University of Oslo
Spring 2019
International Commercial Law

Arbitration as autonomous system?

Giuditta Cordero-Moss, Ph.D., Dr.Juris
Professor, Oslo University
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?
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
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
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)
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/unenforceability based on arbitration agreement

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
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
Invalidity/unenforceability based on excess of power

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
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?

- Specific conflict rules for arbitration
  - Switzerland PILA art. 187; NYC art. V (1) (a) and (d), aet. V(2) (a) and (b); Hague principles on choice of law
- The PIL of the place of arbitration
  - Norway vogl § 31
- The PIL that the arbitrator deems the most appropriate
  - UNCITRAL Model Law art. 28
- Direct application of the rules of law considered appropriate (*voie directe*)
  - French code of civil procedure art. 1511; ICC Rules
- Not specified
  - Sweden, Italy
Invalidity/unenforceability based on composition of arbitral tribunal or irregularity of the procedure

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
Procedural Irregularity

• Irregularity if the tribunal applies soft law on its own initiative?
  – Parties may choose ”rules of law”;
  – Failing parties’ choice, in some systems arbitral tribunal must apply a ”law” (ML article 28(2), English AA sec 46(3))
Invalidity/unenforceability based on lack of arbitrability

(a) The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*; or
Arbitrability

• Violation of the arbitrability rule, 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 Chrisler-Plymouth, Inc., 473 U.S. 614 (1985) and Scherk v. Alberto-Culver Co., 417 U.S. 506, to

• To ensuring application of rules
  • Ingmar C-381/98, Unamar C-184/12 (on choice of law)
  • CDC C-352/13, on court agreements; on arbitration clauses, see AG opinion of 11.12.14
  • Germany, BGH VII ZR 25/12, 5.9.12; Belgium, Cass., 16.11.06
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
• Stockholm court of appeal 2016-01-18 T 9128-14: No jurisdiction in *Renta 4 v. The Russian Federation, SCC*
Recognition of the arbitration agreement:

- From second look doctrine

- To ensuring application of rules
  - Austria, OGH 1.3.2017; Germany, BGH VII ZR 25/12, 5.9.12; Belgium, Cass., 16.11.06; England, [2009] EWHC (QB) 2655
  - Ingmar C-381/98, Unamar C-184/12 (on choice of law)
  - CDC C-352/13, on court agreements; on arbitration clauses, see AG opinion of 11.12.14; AG opinions in C-567/14 (Genentech) and C-284/16 (Achmea)
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
• Stockholm court of appeal 2016-01-18 T 9128-14: No jurisdiction in *Renta 4 v. The Russian Federation, SCC*
Invalidity/unenforceability based on conflict with ordre public

(b) The recognition or enforcement of the award would be contrary to the public policy of that country
Ordre public

• Violation of ordre public, if the tribunal has disregarded mandatory rules to apply the will of the parties?
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)
<table>
<thead>
<tr>
<th>Course</th>
<th>F 09</th>
<th>S 10</th>
<th>F 10</th>
<th>S 11</th>
<th>F 11</th>
<th>S 12</th>
<th>F 12</th>
<th>S 13</th>
<th>F 13</th>
<th>S 14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company law</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cathrine Bjoland</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Competition Law</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nicolai Nielsen</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property and Insolvency</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Siri Hafeld</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Administrative Regulations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tone Wetteland</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arbitrability</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ulrik Tetzschner</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intellectual Property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hedda Bjøralt Roald</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contract Law: Indemnity clauses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tommy Thomsen</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contract Law: Early termination</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nanette Arnesen</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Labour law</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Øivind Foss</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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