International Arbitration

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Drafting international arbitration clauses

Arbitration agreements, though often deceptively short, merit great care in their drafting. The law of arbitration is complex and can give rise to formidable conflicts of laws problems. In many cases, different systems of law will apply to different questions. There will be a *lex causae* (the law governing the contract), a curial law (the law of the seat of the arbitration), a law governing the arbitration agreement, and a procedural law. Some or all of these may be different. Some may not be governed by systems of domestic law at all. Some may be governed by public international law, or even a transnational private law. If the relationships between these areas are misunderstood, the potential for unintended consequences and costly ancillary litigation is significant.

This article will investigate three common mistakes in drafting arbitration clauses.

Brevity

The first mistake is to say too little. In one notorious English case, a dispute resolution clause merely provided for disputes to be resolved "by a QC" (a "Queen's Counsel", a senior English lawyer given official government recognition of his or her expertise). Nothing was said about choice of law, how to choose the QC, or what procedures the QC should follow. Was this really an arbitration agreement at all? Or rather some sort of expert determination provision? The question is an important one: arbitration law contains guarantees of due process, impartiality and judicial review, whereas other forms of dispute resolution may not. Ultimately, the English courts held that this was indeed an arbitration clause, governed by English law and with an English seat. However, the parties spent months (and no doubt a significant amount of money) reaching this conclusion.

The concept of arbitration implies guarantees by domestic courts of a process with minimum

elements of judicial integrity. Parties should be sure that this is how they want to decide their disputes. If disputes are likely to be purely technical, then determination by an expert third party operating outside the boundaries of a legal process may offer a cheaper, easier and quicker resolution than arbitration. However, the problem with expert determination is that if something goes wrong, options for recourse are limited and without the possibility of review, the expert may take less care when reaching a conclusion.

If parties want a dispute resolution clause specifying expert determination, it should be crafted with care, because judges regularly find that experts are really arbitrators and hence operating within the confines of judicial supervision. To opt out of arbitration law is not always easy. Even the words "This is not an arbitration agreement." may not be enough. Some countries' courts insist on deeming any extra-judicial dispute resolution agreement as an arbitration clause. The choice of seat for an expert determination can therefore be significant in order to avoid being obliged to arbitrate even where parties thought they had agreed that they would not.

Opting for ad hoc arbitration - an arbitration agreement that does not refer to any institutional rules – can also have unforeseen consequences. The operation of the arbitration will fall back upon the default rules in the arbitration legislation of the country which is the seat of the arbitration. These default rules may be sparse (as they are in France and Switzerland), leaving arbitral procedure mostly unregulated. Even where they are detailed, the rules may not be what the parties intended. For example, under England's Arbitration Act 1996, if a respondent defaults in appointing a member of a three-person panel, the arbitration may proceed using the claimant's choice as a single arbitrator. In order to avoid such unexpected consequences, it may be safer to follow an established set of arbitral rules, such as UNCITRAL, LCIA, SIAC or ICC.

Choices of law and seat

The second mistake in drafting an arbitration clause is not to consider carefully one's choices of law and seat.

The choice of seat of an arbitral tribunal can affect the outcome of the arbitration in rather surprising ways. The seat is not the place where the arbitral hearings will be held, or the country of residence of the arbitrators. Rather, it is the legal jurisdiction whose courts will have authority to supervise the conduct of the arbitration. Some countries' arbitral laws permit more extensive judicial interference in arbitral proceedings than others. For example, the US courts are far more likely to become involved than most, the Swiss courts far less so.

Some jurisdictions should be avoided all together. Only those countries whose judiciary adopt a conscious policy to permit and encourage arbitration without too much judicial interference should be considered as venues for arbitral proceedings. A contract providing for arbitration in a jurisdiction in which the courts will never permit the procedure to reach the award stage may be worse than having no contract at all.

The elusive concept of "transnational law" must be taken into account when considering a choice of seat. This is not the law governing relations between states, which is international law. Transnational law is more akin to a global commercial law governing international business transactions which sits above, and perhaps even overrides, a choice of law clause in a contract. If the seat of an arbitration is in a country which favours the concept of transnational law, it may have a significant impact on the outcome. This debate is known principally to divide England and France and, although for the most part it makes little practical difference, from time to time it can be critical. For example, French law recognises the "group of companies doctrine" as part of transnational

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arbitral law. If one company signs an arbitration agreement and another company in the same group breaches the agreement, it may be treated as having consented to the arbitration clause and can be included as a co-respondent. It may seem extraordinary to a common lawyer that privity can be violated in this way as a matter of transnational rather than domestic law. However, respected international textbooks on commercial arbitration confirm that this is so. Transnational law is unlikely to feature prominently if the arbitral seat is London; but if the seat is Paris, the position will be quite different. French legal scholars are much in favour of the development of an arbitral *lex mercatoria* and there is evidence to suggest that the French judiciary will support them.

