CHALMERS

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Master's Thesis in the Design and Construction Project Management Master's programme

KRISTIN SCHMITT AND MATTHIAS MAGG

Department of Civil and Environmental Engineering
Division of Construction Management

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ABSTRACT

Regulations for alternative dispute resolutions can be found in the standard construction contracts in Sweden whereas Germany does not have such rules. On the other hand overloaded courts, time consuming procedures and unsatisfying solutions are daily matters in Germany. Differences of these two countries regarding arbitration are studied in order to find possible improvements. One of the reasons for this investigation are the time intensive court procedures which are not appropriate for construction projects which are unique, limited in time and budget and therefore require special knowledge. Arbitration as an alternative dispute resolution has been selected because of the closeness to litigation and binding decisions of the arbitration procedure. A theoretical analysis of the arbitration procedures in Sweden and Germany establishes a general introduction to the subject which offers the possibility of comparing the two countries. Additionally a field study had been done. Interviews with persons working in different positions have been accomplished and analyzed. This research clearly shows that Germany mainly does not use arbitration due to the problem of including additional parties and the fact that arbitration is an unknown und inexperienced method of solving problems. The inclusion of an arbitration clause into the standard construction contract in Germany can be one possible idea for improvement. Further ways of making changes to promote the implementation of arbitration are described in the recommendations.

Keywords: dispute resolutions, arbitration, construction industry, Germany, Sweden

Table of Contents

Table of Illustrations

Table of Abbreviations

AAA	American Arbitration Association
AB 04	General Conditions of Contract in Sweden for Building and Civil Engineering Works and Building Services
AB-U 04	General Conditions of Contract in Sweden for Building and Civil Engineering Works and Building Services for Sub-Contractors
ABK 96	General Rules of Agreement for Architectural and Engineering Consulting Services in Sweden
ABT 06	General Conditions of Contract in Sweden for Design and Build Construction for Building, Civil Engineering and Installation Works
AD	Advocate
AISCC	Arbitration Institute of the Stockholm Chamber of Commerce
AISCC Rules	Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
art.	Article (an article in a set of rules)
CL	Client
CO	Contractor
ch.	Chapter
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. *(German Institution of Arbitration)*
ECOSOC	United Nations Economic and Social Council
ff.	Following pages
ICC	International Chamber of Commerce, located in Paris
ICC Court	International Court of Arbitration of the ICC, established in Paris in 1923
ICC Rules	Rules of Conciliation and Arbitration of the International Chamber of Commerce
LCIA	London Court of International Arbitration
para.	Paragraph
s.	Section
SAA	Swedish Arbitration Act of 1999 (*Lag om skiljeförfarande 1999:116)*
SCC	Stockholm Chamber of Commerce

SchO	Schiedsgerichtsordnung der Deutschen Institution für Schiedsgerichtsbarkeit e.V. *(Arbitration Rules of the German Institution of Arbitration)*
SGOBau	Schiedsgerichtsordnung für das Bauwesen *(Code of Arbitration for the Construction Industry)*
SLBau	Streitlösungsordnung für das Bauwesen *(Rules for Dispute Resolution in the Construction Industry)*
SOBau	Schlichtungs- und Schiedsordnung für Baustreitigkeiten *(Rules for Mediation and Arbitration in the Construction Industry)*
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law
US	United States, *United States of America*
VOB	Vergabe- und Vertragsordnung für Bauleistungen *(German Construction Contract Procedures)*
ZPO	Zivilprozessordnung *(German Code of Civil Procedure)*

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Kristin Schmitt and Matthias Magg

Göteborg in June 2010

I) Introduction

Construction projects are unique, limited for a specific period of time and accomplished with specifically created groups of experts. Additionally, construction projects can become complicated because of different attitudes; different areas of interests and because of the important issues of time, money and quality. Furthermore globalization plays an always growing role in the field of construction. Impacts of globalization can lead to two or even more parties from different countries accomplishing a project, sites all over the world and international employees. Regarding all these influences, the appearance of disputes is no rarity. Disputes can concern various issues and are very common in the construction industry. The logical consequence of two fighting parties with everyone asserting one's right, is to submit the case to a legal court. Litigation is a time-consuming and expensive procedure. The final judgment can demand recourses that can lead to bankruptcy of the losing party. Furthermore, courts are overloaded and the proceeding ends with a settlement including disappointed parties mostly. Regarding the field of construction disputes special knowledge is required. In most cases the judge is lacking the necessary know-how which necessitates additional experts.

How did human beings solve disputes many centuries ago when legal courts did not exist? Probably they did it with the help of talking, accommodating and wisdom for the best solution.

Alternative dispute resolution methods exit nowadays and offer possibilities beside legal court proceedings. In this thesis arbitration procedures will be investigated. The research is limited to the construction industries in Sweden and Germany. Here, the accomplishment of both countries is studied in order to find similarities as well as disparities.

1.1) Target of the Thesis

The target of this master thesis is to examine the arbitration procedures in the Swedish and German construction industry. The basis of this paper is an analysis of current methodologies of arbitration proceedings in both countries. Finally, suggestions for improvements of the arbitration procedures in Sweden or Germany shall be highlighted with the help of a comparison of the systems.

1.2) Limitations

The implementation and application of arbitration methods in the Swedish and German construction industry shall be analyzed. This analysis includes contracts between clients and building contractors as well as contracts between building contractors and sub-contractors in general. A study of consumer contracts is not part of this thesis due to the fact, that this field is too manifold and does not allow a specific examination.

An accurate and precise investigation of international and local standard forms of construction contracts is not part of this research. Merely, the contractual solutions and precautions for dispute resolution integrated into the standard forms of contracts in the Swedish and German construction industry are subject-matter of this thesis.

Furthermore public clients are excluded from this analysis because they predominantly need a transparent decision in Germany, with which they can prove their identity in front of supervisory boards and audit divisions.

This paper deals with different arbitration processes which can be applied as dispute resolution remedies in the construction businesses in Sweden and Germany. Those methods will be compared with the governmental court procedures of both countries supplementary. Whereas the arbitration proceedings will be explicated in detail, the court proceedings will be not because construction processes belong to the most complicated and longest lawsuits and specific legal knowledge is mandatory for an exact analysis of those proceedings, which would go beyond the scope of this master thesis.

Organizational features, such as the examination of witnesses, hotel reservations, seating plans or dress regulations, are not included in this analysis. Such elements have no impact on the arbitration proceeding itself and can be handled differently from each party and are therewith irrelevant for the subject-matter of this study.

Furthermore the time limit for this work did not allow an investigation of measures of security, such as the preservation of evidences, an investigation of contractual regulations between the parties and arbitrators as well as a detailed description of the execution of the final award.

Beside the UNCITRAL Rules for Arbitration ("UNCITRAL Rules") and the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules"), the Arbitration Rules of the Stockholm Chamber of Commerce ("AISCC Rules") are the most important model rules on the subject of arbitration in Sweden (Göthberg, 1994). Therewith this paper put its focus in the chapters regarding Sweden on the description of the arbitration proceeding according to the Swedish Arbitration Act ("SAA"), according to the regulations of the General Conditions of Contract in Sweden for Building and Civil Engineering Works and Building Services ("AB 04") and according to the AISCC Rules. In the part concerning German arbitration regulations the focus is put on the German Code of Civil Procedure ("ZPO"), the Code of Arbitration for the Construction Industry ("SGOBau"), the Rules for Dispute Resolutions in the Construction Industry ("SLBau"), the Rules for Mediation and Arbitration in the Construction Industry ("SOBau") and the Arbitration Rules of the German Institution of Arbitration ("SchO").

Before this thesis commences with the description of the arbitration methods, it must be limited with which conflict situations this paper deals. Construction conflicts are in general civil law cases. The use of arbitration within a penal system is not addressed in the paper. Therewith cases of criminal law are not part of this analysis. Cases of criminal law cannot be solved with alternative dispute resolution methods in Germany as well as in Sweden, because in such cases the state has the sovereignty (Tackaberry et al., 2003) (Ax et al., 2004). Moreover it will not be differentiated between the terms dispute, conflict, difference, disagreement or argument. Hereinafter the term dispute is used therefore in general. These terms will not be discussed and defined in this work.

Finally, there is no differentiation between female and male meanings of terms such as arbitrator or judge that are used in this paper. They stand only for the position of the person and do not draw any conclusions from the person's gender.

II) **Methodology**

This chapter assists the reader with a general outline of the thesis. Part *2.1 Structure of the thesis* gives a short description of the content of every chapter of this paper, whereas part *2.2 Methodical Procedure* deals with the making of this thesis. The reader gets an insight into the timely line up of the execution process.

2.1) Structure of the Thesis

Chapter III, *Theoretical Framework*, starts with a brief historical overview of the development of international arbitration. This shall give a first impression and understanding of the meaning of arbitration. It is followed by short explanations of the most significant conventions and international agreements regarding arbitration, with which the triumphant advance of arbitration in global as well as in domestic cases, has begun. Therewith the reader is equipped with general knowledge regarding arbitration and can follow the specialization of the topic into Swedish and German arbitration without any difficulties.

Additionally general overviews of arbitration in both countries, Sweden and Germany, are stated in chapter III. A brief historical overview of arbitration in Sweden is given firstly, before the historical overview of arbitration in Germany follows. The Swedish Arbitration Act (”SAA”) and the Arbitration Institute of the Stockholm Chamber of Commerce (“AISCC”) as the most important arbitration institute in Sweden are presented in the part about the arbitrational history in Sweden. Similarly the recent German legislation concerning arbitration, as well as the most important institutes, is presented supplementary.

Furthermore, the theoretical framework includes a section with general definitions of arbitration in chapter 3.4 *Arbitration in General*. In there, the most common and accepted definitions of the academic world are presented. Therewith the reader gets an understanding of what exactly arbitration is and he moreover can properly follow the main part of this paper.

The arbitration proceedings in Sweden are presented in part 3.5 *Arbitration in the Swedish Construction Industry*. Firstly, the current basis of law for arbitration in the Swedish construction industry is given. Afterwards the different possible ways of arbitrations are explained in detail. There, the simplified method for dispute resolution, which is offered in the General Conditions of Contract for Building and Civil Engineering Works and Building Services from 2004, the AB 04, is clarified prior to the procedure of the SAA. As a final point the arbitration proceeding of the AISCC will be elucidated. This chapter of the paper is followed by the clarifications of the arbitration procedures used in the German construction industry. For a better understanding of the German procedure, general definitions of the German *“Schiedsgericht”* are given first. Afterwards the proceedings of the German Code of Civil Procedure, the *“Zivilprozessordnung”* (“ZPO”) and the most recent private arbitration regulations will be presented.

In the last part of the theoretical framework, *3.7 Setting Up the Expert interviews*, a general description of which data can be gathered during an expert interview and which methods can be used, to fulfil also the requirements of this thesis, follows. The theoretical knowledge will be applied to this paper and realized in the questionnaire

for the expert interviews. Furthermore the target group will be defined and the structure of the questionnaire will be made clear.

In chapter IV, *Results*, the outcome of the interviews executed in connection with this thesis will be presented. The evaluation of the data follows the structure of the questionnaire, whereas the outcomes of the different subject areas will be presented combined.

Chapter V, *Discussion*, combines the theoretical knowledge and procedures with the practical experiences gained in the expert interviews. Therewith the differences between the literature and the practical world shall be highlighted. Starting points for a better implementation of arbitration in the German construction industry will be mentioned in chapter VI, *Recommendations*. The last chapter, *VII Conclusion*, includes the conclusion concerning the topic of this paper.

2.2) Methodical Procedure

At the beginning of the time period for the conception of this master thesis a general literature review was done. After a time of extensive reading, the knowledge out of this literature study was worked in into the theoretical framework of this paper. The literature referred too, is quoted in the bibliography at the end of this document.

First ideas about potential interview partners and interview questions rose during the same period of time. However, the final questionnaire was set up at the end of the writing process of the theoretical framework in coherence with the theoretical issues mentioned in this master thesis, because both authors had then gained enough knowledge to be able to create a far-reaching questionnaire and to be able to go to the bottom of the subject.

The inquiry for potential experts was of course an ongoing process throughout the whole time. Appointments with potential interviewees have been arranged foresighted and prepared individually. During the execution of the interviews one person was the interviewer whereas the second person was in charge of taking notes. The most essential key-answers have been written down by both persons to be on the safe side. A dictating machine has not been used, because the respondent felt more comfortable without it. Not all interviews could be done face-to-face due to the high workload of the practitioners. In those cases, people answered the questions in a telephone interview on the one hand or answered our questions in writing on the other hand. Interviewees who answered the questions in writing have got the questionnaire per E-Mail and they have sent the answers back the same way. However, the notes have been worked up immediately. Therewith an optimal usage of the data could be guaranteed and the loss of data has been prevented.

The outcomes of the interviews have been combined and summarized in chapter IV of this thesis after the last interview has been carried out. In the same chapter the results of the interviews have been connected with the outcomes of the literature review. The recommendations and conclusion of this work have been developed after this connection as well as a final reflection of the work done so far. The introduction, as well as the abstract, has been written at the very end of the time for this master thesis.

The data as well as the questionnaires of the expert interviews are added to the appendices at the end of this paper.

III) Theoretical Framework

3.1) A Brief Historical Overview of the Development of Arbitration

The origin of arbitration as a way of solving problems lies in mediaeval Western Europe (Mustill, 2004). The story of two traders who are in dispute over a certain price or quality of a commodity highlights the basic idea of mediaeval arbitration. In case of such a dispute, both traders would take a third opinion, an opinion of a person whom they knew and trusted. Therewith they would finally settle the dispute. People would act in this way *"not because of any legal sanction, but because this was expected of them within the community in which they carried on business"* (Redfern et al., 2004).

In those days people had perceived that legal rules and procedures were too strict (Redfern et al., 2004). Because of that the law was open to an arbitration agreement as a method of dispute resolution between parties. But the parties were only allowed to consult an arbitrator after the dispute had arisen. In this connection René David states in his book that *"arbitration was mainly conceived of in the past as an institution of peace"* that had the intention "*to maintain harmony between persons who were destined to live together"*. Furthermore David explains that the arbitrator was *"a squire, a relative, a mutual friend or a man of wisdom"* who was chosen because the parties trusted him and because *"it was expected that he would be able to devise a satisfactory solution for the dispute"* (David, 1985).

Concerning small local communities or minor disputes the authority of the arbitration agreement has been powerful enough to guarantee that the parties accepted and transferred the final decision in those days. But to make a system of such *"private justice"* really effective in bigger cases, something more was needed. The "something more" is named by Redfern et al. the legal system within which the process of private dispute resolution works (Redfern et al., 2004).

For example in Roman law, arbitration agreements had not had any legal consequences. Arbitration was not illegal and was not unknown, but it had no real legal effect. The solution of this problem was a so called *"double promise"*. Therefore *"a term was added that a penalty would be payable if a party failed to honour the arbitration agreement or the arbitral award"*. The court could now enforce the payment of the penalty in case of noncompliance, but it could not enforce the arbitration agreement itself (Redfern et al., 2004).

In times of increasing importance of commercial activities, no country could sit back and watch how a system of *"private justice"* settles important disputes just by the goodwill of the participants. *"It was to be expected that at some stage, the national state would step in and regulate matters".* This happened in England with the first statute concerning arbitration in 1698, the so called Arbitration Act. On the other hand in 1560 the first law made arbitration mandatory for merchants in France. This edict was ignored later on and reinstalled during the French Revolution as *"the most reasonable device for the termination of disputes arising between citizens"*. In 1791 French judges were eliminated and replaced by public arbitrators. But in 1806 the French Code of Civil Procedure took a step back and *"turned arbitration into the first stage of a procedure which would lead to the judgement of a court"* (Redfern et al.,

2004). The Italian Code of Procedure treated arbitration significantly in an own chapter *("On Conciliation and Arbitration"*) in 1865 (David, 1985).

At the beginning of the 20th century international solutions had become even more elementary in times of globalisation and the growing importance of international co-operations. Decisions on the international acceptance of arbitration agreements outside national boundaries had to be found additionally. During this period several important arbitral institutions, such as the London Court of International Arbitration ("LCIA") in 1892, the Court of Arbitration of the International Chamber of Commerce ("ICC Court") in Paris in 1923 or the American Arbitration Association ("AAA") in 1926, were established (Redfern et al., 2004). The main purpose of these chambers were, as Manson states in 1893, *"to have all virtues which the law lacks"* and *"to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer-up of strife".*[1]

3.1.1) Important International Conventions and Rules

It has already been mentioned that it is compulsory to connect national laws, to be able to guarantee an effective international arbitration system. This can be handled by treaties or conventions, which will equip the involved nations with regulations to be able to transform international arbitration agreements into national law (Redfern et al., 2004). There have been many treaties and conventions so far. In this paper only the most important will be described in the following paragraphs.

3.1.1.1) The Geneva Protocol of 1923

The Geneva Protocol of 1923 was initiated by the ICC and carried out under the auspices of the League of Nations. It was the first international convention and its main arrangements were (a) that arbitration clauses were enforceable internationally and (b) *"that arbitration awards made pursuant to such arbitration agreements would be enforced in the territory of the states in which they were made"*. The big success of this protocol was that all involved parties agreed on the execution of the consensus mentioned above. Many European countries such as France, Germany, Sweden and the UK were members of this protocol, as well as Brazil, India, Japan and New Zealand. Germany ratified the protocol in 1924 with reservations. By way of contrast Sweden ratified it not until 1929, but then without reservations (Juris International [1], 2002).

1 Manson (1893) IX L.Q.R. 86 cited by Veeder and Dye, "Lord Bramwell's Arbitration Code" (1992) 8 Arbitration International 330; see also chapter 1, section 1-05 [Redfern et al. (2004)], p.5

3.1.1.2) The Geneva Convention of 1927[2]

The Geneva Convention of 1927 was again under the auspices of the League of Nations and had its main objective in widening *"the scope of the Geneva Protocol by providing for the recognition and enforcement of Protocol awards within the territory of contracting states (and not merely within the territory of the state in which the award was made)".* The member states of the Geneva Convention were basically the same as of the Geneva Protocol, with notable omissions, such as Brazil and Norway (Redfern et al., 2004). Sweden ratified the Geneva Convention in 1929 whereas Germany ratified it in 1930 with reservations (Juris International [2], 2000).

Among their restrictions (which will not be discussed in this paper) the Geneva contracts of 1923 and 1927 were major steps towards a common conformity of international arbitration agreements (Redfern et al., 2004).

3.1.1.3) The New York Convention of 1958[3]

The New York Convention of 1958 is the most important alliance linked to international arbitration and it replaces the Geneva Protocol of 1923 and the Geneva Convention of 1927 substantially in most parts. In 1953 the ICC created a new treaty to govern international arbitration. This draft was taken up by the United Nations Economic and Social Council ("ECOSOC") and lead to the New York Convention. The Convention *"is intended to apply to international arbitration, rather than to purely domestic arbitration agreements"* and its main objective was *"the recognition and the enforcement of foreign arbitral awards"* (Blanch et al., 2006) (Redfern et al., 2004).

The purpose of the New York Convention was to succeed the Geneva Convention and thereby to create a simpler system of arbitration clauses. Nowadays 135 countries around the world signed the New York Convention (Blanch et al., 2006). Leading countries such as the US, the former Russian Federation, Japan, France, Germany, Sweden and the UK, as well as countries such as Nigeria, Ghana, Kuwait, Egypt, Cuba or Mexico belong to the countries which have ratified this contract (Redfern et al., 2004) (Mitchard, 1998). Sweden ratified the New York Convention in 1972 without reservations, whereas Germany ratified it already in 1961 with reservations as usual (Juris International [3], 2002).

3.1.1.4) The UNCITRAL Rules

In 1976 the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules") were authorized by the General Assembly of the United Nations. The Iran – United States Claim Tribunal decided in 1981 to implement the UNCITRAL Rules. With the help of this application the UNCITRAL

2 See also: Convention for the Execution of Foreign Arbitral Awards signed at Geneva, September 26, 1927, *League of Nations Treaty Series* (1929-1930), Vol. XCII

3 See New York Convention 1958: Convention on the Recognition and Enforcement of Foreign Arbitral Awards in *"International Arbitration and Dispute Resolution Directory 1998 – The authoritative guide to international arbitration and dispute settlement."*, Martindale-Hubbell, 1998, p. 291 - 293 ISBN: 185739-231-0,

Rules got a significant boost, which led to an increase in their use around the world and is still going on (Blanch et al., 2006).

The big advantage of the UNCITRAL Rules in comparison with other well known rules is, that *"there is no institution acting as secretariat or reviewer of an award.* That means conversely, that *"the process is in the hands of the parties and their chosen tribunal"* (Blanch et al., 2006).

Currently these rules are not only used as *"one of the pre-eminent sets of arbitration rules in the world"* in ad hoc arbitral procedures, instead they are also used as *"an important source for the rules of various other arbitral bodies"* (such as the LCIA and the ICC) (Blanch et al., 2006).

3.1.1.5) The UNCITRAL Model Law[4]

In 1985 a Model Law of the United Nations Commission on International Trade Law ("UNCITRAL") was adopted. It is the result of long negotiations between legal and industrial experts from all around the world (Blanch et al., 2006) (Redfern et al., 2004). The idea behind the Model Law as a reformation of the New York Convention was that a *"harmonisation of the arbitration laws of the different countries of the world could be achieved more effectively by a model or uniform law".* Due to its big success over 40 states, such as Canada, Germany and Australia, have implemented the Model Law entirely or with minor changes nowadays. *"The text goes through the arbitral process from beginning to end, in a simple and readily understandable form"* (Blanch et al., 2006) (Redfern et al., 2004). Furthermore the Model Law is consistent with the New York Convention and the UNCITRAL Rules (Blanch et al., 2006).

Currently the UNCITRAL Model Law is worldwide accepted to be the best legal norm concerning international arbitration (Blanch et al., 2006).

3.1.1.6) Summary

The main purpose of the Geneva Protocol was *"to secure recognition of the validity of international arbitration agreements[5] and to ensure that, if a party commenced litigation, the courts would refer the parties to arbitration[6]"* (Redfern et al., 2004). The following convention, the Geneva Convention of 1927 focussed on the execution of foreign arbitral awards. In 1958 the New York Convention continued the evaluation process of international arbitration where the Geneva treaties have stopped. Its objectives started with the recognition and enforcement of arbitration agreements (Redfern et al., 2004). Each contracting state of the New York Convention has to recognise an arbitration agreement, when the listed requirements are fulfilled:

- the agreement is in writing,
- it deals with existing or future disputes;

4 See Section Two: UNCITRAL Model Law in *"International Arbitration and Dispute Resolution Directory 1998 – The authoritative guide to international arbitration and dispute settlement."*, Martindale-Hubbell, 1998, p. 299 - 310 ISBN: 185739-231-0,

5 See Geneva Protocol 1923, Art. 1, p. 80

6 See Geneva Protocol 1923, Art. 4, p- 80

- the disputes arise in respect of a defined legal relationship, whether contractual or not;
- they concern a subject matter capable of settlement by arbitration (Redfern et al., 2004).

"The New York Convention, the UNCITRAL Rules and the Model Law are three of the most important legal frameworks to have assisted the worldwide development of international commercial arbitration" (Blanch et al., 2006). All three of them are not only milestones in the development of international arbitration, they were also essential for the improvement of national arbitration (Blanch et al., 2006). The UNICTRAL Model Law provides a model for national arbitration regulations (Blanch et al., 2006) (Redfern et al., 2004).

3.2) A Brief Historical Overview of Arbitration in Sweden

Arbitration as a method of settling disputes is no new phenomenon in Sweden (Bagner et al., 2006). *"Sweden has a long history of recognized arbitration as a means of solving disputes"* (Hobèr et al., 2002). For the first time provisions concerning arbitration appeared in Swedish legislation in provincial codes in 1359 (Bagner et al., 2006) (Hobèr et al., 2002). The code of Sweden, a collection of recent legislation, has been established as the source of law in 1734 (Göthberg, 1994). The first statute concerning arbitration was enacted in Sweden in 1887 (Hobèr et al., 2002).

At the beginning of the 20th century in 1929 the Swedish Arbitration Act ("SFS 1929: 124, abbr. SmL") and the Act on Foreign Arbitration Agreements ("LUSK") were established in Sweden (Göthberg, 1994) (Lindell, 1997) (Hobèr et al., 2002). The LUSK was enacted by reason of the Geneva Convention on Enforcement of Foreign Arbitration Awards from 1927 (Lindell, 1997). The New York Convention on Recognition and Enforcement of Foreign Arbitration Awards from 1958 has been implemented in Sweden as well (Lindell, 1997) (Hobèr et al., 2002).

The Swedish Arbitration Act of 1929 and the Swedish Arbitration Act on Foreign Arbitration Agreements have been adjusted to modern requirements by a new **Arbitration Act** in **1999** (*Lag om skiljeförfarande 1999:116*). Hereinafter referred as "SAA" (Hobèr et al., 2002).

During the last decades the importance of arbitration as a method for dispute resolution has been steadily increasing in Sweden. Because of the high extent of its usage, nowadays there are complaints and discussions about the influence of "private" arbitration as *private* remedy for the resolution of disputes, in comparison with the authority of State Courts (Göthberg, 1994). In contrast with this discussion, Bagner et al. state that *"the long history of arbitrations in Sweden has lead to the development of a positive arbitration culture both in the legal and in the business communities"*. Furthermore it is said that *"it is common for commercial standard-form contracts in Sweden to provide for the resolution of disputes through arbitration"* (Bagner et al., 2006).

3.2.1) A Brief Introduction to the Arbitration Institute of the Stockholm Chamber of Commerce ("AISCC")

The Arbitration Institute of the Stockholm Chamber of Commerce ("AISCC") belongs to the most famous and to the oldest arbitration institutes worldwide. It has a long history in domestic and international arbitration and therewith an excellent reputation (AISCC [1], 2010). Furthermore it is also the leading arbitration institution in Sweden (Hobèr et al., 2002). Because of those reasons the AISCC was selected and is the only arbitration institution which will be discussed in the context of Swedish arbitration methodologies in the sequel of this master thesis. A brief introduction of the AISCC follows in the next sections.

3.2.1.1) A Brief Historical Overview of the AISCC

In 1917 the AISCC was established as an independent institute within the Stockholm Chamber of Commerce (Lindell, 1997). The AISCC became famous as a neutral centre of dispute resolution between Western countries, such as the United States ("US"), and Eastern European countries, such as the Soviet Union, during the Cold War in the 1960's and 1970's (Bagner et al., 2006) (Hobèr et al., 2002).

The current rules of the AISCC (the "AISCC Rules") were established in 2007 (AISCC [1], 2010). Additionally the AISCC offers optional rules for Expedited Arbitration since 1995, which are *"primarily recommended for minor disputes where the parties desire a speedy and inexpensive procedure"* (Lindell, 1997).

3.2.1.2) The Scope of Activities of the AISCC

The main objective[7] of the AISCC is to *"assist in the settlement of domestic and international disputes in accordance with the rules set fort in the charters and also assist in the settlement of disputes in accordance with other rules adopted by the Institute"* (Lindell, 1997). Supplementary, providing guidelines concerning the settlement of disputes under the AISCC Rules and providing information regarding arbitration matters are objectives as well (Bagner et al., 2006).

During the last years the AISCC had to deal with an increasing number of disputes. Approximately 35 cases filed in 1990, 63 cases filed in 1992, 123 cases filed in 2004 and in 2009 215 cases filed to the AISCC (AISCC [1], 2010) (Bagner et al., 2006) (Lindell, 1997).

7 The objectives of the SCC Institute are formulated in article 1 of the AISCC Rules. (Arbitration Rules, 2007)

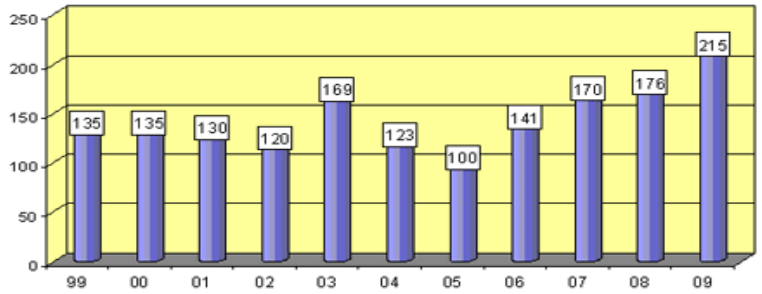

Illustration 1: Case Load of the AISCC from 1999 – 2009 (AISCC [1], 2010)

Its scope of duties is wide and it deals with national and international arbitral proceedings (Lindell, 1997). Among the cases referred to the AISCC approximately 50 % were international (AISCC [1], 2010) (Bagner et al., 2006). Supply agreements, construction projects and licence agreements are examples for its broad field of activities (AISCC [1], 2010) (Hobèr et al., 2002).

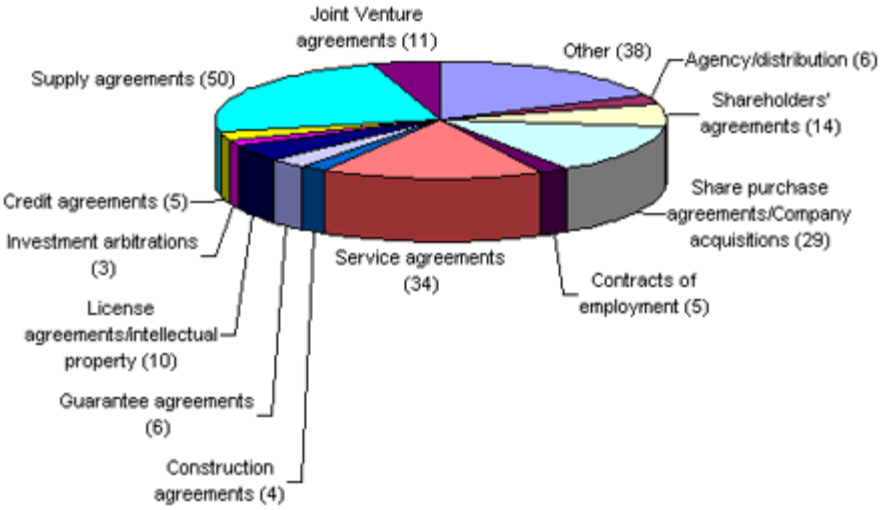

Illustration 2: Subject Matter of Dispute of the AISCC in 2009 (AISCC [1], 2010)

3.2.1.3) Organizational Structure of the AISCC

The AISCC is divided into A) the **Board** and B) the **Secretariat**. Both these entities are explained below.

A) The **Board** of the AISCC is responsible for making all major decisions of the Institute, such as appointing the chairman of the arbitral tribunal and deciding on the costs for the arbitration. Furthermore it will make decisions in cases where the parties have not agreed on certain criteria, such as the place of the arbitration or the number of arbitrators. Since January 2006 the Board consists of six Swedish and six foreign members. They were all appointed by the Board of the Stockholm Chamber of Commerce. Mr. Johan Gernandt is currently the chairman of the board of the AISCC. (AISCC [1], 2010) (Bagner et al., 2006) (Magnusson [1], 2001)

B) The Secretary General is head of the **Secretariat** of the AISCC, which includes an Assistant Secretary General, three legal counsel and four assistants. *"Each Counsel heads his own division with an individual caseload of approximately fifty cases"*. On the one hand the Secretariat is responsible for preparing documentations for the Board to help them reaching their decision, whereas it is also responsible for executing decisions of the Board on the other hand. To assist parties with answering questions concerning arbitration and the SCC Institute itself belongs to its business as well. Annette Magnusson succeeded Mr. Ulf Franke as Secretary General of the AISCC on 1 April 2010. (AISCC [2], 2010) Therefore Mr. Ulf Franke held the position as Secretary General for 25 years. (AISCC [1], 2010) (Bagner et al., 2006) (Magnusson [1], 2001)

3.3) A Brief Historical Overview of Arbitration in Germany

Kühn et al. explain in their section about arbitration in Germany, that "a*rbitration did not have an intensive tradition in Germany. It has been argued that the minor impact of arbitration in Germany was due to the old provisions of the German Code of Civil Procedure.*" (s 1029 ZPO) (Kühn et al., 2006).

The publication of the UNICITRAL Model Law had had an influence on German legal regulations. In January 1998 a completely new arbitration law, according to the UNCITRAL Model Law was published in the 10th book of the German Code of Civil Procedure ("ZPO") (Ax et al., 2004). Therewith the rules for arbitration have not been codified separately, but they have been integrated into the code of civil procedure instead (Wagner, 2002).

The ZPO dates back to the year 1877 and was basically not changed until the year 1998. The implementation of the UNCITRAL Model Law was not a product of a new legal design, but merely translations of the original rules of the UNCITRAL Model Law. Those new provisions count not only for international arbitrations but for all types of arbitrations in Germany (Wagner, 2002). Furthermore the ZPO forms the legal foundation for arbitration in Germany due to the function as federal law (Kühn et al., 2006).

The previous settlement of arbitration had to be replaced because problems rose with the acceptance of the enforcement in foreign countries (Ax et al., 2004). In comparison with traditional German legislation the new regulations differ significantly there from, due to the fact that the legislator modelled the new provisions after the UNCITRAL Model Law (Wagner, 2002).

