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"The agreement to arbitrate is the foundation stone of international arbitration. It records the consent of the parties to submit to arbitration – a consent which is indispensable to any process of dispute resolution outside national courts." (Redfern and Hunter)

Introduction

Consent of the parties represents the first key step to enter into an arbitration agreement and is the main feature of international arbitration, [1] which is described as a consensual[2] method of dispute resolution.

An arbitration agreement can be either an arbitration clause in a contract agreed prior to any dispute [3] or take the form of a submission agreement made separately from the main contract after a dispute has been triggered.[4]

One of the main functions of an arbitration agreement is that it evidences the consent of parties to submit their disputes to arbitration[5], thereby waiving their constitutional rights to a fair trial in national courts, including the rights to any potential appeal procedure. By opting for international arbitration, the parties favour an informal and voluntary method of dispute resolution, which may take place in another jurisdiction, with arbitrators holding expertise and potentially originating from other jurisdictions, and where the arbitral award is binding on the parties. The arbitration agreement therefore reflects the autonomy of the parties to select arbitration as a dispute

[1] Fabio Solimene, 'The doctrines of Kompetenz-Kompetenz and separability and their contribution to the development of international commercial arbitration' [2014] Arbitration 249
[2] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press)
[3] Alan Redfern, M.Hunter, *Law and Practice of International Commercial Arbitration* (6th edn, Sweet and Maxwell) ch 1 para 1.42, 1.43
[4] Redfern, Hunter (n 3) ch 1 para 1.42, 1.43
[5] Hong-Lin Yu, 'Written arbitration agreements-what written arbitration agreements?' [2013] Civil Justice Quarterly 68

resolution process and creates the rights to determine the conduct of the arbitral process and to select the substantive law that governs the arbitration agreement.[6] The parties' agreement to arbitrate also empowers the arbitrators to conduct the proceedings and defines the scope of their jurisdiction. Therefore, when the parties agree to arbitrate their disputes, they create their own private legal system.[7]

Without the consent of the parties, there can be no valid agreement to arbitrate and no valid arbitration. [8] This is recognised by both the national laws and by international arbitral rules, notably the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention')[9] and the UNCITRAL Model Law on International Commercial Arbitration 1985 ('UNCITRAL Model Law')[10].

Even though the autonomy of the parties is rooted in the New York Convention and the UNCITRAL Model Law and is essential for the process of international arbitration, there are limitations on the extent to which the intention of the parties is given effect in this dispute resolution mechanism. The mandatory provisions of the national laws and the intervention of national courts are often required to ensure that the will of the parties to arbitrate has been formulated, that the parties be bound by the international arbitration process and to some extent for the parties to be in control of the arbitral process. Such safeguards are devised to avoid miscarriages of justice, prevent abuses of the international arbitration mechanism and protect the commercial interests of the parties involved in the dispute.

Arbitration agreements and consent in international conventions

[6] Zaherah Saghir, Chrispas Nyombi, 'Delocalisation in international commercial arbitration: a theory in need of practical application' [2016] International Company and Commercial Law Review 269
[7] Margaret L Moses (n 2)18
[8] A Redfern, M Hunter (n 3) ch 1 para 1.40, 1.53
[9] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, article V
[10] UNCITRAL Model Law on International Commercial Arbitration 1985, article 35

In order to ascertain the parties' wishes to subject their dispute to arbitration, many jurisdictions and the international conventions, namely the New York Convention [11] insist that parties submitting to an arbitration execute valid arbitration agreements` in writing.[12] The rationale of having arbitration agreements in written form is mainly to secure the intention of the parties to agree to arbitration[13] In accordance with the provisions of the New York Convention,[14] any arbitral award made on the basis of an arbitration agreement which does not fulfil the written formalities will bear the risk of being set aside by a Court of law and the failure to satisfy all written formalities may render the enforcement of the arbitration award difficult.[15]

The UNCITRAL Model Law has taken into account technological advancement and widened the provisions of the New York Convention and moved beyond the requirement of 'letters' and 'telegrams' to include 'an exchange of letters, telex, telegrams or other means of telecommunication' which provide a record of the agreement.[16] Although many jurisdictions such as the United Kingdom[17], Italy[18] or the United States[19] still insist that a valid arbitration agreement must be in writing, some jurisdictions such as France[20], New Zealand[21] and Scotland[22] have evolved from the written requirements and offer express provisions which require no written formalities for arbitration agreements.

