Although both institutional and ad-hoc arbitration fall within the ambit of the New York Convention and therefore enjoy its benefits (Art I (2) New York Convention) as long as the arbitral award is (or will be) made in the territory of a state other than the state where the recognition and enforcement is sought (Art. I (1) New Nork Convention), institutional arbitration provides the parties with greater legal security and reliability. The rules of the major arbitral institutions do not only lay down the general framework for the arbitral proceedings. They also explicitly resolve **default situations** such as the failure of both parties to agree on a sole arbitrator, respectively a refusal of either party to appoint an arbitrator in case the parties have agreed on a tribunal composed of three arbitrators.[685] Additionally, not all domestic arbitration laws accept a contractual agreement providing for ad-hoc arbitration. Notably Chinese arbitration law considers corresponding arbitration clauses as invalid and unenforceable if the elected seat of arbitration is located in China[686] and the New York Convention will for this reason not apply. **372**

The parties to an arbitration agreement are free to determine the **legal seat** of arbitration. The choice of the legal seat is decisive with regard to the applicable domestic arbitration laws that govern the arbitration proceedings as such (the "*lex arbitri*"). The *lex arbitri* typically contains basic rules for the arbitral proceedings such as the constitution of the tribunal, default proceedings and judicial review of an award, but also determines whether the dispute is arbitrable in the first place.[687] The majority of the provisions contained in the various domestic arbitration laws is usually not of a mandatory character[688] and may accordingly be set aside by the rules of the arbitration institution selected by the parties. Once the legal seat has been chosen, however, mandatory provisions of the seat country's *lex arbitri* must be observed by the tribunal.[689] **373**

The *lex arbitri* must be distinguished from the governing law of the contract (i e the substantive law applied by the tribunal to the merits of the dispute) but also from the **law governing the arbitration agreement** as such (i. e. the law determining whether the arbitration clause is valid as regards its substance) given that the majority of arbitration laws considers the arbitration agreement as a separate contract. If the parties opt for a seat of arbitration in Switzerland, the arbitration agreement will in accordance with the **favor validitatis principle** stipulated in Art. 178 (2) PILA from the perspective of the tribunal be considered as valid (as regards its substance) if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law. If the seat is located elsewhere (or whenever a state court in any other country is dealing with the question whether the arbitration agreement is valid), domestic conflict of law provisions respectively Art. V (1) lit. a NYC[690] will apply. Though there is a strong assumption that an arbitration agreement will be governed by the same law chosen by the parties with **373a**

opt for ad-hoc arbitration given that the UNCITRAL rules contain inter alia provisions dealing with a default of either party to appoint an arbitrator.

[685] See for instance Art 12 (3), (4) ICC Arbitration Rules 2021.

[686] Art 16 of the Chinese Arbitration Law provides that an arbitration agreement must (with regard to arbitration proceedings conducted in China) expressly designate a competent arbitration commission (i e an arbitration institution), see J Tao and C v Wunschheim, "Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions", Arb Int 2007, 309 (323).

[687] JF Poudret and S Besson, Comparative Law of International Arbitration (2nd edn 2007) para 112.

[688] I Bantekas, An Introduction to International Arbitration (2015) 166.

[689] JJ van Haersolte-van Hof and EV Koppe, "International arbitration and the lex arbitri", Arb Int 2015, 27 (30).

[690] In accordance with Art V (1) lit. a) NYC, the arbitration agreement is governed by the law to which the parties have subjected it or, failing any indication thereon, by the law of the country where the award was made.

regard to the main contract (provided the parties have not explicitly stipulated otherwise)[691], this view is not universally accepted: Another opinion, favors the law of the seat of the arbitration as the applicable governing law of the arbitration agreement in the absence of a specific choice of law by the parties with regard to the arbitration agreement itself.[692]

b) Litigation

374 Arbitration is not always the preferred means for the resolution of an international contractual dispute. **Litigation** in front of state courts may be considerably cheaper in individual cases and will in all likelihood put more emphasis on the strict application of legal principles. As already stated, however, the "weak spot" of litigation in an international contract dispute materializes once a party aims to enforce the judgment of a domestic court in a foreign jurisdiction: States have so far shown considerably more reluctance to acknowledge and enforce judgments of foreign state courts than awards rendered by private arbitrators.

