The Arbitration Agreement

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Introduction

- Consent to arbitrate: essential if there is to be an arbitration
- Arbitration agreement: creates arbitral jurisdiction but ousts domestic court jurisdiction
- Two basic types:
  - submission agreement entered into after dispute arises.
  - arbitration clause contained in contract or in separate document, entered into before the dispute arises (usually made at the time of contracting).

Necessity of Arbitration Agreement

- In general, no arbitration agreement means no arbitration
- Some exceptions:
  - definition of arbitration agreements in Article 7(2) ML includes '*an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another*'.
  - Similarly estoppel or similar legal doctrines
  - Occasionally a court orders parties to arbitrate despite absence of an arbitration agreement (e.g. US court default judgements)
  - ICSID: different; open offer to arbitrate

Definition and Formal Requirements of Arbitration Agreements

- Article 7(i) of the ML:

  "*An 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*"

  - "to submit to arbitration"
  - "all or certain disputes"
  - "which have arisen or which may arise";
  - "defined legal relationship";
  - "whether contractual or not";
  - "clause in a contract or in the form of a separate agreement";
- **Question**: can you have an oral arb. agt.?

Definition of ARB Agreement - ML

- Justice Neil Kaplan in a speech commenting on *H Smal Ltd. v Goldroyce Garment Ltd.* [1994] 2 HKC 526:

> "*I venture to suggest that this decision, even if technically correct, produces an absurd result which is inconsistent with commercial reality. There was no doubt that the parties entered into a contract which was contained in or evidenced by the written order and B's conduct.* ***Why on earth should the arbitration clause in the contract require to be established by any higher degree of proof than the basic contractual terms themselves****?*"

Definition - Article II of the NYC

- Article II(1) NYC

  "*Each contracting state shall recognise an agreement in writing under which the parties undertake two submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

  The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters and telegrams".

- Writing required?
- Is that a problem?

Severability of the Arbitration Clause

- **It means**: when the parties to an contract which contains an arbitration clause enter into that contract, they conclude not one but two agreements.
- Concept of "main agreement" and "arbitration agreement". The main agreement refers to the agreement governing the parties' substantive rights. The arbitration agreement is of course the one which provides consent for arbitration.
- **Why important?**
- If a party could avoid arbitration by the mere assertion that the principal agreement is invalid, it would be a very simple way to avoid arbitration or to delay the resolution of the dispute by arbitration.

Severability of the Arbitration Clause

- Article 16(1) of the Model Law:

  "*The arbitral tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*".

- ICC Rules Article 6(9)

Example - *Ferris v Plaister*

- **Facts**: Ferris entered into a contract with “Venture" for the construction of a house. The contract contained an arbitration agreement. About halfway through the construction, Mr and Mrs Ferris became unhappy with the work. Some work had been done and Venture claimed for it. Feris’s said the work was so defective as to be valueless.
- Venture commenced arbitration. Feris wanted to get out of the arbitraiton agreement. They found out that Venture’s building licence was not valid and contended that the contract was therefore void ab initio.
- **Held**: separability meant that the arbitration agreement survived, It was for the arbitrator to determine whether the contract was void ab initio.
- Very interesting decision discussing separability

Severability of the Arbitration Clause

- Supreme Court of the Philippines has noted:

  The doctrine of separability, or severability as other writers call it, enunciates that an arbitration agreement is independent of the main contract. The arbitration agreement is to be treated as a separate agreement and the arbitration agreement does not automatically terminate when the contract of which it is part comes to an end. Jorge Gonzales, et al. v Climax Mining Ltd., et al. GR No. 161957, 22 January 2007, citing P Capper, International Arbitration: A Handbook, Informa Legal Publishing, 2004, p. 12.

- From *Ferris v Plaister (NSW Supreme Court, Australia)*:

  "The concept of separability means that the validity of the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained. This allows an arbitration tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute as to the consequences of such invalidity provided that the arbitration clause is valid as a separate entity and is sufficiently broad in its wording so as to cover non-contractual disputes".

Consequences of separability

- the arbitration agreement's validity is considered separately from the main contract's validity
- 'juridical autonomy', meaning a different law may apply to the arbitration agreement than that which applies to the substantive contract
- In France, autonomy from all laws.

Validity of Main Contract and Arbitration Agreement

- Judge Schwebel, formerly of the International Court of Justice:

  '[w]*hen the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement*'.[1]

- 1994 *Feris v Plaister* (New South Wales Court of Appeal):

  the validity of the arbitration clause does not depend upon the validity of the remaining parts of the contract in which it is contained. This allows an arbitration tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute as to the consequences of such invalidity provided that the arbitration clause is valid as a separate entity and is sufficiently broad in its wording so as to cover non-contractual disputes.

