

# Practical Aspects of the Cooperation between Arbitration Counsel and In-House Counsel through Different Stages of International Arbitration Procedures

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## I. Introduction

The parties in most commercial disputes that are subject to international arbitration procedures consist of corporations, who are represented by members of their in-house counsel team. Internal lawyers are the main users of international arbitration and recent studies show, that they have a strong preference for arbitration over state court litigation when it comes to cross-border commercial disputes<sup>2</sup>. In-house counsel bear a crucial role within and around such arbitration procedures. They select, instruct and supervise outside counsel and are also responsible for guiding the company CEO and management in defining the strategic and commercial course of the arbitration and its implementation in the procedure at issue. Outside arbitration counsel has to bear in mind, that it is not primarily them, but rather in-house counsel who will be held accountable by management for the success or failure of an arbitration<sup>3</sup>. The following article will present four stages of an arbitration, describe typical interactions between internal and outside counsel and will address certain areas, where arbitration counsel and in-house counsel, respectively, can perhaps better consider each other's needs for the benefit of an improved progression and outcome of an arbitration.

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<sup>2</sup> According to the 2018 International Arbitration Survey by the School of International Arbitration at Queen Mary University of London, 92% of the respondents from the in-house counsel subgroup indicated a clear preference for international arbitration with ADR. 8% would opt for cross-border court litigation with ADR and 0% would choose only cross-border court litigation with no ADR (see <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF> for details)

<sup>3</sup> DRAETTA, Ugo: "The Role of In-House Counsel in International Arbitration", (2009) 75 Arbitration, p. 480

## **II. The four Principal Stages of Interaction between Arbitration Counsel and In-House Counsel in International Arbitration Procedures**

### **1. The Contractual and Pre-Procedural Stages**

In-house counsel is often advised by their law firms in the course of exploring potential commercial transactions with a third party. The external lawyers support them in structuring, negotiating and documenting commercial or M&A-transactions. It is advisable, that the commercial and transaction practitioners consult the dispute resolution colleagues in their firm at this primary stage in order to negotiate and draft appropriate arbitration clauses with the other party. The active involvement of arbitration experts should occur very early on in order to avoid proverbial and often disastrous last minute “midnight clauses” and internal corporate lawyers should insist on their consultation. While this should certainly apply to the main transaction document, e.g. a sales, purchase, distribution, construction or joint venture contract, arbitration clauses may also be appropriate for preliminary agreements such as confidentiality agreements, term sheets or MoUs. This should especially be considered when dealing with a publicly listed company that may have a high interest for confidentiality even during an exploration or negotiation stage of a transaction in order to avoid leaks and market rumours. Arbitration is more suited to maintain the confidentiality regarding disputes in advance of co-operations, investments or divestments than litigation before state courts.

In order to draft the arbitration agreement most efficiently and to establish the seat, rules or arbitration institutions that are best suited for the client and the transaction at issue, it is crucial that outside counsel liaise closely with their in-house counterparts to examine disputes that have arisen in the past from similar arrangements or with the counterparty in question<sup>4</sup>. In-house counsel and their business colleagues may also have a better knowledge of the other party and may be able to provide useful input when it comes to issues relating to the enforceability of a potential award against the particular counterparty. Counsel should at this point also draw the client’s attention to the various options in terms of the costs of the procedure, which may vary substantially depending on the institution. In-house counsel has, furthermore, an important role in the structuring of multi-tier arbitration clauses that require

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<sup>4</sup> cf. GREENSPAN, Steven M./WEINER, Conna A.: “Reassessing Commercial Arbitration; Making it work for your Company”, published in ACC Docket, issue March 2017, p. 54

an attempt by the parties to resolve an issue amicably before bringing it to arbitration, mainly by escalating it to members of their senior management<sup>5</sup>. It is highly advisable, that arbitration counsel demonstrate to their in-house colleagues the impact such an escalation mechanism may have on their CEO or other senior members of the company. In-house counsel should obtain the clear approval of such executives before dragging them into direct settlement discussions by escalating a dispute that may otherwise be very remote from their day to day high level responsibilities<sup>6</sup>.