375 These problems do not arise if either party seeks to enforce a judgment of a court located in the EU or the EEA (to the exclusion of Liechtenstein[693]) in another EU/EEA member state. The courts of the member states of the EU/the EEA are under **Regulation (EU) No 1215/1012**[694] (the "Brussels Ia Regulation") as well as the Lugano Convention obliged to acknowledge and enforce any court decision dealing with a commercial or civil law matter rendered by a court of another member state, subject only to compliance of the decision with fundamental procedural and substantive rules. According to Art 25 Brussels Ia Regulation[695], the parties can also agree on the (exclusive) jurisdiction of any national court located inside the EU. A corresponding choice must be respected by all courts of EU member states regardless of whether the place of residence of the parties is located in the EU[696] as well. An (exclusive) **agreement on jurisdiction** is therefore a viable alternative[697] to arbitration

[691] For this view (at least if and when the parties made an express choice of law with regard to the main contract) more recently the UK Supreme Court, *Enka v Chubb* [2020] UKSC 38.

[692] For a thorough discussion from a comparative perspective M Scherer and O Jensen, "The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in Enka v Chubb", IPrax 2021, 177 ff.

[693] Liechtenstein has still not acceded to the Lugano Convention, see https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/Lugano-2-parties_fr.pdf.

[694] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1 ("Brussels Ia Regulation").

[695] Respectively Art 23 Lugano Convention.

[696] According to Art 25 Brussels Ia Regulation, a jurisdiction clause providing for the jurisdiction of a court of any EU member state falls within the ambit of this provision regardless of the domicile of the parties, s. D Kenny and R Hennigan, "Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation", ICLQ 2015, 197 (201).

[697] An agreement on jurisdiction pursuant to Art 25 Brussels Ia Regulation may however not contradict the exclusive jurisdiction of a court in accordance with the Regulation, see Arts 24 and 25 (4) Brussels Ia Regulation. An agreement is pursuant to Art 26 Brussels Ia Regulation also disregarded if the defendant enters an appearance in front of another court to which he has been summoned provided appearance was not entered to contest the jurisdiction of such court. Domestic laws of the member states (in particular the lex fori) must at least with regard to commercial contracts not invalidate an agreement on jurisdiction falling within the ambit of Art 25 Brussels Ia Regulation by taking recourse to stricter domestic laws policing unfair contractual provisions even though the recast wording of Art 25 Brussel ("(…) unless the agreement is null and void as to its substantive validity under the law of that Member State") seems at first glance to permit the former, s. P Mankowski in Rauscher, Europäisches Zivilprozess- und Kollisionsrecht (5th edn 2021) Art 25 EuGVO para 75 ff. with further references; for a different view H Wais, "Einseitige Gerichtsstandsvereinbarungen und die Schranken der Parteiautonomie", 81 RabelsZ 2017, 815 (845).

whenever both parties are based in the EU/EEA and the likelihood that a judgment may have to be enforced abroad appears to be remote.

376 Litigation instead of arbitration is, however, much less recommendable in cases where a court judgment is to be enforced **outside the EU/EEA**. Although bilateral conventions may oblige domestic courts to enforce foreign judgments in individual cases and some national procedural rules do also provide for the general recognition of foreign judgments (sometimes, inter alia, subject to the principle of reciprocity) substantial legal uncertainties whether a judgment will eventually be enforced remain in this case.

