International Commercial Arbitration – Overview

JUS5852 - International Commercial Arbitration – Class 1
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By the end of this class you should be able to answer:

- What is arbitration? When is it “international”, and when is it “commercial”?
- How is arbitration different from other ADR mechanisms? What are arbitration agreements?
- Why would you want to submit your dispute to arbitration? What are the possible advantages and disadvantages of doing so?
- Which legal sources are most significant? What is the relationship between them?
- Which types of arbitration exist? What are the differences between institutional and ad hoc arbitration?
Goal

- The main goal of this class is to provide you with a very wide overview of the field, so that you can understand how the issues that we will be studying in-depth in the future classes fit into the “big picture”.

Reading materials

- This lesson corresponds to Chapter 1 of the book (pgs. 3-42)
What is arbitration?

• “A process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case”.
Key characteristics

Consensual means to resolve disputes
- "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit."
- No arbitration agreement = no arbitration

Non-governmental decision-maker selected by or for the parties
- If governmental decision-maker is selected, then we have a CoF, not an arbitration agreement
- Arbitrators usually selected by the parties or arbitral institutions on their behalf

Final and binding decision – “award”
- It does not result in a merely advisory recommendation
- Arbitral award can be coercively enforced (New York Convention)

Adjudicatory procedure
- Impartial procedure allowing each party to present its case
Activity 1: Is this an arbitration clause?

• “Any and all disputes arising out of this contract shall be resolved by a panel of three arbitrators, seated in London, who shall investigate the necessary facts and render an award which, upon being endorsed by all the parties, shall become binding and enforceable.”
Activity 1: Is this an arbitration clause?

- "In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter 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 of Arbitration."
Activity 1: Is there an arbitration clause here?

“Alice agrees to loan her bike to Bob. Bob needs to return it to the playground by 18:00h and to do Alice’s homework for a week in exchange.

Any dispute, controversy or claim arising under this contract is to be resolved through mandatory arbitration by Ms. Cindy, the teacher, in Oslo, under Norwegian laws, and under the Rules of Arbitration of the International Chamber of Commerce. The Emergency Arbitrator Provisions shall not apply.”
When is an arbitration “international”? 

• Separate treatment of domestic and international arbitration in some jurisdictions makes it necessary to make this determination.

• “It is necessary to verify in each specific case (on the basis of the applicable law) whether the transaction is international or not.” (See further: Cordero-Moss, “International Commercial Contracts”, Cordero-Moss, 3-5)

• National laws differ!
When is an arbitration “international”?  

- **UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006**  
- An arbitration is international if:
  - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  - (b) one of the following places is situated outside the State in which the parties have their places of business:
    - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
  - (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.
Activity 2: When is arbitration “international”?

- Countries 1, 2 and 3 are Model Law countries.
- Is an arbitration international if we have two companies from country 1, arbitrating a dispute in 2, under the law of 3? Why?
- What if the dispute arise out of the contract to build a spaceship in the country 4, a non-Model Law country?
- What if the dispute arose out of the contract to make an Internet website, accessible everywhere, but there’s no other foreign element?
What is “commercial”?

- “To explain the term ‘commercial’, it will be sufficient here to specify that it refers to transactions entered into between parties in the course of their business activities. This leaves consumer contracts outside of the scope of the subject, as well as other aspects of private law, such as family or inheritance law”
Advantages of arbitration

- Neutrality
- Centralized dispute resolution
- Enforceability of agreements and awards
- Commercial competence and expertise
- Finality of decisions
- Party autonomy and procedural flexibility
- Confidentiality
- Cost and speed
- Arbitration involving states

- Activity 3: Is this always the case? Argue otherwise.
(Dis)advantages of arbitration

• Does arbitration always eliminate the bias and the “home player”/“repeat player” advantage that some parties may have?
• Is arbitration always confidential? Can confidentiality be a concern in some cases?
• Arbitrators can have more expertise than judges, but can also have far less. Is this good or bad?
• How about procedural flexibility? While in theory the parties have a lot of flexibility, is there a certain “arbitration culture”, “the way that things are done”?
• Are there some things that should not be arbitrated? Can you think of a few types of disputes that should always be litigated?
### Legal framework

#### Arbitration agreement
- Contractual; *conditio sine qua non*

#### Institutional rules
- Contractual; extension of the agreement between the parties.

#### National legislation
- Legislative; typically only a few mandatory rules that the parties cannot deviate from; a lot of national laws are modelled on UNCITRAL Model Law

#### International conventions
- Legislative; New York Convention is the most important instrument; regulates recognition and enforcement of foreign arbitral awards
Arbitration agreement

• Main elements:
  – Agreement to arbitrate
    • “We want to go to arbitration.”
  – Defined scope of disputes
    • “This is what we want to arbitrate.”
  – Institutional arbitration rules
    • “We want to use these rules of procedure. They are a part of the contract.”
  – Arbitral seat
    • “This is the domicile of arbitration, and unless we say otherwise, this is the procedural law.”
  – Selection of arbitrators
    • “These people will hear our dispute. Or this is how we’ll select them.”
  – Language
    • “This is the language we will use.”
  – Choice-of-law
    • “Here are the laws applicable to 1) merits; 2) arbitration agreement; 3) procedural issues; 4) choice-of-law itself.”
Separability of the arbitration agreement

• Separability: arbitration agreement is treated separately from the underlying contract.
• E.g.: validity of the contract does not affect the validity of the arbitration agreement.
Institutional rules: contractual nature

- Ad-hoc vs. institutional arbitration
- Advantages and disadvantages?
Typical provisions? UNCITRAL Arbitration Rules

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National legislation

- **Norwegian Arbitration Act**
- **US FAA**
- **UK Arbitration Act**

- Regulates “internal” procedures of arbitration and “external” relationship with the courts of the seat
- Can be more or less “arbitration-friendly”
- Very few mandatory rules – useful as default rules

- **UNCITRAL Model Law**
  - Not a convention!
- Differences still exist and might be extremely important!
International framework: NYC

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")
- "A single set of international legal standards for the enforcement of arbitration agreements and awards".
- As such, it does not cover all the aspects of arbitral proceedings – but is still immensely important
- Effects:
  - Requires national courts to recognize and enforce foreign awards, subject to a limited set of exceptions
  - Requires national courts to recognize and enforce arbitration agreements, subject to a limited set of exceptions
  - Requires national courts to refer parties to arbitration, when there is a valid agreement
- Courts don’t get to review the merits before enforcing an award!
Activity 4: Name the source

• Parties from USA and Norway.
• “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 three arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be Oslo, Norway, and the language of the arbitration will be English. The contract, including this clause, shall be governed by the law of Norway.”
• Explain the role, if any, of the:
  – ICC Rules
  – Norwegian Arbitration Act
  – Other Norwegian laws
  – UNCITRAL Model Law
  – UNCITRAL Rules
  – New York Convention