**International Commercial Arbitration**

**Class 1: Introduction**

1. **What is arbitration ?**

Method of dispute resolution involving third neutral parties whose decision is binding.

It is not alternative anymore. In all of international contracts drafted today, there is an arbitration clause.

Why companies choose international arbitration?

* 88% of companies use it ; most are satisfied
* Cheap, fast but the most important feature was procedural flexibility. It surprised arbitration practitioners. Flexibility means that the parties in an arbitration can choose how the process goes: they can choose their sear, have a long or short procedure, any language.
* NY Convention: enforcement and recognition of arbitration agreements. This is what makes arbitration legally valid and enforceable. **(Read in particular Articles 2 & 5: memorize article 5).**

What kinds or arbitration?

* Most popular is ICC, then LCIA.

Types of arbitration

Commercial arbitration (or NY Arbitration) should be distinguished from domestic arbitration and from ICSID arbitration.

* Most of the principles of commercial arbitration are applicable to investment arbitration. Main differences are setting aside proceedings (challenging the award ; in ICSID system, it is done within the ICSID), second difference is enforcement (ICSID has its special enforcement system) and the third system is the substantive law that applies to the dispute because in ICSID, it is always treaty.
* ICSID: disputes between states and private entities.
* But in fact commercial arbitration has more cases involving states than ICSID. A lot of state parties use commercial arbitration. About 10% of ICC cases (100) involve state parties.

There are also some countries where the NY Convention has not been adopted. Meaning there is private commercial convention. And there are places where NY Convention can not apply: Palestine.

1. **History of Arbitration**

Arbitration is a very natural way of solving a disputes. It stems from a tribal elder concept. Ancient Greece, Rome, China…

* The first real lnown Arbitration was the Alabama Claims Arbitration just after the American Civil war. The winner side has sued UK because it has authorized the Southerners to use UK built battleship against the North Side. 15$ million awarded to the US.

Then establishment of the first arbitration Courts, LCIA (19th/ beginning 20th century).

Different legal instruments:

* 1923 Geneva Protocol
* 1927 Geneva Convention
* 1958 NY Convention (supplanted the Geneva Conventions): facilitates the recognition and enforcement of foreign arbitral awards and agreements, 149 parties.

NY Convention: is maybe one of the most successful achievement of international commercial cooperation. This instrument is constantly relied on and participated to the emergence of arbitration.

NY Convention deals with the enforcement of arbitral awards AND the recognition of arbitral awards (Articles 2 & 5).

Graph on ICC cases law: part of the growth is the NY Convention itself.

* 1965: ICSID Convention
* 1966: creation of UNCITRAL
* 1976: UNCITRAL comes up with its Arbitration Rules (revised in 2010)
* 1985: UNCITRAL Model Law on International Commercial Arbitration

UNCITRAL Model law is not an international treaty nor convention, it is just a template arbitration law. Any country can copy past this model law in their own law. Model law has no force of law in itself. More than 60 countries have adopted the model law: Eastern Europe, Asia, Germany, Australia, New Zealand, Canada, Latin America.

* But there are also a lot of countries who do not follow these rules: Switzerland, France, UK, US. Important jurisdictions for arbitration have their own laws.
* However, when you look at the laws of these countries, you will see most of the same principles of the Model Law in those laws.
* Because there is such a similarity, you can pop in different location arbitration. Makes it much more easier for business to solve their dispute since there is a model law and many similarities between arbitration legislations. It is one of the main difference with domestic litigation.

IBA: International Bar Association. They have a special Arbitration Committee. It is important because they are good at coming with rules and guidelines.

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

For next week: NY Convention, Model Law, IBA rules.

1. **Difference between Arbitration and other forms of Dispute Resolution**
2. Litigation

In arbitration, jurisdiction comes from the agreement of the parties. In litigation, judges automatically have jurisdiction.

* Second difference, in arbitration you choose the arbitrator whereas in litigation, the judge is imposed.
* Third, in arbitration you can choose the procedure. Flexibility!
* Fourth, the possibility of having the procedure confidential opposed to court jurisdiction. You can choose to make arbitration confidential but it is not necessary confidential. In some places, there is an automatic presumption of confidentiality. But when you go to a national court (enforcement, procedural issues), you will have to disclose some elements of the dispute but not all of them and not all the facts of the case.
* Fifth, appeal v. finality. Arbitration is in general a final binding process. There is a very limited to set aside an award on procedural grounds, unfairness, biased arbitrators, public policy but there is no appeal on the merits. In litigation, there is always at least one level of appeal.
* Finally, the ability to enforce the awards internationally thanks to the NY Convention. In litigation, there are some regional enforcement treaties (Europe, Brussels Treaty). There is only a draft of an international treaty. If you want a decision that can be enforced internationally, you should choose arbitration.
* Additional point: when choosing arbitration, you can appoint an arbitrator specialized in the field of the dispute. IT background arbitrator for an IT dispute for instance.

