A REVIEW OF ARBITRATION AGREEMENTS IN INTERNATIONAL ARBITRATION

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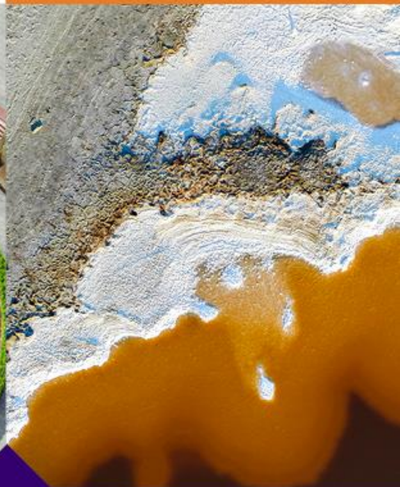

OUTLINE

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- **ARBITRATION AGREEMENTS**

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INTERNATIONAL ARBITRATION IN CONTEXT

COURTS v ARBITRATION

Why Arbitration ?

- **Arbitration is private and ousts the jurisdiction of national courts**:*"party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration"* as it entitles parties to exclude the intervention of the courts for dispute resolution and select the arbitrators, contrary to the court system in which the Judiciary determines the judges who will compose the bench. Furthermore, the forum is ousted since the place of arbitration will not be the *"home ground"* of the parties.

- **Confidential:** confidentiality of arbitral proceedings means that the arbitrator and the parties are prohibited from disclosing the fact of the arbitration, the issue of the award, the proceedings and documents submitted during the entire process, whether during or after the arbitral proceedings are completed.

- **Finality of rights and obligations of the parties**: arbitration resolves disputes finally, which means that parties have accepted that arbitration is the unique form of dispute resolution and they also agree to accept and give effect to the arbitral award without recourse to appeals against awards before the courts.

- **Easy enforcement**: the decision of the arbitral tribunal is easily enforceable against the losing party not only in the place where the award has been delivered but also internationally, applying international treaties such as the New York Convention. Furthermore, at enforcement, there is no review of the decision of the arbitrators and how they reached their conclusion.

- **Significance of arbitration agreements**: *"the agreement to arbitrate is the foundation stone of international arbitration. It records the consent of the parties to submit to arbitration – a consent that is indispensable to any process of dispute resolution outside national courts*[1]*."* In other words, it epitomises *"l'autonomie de la volonté*[2]*"* of the parties to arbitrate their disputes.

ARBITRATION AGREEMENTS

FEATURES OF ARBITRATION AGREEMENTS

- **Separability Presumption or *L'autonomie de la clause compromissoire***

The general proposition is that an arbitration agreement is separate and independent of the main contract of which it forms an integral part. It therefore survives the termination of the contract.

e.g.

if one party claims that there has been a total breach of contract, the contract is not void automatically. The *rationale* for this is 2-fold:

First, as explained by Lord MacMillan:

"it survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract" (*Heyman v Darwins Ltd [1942] AC 356 at 374*).

Secondly, the arbitration agreement and the main contract are seen as 2 separate agreements. On the one hand, the main agreement deals with the commercial obligations of the parties. On the other hand, the secondary contract (i.e. arbitration agreement) sets out the obligation of the parties to resolve any disputes arising under the main contract by arbitration.

Examples of jurisdictions that have upheld the separability presumption:

France

In *Gosset*[3], the Cour de Cassation stated that *"[i]n international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always save in exceptional circumstances … completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract."*

United States

In *Prima Paint Co. v Flood Conklin Manufacturing Corporation*[4] the US Supreme Court validated the separability principle.

The US Supreme Court went further in *Buckeye Check Cashing Inc. v John Cardegna et al*[5] to state that the *Prima Paint* separability applies equally to state and federal courts in the US.