The prospects of enforcement should also affect the choice of seat. Almost 150 countries have signed up to the 1958 New York Convention and abide by its obligations to respect and enforce international arbitration awards. (This is perhaps the quintessential example of transnational arbitral law.) Arbitral awards issued from jurisdictions which fall outside the New York Convention may prove difficult to enforce in the world's major banking centres. The New York Convention also has limitations however. In the United States, enforcement litigation can easily take a year or more as spurious public policy defences may be mounted in last-ditch efforts to avoid payment.

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Some choices of *lex causae* can have unexpected consequences. For example, Polish law provides that any arbitration agreement is automatically void upon commencement of insolvency proceedings. How will this affect a contract governed by Polish law but with an arbitration clause providing for the arbitral seat in some other jurisdiction, for example England or Switzerland? If the Polish respondent is sued and places itself into insolvency proceedings, will the arbitration come to an end? Will the Polish *lex causae* prevail or the English (or Swiss) curial law? The English and Swiss courts have reached opposite conclusions on this issue. The High Court in London declared that in such circumstances the arbitration would continue, while the Federal Tribunal in Lausanne declared that it must stop. In both cases the benefits of an expeditious arbitral procedure were lost while the domestic courts debated the issues.

The moral of this is to treat with circumspection any unfamiliar choice of substantive law that might contain rules declaring arbitration agreements invalid or unenforceable in certain circumstances. This is of particular concern where one of the contracting parties is a state-owned institution. A number of legal systems limit the capacity of public bodies to arbitrate, or may contain unusual rules to the effect that the entirety of an agreement – even an arbitration clause – is invalid if certain formal requirements such as compliance with public procurement rules, have not been observed.

Saying too much

A third peril in drafting an arbitration clause is to say far too much. Arbitration law involves the complex interaction of at least five sets of legal rules: the law governing the contract; the law of the seat of the arbitration; the law governing the arbitration agreement; the procedural rules of the institution appointed to administer the arbitration; and the law of any forum in which interim relief or enforcement of an arbitration award is sought. These rules have been interwoven to achieve approximate consistency over a long period of time. Most institutions' arbitration rules are compatible with permissive arbitral jurisdictions' curial laws. Those rules are designed to give the arbitrators the maximum latitude to manage proceedings as they see fit, consistent with the minimum standards of due process required of any arbitration procedure by the courts of the commonest arbitral seats.

Nevertheless, parties can be tempted to specify detailed procedural rules about how the arbitration should proceed. Arbitration clauses sometimes refer to rules of evidence, time limits within which awards should be rendered, or rules about submission of documents. Complex rules about the role of the Chair of the Tribunal may be included (for example making him an "Umpire", whose decision is relevant only if the other two cannot agree). The tribunal may be permitted to order interim relief, or certain countries' courts may be authorised to do so.

As a general rule, these sorts of provision cause more problems than they solve. They are typically at

variance with the rules of the arbitral institution the parties have agreed to use. The institution may be content that its rules be amended by the parties. But if it is not, the arbitrators will have to establish which rules take precedence. Agreed procedural rules may be at variance with the curial law and shrewd lawyers for a respondent can take advantage of this to create delay and expense.

Clauses giving arbitral tribunals jurisdiction to grant interim relief may also flounder: interim relief granted by an arbitral tribunal is seldom of much use because a litigant must still go to a domestic court to enforce it. A direct approach to the court is usually best: the commercial courts in commonly used jurisdictions will usually want to support arbitral procedures, finding jurisdiction to grant interim relief in cases of genuine urgency or peril, without needing encouragement from lengthy arbitration agreements.

Getting it right

The key to an effective arbitration clause is to keep it as simple as possible, relying upon arbitral law and practice developed over several decades and codified in the best known rules of arbitration and the curial laws of respected jurisdictions.

