**International Commercial Arbitration**

Cours 1

Arbitration is a method of dispute resolution involving a third party who is usually agreed to by the disputing parties and whose decision is binding.

It is not alternative anymore: it is a norm. For international contract it is the basic.

On 100 major international companies: 88% use arbitration. When asked why arbitration the answers were diverse:

* Flexibility: they can choose a long, short arbitration, to have the site in Paris, elsewhere, in several languages…
* Enforcement of outcomes
* Expertise.

One of the main grounds of arbitration remains the NY Convention: article 2 and 5 in particular.

The ICC is the most popular arbitration institution.

Several elements need to be distinguished:

* Domestic or ICSID arbitration

The NYC convention only applies to commercial arbitration. Most of the principles of commercial arbitration are applicable to investment arbitration, but three differences exist:

* Setting aside proceedings
* Enforcement
* Substantive law

Commercial arbitration: a huge number of state parties use ordinary commercial arbitration. About 10% of the ICC case loan involves state parties.

There are some countries where the NYC has not been adopted and there are some countries where the NYC cannot be applied because there is no state (ex the Palestinian authority).

The arbitration is actually a very natural reflex to turn to a third party to decide.

The first arbitration is the Alabama Claims: arbitration between the US and England for the construction of a battle ship. The litigation was put in the hands of 5 private judges.

Soon after that, end of the 19th century, the first arbitration institution was established: the London Court of International Arbitration, Chamber of Commerce of the Hague,…

Followed several legal texts:

* 1923: Geneva Protocol
* 1927: Geneva Convention: rarely applicable now, as the NYC prevails for its signatory states. Indeed the Geneva Convention was asking to have the award validated by two state courts.
* WWII
* 1958: NYC, according to the prof: the most successful international convention for international commercial cooperation.
  + Facilitates the recognition and enforcement of foreign arbitral awards and agreements
  + Initially 25 states, now more than 145 parties to the NYC.

ICC graph about the number of cases filed: exponentially increased and possible that one of the factor of this growth is due to the implementation of the NYC.

* 1966: United Nations Commission on International Trade Law UNCITRAL
* 1976: UNCITRAL Arbitration rules
* 1985: UNCITRAL Model Law:
  + it is not an international convention, nor treaty, it is just a template arbitration law. That is to say that any country can copy paste into their law. It is a text of law that anybody can use.
  + There are more than 60 countries around the world that have adopted the Model Law: Easter countries, Asian countries, Canada, but also in Latin America… But there are also a lot of arbitration countries that don’t have adopted the Model Law: France, Switzerland, US, England… These countries are very important arbitration countries but decided to create their own law.
    - However, when regarding these laws, it is easy no identify the same principles as in the Model Law.
      * This means that as an international arbitration lawyer, it is possible to advise on arbitration when the site in anywhere in the world.
    - This consistency makes it much easier to resolve a litigation through arbitration than in state jurisdiction.

Also, IBA is the International Bar Association, as they have a special arbitration committee:

* IBA rules on the admission of evidence
* IBA rules on drafting arbitration clauses
* IBA rules on the conflict of interest

**Difference between arbitration and litigation:**

* source of jurisdiction : the power of the arbitrators come from the will of the parties, in litigation you don’t need an agreement: judges automatically have jurisdiction. In private international law: you have rules to determine on what the court has jurisdiction, while in arbitration it is an agreement
* in arbitration you choose the judges while in litigation they are imposed
  + when choosing your arbitrator, you can choose someone who has the background to understand the particularities of your dispute
* in arbitration you can choose the rules, the procedures,
* possibility in arbitration to have the procedure confidential, where are it is generally open to public
  + arbitration is not necessarily confidential : automatic confidentiality presumption, but it does not mean that it is a confidential arbitration
  + if you want confidentiality, you have to add that to the contract
  + Also you can to go to the court for enforcement or a setting aside proceeding which is a public proceeding and therefore part of your proceedings can be public
* appeal vs finality: in principle Arbitration leads to a final award without appeal, but possible
* and the possibility to have the award enforced internationally while in litigation an international judgement is generally difficult to enforce.
  + There is a draft treaty for the enforcement of court judgement internationally

**Difference between arbitration and other forms of dispute resolution**:

* In arbitration you reach a binding decision and in mediation it is an agreement.
* Also the mediation comes to a contract, and the arbitration goes with enforcement.
  + At the moment at least you cannot enforce mediation agreement, but an international convention is currently prepared
* Once you have signed arbitration agreement, you cannot later on refuse to arbitrate, even though the arbitration will proceed without you (ad u will probably loose). An arbitration clause is specifically enforceable. On the contrary parties cannot be compelled to participate in ADR (well can be forced to participate but not to find a solution)
  + For instance, in the ICC model clause, the ADR can be a precondition to other proceedings, but it does not mean the party need to have an active participation
  + Morever, when you do find an agreement through mediation, it is possible for the parties to ask to an arbitrator to make it an award.

**Difference between international and domestic arbitration**:

* Generally the law of the states are more restrictive regarding two domestic parties and international laws:
  + type of proceedings
  + type of law : in France the law does distinguish between international and domestic arbitration
    - some countries accept appeal for domestic arbitration, put a time period,…
* How do you define international and domestic arbitration ?
  + Art 1(3) of the model law

Have arbitral awards precedents? Arbitral award are confidential. In investment arbitration precedent have a much more important weight.

**Key concepts in international Arbitration**

* Arbitration agreement
  + Required for an arbitration
  + Specifically enforceable Art II NYW and 8 of the ML
  + Does it need to be in writing :
    - In the NY convention : yes
    - In French Law: no, but in practice you need a proof of the agreement
* Arbitrators
  + Chose by parties
  + Virtually anyone can sit: no restriction
    - It just has to be somebody independent and impartial
    - Also in the agreement or in the institution there can be criteria to choose the arbitrator
* Seat of arbitration (or place) – very important notion
  + Important legal link
  + Chosen by the parties
  + No need for connection
* Party autonomy and procedures
* Finality of outcomes
* Enforcement of arbitration agreement and awards

Arbitration Institution: every year more and more are coming out,

* Do not need one (except mainland China)
  + but generally easier : manage the cost, the schedule, watch the quality of the process (challenge of one of the arbitrators)…in the case of ICC does not do more
* Matter of choice whether and which:
  + but one it’s in the agreement, can be very hard: so need to be very careful when choosing it
* Institutional arbitration is much more practised

Cours 2 - Legal Framework of International Arbitration and the role of the seat

**Readings:**

* **Power point class 1**
* **The attached chapter 2 of the book Greenberg, Kee and Weeramantry;**
* **The New York Convention, especially Articles II and V, which, as Simon mentioned, are essential; Need to memorize the ground to refuse enforcement in art.V.**
* **Skim over the UNCITRAL Model Law, and read** its Articles 1, 4, 5, 18, 19, 20 and 34.

*Important theme for the exams, most theoretical part of the course*

**ARTICLE 18 (of ICC rules) PLACE OF THE ARBITRATION**

*“1 The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.*

*2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.*

*3 The arbitral tribunal may deliberate at any location it considers appropriate ».*

🡺Good example representative of any arbitration rule and law

* Existence of three different places:

The seat of the arbitration, which provide the LEGAL FRAMEWORK (lex arbitri)

The two other are **simply for convenience** they do not change the lex arbitri.

**TERMINOLOGY: SEAT OR PLACE OF ARBITRATION?**

* Terms often used **interchangeably**
* “place” e.g. ICC Rules, Model Law & NYC
* “seat” e.g. various rules in Asia (SIAC, HKIAC, ACICA…)
* It has very significant LEGAL consequences
* Must not confuse with venue or location of hearings, which is simply a physical or geographic place

**DISTINCTION BETWEEN SEAT AND VENUE OF HEARINGS**

**Seat**: LEGAL concept

**Venue**: “*an arbitration proceeding* ***does not only comprise*** *of the oral hearing and the submission [to arbitration]. It encompasses an entire process, commencing from the appointment of the arbitrator or arbitrators to the rendering of the final award*” (PT Garuda Indonesia v Birgen Air [2002] 1 SLR 393 at 402 (Singapore Court of Appeal).