Once a conflict, dispute or breach arises from a commercial relationship which would be subject to arbitration, each party should take a step back and consider with their respective outside counsel if there are objective reasons to arbitrate or whether a settlement strategy should first be attempted for tactical and relationship reasons. Parties often prefer the certainty of a settlement to the uncertainty of an arbitration award<sup>7</sup>. Aside from the legal merits of the particular disputed matter, it should be considered if the parties generally would like to preserve an amicable business relationship in the future and whether there might be further hidden disputes in other areas of their commercial activities<sup>8</sup>. In these situations, an arbitration leading to an award might not solve future problems and an amicable settlement might better take into account overall relationship aspects. On the other hand, the reasons for business heads or management to insist on initiating an arbitration procedure may sometimes be dubious. It could be, that the persons responsible for the commercial dispute are unwilling to accept their own failures and prefer to “pass on” the issue by putting it in the hands of the tribunal. It may also be, that a procedure is initiated by business representatives “out of principle”, to state an example, to give leverage to later settlement negotiations, or simply to keep the upper hand over the opponent. Such motives are often not in the true interest of the company and may not only lead to an unfavourable arbitration award, but also shatter the future relationship between the parties<sup>9</sup>. For these reasons, arbitration counsel should base the recommendation on whether to engage in arbitration or preliminary settlement discussions solely on their own legal and risk assessment. They should team up with in-house counsel, as the

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<sup>5</sup> REDFERN AND HUNTER on International Arbitration, sixth edition (2015), 2.88-2.93

<sup>6</sup> It should be added, that this author generally believes that multi-tier clauses tend to create more problems than they might solve and that they should be avoided where possible

<sup>7</sup> KRYVOI, Yaraslau/DAVYDENKO, Dmitry: “Consent Awards in International Arbitration: From Settlement to Enforcement”, Brooklyn Journal of International Law, Vol. 40, Issue 3, p. 831

<sup>8</sup> ONG, Colin, QC: “Case Strategy and Preparation for Effective Advocacy” in The Guide to Advocacy, 3<sup>rd</sup> Edition (2018), p. 9

<sup>9</sup> cf. DRAETTA, p. 473

latter often see the entire life cycle of a transaction and have a very nuanced understanding of the needs and motivations of their internal colleagues and of the different stakeholders<sup>10</sup>. Internal counsel usually have very good insight and access to the business units to gather all relevant facts and may also be able to convince management of the strategy that is in the company's best interest. In their capacity as both lawyers and members of the operational business they are counsellors and business partners and are, therefore, best suited for this task<sup>11</sup>. It is not surprising, that corporate counsel are ultimately the most important factor to decide on whether or not to initiate arbitration<sup>12</sup>.

If the parties enter into discussions to resolve the issues between them before bringing them to arbitration, counsel should first cautiously decide with their in-house counterparts which documents should be produced during these negotiations in light of their non-prejudice nature. The combined legal team must also determine to which extent the status of the discussions should be recorded or even evaluated in memos and other internal written communications, since such documents may have to be produced in a later arbitration and might influence the tribunal if the settlement efforts fail<sup>13</sup>.

An important caveat that needs to be taken into account when deciding on whether or not to initiate arbitration occurs, when a party is a listed company. Confidentiality regarding the existence and outcome of an arbitration is widely considered one of the fundamental features that distinguishes this form of dispute resolution from proceedings in state courts. However, listed companies usually have a duty under their applicable laws and stock exchange regulations to inform their shareholders and the market of strategic or commercial events that may have a significant impact on the value of the shares of that company. Therefore, depending on the nature and importance of the dispute to be brought to arbitration, confidentiality may not apply and a party may be under a mandatory obligation to inform the public of

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<sup>10</sup> RODGERS, Catherine: "What I wish I had known: Moving In-House", GC Magazine, Winter Issue 2014

<sup>11</sup> cf. NAJAR, Jean-Claude: "A Pro Domo Pleading: Of In-House Counsel and their Necessary Participation in International Commercial Arbitration" in International Commercial Arbitration, Journal of International Arbitration 2008, Vol. 25, Issue 5, p. 623

