International Commercial Law

Arbitration

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Is an arbitration clause really sufficient to exclude relevance of national law?

• Fine as long as you are within the closed circuit (voluntary compliance)

• But what if you need assistance to enforce the award?
Arbitration as autonomous system?

- 1958 New York Convention (ratified by 150 states):
  - Art. II: Courts shall recognise an arbitration agreement and refer the parties to arbitration
  - Art. V: Courts shall recognise and enforce foreign arbitral awards
Judicial control on arbitral awards
UNCITRAL Model Law art. 34/36, New York Convention art V

• Challenge of validity before the courts of place of arbitration
• Enforcement proceedings before the courts of the place of enforcement
Grounds for invalidity/unenforceability of an award

UNCITRAL Model Law art. 34/36, New York Convention art V

• Invalidity of arbitration agreement
• Lack of legal capacity
• Lack of arbitrability
• Contrast with ordre public
• Excess of power
• Procedural Irregularity
Invalidity of arbitration agreement, Legal capacity

• Decided under the lex arbitri/the law of each of the parties

• **Not** under the law chosen by the parties

  – State of Ukraine v Norsk Hydro ASA, Svea Hovrätt, 17 December 2007, T 3108-06
Arbitrability

Recognition of the arbitration *agreement*:

• Decided under the lex fori
• **Not** under the law chosen by the parties

• From second look doctrine
  • Mitsubishi Motors Corp v Soler Chrisler-Plymouth, Inc., 473 U.S. 614 (1985) and Scherk v. Alberto-Culver Co., 417 U.S. 506, to

• To ensuring application of mandatory rules
  • Belgium, Cass., 16.11.06, Germany, OLG München, 17.5.06, U.S., Thomas v Carnival Corp, England, High Court 30.10.09
Arbitrability

Jurisdiction clauses in investment treaties

• Decided under the governing law
• **Not** under an autonomous system

• *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
Public policy

• Decided under the lex fori
• **Not** under the law chosen by the parties

• 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
Typical examples where ordre public clause is applicable - I

• 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 - II

• Company Law
Typical examples where ordre public clause is applicable - III

• Insolvency (French Supreme Court, 6.5.2009 09-10.281, Salen Dry Cargo AB v. Victrix Streamship Co, C.A., 2nd Circ., August 5, 1987)
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An arbitration clause excludes relevance of national law to the extent that:

– The applicable private international law permits to choose a different law, and

– The award meets the criteria of the New York Convention art V and of the lex arbitri
Arbitration as preferred dispute resolution method

• Courts ”trapped” in national laws
  – Mandatory rules
  – Ancillary obligations
  – General rules on interpretation of contracts

• International arbitration believed to be more apt in understanding parties’ interests
What does it mean?

• Relying more on the language of the contract?
• Relying more on considerations of good faith, economic interests, trade usages?
International contracts

• Exhaustive and precise regulation
  – Standardised irrespective of the governing law

• Boilerplate clauses on interpretation and general operation of contracts
  – No waiver
  – Entire Agreement
  – Subject to contract
  – ...

• Any external element excluded
  – No room for interpreter’s discretion
  – Rules and principles of the governing law are meant to be made redundant
Boilerplate clauses

• If interpreted literally, may permit speculative conduct
• Not if interpreted in light of good faith, loyalty, ancillary obligations
If the contract is interpreted by a court

• The wording does not have an absolute meaning detached from the governing law

• Clauses with the same wording may have different effects under different laws

Boilerplate Clauses, International Commercial Contracts and the Applicable Law
Edited by Giuditta Cordero-Moss
What is more faithful to parties’ intention?

- Literal interpretation permitting speculative conduct
- Regard to underlying principles overriding contract’s language
Why do contracts have clauses that have not been evaluated or negotiated?

- Not thoughtlessness
- Not refusal of national laws
- Calculated risk
  - Costs of adapting models
  - Likelihood that risk materialises
  - Consequences of risk materialisation
- Internal organisation
  - Risk management requires standardisation
Faithful interpretation 1

• Understanding uneven approach to contract drafting
  – Important clauses are negotiated carefully
  – Less important clauses are not evaluated or negotiated
  • E.g.: Entire Agreement should not be interpreted literally
Faithful interpretation 2

- Need for objectivity and predictability
  - Contracts may circulate: assignment, security, basis for insurance premium,...
  - Therefore: Entire Agreement should be interpreted literally
Arbitration: a uniform formula to square the circle?

• 1958 New York Convention
• 1985/2006 UNCITRAL Model Law:
  – Arbitral tribunal shall follow the parties’ instructions
  – [National law on arbitrability, public policy, validity of arbitration agreement, validity of award, ...]
• Award enforceable even if:
  – Wrong interpretation of contract
  – Wrong application of law
  – Application of wrong law
Arbitration as largely autonomous system

• But is there an autonomous doctrine of interpretation?
A transnational doctrine of interpretation?

• **UNIDROIT, PECL, DCFR, CESL**

• How faithful is it?
  – Largely based on civilian good faith
  – Overrides contract language

• How autonomous is it?
  – No uniform standard of good faith
  – Unilex on Entire Agreement
Being faithful to the parties’ intentions

Arbitration and the not unlimited party autonomy
The impact of the applicable law on the interpretation of contracts
Nov 21, 2011

APA-prosjektet ("Arbitration and Party Autonomy")
Multiple approaches

- Accurate application of governing law
- Application also of overriding mandatory rules from other systems
- Flexible application of governing law
- Application of transnational principles (with extensive good faith general clauses that override the terms of the contract)
- Application only of the terms of the contract
- Integration of the contract with parties’ interests and trade usages
- Guts feeling of what is right
- Splitting the baby.
Conclusion

• Arbitration is not a unitary system
• Selection of arbitrators is crucial