* It is not possible to change the seat of arbitration because the hearings of an arbitration are taking place in another place:
* Hearings and meetings may be held at **any convenient location** (see ICC Art 18(2); ML Art 20(2)).
* *Angela Raguz v Rebecca Sullivan*. 2000 Sydney Olympic Games. Seat **Geneva (CAST court of arbitration for sport),** hearings in Sydney. Court of Appeal:
  + The seat remains Geneva, does not matter where the hearings took place, because in the contract, the seat is Geneva.
  + “The common law recognize this distinction… *It is, in our opinion, likely that the legislature intended to allow parties to commercial agreements to select a single legal place of arbitration and to leave the choice of the physical location of hearings to the felt necessities of a specific dispute.*”
* **Singapore** Court of Appeal in *PT Garuda Indonesia v Birgen Air*:
  + Singapore Airline wanted the place of arbitration change to Singapore, because would be much more favorable to Indonesia
  + “*It should be apparent from art 20* [Model Law] *that there is a distinction between ‘place of arbitration’ and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely the ‘venue of the hearing’* “.
  + 🡺Singapore Court of Appeal rejected an argument by PT Garuda that the parties had changed the place of arbitration from Jakarta to Singapore by holding their hearings in Singapore.
  + 🡺 You can change the place of arbitration but that has to be by agreement between the parties. 🡺 GENERAL PRINCIPLE.
  + One exception: when **institution** have fixe the place (not parties) it is possible (but really rare) for the institution to change its decision.
* Some small exceptions:
* Ex: the place of arbitration were Singapore, both of the companies where from Indonesia, the hearings where in Melbourne, skype with Saudi Arabia.
* Could he take an oath on the bible?
* Finally it was decided that he may take a formal official affirmative “oath”, not on the bible.
* 🡺In that case the laws of the seat did not apply.
* Also, some courts do no respect the law of the seat of arbitration: Russia, Indonesia, India, some US states.
* QUESTIONS:
* What **powers** do the courts at the venue (place of hearings) have?
  + **They have no power**. They may have inter-measure power. But nothing to do with the fact that the hearing is holding in Sydney.
* What **mandatory rules** do arbitrators have to comply with at the venue?
  + Normally with the seat of arbitration’s laws, but exceptions, see Saudi Arabia case.
* EXERCISE:
* Here is an arbitration clause. Is the seat of arbitration specified?
  + *Any and all disputes arising from this contract shall be finally settled by arbitration held in Hong Kong under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*
* ART.18 (ICC): the place of arbitration shall be fixed by the court unless agreed upon by the parties.
* ICC does not have a default rule fixing the seat of arbitration.
* Here we can argue that the parties did not agree because no “the place of arbitration shall be”.
* BUT in fact in arbitral practice if there is only one place specify in the court (even if the term are not exact) we can infer that the parties probably intended that Hong Kong would be the seat.
* If you don’t choose HK risk that it is not under the parties agreement. Cf Art. V NYC.
* If not ICC, other with default rule, what happen? Ex: LCIA default place is London. Good question. ?????? n’a pas répondu
* And which is the seat in this one?
  + *Any and all disputes arising from this contract shall be finally settled by arbitration held in Hong Kong under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. The place of arbitration shall be Tokyo.*
  + The place is Tokyo, the venue is HK.
* If you are not under any institutional rules, you have an ad hoc institution (=no institutions). How do you determine the seat of arbitration?
  + The arbitrators? Under what can they do that? Model law. Art. 20. But how do I get to that rule? Lex mercatoria assume you have arrive at the ML.
  + 🡺This is very rare.
  + ??????? du coup n’a pas répondu????

**LEX ARBITRI (seat of arbitration), ARBITRAL PROCEDURAL LAW AND ARBITRATION RULES**

* ‘**Lex arbitri**’ – Automatically law of seat. E.g. right to arbitrate, objective arbitrability, due process and independence standards. Setting aside award.
* ‘**Procedural law**’ provides process. E.g. *fallback (recours)* **provisions for arbitrator appointment, challenges, etc. Details of due process etc**. (usually in same law as lex arbitri). Definition of fairness and good faith (ex: 2011 of French arbitration law)
* P**rocedural rules**’ or ‘arbitration rules’. Rules concerning conduct of arbitration adopted **by agreement**. (Can also mention arb. agreement). ???????
* Lex arbitri and procedural law are law, rules apply contractually ???????
* Although rare in practice it is possible to have a procedural law different from the lex arbitri. **Very problematic and to be avoided.** Procedural law can be chosen by the party (India). What happen if one of the parties wants to appeal the arbitral warrant?
* There is often overlap between procedural laws and arbitration rules. E.g. ML and ICC Rules. Which prevails (e.g. on procedure for appointment, challenge, time limits)? See pyramid.
* Procedural law will regulate additional matters. E.g. extent and nature of judicial supervision and involvement (ML Arts 5, 8).



The pyramid of the book is not complete, on the top Arbitration agreement.

Lex arbitri very large.

* What is the hierarchy?
* If there is a **mandatory provision** we go **up** the pyramid.
* If there is a **non mandatory** we go **down**.
* Example of mandatory rules:
* ICC provision about the arbitrator’s rules.
  + We have to look whether the provision in lex arbitri is a **mandatory law**.
  + ICC rules are they mandatory?
  + **How do we know if it is mandatory?** ART.12 (1). It does not say “unless the parties will agree”.
  + Art.11 (6) that is the provision saying as far as the parties did not agree the tribunal shall be compose of… 🡺 non mandatory.
* What if we have an arbitration clause that said: all dispute should be under ICC.
  + But no *scrutiny (examen approfondi)* of the award by the ICC art. 33
  + Process of scrutiny: aspect of protection of the ICC.
  + ICC is the best quality arbitration and want to be sure that the quality of the awards are good. So scrutinizims is a **mandatory process.**
  + ???? comprends pas dans art.33 disent MAY
* Mandatory provision **are non opt out provision**. Even though adopting a set of institution rule is part of the party contract.
* Conflict **between arbitration agreement and lex arbitri**?
* ML art. 10 about the arbitrators, if the parties have non agree, the number of arbitrator should be 3.
* The place of arbitration is Ljubljana, ML apply, say 3 arbitrators.
* But the agreement say ICC rules and does not specify the number of arbitrators.
* 🡺1 or 3 because up to ICC because ML is not mandatory.
* ML art. 10 is non mandatory because non part of **the fundamental principles**.
* Other example with numbers of arbitrators:
* In **Belgium**, the arbitration law say that number of arbitrator need to be *odd (impair*).
* Arbitration under treaty between two countries: the number of the arbitration specified in the treaty is 4.
* We have to check if it is mandatory under Belgium law.
* No one could say if mandatory. Serious doubt that it was.
* 2 options:
  + Change the number of arbitrators but the number is specify in the treaty (you need a diplomatic level),
  + Change the place of arbitration by agreement (indeed the place of arbitration were not specify in treaty but only in the agreement).
  + 🡺So they changed the place of agreement in Geneva.
  + 🡺It was risky to stay in Belgium because we don’t know if Belgium law was mandatory.

**WHAT IS COVERED BY THE LEX ARBITRI?**

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Pre arbitral/ support of arbitration/ Post arbitral

🡺All that is about **a degree of control**: in less developed countries there is more control.

**CONTENT OF TYPICAL ABRITATION LAW (=countries international arbitration laws).**

* Arbitration laws typically regulate:
* Right to arbitrate
* Right to choose procedure
* Competence-competence (not arbitration Rules)
* Formal validity of arbitration agreements
* Default provisions on appointment/ removal of arbitrators
* Fundamental (mandatory) procedural rules, e.g. of arbitrator independence, procedural fairness
  + Apply over and above institutional rules
* Formal and substantive requirements for awards
* Recourse against arbitral awards
  + Is it possible to appeal?
  + Depends on the lex arbitri!
  + (**NZ, ICDR, Israel** *can opt into an appeal to the court??????****,*** it is possible**)**.
  + England: automatic appeal whether there was a manifest error of law. You can **opt out** in the arbitration agreement.
  + **Paris,** not possible.
  + You can specify the recourses in the agreement.

