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ARBITRATION AGREEMENT, OR NO ARBITRATION AGREEMENT, THAT IS THE QUESTION

Unlike Hamlet's agonizing question, the question of the arbitration agreement is of much less importance. Nevertheless, this question regularly leads to heated discussions during contract negotiations and can be of great importance for the parties.

The result in advance: There is no clear answer to the question. Both, state court and arbitration proceedings have their advantages and disadvantages. After all, the following criteria might at least be helpful in answering the question. The following list is not exhaustive.

Language of the Proceedings

The language of the proceedings may be freely chosen in arbitration proceedings. This means that the proceedings do not have to be conducted in the official national language of the place of arbitration. This is a particular advantage in international disputes. The parties can choose a neutral language (usually English), so that neither party receives a "home advantage".

Applicable Law

The parties may freely choose (i.e. determine by agreement) the law applicable to the arbitration proceedings. Free choice of law often also exists in state court proceedings (at least in international cases). An arbitral tribunal may, if the parties agree so, also decide based on equity (i.e. independent of the legal system of a certain country). With regard to state court proceedings, choice of law clauses in favour of non-national legal systems (e.g. lex mercatoria) may be invalid.

The applicable procedural law is often mandatory in state court proceedings and therefore not subject to party disposition. In arbitration proceedings, the parties may also reach agreements on the applicable procedural law. The arbitration procedure is therefore much more flexible. This flexibility is an advantage, on the one hand, because the procedure can be tailored to the needs of the parties. On the other hand, this flexibility can also be detrimental because clear, tested and strict rules are lacking, which can lead to an escalating procedure.

Jurisdiction

In both, arbitration and state court proceedings, the parties may agree on jurisdiction. However, there is an increased risk in state courts that the court will decline jurisdiction if neither the dispute nor one of the parties has a connection to the respective state.

Composition of the Court/Tribunal

In state court proceedings, the parties have little influence on the composition of the court. In arbitration proceedings, the parties can often have a significant influence on the tribunal (e.g. by jointly appointing a sole arbitrator or by appointing a co-arbitrator). In particular, with regard to arbitral tribunals, there are no restrictions concerning the nationality and training of the arbitrator.

As far as independence is concerned, the independence of state courts is generally higher. State judges are not appointed by the parties and are not compensated by the parties. The independence of an arbitral tribunal is, after all, to be assessed positively if otherwise the dispute would have to be settled before the court in the state in which one of the parties is domiciled or before corrupt courts.

Expedited Proceedings

Various arbitration rules (e.g. ICC-Rules, Swiss-Rules, DIS-Rules) provide that, if certain conditions are met, an expedited arbitration procedure is to be applied and the entire procedure is to be concluded within 6 months. State procedural rules may

also provide for expedited procedures. However, the scope of such state proceedings is regularly narrower than in arbitration proceedings.

Preliminary Measures

In urgent cases, if preliminary measures are required, state courts are generally more effective. Some preliminary measures are also provided for in arbitration rules (e.g. Art. 43 Swiss Rules, Art. 29 ICC Rules). However, state courts (as permanently appointed tribunals) can issue orders much faster than arbitration courts. Since precautionary measures can be applied for (at least from a Swiss perspective) at state courts even if the parties have concluded an arbitration agreement, this point does not necessarily speak against the conclusion of an arbitration agreement.

Confidentiality

State court proceedings are generally public. This means that everyone has access to the relevant court hearings and the judgments are published (albeit anonymously). Arbitration proceedings and arbitral awards, on the other hand, are confidential and the parties may agree on corresponding confidentiality obligations. In the case of contractual relationships or disputes which are to be kept secret, an arbitration agreement might be the better choice.

Legal Remedies

As a rule, several appeals can be lodged against decisions of state courts. In the case of arbitration decisions, the appeal procedure is regularly limited (in Switzerland: only one appeal to the Federal Supreme Court and only limited grounds of appeal). This is advantageous in that it speeds up the process. The downside is that there is hardly any possibility of defending oneself against a bad arbitral award.

Enforceability

Between states, the enforceability of state judgments depends on international treaties (e.g. the Lugano Convention) or (in the absence of an international treaty) on the law of the state where the judgment is to be enforced. The same applies in principle with regard to arbitral awards. However, in the area of arbitration there is an international treaty ratified by the vast majority of states (157 states ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards). A similarly comprehensive set of agreements, which ensures the recognition and enforcement of state court judgments, does not exist. From an enforcement point of view, the conclusion of an arbitration agreement can be advantageous. Therefore, before concluding a contract, it must always be kept in mind where any judgment would have to be enforced in the event of a dispute.

Costs

With regard to the compensation of the court/tribunal, there are often binding guidelines in arbitration and state court proceedings. As far as party compensation is concerned, arbitral tribunals are much more flexible than state courts. As a rule, there are no binding guidelines, which is why an arbitral tribunal can award higher compensation. This is particularly advantageous in the event of victory, provided that the party compensation is awarded in accordance with the outcome of the lawsuit. It should be noted that, depending on the applicable arbitration rules, the parties may contractually regulate the costs of the arbitration.

As already explained with regard to the applicable law, there is a risk of escalating proceedings in arbitration (due to the great flexibility of the procedural rules). Witness hearings of several days or extensive document production procedures are not uncommon. Therefore, arbitration proceedings tend to be expensive. On the other hand, the possibility of expedited proceedings and the limited scope for appeal have a cost-cutting effect in arbitration proceedings.

Whether an arbitration agreement makes sense must ultimately be examined on a case-by-case basis. We would be happy to advise you in this respect.

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