377 This substantial advantage of arbitration over litigation with regard to recognition and enforcement may be reduced once the **Hague Convention of 30 June 2005**[698] on Choice of Courts Agreements that has entered into force on 1 October 2015 gains more widespread support. At this point in time, only the EU, the United Kingdom, Singapore, Mexico and Montenegro have acceded to the Convention whereas inter alia the USA and China have signed though (as of 28 February 2022) not yet ratified this instrument.[699] After the **Brexit**, the Hague Convention 2005 does in the absence of an alternative arrangement however serve as the new framework with regard to the judicial cooperation in civil and commercial matters between the UK and the remaining member states of the EU.[700] In accordance with its Art 1 (1), the Hague Convention 2005 applies in all international cases[701] to **exclusive choice of court agreements** as defined and in the form[702] prescribed by Art 3 concluded in civil or commercial matters. The Hague Convention 2005 covers hence not only contractual[703], but also concurring claims under tort with the exception of claims by natural persons based on bodily injury.[704] It establishes a similar mechanism as the New York Convention with regard to judgments of national courts of member states of the Hague Convention 2005 that have been designated by the parties in an exclusive choice of court agreement. In this event, the court designated by the parties may not decline to exercise jurisdiction (Art 5 (2) Hague Convention 2005) whereas all other courts must suspend or dismiss proceedings that fall in the ambit of the exclusive choice of agreement, Art 6 Hague Convention 2005.[705] Finally, the judgment rendered by the designated court must be **recognised and enforced** in all other member states of the Hague Convention 2005 without review of

[698] <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>.

[699] For the current status of the Convention see the website of the Hague Conference on Private International Law: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>. An obligation to recognize both foreign judgments as well as agreements on jurisdiction exist only in relation to judgments rendered by courts of member states of the Convention.

[700] Judgments rendered in the UK with regard to proceedings that were instituted after the end of the transition period (that is on or after 1 January 2021) can in accordance with Art 67 (2) lit. a) of the Withdrawal Agreement concluded between the EU and UK (OJ EU 2019 C 384/1 ff.) no longer be enforced in any member state of the EU accordance with the Brussels Ia Regulation (and vice versa).

[701] In accordance with Art 1 (2) Hague Convention, a case is international unless the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that state.

[702] According to Art 3 lit c Hague Convention, the choice of court agreement must be concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference.

[703] Choice of court agreements with consumers or in contracts of employment are excluded from the scope of the Hague Convention, s. Art 2 (1).

[704] See Art 2 (2) Hague Convention: "This Convention shall not apply to the following matters: "[…] j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship […]". Pursuant to Art 2 (2) lit h) and lit i) antitrust (competition) matters as well as an infringement of intellectual property rights other than copyrights and related rights are inter alia also excluded.

[705] Pursuant to Art 6 lit a through e Hague Convention, this obligation will inter alia not apply if the choice of court agreement is null and void under the law of the state of the chosen court (to the inclusion

the merits and solely subject to certain narrowly defined exceptions (in particular an infringement of fundamental procedural and substantial principles, Arts. 8, 9 Hague Convention 2005). Another convention dealing with the recognition and enforcement of foreign judgments, the **Hague Convention of 2 July 2019** on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has (as of 28 February 2022) not yet entered into force.

c) Alternative dispute resolution

378 In particular in the area of construction, standard form contracts such as the FIDIC conditions often provide for so-called **"multistep dispute resolution"** mechanisms.[706] According to typical ADR clauses, the parties must first attempt to resolve their dispute amicably, either by negotiation at a certain business level and/or by mediation or other ADR procedure before they can proceed with arbitration or, as the case may be, litigation in front of state courts.[707]

379 There is no doubt that this approach may be useful to resolve a complex dispute. In a standard sales transaction, however, **alternative dispute resolution** procedures seem less suitable as a precursor to arbitration/litigation. Besides the problem that mandatory ADR procedures may considerably extend the overall duration of legal proceedings, poorly drafted ADR clauses that do not unambiguously stipulate when the parties are permitted to move on with arbitration or litigation may cause substantial legal uncertainty and additional costs.[708] Although arbitral tribunals and the courts have generally been reluctant to enforce ambiguous ADR clauses, the risk remains that an arbitral tribunal will deny its jurisdiction on the ground that neither negotiations nor mediation attempts were appropriately conducted first.[709]

380 Some domestic laws demand the prior implementation of certain ADR procedures as a condition precedent before the parties can proceed with either litigation or arbitration. For instance, according to s. 108 of the *English Housing Grants, Construction and Regeneration Act 1996*, the parties to a contract that involves construction operations[710] must first refer any dispute to an **adjudication** board[711] whenever construction works are being carried out in England, Scotland or Wales and regardless of whether English law is the governing law of the contract.[712] But in general, a standard sales transaction will not fall within the ambit of these statutory provisions.