**CHOOSING FOREIGN PROCEDURAL LAW**

* Back to Indian cases:
* …] *proceedings in such arbitration shall be conducted in English.* ***The venue of the arbitration proceedings shall be in London.*** *The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable-fees of counsel) to the Party (ies) that substantially prevail on merit.* ***The provisions of Indian Arbitration and Conciliation Act, 1996 shall apply.***
* Where is the seat?
  + Here they choose the Indian procedural law so one has to assume the seat is Indian. But which state? **It has to be a CITY.** They chose New Delhi, Pr. Not sure of how they chose it.
* Does the Indian proc law apply like arbitral rules?
* Which courts deal with setting aside? Which standards do they apply of due process, independence, construction of arb. agreement?
* ?????? n’a pas donné la réponse!!

**DESIGNATION OF SEAT: HOW IS IT CHOSEN?**

* By agreement. Any words indicating choice. Eg ‘the seat of arbitration will be X’.
* Other language, **even vague**, will usually suffice unless there is a conflicting location in the clause.
* Failing agreement: there is a default mechanism under rules or procedural law. Eg ICC Art 18(1); ML Art 20.
* ICC: seats of arbitration **2013** - literally all over the world:
* Places of arbitration 2013: 104 countries, 63 different cities
  + European cities: 79 % (Paris 118, London 70, Geneva 56)
  + Asian cities: 11,84% (Hong Kong 14)
* 11.5% of places fixed by the Court and the rest (**88.5%)** by the parties, that really evolve recently, before was about **75%**.
  + 🡺More people realized the importance of choosing the place of arbitration.

**FACTORS TO CONSIDER IN CHOOSING A SEAT OF ARBITRATION**

* **Laws are most important**.
* **Party to NYC**, modern accessible arbitration law, arbitration friendly courts.
* **Geographic** (for all players) and infrastructure convenience are second most important criteria.
* **Neutrality.** You can choose a seat that is completely neutral, i.e. no connection to any party or to the dispute. In practice there is often zero connection.
* Classic, safe, **popular seats**: S**ingapore, HK, Paris, Zurich, Geneva, Vienna, New York. London,** ok, but some risks.

**CHANGING THE SEAT OF ARBITRATION**

* Can be changed only **with party agreement**. Should consult the Tribunal as well.
* Changing seat can bring (sometimes unexpected) legal consequences: important decision. Much better to change location of hearings if a problem arises.
* If no party agreement, it is **nearly impossible to have it changed**. Perhaps if it was fixed by an institution.
* Indeed, the chosen seat could be considered a condition of the consent to arbitrate. A change would mean parties’ agreed procedure not followed (see e.g. Article 34(2) ML).

**DELOCALISED AND TRADITIONAL VIEW OF ARBITRATION**

Legal theories to describe the **degree of connection** between an arbitration and the seat of arbitration

* **Traditional view:**
* International arbitration proceedings must be attached to a seat, as this is how arbitration gains legal recognition
* Relationship with notion of **state sovereignty**: right of a state to regulate all conduct taking place in its territory
* No truly “international” arbitration as it is **always connected to a seat**, and thus integrated into that country’s laws.
* Francis Mann:

‘***Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction?*** *Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? Various States may give various answers to the question, but that each of them has the right to, and does, answer it according to its own discretion cannot be doubted.*’

* Markham Ball:

‘***Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation’s courts and judicial system.*’**

* **Delocalised or ‘contractual’ view:**
* No link needed between seat of arbitration and arbitration proceedings
* Arbitration gains recognition and existence from **parties’ contract**
* So arbitration proceedings must be free from any **interference or control from local courts.**
* Only enforcing courts may exercise control over an award, as a condition to recognising and enforcing it.
* Before enforcement, an award need not enter into a domestic legal order
* Jan Paulsson: ‘Delocalisation of International Commercial Arbitration: When and Why it Matters’:
* “***The delocalised award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin.*”**
* The focus on the enforcing jurisdiction made sense in early **1980’s**, given the disparity in arbitration laws (lex arbitri). NYC was harmonised but not lex arbitri. Less relevant today due to ML. ????????
  + Example: a certain mandatory law exists in the lex arbitri but does not exist in the jurisdiction of the law governing the contract.
  + Should that law be applied?
* *Hilmarton v OTV*(Cass. le civ., Mar. 23, 1994 ) and *Chromalloy v Egypt(US District Court of the District of Columbia 1996)*. Arbitral awards that had been set aside at the seat were enforced elsewhere. (see Art V1 NYC “may”)
  + Hilmarton: Seat in Switzerland. AT found contract unenforceable because it contravened Algerian laws on bribery and corruption. Upon Hilmarton’s application, the Swiss Federal Supreme Court set aside the award, finding that the arbitrators ought not to have considered Algerian law.
  + But French courts – in decisions ultimately appealed to and confirmed by France’s highest court – recognised the award. *Cour de Cassation* controversially observed8: *the award made in Switzerland was an international award which was not integrated into the legal system of that State, meaning that the award’s existence remained established despite its having been set aside and that its recognition was not contrary to international public policy*”.
* 🡺Both decisions were based on the notion that where an award **contravenes the public policy of the seat of arbitration but not that of the enforcement country, the award can still be enforced.**

**DELICALISATION IN PRACTICE : LEGAL PROVISIONS**

* *Bank Mellat v Helliniki Techniki*, **1984, England**, Justice Kerr:

“*Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with a municipal system of law*” ?????

* Does delocalisation exists in NYC and lex arbitri?
* Article V(2) NYC:
  + “*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.*”
  + ‘That country’ is where enforcement is sought. Could be said to support delocalisation; but still **this only concerns enforcement**
* Article V(1) NYC:
* ‘*Recognition and enforcement of the award may be refused* [upon] *proof that:*

*a) the* [arbitration] *agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or . . .*

*d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or . . .*

*e) The award has . . . been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*’.

* Article V(1)(a) and (d) give primacy to the parties’ agreement (delocalisation), yet then refer to law of the seat.
* NB: the discretion (“may”) supports delocalisation: no requirement to defer to decisions of the courts of the seat
* **Barrier to delocalisation** in Article I NYC:

‘*This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.*’

* Examples of **pure delocalisation in lex arbitri**:
* Former laws in Malaysia and Belgium which did not allow for setting aside proceedings at the seat (in Malaysia if the KLRCA rules were chosen).
* In practice, the ML and all modern arbitration laws allow for only very limited court involvement, yet there is still some connection to the seat (see eg Art 34 (especially 34(2)(b)) and 16(3) ML).
* Some courts (e.g. **India & Indonesia**) have purported to set aside foreign awards despite in India’s case having adopted the ML.
* ICSID arbitration **is delocalised**. NO involvement of domestic courts (except at the end to assist in enforcement).
* Conclusion on delocalisation
* Does not exist in practice in pure form (apart from ICSID).
* However the debate has made arbitration laws light on court supervision, which is a trend likely to continue (eg new French arbitration law allowing parties to opt out of setting aside grounds).

*Suite 26/09*

Delocalised & traditional views of arbitration:

Delocalization is about the degree of the link between the place of arbitration and the arbitration proceedings. The theory od delocalization says that there should be as little control as possible of national courts.

* Ian Paulson : wrote an article on the subject.
* Under French law, arbitration is very detached from the courts. Where the seat is in Paris, you can do whatever you want, the French courts won’t intervene in the proceedings.
* Emphasis is put on the arbitration agreement. Also called contractual view.

The opposite view is the view that the courts of the place of arbitration shall have all the control they want over the arbitration. What matters is the lex arbitri, the law of the place of arbitration. Emphasis is put on the lex arbitri, law of the seat. This is the traditional view.

Example (delocalization) : place of arbitration Paris. Party A wins ; B refuses to pay. Paulson says that we don’t need Paris in this story because Paris is just the place of arbitration; what is important is the legal order of the enforcement jurisdiction which is probably the country of party B where the award should logically be enforced.