<sup>12</sup> According to the 2013 International Arbitration Survey by the School of International Arbitration at Queen Mary University of London, (p.18), 71% of the respondents stated that in-house corporate counsel are the driving force in respect of the decision on whether to initiate formal proceedings

<sup>13</sup> cf. SCHIB, Peter: "Erfolgreiche Durchführung von Internationalen Schiedsverfahren" in Der Unternehmensjurist, Handbuch für die Praxis, 2016, p. 393/394; DRAETTA, p. 472

the details of an arbitration and of its outcome<sup>14</sup>. This is for example the case, when the nature of a procedure could significantly affect the share price or where the dispute refers to strategic issues of the company's business such as a break up of an important Joint Venture, the withdrawal of a lucrative license or a failure to complete an announced strategic acquisition of a company. The exact scope, details and timing of a respective announcement depends on the laws and rules of the jurisdiction governing the listed company, but a disclosure may have to occur already at the time an arbitration is initiated<sup>15</sup>. In any case, the arbitration may have to be disclosed in the company's accounts or annual report once is pending<sup>16</sup>. If there is a risk, that transparency rules would mandate a public announcement of an arbitration, the efforts to reach an amicable solution of the issue should be even more exhausted, since the reaction of the market to that arbitration may severely damage the company. Arbitration counsel will have to carefully determine this issue together with in-house counsel and – in light of the gravity of the potential consequences – also the senior management of the client, before bringing the public's attention to an otherwise confidential dispute.

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<sup>14</sup> cf. PETER, Anna: „Die Kursrelevante Tatsache“, in Schweizer Schriften zum Handels- und Wirtschaftsrecht Band 325, 2015, p. 95; RITZ, Philipp: „Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht“, 2007, p. 135; ROHNER, Thomas/LA SPADA, Fabrizio: Commentary to the Swiss Rules of International Arbitration, 2<sup>nd</sup> Edition 2013, Note 14 to Art. 44; HWANG, Michael/CHUNG, Katie: „Defining the Indefinable: Practical Problems of Confidentiality in Arbitration“, in Journal of International Arbitration 26(5), 2009, p. 626; BAULIG/NIERMANN: „Tatbestandliche Voraussetzungen der Ad-Hoc-Publizitätspflicht“, in Kapitalmarkt Compliance, 2013, p. 59, Note 16

<sup>15</sup> The commentary of the Swiss Exchange SIX to the respective guidelines (Kommentar von SIX Exchange Regulation zur Ad hoc-Publizitäts-Richtlinie RLAhP), Version November 2011, Note 42, for example recommends informing the market already upon filing or knowledge of a substantial law suit as well as upon receipt of the court's ruling. Although this recommendation refers to disputes before state courts, analogies to arbitration procedures should be considered. In this author's view, the SIX should have used the term “legal disputes” (Rechtsstreitigkeiten) rather than “court procedures” (Gerichtsfälle) in the mentioned commentary. As is evident from the sources quoted in the footnote herebefore, arbitrations generally have the same impact on a listed company as disputes pending before state courts or other authorities and there is no objective reason to differentiate between them for the purpose of the RLAhP

<sup>16</sup> cf. DENOIX DE SAINT MARC, Valéry: “Confidentiality of Arbitration and the Obligation to disclose Information on Listed Companies or during Due Diligence Investigations” in Journal of International Arbitration 20 (2), 211-216, 2003

## 2. Initiation of the Arbitration

If the parties decide to forgo settlement discussions or respective attempts failed and an arbitration is initiated, counsel will need to dedicate themselves to selecting (or challenging) the arbitrator or arbitrators, who will be one of the most determining factors of the arbitration. This is a mutual task of external arbitration lawyers and their in-house colleagues and must be done in close cooperation. Lists of potential arbitrators should be submitted to in-house counsel, who should scrutinize and amend them, if necessary. Internal lawyers should also, to the extent permitted, be present and participate during interviews of potential arbitrators<sup>17</sup>. Company lawyers may have different expectations from arbitrators, since they are usually more familiar with their own industry and the matter in dispute. They generally prefer arbitrators that have profound knowledge of their industry or the particular subject matter of the dispute<sup>18</sup>. Therefore, arbitrators selected by in-house counsel might often help to ensure a more business friendly result<sup>19</sup>. Since corporations are unique animals with processes that are sometimes difficult for outsiders to comprehend, it may also be worth considering an arbitrator with in-house experience in a large corporation. All these criteria should be taken into account by outside arbitration counsel, who may have a stronger focus on track record, procedural experience and case management skills of candidates.