Parties should avoid prescribing rigorous procedures for arbitrators to follow. Instead, they should rely on selecting wise and effective arbitrators who will use their discretion to adjudicate disputes in accordance with experience and commercial common sense. The strength of arbitration lies not in speed or cost but in the refreshingly practical approach a robust arbitral panel can take both to the course of the proceedings and the final result. These benefits are easily marred by inappropriate choices of law or seat, or unduly complex arbitration clauses, which often lead to satellite litigation.

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Reform of arbitration law in France

France faces many changes in the arbitration sector. The principal French arbitration institutions have recently modified their rules. As is explained elsewhere in this Quarterly, the ICC's new arbitration rules entered into force on 1 January 2012. The new rules of the Chambre Arbitrale Maritime in Paris ("CAMP") took effect on 8 June 2011. In addition, reforms to French arbitration law came into force on 1 May 2011. Practitioners in France are starting to apply the new provisions.

The new rules are intended to make arbitration in France more efficient and flexible. They codify the most important principles established by French courts over the past 30 years and accelerate the enforcement of arbitration awards in France.

The distinction between domestic and international arbitration is maintained in the new rules, but a large proportion of the provisions which govern domestic arbitrations remain applicable to international arbitrations.

The rules relating to international arbitration apply to disputes which involve the interests of international trade whenever the parties have chosen French law as the procedural law; either expressly or by virtue of arbitration rules which make reference to them, or even when, failing a choice of procedural law by the parties, the arbitral tribunal applies French law. The provisions relating to appeal and the effect of the award also apply whenever the seat of the arbitration is in France,

or when enforcement proceedings are commenced before the French courts.

French law provisions in relation to arbitration are codified in Articles 1442-1527 of the Civil Procedure Code. In brief, the main aspects of the new provisions are as follows:

- Article 1447 of the Civil Procedure Code reinforces the independent nature of the arbitration agreement by providing expressly that the *"arbitration agreement is independent from the rest of the contract to which it relates. It is not affected by the invalidity of the contract"*. The arbitral tribunal can therefore rule on questions concerning the invalidity or alleged lack of existence of the contract which contains the arbitration agreement.

- The principle of *Kompetenz-Kompetenz* is confirmed in the new rules. The State court must declare that it has no jurisdiction where an arbitration agreement exists, unless the arbitral tribunal has not yet been seised and the arbitration agreement is manifestly void or "manifestly inapplicable" (Article 1448). This provision reflects prior French case law. In practice, the French courts will only find that an arbitration agreement is "manifestly inapplicable" in extreme cases, where the dispute is manifestly outside the scope of the arbitration agreement.

- The powers of the arbitral tribunal to order conservatory measures are recognised. The Code now provides that *"the arbitral tribunal may order the parties, in such circumstances as it determines and where necessary by the imposition of a fine, all conservatory or interim measures as it judges appropriate. (...)"* (Article 1468). However, there are some new restrictions. Prior to the reform, some judgments had found that an arbitral tribunal had jurisdiction to order the conservatory attachment of sea-going ships. Article 1468 now expressly prevents this, providing that: *"the State court alone has jurisdiction to order conservatory attachments and judicial securities".*

- The jurisdiction of the President of the first instance civil court (*"tribunal de grande instance" or "TGI"*) of Paris as supporting judge is reaffirmed and expanded. This specialist judge now has jurisdiction when one of the parties is exposed to a risk of denial of justice, even if the dispute does not otherwise have a link with the French judicial system. He can extend the period of the reference and rule on disputes concerning the recusal, substitution or dismissal of an arbitrator.

- Since arbitration is founded on contract, the arbitral tribunal has no powers in respect of third parties. The new provisions take into account this difficulty and also confer jurisdiction on the President of the TGI, upon the request of one of the parties to the arbitration and on the invitation of the arbitral tribunal, to order the production of documents by third parties.

- Both parties and arbitrators are expressly bound to act *"promptly and fairly in the conduct of the proceedings"* (Article 1464 para. 2). According to case law, parties are in particular: (i) obliged to pursue all of their claims in the same arbitration reference; and (ii) prohibited from contradicting themselves to the detriment of others (this latter principle coming close to the English law concept of estoppel).

- In contrast to French domestic arbitration, international arbitration is not confidential. The arbitration rules of the ICC and the CAMP do not place any obligation of confidentiality on the parties either. If they want confidentiality, parties must make express provision for it in their contract.