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[11] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, article II (2)
[12] Hong-Lin Yu (n 5)
[13] Julian D M Lew QC, Loukas A Mistelis, Stefan M Kroll, *Comparative International Commercial Arbitration* (2003 Kluwer Law International) para 7.7
[14] Hong-Lin Yu (n 5)
[15] New York Convention, article V (1)(e)
[16] UNCITRAL Model Law, article 7(2)
[17] Arbitration Act 1996, s5
[18] Article 807 of the Italian Code of Civil Procedure states that 'the submission to arbitration shall, under penalty of nullity, be made in writing and shall indicate the subject matter of the dispute.'
[19] United States Federal Arbitration Act 1990
[20] New French Law 2011, article 1507
[21] New Zealand Arbitration Act 1996, s 2(1)
[22] Arbitration (Scotland) Act 2010, s4

The importance of the parties' autonomy for the formation of an arbitration agreement is illustrated in the provisions of the international treaties whereby a competent authority may refuse to recognize and enforce an arbitral award if there the disputing party adduces evidence that the parties were under some incapacity to enter into an arbitration agreement.[23]

When a dispute arises between the contracting parties and is brought before the national courts, the construction of the arbitration agreement is analysed so as to determine whether the parties have expressed their intention to settle the relevant disputes through arbitration.[24] In jurisdictions, such as in Geneva Switzerland[25], the unreported case of Kassationsgericht[26] makes it clear that the explicit or tacit consent of the parties is required for a valid arbitration agreement. In England, the House of Lords stated that the consent of the parties is the cornerstone of an arbitral process and affirmed that arbitration is a consensual method of dispute resolution which depends mainly 'upon the intention of the parties as expressed in their agreement'.[27]

Consent of parties and the separable obligation to arbitrate

The intention of the parties to enter into an arbitration agreement, gives rise to the obligation to arbitrate which is an independent and separable obligation from the remaining of the main contract. Even if the original contract in which the arbitration clause forms part of, is terminated the obligation to arbitrate survives.[28] The party who wishes to start arbitration proceedings may proceed with the arbitral process, on the basis of the survival of the arbitration agreement which is a separate and independent agreement.

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[23] New York Convention, article V(1)
[24] Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and others, House of Lords [2007] UKHL 40; [2007] 4 All E.R. 951; [2007] 2 All E.R, on appeal from:[2007] EWCA Civ 20 (Also known as Fiona Trust & Holding Corp v Privalov ('Fiona Trust Case'))
[25] Matthias Scherer, 'Switzerland: Kompetenz-Kompetenz and the validity of arbitration agreements in company bylaws' [2006] International Arbitration Law Review N46 Case comment
[26] Kassationsgericht (Geneva) (Unreported, May 13, 2005) (Switzerland)
[27] Fiona Trust Case (n 24)
[28] A Redfern, M Hunter, ch 1 para 1.54

The doctrine of separability which preserves the independence and separability of the arbitration agreement, brings reassurance and protection for parties resorting to arbitration. The autonomy and independence of an arbitration clause from a main contract[29] is important so that the intention to resort to arbitration, via the arbitration clause of the contract, is protected in the event of a total breach of the terms of the main agreement. However, Submission agreements are agreements to arbitrate 'after the occurrence of an event' and are separate documents. In England, the Arbitration Act 1996[30]('Arbitration Act') provides that an arbitration clause is 'ring-fenced' from a main agreement, even if it figures as a clause of the main agreement. The aforementioned Act also provides that the arbitration clause is to be independently interpreted and separately applied from the other clauses of the main contract.[31] The arbitration clause is recognised as not being a clause serving any purpose (or *raison d'être*) of the contract and will therefore remain binding on the parties.[32] The doctrine of separability pursuant to the Arbitration Act 1996 was recognised in 1993 in the case of Harbour Assurance v Kansa General International Insurance[33]

In the case of Fiona Trust v Privalov[34] the doctrine of separability was applied to protect the parties' chosen method of dispute resolution. The House of Lords upheld the decision of the Court of Appeal and was of the view that the 'principle of separability provided for by section 7 of the Arbitration Act 1996 meant that the invalidity or rescission of a main contract does not necessarily entail the invalidity or rescission of an arbitration agreement.' This view was also endorsed in the case of Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and

[29] A.de L. Mc Dougall and L.Ioannou, 'Seperability Saved: US Supreme Court Eliminates Threat to International Arbitration' (2006), White and Case LLP 1 <http://www.bing.com/search?q=01469_Separate_byline.indd&src=IE-Address > accessed on 10 February 2017
[30] Arbitration Act 1996, s7
[31] Philippa Charles, 'The proper law of the arbitration agreement' [2014] Arbitration 55
[32] Heyman v Darwins Ltd [1942] AC 356,374(Lord MacMillan)
[33] Harbour Assurance Co. Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyd's Rep 455
[34] Fiona Trust Case (n24)

others[35] where it was stated that an arbitration agreement must be treated as a 'distinct agreement' and can be declared void or made voidable only on grounds which relate exclusively to the arbitration agreement.'[36]

The doctrine of separability is now enshrined in the institutional and international rules such as the UNCITRAL Model Law [37] and the LCIA Rules[38] which confirm that the arbitration agreement must be treated separable from the underlying contract in which it is incorporated.

