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AN ARBITRATION AGREEMENT IS THE CORNERSTONE OF ARBITRATION

Түйін. Төрелік келісім төрелік етудің негізі ретінде қарастырылуы мүмкін. Онда мүдделі тараптар төрелік соттың беделін және сот шешімдерінің заңдылық деңгейін анықтайды. Мұндай келісімге келу дау бар кезге қарағанда тараптардың арасында ешқандай сенімсіздік немесе шиеленіс жоқ кезінде әлдеқайда оңай. Дау қызу жүріп жатқан кезде, әрбір мүдделі тарап тек өзінің қызығушылықтарына бағытталған. Ол келісімінің жеке мәселелері бойынша келісімге келуді қиындаттырады. Бұл мақала арбитражда «Құзыретті-құзыретті» және «Бөлектеу» түсініктерінің маңыздылығына баға береді. Мақала төрелік келісімнің төрелік үдеріс кезінде дауларды шешу үшін маңызды деген пікірді қолдайды.

Түйінді сөздер: Төрелік келісім, Дауларды альтернативті шешу, «Құзыретті-құзыретті» және «Бөлектеу» концепциясы, Инвестициялық дауларды шешудің халықаралық орталығы, Халықаралық коммерциялық арбитраж, Нью-Йорк конвенциясы, Заманауи Заң, құқық, сот.

Аннотация. Арбитражное соглашение может рассматриваться как основа арбитража. В нем соответствующие стороны устанавливают уровень полномочий арбитражного трибунала и уровень легитимности судебных решений. Такое соглашение гораздо легче согласовывать, когда между сторонами нет напряженности или недоверия, чем во время уже существующего спора. Когда спор идет полным ходом, каждая заинтересованная сторона фокусируется только на своих собственных интересах, что усложняет договороспособность по

деталям соглашения. В данной статье будет дана оценка важности концепций «Компетенц-Компетенц» и «Разделимости» в арбитраже. В статье будет поддержано мнение о том, что арбитражное соглашение имеет важное значение для арбитражного процесса в разрешении споров.

Ключевые слова: арбитражное соглашение, альтернативное разрешение споров, Концепция «Компетенц-Компетенц» и «Разделимость», Международный центр урегулирования инвестиционных споров, Международный коммерческий арбитраж, Нью-Йоркская Конвенция, Современное право, юрисдикция, суд.

Annotation. The arbitration agreement can be considered as the foundation of arbitration. In arbitration agreement, the parties concerned determine the level of authority of the arbitral tribunal and the level of legitimacy of judicial decisions. Such an agreement is much easier to reconcile when there is no tension or distrust between the parties than during an already existing dispute. When the dispute is in full swing, each stakeholder focuses only on their own interests, which complicates the negotiability of the details of the agreement. This article will assess the importance of the concepts "Kompetenz-Kompetenz" and "Separability" in arbitration. The article will also support the view that the arbitration agreement is important for the arbitration process in resolving disputes.

Key words: Arbitration agreement, Alternative Dispute Resolution, The concepts of “Kompetenz-Kompetenz” and Separability, International Centre for Settlement of Investment Disputes, International commercial arbitration, The New York Convention, Modern law, Jurisdiction, Court.

Introduction

An arbitration agreement can be viewed as the foundation of arbitration. In it, the relevant parties establish the level of authority of the arbitration tribunal, and the level of legitimacy of any awards made [1]. An arbitration agreement can be one of two types: one that is established for a current dispute, or one that is drawn up in order to be applied in the event of any future disputes [1]. The agreement is much easier to create and agree on, as there is not the tension or mistrust that accompany an already existing dispute. Moreover, it is more difficult to agree on certain details of the agreement, such as the arbitration site or the applicable law, when the dispute is already in full flow, and each concerned party is focusing on only their own interests. However, it is often advantageous to both parties to reach an agreement on arbitration, as this will resolve the dispute more quickly, and in a less adversarial and public way. Two parties may choose to draw up an arbitration agreement which states in a particular clause that any disputes arising between them will not be resolved through litigation, but through arbitration [2]. This is indeed becoming a more popular option, as the waiting time to bring a case to court increases, and costs of litigation keep on rising. Arbitration can be defined as settling a dispute through an independent arbiter, rather than through the court. Any parties that find themselves in a dispute with each other are not obliged to use arbitration, unless

there is an existing arbitration agreement between them. The focus of this essay will be the arbitration agreement, including its history, the elements that, in accordance with the law, must be contained within it, and the laws that apply to it. There will also be an evaluation of the importance of the concepts of “Kompetenz-Kompetenz” and separability, with regard to arbitration. This essay will support the view that arbitration agreements are essential for the arbitration process, due to the fact that they facilitate the resolution of disputes.