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of its choice of law provisions) or giving effect to the agreement would lead to a manifest injustice respectively would be manifestly contrary to the public policy of the State of the court seized.

[706] S Kröll, "Eskalationsklauseln im internationalen Wirtschaftsverkehr – Instrument effektiven Konfliktmanagements oder zahnloser Tiger mit Konfliktpotential?", ZVglRWiss 2015, 545 (549).

[707] S Leonhard and K Dharmananda, "Peace Talks before war: The Enforcement of Clauses for Dispute Resolution before Arbitration", J Int Arbitrat 2006, 301.

[708] For a cautionary tale see *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.

[709] Leonhard and Dharmananda (n 707) 302 with further references to case law. In particular English courts have in recent years shown an increased willingness to give effect to ADR clauses, see L Flannery and R Merkin, "Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?", Arb Int 2015, 63 ff.

[710] Though the definition of "construction operations" under the Act is rather broad, relevant operations (such as construction, maintenance, repair, alteration) must be carried out in relation to buildings or structures that form part of the land, s. 105 (1) of the Act.

[711] Adjudication is an alternative dispute resolution mechanism that concludes (contrary to conciliation and mediation) with a binding, although not final decision, see N Gould and M Abel, "Adjudication in the UK – recent developments", SchiedsVZ 2005, 167 (190).

[712] See Gould and Abel (n 711) 190.

3. Annotations

a) The arbitration clause

Paragraph 1

§ 14 (1) contains an arbitration agreement that opts for **institutional arbitration** in accordance with the Arbitration Rules of the International Chamber of Commerce (ICC). The ICC is the best known and probably also the most prestigious arbitration institution and therefore widely utilized in international commercial transactions. Apart from the general advantages of institutional arbitration, the **ICC Arbitration Rules 2021** provide also for a specific system of quality control: Pursuant to Art 34 ICC Arbitration Rules 2021, the final award of the tribunal is subject to the approval of the ICC Court (a permanent body of the ICC composed of international renowned experts of international commercial arbitration) as to its form. The ICC Court may also recommend amendments as to points of substance though the tribunal is not bound thereby. **381**

It goes without saying that other arbitration institutions are also recommendable and may even be considerably cheaper than the ICC. In any event however, it is clearly advisable to choose one of the renowned institutions and to use their model arbitration clauses[713] in order to avoid the danger of **"pathological arbitration clauses"** that may be inoperative. Pathological arbitration clauses typically refer contractual disputes to arbitration institutions that do not or have ceased to exist[714] or cannot be unambiguously identified or cause confusion by combining an arbitration agreement with the choice of courts of law.[715] International case law is full of examples where badly drafted arbitration clauses have not only caused major obstacles for the parties in successfully proceeding with the resolution of a dispute but also increased the overall procedural costs.[716] **382**

The choice of a renowned (in particular West European or North American) arbitration institution also offers another substantial benefit: The terms and conditions of many industrial **insurance policies** often accept neither the use of ad-hoc arbitration nor less renowned arbitration institutions as a means[717] of dispute resolution, and non-compliance with this requirement may put the seller's insurance cover at risk. In any event, the seller is best advised to carefully check the requirements of his third-party/product liability insurance with his insurance broker to make sure that the arbitration clause complies with the terms of the insurance policy. **383**

Arbitration pursuant to the ICC Arbitration Rules is expensive.[718] **Costs** can however be substantially reduced if the parties appoint a **sole arbitrator** instead of a three-member tribunal. § 14 (1) accordingly opts for a sole arbitrator, considering that the legal and factual complexity of a dispute related to a standard sales transaction is in all **384**

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[713] See for instance the model arbitration agreements promoted by the London Court of Arbitration (<https://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx>), the Swiss Arbitration Centre (<https://www.swissarbitration.org/centre/arbitration/arbitration-clauses/>), the American Arbitration Association (<https://www.clausebuilder.org/cb/faces/index>) and the German Institution of Arbitration (<https://www.disarb.org/en/tools-for-dis-proceedings/dis-model-clauses>).