Across many jurisdictions, national courts have given due recognition to the separability of arbitration agreements from main agreements. In China, the courts have been observed to apply the principle of separability. The Chinese courts have accepted that when a main contract is null and void, the nullity or voiding of the main contract would not affect the application of the arbitration clause agreed by the parties.[39] In France, the *cour de cassation* in the case of Gosset[40] recognised the doctrine of separability such that the arbitration agreement remains autonomous from the main agreement. In the US, the Supreme Court has also recognised the separability if the arbitration clause in the Prima Paint case.[41]

Separability of the arbitration agreement and the proper law of the agreement

On the basis of the doctrine of separability, the English courts have developed a test to determine the proper law of the arbitration agreement whereby the autonomy of the parties to choose the

[35] Fiona Trust Case (n24)
[36] Ibid (n24)
[37] UNCITRAL Model Law, article 16(1)
[38] LCIA Arbitration Rules, article 23(2)
[39] 'Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law, Supreme People's Court, 23 August 2006; Jiangsu Materials Group Light Industry and Weaving Co. v Hong Kong Top-Capital Holdings Ltd (Canada) & Prince Development Ltd (the Yuyi case), Supreme People's Court, 1988
[40] Cass Civ 1ere, 07 May 1963 (Dalloz, 1963), 545
[41] Prima Paint Co. v Flood Conklin Manufacturing Corporation 388 US 395, 402 (1967)

governing law of the arbitration agreement is respected. [42] The proper law of an arbitration agreement depends on either the express or implied choice of law of the parties. [43] In the absence of an expressed or implied intention of the parties the proper law of the arbitration agreement by identifying the law which has the 'closest and the most real connection' with the relevant agreement which is the place where the parties have chosen to arbitrate, the *lex loci arbitri* rather than the place of the law of the main contract.[44] The international conventions and model rules on international commercial arbitration have further laid emphasis on the consent of the parties as being an essential basis in the formation of the arbitration agreement by providing that the governing law of the agreement to arbitrate depends on the intention of the parties.[45]

However, the doctrine of separability cannot always maintain the autonomy of the parties and the arbitration agreement. The autonomy of parties may therefore be restricted and the relevant dispute may be barred from arbitration on the basis of public policy or equity as determined by national legislation or judicial authority.[46] An arbitration agreement may be invalidated if there has been forgery in obtaining the signature to the agreement to arbitrate.[47]

The principle of competence-competence

The principle of competence-competence which is present in UNCITRAL Model Law[48] enables the arbitral tribunals to rule on their own jurisdiction, such as on matters pertaining to challenges

[42] Philippa Charles, 'The proper law of the arbitration agreement' [2014] Arbitration 55
[43] C v D [2007] EWCA Civ 1282
[44] C v D [2007] n 43; Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors [2012] EWCA Civ 638
[45] UNCITRAL Arbitration rules, article 35(1); International Chamber of Commerce (ICC) Arbitration Rules, Article 21(1)
[46] Laurence Shore, 'Defining Arbitrability' [2009] NYLJ 1 <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf > accessed on 13 February 2017
[47] Fiona Trust Case (n24) paras 17-19
[48] UNCITRAL Model Law, article 16 of the UNCITRAL Model Law

to the arbitration agreements or clauses from which their own authority to resolve disputes between the contracting parties originates.[49]

The principle of competence –competence is further supported by the doctrine of separability which confirms the autonomy of the arbitration clause from the main commercial agreement and enabling the arbitration agreement and the jurisdiction of the arbitral tribunal to survive any possible termination or invalidity of the main contract.[50] The two principles overlap as even though the arbitration clause is interpreted and applied independently of the main contract in which it is endorsed, the fact that it may be valid notwithstanding the infirmities in the contract terms does not mean that the national courts cannot intervene to rule on its validity.[51]

Under the principle of competence-competence, where there is uncertainty with regards to the validity or the scope of the arbitration agreement, the arbitral tribunal has the authority to rule on its jurisdiction and has the power to declare that an arbitration agreement is void without conflicting itself.[52] The arbitrators may be the first to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed but in some circumstances the interference of national courts is required to decide on the legality of the arbitration agreement. However, there are exceptions where the arbitral tribunal does not have the jurisdiction to rule on a particular dispute, for instance where an arbitration agreement is void such that it is impossible to constitute the arbitral tribunal and therefore it is necessary to revert to national courts to resolve the merits of the case.[53]