"As the German law of arbitration has just been overhauled completely, there are no current plans for law reform" (Wagner, 2002).

3.4) Arbitration in General

This chapter will give some general definitions of arbitration. Thereafter reasons will be highlighted why arbitration is especially used in the construction industry. Furthermore, advantages and also disadvantages of the arbitration proceeding will be listed. At the end of this chapter a differentiation of ad-hoc, institutional and permanent arbitration proceedings follow.

3.4.1) What is Arbitration? - General Definitions

In the last decades arbitration has risen to the primary method for the resolution of commercial disputes in many countries around the globe. *"Only the foolhardy lawyer would ignore its new significance to the legal process and the vindication of legal rights"* (Carbonneau, 2007). Nowadays arbitration proceedings concern domestic and international cases of a wide range of commercial branches, such as the construction industry, standard consumer transactions and licensing proceedings (Carbonneau, 2007) (Hobèr et al., 2002). In the construction industry arbitration has traditionally been and still is the preferred remedy for final dispute resolution (Murdoch et al., 2008) (Tackaberry et al., 2003).

There is a homogeneous consensus about the definition of arbitration among the considered and consulted literature. To begin with a general definition Mitchard summarizes arbitration in 1998 as

> *"an adjudicative dispute resolution procedure in which a tribunal issues a ruling known as an award. Arbitration is a private alternative to court litigation. The parties are often represented by lawyers who argue their clients' cases before a tribunal which may comprise a single arbitrator or a panel of arbitrators, usually three. The tribunal is expected to behave "judicially" and will accordingly determine the rights and liabilities of the parties on the issues put to it for adjudication"* (Mitchard, 1998).

Additionally Redfern et al. define arbitration as a *"private method of dispute resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law"* (Redfern et al., 2004). Carbonneau explains arbitration in 2007 as a *"private and informal trial procedure for the adjudication of disputes. It is an extra-judicial process. It functions as an alternative to conventional litigation. It yields binding determinations through less expansive, more efficient, expert, and fair proceedings"* (Carbonneau, 2007). In the same way Murdoch et al. interpret arbitration as a *"procedure for the resolution of disputes which is, [...], under the control of the parties"* (Murdoch et al., 2008). Supplementary the definition of arbitration in English law defines arbitration as

> *"a mechanism for the resolution of disputes. The process takes place, usually in private and on confidential basis, pursuant to an agreement between two or more parties. Under the agreement, the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforceable at law"* (Tackaberry et al., 2003).

The foundation of arbitration is the principle of party autonomy. *"The application of this principle will mean that, after excluding the competence of public courts, the parties in theory are free to individually tailor-make their arbitration agreement"* (Bösch [1], 1994). To avoid uncertainties during the arbitral process the parties are free to include so-called model rules, such as the UNCITRAL Rules[8], in an *ad hoc*[9] arbitration, but without administrative support of an institution, like the DIS or the SCC Institute, provide it in the so called institutional[10] arbitration (Bösch [1], 1994).

3.4.2) Introduction to why Arbitration is used especially in the Construction Industry for Final Dispute Resolution

The construction industry uses arbitration as its final method for dispute resolution. The reasons therefore are not only the various advantages of arbitration[11], but also because of

- the supremacy of arbitration clauses in standard forms of contracts worldwide[12], e.g. in Sweden; and
- the technical content of the disputes that requires technical skilled experts for the final dispute resolution, which perfectly fits to arbitrators skilled in technical disciplines (Sims, 2003).

Furthermore arbitration seems to fit perfectly to the construction industry because of the prototypical nature of works. This is highlighted in construction projects e.g. by the divided responsibility for specifications and design, the complexity of activities, the dependency on other activities, the site specificities, the interaction with already existing construction works, the dependence on weather conditions, the longevity of the final product and in connection therewith the lateness of revelation of defects. Comparable with the arbitration process every construction project is unique and cannot gain knowledge and be compared with similar projects arbitrated previously, like in normal court proceedings (Sims, 2003).

3.4.3) General Advantages and Disadvantages of Arbitration

The following part describes the advantages as well as the disadvantages of the arbitration procedure. These aspects are not country related and refer to the proceeding itself.

8 See Chapter 3.1.1, in particular Section 3.1.1.4 The UNCITRAL Rules

9 See Chapter 3.4.5, in particular Section 3.4.5.2 *Ad hoc* Arbitration

10 See Chapter 3.4.5, in particular Section 3.4.5.1 Institutional Arbitration

11 See Chapter 3.4.3 General Advantages of Arbitration

12 In Great Britain for example the JCT Standard Form of Building Contract, the ICE Conditions of Contract and the NEC Engineering and Construction Contract provide for arbitration as the final remedy of dispute resolution, as well as the FIDIC Construction Contracts implement arbitration as the final method of dispute resolution after a failed decision of a Dispute Adjudication Board in Clause 20.6 [Sims (2003)]

3.4.3.1) Advantages of Arbitration

Privacy, speed, flexibility, the choice of the arbitral tribunal and the choice of the location for the arbitral proceeding are main advantages of arbitration which are highlighted in the literature (Sims, 2003). In this section those general advantages of arbitration will be mentioned and explained.

1.) Privacy: Arbitration is a private method of dispute resolution. The proceedings are not open to the public and the final agreements are normally not published. Hereby the advantage is that competitors, clients and subcontractors must not be informed about a dispute and they therewith have no knowledge about it (Carbonneau, 2007).)

2.) Flexibility: In the case of flexibility several aspects of the arbitration proceeding can be mentioned. First, the parties involved have the right to choose a way of how they want to carry out the arbitration. Either in form of a contract clause before the dispute arises or in an agreement at the beginning of the negotiations about the resolution method. They can choose between an institutional[13] or an *ad hoc*[14] proceeding. Second, they have the right to choose the arbitrators. Arbitration offers the possibility to add skilled experts, e.g. in the field of construction or economy, as arbitrators. With the help of qualified and competent arbitrators, a suitable and fast solution can be assured. Third, the parties have also the right to choose the location of the arbitration (Carbonneau, 2007) (Zerhusen, 2005). Furthermore the arbitral tribunal is able to hear witnesses, experts or parties, and is also able to inspect properties and documents, if required (Ax et al., 2004). All this flexibility gives a lot of freedom to the parties arranging the most effective and efficient contract for every single dispute (Zerhusen, 2005).

3.) Speed /Time: The aspects mentioned under *2.) Flexibility* lead to a quicker and more efficient proceeding than litigation. Additionally the arbitration proceeding is in principle shorter than litigation because there is only one level of a judicial decision. Furthermore official time limits provided in the rules of some arbitral institutions speed up the process (Weigand, 2002) (Zerhusen, 2005).

Zerhusen states for instance that the unification efforts regarding arbitration are much higher than in litigation and the amount of agreement can be within 60%, compared to 16.4% of final solutions in the first instance at court, which can be regarded as an advantage for arbitration regarding cost and time savings (Zerhusen, 2005). Supplementary recent statistics show that arbitration proceedings according to the German DIS Rules lasted nine months from the request to the agreement on average, whereas traditional legal proceedings lasted 26.2 months in case of two instances and 41.7 months in case of three instances on average (Weigand, 2002).

4.) Costs: As Lachmann examined, arbitration proceedings can be much cheaper than litigation. But therefore litigation must continue several levels of justice (Lachmann, 2002). The parties can save a lot of money for the implementation of external experts additionally, if they have decided wisely about the appointment of the

13 See Chapter 3.4.5 Institutional and A*d hoc* Arbitration, in particular Section 3.4.5.1 Institutional Arbitration

14 See Chapter 3.4.5 Institutional and *Ad hoc* Arbitration, in particular Section 3.4.5.2 *Ad hoc* Arbitration

arbitrator(s). (Ax et al., 2004) (Lachmann, 2002) (Hobèr et al., 2002) (Zerhusen, 2005)

5.) Expertise / Professional Competence: Due to the fact mentioned under *2.) Flexibility* that the parties are free in choosing the arbitrators, they can be chosen wisely. Therewith the parties have the possibility to select competent arbitrators which might be experts on the field of the subject-matter of the dispute or experts in the construction industry in general. This definitely can be seen as an advantage in comparison with litigation. In court proceedings the judge cannot be chosen and often does not have the expertise required for being able to solve the dispute on his own. In those cases the judge often consults external and impartial experts (Ax et al., 2004) (Carbonneau, 2007) (Zerhusen, 2005).

6.) Neutrality: Concerning nationality and legal traditions the neutrality of arbitration can be seen as another advantage. In international cases the neutrality is essential for a proper proceeding, because it *"eliminates the conflicts associated with the assertion of national court jurisdiction, the choice of applicable law, and the enforcement of foreign judgements"* (Carbonneau, 2007).

7.) Willingness to co-operate: Due to the fact, that "the recourse to arbitration is *consensual"* and that *"the parties agree by contract to submit existing or prospective disputes to arbitration",* a mutual interest to solve the dispute concurringly exist (Carbonneau, 2007).

8.) Enforcement of the arbitral award: The New York Convention of 1958 as a multilateral treaty guarantees an easy enforcement of arbitral awards worldwide. Therewith it also gives a high degree of legal certainty to be able to enforce the agreement in another jurisdiction than the seat of the court (Weigand, 2002).

7.) Obligation to be represented: The parties are not obliged to be represented by a lawyer within an arbitration procedure, as it is the case at legal court proceedings. This fact can save costs (Lachmann, 2002).

3.4.3.2) Disadvantages of Arbitration

In contradiction to the general advantages, mentioned in the previous section, there are also several disadvantages of the arbitral proceeding. In the last years doubts about the general consensus of advantage or disadvantage have arisen in the academic world. For example, the advantage *speed, regarding a faster process than litigation* cannot be taken for granted nowadays. Work-overloads and institutional administration can cause problems and delays (Weigand, 2002). Nevertheless, the advantages and disadvantages mentioned in those two sections represent the common opinion.

1.) Privacy: Due to the aspects of privacy mentioned as an advantage, every arbitration proceeding is unique and can have a totally different award than similar cases, due to the fact that there are no leading cases because of the closed sessions (Weigand, 2002). Therewith the parties only have a little possibility of prediction, and do not know how their dispute may end because there is no available data from previous endings (Zerhusen, 2005).

2.) Speed/Time: Delays caused by work-overloads and institutional administration lengthen the duration of arbitral proceedings nowadays. *"According to the majority of practitioners the duration of arbitration is often too long."* But even official time limits provided through institutional rules cannot alleviate the problem, because they are often totally unrealistic and can often not be kept (Weigand, 2002).

3.) Costs: Arbitration should be cheaper than litigation regarding its flexibility and the often much shorter duration. But it is not automatically cheaper because of the necessity of the parties to pay for everything (from counsel and arbitrators to the rented rooms). However, comparisons between both systems are difficult, because the fees for the arbitrators can often not be calculated and the number of court levels is not predictable. Calculations in Germany came to the result that arbitration is only cheaper *"if compared to a lawsuit with two subsequent recourses up to the Supreme Court"* (Weigand, 2002).

4.) No obligation to be represented in court: On the one hand this is an advantage and on the other hand not. Most companies use lawyers even if this is not required. This makes an arbitration procedure not longer an easy and possible method for non experts as it was meant to be. It even becomes a risk to take part without a representative (Lachmann, 2002).

5.) Reconsideration: The decisions made by the arbitrators do not demand an investigation by legal court with regards to content afterwards, in general. The main idea of arbitration is to avoid litigation which would be destroyed if court would control the arbitration awards. Only in special cases, such as an award which is not compatible with the law, can provide the possibility of an investigation by court (Englert et al., 2006).

3.4.3.3) Summary

To clarify all the different advantages and disadvantages of arbitration, they are clearly listed in the following illustration.

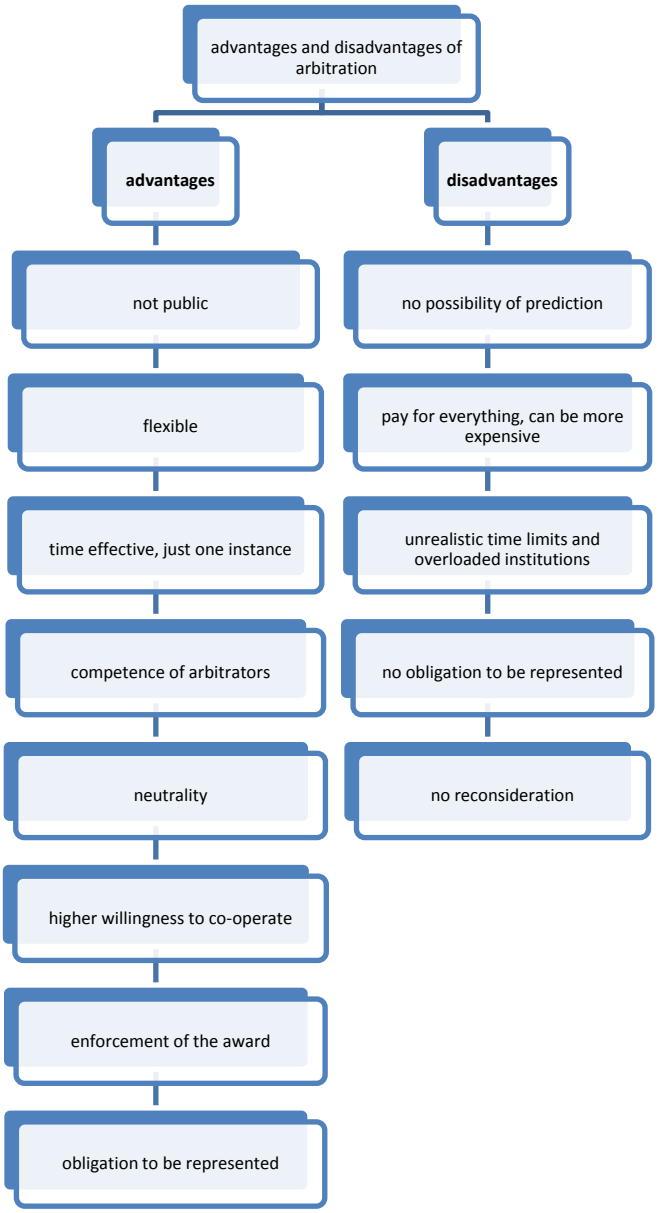

Illustration 3: Advantages and Disadvantages of Arbitration

3.4.5) Institutional -, A*d hoc* - and Permanent Arbitration

The continuous growth of arbitration procedures causes a change in the development of the arbitration courts. In the past the courts constituted occasionally or depending on a case and originate after an arbitration agreement between parties (Ax et al., 2004).

The arbitration process itself can be subdivided into three different kinds of arbitration proceedings. First of all there is the administered or **institutional arbitration.** The second form of arbitration is the so called ***ad hoc* arbitration.** Finally there is the **permanent arbitration** proceeding**.** (Weigand, 2002). All three procedures will be explained in the following paragraphs.

3.4.5.1) Institutional Arbitration

+) Aiming for decisions that are faster, more competent and of higher quality the idea of institutional fixed arbitration courts developed during the last years (Ax et al., 2004). These courts are lead by arbitration institutes and are always in charge of the necessary resources (Zerhusen, 2005). Within an institutional arbitration the rules from the institute are available for the parties (Ax et al., 2004). Institutions like the ICC, LCIA, DIS or the SCC Institute provide parties with a set of procedural rules. *"Those rules provide for a regulation of most of the conceivable situations and especially those critical instances where […] one party […] tries to boycott or obstruct the proceedings by not co-operating as required"* (Weigand, 2002). Big **advantages** of the institutional arbitration are furthermore the support from trained and professional staff of the institution and therewith the possibility for the parties to focus on the substantive issues of the case. Additionally the excellent reputation of many institutions can make it easier to convince the opposing party to choose arbitration as the final dispute resolution method and that arbitration is not more uncertain than traditional litigation at courts (Murdoch et al., 2008) (Weigand, 2002).

For means of clearness the important advantages of institutional arbitration are listed below:

- incorporation of a set of rules from a selected institution
- administration of the arbitration with the help of trained stuff
- smooth and pre-arranged procedure
- support and supervision from professional staff
- in most cases there is an internationally accepted reputation of the institute

-) The costs of the institutional arbitration are a **disadvantage** of this proceeding because it can be quite expansive, due to the fact that the costs are calculated on basis of the amount in dispute. In many institutions the costs can be separated in administrative fees and arbitrator's fees. They will of course vary from institution to institution. *"[...] especially in cases dealing with large sums of money, the procedural costs are a major discouraging factor".* In addition, delays caused by the *"bureaucratic machinery"* of the institutionalized arbitration proceeding and the minor flexibility of the institutional arbitration compared with the *ad hoc* procedure, must be mentioned as disadvantages (Murdoch et al., 2008) (Weigand, 2002).

Additionally the disadvantages are listed for means of clearness as well as the advantages:

- costs
- delays as a result of procedural or administrative requirements

3.4.5.2) *Ad hoc* Arbitration

+) All procedural details and rules have to be arranged by the parties itself, either in an arbitration clause or at a later stage, in the purest form of the *ad hoc* arbitration. This opportunity, to establish a procedure which fits perfectly to the contract and the relationship between the involved parties, can definitely be seen as the main **advantage** of this kind of arbitration. Weigand designates this as a *"tailor-made procedure"* (Murdoch et al., 2008) (Weigand, 2002).

As done in section *3.4.5.1 Institutional Arbitration* the main advantages and disadvantages of the ad hoc arbitration will be listed for clarification as well. First the advantages:

- tailor-made procedure
- higher flexibility

-) But still, there are also **disadvantages**. The success of *ad hoc* arbitration depends on the co-operation of the parties. Furthermore there are opportunities for the parties to use delaying or obstructive tactics in all stages of the process, e.g. in the stage of appointing the arbitral tribunal. The enforcement of an agreement can be another disadvantage because a *"competent court will more easily acknowledge that the other party's procedural rights have been safeguarded by the respective institutional rules"* in case of discord (Murdoch et al., 2008) (Weigand, 2002).

Secondly the disadvantages:

- dependency upon co-operation between the parties
- uncertainties in case of a breakdown of the relationship

Of course, pre-formulated Model Rules, such as the UNCITRAL Arbitration Rules, can be taken into consideration to help the parties overcome certain difficulties (Murdoch et al., 2008) (Weigand, 2002).

3.4.5.3 Permanent Arbitration during the Construction Period

In Germany a special form of an arbitral tribunal exists: the permanent tribunal. There the tribunal starts at the same time as the construction project starts and ends with the finish of the project. This means that a competent team overseas the complete time of the construction phase of the project including the advanced work as well as the final documentation (Englert et al., 2006).

The advantage within the system is the availability of the tribunal and their knowledge about the project. In case of a dispute no time is lost for nomination and presentation of the case and a solving procedure can commence directly. This means no time and money is wasted (Englert et al., 2006). On the other hand a permanent tribunal is cost intensive because of the duration. Englert et al. advice an investigation about the relations of the overall contract value, the possible happening unexpected circumstances, the work to produce and possible costs for a permanent tribunal in comparison to costs and time deficits within a tribunal acting just in case of a dispute. Additionally a risk analysis should be done. Based on these investigations the worthiness of a permanent arbitral tribunal can be discovered (Englert et al., 2006).

Finally Englert et al. recommend a permanent tribunal just for huge and time intensive projects because of the aspects mentioned above (Englert et al., 2006).

3.4.5.4 Summary

In the following illustration the above mentioned differences of the forms of arbitration are summarized.

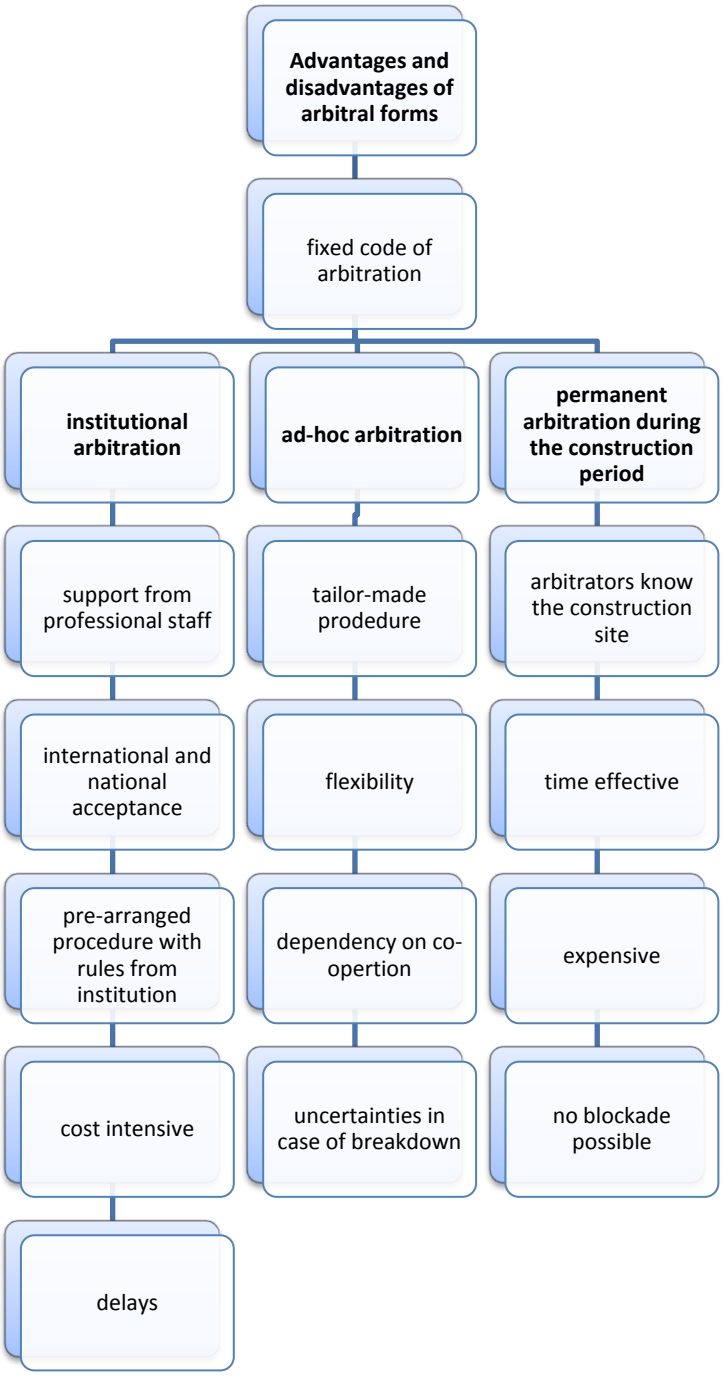

Illustration 4: Résumé of the Three Forms of Arbitration

3.5) Arbitration in the Swedish Construction Industry

According to recent statistics it is believed that each year between 300 and 400 arbitrations are carried out in Sweden. Approximately 20 % involve international agreements (Hobèr et al., 2002).

As explained in chapter *3.4.5 Institutional and Ad hoc Arbitration* it is possible for the parties to choose between an institutional and an *ad hoc* proceeding. This is also possible in Sweden. In arbitrations conducted without the use of an institution, the *ad hoc* arbitrations, the regulations of the SAA will be utilized (Hobèr et al., 2002).

The following sections shall give a general overview of the SAA as well as of the rules of the leading institution in Sweden, the AISCC Rules, and their implementation into the practice. But the following cannot be seen as role models for all arbitrations conducted in Sweden, because *"the numbers of variations in case management are as many as there are cases"* (Magnusson [1], 2001).

3.5.1) Basis of Law in Sweden

In general, parties can arbitrate any dispute and issue they want in Sweden, with the exception of *"... matters of criminal law, family law, some employment law and certain tenancy rights"* which *"are generally not arbitrary in Sweden"* (Bagner et al., 2006). According to the opinions of experts the Swedish court system is open for arbitration and therewith arbitration friendly and supportive (Bagner et al., 2006).

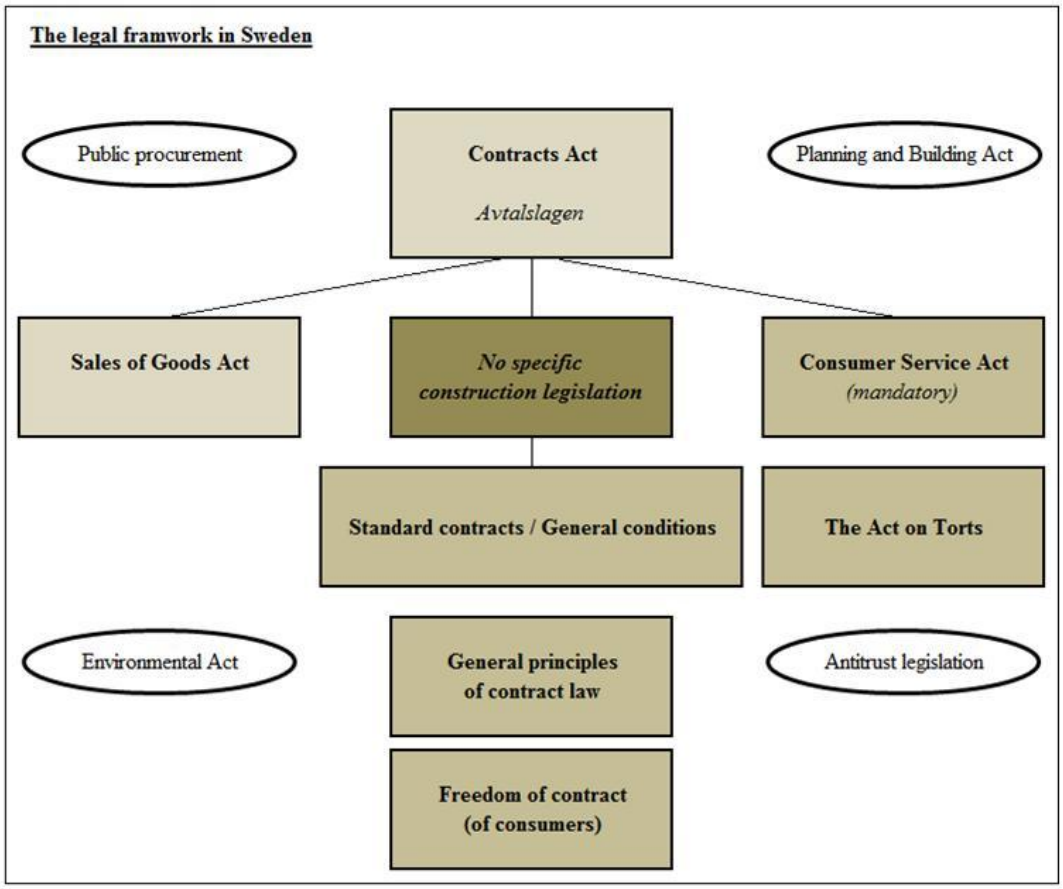

Illustration 5: The legal framework in Sweden (Bretz, 2008)

However, the legal framework does not provide any specific legislation for the construction industry in Sweden. Therefore, the General Conditions of Contract, such as the **AB 04**, the General Conditions of Contract for Building and Civil Engineering Works and Building Services from 2004, the **ABT 06**, the General Conditions of Contract for Design and Build Construction for Building, Civil Engineering and Installation Works, or the **ABK 96**, the General Rules of Agreement for Architectural and Engineering Consulting Services, provide the construction industry with necessary regulations. Those provisions are negotiated set of rules and become valid through a reference in the contract (Bretz, 2008).

The AB 04 regulates the contractual relationship and dependencies between the client and the contractor as well as between the contractor and the sub-contractors, but in the modification **AB-U 04**. Furthermore the AB 04 tells how to handle different issues during the construction period and therewith it also helps to achieve the outcome which was intended from the beginning (Bretz, 2008).

The settlement of disputes is regulated in the chapters nine and ten of the AB 04. Disputes shall mainly be settled by the simplified method offered in chapter 10[15], unless the parties have not agreed otherwise (Ch. 9, Art.1). On the other hand, disputes which cannot be finally settled in accordance with chapter 10 shall be either settled by public court[16] or arbitration in accordance with the provisions of the SAA[17] (Ch. 9, Art.1). Cases with a price base amount lower than 150 shall then be settled by court proceedings, whereas disputes with a price base amount higher than 150 shall be settled by arbitration in accordance with the SAA. But, here is only meant the amount in dispute exclusive of value added tax at the time of execution (AB 04, 2004).

A) Simplified resolution of disputes

B.1) Dispute < 150 price base amounts = court proceeding

B.2) Dispute > 150 price base amounts = arbitration

With the exception of the court proceeding, which is not a subject matter of this paper, the simplified method of dispute resolution and the arbitration proceeding in accordance with the SAA will be explained in the following paragraphs. Additionally, the arbitration proceeding of the AISCC, as the best known arbitration institution in Sweden will be described in the following chapters.

15 See Section 3.6.2 Simplified Method for Dispute Resolution offered in the AB 04

16 Not a subject-matter of this paper

17 See Section 3.6.3 The Practice of the Swedish Arbitration Act

3.5.2) Simplified Method for Dispute Resolution Offered in the AB 04

Chapter 10 of the AB 04 offers the possibility for the parties to settle disputes with the help of a simplified resolution method. The heart of the matter is a competent and unchallengeable arbitrator (AB 04, 2004).

After the parties have reached conformity on solving the dispute with the help of the simplified resolution procedure the issue shall be referred immediately to a sole arbitrator. Therefore the parties have to appoint an arbitrator jointly, if one has not been appointed in the contract already (AB 04, 2004).

Each party shall send a written comment on the dispute to the arbitrator as well as to the opposing party within one week after the appointment of the arbitrator. In the same manner, both parties can also agree on an extra meeting with the arbitrator. Furthermore, each party has to comment on the others party written comment and send it back to the arbitrator and the other party within one week from the date when the party received the comment (AB 04, 2004).

The arbitrator shall inform the parties about his final decision within four weeks. In his final decision the arbitrator shall shortly state the reasons for his decision and which party shall pay his fee. Furthermore the final conclusion is binding for the parties, unless they agree on a different result. Complaints shall be settled either by a public court or an arbitration panel. But therefore the complaint against the decision of the arbitrator has to be done in writing and send to the other party within one month after the arbitrator's decision (AB 04, 2004).

3.5.3) The Practice of the Swedish Arbitration Act

The present statute on arbitration became effective on April 1st, 1999 in Sweden. The so called Swedish Arbitration Act ("SAA"). It deals equally with national and international arbitration. The SAA has not adopted the UNCITRAL Model Law in its entirety, but is close to it (Hobèr et al., 2002).

3.5.3.1) Request for Arbitration in the SAA

A contractual agreement between the parties is necessary to begin with an arbitration proceeding in general. The SAA does not demand a particular form of the arbitration agreement. Therewith the agreement can either be in writing or oral. However, in practice most arbitration clauses are in writing (Bagner et al., 2006) (Hobèr et al., 2002). Simply because *"this will not only eliminate problems associated with having to prove the existence of a verbal arbitration agreement, but it will also allow enforcement of the arbitral award under the New York Convention, should this be necessary"* (Bagner et al., 2006).

The arbitration proceeding starts when one party receives a request for arbitration, including all relevant documents, such as an express and unconditional request for arbitration, a statement of the issue which is covered by the arbitration agreement or a statement of the party's choice of arbitrator (section 19 SAA). The SAA requires a request done in writing (Bagner et al., 2006).

The request for arbitration is handled in section 19 of the SAA (Bagner et al., 2006).

3.5.3.2) Appointment of Arbitrators

The framework of the SAA provides the parties with a lot of freedom concerning the appointment of the arbitrators. The statutory framework of the SAA non-mandatory and the parties can e.g. modify the numbers of arbitrators, fitting to their requirements (s 12 SAA) (Hobèr et al., 2002). However, according to section 13 of the SAA there are three arbitrators, unless the parties have not agreed in a different way. Thereby each party has to appoint one arbitrator. The third arbitrator and likewise the chairperson of the tribunal is then appointed by the two previously chosen arbitrators. There are no restrictions to the nationality and the profession of the arbitrators. They must only have reached full legal capacity and fulfil the requirements of independence and impartiality (s 8, para 1 SAA) (Bagner et al., 2006) (Hobèr et al., 2002) (SAA, 1999).

The claimant has to appoint his arbitrator already in the request for the arbitration (s 19 SAA). Afterwards the other party has to appoint its arbitrator within 30 days after the receipt of the request for arbitration (s 14 SAA). Analogous to this procedure, the two arbitrators have to appoint the chairperson within 30 days after the last party-appointed arbitrator was selected. They are free in their decision and there are no conditions for the selection of the third arbitrator. One party can demand the district court to make the mandatory appointment if one of these procedures fail (s 14 and 15 SAA) (Bagner et al., 2006) (Hobèr et al., 2002) (SAA, 1999).

