# Arbitration law
# National and international

LIUC 2018 -2019

# Dispute

Disagreement » *opinion differences or simply differences in points of view.*

Conflict » *disagreement followed by actions against each other*

Dispute » *disagreement connected with violation of rights (legal concept).*

# Partners

# disagreement

# conflict

# dispute

# Dispute resolution

LITIGATION IN COURT

ALTERNATIVE DISPUTE RESOLUTION - ADR

in general: a variety of dispute resolution methods, which are oriented towards resolution of disputes without litigation.

# Capitulation (avoidance)

*capitulation often means simply giving up in a negotiation or confrontational situation for the sake of ending the dispute as quickly as possible, whether you have achieved the desired results or not*

*In capitulation, one party gets what is desired and the other party generally does not.*

# NEGOTIATION

*Communication for the purpose of persuasion*

This type of ADR aims for the parties to settle the dispute by negotiating and deliberating with each other with the attendance of their attorneys if needed, without intervention of any third party.

Main features of negotiation:

- almost always attempted BEFORE going to court or using other adr;
- allows the parties to meet in order to settle a dispute;
- allows the parties themselves to control the process and the solution;
- does not requires involvement of the third party;
- informal, low cost, high speed, private, future oriented procedure;
- helps to restore relations

but…negotiators often fail to reach an agreement or at least optimal agreement due to some of the following factors:

. Failure of adequate preparation (fact gathering as well as strategic planning)

. Failure of effective communication

. Emotionalism

. Different perceptions of alternatives to agreement

. External pressures

# MEDIATION

A negotiation carried out with the assistance of a third party

*Depending on what seems to be impeding agreement* ***the mediator can help the parties to negotiate in a more efficient way.***

Main features of mediation:

- allows the parties themselves to control the process and the solution;
- requires involvement of the third neutral party (mediator) that helps the parties to exercise their control
- mediator brings opposing parties together and encourages them to work out a settlement;
- informal, low cost, high speed, private, future oriented, voluntary procedure;
- helps to restore relations;
- focuses on underlying interests.

# ARBITRATION

the *Adjudication* of a dispute between parties by a person or persons (arbitrators) chosen or agreed to by the parties. Arbitration award is recognized and enforceable under the law.

*Adjudication:* **the act of judging a case or a dispute, or of making a formal decision about something:**

Main features of arbitration:

- voluntary (on the bases of arbitration clause or agreement);
- a simplified version of a trial;
- parties can agree on arbitral panel, procedural rules, language, applicable law, place of hearings and etc.;
- decision is mandatory to follow;
- formal, more expensive, slower and past oriented private procedure;
- adjudicative method;
- focuses more on legal issues.

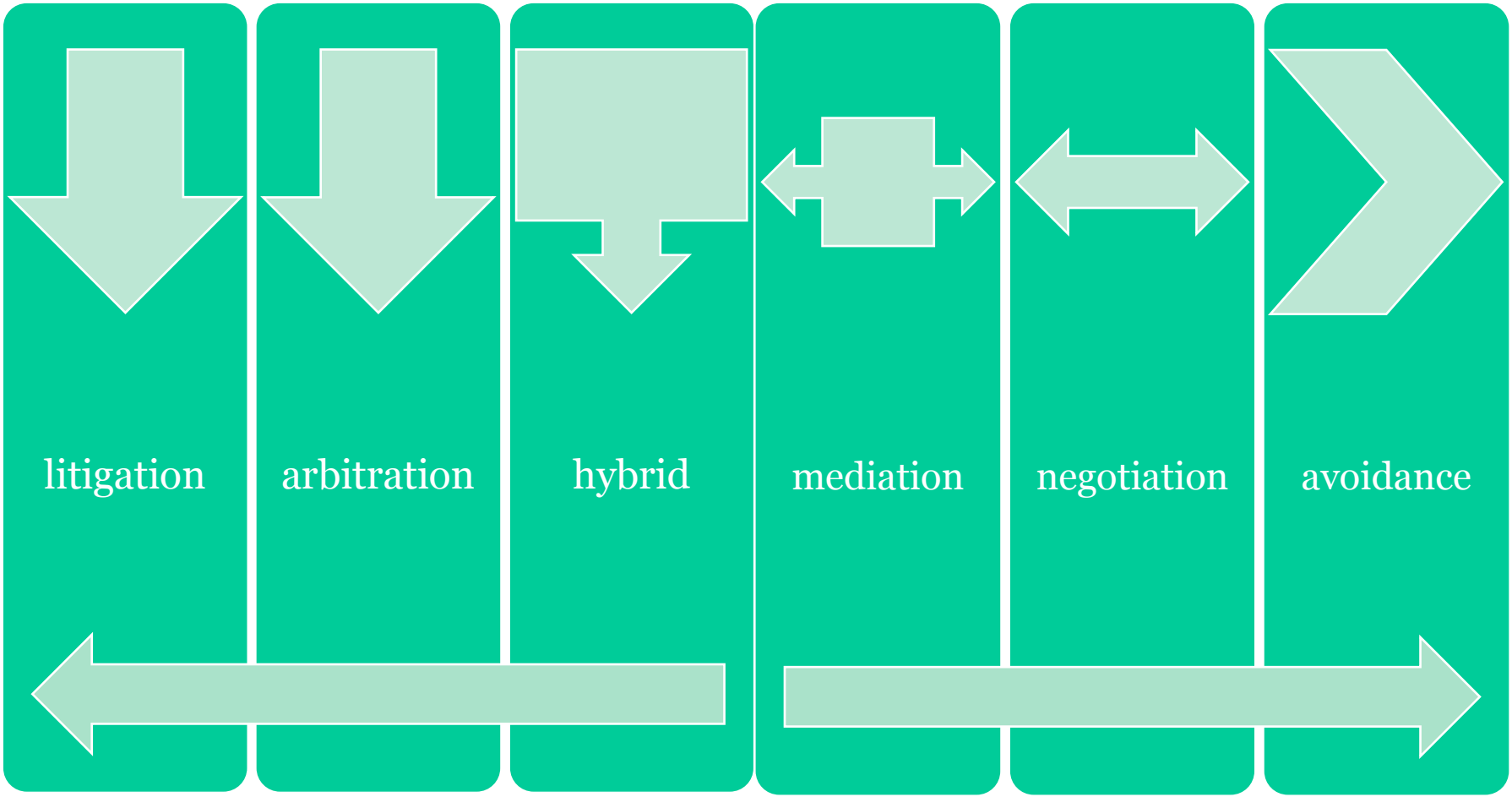
# HYBRID PROCEDURES

These ADR methods combines two or more traditional ADR methods (negotiations, mediation and arbitration).

Main hybrid procedures:

- **MedArb** (third person starts as a mediator but in the event of a failure of mediation, the arbitrator imposes a binding decision);
- **ArbMed** (during the arbitration process, mediation is applied. In case of its failure, arbitrator imposes a binding decision);
- **Neutral evaluation** (expert in certain area investigates the case material and informs parties about the strong and weak points of their positions);
- **Private judging / rent a judge** (presenting case to a retired or former judge in a privately maintained courtroom with all the characteristics of the formal judicial process).

# DISPUTE RESOLUTION



# HOW TO CHOOSE MOST APPROPRIATE DISPUTE RESOLUTION METHOD?

- personal features of the parties;
- negotiation style of the parties;
- financial status of the parties;
- time limits for resolution;
- duration of relations between the parties;
- level of personal emotional involvement of the parties into a dispute;
- level of the conflict escalation

# International disputes

## Private

The same issues involved in domestic disputes

In addition to problems caused by the lack of a single source of law and compulsory jurisdiction

**State owned industry**…

## Public

Between States

Primarily political problems involved

Complex questions of sovereignty

Use of power

**…Private party vs a nation**: investment disputes (one party is a Government and the other is a foreign private investor

# International disputes

Present special problems because they involve more than one national legal system

In the absence of agreement, there is often no predictable place where compulsory jurisdiction can be obtained

There is a considerable likelihood that there will be conflict over where a dispute will be resolved as well as how it will be resolved

# Adr in international disputes

The response of the international community to these problems has been the widespread use of **arbitration clauses** in international trade contracts (ad hoc/institutional)

The development of I.A. has been fueled by **growing global economic interdependence** (increasing number of countries that signed the NY CONV)

Growing importance of international arbitral institutions

**Increasing interest in alternatives to arbitration**

# International adr

- **less expensive** than arbitration
- More **amicable** and capable of preserving **long term business relationships** (involving not only narrow commercial issues but *complex contracts generating profits dependent on continuing a long-term relationship)*
- *New mechanisms that **emphasize management partecipation**; reduce the importance of procedural issues; open up dialogue and facilitate the development of forward looking solutions*

- *New problems with cross –cultural differences in the attitude toward dispute resolution (cultural diversity makes communication more difficult; absence of an international legal framework for adr)*

# Why arbitration in cross border disputes

Voluntary method failed/not attempted

Adjudication: private adjudication – court litigation

Litigation in national court

- Multiplicity of litigation
- Enforcement
- Unfair forum

# Binding arbitration

Voluntary system

Fair and neutral method of dispute resolution

IN MOST INSTANCES PARTIES DO NOT AGREE TO ARBITRATE BECAUSE ARBITRATION IS THE MOST FAVORABLE POSSIBLE FORUM, BUT BECAUSE IT IS THE LEAST UNFAVORABLE FORUM THAT PARTY CAN OBTAIN, WHEN NEGOTIATING DISPUTE RESOLUTION MECHANISMS.

# Other advantages

- Enforceability of **agreement** and **awards** (only few regional conventions/rules establish effective regimes for forum selection clauses and foreign court judgement)
- Commercial competence and expertise of the arbitrators (courts might have little experience in solving complex international disputes)
- Selection of the arbitrators with the best experience
- Confidentiality
- Finality of the decision: limited appellate review (efficiency vs. quality)
- Party autonomy and procedural flexibility: parties can tailor the procedure to the dispute and they can also design the procedure so that it respects the legal procedural backgroud of both parties

# International Arbitration is efficient and parties can benefit of the other advanteges only:

- if the resulting arbitral award can be turned into a judgment that is enforceable in **relevant jurisdictions;**
- if the arbitration agreement can be enforeced, preventing litigation **in another forum** (*if party «changes his mind…» )*

*State law is sufficient for national arbitration but for international arbitration an international enforcement mechanism is needed in order to ensure that:*

- *the arbitration agreements are given effect internationally (and not only in the place where they are made) preventing litigation in another forum and*
- *the arbitration awards made in one jurisdiction can be enforced in other jurisdictions*

# Legal framework

- A legal framework is needed in order to *provide a final resolution of the dispute: that is to ensure the effective circulation of international arbitration agreements and awards*
- Multi - tier legal regime

- Historically:
- Geneva protocol 1923
- Geneva convention 1927

# Before the NY Conv.

## Protocol 1923

2 objectives:

-international enforcement of arbitration agreement (*only between parties subject to the jurisdiction of different contracting states*)

