



JURISDICTION OF THE ARBITRAL TRIBUNAL NATIONAL COURTS AND ARBITRATION

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Competence-Competence and Separability

- **Competence-competence:** Arbitral Tribunals have jurisdiction to decide on their own jurisdiction
- **Separability:** arbitration clause in contract is separate from underlying contract
- **These principles, combined, protect the autonomy of the arbitral process by authorizing the arbitral tribunal to rule on jurisdictional objections and on challenges to the validity of the contract containing the arbitration clause. They work in tandem to prevent a party from derailing an arbitration and bringing it into court through jurisdictional objections or allegations that the contract containing the arbitration clause is invalid.**

Separability doctrine - Introduction

- **Separability doctrine: Arbitration clause is “separate” from underlying agreement**
- **Important consequences of separability presumption:**
 - Invalidity, illegality, termination, or non-existence of underlying agreement does not necessarily invalidate the arbitration agreement
 - Ability to apply different national laws to arbitration agreement and underlying contract

Separability doctrine – Introduction (cont'd)

- **Well established doctrine**
- **All developed jurisdictions recognize the separability doctrine**
 - Germany, Switzerland, United States, France, England, Japan, Belgium, Netherlands, Sweden, Spain, Italy, Singapore, Hong Kong, China (mainland), New Zealand, Algeria, Bolivia, Brazil, Chile, Ecuador, El Salvador, Mexico, Paraguay, Peru, Venezuela, India, Pakistan, Australia, Canada, and Bermuda
 - France, CPC Art. 1447:
 - *An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.[...]*
- **UNCITRAL Model Law: Article 16(1):**
 - “[A]n 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 iure* the invalidity of the arbitration clause.”
- **New York Convention and European Convention recognize the separability doctrine**

Separability doctrine – Introduction (cont'd)

- **Most major international arbitration rules explicitly incorporate the separability doctrine, e.g.:**
 - ICC Rules Art. 6(9):
 - *Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.*
 - LCIA Rules Art 23.2.
 - *[A]n arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.*

Exceptions to the separability presumption

- **1) In certain circumstances, factors that void underlying agreement will also void arbitration clause**
 - In cases where it is alleged that no agreement existed in first place (as opposed to issues of illegality or invalidity), arbitration agreement is likely to be impeached together with underlying contract
 - France, England, United States, Germany
 - Underlying idea: there has been no agreement to the arbitration clause
 - If signature on underlying contract is forged, and one party denies agreeing to anything, then underlying contract and arbitration clause both void
 - If agent is not authorized to bind principal to contract, then he will also be unauthorized to bind principal into arbitration agreement
- **2) Parties are free to agree that arbitration clause is not separate from underlying agreement**

Competence-competence - Introduction

- **Principle: Arbitral Tribunal has authority to decide whether it has jurisdiction to hear a matter, i.e., has jurisdiction to determine its own jurisdiction**
- **Purpose**
 - Greater efficiency of the arbitral process – no need to go to court to resolve jurisdictional disputes
 - Preserves parties' expectation to resolve disputes – including jurisdictional issues – in a neutral forum

Competence-competence – Introduction (cont'd)

- **Competence-competence doctrine is broadly accepted**

- International arbitration conventions

- New York Convention, Art. II(3)

- National legislation

- Switzerland, UK, Belgium, France, Netherlands, Italy, Sweden, Germany, Spain, Korea, Hong Kong, India, Singapore, Australia, New Zealand, several African countries

- FAA does not explicitly address competence-competence

- France, CPC Art. 1465:

- *The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.*

- UNCITRAL Model Law Art. 16(1) expressly authorizes arbitrators to rule on their own jurisdiction

- Institutional Arbitration Rules

- ICC Rules, Art. 6(5)

- *In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decided that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.*

- LCIA Rules, Art. 23.1

- *The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.*

Competence-Competence – subject to ultimate control of courts

- **The competence-competence principle allows arbitrators to rule on their own jurisdiction only as an initial matter. The courts have the ultimate say**
- **E.g.:**
 - **UNCITRAL Model Law Art. 16(3):**
 - *If the arbitral tribunal rules that as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court ... to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*
 - **National legislation**
 - France, CPC 1492
 - *An award may only be set aside where: (a) the arbitral tribunal wrongly upheld or declined jurisdiction [...]*
 - **New York Convention Article V(1) provides that a court may refuse recognition/enforcement of an arbitral award if the arbitration agreement is invalid or the arbitrators exceeded their jurisdiction**

“We lawyers like arbitration. It assures us three litigations: one before, one during and one after the arbitration”.

Quoted in Rau, Alan Scott, Sherman, Edward F., Peppet, Scott, Arbitration, Foundation Press, 2nd ed., 2002, p.134.

Involvement of national courts

- **Involvement prior to arbitration proceedings**
 - Forum Running: Arbitral Tribunals or State Courts – Who must defer to whom?
 - Anti-Arbitration Injunctions
 - Appointment of Arbitral Tribunal
 - Interim (provisional/conservatory) Measures
- **Involvement during arbitration proceedings**
 - Interim Measures
 - Taking of Evidence
 - Assistance in the process of examination of witnesses and experts
 - Establishment of Arbitral Tribunal/challenges
- **Post-award involvement of state courts**
 - Setting Aside Proceedings
 - Enforcement Proceedings

Who must defer to whom?

