

International Commercial Law Arbitration and Mandatory Rules

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Arbitration

- Private settlement of disputes
- Alternative to courts
- Based on will of the parties
- Enjoys judicial recognition

Ad hoc v. Institutional Arbitration

- Composition of tribunal, venue, procedure are determined by the parties
- May refer to arbitration rules (e.g. UNCITRAL Arbitration Rules of 1976/2010)
- Reference to institution makes its arbitration rules applicable
- Arbitration Institute of Stockholm Chamber of Commerce
- International Chamber of Commerce
- LCIA

Arbitration v. Courts

- Neutrality
- Expertise
- Confidentiality
- Finality
- Enforceability (New York Convention of 1958)
- Jurisdiction (New York Convention of 1958)
- Costs
- One party's country
- General legal background
- Publicity
- Appeals
- Limited and not harmonised enforceability (Lugano Convention, Brussels Regulation)
- Limited and not harmonised regulation of jurisdiction (Lugano Convention, Brussels Regulation)
- Length

”International” Arbitration

- Character of the dispute (France)
- Residence of the Parties (Swiss, Sweden, Belgium)
- Character or residence (Italy)
- Character, residence or choice (UNCITRAL)
- No need to distinguish (Holland, Germany, Norway)

International v. domestic arbitration

- Less formal requirements
- Less interference by courts

Is International Arbitration International? (“Delocalisation”)

- Mostly voluntarily carried out
- Venue chosen out of practical convenience
- Parties want flexibility
- If not voluntarily carried out, courts must intervene
- Venue determines arbitration law (e.g. Arbitrators’ injunctive powers), arbitrability, validity of award
- Parties want predictability

Judicial Control

- Challenge at place of arbitration
- Enforcement at place of enforcement
- Parties may exclude challenge:
 - Swiss law
 - Belgian law
 - Swedish law (only for relative grounds)

Annulment of award

- Annulment grounds are not harmonised
- UNCITRAL Model law has same grounds as New York Convention
- Annulled award may (and generally is, but: France, US) be refused enforced

Enforcement of an award

New York Convention art. V

- Award must be enforced, unless:
 - Award was set aside in the country of origin
 - Invalidity of the arbitration agreement
 - Irregularity of the Composition of the tribunal
 - Excess of power
 - Irregularity of the proceeding
 - Dispute was not arbitrable
 - Award is in contrast with ordre public

Judicial Control and Delocalisation

- Does the arbitral tribunal have to follow the will of the parties or does it have to apply national rules?
- What if the parties have made a choice of law to escape application of certain mandatory rules (e.g. Competition law)
- What if the parties have disregarded certain mandatory rules in their contract (e.g. Labour law)

Relevant grounds for invalidity/unenforceability

- Invalidity of arbitration agreement
- Lack of arbitrability
- Contrast with ordre public
- Excess of power
- Procedural Irregularity

Invalidity of arbitration agreement, Legal capacity

- Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46
- State of Ukraine v Norsk Hydro ASA, Svea Hovrätt, 17 December 2007, T 3108-06

Arbitrability/Ordre Public

- Violation of the arbitrability rule/ordre public, if the tribunal has disregarded mandatory rules to apply the will of the parties?

Recognition of the arbitration *agreement:*

- From second look doctrine
 - Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) and Scherk v. Alberto-Culver Co., 417 U.S. 506, to
- To ensuring application of rules
 - Belgium, Cass., 16.11.06, Germany, OLG München, 17.5.06, U.S., Thomas v Carnival Corp, England, High Court 30.10.09

Recognition of the arbitration *award*:

- Arbitrability assessed according to lex fori
- Rationale of rule: ensure accuracy of application of law by the courts
- If the courts have no jurisdiction?
- Arbitrability not as a priori rule
- Arbitrability a posteriori, like ordre public

Jurisdiction clauses in investment treaties

- *RosInvestCo UK Ltd. v. The Russian Federation*, SCC
 - Accepted jurisdiction in spite of narrow jurisdiction clause (“disputes on the amount or method of payment” – not on whether compensation is due)
 - Extended jurisdiction on the basis of the MFN clause
- 9.11.2011, Stockholm District Court: Arbitral tribunal did not have jurisdiction

Function of ordre public

- No review of the merits
- No verification of tribunal's application of law
- Prevent to give effect to an award if the result would violate fundamental principles of the forum
 - Not any mandatory rules
 - Not any overriding mandatory rules
 - The policy underlying some overriding mandatory rules

Disregard of mandatory rules on agency

- Applicable rule: compensation equal to one year of provisions, calculated on the average of the last 5 years of exercise
- Award 1.: compensation equal to six months of provisions – probably not against OP
- Award 2.: compensation equal to one day of provision – probably against OP