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[49] Fabio Solimene (n1)
[50] Amokura Kawharu, 'Arbitral Jurisdiction' [2008] 23 New Zealand Universities Law Review 238
[51] William Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators' [1997] 8 American Review of International Arbitration 133, 142-243
[52] Z Saghir, C Nyombi (n6)
[53] Emmanuel Gaillard and John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration (Alphen aan de Rijn: Kluwer Law International, 1999) 413

The role of national courts, in such circumstances is of pivotal importance as they have to intervene in accordance with the principles of arbitral autonomy, to support the arbitral process especially where the issue relates to whether a contract has ceased to exist or has become void.[54] However, the national courts do not have to bow to the principle of competence-competence in circumstances where no arbitration agreement has been concluded as when a party brings an argument before the Court under section 9(1) of the Arbitration Act 1996, to give precedence to the competence-competence of arbitration proceedings, firstly an arbitration agreement must have been concluded and secondly the issue in the proceedings is a matter which forms part of the arbitration agreement.[55]

Autonomy of the parties and delocalisation

The consent of the parties to select arbitration as an alternative dispute resolution system instead of the national courts, is a key determinant in making international arbitration a delocalised process. Consenting to an arbitration agreement grants parties with 'the unfettered rights to determine how their disputes may be resolved'[56], and in the absence of consenting to the arbitration agreement, the same parties would have been forced to submit to the local jurisdiction of the national courts.

The consent of the parties, as enshrined in the article V(1)(e) of the New York Convention, is one of the main factors which establishes the importance of delocalised arbitration. The consent of parties to submit to an international arbitration results in an arbitral agreement which permits them to circumvent the law of the seat of arbitration (*lex loci arbitri*) and to opt for the laws of a

[54] Albon [2007] EWHC 1879 (Ch) 11
[55] Albon (n 54) 20
[56] Alan Redfern, M Hunter et al., *Law and Practice of International Commercial Arbitration* , 4th edition (4th edition, Sweet and Maxwell, 2004) 11

jurisdiction that is mutually agreed by them.[57] In consenting to an international arbitration, parties also benefit further from the concept of delocalisation since they are able to have the seat of the arbitration abroad and in an environment where absolute discretion is prioritized. Accordingly, a delocalised arbitration upholds the basic characteristics of arbitration, notably, privacy and confidentiality. Delocalisation therefore supports the view that arbitration should be considered as a supra-national process where national laws does not have any power over the process.[58] Since arbitration is a private method of dispute resolution, the concept of delocalisation seems to favour the privacy of the process.

Theoretically, the concept of delocalisation allows the arbitral process to be independent from national legal system and opposes any unwarranted interference with the intention of the parties to arbitrate.[59]By preserving the privacy and confidentiality of the arbitral from any external intrusion, delocalised arbitration may therefore be seen as a 'security blanket' for the arbitral process[60] and may be considered to be an ideal dispute resolution mechanism. However, in practice it remains 'wholly unrealistic'[61] as it attempts to place the arbitral process in a 'legal vacuum' [62]where there are no applicable laws to regulate the procedure. It is it is unreasonable to have an arbitral procedure which evades any national regulations of either the enforcing state or the law of the seat of arbitration. Judicial intervention is necessary to safeguard justice, prevent procedural impropriety and to provide checks and balances over arbitral decisions.[63]

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[57] Matthew Secomb, 'Shades of Delocalisation Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' [2001] 17 Journal of International Arbitration 123, 128
[58] Jie Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration' [2011] I.C.CL.R 1, 6
[59] Goode (n 57) 1, 21
[60] M. Pryles, 'Limits to Party Autonomy in Arbitral Procedure' [2008] International Council for Commercial Arbitration 1, 6
[61] Andrew Tweeddale, Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford: Oxford University Press, 2007)
[62] Li (n59) 1, 4
[63] William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford: Oxford University Press, 2007)149

Accordingly, a dispute resolution process which is completely independent of national laws and judicial intervention damages the practicality of arbitration and the benefits that it provides to the parties who have opted for an arbitral process. Therefore, although the intention of the parties is a key determinant of a contract, the party autonomy cannot be the sole factor that governs the arbitration agreement. The contract law jurisprudence will also be applicable to the arbitration agreement so as to maintain the practicality of the arbitration process[64]. Consequently, the article 11(4) of the UNCITRAL Model Law, has recognised the vital function of the national courts national courts to intervene and resolve any jurisdictional issues related to the arbitration agreement or the conduct of the arbitral procedure so as prevent the arbitration process from being a 'stalemate'. [65]