1. Historical background and definition of the arbitration agreement

It seems that Alternative Dispute Resolution (ADR) methods are now common in the resolutions of disputes that do not involve courts; arbitration is one of the most popular forms of ADR, and involves the dispute being adjudicated by an independent third party. It is now the first method of choice for resolving commercial disputes [3] and in the period from 2000 to 2014 there were a total of 428 registered cases at the International Centre for Settlement of Investment Disputes [4]. Arbitration can be seen in essence as contracting out national legal systems. It provides a mechanism for settling disputes, but importantly this is done in private, with the agreement of both parties; any outcomes regarding the responsibilities and rights of the two parties are seen as final and binding [5]. By agreeing to utilise arbitration in the resolution of a dispute, the parties concerned are demonstrating that they do not wish to involve the courts, but prefer to reach a settlement in private. This in some way diminishes the role of the courts, but there must be some limits imposed upon this; otherwise arbitration would be used to replace a country’s legal system. International commercial arbitration is viewed as a reasonable alternative to settlement in courts however, which leads to an awkward relationship between the two forms of dispute resolution. Arbitration is not a new phenomenon; it has existed for centuries, and after the beginning of the twentieth century it became a truly international practice [6]. It would be ideal for national courts and international arbitration to enjoy a relationship that is ‘free from the controls of parochial national laws and without the interference or review of national courts’ [7]. The opposite of this is undesirable, where the law intervenes unduly and causes excessive damage to the two parties in dispute with each other. In practical terms, the most likely and advantageous one would be somewhat of a compromise between the two. The arbitration agreement is effectively defined by The New York Convention, Article 7 (1):

"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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement” [11].

2. The content and requirements of the arbitration agreement

It is widely agreed that there are certain elements that are required as

standard in an arbitration agreement. The first of these is that all of the parties concerned must agree to the use of arbitration rather than litigation to resolve their dispute, or any future disputes [8]. A clause in the agreement could then give details of the type of arbitration required, the dispute resolution process to be followed, any rules that need to be applied, how many arbitrators are required, and the constitution of the tribunal or the law applicable to the merits [8]. There are few legal restraints and requirements that apply to arbitration agreements, and the requirements of different countries are often amalgamated together. One requirement typically demanded is that there be a written agreement between all parties. This ensures that all of the parties have agreed to arbitration, and are not giving up their right for the dispute to be heard in a court without being consciously aware that they are making this choice. A general rule is that an arbitration agreement constitutes a written agreement provided that it is contained within a document that includes an arbitration clause [8]. As arbitration is now firmly established as a feasible and trustworthy method of settling disputes, the level of control that it is subjected to has decreased, but there still remains an important distinction between arbitration and litigation. It is true that the structure of arbitration is flexible and can be altered by the concerned parties to fit their purpose, but some level of vigilance is still necessary. Arbitration has to be an option when all of the relevant parties agree that it is what they want; however if just one of the parties is not in favour, it should not take place. This is also the case when the minimum level of coherence and agreement has not been met, or when there is no functional structure for taking decisions. The required or desired level of flexibility in arbitration is one of the most debated issues surrounding arbitration [2]. Furthermore, it has been noted that it is common for parties to not pay sufficient attention to drafting the agreement accurately, or to not realise the importance of dispute resolution clauses [2]. This is most typical when drafting an arbitration agreement for use in the future, as the parties involved do not think that a dispute is likely to happen, and do not wish to begin a relationship by dwelling on the possibility that it could fail.

3. The significance of law applied in an arbitration agreement

Although much has been done to harmonise the arbitration process, for example the enactment of UNCITRAL, one of the main issues encountered is deciding which law is applicable in each case [1]. Tribunals' jurisdiction is composed of many elements, and could therefore be subject to several different laws. The conclusion of the arbitration agreement is determined by which law is used to govern it, as is its substantive validity and interpretation, along with any other contractual questions that are not regulated by particular conflict rules. The arbitration clause is seen as legally separate from the container contract, therefore the laws regulating each of these aspects could be different. In addition, it is important not to confuse the arbitration agreement and the arbitral proceedings, the lex arbitri, as these are governed by different laws. The New York Convention, modern law

and the latest arbitration statutes provide a mechanism for making sure that arbitration takes place if there is a valid arbitration agreement in place. A major provision of the New York Convention, Article II (3), states:

"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." [1].