*(à verifier)*

* *Delocalisation is the degree of the link between the place of arbitration and the arbitration proceedings : how much control there is from the seat and the arbitration tribunal : the idea is that there should be as less as possible link*
  + *Jan Paulson first came out with this idea 1950’s*
* *Paris: place that has advanced delocalisation the most: on the French Law, arbitration is very detached from the seat of arbitration*
* *The idea is that the place of arbitration has nothing to do with the law of it*
* *The opposite view: the law of the place of arbitration: court should have all the control they want: rather the law of the seat of arbitration*
  + *Theoretical concept: there are practical advocation*
* *Jan Paulsson: one of the consequence of delocalisation:*
  + *Place of arbitration: Paris, an arbitration arises, Party A wins, Party B refuses to pay*
    - *Paris is just the place of arbitration, what is important is the legal order of an enforcement jurisdiction*
      * *What is important is country B law, if that is where the enforcement is looked for*

In the 80’s, Arbitration was not developed homogenously and back then frustrating for company arbitrating to think about the law of the place of arbitration.

However, nowadays, arbitration laws around the world are quite consistent.

All the systems are pro arbitration in a very delocalised understanding.

* Concrete exemple:
  + Hilmarton v OTV
    - The French court did enforce the award: consistent with Paulsson argument, the place of enforcement is not the place of the seat or of the lex arbitri
    - **Art V.1.e New York Convention**: French courts could have set aside the award
      * Award: not integrated in the system of that state
  + Chromalloy v Egypt
    - Different position in common law jurisdiction: they don’t recognise delocalisation
* New York convention: various principles that would in fact suggest that delocalisation would actually not exist
  + **NYC Art V.2**: consistent with delocalisation
  + **NYC Art V.1 a), d) and e)**: reference to the seat of arbitration, the law of the place where the arbitration took place
    - Therefore, the NYC itself put the emphasis on the place

Delocalisation in Practice:

There are still some impact of the seat of arbitration and the proceedings.

* Israëli/palestinan: lots of trade between the two, but very difficult to enforce contracts as with regards to the political situation
* Legal seat of arbitration in East Jerusalem: domestic award to enforce it
* Concept of the virtual seat: place of arbitration in Paris: seat but the French jurisdiction have actually no power, and the arbitration is taking place in East Jerusalem: it is possible to opt out of all setting aside proceedings
  + Enforcement in Israel: NYC, and when in Palestinian territories: provisions
* Jerusalem arbitration centre: provide rules for video-conference
  + And if one cannot come, then all should participate for video-conference
* The startng point is still French law as it allows this distinction with the seat
  + The degree to which the arbitration seat control the arbitration is determined by the law of the seat
* Under the ICSID: might be an example where it still exists

Delocalisation: does not very exist, however the debate still goes on on the practical field

Cours 3 – The Arbitral Tribunal

**The Arbitral Tribunal**

Two possibilities:

* An arbitration administered by an institution
* An ad hoc arbitration (no institution involved)

**Arbitration Institutions**

* The ICC: the oldest. ICC arbitration, this is not the chamber which administers but the International Court of Arbitration of the ICC. Members of the Chamber are not privileged. 1919: establishment of the ICC. Hope that the commerce can resume. Based in Paris. In 1923, business people submitting their disputes. No lawyers at the beginning. An institution which has the biggest know-how and this know-how is published. ICC sets the arbitration practices that are followed.
* LCIA: international city and arbitration is very much developed there (domestic level as well). 1891: date of establishment. It was an English enterprise and forum for solving disputes of English companies. USSR breaks up, a lot of English companies and law firms implemented in Moscow. They imported the tendency to refer disputes to arbitration. Sent them to LCIA => as a result, Russians refer a lot their disputes to LCIA in London. Most of Russian contracts also elect English law.
* AAA (American Arbitration Association): it solves a lot disputes. But what drives its statistics up is that it does a lot of consumer contracts arbitration.
* Singapore International Center
* PCA (Permanent Court of Arbitration): established in 1899. Arbitration center for public law (between countries). But when ICJ was established afterwards, disputes between states were referred to it. So PCA lacked cases. But thanked to a new management, it became one of the most prominent arbitration institution, mainly for investment disputes (UNCTRAL Model Law). PCA also serves as an appointing institution; in the arbitration rules, there is a default mechanism, if there is a disagreement. PCA can appoint arbitrators if parties fail to do so according to UNCTRAL rules.
* ICSID Center (World Bank): but purely for investment disputes.

There are other institutions at the regional level:

* Stockholm Institute at the Sweden Chamber of Commerce. Majority of its cases involve Scandinavian parties but during communism times, Sweden served as an arbitration center for USSR and its satellites.
* MERCOSUR
* Dubai, Cairo, Swiss, Kuala Lumpur regional centers… All these institutions have their own courts and rules. They also provide services.

Nb: in its new rules ICC prohibited the use of its rules by other arbitral institutions.

Some institutions do not provide a list of arbitrators.

* Lists are an outdated concept. The idea of arbitration is to choose any person you want to judge your case.
* Some institutions still provide a list. Some lists are just indicative (sometimes it is not very clear).

Choosing the arbitrator

Several factors are to be taken into account:

* Knowledge and expertise
* Nationality
* Language skill
* Availability of arbitrators
* As a party, you nominate a co-arbitrator. Then you have to think about his personality, is he able to convey my interests? Can he convince the President of his interpretation of the law?

Process

Classical way of setting up the tribunal: each party nominates its co-arbitrator. And then you have to choose the President.

* Generally, the co-arbitrators agree to nominate the President
* The parties together may choose the arbitrator

Even number of arbitrators: as a party, you should never choose an even number of arbitrators.

* In general, institutional rules provide a number: 1 or 3.

The constitution of the arbitral tribunal is a very important procedural time. When you do it wrong, especially in case of complex arbitration (multiparty) it can be a reason for setting aside the award.

Five arbitrators is possible. In commercial dispute, this is highly unusual. But 5 members is a normal paradigm in state disputes (borders disputes) ; PCA (Arbitration between North and South Sudan : to check).

What happens with the appointment of an arbitrator?

If parties fail to appoint arbitrators; there is a default mechanism. The institution usually appoints the arbitrator in lieu of the parties.

In ad hoc arbitration launched by the Claimant, if the Respondent is not participating. There is no institution. You have to go to the national court where the Respondent is based and asked the court to appoint an arbitrator. They could also refer to PCA which is also an appointing authority.

In ICC arbitration, the parties have a right to nominate their arbitrators. So you nominate an arbitrator, but it doesn’t mean this person will be an arbitrator. He will need to accept the nomination nad have to go through all the independency and impartiality tests before being considered as an arbitrator.

What is the difference between independence and impartiality?

* Independence: objective criteria
* Impartiality: subjective criteria

In the US, it is acceptable to appoint an arbitrator which is clearly advocating the claims of one party. Whereas more impartiality and independence is required in Europe.

IBA Guidelines on Conflict of Interests

They are not binding, just guidelines. Yet they are referred to since there is no equivalent instrument.

Rule of IBA: disclosure if the nominee has any doubt. Even a minor one.

IBA Guidelines divide conflict of interests in three different lists:

* Red list: obvious conflict list of interest, no appointment (is waivable though)
* Orange: so-so, previous service for one of the party in the past 3 years
* Ok: when nothing precludes the nomination of the party.
* Green: when there is some link between the arbitrator and the party but it is okay. Does not preclude to serve as an arbitrator. For example, previously expressed legal opinion.

The arbitrator does not only to be independent from the parties but also from the counsel.

When decisions are made, no reference is made to IBA Guideline.

Any arbitrator, nominated by the parties or appointed by the Court, he has to fill a statement of the ICC “I do accept to serve as an arbitrator”.

* Also says that he is available.
* Disclose the ongoing cases he is involved in.

The rules themselves lay other criteria.

* For instance, on nationality

Challenges

This is when an arbitrator is in place. An a party thinks he is in conflict. If it is an institution arbitration, the board takes a decision. This is not always the case, in ad hoc and ICSID, the decisions concerning conflict of an arbitrator must be taken by the other members of the arbitral tribunal. So an arbitrator is ruling against another arbitrator.

ICC new rules, LCIA, Stochkolm provides for an emergency arbitrator:

* You put somebody in place before the arbitral tribunal is constituted.