- Finally, there are two significant new provisions concerning enforcement:

  - Firstly, the deadline of one month for commencing recourse proceedings will now run from the date of notification of the award and no longer from the date of service of the enforcement order. This will accelerate the time within which any recourse action must be commenced. The parties can agree on the method of notification (Article 1519, para. 3). It will, however, be necessary to ensure that the method chosen is compatible with the rules of the State in which each of the parties is resident.

- Secondly, the commencement of either recourse proceedings to annul an award made in France or of an appeal against an enforcement order are no longer suspensive. It will now be possible to enforce an award whilst such proceedings take place. Article 1526 nevertheless provides for the possibility for the parties seeking relief from the court on an inter partes basis to suspend enforcement of the award or only to permit enforcement on terms, if such provisional enforcement is likely to prejudice seriously the rights of one of the parties. However, it is well-established in other areas of law that suspension of a provisional enforcement order is rarely granted. It seems likely that it will only be granted when enforcement of the arbitration award would have irreparable consequences for the debtor, or if the award appears to be affected by a manifest irregularity.

This restrictive approach has been confirmed in an early application of this new provision by the Court of Appeal of Paris in an order dated 18 October 2011 (*Mambo Commodities vs Compagnie malienne pour le développement des textiles*), in which the Court refused to suspend the enforcement of the award. The debtor alleged that the enforcement would severely affect his financial situation and that there was a risk that the creditor might not be able to reimburse the sums later if the recourse action was successful. The Court held that under the new provisions, there must be a risk of a serious prejudice to the rights of one of the parties and that it is not sufficient to prove that the debtor assumes a financial risk in having to pay the creditor.

In most cases therefore, this new provision should permit the successful party to obtain rapid enforcement of the award and avoid any delaying tactics by the debtor.

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New ICC Rules: has anything changed?

The ICC's revised Rules of Arbitration came into effect on 1 January 2012. The stated intention behind the new Rules is to update the ICC's arbitration procedures, introducing faster and more efficient and flexible processes, with the aim of encouraging businesses to choose ICC arbitration as their preferred forum for international dispute resolution.

There are several important changes, including improved case management procedures, provision for the appointment of an emergency arbitrator, procedures for handling disputes involving multiple contracts and parties and giving arbitrators powers to protect confidentiality.

Case management

Article 22 in the revised Rules imposes on parties and arbitrators an overriding obligation to conduct arbitration in an expeditious and cost-effective manner. This stipulation is supported by a number of specific new measures, including:

- A requirement that tribunals hold case management conferences to consult the parties on procedural matters, and to ensure control over time and legal costs (Article 24).

- A requirement that tribunals state at the close of proceedings when they expect to submit their award to the Secretariat for approval (Article 27).

- Conferring on tribunals the right to take into account

whether parties have acted in an expeditious and cost-effective manner when considering costs orders (Article 37).

- Allowing arbitrators in most cases to hear challenges to their own jurisdiction, whereas previously such challenges were handled by the ICC Court (Article 6).

Emergency arbitrators

The new Rules enable parties to apply for orders preserving assets or evidence before a tribunal has been constituted, by applying to an emergency arbitrator for urgent interim relief (Article 29). The previous edition of the Rules recognised a tribunal's authority to order preliminary measures to preserve the status quo, but provided no means of doing so before the tribunal had been constituted. As a result, emergency relief had to be sought from national courts. The new Rules are intended to avoid the need for this.

However, as with all ICC proceedings, cases involving emergency arbitrators will proceed on notice. An emergency arbitrator will not be able to issue an order without first notifying the respondent and providing it an opportunity to reply to the request for emergency relief. The drawbacks of this are obvious where a claimant is seeking to prevent a respondent from deliberately moving assets or evidence out of reach and the respondent is able to do this quickly. Another limitation is that an order made by an emergency arbitrator is not an arbitration award that can be enforced through national courts under the New York Convention.

Multiple contracts and parties

Multi-party or multi-contract arbitrations are catered for under the new Rules, and can proceed where the ICC is satisfied that the parties have entered into arbitration agreements which are compatible with consolidation. A party may also join a new party to an existing arbitration by submitting a request at any time before an arbitrator is appointed. Previously the addition of a new party required the consent of all parties, regardless of timing.

It was of course previously possible to consolidate arbitrations, but the ICC anticipates that including specific provisions in the Rules will make clearer when consolidation will be possible.

