Transnational civil litigation and International commercial arbitration

Introduction to International Commercial Arbitration - Arbitration agreement

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WHAT IS ARBITRATION ?

- **A possible definition** – Arbitration is a dispute resolution method by which parties consensually submit a dispute to a **non-governmental decision-maker**, **selected by the parties**, to render a **binding decision** resolving a dispute in accordance with **neutral**, adjudication procedures affording the parties an opportunity to be heard
- **Differences between arbitration and mediation** – Mediation is a dispute resolution method that, as the arbitration, relies on the consent of the parties. However, in mediation, the process is a negotiation with the assistance of a neutral third party (the mediator) who has no power to impose a resolution, other than the power of persuasion. Mediators help parties to reach a settlement by assisting them with communications, obtaining relevant information, and developing options.

MAIN FEATURES OF ARBITRATION

- **CONSENSUAL**
  - Arbitration is consensual in its essence, and the jurisdiction of the arbitral tribunal derives from the **arbitration agreement**, whereby the parties agree to submit the dispute to arbitration. The arbitrators' power to decide the dispute is based on the necessary agreement of the parties. Failing any agreement of both parties to the dispute, no arbitration is possible.
- **NON-GOVERNMENTAL DECISION MAKER CHOSEN BY THE PARTIES**
  - The dispute will be decided by the arbitrators who are not part of the judicial system. Arbitrators are natural persons who are selected by the parties just for deciding the single dispute arisen between them. Parties can appoint as arbitrators whoever they wish. They will select who can decide fairly and correctly the dispute as they are independent from the parties and possess legal and technical knowledge of the dispute's subject matter
- **TO RENDER A FINAL AND BINDING DECISION TO RESOLVE THE DISPUTE**
  - Arbitration results in a final and binding decision – the arbitral award – imposed on the parties by the arbitrators and that can be coercively enforced against the losing party

ADVANTAGES OF ARBITRATION OVER LITIGATION

- Arbitration provides a more **neutral** forum that would avoid either party having to submit to the jurisdiction of the other party's national courts. The most favorable situation for a party to a dispute in an international commercial transaction is to litigate in one's own courts. Even if the courts are scrupulously unbiased, that party who litigates at home will use its regular lawyers, follows a familiar procedure and in its own language
- Arbitration allows parties to have their case decided by **arbitrators specifically selected** for their expertise in a particular field of law
- Arbitration offers **flexibility** regarding the rules applicable to the proceedings, giving the parties substantial autonomy and control over the process that will be used to resolve their disputes. Parties can choose not only the rules of procedure applicable to the arbitration process but also the place and the language of arbitration
- **Enforcing** decisions resulting from arbitration (awards) is usually easier than enforcing state court judgments

MAIN SOURCES OF INTERNATIONAL ARBITRATION LAW

- **NEW YORK CONVENTION 1958**
  - NYC is currently in force in over 170 contracting states
  - It contains uniform rules and provisions on the recognition and enforcement of both arbitration agreements and arbitral awards
- **UNCITRAL MODEL LAW 2006**
  - Uncitral Model Law is designed to assist States in reforming and modernizing their laws on arbitration to consider the features and needs of international commercial arbitration.
  - It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal through to the recognition and enforcement of the arbitral award.

ARBITRATION AGREEMENT

Types and effects

- **Types of Arbitration Agreement**
  - Future disputes - **Arbitration clause**
  - Current and already arisen disputes - **Stand alone arbitral agreement** (*compromise*)
- **Negative Effect vs. Positive Effect**
  - An arbitration agreement **precludes national State courts from deciding the dispute** that the parties have agreed to refer to arbitration.
  - An arbitration agreement **confers jurisdiction** on arbitrators, granting them the power to finally resolve and decide the dispute
  - Both effects must be recognized by national States for arbitration being an effective method of dispute resolution (**Art. II New York Convention – Article 8 UNCITRAL Model Law**)