Section 9 of the SAA demands the arbitrators to immediately inform the parties and the other arbitrators in writing if disqualifying circumstances become know regarding the requirements of independence of one arbitrator (s 9 SAA). The SAA provide a list

with circumstances which would lead to an exclusion from the proceeding, additionally in section 8 of the SAA (Bagner et al., 2006) (Hobèr et al., 2002) (SAA, 1999). Such aspects would for example be:

- that the arbitrator or anyone closely affiliated with him is a party or otherwise may expect benefit or detriment as a result of the outcome of the dispute (Bagner et al., 2006)
- that the arbitrator or anyone closely affiliated to him is a member of the board of a company or any other association which is a party or in any other way represents a party or anyone that may expect benefit or detriment as a result of the outcome of the dispute (Bagner et al., 2006)
- that the arbitrator, acting as an expert or otherwise, has taken a position in the dispute or has assisted a party in the preparation or conduct of his case (Bagner et al., 2006)
- that the arbitrator has received or demanded compensation in violation of the Act (Bagner et al., 2006)

3.5.3.3) Challenge and Replacement of Arbitrators

Due to the regulations of the SAA a written explanation, which includes the reasons for the challenge of the arbitrator, must be send in within 15 days after the party has discovered the disqualifying circumstances (Bagner et al., 2006) (SAA, 1999).

The final decision about the dismissal of the challenged arbitrator will be made by the tribunal, unless the parties have not agreed on something different. The decision is binding and cannot be appealed (Bagner et al., 2006) (SAA, 1999).

In addition, the Act allows the parties to take the help of a district court into consideration. The district court has the right to dismiss an arbitrator, if he has caused delays. Furthermore the SAA allows the parties to exchange the district court with an arbitration institution in such a case. The decision of the district court as well as of the arbitration institution will be binding (Bagner et al., 2006) (SAA, 1999).

Section 16 of the SAA regulates the replacement of arbitrators. According to those rules the party that has originally appointed the arbitrator shall appoint his successor within 30 days as well. If the disqualifying circumstances have been known before the appointment of the arbitrator, the district court shall replace the arbitrator (Bagner et al., 2006) (SAA, 1999).

3.5.3.4) General Principles of the Procedure (SAA)

As previously mentioned is the Arbitration Act, as well as the procedure of the Arbitration Institute of the Stockholm Chamber of Commerce, based on the principle of "party autonomy". Both parties have a lot of freedom to create the proceeding that fits the best to the current dispute. Nevertheless there are guidelines that have to be implemented. As in section 21 of the SAA stated, the tribunal has to control that the proceeding is handled in an impartial, practical and speedy manner (s. 21 SAA) (Bagner et al., 2006) (Hobèr et al., 2002) (SAA, 1999).

The tribunal is furthermore responsible for the creation of the timetable of the whole case, unless the parties have not agreed in a different way. Thereby the tribunal has to

include the opportunity to present the case for both parties. First the claimant shall present its position, whereas the respondent shall state its position afterwards (Bagner et al., 2006) (Hobèr et al., 2002) (SAA, 1999).

According to the SAA the tribunal is only required to offer each party time for the presentation of its position "to the extent necessary". This can be done in writing or orally. In comparison with the UNCITRAL Model Law, where both parties have time for a "full" presentation of their position, this difference shall guarantee an effective and speedy manner (s. 24 SAA) (Bagner et al., 2006) (Hobèr et al., 2002) (SAA, 1999).

3.5.3.5) Termination of the Arbitration Proceeding (SAA)

The Swedish Arbitration Act does not include a guideline that adjusts the time limit in which an award must be made. But it includes regulations about the main form of the award. The final award must be e.g. in writing and must be signed by the majority of arbitrators, unless the parties have not agreed differently. Complementary the award must include the place of the arbitration and the date of the final decision. Furthermore the award must be transmitted to the parties directly. In contradiction with the proceeding of the AISCC the SAA does not include an explicit regulation that the final award has to include the reasons for the decision. *"But an omission to state the reasons would be very unusual"* (Bagner et al., 2006).

If an award is not created in accordance with the regulations of the SAA it will be of no effect and is invalid (s. 33 SAA) (Bagner et al., 2006) (SAA, 1999).

After its announcement the award is binding and its merits cannot be appealed. The award can be challenged due to irregularities in the procedure. In case of challenge the act differentiates between circumstances that have no impact on the award (s. 33 SAA) and circumstances that would lead to an abolition of the award, in whole or in part (s. 34 SAA). Reasons for a challenge can e.g. be a contravention of time limits or agreements made between the parties. An award is invalid e.g. if it decides an issue which is not allowed to be arbitrated or which violates Swedish public policy. The request for a challenge must be handed in within three month after the award was announced (Bagner et al., 2006) (SAA, 1999).

3.5.3.6) Costs of the Arbitration Proceeding (SAA)

The general rules from the Swedish Code of Judicial Procedure have to be used if the parties have not agreed otherwise. According to those regulations the losing party is *"liable for his own expenses as well as those of his adversary"* (Hobèr et al., 2002). Fees, expenses of the counsel, costs of evidences and compensation to a party for his own work and time spent are examples of such expenses (Hobèr et al., 2002).

3.5.4) The Practice of the Arbitration Institute of the Stockholm Chamber of Commerce

According to their own homepage the AISCC provides their customers with modern, flexible and up-to-date regulations for a flexible and fast arbitration proceeding. The parties have for instance the freedom to choose the language and the seat of the arbitration (AISCC [1], 2010).

As previously mentioned in section *3.3.1 a brief introduction to the Arbitration Institute of the Stockholm Chamber of Commerce ("AISCC")* the current AISCC Rules were put into force at January 1st, 2007 (AISCC [1], 2010).

3.5.4.1) Request for Arbitration (AISCC)

If the parties want to conduct the arbitration under the administration of the AISCC, their intention should be stated as clearly as possible in a written arbitration clause (Bagner et al., 2006). Therefore the AISCC provides a model arbitration clause:

> *"Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."* (AISCC [1], 2010) (Bagner et al., 2006)

Furthermore, the AISCC provides the parties with advise about agreements which can or should be organized in the contract supplementary, to avoid waiting periods and additional disputes. The parties can for instance prearrange the number of arbitrators, the seat of the arbitration, the language to be used or the law to be applied as the substance of the dispute (AISCC [1], 2010) (Bagner et al., 2006).

The arbitration proceeding is launched when the claimant hands in the request for arbitration. Its official start date is when the AISCC receives the request for arbitration together with all necessary appendices, such as the contact information of both parties, a description of the dispute and a copy of the arbitration agreement (Bagner et al., 2006).

The administrative procedure, after the request is filed to the AISCC, is that the request is directly handed over to one of the three divisions. In favour of efficient case-management, cases in which parties have been involved into earlier resolutions will be assigned to the same division as previously. Hereby information of the old case are not allowed to be used in the present case due to the privacy requirements. Cases with different languages will be forwarded to a division which is able to deal with it. Currently the AISCC is able to handle disputes in English, German, French, Russian and Swedish (Magnusson [1], 2001).

The request for arbitration is regulated in article 2 of the AISCC Rules (Arbitration Rules, 2007).

3.5.4.2) Appointment of Arbitrators (AISCC)

The parties are free to agree on the number of arbitrators while executing arbitration under the SCC Rules. If they do not agree on a specific number of arbitrators there are three arbitrators according to the AISCC Rules on the one hand. Each party has to

appoint one arbitrator, whereas in contrast to the SAA procedure, the third arbitrator and chairman of the tribunal is appointed by the AISCC Board (article 16 AISCC Rules) (Arbitration Rules, 2007). If the parties agreed on another number of arbitrators both parties have to appoint the same number of arbitrators (art 16 (2) AISCC Rules). In case of different nationalities the board shall appoint a chairman having another nationality, unless the parties have not agreed otherwise. On the other hand, the AISCC has the privilege to decide that the dispute will be settled by a sole arbitrator, if the amount in dispute and the complexity allow such a procedure (art 16 (1) AISCC Rules). In this case the AISCC Board shall make the appointment of the sole arbitrator as well (art 16 (1) and (5) AISCC Rules) (Arbitration Rules, 2007). Regarding the AISCC Rules there are no requirements for the appointment of the arbitrators, such as nationality, and there is no official list from which the arbitrators must be picked (Bagner et al., 2006) (Hobèr et al., 2002).

Regarding article 17 of the AISCC Rules, the Institute demands the arbitrators to be impartial and independent. Therefore the arbitrators will be contacted directly after they have been appointed and be summoned to fill out a standard form which will secure impartiality and independence. Copies thereof will be forwarded to both parties. There are no further requirements for the qualification of the arbitrators, except that they must have full legal capacity (Bagner et al., 2006) (Hobèr et al., 2002) (Arbitration Rules, 2007).

Besides these regulations the parties are free to prearrange additional requirements for the qualification of arbitrators (Hobèr et al., 2002).

3.5.4.3) Challenge and Replacement of Arbitrators (AISCC)

The procedure for the challenge of an arbitrator is regulated in article 15 of the AISCC Rules. It is similar to the procedure of the SAA. The parties have to send in a written statement about the reasons for the challenge within 15 days to the AISCC. With the expiration of those 15 days the parties lose their right to challenge the appointment of the arbitrator (Bagner et al., 2006) (Arbitration Rules, 2007).

Before a decision will be made, both parties and their arbitrators have the right to comment on the challenge before the Secretariat. If the opposing party agrees on the challenge, the arbitrator will be dismissed from the position. Otherwise the AISCC Board will make the decision. This decision is binding and cannot be appealed (Bagner et al., 2006) (Arbitration Rules, 2007).

Furthermore the Board has the possibility to remove an arbitrator according to art. 16, if he cannot fulfil his duties or if he cannot perform his functions without a challenge (Bagner et al., 2006) (Arbitration Rules, 2007).

Article 17 of the AISCC Rules regulates the replacement of arbitrators. Therefore, party-appointed arbitrators shall be replaced through the party, which appointed the arbitrator originally, unless the AISCC Board has not decided otherwise. The Board will appoint the new arbitrator itself if it has decided differently (Arbitration Rules, 2007).

3.5.4.4) General Principles of the Procedure (AISCC)

After the settlement of all administrative procedures, such as the payment of the fees and the transmission of both points of opinions, the SCC Institute will hand the dispute over to the arbitral tribunal. In accordance with the SAA, the tribunal has then to assure an impartial, practical and speedy manner. Additionally the tribunal has to set up a timetable and take control over the exchange of additional statements (art. 23 and 24 AISCC Rules) (Bagner et al., 2006) (Hobèr et al., 2002) (Mitchard, 1998).

The AISCC Rules supplementary offer the possibility for the chairman to decide questions of procedure on his own, if the tribunal exists of three or more members and the other arbitrators have given the chairman the necessary authority therefore (art.35 AISCC Rules) (Mitchard, 1998).

3.5.4.5) Termination of the Arbitration Proceeding (AISCC)

Regarding the AISCC Rules the award must be rendered within six months from the date when the dispute was transferred from the Secretariat to the arbitral tribunal (art.37 AISCC Rules) (Arbitration Rules, 2007). In special cases the Board can extend the period of time. Regarding Article 34 of the AISCC Rules *"the arbitral tribunal shall declare the proceedings closed when it is satisfied that the parties have had a reasonable opportunity to present their cases"* (AISCC [1], 2010).

The final award must state the date on which it has been submitted, must be signed by the majority of arbitrators, unless the parties have not agreed otherwise, and it must state the reasons for the decision. The award must be sent to the parties immediately (art.36 AISCC Rules) (Arbitration Rules, 2007) (AISCC [1], 2010) (Bagner et al., 2006) (Hobèr et al., 2002) (Mitchard, 1998).

"An award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay" (art.40 AISCC Rules) (Arbitration Rules, 2007). The AISCC Rules do not provide any rules or provisions for appeals.

3.5.4.6) Costs of the Arbitration Proceeding (AISCC)

The costs for the arbitration proceeding of the AISCC can be calculated roughly with the help of an online figure on the AISCC homepage[18]. This service shall give the parties a first impression of the costs in total (AISCC [1], 2010). The AISCC Rules distinguish between the fees for the arbitral tribunal, the administrative fees and the expenses of the tribunal and the institute (art.43 AISCC Rules). According to Appendix II of the AISCC Rules the claimant has to pay a registration fee of 1.500 €. The registration fee is part of the administrative fee and will be credited to the advance on costs (art.45 AISCC Rules) (Arbitration Rules, 2007).

[18] See www.sccinstitute.com/skiljeforfarande-2/how-much-is-it-1.aspx

ADMINISTRATIVE FEE
OF THE SCC INSTITUTE

Amount in dispute (EUR)		Administrativ Fee of the SCC Institute (EUR)
	to 25 000	1 500
from 25 001	to 50 000	1 500 + 4% on the amount above 25 000
from 50 001	to 100 000	2 500 + 2% on the amount above 50 000
from 100 001	to 500 000	3 500 + 1,6% on the amount above 100 000
from 500 001	to 1 000 000	9 900 + 0,8% on the amount above 500 000
from 1 000 001	to 2 000 000	13 900 + 0,5% on the amount above 1 000 000
from 2 000 001	to 5 000 000	18 900 + 0,1% on the amount above 2 000 000
from 5 000 001	to 10 000 000	21 900 + 0,14% on the amount above 5 000 000
from 10 000 001	to 50 000 000	28 900 + 0,02% on the amount above 10 000 000
from 50 000 001	to 75 000 000	36 900 + 0,02% on the amount above 50 000 000
from 75 000 001		41 900 + 0,01% on the amount above 75 000 000
		Maximum 60 000

Illustration 6: Administrative Fee according to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Arbitration Rules, 2007)

The arbitral tribunal requests a calculation of the costs from the AISCC Board because they have to be allocated in the award (art.43 AISCC Rules). The Board calculates the final costs with the help of Appendix II of the AISCC Rules (Schedule of Costs) (Arbitration Rules, 2007).

The fee for a sole arbitrator or the chairperson of a tribunal is calculated from the Board with the help of a table, which determines the fee considering the amount in dispute. Co-arbitrators get a lump sum of 60 % of the chairperson's fee (Arbitration Rules, 2007).

ARBITRATORS' FEES

Amount in dispute (EUR)		Chairman of the Tribunal/Sole Arbitrator (EUR)	
		Minimum	Maximum
	to 25 000	2 500	5 500
from 25 001	to 50 000	2 500 + 2% on the amount above 25 000	5 500 + 14% on the amount above 25 000
from 50 001	to 100 000	3 000 + 2% on the amount above 50 000	9 000 + 4% on the amount above 50 000
from 100 001	to 500 000	4 000 + 1% on the amount above 100 000	11 000 + 5% on the amount above 100 000
from 500 001	to 1 000 000	8 000 + 0,8% on the amount above 500 000	31 000 + 2,4% on the amount above 500 000
from 1 000 001	to 2 000 000	12 000 + 0,5% on the amount above1 000 000	43 000 + 2,5% on the amount above 1 000 000
from 2 000 001	to 5 000 000	17 000 +0,2% on the amount above 2 000 000	68 000 + 0,8% on the amount above 2 000 000
from 5 000 001	to 10 000 000	23 000 +0,1% on the amount above 5 000 000	92 000 + 0,68% on the amount above 5 000 000
from 10 000 001	to 50 000 000	28 000 +0,03% on the amount above10 000 000	126 000 + 0,15% on the amount above10 000 000
from 50 000 001	to 75 000 000	40 000 + 0,02% on the amount above 50 000 000	186 000 + 0,16% on the amount above 50 000 000
from 75 000 001	to 100 000 000	45 000 +0,012% on the amount above 75 000 000	226 000 + 0,02% on the amount above 75 000 000
from 100 000 001		To be determined by the Board	To be determined by the Board

Illustration 7: Arbitrator's Fees according to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Arbitration Rules, 2007)

Finally *"the losing party shall be ordered to pay such compensation and costs as well as the costs of the other party unless the circumstances call for a different solution"* (Mitchard, 1998).

3.5.4.7) Advantages and Disadvantages of the AISCC Procedure

The SCC Institute takes all relevant developments of recent domestic and international arbitration into consideration and therewith provides the parties with a maximum of flexibility. The parties can establish an appropriate arbitration procedure for every specific case (Bagner et al., 2006).

Another advantage of the arbitration proceeding of the AISCC is the fact, that the AISCC has adopted the method for fixing the administrative costs and the arbitrator's fees, but the fees are cheaper than these of the ICC (Bagner et al., 2006).

3.5.5) Rules for Expedited Arbitration of the AISCC

An arbitration proceeding under the Rules for Expedited Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce shall lead to a binding solution within three months. Therefore the Institute appoints a sole arbitrator for each case and the parties hand in only one statement (except of the statement of claim and the statement of defence) (AISCC [1], 2010) (Bagner et al., 2006).

This simplified procedure shall be used for the settlement of smaller disputes (AISCC [1], 2010) (Bagner et al., 2006),

3.5.6) Inclusion of Additional Parties

An arbitration clause fixed in a contract is binding for the involved parties, but not for a third party. Because of this there have been discussions in Sweden if an arbitration clause can be binding between a singular successor of one party and the remaining party to an arbitral agreement (Mitchard, 1998). Therefore the Swedish Supreme Court decided in 1997[19] *"that the successor and the remaining party are bound by an arbitral clause in the original agreement unless there are special reasons to deviate from this principle"* (Mitchard, 1998).

3.5.7) Summary

The Swedish construction industry tries to avoid long lasting and expensive court proceedings with the addition of the **simplified method for dispute resolution** to the AB04. This way shall guarantee a quick and acceptable resolution of the dispute for both parties.

On the other hand the AB04 offers the parties, for conflicts with a value in dispute above 150 price base amounts, **arbitration** as the final remedy for dispute resolution, if the simplified method cannot be applied successfully. All other cases with a value in dispute below 150 price base amounts will be solved with **court proceedings**. Therewith the Swedish construction industry leads the parties in cases of disputes to the method for dispute resolution, if they have implemented the AB04 into the contract documents.

Arbitration proceedings can be executed according to the rules of the *SAA*, as the Swedish legislation for arbitration in general, or the parties can agree on a set of rules of an *arbitration institute*, such as the AISCC, alternatively. Nowadays institutes, such as the AISCC, additionally offer alternative rules for expedited arbitration. These regulations shall similarly to the simplified method for dispute resolution of the AB04 guarantee a speedier and less expensive procedure.

[19] 1997, *NJA 1997 p.866*

3.6) Arbitration in the German Construction Industry

The following section shall give an overview of the arbitration procedure in Germany. Firstly a short explanation of the "*Schiedsgericht*" is given and the basis of law is described. The different set of rules and additional arbitration institutions are presented. Furthermore, the arbitration procedure in Germany from the beginning till the end is clarified. Afterwards the inclusion of additional parties to the procedure is explained and the duration and costs are analysed.

3.6.1) What is a *"Schiedsgericht"*? – General Definitions

The code of civil procedure delivers a legal definition for an arbitration agreement stating that: "*Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*"(s. 1029 (1) ZPO).

For reasons of completeness the German definition follows: "*Schiedsvereinbarung ist eine Vereinbarung der Parteien, alle oder einzelne Streitigkeiten, die zwischen ihnen in Bezug auf ein bestimmtes Rechtsverhältnis vertraglicher oder nichtvertraglicher Art entstanden sind oder künftig entstehen, der Entscheidung durch ein Schiedsgericht zu unterwerfen"* (s. 1029 (1) ZPO).

The German arbitration proceeding replaces the legal court completely (Lachmann, 2002). It does not decide about technical questions, but it does decide about the overall lawsuit like a normal court (Ax et al., 2004).

Arbitration offers a legal and fundamental comparable solution to the court of justice with the advantage of skilled and experienced arbitrators which can be selected by the parties (Ax et al., 2004). The arbitral tribunal offers a mix from technical and legal knowledge and is able to judge the dispute without helping instruments (Ax et al., 2004).

3.6.2) Basis of Law

The system of law is divided into public and private law in Germany. Illustration 8 highlights this separation. The building law is located in the public section and belongs to group of special administrative laws.

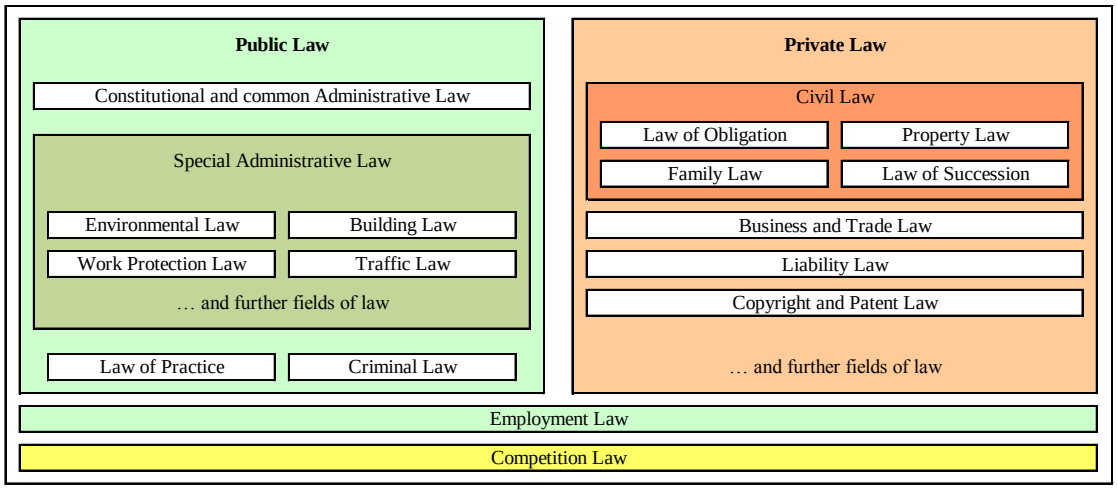

Illustration 8: German system of law (Bezirksregierung Arnsberg, 2007)

When it comes to construction in Germany a standardized set of rules, called *Vergabe- und Vertragsordnung für Bauleistungen (VOB*) (German Construction Contract Procedures) can be used. This set is divided into three parts: VOB/A, VOB/B and VOB/C. Part A describes the awarding procedure for public clients. The next part can be used by all involved parties in the construction sector including a model law. If part B is agreed, all regulations in this part are valid and cannot be excluded. Part C contains additional technical contract conditions (VOB, 2007). The VOB/B can be regarded as helpful and is used very often in Germany. The issue of disputes is dealt with in part B, section 18. Section 18 (3) regulates that it is possible to agree on an alternative dispute resolution which should be done at the conclusion of a contract (VOB, 2007). Neither any proposal which solution method should be used nor which possibilities exist at all. Furthermore, an agreement is not mandatory with this paragraph (VOB, 2007).

The *Schiedsgerichtsverfahren* is based on the 10th book of the German code of civil procedure, section 1025 ff. Additionally several arbitration institutions have published various codes of arbitration containing prefabricated rules (Ax et al., 2004) (Zerhusen, 2005). The most important codes are the SchO, SOBau, SGOBau and since January 2010 the SLBau for Germany. The involved parties are not obliged to follow any procedural rules except the sections 1025 ff. of the code of civil procedure (Englert et al., 2006).

3.6.2.1) ZPO

As mentioned in the history part, the regulations for an arbitration procedure are defined in the 10th book of the *Zivilprozessordnung* (German code of civil procedure). During the last years small changes had to be done as well as the modification according to the currency change (Lachmann, 2002). "*It combines the principle of the parties' contractual freedom with the primacy of arbitration over state court proceedings*" (Kühn et al., 2006). The areas of applications of the ZPO are valid for the national and international arbitration procedure and therewith go beyond the UNCITRAL Model law (Lachmann, 2002). The adjustments done in the ZPO in 1998 accept the arbitration procedure as an adequate procedure, reaching a compulsory

arbitration award and being accepted in front of legal court (s 1054 and 1055 ZPO) (Ax et al., 2004).

The 10th book is divided into ten parts describing all essential parts of an arbitration procedure which allows an easy and fast training with the set of rules. Furthermore, the international standard makes an execution by national parties working abroad possible (Lachmann, 2002).

3.6.2.2) SchO

The German Institution of Arbitration (DIS) publishes the *Schiedsgerichtsordnung* (SchO) and is a registered institution. It originated in January 1992 by an amalgamation of the *Deutschen Ausschuss für Schiedsgerichtswesen* (German Committee for Arbitration, originated in 1929) and the *Institut für Schiedsgerichtswesen* (German Institution of Arbitration, originated in 1974). The DIS is located in Berlin, Cologne and Munich and contains approximately 800 members from Germany as well as from abroad.

The aim of the German Institution of Arbitration is to promote national and international arbitration with the focus on national arbitration (Lachmann, 2002) (DIS, 1998-2010). The German Institution of Arbitration applies themselves in cooperation with other institutions and the German Lawyer Association to further education and training in the area of arbitration (Lachmann, 2002). Additional to other tasks (for example mediation) the DIS offers its own rules for an administrated arbitral procedure valid in the form of July 1998. Due to the change of currency in Germany a new schedule of costs was developed July 2002 and is effective since January 2005.

Every legal entity or natural person that ensures a support of arbitration can become a member of the German Institution of Arbitration. A not fixed membership subscription has to be paid which must not fall below the minimum amount of 200 Euro for natural person and 300 Euro for corporate bodies (DIS, 1998-2010).

3.6.2.3) SOBau

This set of rules is called *Schlichtung- und Schiedsordnung für das Bauwesen* (Rules for Mediation and Arbitration in the Construction Industry) and offers the opportunity to solve disputes without legal court, fast and amicable. It is a conformist agreement for the special requirements of the involved parties in a construction project. The regulations are for clients, contractors and subcontractors, placing their own responsibility on the foreground.

The SOBau is divided into two parts, into arbitration and mediation. The involved parties have to agree upon this code which can be done in parts or as a whole. The speciality of this set of rules is a previous mediation, followed by an arbitration procedure in case of failure. Then the mediator can become the arbitrator in accordance with the involved parties.

The SOBau has been developed by a working group from the Institution of Private Construction and Architecture Law in the German Lawyer Association. It is based on working experiences and represents the knowledge of experts (Ax et al., 2004).

3.6.2.4) SGOBau

"Schiedsgerichtsordnung für das Bauwesen"(Code of Arbitration for the Construction Industry) is the name of these arbitration rules. The SGOBau is developed from the *Deutscher Beton- und Bautechnik Verein* (German Concrete and Construction Engineering Association) and the *Deutsche Gesellschaft für Baurecht e.V.* (German Society of Planning and Buildings Laws and Regulations) (Englert et al., 2006).

The actual set of rules is in force as from July 2005 (SGOBau). The aim of these regulations is a continuous improvement in accordance with the relevant legal position (Englert et al., 2006). The SGOBau receives a higher acceptance in the field of construction because of the closeness to the technical sector that the German concrete and construction engineering association demonstrates, instead of a pure lawyer association (Englert et al., 2006).

3.6.2.5) SLBau

The new *Steitlösungsordnung für das Bauwesen* (Rules for Dispute Resolutions in the Construction industry) was published on January 1st, 2010. It has been established, like the SGOBau, by a co-operation of the German Society of Planning and Buildings Laws and Regulations and the German Concrete and Construction Engineering Association.

The first arbitration code of the German society of planning and buildings laws and regulation was available for the public in 1909. Since 1974 the codes of arbitration are a group project of the two institutions. During the time of July 2005 till December 2009 the code of arbitration was based on three dispute resolutions and was called SGOBau. The new SLBau is a completely new code of arbitration based on four possibilities to solve a dispute which are mediation, conciliation, adjudication and arbitration.

The aim of the institution is the development, the maintenance and the support of construction law as well as an extension of the German, European and International law. Furthermore, co-operations with national and international institutions are planned for the future (Deutsche Gesellschaft für Baurecht e.V.).

The new SLBau can be regarded as a replacement of the SGOBau which is still valid and can be used by the parties.

3.6.3) Procedure of the German *"Schiedsgerichtsverfahren"*

Dispute resolution can only take place if the parties contracted and signed an arbitration agreement and cannot be filed to court if such an arrangement exists (Ax et al., 2004). Furthermore, the legal court cannot transfer the dispute to the arbitral tribunal and contrary (Kühn et al., 2006). The dispute itself cannot be split up with parts being solved by court and by the arbitral tribunal (Lachmann, 2002). An arbitration agreement can be done as an independent agreement or as a clause in the contract documents at the time of the conclusion of the contract (s 1029 (2) ZPO) (Lachmann, 2002). A clause in the contract can be regarded as an independent clause and as a prevention of future disputes whereas the independent arrangement is mostly used when a contract already exists (Ax et al., 2004). Englert et al. and Lachmann

recommend an inclusion of a dispute regulation clause at the conclusion of the construction contract because it can avoid complications when disputes arise. Furthermore agreements about dispute resolution methods are rare after the formation of a dispute. Beside that all involved parties should be subject of a dispute resolution agreement (Englert et al., 2006). Regarding the parties involved in an arbitration arrangement, they are obliged to participate in a co-operative manner and should insist on a fast and successful procedure (Ax et al., 2004).

For the commencement of an arbitration agreement a model arbitration clause, e.g. of the German Institution of Arbitration, can be implemented into the contract documents. The English version of this model clause is: *"All disputes arising out of or relating to the contract (... description of the contract...) or its validity shall be settled ultimately in accordance with the Arbitration Rules of the German Institution of Arbitration (DIS) without recourse to the ordinary courts of law."* (Wagner, 2002)

For the completeness of this thesis, the model arbitration clause in German follows:

"Alle Streitigkeiten, die sich im Zusammenhang mit dem Vertrag (...Bezeichnung des Vertrags...) oder über seine Gültigkeit ergeben, werden nach der Schiedsgerichtsordnung der Deutschen Institution für Schiedsgerichtsbarkeit e.V. (DIS) unter Ausschluss des ordentlichen Rechtswegs endgültig entschieden." (Wagner, 2002)

The regulations of the different institutions as well as the code of civil procedure can be supervised by specific components (Zerhusen, 2005). According to Duve the code of civil procedure already contains complete regulations for an arbitration procedure (Duve, 2007). Additionally, the parties are free to determine their own regulations either based on the code of civil procedure or on a code of arbitration (s 1042 (3) ZPO). According to Ax et al. the code of civil procedure ensures in section 1042 till 1050 a foreseeable procedure without additional agreements from the parties (Ax et al., 2004). Regarding the different codes of arbitration the court can determine additional regulations if the parties have not done that in advance in order to accomplish the procedure (s 1042 (4) ZPO). (Zerhusen, 2005) Englert et al. point out that construction projects are unique and the arbitration agreements should be so as well. They should be worked out for one specific project (Englert et al., 2006).

When it comes to additional agreements the arrangement needs to have constitutional minimum standards and will be ineffective if one party capitalizes its predominance from the beginning (Ax et al., 2004). The regulations have the following valence: (1) Firstly the compelling regulations from the German code of civil procedure, then (2) the personal agreements between the parties, (3) thirdly the not compelling regulations from the code of civil procedure and lastly (4) the rules determined by the arbitration court (Ax et al., 2004).

Section 1042 (1) ZPO ensures the opportunity to present the full case for all parties and an equal treatment of the involved members. This axiom has to be observed through the operation and describes a duty of hearing the parties in the same way as a legal court (Ax et al., 2004). If these principles are not adhered the arbitration award becomes void (Ax et al., 2004).

The code of civil procedure allows the counsel to be an authorized representative in section 1042 (2) ZPO and contradictory agreements are ineffective (Ax et al., 2004). Furthermore foreign attorneys are valid which plays an important role regarding

international projects. Ax et al. state that other codes of procedure do not accept these external professionals (Ax et al., 2004).

Section 1043 ZPO regulates the place of arbitration. The parties are free to have an agreement for the place and if not the arbitral tribunal will decide. Furthermore, the tribunal can, if necessary, meet at an additional different place in order to accelerate the procedure. Regarding the SLBau rules the place where the contract is to be fulfilled should be taken into consideration if the tribunal decides about the place (s 2 (2) SLBau). The SGOBau demands a place for the arbitration that is reachable for all involved parties within the same distance (s 14 (1) SGOBau). Above this, the SOBau agrees on a place including both factors listed before, if the parties have not regulated the place in advance (s 16 (1) SOBau).

In Germany the applicable law, the responsible legal court and the qualification for a domestic or foreign arbitral award depend on the place of arbitration which makes a reference of the place in the contract documents indispensable (Ax et al., 2004).

The language can be determined by the parties of the arbitration procedure as well as the place. In case of a missing agreement the arbitral tribunal decides (s 1045 ZPO). Regarding international projects this point is essential because it allows different languages and does not determine the language to be the same one as the court has (Ax et al., 2004). The SLBau and the SGOBau determine the language to be German unless the parties have not agreed otherwise (s 2 (1) SLBau) (s 13 (1) SGOBau).

3.6.3.1) Commencement of the Arbitration Proceeding

The commencement of the *Schiedsgerichtsverfahren* is regulated by section 1044 code of civil procedure and is defined as the day of receiving a request from the plaintiff solving the particular dispute(s) in front of the court of arbitration. In order to solve a dispute with the help of the arbitral tribunal a statement of claim from the claimant including the supporting facts has to be submitted to the defendant within an agreed period of time. Afterwards the respondent has the opportunity to state his opinion. In addition all important documents should be submitted which might be used by the parties (s 1046 (1) ZPO). The arbitral tribunal will terminate the proceedings if the claimant fails to communicate the statement of claim (s 1048 (1) ZPO). The requirements of the code of civil procedure for this application are the identification of the parties, the subject-matter of the dispute and indications of the arbitration agreement (s 1044 ZPO).