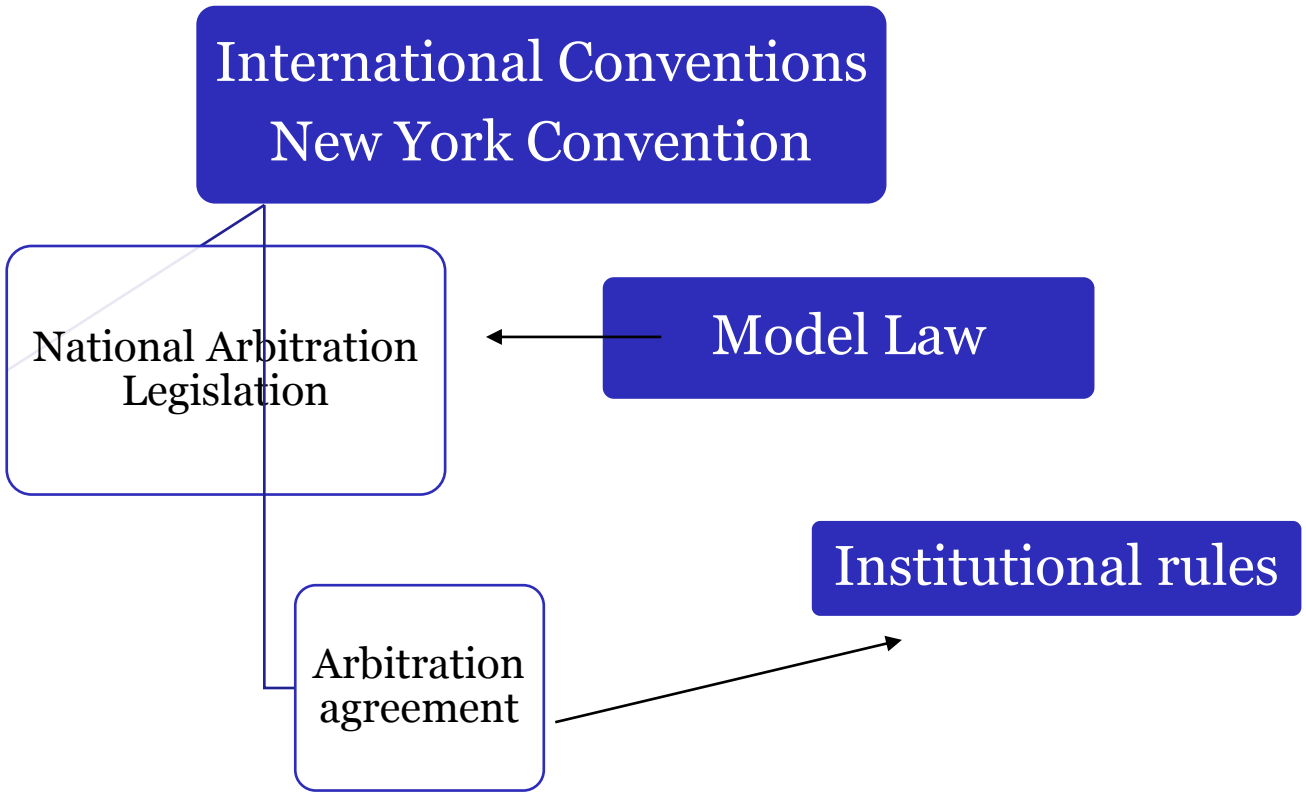
-Enforcement of arbitration agreement *only in the territory of the states in which they were made*

## Convention 1927

-Widen the scope of the protocol by providing for the recognition of awards within the territory of all contracting states,

*-But the party seeking enforcement had to prove the condition necessary for enforcement (double exequatur): i.e. a declaration by the courts of the state where it was made that the award was enforceable)*

# Legal framework (1)



# New York Convention

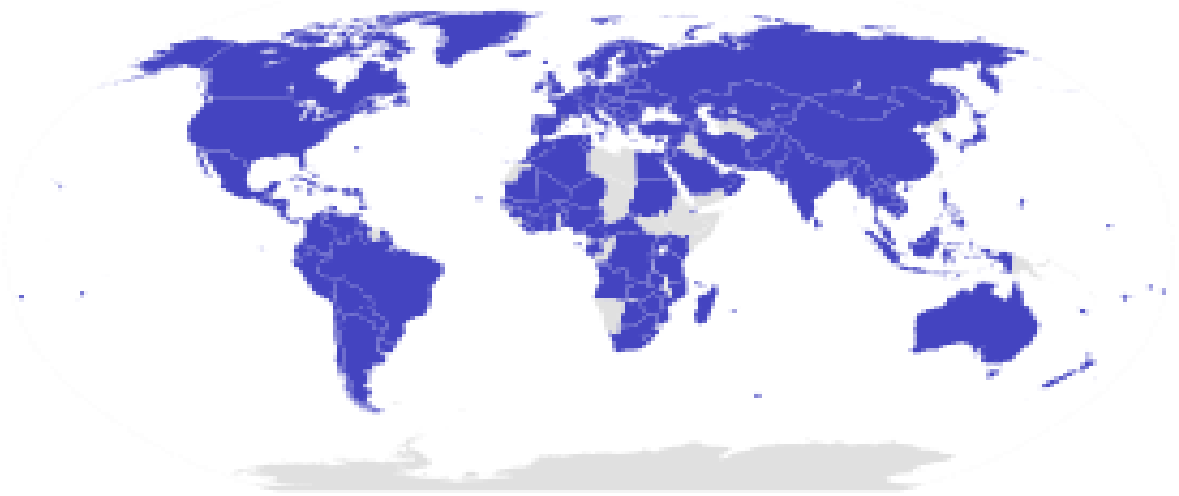
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the **key instruments in international arbitration**.

The **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** was adopted by the United Nations following a diplomatic conference held in May and June **1958** at the United Nations Headquarters in New York.

The New York Convention entered into force on 7 June 1959.

The New York Convention is an international treaty that provides for the recognition and enforcement of international arbitral awards and protects parties against domestic litigation commenced in derogation of agreements to arbitrate.

# The New York Convention



As of April 2018, the Convention has 159 state parties,

# States which are not party to the Convention

| | | |
|---|---|---|
| Chad | Belize | |
| Equatorial Guinea | Republic of the Congo | |
| Gambia | Eritrea | Ethiopia |
| Iraq | Grenada | Guinea-Bissau |
| Libya | Kiribati | North Korea |
| Federated States of Micronesia | Malawi | Maldives |
| Niue | Namibia | Nauru |
| Saint Kitts and Nevis | Palau | Papua New Guinea |
| Seychelles | Saint Lucia | Samoa |
| Somalia | Sierra Leone | Solomon Islands |
| Suriname | South Sudan | |
| Timor-Leste | Swaziland | |
| Turkmenistan | Togo | Tonga |
| Yemen | Tuvalu | Vanuatu |
| | | |

# The New York Convention

www.newyorkconvention1958.org

Two principal effects: mandatory recognition of international arbitration agreements and arbitral awards, subject to only very limited exceptions

The Convention's principal aims are:

- to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.
- To require that foreign and non-domestic arbitral awards will not be discriminated against and to ensure that such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.
- The Convention does not directly affect the authority of a State to enforce a national award

# Art. 1 the scope

1. This Convention shall apply to the recognition and enforcement of **arbitral awards** made i**n the territory of a State other than the State** (1) where the recognition and enforcement of such awards are sought, and arising out of **differences between persons** (4), whether physical or legal. It shall also apply to arbitral awards **not considered as domestic awards** in the State where their recognition and enforcement are sought (2).

2. The term "arbitral awards" (3) shall include not only **awards made by arbitrators** appointed for each case but also those made by **permanent arbitral bodies** (5) to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of **reciprocity** declare that it will apply the Convention to the recognition and enforcement of awards made only in the **territory** of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as **commercial** under the national law of the State making such declaration (6)

# Art. 1

Article I sets out in broad terms the **scope of the New York Convention**.

it provides that the New York Convention applies to the recognition and enforcement of arbitral awards

**1.** "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal".

2. It also states that the New York Convention applies to awards that are "not considered as domestic awards in the State where their recognition and enforcement are sought".

3. Article I (2) provides that the term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted".

4. Finally, article I (3) allows each Contracting State, when signing, ratifying or acceding to the Convention, to restrict the scope of application of the Convention by making the reservations allowed by the Convention. The first reservation, known as the "reciprocity reservation", allows a State to apply the Convention only to awards made in the territory of another Contracting State. The second reservation, known as the "commercial reservation", allows a State to apply the Convention only to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration".

*Let's see those provision in more details…*

# 1. Territorial definition

Pursuant to the first sentence of article I (1), the New York Convention applies to awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought".

Unless a State has made a reciprocity reservation pursuant to article I (3) **the Convention applies to awards made in any State, whether or not a Contracting State.**

In certain jurisdictions, the criterion expressed in the first sentence of article I (1) is the only one used to determine whether or not an award falls within the scope of the Convention. Thus, in several jurisdictions—including Australia Germany, the Netherlands and Spain— an award falls within the scope of the New York Convention only when it is made in a State other than the State where recognition and enforcement is sought.

*National legislation applies to domestic arbitration*

# 2. Non domestic criterion

Pursuant to the second sentence of article I (1), the New York Convention might also applies to awards "not considered as domestic" in the State where recognition and enforcement is sought.

This "non-domestic" criterion is in addition to the "territorial criterion" set out in the first sentence of article I (1) of the Convention. Accordingly, for example courts in the United States have applied, in addition to the "territorial criterion", the "non-domestic criterion" to determine whether an award falls within the scope of the New York Convention.

The New York Convention does not define the term "**domestic**". As a result, Contracting States have discretion to decide, in accordance with their own law, what constitutes a non-domestic award

…

# 2. Non domestic..

- Some courts have held an award to be non-domestic when it is made in the State where recognition and enforcement is sought under the procedural law of another State. For example, a United States court has held that an award rendered in the United States was non-domestic, *inter alia*, because it was made pursuant to a foreign procedural law and the ICC Arbitration Rules.
- Other courts have held an award to be non-domestic when it is made in the State where recognition and enforcement is sought but concerns a dispute involving one or more international elements (.. the citizenship of the parties, the location of property involved in the dispute, .. or whether the award contains another reasonable relation with a foreign country...).
- French courts have also held that the New York Convention applies to "a-national" awards. For example, a French Court of Appeal held that an award rendered on the basis of an arbitration clause that expressly excluded the application of any national procedural law and regulated the procedure itself, fell within the scope of the New York Convention

# *3. awards*

The Convention does not define "arbitral awards".

During the negotiation of article I, it was noted that "*it will depend on the law of the State in which an award is to be enforced whether a particular decision is to be regarded as an arbitral award*".

This suggests that it is up to the courts of the Contracting States where recognition and enforcement is sought to determine when a decision can be characterized as an "**arbitral award**" under the New York Convention.

Courts have generally accepted that the determination whether a decision is an award depends on its nature and content, not on the label given to it by the arbitrators.

Similarly, it would not suffice for arbitrators to label a decision "award" to make it an award within the meaning of the New York Convention.

The question of whether an award rendered in an ***arbitrato irrituale*** (informal arbitration) falls within the scope of the New York Convention has also arisen. An *arbitrato irrituale* is based on the parties' intentions and results in an award which is essentially a contract. Awards rendered in such proceedings bind the parties as soon as they are rendered, but can only be enforced after being confirmed by a competent court. Commentators are generally of the view that a *lodo irrituale* does not amount to an "arbitral award" under the New York Convention.

# 4 Differences..5. arbitrators … 6.reservation

- Differences (*disputes*) between PERSONS (individuals, corporations, partnerships, associations, or other non-governmental entities)

- Awards made by **arbitrators** appointed for each case but also those made by **permanent arbitral bodies**

- **Reservation available to contracting state: reciprocity and commercial**
- Courts have held that when a Contracting State makes the reciprocity reservation, it will apply the New York Convention only to awards rendered in the territory of a State which is a party to the Convention
- The second reservation available to States under article I (3) is the commercial reservation. When a State has made a commercial reservation, the New York Convention applies only to disputes arising out of "legal relationships considered as commercial under the national law of the State making such declaration".. A United States court has held that the notion of "commercial relationship" is broad, noting that its purpose is only "*to exclude matrimonial and other domestic relations awards, political awards, and the like*".

# Art. 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** (the rule)

- 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams (the form)

- 3. 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** (the remedy)

# Art. 2

Article II governs the recognition and enforcement of arbitration agreements.

Provided that certain conditions are satisfied, article II mandates Contracting States to recognize an agreement in writing to submit disputes to arbitration and to enforce such an agreement by referring the parties to arbitration.

The scope of the New York Convention was initially meant to be limited to the recognition and enforcement of arbitral awards to the exclusion of arbitration agreements. .. it was only during one of the last meeting for the preparation and adoption of the Convention that the drafters decided to include a specific provision on the recognition and enforcement of arbitration agreements.

This explains why the recognition and enforcement of arbitration agreements is not mentioned in the Convention's title or in any other provisions (For example, article I (1) which defines the scope of application of the Convention does not deal with arbitration agreements)

# Art. 2

Article II governs the form and effects of arbitration agreements.

**Article II (l)** requires each Contracting State to recognize an "*agreement in writing*" under which the parties undertake to submit their disputes to arbitration. This provision has been interpreted as establishing a presumption that arbitration agreements are valid.