Once the procedure is initiated, the finance department of each party, especially if they are a listed company, will have to consider whether financial provisions in their books should be made. These will usually consist of reserves or contingent liabilities with respect to legal costs, procedural costs or a potential loss under the award. In rare cases, a party expecting an upside from the arbitration may also make provisions for contingent assets. It is a reality in the corporate world, that account provisions are sometimes purposely misstated. Too high reserves, for example, are put in place to be partially released later-on and to create an apparent profit in the books. Too low reserves, on the other hand, may be used to try to dilute the full responsibility of the persons at the commercial source of the dispute. Normally, provisions are established based on the legal risk assessment of outside counsel, which will be presented by in-house counsel to the finance department or the CFO, who will then book the amounts they deem appropriate. Unrealistic provisions can create obstacles

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<sup>17</sup> DRAETTA p. 474; SCHIB, p. 397

<sup>18</sup> The results of the 2006 International Arbitration Survey by the School of International Arbitration at Queen Mary University of London (p.16) showed, that in-house counsel generally favour appointing an arbitrator with specialisation or expertise in the subject matter of the dispute and industry specialisation

<sup>19</sup> cf. GREENSPAN/WEINER, p. 56

to achieve a settlement at a later stage: If they are too high, the respective party may not want to settle at a substantially lower level, although this would actually constitute the correct figure. If they are too low, management might refuse to settle because a settlement would create a book loss. Both scenarios are not in the interest of the company and may ultimately reflect negatively on both external and in-house counsel. For this reason, external counsel should impress upon in-house counsel the importance of booking provisions that correspond to a realistic risk assessment and in-house counsel should take all efforts to ensure, that such an assessment is duly considered and implemented<sup>20</sup>.

In the course of defining the strategy of the arbitration and the next steps, counsel should provide guidance to their in-house colleagues with respect to the tactical options of the arbitration and obtain their respective instructions: Should the procedure be accelerated or rather – to the extent permitted in good faith – delayed? This can be relevant for the timing of the company’s budget and financial goals. Should the style of argument be moderate or aggressive? This depends on the presumed strength of the legal position and the appetite for settlement discussions<sup>21</sup> as well as the nature of the business relationship between the parties. Should, where applicable, a counterclaim be filed? Which type of evidence should be agreed? Which documents should be submitted? Which experts and witnesses should be appointed? Should there be oral hearings or only written submissions? Where should the arbitration hearings, if any, take place? Again, it will be mainly in-house counsel who can offer answers to these questions. They have access to the relevant operative units of the business and the internal decision makers. They are, as lawyers but also as corporate representatives, in a position to establish which employees or executives should personally get involved in the proceedings. They also know, if these persons are available and what location would be most suitable for them. External counsel should present to the internal lawyers their “wish list” for documentary evidence, but the latter, with their intimate knowledge of the business, will ultimately be the ones to give due consideration to sensitive business and trade secrets and to determine which documents actually exist, where to find them and if bringing them into the procedure will be beneficial. In the context of evidence gathering, arbitration counsel should also point out, that it may be useful for in-house counsel to obtain written witness statements from employees already at this early stage. The arbitration may drag on for years and relevant personnel may forget important details or no longer be available because they may retire, move jobs, or even be hired by the other

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<sup>20</sup> For more on this topic see DRAETTA, p 475-477

<sup>21</sup> This topic will be discussed in section 3. hereafter

party<sup>22</sup>. In addition to mutually defining the arbitration strategy and timetable and gathering necessary information and documentation for counsel, in-house lawyers should personally participate in the early case management conference<sup>23</sup>. That way, they actively help to shape the procedure and will also obtain a better sense of the other party, their representatives and the tribunal. This will facilitate their essential role as intermediaries between outside counsel and their own management.