- **Contemporary approach:**

- *competence – competence* of the Arbitral Tribunal
 - e.g., UNCITRAL Model Law Art. 16 (1):
 - *The arbitral tribunal may rule on its own jurisdiction with respect to the existence or validity of the arbitration agreement.*

- **Based on party autonomy**

- State courts must respect will of the parties
- Arbitral Tribunal must not exceed its jurisdiction given by the parties

Who must defer to whom?

Enforcement of agreement to arbitrate

- **UNCITRAL Model Law**

- Article 8 - Arbitration agreement and substantive claim before court**

- 1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

- **New York Convention, Art. II**

- 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

Interim Measures - Definition and Types of Relief

- **Definition: Provisional measures are interim measures of protection and conservation designed to protect a party or its property from irreparable damage during the pendency of the arbitral proceeding**

- **Types of relief**
 - Order to preserve the status quo / prohibiting aggravation of parties' dispute
 - Attachment
 - Injunction (positive or negative)
 - Preservation of evidence
 - Security for legal costs of opposing party
 - Enforcement of confidentiality obligations
 - Interim payments
 - Anti-suit orders

Interim Measures - Arbitrators v. Courts

- **Generally established that both arbitral tribunals and national courts can grant interim relief in aid of arbitration.**

- **Courts:**

- International conventions
- national arbitration laws
 - E.g., France, CPC Art. 1449
 - *The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures.*
[A]pplication shall be made to the President of the Tribunal de grande instance or of the Tribunal de commerce [...]
- arbitration rules
 - ICC Rules Art. 28(2)
 - *Before the file is transmitted to the arbitral tribunal, and in the appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. [...]*

Interim measures - Arbitrators v. Courts

- **Petitioning courts for provisional relief in aid of arbitration is not incompatible with, and does not constitute a waiver of, the arbitration agreement**
 - ICC Rules, Art. 28(2)
 - UNCITRAL Arbitration Rules, Art. 26
 - 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.*
- **AAA's Commercial Arbitration Rules (Rule 34 Interim Measures)**
 - (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.*

Interim Measures - Arbitrators v. Courts

- **Concurring jurisdiction → Choice between arbitral tribunal and court is strategic and/or pragmatic decision to be taken in each individual case**
 - Only courts can order attachments
 - Only courts can order a third party
 - Only courts can enforce orders
 - Provisional measures application before arbitral tribunal may be less cumbersome (tribunal knows case) and may favorably predispose tribunal on merits

Interim measures before the Arbitral Tribunal is constituted

- **Before the arbitral tribunal is constituted, it lacks capability/authority to issue interim measures**
- **National court system is one way to obtain provisional measures**
- **Alternative approaches within international arbitration**
 - Emergency Arbitrator (ICC Rules, SCC Rules, etc.)
 - Art. 37 of the ICDR Rules provides for an expedited procedure before an emergency arbitrator. No opt-in required

Interim measures after the Arbitral Tribunal is constituted

- **Usually, requests for provisional relief are submitted to the arbitral tribunal rather than the national courts**
 - Allows the requesting party to paint itself in a good light and the other party in a bad light
 - Despite arbitral tribunal's lack of coercive powers, parties usually comply with interim relief orders for fear of badly predisposing the tribunal with respect to the merits
 - Exceptions:
 - Fear that opposing party will not comply with tribunal order
 - Third party involved
 - Need for *ex parte* decision

Standards for granting interim relief

- **National court will apply the standards that govern in its own jurisdiction**
- **Arbitral tribunals can refer to:**
 - applicable arbitration rules
 - law of the place of arbitration
 - law governing the parties' underlying contract or relationship
 - international standards

Standards for granting interim relief (cont'd)

- **Generally, the following factors are considered by both national courts and arbitral tribunals**
 - Irreparable, or serious, harm to the petitioner
 - Tribunals consider the extent to which:
 - the claimant will suffer serious injury during the arbitral proceedings; and
 - such injury appears compensable in a final award
 - Urgency
 - The Tribunal must be persuaded that immediate action is necessary to prevent serious or irreparable damage to the requesting party
 - Likelihood of success on the merits
 - Some tribunals consider the *prima facie* strength of the parties' respective claims and defenses when deciding whether to grant interim measures
 - However no prejudgment of the merits allowed. Generally, tribunals will refuse to grant as interim relief the final relief that is requested by the requesting party
 - Balance of equities
 - Some tribunals consider whether it is just or fair that the burden or risk of loss during the arbitral proceedings fall on one party or another

Enforcement of interim measures

UNCITRAL ML on International Commercial Arbitration 2006 amendments

“Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

- (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.”

Enforcement of interim measures under the NYC

- **The NYC does not define “award”**
- **There is nothing in the NYC that expressly excludes enforcement of an interim and conservatory measure**
- **Interim measures do seem to be compatible with the concept of “difference between the parties” contained in Art. 1(1), I(3), II(1), and V(1)(c) and are binding measures, within the meaning of Art. V(1)(e) NYC**
- **However, the status of an award granting an interim and conservatory measure is uncertain under the NYC and depends upon what definition national courts attribute to the term “award”**
- **That qualification will usually depend upon finality**

Assistance with establishment of the Arbitral Tribunal Challenges

- **National legislation**

- France CPC Art.1451 (see also 1453-1456)

- *If the parties cannot agree on the appointment of the additional arbitrator, he or she shall be appointed [....] by the judge acting in support of the arbitration (juge d'appui) [...]*

- Model Law

- Art.11(3)

- *[...] any party may request the court [...] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

- Art. 11(3)

- *If a challenge under any procedure agreed upon by the parties [....] is not successful, the challenging party may request [....] the court [...] to decide on the challenge, which decision shall be subject to no appeal [...].*

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