ARBITRATION AGREEMENT
Definition

- **DEFINITION OF ARBITRATION AGREEMENT**
  - **Article 7 of UNCITRAL Model Law**

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*"

  - **Article II of 1958 New York Convention**

Each Contracting State shall recognize ***an agreement in writing*** *under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a* ***defined legal relationship****, whether contractual or not, concerning a subject matter* ***capable of settlement by arbitration****.*

ARBITRATION AGREEMENT

In writing requirement

- The notion of "in writing" requirement is usually intended broadly and includes also situations in which the agreement has not been signed by both parties.
  - ***New York Convention*** article II.2 provides that
    - *"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"*
  - ***The Model Law***, article 7.2, is even more precise:
    - *"An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or 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 another.* ***The reference in a contract to a document containing an arbitration clause*** *constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract"*

ARBITRATION AGREEMENT

In writing requirement

- ***IS TACIT CONSENT TO ARBITRATION VALID?***
  - When the existence of an agreement is alleged by one party and not denied by the other.
    - The UNCITRAL Model Law mentions it as equivalent to "written agreement",
    - Under the New York Convention, such way of concluding an arbitration agreement does not strictly comply with the requirements set out by article II.
- ***CAN ARBITRATION BE AGREED UPON "BY REFERENCE"?***
  - The UNCITRAL Model Law exspressly admits it and the provision does not require the existence of a **specific reference** to the arbitration clause.
    - Examples: (i) Agreement to re-new or enter into new transaction with reference to previous contract between the same parties, (ii) Contract with reference to one of the parties' general conditions, (iii) Contract with reference to conditions drafted by trade association to which one of the parties belongs, (iv) Subcontract with reference to the contract entered by principal and contractor

SEPARABILITY OF THE ARBITRATION AGREEMENT – KOMPETENZ KOMPETENZ PRINCIPLE

- Arbitration clause must be considered on a stand-alone basis with respect to the other terms of the agreement (***Separability doctrine***)
  - an arbitration agreement which forms part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall ***for that purpose*** be treated as a distinct agreement (***art. 7 English Arbitration Act***)
  - The arbitral tribunal ***may rule on its own jurisdiction***, including any objections with respect to the existence or validity of the arbitration agreement. ***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 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 (***art. 16 UNCITRAL Model Law***)

The principle of separability does not imply that an arbitration agreement is to be treated as a distinct agreement for all purposes but that it is to be treated as such for the purpose of determining its validity or enforceability

TYPES OF ARBITRATION

- **DOMESTIC ARBITRATION**
  - Domestic arbitration is an arbitration where all the relevant elements to it are linked to only one national legal system, i.e. the legal system the state where the arbitration is seated (parties to arbitration agreement are both based in Italy, the contract has been entered to in Italy, the seat of arbitration is in Italy)
- **FOREIGN ARBITRATION**
  - Foreign arbitration is arbitration that takes place in a state other than the one where the result of the arbitral proceedings (the award) may have some relevance
- **INTERNATIONAL ARBITRATION**
  - International arbitration is an arbitration where one or more of the relevant elements (parties to arbitration agreement, seat of the arbitration, place where the contract has been entered into) are linked with two or more national legal systems

TYPES OF ARBITRATION

- **AD HOC ARBITRATION**
  - *Ad hoc* arbitration is an arbitral procedure solely handled by arbitrators and parties, without any intervention from external institutions. The rules that the arbitrators apply in the proceedings are the one provided by the arbitral agreement and/or determined by arbitrators, together with supplementary and mandatory provisions of the "*lex arbitri*"
- **INSTITUTIONAL ARBITRATION**
  - The parties may designate in the arbitration agreement an arbitral institution to administer the arbitration. The designated institution intervenes and administers the arbitration but it does not arbitrate the dispute. It is the arbitral tribunal that arbitrates the dispute in accordance with the rules established by the institution itself, which are to be considered incorporated in the arbitration agreement by reference.