China

The Supreme People's Court in the *Yuyi* case (i.e. *Jiangsu Materials Group Light Industry and Weaving Co. v Hong Kong Top-Capital Holdings Ltd (Canada) & Prince Development)* stated that:

"*Where the main contract is not concluded (null) or does not come into effect after conclusion (void), it will not influence the effect of the arbitration clause agreed by the parties, as the arbitration clause is completely separable from the main contract"*

Separability Presumption & International Conventions

The separability presumption has been expressly validated by institutional and international rules of arbitration.

UNCITRAL Rules – Article 23(1)

"An arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

Model Law – Article 16(1)

"…/… an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other forms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

LCIA Rules – Article 23(2)

"[A]n arbitration clause which forms part or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity of ineffectiveness of the arbitration clause."

Types of Arbitration Agreements

There are 2 types of arbitration agreements:

(a) the arbitration clause; and

(b) submission agreement

Arbitration Clause

This type of arbitration agreement looks to the future inasmuch as it contemplates the resolution of disputes that may arise after entry by the parties into their commercial agreement.

It is the common form of arbitration agreement and is usually short as it is not known what type of disputes may arise and how they should best be dealt with. Accordingly, parties often recite a short model clause of an arbitral institution.

Submission Agreement

This type of arbitration agreement comes into play once actual dispute has arisen between the parties. While it is tailor-made for the specific situation to which it applies, it is not easy to negotiate because the relationship between the parties is already strained.

However, it has the advantage of being detailed e.g. it will name the arbitrators, lists the matters in dispute, provides for the exchange of written submissions and other procedural matters

INGREDIENTS OF VALID & EFFECTIVE ARBITRATION AGREEMENTS

- A valid and effective arbitration clause is one that unequivocally and firmly commits the parties to an agreement to arbitrate their disputes.

Article II.I of the New York Convention:

"Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which …/… may arise between them …/… concerning a subject matter capable of settlement by arbitration."

- Article 7(2) of the UNCITRAL Model Law provides clarity on the meaning of the terms "*writing*" and "*agreement*":

"The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in exchange of letters, telexes, telegrams or other means of telecommunications which provide a record of the agreement, or in exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another."

- An "*indestructible arbitration clause*[5]" raises two issues:
  - First, the procedural aspect;
  - Secondly, the substantive conditions.

Procedural Issues

- Must be in writing; and
- There must be an agreement.

Substantive Issues

- 3-fold test
  - the agreement to arbitrate;
  - the scope of the arbitration agreement; and
  - the finality of the award
- Secondary factors
  - the institution chosen;
  - the seat of the arbitration;
  - the number, method of selection and qualification of arbitrators;
  - language of arbitration;
  - procedure to be followed; applicable substantive rules;
  - timetable for the award;
  - enter judgment on the award;
  - costs of the arbitration;
  - confidentiality; and
  - waiver of sovereign immunity.

SUBSTANTIVE ISSUES	3-fold Test
Agreement to Arbitrate	Under this criterion the test is whether the parties have expressed an unambiguous intention of resorting to arbitration. In other words, arbitration is mandatory and not optional *(Fiona Trust & Holding corp. v Yuri Privalov [2007] EWCA Civ 20 at 19)* It is permissible for the arbitration clause to provide that one party shall have the choice whether to resort to arbitration or the national courts. Generally, this will be vested in the party with the greater bargaining power (*Comparative International Commercial Arbitration – Lew, Mistelis & Kroll (Wolters Kluwer, Law & Business, (2003) page 168)* However, it is vital that the jurisdiction of enforcement is one that acknowledges as valid such unilateral arbitration clauses. Thus, while Mexico does not uphold them as valid, the Federal Court of Germany will uphold such clauses as valid. As regards the rules of interpretation, it is understood that the general rules of interpretation as well as the presumptions on parties' intention are used. A *dicta* from the Australian court is of relevance namely *"[a]rbitration clauses are contractual provisions … and are governed by ordinary rules of contractual interpretation"* (Walter Rau Neusser Oel und Fett AG v cross Pac. Trading Ltd, XXXI Y.B. Comm. Arb 539 (Australian Def. Ct 2005) (2006)). The French Court of Appeal favoured a restrictive approach to interpretation and stated that an arbitration clause was *"a derogation from otherwise access to civil justice"* and therefore *"[t]he arbitration agreement must be strictly interpreted as it departs from the norm" (Judgment of 11 March 1986, Compagnie d'assurance La Zurich v Bureau central français, Gaz. Pal. 1986 1,298).*