ICC arbitration statement: for arbitrators to assert their independence and impartiality

* Arbitrator has to fill this form
  + The arbitrators testified that he accepts to serve as an arbitrator in a case
* In the statement: also need to assert his availability:
  + On the second page: how many cases does he have going on?
* Also ICC exercises control: over arbitration but also over arbitrators

The arbitrator is nominated and a party finds new information, several mechanisms:

* Reference to the Institution, and decides over the case
  + Ad hoc for instance: the arbitral tribunal members decide on the maintenance or not of the arbitrator
    - Delicate situation
* Replacement of arbitrator

Emergency arbitrator: not there to substitute to arbitrators but to make a very fast decision regarding proceedings

* Before the arbitrator the arbitrator tribunal is constituted in order to ensure some provisional measures

Cours 4 – The arbitration agreement

Arbitration is all about consent: it is based on the parties’ agreement.

Arbitration agreement creates arbitral jurisdiction but ousts domestic court jurisdiction.

Two effects:

* you gain the right to arbitrate
* you lose the right to go to court

The arbitration agreement should comprise those two elements

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)

Example: the seat of arbitration can have an incidence on the assumption that a contract is or is not comprehend in arbitration.

There are a few exception of the existence of an arbitration agreement.

* Definition of the arbitration agreement contained in **Art 7 of the ML**
* Consent of the parties, scope of arbitration, future or existing dispute, but also tort claims which are not contractual
  + Oral agreement: depends of the law:
  + **Model law Art 7** provides for two options.
    - The law of the seat
    - The law that the parties have chosen for the arbitral agreement
  + **NYC Art II.1**: agreement in writing

Severability of the arbitration clause:

* the doctrine of severability is complete legal fiction
  + has been created by arbitration lawyers by UNCITRAL and lawyers
  + Signature of two contracts: sign of the main and of the arbitration agreement
    - The relevance of it comes up in a jurisdiction context: the severability doctrine means that if the main contract is void, then the arbitration agreement is not necessary void
      * Ex: Ferris v Plaister
* What is several is only the arbitration agreement

The three consequences of severability:

* validity is separate
* juridical autonomy
* In France, autonomy from laws

Law governing main contract and arbitration agreement:

* contract in arbitration always chosen by the parties or the closest from the contract
  + as a consequence of severability; need to determine the law of the main contract and the arbitration agreement
    - some arbitrators and some courts will find that it is what the parties intended to put all the contract under a single law: often the law of the place of arbitration
      * presumption that the arbitration agreement is governed by French law
    - the seat of arbitration is often chosen as a favourable place
      * need to make a separate conflict of law analysis
        + if it is a contract to build a power station in Turkey

most of the time the law of the seat arbitration is the law governing the arbitration agreement

Turkish law governing the contract, seat of the arbitration in Paris, and for instance English law as the law governing the arbitration agreement

Often it does not happen

* + - Seat of the arbitration: enforcement: will ultimately decide if the arbitration is valid
      * Actually it is more ften use when the place of arbitration is forced by the Contracting state: for instance Ankara, then you want to have the choice of the law governing the contract
        + Philippine case
* Severability: independence of all law?
* Severability is a fiction

Identifying the Parties to an arbitration agreement:

* only A and B have signed the contract, the question is to know if C is whether or not part of the contract
  + C did not sign the contract, but can we read its consent in some other way?
    - Factual scenario: to what extent C acknowledge its participation : often in the negotiation and more importantly in the performance of the contract
      * Therefore C can become a party of the Arbitration agreement
* The main thing is to spot the on signatory who has been dragged into

Anatomy of an arbitration clause:

* all disputes: cover the widest possible scope
  + arising out of or in connexion with: as broad as possible
* shall be or must be: mandatory obligation to arbitrate
* place of arbitration: good to specify it even if the institution has a provision regarding it
* also good practice to specify the language

Cours 5 – The arbitration juridiction

How can you define a conflict of interest?

* **Case Hwatska Elektroprivreda, d.d. v The Republic of Slovenia in 2010/2011**: Challenge of an arbitrator in front of the ICC Court because the arbitrator and one party’s council were from the same chamber in the UK.
  + Special links between the barristers who come from the same chamber.
* However, nowadays, people are more and more linked.
* The idea is that within law firms, two lawyers cannot act on the same case as an Arbitrator and one Party’s council even from different countries.
* As with regards the Chamber case: one of the Party was from a civil law, therefore did not know what were the implications of the fact they were working in the same chamber.
  + Indeed when opening a Chamber website: they do present themselves as a community. However, they underline they work separately. Nevertheless, both where working within the same place: exchange of information, and even more important: barristers share the costs even if they have separate incomes.
* In this very case, both parties were happy with the sole Arbitrator, however, they wanted to make sure of the independence and impartiality of the Arbitrator.
* It was the first time such issue was raised.
* The ICC Court: accepted the challenge of the arbitrator, it is a change in the ICC jurisprudence.
  + Furthermore, since this case: new look at this kind of a conflicts with a new eye
* Other case: what if a new council is brought in the course of the arbitration and change the system of it.
* The IBA Guidelines: when a case starts normally, production of the Terms of Reference once the AT is establish, the idea of this document is to determine the scope of the arbitration and the powers of the AT: therefore, possible to introduce the IBA Guidelines
  + The Terms of Reference being accepted by all
* **Technimont No.11-26.529**
* Court Appel de Reims
* Cour de Cassation : refused the reasoning of the Cour d’Appel de Reims:
  + “*Qu’en statuant ainsi, alors que la partie qui,* ***en connaissance de cause, s'abstient d'exercer, dans le délai prévu par le règlement d'arbitrage applicable****, son droit de récusation en se fondant sur toute circonstance de nature à mettre en cause l'indépendance ou l'impartialité d'un arbitre,* ***est réputée avoir renoncé à s'en prévaloir devant le juge de l'annulation****,* ***de sorte qu’il lui incombait******de rechercher si, relativement à chacun des faits et circonstances qu’elle retenait comme constitutifs d’un manquement à l’obligation d’indépendance et d’impartialité de l’arbitre, le délai de trente jours imparti par le règlement d’arbitrage pour exercer le droit de récusation avait, ou non, été respecté, la cour d’appel n’a pas donné de base légale à sa décision*»**

**The Arbitral Tribunal jurisdiction**

1. **The Separability doctrine**

* Separability doctrine: arbitration clause is separate from the contract, therefore the clause will survive
  + Consequences of the separability presumption:
    - Invalidity, illegality, termination or non existence of underlying agreement does not necessarily invalidate the arbitration agreement
      * In the ICC Court of Arbitration : **prima facie** system
        + First analysis to then forward the clause to the AT to decide upon its jurisdiction
    - Ability to apply different national laws to arbitration agreement and underlying contract
      * Very rare
  + This is a very well established doctrine:
    - All developed jurisdictions recognize the separability doctrine
    - **UNCITRAL Model Law Art 16(1)**

“*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agree- ment. 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 con- tract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*”.

* + Most major international arbitration rules explicitly incorporate the separability doctrine:
    - **ICC 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**
      * New LCIA Rules came into effect October 1st
  + Exceptions to the separability presumption:
    - In certain circumstances, factors that void underlying agreement will also avoid arbitration clause
      * When you sign the contract : need to assert your power: a priori validated
    - Parties are free to agree that arbitration clause is not separate from underlying agreement