Finally, there might be certain notification obligations a party may have to observe in this first stage of an arbitration. Such duties may occur in the framework of liability insurance policies, policies covering legal costs or D&O-policies, that require immediate notification upon becoming aware of a covered event and may mandate an involvement of the insurer in the process. Notification requirements may also have to be fulfilled by the purchasing party in the framework of seller's warranties or indemnities under Business or Share Purchase Agreements that may specifically provide for participation rights of the seller in legal procedures. Such obligations are often within the responsibility of business units and their operative contract management. It is advisable, that arbitration counsel reminds their in-house counterparts of such possible obligations, since a failure of their timely fulfilment may preclude financial recourse and cause substantial loss to the client.

### **3. During the Arbitration Procedure**

Upon obtaining the first procedural order from the tribunal, external counsel will need to rely even more intensely on the collaboration with their in-house colleagues for the implementation of the defined strategy. The legal department will need to physically gather internal documents and other evidence required for submissions and, to the extent permitted, be present when interviewing or preparing the selected witnesses. It is also advisable, that internal lawyers attend the hearings and conferences at all stages of the arbitration, since issues regarding the parties' organization, business practice or other internal matters may come up that external counsel are not in a position to answer<sup>24</sup>. The physical participation will enable in-house counsel to keep a better grip on the risks and opportunities arising from the developing case. This is crucial, since it will be in-house counsel who, based on outside counsel's assessment, will need to report on a regular basis to management and the company's auditors in the framework of confirming, increasing or releasing

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<sup>22</sup> DRAETTA p. 478

<sup>23</sup> NAJAR, p. 625

<sup>24</sup> cf. DRAETTA, p. 477



provisions in the financial statements. In this context counsel should also regularly update the client on accrued and expected further costs throughout the procedure<sup>25</sup>.

As was mentioned in section 1, an amicable resolution of a commercial dispute should be attempted in order to preserve a desired business relationship between the parties, but also to save time and costs and to mitigate the involvement of human resources and management attention. Even if a settlement could not be reached before the arbitration procedure was initiated, a high percentage of pending arbitrations are still settled before the tribunal issues an award<sup>26</sup> and the parties should try to reach a mutually beneficial solution at any stage of an ongoing arbitration. This is a task that is distinctly suited for in-house counsel, who, as a hybrid between legal and business interests, can play a critical, almost neutral role in trying to achieve a commercial settlement during an ongoing procedure<sup>27</sup>. Arbitration counsel on both sides may be absorbed in the procedural issues of the arbitration and be stuck in the presentation of their respective arguments. In practice, it may often occur, that corporate parties are interested in exploring an opening for a settlement, but do not find anyone on the other side to approach or with whom to start negotiating respective terms on a without-precedent basis. In this environment in-house counsel, who have an active presence in the hearings and conferences, but are usually less caught in the hostile cross-fire, are often the only people at the table to keep the direct lines of communication between the parties open<sup>28</sup>. Furthermore, in-house counsel can try to moderate the general temper of the procedure and keep external counsel within boundaries that will allow for a possible reconciliation. Finally, in-house lawyers are aware of the organizational and personal sensitivities of their corporation and will know at what point to approach and update which executives and decision makers to a degree that they can get involved in an imminent amicable solution.

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<sup>25</sup> cf. ONG, p. 11

<sup>26</sup> There are no reliable statistics to determine exactly how many arbitrations are settled before an award is issued, since most arbitration institutions do not publish the respective figures, but estimates range between 30-50%. Examples can be drawn from published statistics of the German DIS, where 38% of arbitrations in the year 2015 were settled and an additional 15% were withdrawn (cf. MENZ, James/TOSCANELLI, Michael: "DIS-Verfahren aus dem Jahre 2015 – Ein statistischer Zwischenstand", in *SchiedsVZ* 2018, p. 116) or from the statistics of the Swiss Chamber's Arbitration Institution (SCAI) for the years 2004-2015, where 24% of pending arbitrations were settled and an additional 11.5% were withdrawn ([www.swissarbitration.org/files/515/Statistics/SCAI%20Statistics%202015%20and%202004\\_2015\\_20160731.pdf](http://www.swissarbitration.org/files/515/Statistics/SCAI%20Statistics%202015%20and%202004_2015_20160731.pdf))