This article applies to the situation where one party begins proceedings to settle the dispute in court, but this is then challenged by one of the other parties, who claims that the court does not have the jurisdiction to hear the case because there is an arbitration agreement [2]. Any countries that adhere to the New York Convention give a commitment to refer such cases to arbitration "at the request of one of the parties", unless that is the arbitration agreement in question can be shown to be "null and void, inoperative, or incapable of being performed" [2]. While there are cases that involve an incorrectly drafted arbitration clause, there are also occasions when one of the parties doubts that the arbitration agreement exists, or that it is valid or of the correct scope. In this case, this party may decide to determine whether this is true before they enter into other forms of dispute settlement. Furthermore, arbitration laws allow any party that has signed an arbitration agreement to begin arbitration proceedings and obtain an award that can be enforced, even when the other party does not wish to cooperate [9].

4. The necessary attributes of an arbitration agreement

It is commonly recognized that there are several aspects of an arbitration agreement that determine whether or not a dispute should be resolved by arbitrators; these are its existence, validity and scope [9]. These elements are grouped together as the jurisdiction of the arbitral tribunal. There are however laws that can override an arbitration agreement, for example in the situation where state law does not allow the arbitration of disputes that have a highly important public policy concerns. Courts and arbitrators may take the decision on whether arbitration can be used to resolve a dispute, but it is generally accepted that arbitrators are competent enough to make this decision themselves. Courts also have the power to review arbitrators' decision on this issue in recognition or setting aside proceedings; they tend to have the final say on these matters. This may give rise to a dilemma, however, as a court may be asked to make a decision on the existence, validity or scope of an arbitration agreement, when the arbitral tribunal has not yet had the chance to make a ruling about its own jurisdiction [9]. This gives rise to the issue of whether indeed the court should make a decision, or allow the tribunal to decide as part of the arbitration proceedings. The New York Convention provides no guidance; it is left to each national legal system to decide [2]. There is also the issue of how much deference a court should afford an arbitral tribunal's decision made prior to the award enforcement stage. A legal order can be

used to determine the amount of deference given to each of these competing values, while minimising obstructionism and maximising value. Legitimate claims should receive prompt judicial decisions. Legal orders have to deal with the doctrines of separability and Kompetenz-Kompetenz; these are discussed in the following section.

5. The concepts of Separability and Kompetenz-Kompetenz

It appears that in international arbitration the concepts of separability and "Kompetenz-Kompetenz" are highly significant. They are used to determine the jurisdiction of the arbitrators, and enable arbitration to function practically – thus their absence would jeopardise arbitral proceedings and the international business community would no longer readily use arbitration to solve disputes [10]. The concepts of "Kompetenz-Kompetenz" and separability are currently widely acknowledged. They are included in Article 16 (1) of the UNICTRAL Modern Law:

"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."[1].

The "Kompetenz-Kompetenz" doctrine provides a tribunal with the power to determine its own jurisdiction [2]. Once a case has been started, the tribunal is able to decide on matters of jurisdictional objections, and it can do so without putting a stop to proceedings and referring the case to court [2]. Without this doctrine, there would be a logical problem should the tribunal decide that its jurisdiction were not valid; if this were the case, it could not take a decision about its own jurisdiction in the first place. Separability means that the arbitration clause is separated from the principle contract, and its termination, and this fact does not necessarily impact on the jurisdiction of the arbitral tribunal [9]. In other words, the legal fate of the arbitration clause is separate to the contract that it forms a part of. This signifies that arbitrators are able to decide whether the contract had ever been successfully concluded or terminated, provided that any of the faults found did not also apply directly to the arbitration clause. These two doctrines are typically analysed together, because they have a connection with the form and scope of the arbitrators' jurisdiction, aiming to maximise the effect of any arbitration proceedings [2]. Without the separability principle it would be difficult for arbitral proceedings to exist; its objective is separating the arbitration clause from the main clause, thereby enabling tribunals to resolve disputes where the main contract is invalid. The "Kompetenz-Kompetenz" doctrine is useful in situations where the competence of the arbitral tribunal is called into question, as it ensures that the proceedings can continue. One important point to remember is that these two principles have different purposes, and are not universally