1. **Competence-Competence principle**
   1. **Principle**

* **Principle**: AT has authority to decide whether it has jurisdiction to hear a matter ie has jurisdiction to determine its own jurisdiction
* **Competence**-competence is broadly accepted
  + **NY Convention Art III(3)**
  + **France CPC Art 1465**: exclusive jurisdiction
  + **UNCITRAL Model Law 16(1)** expressly authorizes arbitrators to rule on objections
  + **ICC Rules Article 6**: prima facie
* The competence-competence pple allows arbitrators to rule on their own jurisdiction only as an initial matter
  + The Courts have the ultimate say
* The principle is subject to ultimate control of courts
  + **UNCITRAL Model Law Art 16(3)**
  + National legislation
    - **CPC 1492**
  + **NY Convention Art V(1)** 
    - provides that a ourt may refuse recognition/enforcement of an arbitral award if the arbitration agreement is invalid or the arbitrator exceeded their jurisdiction
      * Example of the scope of the arbitration
      * But also example where one of the party refuses to participate: in ICC system it is mandatory to go on with the arbitration
  + **Dallah Case**: AT seated in Paris, the AT said they had jurisdiction over a Party who was not part to the agreement
    - The national courts: the matter should be set aside as the AT exceeded the scope of the arbitration dispute
  + In this instance: the terms of reference must play a very important role : the AT has to decide on every single claim, and therefore if an AT does not tackle a point or go beyond the scope, then the award is susceptible to be set aside: must give importance to this document
* “We lawyers like arbitration. It assures us three litigations: one before, one during, and one after”, Alan Scott
  1. **Involvement of national courts**
     1. ***Involvement and assistance***
* Contemporary approach: the decision lies with the Arbitration tribunal
  + Even if you try to approach national courts, they will bring you back to the AT
* However, if a Party goes to the Court and the other Party does not raises the jurisdictional challenge, then it is fine to continue in the national courts as an expression of the Parties will
* Several types of involvement of national courts:
  + Prior to arbitration proceedings
  + During the arbitration proceedings
  + Post award involvement of state courts
    - Enforcement or setting aside
* Ad hoc arbitration agreement: but the other party does not respect the delays nor its engagements: assistance of a national court
* In France - Juge d’appui : instance which deals with arbitration matters, it is a good system as you avoid the risk of amateurism: persons in charge knows about arbitration
  + 1. ***Interim measures***
* Interim measures: when you try to ensure the status quo does not change
  + 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 proceedings
* Nowadays: number of cases with gaz plants
  + Long term contracts: when the market change, disputes arise
* Arbitrators v courts: generally established that both arbitral tribunals and national courts can grant interim relief in aid of arbitration
  + Courts:
    - France **CPC Art 1449**
    - **ICC Rules Art 28(2)**
    - AAA’s commercial arbitration rules
* Interim measures before the AT is constituted:
  + Before the arbitral tribunal is constituted: lack of authority
  + National court system is one way to obtain procisional measures
  + Put in place the emergency mechanism introduce in 2012
    - As it is an emergency arbitrator: has to be put in place in 48 hours: has to be very quick
      * And decision in two weeks time
        + Very expensive : 40 000 US dollars for an emergency decision
* Interim measures after the AT is constituted:
  + Usually requests for provisional relief are submitted to the arbitral tribunal rather than the national courts
* Standards for granting interim relief: exceptional measures
  + Generally several factors considered by AT and National Courts
    - Harm to the petitioner
    - Urgency
    - Likelihood of success on the merits
    - Balance of equities
* Enforcement of interim measures:
  + Provisional
* The main idea is that AT has the power to provide interim measures
  + Yet, a few years ago the national courts have been empowered to take interim measures of protection
    - **UNCITRAL ML 2006 amendment Art 17**
    1. ***Assistance of the court***
* Assistance with establishment of the AT challenges
  + Juge d’appui in France **CPC Art 1451**
  + **Model Law Art 11(3)**
  + **In Ad hoc arbitration:**  possibility to go to national courts for assistance: the parties can say national arbitration, but they also appoint an authority to help them

Cours 6

**(suite court 4)**

**Drafting Arbitration Agreement**

Language

* Language is very important “shall” “will”
* Also the seat of arbitration has to be in a city
  + The seat needs to be specify or a mechanism need to be specified to determine the seat
* Ex2 : the word “arbitration” was not mentioned
  + The choice of arbitration is extremely important : you loose the right to go to court

Scope of clause

Optional elements to include

* Number of arbitrator(s)
* Language of the proceedings
* Confidentiality: parties’ agreement, lex arbitri, institution’s rules
  + In Paris or in ICC rules: no automatic presumption of confidentiality, but need to introduce it in the clause or ask at to the Court of ICC
  + Investment treaty arbitration : debate concerning the confidentiality of Investment Treaty cases: therefore no automatic confidentiality presumption

Ad hoc or institutional?

* the Parties choose Singapore Court as the Institution but with the ICC Rules
  + The Singapore institution accepted to apply the ICC rules
  + However, the winning party was unable to get enforcement in China as ultimately the Parties’ agreement was not in accordance with the Parties agreement
    - Therefore new article in the ICC Rules : only ICC can apply ICC rules
* Multi step arbitration : they are called the multi-tiered rule
  + Mediation
  + Consultation
  + And finally arbitration

What not to include in an arbitration agreement?

* Take a model clause of a site : copy paste it and do not change it
* Problems occur when a Party tries to be fancy
  + 10 years experience, speak Bulgarian,…no such person exist
* Some people try to put delays in the clause in order to have a short arbitration
  + However: if you miss the deadline, does it invalidate the agreement?
* Also example of four arbitrators…

Jurisdiction process:

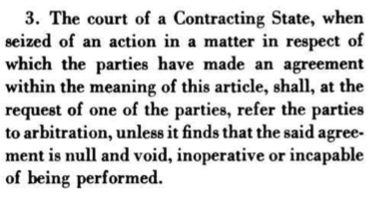
* Can be examined by the ISS Court under the **Article 6.3** of the ICC Rules
  + verification of the jurisdiction
* When there is not this provision, the AT examines its own competence under the competence-competence principle
* If a Party disagree, the Court of the seat of the arbitration can examine jurisdiction
* And then, enforcement under the NY Convention
  + Example of Article 8 of the 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.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

* The Court will consider whether the arbitration agreement is valid or not
* Same under the NY Convention Article 2.3
  + The NYC allows the Courts of each contracting state to apply their own laws: protection of the state and its own principle



Pathological arbitration clause

* Number of arbitrators: no need to specify: institution’ rules : one in general, while country’s rules generally 3
* Existence of the arbitration institution
* Sometimes funny language; understandable though
* Incoterms:
  + Free on Board (FOB): the property in the goods passes when on th ship
  + Cost Insurance FXX: property passes when the goods arrives
  + The problem is the slip of disputes according to the nature of the contract : makes it very complicated
    - Always best not to split between litigation and arbitration
* Problem: one seat if the buyer sues the seller, and another mechanism, if the seller sues the buyer: complicated as might involve two arbitration proceedings

Effects of the Pathological clause => Article 5.D NYC: can be set aside if not in accordance with the Parties’ agreement

* The ICC has to respect the clause : even though risk for setting aside
* Some flexibility given to the ICC by Article 40/41
  + For instance the time limit: the ICC rules do give a power to extend the time limit

Another clause: Swiss Romande and idea of arbitrators, main problem : “in the event” : there is no obligation to arbitrate dispute,…

Questionnaire:

What circumstances? Treaty, or one party applies and the other does not objet

Written agreement? Depends on the lex arbitri

Severability? Separation: two consequences: validity is different and can be ruled by two different rules

One arbitration on two contracts: parties’ agreement: cannot proceed unless the parties agree to modify their agreement: as inefficient as that would be, need to respect the Parties’ agreement

Company’s shareholder: can they be bound by the agreement? Negotiation and performance to get non-parties involved

* if multiple proceedings need to refer to an expert

***The Choice of Law in Arbitration***

* Law governing the arbitration proceedures : lex arbitri, and, sometimes another one
* Two arbitration
* The arbitration agreement can be governed by a different law as to the rest of the contract
* Suppervisory, supportive and enforcement measures:
* The Parties’ legal capacity
* Which law governs the parties substantive rights?
  + Very small bit

The most complex is the law governing the procedures.

Arbitration is much more straightforward than conflict of laws:

Article 28 of the Model law

* Parties are free to choose
* The second sentence excludes “renvoi”
* §2: very broad discretion of the AT to determine the applicable law
  + in most Institution rules : even simpler: Article 21 of the ICC Rules: no reference to conflict of laws
* Article 3 of the Model Law: ex aequo et bono and amiable compositeur
  + Pretty rare to allow that to happen
    - Valid or not: you lack predictability
      * Very rare to be chosen
* The TA shall decide in accordance with the terms of the contract and the usage of trade: emphasizes the importance of the contract

Freedom of parties to choose the law: in about 90% of Parties choose their law under ICC

You can choose a foreign law even if not connection to the contract

Mandatory laws and public policy :

Application of loi de police : will apply regardless of the choice law

In arbitration : mandatory procedural laws : due process, fairness, parties’ autonomy,… competition laws…antitrust laws…

Article 9 of the Rome Regulation : useful definition of mandatory laws

However, very rare : there must be a very strong link between the facts of the case and the mandatory law

* ex: interdiction of compound interests are considered as mandatory law sometimes in order for the award to be enforced in some states like Saudi Arabia.