It remains the case that consolidation and joinder of proceedings should take place early in arbitration. The ICC Court may refuse a request for consolidation where the relevant arbitrations are at an advanced stage.

Confidentiality

The new Rules expressly provide that a tribunal may make orders on the confidentiality of proceedings or on connected matters (Article 22(3)). Parties should be aware, however, that the law of the seat of the arbitration may not recognise such an order. The safest way to ensure confidentiality remains to include an express confidentiality provision in the arbitration agreement.

Conclusion

It remains to be seen whether, despite improved efficiencies, overall costs will still deter some parties from using ICC arbitration. The minimum fee for obtaining an order from an emergency arbitrator is US$40,000. Administrative expenses and arbitrators' fees have increased too. Expenses for a dispute worth between US$1m and US$2m have been increased from 0.70% to 0.95% of the sum in dispute. Arbitrators' fees for a dispute worth between US$1m and US$2m will now range from 0.689% to 3.604% of the sum in dispute.

The ICC International Court of Arbitration recently announced that it had registered 795 arbitration cases in 2011, a small increase on 2010. It will be worth monitoring whether the new Rules help to maintain this upward trend in 2012.

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Challenging an award on grounds of fraud

The decision of the English Commercial Court in *Chantiers de l'Atlantique SA v Gaztransport et Technigaz SAS* (20 December 2011) underlines that a very high threshold is set for any party seeking to challenge an arbitration award on the basis that it is tainted by fraud.

The underlying dispute arose from a licensing agreement for the design by the defendant (GTT) of a containment system for a LNG carrier built by the claimant (CAT). The agreement was governed by French law and provided for ICC arbitration in London. CAT commenced ICC arbitration proceedings, alleging that there were

design faults in the containment system.

Following an unfavourable award in the arbitration, CAT discovered that GTT had concealed test results during the disclosure process and that one of GTT's witnesses, its head of research and development, had given misleading evidence to the tribunal. Since the seat of the arbitration was London, CAT applied to the English Commercial Court to set aside the award. The application was made under section 68(2)(g) of the Arbitration Act 1996. CAT argued that if the arbitral tribunal had been aware of the true position, this would have seriously undermined the credibility of GTT's witnesses.

The Court emphasised that section 68 is *"designed as a longstop only available in extreme cases"*. In order to succeed in an allegation of fraud, a heightened burden of proof must be met. The applicant must establish that the award was obtained by fraud and that there was a causative link between the fraud and the outcome of the arbitration. The applicant must show that the evidence of fraud relied upon could not have been obtained at the arbitration hearing with reasonable diligence and that the evidence would probably have affected the result.

The Court rejected CAT's allegation that there had been fraud during disclosure. In doing so, the Court observed that the arbitration had been conducted by French parties, represented by French lawyers, in accordance with civil law arbitration procedure. The Court stressed that it should not assess GTT's conduct by reference to English law disclosure obligations. In particular, neither party was under a duty voluntarily to disclose relevant documents that supported the other party's case.

The Court agreed with CAT that one of GTT's witnesses had deliberately concealed facts from the tribunal. This constituted fraud by a party to the arbitration for the purposes of section 68(2)(g). However, the Court found that CAT was unable to establish that knowledge of the concealed facts would have had an important influence on or would probably have affected the result of the arbitration. This conclusion followed from the tribunal's decision that, even if there had been a design fault, GTT would not have been liable under French law. CAT was therefore unable to show that the award was obtained by fraud or that it had suffered a substantial injustice, and its application under section 68 failed.

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This decision is another illustration of the reluctance of the English Courts to interfere with arbitration awards. That the arbitration in question on this occasion was subject to French substantive law and procedure was an additional factor dissuading the Commercial Court from intervening on the side of the applicant. The Court also showed itself to be well aware of (and wary of) the important differences between English disclosure obligations and the narrower disclosure obligations that pertain in civil law jurisdictions.

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Dates for your Diary

HFW will be holding a number of International Arbitration seminars throughout the year.

The first of these will take place on 15 March in Geneva and will be held in conjunction with The Graduate Institute Centre for Trade and Economic Integration. Matthew Parish will be speaking on "The role of international arbitration in a new transnational legal order." The focus will be on the development of arbitration in an international context and the emergence of a new autonomous standard that operates outside domestic jurisdictions.

The second seminar will be in Hong Kong on 4 July 2012. Damian Honey and Nick Longley will be speaking.

Please contact events@hfw.com for further details.

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