[714] A Frignani, "Drafting Arbitration Agreements", Arb Int 2008, 561 (565).

[715] See for this specific problem S Stebler, "The Problem of Conflicting Arbitration and Forum Selection Clauses", ASA Bull 2013, 27.

[716] See for examples S Breßler et al, "Pathologische Schiedsklauseln – Beispiele aus der Beratungspraxis", IHR 2008, 89.

[717] R Koch, "Schiedsgerichtsvereinbarungen und Haftpflichtversicherungsschutz", SchiedsVZ 2007, 281.

[718] See Appendix III, ICC Arbitration Rules 2021.

likelihood considerably lower than the complexity of a dispute that may for instance arise from a construction contract.[719] It should also be noted that the ICC Arbitration Rules 2021 provide for so called **Expedited Procedure Rules** (Art 30 and Appendix VI Arbitration Rules) that will in accordance with Art. 1 (2) Appendix VI Arbitration Rules 2021 apply if the arbitration agreement was concluded on or after 1 March 2017, the amount in dispute does not exceed US$ 3 Mio. (US$ 2 Mio. if the arbitration agreement was entered into on or after 1 March 2017 but before 1 January 2021[720]), and the parties have not expressly excluded them, Art 30 (2), (3) lit. b) Arbitration Rules.[721] In this event, the ICC Court may appoint a sole arbitrator notwithstanding any contrary provision in the arbitration agreement, Art 2 (1) Appendix VI Arbitration Rules. Furthermore, the parties are under the Expedited Procedural Rules not at liberty to make new claims after the constitution of the tribunal (Art 3 (2) Appendix VI) and the tribunal may inter alia decide not to allow requests for document production respectively to decide the dispute (to the exclusion of a hearing and an examination of witnesses and experts) solely on the basis of documents submitted by the parties (Art 3 (V) Appendix VI).

385 § 14 (1) is drafted in accordance with the model arbitration clause proposed by the ICC. However, some changes were made: On the one hand, the clause makes explicit reference to concurring **claims under tort**. Even though the latter is in principle covered by the phrase "arising from or related to the contract"[722], an explicit reference may enhance legal certainty even further, as national courts of different legal backgrounds may review both the validity and scope of an arbitration clause. Deviating from the standard clause recommended by the ICC, the suggested clause also contains an explicit reference to the "ICC Court" as the arbitration institution. This amendment is strictly speaking only necessary if the legal seat of the arbitration is in China.[723] However, this wording may also help to prevent the (remote) risk that a Chinese court may (wrongly)

[719] The parties must agree on and nominate the sole arbitrator within 30 days (this time period may be extended by the Secretariat) from the receipt of the claimant's Request for Arbitration by the defendant. Failing an agreement within such time period, the sole arbitrator will be chosen and appointed by the ICC-court, see Art 12 (3) ICC Arbitration Rules 2021.

[720] Appendix VI Art 1 (2) ICC Arbitration Rules 2021.

[721] The parties are however at liberty to opt for the Expedited Procedure Rules even in the event of an amount in dispute in excess of US$ 3 Mio. The ICC recommends in this case the following addendum to the regular arbitration clause: "The parties agree, pursuant to Art 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute"; see <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>.

[722] See for instance the decision of the US District Court, Northern District of California (24 October 1996) *Twi Lite International, Inc v Anam Pacific Corp*, *Yearbook of Commercial Arbitration* XXIII (1998) 910 f., dealing with an arbitration clause that covered only disputes "arising out of the contract" but omitted reference to disputes "relating to the contract". Pursuant to the court, the phrase "arising out of the contract" did on a stand-alone basis not cover claims of misappropriation of trade secrets but only disputes relating to the interpretation and performance of the contract itself (to the exclusion of any collateral issues). For a review of this decision see also P Gillies, "Enforcement of International Arbitration Awards – The New York Convention", Int'l Trade and Bus L Rev 2005, 19 (34). A more generous interpretation has inter alia been applied by English courts, see *Dreymoor Fertilisers Overseas PTE Ltd v Eurochem Trading GmbH* [2018] EWHC 909 (Comm) para 53 with references to prior case law of English courts: "A clause which refers disputes "arising out of" the contract is apt to refer disputes which relate to non-contractual claims".