The different codes of arbitration have additional necessities. The SOBau demands the appointment of one arbitrator or the suggestion of one if the dispute should be solved by just one arbitrator. Furthermore, the plaintiff should add a statement of claim according to section 253 of the code of civil procedure (s 14 (2) SOBau). The requirements of the SLBau and the SGOBau are similar to the SOBau, adding an application to solve the dispute in front of the court of arbitration (s 31 (3) number 4 SLBau) (s 2 (3) number 1 SGOBau). Furthermore, the SGOBau requires a suggestion for the amount of arbitrators if this has not been agreed before (s 2 (4) number 1 SGOBau). The regulations of the DIS have to be differentiated. Here the procedure starts when the DIS Secretariat receives a statement of claim from the claimant (s 6.1 SchO). The content has to be as before, but additional information are required. These are particulars regarding the facts and circumstances which give raise to the claim(s), the amount in dispute, the place of arbitration, the language and the rules applicable (s

6.2 and 6.3 SchO). The DIS Secretariat delivers the statement of claim directly to the respondent which can depend on the advanced payment and the amount of statements required according to section 4 DIS (s 8 SchO).

Englert et al. recommend a clear, appropriate and complete statement in order to give a detailed imagination of the procedure to the opponent party to do necessary preparations (Englert et al., 2006). Furthermore, pointless additional documents can be avoided which could create more confusion and maybe lead to other disputes (Englert et al., 2006).

According to section 1031 (2) ZPO an agreement of arbitration is achieved through silence of the defendant after receiving the statement of claim (Ax et al., 2004) (ZPO). The day of receiving the request is automatically the start for interrupting the lapse (Ax et al., 2004). This hindering is in accordance with section 209 BGB.

An advanced payment need to be done in order to activate the court of arbitration (Ax et al., 2004) (s 25 SGOBau). According to the DIS rules the claimant shall pay the administrative fees as well as the advance arbitrator costs according to their schedule of costs within a specific period of time (s 7 SchO). The procedure will end, if the deadline is missed (Lachmann, 2002). The SLBau regulates a payment at the termination of the arbitration unless an arbitrator has to be nominated by the institution which costs 500 € in advance for the party that did not nominate one (s 47 and 48 SLBau). The regulations of the SOBau offer the possibility for the arbitral tribunal to demand advanced payments at every time of the procedure (s 18 (6) SOBau). According to Ax et al. one party can file a statement of claim at the court of justice in case of refusing payments from the opponent (Ax et al., 2004).

3.6.3.2) Selection of the Arbitrators

The amount of arbitrators can be agreed by the parties whereas one or three arbitrators are usual (Zerhusen, 2005). If there are no arrangements the code of civil procedure defines the amount to three arbitrators (s 1034 (1) ZPO) (Zerhusen, 2005). The DIS rules lay down the arbitral tribunal consists of three arbitrators as well, unless the parties have not agreed on something different (s 3 SchO). The other codes of arbitrations define the amount of arbitrators according to the value in dispute. They name three arbitrators, unless the value in dispute is lower than 100.000 € a sole arbitrator is required (s 30 (2) SLBau) (s 15 (1) SOBau) (s 5 (2) SGOBau). When it comes to large construction projects Ax et al. recommend an upgrade to five arbitrators and according to the dispute a suitable mix between lawyers and construction experts (Ax et al., 2004).

The nomination of the arbitrator(s) depends on the amount that was regulated in the contract documents. The two parties have to agree on a single arbitrator when the dispute should be solved by just one. When three arbitrators are scheduled, every party has to nominate one arbitrator. Then these both have to agree on one chairman and together build the arbitral tribunal (Zerhusen, 2005). The code of civil procedure appoints the court for nominating an arbitrator if one party, all involved parties or the selected arbitrators are not able or refuse to (s 1035 (3) ZPO). The different codes of arbitration appoint other institutions and set time limits for the nomination of the arbitrator(s). The DIS allows a 30 day period to nominate arbitrators and another 30 days to nominate the chairman if there are three arbitrators. In case of no agreement the DIS Appointing Committee nominates the arbitrators (s 12 and 14 SchO). The

time limits for the defendant in the SOBau are two weeks after receiving the petition in order to accept or deny the suggested arbitrator. An additional two weeks grace as an extension will start when the defendant refuses action or denies the proposal. If an agreement cannot be reached, the SOBau appoints the president of the *Deutschen Anwalt Verein* (German Lawyer Association) to nominate an arbitrator (s 15 (3 and 4) SOBau). The SGOBau demands the same time limit of two weeks but adds a one month limit after selecting the two arbitrators for nominating the chairman (s 8 (3) SGOBau). In case of disagreement the German Concrete and Construction Engineering Association select an arbitrator which is identical if the SLBau is agreed (s 7 and 8 SGOBau) (s 32 and 33 SLBau).

Another possibility of selecting arbitrators is an early agreement stating a nomination by the court or the institution which can accelerate the procedure. Here the parties do not have to agree and nominate arbitrators within a time limit because they immediately receive an appointment from the institution (Ax et al., 2004).

The selection of the arbitrator is binding when the other party receives a notification about this appointment (s 1035 (2) ZPO) (Ax et al., 2004).

3.6.3.3) Qualification of the Arbitrators

The German law has no regulation about the qualifications for the arbitrators (Ax et al., 2004). Contradictory to this, the codes of arbitration have specific requirements for the chairman and the sole arbitrator. They shall have qualifications to become a judge, which is received after the second state examination (SGOBau, SOBau and SLBau). Regarding the DIS rules these persons should be lawyers (SchO). Furthermore, the SLBau recommend special knowledge in construction engineering, construction business management, construction law and alternative dispute resolutions for the other arbitrators (s 30 (4) SLBau). Englert et al. demand technical understanding, business knowledge and construction law expertise from all arbitrators as the main prerequisite (Englert et al., 2006). Additionally to these requirements the arbitrators should be in charge of human and social competences which are regarded as an important demand for arbitrators (Englert et al., 2006). The arbitrators should be selected according to these demands in order to achieve a fast and correct solution (Englert et al., 2006).

The selected arbitrators should only accept the position, if they are able to work with the procedure draughty (s 15 (6) SOBau). Generally it can be said that every arbitrator need to be impartial and independent, not a deputy for one party, exercising his task to the best knowledge and abilities (SGOBau) (SchO). Supplementary to the qualifications for each arbitrator the relationship between the involved arbitrators plays an essential role in a procedure. Without harmony among the tribunal one party might feel discriminated. The first consultation is an opportunity for the tribunal to become a team and to create distance based co-operation where no one is able to recognize which arbitrator was nominated by whom. Furthermore, the chairman has to create a friendly, open and competent surrounding in order to achieve the best results, a win-win situation for an amicable future of the parties (Englert et al., 2006).

3.6.3.4) Challenge of the Arbitrators

Refusal or exclusion of an arbitrator is regulated in the sections 1036-1039 ZPO and is only possible if doubts about the independence and impartiality exist (Zerhusen, 2005). A party can challenge the arbitrator nominated by him only for reasons that they did not know at the time of the selection (s 10 (3) SGOBau) (s 1036 (2) ZPO) (s 18.1 SchO). The arbitrator has to inform all parties immediately about circumstances that may create doubts about himself and his tasks (s 1036 (1) ZPO).

A challenge of an arbitrator is possible within two weeks after constitution or after one party becomes aware of circumstances according to section 1036 (2) ZPO. The reasons have to be explained to court in written form (s 1037 (2) ZPO). The DIS arbitration rules intend to an announcement to the DIS Secretariat (s 18.2 SchO). If the parties agree on the challenge, the arbitrator withdraws from the task due to incompetence a substitute arbitrator has to be nominated. In this case, the regulations for the nomination of the initial arbitrators are applicable (s 1039 (1) ZPO) (s 18.3 SchO).

3.6.3.5) Execution of the German *"Schiedsgerichtsverfahren"*

Englert et al. recommend for the implementation of the procedure the form of a hearing. If the parties have not agreed otherwise, for instance on communication by writing or via phone, an oral negotiation is the usual case (Englert et al., 2006).

In the sections 1025 ff. ZPO are no demands for a protocol during the arbitral procedure but it can be agreed by the parties. Then the tribunal should do a protocol according to section 159 ZPO with the content of section 160 ZPO. Englert et al. recommend a protocol in order to support the arbitrators and to help finding a suitable solution (Englert et al., 2006).

For carrying out a precise procedure experts can be appointed by the arbitral tribunal if the parties did not agree otherwise. The involved parties may have to provide relevant information to the experts in order to receive a correct statement (s 1049 ZPO). According to Ax et al. experts might not be necessary if the parties select their arbitrators according to knowledge and skills which built an experienced team. Then additional help would not be necessary (Ax et al., 2004). Regarding a sole arbitrator, experts can support them for specific questions and an amalgamation of expert and arbitrator is created. Additionally, a procedure with such a skilled team can save time and money, which are the main advantages of arbitration according to the literature (Ax et al., 2004).

When it comes to the time and place of the process, connected days with open-end negotiation days are the best solution for the agreement of appointment according to Englert et.al. (Englert et al., 2006). Here the parties should spend time together just to solve the dispute and preferable at a place which leaves no opportunity for other tasks. The advantages of this implementation are a single preparation time, continuous occupation with the topic, a possibility to communicate outside the procedure, a single transportation of the documents and a possible faster dispute resolution (Englert et al., 2006).

The order of events within an arbitration procedure should contain different stages. First, a warming up including an introduction of the involved parties as well as the dispute case should be done by the chairman. Afterwards the way of procedure should

be explained. This includes the time limits of the day which gives a detailed imagination of the objectives. The next stage is an essential part and belongs to the main part of the procedure: every party presents its point of view regarding the dispute. If the dispute contains more issues, it should be solved separately. Here enough time should be scheduled and no interruptions of the presentation must be ensured. After this discussion stage a consultation of the arbitral tribunal seems crucial to confer the received knowledge. If no doubts exist afterwards about parts or special issues of the dispute, the procedure can continue with informing the parties about provisional decisions. If otherwise further doubts occur, taking of evidence is required. The aim of this oral negotiation is an amicable settlement or if not possible an arbitral award which is done by all involved arbitrators in a tribunal. This final decision should be done shortly after the negotiation, not longer than three weeks after (Englert et al., 2006).

When it comes to an international arbitration agreement some regulations have been implemented in Germany. If the construction site is located in Germany, a German arbitral tribunal is responsible. Furthermore, German law has to be used if the procedural language is German. The user of an arbitration agreement has to refer to it either in the language of the contract or in English (Englert et al., 2006).

3.6.3.6) Termination of the Proceeding

Every decision made with an arbitral tribunal existing of three arbitrators should be done by a majority of all its members unless the parties agree otherwise (s 1052 (1) ZPO).

If the parties agree on a settlement of the dispute during the arbitration procedure, the arbitral tribunal terminates the process. If demanded by the parties, the settlement can be recorded in form of an arbitral award on agreed items as long as it is in accordance with the public policy (s 1053 (1) ZPO).

The arbitration procedure ends with the final arbitral award according to section 1056 (1) ZPO or by an order of the arbitral tribunal (s 1056 (2) ZPO). The arbitration award is final and binding to the legally valid judgment of the court of justice (s 1055 ZPO). It has to be in a written form and signed by the arbitrator(s) (s 1054 (1) ZPO). Furthermore the award should state the reasons it is based on, the date and place of the decision (s 1054 (2) and (3) ZPO). Furthermore it has be sent to all involved parties (s 1054 (4) ZPO).

The only possibility is a setting aside of the award due to the reasons of section 1059 ZPO by the Higher Regional Court that was nominated in the contract or in whose district the case place is situated (s 1062 (1) ZPO). The arbitration award has to be declared enforceable by court in order to be able to execute the final decision (s 1060 ZPO). According to section 1062 (1) ZPO the Higher Regional Court is responsible for the enforcement of the arbitral award (Boysen et al., 2000).

Termination within an arbitration procedure based on the DIS rules takes place through an arbitral reward that has to be sent to the DIS Secretary and not to the involved parties. Therefore a certified copy has to be sent to the parties (Lachmann, 2002).

Regarding the costs of an arbitration procedure the tribunal allocates the costs between the parties in form of an award. In order to decide, the tribunal should take

the circumstance and the outcome of the procedure into account (s 1057 (1) ZPO). This allocation has to be included in the final arbitral agreement and means automatically the end of the procedure (Ax et al., 2004). On the other hand it is also possible to make an agreement about the payments in advance. Here, the tribunal settles the amount to be borne by each party. If this decision is only possible after the end of the procedure due to unknown costs, an additional and separate award is required (s 1057 (2) ZPO). In most cases this separate award is used because the exact costs are know after the procedure and the tribunal has to number the amount of money which can only be done afterwards (Ax et al., 2004). If the parties have not agreed otherwise the division of the payment is done according to section 91 ff. ZPO within the relation of prevailing and defeating (Englert et al., 2006).

Recourse of an arbitral tribunal can only be done in accordance to section 1059 ZPO. The only successful reprimand is not treating everyone equally (Englert et al., 2006). Through setting aside the arbitral tribunal the arbitration procedure starts new from the very beginning (s 1059 (5) ZPO). According to Englert et al. the parties has to think intensively about such an application (Englert et al., 2006).

3.6.4) Inclusion of Additional Parties

Today's increasing international markets and therewith a growing globalization do not stop at the construction sector. Public Private Partnership, working associations and syndicates including a range of different persons are no scarcity. All these people have various contractual relations to and with each other. That makes it even more difficult in a dispute for the reason that claims can just be enforced against direct parties with a contractual agreement. Normally the arbitration agreement can be seen as a two-party-procedure, involving one dispute party on every side and the neutral arbitrator(s). But disputes may concern more alliances as defendant or as well as prosecuting parties. For example, deficiencies or delays never concern one part of the contract but the complete contractual network (Zerhusen, 2005).

When it comes to a *Schiedsgerichtsverfahren* the condition is the agreement of all involved parties as well as every arbitrator. No one can be forced to this type of procedure (Lachmann, 2002). The procedure can only affect the parties which have an appropriate contract. The SOBau regulates this in §6 and allows the third part an involvement as main or minor party if the others consent (SOBau).

There are different possibilities of participation of the additional involved group. Firstly it has to be differentiated if the system has to be extended afterwards to a multiparty procedure or if another body is bound to the procedure from the beginning If the original contract contains two dispute partners and a third one should join later, all participants need to agree on it which then leads to the extension of the contract. In a case of more contract partners arguing against each other with a suitable regulation before, everyone select one arbitrator. They all together select the main arbitrator. If one party or the arbitrators are not able to select a person, an institution will do so if agreed in the contract. Another possible case contains more groups on one side, forming a union against the other side which can be regarded as a two-party-procedure again. These groups on one side have to find one arbitrator together, who will then find the main one with the arbitrator from the opponent side. The institution can find a suitable arbitrator if the parties are not able to, but it must be regulated as a final solution in the contract before (Zerhusen, 2005).

The DIS arbitration rules regulate the naming of arbitrators in section 13 SchO. This set of rules refers to one side of claimants including more parties and one side of respondent with multiple parties. With the statement of claim the claimants shall jointly nominate one arbitrator. If the respondents are not able to name one arbitrator and transfer this to the DIS Secretary, both arbitrators will be nominated and the naming of the claimants will be irrelevant (s 13 SchO) (Lachmann, 2002).

Regarding all this different constellations it is recommended to have the same arbitration regulations in all the different levels within the project (Zerhusen, 2005). This means if the client has an arbitration regulation with the contractor, the contractor should have a similar, but suitable for this contract constellation, regulation with the subcontractors (Ax et al., 2004). In general it can be said, that the different parties should have agreements with the direct contractual partner. If this is the case all groups can be part of one arbitration procedure and are even able to solve different disputes within one process (Zerhusen, 2005). This can save time and prevent a contradictory decision about the dispute that could happen with two procedures about the same dispute (Lachmann, 2002).

A disadvantage of the additional inclusion is the possible extension of the content (Lachmann, 2002). Furthermore, the main idea of the system is a two-party-procedure, making it difficult but possible to add other groups (Duve, 2007). Even the SOBau regulates this case in a paragraph; it does not offer solutions for the implementation. This seems to be a common problem which is tried to solve in the new section 44 of the *Streilösungsordnung* (code of dispute resolution) from January 2010 (SLBau).

3.6.5) Duration

The duration of arbitration in Germany is hard to determine because there are not many records and statistics for detailed facts (Bösch [2], 1994). The length of a procedure varies and depends on the range and the circumstances. It can be shorter as court especially when there are more than one level of jurisdiction (Zerhusen, 2005). Duve agrees on the possibility of a faster procedure especially if the parties support this (Duve, 2007). On the other hand he states that arbitration can take longer than legal court but only if the parties did not make further and detailed agreements in a contract. With the willingness of the parties and the suitable arrangements the duration can be shorten (Duve, 2007).

Delays within an arbitration procedure can occur when one party takes up a refusing position regarding the election of the arbitrators or the payment of money in advance. Remedial actions can be taken ahead, in the arbitration contract, describing solutions and fixing deadlines for the selection (Zerhusen, 2005).

According to Ax et al. the arbitration procedure has one problem when it comes to the timely aspect: the nomination of the arbitrators. This can be a time intensive method offering the parties the possibility to select the best arbitrators (Ax et al., 2004). Even without any refusing actions and nominations by court or institutions the appointment can last minimum ten weeks before the main procedure starts (Lachmann, 2002). If the parties do not have problems with the nomination of arbitrators because they have agreed on an institutional procedure it is even possible that the institution is overloaded and delays occur (Duve, 2007). This highlights the possibility of court to be faster within the first legal instance (Lachmann, 2002). On the other hand the

arbitration procedure can be regarded as fast after the nomination due to the interest of acceleration of all involved parties (Ax et al., 2004) (Lachmann, 2002).

Another problem can be the scheduling of a jointly date. Here, all involved parties have to take part as well as the arbitrator(s) and a suitable location has to be found which is not the case at court that has fixed dates and locations (Duve, 2007).

Lachmann states that an arbitration procedure needs time to make the right decisions. According to the ICC the average of the duration is two years whereas the DIS listed nine months for the duration in average (Lachmann, 2002). Duve estimates the duration for a procedure between three month and two years (Duve, 2007). According to Lachmann, nine months are not feasible when it comes to complicated cases. Furthermore, Lachmann recommends guidance based on the matter of concern and not based on the statistics of duration. (Lachmann, 2002)

3.6.6) Costs

The costs of a *Schiedsverfahren* depend on many different parameters:

- The amount of arbitrators used;
- Regulations decided by the parties in the arbitration contract;
- The negotiable arrangements for the payment of the arbitrators; and
- The costs of the institutions for the proceeding (Zerhusen, 2005).

Some lawyers underestimate the meaning of the costs because they seem to be unalterable. On the other hand, companies do not agree because of their limited financial possibilities which make them dealing with this aspect (Lachmann, 2002).

Lachmann conducted an investigation about the costs of arbitration. First he compared an arbitration procedure without lawyers with a process at court in the first instance. He found out that court is continuously cheaper regarding the amount in dispute from 50.000 Euro to 10 Mio. €. (Lachmann, 2002, pp. 701-703) The next research compares the arbitration procedure without lawyers with a case at legal court through two instances. Here, it can be said that the arbitration is clearly cheaper than court with two instances in the same amount of dispute as in the first investigation (Lachmann, 2002, pp. 704-707). Thirdly, an arbitration procedure including lawyers is compared to legal court through two instances regarding the costs. The result shows, that these two procedures are comparable with each other regarding the amount in dispute from 50.000 Euro to 100 Mio. €. Concerning the fact that the arbitration procedure has to be declared as enforceable, the procedure becomes more expensive than legal court (Lachmann, 2002, pp. 707-710).

Additionally Lachmann states that when it comes to high amounts of dispute, the institutions can offer advantages regarding the costs. The fees for the arbitrators of an ad-hoc procedure can be determined by the difficulty and the required time of the case which can keep the amount of money low (Lachmann, 2002). Duve proposes a reduction of the arbitrators to just one, a procedure without lawyers, a limitation of the hearing of evidences and a negotiation of the payment for the arbitrators as possibilities to reduce the costs of an arbitration procedure (Duve, 2007).

Lachmann comes to the conclusion that against many comments the arbitration procedure is not cheaper than legal court and is only justified when arbitration offers much higher quality than court (Lachmann, 2002). This higher quality can be reached

through the selection, availability and the technical know-how of the arbitrator(s) (Duve, 2007). Furthermore, Lachmann considers the costs for cases with low amount in dispute as high and thereby recommends not to solve the dispute with three arbitrators but to find other reasonable possibilities. On the other hand Lachmann explains that costs are not the only criteria to select a suitable procedure (Lachmann, 2002).

3.6.7) Summary

In the German construction industry no prescriptions for solving disputes are mandatory. It is up to the involved parties to make suitable agreements either with the conclusion of the contract or at the time of an arising dispute. Regarding arbitration, the German code of civil procedure offers guidance and regulations which can be agreed for an arbitration procedure. Furthermore several institutions provide rules and standards as well as arbitrators.

A dispute can only be solved if an appropriate arbitration contract exists and the parties agreed on it. The duration and the costs of an arbitration procedure depend on many issues and cannot be defined in detail. In many cases the time can be regarded as shorter to legal court whereas the costs might be as high as in litigation.

A problem in Germany seems to be the inclusion of third parties. No one can be forced to an arbitration procedure without a contractual declaration. But many parties are involved into a construction project with different contracts on the other hand.

3.7) Setting Up the Expert Interview

This chapter describes the procedure of expert interviews which have been conducted for this master thesis. First the type of data collected and the gathering of it will be explained. Furthermore, the undertaking of the expert interviews is described as well as the target group for the questionnaire. Finally suitable methods for the analysis and evaluation of the data are explained and described.

3.7.1) General Information

In the theoretical framework, arbitration in Sweden and Germany has been investigated. Among other things the differences of contractual regulations were highlighted. In Sweden a regulation for arbitration is set up in the AB04 whereas Germany does not have any comparable legal regulation. The reason for this distinction should be explored in detail with the help of experts with sufficient experience and expertise. Furthermore, the reasons for a rarely use of arbitration in Germany are tried to find out. Supplementary the inclusion of additional parties should be examined. On the other hand the implementation and the acceptance of the regulations offered in the AB04 among the experts in Sweden should be analyzed. Furthermore the interviewees should compare litigation with arbitration according to their experiences. In addition the effectiveness of the procedure is tried to figure out.

3.7.2) Data and the Collection of Data

Before the selected data can be explained and analysed, the type of data and the procedure of collecting it has to be described. There are two possible forms of research as well as two ways of collecting the data. The type of data can on the one hand be the quantitative or the qualitative research. The information gathering can be done through the help of questionnaires or interviews on the other hand. (Räisänen, 2008) The following part describes the different possibilities and explains the selected one for this master thesis.

3.7.2.1) Data

Naoum defines the quantitative research as "*an inquiry into a social or human problem, based on testing a hypothesis or a theory composed of variables, measured with numbers, and analysed with statistical procedures, in order to determine whether the hypothesis or the theory hold true*" (Naoum, 2007). Furthermore, the quantitative analysis can be described as "*a numerical presentation and manipulation of observations for the purpose of describing and explaining the phenomena that those observations reflect*" (Babbi, 2007).

This type of research is an objective form including measureable variables (Räisänen, 2008). It is used when specific information about subjects or problems or an examination of hypotheses or theories has to be found (Naoum, 2007). It is based on factual questions, focused on verifiable information (Mayntz et al., 1978) and the research method is outcome orientated (Räisänen, 2008).

The qualitative research is subjective, emphasises meanings and experiences and is used for the purpose of finding alternatives and new possibilities as well as valuing

situations (Naoum, 2007). Here, questions about opinions are used to develop the meaning of the experiences of the respondent (Mayntz et al., 1978) (Kvale et al., 2009). The research method is process orientated and leaves space for interpretations (Räisänen, 2008). Babbi defines this type as "*a nonnumeric examination and interpretation of observations, for the purpose of discovering underlying meanings and pattern of relationships*" (Babbi, 2007).

Within this master thesis the opinion of the respondent is important as well as their personal point of view. The research is done without converting the data into numerical format but rather to create interplay between the theoretical framework and the data collection (Babbi, 2007). This is why the qualitative research method was chosen as the appropriate method for this master thesis.

3.7.2.2) Collection of Data

After defining the type of research the procedure of collecting data has to be described. There are two different ways of conducting this. Firstly the postal questionnaire and secondly the personal interview (Naoum, 2007). Mayntz et al. differentiate the groups into oral and written procedure (Mayntz et al., 1978). Here, the interview will be regarded as an oral investigation and the questionnaire as a written one. Furthermore, Mayntz propose groups or individual methods for collecting the data. Within this master thesis only individual procedures are used because the research is based on personal opinions.

The advantages of a questionnaire are a wide geographic coverage which allows more answers in a limited time frame to a minimum of expense and resources (Naoum, 2007). Especially an online questionnaire offers the possibility of a huge range of respondents without being work intensive and expensive. The anonymity of a questionnaire is much higher than in a personal interview and the interviewer is not able to be influenced by the appearance of the opposite which lead to a neutral analysis (Nachmias et al., 2005). On the other hand the response rate might be low and leaves no possibility to intervene into the situation (Nachmias et al., 2005). Furthermore it cannot be controlled if the right person answers the questionnaire in order to receive valuable answers. Other disadvantages of a questionnaire are the final answers which leave no flexibility for clarifications as well as misunderstandings of complicated and difficult questions (Naoum, 2007).

Interviews as a method for collecting data will not offer such a high amount of answers in a fixed time as it is possible with a questionnaire but offer other possibilities. These are, a greater control over the interview as well as flexibility in the process (Nachmias et al., 2005). Compared with the questionnaire the response rate is high because an interview is a face-to-face situation. On the other hand these meetings are time and cost intensive and offer no anonymity which can lead to personal influences of the interviewer (Nachmias et al., 2005). Interviews can have different degrees of standardization in the range of unstructured interviews to structured interviews (Naoum, 2007) (Mayntz et al., 1978).

Regarding this master thesis both ways of data collection had been done which can be justified by the reason of geography. Personal interviews have been conducted in Germany due to the location of writing. The respondents from Sweden had been offered different possibilities for the collection of data. For the reason of distance the possibility of answering a questionnaire, sent by mail, had been chosen by the

involved persons. This gave the possibility to continue working from Germany without travelling. The questionnaire for the respondents in Sweden contains questions that would have been asked in a face-to-face interview and is rather regarded as an interview than a questionnaire. This form of collecting data can be regarded as structured because the questions are in the same order and have identical wording. On the other hand the questions used for a personal interview in Germany had not been used in the same order and wording rather than leaving space for comments and opinions of the respondent. The questions asked had been used for guidance and detailed information.

3.7.3) Target Group

3.7.3.1) Selection Criteria

For an interview just a specific field of interview partner is worth considering. These are the responsible people on the construction site working together and maybe handle disputes that arise, focusing on clients and contractors. Furthermore, people that work with the procedure of arbitration or had been used as an arbitrator before are possible respondents for this topic. Based on the comparison of Sweden and Germany these experts should have experiences either in one of these countries or preferable in both.

3.7.3.2) Selection of the Target Group

In the part sampling, the character of the respondent are selected. There are two types of sampling: random sampling and selected sampling (Naoum, 2007). Random sampling describes the respondents are chosen freely and some characteristics such as background and type of work are not important. On the other hand within a selected sampling the respondent is chosen because of requirement useful for the special field of research (Naoum, 2007).

Within this master thesis the interview partners have been selected carefully and a special group of people has been designed before in order to receive qualitative comments and answers that are useful for the evaluation of this research.

As mentioned before, the selected groups include people working as clients or contractors in construction projects and lawyers, arbitrators or person from constructional institutions.

The group of clients and contractors have been selected based on the size and experience of the company. It was tried to contact larger companies in order to find respondents with experiences in Sweden and Germany.

Regarding the people with law background it was important that they are specialist in the field of construction and that they are already experienced. It has been tried to contact bigger institutions and companies, hoping to meet people with experience from abroad as well.

During this selection phase it had been important to get in contact with the selected people and then to stay in touch with them easily. The decision of the participation was of free choice of the respondents.

3.7.3.3) Size of the Target Group

Based on the decision of interviews rather than questionnaires, a smaller amount of respondents had been accepted than it could have been with the help of a questionnaire. On the other hand detailed information from specialist in this specific field had been selected and analysed which lead to a linkage of the theory with the collected data.

Additionally time limits for this work made restriction for the amount of interviews as well as economic aspects which lead to a kind of questionnaire for the experts in Sweden.

3.7.4) Interview Execution Methods

In order to accomplish the interviews, questionnaires with possible asked questions had been developed. A separation into different sections, going from more general to more detailed information about arbitration and then about the two countries, can be regarded as useful.

There are two possible forms of questions to design a questionnaire: the open und closed question. The open question allows an open response whereas the closed ones require a specific respond or offer a choice of possible answers (Naoum, 2007).

The aim of this research is to explore the point of views of the experts which is mainly done with open questions in the questionnaire. The negative aspect of this choice is the possibility of the respondent to drift off the topic which can be solved by further question or comments to come back to the important points.

3.7.5) Questionnaire Construction Methods

The aim of the questionnaire was to explore the point of views of the different respondents in their different fields of activities. In order to evaluate the data, the answers need to be comparable with each other. This is done with the help of the questionnaire for the interview which is divided into different parts. Here, five parts had been selected with questions getting more detailed through the questionnaire.

The questions for the different fields of activities, such as client, contractor and advocates do not differentiate completely. The questions are designed according to their working area and their position. The questionnaire for Sweden contains more detailed questions about the procedure of arbitration in Sweden whereas the German investigation includes more specific questions to the German procedure.

The questionnaires are attached to this master thesis in the appendices.

The different parts of the questionnaire are explained shortly below:

- Part 1: General Information

The first part should provide general information about the respondent and the field of work within the company. With the help of this section an easy lead-in to the topic should be reached and the position, from that the respondent's further answers are based on, can be extracted.

- Part 2: Construction Disputes and the Settlement of Dispute

The personal opinion about disputes and reasons for their origins are tried to find out in this chapter. Furthermore, the role and behaviour of companies within a dispute as well as litigation as a possible dispute resolution method are investigated.

- Part 3: Arbitration

This part should deliver information about the procedure of arbitration and can be regarded as the main section of the questionnaire. Advantages and disadvantages, the outcome as well as different forms of arbitration are tried to discover. Due to the fact of different regulations in Sweden and Germany an additional part was added according to the country in which the questionnaire was used. Here detailed information of the procedure within this country should be explored. In Germany questions about the different codes of arbitration are asked whereas the Swedish questionnaire contains comments about the Swedish Arbitration Act and the AB04.

- Part 4: Arbitration in Sweden and Germany

In this part the experience of the respondent in the two countries are tried to detect. Here, differences in the procedures as well as construction industries and reasons for that are tried to figure out.

- Part 5: Practical Experiences

This section is only part in the German questionnaire because a case regarding arbitration in a German construction company was known and details had been tried to find out. Furthermore, mistakes in Germany about the implementation of arbitration are tried to discover due to the seldom use of arbitration in the construction industry.

3.7.6) Data Evaluation Methods

After carrying-out the interviews and receiving the written answers from Sweden an investigation and analysis of the data need to be done. Based on a small range of respondents and answers reflection an opinion, a statistic method is not used to evaluate the data. The statistic method would not deliver reliable results and would not reflect the complete Swedish and German construction sector. The research in form of personal interviews let to different answers from every respondent which might not be identical with the question. Based on these facts, the evaluation needs to be done in form of a report, analysing every response in a summarized form. A summed up report is used because of the anonymity, providing the certainty of not recognising the respondents on their wording and expression.

After receiving the questionnaires, the answers have to be prepared in order to be understood. The main statements have to be highlighted in every section in order to deduce results. With the help of the summarized report the answers are not falsified and can be presented in a comprehensible way.

IV) **Results**

The evaluation of the facts from the expert interviews will be part of the following section. At the beginning of this section the participation rate will be described. Afterwards the procedure of the codification of personal data will be explained. The evaluation of the questions follows thereafter and will be done according to their thematic blocks. A summary of all thematic blocks will be the end of this section.

4.1) Rate of Participation

As many interviews as possible should be held for this master thesis. With a higher rate of participation a broader overview of the opinions of experts and people working in the area should be possible. However, not all persons requested could take part in the consultation. On the one hand this can be justified with busy time schedules of the companies, who simply did not make time for interviews, whereas on the other hand people simply did not want to take part in an interview concerning dispute resolution methods. For all efforts those interview partners did not want to take part because the company name should not be mentioned in connection with construction disputes or no information about company secrets should be given, despite the assurance of absolute anonymity.

CO3 and CO4 have been interviewed to gain knowledge about the opinions and the experiences of German students or graduates respectively working in Sweden and applying Swedish regulations. Therefore the interviewees seemed appropriate due to the fact that they have studied in Germany and are now working for a German construction company at a major infrastructure project in Sweden.