<sup>27</sup> cf. GREENSPAN/WEINER, p. 59

<sup>28</sup> cf. MATTIACCIO, p. 38

For these reasons, arbitration counsel should have every interest to encourage direct participation of their in-house counterparts at hearings and conferences.

In the context of terminating an arbitration dispute through a mutually agreed solution, the framework of international arbitration contains an instrument which most arbitration rules and national laws provide for<sup>29</sup> and which is particularly well suited for the corporate parties; the consent award, also known as award on agreed terms. After having negotiated mutually beneficial terms of a settlement to end an arbitration, the parties can ask the tribunal to formally record their settlement agreement and to terminate the arbitration. The parties ask the tribunal to issue a full award instead of just notifying the tribunal, that they reached an agreement and wish to end the procedure by revoking the mandate of the arbitral tribunal. The advantage of a settlement recorded in such a manner is, that the obligations under the settlement become directly enforceable like any award under the New York convention. The parties do not need to take any further steps, including possibly the initiation of another arbitration or court proceedings, to enforce the settlement agreement<sup>30</sup>. The consent award often creates a win-win situation, since it is the result of an amicable solution, which allows the parties to work together in the future even after going through a litigious procedure. At the same time it will guarantee, that the negotiated resolution of the dispute is final and directly enforceable. This efficient instrument enables in-house counsel and management on both sides to keep their face, since it is a mutually beneficial outcome rendered by the tribunal and bearing its approval. Such a sanctioned settlement is often easier to “sell” to the company’s management or board. Consent awards will remain a preferred choice to terminate disputes and to obtain an internationally enforceable award<sup>31</sup>. Arbitration counsel should promote this option early on and make sure, that their in-house colleagues understand its significance and consequences.

#### 4. The Non-Consensual Award

If the parties cannot achieve an amicable settlement during the procedure, the tribunal will, after due consideration of the arguments, issue the final award and will become *functus officio*. Arbitration counsel, together with in-house counsel, will now have to communicate and explain the outcome of the arbitration to the boards and committees of the parties and also to their

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<sup>29</sup> KRYVOI/DAVYDENKO, p. 832. See for example Art. 15 (8) of the Swiss Rules, Art. 36 of the UNCITRAL Arbitration Rules or Art. 26.9 of the LCIA Rules

<sup>30</sup> cf. KRYVOI/DAVYDENKO, p. 850; REDFERN AND HUNTER, N 9.35

<sup>31</sup> KRYVOI/DAVYDENKO, p. 868

external auditors, insurers and, in case of listed companies, the market and shareholders. The activities of outside and in-house counsel will now shift from the actual arbitration to post-procedure issues, such as internal and external communication, a potential challenge of the award or its enforcement.

It should be pointed out, that even at this post-award stage, there is ample room for settlement discussions between the parties, this time with respect to the enforcement of the award. Counsel of the prevailing party should carefully analyse potential legal and commercial risks and procedural delays, and confer them to the in-house lawyers of the client. Their assessment, together with business relationship considerations, may lead to a management decision to negotiate a settlement agreement with the losing party, which could result in an immediate or gradual, often discounted, fulfilment of the obligations under the award. This would finally conclude the matter without taking a risk of delays, costs and perhaps publicity that may arise from challenge or enforcement proceedings<sup>32</sup>. If no such settlement is attempted or could not be reached, and a losing party considers to challenge the award, counsel should demonstrate to the client the limited grounds, based on which this may be successful. This is particularly important, as many in-house counsel are used to litigation and appeal options in state courts, and may not be aware of the respective limitations in international arbitration. Should the company nonetheless decide to try to invalidate the award, arbitration counsel should, together with their in-house colleagues, select local counsel to challenge it in the relevant court of the seat of the arbitration. For this choice, arbitration counsel should adhere to the suggestions of in-house counsel, who may wish to use one of their preferred law firms rather than lawyers from the network of the arbitration counsel. This applies, *mutatis mutandis*, also to enforcement procedures, which may have to be initiated or defended before courts in several jurisdictions.