Typical examples where ordre public clause is applicable

- Bribery
- Drugs Traffic
- Discrimination
- Confiscation without Indemnity

Typical examples where ordre public clause is applicable - II

- Measures essential to the accomplishment of the tasks entrusted to the European Community:
 - Competition law (Eco Swiss, C-126/97)
 - Protection of the agent (Ingmar, C-381/98 (?))
 - Consumer protection (Claro, C-168/05)

Typical examples where ordre public clause is applicable - III

- Company Law
 - OAO Telecominvest, Sonera Holding B.V., Telia International AB, Avenue Ltd, Santel Ltd, Janao Properties Ltd, and IPOC International Growth Fund Ltd, Federal Commercial Court of West Siberia, 31 December 2006

Typical examples where ordre public clause is applicable - IV

- Insolvency (French Supreme Court, 6.5.2009 09-10.281, Salen Dry Cargo AB v. Victrix Steamship Co, C.A., 2nd Circ., August 5, 1987)
 - Encumbrances

Disregard of Security Exchange Rules

- "Differenzeinwand" – gambling violates ordre public;
- Applicable to financial transactions speculating on fluctuation of currency, interest rates or commodities-swap, future agreements?
- Austria, Supreme Court May 11, 1983: award unenforceable
- Germany, BGH June 15, 1987: matter not arbitrable
- Germany, BGH February 26, 1991: award enforceable

Disregard of Foreign Exchange Rules

- Prohibition in debtor's country to effect payment abroad
- Award directs debtor to effect payment
- English court enforces award – award is valid even if underlying transaction may be illegal in another country (Dalmia Dairy Industries Ltd. V. National Bank of Pakistan [1978] 2 Lloyd's Law Rep 223-303)

Disregard of Import-Export Rules

- French exporter agrees with Mexican importer to falsify invoices to avoid import duties
- Award: French governing law is not concerned with foreign customs law – contract is not against ordre public
- Doctrine:
 - Good award, truly delocalised
 - Narrow-minded award, there is no "foreign" law if tribunal is truly international

Disregard of Embargo

- US court: award violating US embargo against Libya is not against ordre public (National Oil Corp v. Libyan Sun Oil Company, 733 F.Supp. (1990), 800)
- US court: matter relating to US embargo against Cuba is arbitrable (Belship Navigation Inc. V. Sealift Inc, 1995 U.S. Dist. LEXIS 10541)

Awards that disregard OMR

Not enforceable	OMR	Enforceable
**	Legal capacity	
**	Agency	*
*	Competition	
*	Company	
*	Insolvency	
**	Security Exch	*
	Foreign Exch	*
	Import-export	*
	Embargo	*

Excess of power

- Excess of power if the tribunal disregards the will of the parties and applies another law (mandatory rules)?
- Difficult borderline:
 - Review of application of law (inadmissible)
 - Review of power in respect of choice of applicable law (admissible)

Arbitrator's power to disregard choice of law?

- The choice of law made by the parties is a conflict rule of private international law
- Conflict rules are subject to the applicable private international law in respect of:
 - Assumptions
 - E.g.: International agreement
 - Modalities
 - E.g.: In writing
 - Scope of Application
 - E.g.: Other, exclusive choice-of-law rules

PIL limits to party autonomy

- The choice of law made by the parties is made within the limits set by PIL:
 - Other, exclusive choice-of-law rules
 - Overriding mandatory rules of the forum
 - Overriding mandatory rules of third countries
 - Ordre Public
 - The chosen law takes into consideration effects of third countries' rule

Disregard of the parties' instructions

- If due to application of the applicable private international law, no excess of power
 - Arbitrator applies the power that it has according to the arbitration agreement and the applicable arbitration law
- If beyond the borders of PIL, excess of power

Which private international law?

Depends on the *lex arbitri*:

- The PIL of the place of arbitration
 - Norway
- The PIL that the arbitrator deems the most appropriate
 - UNCITRAL, England
- Specific choice-of-law for the arbitration
 - Switzerland
- Direct application of the law considered appropriate
 - France
- Not specified
 - Sweden, Italy

Private international laws are not equivalent

Applicable company law:

- Real seat
- Incorporation

Application of law without private international law is not predictable

Which criteria if not connecting factors?

Procedural Irregularity

- Irregularity if the tribunal applies soft law on its own initiative?
 - In most systems: decisions ex bono et aequo only if the parties requested it
 - Is application of soft law the same as decision ex bono et aequo?
 - In some systems: tribunal may apply "rules of law" on its own initiative