[1] *S Schwebel, International Arbitration: Three Salient Problems, Grotius Publications, 1987, pp. 2–3.2 Ferris v Plaister (1994) 34 NSWLR 474 quoting a passage from Sojuznefteexport (SNE) v Joc Oil Ltd, (1990) XV Yearbook of Commercial Arbitration 384.*

Validity of Main Contract and Arbitration Agreement

- An arbitral tribunal can accordingly determine whether the main contract is valid, or even whether it exists, without contradicting its own jurisdiction
- House of Lords in the famous recent *Premium Nafta case* (also called the *Fiona Trust case*)[3]:

> "*The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged. …*

[3] *Premium Nafta Products Ltd v Fiji Shipping Company Ltd [2007] 2 All ER (Comm) 1053, at paras 17 and 18 per Lord Hofmann.*

Validity of Main Contract and Arbitration Agreement

(Continuation of *Premium Nafta* quote)

Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

- What about a sales contract not quite formed by exchange of emails, but where the arbitration clause was in the initial exchange?

Law governing Main Contract and Arbitration Agreement

Second effect of separability

- Since the two agreements have different purposes, different laws might apply to each.
- Parties can choose the law to govern the arbitration agreement.
  - Article 34(2) (a) ML and Article V(1) (a) NYC refer to the determination of the validity of an arbitration agreement 'under the law to which the parties have subjected it'.
- But they very rarely choose so the arbitral tribunal decides.
  - either the law governing the main contract or that of the place of arbitration. (Traditionally a common law civil law divide)

Law governing Main Contract and Arbitration Agreement

- 2007 English Court of Appeal, *C v D*:

  if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of arbitration. It seems to me that . . . the answer is more likely to be the law of the seat of arbitration than the law of the underlying contract.

[4] *[2007] EWCA Civ 1282 at para 22.*

Law governing Main Contract and Arbitration Agreement

- Which is more logical: law of the seat or of the contract? Which is more closely connected to the main obligations?
- *Philippines v Philippine International Air Terminals Co Inc*[6] provides a good example. (facts are interesting)
- the Arbitral Tribunal held in its award[7]:

> *In the opinion of the arbitral tribunal a strong implication arises that the parties not only removed non-construction and Works disputes from the jurisdiction of the Philippines but also intended that the obligation to arbitrate these disputes should not be referred to the law of the Philippines. In other words, by designating Singapore and the ICC Rules in contrast to the other arbitration obligation appertaining to construction and Works disputes, the parties implied a choice of Singapore law to govern the arbitration agreement as well as the arbitral proceedings for non-construction and Works disputes.*

[7] *Partial Award, paras 84 and 85 as extracted in [2007] 1 SLR 278 at 283.*

Law governing Main Contract and Arbitration Agreement

(Tribunal's award in Philippines case cont.)

One further point can be made. Mustill and Boyd state that if the choice lies between two systems of law, one of which would uphold the arbitration agreement and the other would not, the former may be preferred. A question may arise in this case as to whether the arbitration agreement is valid under the law of the Philippines in view of the decision of the Supreme Court of the Philippines holding that the ARCA is void ab initio. This factor also inclines towards construing the agreement to arbitrate disputes in Singapore as governed by the law of Singapore.

Validity of Arbitration Agreement determined independently of all National Laws

- French theory that arbitration agreement can be interpreted based on general principles and without reference to any law
- 1975 Paris Court of Appeal of Paris *Menicucci*[8] decision:

  > it is sufficient, for determining objections to the arbitral tribunal's competence, to note that taking account of the autonomy of the arbitration agreement in an international contract, that agreement is valid independently of the reference to any state law.

- Still the position in France (at least according to some cases). But criticized by many academics and practitioners
- Remember "delocalization"? Seems consistent with that theory
- In fact, analysed further, the French courts are applying *their own theory and law* not an "international practice" as they claim to be applying
- Other jurisdictions have not followed this approach

[8] *Menicucci: Paris, 13 décembre 1975, Revue de l'arbitrage, 1977.147, note Ph Fouchard; Journal du droit international (Clunet), 1977.107, note E Loquin; Revue critique de droit international privé, 1976.506, note B Oppetit.*

Theoretical Limits of Severability

- Clear that severability makes sense where underlying contract was entered into but there is a defect in the contract itself
- But what if one side argues that it never consented (e.g. never signed) the contract at all. How can severability work? There are not two contracts because the issue is one and the same
- What about “mistake” “lack of authority”
- Separability can be justified by looking to parties’ (implied or assumed) will; would they have wanted and expected the arbitration clause to survive in the given circumstance. A part of it comes down to logic and common sense; but does the doctrine take us too far?

