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International Commercial Arbitration

The Arbitration Agreement

Mag. Florian Haugeneder LL.M.

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Introduction

- An arbitration agreement is the foundation of almost every arbitration.
- Jurisdiction of an arbitral tribunal is based on the consent of the parties.
- An agreement to arbitrate is a waiver of his or her right to access to a “tribunal” established by law (Art 6 ECHR).
- The scope and existence of an arbitration agreement is generally subject to judicial review.



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Forms of consent to arbitration

- Submission Agreement.
- Arbitration Clause inserted into a contract.
- Standing offer to arbitrate contained in investment protection laws or investment protection treaties (“arbitration without privity”).

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Minimum Requirements

- **Submission to Arbitration**
- **Of a defined legal relationship**
- **Example: „All disputes arising out of or in connection with this agreement shall be settled by arbitration.“**

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Obligation to recognize arbitration agreements

Art II (1) New York Convention:

“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.”

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Separability of the arbitration agreement

- The arbitration agreement has a separate legal existence and does not necessarily share the same fate as the main contract in which it is inserted.
- A party may allege that the main contract is terminated or invalid or never came into existence.
- The arbitration agreement must have a separate existence if an arbitral tribunal is to decide any pleas that the main contract is terminated, invalid or never came into existence.
- The separability doctrine is a conceptual cornerstone of arbitration.

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Separability of the arbitration agreement: legal foundations

Art V (1) (a) New York Convention:

*“1. Recognition and enforcement of the award may be refused [...] only if [...]:
(a) The [arbitration 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.”*

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Separability of the arbitration agreement: legal foundations

Art 16 (1) Model Law:

„(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. 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.”

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Separability of the arbitration agreement: legal foundations

- Art 178 (3) Swiss PIL.
- Netherlands CCP Art 1053.
- Not explicitly included in the Austrian CPC, but recognized in the decisions of the Austrian Supreme Court.
- Art 6(9) ICC Rules of Arbitration:

“Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties’ respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.”

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Separability of the arbitration agreement: Limitations

- Main contract and arbitration agreement do not automatically have the same fate. They may nevertheless be affected by the same defects.
- Basis of the separability doctrine are the (implied) intentions of the parties.
- Dissent, error, fraud, lack of authority etc. may taint the validity of the main agreement and of the arbitration agreement.



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Separability of the arbitration agreement: Consequences

- Possible application of a different national law to the main contract and to the arbitration agreement.
- Possible application of different rules within the same jurisdiction (e.g. form requirements, representation).
- Validity of the main contract and of the arbitration agreement are mutually independent.



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Law governing the arbitration agreement

Different stages where the issue arises:

- Arbitration proceedings;
- Court proceedings initiated in parallel to arbitral proceedings;
- Setting aside proceedings;
- Enforcement proceedings.



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Different aspects of an arbitration agreement which may be governed by different laws

- Substantive validity and interpretation (including the issues of consent, error, fraud, and scope of the arbitration agreement).
- Subjective and objective arbitrability.
- Formal validity.



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Substantive Validity: conflicts of laws approach

Art V (1) (a) New York Convention:

*“1. Recognition and enforcement of the award may be refused [...] only if [...]:
(a) The [arbitration] 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.”*

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Substantive validity: conflicts of laws approach

Art VI (2) European Convention on International Commercial Arbitration:

“In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement [...]

(a) under the law to which the parties have subjected their arbitration agreement;

(b) failing any indication thereon, under the law of the country in which the award is to be made;

(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.”

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Substantive Validity: national legislation

- Art 34 (2) (a) (i) and Art 36 (1) (a) (i) UNCITRAL Model Law: largely identical to Art V (1) (a) New York Convention (addressing the issue from the perspective of annulment or enforcement judge).
- Section 48 Swedish Arbitration Act: general conflict of laws rule.
- Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.
- Austrian CPC: no conflict of laws rules.



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Substantive Validity: general characteristics of conflicts of laws approach

- Conflict of laws rules of the New York Convention and of the European Convention on International Commercial Arbitration are applied by arbitral tribunals and the courts irrespective of the fact that they address the issue only from the perspective of the annulment or enforcement court.
- Essentially two criteria: choice of the parties and law of the seat of the arbitration.



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Substantive Validity: choice of the parties

- Specific choice of law applicable to the arbitration agreement is rare.
- Is a general choice of law provision regarding the entire contract (“This agreement is governed by Croatian Law”) a choice of law applicable to the arbitration agreement?



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Substantive Validity: choice of the parties

Owerri v Dielle (Dutch court of Appeal, 4 August 1993, XIX YBCA 703):

“Needless to say, parties, in general, would prefer - excluding special circumstances which do not arise in this case - to submit the validity of the arbitration clause to the same law to which they submitted the main agreement of which the arbitration clause forms a part. According to Art. 28 of the FOSFA Conditions, English law is applicable. An indication can also be found here - although not sufficient in itself - that the question should be decided according to English law.”