**Article II (2),** governing the form of "agreements in writing", covers agreements that have been "*signed by the parties o contained in an exchange of letters or telegrams"*

To ensure that arbitration agreements are complied with, **article II (3)** requires national courts seized of a matter covered by an arbitration agreement to refer the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

*Lets see those provisions in more details*

# In general

The underlying principle that the parties to an arbitration agreement are required to honor their undertaking to submit to arbitration any dispute covered by their arbitration agreement is given effect by the mandatory requirement on national courts to refer the parties to arbitration when presented with a valid arbitration agreement.

National courts are prohibited from hearing the merits of such disputes.

In accordance with the principle of competence-competence, which empowers arbitrators to rule on their own jurisdiction, a challenge to the existence or validity of an arbitration agreement will not prevent an arbitral tribunal from proceeding with the arbitration.

By accepting the principle of competence-competence, national courts do not relinquish their power to review the existence and validity of an arbitration agreement as they recover their power of full scrutiny of the arbitration agreement at the end of the arbitral process, once the award is rendered by the arbitral tribunal.

In some jurisdictions, courts have limited their scrutiny to a *prima facie* review, thereby leaving the arbitrators to be the first to fully decide the issue of their jurisdiction.

In other jurisdictions, courts conduct a full review of the existence, validity and scope of the arbitration agreement in order to determine whether to refer the parties to arbitration.

# Writing requirements

Pursuant to article II (2), the requirement of an agreement in writing is met when an arbitral clause or an arbitration agreement is signed by the parties.

When the parties to the contract or instrument containing the arbitration agreement have signed such contract or instrument, the signature requirement of article II (2) is to be regarded as satisfied.

Under article II (2), an agreement will also meet the "in-writing" requirement if it is contained in an exchange of letters or telegrams. As noted by a German court, the essential factor in the exchange of documents requirement under the New York Convention is mutuality; that is, reciprocal transmission of documents.

# Legal relationship

*Differences: real disputes (also future),*

*contractual or non contractual;*

*all or any…*

*in respect of a defined legal relationship*

*V*ery broad and seldom disputed in case law.

# Arbitrability

The requirement that the dispute concerns a "subject matter capable of settlement by arbitration" refers to the arbitrability of the dispute.

Given the New York Convention's lack of guidance on this topic, **national courts have determined whether a specific subject matter can be settled by arbitration either by referring to the law applicable to the arbitration agreement or by referring to their own law**.

Some courts have determined that this issue should be resolved according to the law applicable to the arbitration agreement.

Other courts have assessed whether a dispute was capable of settlement by arbitration pursuant to their own system of law

As a matter of public policy most jurisdictions prohibit arbitration of some disputed matters, such as family law disputes

Different jurisdiction adopt different solutions….

# Enforcement of the agreement *unless*

Where there is an agreement in writing as defined under article II (1) and (2), article II (3) requires national courts to refer the parties to arbitration, if requested to do so by at least one party, **unless** the court finds that the agreement is null and void, inoperative or incapable of being performed.

the text of the Convention does not provide any indication of **the standard of review** that should be applied by national courts in this exercise, nor any further clarification of the terms "null and void, inoperative or incapable of being performed."

Some courts perform a full review of the agreement to arbitrate to assess whether it is "null and void, inoperative or incapable of being performed", while others confine themselves to a limited or *prima facie* inquiry.

Some courts consider that the issue is to be determined under the **applicable national law; other courts (**United States courts and English courts) have applied **an international standard** of contract law.

In addition, parties have sought to invalidate arbitration agreements by arguing that the **main contract containing the agreement was null and void**. The vast majority of courts distinguish between the invalidity of the contract and the invalidity of the arbitration agreement in accordance with the principle of the **severability** or *separability* of the arbitration agreement—sometimes referred to as the principle of autonomy.

An arbitration agreement has been held **incapable of being performed** when the arbitration agreement was pathological, i.e., in two main situations: (i) when the arbitration agreement is **unclear** and does not provide sufficient indication to allow the arbitration to proceed, and (ii) when the arbitration agreement **designates an inexistent arbitral institution**

# Enforcing awards: art. 3 and art. 5

Art. 3 "*Each Contracting State* ***shall recognize arbitral awards*** *as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall* ***not*** *be imposed* ***substantially more onerous conditions*** *or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of* ***domestic arbitral awards***"

*Art. 5. "Recognition and enforcement of the award* ***may*** *be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ….(list of very limited hypothesis)*

# Art. 3

Article III embodies the pro-enforcement policy of the New York Convention, and sets forth the general principle that "*each Contracting State shall recognize arbitral awards as binding and enforce them*". As a result of article III, foreign arbitral awards are entitled to a *prima facie* right to recognition and enforcement in the Contracting States.

The final text of article III achieved a balanced solution that permits each Contracting State to apply its own national rules of procedure to the recognition and enforcement of foreign arbitral awards, while guaranteeing that such recognition and enforcement will comply with a number of fundamental principles:

*the first principle is that, while the recognition and enforcement of foreign arbitral awards under the Convention shall be conducted "in accordance with the rules of procedure of the territory where the award is relied upon", the "conditions" under which recognition and enforcement of foreign awards can be granted are exclusively governed by the Convention.*

*The second principle is that the national rules of procedure governing the recognition and enforcement of foreign arbitral awards in each Contracting State shall not impose "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

# Enforcement of awards

- The effect of Article III is that the **mechanisms to enforce an international arbitral award** under the New York Convention **will vary from country to countr**y.
- to prevent discrimination against foreign arbitral awards in domestic courts, Article III provides that "[there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral award

# Art. 4

- 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.
- 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

# Minimal requirements for recognition

- 1) “the duly authenticated original award or a duly certified copy thereof;”
- (2) “the the arbitration agreement or a duly certified copy thereof;” and
- (3) “a translation of these documents into such language . . . ce by an official or sworn translator or by a diplomatic or consular agent rtified

# Art. 5 sect. 1

- 1. Recognition and enforcement of the award **may** be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
- (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; or
- (b) The party against whom the award is invoked was not **given proper notice** of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (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
- (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
- (e) The award has not yet **become binding on the parties**, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

# Art. 5 sect. 1 (formal requirements)

- the language of Article V is not mandatory (may)and thus gives domestic courts **discretion to enforce** an arbitral award **even if** one or more of the grounds available to refuse enforcement is met

- all of the grounds enumerated in Article V, Section 1 are **procedural in nature** and do not permit the party opposing enforcement to re-litigate the merits of the arbitration

- **there is no appeal procedure in the New York Convention to correct substantive errors**.

# Art. 5 section 2

- 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

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

# Public policy considerations

the New York Convention permits a domestic court to refuse enforcement of an arbitral award if the **subject matter** of the award is **not capable of resolution** by arbitration in the country where enforcement is sought

- this section gives the enforcing court the right to refuse to enforce an award that violates that country's public policy
- the term "**public policy**" is not defined

# Art. 6

- If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon **may, if it considers it proper, adjourn the decision on the enforcement of the award** and may also, on the application of the party claiming enforcement of the award, order the other party to give **suitable security**.

# Other Conventions

There are other international arbitration treaties (Washington Convention for the resolution of investment disputes)

and regional treaties:

- the **Panama Convention** (1975) for the Americas: negotiated in 1975; 19 contracting states (USA and most South American states; parallels NY Conv. requiring recognition of international agreements and arbitral awards)
- the **European Union**'s treaty for the enforcement of international arbitration awards: Geneva (1961)

# EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

- Signed in Geneva in 1961
- Entered Into Force in **1964** and 31 States (AMONG Which Italy) Are Currently Party To It.
- Most European States Are Party To The Convention While Some Non Eu Members Are Parties
- The Convention Consists Of 19 Articles and addreses The Three Principal Phases Of The International Arbitral Process: Arbitration Agreement Arbitral Procedure And Arbitral Awards

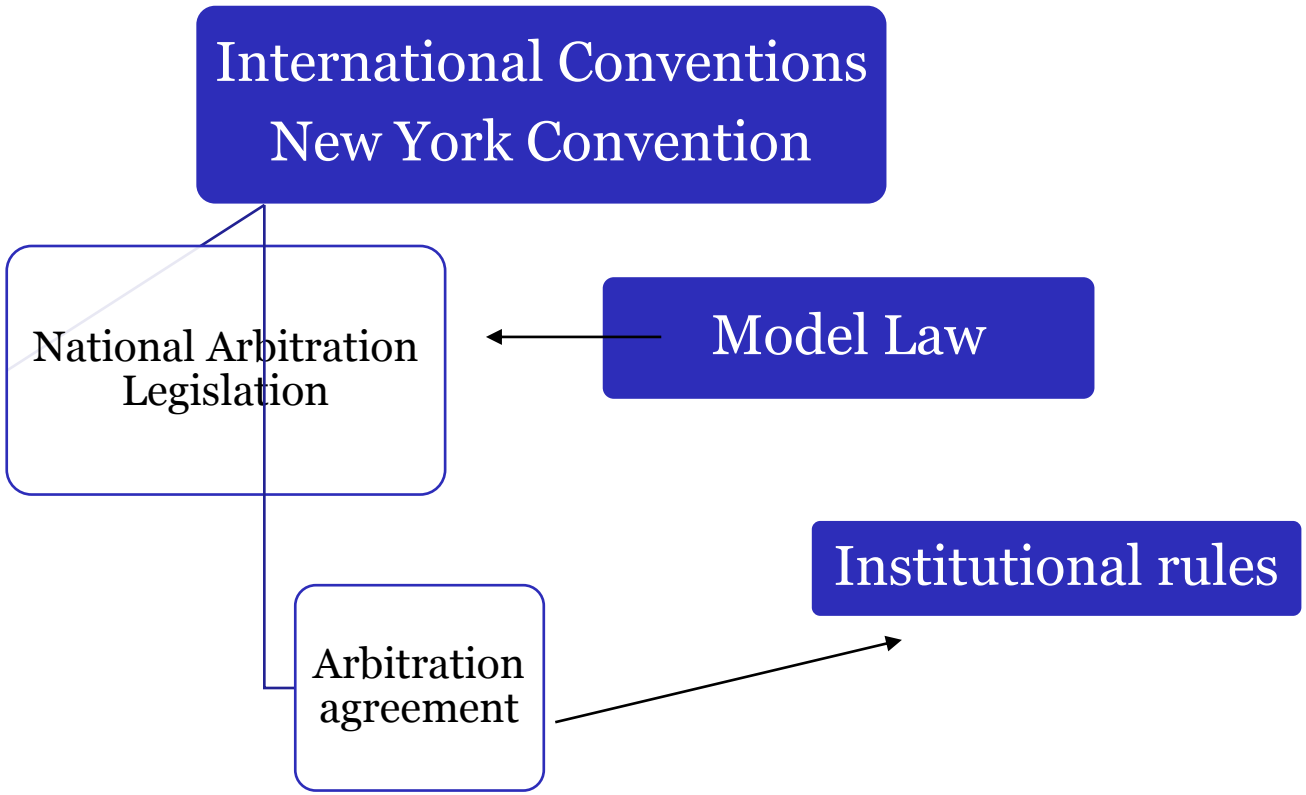
# GENEVA CONVENTION

- With regard to the **arbitration agreement**: art. v and vi confirm the principles of competence-competence and the authority of national courts to consider jurisdictional objections on an interlocutory basis

- With regard to the **arbitration procedure**: art. iii-vii confirm the autonomy of the parties and the arbitrators to conduct arbitration proceedings

- With regard to **award** the convention supplements the New York convention, dealing with the effects of a judicial decision annulling an award in the arbitral seat, in other jurisdictions

# Legal framework (2)



# Balancing act

The New York Convention represents a a significant effort to meet different considerations:

- States are reluctant to give up their autohority over what they view as domestic matters (enforcing awards)
- States want to protect their citizens from what they perceive as unfair treatment by foreign countries and arbitral tribunals
- States want safety valves in order to set aside extreme outcomes and to avoid that fundamental norms are violated by the way an award is generated or by the substance of the award
- There are differing legal traditions to be considered when deciding what «fair adjudication» means

… therefore it contains **general provisions** that left to the contracting States some flexibility to limit the application of the treaty and to refuse enforcement of certain kind of awards.

# National legislation

Underneath the NY Conv. (*global regulation that drives the legal framwork*) we find:

National legislation implementing and elaborating the NY Convention and providing enforcement of its terms in the domestic courts

National legislation interpreting the *general provisions* of the Conv.