recognised. When a main contract is deemed to be null and void, separability can allow arbitrators to settle the dispute, provided the arbitral agreement itself is not affected by any of the contract's defects [10]. If an issue is raised with, for example, the authenticity of the signature on the arbitration agreement, calling into question the competence of the arbitral tribunal, the "Kompetenz-Kompetenz" doctrine is the one that gives the arbitrators the power to decide their own jurisdiction [2]. The theoretical basis of the two principles is different. The separability principle depends on a construct that is fictitious, albeit vital for arbitral proceedings to function [8]. It may be said that no-one signing an arbitration agreement really views it as being separated from the main contract that it is part of; they are viewed as one single agreement, not two. It is therefore possible that one contract can contain two different agreements and that one instrumentum contains two negotia. The circumstances of an arbitral agreement are different however, as one of these negotia is connected to a possible contract dispute and it is therefore considered to be procedural. This is different to a clause that would define the rights and responsibilities of a sale agreement. With the "Kompetenz-Kompetenz" doctrine, state legal systems are actually conceding that arbitral tribunals have the power to rule on jurisdiction. It can successfully prevent proceedings from being delayed in cases where it is alleged that the tribunal lacks jurisdiction. Generally however, courts could challenge this after the initial review of the issue [8].

Conclusion.

Arbitration thus is founded upon the arbitration agreement; the latter can successfully determine the intentions of parties to use arbitration as a form of dispute settlement. Arbitration consists of an independent arbitrator adjudicating a dispute, and it is a popular Alternative Dispute Resolution method, particularly for settling disputes between commercial parties. The New York Convention has recognised two types of arbitration agreement: an arbitration clause can be contained within a contract or within a separate agreement. Arbitration agreements can be applied to disputes that have not yet occurred but may occur in the future, or to disputes that have already arisen. Whichever form the arbitration agreement takes, certain elements are expected as a minimum. The parties concerned must clearly state that they wish disputes (existing or future) to be settled through arbitration, and not through litigation in court, or that they wish to have this option. This can take the form of a short clause that confirms that in a particular country, disputes between these parties should be settled by arbitration. Through the arbitration agreement, the participating parties are also able to determine several important details of the dispute resolution process, for example the form that the arbitration should take, the rules and laws that will be applied, how many arbitrators there should be, and the constitution of the tribunal. It is often the case that the drafting process is not afforded careful attention, or that the significance of dispute resolution clauses is underestimated [2]. These are most likely to occur when the parties

are at an early stage of their relationship, and do not wish to dwell on the possibility that their relationship may fail [2].

Bibliography:

1. UNCITRAL Model Law on International Commercial Arbitration 1985
2. Tibor Varady and others, International Commercial Arbitration (5th edn, West Academic Publishing, 2012)
3. Anon, YPF Repsol: Spain says Argentina shot itself in foot, BBC News Online, 17 April 2012
4. International Centre for Settlement of Investment Disputes, The ICSID Caseload-Statistics (Issue 2015-1), p.7
5. Bergsten, E.E., Dispute Settlement: International Commercial Arbitration, (New York, USA and Geneva, Switzerland: United Nations, 2005), p. 5
6. Stone, K.V.W., Arbitration-International, Encyclopaedia of Law and Society, Clark, D.S., ed., Forthcoming; UCLA School of Law Research Paper No. 05-18, p. 2-3
7. Lew, J.D.M., Achieving the Dream: Autonomous Arbitration, Arbitration International Vol:22, (2006); p. 179
8. Mehmet Onal, 'Attraction of arbitration: to what extent does the judicial system in a country affect the choice of it as an arbitration centre?' (2010), http://webcache.googleusercontent.com/search?q=cache:PkjnOlZMJxcJ:www.dundee.ac.uk/cepmlp/gateway/files.php%3Ffile%3Dcepmlp_car16_11_949944496.pdf+&cd=1&hl=en&ct=clnk&gl=uk, accessed 02 June 2016
9. Alan Uzelac, 'Jurisdiction of the Arbitral Tribunal' (Academia, 3 March 2005),<https://www.academia.edu/910707/JURISDICTION_OF_THE_ARBITRAL_TRIBUNAL> accessed 2 June 2016
10. Phillip Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' (Journal of International Arbitration, Kluwer Law International, 2013) http://landoltandkoch.com/wp-content/uploads/2013/10/JOIA-30-5_Phillip-Landolt.pdf accessed 2 June 2016
11. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958