1. Alternative Dispute Resolution (ADR)

In mediation, decision is not binding. Another important difference is the enforcement aspect; mediation comes as a contract. There is no way to enforce a contracted rendered by a mediator.

* Arbitration is mandatory. When signed on an arbitration agreement, you can not refuse later on to participate. If you refuse, arbitration will proceed without you and it is likely you will loose. An arbitration clause is essentially a clause that is specifically enforceable.
* Parties cannot be compelled to participate in ADR. You can’t be compelled by the decision rendered by a mediator. But participating to an ADR can be a precondition to an arbitration. But you can show up and don’t do anything and wait for the arbitration.
* Some control in arbitration v. total flexibility in ADR.
* Enforcement of outcome v. not enforceable

1. Domestic Arbitration

Differences:

* Different rules: the law of the state in question; less room for choice: restrictions on the applicable law.
* When you’re talking about domestic arbitration, there are different considerations. For instance, some countries allow for appeal, allow to choose foreign law,

How do you define international arbitration as opposed to domestic arbitration?

* Ex: definition of UNCITRAL.

Point: arbitral awards are confidential. Extracts are sometimes published. So awards have persuasive authority but not binding authority. But in investment arbitration (ICSID), precedents have much more important authority. And ICSID tribunal will always refer to previous ICSID decisions.

* Scholars are more important. Citing them.

1. **Key concept in International Arbitration**
2. Arbitration Agreement

Required for an arbitration. Effectively it is specifically enforceable (also read article 8 of the Model Law). For practical considerations and to comply with the NY Convention, the agreements needs to be written.

1. Arbitrators

Chosen by parties. Virtually anyone can sit; no restrictions. It just has to be someone independent or impartial. Parties can add extra requirements and can also change them later on.

1. Seat of arbitration

Very important.

1. Party autonomy and procedure
2. Finality of outcomes
3. Enforcement of arbitration agreements and awards
4. **International Arbitration Institutions**

There are a lot of institutions. Most well known is ICC. You don’t need to have an institution to have an arbitration. You can have ad hoc arbitration (without institution). But its always better to have an institution, they give guidelines, they manage the costs, guarantees the quality of the process and scrutinize the award.

But which institution?

* You need to be very careful in choosing an institution because once it is in your arbitration agreement, it may be very hard to change it. For instance, if you choose a new institution, it can no really deliquesce in a five years period.

86% of the awards were under the rules of an arbitration institution while 14% were ad hoc (Queen Mary survey).

**Class 2: The seat of arbitration**

**Seat of arbitration**

More theoretical part of the course. Arbitration does not take place in a vacuum, there is always a place and a law. The law will provide some limitations and some control. There will always be some control of the court of the place or arbitration. Try to understand this control and try to prioritize the laws of the place of arbitration, the arbitral rules. See what is the hierarchy.

**Article 18 of ICC Rules – Place of Arbitration**

* It is like any arbitration rule or law.
* Place fixed by ICC unless agreed by parties.
* Other locations possible

There are three different places referred to:

* The place or seat of arbitration: most important because it is what provides the legal framework and the link with domestic law.
* The two others are simply for convenience and does not change the lex arbitri

Seat and place are used interchangeably. Very important not o confuse with venue or location of hearings which is simply a physical or geographical place.

Distinction between seat and venue hearings

Arbitration is not only about the hearing. It is a long process. And all that process legally speaking takes place at the seat of arbitration (exchange of submissions, hearings, appointment of arbitrators). The fact the hearings take place somewhere does not change the seat.

*Angela Raguz v. Rebecca Sullivan*, 2000 (Sydney Olympic Games): seat in Geneva. But he Olympics took place in Sydney. Hearings in Sydney. Arbitrators made their decision in Sydney, they never went to Geneva. The appeal was filed in Sydney to know if the seat remains legally speaking Geneva. Answer is yes: it does not matter, the seat remains the seat.

What powers do courts at the venue (= place of hearings) have?

It is possible that they may have some inter-measure power but it has nothing to do with the fact that the hearings is taking place in Sydney. It is only because there is people or assets are located in Sydney. So it is a connecting factor to have hearings held somewhere. In the Geneva Sydney example, the only court that have power are the courts in Geneva.