Pierre Mayer: question whether it is for the arbitrators to raise a mandatory law when the parties did not?

* does the AT have to raise a particular issue ?
  + “moral duty to society” to raise this question
  + or a practical duty to ensure the Award is enforceable
* Role of an arbitrator ? “juge croisé” or a “creature of the Parties’ contract”

Also risk of money laundering

Content of the applicable law;

* at least one, and sometimes all, arbitrators are not qualified on the applicable law
* expertise in the applicable law is not mandatory
  + the parties have to present elements and teaches the AT how to understand the law
    - education of the arbitrators on the law
* Parties’ decision to nominate the arbitral tribunal
  + Wrong application of the substantive law is not a basis to set aside the award
  + Wrong analysis of facts, of the law, wrong application of substantive law
    - The AT should try to apply the applicable law to its best of its ability, however, if there is a question, the AT can refer to the Parties to give their opinion on a case

Ex aequo and bono: whether the parties have specifically authorize that : very important

-

Cours 8

Intervention Guest Speaker

Cours 9

How do we determine the proceedings?

According to the will of the Parties.

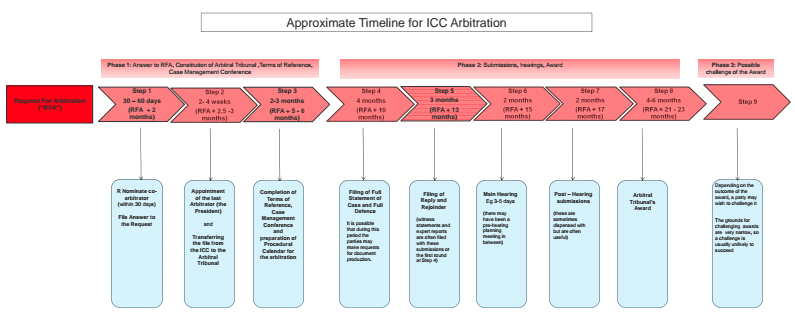
They can agree to pretty much anything.

However, given that freedom, how in practice is that freedom often exercised?

There is no such thing as a classical arbitration procedure. Each procedure shall be tailored to the type of case and actually in fact the individuals involve in the case more than the type of case.

ICC Arbitration will be completely different depending of the parties and the individual backgrounds. It is not the seat of arbitration that changes the proceedings but the individuals. Therefore, the question is not how is Brazilian or Suisse arbitration but: how arbitration influenced by Brazilian proceedings is compared to a Suisse proceedings.

When you have a very international arbitration, with quite a lot of parties coming from very different background: classic type of arbitration.



* Filling of the request for arbitration
* The second stage is the appointment of the arbitrators : based on party autonomy, falls back on the rules, and if not, on the lex arbitri
* Then drafting of term of reference: has to be signed by everyone, Art 23 of the ICC rules.
* First exchange : full claim and full defense
* Second exchange
* The hearing
* Post hearing submissions
* And finally the award
* And the enforcement

Also important to note that it is not uncommon in arbitration to split the issues for instance first the jurisdiction and second the merits of the case.

A lots of other issues can be split of: the quantum, questions of applicable law,…

**ICC: ARTICLE 19- Rules Governing the Proceedings**

“*The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on****, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration***”.

* Principle: by the parties, failing which, arbitrators decide
  + Same in the Model Law Article 19.1

Important points for arbitrators to think about:

* The most important is to fix a procedure that ensure that everybody has an adequate and sufficient opportunity to present its case
  + It does not mean that equal presentation of the case
    - Need to ensure the award will be enforceable
  + Proper opportunity to present the case
* Then need to balance that with time and cost obligations
  + Appropriately timed and cost

Ex: the arbitrators were thinking about 8 months time before hearing, while the parties agreed on a three years

* obligation to respect the parties agreement
* however, need to conduct the arbitration in an expeditious and cost-effective manner
  + Article 22 of the ICC Rules

One option for the arbitrators would be to accept the agreement and accept the time framed by the parties, however, this decision is not consistent with the cost and efficiency pillars of arbitration.

In this case: the arbitrators explained to the parties they were chocked.

In the ICC Rules: incentive for the arbitrators to make the proceedings efficient

* the arbitrators get paid at the end
* the amount paid to arbitrators is forfaitaire: they don’t get paid on the length of the arbitration

Three elements to take into consideration: the agreement of the parties, fair opportunity to present the case and parties autonomy.

The arbitrators will want to take into consideration as well the lex arbitri, the law of the place of enforcement and the institutional rules : to determine if there are some other mandatory rules.

For example: it’s about link of proceedings, for example the length of the arbitration.

Therefore: on the one hand, huge flexibility and freedom, but on the other hand: limitations.

Waiver: implied or express. The interest of it is the implied waiver.

* Model Law - Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

* ARTICLE 39 – Waiver of the ICC

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

Ex: a party starts an arbitration, the other participates and finally the arbitration clause is invalid: too late

For instance, regarding the arbitration proceedings: the claimant and respondent don’t have the same time to present their arguments, the respondent has 3 months, claimant only one. Claimant looses, goes to the jurisdiction to have the award set aside. However, participated, the right to object is lost.

It is often argue with regards to arbitrators independence.

How far does the waiver go?

Indeed it is quite common for the arbitrators to ask the parties if they have comments regarding the way the proceedings have been handled. Usually: no one objects and the parties have waived their right.

One way to answer is to say: we are very happy with the way was conducted, however, we don’t wave any rights.

A waiver rule: efficiency and stability, waiver is a practical way to raise a problem when it occurs.

It forces the parties to raise the problem when it can still be dealt with.

IBA Rules of Evidence:

* they provide a useful source of guideline on how arbitration usually takes place
* strong argument as a support of your claim and your point of view, keeping in mind they are not binding
  + more successful than the IBA on Conflicts of Interest

What is the most important reason why you prefer arbitration? It is expected to be the fact the award is enforceable everywhere, but actually it is generally the flexibility of the proceedings

What happens if a party refuses to participate?

Common law jurisdiction: default judgement.

About 5% of the arbitration: one of the party is not participating.

When it does not participating at all: all the waiver does not apply:

What do you do if you are a party that learns late about the proceedings? Sometimes, it would be to your advantage not to participate: very risky strategy, because the proceedings do go smoothly and you won’t have basis to challenge it

If you are the arbitrator: need to send everything to the correspondent?

You should act as if there was a participating party: encourage to comment, to participate, send all informations…

Jurisdiction can always be reviewed or appeal: exception to the finality of the arbitration.

Ex: Dalha Case

Hearings: oral phase in an arbitration

* Model Law

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, **unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings**, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

* When it comes to the hearing: need to hold one, unless the parties agree not to have one
  + Positive agreement not to have an hearing
* ICC

ARTICLE 25

6 - The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

* When it comes to the hearing: no hearing, unless any of the parties requests a hearing

=> When it comes to hearing: mandatory provisions.

In practice: what is required in general is at least one hearing on the substance. Whether on the right to more than that depends on the arbitral tribunal and on the case itself.

The hearing is the only special rights: when you are in same room and express, often more efficient

It is something about human communication that is best achieved in face to face

Also: “hearing”: can be held through Skype, videoconference, telephone…

ICC RULES - ARTICLE 38

Modified Time Limits

1  The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.

2  The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 38(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.

Cours 10

Complex arbitration

* State and state entity involvement
* Investment cases
* Large amount in disputes
* Procedural challenges

We will see:

* multiple parties arbitrations
* multiple contract arbitrations

This is a complicated topic, therefore need to think carefully about it.

One or several claimants can involve one or several respondents. Now respondent may ask to join an additional party.

Respondent can also ask to join additional parties to the proceedings.

There are also situations where there are two parallels arbitrations may be involving the same parties and may be on the same contracts. So there is a possibility to consolidate these two parallel arbitrations and have one single procedure: avoid the same questions, one single proceedings also allow not to waste time and money. However, for strategic reasons, parties may want to separate the issues.

Also at the moment of filing the request for arbitration: the dispute arbitration clause is referred to in another contract.

How do you run arbitration from several parties? At the same time need to respect due process.

Each party has the right to nominate an arbitrator : how in multiparty arbitration do you ensure this right?

Do these complex arbitration need a special set of rules?