Almost every State that is party to the Convention has a statutory framework for the recognition and enforcement of arbitration awards but also for the regulation of the arbitral proceedings

The practical effect of the Convention is often dependent on both the content of national legislation and the interpretation of national courts

In order to fulfill the objective of uniformity, national courts increasingly cite authorities from foreign and international sources in interpreting the convention

The seat is fundamental

# National legislation

In **civil law countries** arbitration legislation generally takes the form of a chapter in the national code of civil procedure (see art. 839 ss.)

In **common law jurisdiction** the tendency has been to enact separate legislation

In many cases national arbitration statutes are **applicable only to international** (non domestic arbitration or contain separate parts for domestic and international arbitration)

A number of countries have adopted the **same legislation** for both domestic and international arbitration (with limited differences)

# National legislation

**Supportive national legislation**

*Legislation providing effective support for the arbitral process, facilitating international trade*

*Pro enforcement framework*

**Less supportive national legislation**

*Legislation showing hostility or suspect (compromise principle of sovereignty – doubts on neutrality; ideological opposition)*

# Model Law

- The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations General Assembly in 1985 and revised in 2006
- The UNCITRAL Model Law is designed to **implement the New York Convention as well as any other international arbitration** agreements between the enacting state and any other state, and to harmonize the treatment of international commercial arbitration

The Model Law was developed to address **considerable disparities in national laws on arbitration.**

- It does not have independent legal effect but must be *adopted by national legislatures (60) and* has set the agenda for reform even in Countries where it was not adopted
- *It expands and particularizes the legal framework set by the NY Conv.*

The Model Law constitutes a sound basis for the harmonization and improvement of national laws.

It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award

Since its adoption, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law

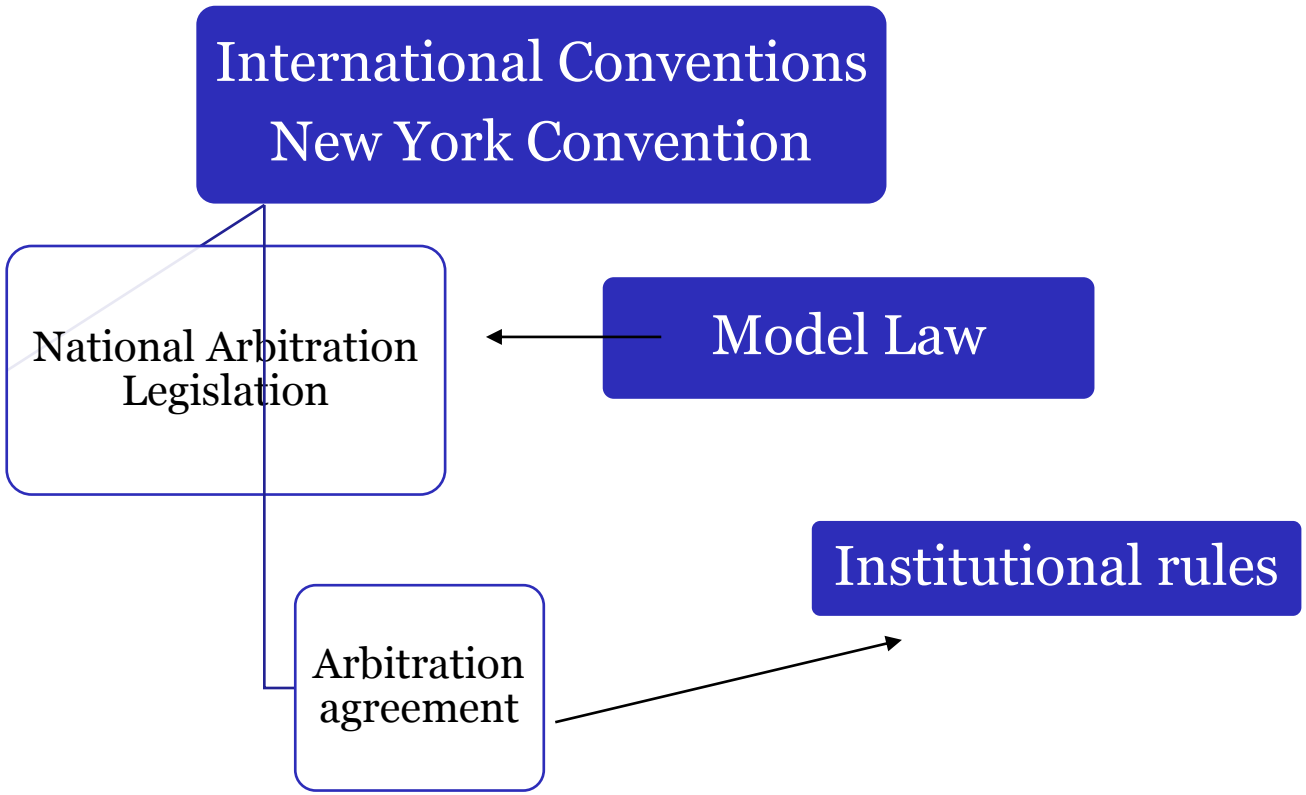
It consists of 36 articles dealing with the treatment of international arbitration, with options available

**C**ountries are free to modify the Model Law in any manner they may choose

# CONTENTS OF THE MODEL LAW

- There are **eight** "Chapters" to the Model Law.
- *GENERAL PROVISIONS: SCOPE OF APPLICATION, DEFINITIONS, AND EXTENT OF COURT INTERVENTION*
- *ARBITRATION AGREEMENTS : DEFINITION AND SCOPE, COURT OBLIGATION TO REFER MATTERS TO ARBITRATION, INTERIM MEASURES*
- *COMPOSITION OF ARBITRAL TRIBUNALS: NUMBER OF ARBITRATORS CHALLENGES TO ARBITRATORS*
- *JURISDICTION OF THE TRIBUNALS: COMPETENCE TO RULE ON OWN JURISDICTION, JURISDICTION TO MAKE PRELIMINARY ORDERS AND INTERIM MEASURES*
- *CONDUCT OF ARBITRAL PROCEEEDING: PROCEDURAL RULES FOR ARBITRATION, COURT ASSISTANCE IN TAKING EVIDENCE*
- *MAKING OF AWARD AND TERMINATION OF PROCEEDINGS: FORM AND CONTENT OF THE AWARD TERMINATION OF ARBITRAL PROCEEDINGS.*
- *JURISDICTIONAL RECOURSE AGAINST ARBTRAL AWARD: GROUNDS TO SET ASIDE ARBITRAL AWARDS*
- *RECOGNITION AND ENFORCEMENT OF AWARDS: PROCEDURES TO ENFROCE AWARDS. GROUNDS TO REFUSE TO ENFORCE AWARD*

# Legal framework (3)



# Arbitration agreement

International arbitration agreements

- Agreement to arbitrate
- Scope of the dispute submitted to arbitration
- Seat and place of the arbitration
- Method of appointment, number and qualification of the arbitrators
- Language of the arbitration
- Choice of law clause
- Other provisions (costs, interest and currency of an award; disclosure or discovery powers of arbitrators; fast track or other procedural rules, confidentiality

**Use of an arbitral institution and its rules (or ad hoc): in this case the rules of the Institution will govern the arbitration**

# Institutional rules

**Institutional arbitration**

- Usually conducted with a pre-existing set of arbitration rules (provided by the institution)
- Overseen by non governamental bodies with various functions

Most institutional arbitration rules address:

- Basic procedural framework and timetable;
- Appointment of arbitrators and challenges to arbitrators;
- Selection of arbitral seat and language;
- Fees payable to the arbitrators and Institution

# Soft law

In addition to National law and Institutional arbitration rules embodied in the arbitration agreeements there are **a number of international guidelines or codes of best practice** regarding the conduct of international arbitrations.

They provide important **source of guidance** for parties and tribunals.

As they **are not formally binding (unless incorporated into the agreement)** they make the arbitral proceedings **more predictable and transparent** leaving parties and arbitrators free to tailor arbitral procedures in particular cases to the individual needs of those cases

IBA GUIDELINES ON CONFLICT OF INTEREST IN INTERNATIONAL ARBITRATION (ethics for arbitrators; impartiality and indipendence)

IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (a blend of civil and common law approaches to evidence)

IBA GUIDELINES ON PARTY REPRESENTATION IN I.A. (conduct and ethics for lawyers)

UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDING (non binding guidelines designed to identify procedural issues that frequently arise in international arbitration)

# Arbitration agreement

Form, validity, interpretation, drafting..

# Arbitration agreement

Cornerstone of arbitration

Parties' autonomy

Arbitration agreements usually take the form of clauses in commercial contracts providing for arbitration of future disputes

Model clause: «all disputes, claims controversies…relating to this agreeement shall be finally resolved by arbitration by [3/1] arbitrator(s). …..

Arbitration agreements may also be concluded in a **separate document** or take the form of **submission agreements covering arbitration of existing disputes**

# Art. 2 of the NY Conv.

Article II governs the form and effects of arbitration agreements.

**Article II (l)** requires each Contracting State to recognize an "*agreement in writing*" under which the parties undertake to submit their disputes to arbitration. This provision has been interpreted as establishing a presumption that arbitration agreements are valid.

**Article II (2),** governing the form of "agreements in writing", covers agreements that have been "*signed by the parties o contained in an exchange of letters or telegrams"*

To ensure that arbitration agreements are complied with, **article II (3)** requires national courts seized of a matter covered by an arbitration agreement to refer the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

*Lets see those provisions in more details*

# Art. 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 (*the rule*)**
- 2. The term "agreement in **writing**" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams ***(the form)***
- 3. 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 (*the remedy*)**

# Art. 2…

- Exclusivity of arbitration over domestic litigation
- Contracting states are required to recognize arb. agreement so long as they are:
- in writing: see reccomendation 2006
- parties agreed to submit to *arbitration* (no *mediation*, forum selection)
- *Differences: real disputes (also future), contractual or non contractual; all or any…*
- *Subject matter capable of settlement by arbitration*
- *Valid – operative – capable of being performed*

# Art. 2

- **A contracting state must suspend or terminate pending domestic court litigation if the subject matter of that litigation is subject to an arbitration agreement covered by the New York Convention**.
- *Positive effects*: obligate parties to participate (?); mechanisms to c**ompensate parties' lack of cooperation (appointment of arbitrators..)**
- *Negative effects*: courts are required to refer parties to arbitration; i.e.: stay of litigation/decline jurisdiction

# Requirements

The requirements for an arbitration agreement to be valid:

- Depend on the law applicable to the arbitration agreement
- But parties should also take into account the Law of the seat and the requirements of NY Convention : otherwise arbitration awards could be set aside or refused enforcement

# ARBITRATION AGREEMENTS

## Applicable law

In principle parties **may agree on the law applicable** to the arb. agreement (as they can agree on the law applicable to the arbitral proceeding: see infra, and to the substance of the dispute: see infra)

In practice they do rarely agree on that issue – therefore:

- Questions of formal validity: usually governed by the law of the seat
- Questions of capacity: *law applicable to the parties* (see: N.Y. Conv. 5.I, a)
- Questions of substantial validity (i.e.: consent, arbitrability) generally determined by the arb. Tribunal: different approaches:

- law of the seat (see art. 34 model law – sect. II a; NY conv. Art. 5 1.a)

- law of the contract (indirectly chosen by the parties)

- validation principle (any law under which is valid)

# ARBITRATION AGREEMENT

The formation of arbitration agreements raises several questions related to

- Consent/capacity
- Form
- Substantive validity
- Arbitrability
- Scope

# Consent and capacity

**Consent** to an arbitration agreement – consent to the contract; implied consent

**Capacity** to enter into an arbitration agreement is often identical to the capacity for other contracts

Therefore: problems related to mental incompetence, minors involved or limitation in corporate documents might arise

When a party lacks capacity to enter into an arbitration agreement the agreement cannot be enforced absent ratification

# Form

See N.Y Convention art. II «in writing»

See Model law art. 7

(The original 1985 version of the provision on the form of the arbitration agreement was modelled on the language used in article II (2) of the New York Convention"). The revision of article 7 is intended to address evolving practice in international trade and technological developements).

# 2 options

1. Requires the written form but it broadens the concept including: a record of contents; electronic means; exchange of statements of claim and difence not denied; arbitration agreement by reference)

2. “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

# Substantive validity

See: art. II, 3 of the New York Convention

See Model Law: art. 8 *Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds **that the agreement is null and void, inoperative or incapable of being performed**.