Judicial intervention may often be required at various stages of an arbitration process. The validity of the arbitration agreement may be challenged by one of the parties prior the creation of the arbitral tribunal[66], for instance in Cangene Corp[67] the validity of an arbitration agreement was challenged before a national Court, but once again, the arbitration agreement was determined as being valid. In the case of Dalimpex Ltd v Janicki[68] where the parties sought clarifications from the court to ensure that an arbitration clause could allow a dispute to be heard by the court of arbitration in Poland and whether the disputes fall within the scope of the arbitral agreement. The court concluded that the court of arbitration in Poland is the proper arbitrator under the arbitral agreement and that the arbitral tribunal of first instance should pronounce on the scope of the arbitration agreement.

[64] Z Saghir, C Nyombi (n6)
[65] UNCITRAL Model Law, article 11(4)
[66] Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' [2009] 24 American University International Law Review 489, 496
[67] Cangene Corp v Octapharm AG (2000) 9 W.W.R 606
[68] Dalimpex Ltd v Janicki (2003) CanLII 34234

The intervention of the national courts is also required in instances where the provisions of an arbitration agreements are in breach of one of the parties' constitutional rights for instance, their the right to a fair trial. In the appeal case of Russian Telephone Company v Sony Ericsson Mobile Communications Rus[69] the Supreme Commercial Court of Russia disregarded the party autonomy to arbitrate and considered the arbitration agreement between the parties as being null and void on the basis that that the arbitration agreement was in breach of one of the parties' right to a fair trial. The arbitration agreement gave the seller the right to have recourse to a national court and deprived the purchaser of that right. The Praesidium of the Supreme Commercial Court[70] was of the view that such deprivation was in breach of the requirement of equality of arms in the Russian constitutional law and the principle of fair trial pursuant to the decision of the European Court of Human Rights in Suda v Czech Republic[71]

Judicial intervention is also important where interim measures have to be provided, as the arbitral tribunals may not always be assigned with the authority to grant interim measures concerning third parties, for instance, where to safeguard evidence or the ordering of injunctions to prevent irreversible situations that could occur and that could affect an arbitral award. In most jurisdictions, only the national Courts are empowered to provide interim measures that may protect the commercial interests of the parties involved in a dispute and developments in arbitration do not indicate that arbitration tribunals will soon be empowered to provide such orders.

In the case of Fiona Trust, the national courts were seized to consider whether the main agreement which contained the arbitration clauses was obtained by bribery and whether the

[69] Russian Telephone Company v Sony Ericsson Mobile Communications Rus Case reference A40-49223/11
[70] Judgment 1831/12 dated June 19, 2012; the judgment was backdated to the date of the hearing
[71] Suda v Czech Republic No 1643/06 28 October 2010

jurisdiction to decide whether the parties should arbitrate lied in the hands of the Court or that of the Arbitral Tribunal.[72] The case of Fiona Trust has demonstrated that the national Courts still have a key role in restoring trust in the administration of justice, even if justice is sought through arbitration and to prevent any possible miscarriages of justice. Even if the parties express their intention to arbitrate it cannot be disputed that judicial intervention may be required at any stage of an arbitration to given that an Arbitral Tribunal may have more limited jurisdiction, for the Court to determine matters to the satisfaction of all parties involved in the arbitration, and to bring more certainty in the judicial process being conducted mainly through arbitration.

Conclusion

It cannot be disputed that international arbitration is consensual in nature and arbitration has never really been imposed on parties in a dispute without the consent of the parties involved. The expressed intention of the parties to agree to have an arbitral tribunal, instead of a national court to resolve their dispute is a decision that affects the right of both parties and without a clear intention to submit to the arbitral process, parties cannot be compelled to resort to an alternative mechanism that affects their constitutional rights. There are instances where parties who have expressed a common intention to arbitrate would not automatically lead to an ideal alternative dispute resolution method. It cannot be questioned that the jurisdiction of an arbitral tribunal will never match the jurisdiction of a national court, and the presence and intervention of a national court will therefore always be necessary to plug in any gaps necessary for parties to assert their rights. Given the ad-hoc nature of arbitral tribunal panels, it may also be necessary to have national courts intervene in the form of check and balances in exceptional circumstances where an intervention is necessary. The first step towards an arbitral process remains unquestionably

[72] Fiona Trust Case (n24)

the intention of the parties to agree to arbitrate because in essence, arbitration was never intended to be imposed on parties against their will.