Small exceptions:

* Arbitration in Singapore with Philippine companies, hearings in Melbourne. Interview of a witness by videoconference in Saudi Arabia. Consider that issue that if he could take an oath on the Bible. But he is Saudi Arabian so there was an issue. So decided it was better not him to take an oath.
* In California: claim in the court arising from a contract. But arbitration clause. And the Californian court has the power to have a loot at the arbitrability issue, it is okay. But there are other examples where courts start interfering in arbitration without consistent with arbitration laws and rules.

Another example: *PT Garuda Indonesia v. Birgen Air*, Singapore Court of Appeal

* Place of arbitration was in Singapore but the hearings were held in Jakarta.
* The Indonesian company wanted to say that the seat had changed to Indonesia because the courts would have been more favorable to their position.
* Claim based on the fact that the hearings took place there. The Singapore Court said no, it does not change the place of arbitration.
* Later in the decision, they say that you can change the place of arbitration but only by agreement of both parties.

There is one exception: it is where the institution has fixed the seat of arbitration. It is possible but extremely rare for the institution to change it later on.

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Lex arbitri, Arbitral Procedural Law and Arbitration Rules

1: Arbitration Agreement

2: Arbitration Rules

3: Procedural Laws

4: *Lex Arbitri*

**Mandatory rules**

ICC rules about the appointment of arbitrators.

* Article 11.6 ICC: provision that says the tribunal shall be XX

Imagine an arbitration rules:

* Dispute shall be judged by an ICC court but there should be no scrutiny of the aard by the ICC. It means that the ICC check the award before sending it to the parties.
* Article XX of ICC rules
* Process of scrutiny: opting out of that conflict with a fundamental principle of the ICC rules and also of arbitration. Scrutiny of the ICC is also protection of the party: they want to make sure that the award is of a minimum quality and make sure that happens, scrutiny is a mandatory process.

Adopting arbitral rules is part of the contract of the parties.

Conflict between Arbitration Rules and Lex Arbitri

Provision of the Model Law dealing with the appointment of arbitrators: Article 10.

* If parties do not agree on the number of arbitrators, there shall be 3.
* Imagine: place of arbitration in Slovenia, Model Law applies ; agreement says ICC rules but does not provide the number of arbitrators.
* Answer: the number of arbitrators is not a mandatory aspect of Model Law because it is not one of the fundamental principle of arbitration. Therefore, the higher element in the hierarchy will apply, that is to say the Arbitration rules (or Agreement).

Another example: in Belgium, law says that there must be an uneven number of arbitrators. Arbitration with France, and place of arbitration is Belgium. Arbitration arising from a treaty between the two parties. And the Treaty provides for 4 arbitrators.

* How to solve the conflict: here, it is not only about the number of arbitrators
* Two options: changing the number of arbitrators but they couldn’t do that because the number was specified in the Treaty and needed to be done at the diplomatic level
* It was possible to change the seat of arbitration in Geneva because the arbitration clause was a separate document different from the Treaty. Seat in Switzerland.
* Both parties agreed to change the seat of course

What is covered by the *lex arbitri*?

* Pre-arbitral matters
* During arbitration: support for arbitration
* Post-arbitration

Control by the judge of the seat of arbitration. Level of control depends on the domestic law.

Content of typical Arbitration Law

It typically regulates:

* Right to arbitrate
* Right to choose procedure
* Competence-competence
* Formal validity of arbitration agreements
* Default provisions on appointment
* Fundamental (mandatory) procedural laws
* Requirements for awards
* Recourse against arbitral awards

So, appeal in arbitration is possible but only in countries that allow it in their domestic law: New-Zealand, ICDR, Israel and UK.

* In the UK, there is an automatic appeal when there is a manifest error in the award. But you can opt-out of that rule.
* So can you appeal? Depends on the seat of arbitration and its provisions.

Choosing foreign procedural law

*Enrecon India v. Enercon CMBH*, Civ. App 2014, Indian Supreme Court:

* See the clause: copy past
* Where is the seat? Bad wording.
* Does Indian procedural law apply like arbitral rules?
* Which courts deal with setting aside? What standards do they apply of due process, independence, construction of the arbitration agreement?

Designation of seat: how is it chosen?

By agreement. Even vague language will suffice unless there is conflicting locations.

Failing agreement default mechanism under rules or procedural law: Article 18 of ICC.

Factors to consider:

* Legal choice. Laws are most important. Party to NYC

**Class 3: 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.