…..

# arbitrability

**In general**

*Child custody*

*Family matters*

*Criminal matters*

*Bankruptcy issues*

**But problems may also arise concerning:**

*Employment*

*Consumers*

*Antitrust, securities*

*Patent law*

# ARBITRATION AGREEMENTS

- **SCOPE AND INTERPRETATION**

- Because arbitration is the voluntary relinquishment of the parties' right to litigate in domestic courts, only those matters that fall within the scope of the parties' arbitration agreement can be arbitrated
- An arbitral award concerning matters outside the scope of the arbitration agreement is unenforceable under the New York Convention

# ALLOCATION OF JURISDICTION

- When discussing the allocation of jurisdiction between courts and arbitrators, there are two related doctrines
- the doctrine of **separability**, which generally holds that an arbitration agreement is considered to be a separate contract from the substantive commercial contract to which it is related (art. 16 model law)
- The doctrine of **competence/competence** which refers to the authority of an arbitral tribunal to determine its own jurisdiction. (art. 16 model law)

## *Model law*
## *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

- The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement (*competence/competence*).

- For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause (*separability*).

# NON SIGNATORY ISSUES

- The cornerstone of international commercial arbitration is that only parties who have agreed to arbitrate a particular dispute can be forced to do so
- There are FOUR categories of theories by which a non-signatory may be bound to arbitrate a dispute
- 1. Agency
- 2. alter ego/group of companies
- 3. successor/ assignment
- 4. implied consent/ estoppel

# Contents of Arb. Agreements

- ESSENTIAL ELEMENTS
- "*(1) The first, which is common to all agreements, is to produce mandatory consequences for the parties,*
- *(2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award,*
- *(3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties*
- *(4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement".*
- Besides those essential elements Parties have many options when drafting the arbitration agreement

# 1. Ad hoc – Institutional arb.

- International arbitration may be either **ad hoc** and **institutional**
- Institutional arbitrations are conducted pursuant to institutional arbitration rules which have been incorporated by the parties' agreement and that absent that agreement have no independent legal effect.
- Those institutional arbitrations are almost always overseen by arbitration institutions with the responsibility for constituing the tribunal, fixing compensation and similar matters
- Institutions do not arbitrate the merits of the parties' dispute: this is a responsibility of the arbitrators selected by the parties or by the institution

# 2: Which INSTITUTION

The best known international arbitration institutions are:

- ICC probably the most famous, it is based in paris but it has branches in HONG KONG, NEW YORK,
- SIAC (SINGAPORE INTERNATIONAL ARBITRATION CENTRE), the leading international arbitration instituiton in Asia
- AAA - CDR
- LCIA (LONDON COURT OF INTERNATIONAL ARBITRATION

- In Italy: Chamber of Arbitration of Milan

# AD HOC ARBITRATION

- Ad hoc arbitration are conducted without the benefit of an appointing authority or pre-existing arbitration rules, subject only to parties arbitration agreement and applicable national arbitration legislation

- The parties sometimes select pre existing rules designed for ad hoc arbitration: this is the case for **Uncitral arbitration rules** that occupy an important position in contemporary arbitration practice, as they create a predictable framework for international arbitration acceptable to common law, civil law and other legal system

- Less expensive and more confidential
- No supervision

# 3.Scope of arb. agreement

Usually it should be defined broadly

«all disputes arising out **and** all disputes in relation to/in connection with the contract»

*Otherwise* parties could question that the subject in dispute falls within the ambit of the arbitration agreement

# 4. Seat

Determines legal jurisdiction tied to arbitration procedure:

- influences law applicable to arbitral procedure
- determines which state courts can under what circumstances intervene in arbitral proceedings
- Influences circumstances under which award can be set aside

# Arbitral seat

- According to general principles governing international arbitration, parties, by selecting a particular location as the **SEAT** of the arbitration, are stating their intent for the procedural law of that location to apply to their arbitration agreement

- According to the Model Law and to most national legislation it is **the law of seat of the arbitration** (*lex loci*) that governs a range of important issues rising in the arbitration both with regard to external relationships with national courts and with regard to internal procedural issues including the applicability of basic guarantees regarding party autonomy and due process.

# THE SEAT

- the concept of **arbitral seat** is central to the international arbitration process
- **it is a legal construct not a geographic location**
- it indicates the nation where an international arbitration has its l**egal domicile or juridical home**
- it is important to distinguish between legal seat and location of the hearings (the seat is often congruent to venue of arbitration)

# CONSIDERATION THAT MIGHT BE RELEVANT TO THE CHOICE OF THE ARBITRAL SEAT

- NEUTRALITY OF THE FORUM STATE TO BOTH PARTIES (UNRELATED TO NEITHER OF THE PARTIES)
- LAW OF A CONTRACTING PARTY OF THE NEW YORK CONVENTION
- STANDARD FOR ANNULMENT OF ARBITRAL AWARDS
- SUPPORTIVE NATIONAL ARBITRATION REGIME
- EFFECTS ON SELECTION OF ARBITRATORS
- MATERIAL INFLUENCE ON THE SUBSTANTIVE OR PROCEDURAL ISSUES

# Arbitrators

Number and appointment method

SOLE – PANEL OF THREE

IF **SOLE**: (in general) PARTIES AGREE ON ARBITRATOR

IF **THREE** ARBITRATORS (in general)

- EACH PARTY APPOINTS ONE ARBITRATOR
- TWO CO-ARBITRATORS CHOOSE PRESIDING ARBITRATOR

If parties fail to reach an agreeement:

- Third party has to decide (arbitral institutions, state courts)

# LANGUAGE

SELECTION INFLUENCES POOL OF AVAILABLE ARBITRATOR

IF PARTIES MAKE NO CHOICE: usually arbitral tribunal will have to determine the language

# Law applicable to the dispute

The law applicable to the *substance* of the dispute can be

- National law
- A-National (i.e.: *lex mercatoria*)
- Parties may agree that the arbitral tribunal shall decide on basis of *what is fair and reasonable*

# National law

- Substantive law applicable to the underlying dispute
- ART. 28 MODEL LAW
- CHOISE OF THE PARTIES (IF MADE)
- SELECTION BY THE ARBITRATORS
- CONFLICT OF LAW (?) most legislation (as well as art. 28 of the model law) do not require the tribunal to apply the conflict of law rules of the seat nor they impose any specific choice of law rules on the arbitrators
- instead they **grant the tribunal broad power to apply** those conflict rule that it concludes are most appropriate to the case-by-case
- **Mandatory Domestic Substantive Law**

# A-national law

Only with the parties' agreement:

- ***GENERAL PRINCIPLE OF LAW****: PRINCIPLES OF LAW THAT ARE COMMON TO LEADING LEGAL SYSTEMS*
- ***LEX MERCATORIA****: CONTROVERSIAL CONCEPT REFERRING TO LAW DEVELOPED OUT OF COMMERCIAL DEALINGS AND JUDICIAL OR COURTS DECISIONS CONCERING THOSE DEALINGS*
- ***UNIDROIT PRINCIPLE OF INTERNATIONAL COMMERCIAL CONTRACTS:*** *DESIGNED TO ESTABLISH A NEUTRAL SET OF INTERNATIONAL RULES OF CONTRACT LAW. THEY ARE OPTIONAL BUT USED BY TRIBUNALS AS GENERAL GUIDANCE*

# Considerations affecting the selection of substantive law

- Parties to international transactions often desire their **own natonal law** o apply in part because it is familiar to themselves
- in some instances a party's home state law will provide no benefits and may instead be detrimental to the party itslef.
- failing selection of their home country's law, parties often prefer a law that is developed, stable and well adapted to commercial dealings
- They avoid the law of states that are newly formed
- Parties, in any event, generally select a law which they are familiar to or whose content they can find with reasonable ease

# Pathological ARB. AGREEMENT

VARIETY OF DEFECTS

- indefinite arbitration agreements
- referring to non existent arbitral institution, rules or arbitrators
- internally contradictory
- optional, non mandatory

# *pathological clauses"*

Frédéric Eisemann coined the term in *Commercial Arbitration Essays in Memoriam Eugenio Minoli* (Torino: Unione Tipografico-editrice Torinese, 1974). According to Eisemann, there are four essential elements of an arbitration clause.

*"(1) The first, which is common to all agreements, is to produce mandatory consequences for the parties,*

*(2) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award,*

*(3) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties,*

*(4) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement".*

An arbitration clause is pathological when it deviates from any one of the above four elements. How defective the clause is depends on the extent of the deviation from those elements.

## The following are some of the common issues that may render arbitration clauses defective.

*"[Parties undertake] to have the dispute submitted to binding arbitration through The American Arbitration Association [hereafter: AAA]* ***or to any other US court****. (…) The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500)."* – (Failed – *X v Y*)

"*In* ***the event of any unresolved dispute****, the matter will be referred to the International Chamber of Commerce*" – (Failed – rejected by the ICC)

"*In the case of dispute (contestation), the parties undertake to submit to arbitration but in the case of* ***litigation t****he Tribunal de la Seine shall have exclusive jurisdiction*" – (Failed)

**Does not appear to make arbitration mandatory**

# https://singaporeinternationalarbitration.com/2013/03/08/pathological-arbitration-clauses

"*[the Parties] shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich*". The Court held that the clause was void because it was **ambiguous** as to whether the parties' disputes should be arbitrated under the auspices of the ICC or the Zurich Chamber of Commerce, as each had its own competent permanent arbitration institution

**an institution is designated as the arbitrator***"All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between both parties".*

**Institution not referred to, does not exist or erroneously referred to**

# Model clause

All the dispute arising out or related to the present contract shall be settled by arbitration under the rules of the Chamber of Arbitration of Milan, by a sole arbitrator/three arbitrators, appointed in accordance with the rules. The arbitral Tribunal shall decide in accordance with the rule of law of….

The seat of the arbitration shall be…

The language of arbitration shall be…

# multistep

*Parties shall attempt in good faith to resolve any dispute arising out of this contract promptly by negotiation betweeen executive managers who have the authority to settle the controversy*

*If the dispute has not been resolved by negotiation within 45 days after delivery of the initial notice of negotiation, the parties shall attempt to settle the dispute by mediation under the rules of…*

*Any dispute arising out or relating to the contract which has not been resolved by mediation within 45 days shall be finally resolved by arbitration in accordance with the rules…*

# Drafting the arb. agreement

- The considerations for drafting international arbitration agreements are very well set out in the IBA Guidelines for Drafting International Arbitration Clauses.

- **Guideline 1:** "*The parties should decide between* ***institutional*** *and* ***ad hoc*** *arbitration*"

- **Guideline 2** "*The parties should select* ***a set of arbitration rules*** *and use the* ***model clause*** *recommended for these arbitration rules as a starting point*

- **Guideline 3:** *Absent special circumstances, the parties should not attempt* ***to limit the scope*** *of* ***disputes*** *subject to arbitration and should define this scope broadly.*

- **Guideline 4:** *The parties should select the* ***place of arbitration****.*

- **Guideline 5:** *The parties should specify the* ***number of arbitrators****.*

- **Guideline 6**: *The parties should specify the **method of selection and replacement of arbitrators** and, when ad hoc arbitration is chosen, should select an appointing authority.*

- **Guideline 7**: *The parties should specify the **language** of arbitration.*

- **Guideline 8**: *The parties should ordinarily specify **the rules of law governing** the contract and any subsequent disputes.*

# Other optional elements

Confidentiality issues

Allocation of cost and Legal fees

Extended judicial review of the award

# Arbitration proceeding

## SEAT, GOVERNING RULES, PROCEDURE

# Choise of law

- **Choice of law** in arbitration has three fundamental parts: (1) the procedural law governing the arbitration and its relationship with domestic courts; (2) the substantive law governing the disputed matter; 3) the law governing the arb. agr.
- While **substantive law** concerns the merits of the matter in dispute, including interpretation and application of the parties' underlying commercial contract, **procedural law** governs the arbitration process and the effect of the arbitration agreement on the matters in dispute.

# Procedural law

- **a)  which is the procedural law selected by the parties?**
- **b) to which aspects of the dispute does procedural law apply?**
- **c) which considerations might be relevant to the  choise of procedural law?**

# a) Arbitral seat

- According to general principles governing international arbitration, parties, by selecting a particular location as the **SEAT** of the arbitration, are stating their intent for the procedural law of that location to apply to their arbitration agreement

- According to the Model Law and to most national legislation it is **the law of seat of the arbitration** (*lex loci*) that governs a range of important issues rising in the arbitration both with regard to external relationships with national courts and with regard to internal procedural issues including the applicability of basic guarantees regarding party autonomy and due process.