[723] See the explicit recommendation by the ICC (https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/) with regard to arbitration conducted in China. However, it is still not entirely clear whether Art 16 of the Chinese Arbitration Act acknowledges arbitration proceedings conducted in China but administered by a foreign arbitration institution at all, see Tao and Wunschheim (n 686) 323. Accordingly, the parties should at best avoid China as the seat of arbitration whenever they elect a non-Chinese arbitration institution.

refuse the enforcement of an award. Explicit reference to the ICC court does no harm in all other cases where no links to China exist at all.

386 The choice of the **(legal) seat** of arbitration is not only a mere choice of convenience but has substantial legal impacts as the tribunal must apply mandatory provisions of the *lex arbitri* and only the domestic courts residing in this state may (pursuant to an internationally accepted general principle) annul the award.[724] Against this background, the Swiss Code on Private International Law (PILA) as the applicable *lex arbitri* (in case of a seat in Switzerland) offers both a reliable legal framework and substantial leeway for the parties. In particular, Art 190 (1) PILA accepts the finality of an arbitral award as a matter of principle and allows an appeal[725] pursuant to Art 190 (2) PILA only in case of irregularities in relation to the constitution of the tribunal, errors of the tribunal with regard to the scope of its jurisdiction or infringements of either fundamental procedural rules (equality of the parties and/or the right to be heard) or the material "ordre public", which has been narrowly interpreted by the Swiss Federal Supreme Court.[726] In theory, and contrary to the vast majority of arbitration laws enacted elsewhere, the parties can (with the exception of the request for a review of an award in accordance with Art. 190a (1) lit. b) PILA in the event that criminal proceedings have established that the arbitral award was influenced by a felony or misdemeanor) even exclude this rather limited appeal provided that neither party has its place of business in Switzerland, see Art 192 PILA.[727] Besides the problem whether this exclusion would be enforceable in general terms and conditions[728], it is from the author's point of view not recommendable to do so given that a (limited) **appeal** against a manifestly wrong award is at least from an ex ante perspective in the interest of both parties.

387 According to Art II (1) of the New York Convention, an arbitration agreement must be recognized by the domestic courts of a contracting state (other than the seat state) if the agreement was made in writing. In accordance with Art II (2) of the New York Convention, this includes clauses contained in signed contracts or in an exchange of letters or telegrams (and based on the better though not uncontested view an exchange of E-mails or other form of (storable) digital communication[729]). But an arbitration clause contained in general terms and conditions will not meet the **formal requirements** of the New York Convention if the other party has accepted those terms merely by way of conduct (eg, by means of a performance of the contract).[730] At the same time,

[724] R Goode, "The Role of the Lex Loci Arbitri in International Arbitration", Arb Int 2001, 19 (30). However, not all jurisdictions adhere strictly to that principle, see for instance with regard to India JK Schäfer, "Der lange Arm der indischen Justiz – Aufhebung von ausländischen Schiedssprüchen bei indischem Nexus", SchiedsVZ 2008, 299.

[725] Pursuant to Art 191 PILA, an appeal may only be taken to the Swiss Federal Supreme Court.

[726] AK Schnyder and M Liatowitsch, Internationales Privat- und Zivilverfahrensrecht (2006) 183. In the essence, only fundamental and internationally accepted legal principles will qualify as forming part of the "ordre public" pursuant to Art 190 (2) lit e PILA, S Pfisterer in Grolimund et al (n 287) Art 190 PILA para 89.

[727] Pursuant to the Swiss Federal Supreme Court, an exclusion of any and all appeals pursuant to Art 192 PILA must be made in an explicit and unambiguous manner. Though express reference to Art 192 PILA in the contractual clause is strictly speaking not necessary, a mere reference to the finality of the award will not be construed as an exclusion of Art 192 PILA, see BG (21 October 2008) ASA Bull 2009, 290 (300).

[728] In a recent decision, the Swiss Federal Supreme Court has however taken the view that even limited appeals can be validly excluded by means of "standardized contractual language", see BG (24 September 2021), File No. 4 A_382_2021. The relevant wording in the arbitration clause here read as follows: "Neither party shall seek recourse to a law court or other authorities to appeal for revision of the decision".