Finally, external and in-house counsel will have to ensure, that in the post-procedural stage the confidentiality of the arbitration and its outcome will still be maintained by the other party as well as by their own client to the extent agreed between the parties or required by the applicable rules and laws. Any leaks must, if possible, be prevented and cut off. If a publication of the award or an agreed settlement is planned, counsel should prepare their in-house colleagues in advance, so that they can draft statements, communication platforms and Q&As together with management and the communications department.

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<sup>32</sup> cf. REDFERN AND HUNTER, N 9.198, referring to studies showing, that post-award settlements are used by between 18-40% of corporations

### III. Conclusion

A close cooperation between outside lawyers and in-house counsel is essential for the benefit of a corporation who is a party to an international arbitration. The first are responsible to their client for legal, procedural and tactical aspects as well as for the demarcation of relevant arguments and evidence. However, it is the latter who have to determine the strategic and commercial course of the arbitration together with senior management and who ensure, that the defined strategy is implemented, maintained and adjusted throughout the entire dispute. It is also in-house counsel who have to assemble the required evidence from within the various business and support divisions of their company and to prepare it for arbitration counsel. In their capacity as both lawyers and business partners, in-house counsel are the persons most suited to comprehend all facets of the dispute at issue. Only if the two legal teams work in tandem in all the stages of an arbitration, from the drafting of the arbitration agreement, the initiation of the procedure, the gathering of evidence, the structuring of arguments and hearings to finally an eventual settlement or the execution or challenge of an award, it can be assured, that the arbitration turns out in the most efficient and beneficial result for the respective party. In the end, it is internal counsel who will be held accountable by management for the success or failure of an arbitration. It is crucial, that they are involved and actively participate throughout the entire procedure, even if they should lack sufficient arbitration experience. In order to better familiarize corporate counsel with the concepts and benefits of International Arbitration it is recommended, that arbitral institutions, drafters of rules, conference organizers or arbitration counsel should systematically and proactively address and invite in-house counsel to exchange views on issues, that might impact their companies<sup>33</sup>. Dispute Resolution lawyers should further try to offer in-house presentations or workshops to corporations about the features of International Arbitration. This might not only lead to an overall increase of commercial arbitration, but will also empower company lawyers and executives to be more involved in arbitrations and to better support arbitration counsel in the proceedings.

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<sup>33</sup> cf. NAJAR, p. 629/630

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**Summary**

In-house counsel are the main users of international arbitration and they mostly decide on whether or not to initiate an arbitration procedure in a commercial dispute. A close cooperation between outside lawyers and in-house counsel is essential for the benefit of a party to an international arbitration. The first are responsible to their client for legal, procedural and tactical aspects and for the demarcation of relevant arguments and evidence. However, it is the latter who have to determine the strategic and commercial course of the arbitration together with senior management and who ensure, that the defined strategy is implemented, maintained or adjusted throughout the entire dispute. Only if the two legal teams work in tandem in all stages of an arbitration, from the drafting of the arbitration agreement, the initiation of the procedure, the gathering of evidence, the structuring of arguments and hearings to finally an eventual settlement or the execution or challenge of an award, it can be assured, that the arbitration turns out in the most efficient and beneficial result for the respective party.

In-house lawyers should personally participate as much as possible in the appointment or challenge of arbitrators, case management conferences and any other hearings. That way, they actively help to shape the procedure and will obtain a better sense of the other party, their representatives and the tribunal. This will facilitate their essential role as intermediaries between outside counsel and their own management. In the end, it is internal counsel who will be held accountable for the success or failure of an arbitration.

This article presents four stages of an arbitration, describes typical interactions between internal and outside counsel and addresses certain areas, where arbitration counsel and in-house counsel can perhaps better consider each other's needs for the benefit of an improved progression and outcome of an arbitration.