# THE SEAT

- the concept of **arbitral seat** is central to the international arbitration process
- **it is a legal construct not a geographic location**
- it indicates the nation where an international arbitration has its l**egal domicile or juridical home**
- it is important to distinguish between legal seat and location of the hearings

- Arbitration law of the seat generally applies
- Some derogation might be allowed
- Therefore parties might choose rules applicable to their proceeding
- But mandatory provisions of the law of seat might not be derogated from (due process, impartiality, annulment..)

# b) To which aspects of the dispute does procedural law apply?

- **It is important to distinguish between procedural and substantive law**
- Some jurisdictions may differ on what may be considered procedural and substantive.
- Generally, the procedural law chosen by the parties and the conflicts of laws principles at the seat of the arbitration apply to determine how to make the distinction between procedural law and substantive law

# Procedural law is applicable to

**1. EXTERNAL RELATIONSHIP WITH NATIONAL COURTS**

- allocation of competence to consider and decide jurisdictional challenges between arbitral tribunals and courts (according to competence -competence, separability doctrine as enacted in different legal regimes….)
- judicial assistance to the constitution of a tribunal, including the selection, removal and replacement of the arbitrators
- judicial assistance in issuing provisional measures in aid of the arbitration
- judicial assistance in evidence taking or discovery in aid of the arbitration
- judicial review of procedural rulings of the arbitral tribunal and
- MOST IMPORTANT: **JUDICIAL REVIEW OF AWARDS, THAT IS ANNULMENT OF ARBITRAL AWARDS**

- 2. **INTERNAL PROCEDURES OF ARBITRATION**
- procedural steps and timetable of an arbitration
- evidentiary and pleading rules
- oath for witnesses
- conduct of hearings
- disclosure and discovery rules
- rights of lawyers to appear and ethical obligation of lawyers
- arbitrators' procedural discretion
- arbitrators' relationship with the parties including their liability
- arbitrators' remedial power including to order provisional relief
- form, making and publication of the award
- **At this regard** a further distinction should be made between **mandatory law – non mandatory rules and** the **rules for arbitration adopted by the parties (see: hierarchy)**

# Legal hierarchy - procedure

a) Mandatory provisions of the law of seat

b) Parties' agreement (not in conflict with mandatory provisions; arbitral institution rules)

c) Non mandatory provisions of the law the seat in not in conflict with a) and b)

d) discretion of the arbitral tribunal

## c) CONSIDERATION THAT MIGHT BE RELEVANT TO THE CHOICE OF THE ARBITRAL SEAT

- 1) LAW OF A CONTRACTING PARTY OF THE NEW YORK CONVENTION
- 2) STANDARD FOR ANNULMENT OF ARBITRAL AWARDS
- 3) SUPPORTIVE NATIONAL ARBITRATION REGIME
- 4) EFFECTS ON SELECTION OF ARBITRATORS
- 5) MATERIAL INFLUENCE ON THE SUBSTANTIVE OR PROCEDURAL ISSUES

# Choice of Substantive Law

- Substantive law applicable to the underlying dispute
- ART. 28 MODEL LAW
- CHOISE OF THE PARTIES (IF MADE)
- SELECTION BY THE ARBITRATORS
- CONFLICT OF LAW (?) most legislation (as well as art. 28 of the model law) do not require the tribunal to apply the conflict of law rules of the seat nor they impose any specific choise of law rules on the arbitrators instead they grant the tribunal broad power to apply those conflict rule that it concludes are most appropriate to the case-by-case

- **Mandatory Domestic Substantive Law**

# Choice of subtantive law under national arbitration legislation in absence of choice of law agreement

## 5 approach:

1) the law of the seat mandatorily require to apply local conflict of law rules or local substantive law (in the past..)
2) Legislation of the seat imposes specialized choice of law rules seated in the territory (*the tribunal shall decide according to the rule of law with which the case has the closest connection: swiss*
3) *Some statutes authorize arbitrators to apply the choice of law rules they consider applicable or appropriate (model law – art. 28)*
4) *Some legislation grants tribunal the power directly to apply whatever substantive rules of law they consider appropriate without applying conflict of law rules*
5) *Exceptionally a nation's law may dictate that particular claims or defenses must be heard by the arbitrator under mandatory national law (antitrust)*

# SUBSTANTIVE LAW

- RULE OF LAW (NATIONAL LEGAL SYSTEMS)

with the parties' agreement:

- ***GENERAL PRINCIPLE OF LAW****: PRINCIPLES OF LAW THAT ARE COMMON TO LEADING LEGAL SYSTEMS*
- ***LEX MERCATORIA****: CONTROVERSIAL CONCEPT REFERRING TO LAW DEVELOPED OUT OF COMMERCIAL DEALINGS AND JUDICIAL OR COURTS DECISIONS CONCERING THOSE DEALINGS*
- ***UNIDROIT PRINCIPLE OF INTERNATIONAL COMMERCIAL CONTRACTS:*** *DESIGNED TO ESTABLISH A NEUTRAL SET OF INTERNATIONAL RULES OF CONTRACT LAW. THEY ARE OPTIONAL BUT USED BY TRIBUNALS AS GENERAL GUIDANCE*

# Considerations affecting the selection of substantive law

- Parties to international transactions often desire their **own natonal law** o apply in part because it is familiar to themselves
- in some instances a party's home state law will provide no benefits and may instead be detrimental to the party itslef.
- failing selection of their home country's law, parties often prefer a law that is developed, stable and well adapted to commercial dealings
- They avoid the law of states that are newly formed
- Parties, in any event, generally select a law which they are familiar to or whose content they can find with reasonable ease

# ARBITRATORS SELECTION

Number; method of selection; qualification; challenges

# Introductory remarks

Tribunal usually consists of one or three arbitrators

In case of sole arbitrator: parties usually have to reach agreement

In case of three arbitrators: usually each party appoints one arbitrato and co-arbitrators togheter appoint the presiding arbitrator

Any arbitrator has to be indipendent and impartial by all means

# Party Autonomy

- Selection and removal of the arbitrators is one of the most important aspect of arbitral proceeding

- NY CONV: the recognition of the award may be refused if **the composition of the arbitral tribunal was not in accordance** with the agreement of the parties (or failing sich agreement was not in accordance with the law of the country where the award was made

- MODEL LAW ART. 11.2 “the parties are free to agree on a procedure of appointing the arbitrators”

# Number and selection

- **Uneven number**
- The M**odel law (**and national legislation) provide that absent agreement the number of arbitrators shall be **three** *(see institutional rules: generally one)*
- **Method of selection**

- *Party-appointed arbitrators*
- *Arbitrator selected arbitrators*
- *Administrative selection of the arbitrator*
- *Arbitrators selected by domestic courts*

# PARTIES' AUTONOMY - IMPARTIALITY

Parties are free to choose whomever they whish..

But there are limits mainly concerning

- INDEPENDENCE AND IMPARTIALITY

- Ad hoc – institutional arbitration
- Parties' appointed arbitrators

# INDEPENDENCE and IMPARTIALITY

- INDEPENDENCE: No fact, circumstances, or relationships between the parties and the arbitrators exist which may affect the arbitrator's freedom of judgment

- IMPARTIALITY is a subjective element linked to the state of mind and to the behavior of the arbitrator. And it implies that the arbitrator does not favor one of the parties

# independence

To be *independent*:

- No financial interest in the outcome of the case
- Not depending on one of the parties for any benefit
- No close relationships to the parties

to be *impartial*

- No reasons to favor one of the parties
- No preconceived notion about the issues in dispute

- **conflict of interest**: qualifies as the situation where a person carries out a function in a context, performing actions which provoke favorable context for himself or unfavorable ones for others in a different context B
- **Neutrality** can be defined as the absence of cultural legal, social proximity with one of the parties

Concepts of impartiality/independence are not easy to define

The issue become even more complicated in international arbitration

Universal standards?

Sometimes i*t might be hard to distinguish which information shall be disclosed*

*Guidance for arbitrators and parties (IBA): general standard to bring order both for parties and arbitrators*

# IBA Guidelines

- THE IBA GUIDELINES ON CONFLICT OF INTEREST.
- ORIGINALLY ENACTED IN 2004 THEY WERE REVISED IN 2014
- They Provide :

- general standards regarding impartiality, independence and disclosure obligations
- three lists of types of relationships that do or do not represent potential conflicts of interest.
- Comment on information do be disclosed by arbitrators
- criteria as to when to reject an appointment
- examples for conflicts of interest and comment on how thy should be handled

# THE LISTS

- The "**red**" list is comprised of waivable and non-waivable conflicts of interest warranting the disqualification of the arbitrator
- The "**orange**" list includes types of relationships that *may* give rise to justifiable doubts as to the independence and impartiality of the arbitrator, but will depend on the facts of the particular disclosure to determine whether disqualification is warranted
- The "**green**" list is comprised of relationships that the prospective arbitrator has no duty to disclose because, according to the Guidelines, they do not generate an actual or appearance of a conflict of interest

# Red list

Non – waivable

Arbitrator must no accept appointment

E.g.: arbitrator is the manager of one of the parties

Waivable

Arbitrator should not accept unless the *both* parties waive the conflict (they have the opportunitiy to waive and the arbitrator may accept)

E.g. arbitrator has previously been involved in the dispute (before he was appointed he has given legal advice on the dispute to one of the party)

# Orange list

Parties might object to the appointement within a period of time

If the parties do not object to the conflict they are deemed to have accepted the arbitrator

e.g.: arbitrator has been appointed as an arbitrator at least twice by one of the parties in the past three years

# Green list

Arbitrator does not even have to disclose the respective information

e.g.: arbitrator served as arbitrator togheter with one of the counsels before

# In order to guarantee impartiality

## DISCLOSURE

-obligation of the arbitrators to disclose information that might give rise to potential conflicts of interests/doubts on impartiality

Withdraw……

## CONFIRMATION

*Insititutional arbitration*

## CHALLENEGES

- Administrative bodies/courts with supervisory power over arbitrators

# Disqualification of Arbitrators Due to Conflicts of Interest

**INSTITUTIONAL ARBITRATION**

- DISCLOSURE (DUTY OF)
- COMMENTS OF THE PARTIES

- CONFIRMATION (BY THE INSTITUTION)

- CHALLENGES (INSTITUTION AND THE COURTS)

# Disqualification of Arbitrators Due to Conflicts of Interest

- AD HOC ARBITRATION
- in ad hoc arbitration, the arbitrator is appointed and will serve as arbitrator after his acceptance, unless circumstances arises according to the applicable law or to the agreement of the parties that allow the parties themselves to challenge the arbitrator
- Challenges according to national law

# Once confirmed…

What if new circumstances giving rise to a conflict of interests arise after the arbitral tribunal was confirmed?

- The arbitrator has to disclose all relevant information
- The parties may not only comment but also challenge the arbitrator
- The arbitral tribunal /or the courts decide

# What if…

***.. If The arbitrator has disclosed relevant information***

- Parties may comment

- In institutionalized arb. the institution generally decides (based on disclosure and comments) over the *confirmation*

***.. If the tribunal is confirmed and new circumstances giving rise to a conflict of interests arise***

- the arbitrator has to disclose all relevant information

- The parties may challenge the arbitrator

- The Institution or the arbitral tribunal usually decide over the challenge

***If the challenge is successful: replacement of arbitrator***

*- with the initial appointment method or*

*- the arbitral institution will apppoint*

***If the challenge is unsuccessful***:

- challenging party may try to have the arbitrator removed by the local state courts

- Seek the vacation of the award?…

# Summary

Tribunal usually consists of one or three arbitrators

In case of sole arbitrator: parties usually have to reach agreement

In case of three arbitrators: usually each party appoints one arbitrato and co-arbitrators togheter appoint the presiding arbitrator

Any arbitrator has to be independent and impartial

# Independence and impartiality

In order to be ***independent*** *an arbitrator must:*

- Have not financial interest in the outcome of the dispute
- Not be depending on one of the parties for any benefits
- Have no close relationship to the parties

In order to be ***impartial***

- Should not have reason to favor one of the parties
- Should not be biased because of preconceived notions about the issues in dispute

# to secure i...i.

How do the parties know whether an arbitrator potentially is not impartial or independent?