In the end eleven interviews could be conducted. The distribution is as follows: four clients, four contractors and three advocates. The total number again shows that the information gained in those interviews can only be a trend analysis and the transformation can only be done under reservations.

4.2) Codification of Personal Data

Personal data as well as data concerning companies shall be made anonymous due to the fact, that answers shall not be attributed to the interviewees. Furthermore it can raise the probability that the interviewees may give more “open” answers, speak about others or reveal secrets.

For those reasons synonyms will be used to make the personal data anonymous. Therewith answers can be attributed to different interview groups and differences between answers of certain thematic blocks will not be garbled.

The breakdown of the different synonyms is as follows:

a) <u>Clients</u>

- CL1: *Project manager in a major Swedish municipality, building engineer, B.Sc.*
- CL2: *Technical Director of the German subsidiaries of an international operating real estate advisory company in Germany. The company offers*

professional and independent specialist consulting to the real estate sector, in particular in the fields of valuation and property consulting services. Furthermore CL2 is responsible for projects abroad, in particular in Eastern Europe. Before that CL2 worked as the technical director of a project development association in Germany. Dipl.-Ing. (FH)

- CL3: *Project manager in a major Swedish municipality, civil engineer, B.Sc.*

- CL4: *Controller in a major Swedish municipality, controlling of procurement documents, business Developer*

b) Contractor

- CO1: *Lawyer in the legal department of a leading German construction company with projects worldwide, specialized in construction law, main field of activity is the resolution of disputes overseas, law studies in Germany, PhD*

- CO2: *Trainee in a leading German construction company with projects worldwide, master student, doing an internship at a major infrastructure project in Sweden, main field of activity is the supervision and preparation of activities for the grouting process, studies in Germany, B.Sc.*

- CO3: *Trainee in a leading German construction company with projects worldwide, writing his diploma thesis at a major infrastructure project in Sweden, main field of activity is the supervision of the grouting works, works closely together with the client, studied in Germany and South Africa*

- CO4: *Project developer for a leading Swedish construction company, specialized in construction management, construction project development and construction law, M.Sc.*

c) Advocate

- AD1: *Managing director of a national association of the German construction industry, honorary professor for construction law at a German university of applied sciences, former director of the legal department of the German federation of the construction industry, honorary assessor of a public procurement complaint board, PhD, lawyer, civil engineer (Dipl.-Ing.)*

- AD2: *Senior Associate in a leading Swedish business law firm, visiting lecturer at a technical university in Sweden for construction law, member of the Swedish bar association, main field of activity in representing clients within dispute resolution and arbitration, Attorney in Law,*

erstwhile working for the legal counsel of the Swedish Construction Industry, LL.M., studies in political science, languages and law

- AD3: *Associate in a medium-sized German law firm for professional clients with domestic and international projects, head of the department for real estates, specialized in construction law, in particular into real estate law, lawyer of a German municipal development society, professional experiences in the field of real estate investment management, law studies in Germany, PhD*

4.3) Results of the Expert Interviews

The results of the different expert interviews are attached according to the different interview groups in the appendices of this master thesis[20]. The questionnaire can therefore be seen as a guideline for the interview. In reason of that, answers can go beyond the subject of the question itself. For reasons of clearness the answers were tried to assign to the matching question.

4.3.1) Part 1: General Information

The first part of the questionnaire can be seen as an introduction into the topic. In chapter 4.2 the interviewee and the company of the interviewee have already been presented. Therefore the customers or the contractors respectively and the contractual relationships will be specified in this section. Those information are important to be able to analyse the answers of the interviewees in context of their everyday work in the right way.

- CL1 works as a project manager in a major Swedish municipality and is in charge of construction projects. At the beginning of his career CL1 has worked as a building engineer on site. Thereafter CL1 has worked as a consultant whereas he now operates on the client's side. CL1 works together with consultants, contractors and the users. CL1 is in charge of approximately twenty construction projects annually.
- CL2 works together with different partners such as investors, architects, planning offices, experts and open and closed funds. The tasks are property services where this department is responsible for technical and environmental technology utilities, monitoring, quality control and project management in building, rebuilding and tenant removal. Further responsibilities are documentation management, energy cards and help in case of problems during the construction e.g. bankruptcy of the client. A rough estimate of the projects CL2 is in charge was 25 annually and the approximation for the annual dispute rate was 5.
- Schools and Preschools belong to the duty as a project manager in a major Swedish municipality for CL3. He started his professional career in a construction company before he started working on the client's side. CL3 is educated as a civil engineer and works together with contractors and

[20] See Appendices Page: 82

consultants as well as with the tender authorities. Altogether CL3 is in charge of approximately twenty construction projects per annum.

- CL4 works in the field of building processes and develops quality processes. Furthermore CL4 works with procurement tasks in a major Swedish municipality. Before that CL4 worked in the field of planning processes. In approximately twenty construction projects CL4 takes part yearly and works together with architects, engineers, construction project managers and builders.
- CO1 is an employee of the law department of a leading German construction company. For this reason CO1 is in contact with the client as well as with the subcontractor within Germany but also abroad. CO1 is a specialist for disputes in foreign countries but sometimes takes care of national disputes. Annually CO1 is in charge of some hundreds dispute cases which, multiplies by 35 employees within the department, leads to the overall number of disputes of the company.
- At the moment CO2 writes his diploma thesis at a major infrastructure project in Sweden. He works for the contractor and stands in contact with the client.
- CO3 works as a trainee for the contractor at a major infrastructure project in Sweden. In addition he has to work with the team of the client.
- Usually CO4 works in the field of project development. There, the development of business opportunities and the management of current projects belong to his functions. In the future CO4 will work as a property manager in a Swedish municipality. Currently CO4 is involved into three till four construction projects annually.
- AD1 mostly works together with construction companies which are member of the national association AD1 is working for. Most of the cases cover national issues. AD1 provides these companies basically with jurisdictional advices in questions of construction law, standard business conditions or contract law. There is no charge for the legal advice for members. AD1 could not give a number of cases he is dealing with during a year, because it is difficult to define where a construction dispute really starts.
- The main tasks of AD2 are representing clients and contract drafting. The clients are mainly person that order building works from a contractor and which need to be represented within dispute resolutions and arbitration. Annually, AD2 deals with 5-20 construction disputes which as well reflect the amount of construction projects AD2 is in charge of.
- The clients of AD3 are professional clients which have their basic field of activity in the construction industry. This can e.g. be municipalities or investment groups. The projects AD3 is involved in vary from client to client. According to a rough guess of AD3 30 – 40 per cent of the construction disputes end with litigation.

4.3.2) Part 2: Construction Disputes and the Settlement of Disputes

In the second part of the questionnaire the interview partners were asked about their general opinion of the high potential for disputes especially in the construction

industry and in which way this can be noticed in their company. Furthermore they were asked about their opinion about judicial court proceedings and how they do experience them or how they have experienced them in the past.

- CL1 sees the cardinal reason for disputes in the construction industry in the battle for prices. According to his opinion all the involved parties want to save and earn money at the same time. Additionally CL1 highlights that the contractor mostly wants to get more money for what was specified in the tender documents and that therewith big discussions occur. In 2009 CL1 has been in contact with two construction disputes, whereas in 2010 he has not been part of a dispute so far. Furthermore CL1 adds that the amount in dispute is often not really high and that construction disputes are conciliated rarely in front of court. Concluding CL1 states that the ultimate ambition should always be the preventative of disputes.
- CL2 clearly states that the reasons for disputes are different opinions between the client and contractor as well as contractor and subcontractor about the interpretation of the work agreed on in the contract documents and timely problems. Regarding the value of money of the dispute in relation to the construction costs CL2 had a case of 10% which can be regarded as exception whereas 1-2% of the construct costs can be regarded as normal for the value of money of the dispute. CL2 does not see the procedure at court as effective which reflects the statement that no disputes are solved with the help of legal court regarding the current work place of CL2. As reasons for this CL2 names the long duration which is not suitable at construction where timely closed decisions are required. Based on this CL2 always tries to avoid disputes which can only be done if the potential of a dispute is recognised in advance. For prevention CL2 tries to talk to the involved parties after convincing the own employees to find a suitable solution.
- Regarding the opinion of CL3 the involved parties only want to deliver what they have calculated. They try to fight for their money, if they will find gaps or if they shall deliver something different from what was agreed on. CL3 does not have any construction disputes in his projects, apart from smaller issues. Because of that the disputes CL3 is in contact with can mostly be settled before a party would take the case to court. Litigation is only effective in construction disputes if it is really needed according to his opinion. Furthermore CL3 declares that it should always be tried to avoid disputes.
- CL4 states that in most cases the contractor is looking for more money that might be warrantable due to design mistakes or uncertainties. CL4 has studied several disputes because of the work with procurement details, but on the other hand is personally not involved into construction disputes. In most cases the conflict is solved before a party takes the issue to court according to the opinion of CL4. Additionally CL4 reminds that most court cases in the construction industry are about aspects, such as built environment, rather about execution mistakes. Furthermore CL4 says that court proceedings can be efficient as well, but that standard agreements and separate settlements are worth aspiring. The real disadvantage of dispute situations is the loss of time and the expenditure of time according to the opinion of CL4. To that effect CL4 advises that all guidelines, agreements and standard documents should be

made so clear, that project managers will not have any problem working with them.

- According to the opinion of CO1, 95% of the reasons for disputes are defects, deadlines and payments which are also the disputes CO1 deals with. Regarding Germany, CO1 states that 30% of the disputes end at legal court whereas just 5% of all disputes abroad have their ending with the help of litigation. Regarding the effectiveness of court CO1 has the opinion that in Germany as well as abroad the court case is not the right solution for disputes in the construction industry which can be justified by the duration of the procedure. On the other hand CO1 makes clear that legal court could be more effective in Germany. An interesting point CO1 states regarding the recommendation of arbitration, is the fact that all disputes are solved at court and arbitration is not recommended. The reason for this is the inclusion of additional parties. In the position of a contractor there is always the client and the subcontractor that have to be involved into the solution finding process. Within arbitration a third party cannot be forced to participate whereas the legal court procedure offers this possibility. For arbitration procedures contractual regulations are required which cannot be forced from the parties. Construction contract relationships are mostly complicated and require the inclusion of additional parties. CO1 declares that three involved parties require the help of litigation for the solution finding. At the end CO1 wishes a routine which could solve all disputes.
- According to the opinion of CO2 delays, disputes about contract clauses, mistakes done in the design, execution mistakes and insufficient tender documents are the main reasons for disputes in the construction industry. Regarding the resolution of disputes CO2 does not have any experiences, neither with court proceedings nor with arbitration. From his point of view taking a dispute to court should only be the last resort to solve problems. Regarding the resolution of disputes CO2 brings up an interesting aspect. A kind of a co-operation has been installed between the client and the contractor on the major infrastructure project to prevent disputes. Neutral members, which are not directly involved into the project, from both parties are grouped in a board. That board meets on a regular basis and has been installed to discuss issues and prevent major disputes in advance.
- CO3 stands at the beginning of his professional career and cannot give any numbers for construction disputes that end with litigation because of that. But from his point of view, disputes often have their roots in a lack of communication and in an insufficient description of the project. According to his opinion most of the disputes are about discrepancies about the work done from the contractor, with which the client is not satisfied. CO3 would avoid court proceedings in any case due to the enormous costs. Supplementary he thinks that a better communication between the parties in dispute could solve 99 per cent of all disputes.
- Construction disputes are rooted in delays, misunderstandings and incorrect results according to the opinion of CO4. Furthermore CO4 adds that other industries which sell completed products can avoid those conflict situations better than the construction industry can do so. In most cases CO4 is in contact with disputes that arise of delays. But presently he does not deal with any

dispute. Supplementary CO4 states that almost all disputes can be regulated with the contract documents and that he therewith tries to avoid conflicts. Finally CO4 does not regard litigation as effective when it comes to disputes in the construction industry.

- Regarding the opinion of AD1 money and different views on certain topics between the client and the contractor are the most relevant reasons for construction disputes. Additionally he mentions defects, insufficient risk analyses and inadequate quantity descriptions as causes for disputes. Far above 90 % of all construction disputes can be solved without litigation according to his opinion. But this is just an estimated feeling. Quite contrary to that he sees the German court procedure as totally unqualified and not effective at all for the resolution of construction disputes. Court proceedings are long-lasting procedures with an unsatisfactory end for the parties. In almost all cases one party is not pleased with the result and appeals the decision in front of the next higher level of jurisdiction. Therefore a court procedure swallows up a lot of money for legal fees and costs. At the end most cases are solved with a compromise settlement which could have been reached far earlier. Court proceedings up to the level of the Higher Regional Court can easily persist 6 – 7 years. AD1 sees the reasons therefore in the lacking expertise of the judges on the one hand and the implementation of expert's reports on the other hand. The problem with expert's reports is according to his point of view the high expenditure of time which is necessary for the preparation of it and the aspect that the opposing party mostly tries to appeal against it. AD1 advises his clients to avoid court proceedings if possible, because they cannot be conducted economical for both parties. Furthermore he states, that court proceedings reach a judgment but do not achieve justice.
- The reason for disputes in the construction industry are, according to AD2, unclear documentation and contracts, unforeseen incidents on site, lack of communication during the project and financial difficulties. These kinds of disputes are mainly the impacts AD2 works with. AD2 clearly states that the court procedure is not an effective dispute resolution method which reflects the issue that most of the disputes involving a substantial amount are solved by arbitration. On the other hand, disputes involving a less amount are usually solved by court. In order to avoid disputes, AD2 tells the involved parties that within the construction industry things are seldom black and white which leaves space for settlements.
- Discrepancies about the contractually agreed scope of construction works between the client and the contractor are the major releases for disputes according to the opinion of AD3. Furthermore he mentions defects as releases for disputes. AD3 has mixed experiences with legal court proceedings. On the one hand court proceedings are dependent on the knowledge and the competence of the judge. Whereas court proceedings are long-lasting processes on the other hand and unnecessarily bind resources that could be used much more valuable for the development of new projects. However, AD3 would always recommend his clients not to take disputes to court. He tries to realize that by weighing pros and cons together with his clients. In most of the cases it is really helpful that the clients are professionals and can fade out feelings and emotions according to the opinion of AD3. Additionally he brings

up the point that the decision to take a dispute to court is always a decision of business.

4.3.3) Part 3: Arbitration

This part deals with the procedure of arbitration. Questions about their personal experiences with arbitration as well as questions about the advantages and disadvantages of arbitration were asked. Additionally questions about the German procedure have been asked in particular in a subsection of this section.

- CL1 does not have personal experiences with arbitration, but would always prefer alternative dispute resolution methods which prevent a conflict between client and contractor in front of court. Furthermore CL1 is not familiar with the different forms of arbitration; neither does he know alternative dispute resolution methods which might be more effective than arbitration. Court proceedings are not good for both parties according to his opinion. Additionally CL1 adds that most parties that have been involved in arbitration proceedings he knows, are mostly satisfied with the final outcome. CL1 is quite satisfied with the methods offered in the AB04 and would prefer those regulations in the worst case. In connection therewith CL1 is not familiar with the Swedish Arbitration Act or with the AISCC.
- Even CL2 did not use the procedure of arbitration CL2 solved disputes with the help of experts. This is the reason why the regulations of the institutions, regulations for arbitrators and the different forms of arbitrations are not known by CL2. In difficult cases a dispute was solved through a proposed agreement to add an expert. Afterwards regulations between the parties where done about the appropriate expert, the payment and that this decision is binding for the involved parties. With this regulation and the try to solve the dispute before through solution finding, CL2 ensured that up to now everyone was satisfied with the result of this procedure. The advantage of arbitration compared to court defines CL2 as faster because of only one instance. Regarding construction processes no one can afford an interruption. CL2 explained that regulations for arbitration in Germany could be placed in the VOB but CL2 would not use it if the others method are still successful. Furthermore, CL2 would not like a regulation that express a forcing action to use arbitration On the other hand CL2 clarifies using arbitration would offers other solution possibilities before the final court procedure. CL2 sees the reason for the rarely use in Germany in the complexity of the daily business for smaller companies. In order to keep working many other important fields e.g. taxes, working conditions, social rights need to be managed. The reason for no regulation in the Germany construction contracts sees CL2 in the differentiation of the working fields. A lawyer should still be able to do his work.
- CL3 does not have any personal experiences with arbitration proceedings and does not know how many construction disputes are solved with the help of arbitration in Sweden. The major advantage of arbitration according to his point of view is that the parties try to find a solution conjointly. Therefore meetings are much more helpful than litigation. Court proceedings would just make the approach to solve disputes complicated. A better communication on

management level can often solve disputes in advance and is according to the opinion of CL3 a possible way of alternative dispute resolution. Furthermore CL3 says that directly after the settlement of a construction dispute the parties are mad, but after a while they usually are pleased with the outcome. The solutions of the AB04 regarding the number of arbitrators suit the opinion of CL3. Supplementary CL3 adds that the ad-hoc arbitration proceeding can be compared with the way of solving problems in the day-to-day work, whereas complicated projects should definitely be solved with the help of advocates. The permanent arbitral tribunal during the construction phase is not familiar to CL3 and does not exist in Sweden according to his opinion. Finally CL3 states that the procedure of the AB04 described in chapter 10 is the most common way of solving construction disputes in Sweden. According to his opinion the procedure explained in chapter 10 works, but has the difficulty to implement guarantees of the project. Regarding chapter 9 of the AB04 CL3 sees also that it works, but that here the sum of money which should be concerned is problematic. Supplementary CL3 thinks that the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry. The AISCC is familiar to CL3 and as a conclusion CL3 states that the procedure offered in the AB04 is appropriate for the resolution of construction disputes in Sweden.

- CL4 is convinced that court proceedings are good when it comes to dispute situations about principles, but not when the subject-matter is about the project execution itself. Furthermore CL4 states that the municipality always uses standard contracts, such as the AB04, and because of that uses the predefined way with arbitration as the dispute resolution remedy. The advantages of that is a defined process with less costs according to the opinion of CL4. In addition CL4 advises to implement experienced experts to represent one. Due to the use of standard contracts there are seldom alternative ways of dispute resolution because of what CL4 does not know anything about other appropriate methods of dispute resolution. Supplementary CL4 adds that the regulations of the AB04 are functional and therewith fit to the construction business. The permanent arbitral tribunal does not exist in Sweden according to the opinion of CL4. Furthermore CL4 declares that the institutional form is not common in Sweden. Usually disputes are settled on the project basis. On the other hand there also external experts who can assist solving disputes, but therefore they have to be independent. Concluding CL4 says that there are three levels of solving disputes in a project: First of all the involved parties try to solve the problem on their own. Secondly external arbitrators solve the dispute in large projects and then, finally if nothing works the case is taken to court. But CL4 adds that the problem is mostly solved at the arbitration stage, as stated in the AB04. Concerning the regulations of the AB04 CL4 likes the aspect that those regulations are already implemented in the standard contract and because of that everybody knows the rules. Therewith the AB04 is sufficient as a guide according to the opinion of CL4 and is simple enough to even solve smaller disputes. In comparison to that CL4 says that court proceedings are time intensive and often cost much more than arbitration proceedings. The Swedish Arbitration Act of 1999 is seen as a major basis of the AB04 by CL4 and the AISCC is also known to CL4, but concentrates more on business conflicts according to CL4.

- CO1 mentioned many advantages as well as disadvantages. The positive aspects of arbitration are more competence within the decision board (normal lawyers have other associations of construction issues), privacy (in a court case only some details receive the public which might lead to misunderstandings), faster due to motivation of the involved parties and arbitrators which intent to find a solution, the freedom to chose a language which is important in international projects and the possibility to start the procedure without an advocate which is essential in company with own experts. On the other hand CO1 sees the problems in the third-party notice, an expensive procedure especially with a low amount in dispute and the complexity till the procedure starts. The reasons for the rarely use of arbitration in Germany sees CO1 in the inclusion of the third parties and the unknown procedure. The people are used to litigation which gives no cause for another procedure. Furthermore, Co1 said that the public client do not have to pay money for the court case and thereby is able to save money. A way to implement arbitration could be a regulation in the VOB according to CO1 but this is only possible if the state exemplifies the procedure at the top position. Regarding the different forms of arbitration CO1 knows them but rather from abroad than from Germany but states that it is essential to agree upon arbitration and further regulations, especially the payments, at an early stage. The construction company of CO1 regulates the amount of arbitrators to one when the amount of dispute is up to three to four million € where higher amounts lead to an arbitral tribunal of three.

  When it comes to the German arbitration regulations CO1 does not now the new SLBau till now but checked it in the internet directly. The differences between the rules are that some are more detailed than the others as well as the price to pay within some institutions. When it comes to the acceptance CO1 explains that lot of arbitration regulations do not support this which lead CO1 to the opinion that one set of rules would bring more acceptance. According to the opinion of CO1 the SGOBau is the mostly used standard when it is about construction whereas the regulations of the DIS are mostly used when it is not about construction e.g. purchasing equipment.

- As a nearly graduated student CO2 does not have any personal experiences with arbitration. The advantages of arbitration stated by him are faster decisions and a higher level of expertise of the arbitrators than the judges. Furthermore CO2 does know other alternative dispute resolution methods. In addition he can imagine a permanent arbitration procedure only for very large projects. But there the advantage of a better project flow is imaginable. CO2 is not familiar with the Swedish regulations concerning arbitration and has so far not heart of the regulations of the AB04, the Swedish Arbitration Act or the Arbitration Institute of the Stockholm Chamber of Commerce.

- CO3 does not have personal experiences with arbitration proceedings. He thinks that solving disputes by using arbitration would cost the parties not as much as a court proceeding. Furthermore CO3 would prefer an institutional proceeding instead of an ad-hoc proceeding. The creation of ad-hoc arbitration can bring on further disputes. The major advantage of institutional proceeding CO4 sees is the possibility to save a lot of effort due to the already existing procedural rules. However, CO3 has not heard anything about the solutions of the AB04 neither of the Arbitration Institute of the Stockholm Chamber of

Commerce nor of the Swedish Arbitration Act so far. Supplementary CO3 does not know other alternative dispute resolution methods.

- Arbitration proceedings are quicker than court proceedings from the point of view of CO4. In addition CO4 states that this is the most important aspect in this comparison because time is money. On the other hand CO4 does not have many experiences with arbitration, but would always prefer it contrary to litigation. Partnering contracts are a good way of preventing dispute situations due to the consensus approach of executing the project from both sides according to the opinion of CO4. Furthermore CO4 is not familiar with the different forms of arbitration and CO4 thinks that the level of satisfaction with the final outcome varies a lot between the parties and the subject-matter itself. Concerning the regulations of the AB04 CO4 takes the view that those are appropriate regulations because everyone is aware of it and knows what to expect prior to signing contracts. Additionally CO4 is familiar with the Swedish Arbitration Act and the procedure of the AISCC. In the worst case CO4 would privilege a proceeding according to the SAA. But regarding the procedure of the SAA CO4 has a suggestion for improvement. CO4 advices to implement the possibility that a client buys a complete product, not just a "service". Finally CO4 enlarges the problem of the inclusion of additional parties and expresses the opinion that all parties are solely responsible before one client because subcontractors do not have anything to do with the contractors' client.
- AD1 has personal experiences with arbitration proceedings and he also works as an arbitrator sometimes. The possibility to choose the arbitrator (s) is the main advantage of arbitration in comparison with litigation according to his opinion. Therewith the arbitrator (s) can be selected adequate for every case individually. But on the contrary he also mentions that arbitration is extensively unknown in Germany. The main reason for the antipathy against arbitration in Germany is in his opinion the attitude of most companies that they do not want to reach a final and legally binding agreement in the first instance. They do want to have the possibility to appeal the award in case of discontent with the final resolution. He also has to qualify the aspect that arbitration proceedings shall be cheaper than legal procedures. According to his point of view arbitration is only cheaper, if court procedures continue about several levels of jurisdiction. Another important aspect that he mentions is the problem of the inclusion of third parties into the arbitration process. As an explanation he says that this is possible with the tool of the third-party notice in German court proceedings, but not in arbitration proceedings which have to be implemented into contractual documents. But form his experiences he can say, that the parties involved into arbitration proceedings are much more satisfied with the result. Supplementary he adds that this cannot be trivialised because court procedures can also reach satisfactory, but the governmental system blocks them in different ways. According to his experiences an implementation of an arbitration clause into the standard contract forms of the German construction industry would be expedient, but this suggestion does not go down particularly well. In addition AD1 remarks that Germany will not come forth with voluntariness in implementing arbitration. For him the various regulations for arbitration in Germany do not complicate the application of them. In the Germany the most used set of rules

is the SGOBau according to his experience. The new SLBau is still more or less unknown among practitioners.

- AD2 has personal experiences with arbitration due to the work as a counsel for clients. Regarding the advantages of arbitration, AD2 states that the procedure is faster, the arbitrators are more competent and the not official procedure. On the other hand the procedure can be regarded as expensive due to arbitrator costs which have to be paid by the parties. Furthermore, the judgement of the arbitral tribunal can only be challenged on formal grounds which are regarded as a disadvantage by AD2. Altogether AD2 cannot define any other alternative dispute resolution as more effective as arbitration. According to AD2 arbitration as the final method instead of court cannot always be preferred because it depends on the case and its complexity. The Swedish Arbitration Act and the Stockholm Chamber of Commerce are known by AD2 although, AD2 has no special opinion about the question if the Swedish Arbitration Act fits to the requirements of the construction industry. When it comes to the regulation of the arbitrators AD2 states that this depends on the rules (either the normal Arbitration Rules of the Stockholm Chamber of Commerce or the Rules for Experienced Arbitrators) you agree upon and the case but usually three arbitrators are used. Regarding the different forms of arbitration AD2 has no experience with the permanent construction arbitral tribunal but with the ad-hoc and institutional. When it comes to the usage of these two forms, AD2 explains that it depends on the case and on what the parties agreed. In Sweden it is most common to use either the normal Arbitration Rules from the Stockholm Chamber of Commerce or the ad-hoc procedure in accordance with the Swedish Arbitration Act. Regarding chapter 10 of the AB04, AD2 thinks that this is not an appropriate method for solving disputes due to no binding decisions which lead to court or arbitration anyway. AD2 thinks that it is quite usual that the parties agree on arbitration instead of chapter 9 of the AB04 but this depends on the complexity of the project and the amount of money. The problem of using court sees AD2 in the complex and technical disputes which are difficult to solve for a normal judge. When it comes to the inclusion of additional parties AD2 states that it might be complicated and should be drafted in the contract before signing. Here questions such as who appoint the arbitrator(s) can be adjusted. AD2 has the opinion that it is not unusual to agree on the inclusion of a multiparty arbitration clause after the dispute has arise. However AD2 tells that an inclusion is not very common based on the fact that the employer has a contract with the contractor but not with its subcontractor which makes it difficult to enforce requests.
- AD3 does not have any experiences with arbitration due to that fact that the law firm, as well as his clients, try to avoid arbitration proceedings. From his point of view arbitration does not have any advantages in comparison with court proceedings. According to his opinion the always propagated advantages, such as secrecy, lower costs, quicker procedural settlements or a high standard of expertise, must be questioned. In his point of view secrecy for instance is much more important in proceedings with disputes about licensing agreements than in construction disputes. Furthermore arbitration proceedings can also be highly expensive due to enormous fees, especially in cases with a tribunal existing of three or even more arbitrators. In addition he states that arbitration proceedings can also be long-lasting processes like court

proceedings. The aspect of a higher expertise is in his opinion connected with the competence and the knowledge of the judge in the court proceeding. There are of course judges with a high level of expertise, whereas there are also judges who will not be prepared really good for the proceeding. In addition AD3 brings up the aspect that the inclusion of third parties into the arbitration proceeding is highly difficult in Germany. This can only be done with regulations in the contract. Otherwise it will for example be impossible for a general contractor to include sub-contractors into an arbitration proceeding with the client. Regarding the knowledge on German regulations on arbitration AD3 does not know the new SLBau and he thinks that one overall set of rules concerning arbitration would be better for the construction industry than various.

4.3.4) Part 4: Arbitration in Sweden and Germany

The following section deals with the differences of the arbitration proceedings in both countries. Here the interviewees have basically been asked about the major differences of the arbitration systems and in connection therewith about the most important differences of the construction industries of the investigated countries.

- CL1 does not have experiences with arbitration proceedings in Germany and cannot give any answers concerning this topic because of that.
- CL2, CO2, AD1 and AD3 do not have any experiences with arbitration proceedings in Sweden and therewith could not answer the question concerning this topic.
- CL3 has only worked in Sweden until now and can because of that not answer the questions of this part. But CL3 thinks that the mentality and the culture have influences on the development of arbitration in both countries and of course on the handling of disputes.
- CL4 sees a long tradition of consensus in Sweden which is also important for the construction sector according to the opinion of CL4. For instance, CL4 states that Swedish people try to meet in the middle if conflicts occur. Furthermore CL4 could not answer the questions concerning this sector due to a lack of work experience in Germany.
- Regarding the acceptance in Sweden CO1 has the opinion that the regulation in the contract makes the user familiar with arbitration and does not offer an unknown procedure which might be a problem is Germany. Till now CO1was responsible for three construction projects in Sweden. From the experience CO1 said that all dispute could have been solved before an arbitration procedure. This was done through advances discussions and negotiations for a suitable solution. A reason for that could be the different mentality of the Sweden which avoid disputes and try to find solutions at coffee break.
- CO3 sees a major difference in the construction industries of both countries in the mentality of the co-operation between the client and the contractors. In Sweden the execution of a project is more like a partner situation in which the partners try to realize the project as good and as efficient as possible. Whereas in Germany the overall attitude is that the partner's disadvantages and problems are the advantages of the other parties. In Germany it is more like a

challenge and a battle situation according to the opinion of CO3. Furthermore he sees that the different mentalities of the people in Sweden and Germany have a big impact on the way of working in the construction industry in general.

- CO4 does not have any experiences with German arbitration proceedings. But CO4 thinks that the product itself is the biggest different of both industries. According to the opinion of CO4 the buildings are built differently because the German contractors seem to be more organized and industrial than the Swedish. Concluding CO4 observes that the different mentalities and cultures of the people in both countries influence the development of arbitration significantly.
- Regarding arbitration AD2 has no experiences with the German procedure. However, AD2 has the opinion that the construction culture of these two countries might have their differences but clearly states that these can be overcome with good communication.

4.3.5) Part 5: Practical Experiences

Part 5 of the questionnaire focuses on alternative dispute resolution methods which might be more effective or used more often than arbitration. In addition questions about the implementation of arbitration in the German legislation are asked.

- Regarding the arbitration regulation in a contract of a leading German construction company which had been deleted in the 90th CL2 sees the problem in the binding regulation which might not be suitable for every construction project. When it comes to other more effective procedures CL2 describes the currently used method as effective and CL2 will work with is in the future as well.
- CO1 explained why the company deleted the arbitration regulation which was due to the fact that this regulation did not fit for every project. In most cases the dispute affected three parties and thereby was useless. The only reason this rule existed at all was the fact that a person of the board was a member of an arbitration institution. According to CO1 the parties take each other to court at the end of the project which leads to the proposal of a construction accompanying procedure offering immediate solutions which should be binding. CO1 know this from project in South East Asia which can be effective if it function well. For Germany CO1 things that it would be important to create a patency, from the state down to every person.
- Mediation and other alternative dispute resolution methods which deal with negotiations between the parties do not have any prospect of success in the German construction industry according to the opinion of AD1. The major problem he sees with those systems is the lack of a legal binding decision and therewith a weak position of the mediator for example.

  The only reason AD1 could think about, why a worldwide operating German construction company eliminated an arbitration clause from their contracts in the 1990's, is that they must have made bad experiences with it.
- Bad experiences and the difficulties by including third parties into the arbitration proceeding can be the only reasons why a leading German

construction company eliminated an arbitration clause from their contracts according to the opinion of AD3. As a new way of solving disputes in the construction industry AD3 mentions mediation. On the one hand he points out that a good mediator can prompt parties to relent, but on the other hand he also sees the future of mediation in the field of solving disputes with high emotions, such as family and neighbourhood disputes.

4.3.6) Part 6: Additional Information

In this section additional information which were gained during the interviews are listed. Those information do not fit too any specific question but are also relevant for the topic or give interesting starting points.

- AD1 additionally informed about the German "Baugerichtstag" (Day of the Construction Courts) which will be organized in May 2010 and shall lead to suggestion for the legislator for the implementation of dispute resolution methods.

  As a conclusion AD1 stated that a solution for the problems in Germany will come, but it will not be a solution comparable with those of other countries, instead it will be a German solution.

- AD3 adds that arbitration has its legitimacy of course, but he also warns against arbitration as a cure-all, because it has also weaknesses which can lead to misuse. Therewith he thinks about the influence which the more powerful party has against the weaker parties. For example, the more powerful party can put the party that will have a contract by all means under pressure by choosing the arbitrator for instance and can therewith have an influence on the final decision.

V) **Discussion**

The discussion part of this master thesis is the linkage between the theoretical framework and the results of the expert interviews. On the one hand it answers the research questions, whereas it on the other hand also shows how valid and reliable the study is for the construction industry.