Until the end of the 90’s, no special rules especially for historical reasons: as commerce developed, and, the reality became more complex.

**ICC Courts**:

* 767 new cases per year (2013)
* 2120 number of parties
* 1/3 of cases are multiple parties cases, therefore, the rules should address this kind of problem

In the 1998 version of the ICC Rules: a rule about the multiparty arbitration regarding the constitution of the Arbitral Tribunal. But what with the 2012 new rules, it was decided to provide new rules for these problems: **Article 6 to 10**.

Afterwards, in October the new LCIA rules came into force and they also inserted new rules regarding these matters of complex arbitrations.

Importance of consent:

There cannot be arbitration unless the parties have agreed so: opt out to defend your right in front of a national court.   
In multiple parties’ cases: need to check that all the parties are comfortable in participating in the arbitration process and that they gave their consent to arbitration.

What happens of course is that, in most of the cases, it is simple because signature. However, in some contracts: parties participated in the negotiations of the contract and its in completion…however, did not sign the contract. The contract can then be extended to the non-signature parties.

Jurisdiction in multiparties and multi-contracts scenarios: two dimensions (ICC Rules):

* Each party must have agreed to arbitrate:
  + With all other partu to the arbitration
  + To have all the claims in a same procedure
    - Difficulty more when both

Scenarios:

* Single contract with more than two parties
* Single contract plus relevant non signatories (agents and representatives, assignees, 3rd parties beneficiaries, guarantors, non-signatories with the same group of companies)
* Related contracts with the same parties
* Related contracts with different parties (construction, M&A acquisition guarantor, joint venture with 3rd parties)

Cf. Ppwt :

***Agency***:

* 2010 UNIDROIT Principles
  + **Article 2.2.3**
* French Civil Code

***Assignment***:

The assignee was not there at the conclusion of the contract: can they rely and are they bound by the arbitration agreement? Often bound, but debated.

***Third party beneficiaries***:

Need to look at how the contract is drafted, but from an ICC’s perspective, it is usually accepted and leaves the decision to the AT.

* 2010 Unidroit
  + **Article 5.2.1**: need to have a close look at the contract

***Non-signatories***:

Other companies of the group, directors, shareholders, non signatory members of the joint venture,…

* Pierce the corporate veil concept
  + The idea is to have an enforceable product at the end
    - It depends of the jurisdiction: same will be willing to dig, some other won’t
    - In the US, well established practice. (Discovery)
  + Whose interests are behind? You try to see who is behind?
    - Discovery process to prove that the ultimate owner will be another company for instance

Grounds: involvement in the conclusion or performance of the contract containing the arbitration clause

File the arbitration request against the joint venture but also the subsidiaries.

Case law:

Today’s reality, lots of cases involving multiple parties, however was not always the case.

* Dow Chemical France, ICC Award 4131, 1982 (30 years ago)
  + Dow chemical from Venezuela, but certain things where done by Dow chemical Us or Switzerland…
  + The French company dealt with these several companies through the project
    - The AT: “Dow chemical has exercised absolute control over its subsidiaries”, “yet these national companies have effectively and individually participated in their conclusion, their performance and their termination”
    - Participation mattered
    - A group of companies constituted in the same group.
  + “their role in the conclusion performance or termination of the contracts”
  + The matter was brought in front of the Paris Court of Appeal
* Société Jaguar V 2000 vs. Société Project XJ 220, Cour d’appel de Paris, 7 dec 1997
  + The French representation asked for the person to pay the second amount in money, but the buyer answered he was not interested anymore
    - The French and English company : general conditions with arbitration agreement on the backside
    - The buyer said there was no international element: no arbitration agreement
      * The Cour d’appel said there was a contract was signed in France but that the buyer was bound by the arbitration agreement in UK.
    - Same test as in Dow Chemical: implication in the negotiation and performance of the contract

The role of the ICC Court:

* Determination of prima facie existence existence of an arbitration agreement or arbitration agreements
  + **Article 6.3 and Article 6.4**
    - One arbitration agreement
    - One arbitration agreement and multiple parties:
      * Dispute over the jurisdiction of the AT
      * The Article 6.3 says the arbitration shall proceed and any question of jurisdiction or multiple claims shall be decided by the At, unless the Secretary decide to refer the matter to the court
      * The court will transmit the case to arbitral tribunal
* Constitution of the Arbitral Tribunal
* Fixing the costs
* Scrutiny of the draft award

Article 6.4 :

The arbitration shall proceed between those of the parties with respect to which the court is prima facie satisfied that an arbitration agreement under the rules that binds them all may exists

Multi-contract arbitrations: setting the boundaries

You have to make sure that the multiple contracts refers to one economic transaction

* First thing to check: whether the arbitration agreement are compatible
  + The Court shall consider for the prima facie decision
    - Constitution of AT: number, method, time limits
    - Place of arbitration
    - Language and
    - Consideration of applicable law
* Second : that all the parties to the arbitration may have agreed that those claims xan be determbed together in a single arbitration
  + The court considers
    - Whether all parties are signatories to all contracts
      * The “group of companies” exception
      * The “at least one contract” exception
    - Same economic transaction

**Example 1: AB/AB/AB**

* The dispute concerned 3 contracts for the development construction and fitting out of the Office Center :
  + Building and then additional works
  + Three separate contracts and
* Multiple contracts and multiple arbitration agreement: whether the arbitration agreement is similar, the language does not have to be identical, the substance has to
  + Same economic transaction: the same arbitral tribunal can consider all the claims all together: avoid parallel arbitration proceedings

**Example 2: AB/AC/AD**

* Party A: same project but parallel transactions – one UK company filed a request for arbitration against three respondents
  + Guarantee Claimant and R1
  + Shareholder agreement relating to Respondent 3, signed by Claimant and Respondent 2 and 3
  + Share purchase agreement and subscription agreement signed by claimant and Respondent 1, 2 and 3
* Broad drafting of the clause: all the cross reference : on this basis AT found itself competent

Joinder of additional parties **Art 7 of the ICC Rules**

* Terminology : joinder, additional parties
* Equal treatment of the parties

Before 2012, the choice of who would be party to arbitration was up to the Claimant, and therefore, the Respondent had less power. Therefore in the 2012 rules: same rights for the Respondent.

* Right to identify the parties without decision of the ICC Court
* The additional party’s agreement is necessary to modify the arbitration clause
* Participation in the constitution of the AT : the important point
  + Every party has a right to participate in the constitution of the AT
  + If you want to bring someone new, you should bring this party before the constitution of the AT
    - If not: reason to set the award aside
    - One exception : ensure that if there would be a cause before any national jurisdiction : any objection to how the AT was constituted
* Time limitation: constitution of the AT
* Notion of Parties to the proceedings

Consolidation:

Administrative act by the court not subject to reconsideration by the AT

It is considered much easier to consolidate before the constitution of the AT, or, if the AT is the same in the two cases.

* The Court may, at the request of a Party, consolidate two or more arbitrations pending under the Rules into a single arbitration, in 3 instances
  + The parties have agreed to consolidation or
  + All claims are made under the same arbitration agreement or
  + Where the claims in the arbitrations are made under more than one arbitration agreement
    - The arbitration are between the same parties and
    - The dispute arise in connection with the same legal relationship and
    - The Court finds the arbitration agreement to be compatible

Constitution of the AT:

* What happens when the multiple parties failed to jointly nominate the arbitrator and agree on the constitution of the AT?
  + **ICC Dutco Case, Cass 1re 7 janvier 1992**
    - French Cour de Cassation considered the principle of equality in the appointment of the arbitrators as a matter of public policy
  + This case had repercussions not only in France but in multiple jurisdictions

If failure to nominate of one of the multiple parties: the ICC Court will not confirm either of the arbitrators chosen and instead will nominate all the three arbitrators: the ICC Court takes away the Parties right to nominate AT: drastic step, but in this way, everyone in equal in the AT constitution

Costs:

General rule: advance on cost on the basis of the amount in disputes: 50/50 proportion

Muliple claims: situation becomes more complicated

Enforcement or Arbitral Awards:

**NYC: Article V**

The AT shall be very vigilant

Ensure that the non-signatories gave their consent and that the constitution of the AT was conducted properly

**French Decree Art 1520**