

Introduction to International Commercial Arbitration

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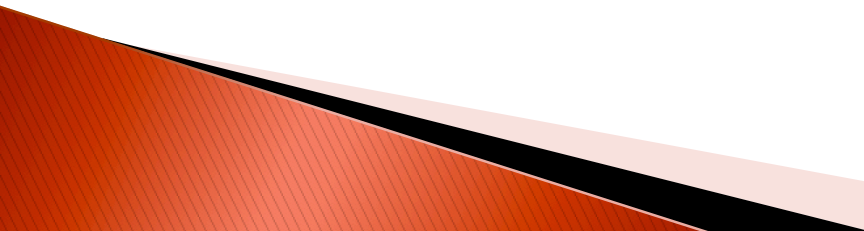
Arbitration Agreements

Lesson n.4

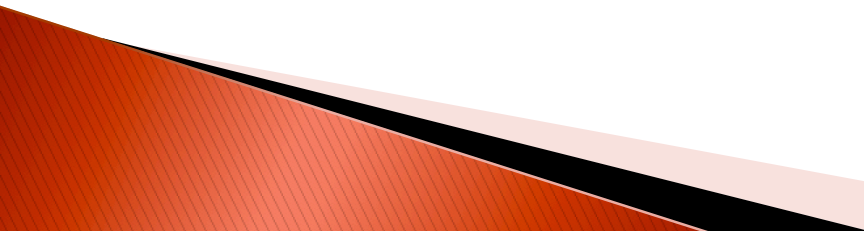
Categories of Arbitration Agreements

- ▶ Basically, Arbitration Agreements are divided into two categories, considering the time the agreement is reached:
 - Before the dispute arises: Arbitration Clause (future disputes will be submitted to arbitration)
 - After the dispute has arisen: Submission Agreement (existing disputes are submitted to arbitration)
- ▶ Statistically, Arbitration Clauses are more frequent. It is easy to guess why.

Where to find Arbitration Clauses

- ▶ Documents in force between private entities (Contracts)
 - ▶ Documents in force between a private entity and a public entity (Contracts)
 - ▶ Documents in force between public entities (Treaties)
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Requirements for its validity – International standards

- ▶ Although some national legislations may have different requirements, usually an Arbitration Agreement is valid when:
 - 1) It is in writing;
 - 2) It deals with existing or future disputes, in respect of a defined legal relationship;
 - 3) The subject matter is capable of settlement by arbitration.
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In writing

- ▶ This requirement is present in most national laws, international conventions (including the 1958 NY Convention) and international models (UNCITRAL Model Law).

What does «in writing» mean?

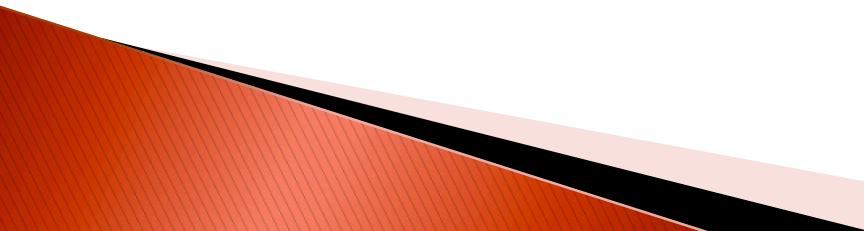
- ▶ The NY Convention is date 1958, so it mentioned:
 - Contract
 - Exchange of letters
 - Telegrams
- ▶ The Model Law is more up-to-date, so it also takes into account electronic communications

What does «in writing» mean?

- ▶ But is not just a matter of technological update. The Model Law also takes into account:
 - written form *ad probationem*
 - by reference
 - implied consent to arbitration
- ▶ This is, however, a Model Law. Many national laws may have tighter (or softer. *E.g.* France) requirements.

What does «in writing» mean?

