.g. by an arbitral tribunal especially constituted for proceedings pursuant to the rules provided for by Art. 1025 et seq. German Code of Civil Procedure or by Hamburg Friendly Arbitration Rules. Such an ad-hoc tribunal does not have a secretariat or any other administrative support.

3. ARBITRATION INSTITUTION
More often parties agree on arbitration proceedings before an arbitration institution. Such arbitral institution commands a secretariat, which administers the proceedings and which also provides its own arbitration rules. They are scattered in big numbers all around the globe. Their arbitration rules differ somewhat substantially in terms of the proceedings as well as in terms of costs. Very well known arbitration institutions are the ICC – International Chamber of Commerce, the DIS – German Arbitration Institution, Cologne, the SCC – Stockholm Chamber of Commerce, the Swiss Chambers of Commerce, the VIAC – Vienna International Arbitration Center, the CEAC – Chinese European Arbitration Centre, Hamburg, the CIETAC – China International Economic and Trade Arbitration Commission, Beijing etc.

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4. SELECTION OF ARBITRATORS

It is important as a general issue and especially in terms of cost management to specify the numbers of arbitrators. Usually there will be a tribunal of three arbitrators. However, a single arbitrator or two arbitrators may also be reasonable as the individual case may be giving regard to the complexity and the economic aspects of a potential case.

5. NATIONALITY OF THE PRESIDING ARBITRATOR

It is crucial for any arbitral proceedings that there is no concern as to the impartiality of an arbitrator. As matter of fact a German party will often appoint a German arbitrator while the foreign opposing party will appoint an arbitrator of its own nationality. In the absence of a party agreement the presiding arbitrator in such situations will usually be appointed by the arbitration institution. Then sometimes the presiding arbitrator will have the nationality of one of the parties. This will make the other party feel uncomfortable. Such situation can be avoided if the arbitration clause provides that the presiding arbitrator must not have the nationality of any of the parties.

6. PLACE OF ARBITRATION

The place of arbitration is decisive for the "nationality" of the arbitral award. Further the (potentially different) place of the hearing can also be provided for in the arbitration clause. This might lead to more efficiency and less costs.

7. LANGUAGE OF THE PROCEEDINGS

Parties should fix the language of the proceedings in the arbitration clause. This will avoid that later in the proceedings the parties are facing a language which they do not command. This would lead to a delay and more importantly to substantial translation costs.

8. APPLICABLE LAW

Last but not least the arbitration clause should contain a choice of law, which the arbitral tribunal shall apply to the substance of the case. This might be the domestic law of any of the parties or the law of a third country. However, the latter may sometimes not be recognized by national civil courts. Such choice therefore requires in depth consideration as the individual case may be. It is also possible to choose or to exclude certain hybrid laws, e.g. the UNIDROIT PRINCIPLES or the CISG.

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