The interviews prove true that the potential for conflicts is considered as extremely high in the construction industry and that the experts are aware of that. The majority of the interview partners see the roots for the development of disputes in price negotiations, unclear tender documents, changes of the design or of the execution done by the client and defects. Additionally CO1 and CL2 bring up the idea that delays and timely difficulties are often motives for the emergence of conflicts. Instead of affiliating the common recognition of this aspect AD3 has a different opinion. In his mind delays are not a principal reason for construction disputes, in particular not in the cases he is in charge of.

The majority among the interviewed experts regard the reputation of litigation as the main dispute resolution method for construction disputes in Germany, as well as in Sweden, as ineffective. The most frequently mentioned reasons therefore, and similarly the biggest disadvantages of court proceedings concerning the resolution of construction disputes, are long-lasting proceedings which can persist over several levels of jurisdiction and the lack of expertise among the judges. Because of that alternative dispute resolution methods are required which do not feature the same problems as in established proceedings, such as long-lasting durations and enormous costs, but which are geared to the unique demands and needs of the construction industry. In this regard it is noticeable that complex construction disputes can result in complex disputes (Harmon, 2003). Furthermore AD1 adds that court proceedings cannot be carried through economically especially in the construction industry. In the opinions of AD1, AD2 and the interviewees working on the contractors' side, arbitration with its possibilities to tailor-make the procedures according to the particular requirements of the construction dispute is an efficient and effective alternative to litigation. In contradiction therewith AD2 does not see a universal remedy in the implementation of arbitration and advices about the abuse of authority in arbitration agreements.

Supplementary this finding supports the results of a study accomplished within the scope of the second German Construction Court Day from 2008 which states that there is a high demand for alternative dispute resolution methods among the parties working in the construction sector (Deutscher Baugerichtstag e.V., 2008). Furthermore this investigation highlighted that 81 per cent of the interviewed clients and 70 per cent of the interviewed contractors would appreciate a mandatory dispute resolution remedy (Deutscher Baugerichtstag e.V., 2008).

The Swedish arbitration proceedings described in the theoretical framework of this master thesis can for instance be solutions for this problematic nature. On the one hand descriptions and specifications of those procedures already exist and on the other hand they are also applied successfully in Sweden for a long time. CL1, CL2 and CL3 prove this reference true for the reason that they all state that the regulations of the AB04 are functional and work in the construction industry. The contractors interviewed for this master thesis concordantly think that arbitration is interesting as a final dispute resolution method and see a lot of advantages in such a proceeding

compared to litigation. Additionally they state in unison that everything should be tried to avoid a quarrel before court. Ultimately they agree on the aspect that disagreements should already be solved before a larger dispute can arise and one party takes the conflict to court. The ultimate ambition of all participants must be to prevent disputes. Therefore AD1 sees arbitration as the only possible alternative towards court proceedings. Mediation and other alternative dispute resolution methods without a binding decision for the parties do not have any chances to become important as dispute resolution methods in the construction industry according to his opinion. AD3 shares the opinion of AD1 and adds that he sees the future of mediation in law cases with emotions, such as family law or neighbour law. Contradictory to the view of AD1 concerning arbitration, AD3 is not a big proponent of arbitration and highlights the possibilities of court proceedings to also be able to be efficient in the settlement of construction disputes. According to his point of view court proceedings stand or fail with the knowledge of the judge. Publicised advantages of arbitration such as cheaper, shorter and a higher know-how of the involved arbitrators cannot withstand the reality of arbitration proceedings according to his opinion. AD3 is convinced that the right choice of dispute resolution methods, whether litigation or arbitration, depends on the specific case. Supplementary AD3 adds that he would always advise the parties to find a settlement outside court and concentrate on the development and the execution of new projects instead of binding resources in the processing of "old" cases which will only waste money.

CO4 suggested partnering contracts as a serious alternative to litigation and arbitration. The main component of partnering contracts is the idea of realizing projects jointly. A deeper investigation of partnering itself is not part of this master thesis, but the different approach of realizing a project jointly between the parties, counteracts the development of disputes. This way of realizing projects fits the overall opinion of avoiding disputes best of all. The installation of a new field of work focussing on partnering projects of a leading Swedish construction company, in times of recession, shows the growing importance of partnering (Wahlqvist, 2008). Furthermore CL4 mentions the consensus culture that predominates in Sweden. CO4 agrees on this aspect and adds, that he sees the biggest difference between the German and the Swedish culture in the circumstance that Swedish companies try to realize projects more in co-operation, while he realizes a dog-eat-dog society in Germany. Bröchner et al. share this view and in addition spot the Swedish construction culture to be able to be a reminder for other countries to "*ensure that the co-operative atmosphere is used to support creative, joint problem solving and decision-making"* (Bröchner et al., 2002). Supplementary CO4 highlights the willingness of the parties to prevent disputes by installing a kind of dispute resolution board that tries to solve conflicts immediately. This procedure can be compared with the permanent arbitral tribunal which has been explained in this paper. The interviewees agreed on the installation of such a permanent arbitration tribunal in large and expansive projects, for instance important infrastructure projects, due to the colossal costs of such an installation. Furthermore AD3 attaches the idea to implement such an establishment in vital projects that stand under massive time pressure, to be able to reach quick decisions.

One objective of this master thesis is to find out why arbitration proceedings are not very widespread in the German construction industry, despite the legal permission and the high international recognition of them. Regarding this aspect traditions play an important role in the construction industry because it is a highly patterned field, not

only because of standard contracts and technical regulations, which not all actors are willing to abandon willingly (Flood et al., 1993) In connection therewith, Swedish arbitration proceedings have been investigated to be able to analyze why arbitration is implemented fundamentally in the Swedish construction industry. The circumstance that arbitration is not that popular and not adopted broadly in Germany originates in the problem that the parties involved in construction disputes, scilicet the clients and the contractors, are not familiar with it or even have not heard that something like that exists. This finding is rather deflating because conflictive to it the interviewees were correspondingly not happy with the outcomes of court proceedings. The positive attitude of German parties concerning the possibility of taking a judgment to the next higher level of jurisdiction in case of loosing or not being satisfied with an arrangement is another indicator for why arbitration is not that popular in Germany as in many other countries in the world, for instance in Sweden. Probably this apprehensive attitude of German parties to continue legal action at the next higher level of jurisdiction in case of not being satisfied with the final outcome, hinders a successful implementation of arbitration in Germany, due to the fact that the parties are not willing to solve a dispute at the first level of jurisdiction.

Regarding the number of arbitrators the experts agree on clear solutions. On the one hand the fees for arbitrators are really high which creates additional costs for the parties. Because of that reason the experts interviewed agree on the fact that for cases with a relatively low amount in dispute it is totally fine to announce a sole arbitrator. In connection therewith AD3 likes the division implemented in the Swedish AB04. After a failed simplified resolution procedure a clearly classification of which dispute is to solve with the help of which procedure is stated. On the one hand disputes with a price base amount < 150 shall be solved with litigation, whereas on the other hand dispute with a price base amount > 150 shall be solved with arbitration. AD3 sees a solution for the economic efficiency of legal procedures in this division. Furthermore AD3 would always advice a sole arbitrator because of the high costs. In contrast thereto AD1 prefers an arbitral tribunal existing of three arbitrators for bigger disputes, due to the fact that more arbitrators can see more aspects and can have more ideas for a potential solution. But AD1 also prefers a sole arbitrator for smaller disputes because of profitability reasons as AD3. As AD1 the practitioners favour a tribunal with three arbitrators. They have a preference for the fair announcement system of the arbitrators, that both parties chose one arbitrator and that the chosen arbitrators decide on the head of the tribunal.

Two dimensions have been identified by Bazin in an investigation of regulatory frameworks in a number of European countries (Winch, 2002). Firstly there is the level of responsibility, either of the actors or of the state, for the interpretation of regulations. Secondly there is the extent to which the countries are performance or prescriptive orientated. During this investigation Germany has been classified as a state with a high responsibility of the state and a prescriptive orientated attitude (Winch, 2002). The results of the interviews done for this master thesis reveal the same assessment. For instance the estimation of CO1 that approximately thirty per cent of the German construction disputes go to court, whereas CO1 thinks contradictory that only about five per cent of the construction disputes abroad end in litigation. In Germany plenty of regulations exist which standardize the way of how things have to be done precisely and therewith limit the amount of scope of the actors. Concluding the results of the interviews, Sweden has been classified as a state with a balanced responsibility of the state and the actors. Additionally Sweden has a

balanced relation between performance orientated and prescriptive orientated. Due to these facts Sweden has been placed in the centre of the illustration 9.

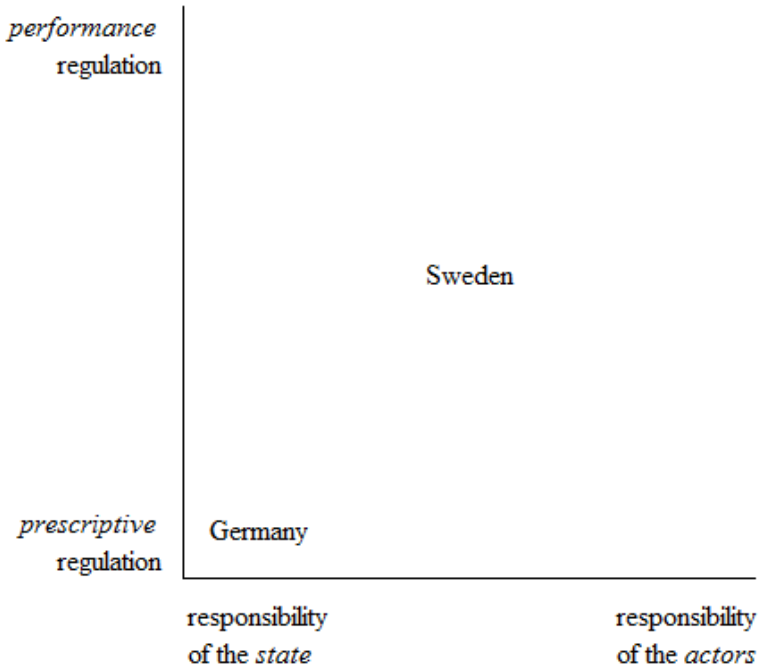

Illustration 9: Comparison of the construction regulation systems for the awareness of arbitration (Winch, 2002)

The major finding of this master thesis is the problematic inclusion of third parties in the German construction industry. Whereas in Sweden arbitral clauses are major components of standard contracts and general conditions, they are not in Germany. In addition thereto the Swedish Supreme Court decided in 1997 that successors are bound by an arbitral clause in the original agreement, unless there are special reasons to deviate from this principle. The inclusion of additional parties seems to be much easier in Sweden because of the general knowledge of arbitration and arbitral clauses in standard forms of contracts of all involved parties in the construction sector. Concluding this background the involved parties are not afraid of arbitration proceedings in Sweden and accept taking part in those, even as successors. Contradictory to this attitude towards arbitration and the handling of the inclusion of additional parties, it is not that simple in the German construction industry. In Germany the general principle, that nobody can be forced to do something without having agreed on it in a contract document, counts. Due to this reason successors cannot be forced to participate in an arbitration proceeding, if they are not willing to. But, with the help of a "third-party notice", successors can be forced to participate in German court proceedings. This possibility is a big advantage of litigation in comparison with arbitration in Germany. Furthermore regulations for the inclusion of third parties are really important in the construction industry because of the specialization especially in this industry to a large extent and the therewith connected existence of subcontractor chains.

Most of the German interviewees were not familiar with the various arbitration procedures offered from several agencies. For instance the new SLBau which was

published at the beginning of 2010 and tries to solve the problem of the inclusion of third parties was not known to the majority of the interview partners. The SLBau provides therefore procedural regulations for the inclusion of additional parties in §44. There the way of how parties have to be included into the proceeding is given. But this does still presuppose the willingness to co-operate of the third party and is therewith not binding.

Finally the attention has again to be called on the fact that the findings of this master thesis only allow a trend analysis because of the small quantity of interviewees. However, the interview partners were members of large companies for which arbitration could be advantageous. It can be assumed hence of this circumstance that smaller companies are not familiar with arbitration proceedings, because even big companies are not as well. On the opposite it can be supposed that arbitration proceedings are well-known and widespread in the Swedish construction industry, due to the fact that it is implemented in the standard contracts of the Swedish construction industry. Because these facts are known it can be assumed that arbitration means something too smaller companies as well.

VI) Recommendations

In the following part possible improvements for dispute resolutions as well as arbitration within Germany and Sweden are proposed. These developments are based on the findings in the discussion.

Arbitration in Germany is still a non familiar and unused procedure whereas Sweden offers the possibility of arbitration in the AB04 and makes it an established and used method. Therefore, it would be relevant to test alternative dispute resolution methods and to establish these as an option in Germany, for large as well as very small parties involved in construction projects.

In the discussion, the inclusion of additional parties as well as the unknown arbitration procedure had been defined as major problems in Germany, leading to avoidance of alternative dispute resolutions. Improvements in this area should be done in order to achieve a higher usage rate for alternative dispute resolutions. Compared with Sweden, the first issue is the unknown dispute resolution method in Germany. This can be related to the existing of chapter 9 and 10 in the AB04 in Sweden whereas no comparable regulations exist in Germany. A rule, located in the standard construction contract in Germany, the VOB/B, offering arbitration as the final dispute resolution method, could help familiarize arbitration to all involved parties by using the standard contract in daily dealings.

Additionally, no one can be forced to participate in an arbitral procedure in Germany which was indicated by the interviewees. In order to use arbitration, an agreement between the parties is required. That means on the other hand that third parties cannot be forced to participate, if a contractual agreement does not exist. This leads to the fact of using litigation in order to have the possibility of a third-party notice. This issue could be solved with a regulation in the standard construction contract in Germany as well. Based on this, the same regulation and therewith the same possibilities would be provided for the contractual chain existing in construction projects.

This change would be the basic improvement for an easier inclusion of additional parties and for creating a more established arbitration procedure. Anyhow, arbitration and litigation should only be used, if previous attempts to solve the dispute amicably in accordance to the best solution for the unique situation failed.

A possible option for making alternative dispute resolutions known could be an implementation from the top, the state. As it is described in the discussion the responsibility of the state in Germany is central and therewith it functions as an example. Furthermore, the state is the only body that is able to take the initiative to relief legal court where capacity overload can be seen as a problem within Germany. The task of the state could be an improvement of the court procedure regarding disputes in the construction industry or an acceptance of a well-known arbitration procedure. A possibility for improvements in litigation could be special skilled, competent and experienced judges who could avoid the employment of external experts. Based on this change a faster decision and thereby the overall duration can be shortened. This would lead to a more effective procedure for the construction industry and would provide a solution in the interest of the overall economy concerning time, cost and quality improvements.

When it comes to the selection of arbitrators the usage of one should be guaranteed in order to save money for the procedure. Therefore, the amount of arbitrators should be

approximately regulated by the amount in dispute. This ensures the opportunity for a cost effective procedure and a highly qualified arbitral tribunal for complicated and expensive disputes.

Regarding the different institutions offering regulations for arbitration a common regulation for the construction industry would be desirable. As described by some respondents one set of rules could avoid confusions and would alleviate the usage. This set of rules could provide an arbitration procedure from the beginning till the end which can help making arbitration a clearer and a less complicated procedure. Furthermore this could also ensure a repeated use of arbitration.

The different approach towards solving disputes in the construction industry in Sweden and Germany has its origin in the different cultures, mentalities and attitudes towards arbitration. Whereas CL4 and CO4 described Sweden as a consensus community, Germany was portrayed as a dog-eat-dog society. This is shown in the familiar use of litigation with the opportunity of a second instance if the outcome is not as desired in Germany. A change of culture within a country can be regarded as nearly impossible and very complicated. Therefore small advices can be brought into a specific market to act as an illustration for possible developments. Regarding the attitude towards alternative dispute resolutions within Germany, an awareness of the different solution methods should be created among construction professionals. Different cases demand different methods. Construction requires a fast and knowledge based resolution process. Based on respondent AD1, solution methods could be allocated to different disputes or fields of disputes due to the fact that voluntary options do not work within Germany. Furthermore, an awareness of communication as an essential tool to avoid disputes at an early stage leading to the possibility of preventing a dispute before arising should become a familiar aspect in Germany. The fact of moving from two sides towards the best solution might be a better way of solving disputes than fighting at court which is cost, time and resource intensive. This method demands openness for the opponent and his point of view. Supplementary a neutral understanding of the issue and therewith the willingness to find the best solution in respect the special situation is crucial. Only without personal emotions and anger this approach can be done. In addition, the construction business works with relationships and recommendations. Parties, with whom amicable solutions have been found and where communication solves problems might be recommended for future projects. Whereas parties that mainly fight with others will rarely be proposed to others. In the construction sector a unique project needs to be accomplished. This should always be the main aim and daily business. Therefore the overall aim should be a concentration towards new construction projects and not towards a time, cost and resource intensive procedure at court.

In conclusion it can be said, that this thesis clearly shows, that changes on different issues can be done in order to ensure a successful implementation and usage of alternative dispute resolutions in Germany for the future.

VII) Conclusion

This paper has described the respective arbitration procedures in the Swedish and German construction industry. The investigation highlights that the arbitral systems are fairly identical for the most parts in both countries. This shows that the knowledge about arbitration is comparable within these two similar developed nations. Despite the legal accreditation, arbitration is not that accepted and applied in Germany. In contrast to this fact arbitration is entirely implemented into the Swedish construction industry. The integration into the AB04, the Swedish standard form of contract of the construction industry, as the main dispute resolution method confirms this perception. However, the common evaluation of litigation as being ineffective for the settlement of construction disputes in Germany as well as in Sweden shows the necessity for alternative dispute resolution methods.

Furthermore the study discloses the reluctant attitude of the parties working in the German construction industry towards arbitration. The results of the interviews showed that arbitration is often not known to the parties and that the parties which are familiar with arbitration disclaim such proceedings, due to the fact that the final award is binding for the involved parties, directly after the first level of jurisdiction.

The major finding of this master thesis, the problematic inclusion of third parties, which is essentially important for all parties working in the German construction industry, is another challenging difficulty. Unless there is no satisfying solution of this dilemma, most parties will still prefer litigation in the future.

Parties involved into a construction dispute should always try to avoid the settlement with the help of external jurisdiction. The best way to solve conflicts is still the direct communication of the parties involved. Keeping in mind that all dispute resolution methods have advantages and disadvantages depending on whether or not the law, time and money are on your site or not, the best result would be an early solution, requiring little resources made by both sides. But even if this does not help solving disputes, arbitration is a functioning alternative to court proceedings with advantages especially for the settlement of disputes in the construction industry.

As a concluding remark it can be said that for a widespread implementation of arbitration in Germany first of all the attitude of German construction professionals towards alternative dispute resolution methods has to be changed. The only possibility of reaching that aim is to disseminate and introduce such proceedings and its characteristics in a broad way, for instance with the help of different organizations. In supplement a solution for the inclusion of third parties has to be generated. Finally to pick up an aspect mentioned by AD1, solutions and advices have to be enforced into regulations, because the implementation of arbitration and other alternative dispute resolution methods will not progress voluntarily in Germany. The conservative and cautious way of accepting and implementing new ways of thinking in Germany could be proved true in this research, by the statements of the interviewees and the study of Bazin described in the discussion, identifying Germany as a prescriptive orientated country with a high responsibility of the state. By way of example the implementation of arbitration can be done with the inclusion of a regulation into the existing VOB/B or with the launching of new standard contracts. Considering construction projects as unique, as ventures with many involved parties from all imaginable professions and as jobs with daily changing circumstances, dispute resolution methods must also offer a

broad spectrum of methods to be able to fit the particular needs of this branch of industry.

At last contractual arrangements and statutes govern all kinds of co-operation and therewith also regulate dispute resolution proceedings. For this reason and because of the findings of this research, the key starting point for improvements in the implementation of arbitration in Germany is in the initiation of written regulations about the mandatory usage of such dispute resolution methods.

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A) Appendices

A2) Arbitral Institutions

A2.1) Arbitral Institutions in Sweden

- *The Arbitration Institute of the Stockholm Chamber of Commerce*
  Vastra Tradgardsgaten 9
  P.O. Box 16050
  SE- 103 21 Stockholm
  Sweden
  Phone: +46 8 555 100 00
  Fax: +46 8 566 316 50
  Email: arbitration@chamber.se
  Website: www.sccinstitute.com

A2.2) Arbitral Institutions in Germany

- *German Institution of Arbitration (DIS)*
  Deutsche Institution für Schiedsgerichtsbarkeit e.V.
  Adenauerallee 148
  D – 53113 Bonn
  Germany
  Phone: +49 228 / 104 2711
  Fax: +49 228 / 104 2714
  Email: dis@dis-arb.de
  Website: www.dis-arb.de

A3) Text of Instruments

A3.1) The Geneva Protocol from 1923

Available at:

Juris International

Link: http://www.jurisint.org/doc/html/ins/en/2002/2002jiinsen5.html

A3.2) The Geneva Convention from 1927

Available at:

Juris International

Link: http://www.jurisint.org/doc/html/ins/en/2000/2000jiinsen68.html

A3.3) The New York Convention from 1958

Available at:

Juris International

Link: http://www.jurisint.org/doc/html/ins/en/2000/2000jiinsen69.html

A3.4) The UNCITRAL Model Law

Available at:

Juris Internationalhttp://www.jurisint.org/doc/html/ins/en/2000/2000jiinsen204.html

A3.5) The Swedish Arbitration Act from 1999

Available at:

Arbitration Institute of the Stockholm Chamber of Commerce

Link: http://www.sccinstitute.com/?id=23746

A3.6) AB 04

Chapter 9

SETTLEMENT OF DISPUTES

§1 Unless the parties agree otherwise, the following shall apply.

Disputes arising from the Contract which are not finally settled in accordance with Chapter 10 shall be settled by a public court, if the amount in dispute is not obviously in excess of 150 price base amounts, exclusive of value added tax. Otherwise disputes shall be settled by arbitration in accordance with the provisions of the Arbitration Act (1999:116).

By price base amount is meant the price base amount at the time of bringing the action.

§2 The fact that a dispute has been referred for judicial settlement shall not entitle the Contractor to suspend the Total Works. Nor shall the Employer be entitled on such grounds to retain sums which are not directly affected by the dispute or otherwise fail to discharge his obligations.

§3 Notwithstanding the provisions of this Chapter, either party is entitled to refer to a public court or apply to an authority for payment of any undisputed, mature claim in respect of the Total Works.

Chapter 10

SIMPLIFIED RESOLUTION OF DISPUTES

§1 If there is disagreement between the parties arising from the Contract they may together refer the matter for settlement to a competent and unchallengeable arbitrator (simplified settlement of disputes), in which connection the matter of disqualification shall be considered with regard of the Administration Act (1986:223).

When the parties have reached agreement on testing a question by the simplified resolution procedure they shall jointly appoint an arbitrator unless one has been appointed in the Contract Documents.

Each party shall within a from the date of appointment of an arbitrator or, if one has been appointed in the Contract Documents, within one week from the date of the parties agreeing on simplified resolution of dispute, comment in writing and clarify his attitude to the question. The comment and the documents which the party wishes to produce shall be sent to both the arbitrator and the other party. The party shall in this case also state whether he requests a meeting before the arbitrator.

Either party is then entitled to comment once on what the other party has alleged, unless the arbitrator considers additional correspondence necessary. The comment shall be sent to the arbitrator and the other party within one week from the date when the party received the comments of the other party in accordance with the above paragraph.

The arbitrator shall within four weeks from the date of receiving the documents cited by the other party notify the parties in writing of his decision, giving a short statement of reasons.

He shall in his decision state which of the parties is finally to pay his fee. Each party will be responsible for his own costs.

The arbitrator's decision is binding on the parties until they agree on a different outcome or the question, after a complaint, is finally settled by either a public court or an arbitration panel.

A complaint against the decision of the arbitrator must be made in writing to the other party not later than one month after the party has learned of the decision of the arbitrator. If neither of the parties has made a complaint on time the parties shall be considered to have accepted the decision of the arbitrator, which means that the question shall be considered finally settled.

If a party brings action in accordance with Chapter 9 concerning a question which is the subject of simplified resolution of dispute the simplified resolution procedure shall be discontinued. The party bringing action under the simplified resolution of dispute procedure shall in that case pay the fee of the arbitrator.

(AB 04, 2004)

A3.7) The AISCC Rules

Available at:

Arbitration Institute of the Stockholm Chamber of Commerce

Link: http://www.sccinstitute.com/skiljedomsregler-4.aspx

A3.8) The German Code of Civil Procedure

Available at:

Bundesministerium der Justiz

Link: http://www.gesetze-im-internet.de/zpo/index.html

A3.9) VOB

Available at:

Bundesministerium für Verkehr, Bau und Stadtentwicklung

Link: http://www.bmvbs.de/Anlage/original_13076/VOB-2002-Teile-A-und-B.pdf

A3.10) SchO

Available at:

Deutsche Institution für Schiedsgerichtsbarkeit

Link: http://www.dis-arb.de/materialien/

A3.11) SOBau

Available at:

ARGE Baurecht

Link: http://www.arge-baurecht.com/mitglieder/sobau/schiedsordnung

A3.12) SGOBau

Available at:

Deutsche Gesellschaft für Baurecht

Link: http://www.baurecht-ges.de/sgo01072005.pdf

A3.13) The SLBau

Available at:

Deutscher Beton- und Bautechnik-Verein E.V.

Link: http://www.betonverein.de/upload/pdf/Fachthemen/SL_Bau.pdf

A4) Expert Interviews (Questionnaires)

A4.1) Client 1

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?

CL1: Project manager in a major Swedish municipality

1.2 What kinds of tasks belong to your field of activity?

CL1: Construction projects in general

1.3 What is your personal career? Studies, education and change of companies?

CL1: Building engineer, worked at site, then consultant and now client

1.4 With what kind of parties do you work with?

CL1: works with consultants, builders and the users

1.5 How many construction projects are you in charge of annually?

CL1: 20

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?

CL1: Everyone wants to save or earn money

2.2 How many cases of construction disputes do you have annually/ are you in contact with?

CL1: Last year (2009) 2 and this year (2010) 0

2.3 With what kind of disputes have you been in contact with?

CL1: Builder wants extra money for what I have specified, big discussion

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?

CL1: None in court for me, seldom happens

2.5 How high is the value of money of the disputes in relation to the construction costs?

CL1: Often low

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?

CL1: No

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?

CL1: Yes

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?

CL1: No

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?

CL1: Do not know

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?

CL1: a direct agreement is better, both (builders and clients) in court is bad reputation

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?

CL1: No

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?

CL1: Most ok

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?

CL1: ---

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?

CL1: No

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?

CL1: No

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?

CL1: ---

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?

CL1: Agreements based on the AB04 are better

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?

CL1: Ok

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?

CL1: Ok

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?

CL1: ---

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?

CL1: No

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?

CL1: Arbitration Act and the AISCC are not known, AB04 is the only familiar set of regulations

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?

CL1: No

4.2 Where do you see the general differences of the construction industries of both countries?

CL1: No idea

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?

CL1: No

4.4 Where do you see the main differences between the Swedish and German arbitration systems?

CL1: ---

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?

CL1: ----

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?

CL1: ---

A4.2) Client 2

Fragebogen als Interviewgrundlage zur Masterarbeit von Kristin Schmitt und Matthias Magg

Schiedsgerichtsverfahren zur Beilegung von Konflikten in der schwedischen und deutschen Bauindustrie

- Eine Analyse der gegenwärtigen Vorgehensweisen -

Teil 1: Allgemeine Einleitung

1.1 In welcher Position/ Tätigkeit arbeiten Sie innerhalb des Unternehmens zurzeit?

CL2: Technischer Leiter eines Immobilienberatungsunternehmen in Frankfurt am Main, verantwortlich für die deutschen Niederlassungen sowie Auslandsprojekte ins. in Osteuropa. Immobilienberatungsunternehmen: alle Dienstleitungen rund um Immobilie der verschiedenen Arten.

1.2 Welche Aufgaben gehören zu ihrem Tätigkeitsfeld?

CL2: Property Service, seine Abteilung ist verantwortlich für technische und umwelttechnische utilities, monitoring, Quality Controlling, Projekt Management im Umbau, Neubau und Mieterausbau. Dokumentenmanagement (elektronische / virtuelle Datenräume). Übernehmen von Bauherrenfunktionen bei Problemen während der Erstellung der Immobilie z.B. GU Konkurs. Energieausweise

1.3 Wie ist ihr persönlicher Werdegang? Studium, Ausbildung, Firmenwechsel?

CL2: Davor technischer Leiter Projektentwicklungsgesellschaft

1.4 Mit welcher Art von Vertragspartnern arbeiten Sie zusammen?

CL2: Offene und geschlossene Fonds, GU, Endinvestor, Architekturbüros, Planbüros, Gutachter

1.5 Wie viele Bauprojekte betreuen Sie jährlich?

CL2: 25

1.6 Mit wie vielen Baustreitigkeitsfällen haben Sie jährlich zu tun?

CL2: 5

Teil 2: Streitfälle und Streitbeilegungsverfahren

2.1 Worin sehen Sie das Konfliktpotenzial im Bauwesen bzw. Gründe für Konflikte/Streitigkeiten am Bau?

CL2: a) Unterschiedliche Meinung zwischen GH/AG und AN über geschuldete Leistung (Art, Umfang und Qualität der geschuldeten Leistung)
b) Terminprobleme

2.2 Mit welchen Baustreitigkeiten haben Sie zu tun?

CL2: a) Optisches Erscheinungsbild einer Klinkerfassade (Naturprodukt), Firma der Herstellung für ersten Bauabschnitt Konkurs und der zweite Teil sah anders aus; sollten aber identisch sein
b) Termin: großer Mieterausbau, der angesetzte Einzugstermin für den Mieter wurde durch verschulden der ausführender Firma aber auch Sonderwünsche und verspätete Planfreigabe gefährdet.

2.3 Wie viele Streitigkeiten enden vor Gericht und wie viele können anders gelöst werden?

CL2: Keine vor Gericht

Für alle Streitfälle in seiner beruflichen Laufbahn: 40-50 Fälle

2.4 Wie hoch ist der finanzielle Wert der Konfliktsituation gemessen an den Baukosten?

CL2: Es gab schon mal einen Fall wo es ca. 10% der Baukosten ausmachte, was aber ein Ausnahmefall war, 1-2% an jeder Baustelle.

2.5 Finden Sie das staatliche Gerichtsverfahren bei Baustreitigkeiten für effektiv? Warum?

CL2: Nein, zeitlich zu lang, durch Verzug, da haben beide Parteien nichts davon, Bauen unter Termindruck, zeitnahe Entscheidungen nötig

2.6 Versuchen Sie Konflikte zu vermeiden? Wenn ja, wie? Wenn nein, warum nicht?

CL2: Ja immer.

Nicht geglückt bei Fassade: GU angewiesen 20-30 m² Klinkerfassade zu mauern um zu schauen wie es aussieht gegenüber der ersten Fassade. GU hat aber 200 m ² vermauert. Architekt, Endinvestor und Kollege aus eigenem Haus (Projektentwicklung) haben es zusammen ohne ihn angeschaut und Krise bekommen. Er konnte nicht eingreifen um Situation zu entschärfen. Geplant war, dass er mit GU es sich anschaut und Entscheidung trifft. Wenn er der Meinung gewesen wäre es passt, hätte er die anderen zum Termin eingeladen. Planung um Konflikt zu vermieden. Er konnte auf Meinung nicht einwirken. Schaden war so groß, dass GU unter Umständen vor Gericht gegangen wäre. Ende: Steine konnten wieder verwendet werden, einer musste von unten sagen wie die zusammen passen. Bedeutet: Konfliktpotenzial früh genug erkennen!

Akustik im Raum: heißt bedingt durch schallharte Oberflächen, Nachhallzeiten im Raum größer 0.8 s die als störend empfunden werden. Mietermöblierung die zerklüftet ist, reduziert dies. Wenn nicht, dann gibt es Problem. Haben heute schon Lösungen parat, die sie nur dem Mieter anbieten, den es stört. Von vorne Änderungen im ganzen Gebäude würden 1 Mio. Euro kosten. Erfahrungen zeigen, dass am Ende ein Zuschuss von 200.000 ausreichen wird, um kritische Mieter zufrieden zu stellen. D.h. 800.000 Euro wurden nicht ausgegeben.

2.7 Raten Sie den Parteien das staatliche Gericht bei Baustreitigkeiten zu vermeiden? Wenn ja, wie? Wenn nein, warum nicht?

CL2: Er war immer eine Partei, heute eher neutral, früher auf AG-Seite versucht Einigung zu erzielen: Versucht mit Gegenpartei tragfähige Lösung zu finden. Außerdem muss er seine Leute überzeugen, dass diese Lösung besser ist.

Extern und intern versucht zu überzeugen und durchzusetzen, nicht vor Gericht zu gehen.

2.8 Hat die Unternehmenspolitik Einfluss auf solche Entscheidungen bzw. beeinflusst sie diese? Sind Entscheidungen einen Streitfall vor Gericht zu lösen von tagesaktuellen Problemen und Entwicklungen geprägt bzw. abhängig?