Identifying the Parties to an Arbitration Agreement

- As arbitration is based on consent, an arbitration agreement can bind only those who are parties to it.
- Numerous complex identity questions arise when non signatories are involved
- Common theories for finding that a non-signatory is bound by an arbitration clause
  - (ii) Assignment/Assumption.
  - (iii) Agency
  - (iv) Alter Ego/Group of Companies
  - (v) Estoppel & waiver

Alter Ego and Group of Companies

- based on factual participation by the related entity in the negotiations and/or, most importantly, the performance of the underlying transaction.
- Look for whether, factually, the non-signatory has acted in such a way as to give the other contracting parties the impression that it is bound by the contract

Capacity

- A party must have the capacity to enter into an arbitration agreement.
- Often an issue where there is a state party involved, eg state argues that the officer who signed the contract was not authorized.
- These objections are decided by the arbitral tribunal under the competence-competence rule.

Consolidation, Joinder, Third Party Notices, Multi-contract Arbitration

- Mechanisms in relation to facilitating complex multi-party issues.
  - What is a multi-party case?
  - What does each term mean?
- Why are these issues much more complex in arbitration than in court litigation?

Consolidation, Joinder, Third Party Notices, Multi-contract Arbitration

- **Answer**: Consent to arbitrate together; powers over non-parties; parties' rights to participate in the constitution of the arbitral tribunal

- Must keep these points in mind in discussing the issues individually below, especially the notion of consent

Consolidation

- if all parties consent : no problem. Problem when one or more does not
- Some arbitral rules address it, e.g. ICC Rules see Article 10

Joinder and Intervention

- Again, if everyone agrees there is no problem
- **Intervention**: basically unknown in international commercial arbitration. Possibly some scope for "amicus curiae" participation in investment arbitration
- **Joinder**: more common
  - problematic if the tribunal is already constituted and the new party does not agree to be joined, as it would not have participated in the constitution of the arbitral tribunal
- If no arbitral tribunal in place it can be done

Joinder and Intervention

- Remember, there are two issues:
  1) Whether the new party can be joined
  2) Whether there is jurisdiction over the new party
- These must be considered <u>separately</u>

Joinder and Intervention

- Article 17(5) of the 2010 UNCITRAL Arbitration Rules:

  The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Joinder and Intervention

- Article 7(1) of the 2012 ICC Rules:

  A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)-6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time for the submission of a Request for Joinder.

Enforcement of Arbitration Agreements

- This will be considered later on in this course.
- In brief, look at Art 8 ML and Art II NYC

Anatomy of an arbitration clause

"All disputes arising out of or in connection with the present contract shall be finally resolved under [specify institutional or UNCITRAL Rules] by one or more arbitrators appointed in accordance with the said rules. The place of arbitration shall be [insert]. The number of arbitrators shall be [one/three]. The language of the arbitration shall be [English]."

Drafting Arbitration Agreements

- Obligation to arbitrate
- Mandatory language, i.e. “will” or “shall” be submitted to arbitration, not “may” or “can” or “if the parties agree”
- Problem?:

> "*Any dispute of whatever nature arising out of or in any way relating to the agreement or its construction or fulfilments may be referred to arbitration. Such arbitration shall place in USA and shall proceed in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce.*"

Drafting Arbitration Agreements

- **Something missing?**

- Problem?:

  "*The present contract is governed by the laws of Luxemburg. Possible disputes will in all cases be submitted to the committee appointed by the International Chamber of Commerce in Paris (France).*"

Drafting Arbitration Agreements

- **Scope of clause**
- It is best to put the very widest possible scope, e.g.:

  "*All disputes arising out of or related to or in any way connected with this contract….*"
- Attempts to narrow clauses almost always lead to costly litigation if there is a dispute
- *Fiona Trust* jurisprudence helps, but does not apply everywhere

Drafting Arbitration Agreements

- Optional elements to include
  i. number of arbitrators (depending on chosen Rules may not be necessary if ICC, see Art 12(2));
  ii. language of the proceedings (this is very useful and I would say *essential to include*);
  iii. confidentiality of the arbitration proceedings and the resulting award, if desired (as it is not automatic in some jurisdictions);
  iv. any desired special powers for the arbitral tribunal (but only if expert advice is sought)).

Ad hoc or Institutional Arbitration?

- Institution or not? If not, use UNCITRAL Rules or not? Does the seat require that there be an institution (i.e. Mainland China)?
- Which one?
- Consider: Reputation and whether it will be there still when a dispute arises; extent of services provided; ability to appoint the right arbitral tribunal; costs (both institution and the structure for arbitrators' fees); scrutiny of award, etc.

Ad hoc or Institutional Arbitration?