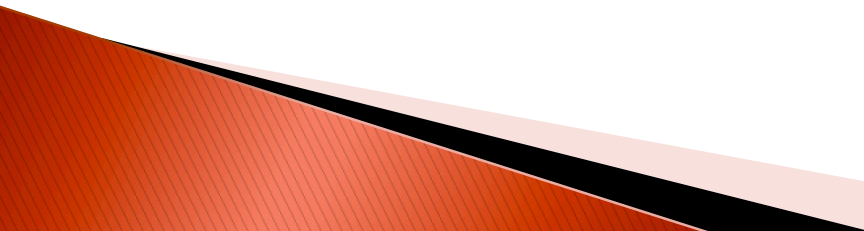
Some national examples

- ▶ The Netherlands: the agreement shall be proven by an instrument in writing expressly or impliedly accepted by the parties
 - ▶ Switzerland: any form of text
 - ▶ (Old) Paraguay: additional submission required
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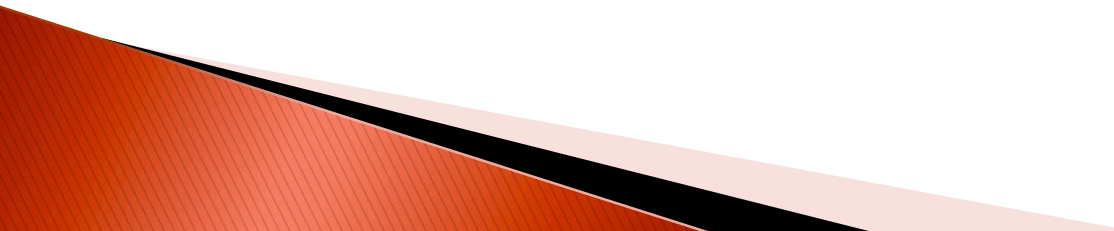
The «relatio perfecta» and «relatio imperfecta» doctrines

- ▶ *Relatio perfecta* (perfect reference)
 - The document/contract does not have an arbitration clause, but it makes reference to an arbitration clause set forth elsewhere
- ▶ *Relatio imperfecta* (imperfect reference)
 - The document/contract does not have an arbitration clause, but it makes reference to some other document (*e.g.* standard conditions) where an arbitration clause is included

What does «a defined legal relationship» means?

- ▶ The scope of the arbitration clause must be defined
 - ▶ The usual situation is related to a contractual legal relationship (but is not the only possible case)
 - ▶ «All disputes arising out of or in connection with this contract»
 - ▶ What about set-off and counterclaims?
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What does «capable of settlement by arbitration»?

- ▶ Arbitration is a form of *private* dispute resolution
 - ▶ Some disputes are reserved for national courts by national laws
 - ▶ Notion of «arbitrability»
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«Arbitrability»

- ▶ Which kind of disputes may be solved by arbitration?
 - basically those pertaining to rights the parties may freely dispose of
 - Problems of public policy
- ▶ Exclusions:
 - Criminal law
 - Family law

«Arbitrability»

- ▶ Doubts – issues:
 - Consumers?
 - Employment?
 - Trademarks&Patents?
 - Antitrust?
 - Insolvency?
 - Bribery and corruption?
 - Natural resources?

Separability

- ▶ The arbitration agreement is considered a separate and autonomous agreement than the contract it refers to
- ▶ Even if the main contract is invalid, the arbitration agreement is deemed valid
 - disputes on the validity of the contract itself will be subject to arbitration
- ▶ Its autonomy means that the agreement could be evaluated differently than the underlying contract (and a different law might apply to the arbitration agreement);

What to include in an arbitration clause

- ▶ Suggestion from the ICC Arbitration:
 - The parties may also wish to stipulate in the arbitration clause:
 - the law governing the contract;
 - the number of arbitrators;
 - the place of arbitration; and/or
 - the language of the arbitration.
 - In principle, parties should also always ensure that the arbitration agreement is in **writing** and **carefully and clearly drafted**.

Defective clauses

- ▶ Unreasonable qualifications
- ▶ Broadness/inclusiveness
 - Any dispute/only some disputes
- ▶ Different kind of (A)DR
 - Expert opinion
- ▶ Wrong name
 - ICC; Chamber of Trade; Chamber of foreing trade; wrong city
- ▶ Non existence/dissolved
 - An institution that does not exists (anymore)

Defective clauses

- ▶ Unreasonable term
 - Three months to conclude arbitration
- ▶ Conflicting or uncertain procedures
 - «Disputes hereunder shall be referred to arbitration by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard to the place of arbitration»
- ▶ Unreasonable qualifications
 - *E.g.* «English-speaking Italian, with a French law degree and familiarity with Middle-East construction contracts»

Examples of arbitration clauses

▶ ICC

- All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules

▶ JCAA

- All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.

Examples of arbitration clauses

▶ LCIA

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

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

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

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

The governing law of the contract shall be the substantive law of []."

Examples of arbitration clauses

▶ CIETAC

- Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

Issue about China

▶ ICC

- The standard clause can be modified in order to take account of the requirements of national laws and any other special requirements that the parties may have. In particular, parties should always check for any mandatory requirements at the place of arbitration and potential place(s) of enforcement.
- For example, it is prudent for parties wishing to have an ICC arbitration in Mainland China to include in their arbitration clause an explicit reference to the ICC International Court of Arbitration.

The following language is suggested for this purpose:
"All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."