CL2: Ja zur Unternehmenspolitik. Nein zu aktuellen Problemen.

Meinung oberster Chef wird sich durch setzten. Er wird seine Leute beraten und schulen es so oder so zu machen.

2.9 In wie weit hat die Preispolitik von Unternehmen Einfluss auf das Konfliktpotenzial und in wie weit glaubst du, dass die Preispolitik den Unternehmern keine andere Möglichkeit als den Gang zum Gericht lässt?
CL2: Nein

Teil 3: Schiedsgerichtsverfahren

Teil 3.1: Schiedsgerichtsverfahren im Allgemeinen

3.1.1 Haben Sie persönliche Erfahrungen mit Schiedsgerichten/Schiedsverfahren gemacht? Welche?
CL2: Das Schiedsgericht als solches wurde von ihm noch nicht verwendet.
Aber er wurde zu einem Streitfall spät hinzu gerufen. Schon 2 Jahre Streit, keine Einigung in Sicht. Problem für ihn, dass er keine Vorsorge mehr treffen kann. Er hat vorgeschlagen einen Gutachter zu nehmen und sich der Aussage zu unterwerfen. Hat er aber vorher in einem Vertrag vereinbart.
Er hat max. mit einem Schiedsgutachter einen Streit gelöst.
Bedarf Vereinbarung, welcher Gutachter, wie er zu bezahlen ist und das sich beide Seiten vollumfänglich unterwerfen.

3.1.2 Worin sehen Sie Vor- und Nachteile des Schiedsgerichtes im Vergleich zum staatlichen Gericht?
CL2: Schneller, keine Revision
Stillstand kann sich keine private Person leisten. Nur Staat

3.1.3 Können Sie aus Ihrer Erfahrung sagen, in wie weit die beteiligten Parteien mit dem Ausgang des Schiedsgerichtes zufrieden waren?
CL2: Zufrieden! Alle!

3.1.4 Warum glauben sie wird in Deutschland das Schiedsgericht zur finalen Streitlösung nicht so häufig genutzt wie im internationalen Bereich? Z.B England, Schweden
CL2: Allgemeine Information der ausführenden Firmen. Haben viele Themen wie fachlich, Steuern, Arbeitsrecht, Sozialrecht, Kaufmännisch..... wie soll kleine Firma das bewältigen

3.1.5 In vielen internationalen Standardbauverträgen z. B. In Schweden AB04 ist das Schiedsgericht als vertragliche Streitlösung vorgegeben. Warum gibt es in der deutschen VOB keine vergleichbare Regelung?
CL2: Macher wollen juristischen Leuten nicht in Suppe spucken

3.1.6 Halten sie solche eine Regelung in der VOB als sinnvoll?
CL2: Ja, wo sonst.

3.1.7 Würden sie die Möglichkeit zur alternativen Streitbeilegung nutzen, wenn sie besteht? Wenn ja, warum? Wenn nein, warum nicht?
CL2: Wenn er mit bisherigen dingen nicht mehr weiter kommen würde, würde es ihm 2 weitere Schritte vor Gericht ermöglichen. Würde aber dabei bleiben erst eigene Dinge zu regeln. Würde immer erst versuchen zwischen Parteien es zu regeln und sich nicht aufzwingen lassen zum Schiedsgericht zu gehen. Ziel: gutes Werk erstellen.

3.1.8 Wie sehen sie die Regelung für die Anzahl der Schiedsrichter? Welche Anzahl ist Ihrer Meinung nach die beste Lösung?
CL2: Nicht bekannt

3.1.9 Sind Ihnen die verschiedenen Formen des Schiedsgerichts wie z.B. institutionelle oder ad-hoc Verfahren bekannt? Wo sehen sie die Vor- und Nachteile dieser Formen? Welche würden sie bevorzugen?

CL2: Nein, nicht bekannt

3.1.10 Ist Ihnen das baubegleitende Schiedsgericht bekannt? Wo würden sie hier die Vor- und Nachteile sehen? Kann sich diese Form auf längere Sicht gesehen in der Bauindustrie durchsetzten?
CL2: Nein, nicht bekannt. Er kann das selbst. Wird sich nur bei sehr wenigen Bauten durch setzten.

Teil 3.2: Deutsche Schiedsgerichtsordnungen

3.2.1 Ist Ihnen die neue SLBau mit Einführungsdatum vom 01.01.2010 bekannt?
CL2: Nein

3.2.2 In Deutschland gibt es mehrere Schiedsgerichtsordnungen wie z.B. SGOBau, SOBau, DIS, SLBau. Sind Ihnen diese bekannt?
CL2: Nein

3.2.3 Kennen sie die wesentlichen Unterschiede der Einzelnen?
CL2: Nein

3.2.4 Führen so viele Ordnungen nicht zu Verwirrungen und Probleme? Würde es eine Ordnung einfacher machen?
CL2: ---

3.2.5 Welche dieser Ordnungen wird von Firmen am meisten verwendet?
CL2: ---

Teil 4: Unterschiede zwischen Deutschland und Schweden

4.1 Haben sie Erfahrungen im Bereich Bauprojekte und damit verbundene Streitfälle im Ausland insbesondere Schweden? Bauunternehmer- oder Bauherrenseite?
CL2: Nein

4.2 Worin sehen sie wesentliche Unterschiede in den Bauindustrien der beiden Länder?
CL2: ---

4.3 Konnten sie schon Erfahrungen mit dem schwedischen Schiedsgerichts sammeln? Waren diese positiv oder negativ im Vergleich zum Deutschen Schiedsgericht?
CL2: ---

4.4 Worin liegen Ihrer Meinung die Unterschiede zwischen dem Schwedischen und dem Deutschen Schiedsgerichtsverfahren?
CL2: ---

4.5 Hat die unterschiedliche Kultur und Mentalität beider Länder diese Entwicklung geprägt?
CL2: ---

Teil 5: Praxis

5.1 In einem vorherigen Gespräch haben wir erfahren, dass ein größeres Bauunternehmen in den 90er Jahren ihre Schiedsgerichtsklauseln aus den Verträgen genommen hat. Können sie mir das erklären?
CL2: Im Vertrag drin: sie sind gebunden. Könnten vielleicht nicht passen für jeden Fall.

5.2 Würden sie andere Verfahren der Streitlösung für effektiver als das Schiedsgericht halten? Warum?
CL2: ---

5.3 Glauben sie, dass in Deutschland Fehler bei der Einführung von Schiedsgerichtsverfahren und – ordnungen gemacht wurden? Wenn ja, welche?
CL2: ---

A4.3) Client 3

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?

CL3: Project manager in a major Swedish municipality

1.2 What kinds of tasks belong to your field of activity?

CL3: Builds schools and preschools

1.3 What is your personal career? Studies, education and change of companies?

CL3: Civil engineer, started in construction and now client

1.4 With what kind of parties do you work with?

CL3: The people that have given tenders, consultants and contractors

1.5 How many construction projects are you in charge of annually?

CL3: 18-24

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?

CL3: The parties' want to deliver only what they have calculated on, if they find gaps they fight for their costs and money, another thing is when they do mistakes

2.2 How many cases of construction disputes do you have annually/ are you in contact with?

CL3: Mostly none, there are often small changes that create small disputes but no big ones

2.3 With what kind of disputes have you been in contact with?

CL3: Small ones, often details that have been discussed already, sometimes costs are shared if it is for better solutions

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?

CL3: Usually they are settled out of court

2.5 How high is the value of money of the disputes in relation to the construction costs?

CL3: Different

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?

CL3: Only if needed

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?

CL3: Of course

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?

CL3: No, have had colleagues that do

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?

CL3: No idea, possibly 10

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?

CL3: To get an understanding and to find a decision, meetings are better; going to court just makes it complicated.

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?

CL3: Sometimes we agree on management level, but only when things are unclear and we can have a dialog

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?

CL3: First people are mad, then usually ok

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?

CL3: It is stated in AB04 this follows projects, so one

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?

CL3: Ad Hoc is everyday and it depends on what is the problem; big problems has to be arbitrated by advocates

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?

CL3: We don't have that in Sweden.

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?

CL3: Arbitration as in AB04

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?

CL3: Arbitration related to projects is more relevant, it should be done with the project partners in focus

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?

CL3: It works; the real problem is too also relate this to guarantees and other times stated in projects

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?

CL3: It works; the difficulty is that it is difficult to decide what sums of money that should be concerned or not

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?

CL3: Yes

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?

CL3: Yes

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?

CL3: AB04 it good enough, as we can go to court if it does not, there are two options

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?

CL3: Only worked in Sweden

4.2 Where do you see the general differences of the construction industries of both countries?

CL3: Sweden and Germany? Don't know but I guess they are project based as we are, do they have standard contracts?

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?

CL3: ---

4.4 Where do you see the main differences between the Swedish and German arbitration systems?

CL3: ---

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?

CL3: Yes, I know that in UK they have more conflicts as the business is structured differently

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?

CL3: ---

A4.4) Client 4

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?

CL4: Controller procurement and business development

1.2 What kinds of tasks belong to your field of activity?

CL4: Develops quality processes and works with procurement tasks

1.3 What is your personal career? Studies, education and change of companies?

CL4: Started as a nurse, then with planning and now with building processes

1.4 With what kind of parties do you work with?

CL4: Procures architects, engineers, construction project managers, builders etc.; also framework agreements.

1.5 How many construction projects are you in charge of annually?

CL4: Works with others, but takes part in about 20

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?

CL4: The contractor usually looks for ways to say that there are changes and unclear things in the design, there is also often faults like moisture and bad building that makes the client want to have money, this happens too often in smaller projects

2.2 How many cases of construction disputes do you have annually/ are you in contact with?

CL4: None

2.3 With what kind of disputes have you been in contact with?

CL4: As CL4 works with procurement, CL4 has studied many examples. Bad built by builder is often a problem, sometimes this goes all the way to the press and courts, but mostly it is solved before; the municipality need to learn from this.

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?

CL4: Most court cases are about things that fall under other laws, such as work-environment; not so much in projects.

2.5 How high is the value of money of the disputes in relation to the construction costs?

CL4: It varies, for projects it is related to project budget if there is no fine. The real cost is time

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?

CL4: They can be but it is better with the standard agreements and separate settlements

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?

CL4: The municipality has an ambition to make all the guidelines, agreements and standards so clear that their project managers have no problems

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?

CL4: No, usually the municipality brings in an experienced project manager to represent them

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?

CL4: ---

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?

CL4: As they use standard contracts the arbitration is a natural way to do it, it is a defined process and cost less. Going to court is good when it concerns principles but not projects.

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?

CL4: As they use standard agreements there are very seldom any alternative solutions, what it mostly is about is to evaluate and check AB04.

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?

CL4: Well the effect is that sometimes people choose not work together again, not leave tenders to that company etc. But people change.

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?

CL4: As in AB04 they shall be assigned or called in after disputes, this is the way it usually is done. The regulations in AB are functional.

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?

CL4: The institutional form is not common; usually disputes are settled on project basis; there are also lawyers and specialists that are often doing this; the important thing is that they are independent; there are 3 levels in project: (1) group members for smaller things, (2) external arbitrators for complete projects and then if none of this work (3) it goes to court; mostly it stops at arbitration as stated in AB04

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?

CL4: In Sweden we do not have a permanent arbitration group, there are some people that are good at this and do it when needed; there are not so many problems to have a permanent group, the main problem is quality so what is needed are controllers on site, that would solve a lot

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?

CL4: See answer above

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?

CL4: Legal court takes long time and often costs more, arbitration is better

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?

CL4: It works, it is clear and the good thing is that it is already in the standard contract so it is already in the contract

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?

CL4: AB04 is a framework agreement that the sector has agreed on, so yes it works, ok, sometimes it works just to talk about how to solve a problem and then a solution comes up

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?

CL4: It does, it is one of the base for AB04 chapter 9

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?

CL4: Ok, but they mostly do business conflicts

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?

CL4: AB04 is sufficient as a guide, this is the basis for the contracts and everyone knows the rules, it is simple enough

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?

CL4: No

4.2 Where do you see the general differences of the construction industries of both countries?

CL4: Do not know

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?

CL4: No

4.4 Where do you see the main differences between the Swedish and German arbitration systems?

CL4: Does not know German contracts

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?

CL4: In Sweden we have a long tradition of consensus which also is important to the construction sector, if we have conflicts we try to meet in the middle, a very Swedish way. We see a little bit more conflicts in the sector today also I think this is because of driven prices and business

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?

CL4: No

A4.5) Contractor 1

Fragebogen als Interviewgrundlage zur Masterarbeit von Kristin Schmitt und Matthias Magg

Schiedsgerichtsverfahren zur Beilegung von Konflikten in der schwedischen und deutschen Bauindustrie

- Eine Analyse der gegenwärtigen Vorgehensweisen -

Teil 1: Allgemeine Einleitung

1.1 In welcher Position/ Tätigkeit arbeiten Sie innerhalb des Unternehmens zurzeit?
CO1: In der Rechtsabteilung zweier Baukonzerne in Stuttgart und Köln.

1.2 Welche Aufgaben gehören zu Ihrem Tätigkeitsfeld?
CO1:Streitfälle im Ausland, aber auch ein paar aus dem Inland

1.3 Wie ist Ihr persönlicher Werdegang? Studium, Ausbildung, Firmenwechsel?
CO1: Jurastudium in Deutschland

1.4 Mit welcher Art von Vertragspartnern arbeiten Sie zusammen?
CO1: Generalunternehmer, NU

1.5 Mit wie vielen Baustreitigkeitsfällen haben Sie jährlich zu tun?
CO1: Persönlich: ca. ein paar hundert. In der Rechtsabteilung arbeiten ca. 35 Mitarbeiter, d.h. mal 35 ergibt die Anzahl für die Abteilung.

Teil 2: Streitfälle und Streitbeilegungsverfahren

2.1 Worin sehen Sie das Konfliktpotenzial im Bauwesen bzw. Gründe für Konflikte/Streitigkeiten am Bau?
CO1: zu 95% sind die Gründe folgende: Mängel, Termine, Zahlung

2.2 Mit welchen Baustreitigkeiten haben Sie zu tun?
CO1: Mängel, Termine, Zahlung

2.3 Wie viele Streitigkeiten enden vor Gericht und wie viele können anders gelöst werden?
CO1: In Deutschland enden ca. 30 % vor Gericht. Im Ausland ca. 5%.

2.4 Halten Sie das staatliche Gerichtsverfahren bei Baustreitigkeiten für effektiv? Warum?
CO1: Nein. Weder für Deutschland noch für das Ausland. In Deutschland könnte das Gericht aber effektiver sein. Grund: Zeit/Dauer

2.5 Raten Sie den Parteien das staatliche Gericht bei Baustreitigkeiten zu vermeiden? Wenn ja, wie? Wenn nein, warum nicht?
CO1: Man geht immer vor das Gericht wegen der Streitverkündung. Drei Beteiligte fordern ein Gericht. Beim staatl. Verfahren kann sich keiner wehren, wobei Schiedsgericht privat ist und einer Zustimmung bedarf. Die dritte Partei muss somit nicht mit einbezogen werden. Aber oftmals erfordert das Vertragsverhältnis dieses. Wäre schön, wenn Routine Streit lösen würde.

2.6 Hat die Unternehmenspolitik Einfluss auf solche Entscheidungen bzw. beeinflusst sie diese? Sind Entscheidungen einen Streitfall vor Gericht zu lösen von tagesaktuellen Problemen und Entwicklungen geprägt bzw. abhängig?

CO1: ---

Teil 3: Schiedsgerichtsverfahren

Teil 3.1: Schiedsgerichtsverfahren im Allgemeinen

3.1.1 Haben Sie persönliche Erfahrungen mit Schiedsgerichten/Schiedsverfahren gemacht? Welche?

CO1: ---

3.1.2 Wie viele Streitigkeiten werden in Deutschland im Schnitt mit Hilfe eines Schiedsgerichtes gelöst?

CO1: ---

3.1.3 Worin sehen Sie Vor- und Nachteile des Schiedsgerichtes im Vergleich zum staatlichen Gericht?

CO1: + schneller, da Motivation vorhanden ist. Beim Gericht kam es schon vor, dass der Richter meinte: in einem Jahr wechsel ich die Kammer und kann daher hier nichts mehr machen. (Richter müssen im Jahr eine bestimmte Anzahl an Fällen lösen. Wenn jetzt viele einfache Fälle kommen wir z.B. Unfall, dann kann der Richter das schnell lösen und die vorgeschriebene Zahl erfüllen. Wenn aber dauernd Baustreitigkeiten kommen, dann hat der Richter schon keine Lust mehr den Fall zu lösen.) (Es gab schon Streitigkeiten, die 5 verschiedene Richter vom Anfang bis zur Endscheidung vor Gericht hatten.)

+ Ahnung von Bau und Baurecht (Richter haben oft andere Vorstellungen)

+ nicht öffentlich (Juristen verstehen viele Dinge falsch oder geben nur Teile weiter)

+ ohne Anwalt, ist für 1. Klageschrift und kleinen Streitwert praktisch (Den kompletten Streifall ohne Anwalt zu lösen funktioniert den seltensten Fällen.)

+ Sprache frei festlegen. Problem wenn man in verschiedenen Ländern tätig ist. Die staatl. Gerichte sind eher bestochen als Schiedsrichter, da dieser was zu verlieren hat. Oft kann man die Sprache im Land nicht sprechen. Problem Richter zu finden aber auch schon Verträge richtig in eine verständliche Sprache zu übersetzten

- Streitverkündung

- meistens teurer (insbesondere NU-Streitigkeiten bzw. Streitigkeiten mit geringem Streitwert)

- großer Aufwand (Benennung, Treffen…)

3.1.4 Können Sie aus Ihrer Erfahrung sagen, in wie weit die beteiligten Parteien mit dem Ausgang des Schiedsgerichtes zufrieden waren?

CO1: ---

3.1.5 Warum glauben Sie wird in Deutschland das Schiedsgericht zur finalen Streitlösung nicht so häufig genutzt wie im internationalen Bereich? Z.B England, Schweden

CO1: Wegen der Streitverkündung. Es ist kein eingeführter Standard. Man ist an staatl. Gericht gewöhnt und man kennt Schiedsgericht nicht. Die öffentliche Hand zahlt keine Gerichtsgebühren und kann mit dem ganz zum Gericht Geld sparen.

3.1.6 In vielen internationalen Standardbauverträgen z. B. In Schweden AB04 ist das Schiedsgericht als vertragliche Streitlösung vorgegeben. Warum gibt es in der deutschen VOB keine vergleichbare Regelung?
CO1: ---

3.1.7 Halten Sie solche eine Regelung in der VOB als sinnvoll?
CO1: Muss einen Weg geben, alle dran zu gewöhnen. Würde am Besten in VOB klappen. Aber der Staat muss von oben anfangen Regelungen durchzusetzen.

3.1.8 Wie sehen Sie die Regelung für die Anzahl der Schiedsrichter? Welche Anzahl ist Ihrer Meinung nach die beste Lösung?
CO1: Kleine Streitfälle 1 Richter (3-4 Mio. €), große Streitfälle 3 Schiedsrichter

3.1.9 Sind Ihnen die verschiedenen Formen des Schiedsgerichts wie z.B. institutionelle oder ad-hoc Verfahren bekannt? Wo sehen Sie die Vor- und Nachteile dieser Formen? Welche würden Sie bevorzugen?
CO1: In Deutschland gibt es das nicht. CO1 ist es aus dem Ausland bekannt. Wenn möglich sollte Schiedsgericht vorher bestimmt sein, da dem Auftraggeber einfallen wird, dass er gerade keine Zeit/Lust mehr hat. Problem ist die Ernennung. Wenn sich einer weigert kann man zwar Richter ernennen lassen, aber wer zahlt den dann? Und ein Vertragspartner wird wohl kaum etwas unterschreiben, wo der schon vorher weiß, dass er das zahlen muss.
Positiv ist es mal gelaufen wo in Verträgen nichts vereinbart wurde und eine Lösung gefunden werden musste. Es wurde sich auf ad-hoc geeinigt was auch positiv durchgeführt wurde.

3.1.10 Ist Ihnen das baubegleitende Schiedsgericht bekannt? Wo würden Sie hier die Vor- und Nachteile sehen? Kann sich diese Form auf längere Sicht gesehen in der Bauindustrie durchsetzten?
CO1: ---

Teil 3.2: Deutsche Schiedsgerichtsordnungen

3.2.1 Ist Ihnen die neue SLBau mit Einführungsdatum vom 01.01.2010 bekannt?
CO1: Nein.
Hauptproblem: sie muss vereinbart werden. In Schweden muss man zwar auch zustimmten, aber das Verfahren ist bekannt.

3.2.2 In Deutschland gibt es mehrere Schiedsgerichtsordnungen wie z.B. SGOBau, SOBau, DIS, SLBau. Sind Ihnen diese bekannt?
CO1: Ja, aber es gibt noch mehrere. Court of National Arbitration ist aber zu teuer und wird versucht zu umgehen.

3.2.3 Kennen Sie die wesentlichen Unterschiede der Einzelnen?
CO1: ein paar sind etwas detaillierter wie z.B. in der Beweisaufnahme.

3.2.4 Führen so viele Ordnungen nicht zu Verwirrungen und Probleme? Würde es eine Ordnung einfacher machen?
CO1: Problem ist die Akzeptanz. Je mehr Regeln es gibt, desto weniger Akzeptanz. Es würde helfen, nur eine zu haben, die alle akzeptieren.

3.2.5 Welche dieser Ordnungen wird von Firmen am meisten verwendet?
CO1: Im Inland DIS, wenn es nicht nur baubezogen ist. Beim Kauf von Maschinen wird hier die DIS verwendet. DIS ist allgemein verwendbar
Anderen sind bauspezifisch. Dieses Bauunternehmen verwendet zurzeit keine, wenn es um Bau geht.

Teil 4: Unterschiede zwischen Deutschland und Schweden

4.1 Haben Sie Erfahrungen im Bereich Bauprojekte und damit verbundene Streitfälle im Ausland insbesondere Schweden? Bauunternehmer- oder Bauherrenseite?

CO1: ---

4.2 Worin sehen Sie wesentliche Unterschiede in den Bauindustrien der beiden Länder?

CO1: Bisher drei Baustellen in Schweden betreut. Bisher kein Streit. Irgendwie ist man sich immer vorher einig geworden. Schweden hat in Verträgen auch eine Wertgrenze, wann zum Schiedsgericht oder zum Gericht muss. War bisher nicht nötig, da man sich immer davor geeinigt hat.

4.3 Konnten Sie schon Erfahrungen mit dem schwedischen Schiedsgerichts sammeln? Waren diese positiv oder negativ im Vergleich zum Deutschen Schiedsgericht?

CO1: ---

4.4 Worin liegen Ihrer Meinung die Unterschiede zwischen dem Schwedischen und dem Deutschen Schiedsgerichtsverfahren?

CO1: ---

4.5 Hat die unterschiedliche Kultur und Mentalität beider Länder diese Entwicklung geprägt?

Durch ein Gespräch mit einem anderen Mitarbeiter des Bauunternehmens wurde folgende Aussage getroffen: Die Länder haben eine unterschiedliche Mentalität. Die Schweden sind nicht Streitsüchtig und versuchen vorher eine Lösung beim Kaffee trinken zu finden.

Teil 5: Praxis

5.1 In einem vorherigen Gespräch haben wir die Information erhalten, dass ein größeres Bauunternehmen in den 90er Jahren eine Schiedsgerichtsklausel aus den Verträgen genommen hat. Haben Sie eine Erklärung hierfür?

CO1: Klausel war im Vertrag, da einer im Vorstand Mitglied im Betonverein war. Daher wurde die SGOBau in Verträge rein genommen. Aber diese Vereinbarung hat eben nicht immer für jeden Fall gepasst. Sondern nur wenn man sich entweder mit dem AG oder dem NU gestritten hat, aber nicht mit 3 Parteien. Aus diesem Grund wurde die Klausel aus den Verträgen genommen.

5.2 Würden Sie andere Verfahren der Streitlösung als effektiver als das Schiedsgericht halten? Warum?

CO1: Ein baubegleitendes Verfahren, dass bindend wäre, wäre effektiv. Man verklagt sich nie während dem Projekt sondern immer am Ende. Ein Verfahren, dass während der Bauzeit entscheidet und bindend ist wäre besser, wenn es denn funktionieren würde. Er kennt so was aus Süd-Ost-Asien, nicht aus Deutschland

5.3 Glauben Sie, dass in Deutschland Fehler bei der Einführung von Schiedsgerichtsverfahren und – ordnungen gemacht wurden? Wenn ja, welche?

CO1: VOB funktioniert weil Staat sie verwendet hat. Funktioniert auch nur, wenn Staat etwas vorgibt und durchsetzt. Einfacher für Schiedsgericht, wenn Staat dahinter ist. Deutscher Anwaltsverein will nur als Richter drin sitzen

Teil 6: Ergänzungen:

CO1: Das Problem ist es ein Durchgängigkeit zu erzeugen. In Deutschland gibt es das Schiedsgericht selten, da es weniger erprobt ist.

In Deutschland findet man leicht einen Richter und auch welche, die nichts mit der Gegenseite zu tun haben (die nicht bestochen sind).

A4.6) Contractor 2

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?

CO2: Trainee, responsible for the supervising of the grouting process

1.2 What kinds of tasks belong to your field of activity?

CO2: Preparing the activity, supervision, documentation

1.3 What is your personal career? Studies, education and change of companies?

CO2: civil engineer (B.Sc.), Master student in Germany, internship in a construction company before continuing with the studies

1.4 With what kind of parties do you work with?

CO2: works for the contractor at a major Swedish infrastructure project, has also to work with the client

1.5 How many construction projects are you in charge of annually?

CO2: is at the beginning of his career

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?

CO2: Disputes often find their roots in lack of communication and lack of object description, therefore leading to misunderstandings on behalf of one or both parties

2.2 How many cases of construction disputes do you have annually/ are you in contact with?

CO2: No idea

2.3 With what kind of disputes have you been in contact with?

CO2: Usually the contractors' claims are rejected by the employer, on the fact that the work of the contractor is not corresponding to what the employer wanted, or to what the contract states

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?

CO2: No idea

2.5 How high is the value of money of the disputes in relation to the construction costs?

CO2: No idea

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?
CO2: It is expansive

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?
CO2: Communication solves 99 % of all disputes; it is indicated to avoid disputes by any costs

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?
CO2: Not really

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?
CO2: ---

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?
CO2: Arbitration will always cost a less

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?
CO2: ---

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?
CO2: No idea

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?
CO2: two t three should be enough

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?
CO2: Ad-hoc is not a very good arbitration, given that it can lead to further disputes; nevertheless it will be less expensive than the institutional one; the institutional one can be more precise and fair and will definitely save the parties a lot of effort

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?
CO2: Not really

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?
CO2: Does not know

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?

CO2: Arbitration, because it saves expanses and most importantly time

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?

CO2: Never heard of it

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?

CO2: Never heard of it

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?

CO2: Never heard of it

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?

CO2: No

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?

CO2: Institutional procedure

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?

CO2: Not really

4.2 Where do you see the general differences of the construction industries of both countries?

CO2: ---

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?

CO2: ---

4.4 Where do you see the main differences between the Swedish and German arbitration systems?

CO2: ---

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?

CO2: Of course

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?

CO2: The same reason why German highways are not built by concessionaires: tradition

A4.7) Contractor 3

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?

CO3: Trainee

1.2 What kinds of tasks belong to your field of activity?

CO3: Writing thesis about tunnel grouting works, respectively supervise execution of the grouting works at a major infrastructure project in Sweden

1.3 What is your personal career? Studies, education and change of companies?

CO3: Student (International civil engineering)

1.4 With what kind of parties do you work with?

CO3: I do work for a contractor and I'm in contact with the client

1.5 How many construction projects are you in charge of annually?

CO3: I do work for one

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?

CO3: Delays by one of the parties, Disputes about contract clauses, Design mistakes and design changes, Execution mistakes, Imprecise/incorrect tender documents

2.2 How many cases of construction disputes do you have annually/ are you in contact with?

CO3: 0

2.3 With what kind of disputes have you been in contact with?

CO3: Delays by one of the parties, Disputes about contract clauses, Design mistakes and design changes, Execution mistakes, Imprecise/incorrect tender documents

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?

CO3: The project is in an early stage there is no major disputes and court yet.

2.5 How high is the value of money of the disputes in relation to the construction costs?

CO3: The project has kind of a cost plus fee contract. It is difficult to allocate costs

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?

CO3: "Depends on the situation"; it should be seen as the last resort and the advantage of long time court proceedings is doubtful.

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?

CO3: the project has kind of a partnership agreement to avoid disputes, etc. There has been a board of "neutral" members from client and contractor installed to discuss issues and prevent major disputes in advance. The board meets on a regular basis and consists of leading managers of both parties which are not directly involved with the project; personal influence to avoid or enforce disputes is very limited.

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?

CO3: No

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?

CO3: No idea

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?

CO3: Faster decisions, the members of an arbitration court do usually have more professional/special knowledge than ordinary courts.

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?

CO3: No

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?

CO3: No

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?

CO3: is not experienced with arbitrations but would guess that a number of 3 is appropriate, one from each party and a completely neutral person.

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?

CO3: ---

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?

CO3: has heard about this form and could imagine that this is very helpful for a limited number of very large projects. The major advantage is probably time saving and less interruptions of the process flow

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?

CO3: ---

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?

CO3: Arbitration seems to be a fair method and spontaneously CO3 would prefer it. However he is not experienced enough to make an ultimate statement

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?

CO3: Never heard of it

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?

CO3: Never heard of it

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?

CO3: Never heard of it

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?

CO3: Never heard of it

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?

CO3: No idea

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?

CO3: No

4.2 Where do you see the general differences of the construction industries of both countries?

CO3: In Sweden and probably many other companies it is more like a partner situation, to get the job as good and as efficient done as possible. In Germany it is more an opponent situation the disadvantage of the other party is my advantage.

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?

CO3: No

4.4 Where do you see the main differences between the Swedish and German arbitration systems?

CO3: ---

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?

CO3: I don't know if and how the different mentality of Swedes and Germans effect arbitration. But the difference in mentality has a large impact on the way of working within the construction industry in general.

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?

CO3: No

A4.8) Contractor 4

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?
CO4: Project developer / project manager

1.2 What kinds of tasks belong to your field of activity?
CO4: Developing business opportunities and managing projects

1.3 What is your personal career? Studies, education and change of companies?
CO4: Master of Science in Engineering (civil engineering) in Sweden; contracting engineer in a leading Swedish construction company; project developer / project manager in a leading Swedish construction company for the past 2 years; Just quit this job and will begin as property manager at major Swedish municipality

1.4 With what kind of parties do you work with?
CO4: Usually working with project development, contractor and client at the same time. The whole project is later sold as a whole to another client.

1.5 How many construction projects are you in charge of annually?
CO4: 3-4

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?
CO4: Delays, misunderstandings and incorrect results. By selling completed products rather than a construction service this could be avoided.

2.2 How many cases of construction disputes do you have annually/ are you in contact with?
CO4: Presently none

2.3 With what kind of disputes have you been in contact with?
CO4: Delays

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?
CO4: Almost all disputes have been regulated by the contract.

2.5 How high is the value of money of the disputes in relation to the construction costs?
CO4: 1-5% it depends on the cause.

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?
CO4: No, it is too slow.

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?
CO4 Yes, by regulating everything in the contract.

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?
CO4: Not much

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?
CO4: No idea

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?
CO4: Arbitration is quicker, time is money remember!

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?
CO4: Partnering contracts

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?
CO4: It depends on what end the party in question is at and the reason for the arbitration, it varies greatly I believe.

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?
CO4: One for each party and one independent

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?
CO4: I have read about it but since I do not work with these questions (our lawyers do) I'm not certain of the content.

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?
CO4: No

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?
CO4: Adjusted by contracts.

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?
CO4: Arbitration.

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?
CO4: Yes, because everyone is aware of it and know what to expect prior to signing contracts.

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?
CO4: Yes, because everyone is aware of it and know what to expect prior to signing contracts.

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?
CO4: No, they must add the possibility that a client buys a complete product, not just a "service".

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?
CO4: Yes

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?
CO4: Arbitration Act

3.2.8 How is the inclusion of additional third parties done? Third parties can be for example subcontractors, contractor and client fighting all against each other or subcontractor and contractor fighting on one side against the client. Can this inclusion be a reason for not choosing arbitration?
CO4: No, all the parties are solely responsible before ONE client; subcontractors have nothing to do with the contractors' client.

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?
CO4: Not much as we have staff who do that.

4.2 Where do you see the general differences of the construction industries of both countries?
CO4: Mainly the products themselves, the buildings are built differently. The German contractors seem to be more organized and industrial.

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?
CO4: No

4.4 Where do you see the main differences between the Swedish and German arbitration systems?
CO4: No idea.

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?
CO4: Yes

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?
CO4: No idea.