[729] R Hausmann in Reithmann and Martiny (n 357) para 7.331 with further references.

[730] In this case, the formal requirements of Swiss law contained in Art 178 (1) PILA (that are relevant both for arbitral tribunals with a legal seat in Switzerland as well as for Swiss courts) are not fulfilled as

certain doubts remain whether the formal requirements of Art II (2) of the New York Convention are fulfilled if the parties sign a contract that incorporates general terms by way of reference but does not explicitly refer to an arbitration clause contained in these terms.[731]

388 Some domestic arbitration laws of the contracting states have established a **lower threshold** with regard to the requirements as to form.[732] But domestic arbitration laws (even those of the seat state) will not necessarily prevail over Art II New York Convention in the state where enforcement is sought. Though more lenient domestic laws may play a role under Art VII of the New York Convention,[733] enforcing states are not obliged (at least pursuant to the New York Convention) to enact or apply more generous legislation.

389 Considering that acceptance by way of conduct will not deemed to be sufficient for the purpose of creating a **valid agreement** to arbitrate, it is also for that reason of eminent importance that the buyer countersigns a document that incorporates the arbitration clause.

Paragraph 2

390 An arbitral tribunal (once established) is usually entitled both in accordance with the arbitration rules of the respective institution[734] (in case of institutional arbitration) as well as pursuant to many national procedural laws[735] to issue **interim or conservatory measures** at the request of either party. The ICC Arbitration Rules have additionally created the alternative of an "**emergency arbitrator**"[736] that will be appointed by the President of the ICC Court even before the establishment of the arbitral tribunal (and until the file has been transmitted to an already established arbitral tribunal) within two days of receipt of a corresponding application of either party. The emergency arbitrator may grant interim measures in the form of an order (Art 29 (2) ICC Arbitration Rules 2021) that is with respect to any question, issue or dispute determined in the order, however, not binding for the arbitral tribunal, Art 29 (3) ICC Arbitration Rules 2021. Any of these **measures must be recognized and enforced by the competent courts** of the state in which their enforcement is sought. This procedure can cost a considerable

well, see D Gränicher in Grolimund et al (n 287) Art 178 PILA para 28. It should be noted however that an arbitration agreement is due to an amendment of the PILA in force since 1 January 2021 now in compliance with the formal requirements if it was made in writing or "any other means of communication allowing it to be evidenced by text".

[731] In the affirmative however R Hausmann in Reithmann and Martiny (n 357) para 7.338.

[732] Art 7 (6) of the UNCITRAL model law on arbitration stipulates that a reference in a contract to a document containing an arbitration clause constitutes a valid arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. Art 178 (1) PILA has been similarly interpreted, see BG (7 February 2001) ASA Bull 2001, 529.

[733] See eg the decision of the German Federal Supreme Court BGH (21 May 2005) SchiedsVZ 2005, 306: In this case, the BGH held that Art VII of the New York Convention did not only justify the application of German arbitration laws tailored for national awards (though § 1061 German Code of Civil Procedure refers solely to the provisions of the New York Convention with regard to international awards) but also the even more lenient provisions of Dutch law as the relevant governing law of the arbitration agreement.

[734] Art 28 (1) ICC Arbitration Rules 2021; Art 34 Commercial Arbitration Rules of the American Arbitration Association; Art 25.1 LCIA Arbitration Rules 2020; Art 26 Swiss Rules; Art 25.1 of the Arbitration Rules of the German Institution of Arbitration 2018.

[735] Germany: Art 1041 (1) German Code of Civil Procedure; Switzerland: Art 183 PILA.

[736] Art 29 and Appendix V (Emergency Arbitrator Rules) ICC Arbitration Rules 2021. The rules on the emergency arbitrator will apply if the arbitration agreement was concluded on or after 1 January 2012 and the parties have not excluded them, Art 29 (6) lit a) and b) ICC Arbitration Rules 2021. § 14 (1) of the International Sales Terms contains accordingly an optional opt-out provision (in italics) that may be used or deleted by users.