

M U N I
L A W

Arbitration agreement

International Commercial Arbitration

Syllabus

- Definition
- Principle of separability
- Enforcement
- Capacity
- Form
- Substantive validity
- Pathological clauses, unilateral clauses, multi-tiered clauses

Arbitration agreement – definition

- Article 7 of UNCITRAL Model Law (Option 1)

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.“

Types of arbitration agreement

- Arbitration clause
- Submission agreement

Principle of separability

- Arbitration clause x main contract – separate agreements
- Article 16(1) of UNCITRAL Model Law
 - *„(...) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.“*

Enforcement of arbitration agreements (1)

- Parties concluded arbitration agreement -> one of them commences court proceedings
- **Is the court obliged to respect (enforce) the arbitration agreement?**
- Article II(3) of the New York Convention
 - *„The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.“*

Enforcement of arbitration agreements (2)

- Article 8(1) of UNCITRAL Model Law
 - *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.*
- Similar provisions in many national laws

Validity of arbitration agreement

- Capacity of parties
- Form
- Substantive validity

Capacity

- Usually not specifically addressed by arbitration laws
- Applicable law -> determined by conflict-of-laws rules
- Natural persons, legal persons – regularly corresponds to the capacity to enter into a contract
- In practice of international commercial arbitration – rarely an issue
- States, state entities

Form (1)

- Written form is a standard (serious effects of arbitration agreements)
- Article II(2) of the New York Convention
 - *The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*
- Recommendation by UNCITRAL from 2006

Form (2)

- Article 7 of UML (Option 1)
 - *The arbitration agreement shall be in writing.*
 - *An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*
 - *The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.*
 - *Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.*
 - *The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*

Substantive validity

- Other issues having impact on validity (e.g. existence of consent, mistake, minimal content etc.)
- Applicable law
 - No uniform approach – depends on legal act and phase of arbitration (arbitrators x courts)
 - Majority view: choice of law x *lex arbitri*

Content (1)

- Essential requirements
 - Intention of the parties to arbitrate
 - Defined legal relationship -> scope of arbitration agreement
- Arbitration clause x submission agreement
- Institutional arbitration (-> model clauses) x ad hoc arbitration

Content (2)

- Key elements
 - Arbitrators – number, nomination
 - Seat of arbitration
 - Language
 - Law applicable to merits
- Other issues

Model clauses

- ICC

- *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.*
- Number of arbitrators
- Seat of arbitration
- Language
- Law applicable to merits

Pathological/defective clauses (1)

- Article II(3) of the New York Convention -> *null and void x inoperative x incapable of being performed*
- **Problems with the intention of the parties to arbitrate**
 - Interpretation is the first step
 - If the intention to arbitrate cannot be found out by the interpretation => arbitration agreement is null and void

Pathological/defective clauses (2)

- **Uncertainty**
 - Interpretation -> null and void (partly or in whole)
 - Identification of institution
- **Inoperative**
 - Ceased to have legal effect
 - *Res judicata*, parties' revocation
- **Incapable of being performed**
 - Establishment of arbitral tribunal

Unilateral clauses (1)

- One-sided, optional, asymmetrical
- Only one party has a right to refer a dispute to another dispute resolution forum than primarily agreed between the parties
- Same way of dispute resolution (litigation) x more ways (arbitration, litigation)
- Two basic examples involving arbitration
 - *The courts of England shall have jurisdiction to settle any disputes (...) but Party X shall have the option of bringing any dispute to arbitration (...).*
 - *All disputes (...) shall be finally resolved by arbitration (...). Notwithstanding the foregoing, Party A shall be free to seek redress before courts in England.*

Unilateral clauses (2)

- Asymmetrical position of commercial parties
- Origin in common law legal culture
- Different positions of national courts
 - England – party autonomy
 - Russia – procedural equality
 - France – potestative clauses under French Civil Code (*A potestative condition is one which makes the execution of the agreement depend upon an event that one or the other of the contracting parties has the power to bring about or to prevent.*)

Multi-tiered clauses

- Escalation of a dispute through at least two different forms
- Negotiation
- Mediation
- Problems with enforcement
- Different positions of national courts
- Mainly depends on the wording
- Clear undertakings of parties, time limits etc.

Example 1

- *„In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce.“*
 - No clear intention of the parties to arbitrate, uncertainty as regards the scope of arbitration agreement (defined legal relationship)
 - If not possible to overcome by interpretation => invalid

Example 2

- *„In case of dispute, the parties undertake to submit to arbitration but in case of litigation the court in Vienna shall have exclusive jurisdiction.“*
 - No clear intention of the parties to arbitrate, uncertainty as regards the scope of arbitration agreement (defined legal relationship)
 - If not possible to overcome by interpretation => invalid

Example 3

- *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.*
 - *The number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties.*
 - *The place of arbitration shall be Vienna.*
 - *The language to be used in the arbitral proceedings shall be English.*

Example 3

- Valid arbitration clause
- Essential elements - clear intention of the parties to arbitrate + defined legal relationship (contract)
- Other key elements - number of arbitrators, way of appointment, seat of arbitration, language
- Ad hoc arbitration - reference to UNCITRAL Rules
- *Lex arbitri* – Austrian law

Example 4

- *All disputes shall be settled amicably and in good faith between the parties. If no agreement can be reached the dispute shall be decided by arbitration in Vienna by the **International Arbitration Tribunal (VIAC) under its International Arbitration Rules** in accordance with international practice. The number of arbitrators shall be three to be appointed in accordance with the Rules. The proceedings shall be conducted in a fast and cost efficient way. The award shall be binding and each party shall comply with the award. This contract is governed by the law of Austria including the CISG.*

Example 4

- Essential elements - clear intention of the parties to arbitrate + defined legal relationship (yes, if the clause is part of the particular contract)
- **Problem: identification of the institution**
 - There is no International Arbitration Tribunal with International Arbitration Rules in Vienna
 - VIAC is commonly known abbreviation for Vienna International Arbitral Centre
 - Can be overcome by interpretation => intention of the parties was to have arbitration under the Rules of Arbitration of VIAC

Sources for presentation

- Moses, M.L. *The Principles and Practice of International Commercial Arbitration*. 3rd ed. Cambridge: Cambridge University Press, 2017. Chapter 2.
- Lew, J.D.M., Mistelis, L. A., Kröll, S.M. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, Chapters 6, 7, 8.
- Blackaby, N., Partasides, C., Redfern, A., Hunter, M. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, Chapters 2, 3.