- Appointed arbitrator must **disclose** all information giving rise to potential **conflict of interests**

Sometimes it might be hard to tell what shall be disclosed:

*IBA Guidelines on conflict of interests* in I.A. provide guidance for arbitrators and parties, providing

- comment on information to be disclosed
- criteria as to when to reject an appointment
- Examples for conflicts of interests and comment on how they should be handled

# Multi-Party Arbitration Proceedings

- The appointment of the arbitrators cannot work in conformity with the arbitration agreement.
- The problem was clearly addressed in 1992 for the first time by the French Court of Cassation in the so called "Dutco" case decided on January 7th
- "*the principle of the equality of the parties in the designation of arbitration is a matter of public policy and that can be waived only after the dispute has arisen*" - See icc rules and CAM rules: unless otherwise "resolved" the tribunal is appointed by the institution

# The arbitral proceeding

# Initiation of the proceeding

In cases of Institutionalized proceedings, arbitration generally begins when a **request for arbitration** is filed with the secreteriat

Otherwise (depending on parties' choice and applicable rules of law) : commencement could also be when:

- Request for arbitration is **forwarded** to, or
- **received** by respondent, or
- the tribunal is fully **constitued**

# Initiation of the proceeding (Inst. Arb.)

In case of institutional arbitration, proceedings generally begin when **a request for arbitration** is filed with the Secretariat of the institution

The secretariat **forwards the request** to the respondent (togheter with the statement of claim)

The secretariat sets timeframe for the **respondent to submit his answer** (and counterclaim)

Then the **arbitral tribunal** has to be constitued (sole arbitrator; panel; disclosure, confirmation, challenges)

# Conducting the proceedings

The arbitral tribunal has to undertake **preliminary measures** in order to organize the proceeding

Procedural timetable and other choices:

Language – Location -Technologies and Evidence admitted (parties agreement)

Parties may submit **written statements**

Arbitral Tribunal conducts one or more **oral hearings** with the parties (unless parties agree on documents-only proceedings)

Hearing are usually held in private (confidentiality)

# Conducting the proceeding

Taking of evidence (by the arbitral tribunal)

- Unless specified otherwise by the parties, arbitral tribunal has broad **discretion**
- Discretion may be used to **bridge the gap** between parties from common law and civil law countries (pre-trial discovery, cross examination of witnesses)
- **IBA Guidelines on the taking of Evidence** in International Arbitration can be used as guidelines or parties might agree on their use, binding the arbitrators to use them in the taking of evidence

# Conducting the proceedings (3)

During all stages arbitral tribunal may issue interim and conservatory measures:

- Orders pertaining to procedural issues that need to be resolved before the proceeding can move forward (Non reviewable by state courts)
- Interim or partial awards (pertaining to substance, jurisdiction, applicable law)

# The award

When the arbitral tribunal is satisfied that both parties **had reasonable opportunity to present their case**, the proceeding will be closed and the tribunal will issue the final award

Usually within **timeframe** set by arbitration rules or national law applicable to arbitral procedure

Arbitral tribunal ussually has to give reasons

Only few institutions scrutinze draft arbitral awards

The final decision regarding substantive issues **always lies with the arbitral tribunal** (empowerd by the parties to do so)

# Commencing Arbitration Proceedings

- 1)REQUEST FOR ARBITRATIONS
- 2)ANSWER – COUNTERCLAIM
- 3) REPLY TO COUNTER CLAIM
- 4) CONSTITUTION OF THE ARBITRAL TRIBUNAL (APPOINTMENT AND CONFIRMATION)

# Taking of evidence

«cultural» differences concerning:

- Qualification of rules (substantive v. procedural)
- Admissibility (common law juries need sticter rules)
- *Evaluation*

# IBA rules on the taking of evidence

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, **economical and fair process for the taking of evidence in international arbitration**.

The Rules provide mechanisms **for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings**.

The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations.

The IBA Rules of Evidence reflect procedures **in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures**

If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they SPECIFY that in the clause

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter.

# IBA rules on the taking of evidence

- Provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings.
- Reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

- Documents and witnesses

# Documents – disclosure

- Art. 3 (IBA RULES) if adopted by the parties, **exclude any authomatic right do disclosure** but permit a party to make a **specific request for a particular document** or narrowly described category of documents on a showing of relevance to the case and materiality to its outcome (see: **The Redfern schedule** )

- If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal **may infer that such document would be adverse to the interests** of that Party.

# Redfern schedule

The Redfern schedule (originally devised by Alan Redf ern) is a **collaborative document**, to which the cl aimant, respondent and tribunal all contribute.

Different columns of the schedule are completed by the parties at various times.

The purpose of the schedule is to create a user-friendly record of requests for disclosure, the parties arguments on those requests and the tribunal's decision.

The schedule consists of four columns. Separate entries are made in each column in respect of every requesteddocument or c lass of documents. The specimen schedule illustrates the entries for a single request ("request 1").

**Column 1**
sets out the request for disclosure. Use a separate entry for each document or class of documents. Consider whether bro ad classes of documents can be divided into sub-classes or single documents.

**Column 2**contains the requesting party's submissions, both in support of the request and in rebuttal of the opposing party's submissions. The submissions in support of the request should do two things: First, it should identify the paragraph of the written pleading or claim submissions to which the requested document relates. If the claim submissions are formulated in a detailed and focused manner, this will be relatively easy. Secondly, it should explain why the documents sought are relevant. This will usually involve explaining exactly what the documents are, what information they are thought to contain, and how that information is likely to impact on the issues which the tribunal has to decide.Column 2 also contains the requesting party's submissions in rebuttal of the opposing party's objections. This section will be completed at later date.

**Column 3** contains the objecting party's submissions . Of course, if the objecting party is happy to produce a specified document or class of documents, then this should be stated. Otherwise, the reasons for resisting production should be set out concisely. Typical grounds for resisting production include irrelevance, the request being too broad in its scope, immunity or privilege, or that the cost of producing the documents is disproportionate.

The requesting party will then respond by entering rebuttal submissions in column 2.

**Column 4** summarises the tribunal's decision on each request, and sets out, in brief, the reasons for that decision.

# Example Redfern Schedule

| Document or category of documents | Relevance and materiality | Possession of Documents | Respondent's Objections | Arbitral Tribunal's Decision |
|---|---|---|---|---|
| The minutes of Respondent's June 2012 executive committee meeting relating to profit forecasting of Target company. | Respondent's defence is (in part) that it made no misrepresentation and took reasonable steps to make an honest forecast.<br><br>The Minutes of the executive committee meetings could shed light on the extent to which Respondent believed in the viability of the profit forecasts it submitted prior to the SPA. | This meeting was referred to by letter X. It is highly likely that minutes were taken of that meeting.<br><br>These documents are not in the Claimant's possession. | The minutes of Respondent's June 2012 executive committee meeting are not relevant to the issues in the present dispute.<br><br>The minutes of this meeting relate to other, unrelated corporate governance issues which are commercially sensitive and confidential.<br><br>Accordingly, Respondent objects on the grounds of :<br><br>- Lack of sufficient relevance to the case or materiality to its outcome (Article 9(2)(a) of the IBA Rules.<br><br>- Grounds of commercial confidentiality (Article 9(2)(e) IBA Rules). | ??? |

# Other evidence: witnesses

With regard to evidence, in general arbitration relies more heavily on **documentary** evidence than on oral testimony

It is also a matter of legal culture: The civil law system is heavily dependent on documentary evidence, while the common law system prizes direct and cross-examination of live witnesses.

Arbitrators may have a civil or common law background. Yet, typical international arbitration has features of both systems.

Different rules and different legal cultures will come into play with regard to the **taking of witness** evidence during the oral hearing.

In the **common law system** parties' counsels conduct the **direct and cross examination**, while in **civil law** country examination was historically **responsibility of the arbitrators**

In international arbitration departures form particular national legal system is almost inevitable,

A good compromise again is the one contained in the IBA RULES see rule 8

# Witnesses

- Art. 8 The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing.
- The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection
- Under this approach each party is free to nominate whatever witnesses it wishes to support its case and only exceptionally will the tribunal direct that a particular witness be made available by one of the parties
- At the hearing tough, generally **the tribunal will permit the parties' attorneys to conduct the direct and cross examination** but it will also make **occasional interjections and follow up questions** in a more active way then common law judges or arbitrators

# Expert witness

- Expert testimony can be presented trough experts appointed by each party and/or by the Tribunal
- common law and civil law culture influences the attitude of arbitrators: tribunal with a common law tenor will generally allow the parties to present their expert, consistent with the adversarial tradition
- In contrast civil law tribunal tend to be more skeptical about the benefit of party appointed expert and are inclined toward the use of only tribunal appointed expert
- the IBA RULES admit and regulate both options as rule n. 5 refers to party appointed expert and rule n. 6 refers to tribunal appointed experts

# Provisional measures

- Conservatory – protective – interim relief
- Protect parties from damages during the course of the arbitration proceeding
- Preserve a factual or legal situation so as to safeguard the rights involved in arbitration

# Provisional remedies

- **Arbitrators' authority**

National legislation (Law of the seat)

Does the law of the seat allow the arbitrator to grant provisional remedies?

Model law: art. 17 (2006)

Italian law: no

Institutional rules

Limits: only parties; enforcement; object; standards; time

Specialized procedures (emergency arbitration)

- **National Courts in aid of**

Prior to arbitration (ad hoc)

Measures binding 3rd parties

Limits to arbitrators' authority

Concurrent jurisdiction?

Appropriate national Courts?

# Authority

- Model law art. 17 Extensively revised in 2006
- Unless otherwise agreed by the parties, the arbitral tribunal may at the request of a party, grant interim measures”
- Art. 818 italian c.p.c “the arbitrators may not grant attachments or other interim measures of protection, except if otherwise provided by the law”

# Criteria (for arbitrators)

- In general a party seeking an interim measure must satisfy specific requirements (*serious* or *irreparable* harm; urgency; prima facie case)
- Model law 17 (A) "the party seeking an interim measure…shall satisfy the tribunal that
- - ***harm*** not adequately reparable by an award of damages is likely to result..
- - ***Reasonable possibility*** to succeed

# Types of remedies

Tribunal's discretion  conforming to principled standards

Wide varieties: see. Model law. Art. 17

Maintaining the status quo

taking action/not taking action

Preserving assets

Preserving evidence

Preventing aggravation of the dispute

Performing contractual obligation

Providing security for claims or costs

Complying with confidentiality obligation

# Emergency Arbitrator (SIAC)

- **In July 2010, the new SIAC Rules were promulgated which provided for two new and innovative provisions for parties**: the emergency arbitrator and the expedited procedure

- The emergency arbitrator provisions were introduced in the SIAC Rules in order to address situations *where a party is in need of emergency interim relief before a Tribunal is constituted*. SIAC was the first international arbitral institution based in Asia to introduce emergency arbitrator provisions in its arbitration rules.

- On average, an emergency arbitrator takes about 8 to 10 days to render its award / order after having heard the parties.

- Awards issued by emergency arbitrators are enforceable under Singapore law.

- Singapore's international Arbitration Act was amended in 2012 to provide for the enforceability of the awards and orders issued by emergency arbitrators in Singapore-seated arbitrations and also arbitrations seated outside Singapore. This made Singapore the first jurisdiction globally to adopt legislation for the enforceability of such awards and orders in Singapore.

# Emergency arbitration

1.A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar. The party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. The application for emergency interim relief shall include:

- a. the nature of the relief sought;
- b. the reasons why the party is entitled to such relief; and
- c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties.
- 2.Any application for emergency interim relief shall be accompanied by payment of the non-refundable administration fee and the requisite deposits under these Rules towards the Emergency Arbitrator's fees and expenses for proceedings pursuant to this Schedule 1. In appropriate cases, the Registrar may increase the amount of the deposits requested from the party making the application. If the additional deposits are not paid within the time limit set by the Registrar, the application shall be considered as withdrawn

- 3.The President shall, if he determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator within one day of receipt by the Registrar of such application and payment of the administration fee and deposits.

