Arbitration agreements (legal framework, formation and validity, interpretation, non-signatory issues)

JUS5852 - International Commercial Arbitration – Class 02
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By the end of this class you should be able to answer:

- Which laws may govern the formation, validity and interpretation of the arbitration agreements?
- What’s the relationship between an arbitration agreement and an underlying contract?
- Who gets to rule on the challenge to the agreement?
- What should you do if one party brings a lawsuit before the courts, in breach of the agreement to arbitrate?
- In which ways can the arbitration agreements be deficient? What should you be aware of when drafting them?
- Can non-signatory parties be held to be parties to arbitration agreement?
Reading materials

• This lesson corresponds to chapters 2, 3, 4 and 5 of the book (pgs. 43-101)
International arbitration agreements

• Presumptively valid
  – NYC 2(1): “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.”

• But what if one of the parties refuses to comply?
  – Specific performance mandated by the NYC 2(3) [and UNCITRAL Model Law 8(1)]: “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”
Competence-competence doctrine

• One of the parties may decide to challenge the existence, validity and/or interpretation of arbitration agreement, arguing that arbitral tribunal doesn’t have the jurisdiction to hear a case.

• It is almost universally accepted that the arbitral tribunal itself has the power to rule on its own jurisdiction.
  – UNCITRAL Model Law Art. 16
    • Diversity of interpretations
  – UNCITRAL Rules 21(1) and other arbitration rules
  – Diversity of national approaches: e.g. prima facie jurisdiction vs. interlocutory judicial decisions

• Courts often have “the final say”.

Separability

- Arbitration agreement is separate and autonomous agreement, independent from the main contract.
- Effects:
  - Invalidity or non-existence of the underlying contract doesn’t mean automatic invalidity or non-existence of the arbitration agreement and vice versa;
  - The governing law is not necessarily the same;
  - Different form requirements.
Obligations

• Obligation to arbitrate
  – Remedies for breach: dismissal or stay of litigation; compelling arbitration (US FAA)

• Obligation not to litigate
  – Remedies:
    • stay or dismissal;
    • compelling arbitration;
    • anti-suit injunctions (Common Law) issued by the courts;
    • awarding monetary damages;
    • non-recognition of judgements;
    • anti-arbitration injunctions;
    • anti-suit orders issued by the arbitral tribunal.

• Always remember that national laws differ!
EU anti-suit injunctions and orders

- Brussels I – arbitration exception
- Brussels I Recast
- CJEU cases: West Tankers, Gazprom
Activity 1: Jurisdiction?

- Companies A and B, incorporated in countries X and Y, have entered into a sales contract with a clause which provided that all disputes arising under the contract shall be solved by arbitration under UNCITRAL Rules, by a tribunal which shall be seated in country Z.
- X, Y and Z are UNCITRAL Model Law countries and parties to the New York Convention.
- When the dispute arose, company A brought the lawsuit before the courts of X, claiming that the contract was signed by their deputy CEO, who had no authority to sign agreements on behalf of A, thereby challenging the validity of the arbitration agreement, and by extension, tribunal’s jurisdiction.
- Advise A and B. Refer to legal sources.
Which law governs?

• Substantive validity: [alternatives]
  – Law of the judicial forum where enforcement is sought
  – Law chosen by the parties (NYC, Model Law)
  – Law of the arbitral seat (NYC, Model Law – in the absence of choice)
  – Validation principle
  – International law

• Formal validity
  – NYC “written form” requirement; relationship with national laws; UNCITRAL 2006 Recommendation

• Capacity
  – NYC 5(1)(a) – national law of party’s domicile or place of incorporation

• Arbitrability
  – Different approaches: either the law applicable to the arbitration agreement or lex fori
Pathological arbitration clauses

- Indefinite agreements
- Non-existent institutions, rules, arbitrators
- Internal contradictions
- Optional clauses

- Different national approaches -- always check the governing law!
- … and try to use the model clauses when you can.

- Courts usually find a way to enforce even pathological clauses.
"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ]."
“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 one or more arbitrators appointed in accordance with the said Rules.”
UNCITRAL Rules

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding:
(a) The appointing authority shall be ... [name of institution or person];
(b) The number of arbitrators shall be ... [one or three];
(c) The place of arbitration shall be ... [town and country];
(d) The language to be used in the arbitral proceedings shall be ...
Substantive invalidity

- “Null and void”, “inoperable”, “incapable of being performed”
  - NYC and UNCITRAL Model Law
    - Unconscionability
    - Duress
    - Fraud
    - Impossibility/frustration
    - Illegality
    - Lack of capacity
    - Termination and repudiation
    - Waiver of right to arbitrate
    - Inconvenient forum
Non-arbitrability

• Certain disputes might not be capable of settlement by arbitration
  – Competition/anti-trust
  – Securities
  – Bankruptcy
  – Employment
  – Consumer disputes
  – Others

• Consequences? Different approaches.
Non-arbitrability, NYC

• Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if [...]:

   (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;

   [...] 

2. Recognition and enforcement of an arbitral award may also be refused if [...]:

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;
New York Convention Guide

Non-signatory issues

• Bases for subjecting non-signatory to arbitration
  – Agency
  – Veil-Piercing
  – “Group of companies” doctrine
  – Succession
  – Assignment or transfer
  – Estoppel
  – Corporate officers and directors

• Formal validity?
• Choice of law?
Activity 2: Interviewing exercise

- Companies A and B are incorporated in countries X and Y, which are parties to the NYC and have incorporated UNCITRAL Model Law. The companies have already entered into an intellectual property licensing agreement, and now want to draft an arbitration agreement. They seek your advice.
  - Which questions would you ask A and B during the interview?
  - Which questions would you ask your colleague who works in the country where the arbitration will be seated?