- **Mix and matching institution's rules**
  - Very bad idea but sometimes attempted, especially in Asia

    "*Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to executive representatives of the Parties for settlement through friendly consultations between the Parties. In case no agreement can be reached through consultation within 40 days …, the dispute may be submitted to arbitration for settlement by either Party. Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English. The tribunal shall consist of three arbitrator(s) to be appointed in accordance with the Rules which are hereby incorporated by reference into this clause.*"

Multi-tiered Arbitration Agreements

- With preliminary steps, e.g. the ICC/SIAC clause set out above
- Multi-tiered very popular and useful, but need to exercise caution
- To what extent should the prior steps be preconditions to consent to arbitrate?
- Is there any point forcing parties to mediate or negotiate if there is no realistic chance of a settlement?
- See e.g. recommended multi tiered clauses in 2012 ICC Rules

What not to include in an Arbitration Agreement

- Excess detail/ complex procedures unless (i) it is really necessary and (ii) you really know what you are doing (i.e. on advice of expert international arbitration lawyer).

- Careful with time limits that are inflexible (see also Art 38 ICC Rules, does this resolve the potential problem?).

Pathological Arbitration Agreements

- "Pathological" term first used by Frederic Eisemann, Secretary-General of the ICC Court, in the early 1970's
- Ambiguous or unclear arbitration agreements.
- Causes litigation (delay and cost) about the clause itself, but may not invalidate the clause
- **NB**: Could always be rectified by subsequent agreement of the parties, but frequently a party will not be cooperative once dispute has arisen

Pathological Arbitration Agreements

- Examples
  i. naming arbitral institution incorrectly or identifying a non-existent institution;
  ii. the examples already given above (e.g. no reference to "arbitration" empowering one institution to administer another institution's rules);
  iii. referring to an arbitral institution by its location rather than name;
  iv. identifying a specific arbitrator who has died or become unable to act;
  v. inherent contradictions.

Pathological Arbitration Agreements

- Clause examples:

  …Any dispute will be settled by the rules of arbitration of the International Chamber of Trade of Singapore by one or several arbitrators appointed accordingly [sic] to the rules…

  …Such arbitration shall be held under the auspices of A.A.L.C.C. Regional Centre for Commercial Arbitration at Singapore in accordance with the UNICTRAL Arbitration Rules as modified by the rules of the centre…

Pathological clauses - Ben Davis article

"*Both parties, in recognition of good faith and mutual understanding in which this agreement has been executed, relinquish their right to have a dispute litigated in their respective jurisdictions. In the event any disputes fail to be settled amicably, both parties agree to arbitrate their difference before the official Chamber of Commerce in Paris, France, and to apply Arkansas, USA law....*"

Pathological clauses - Ben Davis article

"*All differences resulting from the present contract for FOB related disputes shall be settled according to the arbitration and legal provisions governing the seller's FOB contract from its supplier for the cargos in question. CIF related disputes shall be settled in Japan according to Japanese law.*"

Pathological clauses - Ben Davis article

"*Any controversy or claim arising out of or relating to this agreement or the breach hereof shall be settled by arbitration in Soul, Republic of Korea before the Korean commercial Arbitration Tribunal by a single arbitrator in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce. Judgement shall be final and binding on the parties.*"

Pathological clauses - Ben Davis article

"... (a) if the seller should bring an action against the buyer, the parties will refer to the jurisdiction of the tribunal at the chamber of commerce in the city of buyer. If it does not exist, or there exist several, the parties will refer to the jurisdiction of the court of arbitration of the ICC in Paris and take for the decision on the disputes the rules of this chamber of commerce (38 Cours Albert 1ER, Paris 8EME).

(b) In the event that the buyer should bring an action against the seller, the parties will refer to the jurisdiction of the court of arbitration at the (country) chamber of commerce...".

Pathological clauses - Ben Davis article

"*In the event that a dispute is submitted to arbitration in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce, the arbitration will be submitted to three arbitrators appointed in accordance with the said rules and will take place in Swiss Romande: the arbitrators will be nominated by the Swiss courts of Geneva and Lucerne.*"

Pathological clauses - Ben Davis article

"*This contract shall be governed by German law. Place of performance is Berlin (West). Jurisdiction shall be one of Berlin (West). Subsidiarily, the parties agree that disputes arising in relation to this contract shall be settled by the arbitrable tribunal of the International Chamber of Commerce. The arbitrable proceedings shall take place in Bern/Switzerland. In the arbitrable proceedings, German substantive and formal (sic) law shall be applied. The award of the arbitral tribunal is binding and final.*"

Pathological clauses - Ben Davis article

"*In case of any dispute concerning the merchandise, the parties agree to have recourse to the procedure of conciliation foreseen in the rules of conciliation and arbitration of the International Chamber of Commerce. Disputes other than those cited above will be finally settled according to the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with these rules.*"

Now a questionnaire on Arbitration Agreements (new slides)