	However, the contemporary view is that thus restrictive approach does not find its application in *"contemporary decisions"* (*International Arbitration: Law and Practice (Gary B. Born, Wolters Kluwer, Law & Business, 2012*).
Scope of Arbitration Agreement	This is considered as the most important component of the arbitration clause. Under this criterion, the test is whether the arbitration clause provides that all disputes are to be resolved by arbitration or whether specific disputes only are to be referred to arbitration. The guiding principle is to avoid the *"sin of ambiguity" (Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins – Townsend – 58 Disp Res J 1 (2003).* However, there has been a move away from the formalistic interpretation of arbitration agreements to a more pragmatic approach. In *Privalov (Premium Nafta v Fili Shipping* [2007] UKHL 40, Lord Hoffmann first reviewed the terms of the standard 'Shelltime 4 Form' arbitration clause as only *"the agreement can tell you what kind of disputes they intended to submit to arbitration."* The starting position in the construction of an arbitration clause should be that rational businessmen intend that all disputes arising out of that agreement will be decided by the same tribunal. This presumption should be applied unless there is express language to the contrary.

Scope of Arbitration Agreement (ctnd)

Lord Hoffmann declined to consider in detail the extensive case law on the scope of specific wordings used in arbitration clauses – 'arising under' or 'arising out of' - as he agreed with the Court of Appeal that "the time had come to draw a line under the authorities to date and make a fresh start."

Lord Hope of Craighead in his separate assenting opinion confirmed this approach in particular in the context of international commerce.

This view is consistent with the approach adopted in other jurisdictions.

Lord Hoffmann cited a German Bundesgerichtshof Decision of 1970 and Lord Hope of Craighead referred to decisions from the courts of the United States and Australia to conclude that arbitration provisions should be construed as broadly as possible and to prevent different proceedings in alternative fora.

Thus, it is recommended that the arbitration clause is a 'broad' clause in the sense that it accommodates all types of disputes that could potentially arise under the main agreement.

In this regard, jurisdictions such as the United States are known to adopt a 'pro-arbitration' presumption by which an arbitration clause is interpreted expansively.

Furthermore, in the event of doubt, the presumption is extended to disputed claims.

Scope of Arbitration Agreement (ctnd)	The Supreme Court of the United States held that "*any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration*" (*Mitsubishi Motors 473 US at 626*) Accordingly, it is also advisable that the language of the arbitration clause links the arbitration clause to the main agreement of which it forms an integral part. **Model ICC Arbitration Clause** "*All disputes arising out or in connection with the present contract shall be finally settled under the [ICC] Rules*". **Model UNCITRAL Clause** "*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.*"
Finality of Award	Under this criterion, the test is whether the arbitration clause reflects an intention by the parties that the award made by the arbitral tribunal is final and that the right of appeal against the award has been excluded, especially where the national law of a country provides for the possibility of appealing against the award, for instance under English law.

Pathological Clauses

- “Jurisdiction – in case of disputes, the parties undertake to submit them to arbitration as provided for by the Fédération Française de la Publicité. In case of disputes, the Tribunal de la Seine would have exclusive jurisdiction.”
- “The parties may refer any dispute under this agreement to arbitration.”
- “Any dispute may be resolved by arbitration under the ICC Rules, applying the UNCITRAL Arbitral Rules.”
- “The arbitration shall be seated in Miami; the seat of the arbitration shall be at the ICC in Paris.”

CASE ANALYSIS

Would you advise your client to include the following dispute resolution clause into their contract ?

"In the event of a dispute arising Party 1 shall have the right to refer the dispute to arbitration under the rules of the American Arbitration Association."

ANY QUESTIONS?

THANK YOU