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Substantive Validity: choice of the parties

- National Thermal Power Corporation v. The Singer Company, (Supreme Court of India, 1978, 7 May 1992, XVII YBCA, 403, at 406):

“Where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.”

- Austrian Supreme Court, SZ 34/35.



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Substantive Validity: choice of the parties

Fouchard, Gaillard, Goldman, On International Commercial Arbitration, 222:

“Where the main contract does contain a choice of law clause, it is perfectly legitimate to query whether that choice, which is usually expressed in broad terms (“the present contract shall be governed by the law of Country A,” for example), applies only to the main contract, or whether it also applies to the arbitration agreement. The parties will of course only very rarely have given thought to the law applicable to the arbitration agreement. In our opinion, it would therefore be going too far to interpret such clauses as containing an express choice as to the law governing the arbitration agreement.”



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Substantive Validity: in favorem validatis approach

Swiss Private International Law, Art 178 (2):

“An arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.”



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Substantive Validity: substantive rule approach

Municipalité de Khoms El Mergeb v. société Dalico, Cour de Cassation (1Ch. clv.), 20 December 1993:

"According to a substantive rule of international arbitration law the arbitration agreement is legally independent from the main contract in which it is included or which refers to it and, provided that no mandatory provision of French law or international ordre public is affected, that its existence and its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law."

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Objective Arbitrability

- Concerns the question whether a matter can be referred to arbitration.
- Art V (2) (a) New York Convention:

*„Recognition and enforcement of an arbitral award may also be refused if [...]:
(a) The subject matter of the difference is not capable of settlement by arbitration
under the law of that country;“.*



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Objective Arbitrability

- The New York Convention contains an autonomous and conclusive conflict of laws provision.
- No cumulative application of the law applicable to the substantive validity of the arbitration agreement or the law of the state in which an award is anticipated to be enforced.
- Rule is also applied by arbitral tribunals.

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Objective Arbitrability:
areas traditionally not arbitrable or subject to restrictions

- Family law
- Criminal law
- Intellectual property rights
- Insolvency
- Labour law disputes



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Objective Arbitrability: Austrian approach

Section 582 Austrian CPC:

- Pecuniary claims or non-pecuniary claims which may be subject to an out-of-court settlement can be the subject-matter of an arbitration.
- Broad definition includes most disputes arising in the areas of corporate law, competition law or intellectual property law.



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Distinction between mandatory rules and arbitrability

The fact that arbitral tribunals have to apply mandatory rules or rules which are part of the public policy of a state do not mean that the dispute is not arbitrable.

- *Eco Swiss v Benetton* (ECJ, 1 June 1999, Case 126/97);
- *Mitsubishi v Soler* (473 US 614, 105 S Ct 3346, 1985).

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Subjective Arbitrability

- Is the capacity of parties to enter into an arbitration agreement.
- Art V (1) (a) New York Convention:

*“1. Recognition and enforcement of the award may be refused, [...] only if [...] :
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, [...]“.*



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Subjective Arbitrability

- Arbitration laws generally do not contain conflict of laws provisions on the capacity to enter into an arbitration agreement.
- The law applicable to capacity generally has to be determined through the application of general conflicts of laws provisions.
- Connecting factors are usually a party's nationality, place of incorporation, main place of business or his or her domicile or residence.



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Subjective Arbitrability: substantive limitations to the conflicts of laws approach

- Art 177 (2) Swiss PIL:

“A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.”

- Art II (1) European Convention on International Commercial Arbitration:

“In cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.”

- The reliance of states or of state enterprises on limitations to their capacity to conclude arbitration agreements is generally considered as an abuse of rights and invalid.

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Authority of representatives to enter into an arbitration agreement

- **Applicable Law:** law applicable to power of attorney („Vollmachtsstatut“).
- **Austria:** Special Power of Attorney required for the conclusion of an arbitration agreement (Section 1008 Austrian Civil Code).
- **Exception for an authorized signatory** („Prokurist“) and a power of attorney issued by entrepreneurs (sections 49 and 54 Entrepreneurial Code – Unternehmensgesetzbuch).



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Formal Validity of the Arbitration Requirements

- Most Conventions and national arbitration laws contain form requirements as regards the conclusion of arbitration agreements.
- Generally it is required that the arbitration agreement is made „in writing“, with variations as to the meaning of the „in writing“.
- Exception France: Oral Arbitration Agreements are recognized (Article 1507 French Civil Procedure Code: „*An arbitration agreement shall not be subject to any requirements as to its form.*“).