A4.9) Advocate 1

Fragebogen als Interviewgrundlage zur Masterarbeit von Kristin Schmitt und Matthias Magg

Schiedsgerichtsverfahren zur Beilegung von Konflikten in der schwedischen und deutschen Bauindustrie

- Eine Analyse der gegenwärtigen Vorgehensweisen -

Teil 1: Allgemeine Einleitung

1.1 In welcher Position/ Tätigkeit arbeiten Sie innerhalb des Unternehmens zurzeit?
AD1: Hauptgeschäftsführer des Landesverbandes der Bauindustrie in Rheinland-Pfalz

1.2 Welche Aufgaben gehören zu Ihrem Tätigkeitsfeld?
AD1: Interessenvertretung der Bauunternehmen nach innen und außen, z.B. gegenüber der Politik
Rechtsberatung der Bauunternehmen (Anwaltsbüro für die Bauwirtschaft), z.B. bei Fragen zum Baurecht, zu AGB Recht, Vertragsrecht, …
Rechtsberatung für Mitglieder kostenlos
Lobby für die Bauwirtschaft

1.3 Wie ist Ihr persönlicher Werdegang? Studium, Ausbildung, Firmenwechsel?
AD1: Architekturstudium, Dipl.-Ing.
Jurastudium, Jurist
Als Anwalt gearbeitet
Schnittstelle zwischen Bau – Recht
Honorarprofessor an der FH Mainz für Baurecht

1.4 Mit welcher Art von Vertragspartnern arbeiten Sie zusammen?
AD1: Bauunternehmen die Mitglied im Landesverband sind
Nationale Tätigkeit

1.5 Mit wie vielen Baustreitigkeitsfällen haben Sie jährlich zu tun?
AD1: Kann man so nicht genau sagen, wo fängt eine Streitigkeit an

Teil 2: Streitfälle und Streitbeilegungsverfahren

2.1 Worin sehen Sie das Konfliktpotenzial im Bauwesen bzw. Gründe für Konflikte/Streitigkeiten am Bau?
AD1: Geld, unterschiedliche Auffassungen zwischen BH und BU, Vertragslücken, mangelndes Risikomanagement und mangelnde Gefahrenanalyse, ungeklärte Altlasten, Mängel, unvollständige bez. unklare Leistungsbeschreibung oder Leistungsverzeichnis

2.2 Mit welchen Baustreitigkeiten haben Sie zu tun?
AD1: ---

2.3 Wie viele Streitigkeiten enden vor Gericht und wie viele können anders gelöst werden?

AD1: Keine Angaben darüber (es werden darüber keine Statistiken geführt)
Gefühlt und aus dem Bauch heraus können weit über 90 % der Streitfälle anders gelöst werden

2.4 Halten Sie das staatliche Gerichtsverfahren bei Baustreitigkeiten für effektiv? Warum?

AD1: Nein, Bauprozesse sind absolut nicht effektiv und total ungeeignet Bauprozesse sind langwierig, unbefriedigend. Eine Partei ist nach einem Prozess immer unzufrieden und zieht vor die nächsthöhere Instanz (OLG), bis dahin dauert ein Prozess gut und gerne 6-7 Jahre. Vor dem OLG bevorzugen beide Parteien gerne einen Vergleich (die Anwälte aufgrund der Bezahlung auch), dies hätte man auch wesentlich früher erreichen können. Bei einem staatl. Gerichtverfahren wird immer nach hinten gearbeitet: der Anwalt hat keine Ahnung und muss gefüttert werden, der gegnerische Anwalt antwortet wiederum auf das letzte Schreiben der klagenden Partei. Ein Bauprozess verschlingt enorme Kosten (Anwalt, Prozess, Mitarbeiter, Zeit, …) Warum: Mangelnde Kompetenz der Richter (Richter sind dazu da, rechtliche Probleme zu lösen, und keine technischen Probleme). Richter bedient sich der Hilfe von Sachverständigen. Sachverständigengutachten dauern in der Regel ½ - 1 Jahr. Bauprozesse sind reine Sachverständigenschlachten (eine Partei versucht immer das Gutachten anzufechten).

2.5 Raten Sie den Parteien das staatliche Gericht bei Baustreitigkeiten zu vermeiden? Wenn ja, wie? Wenn nein, warum nicht?

AD1: Streitigkeiten werden natürlich versucht im Vorfeld zu klären bzw. nicht zum Streit kommen lassen
Ein Bauprozess kann für beide Seiten (AG und AN) nicht wirtschaftlich geführt werden
Man erhält ein Urteil, keine Gerechtigkeit
Bauprozesse können nicht immer verhindert werden (manchmal muss geklagt werden, z.B. wenn AG nicht bezahlt)

2.6 Hat die Unternehmenspolitik Einfluss auf solche Entscheidungen bzw. beeinflußt sie diese? Sind Entscheidungen einen Streitfall vor Gericht zu lösen von tagesaktuellen Problemen und Entwicklungen geprägt bzw. abhängig?

AD1: Wird von Einzelfall zu Einzelfall entschieden

2.7 In wie weit hat die Preispolitik von Unternehmen Einfluß auf das Konfliktpotenzial und in wie weit glauben Sie, dass die Preispolitik den Unternehmern keine andere Möglichkeit als den Gang zum Gericht lässt?

AD1: Bauunternehmen versuchen natürlich auch immer das Beste und das Ihnen zustehende aus einem Vertrag rauszuholen

Teil 3: Schiedsgerichtsverfahren

Teil 3.1: Schiedsgerichtsverfahren im Allgemeinen

3.1.1 Haben Sie persönliche Erfahrungen mit Schiedsgerichten/Schiedsverfahren gemacht? Welche?

AD1: Ja, arbeitet selbst als Schiedsrichter

3.1.2 Wie viele Streitigkeiten werden in Deutschland im Schnitt mit Hilfe eines Schiedsgerichtes gelöst?

AD1: Darüber gibt es keine Statistiken

3.1.3 Worin sehen Sie Vor- und Nachteile des Schiedsgerichtes im Vergleich zum staatlichen Gericht?

AD1: Der große Vorteil des Schiedsgerichtes gegenüber dem staatlichen Gerichtsverfahren ist, dass der Schiedsrichter / die Schiedsrichter ausgesucht werden kann, und man nicht einem Richter zugeteilt wird.
Dadurch kann der Schiedsrichter qualifiziert ausgesucht werden

Schiedsgerichtsverfahren in Deutschland sehr selten und weitestgehend unbekannt (beteiligte Parteien möchten kein fixes Urteil bereits in der ersten Instanz)
In Deutschland wird man mit Freiwilligkeit zum Schiedsgerichtsverfahren nicht weit kommen

Schiedsgericht nicht günstiger wie staatl. Prozess, aber schneller, oftmals reicht ein Termin aus um die Sache zu erledigen, daher ist das Schiedsgericht oftmals nach einem ½ - 1 Jahr erledigt

Schiedsgericht ist im Gegensatz zu dem staatl. Gerichtsverfahren nur günstiger, wenn das staatl. Verfahren über mehrere Instanzen geht

Schiedsgericht keine Berufung und Revision möglich

Das Problem bei der deutschen Schiedsgerichtsbarkeit ist der Einbezug Dritter (NU) in das Verfahren, da in Deutschland weitestgehend Bauunternehmerketten existieren
Was macht man, wenn dieser nicht freiwillig möchte? (Im Staatl. Gerichtsverfahren kann man Dritte über die sogenannte Streitverkündung in das Verfahren zwingen)

3.1.4 Können Sie aus Ihrer Erfahrung sagen, in wie weit die beteiligten Parteien mit dem Ausgang des Schiedsgerichtes zufrieden waren?

AD1: Aus persönlicher Erfahrung sind die Beteiligten weitaus zufriedener, kann so aber nicht pauschalisiert werden, da staatliche Gerichte diese auch erreichen könnten, das System die staatliche Gerichtsbarkeit jedoch etwas blockiert

3.1.5 Warum glauben Sie wird in Deutschland das Schiedsgericht zur finalen Streitlösung nicht so häufig genutzt wie im internationalen Bereich? Z.B England, Schweden

AD1: Keine Erklärung dafür
Bauunternehmen kennen es oftmals nicht und sind nicht damit vertraut
BU haben Angst vor einem rechtskräftigen und nicht anfechtbaren Urteil bereits in erster Instanz
Kleinteilige Struktur in Deutschland, viele kleine spezialisierte Unternehmen
Unternehmen mit weniger als 20 Mann haben Probleme im Vertragswesen, da kann man nicht erwarten, dass die etwas über Schiedsgerichtsbarkeit wissen

3.1.6 In vielen internationalen Standardbauverträgen z. B. In Schweden AB04 ist das Schiedsgericht als vertragliche Streitlösung vorgegeben. Warum gibt es in der deutschen VOB keine vergleichbare Regelung?

AD1: Die VOB wurde von öffentlichen Auftraggebern entwickelt und diese wollten schlichtweg keine Streitlösung durch ein Schiedsgericht
Öffentl. Auftraggeber dürfen oftmals kein Schiedsgericht in Anspruch nehmen, da der Rechnungsprüfungshof dahinter steht und diese ein fixes Urteil sehen möchte

3.1.7 Halten Sie solche eine Regelung in der VOB als sinnvoll?

AD1: Wäre sinnvoll, stößt aber gegenwärtig nicht auf besonders viel Gegenliebe innerhalb der Bauindustrie

3.1.8 Wie sehen Sie die Regelung für die Anzahl der Schiedsrichter? Welche Anzahl ist Ihrer Meinung nach die beste Lösung?

AD1: Streitwert unter 100.000 € = 1. Schiedsrichter
Streitwert über 100.000 € = 3 Schiedsrichter
Richter werden gerne als Chairman genommen, da sie sich in der Berechnung von Streitwerten und den Verfahrensabläufen auskennen
3 Schiedsrichter macht schon Sinn, da man mit mehreren Personen einfach mehr sieht, für kleine Streitigkeiten stehen die hohen Kosten für mehrere Schiedsrichter in keinem Vergleich zu dem Streitwert

Jede Partei nimmt sich einen Anwalt, auch wenn keine Anwaltspflicht, aber da es sich um rechtliches Verfahren handelt, sollte sich jede Partei einen Anwalt zur Seite nehmen

3.1.9 Sind Ihnen die verschiedenen Formen des Schiedsgerichts wie z.B institutionelle oder ad-hoc Verfahren bekannt? Wo sehen Sie die Vor- und Nachteile dieser Formen? Welche würden Sie bevorzugen?

AD1: Nein

3.1.10 Ist Ihnen das baubegleitende Schiedsgericht bekannt? Wo würden Sie hier die Vor- und Nachteile sehen? Kann sich diese Form auf längere Sicht gesehen in der Bauindustrie durchsetzten?

AD1: Ja, wird sehr gerne bei internationalen Großprojekten genommen, enorm hohen Kosten, schnelle Streitschlichtung im Streitfall
Das deutsche Schiedsgerichtssystem ist darauf nicht gut vorbereitet

Teil 3.2: Deutsche Schiedsgerichtsordnungen

3.2.1 Ist Ihnen die neue SLBau mit Einführungsdatum vom 01.01.2010 bekannt?

AD1: Ja, neues vier Stufen Verfahren, aber ist in Deutschland noch sehr unbekannt

3.2.2 In Deutschland gibt es mehrere Schiedsgerichtsordnungen wie z.B. SGOBau, SOBau, DIS, SLBau. Sind Ihnen diese bekannt?

AD1: Alle bekannt bis auf die DIS, noch nie etwas davon gehört
In Deutschland laufen die meisten Schiedsverfahren nach der SGOBau

3.2.3 Kennen Sie die wesentlichen Unterschiede der Einzelnen?

AD1: ---

3.2.4 Führen so viele Ordnungen nicht zu Verwirrungen und Probleme? Würde es eine Ordnung einfacher machen?

AD1: Da man Regeln selbst festlegen möchte ist eine größere Auswahl schon okay

In Deutschland kommt aber hauptsächlich die SGOBau zur Anwendung

Macht es nicht schwerer

3.2.5 Welche dieser Ordnungen wird von Firmen am meisten verwendet?

AD1: SGOBau

Teil 4: Unterschiede zwischen Deutschland und Schweden

4.1 Haben Sie Erfahrungen im Bereich Bauprojekte und damit verbundene Steitfälle im Ausland insbesondere Schweden? Bauunternehmer- oder Bauherrenseite?

AD1: Nein

4.2 Worin sehen Sie wesentliche Unterschiede in den Bauindustrien der beiden Länder?

AD1: ---

4.3 Konnten Sie schon Erfahrungen mit dem schwedischen Schiedsgerichts sammeln? Waren diese positiv oder negativ im Vergleich zum Deutschen Schiedsgericht?

AD1: ---

4.4 Worin liegen Ihrer Meinung die Unterschiede zwischen dem Schwedischen und dem Deutschen Schiedsgerichtsverfahren?

AD1: ---

4.5 Hat die unterschiedliche Kultur und Mentalität beider Länder diese Entwicklung geprägt?

AD1: ---

Teil 5: Praxis

5.1 In einem vorherigen Gespräch haben wir die Information erhalten, dass ein größeres Bauunternehmen in den 90er Jahren eine Schiedsgerichtsklausel aus den Verträgen genommen hat. Haben Sie eine Erklärung hierfür?

AD1: Schlechte Erfahrungen

Anwälte kennen nur Gerichte, stereotypische Verfahren und Denken

5.2 Würden Sie andere Verfahren der Streitlösung als effektiver als das Schiedsgericht halten? Warum?

AD1: Noch keine bekannt

Von Mediation und Schlichtung halte ich nichts, zu schwache Stellung des Mediators / Schlichtung

Mediation / Schlichtung werden in Deutschland keinen Erfolg haben, da keine zwingende Bindung besteht

5.3 Glauben Sie, dass in Deutschland Fehler bei der Einführung von Schiedsgerichtsverfahren und – ordnungen gemacht wurden? Wenn ja, welche?

AD1: ---

Teil 6: Ergänzungen:

AD1: Diskussionen in Deutschland über Streitschlichtungsverfahren

Baugerichtstag im Mai 2010 (www.baugerichtstag.de), Vorschläge zu Streitschlichtung für den Gesetzgeber

Es wird eine Regelung kommen, nur es wird keine Regelung wie in anderen Ländern werden, es wird eine „deutsche Regelung“ geben, die auch zwingend erforderlich ist

A4.10) Advocate 2

Questionnaire for the Master thesis of Kristin Schmitt and Matthias Magg

Arbitration as a Dispute Resolution Method in the Swedish and German Construction Industry

- An analysis of current methodologies -

Part 1: General information

1.1 What is your position within the company/concern you are working for at the moment?
AD2: Senior Associate, Infrastructure and Construction Group

1.2 What kinds of tasks belong to your field of activity?
AD2: Representing clients within dispute resolution and arbitration; contract drafting, etc.

1.3 What is your personal career? Studies, education and change of companies?
AD2: Studies in Political science, Languages and Law, working for the legal counsel of the Swedish Construction Industry, Senior Associate, Attorney at Law in a major Swedish law firm

1.4 With what kind of parties do you work with?
AD2: usually represent clients that e.g. order building works or an infrastructure project from a contractor

1.5 How many construction projects are you in charge of annually?
AD2: 5-20

Part 2: Construction disputes and the settlement of disputes

2.1 What are the reasons for disputes in the construction industry according to your opinion? Where is the potential for the development of the disputes?
AD2: Unclear documentation, such as drawings and specifications; unclear contracts; unforeseen ground conditions or other unforeseen conditions on site; lack of communication during the construction period between the parties; financial difficulties for a party, etc.

2.2 How many cases of construction disputes do you have annually/ are you in contact with?
AD2: 5-20

2.3 With what kind of disputes have you been in contact with?
AD2: See 2.1

2.4 How many disputes are solved by legal court and how many have been able to be solved by alternative dispute resolution methods?
AD2: Most disputes involving a substantial amount are solved by arbitration. Disputes involving a less amount are usually solved by the courts. Alternative dispute resolution such as DAB is relatively unusually in Sweden.

2.5 How high is the value of money of the disputes in relation to the construction costs?
AD2: It varies, but we quite often see disputes involving smaller amounts that will involve substantial legal fees because of the complexity of the disputed issues.

2.6 Do you consider legal court as effective when it comes to disputes within the construction industry?
AD2: No

2.7 Do you try to avoid disputes? If yes, how do you do this? If not, why not?
AD2: Yes. I think it is fare to say that within the construction industry and especially within a construction dispute, things are seldom black or white, i.e. one party is seldom always a 100 per cent right, which makes room for settlements.

Part 3: Arbitration

Part 3.1: Arbitration in general

3.1.1 Do you personally have experiences with arbitration? What kind of experiences?
AD2: Yes, as counsel for clients.

3.1.2 How many disputes are solved by arbitration in the Swedish construction industry?
AD2: See 2.4. For the exact numbers you can contact the Swedish Chamber of Commerce in Stockholm.

3.1.3 Where do you see the advantages and disadvantages of arbitration in comparison to litigation?
AD2: The arbitration proceedings are usually faster, the matters are usually judged by more competent lawyers (the arbitrators chosen by the parties); the proceedings are not official as opposed to the court proceedings. The arbitration proceedings are however more expensive than the court proceedings, since the parties have to pay the arbitrators costs, which can be seen as an disadvantage. Another disadvantage is that a judgement from the Arbitral Tribunal can only be challenged on formal grounds, i.e. not just because the Arbitral Tribunal has ruled in favour of the opposing party.

3.1.4 Do you know alternative dispute procedures that seem to be more effective than arbitration? Why?
AD2: No

3.1.5 Are you able to tell from your experiences how satisfied the involved parties are with the outcome of an arbitration procedure?
AD2: It depends if they win or lose

3.1.6 How do you see the regulations for the arbitrators? How many arbitrators would you regard as effective?
AD2: In the Stockholm Chamber of Commerce we have either the normal Arbitration Rules or Rules for Expedited Arbitrations. I think both these sets of rules are satisfactory.

3.1.7 Are you familiar with the different forms of arbitration, such as the ad-hoc or institutional arbitration? Where do you see the advantages and disadvantages? Which form do you prefer?
AD2: That depends on the case, and also on the parties agreement, in which it is usually stated which set of rules shall apply.

3.1.8 Do you know the form of a permanent construction arbitral tribunal? What do you consider as the advantages and disadvantages? Do you think this form can be resistant in the today's construction industry?
AD2: I have no experience with a permanent construction arbitral tribunal.

Part 3.2: Arbitration in Sweden

3.2.1 Which is the most common procedure of arbitration in the Swedish construction industry?

AD2: The most common is to use either the normal Arbitration Rules from the Stockholm Chamber of Commerce or ad-hoc procedure in accordance with the Swedish Arbitration Act.

3.2.2 Do you prefer arbitration as the final method for dispute resolution or would you prefer a procedure at a legal court instead?

AD2: Again, that depends on the complexity of the case.

3.2.3 What do you think about Chapter 10 of the AB 04? Do you think it is an appropriate method for the resolution of disputes? Why?

AD2: No, I do not think this is an appropriate method, e.g., the decisions are not binding and the issues tend to end up in court or arbitration for a final decision anyway.

3.2.4 What do you think about Chapter 9 of the AB 04? Do you think it regulates the settlement of disputes in an appropriate way for the construction industry? Why?

AD2: Again, it depends on the complexity of the construction project and the project amount. It is quite usual that the parties agree on arbitration instead of Chapter 9 in their contract. A disadvantage of using normal court system is that dispute issues in a construction project are usually rather complex and technical. This can be difficult for a normal judge to handle, as opposed to specially appointed arbitrators with experience from the construction area.

3.2.5 Do you think the current Swedish Arbitration Act from 1999 fits to the changing and unique requirements of the construction industry? Why?

AD2: I have no special opinion

3.2.6 Do you know the Arbitration Institute of the Stockholm Chamber of Commerce?

AD2: Yes, see above

3.2.7 Would you prefer a procedure according to the Arbitration Act or an institutional procedure, such as the Arbitration Institute of the Stockholm Chamber of Commerce provides? Why?

AD2: Again, it depends on the complexity of the construction project and the project amount

3.2.8 How is the inclusion of additional third parties done? Third parties can be for example subcontractors, contractor and client fighting all against each other or subcontractor and contractor fighting on one side against the client. Can this inclusion be a reason for not choosing arbitration?

AD2: This topic is quite extensive indeed. However, in general one can say that it is always a bit tricky with multiparty arbitration clauses in contracts – if such a clause shall be drafted already in the contract before signing. Questions that arise are e.g. which party/parties that shall appoint the arbitrators, if there are time bars for when arbitration has to be initiated etc. It is however not unusual that parties once a dispute has arisen, agree on a special Dispute Agreement including a multiparty party arbitration clause if necessary. This is, however not so common in the construction industry since the Employer in a construction contract has a direct contractual relation with the Contractor but not the Contractor's sub-contractors. Liability issues etc. are thus generally a question between the two first mentioned parties.

Part 4: Arbitration in Sweden and Germany

4.1 Do you have experiences with international arbitration especially in Germany? What kind of experiences? What was your function?

AD2: No

4.2 Where do you see the general differences of the construction industries of both countries?

AD2: ---

4.3 Have you been able to make experiences with German arbitration before you had to deal with arbitration procedures in Sweden? Have they been positive or negative?

AD2:

4.4 Where do you see the main differences between the Swedish and German arbitration systems?

AD2:

4.5 Do you think the different cultures and mentalities influenced the development of arbitration in both countries?

AD2: It is clear that the German and Swedish construction cultures have their differences. From experience with contractors, it however is clear that those differences are not a problem to overcome with good communication.

4.6 Do you have an explanation why Germany has no fixed regulations to solve disputes with the help of arbitration?

AD2: ---

A4.11) Advocate 3

Fragebogen als Interviewgrundlage zur Masterarbeit von Kristin Schmitt und Matthias Magg

Schiedsgerichtsverfahren zur Beilegung von Konflikten in der schwedischen und deutschen Bauindustrie

- Eine Analyse der gegenwärtigen Vorgehensweisen -

Teil 1: Allgemeine Einleitung

1.1 In welcher Position/ Tätigkeit arbeiten Sie innerhalb des Unternehmens zurzeit?

AD3: Mitinhaber, Leiter Immobiliendezernat (3 Anwälte)

1.2 Welche Aufgaben gehören zu Ihrem Tätigkeitsfeld?

AD3: Spezialisiert auf Immobilienrecht, dazu zählt auch Baurecht und Architektenrecht
Unternehmen beraten

1.3 Wie ist Ihr persönlicher Werdegang? Studium, Ausbildung, Firmenwechsel?

AD3: Jurastudium, Rechtsanwalt,
vorher tätig im Immobilienbankenrecht und im Immobilieninvestmentmanagement

1.4 Mit welcher Art von Vertragspartnern arbeiten Sie zusammen?

AD3: Professionelle Mandanten (Aufbaugesellschaften, Investmentfirmen, …)
Keine privaten „Häuslebauer“

1.5 Mit wie vielen Baustreitigkeitsfällen haben Sie jährlich zu tun?

AD3: ---

Teil 2: Streitfälle und Streitbeilegungsverfahren

2.1 Worin sehen Sie das Konfliktpotenzial im Bauwesen bzw. Gründe für Konflikte/Streitigkeiten am Bau?

AD3: Entsteht durch Meinungsverschiedenheiten bei Abweichungen zwischen Bausoll und Bauist
Differenzen bei der Interpretation der rechtlichen Komponente: was ist geschuldet?
Entstehen meistens durch Mängel, kaum bzw. keine Streitigkeiten durch Terminüberschreitungen

2.2 Mit welchen Baustreitigkeiten haben Sie zu tun?

AD3: ---

2.3 Wie viele Streitigkeiten enden vor Gericht und wie viele können anders gelöst werden?

AD3: Aus dem Bauch heraus 30 – 40 %

2.4 Halten Sie das staatliche Gerichtsverfahren bei Baustreitigkeiten für effektiv? Warum?

AD3: Gemischte Erfahrungen mit dem staatlichen Gerichtsverfahren

Das staatliche Gerichtsverfahren steht und fällt mit dem Richter (Kompetenz)

Ist keine Systemfrage ob es effektiv ist, sondern eine personenbezogene Frage

Prozesse dauern lange und binden unnötig Ressourcen

2.5 Raten Sie den Parteien das staatliche Gericht bei Baustreitigkeiten zu vermeiden? Wenn ja, wie? Wenn nein, warum nicht?

AD3: Wenn es irgendwie geht Gerichtsprozess immer vermeiden

Parteien dahingehend beraten (Vor- und Nachteile abwägen)

Mandanten sind Profis (Emotionen aus dem Verfahren nehmen)

Mandanten sollen sich lieber auf neue Projekte konzentrieren.

2.6 Hat die Unternehmenspolitik Einfluss auf solche Entscheidungen bzw. beeinflußt sie diese? Sind Entscheidungen einen Streitfall vor Gericht zu lösen von tagesaktuellen Problemen und Entwicklungen geprägt bzw. abhängig?

AD3: Entscheidung ob vor Gericht gezogen wird ist eine rei n kaufmännische Entscheidung

2.7 In wie weit hat die Preispolitik von Unternehmen Einfluß auf das Konfliktpotenzial und in wie weit glauben Sie, dass die Preispolitik den Unternehmern keine andere Möglichkeit als den Gang zum Gericht lässt?

AD3: ---

Teil 3: Schiedsgerichtsverfahren

Teil 3.1: Schiedsgerichtsverfahren im Allgemeinen

3.1.1 Haben Sie persönliche Erfahrungen mit Schiedsgerichten/Schiedsverfahren gemacht? Welche?

AD3: Nein

3.1.2 Wie viele Streitigkeiten werden in Deutschland im Schnitt mit Hilfe eines Schiedsgerichtes gelöst?

AD3: ---

3.1.3 Worin sehen Sie Vor- und Nachteile des Schiedsgerichtes im Vergleich zum staatlichen Gericht?

AD3: Keine Vorteile des Schiedsgerichtsverfahrens

Immer propagierte Vorteile: Sachkompetenz, kürzere Dauer, niedrigere Kosten, Geheimhaltung

- Geheimhaltung: keine große Notwendigkeit bei Bauprozessen (anders bei Streitigkeiten für z.B. Patentrecht), kein Vorteil

- geringere Kosten: sehr skeptisch, gerade bei großen Projekten und einem hohen Auftragswert, enorm hohe Tagessätze für Schiedsrichter, kein Vorteil

- kürzere Verfahrensdauer: ist nicht belegt, gibt genau so gut Verfahren die mehrere Jahre andauerten, kein Vorteil

- Sachkompetenz: steht und fällt mit dem Richter, Sachverständigengutachten können in beiden Verfahren angewandt werden, kein Vorteil

3.1.4 Können Sie aus Ihrer Erfahrung sagen, in wie weit die beteiligten Parteien mit dem Ausgang des Schiedsgerichtes zufrieden waren?

AD3: Keine Erfahrungen mit Schiedsgerichtsverfahren

3.1.5 Warum glauben Sie wird in Deutschland das Schiedsgericht zur finalen Streitlösung nicht so häufig genutzt wie im internationalen Bereich? Z.B England, Schweden

AD3: Schiedsgericht sehr unbekannt

3.1.6 In vielen internationalen Standardbauverträgen z. B. In Schweden AB04 ist das Schiedsgericht als vertragliche Streitlösung vorgegeben. Warum gibt es in der deutschen VOB keine vergleichbare Regelung?

AD3: Der Einbezug Dritter ist sehr problematisch (kann nur durch vertragliche Regelungen eingebunden werden)

3.1.7 Halten Sie solche eine Regelung in der VOB als sinnvoll?

AD3: Problem dadurch nicht gelöst, da VOB/B auch wiederum vertraglich eingebunden sein muss

Der Einbezug dritter müsste dann schon in der Ausschreibung (Vergabephase) mit eingebunden werden (wie das dann aufgenommen würde, ist fraglich)

Durch Abstufung wie in Schweden wäre das Kostenproblem schon etwas gelöst

3.1.8 Wie sehen Sie die Regelung für die Anzahl der Schiedsrichter? Welche Anzahl ist Ihrer Meinung nach die beste Lösung?

AD3: Drei Schiedsrichter verursachen sehr hohe Kosten, nicht nötig

Die Partei die am längeren Hebel sitzt kann Macht und Druck ausüben (kleinere Partei möchte immer den Auftrag haben und kann dadurch in Situation gezwungen werden, z.B. bei der Auswahl der Schiedsrichter, dies geht beim staatl. Verfahren nicht

Qualität der Entscheidung leidet bei einem Schiedsrichter nicht (genauso wie beim Gerichtsprozess)

3.1.9 Sind Ihnen die verschiedenen Formen des Schiedsgerichts wie z.B institutionelle oder ad-hoc Verfahren bekannt? Wo sehen Sie die Vor- und Nachteile dieser Formen? Welche würden Sie bevorzugen?

AD3: Ja,

institutionell, da sich Leute darüber ja bereits Gedanken gemacht haben, und es speziell auf das Bauwesen ausgelegt ist

3.1.10 Ist Ihnen das baubegleitende Schiedsgericht bekannt? Wo würden Sie hier die Vor- und Nachteile sehen? Kann sich diese Form auf längere Sicht gesehen in der Bauindustrie durchsetzten?

AD3: Nur bei Großprojekten sinnvoll (die einen hohen Auftragswert haben und unter Zeitdruck stehen)

Bei anderen Projekten würde es sich nicht lohne

Teil 3.2: Deutsche Schiedsgerichtsordnungen

3.2.1 Ist Ihnen die neue SLBau mit Einführungsdatum vom 01.01.2010 bekannt?

AD3: Nein

3.2.2 In Deutschland gibt es mehrere Schiedsgerichtsordnungen wie z.B. SGOBau, SOBau, DIS, SLBau. Sind Ihnen diese bekannt?

AD3: SGOBau durch SLBau ersetzt

SoBau

Dis

Bekannt, nur SLBau und SOBau bauspezifisch

3.2.3 Kennen Sie die wesentlichen Unterschiede der Einzelnen?

AD3: Nein

3.2.4 Führen so viele Ordnungen nicht zu Verwirrungen und Probleme? Würde es eine Ordnung einfacher machen?
AD3: Bestimmt, eine rein bauspezifische Regelung wäre sicherlich von Vorteil

3.2.5 Welche dieser Ordnungen wird von Firmen am meisten verwendet?
AD3: Keine, machen keine Schiedsgerichtsverfahren

Teil 4: Unterschiede zwischen Deutschland und Schweden

4.1 Haben Sie Erfahrungen im Bereich Bauprojekte und damit verbundene Streitfälle im Ausland insbesondere Schweden? Bauunternehmer- oder Bauherrenseite?
AD3: Nein

4.2 Worin sehen Sie wesentliche Unterschiede in den Bauindustrien der beiden Länder?
AD3: ---

4.3 Konnten Sie schon Erfahrungen mit dem schwedischen Schiedsgerichts sammeln? Waren diese positiv oder negativ im Vergleich zum Deutschen Schiedsgericht?
AD3: ---

4.4 Worin liegen Ihrer Meinung die Unterschiede zwischen dem Schwedischen und dem Deutschen Schiedsgerichtsverfahren?
AD3: ---

4.5 Hat die unterschiedliche Kultur und Mentalität beider Länder diese Entwicklung geprägt?
AD3: ---

Teil 5- Praxis

5.1 In einem vorherigen Gespräch haben wir die Information erhalten, dass ein größeres Bauunternehmen in den 90er Jahren eine Schiedsgerichtsklausel aus den Verträgen genommen hat. Haben Sie eine Erklärung hierfür?
AD3: Negative Erfahrungen, zu hohe Kosten,
Problem: Einbezug Dritter

5.2 Würden Sie andere Verfahren der Streitlösung als effektiver als das Schiedsgericht halten? Warum?
AD3: Mediation: riesen Hype darum
Alle Verfahren der Streitbeilegung die Bauprozesse verhindern sind erstrebenswert
Vorteil Mediation: ein guter Mediator kann Parteien zum Einlenken bewegen,
Mediation gibt es aber auch im staatlichen Verfahren: Güteverhandlung vor dem Prozessstart)
Die Zukunft von Mediation liegt sicherlich bei Fällen, in denen hohe Emotionen mitspielen (z.B. Familienrecht, Nachbarschaftsrecht)
Mediation in Bauprozessen eher ungeeignet

5.3 Glauben Sie, dass in Deutschland Fehler bei der Einführung von Schiedsgerichtsverfahren und – ordnungen gemacht wurden? Wenn ja, welche?
AD3: Weiß gar nicht wie und wann das Schiedsgerichtsverfahren überhaupt eingeführt wurde
Geschweige denn, ob es überhaupt publik gemacht wurde

Teil 6: Ergänzungen

AD3: Das Schiedsgerichtsverfahren hat sicherlich seine Berechtigung, ist aber kein Allheilmittel
Man muss vorsichtig sein, denn es gibt auch Missbrauchsmöglichkeiten (wer größere Macht hat, kann Einfluss nehmen)
bei internationalen Verfahren ist es sicherlich von Vorteil, dass man die Verfahrenssprache und die Rechtsgrundlage (welches Recht anzuwenden ist) festlegen kann