- 4.If the parties have agreed on the seat of the arbitration, such seat shall be the seat of the proceedings for emergency interim relief. Failing such an agreement, the seat of the proceedings for emergency interim relief shall be Singapore, without prejudice to the Tribunal's determination of the seat of the arbitration under Rule 21.1.

- 5.Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within two days of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed.

- 6.An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.

- 7.The Emergency Arbitrator shall, as soon as possible but, in any event, within two days of his appointment, establish a schedule for consideration of the application for emergency interim relief. Such schedule shall provide a reasonable opportunity for the parties to be heard, but may provide for proceedings by telephone or video conference or on written submissions as alternatives to a hearing in person. The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, without prejudice to the Tribunal's determination.

- 8.The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties. The Emergency Arbitrator shall give summary reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.

- 9.The Emergency Arbitrator shall make his interim order or Award within 14 days from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time. No interim order or Award shall be made by the Emergency Arbitrator until it has been approved by the Registrar as to its form.

- 10.The Emergency Arbitrator shall have no power to act after the Tribunal is constituted. The Tribunal may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his own jurisdiction. The Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any interim order or Award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn.

- 11.Any interim order or Award by the Emergency Arbitrator may be conditioned on provision by the party seeking such relief of appropriate security.

- 12.The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.

- 13.The costs associated with any application pursuant to this Schedule 1 may initially be apportioned by the Emergency Arbitrator, subject to the power of the Tribunal to determine finally the apportionment of such costs.

# Judicial enforcement

- The arbitral tribunals lack the authority to enforce their provisional remedies
- The enforcement  is the responsibility of national courts
- Model Law art. 17 H /Specific provisions
- Absent specific provisions: Provisional measures /final awards (they are final in that they dispose of the request for preliminary relief)

# Judicial Provisional measures *in aid of arbitration*

Concurrent jurisdiction?

- New York Convention (art. II): different approaches (USA) with regard to international arbitration
- The weight of authority concluded that article II does not forbid court ordered provisional remedies *in aid of arbitration (unless parties agreement …)*
- *National law: concurrent jurisdiction/preferrend forum*
- *Model law art. 9 and 17: concurrent – does not waive rights under an arbitration agreement.*
- *Appropriate national Courts? Jurisdiction*
- *- in aid of arbitration seated*
- *- location of defendant's assets*

# Model Law art. 9

- It is not incompatible with an arbitration agreement for a party to request , before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

# Model law art. 17J

- A court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts.

# Antisuit injunctions

- *Case C-159/02 Gregory Paul Turner v Felix Fareed Ismail Grovit and Others*

- *Case C-185/07 Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*

- *In Case C-536/13, JUDGMENT OF THE COURT (Grand Chamber) 13 May 2015'Gazprom' OAO Lietuvos Respublika,*

# ARBITRATION AWARDS

- To ensure that the award will be recognized and enforced, an arbitrator or tribunal must:
- Make certain that it has jurisdiction to decide the dispute;
- Comply with the procedural rules governing the arbitration;
- Conform to any dictates in the arbitration agreement;
- Apply the substantive law governing the dispute (the lex CAUSAE); and
- When required (e.g., ICC arbitration), have the arbitral organization approve the award.

# TYPES OF AWARDS

Provisional decisions
Partial awards
Interim awards
Final awards
Termination of proceedings without a ruling on the merits
Consent or agreed awards
Default awards

# FORMAL REQUIREMENTS

MODEL LAW IS RAPRESENTATIVE:

SEE ART. 31:

i) be in writing;

ii) contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award;

iii) state the date and the place of arbitration; and

iv) be signed by all of the arbitrators or contain an explanation for any missing signature(s).

# REMEDIES

The remedies that might be included in an arbitral award are fairly wide ranging, including:

- Monetary relief
- Punitive damages;
- Specific performance;
- Injunctive or declaratory relief;
- Rectification or adaptation of contracts;
- Interest;
- Attorneys' fees;
- Costs.

# Attacking the arbitral award

The arbitral award has **binding and final effect** on the parties.

(Loosing) Parties have two options:

- Attacking the award in the Country where it was made (trying to have the **award set aside**)

- Opposing the enforcement in another Country (award's **enforcement refused**)

# New York Convention

- 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 that party furnishes to the competent authority where the recognition and enforcement is sought,proof that:

- (e) *The award has not yet* ***become binding*** *on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

# Setting aside the award

# Introductory remarks

As a general rule; arbitral awards have final and binding effect on the parties

Arbitral award can be attacked only by:

- - the parties trying to have the award set aside
- - the party trying to have the award's enforcement refused

In general: no full review of the award but only legal grounds that pertain to the arbitral procedure (not to the merit) or public policy issues.

# Proceeding for setting aside

Only **in the Country of the seat of the arbitration**

**Legal grounds** depending on **the law of the seat**

See the Model law as a general reference

Keep in mind that there are **national legislation** providing grounds for annulment **more expansive** than under the model law, and other national legislation providing grounds that are **less expansive** than under the model law

Some Jurisdictions explicitly allow for substantive review of the award

# Model law art. 34

(1) **Recourse to a court against an arbitral award** may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of

this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

*(a)* **the party making the application furnishes proof that:**

(i) a party to the arbitration agreement referred to in article 7 was 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 this State; or

(ii) the party making the application was not **given proper notice of the appointment** of an arbitrator or of the arbitral proceedings or **was otherwise unable to present his case**; or

(iii) the award deals **with a dispute not contemplated** by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the **composition of the arbitral tribunal** or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

# *Ex officio*

*(b)* the court finds that:

(i) the subject-matter of the dispute **is not capable of settlement** by arbitration under the law of this State; or

(ii) the award is in conflict with the **public policy** of this State.

**See: legislation more and less expansive**

**See: agreements of the parties limiting or expanding judicial review of arbitration awards.**

# Time limits (art. 34.3)

(3) An application for setting aside may not be made after **three months** have elapsed from the date on which the party making that application had

received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral

tribunal.

# Setting aside proceedings

If challenges are successful: award will be declared null and void

The consequences will depend on the law of the seat:

- in most situations the state courts will remit the case to the arbitral tribunal to save the parties' resources
- In other situations (invalidity of the agreement): the parties can initiate state court proceeding
- In other situations (gross mistakes of the tribunal), the parties can initiate a new proceeding before a new tribunal

# Recogntion and enfocercement

# Recognition and enforcement

**Recognition**: *recognizing the legal force and effect of an award*

**Enforcement:** *concerns the forced execution of an award previously recognized by the same State*

Legal grounds depend on the law of the country of enforcement

But they are often identical due to the N.Y. Convention (art. 5)

Proceedings for the enforcement might differ but remember art 3. "T*here shall* ***not*** *be imposed* ***substantially more onerous conditions*** *or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of* ***domestic arbitral awards"***.

# Recognition and enforcement

- New york Convention 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 that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
- (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; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (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
- (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
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

- Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country

# Article VI

- If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, **adjourn the decision on the enforcement of the award** and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security

# National arbitration

## Italian Legal framework

# ITALIAN ARBITRATION LAW

Italy is a signatory to the New York Convention and ratified it on 31 January 1969 without any reservation to its general obligations. The Convention enterd into force in Italy on 1 May 1969.

Italy is also a party:

- to the 1927 Geneva Convention on The Execution of Foreign Arbitral Awards,
- to the 1961 European Convention on International Commercial Arbitration as well as
- to the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

# Legislative framework

**Code of Civil Procedure – Book IV, Title VIII, Articles 806 – 840 *(CPC)***

Arbitration in Italy is governed by the CPC rules, which are structured as follows.

*Chapter I* Articles 806 – 808 *quinquies* provide general rules on the arbitration agreement (i.e. formal requirements, arbitrability, effects and interpretation of the arbitration agreement) as well on the *arbitrato irrituale* .

*Chapter II* Articles 809 – 815 concern the arbitrators (i.e. number, appointment, replacement, incapacity, acceptance, loss, liability, rights and challenge of the arbitrators).

*Chapter III* Articles 816 – 819 *ter* details on the arbitration procedure (i.e. seat of arbitration, procedural rules, evidence and stay of the proceedings).

*Chapter IV* Articles 820 – 826 deal with the award (i.e. timing, content, effects and correction).

*Chapter V* Articles 827 – 831 deal with challenging the award (i.e. grounds for setting aside, appeal, revocation and third party opposition).

*Chapter VI* Articles 832 govern arbitrations pursuant to pre-established arbitral rules

*Chapter VII* Articles 839 – 840 govern the recognition and enforcement of foreign awards and the procedure for opposing such recognition and enforcement.

# Historical background

*Law 9th February 1983, No. 28 (1983 Reforms)* represented the first attempt to reduce the rigidity of the CPC by excluding Italian nationality as a basic requirement for appointment as an arbitrator.

*Law 5th January 1994, No. 25 (1994 Reforms)* introduced new rules regarding international arbitration in compliance with international conventions and, in particular, with the New York Convention.

*Legislative Decree 2nd February 2006, No. 40 (2006 Reforms)* ***re-drafted most of the previous CPC provisions on arbitral proceedings. The aim of the 2006 Reforms was to promote and improve recourse to arbitration as an attractive alternative to ordinary judicial proceedings***

***Legislative Decree 5/2003 (company disputes arbitration)***

***Law Decree No. 132/2014 (converted into Law No. 162/2014) transfer to arbitration***

Arbitrato rituale (ordinary arbitration)

Arbitrato irrituale (free arbitration): binding as a contract/ non- enforceable

**Arbitrato extracontrattuale** or arbitration on matters not provided for in a contract

# General principles

Due process

Parties' autonomy

Non intervention by the courts

# The arbitration agreement

The arbitration agreement can be in the form of a clause within a contract or a stand-alone agreement. In either case, the arbitration agreement should be in writing and should clearly set out the subject- matter submitted to arbitration

Arbitrability: art. 806 and 829

Separability: art. 808.3

# The arbitral tribunal

Constitution: parties' agreement – default rules 809

Odd number

Court intervention

Capacity

Independence and impartiality

Challenges: art. 815

# Commencement of the arbitation

Written request

Appointment of arbitrator

Service to the other party

# Arbitral proceeding

Parties'autonomy

Arbitrators apply the rules the deem suitable 816 bis

Due process 816 *bis*

*Taking of evidence* art. 816 *ter*

Choise of law: 816 bis

# Making of award

Time limit: 240 day (see art. 820.2)

Extension

*Form and contents of the award* : 823 majority – writing – specific content (arbitrators; seat; parties, arb. Agreement, subject matter; reasons, decision; signature)

Effect: see art. 824 *bis*

# Setting aside the award

Action for nullity: art. 829

Revocation

Opposition by third party

# Art. 829

1) if the arbitration agreement is invalid, without prejudice to the provision of Article 817, paragraph 3 [to be read: paragraph 2];

2) if the arbitrators have not been appointed in the form and manner laid down in Chapters II and VI of this Title, provided that this ground for nullity has been raised in the arbitral proceedings;

3) if the award has been rendered by a person who could not be appointed asarbitrator according to Article 812;

4) if the award exceeds the limits of the arbitration agreement, without prejudice to the provision of Article 817, paragraph 4 [to be read: paragraph 3], or has decided the merits of the dispute in all other cases in which the merits could not be decided;

5) if the award does not comply with the requirements of Article 823, numbers (5), (6) and (7);

6) if the award has been rendered after the expiry of the prescribed time-limit, subject to the provisions of Article 821;

7) if during the proceedings the formalities prescribed by the parties under express sanction of nullity have not been observed and the nullity has not been cured;

8) if the award is contrary to a previous award which is no longer subject to recourse or to a previous judgment having the force of *res judicata* between the parties, provided such award or such judgment has been submitted in the proceedings;

9) if the principle of contradictory proceedings (*principio del contraddittorio*) has not been respected in the arbitration proceedings;

10) if the award terminates the proceedings without deciding the merits of the dispute and the merits of the dispute had to be decided by the arbitrators;

11) if the award contains contradictory provisions;

12) if the award has not decided some of the issues and objections raised by the parties in conformity with the arbitration agreement.

# Substantive law

829....

The recourse for violation of the rules of law relating to the merits of the dispute is admitted only if expressly provided by the parties or by the law.

The recourse against decisions which are contrary to public policy shall be admitted in any case.

# Enforcement and recognition

New York Convention

Art. 839 (request to the President of the C. App.)

Art. 840 (challenge to the C App.)