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Formal Validity of the Arbitration Requirements

- Art II (2) New York Convention:

“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.”

- Art II (2) New York Convention contains a substantive provision on the form of arbitration agreements applicable at all stages of an arbitral procedure before an arbitral tribunal and before national courts. The “in writing” requirement of Art II (2) has generally been interpreted liberally by courts and arbitral tribunals.
 - More favourable national domestic legislation applies pursuant to Art VII (1) New York Convention.
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Formal Validity of the Arbitration Requirements: National Legislation

- Courts and tribunals generally apply the law of the seat of the arbitral tribunal.
- UNCITRAL Model Law has achieved a certain degree of harmonisation.
- Austrian Section 583 CPC is stricter than the Model law, requiring an „exchange“ of writings.

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Formal Validity of the Arbitration Requirements: National Legislation

Art 7 UNCITRAL Model Law (Option I):

“(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ...

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

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Substantive Validity: general principles

- Minimum content of an arbitration agreement: submission to arbitration of disputes arising out of a defined legal relationship.
- Recommended additions:
 - Seat of the arbitral tribunal;
 - Language to be used in arbitral proceedings;
 - Law applicable to the substance of the dispute and to the arbitration agreement.



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Pathological Arbitration Clauses 1

“All disputes which arise in the context of the construction of the above contract, whereby termination by notice shall be decided by UNCITRAL (Arbitrage Rules of United Nations Commission of International Trade Law), arbitration rules 1977.”

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Pathological Arbitration Clauses 2

“Should the parties not be able to settle the dispute amicably ... the Arbitration Court of the Federal Economic Chamber of Yugoslavia will decide. The further instance to resolve disputes is the competent international court.”



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Pathological Arbitration Clauses 3

“Any dispute shall be submitted to the official Chamber of Commerce in Paris, France.”



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Pathological Arbitration Clauses 4

“Disputes or disagreements that cannot be solved through negotiations shall be brought before the International Arbitration Court in Switzerland.”



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Pathological Arbitration Clauses 5

“Arbitration: The seat of arbitration is Paris/France in conformity with the rules and procedures of the Commercial court.”



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Pathological Arbitration Clauses 6

“In case of a difference of opinion over the implementation of the contractual duties of the parties, each contractual party has the right to appeal to an Arbitral Tribunal for conciliation ... the right of the contractual parties to appeal to a proper court is not affected.”

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Pathological Arbitration Clauses 7

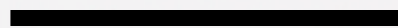
“All disputes under this Agreement shall be finally resolved by an arbitral tribunal sitting under the Austrian Civil Procedure Act.”



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Pathological Arbitration Clauses 8

“Should the parties not be able to come to an agreement regarding differences about the execution of this contract, an arbitrator shall solve the dispute within six months at the latest.”



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Model VIAC Arbitration Clause

All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, shall be finally settled under the Rules of Arbitration (Vienna Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber by one or three arbitrators appointed in accordance with the said Rules.



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Model VIAC Arbitration Clause

Possible supplementary agreements:

- (1) The provisions on expedited proceedings are applicable;
- (2) The number of arbitrators shall be (one or three);
- (3) The substantive law of shall be applicable;
- (4) The language to be used in the arbitral proceedings shall be



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Interpretation of Arbitration Agreements

- Most international conventions and national arbitration laws are silent on the interpretation of arbitration agreements.
- Courts and arbitral tribunals usually apply general rules of contract interpretation.
- Most courts and arbitral tribunals follow an explicit or implicit “in favorem validatis” approach (Austrian Supreme Court, 9 September 1987, 3 Ob 80/87: an arbitration agreement is only invalid if it is unclear in its entirety).

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Material scope of arbitration agreements inserted into a contract

- Contractual disputes (even after the termination of the contract).
- Non-contractual claims relating to a contract (e.g. tort or unjust enrichment claims).
- Claims arising out of related contracts (except if subject to a different forum selection clause).



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Extension of arbitration agreements to non-signatories

- Assignment;
- Group of companies doctrine: extension of the arbitration agreement to companies of the same group of companies if an affiliate has executed the contract and is involved in the negotiations or the performance of the contract (ICC case No. 4131 Dow Chemical v Isover);
- “Alter Ego”: disregard of corporate personality if there is a “unity of interest and ownership”, and that failure to disregard the corporate form would result in fraud or injustice.

KNOETZL

Herrengasse 1, A-1010
Vienna, Austria

T + 43 1 34 34 000
F + 43 1 34 34 000 999

office@knoetzl.com
knoetzl.com

KNOETZL HAUGENEDER NETAL
Rechtsanwaelte GmbH, Sitz: Wien

UID ATU 70056306; ADVM P132011;
FN 442691t HG Wien; DVR 4015340
